ORAL ARGUMENT SCHEDULED MAY 5, 2022

No. 20-1343 (LEAD)
Consolidated with 20-1361, 20-1362, 20-1365, 20-1368, 21-1067, 20-1070

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

CONSTELLATION MYSTIC POWER, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BRAINTREE ELECTRIC LIGHT DEPARTMENT, ET AL.,
Intervenors.

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

FINAL OPENING BRIEF OF PETITIONERS CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY, CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, CONNECTICUT OFFICE OF CONSUMER COUNSEL, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, AND THE NEW ENGLAND STATES COMMITTEE ON ELECTRICITY, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties and *amici* in these consolidated appeals are:

Petitioners: Constellation Mystic Power, LLC, Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, Connecticut Office of Consumer Counsel, the New England States Committee on Electricity, Inc., and the Attorney General of the Commonwealth of Massachusetts

Respondent: Federal Energy Regulatory Commission

Intervenors: Braintree Electric Light Department, Concord Municipal Light Plant, Georgetown Municipal Light Department, Hingham Municipal Lighting Plant, Littleton Electric Light & Water Department, Middleborough Gas and Electric Department, Middleton Electric Light Department, Norwood Municipal Light Department, Pascoag Utility District, Reading Municipal Light Department, Taunton Municipal Lighting Plant, Wellesley Municipal Light Plant, ISO New England Inc., Massachusetts Municipal Wholesale Electric Company, New Hampshire Electric Cooperative, Inc., and the New England States Committee on Electricity, Inc.

Amici: None

B. Rulings Under Review

The following orders of Respondent Federal Energy Regulatory Commission are under review:

1. *Constellation Mystic Power, LLC*, Order Accepting and Suspending Filing and Establishing Hearing Procedures, 164 FERC ¶ 61,022 (July 13, 2018), R.75, JA566;

2. *Constellation Mystic Power, LLC*, Order Accepting Agreement, Subject to Condition, and Directing Briefs, 165 FERC ¶ 61,267 (Dec. 20, 2018), R.313, JA1488;

3. *Constellation Mystic Power, LLC*, Order Granting Clarification in Part, Denying Clarification in Part, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,043 (July 17, 2020), R.374, JA1516;

4. *Constellation Mystic Power, LLC*, Order on Clarification, Directing Compliance, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,044 (July 17, 2020), R.375, JA1549;

5. *Constellation Mystic Power, LLC*, Order on Compliance and Directing Further Compliance, 172 FERC ¶ 61,045 (July 17, 2020), R.376, JA1626; and

6. *Constellation Mystic Power, LLC*, Order Addressing Arguments Raised on Rehearing, and Setting Aside Prior Order, in Part, 173 FERC ¶ 61,261 (Dec. 21, 2020), R.420, JA1917.

C. Related Cases.

The final agency orders at issue in this proceeding have not been reviewed previously in this or any other court. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C). One portion of the agency proceedings below, regarding the return on equity component of the rates at issue, remains pending before Respondent Federal Energy Regulatory Commission.

RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1 of this Court, Petitioners the Attorney General of the Commonwealth of Massachusetts, Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, Connecticut Office of Consumer Counsel, and the New England States Committee on Electricity, Inc. hereby submit the following disclosure statements. Each of the undersigned counsel submits the disclosure statement with regard to the petitioner they represent.

The Attorney General of the Commonwealth of Massachusetts (Massachusetts AG) is a governmental entity charged with ensuring a reliable and safe power system at the lowest possible cost for all ratepayers. The Massachusetts AG does not issue any stock and thus is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, and Connecticut Office of Consumer Counsel are governmental entities that do not issue any stock and thus are not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

The New England States Committee on Electricity, Inc. (the States Committee) is a non-profit entity governed by a board of managers appointed by the

Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Its general purpose is to represent the collective perspective of the six New England states in regional electricity matters. The States Committee has no parent company, is not a publicly held corporation, and there is no publicly held company that has any ownership interest in the States Committee.

Respectfully submitted,

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GLOSSARY

Agreement	The cost-of-service agreement among Constellation Mystic Power, LLC, Exelon Generation Company, LLC, and ISO New England Inc.
Commission or FERC	Federal Energy Regulatory Commission
Connecticut Authority	Petitioner Connecticut Public Utilities Regulatory Authority
Connecticut Department	Petitioner Connecticut Department of Energy and Environmental Protection
Connecticut Consumer Counsel	Petitioner Connecticut Office of Consumer Counsel
Connecticut Parties	Petitioners Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection, and Connecticut Office of Consumer Counsel, collectively
December 2018 Order	*Constellation Mystic Power, LLC*, Order Accepting Agreement, Subject to Condition and Directing Briefs, 165 FERC ¶ 61,267 (Dec. 20, 2018), R.313, JA1260.
December 2020 Order	*Constellation Mystic Power, LLC*, Order Addressing Arguments Raised on Rehearing, and Setting Aside Prior Order, in Part, 173 FERC ¶ 61,261 (Dec. 21, 2020), R.420, JA1917.
Everett	Everett Marine Terminal, the liquefied natural gas facility in Everett, Massachusetts owned by Exelon and used to serve the Mystic Units
Exelon	Exelon Generation Company, LLC, the corporate parent of Mystic
FPA	Federal Power Act
July 2018 Order	*Constellation Mystic Power, LLC*, Order Accepting and Suspending Filing and Establishing Hearing

	Procedures, 164 FERC ¶ 61,022 (July 13, 2018), R.75, JA566.
July 2020 Compliance Order	*Constellation Mystic Power, LLC*, Order on Compliance and Directing Further Compliance, 172 FERC ¶ 61,045 (July 17, 2020), R.376, JA1626.
July 2020 Rehearing Order I	*Constellation Mystic Power, LLC*, Order Granting Clarification in Part, Denying Clarification in Part, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,043 (July 17, 2020), R.374, JA1516.
July 2020 Rehearing Order II	*Constellation Mystic Power, LLC*, Order on Clarification, Directing Compliance, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,044 (July 17, 2020), R.375, JA1549.
Massachusetts AG	Petitioner Massachusetts Attorney General
Mystic	Constellation Mystic Power, LLC, owner of the Mystic Units
Mystic Units or Units	Mystic Units 8 and 9 gas-fired power plants located adjacent to Everett and owned by Mystic
States Committee	Petitioner the New England States Committee on Electricity, Inc.
State Petitioners	Collectively, Massachusetts AG, Connecticut Parties and the States Committee
Supply Agreement	The Fuel Supply Agreement under which Everett will provide Mystic with its fuel requirements
System Operator	ISO New England Inc., the grid operator for New England

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STATE STATUTES

Authorities upon which we chiefly rely are marked with asterisks.

JURISDICTIONAL STATEMENT

Section 313(b) of the Federal Power Act (FPA), 16 U.S.C. § 825*l*(b), grants this Court jurisdiction to review the six Federal Energy Regulatory Commission (Commission or FERC) orders challenged here:

1. *Constellation Mystic Power, LLC*, Order Accepting and Suspending Filing and Establishing Hearing Procedures, 164 FERC ¶ 61,022 (July 13, 2018), R.75, JA566 (July 2018 Order);

2. *Constellation Mystic Power, LLC*, Order Accepting Agreement, Subject to Condition and Directing Briefs, 165 FERC ¶ 61,267 (Dec. 20, 2018), R.313, JA1260 (December 2018 Order);

3. *Constellation Mystic Power, LLC*, Order Granting Clarification in Part, Denying Clarification in Part, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,043 (July 17, 2020), R.374, JA1516 (July 2020 Rehearing Order I);

4. *Constellation Mystic Power, LLC*, Order on Clarification, Directing Compliance, and Addressing Arguments Raised on Rehearing, 172 FERC ¶ 61,044 (July 17, 2020), R.375, JA1549 (July 2020 Rehearing Order II);

5. *Constellation Mystic Power, LLC*, Order on Compliance and Directing Further Compliance, 172 FERC ¶ 61,045 (July 17, 2020), R.376, JA1626 (July 2020 Compliance Order); and

6. *Constellation Mystic Power, LLC*, Order Addressing Arguments Raised on Rehearing, and Setting Aside Prior Order, in Part, 173 FERC ¶ 61,261 (Dec. 21, 2020), R.420, JA1917 (December 2020 Order).

Each of the State Petitioners timely petitioned for review within sixty days after FERC's orders upon the application for rehearing, as required by 16 U.S.C. § 825*l*(b).

The Attorney General of the Commonwealth of Massachusetts (Massachusetts AG) timely petitioned for review of FERC's July 2018 and December 2018 Orders, and FERC's July 2020 Rehearing Orders I & II on September 15, 2020.

Connecticut Public Utilities Regulatory Authority (Connecticut Authority), Connecticut Department of Energy and Environmental Protection (Connecticut Department), and Connecticut Office of Consumer Counsel (Connecticut Consumer Counsel) (together, Connecticut Parties) timely petitioned for review of FERC's December 2018 Order and the July 2020 Rehearing Order II, and FERC's July 2020 Compliance Order on September 15, 2020. Connecticut Parties timely petitioned for review of FERC's December 2020 Order on February 19, 2021.

