

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**Nos. 02-70262, 02-70270, 02-70274, 02-70294, 03-70185**

---

**BONNEVILLE POWER ADMINISTRATION, *et al.*,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

---

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

---

**BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY  
COMMISSION ON THE JURISDICTIONAL CASES**

---

**DENNIS LANE  
SOLICITOR**

**ROBERT H. SOLOMON  
DEPUTY SOLICITOR**

**BETH G. PACELLA  
ATTORNEY**

**FOR RESPONDENT  
FEDERAL ENERGY REGULATORY  
COMMISSION  
WASHINGTON, D.C. 20426**

**JANUARY 31, 2005**



## TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES.....	1
STATUTES AND REGULATIONS.....	2
STATEMENT OF JURISDICTION.....	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	6
I. STANDARD OF REVIEW.....	6
II. THE COMMISSION’S JURISDICTIONAL DETERMINATIONS WERE APPROPRIATE AND WELL-REASONED.....	7
A. Sales Into The Cal PX And CAISO Centralized Single- Clearing-Price Markets.....	7
1. The Commission’s Analysis And Determination.....	8
2. The Commission Appropriately Ordered Revision Of The Market Clearing Prices For All Sales In The Cal PX And CAISO Spot Markets To Assure That The FPA’s Just And Reasonable Requirement Was Satisfied.....	17
B. CAISO Out-Of-Market Spot Transactions.....	43
CONCLUSION.....	47

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>American Rivers v. FERC</i> , 201 F.3d 1186 (9th Cir. 2000) .....	6
<i>Arcadia v. Ohio Power Co.</i> , 498 U.S. 73 (1990).....	35
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	10
<i>California Power Exchange Corporation</i> , 245 F.3d 1110 (9th Cir. 2001) .....	8
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984).....	3, 6, 24, 25
<i>Cities of Anaheim v. FERC</i> , 723 F.2d 656 (9th Cir. 1984) .....	35
<i>City of Fremont v. FERC</i> , 346 F.3d 910 (9th Cir. 2003) .....	24
<i>City of Seattle v. FERC</i> , 923 F.2d 713 (9th Cir. 1991) .....	6, 25
<i>Dillingham v. INS</i> , 267 F.3d 996 (9th Cir. 2001) .....	6, 25
<i>FPC v. Louisiana Power &amp; Light Co.</i> , 406 U.S. 621 (1972).....	33
<i>Irvine Medical Center v. Thompson</i> , 275 F.3d 823 (9th Cir. 2002) .....	6

**TABLE OF AUTHORITIES (Cont.)**

<b>COURT CASES (Cont.):</b>	<b>PAGE</b>
<i>Mid-Continent Area Power Pool v. FERC</i> , 305 F.3d 780 (8th Cir. 2002) .....	7
<i>Natural Gas Clearinghouse v. FERC</i> , 108 F.3d 397 (D.C. Cir. 1997) .....	7
<i>Pacific Gas and Electric Co. v. FERC</i> , 306 F.3d 1112 (D.C. Cir. 2002) .....	15, 16
<i>Pub. Util. Com. v. FERC</i> , 660 F.2d 821 (D.C. Cir. 1981) .....	16
<i>Salt River Project v. FPC</i> , 391 F.2d 470 (D.C. Cir. 1968) .....	19, 20
<i>Texaco Inc. v. FERC</i> , 148 F.3d 1091 (D.C. Cir. 1998) .....	7
<i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000), <i>aff'd sub nom.</i> , <i>New York v. FERC</i> , 535 U.S. 1 (2002) .....	14, 33
<i>United Distribution Companies v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996) .....	4, 9, 16, 26-34
<i>West v. Gibson</i> , 527 U.S. 212 (1999) .....	33
<i>Williams Natural Gas Company v. FERC</i> , 3 F.3d 1544 (D.C. Cir. 1993) .....	39

**TABLE OF AUTHORITIES (Cont.)**

<b>ADMINISTRATIVE CASES:</b>	<b>PAGE</b>
<i>California Power Exchange Corporation,</i> 83 FERC ¶ 61,186 (1998) .....	12
<i>City of Vernon, California,</i> 93 FERC ¶ 61,103 (2000), <i>reh'g denied,</i> 94 FERC ¶ 61,148 (2001) .....	15
<i>Dairyland Power Coop.,</i> 37 FPC 12 (1967) .....	19-20
<i>Mid-Continent Area Power Pool,</i> 92 FERC ¶ 61,229 (2000) .....	26-27
<i>New West Energy Corp.,</i> 83 FERC ¶ 61,004 (1998) .....	26
<i>Pacific Gas &amp; Electric Co.,</i> 77 FERC ¶ 61,204 (1996) .....	8, 10, 11, 37, 44
<i>Pacific Gas &amp; Electric Co.,</i> 81 FERC ¶ 61,122 (1997) .....	8, 11, 37
<i>Pacific Gas &amp; Electric Co.,</i> 82 FERC ¶ 61,326 (1998) .....	12
<i>Prairieland Energy, Inc.,</i> 92 FERC ¶ 61,139 (2000) .....	26

**TABLE OF AUTHORITIES (Cont.)**

<b>ADMINISTRATIVE CASES (Cont.):</b>	<b>PAGE</b>
<i>Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities</i> , Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,760-62 and 31,857, 61 Fed. Reg. 21,540 (1996), <i>clarified</i> , 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), <i>on reh’g</i> , Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, <i>clarified</i> , 79 FERC ¶ 61,182 (1997), <i>on reh’g</i> , Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), <i>on reh’g</i> , Order No. 888-C, 82 FERC ¶ 61,046 (1998), <i>aff’d sub nom. Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000), <i>cert. denied in pertinent part</i> , 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001).....	14
<i>Puget Sound Energy, Inc.</i> , 103 FERC ¶ 61,348 (2003), <i>aff’d</i> , 105 FERC ¶ 61,183 (2003) .....	46
<i>Sacramento Municipal Utility District v. Pacific Gas &amp; Elec. Co.</i> , 37 FERC ¶ 61,323 (1986) .....	26
<i>South Carolina Public Service Authority</i> , 75 FERC ¶ 61,209 (1996) .....	15, 16, 36

## TABLE OF AUTHORITIES (Cont.)

<b>STATUTES:</b>	<b>PAGE</b>
Federal Power Act	
Section 3(3), 16 U.S.C. § 786(3) .....	18
Section 3(4), 16 U.S.C. § 786(4) .....	18
Section 3(7), 16 U.S.C. § 786(7) .....	18
Section 201(b), 16 U.S.C. § 824(b) .....	8, 18, 33
Section 201(b)(1), 16 U.S.C. § 824(b)(1) .....	30
Section 201(d), 16 U.S.C. § 824(d) .....	8
Section 201(e), 16 U.S.C. § 824(e) .....	8, 17
Section 201(f), 16 U.S.C. § 824(f) .....	3, <i>passim</i>
Section 205, 16 U.S.C. § 824d .....	11, <i>passim</i>
Section 205(c), 16 U.S.C. § 824d(c) .....	12
Section 206, 16 U.S.C. § 824e .....	11, <i>passim</i>
Section 313(b), 16 U.S.C. § 825l(b) .....	7
Natural Gas Act	
Section 1(b), 15 U.S.C. § 717(b) .....	28
Section 5, 15 U.S.C. § 717d .....	29



**TABLE OF AUTHORITIES (Cont.)**

<b>REGULATIONS:</b>	<b>PAGE</b>
18 C.F.R. § 35.1(a).....	10
18 C.F.R. § 35.1(e).....	10
18 C.F.R. § 35.2(a).....	10
18 C.F.R. § 35.2(b) .....	10



**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

**Nos. 02-70262, 02-70270, 02-70274, 02-70294, 03-70185**

---

**BONNEVILLE POWER ADMINISTRATION, *et al.*,  
PETITIONERS,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

---

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

---

**BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY  
COMMISSION ON THE JURISDICTIONAL CASES**

---

**STATEMENT OF THE ISSUES**

1. Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) appropriately determined that it has jurisdiction over all transactions in the FERC-jurisdictional California Independent System Operator Corporation (“CAISO”) and California Power Exchange (“Cal PX”) spot markets.

2. Whether the Commission appropriately determined that it has jurisdiction over all CAISO Out-of-Market (“OOM”) spot market transactions.

### **STATUTES AND REGULATIONS**

The relevant statutes and agency regulations are contained in the Addendum to this brief.

