Case Nos. 20-72788, 20-73375, 21-70113, 21-70083

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLAR ENERGY INDUSTRIES ASSOCIATION,

Petitioner

NEWSUN ENERGY LLC,

Petitioner-Intervenor

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

EDISON ELECTRIC INSTITUTE INC.,

Respondent-Intervenor

AMERICAN FOREST & PAPER ASSOCIATION,

Intervenor

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

PETITIONERS' REPLY BRIEF

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Summary of Argument

In late 2020, the Federal Energy Regulatory Commission ("FERC") "gutted" its rules implementing Congress's policy of supporting independent renewable energy development, effectively concluding that Congress's policy was no longer needed.[1] Refusing to accept that an agency cannot rescind legislation, FERC set out to erode its impact by adopting rules that exceed FERC's authority, conflict with Congressional purpose, and trample rights of independent renewable energy producers. FERC's rulemaking order must be vacated.

Argument

I. FERC's Refusal to Conduct an Environmental Assessment Was Unlawful.

"Gutting" forty-year-old rules that successfully promoted clean energy (for which FERC conducted an Environmental Assessment ("EA") before originally adopting) easily clears the low threshold for a mandatory assessment of environmental impacts. FERC and Utility-

[1] Commissioner, now Chairman, Glick's dissent adeptly points out that the rules "effectively gutted the Commission's implementation of" the law. Order 872-A (Glick, Comm'r, dissenting at P 1) (1-PIO_ER-0098); *see also* Order 872 (Glick, Comm'r, dissenting at P 1) (1-PIO_ER-0201).

Intervenors' excuses—that impacts are uncertain and that categorical exclusions apply—fail under applicable law.

A. FERC Should Have Prepared an EA to Resolve any Purported Uncertainty.

The National Environmental Policy Act ("NEPA") mandates that agencies take a hard look at the environmental impacts of their actions. *Cal. ex rel. Lockyer v. USDA*, 575 F.3d 999, 1012 (9th Cir. 2009). Although a full environmental impact statement ("EIS") is not always required, the agency must at least prepare an EA where environmental impacts or their significance are uncertain. 40 C.F.R. § 1501.5(a) (2020) (EA required when significance of effects is unknown); 40 C.F.R. § 1508.9(a)(1) (2020) (EA serves to "provide sufficient evidence" as to need for EIS); 40 C.F.R. § 1501.3 (2020) (requiring EA when necessary under agency's NEPA regulations);[2] 18 C.F.R. §§ 380.4(b)(1)(ii), 380.4(b)(2)(vii) (2015) (FERC will prepare either an EA

[2] The Council on Environmental Quality's amended its NEPA regulations effective September 14, 2020. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020). FERC's action is unlawful under either version, but the prior NEPA regulations apply here where there was an ongoing rulemaking and FERC did not "clearly indicate" an intention to apply the new NEPA regulations. *Id.* at 43,340.

or an EIS instead of applying categorical exclusions where the environmental effects are uncertain); *Lockyer*, 575 F.3d at 1012; *see also Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248-50 (9th Cir. 1984) (agency must collect data and perform studies to resolve uncertainties). FERC did not prepare an EA in this case.

FERC and Utility-Intervenors argue that uncertainties about the impacts from FERC's rule changes preclude an EA. Br. for Resp't FERC 113-19 (Oct. 21, 2021) ("FERC Br."); Br. for Resp't-Intervenors Nat'l Rural Elec. Coop. Ass'n, Am. Pub. Power Ass'n, Large Pub. Power Council, and the Edison Elec. Inst. 71 (Nov. 22, 2021) ("Utilities Br."). However, NEPA requires FERC to account for uncertainties with an EA, rather than using uncertainties to shirk environmental impact analysis altogether.

The "relatively low" threshold under NEPA requires an assessment of environmental impacts whenever a party raises substantial questions about environmental impacts. *Lockyer*, 575 F.3d at 1012. Several parties raised substantial questions about the environmental impacts from FERC's rules changes—pointing out that "gutting" the most significant federal policy supporting renewable energy development would likely contribute to climate change, increase local air and water pollution, and local impacts on sustainable agriculture and infrastructure. 3-PIO_ER-0462-63 (comments of PIO); 4-PIO_ER-0863-64, -0883-85, -0945-57, -0991-1001 (comments of Northwest Coalition)[3]; SEIA_ER-1762-80; *see also* 1-PIO_ER-0190-91 (summarizing all parties' comments).[4]

FERC's original rules had been a significant and substantial cause of the nation's ongoing transition to renewable energy. From 2008 to 2017, projects built under FERC's prior rules represented approximately 13.5 percent of renewable generating capacity added nationwide, and almost one third of all solar capacity, with the most significant Public Utility Regulatory Policies Act ("PURPA") development occurring in Southeastern and Northwestern states where no organized wholesale energy market exists. 4-PIO_ER-0945-50. In fact, FERC concedes that since 2005, facilities developed under its prior rules made up 10 to 20 percent of all renewable resource capacity

[3] Petitioner Community Renewable Energy Association ("CREA") joined the comments filed by Northwest Coalition.
[4] FERC erroneously argues that no reasonably foreseeable environmental impacts were identified. FERC Br. 122-123; Utilities Br. 72.

in the United States. 5-PIO_ER-1166. And that renewable energy development, in turn, "le[d] to the retirement of significant numbers of coal facilities and older inefficient natural gas facilities." FERC Br. 2.

Despite the connection between FERC's original rules and an increase in renewable generation that displaced dirty fossil generation, FERC characterizes the impact from gutting those rules as too uncertain to reasonably forecast. But NEPA requires FERC to conduct an analysis to resolve uncertainties. It does not exempt uncertain impacts from analysis. If the public raises "substantial questions" about environmental impacts, the agency is obligated to conduct at least an EA. *Lockyer*, 575 F.3d at 1012. The public is not required to do more than raise the potential for impacts. The agency must then investigate and determine impacts through the EA process.

FERC's excuse that commenters identified only broad, rather than specific, harms overlooks that "the primary responsibility for NEPA compliance is with the agency[.]" *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092-93 (9th Cir. 2006). When the agency's defective analysis is obvious—such as FERC's outright refusal to consider impacts in this case—commenters are not required to document each and every deficiency to preserve their challenge. *Id.* at 1092 (quoting *Dep't of Trans. v. Pub. Citizen*, 541 U.S. 752, 765 (2004)). Requiring the public to definitively prove impacts before an agency must conduct an EA to investigate potential impacts "would jeopardize NEPA's purpose to ensure that agencies consider environmental impacts before they act rather than wait until it is too late." *Am. Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1033 (D.C. Cir. 2008).

Despite beginning its rulemaking investigation in 2016—providing ample time to comply with NEPA and indicating no rush to finalize rules—FERC made no effort to investigate environmental impacts before issuing proposed rules, as NEPA requires. 18 C.F.R. § 380.11(a)(3) (2020); 40 C.F.R.§ 1502.5 (2020). When FERC proposed rules three years later, it summarily announced that environmental impacts were not foreseeable so it would not even attempt to investigate them. 5-PIO_ER-1182. It has stubbornly persisted ever since.

Tellingly, FERC relies heavily on inapt cases challenging sufficiency of analysis where an agency *completed* an EA or EIS, not where the agency exempted itself entirely from NEPA as FERC did here.[5] Those cases do not support FERC's refusal to even perform the bare minimum level of analysis through an EA.

Moreover, none of the uncertainties FERC points to exempt the agency from preparing an EA. The allegation that FERC's 1980 EA was easier because there was "virtually no QF or independent power development" at that time is irrelevant. FERC Br. 121 (quoting Order 872 at P 732). Ease of resolving uncertainty is not the applicable question. Even if it were, FERC has demonstrated its ability to resolve more complicated uncertainty in other nationwide rulemakings with complex modeling forecasts.[6]

For example, FERC used "computer modeling simulations" in 1996 to determine whether a transmission access rule would provide

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[5] *See* FERC Br. 113-115 (citing *Pub. Citizen*, 541 U.S. 752, at 761-62, 769-70 (2004) (EA prepared)); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 768-79 (1983) (EIS prepared); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 550-59 (1978) (same); *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1093-95 (9th Cir. 2010) (same); *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 193-202 (D.C. Cir. 2017) (same); *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1076-79 (9th Cir. 2011) (EIS prepared but held inadequate); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 826-30 (D.C. Cir. 1976) (same)).

[6] Contrary to Utility-Intervenors' argument, Utilities Br. 73-74, Petitioners preserved this argument. *See* Pet'rs' Opening Br. 17-19 (May 27, 2021) ("PIO Br.").

an advantage to coal-fired facilities lacking pollution controls. 4-PIO_ER-0958 (discussing Order No. 888, 61 Fed. Reg. 21,540, at 21,670-21,689 (May 10, 1996)). FERC recognized any challenges in forecasting environmental harms could not negate NEPA's "critical" requirement that "environmental impacts of a proposed action be adequately identified and evaluated." 61 Fed. Reg. at 21,675. These examples demonstrate that FERC is capable of assessing environmental impacts from its rules when it wants to.

FERC is also wrong that a purported inability to forecast which states will implement each of Order 872's changes exempts FERC from conducting an EA. FERC Br. 114-115; *see also* Utilities Br. 74-75. FERC must assess the range of potential impacts by assuming states will utilize the new authority provided—and as a result "development of new QFs will grind to a halt." 2-PIO_ER-0428-29; 4-PIO_ER-0953; *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1088-99 (D.C. Cir. 1973) (agency must assess potential impacts by assuming third parties will take actions authorized); *see also* *Lockyer*, 575 F.3d at 1018 (requiring an EA when replacing a nationwide Roadless Rule with a rule allowing states to develop their own plans).

Furthermore, FERC's argument that it cannot predict states' choices ignores the self-effectuating provisions of Order 872—like the new Ten-Mile Rule—that discourage renewable energy development nationally and do not depend on state adoption. PIO Br. 10, 25-26. FERC made no attempt to determine the environmental impact from those rule changes either.

Finally, FERC and Utility-Intervenors incorrectly argue that NEPA only applies where "there is a particular project" to study. Utilities Br. 75-76 (citing *Biological Diversity v. Ilano*, 928 F.3d 774, 780 (9th Cir. 2019)); FERC Br. 117-120. As FERC's own regulations acknowledge, NEPA applies to proposed rules with widespread impact, not just individual projects in one narrow region. 18 C.F.R. § 380.5(b)(12) (2020); *see also Cal. Wilderness Coal. v. DOE*, 631 F.3d 1072, 1098 (9th Cir. 2011) (NEPA often applies "even though the programs do not direct any immediate ground-disturbing activity"); *Lockyer*, 575 F.3d at 1014-1018 (EA required for repeal of nationwide

"Roadless Rule").[7] In fact, FERC concedes that NEPA applies to "programmatic rules," which defeats its argument that individual projects are required. FERC Br. 123.

Lastly, FERC and the Utility-Intervenors over-read *Ilano* and ignore its distinguishable facts. The *Ilano* court held that pausing for a NEPA analysis would conflict with the Healthy Forests Restoration Act's mandate for urgent action. 928 F.3d at 780-81. But here, there was no immediate deadline for FERC's rules that would similarly preclude an environmental review. Indeed, FERC took three years just to issue its proposed rules. Moreover, "the designation of landscape-scale areas" at issue in *Ilano* did not change the "status quo," *id.* at 781, whereas Order 872 "gutted" existing rules. 1-PIO_ER-0098, -0201. Thus, *Ilano* is readily distinguishable and FERC's reliance on *Ilano* is misplaced.[8]

[7] Utility-Intervenors' are mistaken to assert this argument is waived. *See* PIO Br. 21; 2-PIO_ER-0424-28; 4-PIO_ER-0944 (comments of Northwest Coalition).

[8] FERC's reliance on *Northcoast Env't Ctr. v. Glickman*, 136 F.3d 660 (9th Cir. 1998) is similarly misplaced. There, the status quo was not altered *and*, unlike FERC here, the agency committed to prepare an EIS before final action. *Id.* at 670.

B. PURPA Does Not Foreclose NEPA Analysis.

FERC next posits that NEPA is inapplicable because "PURPA was not intended specifically to support renewable energy generation and does not represent 'federal clean energy policy.'" FERC Br. 116; *see also* Chamber of Com. *Amicus* Br. 16-17 (Nov. 22, 2021) (similar). FERC is doubly wrong. NEPA applies to *every* major federal action, even if the applicable statute at issue does not specifically relate to environmental concerns. 42 U.S.C. § 4332(C); *Hale v. Norton*, 476 F.3d 694, 700 (9th Cir. 2007). Moreover, PURPA *is* clean energy policy and *does* regard environmental concerns. *FERC v. Mississippi*, 456 U.S. 742, 745-46, 750 (1982); *see also Revised Regulations Governing Small Power Production and Cogeneration Facilities*, 114 FERC ¶ 61,102, at P 70 (2006) (PURPA cogeneration "remains one of the most significant opportunities to improve the efficiency and reduce the environmental impact of United States energy production"); *cf. Ctr. Biol. Div. v. Nat. Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1214 (9th Cir. 2008) (holding the contemporaneously-enacted Energy Policy and Conservation Act of 1975 promoting "energy conservation" and reducing fossil fuel consumption—"complementary" to NEPA's goals).

FERC's reliance on *Public Citizen*, 541 U.S. 752, to assert that PURPA precludes NEPA analysis, is similarly misplaced. FERC Br. 126-127. "*Public Citizen* applies only in those situations where an agency *has no ability* to prevent a certain effect due to its limited statutory authority over the relevant actions." *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 n.20 (9th Cir. 2007) (internal quotations omitted) (emphasis added). In this case, FERC does not claim a lack of any judgment or discretion in crafting the regulations at issue. To the contrary, it claims "broad discretion" to adopt rules that it finds necessary. E.g., FERC Br. 2, 4, 25, 26, 32, 42. Therefore, its reliance on *Public Citizen* must fail. *Nat. Hwy. Traffic Safety Admin.*, 538 F.3d at 1212-14 & n.68.

In sum, nothing in PURPA forecloses NEPA analysis.

C. FERC Cannot Skirt NEPA by Claiming Categorical Exclusion.

FERC and Utility-Intervenors' reliance on FERC's categorical exclusion for clarifying and corrective rules for its policy-based decision to fundamentally change existing rules is also meritless. *See* FERC Br. 123-129; Utilities Br. 77-80 (citing 18 C.F.R. § 380.4(a)(2)(ii)). The premise of FERC's argument is that these changes were "required" by

PURPA. Utilities Br. 79 (quoting Order 872 at P 722); Order 872-A at P 451 (1-PIO_ER-0070). But as explained below, PURPA did not require FERC's changes. If anything, it precluded them.

Moreover, FERC cannot have it both ways. FERC argues at length that it exercised its broad "discretion" to adopt the Ten-Mile Rule. FERC Br. 87-100. Similarly, FERC exercised discretion to not require utilities to offer contract terms of sufficient length to ensure long-term capacity prices would be paid to mitigate the impact of repealing the right to fixed energy prices. Order 872 at PP 331, 349 & n.566 (1-PIO_ER-0146 & -0148); Order 872-A (Glick, Comm'r, dissenting at P 14) (1-PIO_ER-0099-0100); 4-PIO_ER-0907-0908 (comments of Northwest Coalition). If it had discretion to adopt the Ten-Mile Rule and to rescind the Fixed Price Rule while refusing to mitigate with long-term capacity protections, it cannot also claim a lack of discretion precludes environmental review. *See Nat. Hwy. Traffic Safety Admin.*, 538 F.3d at 1212.

FERC also points to an inapt use of a NEPA exclusion in a 2006 PURPA rulemaking. FERC Br. 126. That rulemaking was mandated by a 2005 PURPA amendment and no party argued for NEPA analysis or presented evidence of adverse environmental impacts. 114 FERC ¶ 61,102, at PP 1-4, 118. It establishes no meaningful precedent here, where no similar recent amendments to PURPA required a rulemaking and commenters identified adverse environmental impacts. And, of course, since no party challenged the lack of NEPA analysis for the 2006 rule, no court sanctioned that choice.

Finally, Utility-Intervenors insist on deference to FERC's interpretation of its categorical exclusion rule. Utilities Br. 78. But deference only applies if a regulation is "genuinely ambiguous" and "susceptible to more than one *reasonable* reading." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (emphasis added). An illegal interpretation is *per se* unreasonable. *Id.* at 2415. FERC's interpretation here—that it can avoid NEPA by simply slapping the label "corrective" on its repeal of landmark rules—is not reasonable. It would allow FERC to circumvent NEPA for "controversial" actions with likely environmental risks by labeling underlying statutory interpretations as "corrective." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1027, 1030-32 (9th Cir. 2007); *see also* Order 872 at PP 25-26 (1-PIO_ER-0205).

Tellingly, FERC did not claim a categorical exclusion with its proposed rule—when the EA was due. It shows up only as an improper "*post hoc* rationalizatio[n] advanced to defend past agency action against attack." *Kisor*, 139 S. Ct. at 2417 (internal quotations and citations omitted).

FERC violated NEPA by failing to even prepare an EA—NEPA's minimal analysis process. Accordingly, the Court should vacate Orders 872 and 872-A.

D. Utility-Intervenors' NEPA Standing Challenge Fails.

Utility-Intervenors—but not FERC—challenge Petitioners' NEPA standing. Utilities Br. 65-70. Their argument lacks merit.

Petitioners show numerous harms from FERC's rulemaking. PIO Br. 4-5; Decls. In Supp. of Pet'rs' Opening Br. ("Suppl.ADD")-001-260. That easily meets Petitioners' obligation to show one concrete harm stemming from FERC's rulemaking, which need not be directly tied to the NEPA violation. *Friends of the Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 919 (9th Cir. 2018).

Utility-Intervenors nevertheless challenge Petitioners' harms and argue that (1) purely economic harms are outside NEPA's zone of interest, and (2) pollution-related environmental harms are too speculative to satisfy causation. Petitioners need to show only one harm, so Utility-Intervenors must succeed on both arguments to defeat NEPA standing.[9] Neither argument has merit. Petitioners have standing.

1. **Petitioners' Injuries Are Within NEPA's Zone of Interest.**

FERC's rulemaking harms Petitioners' members' interrelated interests, which satisfies the zone of interest test. While a *purely* economic injury that is not intertwined with an environmental interest is outside NEPA's zone of interest, *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 945 (9th Cir. 2005) (emphasis added), a primarily economic harm is within NEPA's zone of interest if combined with an environmental interest or injury. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA*, 415 F.3d 1078, 1103

[9] Utility-Intervenors do not deny that economic harm will, or has occurred and in effect, appear to concede standing on the PURPA issues. *See* Utilities Br. 4-5, 67 n. 15; *see also* Suppl.ADD-176-83 (Perkins, ¶¶ 31-43, irrigation district's QF harmed due to loss of requirement that all utilities offer fixed prices); Suppl.ADD-119-28 (Stephens, ¶¶ 3-17, same for solar developer with respect to long-term pricing and Ten-Mile rule).

(9th Cir. 2005). And even then, only "a rough correspondence of interests" is required. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1158 (9th Cir. 1998) (golf club's interest in maintaining its grounds—"both natural and built"—falls within NEPA's zone of interest); *see also Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 155 (2010) (farmers' injury from genetically modified seeds having "an environmental as well as an economic component" within NEPA's zone of interest). Moreover, the zone of interest test is "lenient," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014), and "the benefit of any doubt goes to the plaintiff," *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012).

Petitioners' economic interests are, at a minimum, intertwined with environmental interests. For example, Petitioner CREA is an intergovernmental organization of local governments, irrigation districts, and renewable energy developers whose purposes include creating "economically and environmentally responsible electric generation within the State of Oregon." Suppl.ADD-168 (Perkins, ¶ 4). And as this Court recognized in *Tulalip Tribes of Washington v. FERC,* Congress intended PURPA to both promote qualifying facilities ("QFs") and protect the environment. 732 F.2d 1451, 1455 (9th Cir. 1984). Petitioners' members also include owners and operators of small hydropower QFs integrated with irrigation systems with a mission of supporting "ecologically, socially, and financially sustainable agriculture[.]" Suppl.ADD-172-83 (Perkins, ¶¶ 18-44). Reduced revenue from renewable energy sales directly harms their ability to advance sustainable agriculture efforts, including fish screens, and other environmental protections. *Id.*; *see also* Suppl.ADD-022-27 (Dubay, ¶¶ 3-27, FERC's revised pricing rule harms member's solar QF that supports sustainable farm and spiritual mission).

By diluting PURPA's requirement that reluctant utilities purchase energy from environmentally-preferential facilities, Order 872 also implicates Petitioners' mixed economic and environmental interests of transitioning away from fossils fuels to less polluting forms of electricity generation. Petitioners' procedural right to engage in the NEPA process for rules that impede their goals of transitioning to less polluting energy is connected to their environmental interests. E.g., Suppl.ADD-167-71, -183 (Petitioner CREA Director Perkins, ¶¶ 3-11, 44); Suppl.ADD-051-56 (Petitioner Georgia Interfaith Power & Light Director Norred, ¶¶ 5-20).

Petitioners' intertwined economic and environmental interests exceed the minimal "rough correspondence" required to be "arguably" within NEPA's zone of interest. *Presidio Golf Club*, 155 F.3d at 1158 (quoting *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Petitioners have standing, and Utility-Intervenors' zone of interest argument fails.

2. Petitioners' Injuries Satisfy NEPA's Relaxed Causation Requirement for Article III Standing.

Petitioners also separately show standing based on purely environmental harms—like additional pollution—that are indisputably within NEPA's zone of interest. Utility-Intervenors argue that such harms fail Article III's causation requirement. Utility-Intervenors are wrong again.

NEPA is a procedural statute that requires environmentally informed decision-making and provides a necessary process to ensure agencies consider the environmental consequences of their actions. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1115 (9th Cir. 2002). Petitioners suffer a cognizable "procedural injury" caused by a

NEPA violation when FERC makes a decision "without having… an analysis (with public comment) of the likely effects of their decision on the environment" because an environmental harm is more likely. *Citizens for a Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003) (internal quotation omitted). That inference of causation from an uninformed decision satisfies standing requirements. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011).

Moreover, Petitioners demonstrated a direct causal link in this case—satisfying standing even without the inference of causation available under NEPA. Order 872 will reduce renewable generation development, leading to an increase in fossil-fuel generation that produces pollution that harms Petitioners' members. *See* Suppl.ADD-141-49, -203-10 (industry expert demonstrating that reduced encouragement of QFs will result in more pollution impacting Petitioners' members); Suppl.ADD-011-018 (Petitioner's members harmed by fossil fuel pollution in affected states). Thus, even though a procedural injury suffices, in this case Petitioners also demonstrated that FERCs decision will cause them environmental harm.

Utility-Intervenors' argument that Petitioners may not rely on a "chain of future possibilities" and "decisions of independent actors" also has no basis in caselaw applying NEPA. Utilities Br. 68-69.[10] Under NEPA, the question "is whether there is a reasonable probability that the challenged procedural violation will harm the plaintiffs' concrete interests, *not how many steps must occur before such harm occurs*." *Navajo Nation v. DOI*, 876 F.3d 1144, 1161 (9th Cir. 2017) (quoting *Citizens for Better Forestry*, 341 F.3d at 975) (emphasis added). The burden of determining and documenting environmental impacts is on FERC, not Petitioners. Petitioners are not required to create the environmental impact analysis FERC neglected in order to show particular localized impacts (even though Petitioners did so in this case). *See Citizens for a Better Forestry*, 341 F.3d at 971-72.

[10] Utility-Intervenors rely on cases that did not arise under NEPA. Utilities Br. 68-69 (citing *California v. Texas*, 141 S. Ct. 2104, 2112, 2117 (2021) (constitutional challenge to the Affordable Care Act); *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 559-60 (9th Cir. 2019) (Reenactment Provision of the Congressional Review Act); *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1141-43 (9th Cir. 2013) (Clean Air Act); *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 649-54 (9th Cir. 2017) (Commerce Clause and preemption claims); *Am. Petroleum Inst. v. U.S. EPA*, 216 F.3d 50, 62-68 (D.C. Cir. 2000) (Resource Conservation and Recovery Act)).

Utility-Intervenors make a similar, flawed, argument that Petitioners' environmental harms are too speculative because they turn on how independent third parties—including Utility Intervenors' members—will implement FERC's revised rules. Utilities Br. 68-69. But NEPA standing does not require "smoking-gun allegations of harm." *Navajo Nation*, 876 F.3d at 1163. And it does not require Petitioners to wait until states implement FERC's rule changes. *Lockyer*, 575 F.3d at 1011 (plaintiffs not required to wait for individual states to implement a rule change). Instead, causation is satisfied by risk of future harm arising from FERC's rule allowing states to take harmful actions.

Moreover, in this case there is more than risk of harm: the harms are already occurring. Georgia, Idaho, and nonregulated utilities are already undermining QF development in the exact way FERC's new variable pricing rules allow. Suppl.ADD-054-055 (Norred, ¶¶ 16-17); Suppl.ADD-178-79 (Perkins, ¶¶ 36-37); *see also In re Idaho Power,* Order No. 34794, 2020WL5912308 (Idaho Pub. Util. Comm'n. Oct. 2, 2020) (short run pricing only). And Montana is currently moving to revoke the right to long-term fixed-prices. Notice of Opportunity for

Informal Comment, Docket No. 2021.09.118 (Mont. Pub. Serv. Comm'n Nov. 22. 2021).[11]

Petitioners' procedural rights to comment and attempt to influence FERC's rules, and environmentally informed decision-making, were harmed by FERC's failure to study and disclose the likely environmental impact from stripping rights from independent renewable energy development. *See Citizens for a Better Forestry*, 341 F.3d at 971-72. There is at least reasonable probability that an informed decision would have reduced the resulting harms to Petitioners' interests. Petitioners satisfy the causation prong for standing.

II. Order 872's Ten-Mile Rule is Unlawful.

FERC adopted its new Ten-Mile Rule to impose a policy disfavoring "disaggregation"—where the same entity owns multiple

[11] NorthWestern Energy's amicus brief confirms the exact environmental impact Petitioners identified. NorthWestern complains that it was compelled to buy too much renewable energy under FERC's 1980 rules, displacing the utility's polluting fossil fuel generation, while the utility prefers FERC's new rule that allows it to more slowly transition to clean energy over a 25-year period. *Amicus* Br. of N.W. Corp. at 3 (Nov. 22, 2021).

generators on non-adjacent property—rather than to interpret 16 U.S.C. § 796(17)(A)(ii)'s reference to "at the same site." The statute does not support FERC's policy. Moreover, FERC ignored or mischaracterized serious reliance interests in the prior rule based on its erroneous assertion that the new rule has no retroactive effects.

A. FERC Cannot Justify its Definition of "at the Same Site."

FERC struggles to shoehorn its policy to aggregate non-adjacent QFs into a statute that does not support it. FERC Br. 87-88, 91-94. FERC's purported basis shifted throughout the rulemaking process. FERC first claimed the rule was intended to define "a single facility." NOPR at PP 9, 94, 101-03, 106 (5-PIO_ER-1164-65, -1176-78). But confronted with its own prior statements that PURPA does not turn on an "integrated" project or a single "facility," *El Dorado Cty. Water Agency & El Dorado Irrigation Dist.*, 24 FERC ¶ 61,280, 61,578 (1983), FERC grasped for a new justification.

FERC's final order claims that the rule defines the statutory term "the same site." Order 872 at PP 459 n.728, 473-476 (1-PIO-ER-0160, -0162); Order 872-A at P 261 (1-PIO_ER-0041-42). So, FERC swapped out the purported basis for the rule, but did not change the substance.

Instead, it simply "change[d] references" from "facility" to "site," Order 872 at P 459 n.728,476 (1-PIO_ER-0162), and claimed that all of the non-geographic factors originally created to define an "integrated project" as a "single facility" now define the geographic terms " same site." *See* PIO Br. 28; Order 872 at PP 467-68, 508-09 (1-PIO_ER-0161, -0166-67); Order 872-A at PP 246, 261-62 (1-PIO_ER-0039, 0041-42).

On appeal FERC now claims that the rule does not actually define "at the same site" either, but answers the supposedly broader question whether "more than one facility should be considered to be located at the same site." FERC Br. 93; *see also* Utilities Br. 21-22. It is unclear how this new formulation is different from Order 872's claim to interpret "same site." Order 872 PP at 508-09 (1-PIO-ER-0166); Order 872-A at PP 246, 261-62 (1-PIO_ER-0039, 0041-42). The operative terms in both are "same site."

FERC's evolving justification for its Ten-Mile Rule, including its purported purpose and statutory basis, precludes deference. *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 831 (9th Cir. 2009) (agencies receive no deference to interpretations that conflict with plain meaning, change over time, or constitute a mere litigation position); *Turlock Irrigation Dist. v. FERC*, 903 F.3d 862, 868 (9th Cir. 2018) (review is limited to the order's stated grounds for the agency's action) (quoting *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

Moreover, deference would not help FERC in this case because the Ten-Mile Rule is at odds with the statutory text. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (no deference to an interpretation that "goes beyond the meaning that the statute can bear"); *see also Amalgamated Sugar*, 563 F.3d at 831-32 (9th Cir. 2009) (reasonable interpretation must be consistent with the statute's plain meaning); PIO Br. 28-29. The rule aggregates non-adjacent generating facilities, up to ten miles apart, based on factors originally intended to define an integrated or "single facility" and unrelated to the statute's "at the same site" language.

Rather than defending its rule on the plain meaning of "same site," FERC attempts to bootstrap the Ten-Mile Rule using the longstanding one-mile rule, which FERC contends was also based on non-geographic factors, FERC Br. 93; *see also* Utilities Br. 22. But the 1980 one-mile rule was never challenged and is not at issue in this case.

Furthermore, the 1980 rule is also not analogous. It operated to *exclude* facilities located within one mile as not located at the same site, rather than *expanding* the definition to draw in non-adjacent facilities located miles apart based on non-geographic factors. *See N. Laramie Range All. Pioneer Wind Park 1, LLC Pioneer Wind Park II, LLC*, 139 FERC ¶ 61,190, 62,316 (2012).

