No. _____

IN THE
Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,
SOUTHERN CALIFORNIA EDISON COMPANY, AND
SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Regional transmission organizations ("RTOs") operate the interstate electricity grid independently. Congress in the Federal Power Act ("FPA") mandated that the Federal Energy Regulatory Commission ("FERC") "shall have jurisdiction over all facilities for [interstate] transmission," 16 U.S.C. § 824(b)(1), and that RTO membership remain "voluntary," *id.* § 824a(a). Congress also directed FERC to provide incentives "to each ... utility that joins" an RTO. *Id.* § 824s(c).

Here, after Petitioners joined an RTO and FERC awarded them incentives, California enacted a statute that FERC interpreted to mandate membership. The Ninth Circuit held California could do so. And it denied Petitioners an incentive by reading into the federal statute a nontextual exclusion for utilities subject to state RTO mandates. The questions presented are:

1. Whether the Ninth Circuit correctly held that the FPA does not preempt California's RTO mandate, where the grounds for its decision—that FERC lacks exclusive jurisdiction over interstate transmission facilities, and that California's law mandating who operates interstate transmission facilities somehow regulates "intrastate wholesale markets and retail sales"—accord with a recent decision of the Sixth Circuit but conflict with decisions by the Third, Fifth, Eighth, and D.C. Circuits recognizing that FERC's jurisdiction is exclusive and with settled law that transmission facilities operating on the interstate grid (as Petitioners' facilities do) are interstate transmission.

2. Whether RTO mandates render utilities ineligible for incentives under 16 U.S.C. § 824s(c).

LIST OF PARTIES AND PROCEEDINGS

Petitioners are Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company.

Respondent is the Federal Energy Regulatory Commission ("FERC").

There are no related proceedings within the meaning of this Court's Rule 14, though similar questions are presented in *FirstEnergy Service Co. v. FERC*, No. 24-1304 (U.S. filed June 20, 2025) and *American Electric Power Serv. Corp. v. FERC*, No. 24-1318 (U.S. filed June 24, 2025).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners provide the following disclosures:

Pacific Gas and Electric Company is a subsidiary of PG&E Corporation, a publicly held corporation. No publicly held corporation has a 10 percent or greater ownership interest in PG&E Corporation.

Southern California Edison Company is a subsidiary of Edison International, a publicly held corporation. No other publicly held corporation beneficially owns 10 percent or more of Edison International's common stock.

San Diego Gas & Electric Company is a subsidiary of Sempra, a publicly held corporation. No publicly held corporation has a 10 percent or greater ownership interest in Sempra.

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PETITION FOR A WRIT OF CERTIORARI

Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company, and San Diego Gas & Electric Company (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

Since January 2025, the Sixth and Ninth Circuits have launched a revolution in transmission jurisdiction under the Federal Power Act ("FPA"), and this Petition joins two others seeking review of the deepening split on that issue. *See FirstEnergy Serv. Co. v. FERC*, No. 24-1304 (U.S. filed June 20, 2025); *Am. Elec. Power Serv. Corp. v. FERC*, No. 24-1318 (U.S. filed June 24, 2025). This Petition, like those others, also seeks review of the rewriting by FERC of a critical statute governing transmission investment, on an issue where FERC itself has divided.

Electricity is produced and delivered in three steps: generation, transmission, and distribution. Under the FPA, FERC has "jurisdiction over all facilities for [interstate] transmission." 16 U.S.C. § 824(b)(1). Exercising this jurisdiction, FERC has encouraged the development of grid operators known as regional transmission organizations ("RTOs"). *See Reg'l Transmission Orgs.*, Order No. 2000, 89 FERC ¶ 61,285 (1999) ("Order No. 2000"). By operating the grid on a nondiscriminatory basis, RTOs can make service more competitive, reliable, and affordable. But deciding to join an RTO has massive consequences for utilities: they must give over operational control of their facilities and

follow different and more onerous rules. Even so, recognizing the potential for increased transmission investment that comes with RTO participation, Congress directed in Section 219(c) of the FPA that FERC's "rule[s]" "shall[] ... provide incentives to each ... utility that joins" RTOs. 16 U.S.C. § 824s(c) ("Section 219(c)"). Those incentives come via an "adder"—a higher return on equity for transmission investments.

Here, PG&E long ago joined an RTO, the California Independent System Operator Corp. ("CAISO"). FERC duly awarded PG&E the adder, and the Ninth Circuit rejected an attempt by the California Public Utilities Commission ("CPUC") and others to strip the adder. *Cal. Pub. Utils. Comm'n v. FERC*, 29 F.4th 454 (9th Cir. 2022) ("*CPUC II*"). The CPUC had argued that PG&E was not entitled to the adder because a California statute supposedly required it to join an RTO. The Ninth Circuit held that the statute did not in fact compel membership. *Id.* at 461. But then, California enacted a new statute that, as interpreted by FERC, specifically aimed to eliminate the adder for three disfavored utilities—Petitioners, which are California's three large investor-owned utilities—by requiring CAISO membership. Cal. Pub. Util. Code § 362(c). FERC concluded that this law rendered PG&E ineligible for the adder.

Two fundamental errors merit this Court's review:

First, adding to a widening split, the Ninth Circuit incorrectly declined to hold that the FPA preempts California from exercising jurisdiction over who operates Petitioners' federally regulated transmission facilities. The Third, Fifth, Eighth, and D.C. Circuits

have properly applied this Court's teachings to recognize that FERC's jurisdiction over the interstate transmission of electricity is "exclusive," and that nearly all facilities in the continental United States—outside of a portion of Texas—operate in interstate commerce. Under that settled law, state RTO mandates are clearly preempted: They require transmission owners to hand over operational control of federally regulated facilities to *someone else*, which by any measure regulates in the federal sphere.

But in January 2025, the Sixth Circuit pioneered a new and different theory of FPA jurisdiction. It upheld Ohio's RTO mandate on the theory that FERC's jurisdiction over interstate transmission is not exclusive and that state RTO mandates "primarily regulate[] intrastate transmission" (on the ground, it appears, that the facilities are physically within the state). *Dayton Power & Light Co. v. FERC*, 126 F.4th 1107, 1129-30 (6th Cir. 2025), *petition for cert. filed*, 93 U.S.L.W. 3380 (U.S. June 26, 2025) (No. 24-1318). Below, the Ninth Circuit endorsed the Sixth Circuit's view, holding that FERC's jurisdiction is limited to "interstate wholesale rates" and that state RTO mandates permissibly regulate "intrastate wholesale markets and retail sales," Pet. App. 11a—a holding that is especially indefensible because Petitioners' transmission facilities literally cross state lines. FERC itself has now also embraced the Sixth Circuit's theory, authorizing states to directly regulate interstate transmission if "legislative findings" recite a concern with in-state reliability, rates, or services. *San Diego Gas & Elec. Co.*, 192 FERC ¶ 61,015 at P 36 (2025).

This issue warrants this Court's review. The Sixth and Ninth Circuits have launched a revolution in FPA transmission jurisdiction, upending the consensus that FERC's jurisdiction is exclusive and that transmission facilities operating as part of the interstate grid (as Petitioners' facilities do) constitute interstate transmission. This new rule will create chaos in electricity regulation, including by inviting states to create their own rules governing who operates interstate transmission facilities and how those facilities operate—so long as they recite a concern with in-state issues. And the tumult will be all the greater because of the disuniformity the Sixth and Ninth Circuits have created, with basic jurisdictional principles now differing across the same RTOs (which often span multiple states and circuits).

This new rule is wrong. The FPA in its text grants FERC jurisdiction over "all facilities for … transmission … of electric energy" in interstate commerce, 16 U.S.C. § 824(b)(1), and this Court has long recognized that this authority is "exclusive." *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982). Nor can the novel jurisdictional test of the Sixth and Ninth Circuits be squared with the FPA's reservation to states of jurisdiction over "facilities used ... *only* for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1) (emphasis added). In no world are Petitioners' facilities used *only for* intrastate transmission. Indeed, CAISO controls transmission not just in California but in parts of Arizona and Nevada too. What is more, attempts by states like California to reach beyond their sphere by enacting state RTO mandates

are irreconcilable with Congress's express command that RTO membership remain "voluntary." 16 U.S.C. § 824a(a).

Second, the Ninth Circuit incorrectly rewrote Congress's command that FERC's "rule[s]" must provide incentives "to each transmitting utility ... that joins" an RTO. *Id.* § 824s(c). The text could not be clearer: If a utility joins an RTO, it gets an incentive. But the Sixth and Ninth Circuits have edited the statute to add a nontextual voluntariness requirement, which they applied to hold that state RTO membership mandates render utilities ineligible for the adder.

The controversy this issue has generated at FERC reinforces the need for review. For more than a decade after Congress enacted Section 219(c), FERC properly awarded the adder to all RTO members, regardless of whether states had purported to mandate RTO membership. But in the prior Administration, FERC flip-flopped, overreading a Ninth Circuit decision as requiring it to impose a voluntariness requirement and rejecting the warnings of FERC Chairmen Danly and Chatterjee that this requirement flouted the statutory text and Congress's clear intent. *E.g.*, *Elec. Transmission Incentives Pol'y Under Section 219 of the Fed. Power Act*, 175 FERC ¶ 61,035 at P5 (2021) (Danly, Comm'r dissenting).

This Court should resolve that disagreement. FERC and the lower courts have revised the statutory text Congress enacted. They have undermined the incentives Congress aimed to provide. And they have invited states to hijack federal transmission policy and manipulate the federal rate by creating their own RTO

mandates. Any state that wants to reduce utilities' rate of return can just enact a statute purporting to mandate RTO membership, even if its utilities are already RTO members and have no intention of leaving.

This case is a good vehicle, and these issues are of national importance. Several states have already enacted RTO mandates, and several more are considering such mandates—a growing trend that the decision below is bound to encourage and that underscores this case's significance. Meanwhile, there is rare consensus on the imperative of encouraging the generation and transmission of electricity to meet the challenges of rising demand, artificial intelligence, data centers, electrification, reshoring, and greater penetration of renewables. The decisions of the Sixth and Ninth Circuits have introduced enormous uncertainty, when our country cannot afford it.

This case should either be granted and consolidated with *FirstEnergy* and *American Electric Power* for argument, or else it should be held for those cases.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit (Pet. App. 3a-14a) is unpublished but available at *PG&E v. FERC*, 2025 WL 1912363 (9th Cir. July 11, 2025). The orders of the Federal Energy Regulatory Commission (Pet. App. 15a-96a) are reported at 185 FERC ¶ 61,243 (Dec. 29, 2023) (Initial Order); 186 FERC ¶ 62,096 (Feb. 29, 2024) (Order Denying Rehearing by Operation of Law); 187 FERC ¶ 61,167 (June 12, 2024) (Rehearing Order).

JURISDICTIONAL STATEMENT

The Ninth Circuit entered its decision on July 11, 2025. On August 20, 2025, Petitioners timely filed a petition for Ninth Circuit rehearing or rehearing en banc. On September 15, 2025, the Ninth Circuit issued an order denying panel rehearing or rehearing en banc. Pet. App. 1a-2a. This court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the appendix. Pet. App. 97a-109a.

STATEMENT

A. Legal Background

1. The FPA allocates authority over electricity generation, transmission, and distribution between the federal government and the states. Congress provided that FERC "shall have jurisdiction" over the "transmission of electric energy" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Today, it "is only in Hawaii and Alaska and on the 'Texas Interconnect' ... that electricity is distributed entirely within a single State"; elsewhere, "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *New York v. FERC*, 535 U.S. 1, 7 & n.5 (2002). FERC has exercised its exclusive authority to regulate the cost of transmission service, who pays, and terms and conditions. *See, e.g.*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 50-54 (D.C. Cir. 2014).

States have jurisdiction over retail sales, "generation," and "local distribution" facilities, and "facilities used ... only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). States also retain jurisdiction over certain traditional state concerns, including siting. *S.C. Pub. Serv. Auth.*, 762 F.3d at 62.

2. FERC came to recognize that electricity can be delivered more efficiently and reliably if a neutral grid operator coordinates transmission regionally. FERC thus encouraged the formation of "[r]egional [t]ransmission [o]rganizations" and "independent system operators." Order No. 2000, 1999 WL 33505505, at *2-3. These RTOs confer "significant benefits" for consumers, including "improve[d] efficiencies" and "improve[d] grid reliability." *Id.* at *29; *see id.* at *37. But for utilities, joining an RTO is a momentous decision: they must cede to the RTO operational control of their facilities—facilities that represent a significant portion of their invested capital. *E.g.*, 18 C.F.R. § 35.34(f), (k)(7). Congress thus made clear that a utility's choice to join an RTO was to remain "voluntary." 16 U.S.C. § 824a(a).

3. In 2005, Congress enacted Section 219 of the FPA. 16 U.S.C. § 824s. "Section 219 reflect[ed] Congress' determination that the Commission's traditional ratemaking policies may not be sufficient to encourage new transmission infrastructure." *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 at P 5 (2006) ("Order No. 679"), *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006) ("Order No. 679-A"), *order on reh'g*, Order No. 679-B, 119 FERC ¶ 61,062 (2007). In the

three decades before Section 219's enactment, "investment in transmission facilities in real dollar terms declined significantly," and the "growth rate in transmission mileage" in the years immediately before Section 219's passage was "not sufficient to meet" the "expected ... growth in consumer demand." *Id.* at P10.

Congress thus directed FERC to "establish, by rule, incentive-based (including performance based) rate treatments" for interstate transmission, 16 U.S.C. § 824s(a), and identified several general goals FERC's rule should pursue, *id.* § 824s(b). Congress also enacted a more specific mandate, requiring that FERC promulgate a "rule" that "shall[] ... provide for incentives to each transmitting utility or electric utility that joins" an RTO. *Id.* § 824s(c).

To implement Section 219, FERC issued Order No. 679. Order No. 679, 116 FERC ¶ 61,057. One way to induce transmission investment is to boost the rate of return on equity ("ROE"). Regulated utilities make money by earning a return on their invested capital, and ROE is one part of the overall rate. So a higher ROE will, all else equal, incentivize investment in transmission over other uses.

FERC specified that it would approve "[return on equity]-based incentives for public utilities that join and/or continue to be a member of" an RTO. *Id.* at P326. The "basis for the incentive" was a "recognition of the benefits that flow from [RTO] membership." *Id.* at P331. And even as FERC noted that "continuing membership is generally voluntary," it rejected a proposal to make utilities categorically ineligible if state law required membership. *Id.*; *see id.* at P316. FERC emphasized that

the "best way to ensure [that consumer] benefits are spread to as many consumers as possible" is to "provide an incentive that is *widely available* to" member utilities. Order No. 679-A, 117 FERC ¶ 61,345 at P86 (emphasis added).

B. Proceedings Below

1. In 1998, Petitioner PG&E joined a newly created transmission organization, CAISO, which operates the electric grid in California and parts of Nevada and Arizona. *Joint Application of Pac. Gas & Elec. Co.*, D.98-01-053, 1998 WL 242747 (Cal. Pub. Utils. Comm'n Jan. 21, 1998). For a decade after Congress enacted Section 219(c), FERC duly granted the adder to each utility that joined an RTO, and PG&E received the adder beginning in 2007. *E.g.*, *CPUC v. FERC*, 879 F.3d 966, 971-72 (9th Cir. 2018) ("*CPUC I*"); *CPUC II*, 29 F.4th at 459 (similar).

Then in 2018, the Ninth Circuit remanded a decision to FERC to better explain how uniformly awarding the adder to RTO members squared with references in Order No. 679 to membership being "generally voluntary." *CPUC I*, 879 F.3d at 978. That decision considered only Order No. 679, not whether Section 219(c) permitted a voluntariness requirement or whether the FPA preempted states from mandating membership. *Id.*; *see CPUC II*, 29 F.4th at 462. On remand, FERC again awarded PG&E the adder, concluding that state law did not require RTO participation. *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038 at PP2, 42-52 (2019), *aff'd sub nom. Cal. Pub. Utils. Comm'n v. FERC*, 29 F.4th 454 (9th Cir. 2022). The Ninth Circuit affirmed. 29 F.4th at 464.

2. Thereafter, California enacted a new law, AB209, that FERC interpreted to require Petitioners to participate in CAISO—meaning Petitioners must continue to allow CAISO to exercise operational control over their transmission lines. *See* Cal. Pub. Util. Code § 362(c). This law laser-targets only Petitioners, leaving untouched other utilities that California appears to favor. *See id.* FERC then stripped PG&E of its adder on the theory that only voluntary RTO members are eligible for the adder. Pet. App. 42a-43a (Initial Order P42). Petitioners sought rehearing, arguing that: (1) AB209 is field preempted and conflict preempted, and that (2) Section 219(c) does not require voluntariness.[1]

FERC declined to reach preemption and rejected Petitioners' 219(c) argument—applying its prior, divided decisions concerning Ohio's RTO mandate (discussed just below). Pet. App. 77a-78a (Rehearing

[1] Petitioners also argued, and maintain, that FERC misinterpreted California law as mandating RTO membership when they could leave with CPUC approval. Among other things, the California statute does not require that Petitioners "shall participate" in CAISO full stop; it specifies that they "shall participate" "[c]onsistent with Section 851" of the California Public Utilities Code and a prior CPUC decision. That decision, in turn, had said that Petitioners under Section 851 could withdraw *with permission*. *Joint Application of PG&E Co.*, 1998 WL 242747, at *7. And the California legislature was express that it intended to ratify, not abrogate, that decision. Assemb. Bill No. 209 § 1(a)(2), ch. 251, 2021-2022 Reg. Sess. (Cal. eff. Sept. 6, 2022). But FERC and the Ninth Circuit both rejected that argument, and Petitioners do not seek review of that state-law question in this Court (though they reserve all rights to continue to press it through other appropriate avenues).

Order at P37); *id.* at 64a-65a (Rehearing Order at P21). Petitioners sought judicial review in the Ninth Circuit.

3. Meanwhile, the same issues had already arisen concerning Ohio's RTO mandate. By a 3-2 vote, FERC denied the adder to the Dayton Power & Light Company ("Dayton") on the ground that an Ohio law mandates RTO membership. *Dayton Power & Light Co.*, 176 FERC ¶ 61,025 at P 14 (2021), *modified on denial of reh'g*, 178 FERC ¶ 61,102 (2022), *aff'd sub nom. Dayton Power & Light Co. v. FERC*, 126 F.4th 1107 (6th Cir. 2025).

Commissioners Danly and Chatterjee dissented. Commissioner Danly explained that the "Federal Power Act does not limit incentives to only those utilities that 'voluntarily' join a transmission organization." 176 FERC ¶ 61,025 at PP1, 4 (Danly, Comm'r, dissenting). Commissioner Chatterjee emphasized the "RTO Adder's critical importance in attracting and maintaining RTO/ISO membership, the substantial benefits RTOs/ISOs provide to consumers, and the vital role RTOs/ISOs will play in advancing the energy transition." *Id.* at P1 (Chatterjee, Comm'r, dissenting).

FERC then applied its decision to another Ohio utility—and again, Commissioner Danly dissented. He explained that the "plain statutory text" does not limit the adder to "only those utilities that 'voluntarily' join a transmission organization" and concluded that the FERC majority had "improperly added this non-statutory requirement in Order No. 679," which it "had no authority to do ... then or now." *Off. of the Ohio Consumers' Counsel v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214 at P1 (2022) (Danly, Comm'r,

dissenting); *see also id.* at P3 (concluding that the Commission had "work[ed] an amendment of unambiguous law and only Congress—not FERC—has the authority to pass and amend statutes"); *Elec. Transmission Incentives*, 175 FERC ¶ 61,035 at P5 (Danly, Comm'r, dissenting) (explaining that FERC's prior "consistent interpretation of the statute since its inception [had been] correct").

After FERC denied rehearing, the Ohio petitioners sought judicial review—culminating in *Dayton Power & Light Co. v. FERC*, 126 F.4th 1107 (6th Cir. 2025). The Sixth Circuit agreed with the utilities that FERC had erred in declining to consider preemption, but it held that Ohio's law was not preempted. *Dayton*, 126 F.4th at 1126-31.

The Sixth Circuit concluded that Ohio's law was not field preempted because the "FPA's text does not grant FERC *exclusive* jurisdiction over interstate transmission facilities." *Id.* at 1129. Rather, it "primarily regulates" and "targets" "*intrastate* transmission—an area explicitly reserved for states by the FPA in § 824(a) and § 824(b)(1)." *Id.* at 1129-30. The Sixth Circuit also concluded that Ohio's RTO mandate was not conflict preempted and that it was consistent with the FPA's requirement that RTO membership remain "voluntary." *Id.* at 1127-29 (discussing 16 U.S.C. § 824a(a)). Finally, the Sixth Circuit held that Section 219(c) includes a voluntariness requirement. *Id.* at 1122-26.

The Ohio utilities filed multiple petitions for certiorari, which are pending. *See FirstEnergy Serv. Co. v. FERC*, No. 24-1304 (U.S. filed June 20, 2025); *Am.*

Elec. Power Serv. Corp. v. FERC, No. 24-1318 (U.S. filed June 24, 2025).

