

ORAL ARGUMENT DATE NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 04-1396

**SOUTHERN CALIFORNIA EDISON COMPANY,
Petitioner,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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JULY 19, 2005

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent Federal Energy Regulatory Commission hereby certifies as follows:

A. Parties and Amici

All parties and intervenors appearing before the Commission and this Court are listed in Petitioner's brief. There are no *amici*.

B. Rulings Under Review

The following orders of the Federal Energy Regulatory Commission are under review here:

1. *Ormesa LLC*, "Order Granting Recertification," 107 FERC ¶ 61,043 (Apr. 16, 2004), R. 15, J.A. 63; and
2. *Ormesa LLC*, "Order Denying Rehearing," 108 FERC ¶ 61,299 (Sept. 22, 2004), R. 22, J.A. 109.

C. Related Cases

This case has not previously been before this Court or any other Court. Counsel is not aware of any other related cases pending before this or any other Court.

Robert H. Solomon
Deputy Solicitor

July 19, 2005

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GLOSSARY

Certification Order	<i>Ormesa LLC</i> , “Order Granting Recertification,” 107 FERC ¶ 61,043 (Apr. 16, 2004), R. 15, J.A. 63
Commission or FERC	Federal Energy Regulatory Commission
Edison	Petitioner Southern California Edison Company
FPA	Federal Power Act
J.A.	joint appendix page
Ormesa	Intervenor Ormesa LLC
P	paragraph number
Pet. Br.	Petitioner’s opening brief
PURPA	Public Utility Regulatory Policies Act of 1978
QF	qualifying facility; <i>i.e.</i> , qualifying cogeneration or qualifying small power production facility entitled to regulatory benefits under PURPA
R.	record page
Rehearing Order	<i>Ormesa LLC</i> , “Order Denying Rehearing,” 108 FERC ¶ 61,299 (Sept. 22, 2004), R. 22, J.A. 109

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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) reasonably determined, in a manner consistent with the Public Utility Regulatory Policies Act of 1978 (“PURPA”), implementing regulations, and governing precedent, the amount of electricity that Ormesa LLC (“Ormesa”) can sell to Southern California Edison Company (“Edison”) without losing its status as a “qualifying facility” (“QF”)?

STATUTES AND REGULATIONS

Relevant sections of PURPA, the Federal Power Act (“FPA”), and the Commission’s implementing regulations, *see* 18 C.F.R. Part 292, are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

Ormesa owns a geothermal-fueled electric generating facility. For twenty years, the facility has operated as a QF under PURPA and the Commission’s regulations, entitled to sell its output to the local electric utility, Edison.

In 2004, Ormesa filed with the Commission an application to determine the precise certified amount of electric power it can sell to Edison without losing QF status. Recognizing that FERC precedent allows a QF to sell electric power only up to its net output (*i.e.*, its gross electric power output less the amount used for internal station power), Ormesa sought a Commission declaration that its net output includes power used both: (1) to extract hot fluids from geothermal wells and to transport those fluids to its generating facility; and (2) to reinject cooled geothermal fluids back into the ground. Edison, taking the opposite position, responded that both categories of power should be subtracted from Ormesa’s gross output to determine the certified net output of the Ormesa facility that Edison is obligated to purchase.

The Commission adopted neither position. *See Ormesa LLC*, 107 FERC ¶ 61,043 (Apr. 16, 2004), J.A. 63, *reh'g denied*, 108 FERC ¶ 61,299 (Sept. 22, 2004), J.A. 109. On one hand, it agreed with Ormesa, and disagreed with Edison, that electrical power associated with initial extraction and transportation activities can be included in the facility's net output. On the other, it agreed with Edison, and disagreed with Ormesa, that electric power associated with reinjection activity cannot be included in the facility's net output. It also clarified that, regardless of the certified net output of the facility, Ormesa can sell to Edison power equal to the amount purchased from another QF.

II. STATEMENT OF THE FACTS

A. Statutory and Regulatory Framework

Congress enacted PURPA to promote the development of new types of generating facilities and to conserve the use of fossil fuels. *E.g.*, *FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982). Because traditional utilities, like Edison, controlled the transmission lines and were reluctant to purchase power from non-traditional facilities, PURPA directed the Commission to promulgate rules requiring utilities to purchase power from "qualifying" cogeneration and small power production facilities. *E.g.*, *id.* at 750-51; *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 405 (1983).

Under PURPA, the Commission has two principal tasks. First, under

PURPA section 201, which amended FPA sections 3(17)-(18), 16 U.S.C. §§ 796(17)-(18), the Commission determines which “cogeneration facilities” and “small power production facilities” are QFs entitled to various regulatory benefits under PURPA. A “qualifying small power production facility,” like Ormesa’s geothermal facility, must meet size, fuel use, and ownership requirements.¹ See FPA § 3(17)(A)-(E), 16 U.S.C. § 796(17)(A)-(E). The one requirement relevant to this case, the ownership requirement, mandates that a QF must “be owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).” FPA § 3(17)(C)(ii), 16 U.S.C. § 796(17)(C)(ii). See also 18 C.F.R. §§ 292.201-.207 (setting out standards and procedures for determining eligibility as PURPA QFs).