But, even if the 1980 regulation included non-geographic factors to define "same site," it cannot justify the Ten-Mile Rule. A rule that conflicts with the statute's text does not become lawful merely because the agency claims it previously did the same thing. The Ten-Mile Rule is only permissible if it comports with a reasonable interpretation of the statutory term "same site," which does not depend on what FERC said in 1980. *See Michigan v. E.P.A.*, 576 U.S. 743, 751 (2015) (agency interpretations must operate within bounds of reasonable interpretation). FERC makes no attempt to tie the rule to the statutory text.

FERC's Ten-Mile Rule is untethered to the plain meaning of "at the same site." FERC is owed no deference and the Court should vacate the Ten-Mile Rule.

B. FERC Cannot Explain Away Retroactive Application nor Justify its Dismissal of Serious Reliance Interests.

Order 872's Ten-Mile Rule means that existing QFs lawfully sited between one and ten miles apart decades ago can now be deemed too close and lose QF status if they undergo paperwork changes requiring recertification. That upsets reliance interests and constitutes an unlawful retroactive rule. FERC responds to both problems with two arguments: (1) the Ten-Mile Rule does not apply retroactively because FERC said so, and (2) the rule applies to existing facilities only when they undergo certain changes that make them effectively new legal entities. FERC Br. 100-04. Neither argument has merit.

1. The Ten-Mile Rule Unlawfully Applies Retroactively.

Contrary to FERC's insistence that the Ten-Mile Rule only applies prospectively, FERC Br. 101; *see also* Utilities Br. 27, the rule retroactively strips existing QFs located within ten miles of each other of their rights to sell power under PURPA. PIO Br. 35-37. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994); *Ixcot v. Holder*, 646 F.3d

1202, 1213 (9th Cir. 2011) (rule changes applicable to immigration applications filed before enactment are unlawfully retroactive). Indeed, Order 872 expressly states that existing facilities sited under the prior one-mile rule can lose their QF status if as little as a 10 percent change in ownership occurs. Order 872 at P 550 (1-PIO_ER-0171-72). Thus, FERC's own example of the Ten-Mile Rule's application to already-constructed, operating, lawfully sited QFs belies its denial of retroactivity.

2. FERC Unlawfully Dismissed Reliance on the One-Mile Rule.

Application of the Ten-Mile Rule to existing facilities that undergo what FERC deems to be "substantive" changes—including those wholly unrelated to physical siting—impairs existing rights based on siting decisions lawfully made under the prior one-mile rule. FERC acknowledged the reliance interests raised by commenters, but effectively dismissed them as legally nonexistent. Order 872 at PP 530-35 (1-PIO_ER-00169-70). FERC merely offered the truism that "rules can and do change." Order 872-A at PP 316-18 (1-PIO_ER-0049-50).

However, because the Ten-Mile Rule was not written "on a blank slate," FERC had to "assess whether there were reliance interests" in the prior rule, determine whether that reliance was significant, and weigh reliance interests against competing policy concerns. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915 (2020). FERC's failure to do so was arbitrary and capricious. *Nat'l Urb. League v. Ross*, 977 F.3d 770, 778 (9th Cir. 2020). In fact, because FERC both failed to consider reliance interests and denies that the Ten-Mile Rule even implicates reliance interests, FERC's decision was doubly arbitrary and capricious. *Regents of the Univ. of California*, 140 S. Ct. at 1913-15.

On appeal FERC attempts to dismiss reliance interests by arguing that when an existing facility recertifies after making certain changes it becomes entirely "new" in the eyes of the law. *See* FERC Br. 101-04; *see* Order 872-A at P 324 (1-PIO_ER-0050); *see also* Utilities Br. 27-28 (applying this argument to retroactivity). FERC's argument is akin to asserting that replacing one plank of decking makes a ship wholly new. *See In re S. Recycling, L.L.C.*, 982 F.3d 374, 386 (5th Cir. 2020) (discussing Theseus' ship). But two QFs sited more than a mile apart under the old rule do not become "new" and able to comply with FERC's new ten-mile spacing requirement.

FERC fails to establish that all "substantive" changes—such as a change in 10 percent ownership share alone—makes a QF legally new so that FERC can ignore their reliance interests. *See* Order 872A at PP 318, 324 (declaring unsupported conclusion) (1-PIO_ER-0050). Nor does FERC demonstrate that QFs expected their lawful siting decisions made years ago to locate within ten miles of each other would be used to disqualify them for wholly unrelated changes.[12]

FERC's failure to consider reliance interests is also not excused by punting to future case-by-case decisions the threshold for which "substantive" changes subject existing QFs to the new rule. FERC Br. 103-04; Order 872-A at P 326 (1-PIO_ER-0051); Order 872 at P 511 (1-PIO_ER-0167). Promises of potential administrative grace in future adjudications cannot save a rule that radically departs from past

[12] FERC's position that it did not need to consider reliance interests dispenses with Utility-Intervenors' argument that FERC did consider them. *See* Utilities Br. 25-27. In any case, the statements Utility-Intervenors point to fail to satisfy FERC's obligation to "weigh any such interests against competing policy concerns." *Regents of the Univ. of California*, 140 S. Ct. at 1915.

decisions that QFs relied upon in good faith to negate millions of dollars of investment. *Pfaff v. U.S. Dep't of Hous. & Urb. Dev.*, 88 F.3d 739, 748 (9th Cir. 1996); *see also Ford Motor Co. v. F.T.C.*, 673 F.2d 1008, 1009 (9th Cir. 1981) (agencies should not use adjudication to give new substantive meaning to broadly applicable rules).

Because FERC failed to consider and weigh serious reliance interests and ignored the retroactive effect of the rule, the Ten-Mile Rule is invalid and the Court should vacate.

III. FERC's Rescission of Its Fixed Price Rule Is Unlawful.

FERC's original PURPA rules included the Fixed Price Rule, which provided QFs a predictable revenue stream based on forecasted costs, even though those prices may differ from costs calculated "at the time of delivery". 18 C.F.R. § 292.304(b)(5) and (d)(2)(ii) (1980); Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the PURPA, 45 Fed. Reg. 12,214, at 12,224 (Feb. 25, 1980). FERC interpreted PURPA's cap on prices at the purchasing utility's cost of alternative energy to allow "estimates of future costs," rather than undermining the certainty of fixed-prices with a "minute-by-minute evaluation of costs which would be checked against" long-term prices. 45 Fed. Reg. at 12,224; *see also* Small Power Production and Cogeneration—Rates and Exemptions, 44 Fed. Reg. 61,190, 61,196 (Oct. 24, 1979) (long-term estimates satisfy statute "regardless of" short-run costs).

Order 872 rescinded the Fixed Price Rule based on FERC's new statutory interpretation that uses short-run calculations of energy costs as a check on long-run forecasts—the very interpretation FERC previously rejected.

FERC's refusal to even acknowledge that change in interpretation constitutes arbitrary and capricious decision-making, even if the new interpretation were otherwise permissible. Moreover, FERC's new interpretation is impermissible because it creates irreconcilable conflicts between several PURPA provisions and is internally inconsistent. Orders 872 and 872-A must be vacated for both reasons.

A. FERC Denies Adopting the Interpretation That Is Foundational to its Decision to Rescind the Fixed Price Rule.

FERC implausibly denies adopting the very interpretation of PURPA that it applies to rationalize rescinding the Fixed Price Rule.

FERC contends that it *must* rescind the Fixed Price Rule because long-term estimates that exceed real-time calculations—which it calls the "actual avoided cost"—violate PURPA. E.g., FERC Br. 57; Order 872-A at P 451 (1-PIO_ER-0070). Yet FERC also denies using short-run cost calculation as the singular measure of "actual" avoided costs as a check against estimated costs. FERC Br. 47-49.

FERC attempts to obscure that inconsistency by claiming that the Fixed Price Rule was based on two separate justifications: (1) the statute does not mandate a real-time calculation, and (2) a factual "prediction" that overestimations and underestimations would exactly "balance out." *Id.*; Utilities Br. 30-31.[13] FERC claims it is not changing its first premise but instead revoking the Fixed Price Rule only because new evidence negates the second justification's "factual underpinning" that long-run forecasts and real-time calculated costs would exactly balance out. FERC Br. 50.

[13] The 1980 Fixed Price Rule only applied to QFs who commit to provide energy pursuant to legal obligations (i.e., contracts). 18 C.F.R. § 292.304(d)(2)(ii). It did not apply to "as-available" sales. Accordingly, Utility-Intervenors' argument that short run pricing is appropriate for as-available sales is irrelevant. Utilities Br. 32.

FERC's reinterpretation of the 1980 rulemaking misstates the actual basis for the Fixed Price Rule. The second justification never existed—the original Fixed Price Rule was *not* based on a "factual underpinning" that estimates would "balance out" against real-time cost calculations for each contract. In fact, FERC expressly and repeatedly eschewed that very argument. Moreover, FERC's new two-justification theory is internally contradictory.

1. FERC's 1980 Fixed Price Rule Interpreted "Incremental Cost…of Alternative Electric Energy" to Rely on Estimates Rather Than Requiring Real-Time Calculations.

FERC's original Fixed Price Rule relied on a legal interpretation that estimated future costs, standing alone, satisfy the statute's reference to the cost of alternative energy, not based on a factual assumption that long-term and short-run cost calculations would exactly balance out. 45 Fed. Reg. at 12,224; 44 Fed. Reg. at 61,196; *see also Ass'n of Businesses Advocating Tariff Equity v. Pub. Serv. Comm'n*, 173 Mich. App. 647, 669 (1988) ("FERC has explicitly determined that, for the purposes of PURPA, 'avoided costs' is a number subject to approximation, based on estimates" and not a single correct number).

In fact, FERC expressly rejected using real-time cost calculations as a "check" against the long-term estimates, 45 Fed. Reg. at 12,224, finding long-term estimates lawful "regardless of" the real-time costs. 44 Fed. Reg. at 61,196.

As FERC explained in 1995, prices set based on long-term cost estimates "meet the statutory and regulatory standards *even* if they 'differ from avoided costs at the time of delivery.'" *N.Y. State Elec. & Gas Corp.*, 71 FERC ¶ 61,027 (1995) (emphasis added).[14] On appeal of that decision, FERC explained to the D.C. Circuit that PURPA does not require FERC "to tie its avoided-cost methodology only to calculations of avoided-cost which exist at the time of delivery" and instead allows prices "based on an estimate of avoided cost calculated at the time the obligation is incurred *even though* the rates may exceed avoided cost at the time of delivery…." Br. for Resp't FERC, No. 95-1314, 1996 WL 34483007, at *37-*41 (DC Cir. Oct. 30, 1996) (emphasis added) ("FERC NYSEG Br.").

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[14] The Department of Energy agreed with that interpretation as "a reasonable construction of" 16 U.S.C. § 824a-3(b). *Id.* at *6.

FERC's 1980 rulemaking did refer to balancing of long- and short-run calculations, but not as a factual premise as FERC now contends. Instead, FERC's statement "that in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out," 45 Fed. Reg. at 12,224,[15] explained FERC's reasons for rejecting policy arguments against using long-term forecasts. FERC noted that fixed prices based on estimates are not inherently and always higher than short-run calculations to reject the policy arguments about "subsidies." *Id.* However, it did not base the Fixed Price Rule on an assumption that the two calculations are always equivalent. In fact, as FERC explained to the D.C. Circuit, it's "PURPA rules were *not predicated* on the assumption that overestimations and underestimations would balance out over the life of an individual contract." FERC NYSEG Br. at *45-*46 (emphasis added).[16] FERC now claims the exact opposite in this Court. FERC Br. 48-49.

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[15] FERC used quotation marks around "overestimations" and "underestimations" in the 1980 Order to reflect that those were terms used by PURPA opponents, not FERC. It also referred to balancing out "in the long run," not over the course of specific contracts.

[16] In fact, FERC was responding to and rejecting the very argument that it now uses as the premise to rescind the Fixed Price Rule: that

2. FERC's Current Claim That PURPA Precludes Fixed Prices When Long and Short-Run Calculations Have Not Balanced Out Conflicts with Its Interpretation That PURPA Does Not Require a Short-Run Calculation as a Check on Long-Run Projections.

FERC's revisionist "two justifications" version of its 1980 Fixed Price Rule also suffers from internal inconsistency. It cannot be true that FERC retained its original interpretation that no minute-by-minute evaluation of costs is required as a check on long-run estimates, and also that "overestimations" of long-run estimates compared to short-run "actual" calculations violate PURPA. FERC Br. 44-45, 49-50, 57-58, 63-64; *see also* Utilities Br. 33, 40 (making similar argument based on short-run calculation as "actual" avoided costs). If the short-run cost is the "actual" avoided cost and used to measure PURPA compliance for long-term forecasts, then FERC has changing its original interpretation. *Compare* FERC Br. 50 (FERC "concluded that Fixed Price Rule potentially could violate the statutory avoided cost cap" because long-term forecasts exceed short-run calculations) *with* 45

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the Fixed Price Rule is "invalid because [it] was predicated on an assumption that overestimations and underestimations of [the utility's] long-range avoided cost 'would balance out over the life of an individual contract.'" *Id.* at *46 (quoting the utility's brief) (emphasis original).

Fed. Reg. at 12,224 (statute does not require minute-by-minute cost calculation as a check on long-term forecasts); 44 Fed. Reg. at 61,196 (future estimated costs accepted "regardless of" short-run costs); FERC NYSEG Br. *37-*41 (Fixed Price Rule was "not predicated on the assumption that overestimations and underestimations would balance out…"). On the other hand, if the short-run cost is not the "actual" measure, and forecasts are equally compliant with the statute's reference to the cost of alternative energy, then forecasts comply with PURPA regardless of comparison to the short-run calculation and FERC is not required to rescind the Fixed Price Rule. FERC's purported "two justifications" are mutually exclusive and contradictory.

3. FERC's New Interpretation Reflects an Unacknowledged Change.

Ultimately, FERC's insistence that it provided "a reasoned explanation for the change" to rescind the Fixed Price Rule focuses on the wrong "change." FERC Br. 50. The relevant change is FERC's interpretation of the phrase "the incremental cost… of alternative electric energy" in 16 U.S.C. § 824a-3(b). From 1980 until Order 872, FERC interpreted that phrase to allow long-term estimates to constitute the cost of alternative energy, rather than requiring real-time calculations. 45 Fed. Reg. at 12,224; 44 Fed. Reg. at 61,196; FERC NYSEG Brief at *37-*41. Order 872 applies the opposite interpretation–using the real-time cost calculation as the statutorily-mandated "actual" price and deeming higher long-run estimates to be "prohibited by PURPA." Order 872-A at P 451 (1-PIO_ER-0070). FERC's refusal to even acknowledge that change constitutes arbitrary decision-making, regardless of whether FERC's new interpretation is correct (which it is not). PIO Br. 45; *Encino Motorcars LLC v. Navaro*, 579 U.S. 211, 222 (2016) (a failure to acknowledge awareness of a changed position is "arbitrary and capricious… and receives no *Chevron* deference").

FERC makes two arguments that it has not changed its interpretation of avoided costs: (1) that it continues to offer fixed capacity prices, and (2) that states are still allowed to provide fixed energy prices if appropriate. FERC Br. 64-65. First, FERC is wrong that its new rules guarantee QFs fixed capacity payments. As Chairman Glick's dissent correctly noted, the promise of fixed capacity prices is illusory because FERC rules and precedents have allowed states to deny any capacity price. Order 872 (Glick, Comm'r, dissenting at P 12) (1-PIO_ER-0203).[17]

Second, both of FERC's arguments fail to address the fact that FERC's premise for rescinding the Fixed Price Rule as to energy prices relies on a different interpretation of avoided cost than FERC's prior interpretation. That it only justified rescinding the Fixed Price Rule for energy on that changed interpretation, or allowed states to voluntarily fix prices, does not negate the interpretation change.

FERC's failure to acknowledge, much less explain its changed interpretation, requires vacatur of FERC's decision to rescind the Fixed Price Rule.

B. FERC's Justification for Rescinding the Fixed Price Rule Violates Canons of Interpretation by Creating an Avoidable Conflict with Other PURPA Policies.

FERC's new interpretation of 16 U.S.C. § 824a-3(b)'s cost of alternative energy language is also wrong. Limiting that phrase to real-time calculations as the "actual" avoided cost creates internal

[17] FERC points to fixed capacity prices as a "key element" of its new pricing rule without ever acknowledging such requirement is illusory. FERC Br. 60; *see also id.* at 62, 68, 72, 74.

conflict with PURPA's instruction to encourage QF development and avoid discrimination. PIO Br. 41-42.

FERC's interpretation from 1980 until Order 872 "reconciled" PURPA's mandates by interpreting the cost of alternative energy to include long-run estimates and rejecting the interpretation mandating real-time checks of avoided costs. 45 Fed. Reg. at 12,224; *Windham Solar LLC & Allco Fin. Ltd.*, 157 FERC ¶ 61,134, at P 8 (2016); FERC NYSEG Brief at *40 (Congress left the time frame within which avoided costs are calculated open, rather than tying it to avoided costs that exist at the time of delivery). Long-term fixed prices therefore satisfy the price cap in 16 U.S.C. § 824a-3(b), while also providing investors with the revenue certainty of fixed prices "to fulfill [PURPA's] mandate to encourage cogeneration and small power production." 44 Fed. Reg. at 61,196; *see also* 45 Fed. Reg. at 12,224.

FERC admits that its new interpretation denies long-term price certainty, "limit[ing] the Commission's ability to encourage QFs" and address "claims of discrimination under PURPA." Order 872 at P 82 (1-PIO_ER-0116). That is, under FERC's new interpretation of PURPA's avoided cost cap, FERC cannot meet PURPA's mandate to encourage and avoid discriminating against QFs. That is the very conflict between PURPA's mandates that FERC's original interpretation intentionally avoided. Ironically, it is FERC's new interpretation that violates the Supreme Court's instruction that FERC quotes to apply statutes "as a symmetrical and coherent regulatory scheme." FERC Br. 38 (quoting *Brown & Williamson*, 529 U.S. at 133).

FERCs' original interpretation harmonized PURPA's mandates. Order 872's new interpretation creates internal conflict. FERC's new interpretation is erroneous and therefore FERC's decision to rescind the Fixed Price Rule based on that interpretation is invalid. PIO Br. 40-43.

C. FERC's Premise that Fixed Price Contracts Inherently Exceed Avoided Costs Is Irreconcilable with FERC's Decision to Provide States "Flexibility" to Impose Fixed Prices.

FERC's new interpretation of PURPA's avoided-cost cap is also arbitrary and capricious because FERC does not consistently apply it. *See id.* at 45-47. Order 872 contends that overestimations are unlawful and inevitable in long-term forecasts, while simultaneously authorizing states to voluntarily utilize such long-term forecasts.[18] FERC's only response to that obvious inconsistency is to contend that Order 872 merely allows states to "evaluate" whether over- and underestimations will "balance out." FERC Br. 59. That misses the point that if FERC believes it must rescind the Fixed Price Rule because long-term estimates "routinely exceed avoided costs in the ordinary course of events" and "inevitabl[y]… will deviate from actual avoided costs" in violation of PURPA, it may not also allow states to routinely and inevitably violate PURPA. Order 872 at P 253 (1-PIO_ER-0137); Order 872-A at P 76 (1-PIO_ER-0016).

FERC's inconsistency reveals Order 872's erroneous, results-oriented, reasoning. FERC's justification for revoking the Fixed Price Rule is arbitrary and capricious and should be vacated.

IV. Order 872 Unlawfully Discriminates Against QFs.

Congress enacted PURPA to overcome structural advantages of monopoly utilities over alternative energy producers. *Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 850 (9th Cir.

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[18] Petitioner CREA, among others, preserved this argument, despite Utility-Intervenors' contention otherwise. *See* 2-PIO_ER-0386-87.

1994). Critical to that purpose is PURPA's prohibition of discriminating against QFs in favor of monopoly utilities. 16 U.S.C. § 824a-3(b)(2); *Pioneer Wind Park I, LLC*, 145 FERC ¶ 61,215 at P 37 and n.72 (2013). Order 872 violates that protection by rescinding the Fixed Price Rule that served as a bulwark against discriminatory treatment of QFs.

FERC's original Fixed Price Rule allowed QFs to establish fixed contract prices for the term of their investment in alternative power generation—obtaining a price risk hedge typical of all long-term contracts. Order 872-A (Glick, Comm'r, dissenting at P 15) (1-PIO_ER-0100); 44 Fed. Reg. at 61,196 (noting long-term fixed prices for energy is "a normal result of risk allocation resulting from contractual commitments… that… must be permitted if the Commission is to fulfill its mandate to encourage cogeneration and small power production"). That is equivalent to the price risk hedge that monopoly utilities enjoy when states allow them to recover all investments, production costs, fuel contracts, and power purchase obligations, even when they exceed short-run real-time energy prices. Order 872 (Glick, Comm'r, dissenting at P 14) (1-PIO_ER-0203); Order 872-A at P 15 (1-PIO_ER-

0008); 5-PIO_ER-1156 (comments of FTC Commissioner Rebecca Kelly Slaughter); PIO Br. 47-49.

By rescinding the Fixed Price Rule, FERC allows States to deny fixed-price contracts to QFs, imposing maximum price risk, even though States continue to hedge all price risk of utilities by forcing ratepayers to cover energy costs in excess of short-run prices. Order 872 (Glick, Comm'r, dissenting at P 14) (1-PIO_ER-0203); Order 872-A at P 15 (1-PIO_ER-0008); Order 872 at P 257 (1-PIO_ER-0138) ("the question of fixed versus variable energy rates is a question of how risk from increases in avoided energy costs over the life of a QF contract or other LEO should be allocated"). That is textbook discrimination.

FERC and Utility-Intervenors make three unavailing arguments. First, they argue that rescinding fixed energy prices does not discriminate because QFs are still able to establish long-term capacity prices, resembling "contracts typically used elsewhere in the electric industry, including by public utilities" with fixed capacity and variable energy rates. FERC Br. 73-75; Utilities Br. 51. That argument misses the mark because the discriminatory treatment in this case involves the *energy* pricing. FERC's contention that its rules avoid *also* discriminating in capacity pricing does not cure the discriminatory energy pricing.[19]

FERC also cites no evidence that it is "typical" in the utility industry for utilities to incur price risk when the cost to run the power plants they own exceed the short-run market price. FERC's only citation for that claim is to its own unsupported assertion in Order 872. FERC Br. 74-75 (citing Order 872 at P 39).

Nor does a purported utility contract that includes variable energy pricing cure discrimination vis-a-vis the utility. Monopoly utilities run their own power plants, utilize long-term fuel contracts, and enter long-term power purchase agreements that do not cap their energy costs at the short-run, moment-of-delivery cost. PIO Br. 47-49; Order 872 (Glick, Comm'r, dissenting at PP 14-15) (1-PIO_ER-0203); Order 872-A (Glick, Comm'r, dissenting at PP 15-16) (1-PIO_ER-0100). It is the fact that states guarantee long-term, risk-free certainty for those monopoly utility costs, contrasted with the lack of a comparable fixed-price contract for QFs who must assume the risk of the short-run

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[19] As noted above, FERC's purported requirement that QFs be paid fixed capacity rates is illusory. Order 872 (Glick, Comm'r, dissenting at P 12) (1-PIO_ER-0203).

price, which unlawfully discriminates. Order 872 (Glick, Comm'r, dissenting at P 14) (1-PIO_ER-0203).

Second, FERC and Utility-Intervenors erect and attack a strawman that "Congress… withheld from the Commission the authority to provide to QFs the same opportunity to recover costs... that franchised electric utilities have to recover their costs at retail" through cost-based ratemaking. FERC Br. 75-76; Utilities Br. 51-52. Cost-based ratemaking is not necessary to provide non-discriminatory treatment. As FERC's own Fixed Price Rule demonstrated for forty years, providing price certainty with fixed energy price contracts provides non-discriminatory price risk treatment without utilizing cost-based ratemaking for QFs.

As dissenting Commissioner (now Chairman) Glick, Commissioner Slaughter of the Federal Trade Commission, and state regulators all recognized, FERC's Fixed Price Rule provided QFs with an "equivalent right to receive fixed-price contracts for energy [which] proved an integral element of the Commission's ability to prevent discrimination against QFs." Order 872-A (Glick, Comm'r, dissenting at P 15 and n.37) (1-PIO_ER-0100); 5-PIO_ER-1158 (comments of FTC

Commissioner Rebecca Kelly Slaughter); *see also Vote Solar v. Mont. Dep't of Pub. Serv. Regul.*, 473 P.3d 963 at P 70 (Mont. 2020) (long-term contract certainty for QFs provides similar treatment to guaranteed rate recovery for utility-owned generation); *In re Crazy Mountain Wind*, Order 7505b, 2017 WL 67612, at P 74 (Mont. Pub. Serv. Comm'n Jan. 5, 2017) ("a long-term fixed-price QF power purchase agreement is a fixed-price hedge similar to utility acquisition of a generating resource").

Third, FERC and Utility-Intervenors misread the Supreme Court's *American Paper Institute* opinion to argue that as long as QFs still receive "full avoided cost" for energy, FERC need not provide anything further to avoid discriminating. FERC Br. 75; Utilities Br. 50-51 (citing *Am. Paper Inst. v. Am. Elec. Power Serv.*, 461 U.S. 402, 413 (1983)). That argument ignores the difference in price risk treatment between fixed price contracts and variable price contracts: utilities are shielded from risk while Order 872 allows states to impose that risk on QFs. The *American Paper Institute* opinion did not address that difference.

Instead, *American Paper Institute* addressed challenges to FERC's 1980 rules requiring full avoided costs as setting the price too high. 461 U.S. at 406. It held that FERC had statutory authority to set a price at the purchasing utility's full avoided cost, as opposed to a fraction of the utility's' avoided costs, because doing so "plainly satisfies the nondiscrimination requirement" in the statute. *Id.* at 413. The Court rejected arguments that FERC must set the rate at the "lowest possible reasonable rate…." *Id.* at 413-14. The Court did not hold, as Utility-Intervenors imply, that labeling a rate "full avoided cost" is *per se* non-discriminatory, especially when other aspects of the pricing like price risk allocation significantly differs. The *American Paper Institute* opinion is silent as to discrimination in the different price risk between long-run and short-run prices because that issue was not before the Court.

FERC and Utility-Intervenors fail to show that allowing states to impose maximum risk on QFs while insulating monopoly utilities from that risk comports with PURPA's clear prohibition on discrimination. 16 U.S. § 824a-3(b)(2).

V. Order 872's Locational Marginal Price Presumption Unlawfully Changes the Burden of Persuasion and Lacks an Evidentiary Foundation.

Order 872's Locational Marginal Price ("LMP") presumption allows states to set the price for QF energy at a specific auction price. To avoid that presumption, challengers bear the burden to disprove the presumption by challenging it in court and proving that the purchasing utility's marginal cost of energy is not reflected by the LMP. PIO Br. 55-56.[20] That unlawfully shifts the burden of proof. It also lacks the requisite evidentiary foundation to create a presumption.

A. The Text and Effect of FERC's LMP Presumption Unlawfully Shifts the Burden of Persuasion.

FERC and Utility-Intervenors do not dispute that FERC is prohibited from promulgating a rule that shifts the burden of persuasion. FERC Br. 84 (quoting *Cablevision*, 649 F.3d at 716, that agencies may only adopt rules that shift the burden of production not

[20] In fact, it is not clear how a challenger can overcome the presumption because the rule does not actually refer to the utility's marginal cost of energy. 1-PIO_ER-0198 (18 C.F.R. § 292.304(b)(6) (allowing States to presumptively use "a Locational Marginal Price as a rate" for purchase of energy)). The way FERC fashioned the rule, it is unclear what evidence overcomes the presumption—it does not provide, for example, that even definitive evidence that the LMP does not reflect the utility's marginal cost of energy precludes the State's use of the LMP as a "rate."

persuasion).[21] Instead, both attempt to defend Order 872's LMP presumption as only a shift in the burden of production—an argument Chairman Glick aptly described as "an argument that only a lawyer's mother could love." Order 872-A (Glick, Comm'r, dissenting at P 19) (1-PIO_ER-0100). But in doing so, they incorrectly insist that FERC's rule provides that if a challenging party "produce[s] some evidence" the burden reverts to the State to "demonstrate that locational marginal prices represent the purchasing utility's avoided energy cost." FERC Br. 86. That is not what the rule says, nor how it operates in the real world.

The text of the LMP presumption provides that the State may "use a Locational Marginal Price as a rate." 3-SolarER-791 (18 C.F.R. § 292.304(b)(6)). Contrary to FERC and Utility-Intervenors' assertions, the rule does not provide that if a challenger produces "some evidence,"

[21] Utility-Intervenors imply that the prohibition on shifting the burden of persuasion only applies in adjudicatory proceedings (Utilities Br. 53-54), but cite no authority for that assertion. The burden shift here occurs in adjudicatory proceedings as well as rulemaking proceedings. *Californians For Renewable Energy v. Cal. Pub. Utils. Comm'n*, 922 F.3d 929, 936 (9th Cir. 2019) (states may comply with their obligation by adopting rule, adjudications, or other means that achieve compliance).

the State must then prove "that locational marginal prices represent the purchasing utility's avoided energy cost." FERC Br. 86.

Moreover, under the applicable standard of review for challenging state implementation decisions, the rule operates as a shift in the burden of persuasion. When a state uses the LMP presumption "as a rate," a challenger not only bears the burden to challenge that presumption, but must meet a heightened "substantial evidence" standard to overcome the presumption. *See, e.g., Vote Solar*, 473 P.3d at P 36 (challenger must show lack of substantial evidence); *Johnson v. W. Transp., LLC*, 247 P.3d 1094 at P 17 (Mont. 2011) (agency affirmed so long as there is "more than a scintilla of evidence, but less than a preponderance of the evidence" supporting its finding); *Snow Mountain Pine Co. v. Maudlin*, 734 P.2d 1366, 1367 (Or. Ct. App. 1987) (similar); *PacifiCorp v. Wash. Utils. & Transp. Comm'n*, 376 P.3d 389 at P 21 (Wash. Ct. App. 2016) (similar "highly deferential" standard); *Consumers Power Co. v. Pub. Serv. Comm'n*, 472 N.W.2d 77, 92-94 (Mich. Ct. App. 1991) (similar)). That is not only a *shift*, but an *increase* in the burden of persuasion.

