

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 05-1402 and 06-1246

**TRANSMISSION AGENCY OF NORTHERN CALIFORNIA AND
CITY OF VERNON, CALIFORNIA,
PETITIONERS,**

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**

**JOHN S. MOOT
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**SAMUEL SOOPPER
ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, DC 20426**

MARCH 19, 2007

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties appearing before the Commission are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review:

1. *City of Vernon, California, et al.*, 111 FERC ¶ 61,092 (2005) (Opinion No. 479).

2. *City of Vernon, California, et al.*, 112 FERC ¶ 61,207 (2005) (Opinion No. 479-A).

3. *City of Vernon, California*, 115 FERC ¶ 61,297 (2006) (Opinion No. 479-B)

C. Related Cases:

This case was previously before the Court in *Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002).

Samuel Soopper
Attorney

March 19, 2007

TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE ISSUES.....	1
COUNTERSTATEMENT OF JURISDICTION.....	2
STATUTORY AND REGULATORY PROVISIONS.....	2
INTRODUCTION.....	2
STATEMENT OF FACTS.....	4
I. Statutory and Regulatory Background.....	4
II. Factual Background.....	6
A. Proceedings Prior to <i>PG&E</i>	6
B. The <i>PG&E</i> Decision.....	8
C. The Proceedings On Remand.....	9
1. The Order On Remand.....	9
2. The Initial Decision.....	10
3. Opinion No. 479.....	11
4. Opinion No. 479-A.....	13
5. Opinion No. 479-B.....	15
SUMMARY OF ARGUMENT.....	18
ARGUMENT.....	20
I. STANDARD OF REVIEW.....	20

TABLE OF CONTENTS

	<u>PAGE</u>
II. PETITIONER TANC'S APPEAL SHOULD BE DISMISSED FOR LACK OF STANDING, AS TANC HAS ALLEGED NO INJURY ARISING FROM THE CONTESTED ORDERS.....	21
III. THE COMMISSION'S SECTION 205 REVIEW OF VERNON'S TRANSMISSION REVENUE REQUIREMENT WAS NECESSARY TO FULFILL THE COURT'S MANDATE IN <i>PG&E</i>	23
A. The Commission Reasonably Interpreted And Implemented <i>PG&E</i>	23
B. Petitioner's Arguments To The Contrary Are Inconsistent With The <i>PG&E</i> Mandate.....	26
C. None Of The Precedent Cited By Vernon Is Inconsistent With <i>PG&E</i>	31
IV. THE COMMISSION HAS AUTHORITY TO ENFORCE VERNON'S CONTRACTUAL OBLIGATION TO MAKE REFUNDS.....	33
A. The Commission's Refund Order Is Well Within Its FPA Authority.....	33
1. Vernon's Contentions With Respect To The Commission's Authority Are Without Merit.....	35
2. Vernon Fails To Confront The Relevant Contract Language...38	38
B. The Commission's Refund Order Is Not Barred By The Tenth Amendment.....	40
CONCLUSION.....	44

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Alabama Mun. Distributors Group v. FERC</i> , 312 F.3d 470 (D.C. Cir. 2002).....	22
* <i>Alliant Energy Inc. v. Neb. Pub. Power Dist.</i> , 347 F.3d 1046 (8th Cir. 2003).....	16, 36, 37, 39
<i>Atlantic City Electric Co. v. FERC</i> , 295 F.3d 1 (D.C. Cir. 2002).....	31, 32
<i>Bonneville Power Admin. v. FERC</i> , 422 F.3d 908 (9th Cir. 2005).....	16, 32, 35, 36
<i>California Dep't of Water Resources v. FERC</i> , 306 F.3d 1121 (D.C. Cir. 2002).....	38
<i>Cal. Public Utils. Comm'n v. FERC</i> , 254 F.3d 250 (D.C. Cir. 2001).....	27
<i>California Ind. Sys. Operator v. FERC</i> , 372 F.3d 395 (D.C. Cir. 2004).....	6
<i>Cassell v. FCC</i> , 154 F.3d 478 (D.C. Cir. 1998).....	21
<i>Central Vermont Pub. Serv. Corp. v. FERC</i> , 214 F.3d 1366 (D.C. Cir. 2000).....	20
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council</i> , 467 U.S. 837 (1984).....	20
<i>Columbia Gas Transmission Corp. v. FERC</i> , 404 F.3d 459 (D.C. Cir. 2005).....	31, 32

