IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13-4330 & 13-4501 (consolidated)

PPL ENERGYPLUS, LLC, *et al*.,

v.

LEE A. SOLOMON, in his official capacity as President of the New Jersey Board of Public Utilities, *et al*.

v.

CPV POWER DEVELOPMENT, INC.; HESS NEWARK, LLC

CPV POWER DEVELOPMENT, INC.,
Appellant in No. 13-4330

LEE A. SOLOMON, *et al.*,
Appellants in No. 13-4501

HESS NEWARK, LLC,
Intervenor in No. 13-4330

Appeal from Judgment of the U.S. District Court for the District of New Jersey, No. 3:11-cv-00745-PGS (Hon. Peter G. Sheridan)

REPLY BRIEF FOR CPV POWER DEVELOPMENT, INC.

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INTRODUCTION

New Jersey enacted the LCAPP Act to procure the construction of new, environmentally friendly power plants to meet the needs of its citizens by affording successful bidders a form of revenue guarantee, underwritten by ratepayers, to help pay for and facilitate that new construction. It conducted a competitive procurement for the new plants focusing on, among other things, those bids with the lowest proposed revenue requirements and which, therefore, required the lowest payments to be made over fifteen years. The winning bidders then entered into long-term contracts with New Jersey's four electric distribution utilities, pursuant to which the plants would be constructed in exchange for such payments. *See N.J. Bd. of Pub. Utils. v. FERC*, No. 11-4224, slip op. at 32 (3d Cir. Feb. 20, 2014) ("*NJBPU*").

From Appellees' brief, one would hardly know that the LCAPP Act had anything to do with financing and building new power plants. Appellees proceed on the pretense that New Jersey has inexplicably decided to start directly regulating interstate electrical capacity sales. They argue this even though the SOCAs themselves embody no purchase and sale transaction, and set no rate or charge. And there is no earthly reason why the State would want to require its ratepayers to supplement the revenues that a generating facility obtains from selling its capacity in the market *except* to serve some public purpose, such as

facilitating the construction of much needed new power plants and the development of more reliable, efficient energy production.

The hook for Appellees' argument is the benchmark used in the SOCAs to determine the extent of the State's financial support for the new construction. The supplemental payment is based on the difference between the bidder's revenue requirement as bid and what it actually obtains by selling its capacity in the FERC-supervised interstate market. Appellees' hook cannot support their preemption claim.[1]

With respect to field preemption, Appellees have not come close to showing a clear and manifest purpose of Congress or FERC to preempt New Jersey's program. The SOCAs' third-party subsidies are not rates or charges within FERC's jurisdiction. But even if the SOCAs were subject to FERC's jurisdiction, that would simply render them subject to FERC's authority. It would not render them an impermissible intrusion on FERC's authority.

There is no conflict preemption because FERC has expressly recognized that state-subsidized new generation capacity, including New Jersey's, can participate in FERC's markets without impairing those markets, and has taken various steps to ensure the legitimacy of such participation.

[1] Appellees are primarily holders of existing generation resources that benefit from limiting new entry.

Finally, Appellees' novel Commerce Clause argument leads nowhere. The procurement involved no discrimination against out-of-state interests. Businesses from any State were invited to compete to build the new power plants, with no overt or practical preference for New Jersey businesses in the procurement process. There is no impermissible discrimination in New Jersey's considering the benefits to its citizens when it decided whether and where to help facilitate the financing and construction of new power plants, or in New Jersey's wanting the plant to be built near where the need was greatest. In any event, the record shows that no proposed out-of-state project was rejected based on the "benefit" to the State selection criterion to which Appellees object.

ARGUMENT

I. WHETHER FERC-JURISDICTIONAL OR NOT, THE SOCAS ARE NOT "FIELD PREEMPTED."

As demonstrated in CPV's opening brief, the SOCAs are either (a) not FERC-jurisdictional at all, which is Appellants' view; or (b) FERC-jurisdictional, in which case, because they are subject to FERC's authority, they cannot usurp that authority.

Appellees offer various theories why the SOCAs should be deemed to establish rates subject to FERC's jurisdiction. Appellees' arguments fail at every level, linguistic and practical, and FERC itself has never suggested that it has jurisdiction over the type of payments at issue here. The SOCAs are exactly what

they seem to be: contracts that provide supplemental payments, if necessary, to successful bidders to ensure the long-term revenue stream necessary to finance new construction. They do *not* set rates or charges in connection with interstate sales of capacity. They do not invade FERC's rate-approval authority, and they are not preempted.

On the other hand, even if the SOCAs are *subject to* FERC's jurisdiction, they do not improperly invade that jurisdiction. If they are subject to FERC's jurisdiction, FERC may approve them, disapprove them, or modify them as it deems proper under section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, and they are not preempted.

Because under either scenario, the LCAPP Act is *not* preempted, there should be no need to decide the FERC-jurisdiction issue in this case.

A. The SOCAs Do Not Establish Rates And Charges For Interstate Sales Of Capacity.

1. The LCAPP program is plainly within the scope of New Jersey's traditional authority under the FPA.

As described in CPV's opening brief, the FPA, as amended, divides responsibility between FERC and the States. FERC has exclusive jurisdiction to approve rates and charges involving interstate sales by electric generators. But the FPA preserves the States' authority over retail rates, over the purchasing decisions

of their own EDCs, and over the adequacy and reliability of electric supply, including creation of new generating capacity. CPV Br.-23-25.

