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Mark Langer, Clerk
U.S. Court of Appeals for the D.C. Circuit
333 Constitution Avenue, NW
Washington, D.C. 20001

Re: *Public Citizen, Inc. v. FERC*, Nos. 14-1244 and 14-1246
Response to Rule 28(j) Letter

Dear Mr. Langer:

Contrary to Public Citizen's Rule 28(j) letter, *Xcel Energy Services v. FERC*, 815 F.3d 947 (D.C. Cir. 2016), does not support Public Citizen's contention that § 205 of the Federal Power Act "mandate[s]" that the Commission "review rate filings" before they go into effect.

In *Xcel*, the Commission entered an order in which it made an affirmative finding that a rate filed under § 205 might "be unjust and unreasonable" and that "further section 205 review" was needed. *Id.* at 951, 953. But contrary to its own settled policies, the Commission neither suspended the rate nor required the utility to commit to refunding the difference between the proposed rate and whatever rate the Commission ultimately found to be just and reasonable. *Id.* at 950–51. On rehearing, the Commission acknowledged its error but concluded that its regulations prohibited it from ordering a refund. *Id.* at 951–52. In reviewing the Commission's final orders, this Court held

Page 2

that the Commission had “misapprehended its remedial powers” and had authority to correct its acknowledged errors.

Xcel thus stands for the propositions that (i) when the Commission *affirmatively finds* that a proposed rate may be unjust and unreasonable, it must suspend the rate or require a voluntary-refund commitment (a point the Commission conceded); and (ii) the Commission has authority to correct its acknowledged errors, including errors in failing to suspend a dubious rate change or require a voluntary-refund commitment.

Nothing in *Xcel* overturns precedent recognizing that § 205 imposes no obligation on the Commission to act on proposed rates before they take effect. *See* Interv.-Resp. Br. 3–5 (citing cases). Nor does it change the rule that when the Commission does not act, rates take effect automatically by operation of law. Nor does it say anything about a party’s ability to seek judicial review where, unlike in *Xcel*, the Commission has not entered a final, reviewable order.

Respectfully submitted,

/s/ Ashley C. Parrish

Ashley C. Parrish

*Counsel for Electric
Power Supply Association*