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Entergy Services, Inc. v. FERC</i> , 319 F.3d 536 (D.C. Cir. 2003).....	21
<i>Entergy Services, Inc. v. FERC</i> , 391 F.3d 1240 (D.C. Cir. 2004).....	30
<i>ExxonMobil Gas Marketing Co. v. FERC</i> , 297 F.3d 1071 (D.C. Cir. 2002).....	20
<i>FERC v. Mississippi</i> , 456 U.S. 742 (1982).....	42
<i>Florida Power & Light Co. v. FERC</i> , 617 F.2d 809 (D.C. Cir. 1980).....	4
<i>FPC v. Texaco, Inc.</i> , 417 U.S. 380 (1974).....	24
<i>Gulf States Util. Co. v. FPC</i> , 411 U.S. 747 (1973).....	4
<i>Indiana Municipal Power Agency v. FERC</i> , 56 F.3d 247 (D.C. Cir. 1995).....	30
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	22
<i>Midwest ISO Transmission Owners v. FERC</i> , 373 F.3d 1361 (D.C. Cir. 2004).....	5
<i>*National Association of Regulatory Commissioners v. FERC</i> , 2007 U.S. App. LEXIS 626 (D.C. Cir. 2007).....	20, 26, 42
<i>National Fuel Gas Supply Corp. v. FERC</i> , 811 F.2d 1563 (D.C. Cir. 1987).....	20

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Natural Gas Clearinghouse v. FERC</i> , 965 F.2d 1066 (D.C. Cir. 1992).....	20
<i>New York v. United States</i> , 505 U.S. 144 (1992) (<i>New York</i>).....	40, 41
<i>New York v. FERC</i> , 535 U.S. 1 (2002).....	4, 5
* <i>Pacific Gas and Electric Co. v. FERC</i> , 306 F.3d 1112 (D.C. Cir. 2002)	1, 2, 3, 6, 8, 9, 11, 13, 18, 19, 23 25-33, 36, 38
<i>Platte River Whooping Crane v. FERC</i> , 875 F.2d 109 (D.C. Cir. 1989).....	30
<i>Printz v. United States</i> , 521 U.S. 898 (1997).....	40, 41
* <i>Public Utility Dist. Snohomish Cty. v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001).....	21, 22
<i>Public Utils. Comm'n v. FERC</i> , 660 F.2d 821 (D.C. Cir. 1981).....	23
<i>Sacramento Municipal Utility District v. FERC</i> , 428 F.3d 294 (D.C. Cir. 2005).....	28
<i>Tarpon Transmission Co. v. FERC</i> , 860 F.2d 439 (D.C. Cir. 1988).....	20
<i>Tennessee Gas Pipeline Co. v. FERC</i> , 871 F.2d 1099 (D.C. Cir. 1989).....	22
<i>Town of Norwood, Mass. v. FERC</i> , 906 F.2d 772 (D.C. Cir. 1990).....	22

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Towns of Concord v. FERC</i> , 955 F.2d 67 (D.C. Cir. 1992).....	14
<i>Transmission Access Policy Study Group v. FERC</i> , 225 F.3d 667 (D.C. Cir. 2000).....	5, 20
 <u>ADMINISTRATIVE CASES:</u>	
<i>Cal. Indep. Sys. Operator</i> , 91 FERC ¶ 61,205 (2000).....	6
<i>Cal. Indep. Sys. Operator</i> , 93 FERC ¶ 61,104 (2000), <i>reh'g denied</i> , 94 FERC ¶ 61,148 (2001).....	7, 8, 23, 27
<i>City of Azusa, California, et al.</i> , 106 FERC ¶ 61,352 (2002).....	9
<i>City of Vernon, California</i> , 93 FERC ¶ 61,103, <i>reh'g denied</i> , 94 FERC ¶ 61,148 (2000).....	23
<i>City of Vernon, California</i> , 94 FERC ¶ 61,344 (2001).....	8
<i>City of Vernon, California</i> , 109 FERC ¶ 63,057 (2004) (Initial Decision).....	10, 11, 28
<i>City of Vernon, California, et al.</i> , 111 FERC ¶ 61,092 (2005) (Opinion No. 479).....	3, 11, 12, 13, 25, 33
<i>City of Vernon, California, et al.</i> , 112 FERC ¶ 61,207 (2005) (Opinion No. 479-A).....	3, 13-16, 30, 32-34, 38
<i>City of Vernon, California, et al.</i> , 115 FERC ¶ 61,297 (2006) (Opinion No. 479-B).....	4, 15-17, 32, 33, 36, 37 39, 40, 41