Because the States' and FERC's spheres of authority necessarily interact, FERC may occasionally craft its programs to accommodate those of the States; the States may properly develop theirs to recognize FERC's. Here, New Jersey structured its incentives for new power plant construction against the backdrop of the FERC-regulated interstate capacity market, honoring FERC's market and open transmission initiatives. It insisted that the selected generators participate in that market, while providing financial incentives for new construction through a subsidy/rebate mechanism. FERC, for its part, ensured that its market rules would permit the new generators to participate in PJM's structured capacity market without compromising that market, notwithstanding any "subsidy." *See NJBPU*, No. 11-4224, slip op. at 55 (FERC "permit[ted] states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while approving rules that prevent the state's choices from adversely affecting wholesale capacity rates.").

While the adequacy of electric supply is a national imperative, Congress has continued to rely on States to ensure that new power plants are built. FERC has

been denied direct authority over such construction.[2] Similarly, States retain authority over retail rates and over their own EDCs.

2. New Jersey has not ceded its responsibility or historic power to ensure that needed generation capacity is created.

While conceding that States traditionally were responsible for ensuring that adequate electric generating capacity was created, Appellees argue that in departing from the vertically integrated utility structure, some States, including New Jersey, "ceded much of their traditional regulatory authority over generation." Appellees' Br.-7. There is no support for that position. Ensuring that new power plants are built remains a matter of pressing importance. Though the industry structure has changed, the legal framework has not: neither FERC nor PJM has any authority over the building of power plants; that authority resides, as it always has, with the States.

In restructuring its utility industry, New Jersey explicitly sought to take advantage of the newly created market structure and enhanced competition. But contrary to Appellees' suggestion (Appellees' Br.-7-8, 27), a decision to *de*-regulate generation to a degree cannot be equated with ceding ultimate authority over generation, in particular, as to the need to construct such generation. States

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[2] Because market signals may, "at least in theory, incentivize the development of new generation resources," *NJBPU*, No. 11-4224, slip op. at 21, FERC may *indirectly* contribute to ensuring that sufficient generation capacity is created.

can both benefit from an improved, competitive market, as encouraged by FERC, and continue to exercise their traditional power to promote new generation, even if the mechanisms they use may have to be adapted to the new industry structure. Of course, even had the State wished to cede direct authority over generation to FERC, FERC is barred by the FPA from taking up such an offer.

In approving PJM's Minimum Offer Price Rules ("MOPR"), FERC recognized the States' continuing role in supporting new generation. The original 2006 MOPR rules contemplated a blanket exemption for state-sponsored new generation resources – an explicit recognition of the States' responsibility to ensure adequate electricity supply. *See NJBPU*, No. 11-4224, slip op. at 29 (MOPR exempted any "resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall."). When subsequently revised, the MOPR exception still accounted for New Jersey's SOCA-supported new generation capacity, providing that a state-subsidized new generator that satisfied the rules "should be permitted to participate in the auction regardless of whether it also receives a subsidy." JA-518 (*PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at P 177 (2011)). Indeed, the entirety of FERC's efforts to address the participation of SOCA-supported generators in the RPM auction would have been unnecessary if FERC viewed support of new generation as beyond the States' powers or as an impermissible intrusion on FERC's authority.

3. Both the strong presumption against preemption and admonitions against expansive interpretations of FERC authority apply here.

As described in CPV's opening brief, both the presumption against preemption and the judicial practice of avoiding unnecessarily broad constructions of FERC jurisdiction at the States' expense should guide the Court in determining a central issue here: whether the particular exercise of State power reflected in the LCAPP Act improperly intrudes on any power exercised by FERC.

The presumption against preemption applies here with full force. As explained above, *see supra* Section I.A.2, States retain their traditional responsibilities and authority under the FPA.[3]

In fact, the general caution against finding preemption in areas of traditional state authority has special force in connection with the FPA, where Congress *expressly* preserved state authority and contemplated a system of interlocking responsibility, divided among the States and FERC. In these circumstances, courts are admonished to "take seriously the lines Congress drew in establishing a dual regulatory system," *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S.

[3] Appellees cite *United States v. Locke*, 529 U.S. 89, 94 (2004) (federal authority over maritime commerce), and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347-48 (2001) (federal authority over claims federal agency was defrauded), for the notion that this case does not involve the exercise of traditional state powers because it involves state regulation in a federal field, the "wholesale electricity market." Appellees' Br.-23. But Appellees' argument assumes its conclusion: the question here is *whether* New Jersey has, in fact, invaded that field.

493, 513 (1989), and to avoid extravagant interpretations of FERC authority at the expense of the States' preserved powers, *see id*. at 512.

Appellees assert that cautionary principles developed under the Natural Gas Act ("NGA") do not apply here because the similarity between the NGA and FPA is limited to "certain provisions," and the relevant provisions – section 1(b) of the NGA and section 201(b) of the FPA – are not identical. Appellees' Br.-26. But after reviewing the history of the two Acts, the "Supreme Court has held that the Natural Gas Act and the Federal Power Act are 'in all material respects substantially identical,' and constructions of one are authoritative for the other." *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).[4] And the Court specifically applied this principle to section 201(b) of the FPA. In *FPC v. Southern California Edison Co*., 376 U.S. 205, 211-16 (1964), the Court interchangeably used FPA and NGA precedents in construing section 201(b). The Court described the acts' intertwined development and stated that they "grew out of the same judicial history." *Id*. at 211. With specific reference to the overlap with "the part of the Federal Power Act with which we are here concerned," the

[4] *See also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 686 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Court stated: "§ 201(b) of the Power Act has its counterpart in § 1(b) of the Gas Act." *Id.* at 211-12.