4. The Ninth Circuit followed the Sixth Circuit on both issues. On field preemption, it described FERC's exclusive jurisdiction as limited to "interstate wholesale rates." Pet. App. 11a. And it held that California's mandate falls "within the domain Congress assigned to the states," which it characterized as encompassing "intrastate wholesale markets and retail sales." *Id.* (citing 16 U.S.C. § 824(b)(1)). Mere "indirect affects" on "interstate wholesale rates," the Ninth Circuit averred, "do not trigger preemption." *Id.* at 12a.

On conflict preemption, the Ninth Circuit held that "[i]mpossibility preemption does not apply because, by remaining members of CAISO, the Utilities are complying with both federal and state law" and that California's RTO mandate "does not frustrate the purpose of" federal law. *Id.* at 10a-11a.

On Section 219(c), the Ninth Circuit blessed FERC's voluntariness requirement. The only text it considered was the word "incentive." *Id.* at 12a-13a. The Ninth Circuit posited that an incentive is "something that incites or has a tendency to incite to determination or action," *id.* (quoting *Incentive*, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/incentive), and that an "incentive cannot 'induce' behavior that is already legally mandated," *id.* at 13a (internal quotation marks omitted). The Ninth Circuit did not address the rest of Section 219(c) or explain how its reading accorded with Congress's command that FERC's "rule[s]" "shall" provide incentives "to each" utility "that joins" an RTO. 16 U.S.C. § 824s(c). Instead,

the Ninth Circuit broadly declared that "the other subsections of Section 219 suggest that Congress intended Section 219(c) adder to induce voluntary RTO participation." Pet. App. 12a-13a.

The Ninth Circuit denied rehearing en banc. This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S PREEMPTION HOLDING, WHICH ENTRENCHES A DIVISION THAT HAS UPENDED FPA JURISDICTION.

Due to recent decisions of the Sixth Circuit and the Ninth Circuit below, states in those circuits may seek to regulate interstate transmission on the theory that FERC's jurisdiction is not exclusive. States may also now seek to enforce laws that regulate the operation of interstate transmission facilities based on their authority to regulate "intrastate" transactions. These regulations would be preempted in the Third, Fifth, Eighth, or D.C. Circuits, which correctly recognize that FERC's jurisdiction over interstate transmission is exclusive and very few facilities fall within the FPA's carve-out for state regulation of "facilities used ... only for the transmission of electric energy in *intra*state commerce." 16 U.S.C. § 824(b)(1). The Court should grant certiorari to address that division, reject the revolution in FPA jurisdiction recently pioneered by the Sixth and Ninth Circuits, and hold California's RTO mandate preempted.

A. Decisions Of The Sixth And Ninth Circuits Conflict With Decisions Of Other Courts Of Appeals.

The decisions of the Sixth and Ninth Circuits conflict with the law in several other courts of appeals. The D.C. Circuit, Third Circuit, Fifth Circuit, and Eighth Circuit all recognize that FERC's jurisdiction over the interstate transmission of electricity is exclusive. For example, the D.C. Circuit has long affirmed that "FERC—not state[s] …—has 'exclusive authority to regulate the transmission … of electric energy in interstate commerce.'" *Orangeburg v. FERC*, 862 F.3d 1071, 1086 (D.C. Cir. 2017) (quoting *New England Power*, 455 U.S. at 340). Based on that rule, the D.C. Circuit rejected FERC's position that too narrowly read its own exclusive authority. *Accord Green Dev. LLC v. FERC*, 77 F.4th 997, 1000 (D.C. Cir. 2023) (FPA "grants FERC exclusive jurisdiction of the transmission and wholesale sale of electricity in interstate commerce"); *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 700 (D.C. Cir. 2017) ("interstate transmission" "fall[s] squarely within FERC's exclusive [FPA] authority").

The Third Circuit has also held that the "federal government has exclusive control over interstate rates and transmission." *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 247 (3d Cir. 2014). And recently, it reaffirmed that the FPA represents a "significant shift in the balance of state and federal authority" and "empowered" FERC "with new authority and responsibility over interstate transmission and wholesale sales." *Transource Pa., LLC v. DeFrank*, No. 24-1045, --- F.4th ---, 2025 WL 2554133, at *2-3 (3d Cir.

Sept. 5, 2025). Based on that holding, the Third Circuit deemed preempted Pennsylvania's intervention in RTOs' operations. *Id.*

The Fifth Circuit has also concluded that the FPA "gives FERC exclusive jurisdiction to regulate the transmission and wholesale sale of electric energy in interstate commerce." *AEP Tex. N. Co. v. Tex. Indus. Energy Consumers*, 473 F.3d 581, 584 (5th Cir. 2006). And the Eighth Circuit has recognized that "FERC is vested with exclusive jurisdiction" over these matters. *Cent. Iowa Power Co-op v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 907-08 (8th Cir. 2009) (citing *AEP Tex.*, 473 F.3d at 584).

In January 2025, the Sixth Circuit broke with this consensus in holding that FERC's jurisdiction over interstate transmission is not exclusive. Then, the Sixth Circuit compounded the division by concluding that Ohio's law could be understood as a permissible state regulation of "intrastate commerce" and "intrastate transmission." *Dayton*, 126 F.4th at 1129-30. That conclusion, too, cannot be reconciled with precedent from other courts of appeals, which recognize that "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *Transource*, 2025 WL 2554133, at *3; *accord North Dakota v. Heydinger*, 825 F.3d 912, 921 (8th Cir. 2016) (similar); *S.C. Pub. Serv. Auth.*, 762 F.3d at 49-50 (similar). Indeed, that conclusion is the only one consistent with decades of precedent from this Court recognizing that nearly all electricity transmission in the continental United States occurs in interstate commerce. *See New York*, 535 U.S. at 7 & n.5; *Hughes v.*

Talen Energy Mktg., LLC, 578 U.S. 150, 154 (2016); *FPC v. Fla. Power & Light Co.*, 404 U.S. 453, 468-69 (1972).

The decision below aligns with the Sixth Circuit. The Ninth Circuit held that the "FPA grants FERC jurisdiction"—though conspicuously not *exclusive* jurisdiction—"over interstate wholesale rates." Pet. App. 11a. And it concluded that California had "regulate[d] within the domain Congress assigned to the states" on the theory that California had regulated "intrastate wholesale markets and retail sales of electricity." *Id.* It reached this holding even though the transmission facilities at issue here themselves include lines that cross state borders. So under the decision below, as in the Sixth Circuit, the operation of interstate transmission facilities is fair game for states to regulate, based on the notion that these facilities are somehow "intrastate" or involve "retail sales."

FERC has now also endorsed the Sixth Circuit's theory that states may mandate RTO membership because doing so "primarily regulates intrastate transmission." *San Diego Gas*, 192 FERC ¶ 61,015 at P 36. Per FERC, states now may directly regulate the operation of interstate transmission facilities located within their borders, at least if "legislative findings" recite a concern with in-state "reliability", "rate reductions for" retail customers, or "service" within the state, regardless of what the legislation actually regulates. *Id.*

B. The Decision Below Is Wrong.

The decision below, like the decision of the Sixth Circuit, is wrong. The FPA's text broadly provides

FERC with "jurisdiction over *all* facilities for [interstate] transmission," and for the "sale of electric energy [at wholesale]." 16 U.S.C. § 824(b)(1). By contrast, the FPA limits state jurisdiction to "facilities used ... *only* for the transmission of electric energy in intrastate commerce." *Id.* It thus follows that PG&E's transmission facilities here, which are connected to and form part of the interstate grid, operate in interstate commerce and are subject to FERC's exclusive jurisdiction.

With those jurisdictional errors corrected, the Ninth Circuit's preemption holding cannot stand. If California commands utilities to turn over the operation of their federally regulated facilities to CAISO, and operate those facilities within a particular regulatory construct, California is asserting jurisdiction over the operation of those facilities—jurisdiction that Congress has vested exclusively in FERC. That yields field preemption. And California is doing so in conflict with Congress's command that RTO membership remain voluntary. That yields conflict preemption.

The Ninth Circuit's contrary conclusion flies in the face of this Court's precedent. This Court has repeatedly recognized that FERC's jurisdiction over interstate transmission facilities is exclusive. More than 40 years ago, this Court explained that the FPA "delegated to the Federal Power Commission, now [FERC], *exclusive* authority to regulate the transmission ... of electric energy in interstate commerce." *New Eng. Power Co.*, 455 U.S. at 340. In *New York*, this Court made clear that the FPA "authorized federal regulation of electricity in areas beyond the reach of state power" and "also

extended federal coverage to some areas that previously had been state regulated." 535 U.S. at 6. The Court then explained that "[s]pecifically, in § 201(b) of the FPA, Congress recognized the [Federal Power Commission's] jurisdiction as including 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *Id.* at 6-7 (quoting 16 U.S.C. § 824(b)).

Hughes confirmed the same conclusion. That case concerned FERC's parallel authority—set forth in the same sentence—over interstate wholesale sales and held that "[u]nder the FPA, FERC has *exclusive authority* to regulate 'the sale of electric energy at wholesale in interstate commerce.'" 578 U.S. at 154. And if FERC's authority over wholesale sales is exclusive (which it is), its authority over interstate transmission must be, too: Congress conferred those two parallel authorities in the same breath, and this Court has previously recognized that FERC's jurisdiction over transmission is, if anything, *broader* than its jurisdiction over wholesales sales. *See New York*, 535 U.S. at 17, 19-20; *see S.C. Pub. Serv. Auth.*, 762 F.3d at 63 (recognizing that FERC "possesses greater authority over electricity transmission than it does over sales").

The Ninth Circuit is badly wrong that states' jurisdiction over "intrastate wholesale markets," Pet. App. 11a, can sustain California's RTO mandate. States have jurisdiction, as relevant, only over "facilities used ... *only* for" intrastate transmission. 16 U.S.C. § 824(b)(1) (emphasis added). Petitioners' facilities do not qualify: Other than facilities in parts of Texas that are not operated as part of the interstate grid, *all* transmission

facilities in the contiguous forty-eight states—including California—operate in interstate commerce and so cannot be said to be used "only" for intrastate transmission. *See, e.g.*, *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1181 (D.C. Cir. 2020). Indeed, CAISO itself encompasses not just facilities in California, but also some transmission in Arizona and Nevada. So there is nothing intrastate about Petitioners' transmission facilities.

California's RTO mandate also does not somehow regulate "retail sales," insofar as the Ninth Circuit suggested as much. The statute, as interpreted by FERC, dictates who must operate interstate transmission facilities. That does not regulate any retail sale. It regulates interstate transmission. And for that same reason, the Ninth Circuit erred with its makeweight observation that states may "regulat[e] within the[ir] domain" even if doing so "indirectly affects interstate wholesale rates." Pet. App. 11a-12a. An order that Petitioners must turn over control of their facilities to CAISO is direct regulation, not an indirect effect.

This Court's decision in *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015), underscores why California's RTO mandate is preempted. *Oneok* teaches that, in weighing preemption, courts must "consider[] the *target* at which the state law *aims*." *Id.* at 385. It held that California could apply its antitrust laws, which govern "all businesses in the marketplace," to conduct also regulated by the Natural Gas Act. *Id.* at 387. Here, by contrast, California has targeted three public utilities and specified that they "shall participate in the Independent System Operator," Cal. Code Pub. Util.

§ 362(c), whose function is precisely to "operat[e] … the transmission grid," *id.* § 345(a), and which operates pursuant to a tariff FERC must approve. California's target is thus the operation of interstate transmission facilities that fall within FERC's exclusive jurisdiction.

Nor is there anything to the argument, embraced by the Sixth Circuit and now FERC, that states may regulate interstate transmission facilities if they seek to achieve *goals* that the states deem legitimate and within their domain. *Dayton*, 126 F.4th at 1130; *San Diego*, 192 FERC ¶ 61,015 at P 36. This Court rejected exactly that theory in *Hughes*: "That Maryland was attempting to encourage construction of new in-state generation," an issue generally within states' domain, did "not save its program"—because "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority." *Hughes*, 578 U.S. at 164.

Congress's command in the FPA that RTO membership remain "voluntary," 16 U.S.C. 824a(a), both renders California's RTO mandate conflict-preempted and underscores that California has intruded on the federal field. "When the federal government completely occupies a given field or an identifiable portion of it, …the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212–13 (1983) (citation omitted). Section 824a(a) shows that RTO membership is part of the federal field. And with Congress having withheld authority to mandate RTO membership even from its

designated federal regulator, it is bizarre to claim that Congress intended to permit states to regulate this issue. *Cf.* Pet. App. 10a (averring that the FPA's voluntariness requirement precludes only FERC from enacting RTO mandates).

The Ninth Circuit was wrong that conflict preemption is absent on the theory that "by remaining members of CAISO, the Utilities [can] comply[] with both federal and state law." *Id.* State RTO mandates make it impossible for FERC to do *its* job under the FPA. If states mandate RTO participation, FERC cannot "divide the country into regional districts for … *voluntary* interconnection." 16 U.S.C. § 824a(a) (emphasis added). If utilities have no choice but to join RTOs, FERC cannot "promote and encourage such [voluntary] interconnection." *Id.* And if states may impose RTO membership, FERC cannot fulfill its duty to encourage voluntary interconnection in "such district[s]" that "in the judgment of the Commission" "can economically be served by such interconnection"—because states may mandate membership in RTOs encompassing different areas. *Id.* Indeed, California's RTO mandate does just that: As interpreted by the decision below, it requires Petitioners to remain members of *CAISO* specifically—so even if another geographic area better fits FERC's goals, California's mandate stops Petitioners from joining it.

II. THIS COURT SHOULD REVIEW WHETHER THE NINTH CIRCUIT CORRECTLY ADDED A NONTEXTUAL VOLUNTARINESS REQUIREMENT TO SECTION 219(c).

A. Review Is Warranted To Address FERC's Reversal To Impose A Voluntariness Requirement.

This Court's review is also needed to address the rewriting of the adder statute by the Sixth and Ninth Circuits. Two FERC Chairmen have correctly recognized that this rewriting conflicts with Congress' intent and FERC's own understanding in the wake of Section 219's passage, which FERC maintained until 2021. This issue is of immediate national importance, as explained in Part III, and it warrants resolution now.

When FERC promulgated Order No. 679—the rule implementing Section 219(c)—FERC rejected a suggestion from commenters that transmission owners should be categorically ineligible if their RTO participation was mandated by state law. *See* Order No. 679, 116 FERC ¶61,057 at P316. And for more than a decade, FERC granted the adder to utilities that belong to an RTO, including in states with laws purporting to compel RTO membership. *See, e.g.*, *AEPSC*, 124 FERC ¶ 61,306 at P22 (2008); *AEP Appalachian Transmission Co.*, 130 FERC ¶ 61,075 at P21 (2010); *see also Pac. Gas & Elec. Co.*, 148 FERC ¶ 61,245 at P30 (2014), *rev. granted and remanded sub nom. Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966 (9th Cir. 2018); *MISO Inc.*, 150 FERC ¶ 61,004 at PP39-44 (2015); *PPL Elec. Utils. Corp.*, 123 FERC ¶ 61,068 at P35 (2008).

FERC only reversed course after overreading a 2018 decision from the Ninth Circuit. *See CPUC I*, 879 F.3d at 974-75. There, the Ninth Circuit interpreted Order No. 679 and held that while RTO membership confers a presumption of eligibility for an adder, the presumption could be rebutted by showing that membership was in fact involuntary. *Id.* The Ninth Circuit did not interpret Section 219(c), nor even hold that California law at the time in fact required RTO membership. *Id.* at 978 & n.5, 980; *supra* at 10.

Nonetheless, FERC began relying on the Ninth Circuit's decision to deny adders to utilities subject to a state RTO mandate. In so doing, FERC itself has divided. *E.g.*, *Elec. Transmission Incentives*, 175 FERC ¶ 61,035 at P5 (Danly, Comm'r, dissenting); 175 FERC ¶ 61,035 at P 2 (Chatterjee, Comm'r, dissenting); *supra* at 12-13. Yet the Commission is now set in its determination that Section 219(c) includes a voluntariness requirement—often simply cross-referencing its recent decisions to that effect in new matters raising the issue. This Court's intervention is needed to return the Commission to its earlier, correct position on an issue of critical national importance.

B. Section 219(c) Imposes No Voluntariness Requirement.

Chairmen Danly and Chatterjee are right, and the views of the Sixth and Ninth Circuits and current FERC majority are wrong. Section 219(c) provides that FERC "*shall[]*" issue a "rule" that "provide[s] for incentives *to each* transmitting utility or electric utility *that joins* a Transmission Organization." 16 U.S.C. § 824s(c)

(emphases added). Congress could not have been clearer that FERC should award the adder without inquiry into whether the utility joined freely. And the decision below flouts the "preeminent canon of statutory interpretation"—that the "'legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citation omitted).

The Ninth Circuit simply ignored the word "shall," which imposes a mandatory duty. *E.g.*, *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 310 (2020). It also ignored the obligation to provide the adder "to *each*" utility. And it ignored Congress's choice to use the phrase "*that* joins," which directs FERC to look only to the fact of joinder and not why utilities did so. Worse, the Ninth Circuit added the word "voluntarily"—a limitation "Congress could have established ... but … did not." *Off. of the Ohio Consumers' Counsel*, 181 FERC ¶ 61,214, at P2 (Danly, Comm'r, dissenting). Courts may not "add words … to the statute Congress enacted." *Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024).

The only text the Ninth Circuit analyzed—the word "incentives"—does not support this rewriting. The Ninth Circuit posited that an "incentive" is "something that incites or has a tendency to incite to determination or action." Pet. App. 12a (internal quotations omitted). But even taking that definition, the Ninth Circuit ignored the rest of the sentence. Congress commanded FERC to adopt a "rule" that provides "incentives." And this "rule" still "tend[s] to incite" RTO membership even if some states mandate RTO membership. Across its applications, the rule still tends to incite RTO

membership, as well as investment in transmission infrastructure by RTO members. In the same way, we would still say—for example—that veterans' benefits provide an incentive to join the military, even if some individuals who receive those benefits were drafted.

The Ninth Circuit's approach, moreover, also violates another blackletter rule of statutory interpretation—the imperative to "give effect, if possible, to every clause and word of [the] statute." *Fischer v. United States*, 603 U.S. 480, 486 (2024) (alteration in original) (quotation marks omitted). Whereas Petitioners' interpretation gives meaning to every word of Section 219(c), the Ninth Circuit's reading erases Congress's command to provide an incentive "to each" utility "that joins" an RTO.

This erasure is especially indefensible set against Section 219(c)'s broader context. When Congress enacted Section 219(c), several states already purported to impose RTO mandates. 220 ILCS 5/16-126(a) (1997); Ohio Rev. Code Ann. § 4928.12(A) (1999). "We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"—an observation this Court made about an Ohio state law. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 176 (1988). And given those laws, it is impossible to believe that the Congress that commanded FERC to adopt rules granting incentives "to each" utility "that joins" an RTO *really* meant to allow FERC to grant incentives to only *some* utilities and to exclude utilities subject to state RTO mandates. Either Congress understood that those mandates were preempted, or Congress understood that utilities would continue to receive the adder despite such

mandates. There is no other plausible interpretation of the text Congress enacted.

Nor do "the other subsections of Section 219," Pet. App. 13a, support the Ninth Circuit's atextual view. It pointed to the reference in Section 219(a) to "incentive-based" rates, and Section 219(b)'s creation of incentives to "promote," "encourage," and "attract[]" particular conduct. *Id.* (citing 16 U.S.C. § 824s(c)). But in Section 219(c), Congress specifically addressed RTO membership and required FERC's rules to provide incentives "to each … utility that joins." And when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions," the "specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal quotation marks omitted). If anything, Section 219(b) underscores that Congress in Section 219(c) *did not* require that the adder actually induce RTO membership. Congress could have directed FERC to provide incentives to each utility that is "encourage[d]" or "attract[ed]" to join an RTO by the payment, much as it required "a return on equity *that attracts new investment in transmission facilities*." 16 U.S.C. § 824s(b)(2), (3) (emphasis added). But instead, Congress broadly provided that FERC's rules must provide incentives "to each" utility "that joins" an RTO.[2]

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[2] The general requirement in Section 219(d) that rates "be just and reasonable," 16 U.S.C. § 824s(d), also does not support the Ninth Circuit's rewriting. FERC has long recognized that permissible returns on equity fall within a "zone of reasonableness." *E.g.*, *Emera Maine v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017). This

Even if policy concerns could substitute for text, the Ninth Circuit's policy concerns are wrong on their own terms. The Ninth Circuit worried that, if it applied Section 219(c) as written, it would function as a "reward to RTO members" that would not serve Congress's supposed "overarching goal of benefiting customers." Pet. App. 13a. But as explained, Congress concluded that customers benefit immensely from RTO membership. *Supra* at 8. And such membership imposes significant burdens on utilities. *Id.* So it makes perfect sense that Congress required incentives for each utility that joins an RTO.