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES:

PAGE

Ind. & Mich. Distribs. Ass'n,
62 FERC ¶ 61,189 (1993), *aff'd sub nom. Ind. Mun. Power Agency v. FERC*, 56 F.3d 247 (D.C. Cir. 1995).....29

Ohio Power Co.,
63 FERC ¶ 61,325 (1993).....40

Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,
Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).....5

S.C. Pub. Serv. Auth.,
75 FERC ¶ 61,209 (1996).....23

STATUTES:

Federal Power Act

Section 201(f), 16 U.S.C. § 824.....27, 36

Section 205, 16 U.S.C. § 824d.....1, 3, 4, 6, 8, 9, 11-15, 18, 23, 25
26, 30, 33, 36

Section 206, 16 U.S.C. § 824e.....4, 14, 23, 36

Section 313(b), 16 U.S.C. § 824l(b).....21

REGULATIONS:

18 C.F.R. § 35.13.....10

GLOSSARY

<i>Alliant Energy</i>	<i>Alliant Energy, Inc. v. Neb. Pub. Power Dist.</i> , 347 F.3d 1046 (8th Cir. 2003)
<i>Atlantic City</i>	<i>Atlantic City Electric Co. v. FERC</i> , 295 F.3d 1 (D.C. Cir. 2002)
<i>Bonneville Power</i>	<i>Bonneville Power Admin. v. FERC</i> , 422 F.3d 908 (9th Cir. 2005)
California ISO	California Independent System Operator Corporation
<i>Columbia Gas</i>	<i>Columbia Gas Transmission Corp. v. FERC</i> , 404 F.3d 459 (D.C. Cir. 2005)
<i>New York</i>	<i>New York v. United States</i> , 505 U.S. 144 (1992)
<i>PG&E</i>	<i>Pacific Gas and Electric Co. v. FERC</i> , 306 F.3d 1112 (D.C. Cir. 2002)
<i>Printz</i>	<i>Printz v. United States</i> , 521 U.S. 898 (1997)
TANC	Transmission Agency of Northern California
Vernon	City of Vernon, California

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission (Commission or FERC) reasonably interpreted the Court's mandate in *Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002) (*PG&E*), to require review under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d, of the City of Vernon, California's (Vernon) Transmission Revenue Requirement, in order for the agency to assure that the California Independent System Operator (California ISO)'s

Transmission Access Charge rate, of which Vernon's revenue requirement is a cost component, was just and reasonable.

2. Whether the Commission appropriately ordered Vernon to refund amounts over-collected in its Transmission Revenue Requirement from other California ratepayers, based on Vernon's specific agreement to make such refunds in a FERC-jurisdictional contract with the California ISO.

COUNTERSTATEMENT OF JURISDICTION

Petitioner Transmission Agency of Northern California (TANC) does not have standing to appeal the orders at issue, because TANC does not allege that the Commission's ratemaking decisions have any direct or immediate impact on itself or its members.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

In *PG&E*, the Court reviewed the Commission's original approval of Vernon's Transmission Revenue Requirement, which Vernon had developed in order to become a Participating Transmission Owner in the California ISO. The Court remanded the FERC orders, because they "provided no explanation as to

how or why FERC's review of Vernon's [Transmission Revenue Requirement] produced the necessary result, namely, just and reasonable rates for the [California ISO]." 306 F.3d at 1121.

