ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 17-1101, 1106 and 1107 (consolidated)

THE NEW JERSEY BOARD OF PUBLIC UTILITIES, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

JOINT OPENING BRIEF OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Circuit Rule 28(a)(1), Petitioners certify as follows:

A. PARTIES, INTERVENORS, AND AMICI

1. The following parties have appeared before this Court in the present consolidated cases:

Petitioners: New Jersey Board of Public Utilities; Old Dominion Electric Cooperative; Delaware Public Service Commission; American Municipal Power, Inc.; the Independent Market Monitor for PJM.

Respondent: Federal Energy Regulatory Commission

Intervenors: PJM Interconnection, LLC; Exelon Corporation; Elliot Bay Energy Trading, LLC; Public Service Electric and Gas Company; PSEG Power, LLC; PSEG Energy Resources & Trade, LLC; Appian Way Energy Partners; NRG Power Marketing, LLC; DC Energy, LLC; Boston Energy Trading and Marketing, LLC; Vitol, Inc.; J. Aron & Company LLC.

Amicus curiae: No amicus has appeared as of the date of this filing.

2. The following entities appeared in the administrative proceedings before the Federal Energy Regulatory Commission in FERC Docket No. EL16-6-000, *et seq.*, and ER16-121-000, *et seq.*: American Municipal Power, Inc.; American Electric Power Service Corporation; Appian Way Energy Partners; Boston Energy Trading and Marketing, LLC; Buckeye Power, Inc.; Citizen Utility

Board of Illinois; Consumer Advocate Division of West Virginia; Dayton Power and Light Company; DC Energy, LLC; Delaware Division of the Public Advocate; Delaware Public Service Commission; Direct Energy Business, LLC; Dominion Resources Services, Inc.; Elliot Bay Energy Trading, LLC; Exelon Corporation; Financial Marketers Coalition; FirstEnergy Service Company; GenOn Energy Management LLC; Inertia Power I, LLC; J. Aron & Company; Maryland Public Service Commission; Mercuria Energy America, Inc.; Mercuria SJAK Trading, LLC; Monitoring Analytics, LLC; New Jersey Board of Public Utilities; New Jersey Division of Rate Counsel; NextEra Energy Resources, LLC; North Carolina Electric Membership Corporation; NRG Power Marketing LLC; Old Dominion Electric Cooperative; PJM Industrial Customer Coalition; PJM Interconnection, L.L.C.; PSEG Energy Resources & Trade LLC; PSEG Power LLC; Public Service Electric and Gas Company; Saracen Energy East LP; Shell Energy North America (US), L.P.; Southern Maryland Electric Cooperative, Inc.; TranSource, LLC; and Vitol Inc.

B. RULINGS UNDER REVIEW

These petitions for review challenge two orders of the Federal Energy Regulatory Commission:

1. *PJM Interconnection, L.L.C.*, Order Addressing Filing and Issues Raised at Technical Conference, 156 FERC ¶ 61,180 (September 15, 2016) (CIR 102, JA___), and
2. *PJM Interconnection, L.L.C.*, Order on Rehearing and Compliance, 158 FERC ¶ 61, 093 (January 31, 2017) (CIR 132, JA___).

C. RELATED CASES

These consolidated petitions for review have not previously been before this Court or any other court. Petitioners are not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Respectfully submitted,

/s/ Gerit F. Hull
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Counsel for Petitioner AMP

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of this Court, Petitioners Monitoring Analytics, LLC (acting in its Independent Market Monitor for PJM), Old Dominion Electric Cooperative, and American Municipal Power, Inc., hereby provide their corporate disclosure statements as the petitioners in this case.

Monitoring Analytics, LLC

Monitoring Analytics, LLC, has no parent corporation or publicly traded stock. Monitoring Analytics, LLC, is the Independent Market Monitor for PJM and performs the market monitoring function for PJM Interconnection, L.L.C. ("PJM"), which is a Regional Transmission Organization (RTO) approved by the Federal Energy Regulatory Commission. *See* 18 CFR § 35.28(g)(3) (2016); PJM Open Access Transmission Tariff Attachment M.

Respectfully submitted,

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Dated July 11, 2017

Old Dominion Electric Cooperative

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Old Dominion Electric Cooperative ("ODEC") states as follows: ODEC is a not-for-profit power supply electric cooperative to which Rule 26.1 does not apply. *See* Fed. R. App. P. 26.1(a).

Respectfully Submitted,

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Dated July 11, 2017

American Municipal Power, Inc.

American Municipal Power, Inc. ("AMP") is an Ohio nonprofit corporation organized in 1971 as American Municipal Power-Ohio, Inc. (the name was changed to American Municipal Power, Inc. in 2009). It is a membership organization composed of municipalities that own and operate electric utility systems. AMP's members are located in in Ohio, West Virginia, Pennsylvania, Michigan, Virginia, Kentucky, Indiana, and Maryland; an association of municipalities in Delaware also is a member.

AMP has issued term debt in the form of notes payable and bonds for the financing of its own assets and assets developed on behalf of specific members or groups of members. In connection with financing undertaken by the electric systems of certain members, AMP has issued tax-exempt debt securities for municipal projects.

AMPO, Inc. is a for-profit subsidiary that provides natural gas and electric aggregation consulting services to municipalities. It has no securities outstanding.

AMP does not have a parent corporation, and there is no publicly held corporation that holds 10% or more of its stock.

Respectfully submitted,

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Dated July 11, 2017

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GLOSSARY OF TERMS

Act	Federal Power Act, 16 U.S.C. § 791, *et seq.*
AMP	American Municipal Power, Inc., a petitioner in Case No. 17-1107.
ARR	Auction Revenue Rights are the rights to Congestion which can be sold as FTRs in return for a fixed payment or claimed as FTRs.
Balancing Market	The Real-Time Energy Market.
Balancing Congestion	Balancing Congestion is a true up to Day-Ahead Energy Market Congestion, based on differences between Day-Ahead and Real-Time Energy Market Binding Constraints and/or the sum of MWh positions charged or credited at Real-Time Energy Market prices.
Binding Constraint	A Binding Constraint is a transmission line loaded to its limit that cannot transfer additional power from low cost generation to load.
CIR	Item number in the Certified Index to the Record (Document #1675764).
CFTC	Commodity Futures Trading Commission
Congestion	Congestion is the difference between what Load pays for energy and what generation is paid for energy, ignoring losses. In a market design with both Day-Ahead and Real-Time Energy Markets, Congestion is the sum of Day-Ahead Congestion and Balancing Congestion.
Congestion Revenue	Congestion Revenue is revenue collected for Congestion as defined by PJM market rules. Congestion Revenue included Day-Ahead Congestion and Balancing Congestion under the Traditional Congestion Allocation Rule and includes Day-Ahead Congestion under the Load Subsidized Congestion Allocation Rule.

Day-Ahead Congestion	Congestion Revenue collected in the Day-Ahead Energy Market based on day-ahead prices and MWh.
Day-Ahead Energy Market	The PJM energy market that clears financially firm MWh positions in the day prior to the operating day at Day-Ahead Market clearing prices.
DPSC	The Delaware Public Service Commission, a petitioner in Case No. 17-1001.
FERC or "the Commission"	The Federal Energy Regulatory Commission.
Financial Participant	A Financial Participant is a Participant in one or more markets operated by PJM who does not have or does not primarily have obligations or capability to serve Load.
FTR	A Financial Transmission Right entitles the holder to a share of Congestion. FTRs have transmission paths which are directional, with a source, a sink and a MW quantity. An FTR can also be "negative" (*i.e.* create a financial obligation for the FTR Holder). Instruments equivalent to PJM's FTRs are known as Congestion Revenue Rights in other markets.
FTR Auction	An auction administered by PJM in which Participants purchase FTRs.
FTR Holder	The owner of an FTR with rights to receive (or the obligation to pay) Congestion Revenue.
JA	Page number in the Joint Appendix (deferred).
LMP	Locational Marginal Price is the wholesale electricity price at each node in the system, equal to the marginal cost of procuring energy at that node for the specified time. LMP is the result of a security-constrained least-cost dispatch of energy resources to meet forecasted Load in the Day-Ahead Energy Market and actual Load in the Real-Time Energy Market. The Day-Ahead Energy Market solution results in LMPs at every node in every hour. The Real-Time Energy Market results in LMPs at every node in every five-minute

	interval.
Load	Load is location-specific demand for electricity on the PJM system. Load in the Day-Ahead Energy Market is based on cleared load bids. Load in the Real-Time Energy Market is made up of actual real-time demand for energy by retail customers of LSEs.
Load-Subsidized Congestion Allocation Rule	The Load-Subsidized Congestion Allocation Rule, stated in the Orders, defines Congestion Revenue to include only Day-Ahead Congestion (plus ARR revenues in excess of Target Allocations) and to exclude Balancing Congestion.
LSE	Load-Serving Entity. An LSE buys energy and capacity in wholesale electric markets and sells that energy and capacity to retail customers (Load).
Market Monitor	Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM, a petitioner in Case No. 17-1106.
MW	One megawatt, equal to 1,000 kilowatts, and, equivalently, 1,000,000 watts. The megawatt is a unit used to measure electric capacity.
MWh	One megawatt-hour, equal to one MW of electricity supplied for one hour. The megawatt-hour is a unit used to measure electric energy.
NJBPU	New Jersey Board of Public Utilities, a petitioner in Case No. 17-1101.
ODEC	Old Dominion Electric Cooperative, a petitioner in Case No. 17-1107.
Orders	The September 15th Order and the Rehearing Order.
P	Paragraph in a FERC Order.
Participant	A buyer or seller in a PJM Market.

PJM	PJM Interconnection, L.L.C., a FERC-approved Regional Transmission Organization (RTO). PJM operates the bulk power system and the competitive wholesale power markets in the region that includes all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.
PJM Interchange Energy Market	The spot markets for electric energy operated by PJM, including the Day-Ahead Energy Market and the Real-Time Energy Market.
PJM Market	The PJM Market includes a Day-Ahead Energy Market, a Real-Time Energy Market (or Balancing Market), a Capacity Market, Ancillary Services Markets and an FTR Market, as provided for in the Tariff.
Real-Time Energy Market	The PJM energy market that clears on the operating day based on actual Load and actual generation. Also referred to as the Balancing Market because day-ahead positions are balanced based on the Real-Time Energy Market.
Rehearing Order	FERC's decision denying Petitioners' rehearing requests, *PJM Interconnection, L.L.C.*, Order on Rehearing and Compliance, 158 FERC ¶ 61,093 (January 31, 2017) (CIR 132, JA ___).
Revenue Adequacy	A measure of whether Congestion Revenue is sufficient to pay FTRs at levels equal to the Target Allocations.
RTO	Regional Transmission Organization, as defined at 18 C.F.R. § 35.34. RTOs operate the bulk power system and the wholesale power markets in a defined region.
September 15 Order	FERC's order directing implementation of the Load Subsidized Congestion Allocation Rule, *PJM Interconnection, L.L.C.,* Order Addressing Filing and Issues Raised at Technical Conference, 156 FERC ¶ 61,180 (September 15, 2016) (CIR 102, JA ___).