The Ninth Circuit also ignored how its interpretation undermines the goals that Congress in the text directed FERC to pursue. If states may eliminate the adder via mandates, utilities will have less incentive to join in the first place. The investment playing field will also become uneven, with arbitrary differences in state law determining whether utilities in the same multi-state RTO receive the adder or not. Indeed, as described in Part III, the decision below invites states to enact RTO mandates for the sole purpose of manipulating the federal rate—a result Congress cannot have intended.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND THIS CASE IS AN IDEAL VEHICLE.

This Court has previously granted certiorari to clarify the FPA's division of authority between federal and state jurisdiction—even where, unlike here, there is

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provision just makes clear that, accounting for all of Section 219's incentives, the overall rate must still fall in this zone.

no division of authority. *See, e.g.*, *FERC v. EPSA*, 577 U.S. 260 (2016); *Hughes*, 578 U.S. 150. The Court should grant review here as well.

First, the jurisdictional rule adopted by the Sixth Circuit, the Ninth Circuit, and FERC upends settled principles governing federal and state authority by carving out a zone of state jurisdiction over supposedly *intrastate* transmission, when that transmission is in fact in *interstate* commerce. Now, under the guise of regulating supposedly intrastate transmission, states could try to leap beyond their FPA-designed sphere (siting, permitting, and construction) to impose onerous obligations on the interstate transmission of electricity itself. States could seek to add their own terms and conditions or to alter rates for what the Sixth and Ninth Circuits have deemed "intrastate" transmission.

Meanwhile, if states can decide who operates transmission facilities within their borders, and even facilities that cross borders (as the Sixth and Ninth Circuits have held), states could seek to mandate that utilities join or leave *particular* RTOs, join or form other sorts of organizations for the interstate transmission of electricity, or simply hand over control of parts of the interstate transmission grid to another party selected by the state. Indeed, this is no hypothetical: it is the situation here. The California statute does not simply require that Petitioners be members of some RTO; the statute, as interpreted by the decision below, compels membership in CAISO *specifically*. So even if another RTO would better fit the goals of federal law, Petitioners must remain in CAISO. These consequences, moreover, will only proliferate: With

states nationwide expressing frustration with RTOs, and even threatening to leave,[3] the decision below offers states huge leverage to interfere in the federal sphere by threatening to require the transfer of control over federally regulated facilities to whomever the state directs.

This disruption, moreover, is especially pernicious because of the disuniformity the decision below has wrought. States in the Sixth and Ninth Circuits may seek to regulate interstate transmission on the theory that FERC's jurisdiction is not exclusive and that states may enforce laws that regulate what these decisions deem "intrastate" matters—arguments that will not be available in the Third, Fifth, Eighth, or D.C. Circuits, which correctly recognize that FERC's jurisdiction is exclusive. Such division would always militate strongly in favor of review. And here, it does so with particular force because FERC decisions can always be appealed to the D.C. Circuit—meaning the governing law will depend on where litigants sue.

Second, enormous consequences loom from the Sixth and Ninth Circuits' holding that Section 219(c)'s incentive turns on whether states have decided to mandate RTO membership (in combination with its holding that such mandates are not preempted). Several states have enacted such mandates, including Colorado,

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[3] Ethan Howland, *States Threaten to Leave PJM Without Expanded Role in Grid Operator*, Utility Dive (Sept. 23, 2025), https://www.utilitydive.com/news/governors-states-pjm-governance-conference-capacity/760842/ (quoting Pennsylvania Governor Shapiro as stating "[i]f PJM refuses to change, we will be forced to go in a different direction").

Illinois, Michigan, Nevada, Virginia, and Wisconsin. Colo. Rev. Stat. Ann. § 40-5-108; 220 ILCS 5/16-126(a), (b), (*l*); Mich. Comp. Laws Ann. 460.10w; Nev. Rev. Stat. Ann. § 704.79886; Va. Code Ann. § 56-577(A)(1); Wis. Stat. Ann. § 196.485. And at least two more states are considering similar legislation. *See* S. 237, 221st Leg., Sess. (N.J. 2024); H.R. 782, 2023-2024 Reg. Sess. (Pa. 2025). Across all these states, the Sixth and Ninth Circuits' holding threatens to undermine the incentives Congress sought to provide. And it does so at the worst possible time, when all agree on the imperative of encouraging additional investment in the grid to meet the challenges of rising demand, artificial intelligence, electrification, and more.

These consequences are even more troubling because of the distortions the decision below creates. As Commissioner Chatterjee pointed out in dissent, "permitting some RTO/ISO members to receive the RTO Adder, while prohibiting other members from receiving that same incentive, creates an uneven playing field in the competition for investment capital." 176 FERC ¶ 61,025 at P 2 n.4 (Chatterjee, Comm'r, dissenting). The decisions of the Sixth and Ninth Circuits will discourage investment in states that have RTO mandates, and money will instead flow to transmission owners in states that do not have such mandates, for reasons having nothing to do with transmission needs or sound planning principles.

Worse, the decisions of the Sixth and Ninth Circuits invite states to simply manipulate transmission returns on equity—by enacting RTO mandates that have the effect of reducing those returns. Some states may do so

because they disagree with Congress's policy choice in Section 219(c) to encourage transmission investment by RTO members, preferring instead lower rates even at the cost of needed transmission investment. Or states may simply use the decision below to pick winners and losers for the states' own reasons, enacting RTO mandates that target only the returns of certain disfavored utilities, while leaving other utilities untouched.

That, again, is no hypothetical. It is what California has already done. The statute here targets only California's three large investor-owned utilities, and California enacted the statute in direct response to the Ninth Circuit's prior decision holding that these utilities are entitled to the adder. Now, these disfavored utilities do not receive the adder, even as other favored utilities within California continue to do so. In *Horizon West Transmission, LLC*, 192 FERC ¶ 61,093 at P 25 (2025), for example, FERC granted the adder to another utility that California has not (yet) deigned to order into an RTO. If the decision below is allowed to stand, this maneuver will only proliferate. Section 219(c) will become simply a tool that states can use to strongarm desired behavior. That is, quite obviously, not what Congress intended.

This Court's intervention is thus necessary to restore uniformity to the FPA's jurisdictional framework and to restore the uniform incentive that Congress by statute provided, at a moment that could not be more important for our country's energy future.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be consolidated with *FirstEnergy* and *American Electric Power*. Alternatively, this petition should be held for those cases.

Respectfully submitted,

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October 7, 2025

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFIC GAS & ELECTRIC COMPANY; et al., Petitioners, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent, CALIFORNIA DEPARTMENT OF WATER RESOURCES STATE WATER PROJECT; et al., Intervenors.	No. 24-2527 Agency No. ER24-96-000 Federal Energy Regulatory Commission ORDER Sept. 15, 2025

PACIFIC GAS & ELECTRIC COMPANY; et al., Petitioners, v.	No. 24-3786 Agency No. ER24-96-002 Federal Energy Regulatory Commission

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

CALIFORNIA PUBLIC UTILITIES COMMISSION; et al.,

Intervenors.

Before: CALLAHAN, BADE, and KOH, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc (No. 24-2527, Dkt. 85; No. 24-3786, Dkt. 57) are DENIED.

Appendix B

United States Court of Appeals
For the Ninth Circuit.

PACIFIC GAS & ELECTRIC COMPANY;
SOUTHERN CALIFORNIA EDISON COMPANY;
SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent,

CALIFORNIA DEPARTMENT OF WATER
RESOURCES STATE WATER PROJECT;
CALIFORNIA PUBLIC UTILITIES COMMISSION;
CITY OF ANAHEIM; CITY OF AZUSA; CITY OF
BANNING; CITY OF COLTON; CITY OF
PASADENA; CITY OF RIVERSIDE; NORTHERN
CALIFORNIA POWER AGENCY,
Intervenors.

PACIFIC GAS & ELECTRIC COMPANY;
SOUTHERN CALIFORNIA EDISON COMPANY;
SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

CALIFORNIA PUBLIC UTILITIES COMMISSION; CITY OF ANAHEIM; CITY OF AZUSA; CITY OF BANNING; CITY OF COLTON; CITY OF PASADENA,

Intervenors.

No. 24-2527, No. 24-3786

Argued and submitted June 4, 2025
San Francisco, California

FILED JULY 11, 2025

On Petition for Review of an Order of the Federal Energy Regulatory Commission, Agency Nos. ER24-96-000, ER24-96-002

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Before: CALLAHAN, BADE, and KOH, Circuit Judges.

MEMORANDUM*

Pacific Gas and Electric Company (PG&E), Southern California Edison Company, and San Diego Gas and Electric Company (collectively, the Utilities) petition for review of an order from the Federal Energy Regulatory Commission (FERC) denying PG&E's request for rate incentives—known as an "adder"—based on its membership in the California Independent System Operator Corporation (CAISO). We have jurisdiction under 16 U.S.C. § 825*l*(b), and we affirm.

"We review a decision by FERC to determine whether its action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Cal. Pub. Utils. Comm'n v. FERC* (*CPUC I*), 879 F.3d 966, 973 (9th Cir. 2018) (quoting 5 U.S.C. § 706(2)). We "must uphold a decision if the agency has 'examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

between the facts found and the choice made.'" *Id.* (quoting *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016)).

1. The Utilities challenge FERC's determination that California Public Utilities Code Section 362(c) renders their membership in CAISO "involuntary" such that they are no longer entitled to adder under Section 219(c) of the Federal Power Act (FPA), 16 U.S.C. § 824s(c), and *Promoting Transmission Investment Through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057 (2006) [hereinafter Order 679]. Order 679 provides that FERC "will approve, when justified, requests for [adder] for public utilities that join and/or continue to be a member of" a regional transmission organization (RTO) or independent system operator (ISO). Order 679 ¶ 326.

In its initial order denying PG&E's request for a Section 219(c) incentive, FERC found that PG&E's membership in CAISO is not voluntary because "PG&E is required to participate in CAISO and cannot unilaterally withdraw." On rehearing, FERC determined that California law does not permit the Utilities to end their participation even "with [the] approval of" the California Public Utilities Commission (CPUC). We review de novo FERC's interpretation of California law. *Cal. Pub. Utils. Comm'n v. FERC* (*CPUC II*), 29 F.4th 454, 466 (9th Cir. 2022). Because the California Supreme Court has not decided whether CPUC has the authority under state law to approve such a withdrawal, we must predict "how the California Supreme Court 'would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance.'" *Id.* (quoting *Vestar Dev.*

II, LLC v. Gen. Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001)).

FERC did not err by concluding that PG&E's participation in CAISO is involuntary for purposes of the Section 219(c) adder. In *CPUC II*, we rejected CPUC's position that California Public Utilities Code Section 851 requires CPUC to approve a utility's withdrawal from CAISO, reasoning that "transfers of operational control" did not fall within the language of Section 851.[1] *See id.* at 466–67. Shortly after *CPUC II*, California enacted Assembly Bill 209, which amended California Public Utilities Code Section 362. *See* Assemb. Bill 209, Stats. 2022, Ch. 251 (Cal. 2021–2022 Reg. Session) [hereinafter AB 209]. AB 209's preamble rejects our conclusion in *CPUC II*. *See* AB 209 § 1(a) (clarifying that "[t]he transfer of control of an electrical corporation's property is generally prohibited without prior approval by [CPUC] pursuant to Section 851").

As amended, California Public Utilities Code Section 362(c) provides that, "[c]onsistent with Section 851 and [CPUC's] regulation of transfers of operational control of electrical corporation facilities," the Utilities "shall participate" in CAISO.[2] "'Shall' indicates mandatory

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[1] As relevant here, Section 851 requires that a public utility obtain CPUC's approval to "sell, lease, assign, mortgage, or otherwise dispose of" its property. Cal. Pub. Utils. Code § 851(a).

[2] It is undisputed that the Utilities are electrical corporations to which Section 362(c) applies. *See also Joint Application of Pac. Gas and Elec. Co. (U 39-E), San Diego Gas & Elec. Co. (U 902-E), and S. Cal. Edison Co. (U 388-E) for an Order under Pub. Utils. Code Section 853 Exempting Them from the Provisions of Section 851 or in the Alternative for Authority to Convey Operational Control of*

action." *Fejes v. FAA*, 98 F.4th 1156, 1161 (9th Cir. 2024). In light of this mandate, at oral argument, CPUC disclaimed any authority to authorize the Utilities' complete withdrawal from CAISO, notwithstanding CPUC's authority to authorize the Utilities' withdrawal of certain facilities.

And contrary to the Utilities' arguments, neither Section 362(d) nor Section 851 grant CPUC the authority to authorize the Utilities to violate this mandate, as both provisions address only transfers of operational control of specific facilities or property. *See* Cal. Pub. Util. Code § 362(d) ("An electrical corporation shall not withdraw a *facility* from the operational control of [CAISO] without [CPUC] approval pursuant to Section 851." (emphasis added)); Cal. Pub. Util. Code § 851(a) (providing that a public utility "shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its ... *property* necessary or useful in the performance of its duties to the public" without obtaining CPUC's approval to do so (emphasis added)). Thus, the reference to Section 851 in Section 362(c) cannot grant CPUC the authority to allow the Utilities to cease their participation in CAISO. Because the Utilities cannot withdraw from CAISO, their participation is not voluntary. *See Voluntary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/voluntary [https://perma.cc/R3SZ-JXE7] (defining voluntary as "unconstrained by interference" or "acting ... of one's own free will without ... legal

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Designated Transmission Lines and Associated Facilities to an Independent System Operator, 78 CPUC 2d 307, 1998 WL 242747 (Jan. 21, 1998).

obligation"); *Voluntary*, Black's Law Dictionary (12th ed. 2024) (defining voluntary as "[u]nconstrained by interference; not impelled by outside influence").

2. The Utilities argue that if California Public Utilities Code Section 362(c) renders PG&E's participation in CAISO involuntary, it is preempted by federal law. FERC declined to address preemption below.[3] On appeal, FERC argues that its decision to ignore the issue was reasonable but agrees that we may address it on appeal. *See also Ray v. Gonzales*, 439 F.3d 582, 591 (9th Cir. 2006) (noting that the court may address in the first instance purely legal questions over which the agency "claims no particular expertise").

Section 362(c) is not preempted by federal law. Impossibility preemption does not apply because, by remaining members of CAISO, the Utilities are complying with both federal and state law. *See* Cal. Pub. Utils. Code § 362(c) (requiring the Utilities to participate in CAISO); 16 U.S.C. §§ 824a(a) (directing FERC to facilitate "the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy"), 824s(c) (directing FERC to provide rate incentives for RTO participation); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) ("We will find preemption

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[3] In its initial order denying Section 219(c) adder, FERC did not respond to PG&E's request for an opportunity to "fully brief" the issue of "pre-emption of state law requiring [CAISO] participation." In its rehearing order, FERC concluded that the proceeding was "an inappropriate vehicle to address preemption concerns." We therefore reject Intervenors' argument that PG&E failed to adequately raise preemption below.

where it is impossible for a private party to comply with both state and federal law ....").

Obstacle preemption does not apply because California's decision to require the Utilities to participate in CAISO does not frustrate the purpose of Section 219(c) of the FPA, which is to increase participation in RTOs using incentives. *See* 16 U.S.C. § 824s(c); Order 679 ¶ 331. That Congress chose to incentivize, rather than mandate, RTO membership does not necessarily imply an intent to prevent states from mandating it. *See also Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 604, 607 (2011) (cautioning that obstacle preemption is a "high threshold" and that courts must avoid a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," which "would undercut the principle that it is Congress rather than the courts that pre-empts state law" (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110–11 (1992) (Kennedy, J., concurring in part and concurring in judgment))).

As for field preemption, the FPA grants FERC jurisdiction over interstate wholesale rates but leaves regulation of intrastate wholesale markets and retail sales of electricity to the states. *See* 16 U.S.C. § 824; *Elec. Power Supply Ass'n*, 577 U.S. at 266–67; *see also Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989) (explaining that field preemption exists when Congress legislates broadly enough "to occupy an entire field of regulation, leaving no room for the States to supplement federal law"). By requiring CAISO participation, California is regulating within the domain Congress assigned to the states, *see* 16 U.S.C.

§ 824(b)(1), but in a manner that indirectly affects interstate wholesale rates. Such indirect effects do not trigger field preemption. *Cf.* 16 U.S.C. § 824a-1(a) (allowing, but not requiring, FERC to exempt utilities from state laws that *hinder* voluntary utility cooperation).

3. Finally, the Utilities argue that "the plain text of Section 219(c) [of the FPA] awards the adder to all utilities regardless of whether their participation is compelled by state law." Acknowledging that FERC has interpreted Section 219(c) as imposing a voluntariness requirement for adder, *see* Order 679 ¶¶ 326, 331, the Utilities argue that this interpretation conflicts with the plain text of the statute, which "makes clear that FERC lacks discretion to limit the adder only to voluntary members of an RTO."

In determining whether FERC has acted within its statutory authority by requiring voluntary RTO membership for Section 219(c) adder, we exercise our "independent judgment" based on the "best reading" of the statute. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 399, 400, 412 (2024); *see also Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1086 (9th Cir. 2025) (explaining that, after *Loper Bright*, agency interpretations have only the "power to persuade" (quoting *Loper Bright*, 603 U.S. at 388)).

Section 219(c) states that, "[i]n the rule issued under this section, [FERC] shall ... provide for incentives to each transmitting utility or electric utility that joins [an RTO]." 16 U.S.C. § 824s(c). The single, best reading of Section 219(c) is that RTO adder requires voluntary membership. An "incentive" is "something that incites

or has a tendency to incite to determination or action." *Incentive*, Merriam-Webster, https://www.merriam-webster.com/dictionary/incentive [https://perma.cc/NCA3-UMNG]. "An incentive cannot 'induce' behavior that is already legally mandated." *CPUC I*, 879 F.3d at 974. Thus, the Utilities' interpretation of Section 219(c) reads the word "incentive" out of the statute.

Additionally, the other subsections of Section 219 suggest that Congress intended Section 219(c) adder to induce voluntary RTO participation, not to function as a payment or reward to RTO members. Section 219(a) directs FERC to create rate-based incentives to improve transmission for the benefit of consumers. *See* 16 U.S.C. § 824s(a). Section 219(b) identifies the promotion of capital investment and new technology as a target of the incentives, and Section 219(c) identifies RTO membership as another target. *See* 16 U.S.C. § 824s(b)–(c). Finally, Section 219(d) reaffirms FERC's duty to ensure that all rates adopted pursuant to Section 219 are "just and reasonable." 16 U.S.C. § 824s(d). Viewed as a whole, the "best" reading of Section 219 is that the statutory provision provides incentives for a variety of voluntary actions by utilities, with an overarching goal of benefiting consumers. Requiring a connection between a rate incentive and the conduct meant to be induced is consistent with FERC's general duty to ensure that rates are "just and reasonable."[4] *See* 16 U.S.C. § 824s(d).

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[4] The Utilities also argue that the "incentive" in Section 219(c) "is intended to induce ... increased 'capital investment in the enlargement, improvement, maintenance, and operation of all facilities for the transmission of electric energy in interstate

Accordingly, FERC did not act arbitrarily, capriciously, or contrary to law by denying PG&E's request for Section 219(c) adder because California Public Utilities Code Section 362(c) renders PG&E's membership in CAISO involuntary.

AFFIRMED.

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commerce,' " and adder induces this investment by providing "utilities with a higher return on transmission investment." In other words, "the behavior Congress is seeking to induce is investment in transmission infrastructure," not membership in RTOs. This argument is unpersuasive because Section 219(b), not Section 219(c), concerns capital investment in transmission facilities, and Section 219(c) does not condition incentives on infrastructure investments. *See* 16 U.S.C. § 824s(b)–(c).

Appendix C

185 FERC ¶ 61,243
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
Allison Clements, and Mark C. Christie.

Pacific Gas and Electric Company — Docket No. ER24-96-000

ORDER REJECTING IN PART, AND ACCEPTING AND SUSPENDING IN PART, PROPOSED FORMULA RATE FILING, AND ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 29, 2023)

1. On October 13, 2023, Pacific Gas and Electric Company (PG&E) filed, pursuant to section 205 of the Federal Power Act (FPA),[1] revisions to its Transmission Owner Tariff (TO Tariff) to revise its formula rate (Formula Rate) for the costs associated with its transmission facilities. PG&E also filed a proposed 2024 base Transmission Revenue Requirement (TRR) and associated retail and wholesale transmission rates based on the Formula Rate, which PG&E states result in a decrease in its 2023 TRR. In this order, the Commission

[1] 16 U.S.C. § 824d.

accepts in part PG&E's proposed revised Formula Rate and related 2024 TRR, suspends them for a nominal period, to become effective January 1, 2024, and establishes hearing and settlement judge procedures. In addition, the Commission rejects PG&E's request for an adder to its proposed return on equity for its continued participation in California Independent System Operator Corporation (CAISO) (RTO Adder).