In the first order on review here, Opinion and Order Affirming Initial Decision as Modified, *City of Vernon, California, et al.* 111 FERC ¶ 61,092 (2005) (Opinion No. 479), JA 408, the Commission held on remand that, to comply with the Court's mandate in *PG&E*, the agency was required to perform an actual section 205 rate review with respect to Vernon's proposed Transmission Revenue Requirement. While Vernon is not itself subject to the Commission's section 205 jurisdiction, the Commission determined that plenary statutory review of its Transmission Revenue Requirement was necessary, so as to assure that the California ISO's Transmission Access Charge, an FPA-jurisdictional rate of which Vernon's revenue requirement was a cost component, was just and reasonable. *Id.* PP 42-45, JA 424-425.

In the second order on review, *City of Vernon, California, et al.*, 112 FERC ¶ 61,207 (2005) (Opinion No. 479-A), JA 591, the Commission denied Vernon's and TANC's requests for rehearing contesting the application of the section 205 standard to Vernon's Transmission Revenue Requirement. Additionally, the Commission held for the first time that, for the portion of its Transmission Revenue Requirement representing an over-collection of Vernon's costs, Vernon

should pay refunds to the other Participating Transmission Owners. *Id.* P 74-86, JA 613-617.

In the final order on review, *City of Vernon, California*, 115 FERC ¶ 61,297 (2006) (Opinion No. 479-B), JA 669, the Commission denied Vernon’s request for rehearing on the refund issue. The Commission held that Vernon had committed to paying refunds under a specific provision of the Transmission Control Agreement, a FERC-jurisdictional contract between Vernon and the California ISO, and that particular refunds were appropriate.

STATEMENT OF THE FACTS

I. Statutory and Regulatory Background

The FPA charges the Commission to employ its authority “to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce.” *New York v. FERC*, 535 U.S. 1, 6 (2002) (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)). The primary purpose of this grant of authority to the Commission is to protect consumers from excessive rates and charges by public utilities. *E.g.*, *Florida Power & Light Co. v. FERC*, 617 F.2d 809, 816 (D.C. Cir. 1980).

This Court is well aware of the Commission’s exercise of its “broad authority” under FPA §§ 205 and 206, 16 U.S.C. §§ 824d-e, in the last decade “to impose open access as a generic remedy for its findings of systemic

anticompetitive behavior” by transmission-owning public utilities. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 684 (D.C. Cir. 2000) (*TAPS*) (affirmed in *New York v. FERC*, 535 U.S. 1 (2002)). Thus, *New York v. FERC* and *TAPS* affirmed the Commission’s Order No. 888,¹ in which the Commission sought to remedy the monopoly control of vertically-integrated utilities over interstate transmission facilities by requiring such utilities to unbundle wholesale electric power services and to file open access transmission tariffs.

As one means of compliance with FERC’s Order No. 888 open access policies, public utilities were encouraged to participate in Independent System Operators. As described by the Court, such an entity “would assume operational control – but not ownership – of the transmission facilities owned by its member utilities, thereby ‘separat[ing] operation of the transmission grid and access to it from economic interests in generation.’” *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004) (quoting Order No. 888 at 31,654);

¹ Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 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).

see also, e.g., California Ind. Sys. Operator v. FERC, 372 F.3d 395, 397 (D.C. Cir. 2004).

II. Factual Background

A. Proceedings Prior To *PG&E*

The prior history of this case is recounted in detail by the Court in *PG&E*.

The California ISO was created by the State of California to operate electric transmission facilities within the state. Thus, as the Court indicated, the California ISO is a public utility subject to the Commission’s regulatory authority, including the statutory requirement under FPA section 205 that its transmission rates be just and reasonable. 306 F.3d at 1114.

Utilities participating in the California ISO (Participating Transmission Owners) turn over the control and operation of their transmission facilities to the ISO. *Id.* The utilities are compensated by the ISO for the use of their facilities by means of a Transmission Revenue Requirement, “which consists of the costs and rate of return to which the utilities are entitled” as Participating Transmission Owners. *Id.* The Commission “independently examines each of these jurisdictional utilities’ [Transmission Revenue Requirements] to ensure that they are just and reasonable.” *Id.* (citing *Cal. Indep. Sys. Operator*, 91 FERC ¶ 61,205 at 61,723 n.11 (2000)).