### **STATEMENT OF JURISDICTION**

The Commission agrees with Public Entity Petitioners’ Statement of Jurisdiction, noting only that Commission orders in addition to those listed by Public Entity Petitioners are challenged by other petitions filed in these consolidated cases and are discussed, as pertinent, in this Brief.

### **STATEMENT OF THE CASE**

The Commission incorporates by reference the Statement of the Case in its contemporaneously filed brief in the Scope/Transaction cases.

### **SUMMARY OF ARGUMENT**

The Commission appropriately determined that it has jurisdiction over all sales in the FERC-jurisdictional Cal PX and CAISO spot markets. None of the challenges to that determination has merit.

All sales in the Cal PX and CAISO markets, even those by entities that are not public utilities under the FPA, are subject to FERC-ordered revised clearing

prices and any resultant refunds. FERC acted to fix the just and reasonable rate in its jurisdictional markets by employing a market mitigation methodology that simply recalculated the clearing price applicable to all sales in the CAISO and Cal PX spot markets for the period October 2, 2000 through June 20, 2001.

The FPA's legislative history establishes that Congress did not envision governmental entities being able to sell electricity at wholesale in interstate commerce and, thus, under the Commission's purview. Moreover, the legislative history establishes that § 201(f) was added to the FPA, not to prevent FERC from assuring that sales by governmental entities in FERC-jurisdictional markets were made only at just and reasonable rates, but to prevent the FPA from being used to benefit governmental entities at the expense of privately-owned utilities. Thus, the FPA § 201(f) exemption was not intended to preclude FERC jurisdiction over all sales made in the FERC-jurisdictional markets here.

Using the tools of statutory construction in a *Chevron* step one analysis shows that Congress has not spoken to the precise question at issue here. Accordingly, FPA § 201(f) is ambiguous as applied to the circumstances here, and FERC's interpretation is entitled to deference. FERC reasonably interpreted that provision as not preventing the application of modified clearing prices, and any concomitant refunds, to any sales, including those made by governmental entities,

to assure that FERC-jurisdictional Cal PX and CAISO spot market prices are just and reasonable.

The Commission's jurisdictional determination is consistent with Commission and Court precedent. The cases cited as contravening the Commission's holding involved much broader factual scenarios or were not analyzed in light of *United Gas Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996) ("*UDC*").

Additionally, FERC's jurisdictional determination was consistent with and promoted the underlying goal of the FPA – to assure that customers pay only just and reasonable rates for their electricity. If the Commission determines the clearing price in a particular hour is unjust and unreasonable, customers are entitled to refunds regarding all sales made at that unjust and unreasonable clearing price.

All sellers into the Cal PX and CAISO markets, including governmental entities, were on notice from the outset that their sales in those spot markets were subject to FERC jurisdiction, and could be subject to refunds as of October 2, 2000. Commission orders approving operation of the Cal PX and CAISO put all sellers, including governmental entities, on notice that their participation in those markets would be subject to the terms of the CAISO and Cal PX tariffs, which incorporated concomitant FERC jurisdiction. Moreover, the August 2, 2000 complaint

instituting the FERC proceeding alleged that sales into the CAISO and Cal PX markets were unjust and unreasonable. Under the single price auction mechanism that operated in the centralized ISO and PX spot markets, all sellers agreed to receive the same clearing price for their sales. Thus, the complaint, which had a refund effective date of October 2, 2000, put all sellers into those markets on notice that those clearing prices were subject to change and refund if they were found to be unjust and unreasonable.

BPA's argument regarding the limited role FERC has in reviewing BPA-determined rates under the Northwest Power Act is inapposite. BPA did not set the rates at which its sales were made in the instant case. All sales in the Cal PX and CAISO spot markets, including those by BPA, were made at the hourly single-clearing prices determined by the FERC-jurisdictional Cal PX and CAISO.

The Commission also appropriately determined it has jurisdiction over all CAISO OOM spot transactions, including those entered into with governmental entities. While OOM spot transactions occur outside the CAISO spot market, they nonetheless fall under the aegis of the FERC-approved CAISO Tariff as sales into the CAISO market. In fact, those sales could be made only pursuant to the CAISO Tariff and, therefore, are authorized by and operate according to the FPA and FERC's rules thereunder.

## ARGUMENT

### I. Standard Of Review

The Court’s review of FERC’s interpretation of the FPA is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under *Chevron*:

First, as always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the . . . question for the court is whether the agency's answer is based on a permissible construction of the statute.

*American Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 2000) (quoting *Chevron*, 467 U.S. at 842-43) (omissions in original). In step one of the *Chevron* analysis, this Court uses the traditional tools of statutory interpretation (text, structure, purpose, and legislative history) to determine whether Congress has spoken directly to the precise question at issue. *See, e.g., Irvine Med. Ctr. v. Thompson*, 275 F.3d 823, 828-30 (9th Cir. 2002). In step two of the analysis, deference is given to the agency’s reasonable interpretation of an ambiguous statutory provision. *Dillingham v. INS*, 267 F.3d 996, 1005 (9th Cir. 2001); *see also City of Seattle v. FERC*, 923 F.2d 713, 715 (9th Cir. 1991) (court generally shows “great deference” to FERC’s interpretation of the law it administers).



Likewise, the Commission’s reasonable interpretation of its own orders will be upheld. *Mid-Continent Area Power Pool v. FERC*, 305 F.3d 780, 783 (8th Cir. 2002) (“We must give deference to the Commission’s interpretation of its own orders.”); *Texaco Inc. v. FERC*, 148 F.3d 1091, 1099 (D.C. Cir. 1998); *Natural Gas Clearinghouse v. FERC*, 108 F.3d 397, 399 (D.C. Cir. 1997). Further, for all purposes, the Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. §825l(b).

**II. The Commission’s Jurisdictional Determinations Were Appropriate And Well-Reasoned**

After carefully examining and considering the interstate wholesale sales of electric energy at issue, the pertinent statutory provisions, the legislative history, and precedent, the Commission determined that its jurisdiction extended to all sales in the Cal PX and CAISO centralized single-clearing price markets as well as to the OOM spot purchases made by CAISO to assure reliability on its system.

**A. Sales Into The Cal PX And CAISO Centralized Single-Clearing-Price Markets**

The first part of this section discusses FERC’s analysis in determining that its jurisdiction extends to all sales in the Cal PX and CAISO centralized single-clearing-price markets. The second part responds to Petitioners’ challenges to that determination.

## 1. The Commission’s Analysis And Determination

FERC’s jurisdictional analysis concerning sales in the Cal PX and CAISO centralized single-clearing-price auction markets began with its recognized jurisdiction over the entities operating those markets, Cal PX and CAISO, and their tariffs. “It is undisputed that the Commission has personal jurisdiction over the PX and ISO, and that they operate pursuant to FERC-approved tariffs and wholesale rate schedules.<sup>[1]</sup> Moreover, the PX and ISO are public utilities under FPA section 201(e).<sup>[2]</sup>” Joint Excerpts of Record (“JER”) 204; *see also* JER 178. Next, the analysis examined the nature of the sales in those markets, and found them to fall within FERC’s jurisdiction.

The Commission’s subject matter jurisdiction includes wholesale sales (defined as “sale[s] of electric energy to any person for resale”<sup>[3]</sup>) of electric energy in interstate commerce.<sup>[4]</sup> As all of the electric energy sales into the FERC-regulated PX or ISO spot markets are wholesale sales of electricity in interstate commerce, they all fall within the Commission’s subject matter jurisdiction.<sup>[5]</sup>

---

<sup>1</sup> Citing FPA § 201(b).

<sup>2</sup> Citing *In re California Power Exch. Corp.*, 245 F.3d 1110, 1114 (9th Cir. 2001); *Pacific Gas & Elec. Co.*, 77 FERC ¶61,204 (1996), *reh’g denied*, 81 FERC ¶61,122 (1997).

<sup>3</sup> Citing FPA § 201(d).

<sup>4</sup> Citing JER 178 (citing FPA § 201(b)).

<sup>5</sup> Citing Federal Power Act (“FPA”) § 201(b), 16 U.S.C. § 824(b).

JER 204; *see also* JER 178.

The Commission further found that “the exemption for governmental entities in FPA section 201(f) [16 U.S.C. § 824(f)<sup>6</sup>] does not require a different result regarding sales by governmental entities in the PX and ISO spot markets.”