The Court's decision was well founded. Each statute circumscribes FERC authority using the phrase "and shall not apply to any other." 15 U.S.C. § 717(b); 16 U.S.C. § 824(b)(1). Just as the NGA "shall not" extend to facilities for production, the FPA "shall not" extend to electricity generation. Both statutes include the "in connection with" language on which Appellees put so much weight; neither includes the word "exclusive," or that concept, contrary to Appellees' intimation (Appellees' Br.-26-27).

In short, the slightly different texts of the two statutes amount to a distinction without a meaningful difference here. Both statutes establish regimes of divided authority with certain responsibilities assigned to the States. In construing the scope of FERC jurisdiction, courts (and FERC) must bear in mind the important powers Congress assigned to the States. Appellees also completely ignore FPA amendments renewing Congress's intent to preserve state authority over electric generation and resource adequacy. *See* CPV Br.-25-26. Therefore, despite minor differences, Supreme Court precedent, together with the general structure of the two acts and their largely identical genesis, compel the conclusion that the principles applicable to the division of responsibility between FERC and the States under one act also apply to the other.

4. The SOCAs do not set a "price," rate, or charge in connection with an interstate sale of capacity.

a. Appellees' plain language argument is unavailing.

Appellees' statutory argument revolves around the assertion that "a payment received by a generator from a third party for its capacity sales is every bit as much a payment 'received for' those sales as a payment received from PJM." Appellees' Br.-31. Appellees argue that even though SOCA subsidies are received for agreeing to construct new power plants, they are nonetheless paid "in connection with" a sale of capacity, though the EDCs that make the payments are not purchasing that capacity.

Appellees' stab at plain language preemption falls flat. Section 205(a) of the FPA does not grant FERC jurisdiction over third-party "*payments* . . . in connection with an interstate sale." Appellees' Br.-31 (emphasis added). FERC's authority is over "*rates and charges* . . . . in connection with" a sale. 16 U.S.C. § 824d(a) (emphasis added). The part of 16 U.S.C. § 824d(a) that Appellees paraphrase provides:

> 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, . . . shall be just and reasonable . . . .

It is the "rates and charges" that must be "just and reasonable." "Rates and charges" refers to a price set for an exchange transaction – paid *for* a good or

service – involving electric energy. A rate or charge is *not* a separate payment from a third party. Thus, even setting aside that the SOCA payments' purpose is to pay for construction costs, and the Supreme Court's admonitions to construe the statute so as not to unduly interfere with the States' reserved authority, Appellees' plain language argument for FERC jurisdiction over the SOCAs is inconsistent with the text.[5]

If a State or some public-spirited, environmentally minded philanthropist decided to encourage wind power in PJM by offering an extra dollar per megawatt sold by a wind-generator willing to construct a new facility, that supplemental payment could not be regarded as a "rate or charge" subject to FERC's jurisdiction. It would be seen for what it is: a subsidy supplemental to whatever payments are received from PJM for the actual sale of capacity or electricity in the marketplace.

Appellees' plain language argument is not aided by their assertion that "in connection with" is a broad term. Appellees' Br.-31. Indeed, FERC itself has not construed its jurisdiction to reach financial agreements relating to sales that do not go to delivery. *See, e.g., N.Y. Mercantile Exch.*, 74 FERC ¶ 61,311, 61,987 (1996);

[5] Appellees' statement that the SOCAs "dictate the price of a wholesale transaction in the PJM markets" is equally misguided. Appellees' Br.-35. The SOCAs don't dictate a price any more than a rate or charge. A price is paid in exchange for a good or service.

Revised Pub. Util. Filing Requirements, 66 Fed. Reg. 67,134, 67,135-36 (Dec. 28, 2001), FERC Stats. & Regs. ¶ 35,541. FERC's "in connection with" jurisdiction generally extends only to subjects "necessary to make effective the Commission's primary jurisdiction." *Conoco Inc. v. FERC*, 90 F.3d 536, 552 (D.C. Cir. 1996) (quoting *Nw. Pipeline Corp.*, 60 FERC ¶ 61,213, 61,729 (1992)).

Moreover, courts considering "in connection with" under the FPA or NGA have held that it must be construed by FERC case by case, and that its application – and FERC's corresponding exercise of jurisdiction – is largely within FERC's discretion. *See N. Natural Gas Co. v. FERC*, 929 F.2d 1261, 1272-73 (8th Cir. 1991) ("Congress foresaw [FERC's] need for the ability to regulate other aspects of the . . . industry as necessary to make effective its primary control over interstate transportation and sales."); *see also Entergy Servs., Inc.*, 139 FERC ¶ 61,103 at P 33 (2012) ("[FERC] has discretion in determining what rules and practices are 'for or in connection with' . . . jurisdictional services."). Accordingly, in determining whether a payment is "in connection with" a jurisdictional sale, courts first ask whether FERC has actually asserted jurisdiction. *See N. Natural*, 929 F.2d at 1272; *see also Conoco*, 90 F.3d at 549 (deferring to FERC's conclusion that certain facilities were exempt from its NGA § 1(b) authority, declining to "speculate about what circumstances . . . would cause [FERC] to invoke the authority it seeks to reserve"). Here, deciding the issue of FERC jurisdiction in

favor of Appellees would require the Court either to accept Appellees' misreading of the FPA language or to inject itself into an area subject to FERC's judgment but on which FERC has issued no decision.

Once Appellees' plain language theory is stripped away, nothing supports their claim that the SOCAs are FERC-jurisdictional. Appellees offer no reason why the FPA should be interpreted as they suggest, or why Congress would have granted FERC jurisdiction over a State's determination to subsidize construction of new generation facilities.