I. Background and the Instant Filing

2. PG&E's current Formula Rate was filed on October 1, 2018, in Docket No. ER19-13-000 (TO20 Formula Rate). In an order issued on November 30, 2018, the Commission accepted PG&E's proposed TO20 Formula Rate and related 2019 TRR, suspended it for five months, to become effective May 1, 2019, subject to refund, and established hearing and settlement judge procedures.[2] On March 31, 2020, PG&E filed an Offer of Partial Settlement resolving certain issues, which the Commission approved on August 17, 2020.[3] On October 15, 2020, PG&E filed an Offer of Settlement (TO20 Settlement) resolving all remaining issues, which the Commission approved on December 30, 2020.[4] PG&E states that the TO20 Settlement provides that the TO20 Formula Rate terminates on December 31, 2023, and

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[2] *Pac. Gas & Elec. Co.*, 165 FERC ¶ 61,194 (2018).

[3] *Pac. Gas & Elec. Co.*, 172 FERC ¶ 61,142 (2020).

[4] *Pac. Gas & Elec. Co.*, 173 FERC ¶ 61,281 (2020).

requires PG&E to file a new Formula Rate by October 18, 2023.[5]

3. PG&E's Formula Rate consists of two components: (1) the Model; and (2) the Protocols. The Model is a spreadsheet containing individual schedules that calculate the TRR and transmission rates. The Protocols set forth the terms and operation of the formula rate, including annual update and informational filing timelines, as well as review and challenge procedures. PG&E states that the proposed TO21 Formula Rate uses the same structure as the TO20 Formula Rate, with modifications discussed further below to reflect events that have occurred since the TO20 Formula Rate Model went into effect.[6] PG&E states that its proposed TO21 Formula Rate operates using three calendar periods: (1) the prior year, which is the most recent calendar year prior to the filing year (for this filing, the prior year is 2022); (2) the filing year, which is the year when PG&E files its annual update (for this filing, the filing year is 2023); and (3) the rate year, which is the year in which the rates will be effective and is the year immediately following the filing year (for this filing, the Rate Year is 2024).[7]

4. PG&E explains that the proposed TO21 Formula Rate calculates a Base TRR, which consists of a

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[5] PG&E Transmittal Letter at 2 & nn.2-3 (citing Settlement at §1.3).

[6] PG&E states that it held pre-filing discussions with a number of interested parties in advance of filing the TO21 Formula Rate. *Id.* at 5-6.

[7] *Id.* at 6.

wholesale base TRR, plus retail tax adjustment, plus retail uncollectible expense. PG&E states that the wholesale base TRR is calculated by taking the prior year TRR (representing actual costs from PG&E's FERC Form No. 1 supplemented by PG&E company records as needed), plus an incremental TRR (representing the additional costs that PG&E forecasts to incur during the period of time the Base TRR will be in effect), plus an annual true-up adjustment (which is the difference between PG&E's actual transmission costs and revenues received, plus interest).[8]

5. PG&E states that it has made changes to its Protocols to reflect recent guidance by the Commission[9] and pre-filing discussions with interested parties. Specifically, PG&E explains that the Protocols provide for PG&E to post a draft annual update by June 15 of each year followed by an extensive review and information exchange process that goes to December 1.[10] PG&E states that the Protocols provide for PG&E to file the annual update with the Commission on or about December 1 for rates and charges to become effective January 1 of the following year. PG&E states that parties have until January 30 to challenge or protest the annual update and PG&E has until March 15 to file a response.[11]

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[8] *Id.* at 6-7.

[9] *Id.* at n.15 (citing *Ala. Power Co.*, 178 FERC ¶ 61,207 (2022); *Idaho Power Co.*, 179 FERC ¶ 61,054 (2022)).

[10] *Id.* at 7-8; Protocols § 4.5.

[11] PG&E Transmittal Letter at 8; Protocols § 4.1.

6. PG&E states that its proposed TO21 Formula Rate results in a wholesale base TRR for Rate Year 2024 of approximately $2.812 billion, which PG&E states is a decrease of approximately $352 million or 11% from the base TRR under its TO20 Formula Rate for rate year 2023.[12] PG&E states that the main drivers of the decrease are: (1) a reduction in recorded costs in the prior year TRR; (2) a reduction in the annual true-up adjustment; (3) cost savings resulting from PG&E's proposed wildfire self-insurance program; and (4) the removal of certain forecasted capital costs associated with an anticipated agreement with Citizens Energy Corporation (Citizens).[13] PG&E provides an overview of some of the significant modifications discussed below.

7. PG&E proposes a base return on equity (ROE) of 12.37%, which it states reflects PG&E's current financial situation and the significant uncertainties and risks currently faced by PG&E as a result of wildfires and California's existing inverse condemnation policy.[14] PG&E states that its testimony produces a composite zone of reasonableness ranging from 8.02% to 13.24%, and recommends the base ROE at the top of the composite zone, or 13.24%, to account for PG&E's above-

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[12] PG&E Transmittal Letter at 1; PG&E Filing, Ex. PGE-0004 at 25. PG&E filed its annual update under the TO20 Formula Rate on December 1, 2022, in Docket No. ER19-13-000 revising its base TRR and associated rates to be effective on January 1, 2023. The filing is currently pending.

[13] PG&E Transmittal Letter at 1-2.

[14] *Id.* at 8-9.

average risk.[15] PG&E asserts that, after taking into consideration the potential effect of the continuous improvements in its electric transmission system as a result of implementing wildfire mitigation measures, a slightly lower base ROE of 12.37% is just and reasonable.[16] In addition, PG&E requests the RTO Adder of 50 basis points for a total proposed ROE of 12.87%. PG&E contends that it is entitled to the RTO Adder consistent with a decision issued by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) in June 2022.[17] PG&E notes that the California General Assembly passed a bill in 2022 to state that PG&E shall participate in CAISO[18] but argues that the legal validity of this law has not been tested and, more importantly, its effect may be obviated based on the outcome of a case currently pending in the United States Court of Appeals for the Sixth Circuit.[19]

8. Next, PG&E proposes a capital structure that uses adjusted, recorded inputs from FERC Form No. 1 rather than a fixed capital structure.[20] PG&E explains

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[15] *Id.* at 9; Ex. PGE-0019 at 20-22.

[16] PG&E Transmittal Letter at 9; Ex. PGE-0001 at 13:20-14:17; Ex. PGE-0019.

[17] PG&E Transmittal Letter at 9-10 & n.28 (citing *Cal. Pub. Util. Comm'n v. FERC*, 29 F.4th 454 (9th Cir. 2022) (*CPUC*)).

[18] *Id.* at 10 (citing Cal. Pub. Util. Code § 362(c) and (d)).

[19] *Id.* (citing *Am. Elec. Power Serv. Corp. v. FERC*, Case Nos. 23-3196 and 23-3366 (6th Cir. Court of Appeals)).

[20] PG&E states that the TO20 Settlement resulted in a fixed capital structure of 49.75% common equity; 49.75% debt; and 0.5% preferred stock. *Id.*

that its emergence from bankruptcy and resolution of wildfire liabilities included financing transactions that did not result in the acquisition of rate base utility assets but affected the company's book equity, including shareholder-funded contributions to the California Wildfire Fund and securitization of certain wildfire liabilities.[21] Specifically, PG&E proposes adjustments to remove long-term debt and securitization from the capital structure calculations, which are not used to finance rate base. According to PG&E, these adjustments result in capital structure ratios of equity to debt that are more reflective of rate base financing.[22] PG&E states that its proposed capital structure is similar to the adjustments it proposed in Docket No. ER19-1816-000, which were consolidated with the TO20 Formula Rate proceeding,[23] and is consistent with California Public Utilities Commission (CPUC) decisions that authorize PG&E to exclude certain debt costs and make other adjustments when calculating its capital structure.[24]

9. PG&E also proposes to include in the TO21 Formula Rate costs associated with its wildfire liability self-insurance program. PG&E states that it is has

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[21] *Id.*

[22] *Id.* at 10-11.

[23] *See Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,007 (2019) (accepting and suspending proposed revisions to the capital structure calculation in PG&E's Formula Rate and consolidating proceedings).

[24] PG&E Transmittal Letter at 11 & n.33 (citing CPUC Decision (D.) 20-12-025 at 41-43; D.21-04-030, Ordering Paragraphs 18-19).

targeted, in recent years, the purchase of $1 billion in general liability insurance to cover potential wildfire claim costs. PG&E explains that it primarily purchased combined general liability policies covering both wildfire and non-wildfire claim costs in a single policy, but that beginning in 2020, carriers began bifurcating policies into two distinct product offerings, one for wildfire claim costs and a second and separate product for non-wildfire claim costs.[25] PG&E states that the cost of wildfire-only insurance has gotten so high that in 2022, the average cost of wildfire liability insurance coverage in the commercial markets was greater than 80 cents for each dollar of coverage procured.[26] PG&E explains that its wildfire liability self-insurance program will provide significant potential customer savings in the years in which there are smaller losses or no losses because unused funds will be rolled over to the next year, and as the self-insurance balance grows, PG&E can reduce the amount of potential cost recovery in future years to cover its wildfire liability insurance costs.[27]

10. PG&E explains that it has established a $1 billion target as a result of California Assembly Bill 1054, which created the California wildfire fund and requires participating California utilities to be responsible for the first $1 billion in claim costs before the wildfire fund may be called upon.[28] PG&E states that under the currently

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[25] *Id.* at 11-12.

[26] *Id.* at 12.

[27] *Id.*

[28] Ex. PGE-0003 at 4.

effective TO20 Formula Rate, TO customers are allocated a portion of PG&E's insurance premiums, including wildfire insurance premiums, using a blended allocation factor that is 60% labor, 40% plant allocator. In the TO21 Formula Rate, PG&E proposes to first allocate to customers a portion of the initial contribution to establish a $1 billion wildfire self-insurance fund, then allocate to customers a portion of the amounts necessary to replenish the fund as needed due to claims.[29] PG&E proposes to use a plant allocation factor for both the initial contribution and the replenishment amount because any wildfire is likely to be caused by PG&E's facilities (i.e., plant) rather than PG&E employees (i.e., labor).

11. PG&E proposes a single-issue filing provision[30] in section 10.7 of its Protocols to allow for an FPA section 205 filing to revise the Formula Rate as needed to reflect any changes to the implementation of PG&E's wildfire

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[29] PG&E Transmittal Letter at 12-13.

[30] Section 10 (Revisions to Formula Rate Provisions) of PG&E's existing Protocols provides that PG&E may make a single-issue FPA section 205 filing to revise the Formula Rate under a limited number of circumstances including: (1) changes to FERC Form No. 1 or Uniform System of Accounts; (2) changes in retail transmission rates that are required as a result of a CPUC order; (3) changes to the depreciation rates; and (4) changes to reflect any future non-ROE transmission incentives granted by the Commission. Section 10 of the Protocols allows other parties to make single-issue FPA section 206 filings and provides that the Commission is not bound by any single-issue filings from reviewing any or all components of the Formula Rate and may at its discretion broaden the scope of a filing.

self-insurance program approved by CPUC.[31] PG&E states that the new Schedule 30-WFSelfInsurance of the Model addresses the allocation of wildfire self-insurance costs to customers, and explains that PG&E will also be providing workpapers to interested parties with further detail regarding wildfire self-insurance costs.[32]

12. PG&E proposes a composite depreciation rate of 3.29% based on its depreciation study of the average service lives, net salvage, and cost of removal of PG&E's assets. PG&E states that its depreciation study takes into consideration the remaining life technique to reflect the increased estimated average service lives of assets affected by its tower coating program as directed by the Commission.[33]

13. PG&E explains that it proposed to transfer substantially all of its non-nuclear generation assets to a new wholly owned subsidiary, Pacific Generation, LLC (Pacific Generation) and as part of its proposal indicated that it would hold transmission customers harmless from transaction-related costs.[34] PG&E states that its testimony explains how Pacific Generation transaction costs were removed from the Formula Rate to hold transmission customers harmless.[35] PG&E states that

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[31] Ex. PGE-0003 at 13-14.

[32] PG&E Transmittal Letter at 14.

[33] *Id.* at 13-14 & n.36 (citing *Pac. Gas & Elec. Co.*, 178 FERC ¶ 61,123, at P 21 (2022)).

[34] *Id.* at 14 & n.37 (citing *Pac. Gas & Elec. Co.*, 183 FERC ¶ 61,159 (2023)).

[35] Ex. PGE-0001 at 10.

because the CPUC is still considering the Pacific Generation transaction, PG&E and interested parties agreed to add a single-issue filing provision in section 10.6 of the Protocols that directs PG&E to "make a [f]iling to revise the Formula Rate as needed to reflect any changes required by decisions issued by the CPUC and/or FERC after July 1, 2023 to allow the Formula Rate to fully reflect the specific accounting (e.g., operating expenses, rate base, and allocation factor) impacts regarding PG&E's proposed Pacific Generation transaction."[36]

14. PG&E states that it is currently negotiating a Development, Coordination, and Option Agreement with Citizens to provide an annual option for Citizens to enter separate 30-year leases with PG&E for up to $200 million annually. PG&E explains that under each lease, Citizens will prepay the lease amount to PG&E and in turn, Citizens would receive a leasehold interest in the usage rights for transmission assets that are not yet included in PG&E's rate base, and that Citizens will also pay a share of the operation and maintenance costs for these projects based on the percentage of its leasehold interest.[37] PG&E states that this agreement will help enable necessary transmission investments on PG&E's system while investing in the communities served by PG&E, and that Citizens has entered into similar

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[36] PG&E Transmittal Letter at 14.

[37] *Id.*

transactions with San Diego Gas & Electric Company (SDG&E).[38]

15. PG&E explains that in order to avoid double recovery of these leased assets, PG&E has removed the expected prepaid lease payment from forecasted capital costs associated with a group of projects forecasted to go into PG&E rates in 2024 and that PG&E anticipates will be part of the 2024 lease with Citizens.[39] PG&E also states that it has also included in section 10.8 of its Protocols a single-issue filing provision that allows PG&E to make a section 205 filing to modify the TO21 Formula Rate, if needed, after the Citizens transaction is approved by the Commission and/or CPUC.[40] PG&E states that if the transaction with Citizens does not close or there are changes to the group of projects actually included in the 2024 lease, PG&E will revise the capital costs in its annual update for Rate Year 2025 and any difference between PG&E's actual capital costs and forecast will be trued-up in the annual true-up adjustment of the Formula Rate.[41]

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[38] *Id.* at 14-15 & n.40 (citing *e.g., San Diego Gas & Elec. Co.*, 129 FERC ¶ 61,233 (2009) (describing Citizens' transaction for Sunrise Project transaction and approving petition for declaratory order); *San Diego Gas & Elec. Co.*, 151 FERC ¶ 61,011 (2015) (approving petition for declaratory order regarding Sycamore- Peñasquitos Project transaction)).

[39] *Id.* at 15.

[40] *Id.*

[41] *Id.* at 15-16.

16. PG&E proposes to add to the Formula Rate Model a new Schedule 31-COO (cost of ownership) to reflect the cost of ownership rates based on up-to-date cost of service for customer-financed and PG&E-financed facilities.[42] Finally, PG&E has also included a new schedule for the construction work in progress (CWIP) Incentive – Schedule 32-CWIPIncentive – to provide a mechanism for any network transmission projects for which PG&E has received authorization from the Commission for CWIP incentive treatment to include in rate base.[43]

17. PG&E requests an effective date of December 13, 2023; however, PG&E requests that the Commission suspend the TO21 Formula Rate until January 1, 2024. PG&E states that the currently effective base TRR and transmission rates from the TO20 Formula Rate would continue until December 31, 2023 when the TO20 Formula Rate terminates, and on January 1, 2024, the TO21 Formula Rate would become effective.[44]

18. Finally, PG&E requests waiver of the Commission's cost support regulations under 18 C.F.R. § 35.13 (2022), including waiver of the full Period I and Period II data requirements. PG&E asserts that good cause exists for such waiver because the statements, testimony, and exhibits accompanying the filing,

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[42] *Id.* at 16.

[43] *Id.* PG&E notes that there are no projects or costs currently in Schedule 32-CWIPIncentive because no projects have yet been approved by the Commission for a CWIP incentive.

[44] *Id.* at 17.

together with PG&E's publicly available FERC Form No. 1 information, provide ample support for the reasonableness of the proposed Formula Rate.[45]

II. Notice of Filing and Responsive Pleadings

19. Notice of PG&E's filing was published in the *Federal Register*, 88 Fed. Reg. 72,059 (October 19, 2023), with interventions and protests due on or before November 3, 2023. Timely motions to intervene were filed by Public Citizen, Inc.; Peninsula Corridor Joint Powers Board; SDG&E; the City and County of San Francisco, California; Marathon Petroleum Company LP; Modesto Irrigation District; the California Municipal Utilities Association; and Southern California Edison Company. Timely motions to intervene and protests were filed by the Transmission Agency of Northern California (TANC); Northern California Power Agency (NCPA); the City of Santa Clara, California, doing business as Silicon Valley Power (SVP);[46] State Water Contractors (SWC); California Department of Water Resources State Water Project (SWP); and the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California (Six Cities). CPUC filed a notice of intervention and protest. On November 20, 2023, PG&E filed an answer. On December 4, 2023, SWP and CPUC filed answers to PG&E's answer.

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[45] *Id.* at 17-18.

[46] SVP adopts and incorporates the arguments raised in TANC's and NCPA's protests and requests that the Commission grant the relief requested therein. SVP Protest at 3-4.

A. Protests and Motions for Summary Disposition

20. Protesters generally argue that PG&E's proposed Formula Rate is incomplete, lacks transparency, is one-sided, or unjust, unreasonable, and substantially excessive, contrary to Commission policies and precedent, and presents numerous issues that require formal discovery.[47] Accordingly, Protesters request that the Commission nominally suspend PG&E's proposed Formula Rate, subject to refund, and establish hearing and settlement judge procedures.[48]

21. As a preliminary matter, Protesters oppose PG&E's eligibility for the RTO Adder, which CPUC estimates to be worth $41.38 million annually, and they move for summary disposition of this issue.[49] According to CPUC, a utility must voluntarily join and participate in a regional transmission organization (RTO) or independent system operator (ISO) to qualify for this adder. CPUC explains that, after the Ninth Circuit Court of Appeals upheld the Commission's granting of the RTO Adder in prior transmission owner rate cases,[50] California enacted a law that mandates that PG&E join

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[47] CPUC Protest at 3-6, 9-14; Six Cities Protest at 11-30, 33-46; SWC Protest at 5-7; NCPA Protest at 4-10; TANC Protest at 8-17, 19-28; SWP Protest at 1.

[48] CPUC Protest at 17-19; Six Cities Protest at 2; SWC Protest at 8-9; NCPA Protest at 11-12; TANC Protest at 29-30; SWP Protest at 2; SVP Protest at 2-3.

[49] CPUC Protest at 6-9; NCPA Protest at 4-5; TANC Protest at 9, 11; SWC Protest at 4; SWP Protest at 3-4.

[50] *CPUC*, 29 F.4th 454.

and remain a member of CAISO.[51] CPUC contends that the law was intended to reaffirm that PG&E is not a voluntary participant in CAISO.[52] CPUC asserts that the California statute now explicitly states that PG&E "shall participate in the Independent System Operator."[53]

22. Protesters contend that the Commission has previously determined that the RTO Adder is not available when RTO/ISO participation is required under state law.[54] CPUC contends that, because it is the State of California, and not PG&E, who determines whether PG&E will remain a member of CAISO, inclusion of this adder is not justified.[55] SWP contends that PG&E's assertion that the legal validity of the California Public Utilities Code has not been tested does not rise to the level of material factual dispute, making this issue ripe

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[51] CPUC Protest at 7 & n.19 (citing Cal. Pub. Util. Code § 362 (effective Sept. 6, 2022)).

[52] *Id.* at 7-8 & n.22 (citing Cal. Assembly Bill 209, Chapter 251 of the Statutes of 2022 (effective Sept. 6, 2022) (Assembly Bill 209). *See* § 1(a)(2)(b)(1) of the Bill Text stating that "It is the intent of the Legislature to… reaffirm that an electrical corporation currently participating in the Independent System Operator is not a voluntary participant.").

[53] *Id.* at 8 & n.23 (citing Cal. Pub. Util. Code § 362 (c); Cal. Pub. Util. Code §362(d) (prohibiting PG&E from withdrawing from CAISO)).

[54] *See e.g.*, CPUC Protest at 8-9 & n.24 (citing *Dayton Power & Light Co.*, 176 FERC ¶ 61,025, at PP 14, 27-28, 54-56 (2019); *order on reh'g*, 178 FERC ¶ 61,102 (2022) (*Dayton*)).

[55] *Id.* at 6-9.

for summary disposition.[56] Accordingly, Protesters request that the Commission grant summary disposition and reject PG&E's request for the RTO Adder.[57] NCPA contends that, if the Commission does not reject the RTO Adder, it should be included in the hearing and settlement judge procedures.[58]

23. Protesters object to PG&E's proposed base ROE as unjust and unreasonable. Protesters generally contend that PG&E's proposed return on equity is inflated by: (1) using an inappropriately selected proxy group; (2) including an Expected Earnings analysis, which is not part of the Commission's current methodology; and (3) erroneous conclusions regarding PG&E's relative risk position.[59] Six Cities and SWP also assert that PG&E relies on a flawed Capital Asset Pricing Model that is inconsistent with Commission precedent.[60] CPUC argues that if PG&E corrected the above-mentioned issues and followed Commission-approved methodologies, it would significantly reduce

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[56] SWP Protest at 4 & n.14 (citing *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 280 (D.C. Cir. 1986) ("Since no material factual dispute exists, the FERC was not required to hold a hearing.")).