Tariff	The PJM Open Access Transmission Tariff (OATT), including OATT Attachment K–Appendix, which governs the PJM Interchange Energy Market. Attachment K–Appendix contains the same language as Schedule 1 to the PJM Operating Agreement (OA). Citations herein to such rules are to OA Schedule 1, but also apply to OATT Attachment K–Appendix.
Target Allocations	A metric used to determine the allocation of Congestion Revenue among FTR Holders. Target Allocations are based on the difference in the Day-Ahead Congestion prices at the FTR source and FTR sink and the FTR megawatt quantity.
Traditional Congestion Allocation Rule	The Traditional Congestion Allocation Rule, in effect prior to the Orders, defined Congestion Revenue as real-time Congestion and, after the introduction of the Day-Ahead Energy Market, as Day-Ahead Congestion and Balancing Congestion.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the FERC Orders under the Federal Power Act, 16 U.S.C. § 825*l*(b). *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014); *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735 (D.C. Cir. 2012).

STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the addendum.

STATEMENT OF ISSUES

1. The Orders err in departing from and contradicting precedent that approved the inclusion of Balancing Congestion in Congestion Revenue and did so without reasoned explanation.
2. The Orders err in failing to provide reasoned support for the determination that inclusion of Balancing Congestion Revenue in Congestion Revenue is unjust and unreasonable.
3. The Orders err in determining that including Balancing Congestion in Congestion Revenue is inconsistent with the objective of the FTR/ARR market design, which is to return Congestion to Load.
4. The Orders err in failing to provide reasoned support for the determination that Balancing Congestion should, instead of being included in Congestion Revenue, be allocated to real-time Load and exports.
5. The Orders err in determining that the inclusion of Balancing Congestion in the settlement of FTRs contributes to a cost shift between Load (ARR holders) and FTR Holders. The determination has no evidentiary basis and ignores countervailing evidence.
6. The Orders err in determining that including Balancing Congestion in Congestion Revenue is inconsistent with cost causation principles. No evidence supports this determination.

7. The Orders err in creating unjust, unreasonable, and unduly discriminatory rates, terms and conditions in PJM's Interchange Energy Market by removing Balancing Congestion from Congestion Revenue and thereby improperly requiring Load to subsidize FTR Holders.
8. The Orders err in redefining FTRs as day-ahead financial instruments and continuing to treat them as subject to FERC's jurisdiction rather than the CFTC's jurisdiction.
9. The Commission erred in rejecting PJM's proposal to eliminate the netting of negatively valued FTRs against positively valued FTRs.
10. The Commission erred in directing PJM to allocate ARRs based on actual system usage.

INTRODUCTION

These petitions for review challenge FERC Orders that altered the rules of the wholesale electric markets operated by PJM. The effect of the Orders will be an inefficient market that results in subsidies from Load to FTR Holders. This case concerns whether the PJM market rules should return to Load the total amount of Congestion collected from Load. Congestion equals the payments made by Load in excess of payments to generation when there are Binding Constraints.

From 1998 through 2016, the rules provided for the return to Load of all Congestion collected because Load paid Congestion and paid for the transmission system that allowed for the collection of Congestion. Without demonstrating either new facts or a change in circumstances, the Orders determined the rules were unjust and unreasonable. The Orders determined that Load should guarantee the payment of Day-Ahead Congestion to FTR Holders even when that payment exceeds available funds from Congestion.

For that reason the Orders result in rates, terms and conditions of service that are unjust, unreasonable, and unduly discriminatory. FERC acted in an arbitrary and capricious manner in issuing the Orders because the Orders are not based on substantial evidence. The Orders depart from the Commission's prior rulings without reasonable justification.

STATEMENT OF THE CASE AND FACTS

I. FTRs and ARRs Return Congestion Revenue to Load Because Load Pays Congestion and Pays for the Transmission System that Permits Low Cost Generation to be Delivered to Load

In wholesale power systems, the lowest cost generation is dispatched to meet the Load, subject to the ability of the transmission system to deliver the energy produced.[1] When the lowest cost energy cannot be delivered to meet 100% of Load in an area as a result of Binding Constraints, higher cost local generation is dispatched to meet the balance of Load.[2] These facts were true prior to the introduction of LMP markets and continue to be true in LMP markets.

Before the introduction of LMP markets, contracts based on physical rights associated with the transmission system allowed Load to obtain low cost generation, to the extent deliverable, and Load paid for higher cost local generation to meet the balance of its needs.[3] Firm transmission customers who paid for the

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1 PJM OA Schedule 1 § 2.5 (a) ("This calculation shall be made by applying a real-time joint optimization of energy and reserves, given actual system conditions, a set of energy offers, a set of reserve offers, a set of Reserve Penalty Factors, and any binding transmission constraints that may exist.") (JA___).

2 *Id.*

3 *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, at 62,260 (1997) ("We find that the proposed allocation of FTRs is acceptable. Under the *pro forma* tariff, transmission providers are entitled to reserve sufficient capacity to meet native load requirements (*i.e.*, the customers for whom the transmission grid was planned and constructed in the first

transmission system acquired the physical delivery rights necessary to access, and be credited for, low cost generation; others did not.

In LMP markets, introduced in PJM in 1998, when the lowest cost generation cannot be delivered to meet 100% of Load in an area as a result of Binding Constraints, higher cost local generation is dispatched to meet the balance of local Load. Local Load pays the higher cost for 100% of the local Load, including energy imported from low cost generation across the Binding Constraint.[4] In an LMP market, local Load in a constrained area pays for generation as if all generation were high cost generation.

Although local Load *pays* the higher cost for all generation dispatched, the low cost generation from remote nodes with lower prices *receives* payment at those lower prices. The result is payments from Load exceed payments to generation because Load pays the same, higher price for low cost generation as for high cost local generation. Congestion equals the payments Load makes in excess of generation revenue, as a result of Binding Constraints.

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instance). Accordingly, it is entirely consistent to assign transmission providers FTRs to support their existing firm uses of the transmission system, including service for all native load customers.").

[4] PJM OA Schedule 1 § 2.5(a); PJM OA Schedule 1 § 5.1.3(b) (JA___).

With the introduction of LMP markets, FTRs were created as a financial substitute for the prior physical transmission rights to ensure that Load was held harmless from paying too much for low cost generation as a result of the transition to LMP markets.[5] The explicit purpose of FTRs was, from the beginning, to return Congestion to the Load that pays Congestion and pays for the transmission system that permits the use of low cost generation. FTRs permitted Load to relinquish physical transmission rights, which were not consistent with dynamic locational marginal pricing, while retaining the financial equivalent of physical transmission rights.[6]

The financial equivalent of physical transmission meant that the excess payments by Load for Congestion had to be returned to Load. This left Load in the same financial position in an LMP market as Load had been when Load used

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[5] *See Pennsylvania-New Jersey-Maryland Interconnection,* 81 FERC ¶ 61,257, at 62,254 (1997) ("[I]f a firm transmission customer schedules energy between its points of receipt and delivery for which it holds FTRs, it will pay no congestion charges, *i.e.*, its congestion charges will be exactly offset by its congestion revenues.").

[6] *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,276, at P 54 (2003) ("the allocation of ARRs, with the self-scheduling option, provides the same hedge against congestion as the current FTR allocation system provides.").

physical transmission rights.[7] FTRs and the associated revenues were provided directly to Load.[8] The purpose of FTRs is to return Congestion to Load.[9]

When FTRs were created, the Commission recognized that "FTRs entitle the holders to credits to be applied against the congestion charges" which the Commission described as a hedge against congestion.[10] From the beginning, the Commission recognized that FTRs were an offset to Congestion that returned Congestion to Load. FERC noted that "PJM Supporting Companies had proposed that all firm point-to-point transmission customers and network transmission customers would be allocated FTRs as a means of reducing or eliminating the congestion charges."[11] The Commission recognized that "the congestion credits

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7 *Id*. P 17 ("PJM's auction procedures include a self scheduling, right of first refusal provision, which will allow a customer, at its sole discretion, to retain the full value of its congestion management rights.").

8 *See* 81 FERC ¶ 61,257, at 62,259–62,260 & n.123.

9 PJM Filing, FERC Docket No. ER03-406, at 3 (Jan. 10, 2003) ("FTRs are allocated to … transmission service customers on an annual basis, *because these customers pay the revenue requirement for the transmission system*.") (emphasis added).

10 *See Atlantic City Elec. Co.*, 86 FERC ¶ 61,147, at 61,524 (1999) ("The congestion credits for FTR holders would be equal to the cost of congestion that would occur between the specified receipt and delivery points."). *Id.* at 62,253–61 ("[C]ustomers holding FTRs would have a hedge against such congestion charges.").

11 *Id*. at 61,524–25.

awarded to FTR holders would be equal to the cost of congestion that would occur between the specified receipt and delivery points" of that FTR.[12]

FTRs were not created to be a day-ahead product to address only Day-Ahead Congestion. FTRs were created prior to the creation of a Day-Ahead Energy Market and resulted in the return of Real-Time Energy Market Congestion Revenue to Load.[13] When the Day-Ahead Energy Market was added, PJM's energy and Congestion accounting had to be modified to address Congestion in both markets. Operation of the Day-Ahead Energy Market results in financially firm energy positions in the day before the operating day, established at Day-Ahead Energy Market LMP clearing prices. The Real-Time Energy Market is called the Balancing Market because differences between financial positions in the Day-Ahead Energy Market and actual Load and generation are balanced in the Real-Time Energy Market.

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12 *See id*. at 62,253–61 n.4.

13 The Real-Time Energy Market was approved, including provision for the allocation of Congestion Revenue through FTRs, effective April 1, 1998, *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,379, at 62,785 (1997); the Day-Ahead Energy Market was added, effective May 31, 2000. *PJM Interconnection, L.L.C.*, 91 FERC ¶ 61,148, at 61,554–55 (2000).

Load pays for its total energy usage in the Day-Ahead Market and the Balancing Market.[14] Load pays Congestion, including Day-Ahead Congestion and Balancing Congestion.[15] Balancing Congestion is part of Congestion. As the difference between what Load pays for energy and the amount paid to generators, Congestion includes payments made and received in both the Day-Ahead Energy Market and Balancing Market. Balancing Congestion is caused by differences between day-ahead and real-time Binding Constraints and differences between day-ahead and real-time LMPs and Load. Balancing Congestion is a true up to Day-Ahead Congestion, based on Real-Time Market results. Balancing Congestion cannot be separated from Congestion any more than Balancing Market energy payments can be separated from total energy payments.

II. The Allocation of FTRs to Load Directly and Indirectly through ARRs

FTRs are intended to ensure that Load receives the benefits of paying for the transmission system that enables Load to obtain low cost energy. In order for Load to receive the full benefits for which it has paid, all Congestion must be returned to Load. Direct allocation of Congestion to Load is one way to do that. Direct

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14 *Atlantic City Elec. Co.*, 86 FERC ¶ 61,147, at 61,523, n.4 (1999) (citing *PJM Interconnection, L.L.C.*, 81 FERC ¶ 61,257, at 62,253-261 (1997)).

15 PJM OA Schedule 1 §§ 2.5(a), 2.6 (JA___).

allocation of FTRs to Load is another way to do that and was the approach used in PJM prior to the introduction of ARRs. Indirect allocation of FTRs to Load through ARRs is another way to do that, and is the approach currently used in PJM.

Effective June 1, 2003, PJM replaced the direct allocation of FTRs to Load with an allocation of ARRs to Load.[16] Load still holds the rights to Congestion collected under this system, but the ARR construct allows Load to either claim the FTRs directly (self-scheduling), or to sell the rights to Congestion in the FTR Auction.[17] The FTR Auction allows Load to exchange its right to variable Congestion payments (FTR) for a fixed payment (ARR) based on the FTR Auction clearing price.[18]

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16 *PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,276 (2003).

17 *See id.* at 61,861 ("Those entities entitled to an allocation of FTR's under PJM's existing procedures will be allocated the same rights, in the form of ARRs."); PJM Filing, FERC Docket No. ER03-406, at 3 (Jan. 10, 2003) ("ARRs will entitle the holder to receive an allocation of the revenues from the annual FTR auctions.").