The larger point, of course, is that supplemental payments under the SOCAs are not consideration for the purchase of capacity. If the State had wanted to buy capacity, it would have conducted a procurement for capacity. The State wanted to encourage new power plants, not to regulate rates or charges for capacity. Thus, neither in form nor intention has there been any intrusion on FERC's ratemaking authority.

Appellees treat New Jersey's purpose as irrelevant in determining whether the SOCAs invade FERC's authority. Yet in addressing similar issues, where the State's actions could have been characterized in one of two ways, one permissible and the other arguably preempted, the Court made clear that what the State intended can be determinative. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 213-16 (1983). New Jersey's

purpose here was plainly to promote new power plant construction, not to regulate wholesale rates.

b. Where the statute itself does not answer the jurisdictional question, jurisdiction ought not be found unless and until FERC has at least sought to assert its jurisdiction.

Finally, Appellees blithely dismiss CPV's view that the Court should not decide whether the LCAPP Act invades FERC's jurisdiction here without FERC ever having even attempted to assert jurisdiction over the SOCAs. Appellees assert that FERC has no "right of first refusal to decide" preemption. Appellees' Br.-38.

If the sole issue before the Court involved distilling *Congress's* intent from the plain language of the FPA, it might not be necessary to consider how FERC treated the SOCAs – though, even then, the "agency's own views should make a difference." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000). But let's assume that FERC's jurisdiction, judged solely by the statutory language, is not so clear cut, and that Congress itself never clearly resolved the scope of FERC's jurisdiction over these types of supplemental payments. In those circumstances, it would be necessary to consider whether *FERC* has actually and properly exercised jurisdiction over the SOCAs, in other words, whether *FERC* occupied this field.

At the margins, particularly where there is a possibility of FERC intrusion on state power, the decision not to assert jurisdiction is, in part, a matter of FERC's

own judgment. *See New York*, 535 U.S. at 22-24, 26-28 ("[FERC] had discretion to decline to assert such jurisdiction . . . in part because of the complicated nature of the jurisdictional issues."); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374 (1988) (focusing on whether FERC actually and properly exercised its jurisdiction, rather than whether the statute abstractly provides for jurisdiction); *see also N. Natural*, 929 F.2d at 1273 (noting FERC's flexibility in determining whether a rate or charge is "in connection with" a jurisdictional sale). Thus, in the absence of an actual, proper assertion of jurisdiction by FERC, the Court ought not to make this determination itself, let alone to use that determination as a basis for finding a clear and manifest federal intention to preempt state authority.

B. If The SOCAs Are FERC-Jurisdictional, They Are Not Preempted.

Even if Appellees are correct that the SOCAs are subject to FERC jurisdiction, the result is not preemption. If the SOCAs are FERC-jurisdictional, they are simply subject to FERC review. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 171 (2010); *Ark. La. Gas*, 453 U.S. at 577. If FERC asserted jurisdiction over the SOCAs, it would then determine whether the SOCAs are just and reasonable, or whether they should be rejected or modified. Nothing in the LCAPP Act or the SOCAs could preclude FERC's ability to do so. *See id.*; *New York*, 535 U.S. at 26-28. A contract subject to FERC's jurisdiction cannot be said to have usurped FERC's jurisdiction.

Contrary to Appellees' suggestion that FERC's jurisdiction is limited to capacity transactions in the RPM auction, the truth is that PJM's forward capacity auction is not, and has never been, the only means of purchasing and selling capacity in PJM's geographic region. To the contrary, PJM refers to its market mechanism as the base *residual* auction, *NJBPU*, No. 11-4224, slip op. at 24, for a reason: It is the *residual* source of capacity in a marketplace where a great deal of capacity is purchased through bilateral agreements, many of them long-term agreements, at rates different than those established in the RPM auction. Rates and charges for capacity, as provided for in bilateral agreements, are subject to FERC's authority to approve, disapprove, or modify under 16 U.S.C. § 824d. *See NRG Power*, 558 U.S. at 171; *Ark. La. Gas*, 453 U.S. at 577. Review of bilateral agreements can be obtained by filing a complaint with FERC, or FERC can initiate a review on its own.[6] *See NRG Power*, 558 U.S. at 171.

That the State directed its EDCs to enter into the SOCAs following the competitive procurement that established the payments required does not change the *jurisdictional* status of the SOCAs. No one has challenged the States' power to direct their EDCs to enter into long-term agreements, or FERC's jurisdiction over such agreements, if they involve rates and charges for the interstate sale of

[6] FERC is well aware of the SOCAs and similar contracts, such as the CfDs issued in Maryland. *See NJBPU*, No. 11-4224, slip op. at 58, 61-62.

electricity or capacity.[7] FERC is not divested of authority over contracts otherwise subject to its jurisdiction merely because they were entered into at the State's direction.

Although the SOCAs were the product of a competitive procurement overseen by the State and an independent evaluator, Appellees vaguely suggest that since they were not voluntarily entered into by the EDCs, this somehow limits FERC's jurisdiction over them. Appellees' Br.-35. But if the SOCAs set rates and charges for interstate sales of capacity, then FERC has jurisdiction over them. The question whether the EDCs "voluntarily" entered into the SOCAs is irrelevant to whether FERC has jurisdiction over them. And as with other jurisdictional contracts, if they are "clearly the product of a market process," such as the competitive procurement undertaken by New Jersey here, they presumably would