While that provision exempts governmental entities generally from Commission jurisdiction under Part II of the FPA, it does not do so under the specific circumstances here. Here, governmental entities and others sold energy in a centralized, single clearing price auction market under which all sellers received the same price for a given sale, pursuant to market rules set by this Commission and administered by public utilities (the California PX and ISO) subject to this Commission’s jurisdiction. The involvement of the PX and ISO, whose roles are central in these California spot markets, along with the nature of the interstate wholesale sales, give us subject matter jurisdiction entirely independent of the jurisdictional nature of the entities selling into the markets at issue.<sup>7</sup> Thus, FPA section 201(f) does not change the analysis or the result in determining whether we have subject matter jurisdiction over the sales at issue.

JER 204-05; *see also* JER 178-79. The analysis showed FERC was not seeking to stretch its jurisdictional reach beyond the limits set by Congress. “As the Commission can directly regulate the sales at issue regardless of who made the

---

<sup>6</sup> FPA § 201(f) provides that “[n]o provision in this Part [of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority or instrumentality of any one or more of the foregoing . . . unless such provision makes specific reference thereto.”

<sup>7</sup> Citing *UDC*, 88 F.3d 1105.

sales, this is not a case of the Commission indirectly exercising jurisdiction over governmental entities when it cannot do so directly.” JER 205 n.38.

Further, as the sales at issue were possible only because FERC approved CAISO’s and Cal PX’s market structures, “governmental entities that made sales in the PX and ISO spot markets waived any exemption they otherwise may have had from the Commission’s personal jurisdiction regarding those sales.[<sup>8</sup>]” JER 205. That meant all sellers were on notice their sales were governed by FERC.

Because the markets did not exist prior to FERC authorization and operate according to FERC rules, all those who participated in them reasonably had to recognize the controlling weight of FERC authority. The PX and ISO operated under FERC-approved tariffs, which set forth all rates, charges, classifications, practices, rules, regulations or contracts for or in connection with all sales made in their markets.[<sup>9</sup>] The tariffs established spot market auction mechanisms that made clear that all sellers, including governmental entities, would receive the same FERC-regulated market clearing price for any given sale. That price, under the FPA, could not exceed the just and reasonable rate. All sellers were on notice that those clearing prices, and the market rules that set the clearing prices, were subject to change and refund if they were found to be unjust and unreasonable.

JER 205; *see also* JER 179.

---

<sup>8</sup> Citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985).

<sup>9</sup> Citing FPA § 205(c); 18 C.F.R. §§ 35.1(a) and (e), 35.2(a) and (b) and n.1; *Pacific Gas & Elec. Co.*, 77 FERC ¶61,204 at 61,804 (1996).

FERC exercised jurisdiction over all sales in the Cal PX and CAISO from the outset, as it “made clear in [its] order authorizing establishment of the PX and the ISO that, ‘[o]nce filed, the rate schedules and related contracts, rules and protocols will be subject to the exclusive jurisdiction of the Commission under sections 205 and 206 of the FPA, 16 U.S.C. sections 824d, 824e (1994).’” JER 205 (citing *Pacific Gas & Elec.*, 77 FERC at 61,804). Accordingly, “all sellers in the PX and ISO markets, including governmental entities, were on notice that if they participated in those markets, they would do so subject to the terms of the ISO and PX tariffs and concomitant FERC jurisdiction.” JER 205. FERC’s “order authorizing Cal PX and CAISO to operate provided further notice that the same rules and obligations applied to all sellers and sales made in the PX and ISO spot markets. For example, the order established that all PX and ISO rules, protocols, procedures and standards applied to all entities selling energy in the PX and ISO markets.” JER 205 (citing *Pacific Gas & Elec. Co.*, 81 FERC at 61,580-87).

Besides notice from FERC orders, “[g]overnmental entities or their agents entered into various arrangements that explicitly acknowledged the Commission's jurisdiction regarding their sales in the PX and the ISO.” JER 205; *see also* JER 180.

For example, many governmental entities<sup>[10]</sup> accepted a FERC-approved *pro-forma* Scheduling Coordinator Agreement that explicitly acknowledges their obligation “to comply with the terms and conditions of the ISO Tariff and ISO Protocols.”<sup>[11]</sup> Moreover, numerous governmental entities<sup>[12]</sup> executed the FERC-approved *pro-forma* PX Participation Agreement, which “establishes the basis and terms upon which entities shall receive service through the PX, in accordance with the PX Tariff and Protocols.”<sup>[13]</sup> In approving the *pro-forma* PX Participation Agreement, [the Commission] found that it and “the services provided under the PX Tariff are jurisdictional” and needed to be filed with the Commission in accordance with FPA section 205(c).<sup>[14]</sup>

JER 205; *see also* JER 180.

In short, the Commission found that “by participating in the FERC-regulated centralized PX and ISO spot markets, all sellers, including governmental entities, agreed to accept the same clearing price for any given sale under the single price auction mechanism approved by FERC,” and that “all entities, including

---

<sup>10</sup> Noting that “[t]hese sellers included the Cities of Anaheim and Riverside and DWR.”

<sup>11</sup> Citing *Pacific Gas and Elec. Co.*, 82 FERC ¶61,326 at 62,283 (1998).

<sup>12</sup> Noting that “[t]hose entities include the Arizona Electric Power Cooperative (AEPSCO), Bonneville, DWR, the Cities of Anaheim and Riverside, LADWP, Modesto, and NCPA.” *See* PX January 25, 2001 letter filing, Docket No. ER98-2095-000 (index of parties who executed the Participation Agreement as of December 31, 2000).

<sup>13</sup> Citing *California Power Exch. Corp.*, 83 FERC ¶61,186 at 61,770 (1998).

<sup>14</sup> Citing *California Power Exch.*, 83 FERC at 61,771.

governmental, that sold in the PX and ISO spot markets were on notice that they were subject to, and are in fact subject to, FERC jurisdiction regarding the rates to be received for those sales, including FERC rate and refund orders.” JER 205-06 (footnote omitted).

The action at issue – FERC’s mitigation of all unlawful prices with concomitant refunds – properly invoked FERC’s regulatory authority over all sales in FERC-approved and regulated markets. In “act[ing] appropriately pursuant to [its] authority under FPA section 206 to fix the just and reasonable rate by revising the method for calculating the FERC-regulated PX and ISO spot market clearing prices as of October 2, 2000,” the Commission “simply revised the market clearing prices that all market participants previously agreed to accept for their sales, and ordered refunds to effectuate that revision.” JER 206; *see also* JER 179.

The Commission’s finding that all CAISO and Cal PX spot market sales are subject to refund “promotes the underlying goals of the FPA.” JER 180. All sales in the CAISO and Cal PX spot auction markets made within the same hour received the same clearing price. JER 180. Accordingly, if the clearing price was unjust and unreasonable, all sales made during that hour were priced at an unjust and unreasonable rate. JER 180. As up to 30 percent of all sales in these markets were

made by governmental entities, excluding those transactions from a potential refund remedy “could have a serious detrimental effect on consumers.” JER 180.

In addition, the Commission’s jurisdictional holding is consistent with precedent. JER 206-07. For example, in Order No. 888,<sup>15</sup> the Commission determined that governmental entities that receive open access transmission service from a FERC-jurisdictional utility must offer comparable service in return. JER 206-07. The Commission explained how this reciprocity requirement served FPA regulatory objectives:

While we do not have the authority to require [governmental entities] to make their systems generally available, we do have the ability, and the obligation, to ensure that open access transmission is as widely available as possible and that this Rule does not result in a competitive disadvantage to public utilities. . . . [W]e will not permit [governmental entities] open access to jurisdictional transmission without offering comparable service in return.

JER 207 (quoting Order No. 888 at 31,761-62).

---

<sup>15</sup> *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶31,036 at 31,760-62 and 31,857, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶61,009 and 76 FERC ¶61,347 (1996), *on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶61,182 (1997), *on reh’g*, Order No. 888-B, 81 FERC ¶61,248, 62 Fed. Reg. 64,688 (1997), *on reh’g*, Order No. 888-C, 82 FERC ¶61,046 (1998), *aff’d sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *cert. denied in pertinent part*, 69 U.S.L.W. 3574 (U.S. Feb. 26, 2001).