18 PJM Filing, FERC Docket No. ER03-406, at 3 (Jan. 10, 2003) ("[T]ransmission property rights will continue to be allocated to network and firm point-to-point transmission service customers on an annual basis, but in the form of ARRs, not FTRs.").

Any Participant can buy FTRs in FTR Auctions and become FTR Holders.[19] LSEs can convert ARRs into FTRs through self-scheduling and LSEs can buy additional FTRs directly in the FTR Auction.[20]

III. The Commission's Orders

The Commission twice denied complaints filed in separate proceedings by a Participant seeking to remove Balancing Congestion from the calculation of Congestion Revenue.[21] In those prior cases, the Participant, and key supporters, held large FTR positions. The Participant sought an order directing changes that would have brought the Participant, and its supporters, significant financial benefits. The Participant raised arguments similar to the arguments relied upon in the Orders, but the Commission properly rejected them.[22]

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19 *See* PJM OA Schedule 1 § 7.1 (noting that "Market Participants" may participate in all FTR auctions. Market Participant is defined in OA Section 1.) (JA___).

20 PJM OA Schedule 1 § 7.1.1(b) (JA___).

21 *See FirstEnergy Solutions Corp. and Allegheny Energy Supply Co., LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,158 (2012) (*FirstEnergy*), *reh'g denied*, 140 FERC ¶ 61,051 (2012) *(FirstEnergy Rehearing Order*); *FirstEnergy Solutions Corp. and Allegheny Energy Supply Co., LLC v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,209 (2013) (*FirstEnergy II*), *reh'g denied*, 151 FERC ¶ 61,205 (2015) (*FirstEnergy II* Rehearing Order).

22 *See id.*; *see, e.g.*, Motion for Leave to Answer and Answer of the Financial Institutions Energy Group, Docket No. EL13-47 (April 22, 2013); Request for Rehearing of DC Energy, LLC and Vitol, LLC, Docket No. EL13-47

The challenged Orders reversed the Commission's orders rejecting the complaints and repudiated over eighteen years of Commission policy by directing PJM to implement the Load-Subsidized Congestion Allocation Rule.[23] The Orders reversed the FTR market design objective of returning Congestion to Load, and increased revenues to FTR Holders at the expense of Load.[24] This change requires Load to subsidize FTR Holders and shifts FTR risks from FTR Holders to Load.

(Jul. 5, 2013); Request for Rehearing of J. Aron & Company, Docket No. EL13-47 (Jul. 5, 2013).

23 *See infra* Section I.; September 15th Order at P 5; Rehearing Order at P 72 (CIR 102, 132, JA___).

24 *See id.*

SUMMARY OF ARGUMENT

In wholesale power systems, the lowest cost generation is dispatched to meet the Load, subject to the limits of the transmission system. In an LMP market, when the lowest cost energy cannot be delivered to meet 100% of Load in an area as a result of Binding Constraints, higher cost local generation is dispatched to meet the balance of local Load, and that local Load pays the higher local generator cost for 100% of the local Load. The result is that Load payments exceed the payments to generation because Load pays the same, higher price for the low cost generation as for high cost local generation, due to Binding Constraints. This excess is Congestion.

This case is about the disposition of Congestion. From 1998 through 2016, Congestion, both Day-Ahead Congestion and Balancing Congestion, was returned to Load because Load paid Congestion and Load paid for the transmission system that made delivery of low cost energy possible. The PJM market design goal was to return Congestion to Load.

The Orders decided that Balancing Congestion should no longer be included in Congestion. The Commission stated, contrary to recent orders, that Load caused Balancing Congestion, that Load is harmed by the inclusion of negative Balancing Congestion in the calculation of the Congestion Revenue, and that the inclusion of

negative Balancing Congestion in Congestion Revenue harmed the efficacy of FTRs as a financial hedge.

The Commission explained that it reversed its determinations in prior orders because circumstances had changed because PJM took specific actions to change the allocation of Congestion. But there was no change in circumstances. PJM's changes were not a change in the actual, factual circumstances of market conditions.

PJM's actions were unnecessary. PJM reduced ARRs available to Load in a misguided effort to increase payments to FTR Holders. The Commission recognizes that PJM's actions hurt Load. It is illogical for the Commission to use PJM's voluntary and improper actions as the basis for asserting a change in circumstances significant enough to reverse a long series of decisions and to require Load to subsidize FTR Holders.

The Commission erroneously implies that the Orders make Load better off financially. The Orders actually make Load worse off by requiring Load to pay more than Congestion to FTR Holders. The excess amount is the amount of negative Balancing Congestion.

The Commission also mistakenly asserts that the transfer of risk from FTR Holders to Load makes Load better off. FTR Holders voluntarily take risk from Load by purchasing FTRs in the FTR Auction, including the risk that Congestion

may be lower than expected, because: (i) Day-Ahead Congestion is lower than expected, or (ii) Real-Time Congestion is lower than expected and therefore Balancing Congestion is negative. The essence of the role of FTR Holders is to take on risk from Load that holds ARRs. The Orders reassign risk to Load with ARRs that is properly associated with holding FTRs. Load sold FTR Holders the rights to Congestion in order to avoid that risk. Accordingly, the reasoning in the Orders is illogical and inconsistent with fundamental market design principles.

Consider the following example of Congestion allocation under the Orders. Load pays Day-Ahead Congestion equal to $100 which means that Load pays $100 more than the payments received by generation. In the Balancing Market, Balancing Congestion is negative $20 because the line limit for a Binding Constraint was reduced in real time. If the line limit is reduced, less low cost generation is available, and more high cost local generation is required to meet the load. This means that local, high cost generation received an additional $20 compared to the Day-Ahead Market results. The total excess payment by Load to generation (Congestion) is lower by that $20. As a result of the decreased line limit, Load pays an excess of $80 over payments to generation. Therefore, the actual Congestion is $80. In PJM's LMP market and FTR construct existing prior to the Orders, this $80 was available and sufficient to fund FTRs.

However, by arbitrarily defining Congestion Revenue to exclude Balancing Congestion, the Orders would require Load to pay $100 to FTR Holders, which is more than actual Congestion. In the example, there is only $80 in available Congestion to pay back to Load or FTR Holders. But under the Orders, FTR Holders are paid $100, requiring Load to pay $20 more than actual Congestion. This requirement is a perversion of the fundamental nature and purpose of FTRs because it requires Load to pay more than the excess revenue actually available.

The source of Balancing Congestion in the example further illustrates how the Orders are arbitrary. If Load's demand is exactly the same in real-time as in day-ahead and the differential between the two markets' clearing prices is caused by a reduction in transmission capability into a constrained area in real time, then less low cost generation is available to serve Load in the constrained area in real-time and more high cost local generation is needed to serve that Load. The amount of low cost generation that can serve load in a constrained area is determined by the transfer limit of the transmission line connecting low cost generation to the constrained area. A reduced transmission limit means less low cost generation is available and more high cost generation must be used to meet local Load.

The result is a reduction in excess revenue paid by Load, because more local Load is met with high cost local generation and less is met with low cost generation. Excess revenue is the difference between what Load pays and what

generation receives. As the amount of low cost generation meeting load in the constrained area is reduced, the excess revenue is reduced. This means that Balancing Congestion is negative and Congestion is lower than Day-Ahead Congestion. In this example, Load pays exactly the same amount in the Real-Time Market as in the Day-Ahead Market because the local price is the same and Load's demand is the same, but the excess revenue (Congestion) after paying high cost generation is reduced.

To require Load to offset Balancing Congestion to ensure that Congestion Revenue equals Day-Ahead Congestion is inconsistent with LMP market design and the fundamental rules of the Day-Ahead Energy Market. Under the Orders, Load is required to offset the loss of Balancing Congestion even if Load's real-time demand is identical to its day-ahead demand. That violates the principle that the Day-Ahead Energy Market positions are financially firm. Congestion Revenue given to FTR holders should be equal to Congestion, and Load should not be required to pay negative Balancing Congestion.

The Orders changed the fundamental logic of the ARR/FTR construct. Prior to the Orders, Load paid Congestion to FTR Holders. After the Orders, Load pays more than Congestion to FTR Holders. This unsupported redefinition of FTRs results in Load paying more than Congestion.

Cost causation supports the Traditional Congestion Allocation Rule. Load pays all Congestion, both Day-Ahead and Balancing. Congestion should be returned to Load via the ARR/FTR construct.

By redefining FTRs in a way that breaks the link to physical delivery and makes them financial products, the challenged Orders undermine FERC's continuing jurisdiction over FTRs, ARRs, and the mechanisms by which Congestion is to be returned to load. The CFTC has exclusive jurisdiction over financial products with no link to physical delivery.

STANDING

A. New Jersey Board of Public Utilities

Petitioner New Jersey Board of Public Utilities ("NJBPU") is the administrative agency, comprised of a five-member board of commissioners, charged under New Jersey law with general supervision, regulation, and control over public utilities in the State, including electric utilities.[25] NJBPU's regulatory function and jurisdiction are recognized in the Federal Power Act.[26] NJBPU is a "state commission" pursuant to FERC's regulations.[27]

The NJBPU has standing to seek review of the Orders based on "the interest of the states in protecting their citizens in this traditional government field of utility regulation."[28] The issues in this proceeding affect Load and LSEs throughout the PJM region, including the State of New Jersey. NJBPU contends that the Orders on review result in changes to the PJM tariff that are unjust, unreasonable, and unduly discriminatory, and thus unlawful under the Act.[29]

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25 N.J. Stat. Ann. §§ 48:2-1; 48:2-13; 48:2-21.

26 16 U.S.C. § 824(a)-(b).

27 18 C.F.R. § 385.214(a)(2).

28 *Maryland People's Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985).

29 *See* 16 U.S.C. § 824d(a).

B. Delaware Public Service Commission

The DPSC is a state utility regulatory agency responsible for ensuring safe, reliable, and reasonably priced utility services for Delaware consumers.[30] The issues in this proceeding affect customers throughout the PJM region, including customers in the State of Delaware. As such, the DPSC has standing to pursue this appeal.

The DPSC's regulatory function and jurisdiction are specifically recognized under the Federal Power Act.[31] The DPSC is a "state commission" pursuant to FERC's regulations.[32] The DPSC has standing to seek review of FERC's orders based on "the interest of the states in protecting their citizens in this traditional government field of utility regulation."[33]

C. Independent Market Monitor for PJM

The Market Monitor has a concrete interest in this case because it has a mandate to protect and promote competitive markets and competitive market

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30 Del. Code Tit. 26, §§ 201(a), 303(a) .

31 16 U.S.C. § 824(a)–(b).

32 18 C.F.R. § 385.214(a)(2).

33 *Maryland People's Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985).

design.[34] The FTR market is an important component of an efficient LMP market, and the Market Monitor has been required to devote significant resources in the defense of the proper definition of Congestion Revenue in multiple FERC proceedings since 2012. If FTRs are redefined in a manner detrimental to their fundamental purpose, it will introduce defects and confusion into the market design that will complicate the Market Monitor's ability to protect and promote a competitive market design. The limited resources available to the Market Monitor will be unnecessarily diverted to address the problems by the defects and confusion introduced into the market design.