[7] For example, in *Doswell Ltd. Partnership*, 50 FERC ¶ 61,251 (1990), and *Commonwealth Atlantic Ltd. Partnership*, 51 FERC ¶ 61,368 (1990), FERC addressed procurements resulting in power purchase agreements approved by the Virginia State Corporation Commission, which regulates Virginia's retail utilities. Those agreements, unlike the SOCAs, were FERC-jurisdictional, since they concerned wholesale sales of capacity for resale. FERC approved the state-supervised agreements as "just and reasonable" based on its determination that (a) "[the] transaction was clearly the product of a market process," *Doswell*, 50 FERC at 61,757, and (b) sellers lacked market power. While FERC no longer makes such determinations on a contract-by-contract basis, such contracts remain subject to FERC's jurisdiction.

be found "just and reasonable" and, therefore, approved.[8] The issue of "voluntariness," then, has nothing to do with jurisdiction, but only the "justness and reasonableness" of the price. *See*, *e.g.*, *NRG Power*, 558 U.S. at 167-68 (if a bilateral contract is voluntarily entered into, upon challenge, rates are presumed "just and reasonable" unless FERC finds that "the contract seriously harms the public interest").

Finally, Appellees assert that it does not matter that the SOCAs are subject to FERC jurisdiction because New Jersey has no "power to establish wholesale rates in the first place." Appellees' Br.-38. That assertion misses the point. It is the submission to FERC's jurisdiction that precludes a finding that the State improperly invaded FERC's jurisdiction. But Appellees' assertion is also flatly inconsistent with the facts. New Jersey has never "establish[ed] wholesale rates." With the LCAPP Act, New Jersey exercised its undoubted power to direct its EDCs to enter into contracts to ensure that the financial requirements of the

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[8] Appellees cite several FERC decisions rejecting state attempts to prescribe wholesale rates in long-term contracts. *See* Appellees' Br.-37. Here, however, the SOCA price was determined in a competitive procurement. That a price is the product of a "market process" structured by the State, rather than imposed by the State (as if the State were a regulator, with authority to determine the price), makes all the difference. *Compare Commonwealth Atl.*, 51 FERC at 62,244; *Doswell*, 50 FERC at 61,757; n. 7, *supra* (approving state-supervised long-term agreements, with the price set in a competitive procurement), *with Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047 at P 64 (2010); *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 (1997) (rejecting state-imposed, nonmarket prices).

successful bidders were met. The payments under the SOCAs were not "established" as the product of a regulatory process, but rather were the product of a competitive procurement. *See* n.8, *supra*. In any event, they are paid in consideration for the construction of new power plants. If, as Appellees assert, the SOCAs are subject to FERC's authority, they may or may not be satisfactory to FERC. But that would not render them, or the State's action, preempted.

II. THERE IS NO CONFLICT BETWEEN THE LCAPP ACT AND EITHER FERC OR THE FPA.

Appellees here base their conflict preemption argument chiefly on one supposed conflict between the SOCAs and what they say is FERC policy concerning the duration of a permissible revenue guarantee. Appellees' Br.-11-13, 15, 17, 19, 20, 30, 39, 40-46. But the term of any revenue guarantee under the RPM is irrelevant to this case; no such guarantees are at issue. Moreover, it was not the "conflict" addressed by the trial court.

As demonstrated in CPV's opening brief, the district court's more general finding of "conflict" was based primarily on a false premise, namely, that the PJM capacity auction was to be the sole market for developing new capacity. But however "carefully calibrated" the RPM auction was intended to be, Appellees' Br.-40, that auction was not intended as an exclusive source of incentives for new entry. *See* CPV Br.-34-36. Indeed, while early PJM rules exempted state-supported resources from certain auction requirements, *NJBPU,* No. 11-4224, slip

op. at 29, and though these rules were modified to limit that exemption, *id*. at 36, FERC's policies from beginning to end have acknowledged and accommodated the State's continuing role in supporting construction of new generation resources. *See, e.g.*, JA-518 (*PJM*, 135 FERC ¶ 61,022 at P 177).

In fact, a vast market of bilateral contracting pervades PJM, in which capacity is purchased at different prices than in the RPM auction. Every plaintiff and defendant generation company in this suit undoubtedly utilizes and depends on that bilateral market, as do PJM and FERC. Companies rely on numerous markets and sources of information in making decisions about whether and when to build new power plants. But FERC never sought to have the RPM auction displace those markets or the States' independent public-policy role in supporting new power plant construction, or to constitute the RPM auction as the exclusive source of information for purposes of making decisions about new power plant construction.

The possibility that New Jersey's LCAPP Act prompted Appellees, private parties, to change their business plans, Appellees' Br.-45, as would the entry or retirement of any power plant in PJM, is not surprising. This is not a "conflict with federal law" or FERC's purposes. Construction of new, competing power plants encouraged by New Jersey's LCAPP Act is simply one of many factors that

competitors must consider. That Appellees would prefer to exclude the competition created by new entry is equally unsurprising.

FERC has an interest in ensuring that the markets under its supervision generate just and reasonable rates but has determined that the LCAPP Act does not threaten that interest. FERC has the supervisory tools needed to ensure that state-subsidized new generation capacity does not interfere with those markets. FERC has exercised that authority, pronounced itself satisfied with the results thus far,[9] and this Court has affirmed the rules that FERC put in place. *NJBPU*, No. 11-4224, slip op. at 87.

Appellees' current conflict preemption theory, based on the difference between a three-year revenue support and the fifteen-year term of the SOCAs, reflects the same logical flaw as the district court's opinion: If three years versus fifteen years was a matter of concern to FERC, then FERC would and could have addressed this issue in its various decisions assessing the competitive impact of the state-sponsored projects.