Moreover, even the cases FERC cites confirm that FERC's rule falls on the wrong side of the distinction between burden of proof and burden of persuasion. FERC Br. 84-86 (citing *Mobile, Jackson, & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910); *Western & Atl. R.R. v. Henderson*, 279 U.S. 639, 643-44 (1929); *Ariasi v. Orient Ins. Co.*, 50 F.2d 548, 552-554 (9th Cir. 1931)). FERC's LMP presumption is like the unlawful burden shift in *Turnipseed*, rather than the production shift in *Henderson*. Unlike the statute in *Henderson*, FERC's rule does not provide that the State must prove the LMP reflects the marginal cost of energy for the purchasing utility if a challenger simply raises any evidence to the contrary. Instead, similar to the presumptive conclusion in *Turnipseed*, the rule says the LMP is the appropriate "price" and shifts the burden to a challenger to produce sufficient evidence to overcome the default conclusion that the state can use the LMP "as a rate."

FERC's LMP presumption unlawfully shifts the burden of persuasion, not merely production. The rule is invalid and should be vacated.

B. FERC and Utility-Intervenors Fail to Identify a Rational Basis for the LMP Presumption.

FERC's LMP presumption also lacks the required sound and rational connection between the LMP and the marginal cost of energy for all purchasing utilities, making all alternative explanations unlikely. *Sec'y of Lab. v. Keystone Coal Min. Co.*, 151 F.3d 1096, 1100-01 (D.C. Cir. 1998); *see also Chem. Mfrs. Ass'n v. Dep't of Transp.*, 105 F.3d 702, 705 (D.C. Cir. 1997) (agencies cannot simply "adopt presumptions for policy reasons," but must establish "a sound and rational connection between the proved and inferred facts."). Instead, FERC falls back on the conclusory assertion that the LMP is "definitionally" the same as each utility's marginal cost of energy. Order 872 at P 153 (1-PIO_ER-0125); NOPR at P 44 n.78 (5-PIO_ER-1167); FERC Br. 27; *see also* Utilities Br. 55-56. That is incorrect.

At most, the LMP is "definitionally" the price of energy in a particular market auction. That is not the same as the cost of energy to a particular utility for two reasons. First, utilities incur costs higher than market prices. Second, utilities obtain energy supply outside the market auction by supplying energy with their own power plants or bilateral contracts. Both facts dissociate the price in the particular market auction from each individual utility's marginal energy costs. Order 872 at P 152 (1-PIO_ER-0124-25); Order 872-A at PP 56, 64 (1-PIO_ER-0013-14) and (Glick, Comm'r, dissenting at P 18) (1-PIO_ER-0100); 2-PIO_ER-0278-279 (req. for reh'g of PIO) (utilities enter energy supply contracts outside the auction for prices above the auction price); 3-PIO_ER-0488-98 (comments of PIO) (long- term fixed-price energy supply contracts for nuclear power and utilities operating their own generating resources at costs in excess of the auction price); 5-PIO_ER-1191-93 (comments by the Honorable Travis Kavulla President, National Association of Regulatory Utility Commissioners, and Vice Chairman, Montana Public Service Commission).

FERC's response fails to bridge the gap between a particular market price and individual utilities' costs. Instead, it relies on an attenuated chain of references ultimately leading only to a FERC order and judicial opinions explaining only how the auction price is derived. FERC Br. 78-79 (citing Order 872 at P 153, in turn citing *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 524 (D.C. Cir. 2010); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768-69 (2016); Order 831, 157 FERC ¶ 61,115, at P 7). But, again, market price formation is not the issue. The issue is cost. FERC fails to connect a particular market's auction price to each particular utility's costs, which are affected by energy sources outside the market auction. *United Scenic Artists, Loc. 829, Bhd. of Painters & Allied Trades, AFL-CIO v. NLRB*, 762 F.2d 1027, 1035 (D.C. Cir. 1985) ("[t]he conclusion… simply does not follow from the premise…").

FERC's conclusory statement that the two values are "definitionally" the same cannot substitute for the requisite evidence showing the connection between a particular auction price and utilities' costs. Accordingly, FERC's LMP presumption must be vacated.

VI. FERC and Utility-Intervenors Fail to Demonstrate that the Standard Remedy of Vacatur Is Inappropriate.

Vacatur is the standard remedy for Administrative Procedure Act and NEPA violations and is appropriate here. 5 U.S.C. § 706(2)(A) (reviewing court "*shall* … hold unlawful and set aside agency action . . . found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (emphasis added)); *see also Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 575 (9th Cir. 2016) (vacatur usual remedy for NEPA violations). Doing so reinstates the rules previously in force. *Organized Vill. Of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 970 (9th Cir. 2015) (en banc) (citation omitted).

Utility-Intervenors cite an out-of-circuit case denying partial vacatur to claim that the typical remedy of vacatur is "wildly overbroad."[22] Utilities Br. 80. But that is not the law of this Court.

In this Circuit, vacatur "normally accompanies a remand." *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018). Remand without vacatur is only appropriate in "limited circumstances" when the opponent demonstrates that "equity demands" leaving an unlawful rule in place. *Pollinator Stewardship Council v. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015). This Court considers "the seriousness of the agency's errors against the disruptive consequences of an interim change that may itself be changed." *Nat'l Fam. Farm Coal. v. E.P.A.*, 960 F.3d 1120, 1144-45 (9th Cir. 2020) (listing these and other factors such as environmental harm). The few

[22] In the case cited by Utility-Intervenors, the D.C. Circuit denied a request for *partial* vacatur, granting full vacatur instead, because the agency consistently represented that the rule was an integrated whole. *North Carolina v. E.P.A.*, 531 F.3d 896, 929 (D.C. Cir. 2008), *on reh'g in part*, 550 F.3d 1176 (D.C. Cir. 2008). The Court's did not hold that vacatur was inappropriate—as Utility-Intervenors imply—but that the entire rule "must fall." *Id.*

cases involving a remand without vacatur typically involve agency errors that were procedural in nature, such as a failure to publicly notice relevant documentation and where the agency seeks remand on its own motion. *See, e.g.*, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (involving procedural error of failing to provide appropriate public notice and comment of a report related to endangered species listing); *Safer Chemicals, Healthy Fams. v. E.P.A.*, 791 F. App'x 653, 656 (9th Cir. 2019) (granting voluntary remand). Here, FERC's errors are substantive and FERC is not seeking voluntary remand. Where the errors are fundamental and substantive—such as failing to consider environmental impacts—it is unlikely that the same rule would be adopted after remand. So vacatur is appropriate. *See Nat'l Fam. Farm Coal.*, 960 F.3d at 1145 (remand without vacatur inappropriate where "fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand.").

This Court also considers environmental harm in its decision. *See, e.g.*, *Pollinator Stewardship Council*, 806 F.3d at 532 (explaining vacatur appropriate where leaving rule in place would cause more environmental harm than vacating it); *Nat'l Fam. Farm Coal.*, 960 F.3d at 1144-45 (describing factors considered by this Court including environmental harm).[23] Utility-Intervenors do not claim that vacatur would cause environmental harm, much less make the requisite showing that equity demands. Utilities Br. 80-84.

In contrast, the equities favor the normal remedy of vacatur. Failing to vacate FERC's rule would result in environmental harm, in addition to harming the very interests Congress sought to promote through PURPA: "to encourage the development of cogeneration and small power production facilities" and reduce demand for fossil fuels by addressing "problems imped[ing] the development of nontraditional generating facilities." *Mississippi*, 456 U.S. at 750. Utility-Intervenors do not address these harms, and therefore fail to "overcome the presumption of vacatur." *All. for the Wild Rockies*, 907 F.3d at 1122.

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[23] Utility-Intervenors cite to *California Communities Against Toxics v. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) for the proposition that "[a] flawed rule need not be vacated" but fail to note that the agency voluntarily sought remand in that case and that vacatur would have caused, among other impacts, environmental harm from diesel generator pollution following blackouts. *See also id.* (citing prior decisions declining to vacate when significant irreparable harm would have resulted, such as the extinction of a species or increased air pollution).

Conclusion

FERC's attempt to undermine Congressional policy supporting independent renewable energy generation conflict with Congress's statutes and exceed the agency's authority. Vacatur is appropriate for all of the foregoing reasons.

Dated: January 6, 2022.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s):
20-73375 et al.

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This brief contains 11,366 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2022, I caused the foregoing to be electronically filed through this Court's CM/ECF system, which will send notice of filing to all registered users. Counsel for all parties to this matter will be served by the CM/ECF system.

Dated: January 6, 2022.

/s/ David Bender
David Bender

Case Nos. 20-72788, 20-73375, 21-70113, 21-70083

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLAR ENERGY INDUSTRIES ASSOCIATION,

Petitioner

NEWSUN ENERGY LLC,

Petitioner-Intervenor

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

EDISON ELECTRIC INSTITUTE INC.,

Respondent-Intervenor

AMERICAN FOREST & PAPER ASSOCIATION,

Intervenor

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

STATUTES, RULES, AND REGULATIONS ADDENDUM

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January 6, 2022

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REGULATIONS

OTHER

*All documents referencing the Fed. Reg. are excerpts from the original.

(2)(i) *Issues not set for trial-type hearing.* An intervenor who takes a position on any environmental issue that has not yet been set for hearing must file a timely motion with the Secretary containing an analysis of its position on such issue and specifying any differences with the position of Commission staff or an applicant upon which the intervenor wishes to be heard at a hearing.

(ii) *Issues set for trial-type hearing.* (A) Any intervenor that takes a position on an environmental issue set for hearing may offer evidence for the record in support of such position and otherwise participate in accordance with the Commission's Rules of Practice and Procedure. Any intervenor must specify any differences from the staff's and the applicant's positions.

(B) To be considered, any facts or opinions on an environmental issue set for hearing must be admitted into evidence and made part of the record of the proceeding.

(iii) Commission pre-filing activities commenced under §§ 157.21 and 50.5 of this chapter, respectively, are not considered proceedings under part 385 of this chapter and are not open to motions to intervene. Once an application is filed under part 157 subpart A or part 50 of this chapter, any person may file a motion to intervene in accordance with §§ 157.10 or 50.10 of this chapter or in accordance with this section.

(b) *Rulemaking proceedings.* Any person may file comments on any environmental issue in a rulemaking proceeding.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended by Order 689, 71 FR 69471, Dec. 1, 2006]

§ 380.11 Environmental decision-making.

(a) *Decision points.* For the actions which require an environmental assessment or environmental impact statement, environmental considerations will be addressed at appropriate major decision points.

(1) In proceedings involving a party or parties and not set for trial-type hearing, major decision points are the approval or denial of proposals by the Commission or its designees.

(2) In matters set for trial-type hearing, the major decision points are the initial decision of an administrative law judge or the decision of the Commission.

(3) In a rulemaking proceeding, the major decision points are the Notice of Proposed Rulemaking and the Final Rule.

(b) *Environmental documents as part of the record.* The Commission will include environmental assessments, findings of no significant impact, or environmental impact statements, and any supplements in the record of the proceeding.

(c) *Application denials.* Notwithstanding any provision in this part, the Commission may dismiss or deny an application without performing an environmental impact statement or without undertaking environmental analysis.

§ 380.12 Environmental reports for Natural Gas Act applications.

(a) *Introduction.* (1) The applicant must submit an environmental report with any application that proposes the construction, operation, or abandonment of any facility identified in § 380.3(c)(2)(i). The environmental report shall consist of the thirteen resource reports and related material described in this section.

(2) The detail of each resource report must be commensurate with the complexity of the proposal and its potential for environmental impact. Each topic in each resource report shall be addressed or its omission justified, unless the resource report description indicates that the data is not required for that type of proposal. If material required for one resource report is provided in another resource report or in another exhibit, it may be incorporated by reference. If any resource report topic is required for a particular project but is not provided at the time the application is filed, the environmental report shall explain why it is missing and when the applicant anticipates it will be filed.

(3) The appendix to this part contains a checklist of the minimum filing requirements for an environmental report. Failure to provide at least the applicable checklist items will result in

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to ''utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment,'' as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

§ 1501.3 When to prepare an environmental assessment.

(a) Agencies shall prepare an environmental assessment (§ 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in § 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.

(b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decisionmaking.

§ 1501.4 Whether to prepare an environmental impact statement.

In determining whether to prepare an environmental impact statement the Federal agency shall:

(a) Determine under its procedures supplementing these regulations (described in § 1507.3) whether the proposal is one which:

(1) Normally requires an environmental impact statement, or

(2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion).

(b) If the proposed action is not covered by paragraph (a) of this section, prepare an environmental assessment (§ 1508.9). The agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments required by § 1508.9(a)(1).

(c) Based on the environmental assessment make its determination whether to prepare an environmental impact statement.

(d) Commence the scoping process (§ 1501.7), if the agency will prepare an environmental impact statement.

(e) Prepare a finding of no significant impact (§ 1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In certain limited circumstances, which the agency may cover in its procedures under § 1507.3, the agency shall make the finding of no significant impact available for public review (including State and areawide clearinghouses) for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin. The circumstances are:

as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

§ 1508.6 Council.

Council means the Council on Environmental Quality established by title II of the Act.

§ 1508.7 Cumulative impact.

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

§ 1508.8 Effects.

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

§ 1508.9 Environmental assessment.

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

§ 1508.10 Environmental document.

Environmental document includes the documents specified in § 1508.9 (environmental assessment), § 1508.11 (environmental impact statement), § 1508.13 (finding of no significant impact), and § 1508.22 (notice of intent).

§ 1508.11 Environmental impact statement.

Environmental impact statement means a detailed written statement as required by section 102(2)(C) of the Act.

§ 1508.12 Federal agency.

Federal agency means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

§ 1508.13 Finding of no significant impact.

Finding of no significant impact means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (§ 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§ 1501.7(a)(5)). If the assessment is included, the finding need not union as an alternative to undergoing a liquidation. In many instances the Administration would look favorably upon such an alternative, not only because it avoids the disruption, inconvenience, and hardship that a liquidation imposes upon the membership of a credit union, but also because it will reduce the risk of loss to the Share Insurance Fund. If a merger can be arranged that is consistent with longstanding NCUA policies regarding field of membership and common bond, the members will be benefitted by the relatively uninterrupted continuation of credit union services that results from a merger. Additionally, expenses to the Share Insurance Fund can be substantially reduced if a merger, as opposed to a liquidation can be consummated.

The Administration is also mindful of the merger alternatives used in the case of failing banks. While the ability of a bank to absorb another failing bank hinges on the financial strength of the absorbing bank, its location and the impact on competition, in the case of a credit union, it is a question of financial strength and compatibility of fields of membership. Although the authority of the Administration to prescribe rules governing mergers is somewhat broader than that provided other financial institution regulatory agencies, Congress did provide those agencies with a procedure to be used in emergency situations, i.e., in the case of a failing bank. The Administration, however, did not previously provide for a merger procedure in the case of a filing credit union. The proposed rule is designed to address this area.

Under current merger guidelines the requirement of obtaining the approval of the membership for the merger proposal may well frustrate a merger as a practical alternative to liquidation. The added costs of preparing and distributing the ballots and holding the special meeting of the members, coupled with the attendant time delays, may put the credit union into such an insolvent position that a merger cannot be completed or to the point that a merger is no longer a viable alternative. Moreover, the Administration views as academic the question of whether the members, when faced with liquidation as their alternative, would approve a merger as a viable way to continue operations. Members who are dissatisfied with the merger are free to close their accounts and thus have credit union services terminated; the same result as if the credit union were placed into liquidation. The second of the proposed rules, therefore, eliminates the requirement of membership approval for these limited classes of mergers.

In proposing these amendments, the Board relies on, in addition to section 120(a) and 205 of the Act, section 208 (12 U.S.C. 1788), which provides the Board with the authority to take certain actions in order to reduce the risk to the National Credit Union Share Insurance Fund and to facilitate a merger or consolidation of insured credit unions, and section 209 (12 U.S.C. 1789), the general relemaking authority for purposes of the provisions of Title II of the Act.

This proposed regulation provides for a 30-day comment period; comments must be received by November 26, 1979. A 60-day comment period is not provided because the proposal is not viewed as a significant change, it would relieve a previous restriction and the Administration finds it to be in the best interest of credit unions, their members and the National Credit Union Share Insurance Fund.

In addition, a regulatory analysis was not prepared for this proposed regulation because it was determined the proposal will not result in a significant impact on the national economy or cause a major increase in the costs or expenses of Federal credit unions. Also, certain other procedures provided for in NCUA's Report on Improving Government Regulations were not followed because the proposal is in response to an emergency and the process is unnecessary for the public interest. This determination was made by James J. Engel, Assistant General Counsel.

Accordingly, the National Credit Union Administration proposes to amend 12 CFR Part 708 to read as set forth below.

Rosemary Brady,
Secretary, NCUA Board.

October 18, 1979.

1. Part 708 is amended by deleting the term "Administrator" each time it appears therein and by inserting the term "Board" in lieu thereof.

§ 708.7 [Amended]

2. Paragraph (b) of 12 CFR 708.7 is amended by deleting the words "in a vote in which at least 20 per centum of the total membership of the credit union participates."

§ 708.6 [Amended]

3. Paragraph (a) of 12 CFR 708.6 is amended by deleting the period at the end of the subsection and inserting in lieu thereof the following: "; *Provided, however,* That in the event the Board determines that the merging credit union, if it is a Federal credit union, is in danger of insolvency, and that the proposed merger would reduce the risk or avoid a threatened loss to the National Credit Union Share Insurance Fund, the Board may permit the merger to become effective without an affirmative vote of the membership of the merging Federal credit union, not withstanding the provisions of § 708.7."

(Sec. 120, 73 Stat. 635 (12 U.S.C. 1766) and Sec. 209, 84 Stat. 1104 (12 U.S.C. 1789)).

[FR Doc. 79-32780 Filed 10-23-79; 8:45 am]
BILLING CODE 7535-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 292

[Docket No. RM79-55]

Small Power Production and Cogeneration—Rates and Exemptions

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The proposed rules would implement section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA). The rules set forth rates for the sale of electric energy between qualifying small power production and cogeneration facilities and electric utilities, and provide for the exemption of qualifying facilities from certain State and Federal regulation. The proposed rules also provide guidelines for the interconnection arrangements between qualifying facilities and electric utilities.

DATE: Written comments by December 1, 1979. Dates of the public hearings will be announced at a later time.

ADDRESS: All responses to reference Docket No. RM79-55, and to be addressed to: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426. Locations of the public hearings will be announced at a later time.

FOR FURTHER INFORMATION CONTACT: Adam Wenner, Executive Assistant to the Associate General Counsel, 825 North Capitol Street, N.E., Washington, D.C. 20426 (202) 357-8171.

SUPPLEMENTARY INFORMATION:

Issued: October 10, 1979.

Section 210(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA)

These costs are part of the costs of interconnection, and are the responsibility of the qualifying facility under § 292.108 of these rules. However, pursuant to agreement between the qualifying facility and any electric utility which transmits electric energy on behalf of the qualifying facility, the transmitting utility may share the costs of transmission. The electric utility to which the electric energy is transmitted has the obligation to purchase the energy at a rate which reflects the costs that it can avoid as a result of making such a purchase.

Paragraph (b) sets forth the statutory requirement of section 210(a) of PURPA that electric utilities offer to sell electric energy to qualifying facilities. This section creates a Federal right for qualifying facilities to obtain electric service, in addition to any service the electric utility is obligated to provide under State laws.

The Staff discussion paper dealt with the issue of whether there is inherent in section 210 of PURPA the authority to order interconnections between electric utilities and qualifying facilities, or whether qualifying facilities must use the procedures set forth in the new sections 210 and 212 of the Federal Power Act to gain interconnection.[7] The Commission believes that the requirement to interconnect is within the legal authority of the Commission under section 210 of PURPA, particularly subsumed within the requirement to buy and sell. To hold otherwise would mean that Congress intended to have qualifying facilities go through an extended and expensive proceeding simply to gain interconnection, contrary to the entire thrust of sections 201 and 210 of PURPA.

These sections evince the clear Congressional intent to encourage development of these desirable forms of generation, and to have the commercial development of these facilities proceed expeditiously. In other words, Congress has already made the judgment that these kinds of facilities serve one of the purposes of the Act as set out in section 101, *viz*, "the optimization of the efficiency of use of facilities and resources by electric utilities", and it would be both redundant and unduly burdensome to have the sponsors of individual facilities show in an evidentiary hearing conducted under section 210 of the Federal Power Act that their project in particular would serve this end (or one of the other related goals established as criteria for an interconnection order in section 210(c)(2)). The purpose of an interconnection application, whether under section 202 or 210 of the FPA, is to secure service, whether emergency or otherwise; and section 210 of PURPA establishes the entitlement of a qualifying facility to service from the interconnected utility. In effect, the proponents of the view that a qualifying facility must apply under sections 210 and 212 of the FPA have the burden of showing that Congress intended interconnection and the entitlement to buy and sell be denied to a qualifying facility which is unable to make the showings required by those sections, especially in light of the fact that a previously interconnected customer installing qualifying facilities would not have to so apply.

This is not to say that all of the protections that Congress has given the target of an interconnection application in sections 210 and 212 of the FPA are necessarily absent from section 210 of PURPA. The Conference Report on section 210 states that customers of utilities are not to be compelled to subsidize qualifying facilities, and this principle would seem to bear on the question of who pays the costs of interconnection as well as on the per-unit price to be paid for energy. On the other hand, the Conference Report includes a proscription against "unreasonable rate structure impediments, such as unreasonable hook up charges." This provides another argument in favor of reading section 210 of PURPA as including interconnection authority, since the elaborate cost determination required under sections 210 and 212 of the FPA is redundant if the costs of interconnection are viewed simply as a feature of the rate structure with the charge therefor based on the cost of the utility. However, the Commission does view section 210 of the FPA as an alternate avenue for remedy available to any qualifying facility which wishes to apply under it.

The obligation to interconnect can be part of either an electric utility's option to purchase from or sell to a qualifying facility. With regard to the obligation to sell, State law ordinarily sets out the obligation of an electric utility to provide service to customers located within its service area. The Commission believes that State law will normally impose on an electric utility the obligation to interconnect and that the Commission's proposal will not, in most instances, impose any additional obligation on electric utilities.

As noted in the Staff discussion paper, by installing certain equipment, an electric utility can be protected from disruption of its operations caused by a qualifying facility. The Commission has not received comments which disagree with this understanding. Therefore, through the allocation of the costs associated with such equipment to the qualifying facilities, as provided in § 292.109, and through the imposition of standards for operating reliability under § 292.110, appropriate physical and financial protection for the electric utilities is provided in the Commission's proposed rules.

Several commentors urged that the Commission require electric utilities to offer to operate in parallel with a qualifying facility. By operating in parallel, a qualifying facility is enabled automatically to export any electric energy which is not consumed by its own load. Therefore, provided that the qualifying facility complies with the standards set forth in § 292.110 regarding operating reliability, the Commission proposes in paragraph (e) that electric utilities be required to offer to operate in parallel with a qualifying facility.

§ 292.105 Rates for purchases.

Section 210(b) of PURPA provides that in requiring any electric utility to purchase electric energy from a qualifying facility, the Commission must insure that the rates for such purchases be just and reasonable to the electric consumers of the purchasing utility, in the public interest, nondiscriminatory to qualifying facilities, and that they not exceed the incremental costs of alternative electric energy (the costs of energy, which, but for the purchase, the utility would generate from another source).

Types of Purchases

In impelementing this statutory standard, it is helpful to review industry practice respecting sales between utilities. Sales of electric power are ordinarily classified as either firm sales, where the seller provides power at the customer's request, or non-firm power sales, where the seller and not the buyer makes the decision whether or not power is to be available. Rates for firm power purchases include payments for the cost of fuel and operating expenses, and also for the fixed costs associated with the construction of generating units needed to provide power at the purchaser's discretion. The degree of certainty of deliverability required to constitute "firm power" can ordinarily be obtained only if a utility has several generating units and adequate reserve capacity. The capacity payment, or demand charge, will reflect the cost of the utility's generating units and the

[7] Staff discussion paper, *supra*, at 10–14.

associated costs of assuring that firm power will be available on demand.

In contrast, the ability to provide electric power at the selling utility's discretion imposes no requirement for the construction of capacity on the seller. In order to provide power to customers at the seller's discretion, the selling utility needs only to provide for the cost of operating its generating units. These costs, called "energy" costs, ordinarily are the ones associated with non-firm sales of power.

Purchases of power from qualifying facilities will fall somewhere on the continuum between these two types of electric service. Thus, for example, wind machines that furnish power only when wind velocity exceeds twelve miles per hour may be so uncertain in availability of output as only to permit a utility to avoid generating an equivalent amount of energy. The utility must continue to provide capacity that is available to meet the needs of its customers. Rates for such sporadic purchases should thus be based on the utility system's avoided incremental cost of energy (system lambda), and not based on avoided capacity.

On the other hand, photovoltaic cells, although subject to some uncertainty in power output, have the general advantage of providing their maximum power coincident with the system peak when used on a summer peaking system. The value of such power is greater to the utility than power delivered during off-peak periods. Since the need for capacity is based on system peaks, the qualifying facility's coincidence with the system peak should be reflected in the allowance of some capacity value and an energy component that reflects the avoided energy costs at the time of the peak.

A facility burning municipal waste or biomass can operate more predictably and reliably than solar or wind systems. It can schedule its outages during times when demand on the utility's system is low. If such a unit demonstrates a degree of reliability that would permit the utility to defer or avoid construction of a generating unit or the purchase of firm power from another utility, then the rate for such a purchase should be based on the avoidance of both energy and the capacity costs.

In order to be able to defer or cancel the construction of new generating units, a utility must obtain a commitment, sufficiently ahead of the lead time for the construction of its own new capacity, that provides contractual or other legally enforceable assurances that capacity from alternative sources will be available. If a qualifying facility makes such a commitment, the Commission believes that, as a matter of both policy and interpretation of section 210, the qualifying facility is entitled to receive rates based on the utility's avoided costs resulting from the capacity the qualifying facility supplies. Moreover, if a cogenerator or small power producer were permitted to receive only the energy (fuel, and operating and maintenance) expenses which the purchasing utility can avoid—while the cogenerator or small power producer must himself invest in new, and oftern highly capital-intensive, machinery—these potential sources of energy may go undeveloped. In light of the Commission's statutory obligation to encourage cogeneration and small power production, the Commission believe that a proper interpretation of "the incremental costs of alternative electric energy" requires that, when purchases of energy can substitute for intermediate, or base-load, the rate to the cogenerator or small power producer include the net avoided capacity and energy costs.

If a qualifying facility opts to receive rates based on avoided energy costs, such rates should reflect the energy costs of the electric utility's units which otherwise would have been operated. The Commission believes that there are a variety of acceptable ways to carry out this policy at the State level. The general concept here is that rates for purchases from the qualifying facility would be based on the highest energy cost unit then operating. The qualifying facility would continue to be dispatched until the cost of energy from the utility's generating unit with the highest energy costs is lower than the price at which the qualifying facility wishes to sell.

The Commission neither expects nor requires that the determination of utilities' avoided costs will be so precise. By definition, these costs are based on estimates of costs which would be incurred if certain events were to take place. Electric rates are ordinarily calculated on the basis of averaging. So long as a rate for purchases reasonably accounts for the avoided costs, and does not fail to provide the required encouragement of cogeneration and small power production, it will be considered as implementing these rules.

Paragraph (a) therefore provides that the statutory requirements regarding rates for purchases of energy and capacity from a qualifying facility are satisfied if the rate reflects the avoided costs resulting from such a purchase as determined on the basis of the cost of energy and capacity set forth pursuant to § 292.103(b) or (c).

Method of Implementation

The Commission is required under section 210 of PURPA to prescribe rules requiring electric utilities to offer to sell electric energy to and purchase electric energy from qualifying facilities. Paragraphs (b) and (c) of section 210 set forth the standards regarding the rate at which such purchases and sales shall be made. The implementation of Commission rules promulgating these standards is reserved to the State regulatory authorities and non-regulated utilities, which are required under section 210(f) to implement the Commission's rules.

One major area of concern expressed in comments received from electric utilities, cogenerators and small power producers, and State regulatory authorities has been that the Commission's rules should state general principles sufficient to leave the states and non-regulated utilities flexibility.[6] The basis for this recommendation is the need for experimentation in a new technological area and in an area that is subject to a variety of State procedures, the diverse nature of cogeneration and small power production systems, and the differences in the costs of energy and capacity on individual electric systems. As a result, while we herein propose that, for example, capacity costs must be paid if a utility can actually avoid the construction or purchase of capacity, our rules will not dictate the method by which such a payment is to be determined. Rather the Commission proposes to leave the selection of a methodology to the States and nonregulated electric utilities, with the understanding that should a State or nonregulated utility not fulfill the intent and purposes of our rules and of section 210 of PURPA, the Commission and others have available the enforcement power set forth in section 210(h) of PURPA to assure compliance. Additionally, the Commission is authorized to revise these rules in the future to provide greater specificity to these rules if that is necessary.

Paragraph (b) requires electric utilities, on request of a qualifying facility, to promulgate a tariff or other method for establishing rates for purchases from qualifying facilities of ten kilowatts or less. In Docket No. RM79-54 the Commission proposed a minimum size limitation for qualifying facilities of ten kilowatts. However,

[6] Comments of American Electric Power, filed August 1, 1979, at 2-3; Comments of Electric Consumer Resource Council (ELCON), filed August 1, 1979, at 6; Comments of the National Association of Regulatory Utility Commissioners (NARUC), filed August 1, 1979, at 2-5.

comments received in response to that proposed rulemaking indicate that such a limitation could hamper the development of auxiliary solar and wind power units. Without finally determining that question in this rulemaking, it appears to the Commission that the burden of interconnected operation on both utilities and qualifying facilities can be minimized if standard tariffs are used.