Similarly, in *City of Vernon, California*,<sup>16</sup> the Commission found that, “while it does not have jurisdiction under sections 205 and 206 of the [FPA] over [Vernon, a governmental entity],” it had the authority to review, and require modification of, the governmental entity’s transmission revenue requirement included as part of CAISO’s rates for FERC-jurisdictional service “as a means of ensuring that the costs ultimately charged by the ISO are just and reasonable.” JER 207. The Commission found that it could not carry out its statutory responsibility without such review: “The Federal Power Act requires [the Commission] to ensure the justness and reasonableness of the ISO’s rates, and [the Commission] cannot reach this result if [it] absolve[s] from [its] review the portion of the ISO’s costs incurred with respect to [this governmental entity].” That reasoning applies here as well. JER 207 (quoting *Vernon*, 94 FERC at 61,564). On appeal of the *Vernon* orders, the D.C. Circuit agreed with the Commission’s reasoning: “As a general matter, publicly-owned utilities are not subject to FERC’s §§ 205 and 206 jurisdiction, *see* FPA § 201(f), 16 U.S.C. § 824(f), although FERC may analyze and consider the rates of non-jurisdictional entities to the extent that those rates affect jurisdictional

---

<sup>16</sup> 93 FERC ¶61,103 at 61,285 (2000), *reh’g denied*, 94 FERC ¶61,148 at 61,564 (2001) (citing *South Carolina Public Service Authority*, 75 FERC ¶ 61,209 at 61,696 (1996)), *remanded on other grounds sub nom. Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002).

transactions.” 306 F.3d at 1114 (citing *South Carolina*, 75 FERC at 61,696 and n.7 and *Pub. Util. Com. v. FERC*, 660 F.2d 821, 826 (D.C. Cir. 1981)).

The same reasoning applies to similar situations arising under the Natural Gas Act (“NGA”). While local distribution companies (“LDCs”) and municipalities are expressly exempt from FERC regulation under the NGA, the Commission found, and the D.C. Circuit affirmed, that FERC’s open access rules should govern LDCs’ and municipalities’ release of transportation capacity on a FERC-jurisdictional pipeline’s system. JER 179 (citing *UDC*, 88 F.3d 1105). “The Court found that, notwithstanding the [LDCs’ and municipalities’] exemption from the NGA, ‘the Commission’s jurisdiction attaches to the subject of the capacity release transaction: interstate transportation rights.’” JER 179 (quoting *UDC*, 88 F.3d at 1152). “Similarly, here, Commission jurisdiction attaches to the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-authorized and Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants, including [governmental entities].” JER 179. *See also* 179-80, 208-10.

Thus, by finding that it had jurisdiction over all sales here, the Commission was “consistent in [its] approach regarding the activities of governmental entities as they affect matters subject to [its] jurisdiction” in the specific limited factual

scenario presented in “the California PX and ISO spot markets during which all sellers received the same price for a given transaction. That price was determined by FERC-jurisdictional entities (the PX and ISO) in FERC-jurisdictional markets under a single price auction format, as originally set and later modified by FERC, for sales of electric energy for resale in interstate commerce.” JER 207.

**2. The Commission Appropriately Ordered Revision Of The Market Clearing Prices For All Sales In The Cal PX And CAISO Spot Markets To Assure That The FPA’s Just And Reasonable Requirement Was Satisfied**

Public Entity Petitioners and Intervenor Salt River Project Agricultural Improvement and Power District (“Salt River”) raise myriad challenges to the determination to order revision of the market clearing prices for all sales in the FERC-jurisdictional Cal PX and CAISO single-clearing price spot markets. None of the challenges has merit.

Public Entity Petitioners first claim that refunds cannot be ordered regarding their sales in the Cal PX and CAISO spot markets because they are not public utilities. Br. at 18-20, 27, 59-61. Some of the Petitioners/Petitioner-Intervenors, however, are public utilities under the FPA. JER 195 n.5.

FPA § 201(e), 16 U.S.C. § 824(e), defines “public utility” as “any person who owns or operates facilities subject to the jurisdiction of the Commission under

this Part . . . .” “Person” is defined as “an individual or corporation.” FPA § 3(4), 16 U.S.C. § 786(4). “‘Corporation’ means any . . . organized group of persons, whether incorporated or not . . . . It shall not include ‘municipalities’ as hereinafter defined.” FPA § 3(3), 16 U.S.C. § 786(3). “Municipality” is defined as “a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.” FPA § 3(7), 16 U.S.C. § 786(7). Here, FERC exerted its authority over interstate sales at wholesale of electricity under FPA § 201(b), 16 U.S.C. § 824(b), which applies to “the sale of electric energy at wholesale in interstate commerce.”

Public Entity Petitioners admit that “[e]ach of the Petitioners and Petitioner-Intervenors engages in the generation, transmission, distribution, purchase and/or sale of electric energy at wholesale . . . .,” Br. at 6, and that Bonneville Power Administration (“BPA”), State Water Contractors/The Metropolitan Water District of Southern California (“SWC/MWD”), and AEPCO are not “municipalities” under the FPA, Br. at 6-7 (“With the exception of SWC, BPA and AEPCO, each of the Petitioners and Petitioner-Intervenors is a ‘municipality’ as that term is defined by § 3(7) of the FPA, 16 U.S.C. § 786(7)”). Thus, at least three of the Public Entity Petitioners are public utilities under the FPA.

*Dairyland Power Coop.*, 37 FPC 12, 15 (1967) and *Salt River Project v. FPC*, 391 F.2d 470, 473 (D.C. Cir. 1968), do not, as Public Entity Petitioners assert (Br. at 7, 28), stand for the proposition that AEPCO, simply by being a RUS-financed electrical cooperative, is not a public utility under the FPA. *Dairyland* held that certain RUS-financed cooperatives were not subject to FERC jurisdiction, but that holding was not extended to RUS-financed cooperatives, such as AEPCO, that generate and transmit electric energy for sale in interstate commerce.

While it is our opinion that the respondents here are not subject to our jurisdiction under the Power Act, we wish to make it clear that jurisdiction over major generating and transmission cooperatives in interstate commerce, as opposed to those that merely transmit and distribute electric energy (including generating small amounts of power), would be in the public interest. These G&T cooperatives have become increasingly important in recent years in the amount of revenues realized and in power generated. They sell electric energy to REA distribution cooperatives. They also sell to, and exchange power with, investor-owned utilities and engage in interstate pooling of electric energy. Such operations are part of the interstate business of transmitting and selling electric energy for ultimate distribution to the public including not only the members of the cooperatives, but the ultimate customers served through the investor-owned utilities with which the generating and transmission cooperatives are interconnected. Since the generating and transmission cooperatives have become an important segment of the interstate electric industry, at least in certain parts of the country, they should not be exempt from regulation. While there may be incipient conflicts between regulation by this Commission and the Administrator of REA, as argued by the respondents here, we are confident that these could be resolved by Congress in the most appropriate manner.

*Dairyland*, 37 FPC at 27-28.

In reviewing the Commission's *Dairyland* analysis, the D.C. Circuit found that RUS-financed cooperatives "fall within the ambit of the [FPA]'s central phrase, 'public utilities.'" *Salt River*, 391 F.2d at 474 and n.8. Noting *Dairyland*'s explicitly limited non-jurisdictional determination, the Court explained that "if the Commission had found that conditions in the power industry had so changed that generating cooperatives now did fall within its jurisdiction, this court would be faced with a different issue. For just as the Commission's determination here that it is without jurisdiction is entitled to judicial deference, so would be its determination that it had the requisite authority." *Id.* at 474 and n.8 (citations omitted).

Thus, the instant ruling -- that sales of energy by RUS-financed cooperatives in the Cal PX and CAISO centralized single-clearing price auction markets, including those by AEPCO were subject to FERC's jurisdiction -- is consistent with *Dairyland* and the FPA, is due deference, and should be affirmed.

In any event, all sales in the Cal PX and CAISO markets, even those by entities that are not public utilities, are subject to FERC-ordered revised clearing prices and any resultant refunds. The Cal PX and CAISO are FERC-jurisdictional public utilities, their tariffs were filed with and approved by FERC, and all sales into their markets were wholesale sales of electricity in interstate commerce. Under

the single price auction mechanism approved by FERC, the Cal PX and CAISO set a single hourly clearing price at which all spot market sales in that hour were made. JER 178, 204, 207 n.59. Moreover, all entities making sales in the Cal PX and CAISO spot market accepted, and were on notice, that the rates and conditions for their sales were governed by FERC, including any FERC rate and refund orders. JER 205-06. FERC's action here simply exercised its FPA § 206 authority over all sales in the Cal PX and CAISO markets to revise any unlawful clearing prices through use of a market mitigation methodology that would set the just and reasonable rates in those markets. JER 179, 206.

Contrary to Public Entity Petitioners' (Br. at 23-25) and Salt River's (Br. at 10-11, 17) contention, the FPA legislative history does not show a congressional intent to exclude governmental entities' sales from FERC jurisdiction under the specific circumstances at issue here. Just the opposite, the legislative history establishes that Congress did not envision a market scenario such as the one here, where governmental entities would sell electricity in FERC-regulated markets.