The New England States Committee on Electricity, Inc. (the States Committee) timely petitioned for review of the Commission's December 2018 Order and the July 2020 Rehearing Order II on September 15, 2020. The States Committee

timely filed with this Court a petition for review of the Commission's December 2020 Order on February 16, 2021.

Jurisdiction and venue in this Court are proper pursuant to 16 U.S.C. § 825*l*(b).

STATEMENT OF ISSUES

Whether the challenged Commission orders are arbitrary and capricious or contrary to law because they approve unjust and unreasonable charges to New England ratepayers under an agreement between ISO New England Inc. (System Operator), the operator of the New England electric grid, and Constellation Mystic Power, LLC (Mystic), the operator of two gas-fired power plants (Agreement).

The State Petitioners challenge the portions of FERC's orders that:

1. allocate to ratepayers 91 percent of the costs of the Everett Marine Terminal (Everett), rather than a significantly lesser percentage commensurate with Mystic's actual use of the Everett facility;
2. authorize the recovery of Everett's fixed and variable costs of ownership and operation in excess of the Commission's authority under the FPA;
3. require that ratepayers pay all of Everett's costs allocated to vapor sales without crediting against those costs revenue that Everett derives from vapor sales to third parties;
4. approve the inclusion in the Agreement of a "clawback" provision that fails to obligate Mystic to refund to ratepayers the costs of repairs or capital expenditures for Everett in the event that Everett continues to operate after the Agreement expires;
5. fail to address arguments regarding provisions in the Agreement that (a) give Mystic an incentive to delay capital expenditures until the Agreement goes into effect; and (b) grant ratepayers the ability to

challenge revenue discrepancies under the Agreement's "true-up" procedures; and

6. render ambiguous FERC's rulings that otherwise clarified the rights of ratepayers to challenge the prudence of certain costs under the Agreement.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutory provisions are set forth in a separate addendum.

STATEMENT OF THE CASE

In the orders under review, the Commission approved the Agreement, a two-year, cost-of-service agreement among the System Operator, Mystic, and its corporate parent, Exelon Generation Company, LLC (Exelon).[1] Mystic is the owner of two gas-fired power plants—Mystic Units 8 and 9 (Mystic Units or Units)—which normally sell electricity in New England's wholesale electricity markets at market-based rates.[2] The Agreement stems from the System Operator's finding that the Units' continued operation until 2024 is required for "fuel security," and that absent the Agreement the Units would retire before then. State Petitioners do not challenge those findings. We seek judicial review because the Agreement rates that

[1] Exelon is a wholly owned subsidiary of Exelon Corporation.

[2] The Units jointly provide approximately 1,400 MW of capacity. R.75 [July 2018 Order P 3], JA566.

FERC approved subject New England consumers to substantially unjust and unreasonable charges.[3]

Since 2000, New England has become increasingly reliant on power plants that burn natural gas. The System Operator has expressed concerns that pipeline constraints, upstream gas withdrawals, and competing use of gas for heating may jeopardize the "security" (or certainty) of gas import deliveries to New England electric generators. Consequently, the System Operator has taken action in recent years to maintain the availability of generators that rely on fuel not imported by pipeline (i.e., "fuel security").

The System Operator determined that the Mystic Units fit that bill because the Units do not rely on natural gas imported through pipelines; rather, their sole source of fuel is liquefied natural gas delivered by ship. The Units are sited next to Everett, which has "historically operated as a stand-alone entity with its own cost structure that recovers its costs through the market."[4] Since 1971, Everett, "the longest-operating [liquefied natural gas] import terminal in the U.S.,"[5] has received liquefied

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[3] The return on equity (Return) used to set charges under the Agreement was subject to separate paper hearing procedures. R.313 [December 2018 Order P 31], JA1276. The Commission issued an order setting a 9.33 percent Return; the ruling is pending on rehearing and is not at issue here. *Constellation Mystic Power, LLC*, 176 FERC ¶ 61,019 (2021).

[4] R.75 [July 2018 Order P 25], JA576. Everett was previously called the Distrigas Facility. *Id*. P 3, JA567.

[5] R.253 [Ex. MYS-0001 at 5:12], JA970.

natural gas cargoes, and sold some as a liquid (transported by truck) and the rest as vapor injected into interstate pipelines. When the Mystic Units began commercial operation in 2003,[6] they were interconnected with Everett's facilities and began purchasing fuel-related services from Everett.[7] In 2018, Exelon bought the Everett facilities.[8]

Everett delivers vaporized gas to the Units and is their sole fuel source. Mystic is interconnected such that it makes use of only some of Everett's vaporization facilities; Everett's other vaporization systems provide gas at pressure levels too low for Mystic to use.[9] Everett also sells vapor gas to purchasers besides Mystic, including two interstate pipelines and a local gas distribution company. Everett is configured to deliver nearly twice as much gas to the pipelines as it supplies to Mystic.[10] Everett also makes liquefied gas sales by truck.[11]

In January 2018, the System Operator issued an "Operational Fuel Security Analysis" identifying infrastructure that, if not available, might jeopardize New

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[6] R.2 [Mystic Filing at 6], JA6.

[7] *Id.*

[8] *Id.*

[9] R.276 [Connecticut Parties Initial Brief at 17-18 (citing Ex. CT–064)], JA1252-JA1253.

[10] *Id.*

[11] R.139 [Ex. S–0001 at 9:11–10:2], JA638-JA639; R.125 [Ex. ISO–001 at 26:22–27:2], JA619-JA620.

England electric system reliability. The report identified Everett and the Mystic Units as critical facilities whose retirement would pose unacceptable "fuel security" risks. The System Operator found the Units' retirement might, in turn, lead to Everett's retirement, heightening these "fuel security" risks.[12] Armed with this knowledge, Mystic's corporate parent, Exelon, notified the System Operator in March 2018 of its intention to retire the Units on May 31, 2022.[13] Given the Units' identified role in providing fuel security, the System Operator sought to retain the Units.[14]

The System Operator and Mystic negotiated the Agreement to keep the Units in service for two more years. The System Operator's principal negotiator testified that the parties to these discussions lacked "equal bargaining power" because once the "determination of need" had been issued, Mystic "knew the urgency of the . . . task."[15]

Mystic submitted the Agreement to FERC for approval in May 2018.[16] Under the proposed Agreement, Mystic would receive its full cost of service during the Agreement's two-year term. Mystic proposed to buy gas from its then-soon-to-be

[12] R.75 [July 2018 Order P 22], JA574.

[13] R.2 [Mystic Filing at 1 n.4], JA1.

[14] R.75 [July 2018 Order P 4], JA567.

[15] R.276 [Connecticut Parties Initial Brief at 5 (citing Ex. CT-076)], JA1251.

[16] R.2 [Mystic Filing], JA1.

affiliate, Everett, under a separate Fuel Supply Agreement (Supply Agreement) negotiated by the two affiliated entities.[17] Although the Supply Agreement is not subject to FERC's FPA jurisdiction,[18] Mystic proposed to recover through the Agreement, and impose on Mystic's ratepayers, variable fuel costs as well as 100 percent of Everett's fixed operating costs. These costs would be offset by only 50 percent of the profit Everett earned on third-party sales.[19] Alternatively, Mystic expressed a willingness to credit 100 percent of sales margins against the Agreement's charges if directed to do so.[20]

State Petitioners and others challenged Mystic's proposal to recover Everett's full costs-of-service where sales to Mystic were only a fraction of Everett's total sales. Separately, parties argued that it was unfair to credit customers with only 50 percent of the margins earned on third-party sales if ratepayers were to pay 100 percent of Everett's costs.

The proposed Agreement would also allow Mystic to recover completely during the Agreement's term the costs of any repairs or capital expenditures needed

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[17] The parties to the Supply Agreement are Mystic and another Exelon subsidiary. R.2 [Ex. MYS-004 at 1], JA227.

[18] The Supply Agreement is for the sale of liquefied natural gas and does not implicate FERC's FPA jurisdiction over the "sale of electric energy at wholesale in interstate commerce . . . ." 16 U.S.C. § 824(b)(1).

[19] R.75 [July 2018 Order P 22], JA574.

[20] *Id.*, JA574-JA575.

to keep the Units and Everett operational, even though either or both could continue operating long after the Agreement ended. Although the Agreement did not contain one, Mystic offered to include a "clawback" mechanism through which it would refund certain capital expenditures incurred during the Agreement's term if the Units remained in service past the termination date.[21] This provision guards against the possibility that the facilities could "toggle" between cost-of-service payments and a subsequent—and subsidized—return to merchant operations.

On July 13, 2018, FERC accepted the Agreement for filing, and, at Mystic's urging, set it for an expedited hearing.[22] As part of its order, the Commission rejected arguments that it lacked jurisdiction to authorize recovery of Everett costs in the Agreement's rates,[23] but permitted parties to litigate whether recovery of "all costs . . . claim[ed] in connection with" Everett were just and reasonable,[24] as well

[21] R.2 [Mystic Filing at 16], JA16.