The Market Monitor is experiencing harm related to its institutional mission and purpose. The Supreme Court has recognized such harm as a valid basis for standing.[35] Because the Market Monitor plays a unique role, granting standing to it

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34 *See Natural Resources Defense Council v. Costle*, 561 F.2d 904, 911 (D.C. Cir. 1977) ("[A]ppellants … involvement may lessen the need for future litigation to protect their interests"); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003) ("there is no question that the task of reestablishing the status quo if the Fund succeeds in this case will be difficult and burdensome."); *Nuesse v. Camp*, 385 F.2d 694, 699–700 (D.C. Cir. 1967) ("[W]here protection of the competitive equality of state banks is the core of the federal statute controlling the branching of national banks, a state banking commissioner has an adequate interest in the construction of the federal act to justify intervention.").

35 *See Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 611–612 (1982) ("A private organization may bring suit to vindicate its own concrete interest in performing those activities for which it was formed …." (citing, *e.g.*, *Havens*

does not significantly expand the basis for assertions of standing. No other party can represent its interests. The Market Monitor also receives retail electric service in the PJM region and is thereby harmed by the inefficient operation of PJM Market, including inefficiencies resulting from an inefficient FTR market design.

D. Old Dominion Electric Cooperative

Pursuant to Circuit Rule 28(a)(7), Old Dominion Electric Cooperative has standing to seek review of FERC's orders described in Section II, above. ODEC was an active participant in FERC Docket Nos. EL16-6-000 and ER16-121-000, in which FERC modified the PJM market design for ARRs and FTRs. Moreover, ODEC has been directly harmed by FERC's orders, because, as a result of FERC's action in the underlying dockets, the value of ARRs and FTRs has been diminished such that they no longer allow ODEC, as an LSE, to meet its load-serving obligations by providing long-term transmission rights that are physically or financially firm. Thus, ODEC possesses standing before this Court to raise the issues contained in its petition for review.[36]

Realty Corp. v. Coleman, 455 U.S. 363, 378–379 (1982); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977); *NAACP v. Button*, 371 U.S. 415, 428 (1963))).

[36] *See Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

E. American Municipal Power, Inc.

American Municipal Power, Inc. ("AMP") is an Ohio nonprofit corporation with 135 members that own and operate municipal electric utility systems in several states that are (in whole or part) within PJM's area of operations. AMP supplies wholesale power service for most its members by providing its own electric generation resources, scheduling and dispatching member-owned generation, and entering into power supply and transmission arrangements with third-parties on behalf of its members.

AMP is an active participant in PJM Markets. AMP buys and sells electric energy and capacity to meet the needs of AMP members located in PJM and obtains transmission service from PJM. AMP has been directly harmed by FERC's orders, because, as a result of FERC's action in the underlying dockets, the value of ARRs and FTRs has been diminished such that they no longer allow AMP, as an LSE, to meet its load-serving obligations by providing long-term transmission rights that are physically or financially firm. AMP anticipates that the Orders will increase its (and its members') net costs of providing service to their customers. In light of this direct injury to its interests and the interests of its members, and in view of its participation and exhaustion of administrative remedies in the proceedings below, AMP has standing to seek review of FERC's orders.

STANDARD OF REVIEW

This Court has jurisdiction under 16 U.S.C. § 825*l*(b) and "review[s] FERC's orders under the arbitrary and capricious standard and upholds FERC's factual findings if supported by substantial evidence." *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010) (citing *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010)). Thus, if FERC "fail[ed] to provide an intelligible explanation" for its decision, which "amounts to a failure to engage in reasoned decision making," then its decision must be set aside. *NextEra Desert Ctr. Blythe, LLC v. FERC*, 852 F.3d 1118, 1123 (D.C. Cir. 2017) (citing *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 448 (D.C. Cir. 2005)). *See also* 5 U.S.C. § 706(2)(A) (allowing agency action to be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law).

ARGUMENT

I. THE COMMISSION ERRED IN ALLOCATING BALANCING CONGESTION TO LOAD AND EXPORTS, RATHER THAN TO FTR HOLDERS[37]

The Orders provide several rationales for excluding Balancing Congestion from Congestion Revenues: (i) it contributes to the identified unjust and unreasonable cost shift between ARR holders and FTR holders; (ii) it is inconsistent with cost causation principles; and, (iii) it reduces the efficacy of FTRs as a hedge.[38] However, the rationales are factually incorrect and the Orders are legally deficient.

A. The Orders Departed from Precedent By Excluding Balancing Congestion from Congestion Revenue without a Reasoned Explanation.

The Orders are arbitrary and capricious because they depart from prior determinations without providing a reasonable explanation.[39] The Orders overturn the Traditional Congestion Allocation Rule that has been in place since the introduction of LMP Markets on April 1, 1998 without reasonable explanation.[40]

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37 NJBPU, DPSC, the Market Monitor, ODEC and AMP join these arguments.

38 *See* September 15 Order at P 94 (CIR 102, JA___).

39 *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

40 The Orders mandated a change to Section 5.2.5 of Schedule 1 to the OA, which provided: "Calculation of Transmission Congestion Credits …. The

The Traditional Congestion Allocation Rule was modified, effective May 31, 2000, with the introduction of the Day-Ahead Energy Market, to recognize that Congestion Revenue is equal to Day-Ahead Congestion plus Balancing Congestion.[41] The Commission has upheld the Traditional Congestion Allocation Rule, when previously challenged, such that it remained in effect until the Orders. The Orders deviate from precedent and provide no reasonable explanation for finding the Traditional Congestion Allocation Rule unjust and unreasonable.

In 2012 and again in 2013 through 2015, the Traditional Congestion Allocation Rule was unsuccessfully challenged by a financially distressed Participant.[42] Financial Participants, who held significant FTR positions but did not

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total of all the positive Target Allocations determined as specified above shall be compared to the total Transmission Congestion Charges in each hour resulting from both the Day-ahead Energy Market and the Real- time Energy Market." The Act places a significant burden on the Commission when it institutes proceedings under section 206 reviewing rules previously approved under section 205. 16 U.S.C. § 824e(b). An affirmative showing by the Commission that the rule has become "unjust, unreasonable, unduly discriminatory, or preferential" is required. *Id*.

41 *See PJM Interconnection, L.L.C.*, FERC Docket No. ER00-1849-000 (May 18, 2000) (delegated letter order).

42 *See FirstEnergy v. PJM*, 138 FERC ¶ 61,158 (2012) (FirstEnergy), *reh'g denied*, 140 FERC ¶ 61,051 (2012) (FirstEnergy Rehearing Order); *FirstEnergy Solutions Corp. v. PJM*, 143 FERC ¶ 61,209 (2013) (FirstEnergy II), *reh'g denied*, 151 FERC ¶ 61,205 (2015) (FirstEnergy II Rehearing Order).

serve Load, also criticized the inclusion of Balancing Congestion in Congestion Revenue.[43] Specifically, the *FirstEnergy II Rehearing Order* determined that "allocation of real-time balancing congestion to current FTRs has a reasonable basis, because FTR holders are in the best position to reflect the associated underfunding in the value of FTRs."[44]

The *FirstEnergy II Rehearing Order* also determined that: (1) retaining the Traditional Congestion Allocation Rule continued to be the basis for a good market design because "the allocation of real time balancing congestion to FTR holders is a practical way to capture the impacts of modeling issues and ensure that any differences will affect the funding for FTRs;"[45] (2) "a general uplift to all PJM stakeholders or customers would not provide an incentive for any party to reduce the underfunding and would provide even less ability for parties to value FTRs based on the expected underfunding";[46] and (3) "the underfunding of FTRs does

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43 *See*, *e.g.*, Motion for Leave to Answer and Answer of the Financial Institutions Energy Group, Docket No. EL13-47 (April 22, 2013); Request for Rehearing of DC Energy, LLC and Vitol, LLC, EL13-47 (July 5, 2013); Request for Rehearing of J. Aron & Company, EL13-47 (July 5, 2013).

44 *FirstEnergy II Rehearing Order* at P 24.

45 *Id*.

46 *Id.* P 24 & n.15.

not demonstrate that the current allocation method for the underfunding is unjust and unreasonable" or "unduly discriminatory."[47]

However, the Orders disregard this recent precedent, which rejected arguments that the Traditional Congestion Allocation Rule is unjust and unreasonable.[48] The September 15 Order does not reference any new evidence that supports reversal of the prior decisions. In *First Energy II*, the parties seeking rehearing claimed that including balancing congestion in the calculation of congestion charges results in an underfunding of FTRs.[49] The Commission now references the same parties (including First Energy and J. Aron) in adopting their twice-rejected arguments in this proceeding.[50] The September 15 Order does not explain why the Commission reversed its view of the same argument.

The September 15 Order only briefly mentions the sudden reversal of the earlier decisions:

> While in the *FirstEnergy Solutions* complaint proceeding, the Commission held that the parties had not established that the current methodology is unjust and unreasonable, [footnote omitted] such a finding does not preclude the Commission from re-examining the

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47 *FirstEnergy II Rehearing Order* at P 23. .

48 *See FirstEnergy*; *FirstEnergy II*.

49 *First Energy II Rehearing Order* at PP 10, 11, 14, 15, 17, 18.

50 September 15 Order at PP 82, 88 (CIR 102, JA___).

> issue when circumstances have changed or additional evidence has been presented. [footnote omitted][51]

The Orders rely on the unsupported assertion that a change of circumstances has occurred. The Orders do not cite any additional evidence. The Commission's reversal of a prior decision requires a reasoned analysis supported by substantial evidence.[52] The Orders fail to provide either. The Orders are silent as to why specific findings concerning cost causation, the definition of Congestion, improper cost shifts, and the ability of voluntary FTR purchasers to make their own decisions on the values of FTRs, in the earlier *FirstEnergy* and *FirstEnergy II* orders, which reflected years of litigation and deliberation, were suddenly overturned.

The September 15 Order asserts that "[b]y the time of the PJM filing . . . circumstances had changed considerably."[53] The referenced change was not a change in circumstances. The change in PJM's modeling was intended to increase

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51 *Id*. P 92.

52 *ANR Pipeline Co. v. FERC,* 71 F.3d 897, 901 (D.C. Cir. 1995) ("Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious."); *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 698 (D.C. Cir. 2007) (courts must "reverse a decision that departs from established precedent without a reasoned explanation") (citing *Exxon Mobil Corp. v. FERC,* 315 F.3d 306, 309 (D.C. Cir. 2003)).

53 September 15 Order at P 93 (CIR 102, JA___).

payments to FTR Holders and to reduce the allocation of ARRs to Load and was addressed elsewhere in the September 15 Order.[54] If it did not like the outcome, the Commission had the authority to direct PJM to undo its change. The referenced change had nothing to do with the rationale provided in the *FirstEnergy* and *FirstEnergy II* decisions for upholding the Traditional Congestion Allocation Rule. Reversal of the *FirstEnergy* and *FirstEnergy II* decisions is unsupported because of a failure to demonstrate any change in relevant circumstances.

The September 15 Order also states: "The record demonstrates that the pervasive problem associated with including balancing congestion in the definition of FTRs is either chronic under-funding or the unrealized value of ARRs for certain LSEs."[55] The current record is not materially different from the record upon which the Commission reached the opposite and correct conclusions in *FirstEnergy* and *FirstEnergy II*. The record here includes no additional evidence and provides no support for any asserted change in relevant circumstances.

The *FirstEnergy II Rehearing Order* determined that "allocation of real time balancing congestion to current FTRs has a reasonable basis, because FTR Holders are in the best position to reflect the associated underfunding in the value of

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54 *Id*. PP 40, 45.

55 *Id*. P 93.

FTRs."[56] The *FirstEnergy II Rehearing Order* further determined that linking Day-Ahead and Balancing Congestion contributed to creating and maintaining a good market design because "the allocation of real time balancing congestion to FTR holders is a practical way to capture the impacts of modeling issues and ensure that any differences will affect the funding for FTRs."[57] The September 15 Order fails to provide reasoned analysis for a departure from this precedent.