For example, the following colloquy occurred during the Senate Hearings<sup>17</sup>:

Senator HASTINGS. I cannot quite understand why you should permit a municipality that owns a power plant to transmit its power across State lines and charge somebody a greater amount for it than it ought to charge. Do you know of any reason why that should be permitted by any publicly owned plant?

Mr. DEVANE. In the first place, I do not think any municipality transmits power across State lines.

Senator HASTINGS. But if they do?

Mr. DEVANE. That is a strictly municipal function, and I know of no authority by which they can do that.

The CHAIRMAN. I do not know of any power by which a municipally owned plant could transmit its power and sell it in a foreign State, because they are only organized for the purpose of doing business in that particular city, or in that particular State, and I do not think that there is any case where they have the power, under their constitution, to do otherwise.

Senator HASTINGS. But if they do have it, I do not see why they should not be included in this bill.

Mr. DEVANE. So far as we know, they do not do it, and so far as we know, they do not have that power.

---

<sup>17</sup> *To Provide for the Control and Elimination of Public-Utility Holding Companies Operating, or Marketing Securities, in Interstate and Foreign Commerce and Through the Mails, to Regulate the Transmission and Sale of Electric Energy in Interstate Commerce, to Amend the Federal Water Power Act, and for Other Purposes: Hearings Before the Senate Comm. on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. 256-57 (1935) (statement of Dozier DeVane, Solicitor, FPC).*



Testimony before the House of Representatives similarly assured Congress that governmental entities could not engage in interstate transmission or wholesale sales of electric energy. The FPC Solicitor stated: “I cannot imagine that a municipally owned plant in one State would attempt to do business in the other State,”<sup>18</sup> and “I think, conclusively, that the municipal plant would have no power to furnish energy in the other State.”<sup>19</sup> Thus, the factual situation presented here was not addressed by Congress in the FPA.

Moreover, the legislative history establishes that § 201(f) was added to the FPA, not to prevent FERC from assuring that governmental entity sales into FERC-jurisdictional markets were made only at just and reasonable rates, but to prevent the FPA from being used by governmental entities to gain benefits at the expense of privately-owned utilities. As the Senate Report explained:

A new subsection (e) has been added [to Section 201, later codified as § 201(f)] to remove all doubt that the act is not to apply to public projects, Federal, State or municipal. Despite repeated assurances by representatives of the Federal Power Commission that no such

---

<sup>18</sup> *To Provide for Control in the Public Interest of Public Utility Holding Companies Using the Mails and the Facilities of Interstate Commerce, to Regulate the Transmission and Sale of Electric Energy and Natural Gas in Interstate and Foreign Commerce, and for Other Purposes: Hearings Before the House Comm. on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess. 569 (1935) (statement of Dozier DeVane, Solicitor, FPC).*

<sup>19</sup> *Id.* at 2160, cited in JER 206 n.50.

authority was intended, the charge was frequently made that the bill as originally introduced authorized the Commission to compel private utilities to establish connection or exchange power with public plants. This new subsection carries out in unmistakable terms the original intention of the bill in this respect.

S. Rep. No. 621, 74th Congress, 1st Sess. 19 (1935). The Senate Report further states that FPA § 201(f) was “designed to make perfectly clear that no compulsory powers may be exerted upon public projects or upon privately owned projects for the benefit of public plants.” *Id.* at 49.

Because the legislative history establishes that Congress did not envision governmental entities making sales in FERC-jurisdictional markets such as those here, no congressional intent can be found in FPA § 201(f) as prohibiting FERC jurisdiction over sales made by governmental entities in FERC-jurisdictional markets. *See City of Fremont v. FERC*, 336 F.3d 910, 919 (9th Cir. 2003) (“Because Congress did not envision orphan proceedings, the text of § 15 cannot be read fairly as prohibiting FERC from applying § 15 procedures to orphan proceedings.”).

Under the *Chevron* step one analysis, the traditional tools of statutory construction shows that Congress did not envision governmental entities making sales in FERC-jurisdictional markets such as those here, and that § 201(f) was intended to protect privately-owned utilities. In short, Congress did not speak to the

precise question at issue: FERC's authority over jurisdictional sales by governmental entities.

It follows that *Chevron* step two analysis must be applied to FPA § 201(f) in the circumstances here. In that analysis, FERC's reasonable interpretation of the statutory provision, not Public Entity Petitioners' contrary interpretation, is due substantial deference. *Dillingham*, 267 F.3d at 1005; *Seattle*, 923 F.2d at 715. By exercising jurisdiction over these sales, FERC did not "expand the scope of its jurisdiction" (Public Entity Petitioners Br. at 28-34) or "limit [a] congressionally-mandated regulatory exemption" (*id.* at 50). Rather, FERC simply interpreted the statute it administers in the specific circumstances presented, and found that modifying the clearing price (and ordering refunds) for all sales in the jurisdictional Cal PX and CAISO spot markets best carried out the FPA's objectives.

Public Entity Petitioners' (Br. at 35-51) and Salt River's (Br. at 13-15) assertion that precedent is inconsistent with that jurisdictional determination has no merit.

Rather, the cited cases involve much broader factual scenarios, and stand for the unexceptional proposition that FPA section 201(f)

generally exempts governmental entities from our jurisdiction.<sup>[20]</sup> For example, in *New West*, a governmental entity sought general Commission authorization under FPA section 205 to engage in wholesale electric sales at market-based rates as a power marketer. We rejected the request, finding that the governmental entity was exempt from Commission FPA section 205 rate regulation by virtue of FPA section 201(f). *New West* is inapposite to our holding here, as that order did not involve a centralized market or single price auction for the sale of electric energy in interstate commerce operated by a public utility subject to our exclusive rate jurisdiction, but rather addressed only the much broader issue of whether the Commission can assert jurisdiction over a governmental entity's interstate wholesale sales as a general matter, regardless of the circumstances under which those sales are made.

JER 206. Furthermore, when the allegedly inconsistent cases were decided the Commission had “not analyze[d] the jurisdictional issues in the cited cases in light of *UDC*. Similarly, the court precedent cited by those requesting rehearing neither involved the limited specific circumstances present here nor considered the jurisdictional matters at issue in light of *UDC*.”<sup>21</sup> *Id.* at n. 52.

---

<sup>20</sup> Citing, e.g., *Prairieland Energy, Inc.*, 92 FERC ¶61,139 (2000); *Mid-Continent Area Power Pool*, 92 FERC ¶61,229 (2000) (“*MAPP*”); *New West Energy Corp.*, 83 FERC ¶61,004 (1998); *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 37 FERC ¶61,323 (1986).

<sup>21</sup> Thus, Salt River's contention (Br. 15) that the Commission “acknowledged” in *MAPP* that it cannot order governmental entities to pay rate refunds is inapposite, as that case was decided without consideration of *UDC*. Moreover, the Commission's statement in the March 9 Order that it “has no authority to order

Despite Public Entity Petitioners' strained attempt to reconcile the *MAPP* facts with the facts here (Br. at 40-41), the Commission found the two situations differed on key points. Here, FERC's determination rests on "the specific circumstances before [FERC] in this case: sales made in FERC-jurisdictional (PX and ISO) spot markets in which all sellers received the same prices for sales of electric energy for resale in interstate commerce determined by FERC-jurisdictional entities under a single price auction format." JER 206. In *MAPP*, by contrast, *MAPP* was not a public utility, did not run a single price auction market, and "did not itself own or control FERC-jurisdictional facilities, or provide transmission services, or determine prices at which transmission is sold. Under the terms of the *MAPP* members' contractual agreements, the individual members (and not *MAPP*) offer and provide jurisdictional transmission service." *MAPP*, 92 FERC at 61,755.

Next, Public Entity Petitioners claim *UDC* does not support FERC's exercise of subject matter jurisdiction over all sales, including those by governmental

---

[governmental entity] sellers to make refunds," JER 114, does not rise to the level of precedent as Salt River claims (Br. at 15). JER 212. That bald statement was reversed on rehearing after consideration of the specific circumstances here and pertinent precedent. *Id.*

entities, in the Cal PX and CAISO spot markets.<sup>22</sup> Br. at 42-52. *UDC* shows otherwise.

In *UDC*, municipalities and FERC agreed that FERC did not have jurisdiction over municipalities because they are expressly exempted from the definition of “natural gas company.” *UDC*, 88 F.3d at 1153. FERC found, nonetheless, that it had jurisdiction over their release of pipeline transportation capacity and could require them to comply with FERC capacity release regulations. The court agreed. *Id.* at 1153-54.