Some utilities already have such tariffs in effect. For units of ten kilowatts or less, it is likely that few changes in the utility's distribution system would be required. For example, an electric utility might offer to permit certain customers to reverse their electric meters, thus permitting consumption by the customer. While the Commission will deal more extensively with the matter of a size limitation for qualifying facilities in its final rule in Docket No. RM79-54, the Commission solicits comment here on the merits of requiring utilities to promulgate tariffs for qualifying facilities of ten kilowatts of less.

Paragraph (c) concerns a problem arising in the implementation of the concept of avoided costs. At the time that a qualifying facility delivers electric energy to an electric utility, that utility can determine its system lambda and thus calculate the costs it can avoid by making the purchase. Subparagraph (1) therefore provides rates for purchases made on an "as available" basis may be based on the purchasing utility's avoided energy costs.

In order to establish certainity of future revenue, a qualifying facility might seek to obtain a contract from a utility providing that the utility will pay a certain price for energy from a qualifying facility, under specified terms and conditions. Indeed, a qualifying facility desiring to obtain capacity credit must provide the purchasing utility with assurance that such capacity will continue to be available.

In the case of future purchases pursuant to a legally enforceable obligation, the utility's avoided energy or capacity costs may be based on the costs of production facilities which are not built and for which the only available cost data are estimates. When the qualifying facility actually supplies electricy, the utility's avoided costs may deviate from these estimated figures. The Commission believes that these potential deviations are a normal result of risk allocation resulting from contractual commitments or other legal obligations, and believes that they must be permitted if the Commission is to fulfill its mandate to encourage cogeneration and small power production. Accordingly, subparagraph (2) provides that rates for such purchases may be based on future estimated utility costs of energy or capacity regardless of whether these estimated costs actually track the actual costs that are incurred.

Paragraph (d) sets forth factors on the basis of which the State regulatory authority or nonregulated utility should determine a utility's avoided costs. These principles relate both to the quality of power available from the qualifying facility and its ability to displace or replace energy and capacity on the utility's system.

Subparagraph (1) deals with the availability of capacity from a qualifying facility during system daily and seasonal peak periods. If a qualifying facility can provide energy to a utility during peak periods when the electric utility is running its most expensive generating units, this energy has a higher value to the utility than energy supplied during offpeak periods during which only units with lower running costs are operating. Ideally, the rates for purchases would reflect the cost in the purchasing utility's system at the precise moment when such energy is supplied. The metering equipment that would be required to ascertain these times of delivery with the requisite specificity may be either unavailable or prohibitively expensive. To the extent that such metering equipment is available, however, the State or nonregulated utility should take into account the time at which the purchase from a qualifying facility is made.

Clauses (i), (ii), (iii), (iv), and (v) deal with the reliability of a qualifying facility. When an electric utility provides power from its own generating units or from those of another electric utility, it normally controls the production of such power from a central location. The ability to so control power production enhances a utility's ability to respond to changes in demand and thereby enhances the value of that power to the utility. A qualifying facility may be able to enter into an arrangement with the utility which gives the utility the advantage of dispatching the facility.[9]

Clause (ii) refers to a qualifying facility's ability and willingness to provide power and energy during system emergencies. Section 292.109 of these proposed regulations concerns the provision of electric services during system emergencies. It provides that, to the extent that a qualifying facility is willing to forego its own use of energy during system emergencies and provide power to a utility's system, the rate for purchases from the qualifying facility should reflect the value of that service. Small power production and cogeneration facilities could provide significant back-up capability to electric systems during emergencies. One benefit of the encouragement of interconnected cogeneration and small power production may be to increase overall system reliability during such emergency conditions. Any such benefit should be reflected in the rate for purchases from such qualifying facilities.

Clause (iii) deals with periods during which a qualifying facility is unable to provide power. Electric utilities schedule maintenance outages for their own generating units at periods during which demand is low. If a qualifying facility can similarly schedule its maintenance outages during periods of low demand, or during periods in which a utility's capacity will be adequate to handle existing demand, it will enable the utility to avoid the necessity to provide redundant capacity. With regard to forced or unscheduled outages, addressed in clause (iv), it is clear that a utility cannot avoid the construction or purchase of capacity if it is likely that the qualifying facility which would replace such capacity may go out of service during the period when the utility needs its power to meet demand. Based on estimated and demonstrated reliability of the qualifying facility, the rate for purchases from a qualifying facility should be adjusted to reflect its forced and scheduled outage rate.

Subclause (v) refers to the lenght of time during which the qualifying facility has contractually or otherwise guaranteed that it will supply energy or capacity to the electric utility. A utility-owned generating unit normally will supply power for the life of the plant, or until it is replaced by more efficient capacity. In contrast, a cogeneration or small power production unit might cease to produce power as a result of changes in the industry or in the industrial processes utilized. Accordingly, the value of service from the qualifying facility to the electric utility will be affected by the degree to which the qualifying facility contractually insures that it will continue to provide power. In order to provide capacity value to an electric utility a qualifying facility need not necessarily agree to provide power for the life of the plant. A utility's generation expansion plans normally include temporary purchases of firm power from other utilities in years preceeding the addition of a major

[9] See comments of Hawaiian Electric Company, filed July 27, 1979, at 2.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 35 and 385

[Docket Nos. RM95–8–000 and RM94–7–001; Order No. 888]

Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities

Issued April 24, 1996.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing a Final Rule requiring all public utilities that own, control or operate facilities used for transmitting electric energy in interstate commerce to have on file open access non-discriminatory transmission tariffs that contain minimum terms and conditions of non-discriminatory service. The Final Rule also permits public utilities and transmitting utilities to seek recovery of legitimate, prudent and verifiable stranded costs associated with providing open access and Federal Power Act section 211 transmission services. The Commission's goal is to remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers.

EFFECTIVE DATE: This Final Rule will become effective on July 9, 1996.

FOR FURTHER INFORMATION CONTACT:

David D. Withnell (Legal Information—Docket No. RM95–8–000), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 208–2063

Deborah B. Leahy (Legal Information—Docket No. RM94–7–001), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 208–2039

Michael A. Coleman (Technical Information), Office of Electric Power Regulation, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 208–1236.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing 202–208–1397 if dialing locally, or 1–800–856–3920 if dialing long distance. CIPS is also available through the Fed World system (by modem or Internet). To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400, or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. The full text of this order will be available on CIPS indefinitely in ASCII and WordPerfect 5.1 format. The complete text on diskette in Wordperfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in the Public Reference Room at 888 First Street NE., Washington, DC 20426.

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hydroelectric licensing practices are beyond the scope of this rulemaking. Indeed, National Hydropower has already raised its concerns in a petition to the Commission to revise our hydroelectric licensing procedures, filed on July 10, 1995. That is the proper proceeding in which to address our hydroelectric licensing practices.

8. Residential Customers

Comments

Several commenters are concerned that the rule may undermine the financial position of public utilities so that they will not be able to provide many of the programs that benefit low-income residents (*e.g.,* assistance to low-income and elderly consumers, weatherization and energy conservation programs, and payment of taxes that provide many city services).[930]

La Raza is concerned that the rule will permit large preferred customers to opt out of the regulated structure, leaving behind a smaller and less affluent base to support the long-term investments made under the previous regulatory environment.

Home Builders is concerned that utilities may compensate for reduced profits under the proposed rule by raising infrastructure charges and hookup fees for new homes, thus reducing new home sales.

State and City Supervised Housing for Equity in Electric Rates states that publicly supervised housing is uniquely qualified to obtain open access electricity from wholesale markets, and that the Commission should adopt policies that bring competitive benefits to residents of such housing.

Commission Conclusion

While some residential consumers may be apprehensive about the changes that this rule may have on the electric industry, we are convinced that the changes we are proposing for wholesale markets will benefit them. As wholesale transmission open access becomes a reality, residential consumers should reap the benefits of more competitive bulk power markets and associated lower costs. This rule does not require retail transmission access for retail customers of any size. Moreover, this rule does not require any changes in programs such as assistance to low-income and elderly consumers and weatherization and energy conservation. As discussed in Section IV.I, those programs are under the jurisdiction of the individual states, and will remain under their jurisdiction. Indeed, this rule contains several safeguards to maintain the ability of states to impose conditions on retail access, such as conditions that help to protect residential customers from becoming the residual payer of stranded costs.

[930] *E.g.,* Urban League, Latin League, Black Mayors, Homelessness Alliance, National Women's Caucus, La Raza.

V. Environmental Statement

This section reviews and adopts the final environmental impact statement (FEIS) prepared by the Commission staff in connection with this rule. It identifies the alternatives considered by the agency in reaching its decision; analyzes and considers whether and to what extent the chosen alternative—adoption of this rule—is likely to result in environmental harm; evaluates alternatives and suggestions for mitigating environmental harm from the rule, if any; and states the Commission's decision.

Summary

A. The Environmental Impact Statement

The Commission decided to prepare an environmental impact statement (EIS) evaluating the environmental consequences that could result from adoption of this rule. We did so largely in response to the claims of several commenters, including the Environmental Protection Agency (EPA), who charge that the rule will have significant adverse environmental effects.

Although a number of issues were raised, by far the most prominent concern arises from the theory that competitive market conditions created by the rule will provide an advantage to power suppliers who produce power from coal-fired facilities that are not subject to stringent environmental controls on nitrogen oxides (NO_X) emissions.[931] Under this theory, these facilities, located primarily in the Midwest and South, will, as a result of the rule, generate more power and emit more NO_X, which will contribute to ozone formation. The ozone could add to pollution both in those regions and more significantly in the Northeast, to which area such pollutants could be transported. Those who propound this theory argue that it is the responsibility of the Commission, using its authority under the Federal Power Act, to effect environmental controls that will mitigate what they predict will be significant increases in NO_X emissions associated with this rule.

The staff prepared an FEIS based upon computer modeling simulations of power generation patterns and NO_X emissions likely to occur as a result of the rule. Staff used widely accepted models for studying economic conditions in power markets and simulating emissions of NO_X and other pollutants. These models took into account a variety of different assumptions concerning significant factors such as coal and natural gas prices and other competitive conditions. These factors are critical because increased use of coal-fired generation tends to increase NO_X emissions, while increased use of gas-fired generation is environmentally more benign.

[931] References throughout the Environmental Statement are to emissions from the electric industry, and not to emissions from all sources.

The examination in the FEIS of the environmental effects that are likely to result from implementing the rule is based on an analytic framework that was shaped by comments received in the scoping process and on the DEIS. The study was revised to reflect the frozen efficiency reference case assumptions requested by EPA and other commenters. This was done to ensure full disclosure of possible environmental impacts even though the Commission disagrees that use of these assumptions is appropriate.

It has been observed in the context of agency preparation of an environmental study that ''(t)he NEPA process involves an almost endless series of judgment calls.'' [932] That is particularly true where, as here, the agency undertakes to examine the impacts of a proposed regulatory program. In designing an effective assessment of the environmental impacts of the rule, the Commission had to make a number of judgments as to the type and the scope of studies necessary to analyze the proposals sufficiently. Commenters also raised many issues related to the design of the study. For example, the Center for Clean Air Policy contends that the Commission should model a range of mitigation policies; the Missouri Department of Natural Resources contends that the impact of the rule on generation may be locally intense and that these effects should have been studied; and other commenters sought to have the Commission examine different database or modeling assumptions.

For these and similar matters we exercised our judgment as to the appropriate manner in which to treat the issue. For example, we determined not to model a range of mitigation

[932] Coalition on Sensible Transportation, Inc. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987). The Court added that ''[i]t is of course always possible to explore a subject more deeply and to discuss it more thoroughly. The line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.'' *Id.*

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policies because we did not find that the impacts of the rule require the Commission to adopt or implement a plan of mitigation. It would have been extremely difficult, if not impossible, to examine the many varied local impacts that could be expected across the Nation in response to the Rule. We made judgments as to the appropriate database and modeling assumptions to use—in some cases, those assumptions were shaped or changed by comments we received.

In short, many competing considerations came into play during the design of the complex analysis used to examine the environmental effects of the rule. We exercised our judgment, for example, based on consideration of whether matters are within the scope of the rule, the most appropriate way to study the effects of the proposal, and whether the issues raised were relevant to a consideration of the environmental effects of the rule. The Commission's response to issues raised by commenters is reflected in the response to comments set forth in Appendix J of the FEIS. We conclude that the FEIS reflects the appropriate consideration of these and many similar issues.

B. Major Issues

Some comments on the draft environmental impact statement (DEIS), as well as earlier comments in response to Commission scoping inquiries, raise two major areas of objection to the Commission's analysis. First, commenters claim that in determining what NO_X emission levels would be in the future with the adoption of the rule, the Commission did not compare the emissions levels associated with the rule against the appropriate base case. They argue that the Commission should have analyzed and compared the impacts of the rule to a ''no-action'' alternative that assumes that the Commission abandons all its open access policies, not just this rule. Some commenters, including EPA, go even further, suggesting that the Commission compare emission levels projected to result from the rule against a ''frozen efficiency'' case in which other major factors—factors that would increase industry efficiency independent of the Rule—do not occur. Such factors include adoption of pro-competitive state policies and actions by utilities to undertake mutually beneficial voluntary transactions that do not require the use of open access tariffs mandated under this rule. Commenters who advocate either a different ''no-action'' alternative or the frozen efficiency case expect that studies using those assumptions will show that the rule will cause significantly greater NO_X emissions than shown in the DEIS.[933]

Assuming these results, these commenters raise their second major area of concern, which is mitigating the presumed effects of the rule. These arguments vary somewhat but share a common theme: That the Commission has a responsibility, either as a legal or public policy matter, to mitigate what they expect to be the significant environmental impact associated with the rule. They suggest various mitigation schemes, including a FERC-administered NO_X emission allowance program along the lines of the sulfur dioxide (SO_2) program enacted by Congress and administered by the EPA under the Clean Air Act. Other proposals would have the Commission condition the right of a seller to use an open access tariff on certification that the source of the power sold is in compliance with (as yet undetermined) emissions limitations. Another proposal would have the Commission impose a charge on emissions to be paid by utilities to a fund established by the Commission. The added cost to the utilities would work to account for, or ''internalize'', the external costs of emissions.

Commenters advocating Commission-administered mitigation argue that the mechanisms under current law for regulating NO_X emissions are cumbersome and slow, and that the Commission should not (some argue, may not) go forward with the rule unless it puts in place environmental regulatory mechanisms that prevent further increases in NO_X emissions.

Various legal theories are advanced as a basis for Commission environmental regulation under the Federal Power Act. Some argue that the conditioning authority under the Federal Power Act is sufficient to enable us to fashion comprehensive controls on emissions from utility generators because there is a direct causal nexus between power trading (which we regulate) and generation (which we do not). Others argue that such authority lies in the use of our power to impose requirements on utilities ''in the public interest'', enhanced by the National Environmental Policy Act. Others argue that, in remedying undue discrimination, we must correct competitive advantages arising from Congressional decisions to exempt certain kinds of generation facilities from some Clean Air Act regulation.

[933] *See* Section V, Discussion, Subsection C.

C. Commission Conclusions

After reviewing the comments and the additional studies conducted by staff in response to the comments, the Commission adopts the findings in the FEIS.

First, the findings show that, without the rule, NO_X emissions are expected to decline until at least the year 2000. Thereafter, again without the rule, NO_X emissions are expected to increase steadily through the year 2010 (the end of the FEIS study period). The extent of the decrease and the increase will largely be determined by the relative prices of natural gas and coal, the two main fuels used to generate electric power in most regions.[934]

In reaching this conclusion, the FEIS used two ''base'' cases. In one (the ''High-Price-Differential Base Case''), natural gas was assumed to become substantially more expensive compared with coal than it is today. In the other (the ''Constant-Price-Differential Base Case''), natural gas was assumed to maintain essentially the same price relative to coal that has existed for the last ten years. The two cases describe the range of emissions due to fuel price uncertainty without the rule and demonstrate the overall trends of decreases until 2000 and increases thereafter.

Second, the FEIS finds that the rule will not in any significant respect affect these overall trends.

The potential impact of the rule was studied initially under two scenarios.[935] In one (the ''Competition-Favors-Gas Scenario''), the rule is assumed to result in efficiency gains in the electric industry that would tend to favor natural gas as a fuel. In this scenario the effect of the rule is slightly beneficial. Total NO_X emissions are reduced overall by about two percent nationwide from the base cases. In the other (the ''Competition-Favors-Coal Scenario''), the rule is assumed to result in efficiency gains in the electric industry that would tend to favor coal as a fuel. In this scenario the effect is again slight, showing approximately a one percent increase in NO_X emissions nationwide from the base cases. In both scenarios, however, the rule does not have an overall effect on NO_X emission trends.

Stated differently, under any case studied, with or without the rule, there will be an overall net decrease in NO_X

[934] Generally, a relative advantage for coal is likely to increase environmental impacts while a relative advantage for natural gas is likely to create modest environmental benefits.

[935] A third scenario considered improved conditions for the transmission system only. This scenario showed very small effects from the rule and is not addressed further here.

emissions through the year 2000.[936] Thereafter, NO_X emissions begin to increase. The rule does not materially affect either the decline prior to 2000 or the increase thereafter.

Based on these findings the Commission concludes that a comprehensive, Commission-imposed mitigation scheme to address the environmental consequences of the rule is not appropriate. If competition favors gas, the effects are beneficial and mitigation is unnecessary. If competitive conditions favor coal through the year 2010, and NO_X emissions increase slightly as a result of the rule, these minor effects would be effectively mitigated as a part of a comprehensive NO_X cap and trading allowance scheme developed by EPA in cooperation with the Ozone Transport Assessment Group (OTAG) and administered by EPA and state environmental regulators under the clearly established authority of the Clean Air Act.

Further, the Commission believes that staff has selected the appropriate ''no-action'' alternative. An alternative that requires the Commission to reverse all its other open access policies is simply not a ''no-action'' alternative. To the contrary, it would require decisive action running counter to the direction from the Congress in the Energy Policy Act and the needs of the marketplace and electricity consumers.

However, to ensure that the effects of the rule were analyzed fully, the FEIS did study a reference case based on the ''frozen efficiency'' case proffered by EPA and the Department of Energy (DOE).[937] Although, as described below, we believe this case to be highly unlikely, the results show that, even under this scenario, the impacts of the rule are not great and do not vary significantly from those projected by staff under the other assumptions.

In one case requested by EPA, staff studied a combination of assumptions most likely to show significant increases in emissions associated with the rule; the case included EPA's frozen efficiency scenario, coupled with the ''Competition-Favors-Coal'' assumptions. Other cases requested by EPA posit dramatic increases in transmission capacity (that we find highly unlikely). Even this combination of assumptions—geared to demonstrate the greatest impact the rule might have on increased NO_X emissions—produced little in the way of environmental consequences associated with the rule. Under these extreme (and unlikely) conditions, there would still be a net decrease in NO_X emissions until at least the year 2000, albeit a smaller decrease than in the base cases. Comparing projections of emissions for the same years, emissions would be higher than the base cases only by two percent in 2000 and three percent in 2005.[938] It is only in the year 2010, assuming these improbable scenarios, that NO_X emissions associated with the rule would be higher than the base case by even five percent.[939]

Based on these studies, including the EPA reference case, the Commission endorses the staff findings that the rule will affect air quality slightly, if at all, and that the environmental impacts are as likely to be beneficial as negative. This is true even under scenarios contrived to maximize emissions associated with the rule under circumstances that this Commission believes to be highly unlikely.

Importantly, this is also true in the near- to mid-term. Until the year 2010, even the worst case (the frozen efficiency case) produces results very similar to those produced using assumptions the Commission believes to be reasonable. In short, the rule will not produce an ''ozone cloud'' coming across the Appalachians to threaten the Northeast on the day the rule goes into effect. Assuming that any environmental impacts occur, they are years in the future and may well be beneficial. As a result, calls for Commission mitigation, and in particular for interim mitigation to ''fill the gap'' until programs under the Clean Air Act can be adopted, are unnecessary and disproportionate to the possible effects of the rule.

We also endorse the staff view that it is neither within our statutory authority nor appropriate as a matter of policy to fashion from the FPA a comprehensive clean air regulatory program to address NO_X emissions. As described below, we believe that the mitigation proposals proffered in comments exceed our statutory authority to regulate rates, terms and conditions of sales of electric energy and transmission of electric energy in interstate commerce. We are, in essence and by law, economic regulators. While we have an obligation under NEPA to take the environmental consequences of our actions into account in fashioning our decision—and we have done so—NEPA grants us no new regulatory powers. While NEPA extends our general obligation to engage in reasoned decisionmaking to include the consideration of possible environmental consequences of our actions, it compels no particular substantive result.

Though our conditioning authority under sections 205 and 206 of the FPA is broad, our actions under it are confined to the subject matter of our jurisdiction. That subject matter excludes the physical aspects of generation and transmission. Our actions must derive from and advance our statutory mandate to protect consumers by establishing utility rates and business practices that are just, reasonable, and not unduly discriminatory or preferential. These authorities, however broad they are with respect to economic matters, are not unbounded; they may not be used to ''fill in the gaps'' of regulatory programs that, by law, are not our own.

Moreover, even if it were possible to tease from the FPA some implicit authority to regulate NO_X emissions from utility generators, it is not feasible for this Commission to develop and implement such a program. The mitigation schemes presented in comments are filled with unknowns and complexities that are best resolved by those charged with administration of the Nation's environmental laws. In some cases, the mitigation schemes are based on a model of utility transactions that is fundamentally at odds with the purposes of the rule. For example, several proposals would require the Commission to establish whether emissions from certain units or systems contribute to ozone noncompliance elsewhere, perhaps hundreds of miles away. Other proposals would require the Commission to establish baseline standards for emissions; generating units with emissions above that level would be required to adopt mitigation measures. The technical difficulties associated with these proposals are evident on their face. While resolving these issues is necessary to establish an effective NO_X regulatory program, the Commission does not possess the requisite expertise to establish baseline NO_X emission levels and address the difficult technical and policy issues that are presented in regulating NO_X emissions. EPA is the agency with jurisdiction over and experience with such matters. Although efforts are underway to resolve these issues within the framework of the Clean Air Act, all air regulators agree that much work still needs to be done.

[936] These results are set forth graphically and in tabular form in the FEIS at pp. ES–3 and ES–13. They are also reproduced in Appendix H.

[937] Although DOE agreed with EPA's request that we analyze the frozen efficiency case as a reference case, DOE believes that the DEIS selected the appropriate base case. DOE also argues that the mitigation of any adverse consequences from the rule should be addressed by EPA under the Clean Air Act or by the Congress.

[938] FEIS Table 6–10 at p. 6–17.

[939] *Id.*

Other proposals would require the Commission to track generation that is used for wholesale versus retail sales. However, for example, use of holding company corporate structures, as well as emerging market structures, would make it extremely difficult, if not impossible to distinguish between retail and wholesale transactions. In addition, such measures are inconsistent with the goals of the rule (and the Energy Policy Act) to eliminate time-consuming, inefficient transaction-based approvals that impede open access and to promote entry of sellers into bulk power markets on a competitive basis.

Moreover, any such program implemented by this Commission could well undercut the existing regulatory scheme crafted by Congress under the Clean Air Act, as amended. In particular, we are being asked essentially to rework the legislative decisions made by Congress regarding certain coal-fired generators. Those decisions are at the heart of the 1990 Clean Air Act compromise. The only means Congress has made available for addressing these problems under current law are in the Clean Air Act. If these means prove insufficient to address the NO_X problem overall, the case for change must be presented to the Congress.

Although we have concluded that NO_X emissions problems are most effectively addressed by clean air regulations within the framework of the Clean Air Act, we do recognize that the question of NO_X emissions is a very important one. Our FEIS documents that, with or without this rule, NO_X emissions from all sources are expected to increase over time. This will present a significant environmental issue for the Northeast, which is already struggling to reach current NO_X reduction standards, as well as for other regions of the country that are being called on to participate in an inter-regional solution to the NO_X problem. As the EPA rightly recognizes, attempting to frame an appropriate solution with the tools currently available is a tough job. We therefore understand why those concerned would try to enlist this Commission in an effort to solve this problem with regulatory mechanisms other than those set out in the Clean Air Act. We also understand why even the prospect of exacerbating that problem would ignite the kind of controversy reflected in the comments to this rule, and why, in response, those who have gained Congressional exemptions from certain regulations wish not to have those benefits undermined. At the same time, we understand, and have great sympathy with, the many commenters who have suggested that the economic benefits of this rule to consumers should not be suppressed or delayed by this difficult, ongoing debate.

Our FEIS clearly demonstrates that this rule is not the appropriate vehicle for resolving this very important debate. We believe that our study makes a significant contribution nonetheless. We have added significantly to the understanding of the problem and have established a viable, current baseline for assessing future industry trends. This baseline should serve air regulators well in analyzing overall NO_X emissions in the future.[940] We have resolved some important questions about the role of open access and have established clearly the influence of energy prices on NO_X emissions in the future.

Our study also supports the view held by many commenters that the appropriate regulatory mechanisms for addressing the NO_X problem overall, including emissions from electric utility generating plants, is a NO_X emissions cap and allowance trading scheme along the lines of that developed by the Congress under the Clean Air Act for SO_2 emissions. As staff suggests, even if there are slight environmental impacts associated with the rule, they are better and more effectively addressed as a part of a comprehensive NO_X regulatory program. While Congress did not enact such a scheme for NO_X, it did, as described below, empower the EPA to establish such a program. The EPA is the only federal agency with clear authority and expertise to address this problem. It should do so.

The FEIS also identifies the importance of OTAG to the development of a fair and effective NO_X regulatory program. OTAG, which includes representatives from all affected states, is currently at work developing the analytic basis needed for a regional consensus solution to the NO_X problem. OTAG is also evaluating possible solutions, including an allowance trading scheme. We believe that OTAG's efforts are to be applauded, and we encourage the EPA and all interested parties to work with OTAG to address this issue of national concern.

[940] For example, the data we used to project future industry generation and fuel use update by several years the data relied upon by EPA in its Regulatory Impact Analysis used as a basis for its recently proposed NO_X rule, entitled ''Acid Rain Program; Nitrogen Oxides Emission Reduction Program.'' 61 FR 1442 (1996). We believe the data developed in the FEIS will make a useful contribution to EPA's effort.

Discussion

A. Compliance With NEPA Requirements

1. Background

The Commission issued a NOPR in this proceeding on March 29, 1995. In doing so, we concluded that promulgating the proposed Rule would not represent a major federal action having a significant adverse impact on the human environment and that the proposed Rule fell within the categorical exemption provided in the Commission's regulations for electric rate filings submitted by public utilities under sections 205 and 206 of the FPA.[941] Subsequently, the Commission determined that, despite the availability of the categorical exclusion, it would nonetheless prepare an environmental analysis. On July 12, 1995, the Commission directed staff to prepare an EIS to assess the environmental impacts of the proposed Rule. That notice requested comments on environmental issues and scheduled a scoping meeting for September 8, 1995.[942]

A Notice of Availability of the DEIS was published in the Federal Register on November 27, 1995.[943] The DEIS evaluated several potential alternatives and mitigation measures as summarized below.

A Notice of Availability of the FEIS was published in the Federal Register on April 19, 1996.[944]

2. General Requirements

Section 102 of NEPA, 42 U.S.C. 4332, requires that federal agencies prepare an EIS on proposals for major federal actions significantly affecting the quality of the human environment. The objective is to build into the agency decisionmaking process careful consideration of environmental aspects of proposed actions, including the evaluation of reasonable alternatives. Although we believe a categorical exclusion to be available,[945] the Commission has performed this EIS to ensure that this Rule is promulgated with the benefit of careful consideration of its environmental aspects.

3. Alternatives

The consideration an agency must give in an EIS to alternatives to its proposed action is bounded by a number of factors, including notions of feasibility, whether basic changes would

[941] 18 CFR 380.4(a)(15).

[942] 60 FR 36752 (1995).

[943] 60 FR 58304 (1995).

[944] 61 Fed.Reg. 17,296 (1996).

[945] *See* 40 CFR 1507.3 (1995); 18 CFR 380.4 (1995).

be required to the statutes and policies of other agencies, and the extent to which the proposal would result in significant impacts. The United States Supreme Court (Supreme Court or Court) stated what is required in an EIS with regard to alternatives in *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 551 (1978): ''(A)s should be obvious even upon a moment's reflection, the term 'alternatives' is not self-defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility.'' [946] In this regard, the Supreme Court quoted *Natural Resources Defense Council* v. *Morton,* 458 F.2d 827, 837–38 (D.C.Cir. 1972), with approval as follows:

There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of ''alternatives'' put forward in comments when those effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies—making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.

The Supreme Court went on to discuss the concept of ''feasibility'', stating that:

Common sense also teaches us that the ''detailed statement of alternatives'' cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man. Time and resources are simply too limited to hold that an impact statement fails because the agency failed to ferret out every possible alternative, regardless of how uncommon or unknown that alternative may have been at the time the project was approved.[947]

Thus, an EIS must discuss the alternatives that are feasible and briefly discuss the reasons others were eliminated. There is no minimum number of alternatives that must be discussed.[948] An agency's consideration of alternatives is adequate if it considers an appropriate range of alternatives—it does not have to consider every available alternative.[949]

The range of alternatives that must be considered in the EIS need not extend beyond those reasonably related to the purposes of the project.[950] An agency is entitled to identify some parameters and criteria related to the proposal for generating alternatives to which it would devote serious consideration. Without such criteria, an agency could generate countless alternatives.[951] Alternatives that are unlikely to be implemented need not be considered, nor must an agency consider alternatives that are infeasible, ineffective, or inconsistent with basic policy objectives.[952] In this sense, central to evaluating practicable alternatives is the determination of a project's purpose.[953]

Furthermore, the range of alternatives that reasonably must be considered decreases as the environmental impact of a project becomes less and less substantial. If a proposal would have minimal environmental effect, the range of alternatives that must be considered is narrow. It would be an anomaly to require that an agency search for more environmentally sound alternatives to a project that it has determined will have no significant environmental effects.[954] Moreover, feasible alternatives may be rejected if they present unique problems or cause extraordinary costs and community disruption.[955]

As applied to the instant case, NEPA does not require the consideration of alternatives that are remote and speculative possibilities because they would require basic changes to statutes and policies. Therefore, alternatives that would require the Commission to ignore open access policies enacted by Congress in the Energy Policy Act and to assume such policies would not be pursued by the states are not feasible and need not be considered. Likewise, the Commission need not consider alternatives that are ineffective or inconsistent with basic policy objectives, or that would cause extraordinary costs and community disruption. Finally, because the rule would have minimal environmental effect, the range of alternatives that must be considered is narrow. We conclude that staff has examined the appropriate alternatives in the FEIS and correctly determined that promulgation of the rule represents the most appropriate action.