[22] R.75 [July 2018 Order], JA566. The procedures included bypassing an initial decision by an Administrative Law Judge; following trial, the matter was briefed directly to the Commission. *Id*. P 12, JA570.

[23] *Id.* PP 34-37, JA578-JA580.

[24] *Id.* P 37, JA580. Both Commissioner (now Chairman) Glick and Commissioner Powelson dissented, characterizing the Agreement as "an unprecedented exercise of market power … that will let a single market participant fundamentally alter the course of the wholesale electricity markets." *Id.* Glick Dissent at 5, JA597. And Commissioner Glick observed that it "appears to be a question of first impression" whether "the Commission has jurisdiction to permit Mystic to recover all of the costs of operating [Everett] in its wholesale electric rate . . . ." *Id.* at 2, JA594.

as the percentage "margin" on any third-party sales to be credited to ratepayers.[25] The Massachusetts AG sought rehearing of the July 2018 Order's determination as to jurisdiction.[26]

An evidentiary hearing was held in September-October 2018. On December 20, 2018, the Commission issued its initial order on the Agreement.[27] Each of the State Petitioners timely petitioned for rehearing, and on rehearing FERC modified its decision in part.

Cost allocation, jurisdiction, and revenue crediting: The December 2018 Order rejected Mystic's proposed allocation of 100 percent of Everett costs, but approved a proposal by Commission Trial Staff (Staff) to include in the Agreement's rates 91 percent of Everett's operating costs—the historical ratio of Everett's vapor sales to its total sales—and Staff's related revenue crediting mechanism, under which Exelon (as owner of Everett) would retain up to 50 percent of the margin on third-party forward sales.[28] In support of this determination, FERC cited "the

[25] R.75 [July 2018 Order P 37], JA580.

[26] R.119 [Massachusetts AG August 2018 Rehearing Request at 6-16], JA599-JA609.

[27] R.313 [December 2018 Order], JA1260.

[28] The crediting mechanism applied to "forward sales," i.e., those made at least three months in advance. R.313 [December 2018 Order P 113 n.240], JA1312; *id.* P 134 n.303, JA1323-1324.

extremely close relationship between Everett and Mystic 8 and 9,"[29] adding that even a 100 percent allocation of Everett's costs posed no jurisdictional issue because Everett "'is fully integrated with Mystic 8 and 9, and each depends on the other to operate economically.'"[30] FERC also approved Staff's revenue-crediting mechanism, acknowledging the need to "balance[] the goals of refunding to ratepayers as much as possible while still providing an incentive for Mystic to pursue forward third-party sales."[31] FERC rejected allocating costs based on the Units' use of Everett's physical systems, despite evidence that the Mystic Units are capable of using at most roughly 39 percent of Everett's simultaneous vaporization capacity.[32]

On rehearing, FERC walked back its reliance on the "extremely close relationship" between Mystic and Everett and acknowledged its lack of jurisdiction over Everett. [33] Despite this recognition, FERC refused to reconsider its 91 percent allocation finding,[34] even while acknowledging that: (1) Everett's costs should be allocated based on the application of "cost causation principles"; (2) the Commission's task is to determine the percentage of Everett's fixed operating costs

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[29] *Id.* P 106 (citing July 2018 Order P 36), JA1309.

[30] *Id.* P 133 n.297 (quoting July 2018 Order P 36), JA1322.

[31] *Id.* P 135, JA1324.

[32] R.252 [Ex. CT-010 at 9:23-25], JA960; R.253 [Ex. NES-028 at 7:10-12, 26:21–27:7], JA1232, JA1233-JA1234.

[33] R.374 [July 2020 Rehearing Order I P 26], JA1525-JA1526.

[34] R.375 [July 2020 Rehearing Order II], JA1549.

"attributable to serving Mystic" [35]; and (3) "some vapor sales are made to third parties."[36] Worse, the Commission concluded that its "determination of the proper cost allocation based on cost-causation principles obviate[d] the need for" any revenue crediting back to customers for third-party sales, and reversed its earlier acceptance of that portion of Staff's proposal.[37]

Commissioner Glick dissented, calling the decision "an unfortunate double whammy for ratepayers, who will now be responsible for paying all of Everett's fixed costs, while receiving no credit for sales Everett is able to make to third parties using the facilities they have paid for. This is certainly not a just and reasonable result."[38] Indeed, the Commission had raised the same concern in the December 2018 Order, finding that "[i]f costs are included but related revenue credits are excluded, then the resulting rate results in double-recovery."[39]

Connecticut Parties sought rehearing of the revenue crediting decision, arguing for restoration of the Staff's mechanism "unless or until Mystic's share of

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[35] *Id.* P 64, JA1580.

[36] *Id.*, JA1581. While disclaiming jurisdiction over Everett, FERC found it nonetheless had the power to order Everett's cost recovery in Agreement rates because the Fuel Supply Charge is a component of Mystic's cost-of-service.

[37] *Id.* P 66, JA1581.

[38] *Id.* Glick Dissent P 9 & n.21, JA1621.

[39] R.313 [December 2018 Order P 134 n.303], JA1323-JA1324.

Everett costs is reduced to correspond to its use of the facilities."[40] The Commission denied the request.[41]

Clawback: The Commission's December 2018 Order found that the lack of a "clawback" provision rendered the Agreement unjust and unreasonable. R.313, [December 2018 Order P 208], JA1353. The Commission directed Mystic to revise the Agreement to include a clawback provision, modeled after one the Commission had previously approved. The States Committee sought clarification, or, alternatively, rehearing, that the clawback directive was applicable to Everett as well as the Mystic Units. R.316 [States Committee January 2019 Rehearing Request], JA1372.

On compliance, Mystic included a clawback provision, but limited it to refunding certain costs for Mystic repairs and capital expenditures if the Units remained in service after the Agreement's expiration.[42] The States Committee and Connecticut Parties protested the omission of Everett expenditures from the Agreement's clawback provision, arguing that the December 2018 Order required a clawback that included the Mystic Units *and* Everett. R.343 [States Committee March 2019 Protest at 2-4], JA1509-JA1511; R.345 [Connecticut Parties March

[40] R.378 [Connecticut Parties August 2020 Rehearing Request at 13], JA1664.

[41] R.420 [December 2020 Order], JA1917.

[42] R.335 [Mystic March 2019 Compliance Filing at 6], JA1506.

2019 Protest at 6-9], JA1512-JA1515. Connecticut Parties noted the need to include Everett expenses in the clawback was especially acute given the "affiliate relationship and potential for self-dealing between Mystic and Everett,"[43] and pointed out that Mystic itself had confirmed its "willing[ness] to agree to a clawback process to refund certain capital expenditures if Everett continues in service after the Mystic Agreement terminates."[44]

The Commission denied the States Committee's rehearing request, permitting Exelon to retain cost-of-service payments for Everett repairs and capital expenditures "even if Everett remains in service after the term of the Mystic Agreement."[45] While FERC's orders required ratepayers to pay for Everett's repairs and capital expenditures through provisions in the FERC-jurisdictional Agreement, the Commission determined it lacked jurisdiction to require refunds of these same expenditures should Everett return to merchant operations after the Agreement's expiration. *Id.* P 43, JA1570.

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[43] R.378 [Connecticut Parties August 2020 Rehearing Request at 7-8], JA1658-JA1659.

[44] R.229 [Ex. S-0022 REVISED at 14:30–15:3], JA946-JA947; R.142 [Ex. S-0023 at 2], JA650; R.195 [Ex. MYS-0053 at 6:20-22 (discussing potential clawback of capital additions, "whether at Mystic or at Everett")], JA943.

[45] R.375 [July 2020 Rehearing Order I P 35], JA1566.

In a separate order, FERC rejected protests of Mystic's compliance filing, relying on the analysis in the Commission's July 2020 Rehearing Order II.[46] Connecticut Parties sought rehearing of the July 2020 Compliance Order,[47] which the Commission disposed of summarily. R.420 [December 2020 Order P 39], JA1935.

Annual true-ups and challenges: In the December 2018 Order, FERC conditionally approved Mystic's "protocols," which require Mystic to make annual informational filings containing projected costs and true-ups to actual costs and give interested parties the right to review and challenge such costs.[48] The States Committee sought clarification and rehearing on certain aspects of these provisions to ensure that the protocols (1) do not give Mystic an incentive to delay capital projects until the Agreement starts (thus giving Mystic accelerated recovery of long-term projects); (2) give customers the ability to audit and challenge the total amount of revenues Mystic receives from customers; and (3) grant customers the right to challenge the costs of third-party sales. The Commission failed to address those arguments.

[46] R.376 [July 2020 Compliance Order], JA1626.

[47] R.379 [Connecticut Parties Compliance Rehearing Request], JA1672.