The *FirstEnergy Rehearing Order* explained: "For example, a general uplift to all PJM stakeholders or customers" (*i.e.*, a result similar to the Load-Subsidized Congestion Allocation Rule) "would not provide an incentive for any party to reduce underfunding and would provide an incentive for any party to reduce underfunding and would provide even less ability for parties to value FTRs based on the expected underfunding."[58] The *FirstEnergy Rehearing Order* determined that: "the underfunding of FTRs does not demonstrate that the current allocation method for the underfunding is unjust and unreasonable" or "unduly discriminatory."[59]

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56 *FirstEnergy II Rehearing Order* at P 24.

57 *Id*.

58 *Id*.

59 *Id*. P 23.

The *FirstEnergy II Rehearing Order* remains correct. Participants are free to discount their bids in FTR Auctions in order to reflect their expectations of Congestion, including Balancing Congestion. A key rationale for including Financial Participants in FTR Auctions is to provide LSEs an opportunity to exchange uncertain payments based on future Congestion for fixed payments. Financial Participants purchase FTRs which give them rights to Congestion Revenue and the auction clearing price paid for the FTRs goes to ARR holders. The *FirstEnergy II* decision correctly determined: "The amount paid by FTR holders should reflect the expected value of a given FTR."[60] The expected value of an FTR is determined by expected Congestion, including Day-Ahead and Balancing Congestion. There was no reason for undercutting the basic terms of the exchange of expected Congestion Revenue for a fixed payment. Assigning Balancing Congestion directly to Load, as the September 15 Order requires, means that Load no longer receives a fixed payment and that FTR purchasers no longer include Balancing Congestion in their calculations. The Commission provides no coherent rationale for adopting this previously rejected approach.

The September 15 Order requires Load to pay an uncertain amount of Balancing Congestion, which offset ARR payments, in order to support FTR

[60] *FirstEnergy II* at P 42.

payments. The payment of Balancing Congestion by Load reduces and makes variable the fixed ARR payments that Load should receive in return for the sale of FTRs at auction. The September 15 Order therefore fundamentally changes the exchange between FTR Holders and Load in favor of FTR Holders without any supporting rationale and without recognizing the significance of the change. FTR Holders take on the risk of variable Congestion payments for which they pay Load fixed ARR payments. The purpose of including Financial Participants in FTR Auctions was to permit Load to exchange variable Congestion payments for fixed ARR payments. FTR Holders took on the risk of Congestion being less than expected. The Orders shift that risk back to Load.

FirstEnergy II correctly determined: "The amount paid by FTR holders should reflect the expected value of a given FTR. Thus, if the value of FTRs is reduced by underfunding, then the FTR holders should pay less for these instruments, and will receive the value for which they have paid."[61] No new arguments have been raised nor have any facts or circumstances changed that affect the validity of this holding.

In *FirstEnergy II*, the Commission rejected the contention that "FTRs are not funded to the levels that are necessary to provide the intended hedge against

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61 *FirstEnergy II* at P 42.

congestion," correctly observing that "[i]n PJM, the right to financially firm transmission service is provided through the allocation of ARRs, which are directly allocated to Loads to offset congestion. FTRs, in PJM, are awarded to bidders in an FTR auction."[62] The Commission found that "full funding of FTRs is a goal, but the PJM Tariff does not ensure full funding."[63] No new arguments have been raised nor have any facts or circumstances changed affecting the validity of these holdings.

The conclusions of the September 15 Order have no basis in new facts or arguments. Instead, the Commission based its decision on misunderstandings of Congestion, FTRs and the purpose of the FTR market design. In contrast, the Commission reached the correct conclusions, based on the facts and an accurate understanding of Congestion, FTRs and the purpose of the FTR market design, in its *FirstEnergy* and *FirstEnergy II* decisions. The Commission's deviation from this precedent in the September 15 Order to accept the self-serving and flawed arguments of Financial Participants, with substantial FTR positions, does not

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62 *FirstEnergy II* at P 41.

63 *FirstEnergy II* at P 41 (citing *PPL EnergyPlus, LLC v. PJM Interconnection, L.L.C.,* 134 FERC ¶ 61,263, at P 46 (2011) (the Tariff contemplates the possibility of underfunding FTRs in a planning period)); and Tariff, Attachment K-Appendix § 5.2.5(c); *see also FirstEnergy II Rehearing Order* at P 26; *FirstEnergy* at P 15.

evidence reasoned decision making.[64] The brief explanations offered in September 15 Order contrast sharply with earlier well-reasoned and well-supported findings, further revealing the Commission's September 15 Order to be faulty, illogical and unsupported.

One source of the Commission's confusion involves the significance of Target Allocations. Target Allocations were initially used to allocate available Congestion Revenue among FTR Holders. Eventually, FTR Holders began to assert that FTR Holders are guaranteed Target Allocations regardless of actual Congestion Revenue collected, which depends on the misrepresentation that FTRs are purely a day-ahead product. The asserted underfunding underlying the original First Energy complaints (addressed in the associated *FirstEnergy* and *FirstEnergy II* decisions) has this misrepresentation at its core. Once it is recognized that no more Congestion Revenue than the amount actually collected can be paid out, it is clear that underfunding is a misnomer and a logical impossibility. The Target Allocation argument is logically incorrect, inconsistent with the definition of

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64 In contrast, the Commission correctly determined in the *FirstEnergy II* decision that, "[w]hile some parties, like FirstEnergy, may benefit from such a reallocation, FirstEnergy has not shown that such a reallocation will benefit the overall market structure in PJM nor allocate costs to those that cause the costs to be incurred or have the incentive to reduce those costs." *FirstEnergy II* at P 44.

Congestion Revenue, and inconsistent with the historical fact that FTRs were created prior to the creation of the Day-Ahead Energy Market.

The original purpose of FTRs was to return Congestion Revenue to Load that pays for the transmission system and that pays Congestion.[65] For eighteen years the value of FTRs was determined by the amount of Congestion, including Balancing Congestion. The Commission clearly stated this distinction in the *FirstEnergy* and *FirstEnergy II* decisions.[66] The Commission has explicitly recognized that the Tariff does not provide a guarantee to FTR Holders that they will be paid their Target Allocations.[67] The level of Congestion associated with the physical delivery of energy is unpredictable and there is no reason to require Load to pay more than Congestion to subsidize or guarantee the profitability of Financial Participants who choose to buy FTRs. The Commission's Orders provide no basis to now reverse itself and provide that guarantee.

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65 *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61, 257, at 62,254 (1997) ("[I]f a firm transmission customer schedules energy between its points of receipt and delivery for which it holds FTRs, it will pay no congestion charges, *i.e.*, its congestion charges will be exactly offset by its congestion revenues.").

66 *See FirstEnergy II* at P 41 (citing 134 FERC ¶ 61,263, at P 46 ("the Tariff [PJM OA Schedule 1 § 5.2.5(c)] contemplates the possibility of underfunding FTRs in a planning period."); *see also FirstEnergy II Rehearing Order* at P 26*; FirstEnergy* at P 15.

67 *See id*.

Thus, the Court should determine that the Orders failed to "examine the relevant data and articulate a rational connection between the facts found and the choice made."[68] FERC cannot depart from those rulings without "provid[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."[69] The failure to provide such reasoned analysis renders the Orders "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and worthy of being set aside.[70]

B. The September 15 Order Lacks Reasoned Support for the Load-Subsidized Congestion Allocation Rule.

1. Removing of Balancing Congestion from the Calculation of Congestion Revenue is Not Supported by Cost Causation Principles.

The Orders cite cost causation as a justification for the Load-Subsidized Congestion Allocation Rule.[71] The Commission states "the multi-faceted nature of balancing congestion does not easily permit a granular allocation to those parties

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68 *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 17 (D.C. Cir. 2014) (internal punctuation and citation omitted) (citing *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)).

69 *Alcoa*, 564 F.3d at 1347 (citing *Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003)).

70 5 U.S.C. § 706(2)(A).

71 *See* September 15 Order at PP 94–96, 98–99; Rehearing Order at PP 75, 77–78, 80–81, 83 (CIR 102, 132, JA___).

causing and directly benefiting from balancing congestion."[72] The Rehearing Order states, "limiting the allocation to any subset of market participants that are not fully responsible for the costs associated with balancing congestion would be inconsistent with cost causation principles."[73] The Commission cannot define who is responsible for the costs of Balancing Congestion, but nonetheless allocates Balancing Congestion to Load plus exports. The Orders reveal a misunderstanding regarding the applicability of the cost causation principle to the FTR market, the purpose and valuation of FTRs, , and the definition of Balancing Congestion.

The *FirstEnergy* and *FirstEnergy II* decisions correctly find that cost causation provides no basis for distinguishing between Day-Ahead and Balancing Congestion.[74] Cost causation supports the Traditional Congestion Allocation Rule. Congestion is paid by Load in an LMP market. The payment of Congestion by Load is in excess of what is necessary to pay generators. Congestion is a source of revenue. Congestion should be returned to Load, which paid Congestion and continues to pay for the transmission system, *via* the ARR/FTR construct and through transmission service rates.

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72 Rehearing Order at P 78 (CIR 132, JA___).

73 *Id*.

74 *FirstEnergy* at P 45; *FirstEnergy II* at P 43-44.

The ARR/FTR market design involves an allocation of Congestion Revenue, which is the sum of Day-Ahead Congestion and Balancing Congestion. The *FirstEnergy II* decision correctly found: "Neither FirstEnergy nor any of the commenters have identified the parties causing the underfunding. FirstEnergy also does not provide evidence demonstrating why all transmission customers, who already pay for transmission system access, should pay for the underfunding."[75] No new arguments or changes in facts or circumstances undercut the validity of this decision. There is no new evidence in the record supporting any change in allocation of Congestion Revenue.

The Commission failed to show that its determination to reverse course on the allocation of Congestion Revenue was "supported by substantial evidence and that the methodology used in arriving at that judgment is either consistent with past practice or adequately justified."[76] FERC fell short of demonstrating that it "made a principled and reasoned decision supported by the evidentiary record."[77]

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75 *FirstEnergy II* at P 43.

76 *See Maine v. FERC*, 854 F.3d 9, 21-22 (D.C. Cir. 2017) (citing *Town of Norwood v. FERC*, 80 F.3d 526, 533 (D.C. Cir. 1996)).

77 854 F.3d at 30.

2. Removing Balancing Congestion from the Calculation of Congestion Revenue Results in Undue Discrimination Between FTRs Held by Load and FTRs Held by Financial Participants.

The Orders result in undue discrimination between FTRs held by Load and FTRs held by Financial Participants, in violation of the FPA.[78] If there were two identical FTRs, one the result of Load self-scheduling an ARR as an FTR and one the result of a Financial Participant purchasing an FTR in the FTR Auction, the value of the Load's FTR would be less than the value of the Financial Participant's FTR. Under the Orders, FTRs held by Load are less valuable than FTRs held by non-Load entities because Load must pay Balancing Congestion, while non-load participants holding FTRs do not. There is no justification or basis for this different treatment. The result is undue discrimination between FTRs held by Load and FTRs held by non-Load participants, contrary to the goals of FTR market design.

3. The Orders Erred in Finding that the Traditional Congestion Allocation Rule Contributes to an Inappropriate Cost Shift Between Load and FTR Holders.