Appellees cite the new entry price adjustment ("NEPA"), which allowed qualifying new capacity resources in small locational delivery areas to bid into the PJM market a three-year price, even if that price were to exceed the PJM clearing

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[9] JA-655, 658-59 (*PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at PP 132, 143 (2013)).

price in subsequent auctions. JA-439 (*PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at P 140 (2009)). Appellees argue that FERC's rejection of a proposal to extend the NEPA's three-year price guarantee to a longer term reflects a fundamental policy choice applicable to the SOCAs and their fifteen-year term.

But FERC has made no general policy choice about the appropriate duration of a state subsidy for new power plants. The NEPA applies only in the context of the RPM capacity market to address a particularized problem. *See* JA-441 (126 FERC ¶ 61,275 at P 149) (NEPA addresses "the issue of lumpy investments in a small [locational delivery area]"). It operates as an exception to the general PJM capacity market rules, available only to those that qualify for that exception. Limitations on its scope are, therefore, beside the point. Here, the SOCA-supported generators, CPV and Hess, participated in the PJM auction and satisfied the applicable requirements, including the modified MOPR rules, and cleared the market on that basis. JA-68. Whether they would have qualified for the NEPA never arose.

FERC could have addressed any limits on the duration of state subsidies when it comprehensively reexamined the MOPR rules and other aspects of the auction, *see NJBPU*, No. 11-4224, slip. op. at 34-42, or when it pronounced the results just and reasonable, notwithstanding the participation of the SOCA-supported generators. JA-655, 658-59 (*PJM*, 143 FERC ¶ 61,090 at PP 132, 143).

FERC did not object. FERC did what it deemed necessary to maintain the purpose and efficiency of the RPM auction, specifically concluding that requiring a new SOCA-supported entrant to clear the auction once would be sufficient, and then allowing it to bid zero in subsequent years. *NJBPU*, No. 11-4224, slip op. at 84.

As to the broader question whether there is some latent incompatibility between PJM's auction and the LCAPP Act, this Court recently recounted in *NJBPU* FERC's response to the Maryland and New Jersey initiatives, leaving no doubt that FERC had the tools to reconcile state-subsidized new power plants with PJM's auction, and that it did just that. FERC concluded that "even if discriminatory subsidies are being received, if the resource is needed at the MOPR bid then it is a competitive resource and should be permitted to participate in the auction regardless of whether it also receives a subsidy." *Id*. at 41, 84; *see also id.* at 82 ("It does not matter, FERC ruled, whether or not the resource later receives a subsidy.").

Appellees twist FERC's statement that it did not "pass judgment on state and local policies" as if that meant that FERC condemned them. Appellees' Br.-38, 48. The exact opposite is true. FERC accommodated state-supported resources within the RPM structure. FERC thus explained that so long as wholesale prices are protected through the MOPR, it does not intend to "interfere with states or localities that, for policy reasons, seek to provide assistance for new capacity entry

if they believe such expenditures are appropriate for their state." *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 89 (2011).

Appellees also assert that FERC did not address the total revenues generators could receive. Appellees' Br.-46, 48. But again, that is precisely the point: FERC addressed and fixed what troubled it in relation to the LCAPP that *was* within its jurisdiction, namely, the amounts that state-sponsored projects would be allowed to bid into PJM's capacity auction. But it was not troubled by total revenues, even as it performed its "duty under the FPA to assure just and reasonable rates in wholesale markets." JA-509 (135 FERC ¶ 61,022 at P 143).

III. THE DISTRICT COURT PROPERLY REJECTED APPELLEES' COMMERCE CLAUSE CLAIM.

A. Appellees Misstate The Trial Judge's Ruling.

Appellees assert that the district court found that the "LCAPP's preferences for in-state generators 'place[] a direct burden upon interstate commerce'" and that the court failed to follow through on this alleged finding of facial discrimination against interstate commerce. Appellees' Br.-17, 56-58 (quoting JA-84). But the quoted sentence from the trial court's opinion does not end where Appellees suggest. The quoted sentence had nothing to do with *discrimination* against out-of-state interests. The district court made no such finding. The quoted sentence addressed preemption, specifically whether the Act involved interstate commerce

within the meaning of *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). JA-84.

B. LCAPP's "Community Benefits" Factors Played No Role In Evaluating Bids.

The LCAPP Act does not discriminate against out-of-state interests at all. The procurement was open to companies from any State willing to build a power plant to address New Jersey's need for such construction, with neither overt nor hidden preferences for in-state businesses, and without regard to a bidder's location or place of incorporation. Companies from any State had an equal chance to compete. That is dispositive of the Commerce Clause discrimination claim.

Appellees nonetheless argue that New Jersey's potential consideration of "environmental, economic, and community benefits" in the evaluation process produced a preference not in the choice of the builder, but for *building* in New Jersey. Appellees theorize that New Jersey's consideration of the benefits of a particular proposal to New Jersey citizens amounts to impermissible discrimination.

At the outset, it is odd to suggest that a State would violate the Commerce Clause if it chose not to facilitate construction in some other State, or if it considered the benefits to New Jersey residents in deciding where to subsidize new construction. *See* Section III.C, *infra*.

But there is no need to reach that issue because the "benefits" criteria about which Appellees complain played no role in evaluating any proposal to build a plant outside New Jersey. No proposal for construction outside New Jersey reached the stage where "benefits" factors applied to the bids. As was uncontroverted below, the LCAPP procurement elicited 34 proposals, including several for plants in Illinois and Pennsylvania. JA-1957 (LCAPP Agent's Report). Objective eligibility criteria unrelated to the "benefits" standards knocked out 25 of them, including all proposals for out-of-state construction. JA-1957, 1959. The State applied the "benefits" factors to only nine proposals, all involving in-state construction. JA-800 (Levitan Transcript Excerpt); JA-1948, 1960.