[57] CPUC Protest at 15-17; TANC Protest at 28-29. SWC adopts and incorporates by reference SWP's and CPUC's requests. SWC Protest at 4; SWP Protest at 3-4.

[58] NCPA Protest at 4.

[59] CPUC Protest at 3-6; Six Cities Protest at 11-25, 27-30; SWC Protest at 5; NCPA Protest at 5-7; TANC Protest at 9-11; SWP Protest at 5-11.

[60] Six Cities Protest at 26-27; SWP Protest at 9-11.

the composite range of its ROE from 8.02%-13.24% to 8.45%-11.70%.[61]

24. In addition, Protesters assert that PG&E's proposed 3.29% depreciation rate is excessive and represents an unjustified increase from its currently authorized depreciation rate of 2.86%. Protesters contend that PG&E's depreciation study contains several errors, including a reliance on altered historical data and overstating the expected cost of removal and understating the reasonably expected service lives of certain asset categories.[62] TANC objects that PG&E appears to have repeated the same service life analysis, without explanation or justification, that the Commission has previously rejected based on a finding that PG&E had underestimated the longevity of PG&E transmission assets.[63]

25. Protesters also identify other issues that they argue require suspension of the proposed Formula Rate and formal hearing procedures. For example, several Protesters challenge PG&E's proposed adjustments to its capital structure.[64] Six Cities similarly oppose PG&E's proposed cost of debt as contrary to Commission precedent.[65] NCPA and TANC question

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[61] CPUC Protest at 6.

[62] *Id.* at 10-13; SWC Protest at 6; NCPA Protest at 7; TANC Protest at 11-17; SWP Protest at 19.

[63] TANC Protest at 11-15 (citing Opinion No. 572 at P 93).

[64] Six Cities Protest at 5-8, 10-11; SWC Protest at 6; SWP Protest at 11-13.

[65] Six Cities Protest at 9-10.

PG&E's accounting for wildfire costs, and argue that PG&E has not demonstrated that the proposed wildfire self-insurance program is just and reasonable.[66] In addition, NCPA and SWP contend that PG&E has failed to demonstrate that its proposed cost of ownership charge, and particularly the change in finance charges, is just and reasonable.[67] SWP contends that PG&E is inappropriately capitalizing costs that should be expensed.[68] TANC argues that PG&E failed to support its methodology for calculating the gross load forecast and has also failed to provide an explanation or any supporting documentation for its proposed change to its annual fixed charge rate calculation.[69] TANC notes that PG&E is making its TO20 Rate Year 2024 Annual Update in December 2023 and incorporates by reference its protests on PG&E's TO20 Formula Rate Annual Updates for Rate Years 2022 and 2023. TANC asserts that, to the extent the Commission determines that PG&E's proposed treatment of certain costs under TO20 are unjust and unreasonable, such costs should not be used as a basis for PG&E's transmission revenue requirement under the TO21 Formula Rate.[70]

26. Although some Protesters support the proposed revisions to section 4 of the Protocols (Updating the

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[66] NCPA Protest at 7-8; TANC Protest at 22-27; SWP Protest at 13-14.

[67] NCPA Protest at 9-10; SWP Protest at 18-19.

[68] SWP Protest at 14-18.

[69] TANC Protest at 19-22.

[70] *Id.* at 17-19.

Base TRR),[71] Protesters request that the revised Protocols be included in the hearing and settlement judge procedures.[72] CPUC also objects to the indefinite term of PG&E's proposed Formula Rate set forth in the Protocols with no sunset date.[73]

B. Answers

27. PG&E objects to Protesters' request that the Commission reject its proposed RTO Adder, contending that both the Commission and the Ninth Circuit Court of Appeals have determined that PG&E is eligible for the RTO Adder because of its ongoing participation in CAISO.[74] PG&E argues that, although section 362 of the California Public Utilities Code, as amended by Assembly Bill 209, directs PG&E and the other California utilities to participate in CAISO, subsection (d) expressly allows PG&E to seek to voluntarily withdraw from CAISO, subject to CPUC approval.[75]

28. PG&E contends that, although the Commission has indicated that a utility's ongoing participation in an RTO or ISO must be "generally voluntary" to be eligible

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[71] Six Cities Protest at 46-47; SWP Protest at 20.

[72] CPUC Protest at 1; Six Cities Protest at 2.

[73] CPUC Protest at 14-15; Protocols § 3 (Term of the Formula Rate).

[74] PG&E Answer at 3-4 & n.9 (citing *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038 (2019), *order denying reh'g*, 170 FERC ¶ 61,194 (2020); *CPUC*, 29 F.4th 454).

[75] *Id.* at 4 (explaining that section 362 (d) states in relevant part: "An electrical corporation shall not withdraw a facility from the operational control of the Independent System Operator without commission approval pursuant to Section 851.").

for the RTO Adder, the Commission has not defined "voluntary," instead indicating that it will review a utility's request for an RTO Adder on a "case-by-case" basis.[76] PG&E argues that here, even with the enactment of Assembly Bill 209, there is a disputed factual issue about whether PG&E's ongoing participation in CAISO is voluntary, repeating that section 362(d) provides that a utility can withdraw its facilities from CAISO with CPUC approval. Thus, PG&E contends that as a factual matter its participation in CAISO continues to be voluntary in that California law expressly provides PG&E an opportunity to withdraw, subject to CPUC approval.[77]

29. PG&E argues that *Dayton* is distinguishable as in that case the Ohio statute at issue, unlike the California statute here, does not include language that allows Ohio utilities to withdraw from the RTO/ISO. Moreover, PG&E notes that, in *Dayton*, the Commission ordered a paper hearing to explore whether Dayton has shown that its participation in an RTO is voluntary, and the parties here have not had an opportunity to fully brief factual and legal issues related to section 362 and the voluntariness of PG&E's participation in CAISO. PG&E asserts that, at a minimum, summary disposition should be denied and the parties given an opportunity through hearing and settlement judge procedures to fully address this issue.[78] In addition, PG&E states that

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[76] *Id.* at 5 & nn.14-15 (citing *Promoting Transmission Investment*, Order No. 679, 116 FERC ¶ 61,057, at PP 326, 331 (2006)).

[77] *Id.* at 5-6.

[78] *Id.* at 6-7.

the Commission's decisions in *Dayton* are currently on appeal in the Sixth Circuit Court of Appeals and contends that the Commission should not grant summary disposition on an issue that is still being actively considered in the Courts of Appeal.[79]

30. PG&E agrees with Protesters that there are a number of disputed issues of material fact that are best resolved in hearing and settlement judge procedures.[80] Nevertheless, PG&E defends each disputed aspect of the TO21 Formula Rate and asserts that it has demonstrated that its proposal is just and reasonable and consistent with Commission precedent. For example, PG&E contends that its proposed base ROE is justified by its speculative credit rating and corresponding risk to PG&E from wildfires.[81] PG&E also asserts that, consistent with Commission precedent, its proposed capital structure uses actual company data and appropriately excludes certain unique financings that are unrelated to rate base investment.[82] PG&E also argues that Protesters mischaracterize or misunderstand other aspects of the proposed Formula Rate, including the depreciation study, the transparency regarding the wildfire self-insurance program, the definition of unfunded reserves, and costs that should be treated as expenses rather than capital.[83] PG&E

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[79] *Id.* at 7.

[80] *Id.* at 2-3.

[81] *Id.* at 10-17.

[82] *Id.* at 18-20.

[83] *Id.* at 22-27.

disputes CPUC's claim that the proposed TO21 Formula Rate is unjust and unreasonable because it does not have a specifically defined term. PG&E contends that the point of a formula rate is that the Commission finds that the mechanism by which PG&E recovers its costs is fair, and then the actual costs are reviewed through the annual update process, rendering an expiration date for the formula rate unnecessary.[84]

31. CPUC and SWP argue that the summary disposition on the issue of the RTO Adder is appropriate because there is no question of fact or law as to whether PG&E's participation in CAISO is voluntary. SWP asserts that PG&E has had ample opportunity to provide factual and legal support for its position and has failed to do so.[85] CPUC and SWP maintain that California law clearly requires PG&E to participate in CAISO because, even though California Public Utilities Code section 362(d) permits PG&E to seek to withdraw its facilities from CAISO control, PG&E may not by its own decision-making withdraw from CAISO.[86] CPUC and SWP also object to PG&E's attempt to rely on arguments made in the *Dayton* line of cases. SWP contends that this line of argument is procedurally improper because the deadlines for the Commission to reconsider *Dayton* have passed, and because, regardless of the outcome of the *Dayton* appeal, the Commission

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[84] *Id.* at 28.

[85] SWP Answer at 2-5.

[86] *Id.* at 6-8; CPUC Answer at 4-5.

lacks the authority to invalidate a state statute.[87] CPUC argues that the Commission should not wait to rule on this issue for an undetermined outcome in a separate, and distinct, legal proceeding because the California statute clearly requires PG&E's participation in CAISO.[88] Finally, SWP contends that it is irrelevant to this case whether the other California utilities currently recover the RTO Adder because only PG&E has requested the RTO Adder since passage of Assembly Bill 209.[89]

III. Discussion

A. Procedural Matters

32. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2022), the notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

33. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2022), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers submitted by PG&E, CPUC, and SWP because they have provided information that assisted us in our decision-making process.

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[87] SWP Answer at 8-11.

[88] CPUC Answer at 7.

[89] SWP Answer at 11-12.

B. Substantive Matters

34. As discussed below, with the exception of our summary disposition of PG&E's request for the RTO Adder for its continued participation in CAISO, we are setting all issues raised in PG&E's proposed Formula Rate for hearing and settlement judge procedures.

1. RTO Adder

35. We reject PG&E's request for the RTO Adder.

36. In the Energy Policy Act of 2005, Congress added section 219 to the FPA, directing the Commission to establish, by rule, incentive-based rate treatments to promote capital investment in electric transmission infrastructure.[90] The Commission subsequently issued Order No. 679,[91] establishing the processes by which a public utility may seek transmission rate incentives pursuant to section 219. In November 2012, the Commission issued a Policy Statement providing guidance regarding its evaluation of applications for transmission rate incentives under section 219 and Order No. 679.[92]

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[90] Pub. L. No. 109-58, § 1241, 119 Stat. 594 (2005).

[91] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

[92] *Promoting Transmission Investment Through Pricing Reform*, 141 FERC ¶ 61,129 (2012) (Transmission Incentives Policy Statement).

37. In Order No. 679, the Commission found that "entities that have already joined, and that remain members of, an RTO, ISO, or other Commission-approved Transmission Organization, are eligible to receive" the RTO Adder incentive[93] and have a presumption of eligibility.[94] The Commission explained that "the basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact continuing membership is generally voluntary."[95]

38. Under a prior formulation of the California statute, the Ninth Circuit remanded the question of PG&E's eligibility for the RTO Adder to the Commission and instructed the Commission to inquire "whether [PG&E] could *unilaterally* leave [CAISO] and thus whether an incentive adder could induce it to remain."[96] On remand, the Commission found that California law did not mandate PG&E's participation in CAISO, and that the RTO Adder therefore induced PG&E to continue its membership.[97] On appeal, in 2022,

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[93] Order No. 679, 116 FERC ¶ 61,057 at P 331.

[94] *Id.* P 327 ("An entity will be presumed to be eligible for the incentive if it can demonstrate that it has joined an RTO, ISO, or other Commission-approved Transmission Organization, and that its membership is on-going.").

[95] *Id.* P 331.

[96] *Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966, 979 (9th Cir. 2018) (emphasis added).

[97] *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038 at PP 2, 43-52.

the Ninth Circuit upheld the Commission's interpretation of California law.[98]

39. However, as noted above, California has since amended its public utilities code and enacted a law, effective September 6, 2022, which requires that electrical corporations[99] such as PG&E participate in CAISO, and may not withdraw from CAISO without CPUC approval.[100] Section 1(a)(2)(b)(1) of Assembly Bill 209 provides that "It is the intent of the Legislature to . . . reaffirm that an electrical corporation currently participating in [CAISO] is not a voluntary participant."[101] Additionally, section 362(c) of California Public Utilities Code provides that "an electrical corporation . . . shall participate in [CAISO]."

40. Although PG&E argues that section 362(d) ("An electrical corporation shall not withdraw a facility from the operational control of [CAISO] without [CPUC] approval") means that there is some dispute about whether PG&E is required to remain in CAISO, we disagree. Section 362(d) explicitly addresses the

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[98] *CPUC*, 29 F.4th 454, 468.

[99] Under California law, an "electrical corporation" is "every corporation or person owning controlling, operating, or managing any electric plant for compensation within the state." Cal. Pub. Util. Code § 218. Therefore, as the owner of the electric facilities at issue in this proceeding, PG&E meets the definition of "electrical corporation" for purposes of the CAISO participation requirement, and PG&E does not dispute the applicability of the statute.

[100] Cal. Pub. Util. Code §§ 362 (c) and (d).

[101] Cal. Assemb. B. 209, Chapter 251 of the Statutes of 2022, § 1(a)(2)(b)(1) (effective Sept. 6, 2022).

circumstances under which an electrical corporation can withdraw a particular facility from CAISO's operational control, not whether the electrical corporation itself can withdraw.

41. Pursuant to Rule 217 of the Commission's Rules of Practice and Procedure,[102] the Commission may summarily dispose of a proceeding or part of a proceeding when it determines that there is no genuine issue of material fact. We are not persuaded by PG&E's arguments that there is a disputed factual issue about whether PG&E's ongoing participation in CAISO is voluntary and that the Commission should therefore set this matter for hearing and settlement judge procedures. To the contrary, we find that the issue presented is a legal question of statutory interpretation and that it can be resolved on the existing record.[103]

42. Accordingly, we find that, by virtue of the recently enacted California statute, PG&E is required to participate in CAISO and cannot unilaterally withdraw from CAISO. As such, PG&E's participation in CAISO

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[102] 18 C.F.R. § 385.217 (2022).

[103] As a general matter, we note that it is within the Commission's discretion to hold an evidentiary hearing. *See, e.g.*, *Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C. Cir. 2010) (explaining that the Commission's "choice whether to hold an evidentiary hearing is generally discretionary.") (internal quotations and citations omitted); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990) (the decision whether to conduct an evidentiary hearing is in the Commission's discretion).

is no longer voluntary. Thus, we find that PG&E is no longer eligible for the RTO Adder.

43. Likewise, we are not persuaded by PG&E's attempt to distinguish this case from *Dayton* on the grounds that "the Ohio statute mandates participation and did not identify any statutory language that allows for withdrawal."[104] To the contrary, as discussed above, we find that the California statute does mandate participation and does not permit PG&E to withdraw from CAISO without CPUC approval. Moreover, we find it inapposite that, in *Dayton*, the Commission established a paper hearing to allow a full opportunity for parties to brief the issue, because the existing record is adequate to make a determination here. Therefore, we find that no further process is necessary.[105] Finally, we find that the fact that *Dayton* is on appeal does not affect a finding here; an appeal does not require the Commission to put similar issues in a holding pattern pending resolution of the appeal.[106]

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[104] PG&E Answer at 6-7.

[105] *See, e.g., Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (the Commission has "broad discretion to determine when and how to hear and decide the matters that come before it.").

[106] *See Midcontinent Indep. Sys. Operator, Inc.*, 157 FERC ¶ 61,168, at P 8 (2016) (finding that the "filing for judicial review of a Commission order does not stay the effectiveness or enforceability of the order's provisions").

2. Remaining Issues

44. Aside from the RTO Adder issue, our preliminary analysis indicates that PG&E's proposed TO21 Formula Rate and proposed 2024 TRR have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We find that PG&E's filing raises issues of material fact that, to the extent not summarily disposed of here, cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

45. Accordingly, we accept PG&E's proposed Formula Rate and proposed 2024 TRR for filing and suspend them for a nominal period, to become effective January 1, 2024, subject to refund, and set them for hearing and settlement judge procedures. We grant PG&E's requested waiver of section 35.13 of the Commission's regulations, consistent with the Commission's prior acceptance of formula rates.[107] We find that full Period I and Period II data are not needed for an evaluation of the justness and reasonableness of PG&E's filing. However, to the extent that participants at the hearing can show the relevance of additional information needed to evaluate the proposal, the

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[107] *See, e.g., Sw. Power Pool*, 185 FERC ¶ 61,110, at P 27 (2023); *S. Cal. Edison Co.*, 136 FERC ¶ 61,074, at P 29 (2011); *Commonwealth Edison Co.*, 119 FERC ¶ 61,238, at P 94 (2007); *TransAllegheny Interstate Line Co.*, 119 FERC ¶ 61,219, at P 57 (2007); *Am. Elec. Power Serv. Corp.*, 120 FERC ¶ 61,205, at P 41 (2007).

Administrative Law Judge can provide for appropriate discovery of such information.

46. While we are setting these matters for a trial-type evidentiary hearing,[108] we encourage efforts to reach settlement before hearing procedures commence. To aid settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.[109] If parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.[110] The settlement judge shall report to the Chief Judge and the Commission within 60 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide additional time to continue settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

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[108] Trial Staff is a participant in the hearing and settlement judge procedures. *See* 18 C.F.R. § 385.102(b), (c) (2022).

[109] 18 C.F.R. § 385.603 (2022).

[110] If parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (https://www.ferc.gov/available-settlement-judges).

The Commission orders:

(A) PG&E's proposed inclusion of the RTO Adder in its Formula Rate is hereby rejected, as discussed in the body of this order.

(B) The remainder of PG&E's proposed Formula Rate and proposed 2024 TRR are hereby accepted for filing and suspended a nominal period to become effective January 1, 2024, subject to refund, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred on the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of PG&E's proposed Formula Rate and 2024 TRR, as discussed in the body of this order. However, the hearing will be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2022), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within 45 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable

after the Chief Judge designates the settlement judge. If parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(E) Within 60 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide participants with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of participants' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 45 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426, or remotely (by telephone or electronically), as appropriate. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission. Commissioner Danly is not participating.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

Appendix D

186 FERC ¶ 62,096
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Pacific Gas and Electric Company	Docket No.	ER24-96-002

NOTICE OF DENIAL OF REHEARING BY OPERATION OF LAW AND PROVIDING FOR FURTHER CONSIDERATION

(February 29, 2024)

Rehearing has been timely requested of the Commission's order issued on December 29, 2023, in this proceeding. *Pac. Gas & Elec. Co.*, 185 FERC ¶ 61,243 (2023). In the absence of Commission action on a request for rehearing within 30 days from the date it is filed, the request for rehearing may be deemed to have been denied. 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713 (2023); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

As provided in 16 U.S.C. § 825*l*(a), the requests for rehearing of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 16 U.S.C. § 825*l*(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper.

Debbie-Anne A. Reese,

Acting Secretary.

Appendix E

187 FERC ¶ 61,167
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Chairman; Allison Clements and Mark C. Christie.

Pacific Gas and Electric Company — Docket No. ER24-96-002

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued June 12, 2024)

1. On December 29, 2023, the Commission issued an order addressing Pacific Gas and Electric Company's (PG&E) proposed revisions to its Transmission Owner Tariff (TO Tariff) to revise PG&E's formula rate (Formula Rate) for the costs associated with its transmission facilities.[1] The Commission accepted those revisions in part, suspended them for a nominal period, and established hearing and settlement judge procedures. As relevant here, the Commission also rejected PG&E's request for an adder to its proposed return on equity for its continued participation in the

[1] *Pac. Gas & Elec. Co.*, 185 FERC ¶ 61,243, at P 1 (2023) (RTO Adder Order).

California Independent System Operator Corporation (CAISO) (RTO Adder).[2]

2. On January 29, 2024, PG&E, Edison Electric Institute (EEI), and, jointly, San Diego Gas & Electric Company (SDG&E) and Southern California Edison Company (SoCal Edison) timely filed requests for rehearing of the RTO Adder Order. Pursuant to *Allegheny Defense Project v. FERC*,[3] the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),[4] we are modifying the discussion in the RTO Adder Order and continue to reach the same result in this proceeding, as discussed below.[5]

I. Background

3. As relevant here, PG&E proposed in its Formula Rate a base return on equity (ROE) of 12.37% and requested the RTO Adder of 50 basis points for a total

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[2] *Id.* PP 35-43.