As the court explained, “NGA § 1(b) extends the Commission’s jurisdiction over not only ‘natural gas companies’ but also the interstate transportation of natural gas.”<sup>23</sup> *UDC*, 88 F.3d at 1153. Thus, even if municipalities are expressly exempt from FERC jurisdiction, “FERC may, consistent with the NGA, require municipalities to comply with its capacity release regulations” because “FERC’s transportation jurisdiction extends as a separate matter over capacity release given

---

<sup>22</sup> Public Entity Petitioners’ brief wholly ignores that FERC’s determination is consistent with its precedent in Order No. 888 and *Vernon*. See JER 206-07.

<sup>23</sup> NGA § 1(b), 15 U.S.C. § 717(b), provides the Commission with jurisdiction over “the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . . and . . . natural gas companies engaged in such transportation or sale.”

the involvement of interstate gas pipelines.” *Id.* at 1154. In *UDC*, the determinative factor was the nature of the transaction, not who was party to it. “[T]he transaction itself control[led] access to interstate transportation capacity entirely independent of the jurisdictional nature of the releasing and replacement shippers.” *Id.* at 1154.

The court further found that, “in instituting the capacity release program, the Commission legitimately invoked its authority under NGA § 5 over ‘any rate, charge, or classification’ or ‘any natural-gas company,’ 15 U.S.C. § 717d, given that pipelines are natural-gas companies.” *Id.* n.65. Two factors supported the Court’s conclusion: (1) the pipeline’s “absolutely central” role in the capacity release program, and (2) without FERC’s implementation and regulation of the capacity release program release by any shipper “simply do[es] not occur.” *Id.* at 1154 and n.6.

Similarly in the instant case, CAISO and CAL PX played “absolutely central” roles in their single price auction spot markets by setting the clearing price, and prior to FERC’s implementation and regulation, auction sales by any seller simply did not exist. Although FERC agreed that it generally does not have jurisdiction over governmental entities because they are exempted under the FPA, FERC has jurisdiction over all sales in its jurisdictional Cal PX and CAISO spot

markets because “Commission jurisdiction attaches to the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission authorized and Commission regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants including [governmental entities] and non-public utilities.” JER 179.

As in *UDC*, the FPA extends the Commission’s jurisdiction over not only “public utilities,” but also over interstate wholesale sales of electric energy. FPA § 201(b)(1). Thus, regardless of FPA § 201(f), FERC may, consistent with the FPA, apply market mitigation clearing prices to all interstate wholesale sales of electric energy in its jurisdictional markets, including those made by governmental entities, because FERC’s jurisdiction extends as a separate matter over interstate wholesale sales in the jurisdictional Cal PX and CAISO markets.<sup>24</sup> As Cal PX or CAISO determined the clearing prices of these wholesale interstate sales, the prices were set entirely independent of the jurisdictional nature of the seller.

In ordering refunds of amounts collected above the mitigated market clearing prices, therefore, the Commission legitimately invoked its FPA § 206 authority over

---

<sup>24</sup> Public Entity Petitioners err in asserting that the “subject matter of the [challenged] orders is the non-jurisdictional sale of electric energy by non-public utilities.” Br. at 49.



“any rate, charge, or classification” or “any public utility” to set the just and reasonable rate that Cal PX and CAISO, jurisdictional public utilities, may charge in their jurisdictional spot markets. *See UDC*, 88 F.3d at 1154 n.65. Because the Cal PX’s and CAISO’s role is absolutely central to effectuating the interstate wholesale sales at issue, this case differs from those in which FERC concluded it could not require governmental entities to comply with FERC rulings. *Id.* at 1154 and n.66. Here, as in *UDC*, “the Commission set up the program that benefited both jurisdictional and non-jurisdictional parties,” and, accordingly, “could establish the rules by which *all* parties must abide.” JER 179. Public Entity Petitioners admit that “[i]n *UDC*, the court held that the Municipalities, like any other shipper, were bound by the [FERC-jurisdictional] tariffs under which shippers purchased pipeline capacity.” Br. at 46. Likewise, here, governmental entities are bound by the FERC-established CAISO and Cal PX tariffs under which they made sales of their electric energy.

Citing the *UDC* court’s discussion of “the NGA’s limitation on FERC’s jurisdiction over LDCs” – that “the local-distribution exception applies only to the movement of gas within an LDC’s local mains and not to the movement of gas in high-pressure interstate pipelines,” Public Entity Petitioners assert *UDC* demonstrates that the NGA exemption for LDCs is not equivalent to the FPA’s for

governmental entities. Br. at 47-48 (quoting *UDC*, 88 F.3d at 1131). That assertion conveniently ignores the *UDC* court’s separate discussion of the NGA’s limitation on FERC’s jurisdiction over municipalities. The court accepted as true that municipalities are exempt from FERC’s NGA jurisdiction,<sup>25</sup> and found “[t]hat notwithstanding, FERC may consistent with the NGA, require municipalities to comply with its capacity release regulations” because “FERC’s transportation jurisdiction extends as a separate matter over capacity release given the involvement of the interstate gas pipelines.” *UDC*, 88 F.3d at 1153-54. Thus, the NGA’s express exemption of municipalities from jurisdiction is equivalent to FPA § 201(f)’s express exemption of governmental entities. *See* JER 209. The same reasoning applies here given FERC’s jurisdiction over all sales made in the CAISO and Cal PX markets.

Salt River contends that FERC found “a regulatory gap exists, under the FPA, justifying FERC’s exercise of jurisdiction over the sales rates of [governmental entities].” Br. at 18 (citing JER 179). FERC clarified, however, that it was not acting to fill a regulatory gap, but to avoid what otherwise would be a

---

<sup>25</sup> This also disposes of Salt River’s claim (Br. at 17-18) that the *UDC* analysis is inapplicable to the FPA because governmental entities generally are exempt from FERC’s FPA jurisdiction over the wholesale sale of electric energy in interstate commerce.

regulatory gap. JER 210 and n.86 (citing *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 632 (1972), and *West v. Gibson*, 527 U.S. 212, 218 (1999)). The governmental entity sales at issue here are wholesale sales in interstate commerce over which the States do not have jurisdiction. JER 210 and n.86.

Salt River next argues FERC's concern that excluding the governmental entity spot sales at issue from FERC jurisdiction would result in a regulatory gap "lacks credibility" because "in *Transmission Access Policy Study Group v. FERC*, [225 F.3d 667, 692-93 (D.C. Cir. 2000) ("*TAPS*"), *aff'd New York v. FERC*, 535 U.S. 1 (2002),] FERC argued that 'natural gas jurisprudence is inapplicable because the language of the NGA and FPA differ on *this issue*, and the natural gas cases turned on the existence of a regulatory gap that does not exist in the electricity field.'" Br. at 18-19 (emphasis added). The cited statement in *TAPS*, 225 F.3d at 692, was made regarding the matter *at issue there* – bundled retail sales of electricity, an area over which States have long asserted jurisdiction – and cannot appropriately be construed to apply to the wholly different issue here, involving interstate wholesale sales where the States cannot assert jurisdiction.

FERC is not, as Public Entity Petitioners assert (Br. at 49), "us[ing] FPA § 201(b) as a jurisdictional hook for evading § 201(f)'s express exemption . . . ." Rather, as in *UDC*, 88 F.3d at 1154 and nn. 65-67, the FERC-jurisdictional Cal PX

and CAISO's "absolutely central" role in setting the price for the interstate wholesale sales at issue provides a solid basis for Commission jurisdiction over all sales, including those by governmental entities. This is plainly not the hypothesized circumstance in *UDC* under which FERC would not have jurisdiction over otherwise nonjurisdictional entities; that is, where "FERC in fact merely manipulated its regulations to involve the pipelines in a minimal way only to thereby create a jurisdictional toehold over a nonjurisdictional entity." *UDC*, 88 F.3d at 1154 n. 67.

There also is no merit to Petitioners' hyperbolic concern that FERC's determination here "would obliterate all distinctions between sales by public utilities and non-jurisdictional entities under the FPA." Br. at 49. FERC's ruling was constrictive, not expansive:

[FERC's jurisdictional] ruling here is limited to the specific circumstances during a past time period in the California PX and ISO spot markets during which all sellers received the same price for a given transaction. That price was determined by FERC-jurisdictional entities (the PX and ISO) in FERC jurisdictional markets under a single price auction format, as originally set and later modified by FERC, for sales of electric energy for resale in interstate commerce.

JER 207.