[48] R.313 [December 2018 Order P 175 (citing July 2018 Order P 20)], JA1338.

SUMMARY OF ARGUMENT

The orders on review are arbitrary, capricious, and contrary to law because they approve an Agreement that, in significant respects, imposes unjust and unreasonable charges on New England ratepayers.

The Commission erred in requiring ratepayers to pay 91 percent of the costs associated with Everett. Judicial and Commission precedent is clear: ratepayers pay only the costs of facilities used to serve to them. FERC's job was to determine the share of Everett's costs attributable to Mystic, and to limit recovery under the Agreement accordingly. This inquiry should have been straightforward. The record showed conclusively that Mystic can use at most roughly 39 percent of Everett's vaporization capacity. But the Commission chose instead to allocate to New England ratepayers 100 percent of the costs associated with Everett's vaporization systems, amounting to 91 percent of Everett's total costs. This approach disregarded evidence that Everett's ability to deliver vaporized gas to Mystic is dwarfed by its ability to supply vaporized gas to two interconnected interstate pipelines and a local distribution company. Although the Commission may have desired to ensure the financial viability of this particular liquefied natural gas terminal, the FPA does not afford FERC jurisdiction to do so, and FERC cannot accomplish the same result through cost allocation.

The Commission compounded its cost allocation error by eliminating the obligation for Mystic to credit against the charges imposed under the Agreement any of the profit Everett earns on sales of liquefied gas to third parties. Again, the Commission's precedent is clear: where customers pay for facilities used to make third-party sales, the revenues earned on those sales must be credited back to customers. Here, New England ratepayers were treated in a doubly unreasonable fashion: FERC required them to pay rates that include a bloated allocation of Everett's costs, but afforded them no benefit from sales made by facilities paid for through Agreement rates. The Commission could have resolved this problem in the first instance by allocating to the Agreement the appropriate share of Everett costs; having failed to do so, FERC should have at least ensured that ratepayers receive a credit for their share of any revenues from third-party vapor gas sales.

The Commission was likewise wrong to exclude from a refund or "clawback" obligation expenditures made to keep Everett in operation during the term of the Agreement in the event that Everett continues to operate thereafter. The ruling is at odds with Mystic's acknowledgement that both Mystic and Everett would be part of any clawback mechanism. The Commission's rationale—that Everett's costs are imposed through a non-jurisdictional fuel supply agreement—does not justify the exclusion. Having found that Everett's costs can be charged to New England ratepayers under the FERC-jurisdictional Agreement, the Commission cannot

simultaneously exclude Everett expenditures from the clawback on grounds that they are non-jurisdictional and extra-Agreement. The rationale for clawing back Everett and Mystic expenditures is the same: it is inequitable in either case to charge ratepayers for costs that will benefit Mystic or Everett after the Agreement terminates.

Finally, the Commission erred in failing to address arguments concerning: (1) Mystic's obligation to demonstrate that it had not delayed capital projects until the Agreement starts (thus giving Mystic accelerated recovery of long-term projects); and (2) the ability of customers to audit and challenge the amount of revenues credited against Agreement rates. The Commission also failed to explain why it excluded the right of customers to challenge the costs of third-party sales and how to reconcile rulings that appear incompatible.

State Petitioners' petitions for review should be granted, and the challenged decisions should be vacated and remanded.

STANDARD OF REVIEW

Under the Administrative Procedure Act, this Court reviews FERC orders "to determine whether they are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Braintree Elec. Light Dep't v. FERC*, 667 F.3d 1284, 1288 (D.C. Cir. 2012) (quoting 5 U.S.C. § 706(2)(A)). Reviewing courts must "ensure that the Commission engaged in reasoned decisionmaking," and

"weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016) (*EPSA*). The Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Braintree Elec.*, 667 F.3d, at 1288 (internal quotations and citation omitted).

This Court also reviews Commission orders under the FPA. *See* 16 U.S.C. § 825*l*(b). FERC rulings must be "supported by substantial evidence," and "consistent with past practice or adequately justified." *Emera Me. v. FERC*, 854 F.3d 9, 22 (D.C. Cir. 2017) (internal quotations and citations omitted). Ultimately, the Court seeks to "ensur[e] that the Commission has made a principled and reasoned decision supported by the evidentiary record." *Id.* at 22.

STANDING

Petitioners seeking judicial review must demonstrate that they (1) are aggrieved, and (2) have timely sought rehearing of the challenged orders. *See* 16 U.S.C. § 825*l*(b); *Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001). Those conditions are met here. State Petitioners represent "the interest of the states in protecting their citizens in this traditional governmental field of utility regulation-that is, the states' *parens patriae* interest." *Md. People's Counsel v. FERC*, 760 F.2d 318, 321 (D.C. Cir. 1985); *see also* 16 U.S.C. § 825g(a).

Connecticut Authority is statutorily charged with regulating the rates and retail services of Connecticut's electric and gas utilities. *See* Conn. Gen. Stat. §§ 22a-2d, 16-19.

Connecticut Department is an agency of the State of Connecticut statutorily charged with overseeing Connecticut's energy and environmental policies. Conn. Gen. Stat. §§ 22a-2d, 22a-5.

Connecticut Consumer Counsel is the statutorily designated advocate for Connecticut ratepayers in all utility matters, and is authorized by statute to appear in any federal or state proceedings where Connecticut ratepayer interests are implicated.

The Massachusetts AG represents the interests of the Commonwealth and its citizens on matters that affect Massachusetts electric consumers. She is expressly authorized to intervene on behalf of ratepayers in FERC proceedings under Mass. Gen. Laws ch. 12 §§ 10, 11E(a).

The States Committee is a not-for-profit entity governed by a board of managers appointed by the Governors of the six New England states. The States Committee's mission is to represent the interests of New England citizens by advancing policies that will provide electricity at the lowest possible price over the long term, consistent with maintaining reliable service and environmental quality.

Each of the State Petitioners actively participated in the underlying agency proceedings, and timely filed petitions for rehearing and judicial review pursuant to 16 U.S.C. § 825*l*(b).[49]

Absent modification, the challenged orders will result in direct, imminent injury through the imposition of unjust and unreasonable rates on New England ratepayers. This Court can redress this injury by setting the orders aside. As state representatives authorized to protect New England's electric consumers from paying unjust and unreasonable rates, State Petitioners are aggrieved parties with Article III standing. *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1077 (D.C. Cir. 2017).

ARGUMENT

I. THE COMMISSION ERRED IN ALLOCATING 91 PERCENT OF EVERETT COSTS TO THE AGREEMENT.

The Commission-approved Agreement allocates to New England ratepayers nearly all of the costs of Everett, Mystic's affiliated fuel supplier.[50] That allocation is contrary to the evidence and well-established cost-causation principles; and FERC's adoption of it exceeds its jurisdiction.

[49] The States Committee joins in Sections III, IV, and V of this brief.

[50] R.313 [December 2018 Order P 100], JA1306.

A. The Commission's cost-allocation determination is not supported by precedent or record evidence.

This Court has found that "[u]tility customers should normally be charged rates that fairly track the costs for which they are responsible."[51] The Commission and the courts have "understood [the FPA's 'just and reasonable'] requirement to incorporate a 'cost-causation principle'" aimed at ensuring that "'burden is matched with benefit.'"[52] Consequently, the Commission "generally may not single out a party for the full cost of a project, or even most of it, when the benefits of the project are diffuse."[53]

While the December 2018 Order acknowledged these requirements,[54] the Commission's ruling disregards these principles. FERC allocates nearly all of Everett's fixed operating costs—and 100 percent of Everett's costs attributable to vaporized gas sales—to Mystic and, in turn, New England ratepayers, even though much of the Everett facility is not used to supply Mystic with gas, but rather to make third-party sales.

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[51] *Pa. Elec. Co. v. FERC*, 11 F.3d 207, 211 (D.C. Cir. 1993).

[52] *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1255 (D.C. Cir. 2018) (quoting *BNP Paribas Energy Trading GP v. FERC*, 743 F.3d 264, 268 (D.C. Cir. 2014)), *reh'g denied*, 905 F.3d 671 (D.C. Cir. 2018).

[53] *Id*.

[54] R.313 [December 2018 Order P 133], JA1322-1323. *See also id.* ("[P]rinciples of fairness and cost causation require that New England ratepayers and those third-party customers should share those costs."), JA1323.

Undisputed record evidence showed that Mystic uses—and is capable of using—only a portion of the Everett facilities:

> Mystic can use only two of Everett's four vaporization systems and cannot use its [liquefied gas] refueling station at all. Mystic requires vaporized gas to be delivered at . . . 700 [pound-force per square inch gauge pressure] or greater. . . . Only Everett's High Pressure . . . and High Pressure Expansion . . . vaporization systems operate at the necessary pressure; the Medium Pressure . . . and Low Pressure . . . vaporization systems supply gas at lower pressures that Mystic cannot use. . . .