[3] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

[4] 16 U.S.C. § 825*l*(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

[5] *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the RTO Adder Order. *See Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 808 F.3d 55, 56-57 (D.C. Cir. 2015).

proposed ROE of 12.87%. PG&E contended that it is entitled to the RTO Adder consistent with a June 2022 decision issued by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).[6] PG&E noted that the California General Assembly passed a bill in 2022 to state that PG&E shall participate in CAISO.[7] However, PG&E argued that the legal validity of this law had not been tested and, more importantly, its effect may be obviated based on the outcome of a case currently pending in the United States Court of Appeals for the Sixth Circuit.[8]

4. The Commission in the RTO Adder Order summarily rejected PG&E's request for the RTO Adder for its continued participation in CAISO; the Commission set all other issues raised in PG&E's proposed Formula Rate for hearing and settlement judge procedures.[9] The Commission recognized that, since *CPUC II*, where the Ninth Circuit affirmed the Commission's determination that PG&E's participation in CAISO was voluntary, California has amended its public utilities code.[10] California's new law, effective September 6, 2022, requires certain electrical

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[6] PG&E Transmittal Letter at 9-10 & n.28 (citing *Cal. Pub. Util. Comm'n v. FERC*, 29 F.4th 454 (9th Cir. 2022) (*CPUC II*)).

[7] *Id.* at 10 (citing Cal. Pub. Util. Code §§ 362(c) & (d)).

[8] *Id.* (citing *Dayton Power & Light Co. v. FERC*, Case Nos. 23-3196 & 23-3366 (6th Cir.)).

[9] RTO Adder Order, 185 FERC ¶ 61,243 at P 34.

[10] *Id.* PP 38-39 (citing *CPUC II*, 29 F.4th at 468).

corporations[11] such as PG&E, to participate in CAISO, and prohibits all electrical corporations from withdrawing facilities from the operational control of CAISO without approval of the California Public Utilities Commission (CPUC).[12]

5. The Commission disagreed with PG&E's argument that section 362(d) of California Public Utilities Code, which states that "[a]n electrical corporation shall not withdraw a facility from the operational control of [CAISO] without [CPUC] approval," presents a factual dispute about whether PG&E is required to remain in CAISO. The Commission found that section 362(d) explicitly addresses the circumstances under which an electrical corporation can withdraw a *particular facility* from CAISO's operational control, not whether the electrical corporation itself can withdraw.[13]

6. The Commission stated that it was not persuaded by PG&E's arguments that there is a disputed factual

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[11] Under California law, an "electrical corporation" is "every corporation or person owning, controlling, operating, or managing any electric plant for compensation within the state." Cal. Pub. Util. Code § 218. The Commission in the RTO Adder Order found that, as the owner of the electric facilities at issue in this proceeding, PG&E meets the definition of "electrical corporation" for purposes of the CAISO participation requirement, and observed that PG&E does not dispute the applicability of the statute. RTO Adder Order, 185 FERC ¶ 61,243 at P 39 n.99.

[12] Cal. Pub. Util. Code §§ 362 (c) & (d); Assemb. B. 209, 2022 Cal. Stat., Ch., §§ 1(a)(2) & (b)(1) (effective Sept. 6, 2022) (AB 209).

[13] RTO Adder Order, 185 FERC ¶ 61,243 at P 40.

issue about whether PG&E's ongoing participation in CAISO is voluntary and that the Commission should therefore set this issue for hearing and settlement judge procedures. The Commission found instead that the issue presented was a legal question of statutory interpretation and that it could be resolved on the existing record.[14]

7. Accordingly, the Commission found that, by virtue of the recently enacted California statute: (1) PG&E is required to participate in CAISO; (2) PG&E cannot unilaterally withdraw from CAISO; (3) PG&E's participation in CAISO is no longer voluntary; and (4) PG&E is no longer eligible for the RTO Adder.[15]

8. The Commission disagreed with PG&E's argument that the Commission should reach a different result on the RTO Adder than in *Dayton Power*,[16] where the Commission found that Transmission Organization[17] membership was mandatory in Ohio, due to the Ohio law in that proceeding being more restrictive than the

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[14] *Id.* P 41 & n.103 (citing *Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C. Cir. 2010); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990)).

[15] *Id.* P 42.

[16] *Dayton Power & Light Co.*, 176 FERC ¶ 61,025 (2019) (Dayton Initial Order), *order on reh'g*, 178 FERC ¶ 61,102 (2022) (Dayton Rehearing Order) (together, *Dayton Power*).

[17] Transmission Organization is defined in 18 C.F.R. § 35.34(b)(2) (2023) and includes regional transmission organizations (RTO) and independent system operators (ISO). We use RTO generally in this order to refer to RTOs, ISOs, and other Transmission Organizations.

California statute at issue in this proceeding. Instead, the Commission restated its finding that the California statute mandates PG&E's participation in CAISO.[18] The Commission also found that, unlike in *Dayton Power*, no paper hearing was necessary in this proceeding because the existing record was adequate to make a determination. The Commission further found that the pending appeal of *Dayton Power* in the Sixth Circuit would not require the Commission to put similar issues in this proceeding in abeyance.[19]

II. Discussion

A. Procedural Issues

9. On January 18, 2024, EEI filed a motion to intervene out-of-time.

10. On January 26, 2024, the California Department of Water Resources State Water Project, CPUC, City and County of San Francisco, Northern California Power Agency, and State Water Contractors filed an answer opposing EEI's motion to intervene out-of-time.

11. On February 8, 2024, the Chief Administrative Law Judge granted EEI's motion to intervene regarding only the portions of PG&E's proposed revised formula rate and 2024 transmission revenue requirement that the Commission in the RTO Adder Order set for hearing and settlement judge procedures,

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[18] RTO Adder Order, 185 FERC ¶ 61,243 at P 43.

[19] *Id.* (citing *Tenn. Valley Mun. Gas Ass'n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998); *Midcontinent Indep. Sys. Operator, Inc.*, 157 FERC ¶ 61,168, at P 8 (2016)).

i.e., not the Commission's rejection of PG&E's proposed RTO Adder in the RTO Adder Order.[20]

12. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure,[21] we deny EEI's motion to intervene out-of-time with respect to its challenge to the RTO Adder Order. In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d), and consider, among other things, whether the movant had good cause for failing to file the motion within the time prescribed. When, as here, late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, the movant bears a higher burden to demonstrate good cause for granting such late intervention.[22] Having offered no explanation for why the motion could not have been timely filed, we find that EEI has failed to demonstrate the requisite good cause, and we deny the motion to intervene out-of-time with respect to its challenge to the RTO Adder Order.

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[20] Order of Chief Judge Granting Late Motion to Intervene of Edison Electric Institute, at P 13 ("Given EEI's representation that it 'accepts the record as it stands,' EEI's participation in the hearing and settlement judge procedures is limited accordingly.") (Feb. 8, 2024) (quoting EEI Motion to Intervene at P 3).

[21] 18 C.F.R. § 385.214(d) (2023).

[22] *See, e.g.*, *PJM Interconnection, LLC*, 167 FERC ¶ 61,209, at P 24 (2019); *PáTu Wind Farm, LLC v. Portland Gen. Elec. Co.*, 151 FERC ¶ 61,223, at P 39 (2015); *Columbia Gas Transmission Corp.*, 113 FERC ¶ 61,066, at P 5 (2005).

13. In light of our decision to deny EEI's late motion to intervene, we will dismiss EEI's request for rehearing. Because EEI is not a party to this proceeding, it is not eligible to seek rehearing of the RTO Adder Order under the FPA and the Commission's regulations.[23]

B. Substantive Issues

14. As discussed in more detail below, PG&E, SoCal Edison, and SDG&E (Rehearing Parties) challenge on rehearing the Commission's summary rejection of PG&E's proposed RTO Adder. These parties broadly argue that FPA section 219(c),[24] which directs the Commission to establish transmission incentives for transmission owners that join RTOs, does not require that participation in an RTO be voluntary. Rehearing Parties also assert that, if voluntary participation in an RTO were a prerequisite to eligibility for such an adder, PG&E's participation in CAISO remains voluntary under California law even after the California legislature added sections 362(c) and (d) of the California Public Utilities Code. Rehearing Parties contend that the Commission's finding that a transmission owner must

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[23] *See* 16 U.S.C. § 825*l*(a); 18 C.F.R. § 385.713(b) (2023); *S. Co. Servs., Inc.*, 92 FERC ¶ 61,167 (2000). Given that the Chief Administrative Law Judge has granted EEI's intervention in the hearing and settlement judge procedures on the assumption that EEI has accepted the record in this proceeding, EEI's participation in this proceeding is limited to the issues the Commission has set for hearing and settlement judge procedures and does not include EEI's challenge to the RTO Adder issue. *See supra* note 20.

[24] 16 U.S.C. § 824s(c).

have the ability to withdraw unilaterally from CAISO to receive the RTO Adder contravenes Commission precedent and the FPA, and unduly discriminates against these transmission owners in relation to other California electric corporations that are eligible for the RTO Adder. Moreover, Rehearing Parties describe sections 362(c) and (d) as preempted by the Commission's exclusive jurisdiction over transmission under the FPA and assert that this preemption renders participation in an RTO voluntary. Rehearing Parties argue that, if the Commission believes that there are disputed factual issues or that the Commission needs a more developed administrative record, it should set PG&E's proposed RTO Adder for hearing and settlement judge procedures.

15. As discussed below, we continue to find that PG&E does not qualify for the RTO Adder under the Commission's current incentives policy because: (1) Order No. 679,[25] issued pursuant to FPA section 219[26] and as interpreted in *California Public Utilities Commission v. Federal Energy Regulatory Commission*,[27] requires a showing of voluntary membership in a Transmission Organization; and (2) PG&E's membership in a Transmission Organization is not voluntary because the California statute requires

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[25] *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) (Order No. 679-B).

[26] 16 U.S.C. § 824s.

[27] 879 F.3d 966 (9th Cir. 2018) (*CPUC I*).

PG&E to participate in CAISO. We also sustain the Commission's prior decision to not include PG&E's eligibility for the RTO Adder among the other issues in PG&E's proposed formula rate that were set for hearing and settlement judge procedures.

1. Whether the Commission Contravened FPA Section 219(c)

a. Requests for Rehearing

i. PG&E

16. PG&E argues that, pursuant to FPA section 219(c), the Commission must grant an RTO Adder to each utility participating in an RTO and that a utility's reason for joining an RTO is irrelevant for determining eligibility for the adder. PG&E parses section 219(c) as requiring the Commission to provide an RTO Adder "to each" utility "that joins" an RTO.[28] According to PG&E, by using the word "to each," Congress did not provide the Commission with discretion to place further requirements on eligibility for the RTO Adder such that some utilities receive it but not others. PG&E similarly argues that the phrase "that joins" does not allow the Commission to inquire into the reasons for a utility joining an RTO in awarding the incentive. PG&E argues that this signals Congress's unambiguous intent and that

[28] Section 219(c) states, "In the rule issued under this section, the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization." 16 U.S.C. § 824s(c).

the Commission must give it effect.[29] PG&E argues that the word "incentive" in section 219 does not permit the Commission to consider why a utility has joined an RTO, but rather that an "incentive" is simply what the utility receives for joining the RTO.[30] PG&E therefore asserts that there is no statutory basis for the Commission's "voluntariness requirement."[31] PG&E argues that the Commission cannot rely on Order No. 679 to the extent that it runs contrary to the statutory language.[32]

17. PG&E further argues that the Commission's requirement that a utility's ongoing participation be voluntary is contrary to the policy underlying section 219(c). PG&E asserts that the purpose of section 219 is to offer "incentive-based rate treatments that benefit consumers by ensuring reliability and reducing the cost of delivered power."[33] PG&E argues that the Commission in the RTO Adder Order contravened its policy in Order No. 679-A that rewards a utility due to the increased reliability and lower costs resulting from the utility joining the RTO. PG&E states that whether a utility's membership in an RTO is voluntary is irrelevant to whether customers benefit while the utility's participation in an RTO is ongoing. PG&E

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[29] PG&E Rehearing Request at 10-11 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[30] *Id.* at 14.

[31] *Id.* at 11.

[32] *Id.* at 13.

[33] *Id.* at 11-12 (quoting Order No. 679-A, 117 FERC ¶ 61,345 at P 130).

contends that the Commission's rejection of PG&E's proposed RTO Adder is at odds with the statutory text of section 219(c) and Commission policy recognizing that the incentive to join an RTO should be "widely available."[34]

18. PG&E argues that its proposed RTO Adder in this proceeding does not constitute a collateral attack on Order No. 679 because, prior to the RTO Adder Order, PG&E routinely received an RTO Adder and had no reason to challenge Order No. 679 as potentially inconsistent with section 219(c). PG&E alleges that, now that the Commission has precluded PG&E from eligibility for the RTO Adder due to Order No. 679, it may challenge the consistency of Order No. 679 with section 219(c).[35] PG&E represents that the Commission, the petitioners, PG&E, and the Ninth Circuit in *CPUC I* did not address whether Order No. 679 is consistent with section 219(c). Instead, PG&E represents that the court in *CPUC I* addressed only whether the Commission erred in not applying a case-by-case

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[34] *Id.* (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86).

[35] *Id.* at 14-15 (citing *Consumers' Rsch. v. FCC*, 67 F.4th 773, 785 (6th Cir. 2023); *CPUC I*, 879 F.3d at 971-72; *Herr. v. U.S. Forest Serv.*, 803 F.3d 809, 821 (6th Cir. 2015); *Weaver v. Fed. Motor Carrier Safety Admin.*, 744 F.3d 142, 145 (D.C. Cir. 2014); *Commonwealth Edison Co. v. U.S. Nuclear Regul. Comm'n*, 830 F.2d 610, 614 (7th Cir. 1987); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958); Dayton Rehearing Order, 178 FERC ¶ 61,102 at P 18; *Pac. Gas & Elec. Co.*, 168 FERC ¶ 61,038, at P 45 (*CPUC I* Order on Remand), *reh'g denied*, 170 FERC ¶ 61,194 (2020) (*CPUC I* Remand Rehearing Order), *aff'd*, *CPUC II*, 29 F.4th 454).

analysis to determine whether PG&E was eligible for the RTO Adder and that PG&E had addressed this potential inconsistency in its answer in this proceeding.[36]

ii. SoCal Edison and SDG&E

19. SoCal Edison and SDG&E argue that the Commission erred in disregarding the plain language of FPA section 219(c) that renders a transmission owner eligible for an incentive for joining an RTO, regardless of the utility's reason for joining.[37] SoCal Edison and SDG&E assert that the Commission's requiring voluntary participation in an RTO in order to qualify for an RTO Adder is inconsistent with the plain text of section 219(c), which does not give the Commission discretion to provide an RTO Adder only to transmission owners that join an RTO voluntarily, but rather mandates that the Commission must grant an RTO Adder "to each" transmission owner that joins an RTO.[38]

20. SoCal Edison and SDG&E describe the purpose of section 219(c) as motivating investment in new transmission to ease a utility's attraction of capital. SoCal Edison and SDG&E maintain that each utility joining an RTO faces the same risks, and the utility's customers receive the same benefits, from joining an RTO regardless of the reason. SoCal Edison and SDG&E contend that the plain language of section 219(c) and any voluntariness requirement were not addressed

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[36] *Id.* at 15-16 (citing *CPUC I*, 879 F.3d at 979; PG&E Answer at 8).

[37] SoCal Edison and SDG&E Rehearing Request at 2-3, 7.

[38] *Id.* at 7-9 (quoting 16 U.S.C. § 824s(c)).

on the merits in *CPUC I*, and therefore reason that the Commission cannot rely on *CPUC I* in this proceeding. SoCal Edison and SDG&E acknowledge that Order No. 679 recognizes that RTO participation is generally voluntary. However, SoCal Edison and SDG&E argue that Order No. 679 did not establish a requirement that participation in an RTO must be voluntary to qualify for an RTO Adder and that the Commission in Order No. 679 rejected comments arguing that the RTO Adder should not be granted where RTO membership is required by state statute.[39] SoCal Edison and SDG&E argue that the Commission, until *CPUC I*, did not include a voluntariness requirement to determine eligibility for an RTO Adder and that the Commission is not suited to interpret whether state law requires a utility's participation in an RTO.[40]

b. Commission Determination

21. We disagree with Rehearing Parties that the RTO Adder Order applied a voluntariness requirement in conflict with FPA section 219(c). Rather, in the RTO Adder Order, the Commission rejected PG&E's request for the RTO Adder, consistent with the Commission's

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[39] *Id.* at 9-10 & n.19 (citing 16 U.S.C. §§ 824s(a), (b); *CPUC I*, 879 F.3d at 977-79; RTO Adder Order, 185 FERC ¶ 61,243 at PP 36-37; Order No. 679, 116 FERC ¶ 61,057 at PP 316, 331 & n.180; Order No. 679-A, 117 FERC ¶ 61,345 at P 86).

[40] *Id.* at 10-11 & n.22 (citing *Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,004, at PP 39-44 (2015); *PPL Elec. Utils. Corp.*, 123 FERC ¶ 61,068, at P 35 (2008); *San Diego Gas. & Elec. Co.*, 118 FERC ¶ 61,073, at PP 25-26 (2007)).

Order No. 679, which was promulgated pursuant to and consistent with section 219(c).[41]

22. Section 219(c) directs that "the Commission shall, to the extent within its jurisdiction, provide for incentives to each transmitting utility or electric utility that joins a Transmission Organization."[42] The stated purpose of section 219 in creating such incentives is to "benefit[] consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion."[43]

23. In implementing and interpreting section 219 through Order No. 679, the Commission provided for "ROE-based incentives for public utilities that join and/or continue to be a member of an ISO, RTO, or other Commission-approved Transmission Organization."[44] The Commission decided against "creat[ing] a generic adder for such membership" but instead stated that it would "consider the appropriate ROE incentive when public utilities request this incentive."[45] In considering the directives of section 219, including its stated

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[41] RTO Adder Order, 185 FERC ¶ 61,243 at P 37; Order No. 679, 116 FERC ¶ 61,057 at P 1.

[42] 16 U.S.C. § 824s(c).

[43] *Id.* § 824s(a).

[44] Order No. 679, 116 FERC ¶ 61,057 at P 326.

[45] *Id.*; *see also CPUC I*, 879 F.3d at 971 ("FERC declined to adopt this proposal [for a generic adder], electing to consider 'on a case-by-case basis' what incentive (if any) is appropriate for a utility.") (quoting Order No. 679, 116 FERC ¶ 61,057 at P 326).

purpose,[46] the Commission reasonably imposed a voluntariness requirement from the outset: "The basis for the incentive is a recognition of the benefits that flow from membership in such organizations and the fact that continuing membership is generally voluntary."[47] While the Commission in Order No. 679 established a presumption of eligibility for the RTO Adder for an entity with ongoing RTO membership on the basis that "continuing membership is generally voluntary,"[48] the Ninth Circuit in *CPUC I* recognized that, "[w]hen membership is not voluntary, the incentive [under Order No. 679] is presumably not justified."[49] The Commission's focus in Order No. 679 on whether the RTO Adder induces some voluntary conduct is consistent with the court's observation in *CPUC I* that Order No. 679 was promulgated against the backdrop of the Commission's "longstanding policy that rate incentives must be prospective and that there must be a connection between the incentive and the conduct meant to be induced."[50]

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[46] Order No. 679, 116 FERC ¶ 61,057 at PP 1, 5; Order No. 679-A, 117 FERC ¶ 61,345 at P 86.

[47] Order No. 679, 116 FERC ¶ 61,057 at P 331.

[48] *Id.* PP 327, 331.

[49] *See CPUC I*, 879 F.3d at 974.

[50] *CPUC I*, 879 F.3d at 977; *see also New England Power Pool*, 97 FERC ¶ 61,093, at 61,477 (2001) (finding that rewarding a utility for performing routine maintenance unjustly rewards the utility "for doing what it is supposed to do"), *order on reh'g*, 98 FERC ¶ 61,249 (2002); *Pol'y Statement on Incentive Regul.*, 61 FERC ¶ 61,168, at 61,559 (1992) ("Incentive rate plans must be prospective. A 'reward'

24. Contrary to Rehearing Parties' assertion,[51] the Commission in Order No. 679 properly considered a utility's ability to voluntarily withdraw from an RTO as relevant to the stated purpose of section 219, and reasonably distinguished between entities that can voluntarily join or withdraw from an RTO and those that cannot. To the extent that consumers continue to receive reliability and efficiency benefits noted in the statute from a utility's involuntary membership in an RTO, the incentive could not induce those benefits. The Commission therefore reasonably decided in Order No. 679 against a generic adder and the ensuing increase in transmission rates, in order to better meet the purpose of section 219(a) of "benefitting consumers by ensuring reliability and reducing the cost of delivered power."[52]

25. *CPUC I* is consistent with the Commission's policy as set forth in Order No. 679. We disagree with PG&E's reading of *CPUC I* as limited to requiring only a "case-by-case" examination of adders.[53] *CPUC I* stated that a "case-by-case review of incentive adders" was necessary "even for utilities that have demonstrated ongoing membership in transmission organizations."[54] However, we do not view this language

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for past behavior does not induce future efficiency and benefit customers.").

[51] PG&E Rehearing Request at 11-12; SoCal Edison and SDG&E Rehearing Request at 9.

[52] *See* 16 U.S.C. § 824s(a); *see also* Order No. 679-A, 117 FERC ¶ 61,345 at P 86.

[53] *See* PG&E Rehearing Request at 15-16.