Certain commenters have argued that the alternative that calls for the Commission to abandon the policy of promoting transmission access is more appropriate for the no-action alternative than the no-action alternative selected by the staff.[956] We disagree. As discussed below, that contention is more properly an argument about the appropriate baseline to use in the FEIS. That debate has been resolved by the consideration of a reference case that includes a baseline which bounds the effects that those commenters seek to have analyzed.

4. Mitigation

To fulfill the requirements of NEPA with regard to mitigation, an agency must identify and evaluate the adverse environmental effects of the proposed action, in this case the rule. Having identified and evaluated adverse environmental effects, the agency is not constrained from then deciding that other values outweigh the environmental costs of the proposal.

The leading case interpreting this requirement is *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332 (1989)(*Methow Valley*). There, the Court explained that:

Although these procedures (preparation and circulation of an EIS) are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process. *If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs* * * *. Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.[957]

The Court held that ''(t)o be sure, one important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences.'' [958] This is so because:

Implicit in NEPA's demand that an agency prepare a detailed statement on ''any adverse environmental effects which cannot be avoided should the proposal be implemented, 42 U.S.C. 4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided. More generally, omission of a reasonably complete discussion of possible mitigation measures would undermine the ''action-forcing'' function of NEPA. Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects * * *.[959]

The Court acknowledged that:

There is a fundamental distinction, however, between a requirement that mitigation be

[946] Vermont Yankee, 435 U.S. at 551.

[947] *Id.*

[948] Laguna Greenbelt, Inc. v. DOT, 42 F.3d 517, 524–25 (9th Cir. 1994).

[949] Resources Limited, Inc. v. Robertson, 35 F.3d 1300, 1307 (9th Cir. 1993).

[950] *Id.*

[951] *Id.*

[952] *Id.*

[953] National Wildlife Federation v. Whistler, 27 F.3d 1341, 1345 (8th Cir. 1994).

[954] Missouri Mining, Inc. v. ICC, 33 F.3d 980, 984 (8th Cir. 1994).

[955] Communities, Inc. v. Busey, 956 F.2d 619, 627 (6th Cir.), *cert. denied,* 506 U.S. 953 (1992).

[956] *See* Section V, Discussion, Subsection B.2.

[957] Methow Valley, 490 U.S. at 350–51 (citations and footnote omitted) (emphasis added).

[958] *Id.* at 351 (footnote omitted).

[959] *Id.* at 351–52 (citation omitted).

discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other * * *. Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.[960].

The Court again stressed that ''(b)ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures.'' [961] Thus, the Court held that mitigation, including mitigation that other governmental bodies have jurisdiction to implement, must be discussed in sufficient detail to ensure that environmental consequences of a proposed action have been fairly evaluated. However, a complete mitigation plan need not be actually formulated or adopted.

The suggestion by various commenters that the Commission is required to adopt and implement a plan to mitigate the impacts of the rule is without legal or factual basis. Even if the effects of the rule were greater than the FEIS shows them to be, *Methow Valley* clearly establishes that, regardless of the impacts of the proposed action, the Commission is required only to understand the impacts of its actions. This compels us to consider and discuss mitigation; it does not require us to adopt and implement mitigation. This FEIS thoroughly examines mitigation of possible adverse environmental effects and concludes that sufficient mechanisms exist to address the impacts of the rule, if any.

5. Role of EPA

Section 309 of the Clean Air Act, 42 U.S.C. 7609, authorizes EPA to review and comment on environmental impact statements prepared by federal agencies. If the EPA Administrator determines that a proposed regulation is unsatisfactory from, among other things, the standpoint of environmental quality, she may refer the matter to the Council on Environmental Quality (CEQ).[962]

In this case, EPA has commented extensively on the DEIS. It sought changes to the staff's analysis, primarily to include the use of the frozen efficiency assumptions. The staff has fully complied with EPA's study requests even though it regards such assumptions as implausible, contrary to the Energy Policy Act and Commission policy, and at odds with industry trends and practical considerations affecting the industry.[963]

Although EPA may disagree with the environmental acceptability of an agency's proposal, the agency is charged with making the ultimate determination whether to implement a proposal; in making that decision, the agency is free to reject advice offered through the comment and referral process.[964] Objections on the part of EPA may give rise to a heightened obligation of the agency to explain clearly and in detail its reasons for proceeding in the face of those objections. This the Commission has done. It has thoroughly examined the impact of the assumptions advanced by EPA; that analysis is detailed in Chapter 6 of the FEIS.[965]

In summary, NEPA prescribes a process and not a result. What is critical is that environmental impacts of a proposed action be adequately identified and evaluated—an important component of this process is understanding the possible mitigation measures that are involved, including measures which may be beyond the jurisdiction of an agency to implement. This requirement does not translate, however, into a requirement that an EIS adopt a mitigation plan, particularly where, as here, the impacts of the rule are small and may be either positive or negative.

B. Analysis of Alternatives

The FEIS evaluated three alternatives to the rule including: (1) A no-action alternative which assumes that the rule is not adopted, but that existing statutory and regulatory policies remain in place; (2) a Commission decision to reverse existing policies and halt implementation of mandatory open access; and (3) a Commission decision to aggressively develop competitive power markets by mandating corporate reorganization or divestiture.

1. The No-Action Alternative

The principal alternative to the proposed action is for the Commission not to adopt the rule, but to continue its existing open access and stranded cost policies. In recent years, the Commission has required public utilities that merge or seek to acquire jurisdictional transmission facilities under section 203 of the FPA to file open access transmission tariffs. The Commission also has required public utilities to file open access transmission tariffs to mitigate market power and to ensure non-discrimination if they or their affiliates wish to sell power at market-based rates. In addition, the Commission processes case-by-case requests made by potential transmission users under section 211 of the Energy Policy Act for transmission service, and has allowed utilities to include stranded cost provisions in their open access transmission tariffs on a case-by-case basis.[966]

Actions taken pursuant to section 211, and pursuant to sections 203 and 205 in merger and market-based rate cases respectively, represent a case-by-case approach to establishing open access. By contrast, the rule would, in a single generic proceeding, require each jurisdictional public utility to file open access tariffs at the same time. The consumer benefits from the rule are expected to be $3.8 to $5.4 billion per year.[967]

Absent action on the rule, the Commission would continue on a case-by-case basis to require public utilities to file open access tariffs and provide case-specific service as necessary or appropriate. Sections 205 and 206 charge the Commission with ensuring that voluntary transmission tariffs are not unduly discriminatory. If the rule were not adopted, the Commission would continue to require that voluntary tariffs be upgraded to offer non-discriminatory open access transmission services pursuant to the Commission's current standards. The result of continuing the Commission's policies without the rule is that the Commission would effectuate a more open transmission grid than is present today, but in a patchwork manner and at a slower pace. Over some extended time period, many, but not necessarily

[960] *Id.* at 352–53 (citation and footnote omitted).

[961] *Id.* at 353 n .16.

[962] The process appropriate for CEQ referral of actions by an independent regulatory agency is not addressed here.

[963] For example, see the discussion on transmission constraints at Section V, Discussion, Subsection C.

[964] *See* Alaska v. Andrus, 580 F.2d 465 (D.C. Cir.), *vacated in part on other grounds sub nom.* Western Oil & Gas Ass'n v. Alaska, 439 U.S. 922 (1978).

[965] The Commission bears the ultimate responsibility for evaluating the environmental impacts of the rule. In doing so, it must consider EPA's comments, but is not bound by them. *See* Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 201 (D.C.Cir.), *cert. denied,* 502 U.S. 994 (1991). In that case the Court held that:

> Congress wants the EPA to participate when other agencies prepare environmental impact statements. *See* 42 U.S.C. 7609(a). The EPA participated here. But the (Federal Aviation Agency), not the EPA, bore the ultimate statutory responsibility for actually preparing the environmental impact statement, and under the rule of reason, a lead agency does not have to follow the EPA's comments slavishly—it just has to take them seriously. *See Alaska v. Andrus,* 580 F.2d at 474.

[966] *See* Section III.

[967] *See* Section I.

all, utilities would become subject to open access requirements.

The case-by-case approach to achieving open access now in use is slower and more costly, and thereby less desirable, than the generic approach set forth in the rule. Given the rapid changes facing the industry, and the opportunity for great consumer savings, the no-action alternative is not a reasonable alternative to the rule.

2. Abandon the Policy of Promoting Transmission Access

A second alternative is for the Commission to abandon its current policy and take no action whatsoever to foster transmission access. Under this alternative, the Commission would no longer require open access transmission as a condition of mergers and asset acquisitions under section 203 or requests for market-based pricing under section 205, and would no longer grant applications filed pursuant to section 211. Offers of transmission would become strictly voluntary.

This alternative is inconsistent with Congress' general intent in the Energy Policy Act to foster wholesale competition, and also with its specific intent in expanding section 211 to permit the Commission to require a transmission-owning utility to make its transmission system available to eligible users if to do so is in the public interest. This alternative is also inconsistent with the Commission's obligations under sections 205 and 206 to ensure that public utilities do not unduly discriminate in providing jurisdictional services. It is, therefore, not a reasonable alternative to the rule.

3. Corporate Reorganization/Divestiture Alternative

Under this alternative, the Commission would require public utilities either to divest control of their transmission assets or to reorganize their corporate structures to perform their transmission functions through a separate subsidiary, thereby segregating transmission from the rest of the utilities' operations. However, corporate reorganization or divestiture would have no effect on the operation of power plants, which are assumed to be dispatched on the basis of economic efficiencies. Thus, this alternative would lead to the same environmental impacts as the rule. That is, the environmental effects would be no different from those studied in the FEIS.

C. The Scope of the FEIS

The FEIS examines the environmental impacts that could result from implementing this rule. This analysis is undertaken against the background of the existing electric industry. The electric industry currently produces environmental impacts, and those impacts are certain to change over time as the industry responds to factors as varied as changes in demand for electricity, the price of fuels, changes in regulatory programs, technological developments, and changes in market structure.

The FEIS does not examine the environmental impact of electric generation that is required to meet generators' existing service requirements. Nor does it examine the environmental effects of the inter-utility power exchanges that have occurred in the industry for as long as utilities have been interconnected. Rather, the FEIS examines impacts of potential increases in generation and changes in patterns of generation that might result from implementation of the rule.

In creating an analytical construct to examine the impacts of the rule, the staff developed a set of cases that defined the framework for running the computer models utilized to examine the changes in types of power plants constructed in the future and changes in operating patterns of existing power plants, including changes in fuel mix.

First, staff characterized how electric power markets might evolve absent adoption and implementation of the rule by establishing baselines (i.e., base cases) to project the future impacts of the industry.[968] The relative prices of coal and natural gas are critical in establishing what is likely to happen in the future. Accordingly, a range of prices was developed to project the impacts of these factors. In the first baseline, the Constant-Price-Differential Base Case, coal and natural gas prices are assumed to maintain the same relative position they have maintained over the past ten years. In the second baseline, the High-Price-Differential Base Case, natural gas is assumed to become substantially more expensive compared with coal than it has been over the past 10 years. In all other respects, the assumptions underlying the two base cases are the same.

Because the purpose of the base cases is to describe the impacts of the electric industry if the Commission takes no action over and beyond continued implementation of existing policies, the baselines assume that the Commission continues the open access and stranded cost policies it has instituted in recent years.

Some commenters have challenged this aspect of the baselines used in the study. The gist of their argument is that the environmental impacts of these programs have not been evaluated and that the baselines therefore improperly take credit for impacts that have not yet occurred, thus understating the projected impacts of the rule. In general, these commenters argue that the second alternative considered by the staff represents the ''true'' no-action alternative.

At bottom, this debate is not about what constitutes the appropriate no-action alternative. Rather, it is a debate about what aspects of the electric industry should be taken into account when determining future environmental impacts of the industry against which to measure the impacts of the rule. The commenters urge the Commission to consider varying baselines, but in general they oppose inclusion in the base cases of the Commission's ongoing open access and stranded cost programs.

Some commenters not only urge that the Commission not take into account continued implementation of its open access and stranded cost programs, but that it go much farther and establish baselines (against which to examine the impacts of the rule) that do not reflect the impacts of a great many changes that are already taking place in the electric industry. This proposal would establish a baseline that does not take into account: (1) Current Commission transmission policy; (2) programs that states and industry players have adopted to improve industry efficiency; and (3) mutually beneficial transactions that electric companies enter into on a regular basis.

The use of these assumptions would fly in the face of long-standing industry trends which move in precisely the opposite direction. Utilities are reducing reserve margins, improving plant availabilities, and reducing barriers to transmission even without Commission action.[969] Many states are aggressively pursuing plant efficiency policies.[970] These trends are long-standing and are not attributable to the rule, or even to a broader Commission program of open access. These trends, projected into the future, form the basis for the conditions reflected in the FEIS base cases. These trends are fundamentally at odds with the assumptions some commenters wish the Commission to use to establish baselines.

[968] As discussed below, once baselines were established to portray what is likely to happen in the electric industry without the rule, the projected impacts of the rule were then determined against this background.

[969] FEIS Chapter 6.

[970] *Id.*

We conclude that the approach used by staff to develop the baselines used in the FEIS is appropriate. Abandoning current open access policies is unrealistic, contrary to Congressional intent, and at odds with pro-competition policies that are at the heart of the Commission's current regulatory mission. The selection of the appropriate methodology to establish the baselines used in the FEIS is clearly within the Commission's discretion and expertise.[971]

What the commenters challenging this assumption desire is additional study of the impacts of the rule. Specifically, they wish to test the rule against a different set of assumptions for the acknowledged purpose of attributing greater adverse environmental consequences to the rule. The regulations of the Council on Environmental Quality no longer contain a requirement to conduct a conjectural ''worst-case analysis.''[972] NEPA requires an agency to adequately identify and evaluate the adverse environmental effects of a proposed action.[973] It does not require the agency to ignore the world as it exists.

Nonetheless, to respond to concerns about the baselines used in the DEIS with respect to key atmospheric emissions, the staff conducted sensitivity analyses to examine the outer boundaries of a range of cases requested by some commenters. This range of cases is called the ''frozen efficiency'' case. In essence, the frozen efficiency cases assume that no further open access of any kind occurs during the study period and that efficiency in the industry (for instance, power plant availability) remains frozen through the same period. The assumption that there is substantially more inter-regional transmission capacity than posited in the original analysis is separately examined in the base and rule cases.[974]

We must reiterate that the frozen efficiency case is far more restrictive in its assumptions than a true no-action case in which the Commission simply stops all efforts to promote open access. A true no-action case would closely resemble the FEIS base cases because much of the efficiency gain in that base case would occur even with no move toward open access.

As detailed in Chapter 6 of the FEIS, and as discussed below, even the frozen efficiency case demonstrates results that are essentially the same as those demonstrated by the base cases used by the staff. In the frozen efficiency worst case, when coal prices become considerably more attractive compared to gas prices, national NO_X emissions would be lower than in the base cases used by staff by only one percent (in 2000) to four percent (in 2010). If coal and natural gas prices remain at today's relative levels, the effects would be smaller—zero percent in 2000 to two percent lower in 2010. National CO_2 emissions would be between zero and two percent lower than in the base cases used by the staff over the same time frame.

D. Economic and Environmental Impacts of the Rule

The FEIS reports a quantitative estimate of approximately $3.8 billion to $5.4 billion in benefits per year of cost savings expected from competition under the rule. The FEIS also considers other, non-quantifiable benefits that can be expected from implementing the rule. These benefits include better use of existing assets and institutions, new market mechanisms, technical innovation, and less rate distortion. Further, the FEIS demonstrates to our satisfaction that the rule is likely to have little or no adverse environmental impact and that any impacts are as likely to be beneficial as harmful.

The issue most frequently raised by commenters involves air quality impacts, particularly the possible transport of NO_X emissions from upwind areas to airsheds in the Northeast and the resulting impacts on ozone non-attainment areas.

With regard to NO_X, the FEIS demonstrates that, as a result of clean air regulatory programs, NO_X emissions nationwide, with or without the rule, will decline through the year 2000, but begin to climb thereafter.[975] This basic trend remains the same in all cases examined in the FEIS. This is because the level of NO_X emissions in any given year depends primarily on one key uncertainty that is not related in any way to the rule—the relative price of natural gas and coal.[976] Lower prices for natural gas, relative to coal, lead to lower levels of NO_X emissions.

The FEIS also demonstrates that increases in access to transmission and efficiencies in electric power markets associated with the rule do not alter the expected trend of NO_X emissions, regardless of the relative price of natural gas and coal. Increased transmission access and industry efficiency facilitated by the rule may either decrease total emissions somewhat or increase them somewhat, depending on whether competitive conditions in the electric industry favor natural gas or coal. When competitive conditions favor natural gas, the effect of the rule is beneficial, reducing emissions somewhat. When competitive conditions favor coal, emissions increase by a small amount. Nevertheless, the overall trend of expected NO_X emissions retains its general shape.

In assessing the projected impacts of the electric industry absent adoption of the rule (*i.e.,* the base cases studied in the FEIS), the most important factor affecting changes in national NO_X emissions is the relative competitive position of coal and natural gas. The most important factor affecting the relative competitive positions of coal and natural gas is price.

National NO_X emissions from the electric industry were 5,844 thousand tons in 1993, the last year for which complete data is available. If relative gas

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[971] *See, e.g.*, Sierra Club v. Marita, 46 F.3d 606, 621, 623 (7th Cir. 1995).

[972] Methow Valley, 490 U.S. at 354–55. The revised requirement, 40 CFR 1502.22, which pertains to incomplete or unavailable information, is inapplicable as well. The problem here is not incomplete or unavailable information, but rather which existing policies and events should be included in the analysis.

[973] 42 U.S.C. 4332.

[974] Several commenters, including EPA, are concerned that increases in transmission capacities resulting from open access might increase generation levels and thus air emissions. EPA is especially concerned with the expansion of transmission links between the midwest and east coast. The FEIS examines scenarios that increase transmission capacity substantially beyond current levels. This analysis finds that postulated increases do not affect emissions attributable to the rule. We believe increases considered in the FEIS far exceed any transmission capacity increases that might occur as a result of the rule. This is due in part to the fact that state-level siting issues, the principal barrier to major capacity increases in the transmission grid, are unaffected by the rule. The issues regarding enhancement of existing lines are more complex. Competition under open access will lead to improved efficiencies in generation. Transmission, on the other hand, will remain a regulated monopoly function. The rule will reduce barriers to access, but will not open the transmission system to direct competition. Thus, we believe that the competitive effects of the rule on transmission expansion will be relatively small.

EPA urges us to assume that transmission capacity is expanded by 40 percent compared to our base case. We do not believe this is likely to occur. The experience with one proposed new transmission line in the very area EPA focuses on demonstrates this difficulty. Duquesne Light filed an application with the Pennsylvania Public Utilities Commission to construct a new 500 Kv line across Pennsylvania to supply electricity to New Jersey. Within a few days of the filing of the application, over 3,000 individuals and groups filed complaints in opposition to the proposed line. ''Electricity Utility Week'' (November 4, 1991). A bill was proposed in the Pennsylvania Legislature to prevent construction of the line. Another bill was introduced in Congress to halt construction of new transmission lines throughout the U.S. for two years. Duquesne ultimately decided to withdraw its proposal and the line was not constructed. ''The Energy Daily'' (April 4, 1994).

[975] FEIS Figure ES–1 and Table ES–2, reproduced at Appendix H.

[976] *See, e.g.*, FEIS at ES–8.

and coal prices remain the same, for example, we project that national NO_X emissions will be 5,579 thousand tons in 2005 without adoption of the rule. If gas prices rise relative to coal prices, we project that NO_X emissions in 2005 will be 6,053 thousand tons without adoption of the rule. Stated another way, favorable coal prices are projected to result in NO_X emissions that are about three percent higher in 2000 to 10 percent higher in 2010 over the base case where gas is the favored fuel.

The effect of adopting the rule could be to raise or lower national emissions slightly compared to the effects projected in the base cases. Nationally, in 2005, we project that the Competition-Favors-Coal Scenario (with rising relative gas prices) would add one percent to NO_X emissions above the base case that favors coal. The Competition-Favors-Gas Scenario (with constant relative fuel prices) would lower emissions by two percent compared with the base case that favors gas.

Regional effects are generally similar. In 2005, in the East North Central region (a source of potential increased NO_X emissions that might affect the Northeast), the base cases project small increases in industry emissions (two percent). In that region in 2005, the rule may add as much as one percent to NO_X emissions compared to the relevant base case (the Competition-Favors-Coal Scenario) or reduce emissions compared to the relevant base case by as much as three percent (the Competition-Favors-Gas Scenario).

The EIS uses the UAM–V model to track the effects of projected NO_X emissions on downstream ozone levels during a severe weather period. This detailed air quality modeling shows no real difference in the Northeast between the base case favoring coal (the High-Price-Differential Base Case) and the Competition-Favors-Coal Scenario. Detailed local analysis shows slightly lower ozone concentrations in some locations and slightly higher concentrations in others. None of the differences adds to non-attainment levels projected in the relevant base case, and all fall within the noise levels of the model. That is, they are smaller than the uncertainties in the science underlying the model.

As discussed above, the Commission believes that the base cases used by staff in its analysis are the most realistic and, therefore, the most appropriate cases to consider the potential environmental impacts of the rule. However, as requested by the EPA, DOE, and certain other commenters, sensitivity analyses were conducted to examine the impacts on the results of the analysis if key assumptions are changed as requested by commenters. Presumably, comparing the projected impacts of the rule to the requested ''frozen efficiency'' case provides a measure of the greatest impacts that could possibly (albeit unrealistically) be expected from implementing the rule.[977]

As the FEIS discusses, even comparing projected NO_X emissions under the rule to the highly implausible frozen efficiency case, impacts attributable to the Rule are projected to be modest or non-existent. This holds true even when large (up to 40 percent) increases in transmission capacity are assumed to occur under the rule.[978] Moreover, adding coal-favoring assumptions—which would presumably increase emissions—about future competitive conditions in the electric industry to the implausible frozen efficiency assumptions, NO_X emissions are projected to increase very modestly until the year 2010 (by only two percent in 2000 and three percent in 2005). Even using this highly unlikely alternative to the rule, the analysis projects a net environmental benefit (although a very small one) if gas prices stay constant compared to coal prices.

Concern also has been expressed with regard to the need to mitigate CO_2, mercury, and fine particulate emissions, and with the impact of the rule on visibility. As with NO_X, the FEIS demonstrates that the rule is as likely to improve such emissions and visibility as it is to exacerbate them. In any event, the impact is expected to be small.

In sum, the Commission adopts the FEIS findings that:

- The relative price of coal and natural gas has a larger effect on NO_X emissions than any impacts from the proposed rule. Without the proposed rule, different fuel price assumptions are projected to lead to a 7 percent difference between the two base cases in nationwide NO_X emissions in 2005, with some regions affected more than others.
- The rule is projected to have only slight impacts on NO_X emissions, and the impacts are as likely to be beneficial as harmful. In 2005, if competitive conditions in the electric industry (for instance, heat rates) favor natural gas, the proposed rule is projected to decrease baseline NO_X emissions by 2 percent nationwide. If competitive conditions favor coal, the rule is projected to raise baseline NO_X emissions by 1 percent. Regional effects in both cases are generally similar. In short, any negative impacts that the rule might cause are a small fraction of the uncertainty inherent in fuel price projections.
- Even a substantial increase in transmission capacity (up to 40 percent on every transmission line in the country) would change emission estimates by very small amounts in all cases. In many cases, the changes would represent net environmental benefits.
- Even comparing projected emissions under the proposed rule to the highly implausible frozen efficiency case, impacts attributable to the rule are projected to be modest or non-existent. The staff believes this is an unreasonable comparison because the frozen efficiency assumptions ignore industry trends that the Commission is generally powerless to stop. In effect, they assume that the alternative to the proposed rule is (1) for the Commission to reverse current transmission policy, an action that is inconsistent with Congressional policies under EPAct, (2) for states to cease adopting programs to improve industry efficiency, and (3) for electric companies to cease entering mutually beneficial transactions. Even after adding coal-favoring assumptions about future competitive conditions in the electric industry to the implausible frozen efficiency assumptions, NO_X emissions are projected to increase only very modestly until 2010 (by only 2 percent in 2000 and 3 percent in 2005). Even using this highly unlikely alternative to the proposed rule, the analysis projects a net environmental benefit (although a very small one) if gas prices stay constant compared to coal prices. EPA indicates that it considers the lower gas price assumption to be ''the more likely of the base cases'' (DEIS comments, p. 35).[979]

E. Mitigation Analysis

An agency is required to consider mitigation if the proposed action will result in adverse environmental impacts.[980] The insistence of commenters that the Commission adopt and implement mitigation measures is based on significantly overstated assumptions regarding the contribution of the rule to existing environmental problems. The analysis presented in the FEIS establishes that these assumptions about the impact of the Rule are wrong. As stated in the FEIS,

The sensitivity analyses (*i.e.*, the frozen efficiency case requested by EPA, DOE and other commenters) do not support the argument that the proposed rule is likely to lead to large immediate impacts that require

[977] These assumptions include, and go substantially beyond, the ''no-action'' alternative advocated by EPA and others in positing a baseline that would tend to maximize the amount of NO_X emissions attributed to the rule. This is because under a frozen efficiency scenario *all* increases in power trading (and resulting NO_X emissions) would be attributed to the Rule. In fact, as described below, many of the efficiencies posited under the EPA assumptions are attributable to other factors and certain of the efficiencies (*e.g.*, 40 percent increase in transmission capacity) are wholly unrealistic.

[978] Some commenters assume that large increases in transmission capacity would result in a significant expansion in generation and thus increased emissions. In reality, the analysis present in Chapter 6 of the FEIS indicates that this is not the case.

[979] FEIS at ES–2.

[980] *See* Methow Valley, 490 U.S. at 348–53.

immediate mitigation. In fact, using the more reasonable EIS base cases, it is clear that the proposed rule is at least as likely, if not more likely, to benefit the environment as it is to have adverse environmental impacts. As a result, we believe it is not a responsible course of action to undertake efforts to mitigate speculative adverse environmental consequences that may well not materialize; such action could well have the opposite effect and delay the clear benefits the proposed rule will produce in order to address small, highly uncertain environmental impacts.[981]

Even if the rule were to result in adverse environmental impacts as a result of competitive conditions that favor the future use of coal, such impacts are not likely to occur until about the end of the time period examined in the FEIS. EPA in its comments on the DEIS stressed, based on views it formed prior to knowing the results of the frozen efficiency case, that the Commission should develop interim mitigation until EPA can implement a program of controls. EPA stated in its comments that it has authority to address ''some'' of the impacts it believed would result from the rule, but stated that it would take it considerable time to do so—up to 10 years. The results of the unrealistic worst case analysis demonstrate that adverse effects would not be expected to occur for approximately 10 years in any event. Thus, interim mitigation is not required; EPA will have sufficient time to develop under the Clean Air Act whatever mitigation plan it may deem necessary.

Although the staff concluded that mitigation was unnecessary given the results of its analysis, given the importance of this issue, it nonetheless examined in considerable detail measures, including those proposed by commenters, that could be taken to mitigate adverse environmental consequences of the rule if they were to occur. The FEIS focuses on NO_X emissions in particular given the importance assigned to this issue by commenters.

1. Mitigation Measures Under the Clean Air Act

As discussed in greater detail in the FEIS, the existence for many years of a significant ozone non-attainment problem in parts of the U.S. has led to the development of mechanisms to address this issue. In particular, Congress has established requirements in the Clean Air Act for regulating NO_X emissions. These requirements establish specific NO_X emission levels for certain types of boilers. As discussed below, the Commission is not authorized to alter those requirements as requested by certain commenters.

In the 1990 Amendments to the Clean Air Act, Congress enacted the Acid Rain Program to reduce annual SO_2 and NO_X emissions. For SO_2, Congress established a cap and trade program that uses a market-based allowance system to reduce SO_2 emissions from utilities by approximately 50 percent. The allowance system caps utility emissions at 8.9 million tons a year by 2000. A pool of 8.9 million allowances was then created, each representing the right to emit one ton of SO_2 pollution in a specified calendar year. The allowances can be used to permit current emissions, sold, or held in reserve.

As a result of uncertainty in the understanding of ozone formation and transport, Congress acted less aggressively in regulating NO_X emissions. It chose to limit NO_X emissions from utilities by means of allowable emission limits and to require further study of ozone precursors, leaving room for the EPA to abate NO_X requirements where scientifically justified. Accordingly, in section 407 of the Clean Air Act, 42 U.S.C. 7651f, Congress established a NO_X reduction program which provides that EPA shall by regulation establish annual allowable emissions limitations for NO_X for specified types of utility boilers (Group 1 boilers). Section 407 also provides that, by not later than January 1, 1997, the Administrator shall establish allowable emission limitations for NO_X on a lb/MMBtu, annual average basis for specified other types of utility boilers (Group 2 boilers).

On April 13, 1995, EPA promulgated a Rule setting emission limitations on Group 1 boilers that combust coal as a primary fuel. EPA reports that the April 13, 1995 regulation ''is expected, by the year 2000, to nationally reduce NO_X emissions by an estimated 1.54 million tons per year.''[982]

On January 19, 1996, EPA published a proposed rule to implement the second phase of the Acid Rain Program. This rule proposes to establish NO_X emission limitations for Group 2 boilers and to revise NO_X emission limitations for Group 1 boilers to impose tougher standards. EPA states that ''[t]he proposal would, by the year 2000, achieve an additional reduction of 820,000 tons of NO_X annually.''[983]

In addition, Congress determined to deal with the issue of the interstate transport of ozone by authorizing the formation of transport commissions. The Clean Air Act authorizes EPA to establish transport regions that are charged with assessing the degree of interstate transport of pollutants, assessing mitigation strategies, and recommending revisions to State Implementation Plans to correct the problem. The Clean Air Act specifically establishes an ozone transport region (OTR) for the Northeast. The jurisdictions that comprise the OTR have developed a coordinated approach to this problem that includes adopting a regional cap on NO_X emissions.