The Orders erred in determining that the Traditional Congestion Allocation Rule contributes to an inappropriate cost shift between Load and FTR Holders. The Rehearing Order incorrectly rejects the argument that "the removal of balancing

[78] *See* 16 U.S.C.§ 824d(b) (prohibiting "undue prejudice or disadvantage.").

congestion will result in load subsidizing FTR holders."[79] The Rehearing Order states: "Load ultimately bears the cost of congestion whether it is included in the FTR funding equation or if it is directly allocated to load." The Commission is correct in stating that Load pays Congestion. But the Commission fails to recognize that negative Balancing Congestion means that Congestion is *lower* than Day-Ahead Congestion and that the Commission is therefore requiring Load to pay FTR Holders an amount greater than Congestion when there is negative Balancing Congestion.

The Commission also fails to recognize that Congestion is not actually a cost; Congestion is an excess payment by Load in an LMP system that should be returned to Load. The Rehearing Order claims that "PJM's efforts to restore funding by conservatively allocating Stage 1B ARRs led to approximately $257 million of unallocated ARRs for the 2014/2015 Planning Period, which otherwise would have been to the benefit of LSEs, and ultimately Load."[80]

The Commission mistakenly assumes that PJM's actions were required. They were not required. PJM chose to reduce the number of ARRs available to

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79 Rehearing Order at P 80 (CIR 132, JA___).

80 *Id.*

Load in order to increase payments to FTR Holders.[81] PJM does not have an obligation to pay FTR Holders their Target Allocations.[82] The Commission correctly recognized that PJM's action was detrimental to load, and it should have directed PJM to reverse its action. It is arbitrary and capricious for the Commission to rely on PJM's misguided and unnecessary action as the premise for a decision to require Load to subsidize FTR Holders.

4. The Orders are Based on a Misunderstanding of FTRs.

The Rehearing Order states, "[t]he persistent and unpredictable level of FTR underfunding causes FTR auction participants to include a risk premium in their bids to account for underfunding."[83] The Commission concludes: "Removing balancing congestion from FTRs restores the integrity of the FTR product as a hedge against day-ahead congestion and also results in a more economically efficient means of allocating balancing congestion as it does not add imprecise risk

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81 *See* Initial Post-Technical Conference Comments of PJM Interconnection, L.L.C., FERC Docket No. EL16-6 et al. (March 15, 2016) ("PJM also modified several processes that did not require … Tariff revisions.[footnote omitted] One such modification was that PJM began modeling a greater number of transmission outages in its simultaneous feasibility review process to more accurately evaluate FTR feasibility.").

82 *See supra* note 71 and accompanying text.

83 Rehearing Order at P 80 (CIR 132, JA___).

premiums and inequitable cost shifts between classes of ARRs."[84] The Commission's conclusion is based on the mistaken assertions that PJM's actions were necessary or even consistent with the Commission's prior orders, and that FTR Holders should be held harmless from market risk. ARR holders have the option to sell the rights to variable Congestion to FTR purchasers or to retain the rights to variable Congestion by self-scheduling ARRs as FTRs. FTR Holders are by definition voluntarily taking on risk by purchasing FTRs in a market.

Part of that risk is that Congestion may be lower than expected either because Day-Ahead Congestion is lower than expected or because Real-Time Congestion is lower than expected and therefore Balancing Congestion is negative. The assertion that FTR Holders should be insulated from risk is based on a misunderstanding of the role of FTR Holders. The essence of the role of FTR Holders is to assume risk from Load that has ARRs. The Orders assign the risk of holding FTRs back to Load; but Load sold the rights to Congestion to FTR Holders precisely in order to avoid that risk.

5. The Orders' Definition of FTRs is Inconsistent with the Commission's Policy and Statutory Mandates.

The Orders erred in failing to define FTRs consistent with the Commission's policy goals and statutory mandates. A decision inconsistent with an agency's own

84 *Id*.

policies and lacking reasoned explanation is arbitrary and capricious.[85] Moreover, the Courts have applied heightened scrutiny to agency actions when they call into question the agency's understanding of its statutory mandate.[86]

As previously noted, the policy goal of FTRs is the return of Congestion Revenue to Load because Load pays Congestion and should receive the benefits of paying for the transmission system that was designed to enable Load to obtain low cost energy.[87] Consistent with FERC's policy goals for FTRs, the Traditional

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85 *See Bahr v. EPA*, 836 F.3d 1218, 1229 (9th Cir. 2016) ("Where the petitioner challenges the agency's action as inconsistent with the agency's own policies, we examine whether the agency has actually departed from its policy and, if so, whether the agency has offered a reasoned explanation for such departure." (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016))).

86 *See American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 1999) ("Where, however, the petitioners call into question the Commission's understanding of its statutory mandate, our review is *de novo*." (citing *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1306 (9th Cir. 1997))).

87 In its order approving the implementation of PJM's LMP markets, the Commission explained the goal of FTRs is to provide Load an offset to Congestion. *Pennsylvania-New Jersey-Maryland Interconnection,* 81 FERC at 61,241 ("FTRs serve a limited function of allowing a transmission service customer to protect against incurring transmission congestion costs."). The Commission identified the relationship between entitlement to Congestion Revenue and the cost to Load of building the transmission system. *Id*. at 62,261 ("We find that the billing determinants used for calculating the basic transmission charge for network customers should be modified to be consistent with the units used to determine the distribution of FTRs, and hence congestion revenues …. [U]nder Supporting Companies' proposal network customers would receive a greater percentage of the FTRs (and

Congestion Allocation Rule provides for FTR Holders to receive Congestion Revenue. The Orders, contrary to the policy goals for FTRs, and without a reasoned explanation, shift substantial revenue from Load to FTR Holders, many of whom are Financial Participants speculating in FTRs, and reduces the ability of Load to properly offset Congestion.

Moreover, Congress recognized and confirmed the Commission's FTR policy goals when it passed the Energy Policy Act of 2005, which amended the Act to include provisions specifically addressing native load service obligations and the role of FTRs.[88] Section 217(b) provides that "[a]ny load-serving entity … is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to *deliver the output or purchased energy, or the*

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congestion revenues) than their percentage share of transmission costs.") The Commission explained how FTRs fit into the LMP market design. *Id*. at 62,253 ("We find that Supporting Companies' proposed locational marginal pricing (LMP) model, in conjunction with the use of FTRs … should be implemented… We believe that the LMP model will promote efficient trading and be compatible with competitive market mechanisms. In this regard, we find that the LMP approach will reflect the opportunity costs of using congested transmission paths, encourage efficient use of the transmission system, and facilitate the development of competitive electricity markets.").

[88] 16 U.S.C. § 824q.

output of other generating facilities … to the extent required to meet the service obligation of the load-serving entity.[89]

The Orders contradict the statutory definition of an FTR as an instrument to facilitate the delivery of energy, and redefine FTRs as purely day-ahead instruments. The departure from policy and the confirming statutory mandate is detrimental to LSEs and the Load that is ultimately served in real-time. Therefore, the Orders are inconsistent with a proper understanding of the statutory mandate for FTRs in Section 217(b) of the Act.

The Commission has provided no reasoned explanation for the Load-Subsidized Congestion Allocation Rule consistent with its policy goals and the confirming statutory mandate. The Traditional Congestion Allocation Rule in place from 1998 through 2017, which is consistent with such goals and mandate, should be reinstated.

6. The Orders Erred in Defining FTRs as a Hedge Against Day-Ahead Congestion.

The September 15 Order asserts "that the inclusion of balancing congestion in the settlement of FTRs … reduces the efficacy of FTRs as a hedge."[90] The Rehearing Order states, "including balancing congestion in the funding definition

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89 16 U.S.C. § 824q(b)(2) (emphasis added).

90 September 15 Order at P 94 (CIR 102, JA___).

of FTRs is not necessary to maintain a financial hedge."[91] The Rehearing Order states that the Commission accepts "PJM's explanation … that balancing congestion does not represent congestion but rather an imbalance in real-time compensation."[92]

The Commission's assertions about the role of FTRs in providing a financial hedge are not supported by any evidence and ignore the role of Financial Participants who are purely speculators in FTRs. In the Orders, the Commission never clearly defines what it now means by a hedge or for whom FTRs are to serve as a hedge or against what FTRs are to serve as a hedge.

From the outset, the Commission has recognized that FTRs were an offset to Congestion that functioned by returning Congestion to Load.[93] The Commission defined that as a hedge against Congestion.[94] The Commission has not explained how they arrived at the new conclusion that FTRs, originally defined as a hedge (offset) against Congestion for Load should now be a hedge against Day-Ahead Congestion for FTR Holders, particularly FTR Holders that have profited

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91 Rehearing Order at P 79 (CIR 132, JA___).

92 *Id*.

93 *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, at 62,253 (1997).

94 *Id*.

consistently, even during years when Congestion Revenue was significantly lower than Target Allocations.[95]

Financial Participants owned 65.6% of all 2016 and 2017 Annual FTRs.[96] The Orders provide no reasonable basis for the redefinition of FTRs as a hedge against Day-Ahead Congestion only that is guaranteed by Load. It is an illogical finding that is inconsistent with the established principle that Congestion should be returned to Load. It is also inconsistent with the principles of FPA Section 217(b), which provide that "[a]ny load serving entity … is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to *deliver the output or purchased energy, or the output of other generating facilities* … to the extent required to meet the service obligation of the load-serving entity." The Orders undercut the ability of LSEs to use such rights by devaluing them in order to unjustifiably reward Financial Participants.

C. The Orders Rely on a Faulty Recharacterization of FTRs as Day-Ahead Instruments.

When FTRs are considered consistent with the Traditional Congestion Allocation Rule (as the allocation of Congestion collected as a byproduct of LMP

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95 Market Monitor, *2016 State of the Market Report for PJM*, Vol. 2, at 553 (Table 13-31) (Mar. 9, 2017) (JA__).

96 *Id* at 544 (Table 13-17).

Market operations), the jurisdiction of the Commission over FTRs is clear. In contrast, another federal agency, the Commodity Futures Trading Commission ("CFTC"), has jurisdiction over derivatives contracts such as options, swaps, and futures.[97] The Commodity Exchange Act ("CEA") provides for exemption from CFTC regulation for certain contracts, agreements, or transactions entered into pursuant to a Commission-approved tariff under specified conditions as determined by the CFTC. [98] Specifically, the CFTC grants exemptions from its regulation based on, *inter alia*, a finding that the exemption is consistent with the public interest.[99]

The CFTC, in response to a petition from PJM and other market administrators, issued a final rule exempting specified transactions, which include

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97 7 U.S.C. § 2(a)(1)(A) ("The [CFTC] shall have exclusive jurisdiction… with respect to … 'option[s]' … transactions involving swaps or contracts of sale of a commodity for future delivery … traded or executed on a contract market").

98 7 U.S.C. §§ 2(a)(1)(I), 6(c)(2). *See also Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act*, 78 Fed. Reg. 19,879, 19,881 (2013).

99 *Id. See also* 78 Fed. Reg. 19,879, 19881–82.

FTRs, from CFTC regulation ("CFTC Order").[100] The CFTC Order identifies the attributes required in order to exempt these specified transactions in the public interest. "[F]undamental to this 'public interest' and 'purposes of the [Act]' analysis is the fact that the Covered Transactions are *inextricably tied to the Requesting Parties' physical delivery of electric energy*."[101] The CFTC continues, "In contrast, an exemption for transactions that are… not directly linked to the physical generation and transmission of electric energy… is unlikely to be in the public interest or consistent with the purposes of the CEA, taking such transactions outside the scope of the Final Order."[102]

Under the Traditional Congestion Allocation Rule, FTRs return Congestion to FTR Holders based on the price of delivered energy in the Day-Ahead Energy Market and in the Real-Time Energy Market, creating an inextricable link to physical energy delivery. In order to retain such a link, and to a avoid grounds for shifting jurisdiction over FTRs from FERC to the CFTC, the calculation of FTR value must include Balancing Congestion. The Day-Ahead Energy Market, by contrast, is a financially firm market that does not result in the physical delivery of

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100 78 Fed. Reg. 19,879.