Second, under PURPA section 210, 16 U.S.C. § 824a-3, which did not amend the FPA, the Commission determines what regulatory benefits are “necessary to encourage cogeneration and small power production, and to encourage geothermal small power production facilities of not more than 80

¹ The statute specifies a “geothermal facility” as an eligible small power production facility, 16 U.S.C. § 796(17)(A), and “geothermal resources” as an eligible energy source, 16 U.S.C. § 796(17)(A)(i). See, e.g., *Southern California Edison Co. v. FERC*, 195 F.3d 17 (D.C. Cir. 1999) (concerning eligible energy sources and permissible uses of fossil fuels for qualifying small power production facilities); *New Charleston Power I, L.P. v. FERC*, 56 F.3d 1430 (D.C. Cir. 1995) (same).

megawatts capacity.” 16 U.S.C. § 824a-3(a). Specifically, PURPA section 210 directs the Commission to develop rules which require “electric utilities to offer to – (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities, and (2) purchase electric energy from such facilities.” *Id.* § 824a-3(a)(1)-(2).

In accordance with this directive, the Commission’s implementing regulations direct “each electric utility” to purchase “any energy and capacity which is made available from a qualifying facility.” 18 C.F.R. § 292.303(a).² Electric utilities have an obligation to purchase two types of QF energy and capacity: (1) that which is made available “directly to the electric utility” by the selling QF, *id.* § 292.303(a)(1); and (2) that which is made available “indirectly” by sale by another QF and transmitted by “any other electric utility,” *id.* §§ 292.303(a)(2), 292.303(d).

B. Distinction Between Gross Output and Net Output

As explained in *Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037, 1040 (D.C. Cir. 2000), “[t]here are two ways of measuring the power production capacity of a QF.” One measure is gross output, “which is all electricity produced by the facility.” *Id.* The other measure is net output, “which is gross output less

² Similarly, “each electric utility” is obligated to “sell to any qualifying facility . . . any energy and capacity requested by the qualifying facility.” 18 C.F.R. § 292.303(b).

the electricity used in the QF's own operations." *Id.*

Relevant provisions of PURPA and its implementing regulations are unclear as to whether an electric utility's obligation to purchase from a QF all "available" power obligates it to purchase the QF's gross output or net output. *See Connecticut Valley*, 206 F.3d at 1044 (noting ambiguity). Shortly after the Commission issued its QF regulations, it determined that the power production capacity of a QF is "the maximum net output of the facility which can be safely and reliably achieved under the most favorable operating conditions." *Occidental Geothermal, Inc.*, 17 FERC ¶ 61,231 at 61,445 (1981). It defined "net output" as the facility's "send out after subtraction of power used to operate auxiliary equipment in the facility necessary for power generation (such as pumps, blowers, fuel preparation machinery, and exciters) and for other essential electricity uses in the facility." *Id.*³

In *Power Developers, Inc.*, 32 FERC ¶ 61,101 (1985), the Commission answered definitively that the qualifying capacity of a QF is its net output, rather than its gross output. The Commission reasoned that if a QF were allowed to sell its gross output at the utility's avoided cost and to purchase power from the utility for its internal station needs, the QF would, in essence, be selling more power than

³ In *Occidental*, the Commission held that net output is the appropriate measure of the 80 MW size limitation for qualifying small power production facilities.

the facility, standing alone, is capable of delivering. *Id.* at 61,276. In other words, the QF would be receiving avoided cost prices for an amount of power that the purchasing utility has not avoided generating or procuring. *Id.* Such a result would be inconsistent with the underlying intention of PURPA and its implementing regulations: to place purchasing utilities and their ratepayers in the same financial position as if they had not purchased QF power. *Id.*; *see also Penntech Papers, Inc.*, 48 FERC ¶ 61,120 at 61,423 (1989) (a QF’s net output is “the amount of electric power actually capable of being displaced” by the QF, *i.e.*, “the gross electric power output of the facility less the electric power consumed by the facility in the power production process”).

In *Turners Falls Ltd. Partnership*, 53 FERC ¶ 61,075 (1990), *order on clarification*, 55 FERC ¶ 61,487 (1991), the Commission clarified the consequence – loss of QF status – that would result from a QF’s selling in excess of its net output. The Commission’s determination rested not only on policy considerations, but also on the statutory requirement, *see supra* page 4, that a QF must “be owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).” FPA § 3(17)(C)(ii), 16 U.S.C. § 796(17)(C)(ii). A QF selling its gross output to an electric utility, while also purchasing power for its internal operations from that same utility, would, in an economic sense, be selling back to the utility

(perhaps at a higher price) power that was generated by the utility, in violation of the statutory prohibition against utility ownership of QFs. 55 FERC at 62,667-68.