Public Entity Petitioners complain that including governmental entities' Cal PX and CAISO sales in the refund plan would not allow them to retain unjust and

unreasonable rates to which they claim FPA § 201(f) entitles them. Br. at 51. But, FERC's jurisdictional determination here was consistent with and promoted an underlying objective of the FPA: to protect customers from excessive rates. JER 180. "One of the FPA's principal goals is to ensure that the rates customers pay for their electricity are 'just and reasonable.'" *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 88 (1990); *see also Cities of Anaheim v. FERC*, 723 F.2d 656, 663 (9th Cir. 1984) ("Congress' primary purpose in enacting the [FPA] was protection of consumers from excessive rates and inadequate service."). Here, that goal could be reached only by making all sales at issue subject to refund. "[I]f the price for a specific sale is found to be unjust and unreasonable, then all sellers who obtained that price received an unjust and unreasonable rate. To the extent the Commission determines refunds are an appropriate remedy for that sale, consumers can only be made whole by refunds from all sellers who received the excessive price." JER 180.

Public Entity Petitioners' next argument mischaracterizes FERC as stating governmental entities waived any "subject matter jurisdiction" objections they had regarding their Cal PX and CAISO sales. Br. at 53. As Petitioners' quotation from FERC's order makes clear, FERC found only that governmental entities waived any *personal* jurisdiction objections. Br. at 52 (quoting JER 205 ("[G]overnmental

entities that made sales in the PX and ISO spot markets waived any exemption they otherwise may have had from the Commission’s personal jurisdiction regarding those sales.”)). Likewise, Salt River’s claim (Br. at 13-14) that FERC departed from its precedent in *South Carolina*, 75 FERC at 61,696, that a governmental entity cannot waive limitations on the Commission’s *subject matter* jurisdiction misses FERC’s point.

Contrary to Public Entity Petitioners’ (Br. at 55-58, 61) and Salt River’s (Br. at 20-21) contention, the October 2, 2000 refund effective date applied from the outset to all sales into the Cal PX and CAISO spot markets, including those by governmental entities. The Commission set the refund effective date based on the August 2, 2000 complaint by San Diego Gas & Electric Company (“SDG&E”) (CP ER 570-88). JER 33. That complaint was cast in general terms against “Sellers of Energy and Ancillary Services Into Markets Operated by the [CAISO] and the [Cal PX],” CP ER 570, and requested that “the Commission find that rates in excess of \$250.00 per MWh for sales into the markets for energy and ancillary services operated by the [CAISO] and the [Cal PX] are unjust and unreasonable . . . .,” *id.* at 588. Moreover, the complaint asserted that: “the ISO-coordinated wholesale markets that are subject to the Commission’s exclusive jurisdiction are dysfunctional, inefficient, and incapable of producing just and reasonable rates

when loads reach moderately high levels,” *id.* at 581, and “prevalent wholesale prices – prices subject to this Commission’s jurisdiction – are neither just nor reasonable: suppliers are selling electricity at prices that far exceed prices produced by competition . . . .,” *id.* at 583. Fairly read, the complaint encompassed all sales made in the CAISO and Cal PX markets.

In addition, the Commission explained:

We made clear in our order authorizing establishment of the PX and the ISO that, “[o]nce filed, the rate schedules and related contracts, rules and protocols will be subject to the exclusive jurisdiction of the Commission under sections 205 and 206 of the FPA, 16 U.S.C. sections 824d, 824e (1994).”<sup>26</sup> Thus, all sellers in the PX and ISO markets, including governmental entities, were on notice that if they participated in those markets, they would do so subject to the terms of the ISO and PX tariffs and concomitant FERC jurisdiction. Our order authorizing the PX and ISO to operate provided further notice that the same rules and obligations applied to all sellers and sales made in the PX and ISO spot markets. For example, the order established that all PX and ISO rules, protocols, procedures and standards applied to all entities selling energy in the PX and ISO markets.<sup>27</sup>

JER 205.

---

<sup>26</sup> Citing *Pacific Gas & Elec. Co.*, 77 FERC at 61,804.

<sup>27</sup> Citing *Pacific Gas & Elec. Co.*, 81 FERC at 61,580-87.

The Commission also found that all sellers, including governmental entities, were on notice that their sales into the Cal PX and CAISO spot markets were subject to refund as of October 2, 2000.

Under the single price auction mechanism that operated in the centralized ISO and PX spot markets, all sellers agreed to accept the same clearing price for any given sale. From the time the Commission acted on SDG&E's complaint, all sellers into those markets were on notice that those clearing prices, and the market rules that set the clearing prices, were subject to change if they were found to be unjust and unreasonable. . . . Our action here establishes a revised method for calculating the just and reasonable clearing prices to be applied in those markets for the period beginning October 2, 2000. . . . Our action thus revises the market clearing prices that all market participants previously agreed to accept for their sales. In this context we see no reason to treat [governmental entity] sellers differently, as they are receiving the same price, the just and reasonable market clearing price established pursuant to market rules approved by this Commission, that they expected to obtain for their wholesale sales into the centralized ISO and PX spot markets.

JER 179; *see also* JER 180, 204-06. Thus, all sellers into the Cal PX and CAISO markets, including governmental entities, were on notice from the outset that their sales in the PX and ISO spot markets were subject to Commission jurisdiction and possible refunds any time the price was excessive. JER 205-06.

That notice was not negated, as Public Entity Petitioners (Br. at 57-58) and Salt River (Br. at 20-21) posit, by intervening events. JER 205 n.43. As discussed above, SDG&E's complaint, which instituted the proceeding, concerned all aspects



of the CAISO and Cal PX markets and put all sellers on notice that their sales as of October 2, 2000 would be subject to potential refunds. Moreover, the first refund filing (for January 2001) included governmental entity sales in the refund calculations. JER 114. When the Commission denied the claim regarding governmental entity sales, stating only that it “ha[d] no authority to order such sellers to make refunds,” JER 114, SDG&E (and others) sought rehearing, FERC ER 52-55. SDG&E’s rehearing pointed out that “[a]ll sellers in the wholesale markets serving California consumers have been on notice of possible refunds since SDG&E filed its August 2, 2000, complaint initiating this proceeding.” FERC ER 53. The July 25 Order granted rehearing on that point. JER 178. As FERC’s statements in the November 1 and March 9 Orders were subject to rehearing, they could not reasonably be relied upon to negate the notice provided in this proceeding.

To assuage any lingering concern as to whether the October 2, 2000 refund effective date applied from the outset to sales by governmental entities, the Commission provided an alternative basis – that the adjudicatory jurisdictional determination here should apply retroactively under the five-factor test enunciated in *Williams Natural Gas Company v. FERC*, 3 F.3d 1544, 1553-55 (D.C. Cir. 1993). JER 180-81, 210-12.

Public Entity Petitioners challenge the Commission’s analysis of the five factors. Br. at 63-64. First, they assert “this is not a case of first impression since FERC has previously and consistently held that it has no refund jurisdiction over [governmental entities].” Br. at 63 (citation omitted). The Commission found otherwise, explaining that it “had never dealt with market-wide refunds in a single price auction for widespread centralized spot purchases of wholesale electricity in interstate commerce.” JER 211 (quoting JER 181). “As the Commission has never interpreted how the FPA should be adapted to fulfill its purposes in the particular circumstances here, which reflect a new ratemaking paradigm, this case is one of first impression.” JER 211.

On the second criterion, Public Entity Petitioners claim the refund rulings “represent an abrupt departure from well-established law,” rather than an effort to fill a void in an unsettled area of law. Br. at 63. But, “the Commission has never [before] addressed the legal question of how refunds should apply in these particular circumstances, and thus the ruling is properly seen as an effort to fill a void in an unsettled area. . . . In the context of this case, the March 9 Order does not constitute well-settled law. Not only was the Order subject to numerous rehearing requests, but also it was in place for only four months before issuance of the July 25 Order . . . .” JER 211-12; *see also* JER 181 (“The Commission seeks to

redress a previously unencountered situation in a manner that furthers the underlying purpose of the FPA.”).

Public Entity Petitioners also challenge FERC’s finding regarding the third criterion, which addresses the extent to which parties relied on the old rule. Br. at 63. “Here, there was no old rule to apply to the precise situation.” JER 181. “[A]gain, the Commission is not asserting jurisdiction over [governmental entities], but only over the interstate sales for resale that they made in the California PX and ISO spot markets, which were established and regulated entirely under Commission FPA authority.” JER 212. Moreover, “[a]s early as the August 23 Order responding to complaints that sales in those markets might exceed the just and reasonable standard, and well before the October 2 refund effective date, governmental and non-governmental sellers were aware that possible remedies for all sales violating that standard in those markets included refund liability.” JER 212.