The transmission facilities originally operated by the California ISO were

owned by Pacific Gas and Electric Company, San Diego Gas and Electric Company and Southern California Edison Company, all public utilities subject to FERC jurisdiction. *Id.* However, with non-jurisdictional municipal utilities, such as Vernon, becoming ISO participants, new procedures were necessary.

In 2000, the Commission approved a revised California ISO tariff under which non-jurisdictional Participating Transmission Owners would either submit their Transmission Revenue Requirements to an ISO panel subject to FERC review (now defunct), or directly with the Commission. *See* 306 F.3d at 1115 (citing *Cal. Indep. Sys. Operator Corp.*, 93 FERC ¶ 61,104 at 61,287 (2000)).

On August 30, 2000, Vernon filed with the Commission a petition “for a determination by the Commission that Vernon’s Transmission Revenue Requirement” set by its City Council “is proper for purposes of Vernon becoming a Participating Transmission Owner [] in the [California] ISO.” R. 96 at 1; JA 166. Vernon requested approval of a Transmission Revenue Requirement of \$13,080,189.

Vernon sought Commission action on its petition by October 31, 2000, to facilitate its becoming a Participating Transmission Owner status. Once Vernon attained such status, it would turn over operational control of its transmission entitlements to the California ISO, and be reimbursed by the ISO for the costs reflected by its Transmission Revenue Requirement. These costs would be

collected by the ISO from its transmission customers through its Transmission Access Charge.

The Commission accepted Vernon's proposal subject to certain modifications. *See California Independent System Operator*, 93 FERC ¶ 61,104 (2000), JA 221, *reh'g denied*, 94 FERC ¶ 61,148 (2001), JA 236. Vernon duly refiled a Transmission Revenue Requirement of \$10,216,178, reflecting these modifications, which was accepted by the Commission. *City of Vernon, California*, 94 FERC ¶ 61,344 (2001), JA 244.

Existing Participating Transmission Owners, Pacific Gas and Electric Company and Southern California Edison Company, appealed the Commission's orders to this Court, on the ground that the agency's review of Vernon's Transmission Revenue Requirement did not meet the section 205 standard.

B. The *PG&E* Decision

In *PG&E*, the Court held that "although FERC has considerable discretion in choosing how to implement its statutory duty," the agency's review of Vernon's Transmission Revenue Requirement had "fail[ed] to ensure that the [California ISO]'s rates will be just and reasonable under § 205" of the FPA. 306 F.3d at 1114. At the heart of the Court's concern was the failure of the Commission to clarify or develop either the approach or the standard that it applied to Vernon's Transmission Revenue Requirement, in order to comply with section 205. *Id.* at

1118.

PG&E did not order a particular approach by the Commission on remand. Rather, the Court emphasized that the Commission could exercise its discretion as to the method of review of Vernon's Transmission Revenue Requirement, "so long as FERC can ensure" by its review "that the [California ISO]'s rates will ultimately be just and reasonable." *Id.* at 1116. The Court summed up its holding:

[A] remand is required so that FERC can articulate with clarity what approach and standard are governing its review and how both ensure the [California ISO's] rates are just and reasonable under § 205.

Id. at 1119.

C. The Proceedings On Remand

1. The Order On Remand

On remand, after the failure of settlement proceedings, the Commission determined that the issues raised by Vernon's requested Transmission Revenue Requirement should be set for hearing:

[I]n light of the Court's finding that the Commission had not shown that Vernon's [Transmission Revenue Requirement] would result in just and reasonable [California ISO] rates, we will establish hearing procedures to explore the appropriate [Transmission Revenue Requirement] for Vernon that will ensure that the [California ISO's] rates after inclusion of Vernon's [Transmission Revenue Requirement] are just and reasonable.

City of Azusa, California, et al., 106 FERC ¶ 61,143 P 20 (2002), JA 264, 269.

The Commission rejected Vernon's contention that it should limit any

further review to Vernon's rate of return and depreciation rate, two matters about which the Court had expressed specific concern. Rather, the Commission explained, the Court's decision required it to "determine that Vernon's overall [Transmission Revenue Requirement], comprised of all of its rate components, when included in the [California ISO's] rates result in just and reasonable [California ISO] rates." *Id.*

2. The Initial Decision

After an evidentiary hearing and briefing, the administrative law judge issued her Initial Decision. *City of Vernon, California*, 109 FERC ¶ 63,057 (2004), R. 603, JA 359 (Initial Decision).