Finally, in *Connecticut Valley Electric Co. v. Wheelabrator Claremont Co., et al.*, 82 FERC ¶ 61,116 (1998), *reh'g denied*, 83 FERC ¶ 61,136 (1998), *aff'd in part, dismissed in part, Connecticut Valley Electric Co. v. FERC*, 208 F.3d 1037 (D.C. Cir. 2000), the Commission “reiterate[d]” its earlier determination that a QF may not sell in excess of its net output. 82 FERC at 61,411.⁴ The Commission clarified, among other things, that the general ban on sales in excess of net output does not, however, extend to sales of incremental QF power; *i.e.*, power generated by other qualifying cogeneration and small power production facilities. 82 FERC at 61,418 & n.17 (citing *Turners Falls*), 61,419 & n.21; 83 FERC at 61,612 & nn. 34-35.

C. The Ormesa Geothermal Facility

Ormesa owns and operates a geothermal small power production facility located in Imperial County, California. *See* Ormesa Application for Recertification of QF Status, R. 8 at 1, J.A. 15. There are three distinct aspects of its operation.

1. Extraction and Transportation of Geothermal Fluids

Seven geothermal production wells produce geothermally-heated fluids

⁴ Because of uncertainty prior to *Turners Falls*, the Commission determined to apply that ruling prospectively only, *i.e.*, to QFs selling in excess of their net output under contracts entered into after the date of *Turners Falls*.

(brine). J.A. 18. Electric pumps, consuming 3.24 MW of electricity provided by another geothermal QF, extract the geothermal brine from the wells and transport the brine to the generating facility. J.A. 20.

2. Fuel Handling at the Facility

The geothermally-heated fluids are transported directly into the generating facility. J.A. 18-19. The fluids are pumped to vaporizers, where they vaporize the working fluid, isopentane.⁵ The gaseous isopentane then flows directly to and powers the turbines and the generators, from which electric energy is produced. The gross electric generating capacity of the facility is 19.95 MW; 3.38 MW of that capacity is used for fuel handling and other internal station power uses at the facility. J.A. 19.

3. Reinjection of Spent Fluids

The spent (cooled) geothermal fluids leave the generating facility and are reinjected into field wells. J.A. 19-20. According to Ormesa, reinjection of spent fluids is required by applicable environmental and land use law; it also helps to maintain underground pressure and thus aids in the extraction process. J.A. 19, 23. The reinjection process consumes 1.35 MW of electricity, which is provided by another geothermal QF.

D. Ormesa's Application and Edison's Response

⁵ See, e.g., <http://www.inchem.org/documents/icsc/icsc/eics1153.htm> (describing chemical properties of isopentane).

Ormesa applied, on February 3, 2004, for recertification of its geothermal facility as a QF.⁶ *See* R. 8, J.A. 1. Ormesa sought to confirm that the net capacity of its facility, available for sale to Edison, is 16.57 MW. J.A. 16, 24.

To reach that figure, Ormesa subtracted the 3.38 MW of power used for fuel handling and station use from the gross capacity of 19.95 MW. J.A. 19. Ormesa argued that the 3.24 MW of power used for initial extraction and transportation should not also be subtracted from gross output. Citing *GEO East Mesa Limited Partnership*, 55 FERC ¶ 61,255 (1991) (“*GEO*”), Ormesa argued that the power used to extract geothermal fluids and transport them to the generating facility is not considered station power, and thus need not be subtracted from gross output. J.A. 21-22.

Ormesa also argued that the 1.35 MW of power used for later reinjection should not be subtracted from gross output. Recognizing that Commission precedent is not so clear as to the appropriate treatment of reinjection power, Ormesa argued that the Commission’s *GEO* treatment of extraction/transportation power should also apply to reinjection power. According to Ormesa, the reinjection process is unrelated to the power production process, but simply disposes of the by-product of generation, and thus should not be considered in

⁶ The facility was originally certified by the Commission as a QF in 1986. *See Ormesa Geothermal II*, 36 FERC ¶ 62,030 (1986). According to Ormesa, *see* J.A. 15, it subsequently applied for self-recertification in 1995 and 2002. *See* 18 C.F.R. § 292.207 (alternative procedures for obtaining QF status).

computing the net output of its facility. J.A. 22-24.

Edison protested Ormesa's filing. *See* R. 10, J.A. 37. Edison did not challenge Ormesa's continuing eligibility for QF status. Rather, it challenged Ormesa's claim that its net output for sale to Edison is 16.57 MW. *See* J.A. 38 (noting that Ormesa's application for QF recertification is, in effect, a request for a declaratory order as to the net output of its facility). Edison argued for a lower figure to reflect additional station power uses.

Specifically, Edison argued that power used for initial extraction and transportation activities should be subtracted from the net output of Ormesa's facility. *See* J.A. 48-49. Edison asked the Commission to reconsider and reverse *GEO*, so as to conclude that extraction activity represents the beginning of power production activity. Edison also argued that power used for later reinjection activity should be subtracted from the net output of Ormesa's facility. *See* J.A. 41-48. Edison urged the Commission to conclude that the reinjection of cooled fluids, like the initial extraction of hot fluids, represents a necessary and integral part of the power production process.

E. The Commission's Decision

The Commission granted Ormesa's request for QF recertification, but at a lower certified net capacity than it requested. *See Ormesa LLC*, 107 FERC ¶ 61,043 (Apr. 16, 2004), R. 15, J.A. 63 ("Certification Order").