R.276 [Connecticut Parties Initial Brief at 17-18], JA1252-JA1253. Mystic also makes no use of the piping that interconnects Everett's vaporization systems to the pipelines. *Id.* at 18 & n.27, JA1253. And even as to the Everett systems used to serve the Units:

> Mystic uses only a fraction of Everett's [High Pressure and High Pressure Expansion] capacity. Even when Mystic is operating at full capacity and consuming approximately 250,000 [Metric Million British thermal units (MMBtu) per day], Everett is able to supply to the Algonquin and Tennessee Gas pipelines an additional 465,000 MMBtu/day or more—nearly double the quantity consumed by Mystic.

Id. at 18, JA1253. Mystic in fact conceded that Everett's capacity of "715,000 MMBtu/day . . . is well in excess of" the maximum amount Mystic can use. R.139 [Ex. S-0003 at 1], JA642.

The upshot is that "Mystic is capable of using, at most, only about 39 percent of Everett's certificated, simultaneous vaporization capacity."[55] Given this engineering reality—which was not disputed by any party, including Mystic—State Petitioners each argued that ratepayers should pay under the Agreement no more than that percentage of Everett fixed costs.[56]

Staff did not support this allocation. Using historical sales data, Staff instead calculated that vapor (i.e., non-liquid) sales were 91 percent of Everett's total sales, and, on that basis, allocated 91 percent of Everett's costs to the Agreement. *See* R.313 [December 2018 Order P 117 (citing Staff Initial Brief at 76-78)], JA1315. In other words, Staff recommended that 100 percent of Everett costs associated with vapor sales be allocated to Mystic.

The Commission selected Staff's proposed "combination of the recovery of 91 percent of Everett's costs . . . and a sliding scale revenue sharing mechanism." R.313 [December 2018 Order P 120], JA1316-JA1317. FERC's sole justification for that decision was a single sentence:

> We find that Trial Staff's proposal is reasonable because it both allocates costs to third-party customers that do not

[55] R.276 [Connecticut Parties Initial Brief at 29 (citing Tr. 856:4-12)], JA1254; R.252 [Ex. CT-010 at 9:23-25], JA960; R.253 [Ex. NES-028 at 7:10-12, 26:21–27:7], JA1232, JA1222-JA1234.

[56] R.276 [Connecticut Parties Initial Brief at 29-30], JA1254-JA1255; R.266 [Massachusetts AG Brief at 38-39], JA1238-JA1239; R.272 [States Committee Initial Brief at 40], JA1241.

> benefit Mystic 8 and 9 at all (*i.e.*, the costs associated with liquid natural gas sales) and excludes the revenues associated with those fixed costs from the revenue requirement calculation.

Id. P 134, JA1323.

But the Commission's logic is flawed: the 91 percent allocation does not distinguish the costs of Everett facilities that Mystic uses from those Everett facilities that Mystic cannot use. Staff's proposal instead treated *all* Everett operating costs as common costs—contrary to record evidence.[57] Worse, allocating costs based on the historical ratio of liquid sales to vapor sales ignores that the majority of Everett's vaporization capacity serves third-party vapor customers—not Mystic. Substantial evidence demonstrated that Everett is capable of delivering to third parties via the interstate pipelines (and other interconnections) far more vapor than Mystic possibly could consume. R.276 [Connecticut Parties Initial Brief at 18 (citing Exs. CT-063, CT-064)], JA1253.

The Commission acknowledged on rehearing that "some vapor sales are made to third parties," but asserted that such third-party sales "benefit Mystic by

[57] Using a historical ratio has other problems. Connecticut Parties explained that doing so "fails to account for expected changes in the relative amounts of liquid and vapor sales." R.319 [Connecticut Parties January 2019 Rehearing Request at 6], JA1494. Mystic deliveries during the Agreement's term are expected to "diminish," which will in turn increase the relative proportion of liquid sales, rendering it "unjust and unreasonable to use the historic average nine percent as a proxy for the expected ratio of liquid sales to total sale going forward." *Id.* at 7, JA1495. The Commission's orders ignored this concern.

helping to manage Everett's tank," concluding, without explanation, that "those benefits are not trivial." R.375 [July 2020 Rehearing Order II P 64], JA1580-JA1581. Even if correct, that alone cannot justify allocating to New England ratepayers *100 percent* of the Everett fixed costs attributed to vapor sales. As the Connecticut Parties explained, the tank-management argument "works both ways."[58] Just as third-party sales may help manage inventories to benefit Mystic, Mystic's ability to adjust its fuel consumption affords "another tank management option" that enables Everett to provide service to third parties at lower cost. *Id.* The reality is that all vapor customers use Everett's tank, and all vapor sales (or other sales) can serve as tank-management tools that benefit other users. Focusing selectively on the benefits to Mystic does not justify foisting 91 percent of Everett's fixed costs—which constitutes all of Everett's fixed costs allocated to vapor sales—on Mystic and its ratepayers.

The Commission's obligation to engage in reasoned decision-making requires that it examine record data and articulate a rational connection between the facts found and the determination made. *See, e.g.*, *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Fulfillment of that

[58] R.276 [Connecticut Parties Initial Brief at 18 n.27], JA1253.

obligation requires the Commission to "'respond meaningfully to the arguments raised before it.'" *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) (quoting *Pub. Serv. Comm'n v. FERC,* 397 F.3d 1004, 1008 (D.C. Cir. 2005)). The allocation ruling falls far short of this obligation—FERC did little more than recite positions before selecting a winning claim. *See id.* The Commission's unreasoned approach renders its ruling arbitrary and capricious.

B. The Commission's allocation of nearly all Everett costs to Mystic is an improper end-run around jurisdictional limits.

FERC lacks authority under the FPA to regulate the rates charged by Everett.[59] But by allocating nearly all of Everett's costs to Mystic, the Commission attempts to do through cost allocation what it cannot do directly: ensure that Everett "recovers the majority of its costs." R.313 [December 2018 Order P 107], JA1310. The Commission's attempt to "bail out" Everett[60] by allocating nearly all of Everett's costs to Mystic is a jurisdictional "boot-strap" that cannot be reconciled with the FPA. *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)) (agency "'may

[59] 16 U.S.C. § 824(b)(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 . . . .").

[60] R.313 [December 2018 Order, Glick Dissent at 1-2], JA1364-JA1365 ("The record revealed that ISO-NE's actual 'fuel security' goal was to bail out the Everett [liquefied natural gas] import facility, but to do so under the guise of the FPA.").

not bootstrap itself into an area in which it has no jurisdiction'"); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 462-463 (D.C. Cir. 2005).

FERC is a "creature of statute" limited by the bounds of the FPA, *Atlantic City Electric Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (internal quotations omitted), which restrict FERC's jurisdiction to ensuring the justness and reasonableness of a public utility's rates, terms, and conditions in connection with the interstate transmission and wholesale sales of energy as well as the "rules and regulations affecting or pertaining to such rates or charges." 16 U.S.C. § 824d(a). Absent a "common-sense construction of the FPA[]," this language "could extend FERC's power to some surprising places" including "markets in just about everything—the whole economy, as it were . . . ." *EPSA* at 774.

To avoid a result where FERC could "regulate now in one industry, now in another" the Supreme Court has held that the FPA's language limits FERC's jurisdiction to "rules or practices that '*directly affect* the [wholesale] rate.'" *Id.* (emphasis added) (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004)). The Commission attempts to meet that standard by asserting that "[t]he Fuel Supply Charge is a component of Mystic's cost-of-service rate and, as a result, is subject to Commission review and approval." R.374 [July 2020 Rehearing Order I P 26], JA1525-JA1526. There is no dispute that Mystic should be able to recover its actual fuel costs or that the Commission can review Mystic's costs

before permitting their inclusion in a jurisdictional rate. But the Commission's jurisdiction over the Agreement does not provide a jurisdictional basis for burdening New England ratepayers with Everett costs that are not fairly attributable to Mystic's use of that facility. FERC's declaration that this is simply a matter of cost allocation cannot be permitted to shield its jurisdictional overreach.

The Commission's repeated and explicit expressions of concern about Everett's financial viability[61] evidence its intent to use the Agreement "to keep a separate and unquestionably non-jurisdictional entity, [Everett], financially afloat." R.374 [July 2020 Rehearing Order I, Glick Dissent P 7], JA1542. FERC's changing rationales to justify the unvarying recovery of 91 percent of Everett's costs are further evidence of this improper, non-jurisdictional goal. After initially relying on the "extremely close relationship" between Everett and Mystic to justify inclusion of the Everett costs,[62] FERC changed course, recognized its lack of jurisdiction over Everett, and instead asserted that its review of Everett's rate is nothing more than its traditional review of fuel costs included in jurisdictional rates.[63] But FERC's argument is not supported by any of the authorities it cites. The cited cases are all

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[61] *See, e.g.,* R.75 [July 2018 Order PP 34-37], JA578-JA580; R.313 [December 2018 Order P 107 & n.297], JA1309-JA1310, JA1322; R.374 [July 2020 Rehearing Order I P 34], JA1531-JA1532.