Appellees speculate that given the chance, state officials would apply these factors to favor New Jersey. Appellees' Br.-52-53. But discriminatory potential "is not enough to trigger strict scrutiny." *Freeman v. Corzine*, 629 F.3d 146, 164 (3d Cir. 2010); *see also Heffner v. Murphy*, No. 12-3591, slip op. at 10 (3d Cir. Feb. 19, 2014) ("A party asserting a facial challenge must establish that no set of circumstances exists under which the Act would be valid."); *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 311 (1997) (rejecting "hypothetical possibility of favoritism"). Thus, there is no basis for a "discrimination" challenge to the actual LCAPP Act procurement, nor for any type of facial challenge based on concerns about the application of the benefits criteria to some future procurement. The

LCAPP Act provided for a pilot program. N.J. Stat. Ann. §§ 48:3-98.2, 48.3-98.3(a). Whether there will be some future procurement, and whether it would involve similar benefits criteria, is purely speculative.

C. The LCAPP's "Benefits" Factors Do Not Unlawfully Discriminate Against Interstate Commerce.

Although the LCAPP Act procurement was open to businesses from anywhere in the United States, a successful bidder would have to construct its plant in or near New Jersey. Not only is this requirement not a discrimination against out-of-state interests, it results from locational constraints directly related to the problem New Jersey confronted. As the district court determined, certain areas in the State had "higher capacity prices than other PJM areas due to transmission costs." JA-88. Generally speaking, transmission costs decrease "the closer the generation facility is to the delivery area." *Id.* And reliability issues may be resolved through "additional generation in or near the location where the reliability issue will occur." *Id.* (emphasis omitted). It was thus "reasonable that the Board would incentivize construction in areas where reliability concerns are in flux." *Id.*

There is no discrimination where the claimed favoritism results from what is "by nature a highly localized enterprise." *Heffner*, No. 12-3591, slip op. at 22 (regulating "highly localized" funeral business may lead to disproportionate in-state benefits without burdening interstate commerce). Indeed, even if the LCAPP Act could be regarded as "discriminatory" in seeking construction in or near New

Jersey, it would survive heightened scrutiny because it "serves a legitimate local interest" that "could not be served as well by available nondiscriminatory means." *Id.* at 19. The State properly sought "additional generation in or near the location where the reliability issue will occur." JA-88.

Moreover, encouraging the construction of *new* power plants does not interfere with, regulate, or burden any *existing* line of interstate commerce. But even if it did, the constraints associated with siting a new power plant near where it would serve its intended function would easily pass the balancing inquiry set out in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which upholds a statute unless its "burdens on interstate commerce substantially outweigh the putative local benefits." *Heffner*, No. 12-3591, slip op. at 19.

More broadly, Appellees offer no support for the idea that a State cannot take into account the benefits to its citizens – environmental, economic, community, or otherwise – when it decides whether to finance a new project, such as the construction of a power plant. "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause's prohibitions.]" *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *accord Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 590-91 (1997) (distinguishing subsidies, which are permissible, from discriminatory taxes, which

are not). Here the subsidy was available to any company, from any State, willing to build a qualifying power plant.

New Jersey was willing to have its ratepayers help underwrite the substantial costs of new power plant construction to solve electric reliability and other problems for the benefit of *New Jersey's* citizens. That New Jersey might also consider benefits to its citizens flowing from its decision to help facilitate such a project should present no Commerce Clause issue at all. Indeed, it is difficult to imagine that *the Commerce Clause* ever requires one State to subsidize the construction of facilities in some other State.[10]

The SOCAs are what they appear to be: a form of financing to encourage, and, if necessary, subsidize, new power plant construction for the benefit of New Jersey's citizens. As such they present no constitutional concern under the Commerce Clause or the Supremacy Clause.

[10] New Jersey could have gone farther and required that new plants be constructed within its borders. A State has a legitimate interest in ensuring that a new plant it will be subsidizing has the cooperation of state and local governments in matters of zoning and certification, as well as construction permitting and regulatory supervision.

CONCLUSION

The district court's judgment with respect to field and conflict preemption should be reversed. The district court's judgment on the Commerce Clause claim should be affirmed.

Dated: March 5, 2014

Respectfully submitted,

CPV Power Development, Inc.

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1. **Word Count.** This brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The "Word Count" function of Microsoft Word 2010 was used for this purpose.

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3. **Virus Check.** I further certify that a virus check of the electronic PDF version of this brief was performed using Avast version 9.0.2011 software, and according to that program, this filing is free of viruses.

4. **Certificate of Identical Compliance of Briefs.** I hereby certify that the text within the electronic and hard-copy forms of this brief are identical.

March 5, 2014

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25 and Local Appellate Rules 25 and Misc. 113.4, I hereby certify that I have on this 5th day of March, 2014, caused the foregoing document to be served upon each party identified in the attached service list through the Court's CM/ECF system. I further certify that on this day seven hard copies of this brief are being sent to the Clerk of Court via overnight delivery.

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STATUTORY ADDENDUM

§ 715*l*. Repealed. June 22, 1942, ch. 436, 56 Stat. 381

Section, acts Feb. 22, 1935, ch. 18, § 13, 49 Stat. 33; June 14, 1937, ch. 335, 50 Stat. 257; June 29, 1939, ch. 250, 53 Stat. 927, provided for expiration of this chapter on June 30, 1942.

§ 715m. Cooperation between Secretary of the Interior and Federal and State authorities

The Secretary of the Interior, in carrying out this chapter, is authorized to cooperate with Federal and State authorities.