[54] *CPUC I*, 879 F.3d at 974.

as suggesting that a transmission owner that has been shown to have joined an RTO involuntarily could demonstrate eligibility for the RTO Adder based on other factors, given the court's clear pronouncement elsewhere in the opinion that the Commission's policy under Order No. 679 requires that incentives induce voluntary action.[55] Rather, *CPUC I* treats voluntary participation in an RTO as a necessary condition for the RTO Adder under Order No. 679, and a lack of voluntary participation sufficient to rebut the presumption of eligibility.[56] The court in *CPUC I* found "erroneous" the Commission's earlier determination that "ongoing membership itself is the sole criterion for receipt of an incentive adder."[57] Moreover, because Order No. 679 specifies that utilities may only earn an RTO Adder "when justified," the Ninth Circuit determined that automatically granting an RTO Adder to utilities would render that "when justified" language "a surplusage" and that a utility's failure to demonstrate that its participation in an RTO was voluntary would

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[55] *Id.* at 977.

[56] *Id.* at 974 ("When membership is not voluntary, the incentive is presumably not justified."), 977 ("FERC has a longstanding policy that rate incentives must be prospective and that there must be a connection between the incentive and the conduct meant to be induced. This policy is incorporated in Order 679. The policy prohibits FERC from rewarding utilities for past conduct or for conduct which they are otherwise obligated to undertake.").

[57] *Id.* at 974.

presumptively render the utility ineligible for the RTO Adder.[58]

26. To the extent that Rehearing Parties argue that section 219(c) would permit alternatives to the case-by-case approach outlined in Order No. 679, we decline to consider such alternatives here. The merits of such a prospective policy change would be appropriately addressed by a generic proceeding and not in an individual adjudication.

27. We also disagree with SoCal Edison's and SDG&E's contention that the Commission in Order Nos. 679 and 679-A rejected requests to limit eligibility for an RTO Adder to those utilities that join RTOs voluntarily.[59] The Commission in Order No. 679 did not specifically address comments requesting that "the incentive should not apply where a transmission owner is ordered to join a RTO/ISO by statute,"[60] but rather explained, as discussed above, that the Commission would approve requests for an RTO Adder "when justified."[61]

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[58] *Id.* at 974-75 (quoting Order No. 679, 116 FERC ¶ 61,057 at P 326).

[59] *See* SoCal Edison and SDG&E Rehearing Request at 10 & n.21.

[60] Order No. 679, 116 FERC ¶ 61,057 at P 316.

[61] *Id.* P 326.

2. Whether PG&E's Participation in CAISO Is Voluntary Under California State Law

a. Requests for Rehearing

i. PG&E

28. PG&E argues that, to the extent the Commission properly applies a voluntariness requirement, PG&E meets that requirement because it voluntarily joined CAISO in 1998.[62] PG&E states the California statutes in effect at the time it joined CAISO encouraged but did not mandate membership.[63] PG&E argues that the Commission found in Order No. 679 that joining an RTO prior to the enactment of section 219(c) does not bar eligibility for the RTO Adder.[64]

29. PG&E argues alternatively that, even if the Commission does condition eligibility for the RTO Adder based on whether a utility has voluntarily remained in an RTO, PG&E would qualify. PG&E argues that California Public Utilities Code section 362(c) does not prohibit PG&E from leaving CAISO but instead only requires that PG&E first receive approval from CPUC. PG&E asserts that section 362(c) references California Public Utilities Code section 851, which permits utilities to take certain actions with regard to utility property only with CPUC approval, and therefore section 362(c) enables CPUC to grant PG&E's request to exit CAISO as long as the requests satisfies section 851. PG&E

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[62] PG&E Rehearing Request at 16-17.

[63] *Id.* at 17 (citing Cal. Pub. Util. Code §§ 330(m) & 365 (2023)).

[64] *Id.* (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86).

maintains that, to the extent that the Commission interprets section 362(c) as always preventing PG&E from exiting CAISO, even if with CPUC approval, the Commission has disregarded the reference in section 362(c) to section 851 and CPUC's jurisdiction over utility transfers of operational control. PG&E contends that sections 362(c) and 362(d) read together permit PG&E to withdraw some (section 362(d)) or all (section 362(c)) of its facilities from CAISO, subject to the approval of CPUC.[65]

30. PG&E alleges that the requirement that PG&E obtain approval from CPUC before withdrawing from CAISO does not make its continued participation involuntary. PG&E draws an analogy to a merger, claiming that the requirement that a utility seek regulatory approval for a merger does not change the fact that a merger is a voluntary choice. PG&E represents that, on brief in the *CPUC I* appeal, the Commission stated that PG&E's authority to seek to withdraw and the potential for judicial review rendered PG&E's continued participation in CAISO voluntary.[66] PG&E argues that, given that nothing in section 219(c) or Order No. 679 has changed since the Commission

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[65] *Id.* at 18-19 (citing RTO Adder Order, 185 FERC ¶ 61,243 at PP 39, 43; Cal. Pub. Util. Code § 851; *People v. Valencia*, 3 Cal. 5th 347, 357 (2017); *Huff v. Securitas Security Servs.*, 23 Cal. App. 5th 745, 759 (2018)).

[66] *Id.* at 20 (citing Commission Br., *CPUC I*, Case No. 17-10481, at 23-25 (9th Cir. filed Sept. 19, 2016) (*CPUC I* Commission Brief)).

made these statements, the Commission has failed to explain why it reversed course here.[67]

31. PG&E asserts that nothing in section 219(c) or Order No. 679 and its subsequent orders permits the Commission to define a utility's voluntary participation in CAISO as entailing the ability to unilaterally withdraw from CAISO. PG&E states that the word "unilateral" does not appear in Order Nos. 679-A and 679-B and appears only in Order No. 679 in the context of deferred cost recovery but not in relation to the RTO Adder. PG&E represents that Order No. 679 only mentions voluntariness by observing that continuing membership in RTOs is "generally voluntary."[68]

32. PG&E states that the Ninth Circuit in *CPUC I* also did not require that a utility be able to unilaterally withdraw from an RTO in order to qualify for an RTO Adder. PG&E states that the word "unilaterally" appears in *CPUC I* only in the context of examining "PG&E's specific circumstances for incentive eligibility" and that *CPUC I*, although declining to address the issue, referenced the Commission's position on appeal that PG&E's participation in CAISO is voluntary even if PG&E must seek regulatory approval in order to withdraw from CAISO.[69] While PG&E interprets *CPUC I* as concluding that an incentive cannot induce

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[67] *Id.* at 19-21.

[68] *Id.* at 21-22 (citing Order No. 679, 116 FERC ¶ 61,057 at P 331; RTO Adder Order, 185 FERC ¶ 61,243 at P 37).

[69] *Id.* at 22-23 (citing *CPUC I*, 879 F.3d at 978-79 & n.5; RTO Adder Order, 185 FERC ¶ 61,243 at P 38).

behavior already legally mandated, PG&E construes section 362(c) as not requiring PG&E to participate in CAISO.[70] PG&E observes that, on remand from the Ninth Circuit after *CPUC I*, the Commission did not determine that a utility needed the ability to withdraw unilaterally from an RTO in order to qualify for an RTO Adder. PG&E states that the Commission instead asked what standard CPUC would employ to review a withdrawal request. Accordingly, PG&E infers that the Commission on remand from *CPUC I* could have found withdrawal voluntary even if CPUC approval was a prerequisite to withdrawal and that the ability to withdraw is not necessary to determine that a utility's participation in an RTO is voluntary. PG&E concludes that the Commission in the RTO Adder Order changed its position from the remand of *CPUC I* without explanation.[71]

33. PG&E also argues that the Commission erred in relying on a statement of legislative intent, namely that, in AB 209, the legislature stated that it intended to "reaffirm" that an electrical corporation's participation in CAISO is not voluntary.[72] PG&E states that, under California law, the text of the statute is the best indicator of legislative intent and courts may not rely on

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[70] *Id.* at 23 (citing *CPUC I*, 879 F.3d at 974-75; RTO Adder Order, 185 FERC ¶ 61,243 at PP 39, 43).

[71] *Id.* at 23-24 (citing *CPUC I* Order on Remand, 168 FERC ¶ 61,038 at P 9; RTO Adder Order, 185 FERC ¶ 61,243 at P 39).

[72] *Id.* at 24-25 (citing RTO Adder Order, 185 FERC ¶ 61,243 at P 39; AB 209, § 1(b)(1)).

legislative history to override the text.[73] PG&E asserts that "voluntary participant" does not appear in section 362(c) itself. PG&E maintains that whether participation in CAISO is voluntary is a federal, rather than state, issue and, in any event, whether participation in CAISO is voluntary or not is a question of federal law and section 362(c) does not control. Because section 1(a)(2) of the AB 209 preamble references CPUC's 1998 transfer authorization order and specifies that section 362 does not change existing law allowing PG&E to leave CAISO with CPUC's permission, PG&E asserts that AB 209 does not change existing law that PG&E is not required to remain in CAISO.[74]

ii. SoCal Edison and SDG&E

34. SoCal Edison and SDG&E argue that the Commission erred in finding PG&E's participation in CAISO involuntary. SoCal Edison and SDG&E argue that, to the extent the Commission relies upon section 1 of AB 209, it should find that PG&E should continue to receive the RTO Adder under *CPUC II*. SoCal Edison and SDG&E quote CPUC's protest and the RTO Adder Order as arguing that section 1 states the California legislature's intent to reaffirm the existing state law. If that is the case, according to SoCal Edison and SDG&E, PG&E would remain eligible for the RTO Adder because

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[73] *Id.* at 25 (citing *Tonya M. v. Superior Ct.*, 42 Cal. 4th 836, 844 (2007)).

[74] *Id.* at 25-26 (citing *CPUC II*, 29 F.4th at 459; *CPUC I* Order on Remand, 168 FERC ¶ 61,038 at P 14; CPUC, Decision No. 98-01-053, 78 CPUC 2d 307, 1998 WL 242747 (Jan. 21, 1998) (California Transfer Authorization Order); AB 209, § 1(a)(2)).

the Commission, affirmed by the Ninth Circuit, had already determined that PG&E's participation in CAISO was voluntary under the previously existing law. SoCal Edison and SDG&E also argue that the language in AB 209 section 1 stating the legislature's intent to "reaffirm that an electrical corporation currently participating in [CAISO] is not a voluntary participant" is only legislative intent, and not the language of the statute.[75]

35. SoCal Edison and SDG&E further argue that the Commission's interpretation of section 362(c) as a requirement that PG&E "shall participate" in CAISO ignores the remaining text of section 362(c) providing that such participation shall be "[c]onsistent with section 851 and [CPUC's] regulation of transfers of operational control of electrical corporation facilities." SoCal Edison and SDG&E argue that this means that PG&E is not barred from withdrawing from CAISO, but rather must merely seek the relevant regulatory approval under section 851 before doing so.[76] SoCal Edison and SDG&E claim that the Commission acknowledges this in the RTO Adder Order,[77] where the Commission stated that section 362 "requires that electrical corporations such as PG&E participate in CAISO, and may not withdraw

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[75] SoCal Edison and SDG&E Rehearing Request at 12-13 (citing CPUC Protest at 7-8; RTO Adder Order, 185 FERC ¶ 61,243 at P 39; *CPUC II*, 29 F.4th at 458).

[76] *Id.* at 13-15 (citing Cal. Pub. Util. Code §§ 362(c), (d), 851).

[77] *Id.* at 14 (citing RTO Adder Order, 185 FERC ¶ 61,243 at PP 39, 43).

from CAISO without CPUC approval."[78] SoCal Edison and SDG&E also argue that the Commission previously stated in its brief filed in *CPUC I* that, even if regulatory approval were required for PG&E to leave CAISO, PG&E's participation would be voluntary, and state that nothing has changed since the Commission made these statements.[79] SoCal Edison and SDG&E also argue that the concept of voluntariness refers to situations where an individual's will is overridden, not situations where a utility has to seek approval.[80]

b. Commission Determination

36. We continue to find that PG&E's participation in CAISO is not voluntary. California Public Utilities Code section 362(c) provides that, "[c]onsistent with Section 851 and [CPUC's] regulation of transfers of operational control of electric facilities, an electric corporation subject to [the California Transfer Authorization Order] . . . shall participate in [CAISO]."[81] Rehearing Parties do

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[78] RTO Adder Order, 185 FERC ¶ 61,243 at P 39.

[79] SoCal Edison and SDG&E Rehearing Request at 16-17 (citing *CPUC I* Commission Brief at 23-25).

[80] *Id.* at 17 (citing Collins English Dictionary—Complete and Unabridged, "Voluntary" ("actions or activities are done because someone chooses to do them and not because they have been forced to do them"), *available at* https://www.collinsdictionary.com/us/dictionary/english/voluntary).

[81] Cal. Pub. Util. Code § 362(c); *see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

not dispute that PG&E is subject to the California Transfer Authorization Order. Therefore, PG&E is required to participate in CAISO. Further, as noted in the RTO Adder Order,[82] the California legislature confirmed its intent in AB 209, which enacted section 362(c): "It is the intent of the legislature . . . [t]o reaffirm that an electrical corporation currently participating in [CAISO] is not a voluntary participant."[83]

37. We disagree with Rehearing Parties that entities subject to section 362(c), such as PG&E, may end their participation in CAISO subject to approval from CPUC. To the extent that the RTO Adder Order may be construed otherwise,[84] we clarify the discussion in the RTO Adder Order consistent with this paragraph. The operative words of section 362(c) are "shall participate." The use of the present tense "participate" implies an ongoing relationship.[85] Moreover, the text "[c]onsistent with Section 851 and [CPUC's] regulation of transfers of operational control of electric facilities" in section 362(c)

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[82] RTO Adder Order, 185 FERC ¶ 61,243 at P 39.

[83] AB 209, § 1(b)(1).

[84] In the RTO Adder Order, the Commission stated that "California has since amended its public utilities code and enacted a law . . . which requires that electrical corporations such as PG&E participate in CAISO, and may not withdraw from CAISO without CPUC approval."). RTO Adder Order, 185 FERC ¶ 61,243 at P 39 (citing Cal. Pub. Util. Code §§ 362(c) & (d)).

[85] *See U.S. v. Thomas*, 973 F.2d 1152, 1157 (5th Cir. 1992) (present tense implies ongoing activity); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (use of present tense is "[o]ne of the most striking indicia of . . . prospective orientation").

does not permit PG&E to end its participation in CAISO with approval of CPUC. Section 851 of the California Public Utilities Code requires CPUC approval for certain types of utility property transactions,[86] and was the asserted statutory authority for the California Transfer Authorization Order.[87] Given the clear directive in section 362(c) that PG&E "shall participate in [CAISO]," the reference to section 851 and CPUC's regulation of transfers of operational control of electric facilities in this same section is better read as a recognition that CPUC first claimed authority to authorize PG&E's participation in CAISO under section 851.[88]

38. Nor does section 362(d) permit PG&E to leave CAISO. As stated in the RTO Adder Order, "Section

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[86] Section 851(a) states in relevant part: "A public utility . . . shall not sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its . . . plant, system, or other property necessary or useful in the performance of its duties to the public, or any franchise or permit or any right thereunder, or by any means whatsoever, directly or indirectly, merge or consolidate its . . . plant, system, or other property, or franchises or permits or any part thereof, without first having either secured an order from the commission authorizing it to do so for qualified transactions valued above five million dollars ($5,000,000), or for qualified transactions valued at five million dollars ($5,000,000) or less, filed an advice letter and obtained approval from the commission authorizing it to do so."

[87] California Transfer Authorization Order, 1998 WL 242747 at 1.

[88] *See Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) (recognizing "basic canon of statutory construction that [legislature] intended to give its words their ordinary meaning").

362(d) explicitly addresses the circumstances under which an electrical corporation can withdraw a particular facility from CAISO's operational control, not whether the electrical corporation itself can withdraw."[89] Rehearing Parties have not challenged the Commission's interpretation of section 362(d) in this regard.

39. We disagree with Rehearing Parties that the Commission's brief submitted to the Ninth Circuit in *CPUC I* is binding on the Commission here.[90] It is the Ninth Circuit's decision in *CPUC I*, not the Commission's underlying brief, that binds the Commission.[91] Further, the Commission may change its position on an issue if it presents a reasoned basis for doing so, as we have done here in light of subsequent developments in California law.[92]

40. We disagree with Rehearing Parties that the Commission erred in relying on section 1(b)(1) of AB 209 to interpret section 362(c) as requiring their

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[89] RTO Adder Order, 185 FERC ¶ 61,243 at P 40.

[90] *See* PG&E Rehearing Request at 20-21 (citing *CPUC I* Commission Brief at 23-25); SoCal Edison and SDG&E Rehearing Request at 15-16 (same).

[91] *CPUC I* Remand Rehearing Order, 170 FERC ¶ 61,194 at P 36 (finding statements of Commission counsel at *CPUC I* oral argument not binding).

[92] *See B&J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) ("[W]e observed—unremarkably—that agencies may change their policies as long as they engage in reasoned decisionmaking and explain their breaks with precedent.").

participation in CAISO.[93] As the Supreme Court has held, "statutory language cannot be construed in a vacuum" and "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[94] We find that the Commission correctly looked to section 1(b)(1) of AB 209 – the bill that enacted section 362(c) – as a clear declaration of the California legislature's will to "reaffirm that an electrical corporation currently participating in [CAISO]" is not a voluntary participant.[95] PG&E's contrary interpretation would run against the express language of section 1(b)(1).[96]

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[93] *See* PG&E Rehearing Request at 24-26.

[94] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[95] AB 209, § 1(b)(1).

[96] To the extent that PG&E argues that section 1(b)(1) is contrary to language in section 1(a)(2) of AB 209 stating that "[t]he amendments of [s]ection 362 . . . made by this act do not constitute a change in, but are declaratory of, existing law established in [the California Transfer Authorization Order]," *see* PG&E Rehearing Request at 25-26 & n.60, we find that the "existing law" referred to in this section most logically refers to CPUC's argument, rejected by the Ninth Circuit in *CPUC II*, that the California Transfer Authorization Order constituted binding legal precedent rendering PG&E's participation in CAISO involuntary. *See CPUC II*, 29 F.4th at 466-67.

3. Whether the Commission Departed from Commission Precedent Without a Reasoned Explanation

a. Requests for Rehearing

i. PG&E

41. PG&E argues that the Commission departed from its prior practice in evaluating eligibility for the RTO Adder, and instead adopted a new requirement that PG&E's participation in CAISO is not voluntary if it cannot "unilaterally withdraw."[97] PG&E states that the Commission must "provide a reasoned explanation" for a change in its position[98] and "acknowledge that it is departing from its precedent" when that is the case.[99] PG&E argues that the "unilaterally withdraw" requirement is inconsistent with the Commission's statements to the Ninth Circuit in *CPUC I*.[100] PG&E argues that the Commission has not explained its change in position.[101]

ii. SoCal Edison and SDG&E

42. SoCal Edison and SDG&E argue that the Commission erred in departing without explanation from Commission precedent that defines voluntary

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[97] PG&E Rehearing Request at 27.

[98] *Id.* at 26 (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016)).

[99] *Id.* (quoting *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2017)).

[100] *Id.* at 27.

[101] *Id.* at 26-27.

participation in an RTO for the purpose of RTO Adder eligibility.[102] SoCal Edison and SDG&E argue that the Commission has adopted a new requirement, beyond what is mandated by FPA section 219(c), *CPUC I*, and Order No. 679, that a utility be able to withdraw unilaterally from an RTO in order to demonstrate that its participation in that RTO is voluntary. SoCal Edison and SDG&E state that the Ninth Circuit in *CPUC I* only mentioned a "unilateral" ability to withdraw from CAISO once in the context of PG&E's eligibility for an RTO Adder, but it at no point held that an ability to "unilaterally withdraw" was required for voluntary participation.[103]

43. SoCal Edison and SDG&E explain that, on remand from *CPUC I*, the Commission asked several questions about PG&E's participation in CAISO under California law, none of which mentioned whether PG&E could withdraw unilaterally from CAISO, and ultimately found that California did not require PG&E's participation in CAISO. SoCal Edison and SDG&E contend that, by contrast, the Commission in the RTO Adder Order only addressed whether PG&E could unilaterally withdraw from CAISO and did not address whether PG&E is compelled to remain in CAISO or the

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[102] SoCal Edison and SDG&E Rehearing Request at 2-3.

[103] *Id.* at 17-19 (referencing RTO Adder Order, 185 FERC ¶ 61,243 at PP 37, 38 (citing *CPUC I*, 879 F.3d at 979), 42).

fact that the Commission has departed from Commission precedent.[104]

b. Commission Determination

44. We find that the Commission did not depart from its policy articulated in Order No. 679 in the RTO Adder Order. As the Ninth Circuit found in *CPUC I*, the Commission's longstanding policy "incorporated in Order [No.] 679 . . . prohibits FERC from rewarding utilities for past conduct or for conduct which they are otherwise obligated to undertake."[105] In order to comply with this policy, the Ninth Circuit found that the Commission "needed to inquire into PG&E's specific circumstances, i.e., whether it could unilaterally leave [CAISO] and thus whether an incentive adder could induce it to remain in [CAISO]."[106] The Ninth Circuit found as well that "Order 679-A ... distinguishes between utilities that have the option to withdraw from transmission organizations and those without the option, and it necessarily implies that incentives are justified only for the former."[107] Therefore, contrary to the assertions of Rehearing Parties,[108] the Commission's

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[104] *Id.* at 19-21 (citing *Pac. Gas & Elec. Co.*, 164 FERC ¶ 61,121, at P 25 (2018); RTO Adder Order, 185 FERC ¶ 61,243 at P 38; Commission Br., *CPUC II*, Case No. 19-72897, at 3 (9th Cir. filed Oct. 29, 2020)).