Although the OTR process is achieving its purpose, a broader program is clearly appropriate to address the overall problem. As a consequence, the Ozone Transport Assessment Group (OTAG) has been formed which encompasses the OTR and upwind states that contribute to non-attainment. OTAG is performing extensive photochemical grid modeling of the eastern U.S. to determine ozone transport problems and to evaluate the efficiency of various control strategies. OTAG is considering recommending a cap and trade system for NO_X emissions from all sources in a 37-state area comprising the Northeast OTR and upwind states. If the cap and trading system becomes effective it therefore should fully mitigate NO_X emission increases, if any, attributable to open access transmission within the 37-state area. A cap and trade program is also likely to mitigate CO_2 and mercury emissions.[984] Any incremental increases in NO_X, mercury, or CO_2 emissions that may result from the rule can and should be addressed within this existing framework.

All of these factors lead us to agree with the staff's conclusion in the FEIS that a cap and trading system such as that under consideration in the OTAG process is the preferred approach to the overall NO_X emissions problem, including emissions associated with the rule, if any. This approach brings together EPA and the concerned states in a program that utilizes existing regulatory authority under the Clean Air Act.

The OTAG process brings to the table the parties that must participate in making the difficult decisions necessary to fully resolve this problem. OTAG possesses the technical resources and expertise to address the difficult scientific and technical issues that must be resolved to remedy this problem. A cap and trading system will require the

[981] FEIS at 7–5.

[982] 61 FR 1442 (1996).

[983] *Id.*

[984] It should be noted that the science relating to determining mercury emission levels and also to the environmental impacts of CO_2 is uncertain, particularly with regard to the impacts of CO_2 emissions. The FEIS evaluates these matters as best it can under the circumstances.

development of emission baselines for a great many entities; development of such baselines is certain to require extensive modeling and many difficult compromises. OTAG and others have been working towards this end for a long time. A more limited approach—one undertaken by this Commission or aimed at the limited (and only potential) impacts of the rule—cannot render a satisfactory solution. A program designed to deal with the slight impacts associated with the rule will not contribute significantly to the overall solution and could, indeed, impede it if the Commission took actions that prove inconsistent with solutions developed by OTAG or if debate over Commission-sponsored mitigation were to continue to distract interested parties from the preferred route of developing a consensus solution within the framework of the Clean Air Act. We respect the expertise and the goals of the OTAG process and do not believe we can or should substitute for them in addressing this long-term national problem.

2. Mitigation Measures Proposed by Commenters

The FEIS also analyzes NO_X mitigation measures proposed by commenters. These include voluntary measures pursuant to which the Commission would support utility efforts to mitigate pollution and proposals under which the Commission would mandate mitigation. Commenters suggest a variety of Commission actions including using its conditioning authority to require utilities to consider environmental impacts;[985] sanctioning imputed charges in rates to reflect incurred environmental externalities; and designing specific, transaction-oriented mechanisms designed to address the increment of emissions attributable to new wholesale transactions resulting from the rule.[986] The FEIS discusses five proposals in some detail: Those presented by the Center for Clean Air Policy (CCAP), the EPA, Joint Commenters, the Project for Sustainable FERC Energy Policy (Sustainable FERC), and the DOE.[987] Of these, the FEIS recommends the proposal put forward by DOE:

> Staff concurs (with the DOE analysis) that the best solution to the problem of NO_X transport and ozone non-attainment lies in exercise of statutory authority under the Clean Air Act by EPA and the states. Absent Congressional action, no resolution of the difficult political and technical issues will represent a lasting solution of this problem except one that comes from a collaborative process such as OTAG.[988]

As the FEIS explains in great detail, each of the other recommendations suffers from serious shortcomings. In one form or another, they would require the Commission to implement technically complex emissions control regimes outside of the Commission's expertise. Some would require that we duplicate existing monitoring systems. Others would require that we implement provisions that would, in effect, defeat the very purpose of the rule.[989] Indeed, these recommendations would have the Commission embark upon an extensive environmental regulatory regime that appears unwarranted, unworkable and, as discussed below in some detail, beyond our lawful authority. And they would have us act in a way that may well frustrate the ongoing efforts to deal with these problems and would frustrate the benefits to be derived from the rule.

The CCAP asserts that FERC should establish an emissions monitoring program for NO_X and CO_2 and implement an emission neutrality requirement (ENR) to mitigate what it believes to be the impacts of the rule. The monitoring program would require generators to identify emissions associated with off-system sales on a kWh basis in real-time and integrate this information with the data to be made available on electronic bulletin boards (EBBs). Under the ENR aspect of CCAP's proposal, to be eligible for service under open access tariffs, companies that operate plants upwind from the Northeast OTR and the upper Midwest would have to certify that firm and economy off-system power sales using an open access tariff would have no incremental impact on ozone compliance in other areas. All sales for resale that require service under an open access tariff and originate upwind of the OTR would need to include NO_X emissions reduction credits equal to the increase in emissions related to those sales. The seller could meet its requirement to be ''emission neutral'' under the mechanism by achieving the required emission reductions annually at their own facilities, or through purchases of credits anywhere in the airshed.

EPA proposes two mitigation alternatives. In the first, it states that FERC could deny open access service unless there is a showing that the service will not have an adverse environmental impact. Under this approach, EPA, in cooperation with the states in OTAG, would recommend and establish a mitigation mechanism that could be entered into by a customer seeking open access service and used by such customer to make the necessary environmental demonstration supporting the provision of the service. The FERC would rule on whether the mitigation mechanism presented by the customer and the evidence on the likely effectiveness of the mechanism were sufficient to make the environmental demonstration.

In the second proposal, EPA suggests that any fossil fuel-burning generating entity seeking service under open access transmission tariffs would be required to commit by an enforceable contractual undertaking that it will avoid or offset emission increases (measured against as yet undetermined baselines), and periodically certify its compliance with that commitment. Middlemen would have a similar obligation. The generator could meet its emission limits either by making verified emission reductions within its own facilities or by obtaining eligible emissions offsets from other entities. An important element of the mitigation mechanism is the emissions baseline above which mitigation would be required. This mitigation mechanism would operate until superseded by appropriate programs addressing these pollution problems under other authority. EPA's own comments on the DEIS recognize that there may be substantial practical complexities in implementing such mechanism.

The Joint Commenters propose a flexible mitigation strategy pursuant to which FERC would require as part of open access transmission a demonstration that NO_X emissions would not be increased. To qualify for open access transmission access, an electric generating unit would be

[985] For example, EPA suggests that we require certain types of filings, such as a request to charge market-based rates, to include an assessment of environmental impacts and mitigation, if necessary. Joint Commenters suggest we require wheeling and interconnection applicants to demonstrate that their requests will not contribute to increased NO_X or ozone in downwind regions, and Conservation Law suggests linking recovery of stranded costs to the retirement of unsuitable generators.

[986] The FEIS also discusses mitigation measures that can be undertaken by others. These include strategies to require some existing plants to meet more stringent, new NO_X standards, relying on market forces to control inter-regional NO_X transport, or measures that could be employed by the states to limit power purchases based on environmental considerations. *See* FEIS at 7–26 to 7–28.

[987] FEIS at 7–28 to 7–43.

[988] FEIS at 7–43.

[989] The rule represents the Commission's remedy to unduly discriminatory practices found to exist by public utilities that own and/or control interstate transmission facilities. Having found an unlawful practice, we must remedy it. However, EPA would require that those seeking to enjoy the benefits of non-discriminatory open access transmission further agree to go beyond current environmental requirements specified by federal and state authorities authorized by Congress to regulate such matters.

responsible for mitigating any excess NO_X emissions that adversely affect ozone non-attainment areas. Utility systems would be able to comply by use of emission control technology, fuel changes, or other measures to reduce applicable emissions, or by buying appropriate emission reduction credits to offset excess emissions. To comply with this policy, a company would need first to calculate whether it had excess emissions for the ozone season. A company that failed to mitigate would be required to remit to a regional emissions fund all revenues in excess of the incremental operating cost of producing electricity sold under the open transmission access policy during the previous ozone season plus an emissions make-up penalty the following year patterned after the penalty for excess emissions in the Acid Rain Program. The proposed mitigation policy would apply generally throughout the OTAG region.

The outlines of Sustainable FERC's proposal are vague, but it appears to request that FERC, either singly or in combination with other agencies, eliminate the different environmental standards that apply to entities participating in open access transmission. This plan would include the reporting of emissions data to EPA, principles to eliminate the adverse impacts of non-comparable environmental standards, and an EPA-administered emissions monitoring process designed to determine whether generating plant emissions of specific pollutants under open access exceed designated baselines.

Finally, DOE proposes action under the Clean Air Act as the most effective mitigation of the inter-regional NO_X transport problem. DOE supports the activities of OTAG and believes that a regional NO_X cap and trading system is a particularly promising approach. If OTAG does not succeed in addressing the problem, EPA should consider exercising its authority under sections 110 and 126 of the Clean Air Act, 42 U.S.C. 7410 and 7426, respectively, to require states to amend their State Implementation Plans to reach the same result.

The proposals advanced by CCAP, EPA, Sustainable FERC, and Joint Commenters suffer from practical and legal problems that render them unworkable. A common thread is for the Commission to ''level the environmental playing field.'' ''Impacts of non-comparable environmental standards'' are not impacts of this rule, but rather of the Clean Air Act regulations and statutory requirements under which those standards have been imposed. We have no authority to ''level'' the different emissions standards for different types of power plants, when those differences in standards are the direct result of the program adopted in the Clean Air Act and regulations promulgated by EPA. In enacting the Clean Air Act, Congress chose not to impose identical emission standards on all electric utility powerplants, but did create mechanisms for regulation of certain pollutants that can be used to ''level the playing field'' if that is appropriate clean air policy. For the Commission to presume to overturn those standards or seek to impose more stringent standards is something the Commission believes it cannot do.

A fundamental problem that plagues several proposals is the difficulty in identifying causation. While it is generally accepted that there is a link between increased emissions in certain areas of the country and increases in ozone levels in other areas, that link is in many respects poorly understood. In particular, it is difficult to prove that emissions from a particular unit or particular system contribute to ozone noncompliance elsewhere. As a result, it is very difficult to establish an analysis that would support a certification that a particular power sale would have no incremental impact on ozone compliance.

Similarly, the proposals tying ''emission neutrality'' to ''open access transactions'' seem to fundamentally misunderstand the operation of power markets and the role of open access tariffs in moving power from willing sellers to willing buyers. In particular, these proposals do not reflect the difficulty in identifying the transactions that are likely to result from the open access policies adopted in this rule. The rule does not authorize sales for resale of electric energy; rather, it establishes requirements for open access transmission, *i.e.*, it requires utilities with monopoly control of transmission to make transmission service available to customers who want to buy power from someone other than the transmission owner. Open access will facilitate transactions where the transmission owner will not provide service. However, generators do not necessarily have to request service under a Commission ordered open access tariff to make specific sales. There are a number of ways to structure transactions where third party transmission service is either not necessary or is voluntarily available.[990] Even when open access tariffs are used, the sales are not always (or even often) sales from specific generators to specific buyers. Marketers or brokers can buy generation from any number of sources. They can also buy transmission service in blocks that may not be associated with specific sales. Service agreements can be executed that allow use of non-firm transmission service for transactions that are not even known at the time of the execution of the agreement.

The rule envisions a world where transmission will be arranged with minimal transaction cost. Terms, conditions, rates, and even approvals often will be established far in advance of particular transactions. All other problems aside, requiring showings of the kind required by the various mitigation proposals would undermine the basic philosophy behind the rule, would make transactions much more difficult to engage in, would increase transaction costs, and would cause delays resulting in lost efficiencies. In addition, it would directly conflict with the Commission's responsibility under the FPA to remedy undue discrimination in jurisdictional services, which is the fundamental purpose of the rule.

Another significant issue with several of the proposals is how to establish the baselines against which to measure emissions. Establishing such baselines is extremely difficult; EPA itself, for example, has not come to grips with these complexities. The picture is complicated by difficulties in identifying open access transactions that result from the policies implemented by this rule. For example, some utilities use holding company corporate structures in which generation assets are held in an affiliate that sells power at wholesale to the holding company's distribution affiliate. For these utilities, all retail native load service would be subject to environmental review under the mitigation proposals if the base were established by reviewing all wholesale sales. This would make the Commission responsible for addressing all NO_X emissions from power plants for utilities with such corporate structures, a result that goes far beyond the stated goal of mitigating emissions that result from increased interstate trade facilitated by the rule.

As the industry changes, new structures are emerging that will make any system that tries to keep track of wholesale sales even more difficult to administer. California is putting into place an industry structure that could see all generation in the state sold into a central pool and then sold again at wholesale to distributors. Other states

[990] Indeed, over 100 utilities are now providing some form of open access on a voluntary basis.

are contemplating retail market structures that are even more fluid than the California proposal. Differentiating between sales for resale that are for former retail customers and sales for resale that are for ''new'' wholesale customers, and therefore somehow the result of open access policies, would be extremely difficult. In general, it is not easy to distinguish among growth in generation for native retail load, wholesale requirements customers, existing economy sales, and new sales that are facilitated by the rule, either for purposes of establishing a baseline or for tracking responsibility for emissions.[991]

Joint Commenters proposal would have the Commission impose a revenue collection measure—in essence a tax on open access transmission. The Commission is authorized by the FPA to pass through costs, not to collect additional fees from entities utilizing programs established by the Commission. The payment of emission fees is outside the Commission's authority under the FPA.

The FEIS concludes that mitigation by the Commission should not be undertaken in this rule because:

- Any mitigation measures the Commission might undertake are not justified by the small impacts of the rule, which impacts are as likely to be beneficial as they are to be harmful;
- The impacts of the proposed rule are dwarfed by the far larger ozone and NO_X emission issues that either have nothing to do with the electric industry or will be unchanged by the rule or the larger open access program. We believe that it would be ineffective to address the NO_X and ozone issues in a piecemeal way;
- The NO_X issue is part of a long-standing, difficult set of inter-regional environmental issues. Representatives of many interests have invested substantial efforts toward finding acceptable solutions through the OTAG process. Any mitigation the Commission might undertake could usurp EPA's mandate under the Clean Air Act and undermine progress towards comprehensive solutions sought by OTAG. This is not justified by impacts that are small and just as likely to be positive;
- We do not agree that the frozen efficiency reference case should be substituted for the EIS base cases or that competitive forces will favor coal over the next 15 years. But even accepting these assumptions, emissions attributable to the rule are relatively small until well after the turn of the century. So, even accepting such assumptions, the staff believes it would be unreasonable for the Commission to adopt mitigation requirements as part of the final rule; to do so would be tantamount to assuming that EPA and OTAG will not implement reasonable control measures in the next ten to 15 years;
- The Federal Power Act and NEPA, either singly or conjointly, do not authorize the Commission to adopt and implement the proposed mitigation measures. The Commission does not possess (and has no mandate to possess) expertise on the extremely difficult issues involved in atmospheric chemistry and transport. It is fundamentally an economic regulatory agency. As a result, any mitigation measures the Commission undertook would be based on less-than-ideal information and analysis. It is unreasonable for the Commission to attempt such mitigation given the impacts found in this FEIS. This is especially true in light of the substantial additional research that EPA and OTAG are undertaking on the basic nature of the problem;
- Some suggested mitigation measures that might work at the transaction level would undermine the purpose of the rule. There is no justification for endangering the substantial benefits projected from the rule to mitigate a problem that might not exist and that is, in any case, likely to be small.[992]

In sum, the rule is expected to have small impacts and those impacts are as likely to be beneficial as they are to be harmful. Therefore, mitigation is not required. In addition, processes are in place to address the pre-existing NO_X problem—a problem that dwarfs any impacts the Rule might have. These processes are expected to address the underlying transport problems well before any potential harmful effects of the rule will develop.[993]

The mitigation measures that certain commenters urge the Commission to adopt are truly unwarranted in light of these facts. They also fail to recognize or adequately consider the Commission's limited jurisdiction, its lack of expertise required to assess and address the underlying problem, the existing mechanisms and efforts to address the underlying problem, and the balance that has been reached and continues to be defined by the many interests that have invested substantial efforts toward finding acceptable solutions to these problems.

3. Legal and Policy Considerations

The FEIS concludes that the mitigation measures recommended by commenters are beyond our authority to implement and that strong policy considerations militate against their adoption. We agree.

Several commenters contend that the Commission is authorized to use the rulemaking as a vehicle to impose an air emissions regulatory regime on the electric utility industry.[994] Others argue that, as a matter of law and policy, we cannot and should not impose such measures.[995] While the conditioning proposals vary in specifics, all have as their central theme that generators would be forced to agree to operate generation facilities in a manner to reduce air pollution below levels currently authorized by EPA and the states.[996]

The Commission's authority to regulate public utilities is set out in Parts II and III of the FPA. Parts II and III do not provide the Commission with the authority to condition either the provision of, or access to, jurisdictional services on the agreement to undertake environmental mitigation measures.[997] Section 201, which is found in Part II of the FPA, explicitly bars the Commission from exercising the jurisdiction that the proponents of the conditioning

991 We are also very concerned about the time and effort involved in developing the various programs suggested by commenters. The EPA and OTAG are working on the establishment of emissions standards, which action is an essential prerequisite to three of the proposals. However, developing those standards is among the challenges that EPA believes may take up to 10 years to complete. It simply makes no sense to delay the benefits of the rule (which has slight, if any, environmental impacts) during the period required for experts in the area to develop standards that, once established, can form the basis of a program under existing Clean Air Act authority.

992 FEIS at 7–48.

993 Many commenters state that the rule does not require mitigation and urge that a mitigation plan not be adopted. We would also note in light of the substantial number of comments opposing the proposition that we have mitigation authority, that any such mitigation measure we may choose to undertake would, in all likelihood, be subject to judicial review and the inevitable delays and uncertainties that accompany litigation. In the meantime, we would expect actions by OTAG and EPA to eclipse whatever action the Commission attempted to implement during this time.

994 Alliance for Affordable Energy, *et al.* (Alliance); EPA; Project for Sustainable FERC Energy Policy (Project for Sustainable FERC); and Northeast States For Coordinated Air Use Management (NESCAUM).

995 *See, e.g.*, AEP at 3; CINERGY at 8–9; Entergy at 11–13; GPU at 2; Midwest Ozone Group at 3; NMA at 5–8; Ohio Consumers' Counsel at 5; Ohio PUC at 1; TVA at 8; and WEPCO at 2. *See also* CCEM Supplemental Comments at 1–5.

996 *See, e.g.*, CCAP (FERC should establish an emissions monitoring program and implement an emission neutrality requirement); EPA (either deny open access service unless the customer demonstrates no adverse environmental impact or require, through contract terms, any generating entity seeking open access service to avoid or offset emission increases for the benefit of third parties); Joint Commenters (electric generators to qualify for open access must be held responsible for mitigating any excess NO_X emissions through a revenue collection measure); Project for Sustainable FERC (pro forma tariffs to contain environmental mitigation measures imposed on generators). *See generally,* FEIS at 7–28 to 7–42.

997 Parts II and III of the FPA originated with the Public Utility Act of 1935, 49 Stat. 803, 838 (Aug. 26, 1935) and stemmed in part from the financial abuses in the utility industry in the late 1920s and early 1930s. *See* Report of National Power Policy Committee on Public-Utility Holding Companies, S. Rep. No. 621, Appendix, 74th Cong., 1st Sess. 55–60 (1935); *see also* H.R. Rep. No. 1318, 74th Cong., 1st. Sess. 1–3 (1935). The FPA has been amended several times, most recently by the Energy Policy Act of 1992.

proposals would have us undertake: authority over the *operation* of generating facilities. Section 201(b)(1) provides that:

The Commission shall have jurisdiction over all facilities for (the transmission of electric energy in interstate commerce) or (the) sale of electric energy (at wholesale in interstate commerce), *but shall not have jurisdiction, except as specifically provided in (Parts II and III), over facilities used for the generation of electric energy* * * *. (emphasis added).

This standard is reflected throughout Parts II and III of the FPA. Sections 205 and 206, which are the cornerstones of Parts II and III, concern the regulation of *rates, terms and charges* occurring in connection with transmission or sales subject to the Commission's jurisdiction. Parts II and III do not grant the Commission authority to regulate the environmental aspects of jurisdictional activities.[998] Instead, they provide authority over certain interconnections;[999] the rates, terms and conditions of wholesale sales of electric energy in interstate commerce and transmission in interstate commerce; the disposition and merger of facilities used for such sales and transmission; issuance of securities; accounting matters; and interlocking directorates. Thus, the Commission's jurisdiction over generation extends only to matters directly related to the *economic* aspects of transactions resulting from such facilities.[1000] We do not have jurisdiction over the *physical* aspects of generation facilities.[1001]

This limitation on the Commission's jurisdiction stems from the historical purposes for which the Commission was established. Congress had two objectives in expanding the authority of the Federal Water Power Commission in 1935.[1002] The first was to close the gap created by *Public Utilities Commission* v. *Attleboro Steam & Electric Co.,* 273 U.S. 83 (1927)(*Attleboro*), in which the Court found that under the Commerce Clause states could not regulate wholesale sales of electricity in interstate commerce. The result was a gap in regulation of such sales because there was no federal entity with authority to regulate them at that time. The second was to eliminate the economic abuses that were then rampant in the industry.[1003] In expanding the Commission's jurisdiction Congress made clear that such Federal regulation, however, was ''to extend only to those matters which are not subject to regulation by the States.''[1004]

Several commenters argue nonetheless that the Commission may do indirectly what it is barred from doing directly. Their arguments boil down to the claim that the Commission's responsibility under the FPA to act in the ''public interest'', either alone or in conjunction with NEPA, provides the Commission with the authority to impose environmental regulation on generators to address the supposed impacts of the Rule.[1005] We disagree. In making this argument, the commenters attribute to that standard a breadth of discretion that vastly exceeds the traditional ambit of our authority.

It is well established that NEPA merely establishes a procedural vehicle for assessing the impacts of a proposed action on the environment. It neither expands nor contracts the basic grant of jurisdiction made by Congress to the agency conducting the review, and it does not mandate particular results but simply prescribes a process.[1006] Commenters' arguments that NEPA somehow ''fills in the blanks'' of the FPA to authorize us to impose environmental regulatory regimes on generating facilities, or those who may purchase power from them, is simply incorrect. If we have such authority, it must be found in our substantive statute, the FPA.

Courts have addressed the breadth of our public interest standard on several occasions. The principal case on this point is *National Association for the Advancement of Colored People* v. *FPC* 520 F.2d 432 (D.C. Cir. 1975), *aff'd,* 425 U.S. 662 (1976) (*NAACP*). In *NAACP,* a number of organizations requested that the Commission promulgate regulations requiring equal employment opportunity and proscribing racial discrimination in the employment practices of public utilities.[1007] The Commission declined, finding that the FPA did not authorize it to do so. Petitioners appealed, contending that the Commission was authorized and required to act in the public interest:

to order such interconnections of electric power transmission facilities, setting such terms and conditions for the same, as are ''necessary or appropriate in the public interest''; to approve such asset sales and consolidations of interstate electric power companies as are ''consistent with the public interest; to approve such securities issuances by those companies as are ''compatible with the public interest'' and ''consistent with the proper performance * * * of service as a public utility''; to determine ''just and reasonable'' rates for interstate sales and transmission of electric power; and to order that ''proper, adequate or sufficient'' interstate power service be rendered.[1008]

On this basis, they argued that because prohibition of discrimination is in the ''public interest,'' the Commission was therefore required to proscribe discrimination by jurisdictional entities.

The Court rejected petitioners' argument. It observed that:

the (Federal Power) Act's preamble echoes the generality of the foregoing quoted

[998] The statutory framework established by Congress in sections 205 and 206 is not compatible with the administration of environmental regulatory regimes as a precondition to authorization. The Commission has only 60 days to review rate filings under section 205 before they become effective. Absent Commission action rejecting a rate filing or suspending its operation for up to five months within such period, a jurisdictional transaction (either the sale of energy or the transmission of energy) and the proposed rates accompanying the transaction go into effect by operation of law. Some mitigation proposals would require us to reject transactions within 60 days or allow them to go forward but with case-by-case determinations or hearings on environmental effects made within that time period. This could result in transaction gridlock for the trade of electricity in interstate commerce—a situation that is totally at odds with the regulatory framework established by Congress in the FPA and the Commission policy objectives under this rule to minimize regulatory impediments to fluid competitive power sales markets. Moreover, letting transactions go into effect subject to environmental hearings is not likely to produce meaningful environmental controls. Clearly, our processes, which contemplate the resolution of factual matters through hearings and the use of refund obligations to adjust parties' obligations on the basis of the record, make no provision for extensive scientific inquiry and are not designed to accommodate the imposition of clean air standards on power sellers.

[999] *See* FPA section 202(b), 16 U.S.C. 824c(b). *See also* Department of Energy Organization Act, 42 U.S.C. 7151, 7172.

[1000] We also note that section 731 of the Energy Policy Act preserves state and local authority over environmental protection and the siting of facilities.

[1001] For example, we do not have jurisdiction over the physical location of generation or transmission facilities, even though we have exclusive jurisdiction of the rates, terms and conditions of sales for resale or transmission of electric energy in interstate commerce by public utilities using such facilities, *i.e.,* the economic aspects of the use of such facilities.

[1002] The Federal Water Power Commission was established in 1920 with jurisdiction over the licensing of hydropower projects. 41 Stat. 1063 (June 10, 1920). In 1935, it was reconstituted as the Federal Power Commission, with expanded responsibilities over utility regulation. The jurisdiction over the licensing of hydropower was preserved as Part I of the Federal Power Act.

[1003] *See* Report of National Power Policy Committee on Public Utility Holding Companies.

[1004] FPA section 201(a), 16 U.S.C. 824(a). The House, Senate and Conference Reports concerning the Public Utility Act of 1935, *i.e.,* concerning Parts II and III of the FPA, are silent with respect to environmental concerns.

[1005] *See, e.g.,* comments by EPA, Project for Sustainable FERC, and Attorneys General.

[1006] *See, e.g.,* Methow Valley, 490 U.S. at 350–53; *see also,* LaFlamme v. FERC, 852 F.2d 389, 399 (9th Cir. 1988).

[1007] NAACP, 520 F.2d at 433.

[1008] *Id.* at 437–38 (footnotes omitted). The authorities listed cover FPA sections 202, 203, 204, 205, 206, and 207.

phrases, declaring that the sale and transmission of electric power are ''affected with the public interest,'' federal regulation of interstate aspects being ''necessary in the public interest.'' The statute itself nowhere defines the ''public interest,'' but instead leaves the precise ambit of the Commission's concern uncertain.[1009]

The Court found from the entirety of the Act that, ''(o)f the Commission's primary task there is no doubt, however, and that is to guard the consumer from exploitation by non-competitive electric power companies.'' [1010] The Court reiterated that ''(t)he Supreme Court has stated that the words 'public interest' do not constitute a 'mere general reference to the general welfare, without any standard to guide determinations.' '' [1011] Significantly, the Court also found that ''(w)ords like 'public interest' * * * though of wide generality, take their meaning from the substantive provisions and purposes of the Act.'' [1012] The Court concluded that:

Congress has not charged the Commission with advancing *all* public interests, but only the public's interest in having the particular mandates of the Commission carried out, its interest, in other words, in the conservation of natural resources and the enjoyment of cheap and plentiful electricity and natural gas. [1013]

With this, the Court rejected petitioners' argument that the FPA ''public interest'' standard requires the Commission to promulgate regulations prohibiting discriminatory practices by entities who are in some way regulated by the Commission. The Court found that the Commission was *not empowered* to promulgate anti-discrimination regulations because to do so would not be ''reasonably related to the furtherance of the Commission's proper objectives,'' which, under Part II of the FPA, are ''the enjoyment of cheap and plentiful electricity.'' [1014]

On review, the Supreme Court affirmed this limited reading of the Commission's authority to act in the public interest.[1015] In doing so, the Court noted that:

The use of the words ''public interest'' in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.[1016]

The question the Supreme Court asked in *NAACP* is the appropriate question here concerning the commenters' environmental mitigation proposals:

The question presented is not whether the elimination of discrimination from our society is an important national goal. It clearly is. The question is not whether Congress could authorize the Federal (Energy Regulatory) Commission to combat such discrimination. It clearly could. The question is simply whether and to what extent Congress did grant the Commission such authority.[1017]

We believe the same conclusion is true here for air pollution as the Court found there regarding discrimination.[1018]

The argument by EPA and others that because the FPA authorizes the Commission to act in the ''public interest'' it somehow authorizes the Commission to impose environmental mitigation measures is virtually indistinguishable from petitioners' argument in *NAACP*.[1019] Here, as in *NAACP*, parties urge the Commission to act to achieve worthwhile goals. However, the question is not whether the measures proposed by the parties would advance important national goals. Rather, ''[t]he question is simply whether or to what extent Congress did grant the Commission such authority.'' [1020] Also here, as in *NAACP*, the parties improperly base their belief that the Commission has authority to act under the FPA on an incorrect, overly broad application of the ''public interest'' standard. The goals sought to be advanced by EPA and others are broadly speaking ''in the public interest,'' but they are not goals that Congress has directed this Commission to pursue.[1021] Thus, just as the FPA did not authorize the Commission to take actions that petitioners requested in *NAACP*, the FPA does not authorize the Commission to undertake the types of environmental mitigation measures proposed by the commenters.[1022]

[1009] *Id.* at 438 (footnote omitted).

[1010] *Id.*

[1011] *Id.* at 440, *citing* New York Central Securities Co. v. United States, 287 U.S. 12, 24 (1932).