The Commission first noted that Ormesa and Edison have “contrary interests.” *Id.* at P 14, J.A. 66. Ormesa, like all QFs, “is interested in maximizing the amount of capacity and energy” that it can sell; Edison, like all purchasing utilities, “is interested in minimizing the amount that the QF can sell.” *Id.* For this reason, Ormesa is motivated to argue that its power uses are not station power (or auxiliary) uses that, consistent with Commission policy on the subject, *see supra* pages 6-7, must be subtracted to determine the facility’s net output. Edison is motivated to argue the opposite. *Id.* at PP 14-17, J.A. 66-67.

The Commission agreed with Ormesa that the initial extraction and transportation of geothermal fluids is governed by *GEO*. In *GEO*, the Commission found that power used to extract heated brine and pump it to a generating facility (in contrast with power used during later fuel handling at the facility) did not represent station power used for electricity generation. *Id.* at P 18 (citing *GEO*, 55 FERC at 61,813-14), J.A. 67. The Commission reached the same conclusion here, finding that the geothermal brine is not the “working fluid” at Ormesa’s facility. *Id.* at P 20, J.A. 68. All the brine does is heat the isopentane which, when vaporized, drives the turbines and the generators. *See supra* pages 8-9 (explaining stages of production). The Commission declined Edison’s invitation to overturn its conclusion in *GEO* and now treat the geothermal brine (rather than the isopentane) as the working fluid at the facility. For these reasons, the Commission decided not

to subtract 3.24 MW of power associated with initial extraction and transportation activities in determining the net output of the Ormesa facility.

The Commission did, however, agree with Edison (and not with Ormesa) that the 1.35 MW of power associated with later reinjection activity should be subtracted in calculating the facility's net output.⁷ After its heat is removed, the geothermal brine is "effectively spent fuel" that must be disposed of in some manner. Certification Order at P 20, J.A. 68. Such disposal is a necessary and integral part of the power production process. *Id.* Accordingly, the power associated with the disposal of spent fuel must be subtracted from gross output to determine the facility's net output.

The Commission thus certified the Ormesa facility as having a net output of 15.22 MW (19.95 MW gross output less 3.38 MW for fuel handling less 1.35 MW for reinjection). *Id.* at P 22, J.A. 69. Recognizing, however, Ormesa's representation that power used for reinjection comes from another geothermal QF, *see* J.A. 15-16, 20, the Commission allowed Ormesa to sell an additional 1.35 MW of QF power without jeopardizing its QF status. *Id.* at PP 21-22, nn. 8, 10, J.A. 68-69 (citing *Connecticut Valley* for proposition that "a sale in excess of net output would deprive a facility of its QF status unless the incremental sale consisted of

⁷ The parties were in agreement that 3.38 MW of power associated with fuel handling at the facility should be subtracted. *See* Certification Order at P 19, J.A. 68.

power solely from cogeneration or small power production facilities”).

Both Edison and Ormesa filed requests for rehearing. *See* J.A. 70 (Ormesa), 94 (Edison). Ormesa argued that the Commission should have certified the net output of its facility at 16.57 MW (*i.e.*, 1.35 MW for reinjection should not have been subtracted). Edison argued that the Commission should have certified the net output of the facility at 11.98 MW (*i.e.*, 3.24 MW for initial extraction, as well as 1.35 MW for later reinjection, should have been subtracted). Edison also argued that the Commission should not have adopted a new exception for resales of QF power.

The Commission denied both requests for rehearing. *See Ormesa LLC*, 108 FERC ¶ 61,299 (Sept. 22, 2004), R. 22, J.A. 109 (“Rehearing Order”). It continued to find that power for initial extraction and transportation is not station power (auxiliary load) that must be subtracted from gross output, while power for later reinjection is station power that must be subtracted. *Id.* at PP 11-14, J.A. 112-13. It also clarified that its decision to allow Ormesa to sell the output of other QFs does not represent a new policy, but rather is entirely grounded on existing (statutory and regulatory) authority. *Id.* at PP 9-10, J.A. 111.

SUMMARY OF ARGUMENT

The Commission, in allowing Ormesa to sell to Edison an amount of power equal to that it procures from another geothermal QF, did not create a new exception to the net output rule. Rather, it followed the exception recognized earlier in *Connecticut Valley*, based on the statutory ownership requirement and earlier cases construing the net output rule. By selling only QF power that it purchases or generates itself, Ormesa will, consistent with PURPA, displace traditional means of generation and will not, in an economic sense, compel Edison to buy back its own power at a higher price. If, somehow, Ormesa collaborates with other QFs to sell non-qualifying power to Edison, in contravention of its representations to the Commission and in violation of PURPA requirements, then it no longer can rely upon the Commission's certification in the instant orders.