[62] R.75 [July 2018 Order P 36], JA579; R.313 [December 2018 Order P 106], JA1309.

[63] R.374 [July 2020 Rehearing Order I P 26], JA1525-JA1526.

factually inapposite and do not support the proposition that FERC may approve recovery of fuel costs designed to ensure the financial viability of the fuel supplier.[64]

The FPA does not provide FERC the authority to force captive electric ratepayers to cross-subsidize Everett's merchant operations and provide Everett with a regulated revenue guarantee. FERC cannot be allowed to establish a precedent of indirectly accomplishing a result it lacks the jurisdiction to accomplish directly.[65]

II. THE COMMISSION ERRED IN FAILING TO REQUIRE MYSTIC TO CREDIT REVENUES FROM EVERETT VAPOR SALES AGAINST AGREEMENT RATES.

The December 2018 Order approved inclusion in the Agreement of a "revenue crediting" mechanism, under which a portion of profit margins earned on certain third-party vapor sales from Everett would offset Agreement charges, while entitling Exelon (through ownership of Everett) to retain up to 50 percent of the margin on

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[64] R.374 [July 2020 Rehearing Order I P 26 n.63], JA1526; *City of Vernon v. S. Cal. Edison Co.*, 31 FERC ¶ 61,113, at 61,231 (passing through fuel cost refunds), *reh'g denied*, 32 FERC ¶ 61,373 (1985), *petition for review denied sub nom. S. Cal. Edison Co. v. FERC*, 805 F.2d 1068 (1986); *Pub. Serv. Co. of N.H.*, 6 FERC ¶ 61,299, at 61,715, *reh'g denied*, 9 FERC ¶ 61,202 (1979) (disallowing additional fuel costs beyond existing contract); *Elec. Coops. of Kan.*, 14 FERC ¶ 61,176, at 61,319 (1981) (disallowing costs to exceed regulatory authority); *Delmarva Power & Light Co.*, 24 FERC ¶ 61,199, at 61,460-61 (addressing treatment of spent nuclear fuel rods), *opinion modified*, 24 FERC ¶ 61,380 (1983), *petition denied sub nom. Cities of Newark v. FERC*, 763 F.2d 533 (3d Cir. 1985).

[65] FERC cannot "do indirectly what it [cannot] do directly." *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996) (citing *Nw. Central Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512 (1989)).

such sales. R.313 [December 2018 Order P 135], JA1324.[66] For ratemaking purposes, revenue crediting goes hand-in-hand with cost allocation. The Commission explained in the December 2018 Order that the "general rule" on the "equitable treatment of costs *vis-à-vis* revenue credits" is that if costs are included in rates, then revenues produced by ratepayer-funded facilities should be credited to ratepayers. R.313 [December 2018 Order P 134 n.303], JA1323-1324. The alternative, as the Commission explained, is unreasonable: "if costs are included but related revenue credits are excluded, then the resulting rate results in double-recovery." *Id.*, JA1324. Indeed, all parties—including Mystic—agree that Mystic's costs must be defrayed by revenues from Everett's sales to third parties.[67]

On rehearing, Connecticut Parties argued that the sliding scale mechanism would result in a double recovery, because it would not only permit "recover[y] (from electric ratepayers through the . . . Agreement) [of] all Everett costs allocated to vapor sales," but would simultaneously permit Everett to retain, on average, an estimated "35.8 percent of the margin on all forward vapor sales."[68] Connecticut

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[66] The crediting would be on a sliding scale, with the percentage that Exelon would retain rising from 10 to 50 as the amount of sales increased. R.313 [December 2018 Order P 120], JA1316-JA1317; R.274 [Staff Initial Brief at 94], JA1249.

[67] R.304, [Mystic Reply Brief at 87], JA1259; *see also* R.195 [Ex. MYS-0053 at 27:19-28:3], JA944-JA945. *Accord* R.139 [Ex. S-0001 Second Revised at 22:12-15], JA641; R.274 [Staff Initial Brief at 94-95], JA1249-JA1250.

[68] R.319 [Connecticut Parties January 2019 Rehearing Request at 10 & n.14], JA1498-JA1499.

Parties argued that revenue crediting was a poor substitute for proper cost allocation in this case. On the one hand, crediting 100 percent of third-party sales margins would deprive Everett of its incentive to make the sales. On the other hand, crediting less and assigning almost all of Everett's costs to ratepayers would give Everett a windfall, allowing it to retain more than its full cost of service. Instead, the Connecticut Parties said, the "just and reasonable way to incentivize third party sales" would be to assign Mystic a share of Everett fixed costs proportionate to its use (i.e., roughly 39 percent), leaving Everett to recover its remaining fixed costs through its merchant operations and sales. *Id.* at 11. In that case, they said, it would be appropriate to let Everett keep all of its third-party sales margins.

In its order on rehearing, the Commission made things worse: it affirmed its allocation of excessive fixed costs to Mystic, but *removed* the revenue crediting mechanism established in the December 2018 Order. The Commission reasoned that its removal was appropriate because the 91 percent allocation of Everett costs was "proper . . . based on cost-causation principles[.]" R.375 [July 2020 Rehearing Order II P 66], JA1581. The Commission also questioned its ability to regulate the "conduct" of Everett through the use of the crediting mechanism. *Id.*

Connecticut Parties again sought rehearing, arguing that that the crediting mechanism should be restored, and kept "in place unless or until Mystic's share of Everett costs is reduced to correspond to its use of the facilities." R.378 [Connecticut

Parties August 2020 Rehearing Request at 13, 15], JA1664, JA1666. Connecticut Parties observed that the Commission's concern about regulating Everett's conduct was a strawman, as the revenue crediting mechanism regulated Mystic, not Everett. Further, eliminating the crediting mechanism without revising the allocation results in a windfall to Everett at the expense of the consumers the Commission is obligated to protect. Connecticut Parties went on to explain that if there were doubt about the Commission's authority to incentivize Everett sales, then it should have "required Mystic to credit all Everett third party sales revenue to Mystic's customers." R.378 [Connecticut Parties August 2020 Rehearing Request at 17], JA1668.

The Commission rejected these arguments in the December 2020 Rehearing Order without offering any additional explanation. R.420 [December 2020 Rehearing Order P 39], JA1935 ("We . . . disagree with . . . Connecticut Parties, for the reasons described in the July 2020 Orders, that the Commission erred by no longer requiring a third-party revenue crediting mechanism.").

Neither the July 2020 Rehearing Order II nor the December 2020 Rehearing Order provided the requisite explanation for the Commission's reversal, nor do they square FERC's decision with contrary precedent.[69] The failure to do so renders the

[69] *See, e.g.*, *Mun. Light Bd. v. Bos. Edison Co.*, Op. No. 729, 53 F.P.C. 1545, 1562-63 ("Since the firm customers are picking upon the entire cost of the reserves associated with their service, we have given the firm customers the benefit of any revenues received from [non-firm] sales by crediting the total cost of service with the [non-firm] revenues."), *modified*, Op. No. 729-A, 54 F.P.C. 440, *stay denied*, 54

Commission's revenue crediting determination arbitrary and capricious. *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018) (remanding orders to FERC for further explanation where the Commission "failed to square its decision with its past precedent").

III. THE COMMISSION'S EXCLUSION OF EVERETT COSTS FROM THE CLAWBACK WAS ARBITRARY AND CAPRICIOUS.

FERC's cost-of-service ratemaking typically provides for the recovery of capital expenditures over the life of a facility; this approach does not, however, apply to resources participating in New England's wholesale markets on a merchant basis. Such resources are paid market-based rates, including those set through competitive auctions. When a generator wishes to retire, but the System Operator retains the resource through a time-limited agreement, FERC has permitted the generator to recover 100 percent of capital expenditures made by the generator to keep the resource in operation during the agreement's limited term. *See New England Power*

F.P.C. 1312 (1975), *affirmed sub nom. Towns of Norwood v. F.P.C.*, 546 F.2d 1036 (D.C. Cir. 1976); *Minn. Mun. Power Agency v. S. Minn. Mun. Power Agency*, 68 FERC ¶ 61,060, at 61,205 n.3 (1994); *Golden Spread Elec. Coop., Inc. v. Sw. Pub. Serv. Co.*, Op. No. 501, 123 FERC ¶ 61,047, P 82 (2008) ("In a cost-based regime," either "revenues from intersystem sales are . . . reflected in wholesale rates through . . . a revenue credit," or "intersystem customers are allocated a share of the total system fixed and variable costs as if they were requirements customers"), *on reh'g*, Op. No. 501-A, 144 FERC ¶ 61,132 (2013).

Generators Ass'n v. FERC, 707 F.3d 364, 367 (D.C. Cir. 2013) (discussing history of reliability must-run agreements in New England).