[1012] *Id., quoting* Alabama Electric Cooperative, Inc. v. SEC, 353 F.2d 905, 907 (1965), *cert. denied,* 383 U.S. 968 (1966).

[1013] *Id.* at 441 (emphasis in original). The Court made clear that ''the conservation of natural resources'' was a Commission interest only with regard to the regulation of hydropower resources under Part I of the FPA. *Id.* at 437.

[1014] *Id.* at 443 and 441.

[1015] NAACP, 425 U.S. 662 (1976).

[1016] *Id.* at 670 (footnote omitted). Several commenters, *e.g.*, Project for Sustainable FERC at 31–32 and Alliance at 53, make much of the Court's statement that there are undoubtedly other subsidiary purposes contained in the FPA and NGA, noting its reference in a footnote that the Commission has authority to consider ''environmental'' questions. NAACP, 425 U.S. at 670 n.6. However, they neglect to mention that the section of the FPA which the Court identified in support of this reference to environmental questions is section 10 of the FPA concerning our Part I authority over hydroelectric licensing matters, not Parts II and III. Part I contains explicit authority for the Commission to consider and require environmental mitigation measures.

[1017] NAACP, 425 U.S. at 665.

[1018] In analyzing the scope of the Commission's authority to act in the public interest, the *NAACP* Court found it useful to analogize to federal labor law. While noting that Congress had ''unmistakably defined the national interest in free collective bargaining,'' *Id.* at 671, the Court found that it could not be supposed that in directing the Commission to be guided by the ''public interest,'' Congress instructed the Commission ''to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees.'' *Id.* Yet this is exactly the form of what EPA and the other commenters supporting our authority to require environmental mitigation would have us do. However, just as with discriminatory employment practices, we can consider the consequences of air pollution practices of our regulatees ''only insofar as such consequences are *directly related* to the Commission's establishment of just and reasonable rates in the public interest.'' *Id.* (emphasis added).

[1019] We note that the standard the Commission is bound to apply in reviewing section 205 and section 206 transactions (which are the focus of the majority of commenters' mitigation proposals) is not a broad ''public interest'' standard, but rather a standard that rates, terms and conditions of such transactions be ''just, reasonable and not unduly discriminatory or preferential.'' 16 U.S.C. 824d, 824e.

[1020] NAACP, 425 U.S. at 665.

[1021] The limited nature of the Commission's ability under *NAACP* to consider ''environmental'' issues is reflected in the few court decisions on this subject. *See Public Utility Commission of California* v. FERC, 900 F.2d 269, 281 (D.C. Cir. 1990) (The broad public interest standards in the Commission's enabling legislation are limited to ''the purposes that Congress had in mind when it enacted this (NGA and FPA) legislation. This rule helps confine an agency's authorization ''to those areas in which the agency fairly may be said to have expertise.''); *Process Gas Consumers Group* v. *FERC*, 930 F.2d 926, 935 & n.14 (D.C. Cir. 1991) (Commission improperly allowed in rates the costs of research intended to benefit ratepayers solely through a ''cleaner environment''; the Court found that the Commission has no particular ''expertise'' in determining and promoting the pollution-reducing effects of natural gas vehicles).

[1022] The Supreme Court's holding in *NAACP* as to the limited ability of administrative agencies to implement broad ''public interest'' mandates, and direction to refrain from straying beyond the specific purposes of the regulatory legislation they are entrusted to administer, is well established. *See Community Television of Southern California* v. *Gottfried*, 459 U.S. 498, 510–11 n.17 (1983) (''[A]n agency's general duty to enforce the public interest does not require it to assume responsibility for enforcing legislation that is not directed at the agency''); *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114 (1976) (''It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies''); *McLean Trucking Company* v. *United States*, 321 U.S. 67, 79 (1944) (that Congress ''has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies'' does not ''necessarily include either the duty or the authority to execute numerous other laws'' beyond enumerated statutory responsibilities); *see also Bob Jones University* v. *United States*, 461 U.S. 574, 611 (1983) (Powell, J., concurring) (''This Court often has expressed concern that the scope of an agency's authorization be limited to those areas in which the agency fairly may be said to have expertise'').

Lower courts have repeated the Court's admonition in this regard on numerous occasions

The Project for Sustainable FERC argues that in *Richmond Power & Light* v. *FERC*, 574 F.2d 610, 616–17 n.22 (D.C. Cir. 1978) (*Richmond Power*), the Court ''suggested'' a broader agency latitude than described in *NAACP*.[1023] We disagree.

Richmond Power involved a case where the Commission was challenged, *inter alia*, because it declined to adopt a particular transmission rate that would have permitted Richmond to shift from oil to some other fuel. The Court affirmed the Commission's decision, finding that:

> Although the Commission must serve the public interest in approving rates, we see no abuse of discretion in limiting this proceeding to the shortrun problem of setting just and reasonable rates for the service theretofore provided in response to the 1973 oil embargo. While an administrative agency must remain faithful to public policies directly related to its regulatory authority, surely at any given moment of history it may rationally decline to affirmatively foster other policies in weighing the specific interests that it is required by the statute to consider. This is especially true when the forum chosen by proponents of the other policy is not well suited to the study of its implications.[1024]

In dicta, in a footnote that began with the Court doubting whether the goal of energy independence is within the Commission's regulatory jurisdiction at all, the Court merely said that ''(n)othing in *NAACP* v. *FPC*, *supra*, forecloses agency discretion to *consider* in given situations pervasive public policies that it is not required to evaluate in every decision it makes.'' [1025]

The discretion to *consider* public policy matters is a far cry from the authority, or obligation, to regulate those matters. We have considered the environmental impact of the rule. Nothing in *Richmond Power* suggests that the consideration of such matters conveys an affirmative grant of broad new regulatory powers to develop and implement a comprehensive regulatory program in an area expressly assigned by Congress to another agency.[1026]

The cases rejecting commenters' broad reading of our public interest authority are supported by the decision in *Office of Consumers' Counsel* v. *FERC*, 655 F.2d 1132 (D.C. Cir. 1980) (*Great Plains*). There, the Court found that, even under the explicit ''public interest'' standard in section 7(a) of the Natural Gas Act, the Commission is not granted power to act on matters outside of its statutory mandate.[1027]

In *Great Plains,* the Court reviewed a Commission decision to grant a certificate of public convenience and necessity to facilitate construction and operation of a coal gasification plant. Although the NGA does not explicitly provide the Commission with authority to certificate coal gasification projects, the Commission reasoned that it had such authority because the demonstration project was ''in the public interest'' and, because the Commission was authorized under section 7 of the NGA to ''consider'' all factors in reaching a decision on whether to grant the certificate, it had the requisite authority to act.

The Court rejected the Commission's reasoning in that case, stating that:

> Any such authority to consider all factors bearing on the ''public interest'' must take into account what the ''public interest'' means in the context of the Natural Gas Act. FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority.[1028]

The Court repeated the finding in *NAACP* that the Commission's authority to act in the public interest is limited to the furtherance of the purposes for which its organic statutes were adopted.[1029]

In concluding that the Commission was not authorized to act as it did, the Court looked to several factors. The Court found it persuasive that Congress had specifically authorized a different governmental entity, the Synthetic Fuels Corporation, to provide support for coal gasification, and that Congress had carefully crafted a special means for providing federal financial assistance for synfuel development.[1030] The Court also found it persuasive that the Commission possessed no expertise in making determinations regarding the relative merits of different synfuel processes, methods or technologies, and that the financing arrangements ''were certainly not ordered with the interests of ratepayers foremost in mind.''[1031] The Court stated that ''by utilizing its statutory tools for a non-statutory purpose, FERC very likely was distracted from its primary statutory duty to protect the interests of ratepayers.'' [1032] Finally, the Court found that the Commission's action seemed to have been prompted at least in part by an attitude that, because Congress had not acted speedily, the Commission could act. The Court criticized the Commission for improperly attempting to preempt Congressional action and to ''fill in''

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in finding that federal agencies improperly have overstepped, or properly have refrained from overstepping, the limitations of their ''public interest'' (or similarly worded) jurisdiction. *See, e.g.*, *The Business Roundtable* v. *Securities and Exchange Commission*, 905 F.2d 406, 413–14 (D.C. 1990) (SEC's assertion of authority under ''public interest'' standard to bar national security exchanges and associations from listing stock of certain corporations invaded traditional state regulatory purview); *Public Utility Commission of California* v. *FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (FERC has no authority to consider allegations of copyright infringement or unfair trade practices in determining whether to issue certificates of public convenience and necessity); *American Trucking Association* v. *United States*, 642 F.2d 916 (5th Cir. 1981) (intention of ICC to promote competition is consistent with statutory standard; more generalized intention to promote public welfare needs, unrelated to its legislative instruction to attend to transportation needs of the public, is not); *Natural Resources Defense Council, Inc.* v. *Securities and Exchange Commission*, 606 F.2d 1031 (D.C. Cir. 1979) (SEC has no obligation to promulgate regulations requiring comprehensive disclosure of (among other things) corporate environmental policies unrelated to objectives of federal securities laws); *Sunflower Electric Cooperative, Inc.* v. *Kansas Power & Light Company*, 603 F.2d 791, 799 (D.C. Cir. 1979) (FERC does not have primary jurisdiction to consider antitrust-related issues that do not involve rate-setting practices of public utilities); *O-J Transport Company* v. *United States*, 536 F.2d 126, 131–32 (6th Cir.), *cert. denied*, 429 U.S. 960 (1976) (ICC properly did not stray beyond its congressionally-defined role over transportation regulation by refusing to promote more generalized public welfare concerns); *see also*, *e.g.*, In re Multidistrict Vehicle Air Pollution, 538 F.2d 231 (9th Cir. 1976) (under antitrust laws, federal district court has no authority to fashion an environmental remedy, intended to reduce auto emissions, that serves no antitrust purpose).

[1023] Project for Sustainable FERC at 31.

[1024] Richmond Power, 574 F.2d at 616–17 (footnotes omitted).

[1025] *Id.* at 616 n.22 (emphasis added).

[1026] Alliance and the Project for Sustainable FERC cite *American Trucking Association, Inc.* v. *United States*, 642 F.2d 916 (5th Cir. 1981), to support an argument that, even under *NAACP*, the Commission can impose conditions under the FPA ''public interest'' standard because there is a ''nexus'' between the primary goals of the FPA and the proffered conditions. As discussed below in greater detail, we disagree.

American Trucking involved review of an ICC rulemaking effort to, among other things, allow government agencies to tender a fair portion of their freight shipments to small businesses and those operated by disadvantaged persons. In reviewing the case, the Court referenced the *NAACP* decision to observe that under the governing law, the ICC's ''useful purpose'' and ''public need'' criterion (used here to justify the regulations) do ''not (refer) to the pursuit of affirmative action goals.'' *Id.* at 921–922. Indeed, it is clear that the Court read *NAACP* as permitting the consideration of ''racial, ethnic and social-economic factors'' only when they relate to the matters within the ICC's authority, *i.e.*, the transportation needs of the public, as opposed to some generalized notion of the general public welfare. *Id.* at 922 n.3.

[1027] NGA section 7(a), like, for example, FPA section 203(a), provides for a ''public interest'' standard of review. Section 7 of the NGA represents the maximum authority the Commission has over environmental issues under that Act. Section 7 provides the Commission authority to approve the siting and construction of facilities.

[1028] Great Plains, 655 F.2d at 1147.

[1029] *Id.*

[1030] *Id.* at 1150.

[1031] *Id.* at 1151.

[1032] *Id.*

where the agency believed federal action was needed.[1033]

The facts and reasoning in *Great Plains* are directly analogous to this proceeding. Congress has specifically authorized other entities—EPA and the states—under other statutes to address air pollution. The Commission is being urged to regulate in an area in which, as in *Great Plains,* it possesses no special expertise (*i.e.,* in making determinations regarding appropriate air pollution control mitigation measures) and in which it is not authorized to act.[1034] Finally, as in *Great Plains,* if the Commission were to undertake mitigation, it would be diverted from its primary statutory duty to protect the economic interests of ratepayers, *i.e.,* by having to continually monitor compliance with mitigation conditions.[1035]

As in *Great Plains,* the Commission is being urged to act at least in part because of the belief that Congress has not provided a sufficiently speedy process by which to regulate air pollution produced by electric utilities. The EPA argues that:

> Regulations under the Clean Air Act must in general be implemented through State Implementation Plans; the time from reaching a general conclusion that control is needed to adoption of necessary regulations by states generally takes from three to five years; that regulatory lag time means compliance with new rules can be, and usually is, more than a decade from the point at which the problem occurred. Ten years of bad air is ten years delay too many.[1036]

That Congress has imposed upon the EPA procedures that the EPA and others find burdensome and overly time consuming is an issue for Congress and EPA to address, not the Commission.[1037]

This conclusion has particular force when, as here, we are urged to impose environmental restrictions on certain coal-fired generators in spite of Congressional actions regulating those entities. In essence, some commenters argue that under a very tenuous connection to the public interest standard of the FPA we may undertake to do more than the agency that Congress has authorized to act on such matters. This result is not a correct reading of the law and we reject it.

Several commenters attempt to overcome the various Courts' views of the scope of the public interest standard under the FPA by arguing that there is a ''direct nexus'' between the Rule and environmental concerns that suffices to invoke an imputed authorization under the FPA to prescribe environmental requirements on generators.[1038] To this end, they argue that the purpose of the rule is really to facilitate the least-cost use and construction of generation resources and that the environmental consequences of these actions will impact economic efficiency, rates, competition, and competitive markets. Thus, they conclude that we have the authority to require that those who seek to obtain transmission access on a non-discriminatory basis must first mitigate air emissions under as yet undefined standards.

These commenters misstate the question. The question is not whether there is a nexus between the rule and environmental concerns. Clearly, electric utilities contribute to pollution; anything that facilitates the sale of power from whatever source is, under this tenuous logic, ''related'' to environmental concerns.[1039]

However, as discussed below, Congress did not give us plenary powers over public utilities to shape their activities in response to a broad range of public policy concerns. The nexus that must be established is a nexus between the requirements sought to be imposed, in this case emission controls, and the statutory *standards* which authorize us to act. That is, in order to impose the environmental conditions sought by commenters, a direct connection must be established between those conditions and our duty to determine that the rates, terms and conditions of service under our open access tariffs are not unjust, unreasonable, unduly discriminatory, or preferential.

It is on this point that commenters' arguments founder. While the Commission has broad latitude to interpret these standards to advance the interests of ratepayers, we cannot implement policy objectives that are not assigned to us and that are, in fact, clearly assigned to other entities. The Congress has assigned responsibility for environmental regulation of air quality to EPA and the states; it has explicitly charged them with dealing with such pollution from electric generating facilities. While, as noted earlier, we do not dispute the need to give appropriate weight to environmental considerations in making decisions within our authority, we cannot use that authority to accomplish public policy objectives that, by statute, are required to be implemented and administered by other agencies.[1040]

[1033] *Id.* at 1151–52.

[1034] To our knowledge the only time Congress has asked the Commission with respect to its regulation under Parts II and III of the FPA to address environmental issues was in Section 808 of the Clean Air Act Amendments of 1990. There, Congress directed the Commission, in consultation with EPA, to study the environmental externalities of electricity production. The Commission staff did so and provided the required report to Congress. While the Commission in compliance with the 1990 Amendments also addressed the accounting issues related to SO_2 emissions trading, the Commission did so within the context of its accounting authority under the FPA.

[1035] EPA argues that the Commission would not be required to monitor compliance with the environmental mitigation measures. However, if environmental mitigation is within our statutory mandate, we could not delegate that authority to others. *See* EPA at 51.

[1036] EPA at 4–5; *see also* Project for Sustainable FERC (protections achieved by the Clean Air Act Amendments of 1990 are in danger of being destroyed by the Energy Policy Act's open access policies if those policies are implemented without environmental mitigation).

We would also note that the premise upon which EPA makes this argument—that air emissions will rapidly increase with implementation of the rule—is not supported by the record. *See* Section V, Discussion, Subsection C.

[1037] We believe that this conclusion is supported by section 205(a) of the Public Utility Regulatory Policies Act of 1978 (PURPA). PURPA, *inter alia,* amended the FPA in certain respects but also gave the Commission authority in certain sections, such as PURPA sections 205(a) and 210, that did not amend the FPA. Under PURPA section 205(a), the Commission in certain circumstances may exempt electric utilities, in whole or in part, from state laws, rules or regulations which prohibit or prevent voluntary coordination, including agreements for central dispatch. (Of course, the central dispatch is dispatch of generation facilities.) However, PURPA section 205(a)(2) provides that no exemption may be granted if the state law, rule or regulation is designed, among others, to protect public health, safety or welfare *or the environment.* In commenting on the limitation of the Commission's exemption authority under PURPA section 205(a), the Conferees noted that the prohibition includes ''regulations under the Clean Air Act.'' H.R. Conf. Rep. No. 1750, 95th Cong., 2d Sess. 95 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 7797, 7829. While the Commission's statutory authority has been modified in legislation enacted subsequent to PURPA, the provisions of PURPA section 205(a) have not been modified.

[1038] *See, e.g.,* EPA at 54. *See also* Alliance; Project for Sustainable FERC; Coalition; Signatories; CCAP; Attorneys General.

[1039] Under this logic, the Securities and Exchange Commission, for example, which facilitates utility financing for new facilities would be empowered to administer environmental requirements.

[1040] We are also troubled by the confusion that persists as to the usefulness of imposing a condition on the use of open access tariffs as a means to accomplish environmental goals. As noted earlier, the Commission's decision to compel the filing of open access tariffs is intended to provide access to third party power suppliers who need access across a utility's transmission system. Open access will primarily benefit independent power suppliers offering power from new facilities, most of which under current market conditions are likely to be gas-fired facilities. Traditional utilities that own the generating plants of particular concern to commenters (*i.e.,* coal-fired plants subject to less strict environmental controls) have extensive transmission systems that they can use to get power to market. Thus, the exercise of conditioning authority is more likely to impede sales from new, cleaner facilities than it is sales from older, coal-fired facilities. It makes no sense from an economic or environmental perspective to burden new transactions with this cumbersome condition for what will likely be little in the way of effective environmental controls.

Some commenters have sought to address this issue by characterizing the proposed conditions as necessary to create a level competitive playing field among generators. For example, Alliance argues that unless the Commission requires environmental mitigation certain competitors in the bulk power market (those with ''dirty generation'') would be favored over ''clean'' competitors. It argues that:

> Mitigation of the environmental impacts resulting from the NOPR has a direct relationship to ensuring that open access is implemented under terms of economic fairness for all utilities and utility consumers, and not merely those with current low-cost regulatory advantages.[1041]

We note that all power generation technologies have different costs. For example, hydroelectric facilities which, like coal-fired facilities, may have environmental mitigation conditions imposed on them, may be quite expensive to build compared to gas or oil-fired generation, but their operating costs may be significantly lower. These cost differences may reflect the different costs of complying with mandated environmental requirements; the prudent costs of complying with such mandates may be reflected in rates.

Indeed, sellers come to the power markets with a variety of advantages and disadvantages, many of which are the result of federal laws—for example, tax preferences, labor standards, and similar matters. In empowering the Commission to remedy undue discrimination and promote competition, Congress has not authorized the Commission to equalize the environmental costs of electricity production in order to ensure ''economic fairness.'' Such homogenization of competitors, or their costs, has never been a goal of the FPA.[1042]

In short, the ''economic nexus'' urged by commenters advocating that the Commission undertake to regulate air emissions is inconsistent with the ''charge to promote the orderly production of plentiful supplies of electric energy'' envisioned by the FPA.[1043]

We have exercised conditioning authority in the past only where necessary to ensure that jurisdictional transactions and rates do not result in anti-competitive effects, or are not unjust, unreasonable or unduly discriminatory or preferential.[1044] Thus, the conditions we have imposed have involved economic regulatory matters within our purview under the FPA.[1045] Any exercise of conditioning authority must, as the Supreme Court noted in *NAACP,* be directly related to our economic regulation responsibilities; EPA and the other commenters have not demonstrated such a nexus.[1046]

This distinction is more evident when one considers the way in which we are authorized to treat the costs of environmental compliance. There are legitimate costs of environmental compliance that should be reflected in jurisdictional rates to the extent prudently incurred, just as the prudent costs of complying with, for example, occupational health and safety requirements designed to protect utility employees should be reflected in jurisdictional rates. This we are authorized to do and we routinely review and allow such costs.[1047] However, the fact that the costs of providing utility workers with a safe workplace are properly reflected in utilities' jurisdictional rates does not mean that we have authority to condition sellers' rates or customers' use of jurisdictional services on meeting safety regulations that are in the public interest. The same rationale applies to environmental matters related to the rule.[1048]

Commenters also raise several other arguments to support the claim that the Rule requires us to undertake environmental regulation to remedy supposed impacts of the rule. EPA, for example, argues that requiring environmental mitigation would not run afoul of the prescription of section 201(b)(1) of the FPA enjoining our regulation of generation facilities because the ''regulation of transmission tariffs necessarily has manifold indirect effects on generation sources. The proposed mitigation mechanism would influence generation sources in a similar, indirect manner.'' [1049]

EPA fundamentally misunderstands the purpose of the Rule. We act to remedy unduly discriminatory practices in, as here for example, the provision of transmission access. Since ''undue discrimination,'' is one of the matters ''specifically provided in this Part (II)'', *i.e.,* in FPA sections 205 and 206, we are acting within the bounds of our statutory mandate and the effect that the Rule may have ''over facilities used for the generation of electric energy'' is specifically sanctioned. Indeed, many generators are transmission customers who we are obliged to protect under the FPA. That there may be indirect environmental consequences from our Rule does not trigger our jurisdiction under the FPA.

[1041] Alliance at 55. *See also* Project for Sustainable FERC at 37.

[1042] For the same reason, we do not have authority to impose an obligation on utilities to ''internalize'' environmental externalities. *See generally* FEIS at 7–24. In effect, such proposals would involve the Commission requiring a surcharge on power sales rates fixed at some amount equal to the environmental ''cost'' inflicted by the generation supporting those sales. Assuming such a surcharge could be calculated, imposing such a cost would be to fix a rate without reference to any cost incurred by the public utility. Indeed, we would impose in rates, and require ratepayers to pay, a cost that was manifestly not incurred by the utility. In reality, such a surcharge would require us to impose a tax or a penalty, neither of which we are authorized to impose.

The SO_2 program created under the 1990 Clean Air Act Amendments illustrates the way in which EPA and FERC authority can intersect to accomplish the goal of internalizing externalities. There, the Congress by capping emissions and providing for a market in emission allowances required utilities to ''pay for'' the right to emit SO_2. These costs are legitimate costs and the *Commission's* role is to permit their recovery in rates. Similarly, a comparable NO_X cap and trading scheme established by EPA would ''internalize'' the external costs of NO_X pollution and the Commission would provide for prudently incurred allowance costs in rates.

[1043] NAACP, 425 U.S. at 670.

[1044] Cf. Utah Power & Light Co., Opinion No. 318, 45 FERC ¶ 61,095 at 61,280–83 (1988) (discussing the Commission's authority to condition a merger). Unlike the situation in Opinion No. 318 where the Commission had the authority under section 203 to disapprove a merger upon a finding of actual and potential anticompetitive effects, the Commission's rate authority under sections 205 and 206 does not permit the Commission to deny the proposed rates out of a concern that such action will result in an increase in air pollution. *See* Monongahela Power Co., 39 FERC ¶ 61,350 at 62,096, *reh'g denied,* 40 FERC ¶ 61,256 (1987). As a result, we have no authority to condition the same result under these sections on environmental mitigation.

[1045] The obligation of the Commission to weigh antitrust considerations highlights this point. The Commission must take into account anticompetitive effects when setting rates. *See Northern Natural Gas Co.* v. *FPC,* 399 F.2d 953 (D.C. Cir. 1968). However, we are limited as to the remedies we may impose. We cannot go further and assess the range of remedies that, for example, a Court may exact upon finding an antitrust violation. *See generally* NAACP, 520 F.2d at 441.

[1046] Project for Sustainable FERC, at 32–33, and Alliance, at 41–42, have attempted to argue that *NAACP* actually supports the Commission having authority to order environmental mitigation. Their argument fails because they have not shown, and cannot show, the necessary direct nexus to our economic regulation.

[1047] For example, our regulations permit 100 percent of any construction work in progress for pollution control facilities allocable to wholesale sales to be included in rate base. *See* 18 CFR 35.25 (1995). This regulatory action, directly related to our core ratemaking responsibilities, removes an economic disincentive for public utilities to invest in structures designed to reduce the amount of pollution produced by a generating facility. *See* 18 CFR 35.25(b) (definition of pollution control facility).

The Commission also addressed the ratemaking consequences of SO_2 emissions trading in response to a petition from the Edison Electric Institute. This is another example of the Commission's proper exercise of its jurisdiction, *i.e.,* over the costs of environmental compliance.

[1048] Indeed, our regulations provide for such cost recovery.

[1049] EPA at 50.

EPA next argues that, even if we could not impose a specific mitigation mechanism for open access transmission, we could deny transmission service unless there is a showing that the service will not have an adverse environmental impact.[1050]

We have already discussed why we believe this approach is unworkable and inconsistent with sections 205 and 206 of the FPA.[1051] Plainly stated, EPA would have transmission customers assume an additional regulatory burden in order to be treated lawfully.[1052] Quite apart from this fundamental problem, such a regime is beyond our authority. Our regulation under sections 205 and 206 is over the *selling* public utility's rates, terms and conditions, not over the buyer's agreement to undertake measures which have no nexus whatsoever with the seller's costs or terms of service.

EPA states that its alternative mitigation mechanism would not be a condition of the open access *tariff,* but apparently a condition on the ability of customers to take service under the tariff. However, our authority to set terms and conditions of eligibility derives from precisely the same authority that we use to set other tariff terms. It must still be based on a nexus with the subject matter of our jurisdiction. For buyers, open access is a right, not a privilege. We fail to see, given the direction of the FPA to ensure these rights, any basis for us to undertake the actions EPA proposes.

Finally, EPA points to the Commission's decision to exclude certain diesel facilities in defining qualifying facilities (QF) under PURPA section 210.[1053] However, this provides no precedent for imposing environmental standards to prevent customers from obtaining nondiscriminatory open access. Whatever the merits of that decision,[1054] the Commission subsequently found that any facility that satisfies the ownership and technical requirements for QF status set forth in PURPA and the Commission's regulations is a QF without any action by the Commission.[1055] More to the point, EPA ignores the fact that, in issuing environmental findings with its QF Rules, the Commission found that environmental concerns were a local matter to be handled under other statutory authorities. While PURPA permitted certain qualifying facilities to be exempt from state and federal laws,

> it excludes exemptions from environmental laws. Thus, a qualifying facility may not be built or operated unless it complies with all applicable local, State, and Federal zoning, air, water, and other environmental quality laws, and unless it obtains all required permits.[1056]

Thus, while we have noted that QFs are required to satisfy all environmental requirements, we have not viewed our responsibilities under PURPA as permitting us to enforce compliance with environmental laws.[1057]

EPA then proposes to require any fossil fuel-burning generating entity seeking service under an open access tariff to (a) commit by contract to avoid or offset emissions increases (measured against certain baselines), and (b) periodically certify its compliance with that commitment.[1058] This proposal is neither workable nor within our jurisdiction.

The deficiency with respect to (a) is that we have no authority to require such action. While EPA cites to FPA section 206 for the proposition that we may change jurisdictional contracts, we may do so only if the contract is, for example, unjust or unreasonable with respect to matters within our jurisdiction, *i.e.*, economic regulation. Our standards for acting are strictly prescribed under the FPA.[1059] As *NAACP* and *Great Plains* teach, sections 205 and 206 do not provide the Commission with the means to remedy every possible problem that is in any fashion related to a sale for resale or transmission in interstate commerce by a public utility. Since we do not have the authority to require (a), it follows we cannot require the periodic certification of compliance recommended in (b).

EPA notes that it ''could establish a procedure whereby a generator could *voluntarily* subject its facilities to emission limits that are enforceable by EPA and/or state environmental authorities.'' [1060] This is a matter within EPA's province, and we support EPA in undertaking whatever measures it determines to be within its authority and appropriate to the problem.

Alliance argues, at 47–51, that sections 211 and 212 of the FPA, as amended by the Energy Policy Act, authorize the Commission to impose environmental conditions. To the extent that Alliance's arguments rely on the ''public interest'' language used in section 211, we believe that the discussion above already addresses such arguments, with one exception: Alliance argues that the House Report for the Energy Policy Act states that the purpose of the Act is to ''increase U.S. energy security in cost-effective and environmentally beneficial ways

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[1050] EPA at 51. *See also* NESCAUM at 19; Alliance at 18, 53; Project for Sustainable FERC at 37.

[1051] CCEM argues that the tracking of documentation with environmental compliance requirements will stifle the very competitive bulk power market that EPA and others profess to support. CCEM notes that ''(i)t is both ironic and inexplicable why EPA, the agency charged with enforcing the nation's clean air and other environmental protection laws is so anxious to shift this responsibility away from itself and onto economic participants in the incipient, competitive power supply industry.'' CCEM Supplemental Comments at 4.

[1052] We also note that under EPA's scheme those most likely to benefit from denying access—transmission sellers—would be provided the authority to lawfully deny transmission access.

[1053] EPA states at 51–52 that:

> In implementing section 210 of the Public Utility Regulatory Policies Act, the FERC took the approach of declining to act because of the potential adverse environmental impacts of the action. Section 210 required the FERC to prescribe regulations ''to encourage cogeneration and small power production * * * Because of its concern that ''diesel and dual-fuel commercial cogeneration facilities in the New York City area had the potential to cause environmentally significant effects'' (46 FR 33025) (1981)), the FERC issued regulations that excluded new diesel cogeneration facilities from being ''qualifying facilities.'' 45 FR 17964.
>
> EPA maintains that the FERC similarly has authority in the instant case to deny open access transmission to the extent such transmission would have adverse environmental impacts.

[1054] The Commission subsequently modified this position and decided to treat diesel cogeneration facilities like other QFs.