On the issue of the appropriate standard of review to be applied to Vernon's Transmission Revenue Requirement, the judge held that "some deference" should be given to Vernon, namely, that as a "non-jurisdictional entity," it would be excused from complying with the technical requirements of Commission regulations governing rate filings. Initial Decision P 28 (citing 18 C.F.R. § 35.13), JA 370.

However, the judge determined that, because Vernon had set its Transmission Revenue Requirement only for purposes of joining the California ISO, independent of its retail rates, "close scrutiny" of the revenue requirement was necessary. *Id.* Therefore, the judge reasoned, "each element of Vernon's

[Transmission Revenue Requirement]” should be carefully examined “using a method approximating a Section 205 review in order to determine whether or not inclusion of Vernon’s [Transmission Revenue Requirement]” in the California ISO’s Transmission Access Charge would result in that rate being just and reasonable. *Id.* P 29, JA 371. In the judge’s view, this approach met the Court’s concerns in *PG&E*. *Id.* (citing *PG&E*, 306 F.3d at 1116).

The Initial Decision went on to review the individual cost items in Vernon’s Transmission Revenue Requirement contested by the parties, rejecting Vernon’s claim of Allowance of Funds Used During Construction, *id.* PP 59-74; JA 382-387, and establishing the appropriate rate of return. *Id.* PP 92-126, JA 393-407.

The judge did not reach the issue of refunds, in the belief that any over-collection of Vernon’s Transmission Revenue Requirement could “be netted out in the ISO’s balancing account.” *Id.* P 58 n.41, JA 381.

3. Opinion No. 479

Opinion No. 479 affirmed the judge’s conclusions, but clarified that FPA section 205 provided the appropriate standard of review for Vernon’s Transmission Revenue Requirement, rather than one “approximating” section 205 review. The question presented by *PG&E*, in the Commission’s view, was whether it could assure that the California ISO’s Transmission Access Charge rate was just and reasonable “without reviewing the individual components of Vernon’s

[Transmission Revenue Requirement] by means of a section 205 review.” Opinion No. 479 P 38, JA 423. The Commission found that it could not.

A key element in the Commission’s determination was that it was prevented by “[f]undamental concepts of due process” from giving deference to Vernon’s proposal, as “Vernon has every incentive to increase its [Transmission Revenue Requirement] at the expense of non-Vernon [California ISO] ratepayers.” *Id.* P 40, 41, JA 423.

While acknowledging that Vernon was not subject to FERC’s FPA jurisdiction, the agency concluded that “Vernon having voluntarily made its [Transmission Revenue Requirement] part of a jurisdictional rate, the [Transmission Revenue Requirement] is subject to our section 205 jurisdiction and both can and must be reviewed thereunder.” *Id.* P 42, JA 424. Such review was necessary, the Commission explained, to ensure that the Transmission Access Charge was just and reasonable, as the Court had required.

The Commission rejected the administrative law judge’s conclusion that Vernon’s Transmission Revenue Requirement should be subject to a “section 205 like proceeding.” *Id.* P 44 (internal quotation marks omitted), JA 424. The agency did agree with the judge that, because “Vernon in and of itself is not subject to section 205,” she had properly excused Vernon from FERC’s regulatory filing requirements. *Id.* Nonetheless, Opinion No. 479 concluded, the Commission was

authorized and required by the FPA to directly review Vernon's revenue requirement:

Vernon's [Transmission Revenue Requirement], voluntarily submitted as a component of a jurisdictional rate, is necessarily subject to a full and complete section 205 review as part of our section 205 review of that jurisdictional rate. . . . [W]e emphasize that this course is necessary because there is no other feasible manner in which to make certain that the jurisdictional [California ISO Transmission Access Charge] rate is just and reasonable.

Id., JA 425.

Opinion No. 479 then went on to review various elements of Vernon's proposal, such as its appropriate rate of return. (Vernon does not seek judicial review with respect to these findings.)

4. Opinion No. 479-A

In Opinion No. 479-A, the Commission denied rehearing of its decision that it was authorized by the Court's decision in *PG&E* to perform a section 205 review on Vernon's Transmission Revenue Requirement, and, for the first time, addressed the propriety of refunds.