Similarly, the Commission followed its *GEO* precedent in finding that extraction power should not be treated as station power that must be subtracted from Ormesa's net output. The fact that the Commission reached a different conclusion as to the treatment of reinjection power is not determinative, as the Commission found that the extraction and reinjection processes are materially different. The Commission's expert analysis of the various stages of operation of Ormesa's geothermal facility, resting on scientific and technical processes and requiring policy judgments, is entitled to judicial respect.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of Commission decisions falls under the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A). The relevant inquiry for the reviewing court under that familiar standard is whether the agency has “examine[d] the relevant data and articulate[d] a . . . rational connection between the facts found and the choice made.” *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Commission’s findings as to facts, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825l(b); *see, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) (“highly deferential” review to determine whether agency decision is based on substantial evidence in the record). Deference is particularly appropriate where, as here, “regulation concerns ‘a complex and highly technical regulatory program,’ in which the identification and classification of relevant ‘criteria necessarily require significant expertise and entail the exercise of judgment ground in policy concerns.”” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)); *see also, e.g., B&J Oil and Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) (courts are “particularly

reluctant to interfere” with agency decisions on “complex scientific or technical questions”).

As explained below, the Commission’s decisions, to calculate the certified net output of the Ormesa facility and to allow the facility, regardless of its net output, to sell power equal to the amount purchased from another QF, follow Commission policy and precedent, are reasonable and fully explained, and thus should be upheld on review.

II. THE COMMISSION REASONABLY APPLIED EXISTING POLICY IN ALLOWING ORMESA TO RESELL POWER PURCHASED FROM ANOTHER QF

A. The Commission Applied to Ormesa an Existing Exception to the Net Output Rule

The Commission’s approach is not, as Edison charges (Pet. Br. 17), “curious” or otherwise exceptional. Ormesa requested Commission confirmation that the net power production capacity of its geothermal facility is 16.57 MW (JA 24); Edison responded that the certified net capacity should be much lower (11.98 MW). *See* Certification Order at P 14, J.A. 66 (explaining “[p]reliminarily” the diverging interests of the QF and the utility). Applying established policy concerning the calculation of a QF’s net output to the specific facts of this case, the Commission calculated a certified net output of 15.22 MW, after subtracting some (but not all) disputed load, a figure that fell between the competing figures advanced by the two parties.

Not stopping there, the Commission continued to respond to Ormesa's reference in its application that it "uses power from another geothermal QF" to provide electric power for both the initial extraction and transportation of hot geothermal fluids and the subsequent reinjection of cooled fluids. J.A. 15-16; *see also* J.A. 20 (Ormesa provides from its own facility power for fuel handling, while procuring power for other activities from "another geothermal QF"), 22 (seeking status of 1.35 MW of "pumping energy supplied by another QF" during reinjection).

Thus, Edison is mistaken in arguing (Pet. Br. 3, 20) that the Commission acted *sua sponte* or without reason in addressing the status of QF power supplied to Ormesa for reinjection activity. Ormesa placed that issue directly before the Commission. If the Commission had determined that reinjection power, like extraction power, did not represent station power that has to be subtracted from gross output, then the source of that power would not have mattered – Ormesa could have sold that amount of power to Edison regardless of its origin. Once the Commission determined – in agreement with Edison and disagreement with Ormesa – that the 1.35 MW of reinjection power purchased from another QF did represent station power that has to be subtracted from gross output, however, it then needed to determine whether Ormesa could nevertheless sell an equivalent amount of power, purchased from another QF, without losing its own QF status.

The Commission decided that Ormesa could make such a sale. The Commission did not, however, develop a brand new exception to the net output rule, as Edison repeatedly submits (Pet. Br. 2-4, 17, 19-20, 26). Rather, the Commission explicitly followed its approach from an earlier case:

Ormesa indicates that here the 1.35 MW will be purchased from another QF. In *Connecticut Valley Electric Company, Inc. v. Wheelabrator Claremont Company, L.P., et al.*, 82 FERC ¶ 61,116 at 61,418 & n.17, *order on reh'g*, 83 FERC ¶ 61,136 at 61,612 (1998), the Commission found that a sale in excess of net output would deprive a facility of its QF status unless the incremental sale consisted of power solely from cogeneration or small power production facilities. Therefore, notwithstanding the discussion above, given that 1.35 MW will be purchased from another QF, Ormesa is permitted to sell an additional 1.35 MW from its facility without jeopardizing its QF status.

Certification Order at P 22 n.10, J.A. 69; *see also id.* at P 21 & n.8, J.A. 68 (explaining that while the 1.35 MW of reinjection power “normally” would not be available for sale under the net output rule, it may, by virtue of being supplied by another QF, still be sold “without jeopardizing [Ormesa’s] QF status”).

Edison argues that the Commission’s reliance on *Connecticut Valley* is misplaced. Pet. Br. 31-32. But *Connecticut Valley* is directly on point. There, the Commission, relying on its holdings in earlier cases, explicitly recognized an exception to the general rule that a QF cannot sell power in excess of its net output: “[T]he exception is if the incremental output sold, *i.e.*, above net output, is solely from cogeneration or small power production facilities.” 82 FERC at 61,419 n.21;

see also id. at 61,418 (noting that the Commission “clearly stated” in *Turners Falls* “that a sale in excess of net output would deprive a facility of its QF status, unless the incremental sale was of power solely from cogeneration or small power production facilities”) and 61,419 (“reiterat[ing]” the same rule and exception). On rehearing in *Connecticut Valley*, the Commission explicitly clarified the status of “additional QF power,” delivered from one QF to another, by “reiterate[ing]” that the “sale of power over net output” does not deprive the facility of QF status as long as that incremental sale is “solely from cogeneration or small power production facilities.” 83 FERC at 61,612 & nn.34-35.