Although this approach may be reasonable if the resource is retired when the agreement ends, the generator will receive a windfall if the resource instead returns (or "toggles back") to merchant operations, as it will have collected its costs on an accelerated basis during the term of the agreement and will not need to recover those costs in subsequent years, increasing the profit margin earned on market revenues after its return to merchant operations. In that case, ratepayers will have subsidized repairs and capital costs that other resources participating in the market must fund through market revenues. The Commission therefore requires generators operating under these agreements that do not retire at the end of the agreement to refund back to consumers the cost of certain ratepayer-funded repairs and capital expenditures. This "clawback" obligation ensures that a generation resource cannot "recover the costs for significant upgrades . . . and then . . . return to service, without having to reimburse those upgrade costs." *Midcontinent Indep. Sys. Operator, Inc.*, Op. No. 556, 161 FERC ¶ 61,059, P 55 (2017) (Opinion No. 556), (citation omitted).

In the December 2018 Order, the Commission determined that the Agreement was not just and reasonable absent a clawback provision and directed Mystic to revise the Agreement to include one modeled after the clawback approved in Opinion No. 556. R.313 [December 2018 Order P 208], JA1353-JA1354.

The December 2018 Order did not distinguish between repairs and capital expenditures made to ensure the continued operation of the Mystic Units and those made to ensure the continued operation of Everett. The States Committee sought clarification or, in the alternative, rehearing, that the Everett costs that Mystic recovered through the Agreement would likewise by clawed back if Everett remained in service after the Agreement's term. R.316 [States Committee January 2019 Rehearing Request at 3-6], JA1374-JA1377. The Commission denied that request, finding that because Everett was operating under the non-jurisdictional Supply Agreement, FERC lacked authority to require refunds. R.375 [July 2020 Rehearing Order II P 43], JA1570. FERC reached this conclusion notwithstanding its ruling that it had authority to require ratepayers to pay for Everett's repairs and capital expenditures through the FERC-jurisdictional Agreement. Additionally, FERC found that if Mystic retires but Everett does not, the Agreement "would be terminated; therefore, there would be no rate within the jurisdiction of the Commission through which to order a refund." *Id*.

Connecticut Parties sought rehearing, pointing out that the ruling was contrary to Mystic's position at trial, where Mystic confirmed that the clawback would apply to Everett expenditures. R.378 [Connecticut Parties August 2020 Rehearing Request at 5], JA1656; R.379 [Connecticut Parties Compliance Rehearing Request at 6], JA1677. Connecticut Parties also noted the fallacy in FERC's position that it lacks

a vehicle to claw back payments for Everett costs, arguing that if FERC can allow the recovery of Everett costs through the Agreement, then it can require inclusion of a clawback provision when failing to do so would be unjust and unreasonable. R.378 [Connecticut Parties August 2020 Rehearing Request at 10], JA1661; R.379 [Connecticut Parties Compliance Rehearing Request at 9], JA1680. And such clawback obligations would "survive termination pursuant to section 2.5 of the [A]greement." R.378 [Connecticut Parties August 2020 Rehearing Request at 11], JA1662; R.379 [Connecticut Parties Compliance Rehearing Request at 10], JA1681.

FERC rejected the requests, referring back to its July 2020 Rehearing Order II and offering no further explanation or analysis. *See* R.420 [December 2020 Order P 39], JA1935. "An agency's 'failure to respond meaningfully' to objections raised by a party renders its decision arbitrary and capricious." *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)). FERC's failure to address any of the Connecticut Parties' arguments, in itself, requires remand.

A. FERC's cursory rationales for limiting the clawback to Mystic did not constitute reasoned decision-making.

FERC's rulings result in a jurisdictional one-way street, in which consumer dollars flow to Mystic to fund Everett capital expenditures, but do not flow back to consumers should Everett remain in service after the term of the Agreement. This is not reasoned decision-making. FERC said that it had the authority to allow Mystic

to recover Everett's costs through the Agreement, emphasizing its jurisdiction over Mystic's rates, not over Everett's rates or sales. R.375 [July 2020 Rehearing Order II P 22], JA1559-JA1560. If that is the case, then the Commission can also require Mystic to refund that money to consumers should Everett continue to operate beyond the Agreement's term.

FERC's rationale for requiring a clawback was "to prevent the inequitable recovery from . . . customers for repairs that provide significant benefits beyond the term of the [Agreement] should the [resource] later return to regular utility service." R.313 [December 2018 Order P 210], JA1354 (quoting Opinion No. 556, PP 56, 59). In refusing to apply the clawback to Everett (in addition to Mystic), FERC failed to explain the inconsistency with the precedent it relied upon in mandating that a clawback provision be included in the Agreement. "[G]loss[ing] over or swerv[ing] from prior precedents without discussion cross[es] the line from the tolerably terse to the intolerably mute." *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22 (D.C. Cir. 2014) (cleaned up) (quoting *Bush–Quayle '92 Primary Committee, Inc. v. Fed. Election Comm.*, 104 F.3d 448, 453 (D.C. Cir.1997)).

FERC's companion rationale that there is no rate through which to refund customers, R.375 [July 2020 Rehearing Order II P 43], JA1570, is also incorrect. The Agreement requires Mystic to make a "true-up" filing by April 1, 2025—well *after* the Agreement's term has expired—in which it will reconcile estimated costs

it has recovered with actual expenditures. R.388 [Mystic September 2020 Compliance Filing, Attach. A at 59-60], JA1793-JA1794. Accounting reconciliations and settlement of funds will thus continue well beyond the Agreement's termination date. Even if that were not the case, FERC could have conditioned Agreement approval on the conduct of a final, Everett-related reconciliation. In other circumstances where FERC lacked authority over rates, the Commission has imposed conditions requiring voluntary commitments before finding a rate schedule just and reasonable. *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 171 FERC ¶ 61,143, P 33 (2020) ("[T]he Commission retains authority to approve voluntary contractual refund commitments when [regional transmission operators] include a non-public utility's [rates] in their jurisdictional rates."). During the hearing, Mystic made a voluntary commitment to include Everett in the clawback,[70] and FERC's failure to accept—or even acknowledge—this commitment is unexplained.

In any case, Mystic's refund obligation is codified in the Agreement, the requirements of which will survive its termination: "[n]otwithstanding the

[70] R.189 [Exhibit NES-004], JA939 ("Exelon confirms that it is willing to agree to a clawback process to refund certain capital expenditures if Everett continues in service after the Mystic Agreement terminates."). R.253 [Ex. MYS-053 at 6:21], JA1223 (discussing potential clawback of capital additions, "whether at Mystic or at Everett.").

termination of this Agreement, the Parties shall continue to be bound by the provisions of this Agreement which by their nature are intended to and shall, survive such termination." R.388 [Mystic September 2020 Compliance Filing, Attach. A at 12], JA1746. This provision is enforceable against Mystic and Mystic's corporate parent, regardless of whether the Mystic Units or Everett retire. Connecticut Parties raised this issue, R.378 [Connecticut Parties August 2020 Rehearing Request at 11], JA1662, but FERC failed to address it.

B. FERC's orders ignore record evidence.

FERC's failure to apply the clawback to Everett ignores that no party—including Mystic—expressed opposition at trial to the clawback's application to Everett. Mystic itself confirmed that it was amenable to a clawback of certain capital expenditures for Everett if Everett continues in service after the Agreement terminates.[71] Both the States Committee and Connecticut Parties brought this to FERC's attention,[72] but FERC inexplicably failed to accept Mystic's commitment to an Everett clawback.

Connecticut Parties argued that FERC's decision in the July 2020 orders to exempt Everett from the clawback was an unacknowledged reversal of the

[71] R.189 [Exhibit NES-004], JA936.

[72] *See* R.381 [States Committee August 2020 Rehearing Request at n.5], JA1687; R.378 [Connecticut Parties August 2020 Rehearing Request at 5], JA1656 (citing Tr. 898:14-15, 16-24).

December 2018 Order. FERC agreed in the earlier order with Staff's proposal to require Mystic to "include a clawback provision like the mechanism described in the MISO tariff" which requires the refund of "'all costs, less depreciation, for repairs and capital expenditures that were needed to continue operation of the Generation Resource.'" R.313 [December 2018 Order P 208], JA1353-JA1354 (internal quotation and citation omitted). As Connecticut Parties observed, the plain language of this provision would require Mystic to refund *all* undepreciated costs of repairs and capital expenditures, i.e., costs related to both Mystic and Everett if either facility continues operating after the Agreement's term. R.378 [Connecticut Parties August 2020 Rehearing Request at 6-7], JA1657-JA1658; R.379 [Connecticut Parties Compliance Rehearing Request at 7], JA1678.

FERC's orders ignored these arguments. The Commission acted contrary to its obligation to make "a reasoned decision based upon substantial evidence in the record." *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (cleaned up).

C. FERC's failure to require Mystic to apply the clawback to Everett is contrary to the FPA.

The Commission was required under FPA Section 205 to ensure that Mystic's rates are just and reasonable, 16 U.S.C. § 824d(a), and that they do not "make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage." 16 U.S.C. § 824d(b). FERC failed in both

respects. Absent the inclusion of Everett expenditures in the clawback mechanism, the Agreement fails these tests. It burdens ratepayers with excessive costs, and provides unfair, preferential treatment to Everett—itself an affiliate of Mystic.