101 *Id.* at 19,894 (internal citation omitted) (emphasis added).

102 *Id.* at 19,895.

electricity. The difference between the financial Day-Ahead Energy Market and the physical Real-Time Energy Market is the conversion of financial positions to physical energy delivery and the associated change in prices. By definition, Balancing Congestion is the congestion-related link between the financial and physical markets. If Balancing Congestion is removed from the calculation, as the September 15 Order requires, FTRs are no longer inextricably tied to physical energy delivery, but only to the financially firm Day-Ahead Energy Market. The September 15 Order removes the link between FTR transaction and the physical delivery of energy, and therefore removes FTRs from the scope of rationale for the grant of an exemption of FTRs from the CFTC's exclusive jurisdiction provided by the CFTC Order.

Calculating the value of FTRs as the September 15 Order mandates effectively redefines FTR transactions as instruments within the exclusive jurisdiction of the CFTC, specifically as "transactions…involving contracts of sale of a commodity for future delivery."[103] The Day-Ahead Energy Market establishes financial obligations for the sale and purchase of electricity (a commodity) for delivery in the future (the next day, in the Real-Time Energy Market). When the

[103] 7 U.S.C. § 2 (a)(1)(A) ("The [CFTC] shall have exclusive jurisdiction … with respect to … 'option[s]' … transactions involving swaps or contracts of sale of a commodity for future delivery ….").

definition of FTRs is based only on the Day-Ahead Market prices, FTRs become instruments under the exclusive jurisdiction of the CFTC, and not the Commission.

II. THE COMMISSION FAILED TO DEMONSTRATE REASONED DECISION-MAKING AND VIOLATED FPA SECTION 217 IN FINDING PJM'S PORTFOLIO NETTING RULE TO BE JUST AND REASONABLE[104]

The Commission erred in rejecting PJM's proposal to eliminate the netting of negatively valued FTRs against positively valued FTRs within an FTR Holder's FTR portfolio. In doing so, the Commission unreasonably rejected Tariff revisions that were intended to help restore the value of FTRs in accord with their original purpose. FTRs were created to enable LSEs to meet their load-serving obligations by providing them with a revenue stream as consideration for the value of the LSEs' contribution toward the costs of the PJM transmission system. As a result, the Commission's decision violates FPA section 217 and is an unjustified deviation from Commission precedent acknowledging the priority of LSEs in FTR allocation and funding.

LSEs contribute to the cost of the PJM transmission system through their payment of transmission service rates. The cost of Congestion is embedded in the LMP that LSEs pay for energy to meet their load-service obligations. LSEs receive the revenue stream from positive FTRs that is intended to offset the cost of

[104] NJBPU, DPSC, the Market Monitor, ODEC, and AMP join these arguments.

Congestion by returning those embedded transmission congestion charges to the LSEs. In this manner, FTRs support the LSEs' acquisition of long-term transmission rights that are physically or financially firm. However, the Orders deprive LSEs of these benefits in significant part while violating provisions of the FPA intended to provide statutory priority to LSEs.

The Energy Policy Act of 2005[105] added section 217(b)(4) to the Act, which directed the Commission to facilitate "the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enable[] load-serving entities to secure firm transmission rights (*or equivalent tradable or financial rights*) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs." [106] In implementing FPA section 217(b)(4), the Commission stated that: "[LSEs] must have priority over non-load serving entities in the allocation of long-term firm transmission rights that are supported by existing transmission capacity."[107]

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105 Pub. L. No. 109-58, 119 Stat. 957, § 1233 (2005).

106 16 U.S.C. § 824q (emphasis added).

107 *Long-Term Firm Transmission Rights in Organized Electricity Markets*, Order No. 681, 116 FERC ¶ 61,077, at P 325 (2006).

As explained by PJM, its practice of netting negatively valued FTRs against positively valued FTRs results in an unjust and unreasonable allocation of risk to positive FTR Holders—the LSEs.[108] The practice results in degradation of the LSEs' statutory priority to firm transmission service by arbitrarily requiring LSEs to subsidize the speculative activities of financial entities that take positions in counterflow (*i.e.* negative) FTRs.[109] This subsidization occurs because of a simple mathematical principle related to underfunded FTRs.

For illustration, positive FTRs, typically held by the LSEs in connection with serving load, bear the burden of FTR under-funding.[110] This fact is reflected in the so called "payout ratio." Where Congestion revenue is insufficient to meet the Target Allocation[111] value of the positive FTR, the ratio of payments actually made in relation to the Target Allocation is the payout ratio for positive FTRs. The

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108 PJM Filing, FERC Docket No. EL16-6-000, at 22 (Oct. 19, 2015) (CIR 1, JA___).

109 *Id*. at 19 (Negative FTRs are "typically held by financial market participants as part of a speculative portfolio of FTR products.").

110 September 15 Order at P 8 ("PJM states, however, that when there is not enough revenue to fund all prevailing flow FTRs, the holder of these rights will receive a reduced pro-rata allocation of Transmission Congestion Credits.") (CIR 102, JA___).

111 *See supra* Section I.A.

payout ratio exists because there is a "payout" associated with positive FTRs that is lower than expected because of the underfunding problem in PJM.

In contrast, there is no "payout" flowing to holders of negative FTRs, which are typically held by Financial Participants. Rather, these speculative market participants previously accepted a payment in exchange for undertaking the obligation, or risk, to make a future payment in the full amount of actual counterflow congestion. Netting requires LSEs holding positive FTRs to subsidize these speculators by inappropriately reducing the negative FTR Holders' payment obligation by the payout ratio; thereby exacerbating the FTR underfunding faced by the LSEs. This occurs because the full negative value of the payment obligation associated with the negative FTRs is netted against the reduced actual value of the positive FTRs, rather than the target value.

Instead of accepting PJM's proposal to end this detrimental practice, the Commission, in the Orders, has elected to preserve it.[112] In considering whether PJM's existing netting provisions were unjust and unreasonable under FPA section 206, the Commission erroneously determined that "there is no subsidy" to Financial Participants through netting.[113] Thus, the Commission's decision was not

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[112] September 15 Order at P 68; Rehearing Order at P 44 (CIR 102, 132, JA___).

[113] Rehearing Order at P 47 (CIR 132, JA___).

the product of reasoned decision-making and is arbitrary and capricious. Further, the Commission disregarded the effect on Load's statutory preference to firm transmission rights in violation of FPA section 217.[114]

III. THE COMMISSION ERRED IN DIRECTING PJM TO ALLOCATE ARRS USING RECEIPT AND DELIVERY POINTS THAT REFLECT ACTUAL SYSTEM USAGE[115]

The Commission erred in directing PJM to develop a "method of allocating Stage 1A ARRs based on the same points that reflect actual system usage."[116] The Commission correctly determined that the use of historic paths in the Stage 1A 10-year simultaneous feasibility analysis leads to an unjust and unreasonable result—namely, a shift in value from ARRs to FTRs.[117] This is the allocation methodology reflected in PJM's tariff provisions that were in effect prior to this proceeding. However, the Commission's decision is arbitrary and capricious because: (i) it fails to address the problem that it purported to solve; and (ii) it ignored arguments demonstrating the soundness of PJM's original proposal.[118]

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114 *See id.*

115 ODEC and AMP join these arguments.

116 September 15 Order at P 3; Rehearing Order at P 22 (CIR 102, 132, JA___).

117 September 15 Order at P 40; Rehearing Order at P 9 (CIR 102, 132, JA___).

118 The Commission's decision also compelled PJM to make a compliance filing differing from its filing under section 205. September 15 Order at P 39 (CIR 102, JA___). The Commission conditionally accepted this compliance

1. The Commission's Approach Fails to Address the Problems Created by the Previous ARR Allocation Methodology.

ARR Holders are typically the Network and Firm Point-to-Point transmission service customers that have paid the embedded costs of the transmission system through fully allocated cost-based rates. These customers are entitled under section 217 of the FPA to protection of their ability to meet their service obligations.[119] Any replacement ARR allocation methodology accepted by the Commission must correct the shift of value from the ARR holders to the FTR Holders that was inherent in the previous methodology.

The record demonstrates that PJM's proposed addition of a 1.5% adder to its planning criteria methodology had the potential to restore value to ARRs by triggering transmission upgrades earlier and therefore providing feasible ARRs more promptly. PJM attested to this in its compliance filing.[120] However, in the Commission's view, PJM's filing had the potential to cause construction of

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filing in the Rehearing Order at P 113 (CIR 132, JA___). This practice violates FPA section 205 under the Court's holding in *NRG Power Marketing, LLC*, No. 15-1452, contained in the opinion the Court issued on July 7, 2017, long after the petitioners had an opportunity to cite authority before FERC.

[119] 16 U.S.C. § 824q; *see also Long-Term Firm Transmission Rights in Organized Electricity Markets*, 116 FERC ¶ 61,077, at P 325 (2006).

[120] PJM Filing, Docket No. EL16-6-003 (Nov. 14, 2016) (CIR 116; JA__) .

unnecessary transmission projects in supporting additional ARR allocations.[121] From this premise, the Commission ordered PJM to develop its allocation of ARRs using "only actively used paths."[122]

The Commission declared this approach "necessary to remedy the disconnect between Stage 1A ARR allocation and actual system usage."[123] Although the Commission's approach may mitigate unproven concerns over stimulating unnecessary transmission projects, no evidence in the record supports the view that allocation based on active paths will restore value to ARRs. To the contrary, the likely result will be fewer feasible Stage 1A ARRs and further degradation of the overall value of ARRs to LSEs. ARRs were developed as a way of providing LSEs a more reliable long-term tradable financial transmission right, given that FTR funding and the associated payouts to FTR Holders often are uncertain and difficult to predict. The Commission's decision is inconsistent with this objective. Thus, the Commission's decision is arbitrary and capricious and inconsistent with FPA section 217.

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121 September 15 Order at P 42 (CIR 102, JA___).

122 *Id.* P 45 (CIR 102, 132, JA___).

123 *Id.* P 40 (CIR 102, 132, JA___).

2. The Commission Ignored Arguments Demonstrating the Soundness of PJM's Original Proposal.

The Commission ignored evidence in the record supporting the conclusion that the approach PJM proposed in its original filing would not cause construction of unnecessary transmission facilities. PJM stated that the 1.5% adder it proposed "will not necessarily result in additional transmission being built."[124] Further, the Commission failed to address or consider PJM's statements demonstrating that the 1.5% adder would identify transmission enhancements at an earlier point, and that these would produce a reliability benefit and are justified on an economic basis.[125]

The Commission disregarded specific evidence pertaining to the only transmission project built to address ARR infeasibility under the existing PJM simultaneous feasibility and transmission planning process. This process considers transmission projects necessary to support ARR feasibility. Technical conference discussion and the parties' pleadings show that the Grand Prairie Gateway transmission project resolved a $48 million annual revenue shortfall associated with ComEd Zone Stage 1A ARRs.[126] If that project had been brought into service one year earlier through inclusion of the 1.5% adder in the PJM planning

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124 PJM Comments at 3 (Mar. 15, 2016) (CIR 77, JA___).