Thus, the Commission did not create an exception in the instant orders. Rather, it simply applied the exception recognized in its *Connecticut Valley* orders and based on earlier orders. Further, the *Connecticut Valley* orders were appealed to and upheld by this Court. *See Connecticut Valley*, 208 F.3d at 1044 (recognizing ambiguity in statute and deferring to the Commission’s reasonable articulation and application of the net output rule). To the extent Edison is now challenging the Commission’s ruling in *Connecticut Valley*, that challenge represents an improper collateral attack on long-final orders. *See, e.g., Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 174 (D.C. Cir. 1993); *see also Southwest Gas Corp. v. FERC*, 145 F.3d 365, 370 (D.C. Cir. 1998) (noting that the “Commission need not revisit the reasoning of a general order every time it applies

it to a specific circumstance”).

Edison attempts to downplay the relevant passages from *Connecticut Valley* as mere *dicta*. See Pet. Br. 18, 20. As the Commission responded in the Rehearing Order, however, “the statements taken from *Connecticut Valley* were not merely *dicta*.” 108 FERC at P 10, J.A. 112. Rather, those statements interpreted the statutory limitation on utility ownership of QFs: “[T]he prohibition against a QF’s selling in excess of its net output derives from the definitions in the statute, which provide that a qualifying facility be ‘owned by a person not primarily engaged in the generation or sale of electric power (*other than electric power solely from cogeneration facilities or small power production facilities*).’” *Id.* (quoting 16 U.S.C. §§ 796(17)(C)(ii), 796(18)(B)(ii)) (emphasis original).⁸

Thus, the regulatory exception from the general net output rule for power from other QFs, developed in earlier cases, is itself based on a statutory exception. Just as the statute allows a QF to be owned by a person primarily engaged in the

⁸ In this regard, the Rehearing Order (at P 10 n.8, J.A. 112) cited *Connecticut Valley*, 82 FERC at 61,418 & n.17, and *Connecticut Valley*’s discussion of *Turners Falls*, 55 FERC at 62,667. Even if Edison were correct that statements from those cases were not dispositive in those particular cases, that fact would have no bearing on the Commission’s ability to apply those statements to the facts of later cases. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“adjudicative cases may and do serve . . . as vehicles for the formulation of agency policies”); *Michigan Wisconsin Pipe Line Co. v. FPC*, 520 F.2d 84, 89 (D.C. Cir. 1975) (“[t]here is no question that the Commission may attach precedential, and even controlling weight to principles developed in one proceeding and then apply them under appropriate circumstances in a *stare decisis* manner”).

generation and sale of electric power, as long as that power comes from QFs, so, too, does the Commission allow a QF to sell power in excess of its net output, as long as that incremental power comes from QFs. *See Turners Falls*, 55 FERC at 62,667-68. The Commission's interpretation of PURPA (and implementing regulations and case law) is entitled to deference. *See Connecticut Valley*, 208 F.3d at 1044.

B. Application of the Exception to Ormesa's Facility Does Not Undermine the General Net Output Rule

By selling only QF power that it purchases or generates itself, Ormesa satisfies all the requirements for QF status (including the ownership limitation). Edison's argument (Pet. Br. 4, 19-20, 26-31) that the exception will undermine the net output rule -- which as explained above represents an inappropriate collateral attack on *Connecticut Valley* -- is in any event unfounded. As long as Ormesa is selling QF power -- either QF power it generates or power generated by another QF -- its sales to Edison displace an equivalent amount of power that otherwise would be generated through more traditional means. *See Turners Falls*, 55 FERC at 62,670 (net output rule assures that PURPA benefits extend only to QFs "which displace an amount of power which is actually capable of being avoided on the combined utility system"); *Penntech Papers*, 48 FERC at 61,423 (explaining displacement theory behind net output rule).

Moreover, as long as Ormesa is selling qualifying power -- generated either

by its own facility or another QF – there is no opportunity to resell power purchased from Edison back to Edison at a higher price, as Edison fears (Pet. Br. 19-20, 24-25). In other words, by selling only QF power, Ormesa does not violate the net output rule in an “economic sense.” *Connecticut Valley*, 208 F.3d at 1040-41 (explaining that a QF allowed to sell its gross output at full avoided cost would in effect be able to sell back “at a significant markup the quantum of electricity it purchased from the utility for its internal operating needs”).