[105] *CPUC I*, 879 F.3d at 977.

[106] *Id.* at 979.

[107] *Id.* at 975 (citing Order No. 679-A, 117 FERC ¶ 61,345 at P 86).

[108] *See* PG&E Rehearing Request at 26-27; SoCal Edison and SDG&E Rehearing Request at 17-21.

policy articulated in Order Nos. 679 and 679-A, as interpreted by the Ninth Circuit, required the Commission to consider whether PG&E could unilaterally withdraw from CAISO as an element of whether PG&E's participation in CAISO is voluntary.

45. The Commission appropriately analyzed this element as applied to PG&E, determining that, "by virtue of the recently enacted California statute, PG&E is required to participate in CAISO and cannot unilaterally withdraw from CAISO."[109] Based on these elements, the Commission determined that PG&E's participation in CAISO was no longer voluntary.[110]

46. While the Commission on remand from *CPUC I* solicited from the parties several questions relating to whether PG&E's participation in CAISO was voluntary, the Commission in the RTO Adder Order did not need to solicit briefing on this issue.[111] The Commission here reasonably determined that the record was sufficient to determine that the changes in California law enacted

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[109] RTO Adder Order, 185 FERC ¶ 61,243 at P 42.

[110] *Id.*

[111] *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (agencies have broad discretion over the formulation of their procedures); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992) (the Commission has discretion to mold its procedures to the exigencies of the particular case); *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001 (1984) ("The Commission . . . is generally master of its own calendar and procedures.").

after *CPUC II* render PG&E's participation in CAISO involuntary.[112]

4. Whether the Commission's Ruling Unduly Discriminates Against PG&E and Other California Investor-Owned Utilities

a. Requests for Rehearing

47. Rehearing Parties argue that, even if the Commission's interpretation of California law in the RTO Adder Order is correct and PG&E must continue participating in CAISO, the Commission's reliance on state law is unduly discriminatory against PG&E and other California investor-owned utilities compared to similarly situated electrical corporations in California and participating transmission owners in CAISO that are eligible for the RTO Adder.[113] Rehearing Parties state that the Commission mistakenly interpreted California Public Utilities Code section 362(c) to apply to all electrical corporations in California. However, according to Rehearing Parties, they are the only three utilities to which section 362(c) applies.[114] In this respect, Rehearing Parties argue that section 362(c) is unlike the Ohio statute at issue in *Dayton Power*, which applied to all entities that owned or controlled

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[112] *See* RTO Adder Order, 185 FERC ¶ 61,243 at PP 41-42.

[113] PG&E Rehearing Request at 5-6, 9; SoCal Edison and SDG&E Rehearing Request at 2-4.

[114] PG&E Rehearing Request at 21 (citing RTO Adder Order, 185 FERC ¶ 61,243 at P 39); SoCal Edison and SDG&E Rehearing Request at 27-28 (same).

transmission facilities in Ohio.[115] Rehearing Parties provide examples of orders in which the Commission has accepted proposed RTO Adders for other California electrical corporations that participate in CAISO.[116] Rehearing Parties argue that section 362(c) results in discriminatory treatment and is not justified, and that the Commission cannot simply defer to the California legislature's distinct treatment of these entities.[117]

b. Commission Determination

48. We find that the RTO Adder Order does not unduly discriminate against Rehearing Parties compared to other utilities participating in CAISO. Our decision rejecting PG&E's request for an RTO Adder is based on the requirement in California Public Utilities Code section 362(c) for PG&E to participate in CAISO.[118]

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[115] PG&E Rehearing Request at 28 (citing Dayton Initial Order, 176 FERC ¶ 61,025 at P 5); SoCal Edison and SDG&E Rehearing Request at 21-22 (same).

[116] PG&E Rehearing Request at 28-29 (citing *LS Power Grid Cal.*, 171 FERC ¶ 61,222, at PP 2, 32 (2020); *DCR Transmission*, 184 FERC ¶ 61,199, at P 6 (2023); *Morongo Transmission LLC*, 175 FERC ¶ 61,104, at P 4 (2021); *Citizens S-Line Transmission*, 178 FERC ¶ 61,067, at P 16 (2022)); SoCal Edison and SDG&E Rehearing Request at 21-22.

[117] PG&E Rehearing Request at 30-31 (citing *W. Deptford Energy, LLC, v. FERC*, 766 F.3d 10, 21 (D.C. Cir. 2014); *ANR Storage v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018); *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999)); SoCal Edison and SDG&E Rehearing Request at 21-22 (same).

[118] We also note that the cited cases all precede the effective date of sections 362(c) and (d). *See* PG&E Rehearing Request at 28-29; SoCal Edison and SDG&E Rehearing Request at 22 n.51.

As Rehearing Parties acknowledge,[119] they are the only electrical corporations to which section 362(c) applies. If other utilities request the RTO Adder and are not subject to section 362(c), those entities are not similarly situated to PG&E.[120] To the extent that Rehearing Parties are challenging the California legislature's decision that they are the only utilities to which section 362(c) applies, the Commission is not the correct forum for such challenges.

5. Whether the FPA Preempts Sections 362(c) and (d) of the California Public Utilities Code

a. Requests for Rehearing

49. Rehearing Parties argue that the Commission erred in relying on California Public Utilities Code sections 362(c) and (d), which they allege are both conflict and field preempted by the Commission's authority under the FPA.[121]

50. As to field preemption, Rehearing Parties argue that, when Congress exclusively occupies a field, any state laws seeking to regulate activity in that same field

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[119] PG&E Rehearing Request at 27-28; SoCal Edison and SDG&E Rehearing Request at 21-22.

[120] *See S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 185-86 (D.C. Cir. 2013) (rejecting argument that Commission applied different standards to similarly situated entities where Commission adequately explained how entities were not similarly situated).

[121] PG&E Rehearing Request at 22; SoCal Edison and SDG&E Rehearing Request at 31-34.

are invalid.[122] Rehearing Parties argue that this doctrine applies here because, under the FPA, Congress has vested the Commission with exclusive jurisdiction over electrical transmission and the creation of regional districts for coordinating such electrical transmission.[123] Rehearing Parties assert that sections 362(c) and (d) intrude on the Commission's exclusive jurisdiction by purporting to dictate how transmission owners may engage in interstate transmission (through CAISO) and who must have operational control of such facilities (only CAISO).[124]

51. As to conflict preemption, Rehearing Parties argue that, in the event of a conflict between federal and state laws, the federal law controls under the federal supremacy doctrine.[125] Rehearing Parties argue that a conflict exists if it is impossible to comply with both federal and state law, or if the state law poses an obstacle

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[122] PG&E Rehearing Request at 32 (citing *Oneok Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015); *Arizona v. U.S.*, 576 U.S. 387, 401 (2012); *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 730 (2012)); SoCal Edison and SDG&E Rehearing Request at 23 (same).

[123] PG&E Rehearing Request at 32 (citing 16 U.S.C. §§ 824(a) and 824a(a)); SoCal Edison and SDG&E Rehearing Request at 12 (citing 16 U.S.C. § 824(b); *Hughes v. Talen Energy Mktg. LLC*, 578 U.S. 150, 163 (2016); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63 (D.C. Cir. 2014); *N.Y. v. FERC*, 535 U.S. 1, 7 (2002)).

[124] PG&E Rehearing Request at 32; SoCal Edison and SDG&E Rehearing Request at 24.

[125] PG&E Rehearing Request at 32 (citing *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (2002)); SoCal Edison and SDG&E Rehearing Request at 25 (same).

to the "full purposes and objectives" of the federal law.[126] Rehearing Parties argue that California Public Utilities Code sections 362(c) and (d) are in direct conflict with FPA section 202(a),[127] which evidences Congress's intent that transmission coordination and interconnection arrangements be voluntary, and are therefore preempted.[128] Rehearing Parties argue that, in Order No. 2000, the Commission embraced a voluntary approach consistent with the directive of FPA section 202(a); specifically, they allege that the Commission rejected comments that RTO membership be made mandatory and concluded that "an open collaborative process that relies on voluntary regional participation" would result in RTOs that meet regional needs.[129]

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[126] PG&E Rehearing Request at 32-33 (quoting *Crosby v. Nat'l Foreign Trade Council*, 550 U.S. 363, 372-73 (2000)); SoCal Edison and SDG&E Rehearing Request at 25 (same).

[127] FPA section 202(a) provides, in relevant part: "For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest." 16 U.S.C. § 824a(a).

[128] PG&E Rehearing Request at 33; SoCal Edison and SDG&E Rehearing Request at 25.

[129] PG&E Rehearing Request at 31 (quoting *Reg'l Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089, at 30,993-95 (1999) (cross-referenced at 89 FERC ¶ 61,285), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (cross-

52. SoCal Edison and SDG&E further allege that section 362(d) conflicts with CAISO's Commission-approved tariff, in allowing a CAISO member to withdraw facilities from CAISO subject to CPUC's approval. SoCal Edison and SDG&E state that, if a transmission owner were to withdraw all of its facilities from CAISO under section 362(d), it would violate CAISO's Transmission Control Agreement, which sets the terms for whether CAISO takes or disclaims operational control of a participating transmission owner's facilities.[130] PG&E argues that preemption is a purely legal issue, and that the Commission should not decline to substantively address preemption for lack of a sufficient record, as it alleges that the Commission did in *Dayton Power* and *Ohio Consumers Council v. American Electric Power Service Corp.*[131] SoCal Edison and SDG&E similarly argue that reasoned decision-making requires the Commission to address preemption on the merits, and that, in declining to do so, the Commission is effectively deciding that preemption does not apply.[132]

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referenced at 90 FERC ¶ 61,201), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001)); SoCal Edison and SDG&E Rehearing Request at 26 (same).

[130] SoCal Edison and SDG&E Rehearing Request at 27-28 (citing CAISO, Rate Schedules, CAISO and TOs Transmission Control Agreement (13.0.0), § 4.1.1).

[131] PG&E Rehearing Request at 33 (citing Dayton Initial Order, 176 FERC ¶ 61,025 at P 71; *Ohio Consumers Couns. v. Am. Elec. Power Serv. Corp.*, 181 FERC ¶ 61,214, at P 84 (2022) (*AEP*)).

[132] SoCal Edison and SDG&E Rehearing Request at 29-30.

b. Commission Determination

53. We continue to find that this proceeding is an inappropriate vehicle to address preemption concerns. As the Commission stated in the Dayton Initial Order:

> This filing turns on whether accepting the proposed rate, i.e., the RTO Adder, would be just and reasonable, which, as relevant here and as discussed above, requires the Commission to consider whether a utility is currently a member of a Transmission Organization and whether that membership is voluntary. By contrast, Supporting Parties['] preemption arguments seek a determination from the Commission regarding the constitutionality of an Ohio law. We find that, given the facts and circumstances before us, Dayton's Incentive Rate Application is not an appropriate procedural vehicle to address the constitutionality of the Ohio statute.[133]

54. We find that the same reasoning applies here. Thus, we continue to decline to address Rehearing Parties' arguments regarding preemption. As the Commission noted in the Dayton Initial Order, even if we agreed that the statute were preempted, only a federal court has the ultimate authority to invalidate

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[133] Dayton Initial Order, 176 FERC ¶ 61,025 at P 71.

California Public Utilities Code sections 362(c) and (d).[134] Therefore, given this and the other reasoning outlined in the Dayton Initial Order,[135] we exercise our discretion not to further address the preemption issue. As the facts stand currently before us, section 362(c) is in place, rendering PG&E's RTO participation mandatory.

6. Whether the Commission Erred in Failing to Set PG&E's Requested RTO Adder for Hearing and Settlement Judge Procedures

a. Requests for Rehearing

i. PG&E

55. PG&E argues that the Commission erred in granting summary disposition regarding PG&E's proposed RTO Adder.[136] PG&E contends that, if the Commission believes there are factual issues that need further development such as preemption, then the Commission should deny summary disposition and set the RTO Adder issue for settlement and hearings, subject to refund, just as the Commission did for the remainder of PG&E's proposed formula rate in this proceeding.[137] PG&E asserts that the Commission's grant of summary disposition on whether PG&E is

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[134] *See Marbury v. Madison*, 5 U.S. 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each."); *Fletcher v. Peck*, 10 U.S. 87, 136-39 (1810) (finding state act prohibited by U.S. Constitution).

[135] Dayton Initial Order, 176 FERC ¶ 61,025 at P 71.

[136] PG&E Rehearing Request at 6; *see also id.* at 9.

[137] *Id.* at 5-6, 34.

eligible for an RTO Adder runs counter to the Commission's determination in *AEP* and the Dayton Initial Order that the Commission lacked a sufficient record to address preemption issues.[138]

ii. SoCal Edison and SDG&E

56. SoCal Edison and SDG&E argue that the Commission erred in failing to allow full briefing on the standard to apply, FPA section 219(c), and preemption in evaluating PG&E's request for the RTO Adder. According to SoCal Edison and SDG&E, the Commission only permitted PG&E to respond in its answer to the motions for summary disposition and should instead have permitted PG&E to respond more fully with legal briefing pursuant to Rule 213 of the Commission's Rules of Practice and Procedure.[139]

b. Commission Determination

57. We find that the Commission reasonably found that there was no genuine issue of material fact and summarily disposed of PG&E's proposed RTO Adder. Rule 217 of the Commission's Rules of Practice and Procedure permits the Commission to "summarily dispose of all or parts of the proceeding" when it "determines that there is no genuine issue of fact material to the decision of a proceeding or part of a

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[138] *Id.* at 34 (citing *AEP*, 181 FERC ¶ 61,214 at P 84; Dayton Initial Order, 176 FERC ¶ 61,025).

[139] SoCal Edison and SDG&E Rehearing Request at 31-32 (citing 18 C.F.R. § 385.213 (2023), 18 C.F.R. § 385.217 (2023); Dayton Initial Order, 176 FERC ¶ 61,025).

proceeding."[140] Although the Commission set for hearing the remainder of PG&E's proposed formula rate, the Commission had the authority to summarily dispose of PG&E's proposed RTO Adder.

58. We continue to find that the issue of PG&E's eligibility for the RTO Adder is a legal, rather than factual, issue that may be resolved without a hearing. Unless there are disputed issues of motive, intent, or credibility, the Commission may summarily dispose of a specific disputed rate issue on a written record where the proposed rate issue contravenes the Commission's regulations, and need not set a disputed issue for hearing.[141] As discussed above,[142] PG&E's participation

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[140] 18 C.F.R. § 385.217(b).

[141] *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) ("FERC may properly deny an evidentiary hearing if the issues, even disputed issues, may be adequately resolved on the written record, at least where there is no issue of motive, intent, or credibility."); *S. Cal. Edison Co. v. FERC*, 686 F.2d 43, 47 (D.C. Cir. 1982) ("It is well settled that when all or part of utility rate filings contravene the Commission's regulations, no hearing is required before rejecting that portion of the filings in question."); *see also Envt'l Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993) ("FERC . . . is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions."); *Mun. Light Boards v. FPC*, 450 F.2d 1341, 1345 (D.C. Cir. 1971) ("There are occasions when an agency may dispose of a controversy on the pleadings without an evidentiary hearing when the opposing presentations reveal that no dispute of fact is involved, but only a question of law or administrative policy of such a nature that there is neither a dispute as to material facts nor a need to ventilate the underlying facts to aid in policy determination.").

[142] *See supra* section II.B.2.b.

in CAISO is not voluntary, as section 362(c) of the California Public Utilities Code mandates PG&E's participation. The correct interpretation of section 362(c) is a legal issue. PG&E does not allege that there are issues of "motive, intent, or credibility"[143] regarding its ability to withdraw from CAISO, and the Commission accepted PG&E's answer responding to protestors' motions for summary disposition.[144] Accordingly, the Commission was not required to solicit briefing on this issue from the parties or to set this issue for an evidentiary hearing, and appropriately disposed of this issue on the written record.[145]

The Commission orders:

(A) EEI's motion to intervene out-of-time is hereby denied and EEI's request for rehearing is hereby dismissed, as discussed in the body of this order.

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[143] *Pac. Gas & Elec. Co.*, 306 F.3d at 1119.

[144] *See* RTO Adder Order, 185 FERC ¶ 61,243 at P 41.

[145] While the Commission established a paper hearing in *Dayton Power*, *see* Dayton Initial Order, 176 FERC ¶ 61,025 at P 2, we find that the record is adequately developed in this case to determine that PG&E is not eligible for the RTO Adder for the reasons discussed herein. *See also supra* notes 111 and 141.

(B) In response to Rehearing Parties' requests for rehearing, the RTO Adder Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Acting Secretary.

Appendix F

Relevant Statutory Provisions

16 U.S.C. § 824

§ 824. Declaration of policy; application of subchapter

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

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

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

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

have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

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

(c) Electric energy in interstate commerce

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

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

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

(e) "Public utility" defined

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

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

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

(g) Books and records

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

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

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

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

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

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

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

(4) Nothing in this section shall--

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

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

(5) As used in this subsection the terms “affiliate”, “associate company”, “electric utility company”,

"holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

16 U.S.C. § 824a

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

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

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

commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

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

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

(c) Temporary connection and exchange of facilities during emergency

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

(2) With respect to an order issued under this subsection that may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation, the Commission shall ensure that such order requires generation, delivery, interchange, or transmission of electric energy only during hours necessary to meet the emergency and serve the public interest, and, to the maximum extent practicable, is consistent with any applicable Federal, State, or local environmental law

or regulation and minimizes any adverse environmental impacts.

(3) To the extent any omission or action taken by a party, that is necessary to comply with an order issued under this subsection, including any omission or action taken to voluntarily comply with such order, results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall not be considered a violation of such environmental law or regulation, or subject such party to any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation.

(4)(A) An order issued under this subsection that may result in a conflict with a requirement of any Federal, State, or local environmental law or regulation shall expire not later than 90 days after it is issued. The Commission may renew or reissue such order pursuant to paragraphs (1) and (2) for subsequent periods, not to exceed 90 days for each period, as the Commission determines necessary to meet the emergency and serve the public interest.

(B) In renewing or reissuing an order under subparagraph (A), the Commission shall consult with the primary Federal agency with expertise in the environmental interest protected by such law or regulation, and shall include in any such renewed or reissued order such conditions as such Federal agency determines necessary to minimize any adverse environmental impacts to the extent practicable. The conditions, if any,

submitted by such Federal agency shall be made available to the public. The Commission may exclude such a condition from the renewed or reissued order if it determines that such condition would prevent the order from adequately addressing the emergency necessitating such order and provides in the order, or otherwise makes publicly available, an explanation of such determination.

(5) If an order issued under this subsection is subsequently stayed, modified, or set aside by a court pursuant to section 825l of this title or any other provision of law, any omission or action previously taken by a party that was necessary to comply with the order while the order was in effect, including any omission or action taken to voluntarily comply with the order, shall remain subject to paragraph (3).

(d) Temporary connection during emergency by persons without jurisdiction of Commission

During the continuance of any emergency requiring immediate action, any person or municipality engaged in the transmission or sale of electric energy and not otherwise subject to the jurisdiction of the Commission may make such temporary connections with any public utility subject to the jurisdiction of the Commission or may construct such temporary facilities for the transmission of electric energy in interstate commerce as may be necessary or appropriate to meet such emergency, and shall not become subject to the jurisdiction of the Commission by reason of such temporary connection or temporary construction: Provided, That such temporary connection shall be

discontinued or such temporary construction removed or otherwise disposed of upon the termination of such emergency: Provided further, That upon approval of the Commission permanent connections for emergency use only may be made hereunder.

(e) Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

(f) Transmission or sale at wholesale of electric energy; regulation

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is (a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or (b) generated in a foreign country and transmitted across an

international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e).

(g) Continuance of service

In order to insure continuity of service to customers of public utilities, the Commission shall require, by rule, each public utility to--

(1) report promptly to the Commission and any appropriate State regulatory authorities any anticipated shortage of electric energy or capacity which would affect such utility's capability of serving its wholesale customers,

(2) submit to the Commission, and to any appropriate State regulatory authority, and periodically revise, contingency plans respecting--

(A) shortages of electric energy or capacity, and

(B) circumstances which may result in such shortages, and

(3) accommodate any such shortages or circumstances in a manner which shall--

(A) give due consideration to the public health, safety, and welfare, and

(B) provide that all persons served directly or indirectly by such public utility will be treated, without undue prejudice or disadvantage.

16 U.S.C. § 824s

§ 824s. Transmission infrastructure investment

Currentness

(a) Rulemaking requirement

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

(b) Contents

The rule shall--

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

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

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

(4) allow recovery of--

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

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

(c) Incentives

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

(d) Just and reasonable rates

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