125 PJM Answer at 6 (Nov. 23 2016) (CIR 118, JA___).

126 *Id*.

processes, the costs of accelerating the project would have been lower than the annual ARR revenue shortfall.[127]

In the Rehearing Order, the Commission acknowledged that PJM's proposal "would not always result in the construction of additional transmission . . . ," but indicated that it "could result in unwarranted transmission enhancements."[128] Rather than citing record evidence for this alleged possibility, the Commission cited the September 15 Order. Further, the Commission dismissed references to the Grand Prairie Gateway project because it was "only a single example. . . ."[129] This project was the only relevant project because it was the only project ever developed specifically to address ARR infeasibility. Thus, the Commission erred in failing to account for this record evidence of a material reliability and economic justification for PJM's proposed 1.5% adder without reason and failed to cite evidence supporting its own unproven concerns over "unwarranted" transmission. The Commission's failure to base this decision on substantial evidence means that this decision is not the product of reasoned decision making and is therefore arbitrary and capricious.

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127 ODEC Comments at 7 (Mar. 15, 2016) (CIR 78, JA___).

128 Rehearing Order at P 23 (CIR 132, JA___).

129 *Id.*

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court find that FERC failed to engage in reasoned decision making; and, thus, the Orders should be vacated, and the matter remanded for further action. The Court should further direct that FERC ensure that all Congestion is returned to Load in a manner that is not unjust and unreasonable or unduly discriminatory and that FERC's treatment of Balancing Congestion Revenues in the calculation of Congestion not result in an unjust and unreasonable or unduly discriminatory rate to Load.

Respectfully submitted,

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July 11, 2017

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and this Court's Order dated May 31, 2017, I certify that the Brief for Petitioners has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 12,768 words, not including the tables of contents and authorities, the glossary, and the certificates of counsel.

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July 11, 2017

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 11th day of July 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or by U.S. Mail, as indicated below:

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STATUTORY ADDENDUM

Federal Power Act Section

Section 201, 16 U.S.C. § 824

Section 205, 16 U.S.C. § 824d

Section 217, 16 U.S.C. § 824q

Section 313, 16 U.S.C. § 825*l*

Federal Power Act section 201

16 U.S.C. § 824

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

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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.)

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

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

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

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

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

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

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

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

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

Section 214 of Pub. L. 95–617 provided that:

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

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

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

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

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

Federal Power Act section 205

16 U.S.C. § 824d

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

Federal Power Act section 217

16 U.S.C. § 824q

2005), the authorization shall be reviewed for renewal taking fully into account reliance on such electricity infrastructure, recognizing the importance of the authorization for public health, safety, and economic welfare and as a legitimate use of Federal land.

(9) In exercising the responsibilities under this section, the Secretary shall consult regularly with—

(A) the Federal Energy Regulatory Commission;

(B) electric reliability organizations (including related regional entities) approved by the Commission; and

(C) Transmission Organizations approved by the Commission.

(i) Interstate compacts

(1) The consent of Congress is given for three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to—

(A) facilitate siting of future electric energy transmission facilities within those States; and

(B) carry out the electric energy transmission siting responsibilities of those States.

(2) The Secretary may provide technical assistance to regional transmission siting agencies established under this subsection.

(3) The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).

(4) The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C) of this section.

(j) Relationship to other laws

(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Subsection (h)(6) of this section shall not apply to any unit of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument.

(k) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, § 216, as added Pub. L. 109–58, title XII, § 1221(a), Aug. 8, 2005, 119 Stat. 946.)

REFERENCES IN TEXT

The National Forest Management Act of 1976, referred to in subsec. (h)(6)(D)(i), is Pub. L. 94–588, Oct. 22, 1976, 90 Stat. 2949, as amended, which enacted sections 472a, 521b, 1600, and 1611 to 1614 of this title, amended sections 500, 515, 516, 518, 576b, and 1601 to 1610 of this title, repealed sections 476, 513, and 514 of this title, and enacted provisions set out as notes under sections 476, 513, 528, 594–2, and 1600 of this title. For complete classification of this Act to the Code, see Short Title of 1976 Amendment note set out under section 1600 of this title and Tables.

The Endangered Species Act of 1973, referred to in subsec. (h)(6)(D)(ii), is Pub. L. 93–205, Dec. 28, 1973, 87 Stat. 884, as amended, which is classified principally to chapter 35 (§ 1531 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (h)(6)(D)(iii), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§ 1251 et seq.) of Title 33, Navigation and Navigable Waters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The National Environmental Policy Act of 1969, referred to in subsecs. (h)(6)(D)(iv) and (j), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Federal Land Policy and Management Act of 1976, referred to in subsec. (h)(6)(D)(v), is Pub. L. 94–579, Oct. 21, 1976, 90 Stat. 2743, as amended, which is classified principally to chapter 35 (§ 1701 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 43 and Tables.

§ 824q. Native load service obligation

(a) Definitions

In this section:

(1) The term ''distribution utility'' means an electric utility that has a service obligation to end-users or to a State utility or electric cooperative that, directly or indirectly, through one or more additional State utilities or electric cooperatives, provides electric service to end-users.

(2) The term ''load-serving entity'' means a distribution utility or an electric utility that has a service obligation.

(3) The term ''service obligation'' means a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State, or local law or under long-term contracts to provide electric service to end-users or to a distribution utility.

(4) The term ''State utility'' means a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or a corporation that is wholly owned, directly or indirectly, by any one or more of the foregoing, competent to carry on the business of developing, transmitting, utilizing, or distributing power.

(b) Meeting service obligations

(1) Paragraph (2) applies to any load-serving entity that, as of August 8, 2005—

(A) owns generation facilities, markets the output of Federal generation facilities, or holds rights under one or more wholesale contracts to purchase electric energy, for the purpose of meeting a service obligation; and

(B) by reason of ownership of transmission facilities, or one or more contracts or service agreements for firm transmission service,

holds firm transmission rights for delivery of the output of the generation facilities or the purchased energy to meet the service obligation.

(2) Any load-serving entity described in paragraph (1) is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to deliver the output or purchased energy, or the output of other generating facilities or purchased energy to the extent deliverable using the rights, to the extent required to meet the service obligation of the load-serving entity.

(3)(A) To the extent that all or a portion of the service obligation covered by the firm transmission rights or equivalent tradable or financial transmission rights is transferred to another load-serving entity, the successor load-serving entity shall be entitled to use the firm transmission rights or equivalent tradable or financial transmission rights associated with the transferred service obligation.

(B) Subsequent transfers to another load-serving entity, or back to the original load-serving entity, shall be entitled to the same rights.

(4) The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

(c) Allocation of transmission rights

Nothing in subsections (b)(1), (b)(2), and (b)(3) of this section shall affect any existing or future methodology employed by a Transmission Organization for allocating or auctioning transmission rights if such Transmission Organization was authorized by the Commission to allocate or auction financial transmission rights on its system as of January 1, 2005, and the Commission determines that any future allocation or auction is just, reasonable and not unduly discriminatory or preferential, provided, however, that if such a Transmission Organization never allocated financial transmission rights on its system that pertained to a period before January 1, 2005, with respect to any application by such Transmission Organization that would change its methodology the Commission shall exercise its authority in a manner consistent with the[1] chapter and that takes into account the policies expressed in subsections (b)(1), (b)(2), and (b)(3) of this section as applied to firm transmission rights held by a load-serving entity as of January 1, 2005, to the extent the associated generation ownership or power purchase arrangements remain in effect.

(d) Certain transmission rights

The Commission may exercise authority under this chapter to make transmission rights not used to meet an obligation covered by subsection (b) of this section available to other entities in a manner determined by the Commission to be just, reasonable, and not unduly discriminatory or preferential.

(e) Obligation to build

Nothing in this chapter relieves a load-serving entity from any obligation under State or local law to build transmission or distribution facilities adequate to meet the service obligations of the load-serving entity.

(f) Contracts

Nothing in this section shall provide a basis for abrogating any contract or service agreement for firm transmission service or rights in effect as of August 8, 2005. If an ISO in the Western Interconnection had allocated financial transmission rights prior to August 8, 2005, but had not done so with respect to one or more load-serving entities' firm transmission rights held under contracts to which the preceding sentence applies (or held by reason of ownership or future ownership of transmission facilities), such load-serving entities may not be required, without their consent, to convert such firm transmission rights to tradable or financial rights, except where the load-serving entity has voluntarily joined the ISO as a participating transmission owner (or its successor) in accordance with the ISO tariff.

(g) Water pumping facilities

The Commission shall ensure that any entity described in section 824(f) of this title that owns transmission facilities used predominately to support its own water pumping facilities shall have, with respect to the facilities, protections for transmission service comparable to those provided to load-serving entities pursuant to this section.

(h) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

(i) Jurisdiction

This section does not authorize the Commission to take any action not otherwise within the jurisdiction of the Commission.

(j) TVA area

(1) Subject to paragraphs (2) and (3), for purposes of subsection (b)(1)(B) of this section, a load-serving entity that is located within the service area of the Tennessee Valley Authority and that has a firm wholesale power supply contract with the Tennessee Valley Authority shall be considered to hold firm transmission rights for the transmission of the power provided.

(2) Nothing in this subsection affects the requirements of section 824k(j) of this title.

(3) The Commission shall not issue an order on the basis of this subsection that is contrary to the purposes of section 824k(j) of this title.

(k) Effect of exercising rights

An entity that to the extent required to meet its service obligations exercises rights described in subsection (b) of this section shall not be considered by such action as engaging in undue discrimination or preference under this chapter.

(June 10, 1920, ch. 285, pt. II, § 217, as added Pub. L. 109–58, title XII, § 1233(a), Aug. 8, 2005, 119 Stat. 957.)

[1] So in original. Probably should be ''this''.

FERC RULEMAKING ON LONG-TERM TRANSMISSION RIGHTS IN ORGANIZED MARKETS

Pub. L. 109–58, title XII, §1233(b), Aug. 8, 2005, 119 Stat. 960, provided that: ''Within 1 year after the date of enactment of this section [Aug. 8, 2005] and after notice and an opportunity for comment, the [Federal Energy Regulatory] Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act [16 U.S.C. 824q(b)(4)] in Transmission Organizations, as defined by that Act [16 U.S.C. 791a et seq.] with organized electricity markets.''

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

(a) Definition of electric utility or person

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

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

(2) is located—

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

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

(b) Protection of transmission contracts

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

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

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

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

§ 824s. Transmission infrastructure investment

(a) Rulemaking requirement

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

(b) Contents

The rule shall—

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

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

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

(4) allow recovery of—

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

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

(c) Incentives

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

(d) Just and reasonable rates

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

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

§ 824t. Electricity market transparency rules

(a) In general

(1) The Commission is directed to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce, having due regard for the public interest, the integrity of those markets, fair competition, and the protection of consumers.

(2) The Commission may prescribe such rules as the Commission determines necessary and appropriate to carry out the purposes of this section. The rules shall provide for the dissemination, on a timely basis, of information about the availability and prices of wholesale electric energy and transmission service to the Commission, State commissions, buyers and sellers of wholesale electric energy, users of transmission services, and the public.

(3) The Commission may—

(A) obtain the information described in paragraph (2) from any market participant; and

(B) rely on entities other than the Commission to receive and make public the information, subject to the disclosure rules in subsection (b) of this section.

(4) In carrying out this section, the Commission shall consider the degree of price transparency provided by existing price publishers and providers of trade processing services, and shall rely on such publishers and services to the maximum extent possible. The Commission may establish an electronic information system if it determines that existing price publications are

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ation, 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 Public Printer 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 Printing 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.)

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.

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this 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) of this section, the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

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

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

(A) electric energy; or

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

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

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in