[1055] *See* CMS Midland, Inc., 50 FERC ¶ 61,098 at 61,277–278 (1990), *reh'g denied,* 56 FERC ¶ 61,177 (1991), *aff'd mem. sub nom.,* Michigan Municipal Cooperative Group, v. FERC, 990 F.2d 1377 (D.C. Cir.) (*per curiam*), *cert. denied,* 114 S.Ct. 546 (1993); *see also* Mesquite Lake Associates, Ltd., 63 FERC ¶ 61,351 (1993); Citizens for Clean Air and Reclaiming Our Environment v. Newbay Corporation, 56 FERC ¶ 61,428 at 62,532–33, *reh'g denied,* 57 FERC ¶ 61,219 (1991).

[1056] Small Power Production and Cogeneration Facilities—Environmental Findings, 10 FERC ¶ 61,314 at 61,632 (1980). The Commission has included similar language in every order it issues finding qualifying facility status. *See also* Small Power Production and Cogeneration, Order No. 70–E, FERC Stats. & Regs., Regs. Preambles 1977–81 ¶ 30,274 at 31,596 (1981).

[1057] The important point is that the Commission has fully complied with its responsibilities under NEPA in both instances. Whatever initial decision it may have come to in 1981 with regard to the particular circumstances involved in adopting QF regulations under PURPA is irrelevant to the instant rulemaking.

[1058] EPA's proposal apparently would apply only for NO_X, CO_2 and mercury. *See* EPA at 58 n.31 and 60 (because there is already a nationwide cap on SO_2 emissions in the Clean Air Act, there is no need for mitigation for that pollutant). In other words, EPA apparently would require us to impose environmental mitigation only in those instances in which Congress has not provided a nationwide cap for a pollutant.

[1059] *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[1060] EPA at 59 (emphasis added). *See also* Project for Sustainable FERC at 38–39 (proposing that a regulatory plan be developed through consultations between the Commission, EPA, DOE, and appropriate regional and state regulators and then presented in the FEIS).

* * *.'' [1061] However, even if we assume that the Report language reflects Congressional intent for the Energy Policy Act in general, we note that, in Title VII of the Energy Policy Act concerning electricity, the only mention of the environment was, as noted above, in section 731 which specifically provided that nothing in the Energy Policy Act in any way interferes with the authority of any state or local government relating to, *inter alia*, environmental protection. While we do not quarrel with the proposition that Congress in the Energy Policy Act obviously had concerns with environmental matters,[1062] Congress did not provide the Commission with any authority to mandate environmental mitigation.

We have undertaken an extensive NEPA analysis to consider the environmental effects of our Rule. We cannot, however, take NEPA's requirement to consider environmental effects as authority to require the environmental mitigation proposed in the comments. Congress has charged other agencies, most notably the EPA, with the responsibility of protecting the environment and enforcing environmental laws.[1063] While we stand ready to work in a complementary fashion with these agencies, we believe that any attempt by the Commission to go beyond the economic regulation that Congress has delegated to us would be *ultra vires*.

To summarize: The Commission's jurisdiction under Parts II and III of the FPA is limited to matters relating to economic regulation. Neither the relevant statutes nor the case law supports the expansive and novel reading of the Commission's authority advocated by the commenters that argue that we have environmental mitigation authority. The Commission is not explicitly given such authority in either the FPA or NEPA. Moreover, the FPA and the case law clearly compel the conclusion that we cannot impose environmental conditions that do not directly relate to the economic matters over which we have jurisdiction. To do so, in fact, would prevent the Commission from effectively carrying out its responsibilities under the FPA.

F. Coastal Zone Management Act Issue

By letter dated February 22, 1996, and filed with the Commission on March 5, 1996, the Connecticut Department of Environmental Protection (Connecticut) notified the Commission that it has determined that the Commission's proposed action in this rulemaking proceeding is likely to adversely affect Connecticut's coastal resources. Connecticut reasons that the Rule's promotion of competition ''is likely to increase energy production by mid-west coal burning plants(,) which will in turn increase the export of nitrogen and sulphur oxides.'' Connecticut states that airborne nitrogen emissions are linked to adverse environmental impacts in Long Island Sound. It therefore asserts that, pursuant to section 307(c)(1) of the Coastal Zone Management Act (16 U.S.C. 1456(c)(1)) (CZMA), and the federal regulations promulgated thereunder (15 CFR part 930), the Commission is required to provide it with a determination of the Rules' consistency with Connecticut's federally approved coastal management plan.

Section 307(c)(1)(A) of the CZMA deals with the prevention or amelioration of adverse physical impacts on coastal zone resources attributable to federal activities. The legislative history indicates that in enacting the CZMA Congress was concerned with the adverse effects on coastal lands and waters of such activities as excavation, filling, diversion of water or sediment, clearing, and off-shore energy exploration and dumping.[1064]

As discussed more fully above, section 201 of the FPA declares that the Commission shall *not* have jurisdiction over facilities used for the generation of electricity except as specifically provided. Thus, the Commission has no direct jurisdiction over fossil-fuel plants. Its jurisdiction extends only to the rates, terms, and conditions of wholesale sales and transmission of electric energy in interstate commerce from those plants. While we are aware that the legislative history of the CZMA indicates a Congressional intent to cover all federal activities, there is absolutely no indication in the CZMA or its legislative history that ''federal activities'' should include all federal regulatory decisions, including Commission orders involving interstate electric rates and service (or any other jurisdictional matter under Part II of the FPA).[1065] We are not aware of any judicial or agency interpretation that would cast the net of the states under the CZMA broadly enough to include the generic federal regulatory action undertaken in this Rule. Such action is clearly remote from the kind of activities such as leasing of land, and dredging and filling that either affect, or authorize specific activities that affect, the environment in the coastal zone.

Connecticut's attempt to pull FPA Part II regulation into the CZMA federal consistency provisions by dint of the rulemaking's alleged adverse impact on air quality and consequent adverse impact on water quality in the coastal zone is untenable in view of the existence of the Clean Air Act, a complex, 700-page environmental law that constitutes a comprehensive scheme of regulation of the Nation's air quality, including the direct regulation of emissions by utility power plants. Indeed, the CZMA provides that the requirements of the Clean Air Act, and governmental directives pursuant to that Act, shall be incorporated in, and shall be the air pollution control requirements of, all state coastal zone

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[1061] Alliance at 62, *quoting* H.R. Rep. No. 474 (Part I) (Vol. 4), 103d Cong., 2d Sess. 132 (1992), *reprinted in* 1992 U.S. Code Cong. & Ad. News 1955.

[1062] For example, Title XVI concerned Global Climate Change.

[1063] *See, e.g.*, S. Rep. No. 228 (concerning the Clean Air Act Amendments of 1990), 101st Cong., 2d Sess. 5 (1990), *reprinted in* 1990 U.S. Code Cong. & Ad. News 3391 (''The States, together with EPA, are responsible for ensuring that the primary air quality standards are met * * *''); S. Rep. No. 228, 101st Cong., 2d Sess. 9, *reprinted in* 1990 U.S. Code Cong. & Ad. News 3395 (''The 1970 and 1977 Clean Air Act Amendments established a partnership between the States and Federal government. EPA sets nationally uniform air quality standards and States, with the Agency's assistance, are responsible for meeting them.''). *See also, e.g., Connecticut* v. *EPA*, 696 F.2d 147, 163 (2d Cir. 1982) (''One central focus of the Clean Air Act Amendments of 1977 was to ensure that the EPA would monitor and control the impact of pollution from one state on air quality in another.''); *Ohio Environmental Council* v. *EPA*, 593 F.2d 24, 31 (6th Cir. 1979) (''Congress placed responsibility for enforcing the Clean Air Act in the U.S. EPA.'').

We further note the following limitations on the Clean Air Act Amendments of 1990 with respect to the emission allowance program in section 403(f), which provides in pertinent part:

Nothing in this section shall be construed as requiring a change of any kind in any State law regulating electric utility rates and charges or affecting any State law regarding such State regulation or as limiting State regulation (including any prudency review) under such a State law. Nothing in this section shall be construed as modifying the Federal Power Act (16 U.S.C.A. 791a et seq.) or as affecting the authority of the Federal Energy Regulatory Commission under that Act. Nothing in this subchapter shall be construed to interfere with or impair any program for competitive bidding for power supply in a State in which such program is established.

42 U.S.C. 7651b(f). Thus, Congress expressly chose not to tie environmental authority under the emission allowance program to the Commission's and states' ratemaking authority.

[1064] The conference report on the 1990 CZMA amendments expressly states that the principal objective of the 1990 revisions to the language of section 307(c)(1) was to overturn a Supreme Court decision holding that Outer Continental Shelf oil and gas lease sales were not subject to CZMA consistency determinations. H.R. Rep. No. 101–964, 101st Cong., 2d Sess. 2675 (1990).

[1065] In using the phrase ''federal activities'' Congress did not use the term ''federal action'' which has clear and broad meaning under NEPA.

COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1515, 1516, 1517, and 1518

[CEQ–2019–0003]

RIN 0331–AA03

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

AGENCY: Council on Environmental Quality.

ACTION: Final rule.

SUMMARY: The Council on Environmental Quality (CEQ) issues this final rule to update its regulations for Federal agencies to implement the National Environmental Policy Act (NEPA). CEQ has not comprehensively updated its regulations since their promulgation in 1978, more than four decades ago. This final rule comprehensively updates, modernizes, and clarifies the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action. The rule will improve interagency coordination in the environmental review process, promote earlier public involvement, increase transparency, and enhance the participation of States, Tribes, and localities. The amendments will advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA.

DATES: This is a major rule subject to congressional review. The effective date is September 14, 2020. However, if congressional review has changed the effective date, CEQ will publish a document in the **Federal Register** to establish the actual effective date or to terminate the rule.

ADDRESSES: CEQ has established a docket for this action under docket number CEQ–2019–0003. All documents in the docket are listed on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Viktoria Z. Seale, Chief of Staff and General Counsel, 202–395–5750, *NEPA-Update@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

President Nixon signed the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.,* (NEPA or the Act) into law on January 1, 1970. The Council on Environmental Quality (CEQ) initially issued interim guidelines for implementing NEPA in 1970, revised those guidelines in 1971 and 1973, and subsequently promulgated its regulations implementing NEPA in 1978. The original goals of those regulations were to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy established by the Act.

Since the promulgation of the 1978 regulations, however, the NEPA process has become increasingly complicated and can involve excessive paperwork and lengthy delays. The regulations have been challenging to navigate with related provisions scattered throughout, and include definitions and provisions that have led to confusion and generated extensive litigation. The complexity of the regulations has given rise to CEQ's issuance of more than 30 guidance documents to assist Federal agencies in understanding and complying with NEPA. Agencies also have developed procedures and practices to improve their implementation of NEPA. Additionally, Presidents have issued directives, and Congress has enacted legislation to reduce delays and expedite the implementation of NEPA and the CEQ regulations, including for transportation, water, and other types of infrastructure projects.

Despite these efforts, the NEPA process continues to slow or prevent the development of important infrastructure and other projects that require Federal permits or approvals, as well as rulemakings and other proposed actions. Agency practice has also continued to evolve over the past four decades, but many of the most efficient and effective practices have not been incorporated into the CEQ regulations. Further, a wide range of judicial decisions, including those issued by the Supreme Court, evaluating Federal agencies' compliance with NEPA have construed and interpreted key provisions of the statute and CEQ's regulations. CEQ's guidance, agency practice, more recent presidential directives and statutory developments, and the body of case law related to NEPA implementation have not been harmonized or codified in CEQ's regulations.

As discussed further below, NEPA implementation and related litigation can be lengthy and significantly delay major infrastructure and other projects.[1] For example, CEQ has found that NEPA reviews for Federal Highway Administration projects, on average take more than seven years to proceed from a notice of intent (NOI) to prepare an environmental impact statement (EIS) to issuance of a record of decision (ROD). This is a dramatic departure from CEQ's prediction in 1981 that Federal agencies would be able to complete most EISs, the most intensive review of a project's environmental impacts under NEPA, in 12 months or less.[2] In its most recent review, CEQ found that, across the Federal Government, the average time for completion of an EIS and issuance of a ROD was 4.5 years and the median was 3.5 years.[3] CEQ determined that one quarter of EISs took less than 2.2 years, and one quarter of the EISs took more than 6 years. And these timelines do not necessarily include further delays associated with litigation over the legal sufficiency of the NEPA process or its resulting documentation.

Although other factors may contribute to project delays, the frequency and consistency of multi-year review processes for EISs for projects across the Federal Government leaves no doubt that NEPA implementation and related litigation is a significant factor.[4] It is critical to improve NEPA implementation, not just for major projects, but because tens of thousands of projects and activities are subject to NEPA every year, many of which are important to modernizing our Nation's infrastructure.[5]

As noted above, an extensive body of case law interpreting NEPA and CEQ's implementing regulations drives much of agencies' modern day practice. Though courts have correctly recognized that NEPA requires agencies to follow certain procedures and not to reach particular substantive results, the accretion of cases has not necessarily clarified implementation of the law. In light of the litigation risk such a situation presents, agencies have responded by generating voluminous studies analyzing impacts and alternatives well beyond the point where useful information is being produced and utilized by decision makers. In its most recent review, CEQ found that final EISs averaged 661 pages in length, and the median document was 447 pages.[6] One quarter were 748 pages or longer. The page count and document length data do not include

[1] *See infra* sec. I.B.3 and I.C.

[2] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 FR 18026 (Mar. 23, 1981) (''Forty Questions''), *https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.* ''The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.'' *Id.* at Question 35.

[3] *See infra* sec. I.B.3.

[4] *See also,* Philip K. Howard, Common Good, Two Years, Not Ten: Redesigning Infrastructure Approvals (Sept. 2015) (''Two Years, Not Ten''), *https://www.commongood.org/wp-content/uploads/2017/07/2YearsNot10Years.pdf.*

[5] As discussed in sections II.D and II.C.5, CEQ estimates that Federal agencies complete 176 EISs and 10,000 environmental assessments each year. In addition, CEQ estimates that agencies apply categorical exclusions to 100,000 actions annually. *See infra* sec. II.C.4.

[6] *See infra* sec. I.B.3.

rulemaking to protect public health or safety. Paragraph (d) addresses timing when an agency files the final EIS within 90 days of the draft EIS. Finally, paragraph (e) addresses when agencies may extend or reduce the time periods. The proposed rule made edits to clarify the language in these paragraphs without changing the substance of the provisions. CEQ includes these changes in the final rule and makes additional clarifying revisions.

12. Emergencies (§ 1506.12)

Section 1506.12, ''Emergencies,'' addresses agency compliance with NEPA when an agency has to take an action with significant environmental effects during emergency circumstances. Over the last 40 years, CEQ has developed significant experience with NEPA in the context of emergencies and disaster recoveries. Actions following Hurricanes Katrina, Harvey, and Michael, and other natural disasters, have given CEQ the opportunity to respond to a variety of circumstances where alternative arrangements for complying with NEPA are necessary. CEQ has approved alternative arrangements to allow a wide range of proposed actions in emergency circumstances including catastrophic wildfires, threats to species and their habitat, economic crisis, infectious disease outbreaks, potential dam failures, and insect infestations.[100] CEQ proposed to amend § 1506.12, ''Emergencies,'' to clarify that alternative arrangements are still meant to comply with section 102(2)(C)'s requirement for a ''detailed statement.'' This amendment is consistent with CEQ's longstanding position that it has no authority to exempt Federal agencies from compliance with NEPA, but that CEQ can appropriately provide for exceptions to specific requirements of CEQ's regulations to address extraordinary circumstances that are not addressed by agency implementing procedures previously approved by CEQ. *See* Emergencies Guidance, *supra* note 29. CEQ maintains a public description of all pending and completed alternative arrangements on its website.[101] CEQ makes this change in the final rule.

13. Effective Date (§ 1506.13)

Finally, CEQ proposed to modify § 1506.13, ''Effective date,'' to clarify that these regulations would apply to all NEPA processes begun after the effective date, but agencies have the discretion to apply them to ongoing NEPA processes. CEQ also proposed to remove the 1979 effective date from the introductory paragraph, and strike 40 CFR 1506.13(a) referencing the 1973 guidance and 40 CFR 1506.13(b) regarding actions begun before January 1, 1970 because they are obsolete. This final rule makes these changes.

I. Revisions to Agency Compliance (Part 1507)

CEQ proposed modifications to part 1507, which addresses agency compliance with NEPA, to consolidate provisions relating to agency procedures from elsewhere in the CEQ regulations, and add a new section to address the dissemination of information about agency NEPA programs. CEQ makes these changes in the final rule with some modifications to the proposed rule as discussed in the following sections.

1. Compliance (§ 1507.1)

CEQ proposed a change to § 1507.1, ''Compliance,'' to strike the second sentence regarding agency flexibility in adapting its implementing procedures to the requirements of other applicable laws for consistency with changes to paragraphs (a) and (b) of § 1507.3, ''Agency NEPA procedures.'' This change is also consistent with the direction of the President to Federal agencies to ''comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements.'' E.O. 11514, as amended by E.O. 11991, sec. 2(g). CEQ makes this change in the final rule. Under the final rule, § 1507.1 requires all Federal agencies to comply with the CEQ regulations as set forth in parts 1500 through 1508.

2. Agency Capability To Comply (§ 1507.2)

CEQ proposed edits to the introductory paragraph of § 1507.2, ''Agency capability to comply,'' to clarify its meaning, which is to allow agencies to use the resources (including personnel and financial resources) of other parties, including agencies and applicants, and to specifically require agencies to account for the contributions of these other parties in complying with NEPA. This section also requires agencies to have their own capacity to comply with NEPA and the implementing regulations. This includes staff with the expertise to independently evaluate environmental documents, including those prepared by applicants and contractors. CEQ makes these clarifying edits in the final rule.

Additionally, CEQ proposed to revise paragraph (a) to make the senior agency official responsible for overall agency compliance with NEPA, including coordination, communication, and resolution of implementation issues. CEQ is finalizing this change. Under the final rule, the senior agency official is an official of assistant secretary rank or higher (or equivalent) with responsibilities consistent with the responsibilities of senior agency officials in E.O. 13807 to whom agencies elevate anticipated missed or extended permitting timetable milestones. The senior agency official is responsible for addressing disputes among lead and cooperating agencies and enforcing page and time limits. The senior agency official also is responsible for ensuring all environmental documents—even exceptionally lengthy ones—are provided to Federal agency decision makers in a timely, readable, and useful format. *See* §§ 1501.5(f), 1501.7(d), 1501.8(b)(6) and (c), 1501.10, 1502.7, 1507.2, 1508.1(dd).

CEQ proposed to amend paragraph (c) to emphasize agency cooperation, which includes commenting on environmental documents on which an agency is cooperating. CEQ makes this change in the final rule. CEQ revises paragraph (d) in response to comments to strike the second sentence, which created confusion regarding the reach of section 102(2)(E) of NEPA. Finally, CEQ proposed to add references to E.O. 11991, which amended E.O. 11514, and E.O. 13807 in paragraph (f) to codify agencies' responsibility to comply with the orders. CEQ makes both of these changes in the final rule.

3. Agency NEPA Procedures (§ 1507.3)

Agency NEPA procedures set forth the process by which agencies comply with NEPA and the CEQ regulations in the context of their particular programs and processes. In developing their procedures, agencies should strive to identify and apply efficiencies, such as use of applicable CEs, adoption of prior NEPA analyses, and incorporation by reference to prior relevant Federal, State, Tribal, and local analyses, wherever practicable. To facilitate effective and efficient procedures, CEQ

[100] In response to the economic crisis associated with the coronavirus outbreak, Executive Order 13927, titled ''Accelerating the Nation's Economic Recovery From the COVID–19 Emergency by Expediting Infrastructure Investments and Other Activities,'' was issued on June 4, 2020. 85 FR 35165. This Executive order directs agencies to identify planned or potential actions to facilitate the Nation's economic recovery, including identification of actions that may be subject to emergency treatment as alternative arrangements.

[101] *https://ceq.doe.gov/nepa-practice/alternative_arrangements.html.*

proposed to consolidate all of the requirements for agency NEPA procedures in § 1507.3, as discussed in detail below.

In the final rule, CEQ adds a new paragraph (a) to clarify the applicability of these regulations in the interim period between the effective date of the final rule and when the agencies complete updates to their agency NEPA procedures for consistency with these regulations. Consistent with § 1506.13, ''Effective date,'' which makes the regulations applicable to NEPA reviews begun after the effective date of the final rule, paragraph (a) of § 1507.3 requires agencies to apply these regulations to new reviews unless there is a clear and fundamental conflict with an applicable statute. For NEPA reviews in process that agencies began before the final rule's effective date, agencies may choose whether to apply the revised regulations or proceed under the 1978 regulations and their existing agency NEPA procedures. Agencies should clearly indicate to interested and affected parties which procedures it is applying for each proposed action. The final rule does not require agencies to withdraw their existing agency NEPA procedures upon the effective date, but agencies should conduct a consistency review of their procedures in order to proceed appropriately on new proposed actions.

Paragraph (a) also provides that agencies' existing CEs are consistent with the subchapter. CEQ adds this language to ensure CEs remain available for agencies' use to ensure a smooth transition period while they work to update their existing agency procedures, including their CEs, as necessary. This change allows agencies to continue to use their existing CEs for ongoing activities as well as proposed actions that begin after the effective date of the CEQ final rule, and clarifies that revisions to existing CEs are not required within 12 months of the publication date of the final rule. Agencies must still consider whether extraordinary circumstances are present and should rely upon any extraordinary circumstances listed in their agency NEPA procedures as an integral part of an agency's process for applying CEs.

In paragraph (b) (proposed paragraph (a)), CEQ proposed to provide agencies the later of one year after publication of the final rule or nine months after the establishment of an agency to develop or revise proposed agency NEPA procedures, as necessary, to implement the CEQ regulations and eliminate any inconsistencies with the revised regulations. CEQ includes this sentence in the final rule with a correction to the deadline—the deadline is calculated from the effective date, not the publication date. CEQ notes that this provision references ''proposed procedures,'' and agencies need not finalize them by this date. The final rule strikes a balance between minimizing the disruption to ongoing environmental reviews while also requiring agencies to revise their procedures in a timely manner to ensure future reviews are consistent with the final rule. Agencies have the flexibility to address the requirements of the CEQ regulations as they relate to their programs and need not state them verbatim in their procedures. In addition, CEQ proposed to clarify that, except as otherwise provided by law or for agency efficiency, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the CEQ regulations. CEQ includes this language in the final rule, changing the order of the phrases, changing ''provided by law'' to ''required by law'' to enhance clarity, and adding a cross-reference to paragraph (c), which references efficiencies. This change is consistent with the direction of the President to Federal agencies in E.O. 11514 to comply with the CEQ regulations issued except where such compliance would be inconsistent with statutory requirements. E.O. 11514, as amended by E.O. 11991, sec. 2(g). Finally, the final rule eliminates the sentence from 40 CFR 1507.3(a) prohibiting agencies from paraphrasing the CEQ regulations because it is unnecessarily limiting on agencies. Agencies have the flexibility to address the requirements of the CEQ regulations as they relate to their programs and need not state them verbatim in their procedures.

Consistent with its proposal, the final rule requires agencies to develop or revise, as necessary, proposed procedures to implement these regulations. In the NPRM, CEQ proposed to subdivide 40 CFR 1507.3(a) into subordinate paragraphs (a)(1) and (2) for additional clarity because each of these paragraphs have an independent requirement. CEQ finalizes this change as paragraphs (b)(1) and (2) in the final rule. Paragraph (b)(1) addresses the requirement for agencies to consult with CEQ when developing or revising proposed procedures. Paragraph (b)(2) requires agencies to publish proposed agency NEPA procedures for public review and comment. After agencies address these comments, CEQ must determine that the agency NEPA procedures conform to and are consistent with NEPA and the CEQ regulations. CEQ proposed to eliminate the recommendation to agencies to issue explanatory guidance and the requirement to review their policies and procedures. CEQ makes this change in the final rule because it is redundant to the proposed language in paragraph (b) requiring agencies to update their procedures to implement the final rule.

The NPRM proposed to move the provisions in § 1505.1, ''Agency decision making procedures,'' to proposed § 1507.3(b). The final rule moves these provisions to paragraph (c). As stated in the NPRM, consistent with the proposed edits to § 1500.1, CEQ proposed to revise this paragraph to clarify that agencies should ensure decisions are made in accordance with the Act's procedural requirements and policy of integrating NEPA with other environmental reviews to promote efficient and timely decision making. CEQ includes these edits in the final rule, along with an additional edit to change passive to active voice. CEQ does not include proposed paragraph (b)(1) (40 CFR 1505.1(a)) in the final rule because the phrase ''[i]mplementing procedures under section 102(2) of NEPA to achieve the requirements of section 101 and 102(1)'' could be read to suggest that agencies could interpret NEPA in a manner that would impose more burdens than the requirements of the final rule. Including this provision in the final rule would be inconsistent with the language in paragraph (b) that limits agency NEPA procedures to the requirements in these regulations unless otherwise required by law or for agency efficiency. Finally, CEQ corrects the reference in paragraph (c)(4) to EIS, changing it to ''environmental documents'' consistent with the rest of the paragraph.

CEQ proposed a new paragraph (b)(6) to direct agencies to set forth in their NEPA procedures requirements to combine their NEPA documents with other agency documents, especially where the same or similar analyses are required for compliance with other requirements. As stated in the NPRM, many agencies implement statutes that call for consideration of alternatives to the agency proposal, including the no action alternative, the effects of the agencies' proposal and alternatives, and public involvement. Agencies can use their NEPA procedures to align compliance with NEPA and these other statutory authorities to integrate NEPA's goals for informed decision making with agencies' specific statutory requirements. This approach is consistent with some agency practice. *See, e.g.,* 36 CFR part 220; Forest Service Handbook 1909.15 (U.S.

Service Date: November 22, 2021

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF NorthWestern Energy's Petition for Rulemaking to Incorporate FERC's Rule Allowing Variable Cost of Energy Rates under PURPA	)))))	REGULATORY DIVISION DOCKET NO. 2021.09.118

NOTICE OF OPPORTUNITY FOR INFORMAL COMMENT

On September 24, 2021, the Montana Public Service Commission received a petition from NorthWestern Energy ("NorthWestern"), requesting the Commission to initiate a rulemaking proceeding to incorporate recent changes to the Federal Energy Regulatory Commission's ("FERC") regulations implementing the Public Utility Regulatory Policies Act of 1978 ("PURPA").

By law, an agency must act on a petition for rulemaking by denying the petition in writing or initiating rulemaking in accordance with Mont. Code Ann. §§ 2-4-302 through 2-4-305. Pursuant to Mont. Code Ann. § 2-4-304, an agency may begin rulemaking with informal conferences and consultations as a means of obtaining the viewpoints of interested persons. Given the contested nature of PURPA proceedings, the Commission will begin by soliciting informal comments on the proposed rulemaking. Additionally, the Commission may, in its discretion and in accordance with the Montana Administrative Procedure Act, begin formal rulemaking while it is receiving informal comments.

FERC amended its PURPA rules, effective December 31, 2020. *In re PURPA Implementation Issues*, Docket Nos. RM19-15-000 and AD16-16-000, Order No. 872, 85 Fed. Reg. 54638-01 (Sept. 2, 2020). Prior to the adoption of these rules, QFs had the right to choose between a calculation of avoided costs at the time when a legally enforceable obligation is incurred, or at the time of delivery of the QFs energy. FERC's rules now allow states, among other things, the discretion to establish avoided costs of energy for QFs to be calculated at the time of delivery in instances where the QF has chosen to provide capacity and/or energy pursuant to a legally enforceable obligation.

To effectuate these regulations, NorthWestern requests the Commission to initiate a rulemaking to amend Mont. Admin. R. 38.5.1902(1) and (5), Mont. Admin. R. 38.5.1903(2), and Mont. Admin. R. 38.5.1905(3).

Congress requires state commissions to implement PURPA regulations within one year from their effective date. 16 U.S.C. § 824a-3(f). Under federal statute, the Commission has until December 31, 2021, to implement FERC's regulations. The Commission may adopt by reference federal regulations; however, the federal regulation must be adopted consistent with MAPA's rulemaking procedures. Mont. Code Ann. § 2-4-307. Amendments to already incorporated federal regulations are not incorporated automatically and must be incorporated through a subsequent rulemaking proceeding. Mont. Code Ann. § 2-4-307(4). The Commission's regulations incorporate by reference FERC regulations. Mont. Admin. R. 38.5.1902. To incorporate the FERC's amendments to those regulations, the Commission must either issue a notice of incorporation by reference (Mont. Code Ann. § 2-4-307(6)) or proceed with traditional rulemaking (*see* Mont. Code Ann. § 2-4-302).

Consistent with Mont. Code Ann. § 2-4-304, the Commission invites public comment from interested parties on NorthWestern's proposed rulemaking by **December 14, 2021.** By the comment deadline, interested parties must submit comments electronically (e-file) on the Commission's website at http://psc.mt.gov ("Electronic Filing" under "For Regulated Utilities" tab). Physical copies are not required. Members of the public may also submit written public comments on the matter by email to pschelp@mt.gov. The Commission will determine next steps after reviewing informal comments. The Commission's jurisdiction over this matter is provided at Mont. Code Ann. § 69-3-601 through -604 generally.

DONE AND DATED this 22nd day of November, 2021.

BY THE MONTANA PUBLIC SERVICE COMMISSION
JAMES BROWN, Chairman
BRAD JOHNSON, Vice Chairman
TONY O'DONNELL, Commissioner
RANDALL PINOCCI, Commissioner
JENNIFER FIELDER, Commissioner

CERTIFICATE OF SERVICE

I certify that on the 22nd day of November, 2021, a true and accurate copy of the foregoing document was served by email to the following:

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For the purpose of Public Notice, this document has been sent to the following media outlet(s):

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By: /s/ Lori Sandru
Lori Sandru
Montana Public Service Commission

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2022, I caused the foregoing to be electronically filed through this Court's CM/ECF system, which will send notice of filing to all registered users. Counsel for all parties to this matter will be served by the CM/ECF system.

Dated: January 6, 2022.

/s/ David Bender
David Bender