(June 25, 1946, ch. 472, § 3, 60 Stat. 307.)

CODIFICATION

Section was not enacted as a part act Feb. 22, 1935, which comprises this chapter.

DELEGATION OF FUNCTIONS

Delegation of President's authority to Secretary of the Interior, see note set out under section 715j of this title.

CHAPTER 15B—NATURAL GAS

Sec.

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intrastate transactions exempt from provisions of chapter; certification from State commission as conclusive evidence

The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

(d) Vehicular natural gas jurisdiction

The provisions of this chapter shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2) subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

(June 21, 1938, ch. 556, § 1, 52 Stat. 821; Mar. 27, 1954, ch. 115, 68 Stat. 36; Pub. L. 102–486, title IV, § 404(a)(1), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(a), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Subsec. (b). Pub. L. 109–58 inserted ''and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation,'' after ''such transportation or sale,''.

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

1954—Subsec. (c). Act Mar. 27, 1954, added subsec. (c).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and 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.

STATE LAWS AND REGULATIONS

Pub. L. 102–486, title IV, § 404(b), Oct. 24, 1992, 106 Stat. 2879, provided that: ''The transportation or sale of natural gas by any person who is not otherwise a public utility, within the meaning of State law—

''(1) in closed containers; or

''(2) otherwise to any person for use by such person as a fuel in a self-propelled vehicle,

shall not be considered to be a transportation or sale of natural gas within the meaning of any State law, regulation, or order in effect before January 1, 1989. This subsection shall not apply to any provision of any State law, regulation, or order to the extent that such provision has as its primary purpose the protection of public safety.''

EMERGENCY NATURAL GAS ACT OF 1977

Pub. L. 95–2, Feb. 2, 1977, 91 Stat. 4, authorized President to declare a natural gas emergency and to require emergency deliveries and transportation of natural gas until the earlier of Apr. 30, 1977, or termination of emergency by President and provided for antitrust protection, emergency purchases, adjustment in charges for local distribution companies, relationship to Natural Gas Act, effect of certain contractual obligations, administrative procedure and judicial review, enforcement, reporting to Congress, delegation of authorities, and preemption of inconsistent State or local action.

EXECUTIVE ORDER NO. 11969

Ex. Ord. No. 11969, Feb. 2, 1977, 42 F.R. 6791, as amended by Ex. Ord. No. 12038, Feb. 3, 1978, 43 F.R. 4957, which delegated to the Secretary of Energy the authority vested in the President by the Emergency Natural Gas Act of 1977 except the authority to declare and terminate a natural gas emergency, was revoked by Ex. Ord. No. 12553, Feb. 25, 1986, 51 F.R. 7237.

PROCLAMATION NO. 4485

Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, declared that a natural gas emergency existed within the meaning of section 3 of the Emergency Natural Gas Act of 1977, set out as a note above, which emergency was terminated by Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, formerly set out below.

PROCLAMATION NO. 4495

Proc. No. 4495, Apr. 1, 1977, 42 F.R. 18053, terminated the natural gas emergency declared to exist by Proc. No. 4485, Feb. 2, 1977, 42 F.R. 6789, formerly set out above.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) ''Person'' includes an individual or a corporation.

(2) ''Corporation'' includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) ''Municipality'' means a city, county, or other political subdivision or agency of a State.

(4) ''State'' means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) ''Natural gas'' means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) ''Natural-gas company'' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) ''Interstate commerce'' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) ''State commission'' means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) ''Commission'' and ''Commissioner'' means the Federal Power Commission, and a member thereof, respectively.

(10) ''Vehicular natural gas'' means natural gas that is ultimately used as a fuel in a self-propelled vehicle.

(11) ''LNG terminal'' includes all natural gas facilities located onshore or in State waters that are used to receive, unload, load, store, transport, gasify, liquefy, or process natural gas that is imported to the United States from a foreign country, exported to a foreign country from the United States, or transported in interstate commerce by waterborne vessel, but does not include—

(A) waterborne vessels used to deliver natural gas to or from any such facility; or

(B) any pipeline or storage facility subject to the jurisdiction of the Commission under section 717f of this title.

(June 21, 1938, ch. 556, § 2, 52 Stat. 821; Pub. L. 102–486, title IV, § 404(a)(2), Oct. 24, 1992, 106 Stat. 2879; Pub. L. 109–58, title III, § 311(b), Aug. 8, 2005, 119 Stat. 685.)

AMENDMENTS

2005—Par. (11). Pub. L. 109–58 added par. (11).

1992—Par. (10). Pub. L. 102–486 added par. (10).

TERMINATION OF FEDERAL POWER COMMISSION; TRANSFER OF FUNCTIONS

Federal Power Commission terminated and 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)(1), 7291, and 7293 of Title 42, The Public Health and Welfare.

§ 717b. Exportation or importation of natural gas; LNG terminals

(a) Mandatory authorization order

After six months from June 21, 1938, no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed exportation or importation will not be consistent

may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final condition would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

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

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

§ 824. Declaration of policy; application of subchapter

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

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

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

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

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

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

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

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

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

EFFECTIVE DATE OF 2005 AMENDMENT

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

STATE AUTHORITIES; CONSTRUCTION

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

PRIOR ACTIONS; EFFECT ON OTHER AUTHORITIES

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

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

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

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

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

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

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

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

(c) Temporary connection and exchange of facilities during emergency

During the continuance of any war in which the United States is engaged, or whenever the Commission determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest. If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the

previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any security so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of subsection (a) of this section.

(c) Compliance with order of Commission

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classi-