Edison worries (Pet. Br. 29-30) that “rational” QFs will take advantage of what Edison sees as a “gaping loophole” by “launder[ing]” non-qualifying power. However, Edison presented no evidence that it or any utility has been subjected to any such collaborative behavior in the years since the Commission announced the net output rule and exception. If a cogeneration or small power production facility sells non-qualifying power to Ormesa, that facility fails the PURPA ownership requirement and, under *Turners Falls* and *Connecticut Valley*, is not a QF. See *Turners Falls*, 55 FERC at 62,671 (facility is not permitted “to use its PURPA benefits as leverage to gain potential benefits from the sale of nonqualifying output”). If Ormesa, in turn, tries to pass non-qualifying power on to Edison, it no longer is purchasing reinjection power from a QF, as it represented to the Commission, and thus no longer can rely on the Commission’s certification in the challenged orders. See, e.g., *Cogentrix of Mayaguez, Inc.*, 59 FERC ¶ 61,392 at

62,495 (1992) (noting that “[i]f the facility does not operate as represented in the application, [the applicant] cannot rely on the order granting certification”); *see also* 18 C.F.R. § 292.207(d)(1)(i) (same).

Edison’s expressed concern as to the possible sale of non-qualifying power is entirely speculative. If it believes that Ormesa is no longer satisfying the terms of its QF certification, or more generally PURPA and the Commission’s regulations, it can file with the Commission a complaint or a petition for a declaratory order, *see* 18 C.F.R. §§ 385.206, 385.207(a)(2), or, more specifically, a motion to revoke Ormesa’s QF status, *see* 18 C.F.R. § 292.207(d)(1)(ii). *See also Independent Energy Producers Ass’n v. California Public Utilities Commission*, 36 F.3d 848, 859 (9th Cir. 1994) (noting appropriate avenues for redress before the Commission).⁹ Edison currently monitors Ormesa’s operations for compliance with all applicable PURPA requirements (J.A. 60); there is no reason to suspect that Edison will be any less able to monitor Ormesa’s compliance going forward. *See* 18 C.F.R. § 292.303(d) (Edison already is obligated to purchase power from other QFs that is transmitted by other utilities). *See also Brazos Electric Power Coop. v. FERC*, 205 F.3d 235, 246 (5th Cir. 2000) (PURPA does not require

⁹ There may be additional extra-Commission remedies to enforce express contractual warranties that the QF will maintain and operate its facility in continued compliance with PURPA regulations. *See Independent Energy Producers*, 36 F.3d at 852 (discussing contractual relationship between California QFs and California utilities).

“heavy-handed oversight” or Commission “micromanagement” into the arm’s-length relationship between QF and utility).

In sum, the Commission responded to Ormesa’s application and Edison’s protest with the analysis they required. A PURPA certification proceeding is a limited proceeding. *See Sugarloaf Citizens Ass’n v. FERC*, 959 F.2d 508, 513 (4th Cir. 1992). As the Commission has explained:

[I]n acting on an application for certification or recertification of qualifying status, [the Commission] essentially renders a declaratory order. The Commission acts upon the information presented in the application and the responsive pleadings and renders a decision on whether the facility, *as described in the application*, meets the statutory and regulatory requirements for qualifying status.

Sithe/Independence Power Partners, L.P., 61 FERC ¶ 61,212 at 61,786 (1992) (citing cases) (emphasis in original); *see also Connecticut Valley*, 83 FERC at 61,611-12 (same).

Here, as explained *supra* at page 18, Ormesa’s application offered little information about its QF purchases. The Commission responded on the basis of the facts before it, not on the basis of speculation as to what might happen in the future. Citing *Connecticut Valley* and *Turners Falls*, the Commission decided only that Ormesa can utilize the exception to the net output rule as recognized in earlier cases; it had no need to consider further the “implications” of a “newly minted exception,” Pet. Br. 26, as the exception it applied is not new. In these circumstances, the Commission’s certification of Ormesa was reasonable and its

explanation fully satisfactory. *See Entergy Services, Inc. v. FERC*, 319 F.3d 536, 543 (D.C. Cir. 2003) (agency's rationale can be found in cited orders upon which it relies).

III. THE COMMISSION REASONABLY FOLLOWED EXISTING POLICY IN ALLOWING ORMESA TO REFLECT EXTRACTION POWER IN CERTIFIED NET OUTPUT AVAILABLE FOR SALE TO EDISON

The Commission followed its *GEO* precedent in deciding that 3.24 MW of power used for initial extraction and transportation of geothermal fluids is not station power, and thus included that power in Ormesa's certified net output. In making this decision, the Commission agreed with Ormesa and disagreed with Edison. *See* Certification Order at PP 18-20, J.A. 67-68; Rehearing Order at PP 11-14, J.A. 112-113. (In contrast, the Commission agreed with Edison and disagreed with Ormesa in treating reinjection power as excluded station power. *See* Certification Order at P 21, J.A. 68; Rehearing Order at PP 13-14, J.A. 113.)