FERC itself concluded that the Agreement as originally filed was "not just and reasonable because it does not contain a clawback provision." R.313 [December 2018 Order P 208], JA1353. As FERC explained, "'the main intent of the [clawback] provision [is] to prevent the inequitable recovery from . . . customers for repairs that provide significant benefits beyond the term of the [agreement] should the [resource] later return to regular utility service.'" *Id.* P 210, JA1354 (quoting Op. No. 556, PP 56, 59). Additionally, a clawback prevents the agreement from conferring an undue competitive advantage on a facility that returns to competitive operations after the agreement ends. *See id.* P 211, JA1354-JA1355.

These considerations apply equally to *all* costs flowed through the Agreement, including Everett costs. And that is true even if—perhaps especially if—Mystic retires but Everett continues operating. If it is inequitable to charge Mystic's ratepayers for expenditures that benefit Mystic after the Agreement, it is equally inequitable to charge ratepayers for costs that will benefit Everett after the Agreement. And as discussed above, the Commission has no warrant to use the Agreement as a tool to provide Everett with benefits that may last long after the Agreement ends. As Connecticut Parties explained, the affiliate relationship and

potential for self-dealing between Mystic and Everett make a stronger case for the need for a clawback for Everett, R.378 [Connecticut Parties August 2020 Rehearing Request at 7-8], JA1658-JA1659, yet FERC inexplicably accorded Mystic's affiliate an exemption from the Commission's clawback policies.

IV. FERC FAILED TO ADDRESS ARGUMENTS CONCERNING THE AGREEMENT'S COST RECOVERY PROVISIONS.

FERC failed to address two other issues raised on rehearing.

Delaying Projects. FERC initially directed Mystic to modify the Agreement's protocols to "requir[e] a demonstration that Mystic is not delaying projects until the term of the Agreement that it would otherwise have undertaken sooner with the purpose of recovering excessive costs from ratepayers under the Agreement." R.313 [December 2018 Order P 174], JA1338. FERC subsequently modified its ruling, under the guise of a "clarification," so that Mystic would only be required to identify whether there was a delay, rather than to demonstrate affirmatively that it is not delaying projects. R.375 [July 2020 Rehearing Order II P 87], JA1589-JA1590.

The States Committee sought rehearing of this ruling, explaining that it would leave Mystic with an incentive to delay capital projects into the Agreement's term, which would unfairly shift costs to ratepayers. R.381, [States Committee Rehearing Request at 28-30], JA1713-JA1715. This incentive arises because during the Agreement's term, Mystic "will only be able to recover from ratepayers a portion of the costs of capital projects completed before the [Agreement's] period—which will

be treated as a part of rate base—while Mystic will be able to recover the full cost of capital projects expensed during the [Agreement's] term in the year that they are expensed." *Id*. (quoting Staff Initial Brief at 100), JA1715.

In its December 2020 Order, FERC recited the States Committee's argument, R.420 [December 2020 Order P 32], JA1931, but failed to address it.

Revenue Discrepancies. FERC required Mystic to include in the Agreement a "true-up" of rates, through which Mystic is required to reconcile projected costs with actual expenditures. R.75 [July 2018 Order P 20], JA574. In the December 2018 Order, FERC held that the true-up process must require Mystic to reconcile revenues earned during the Agreement's term in addition to projected costs. R.313 [December 2018 Order P 179], JA1340-1341. On rehearing, FERC reversed course and held that it is not necessary for Mystic to true-up its revenues because, according to FERC, the Agreement contains provisions that will credit revenues Mystic earns against its revenue requirement. R.375 [July 2020 Rehearing Order II P 88], JA1590. The States Committee asked FERC to confirm that it did not intend to eliminate the right of interested parties to challenge Mystic's calculation of such revenue credits, and thereby to ensure that Mystic is not over-recovering its costs. R.381 [States Committee August 2020 Rehearing Request at 31], JA1716. Again, FERC recited the States Committee's argument, R.420 [December 2020 Order P 25], JA1928, but failed to address it.

With respect to both of these issues, FERC did not adequately explain why it reversed its earlier rulings. Failing to address an argument is arbitrary and capricious decision-making and requires remand. *See, e.g., Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 755 (D.C. Cir. 2010) ("Because the Commission failed to address those issues in the challenged orders, we now remand the orders to FERC").

V. FERC'S ORDERS ADDRESSING THE RIGHT TO CHALLENGE THE PRUDENCE OF THIRD-PARTY SALES ARE CONFUSING AND INTERNALLY INCONSISTENT.

The Commission's December 2018 Order found that the prudence of third-party sales that Everett makes "is more appropriately reviewed during the true-up process, including whether Mystic reasonably recovered the variable costs of third-party natural gas sales in accordance with the Agreement." R.313 [December 2018 Order P 164], JA1332-JA1333.

Subsequently, FERC found that because it was no longer requiring revenue from third-party sales to be credited back to ratepayers,[73] its earlier ruling concerning prudence review of these sales was rendered moot. R.375 [July 2020 Rehearing Order II P 73], JA1584. The States Committee sought rehearing, arguing that if FERC permits the costs of third-party sales to be passed on to ratepayers, interested parties must have the ability to challenge whether incurrence of costs associated with

[73] *See* Section II, *supra*.

these sales was prudent. R.381 [States Committee August 2020 Rehearing Request at 27-28], JA1712-JA1713.

The December 2020 Order created confusion. On the one hand, FERC purportedly granted the States Committee's rehearing request. *See* R.420 [December 2020 Order P 27], JA1929-JA1930. On the other hand, FERC also stated that it agreed with Mystic that the Commission's intent regarding third-party sale prudence "was limited to the expectation that [the System Operator] will audit and ensure that the tank congestion charge is properly calculated." *Id.* P 28, JA1930.[74]

FERC provides no explanation for excluding interested parties from challenging the prudence of tank congestion charges, or how to square this exclusion with the earlier rehearing request it granted to the States Committee. FERC's dual rulings on rehearing cannot be reconciled with one another and must be remanded to the agency for a clear explanation. *See, e.g., FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 448 (D.C. Cir. 2005) ("FERC's failure to provide an intelligible explanation for adopting its new rationale amounts to a failure to engage in reasoned decisionmaking.").

[74] The tank congestion charge was originally structured so that ratepayers share some of the risk of losses that Mystic may incur from tank congestion to offset the revenues that ratepayers would have been credited from third-party sales. *See* R.313 [December 2018 Order P 160], JA1331.

VI. CONCLUSION

State Petitioners' petitions for review should be granted, and the challenged decisions should be vacated and remanded.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because its textual portions, including headers, quotations, and footnotes, but excluding the (i) cover pages, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) signature block contain 10,586 words, as counted by the word count feature of Microsoft Word 2010, with which this brief was prepared.

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February 23, 2022

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§ 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 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."

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

16 U.S.C.

United States Code, 2015 Edition
Title 16 - CONSERVATION
CHAPTER 12 - FEDERAL REGULATION AND DEVELOPMENT OF POWER
SUBCHAPTER II - REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE
16 U.S.C. Sec. 824d - Rates and charges; schedules; suspension of new rates; automatic adjustment clauses
From the U.S. Government Publishing Office, www.gpo.gov

§ 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.

16 U.S.C.

United States Code, 2011 Edition
Title 16 - CONSERVATION
CHAPTER 12 - FEDERAL REGULATION AND DEVELOPMENT OF POWER
SUBCHAPTER III - LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS
16 U.S.C. Sec. 825g - Hearings; rules of procedure
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§ 825g. Hearings; rules of procedure

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

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

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

16 U.S.C.

United States Code, 1995 Edition
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CHAPTER 12 - FEDERAL REGULATION AND DEVELOPMENT OF POWER
SUBCHAPTER III - LICENSEES AND PUBLIC UTILITIES; PROCEDURAL AND ADMINISTRATIVE PROVISIONS
16 U.S.C. Sec. 825l - Review of orders
From the U.S. Government Publishing Office, www.gpo.gov

§ 825*l*. Review of orders

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

Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, 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 person unless such person 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; Aug. 28, 1958, Pub. L. 85–791, §16, 72 Stat. 947.)

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

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".

Transfer of Functions

Federal Power Commission terminated and its functions, personnel, property, funds, etc., transferred to Secretary of Energy (except for certain functions transferred to Federal Energy Regulatory Commission) by sections 7151(b), 7171(a), 7172(a), 7291, and 7293 of Title 42, The Public Health and Welfare.

Executive and administrative functions of Federal Power Commission, with certain reservations, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 9 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out as a note under section 792 of this title.

Section Referred to in Other Sections

This section is referred to in section 824k of this title; title 33 section 988; title 42 section 7172.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 23rd day of February, 2022, caused the foregoing document to be served electronically through the Court's CM/ECF system.

/s/ Scott H. Strauss
Scott H. Strauss

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