Despite Public Entity Petitioners’ claims to the contrary, Br. at 63-64, the fourth and fifth criteria, regarding undue burden and fundamental fairness, respectively, also weighed in favor of retroactivity. JER 181, 212. It is neither an undue burden nor fundamentally unfair for governmental sellers to refund amounts received over and above the just and reasonable rate. JER 181, 212. On the other

hand, if governmental entity sales above just and reasonable rates are not subject to refund, the “FPA’s primary statutory interest of preventing exploitation of consumers” would be thwarted. JER 212. Accordingly, evaluation of the five relevant factors favored retroactive application here. JER 212.

Salt River argues that “FERC does not gain jurisdiction over sales rates charged by the governmental entity merely because it executed an agreement with a public utility.” Br. at 22. FERC did not claim to gain jurisdiction over governmental entity sales under the circumstances here based on the fact governmental entities executed Cal PX and CAISO agreements. Rather, the Commission found, governmental entities had notice of FERC jurisdiction over their sales here given that “[g]overnmental entities or their agents entered into various arrangements that explicitly acknowledged the Commission’s jurisdiction regarding their sales in the PX and the ISO.” JER 205; *see also* JER 180.

Finally, BPA’s claim that FERC had no jurisdiction over its sales into the Cal PX and CAISO single-clearing price spot markets pretends that BPA set the rates at which those sales were made. Public Entity Petitioners’ Br. at 69-83. In fact, however, all sales in the Cal PX and CAISO spot markets, including those by BPA, were made at the hourly single-clearing prices determined by the FERC-jurisdictional Cal PX and CAISO in accordance with their FERC-approved tariffs.

Thus, BPA's argument regarding the limited role FERC has in reviewing BPA-determined rates under the Northwest Power Act is inapposite.

**B. CAISO Out-Of-Market Spot Transactions**

CAISO made out-of-market ("OOM") purchases only at the last minute (*i.e.*, 24 hours or less before delivery) when grid reliability was at risk because supply was insufficient to meet market demand. JER 7, 182, 218. When CAISO made OOM calls to backstop its spot markets, therefore, potential suppliers knew CAISO was in a must-buy situation. JER 7, 182. Those circumstances provided sellers a clear opportunity to take advantage of the California markets' flawed structure and rules to obtain unjust and unreasonable rates. JER 7, 182. Accordingly, the Commission found that CAISO OOM spot transactions would be subject to refund. JER 182-83.

This potential refund liability applied to all CAISO OOM spot transactions, including those with governmental entities. While OOM spot transactions occur outside the CAISO spot market, "they still fall under the aegis of the FERC-approved CAISO Tariff as sales into the CAISO market." JER 556 P 84. All OOM spot transactions were entered into, and payment for them was made, pursuant to FERC-jurisdictional CAISO Tariff Section 2.3.5.1.5. FERC ER 17 at P 35; JER

218, 556 at P 85. In fact, those “sales could only be made pursuant to the CAISO Tariff.” JER 556 at P 83.

Thus, “governmental entities knew or should have known that such transactions were governed by the FERC-approved CAISO Tariff.” JER 556 P 85. “Because OOM transactions were authorized by the Commission and operate according to [Commission] rules, such transactions involving governmental entities, like spot market transactions involving governmental entities, fall under the Commission’s jurisdiction.” JER 556 P 84. *See also* JER 205 (the Commission “made clear in [its] order authorizing establishment of the PX and ISO that, “[o]nce filed, the rate schedules and related contracts, rules and protocols will be subject to the exclusive jurisdiction of the Commission under Sections 205 and 206 of the FPA.”) (quoting *Pacific Gas & Elec.*, 77 FERC at 61,804) (further citation omitted).

Salt River contends that “it is difficult to imagine when, if ever, FERC would not claim jurisdiction over sales made by a governmental entity.” Br. at 13-14; *see also* Br. at 17. That contention is belied by the innumerable instances outside the context of the instant circumstances in which FERC has not claimed jurisdiction over sales by governmental entities. In the OOM context, as in the CAISO and Cal PX spot market context, “the key issue is whether particular sales could *only* be

made pursuant to the [FERC-jurisdictional] Tariff.” JER 556 P 83 (emphasis added). Because CAISO OOM spot transactions could only be made pursuant to the CAISO Tariff, FERC has jurisdiction over those transactions regardless of whether the seller was a governmental entity. Again, FERC’s reasonable interpretation of the entire FPA, including the § 201(f) exemption, in the particular circumstances at issue is due deference and should be affirmed.

Indicated Public Entity Petitioners assert that the May 12 Order failed to explain how CAISO OOM spot transactions with governmental entities could be subject to FERC jurisdiction in light of the Commission determination that it had jurisdiction over governmental entity sales in the CAISO and Cal PX spot markets because those sales were in FERC-jurisdictional centralized markets in which all sellers received the same clearing price. Br. at 77-81. Contrary to Petitioners’ claim, the latter ruling does not preclude the former.

The Commission explained that single-clearing price FERC-jurisdictional market sales are not the only governmental entity sales over which FERC has jurisdiction. JER 556 PP 83-85. FERC’s jurisdiction over CAISO OOM spot market transactions derives from the fact that they can be made only under the

FERC-jurisdictional CAISO Tariff,<sup>28</sup> and, therefore, are authorized by and must follow Commission rules. JER 556 PP 84-85. “[E]ven if a governmental entity had not signed a Participating Generator Agreement with the CAISO, so long as the CAISO invoked its OOM tariff authority to call upon a non-participating generator to provide short-term energy for reliability purposes on the CAISO-controlled grid,” it “knew or should have known that such transactions were governed by the FERC-approved CAISO Tariff.” JER 556 P 85.

---

<sup>28</sup> The Commission rejected the notion that the CAISO OOM spot transactions occurred under the WSPP Agreement, thereby distinguishing the circumstance at issue here from that in *Puget Sound Energy, Inc.*, 103 FERC ¶ 61,348, *aff'd*, 105 FERC ¶ 61,183 (2003). Unlike the CAISO Tariff, the WSPP Agreement indicates nothing in it provides the Commission with jurisdiction over parties that are not otherwise subject to Commission jurisdiction. JER 556; *Puget Sound Energy, Inc.*, 103 FERC at P 40.



## CONCLUSION

For the reasons stated, the Commission's jurisdictional determinations should be affirmed in all respects.

Respectfully submitted,

Dennis Lane  
Solicitor

Robert H. Solomon  
Deputy Solicitor

Beth G. Pacella  
Attorney

Federal Energy Regulatory  
Commission  
Washington, D.C. 20426  
TEL: (202) 502-6048  
FAX: (202) 273-0901

January 31, 2005



## **CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 10,482 words, not including the tables of contents and authorities, the glossary, the certificates of counsel and the addendum.

---

Beth G. Pacella  
Attorney for Federal Energy  
Regulatory Commission



**STATEMENT OF RELATED CASES**

The Commission agrees with the Statement of Related Cases found in the Public Entity Petitioners' Brief.

---

Beth G. Pacella  
Attorney for Federal Energy  
Regulatory Commission



*Bonneville Power Administration,  
et al. v. FERC  
9th Cir. No. 02-70262, et al.*

**Docket Nos. EL00-95, et al.**

### **CERTIFICATE OF SERVICE**

In accordance with Paragraph 8 of the Court's Order issued in these consolidated cases on November 24, 2004, I hereby certify that on this 31st day of January, 2005, I have caused the foregoing Brief of Respondent Federal Energy Regulatory Commission to be served upon each of the persons on the attached list in accordance with the agreement of all parties, by electronic distribution via the Listserv established by the Federal Energy Regulatory Commission in FERC Docket Nos. EL00-95, *et al.* (the "Listserv").

Additionally, I certify that I have served copies of the Supplemental Excerpts of Record of Respondent Federal Energy Regulatory Commission in the Jurisdictional Cases upon each of the persons on the attached list by electronic distribution via the FERC Listserv.

I further certify that for all documents served electronically, (1) I have confirmed or will confirm that the documents have been processed by the Listserv and are being distributed to all parties; and (2) I have sent a separate "service announcement" electronic mail message on the Listserv to all parties providing the titles of the documents being served.

Finally, I certify that for any party opting out of the electronic distribution arrangement described above, I will cause the foregoing Brief and Supplemental Excerpts of Record to be served via regular mail or overnight delivery, as requested by any such party, as soon as such request is made known to me.

---

Carol J. Banta  
Attorney for Federal Energy  
Regulatory Commission