The Commission in *GEO* differentiated between pumping energy used for the initial extraction of geothermal fluids and their transportation to the generating facility, and pumping energy used for fuel handling and power production at the facility. 55 FERC at 61,813-14. The Commission determined that its earlier decisions on the calculation of net output, *see supra* pages 6-7, lead to treating only the second category of pumping load as station (auxiliary) load that must be subtracted from the facility's net output. In support, the Commission in *GEO*

compared the mining, transportation and handling of coal (requiring different pieces of equipment to perform different functions) to the extraction, transportation and handling of geothermal fluids (where pumps perform each function). *Id.*

Presented with similar facts concerning the operation of another geothermal QF, the Commission here both explained its holding in *GEO*, Certification Order at PP 18-20, J.A. 67-68, and applied that holding, *id.* at P 20, J.A. 68, and Rehearing Order at PP 11-12, J.A. 112. The Commission found no reason to accept Edison's invitation to overturn *GEO*. Specifically, the Commission rejected Edison's argument that the Commission should now reject *GEO*'s treatment of the isopentane at the facility, rather than the geothermal brine transported to the facility, as the "working fluid" that "turn[s] the turbines and generators." Certification Order at P 20, J.A. 68. Consistent with *GEO*, the Commission treated the geothermal brine as simply the fuel that heats and vaporizes the isopentane, not the fuel that actually produces electric power. *Id.*

Edison argues (Pet. Br. 2, 5, 21, 35-39) that the Commission's treatment of extraction power is inconsistent with its treatment of reinjection power. Because the Commission determined that reinjection power serves station power uses that must be subtracted from the facility's net output, *see id.* at P 21, J.A. 68, and Rehearing Order at PP 13-14, J.A. 113, Edison argues that the Commission must

overturn *GEO* and treat extraction power exactly the same way.¹⁰

The Commission reasonably rejected this argument. It did not, as Edison claims (Pet. Br. 35), find that Ormesa's facility operates as a closed, continuous system. Nor did it find that extraction and reinjection operate, as Edison submits (Pet. Br. 35-36, 39), as "complementary" or "indispensable halves of a continuous power production cycle." To the contrary, the Commission distinguished between the two functions. The heated, extracted geothermal fluid is fuel that heats the isopentane at the facility. The cooled, reinjected fluid is "no longer fuel, but is effectively spent fuel" that must be disposed of in some manner. Certification Order at P 21, J.A. 68. While the Commission found, on the one hand, that the heated, extracted fluid is not "necessary and integral" to the power production process, the Commission found, on the other hand, that disposal of the cooled fluid emerging from that process is indeed necessary and integral to that process. *Id.*; Rehearing Order at P 14, J.A. 113.

The Commission thus differentiated between the extraction process and the reinjection process, and thus justified its different treatment of the two processes. Edison tries (*see* Pet. Br. 21, 35) to find support in the fact that Ormesa, like Edison, argued to the Commission that the processes are similar and should be

¹⁰ Significantly, Edison does not argue that the facts of *GEO* are different in any material respect than those in the instant case, or that *GEO* (if not overturned) should not be applicable.

treated the same way. The Commission found, however, that the extraction and reinjection processes are not “equivalent” processes requiring the same treatment. Rehearing Order at PP 13-14, J.A. 113 (rejecting Ormesa’s argument that reinjection power should not be treated as station power and that it should be included in its net output).

In any event, Ormesa made its argument in support of a completely different result – reflection of both extraction and reinjection load in its certified net output. *See* Certification Order at P 14, J.A. 66 (Ormesa and Edison have “directly contrary interests”). Even if Edison were correct, which it is not, that the Commission erred in treating the two processes differently, there is no need for the Commission to overturn *GEO* and revisit its determination as to the status of extraction power. Rather, it can eliminate any inconsistency by maintaining *GEO* and revisiting its determination that reinjection power be treated as station power that must be excluded from Ormesa’s certified net output.¹¹

¹¹ Edison argues at length (Pet. Br. 36-39) that the *GEO* analogy between geothermal-fueled and coal-fueled generation does not work as well as an analogy between geothermal-fueled and nuclear-fueled generation. It is well within the agency’s discretion, however, to decide that a particular case is closer to one set of facts than another. *See New Charleston Power I, L.P. v. FERC*, 56 F.3d 1430, 1431, 1433 (D.C. Cir. 1995) (concluding that it was “well within bounds” for the agency to conclude that “rain-soaked cow manure,” fueling a particular qualifying small power production facility selling power to Edison, should be treated more like a “golf ball that knocks out a high-voltage transformer” than a “volcanic eruption in the Philippines”).

In sum, Edison is making the extraordinary request that the Court upset the Commission's policy judgment as to the appropriate treatment of a particular technical process. Courts are understandably reluctant to interfere with the agency's assessment of a process (here, the operation of a geothermal-fueled qualifying small power production facility) left by Congress for the agency's expert consideration. *See, e.g., Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 11 (D.C. Cir. 2003) (court "lacks the experience and expertise to resolve" a "methodological dispute" that "fairly conceptualized, really centers on the wisdom of the agency's policy") (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984)). Judicial deference is particularly appropriate, where, as here, petitioner is seeking to compel the agency to revisit and alter an existing rule. *See Midwest Independent Transmission System Operator, Inc. v. FERC*, 388 F.3d 903, 911 (D.C. Cir. 2004). In the instant circumstances, the Commission was fully justified in following its *GEO* rule in favor of including extraction power (but not reinjection power) in Ormesa's certified net output.

CONCLUSION

For the foregoing reasons stated, the challenged orders should be upheld as reasonable in all respects.

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Southern California Edison Co. v. FERC
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FERC Docket No. QF86-681

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 28(d)(1), I hereby certify that this brief contains 6519 words, not including the tables of contents and authorities, the certificate of counsel, this certificate and the addendum.

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