On the first issue (rate review), Opinion No. 479-A emphasized that it read *PG&E* "as fully endorsing – though not necessarily requiring – the Commission's performing a section 205 review of Vernon's [Transmission Revenue Requirement] to ensure that the ISO's [Transmission Access Charge] rate, of which it is a component, is just and reasonable." Opinion 479-A P 26, JA 599.

The Commission affirmed that, consistent with the Court's decision, section 205 review of Vernon's revenue requirement was necessary. *Id.* P 37, JA 602.

With respect to refunds, the Commission held that the issue was governed by section 16.2 of the California ISO's Transmission Control Agreement, to which Vernon is a signatory:

Each Participating [Transmission Owner] whether or not it is subject to the rate jurisdiction of FERC under Section 205 and Section 206 of the Federal Power Act shall make all refunds, adjustments to its Transmission Revenue Requirement, and adjustments to its [Transmission Owner] Tariff and do all other things required of a Participating [Transmission Owner] to implement any FERC Order related to the ISO Tariff, including any FERC Order that requires the ISO to make payment adjustments or pay refunds to, or receive prior period overpayments from, any Participating [Transmission Owner]. All such refunds and adjustments shall be made, and all other actions taken, in accordance with the ISO Tariff, unless the applicable FERC order requires otherwise.

Id. P 75 & n.91, JA 613-614 (citing Ex. S-3, R. 705, JA 275) (quoting Transmission Control Agreement, section 16.2). The Commission read this language to legally obligate Vernon to pay refunds for any over-collection of its Transmission Revenue Requirement. *Id.*

The Commission then applied equitable considerations to determine whether refunds were appropriate on the cost items in question. *Id.* P 82 & n.98 (citing *Towns of Concord v. FERC*, 955 F.2d 67, 75-75 (D.C. Cir. 1992)), JA 616. In accordance with this equitable standard, Opinion No. 479-A excused Vernon from refunds arising from the costs of certain facilities transferred to the ISO's control.

Id. P 83, JA 616. (No party sought judicial review with respect to this determination.)²

However, the Commission concluded that Vernon should be responsible for refunds representing other costs improperly included in its Transmission Revenue Requirement, to avoid cost shifting “to ISO ratepayers who received no concomitant benefit.” Opinion No. 479-A P 85, JA 617.³

5. Opinion No. 479-B

On rehearing, Vernon argued that, as a municipal utility exempt from FPA section 205, the Commission had no authority to require it to refund any cost over-collection, and that, in any event, the Commission had failed to abide by various section 205 requirements. The Commission rejected Vernon’s arguments as both internally inconsistent (while Vernon maintained its submission was not governed by section 205, it nonetheless asserted that FERC had failed to comply with section 205 requirements), and irrelevant. “Rather,” the agency concluded, “the critical

²The Commission estimated that the amount at issue concerning these facilities “would reduce Vernon’s proposed [Transmission Revenue Requirement] of approximately \$10.2 million by approximately \$2.2 million or approximately 22 percent” of its revenue requirement for each of the two years the costs of these projects were included. Opinion No. 479-A P 103, JA 622.

³The cost items were for Vernon’s improper claim of Allowance for Funds Used During Construction, and the lowering of its rate of return on equity. Vernon does not contest these specific findings on appeal.

issue is whether the [Transmission Control Agreement] that Vernon executed, which was filed with and accepted by the Commission, provides a basis to order Vernon to pay refunds.” Opinion No. 479-B P 31, JA 679.

The Commission resolved this question in the affirmative, relying on section 16.2 of the Transmission Control Agreement. *Id.* P 32, JA 680. This provision, the Commission explained, “requires Participating Transmission Owners (regardless of their jurisdictional status) to implement any order ‘related to’ the ISO Tariff.” *Id.* (footnote omitted)(quoting section 16.2), JA 680. In the agency’s view, there was no doubt that Opinion No. 479-A, requiring Vernon to make refunds, was such an order. *Id.*

Thus, Opinion No. 479-B concluded that Vernon having “bound itself contractually,” the Commission was “within its rights to hold Vernon to its commitment,” despite Vernon’s status as a municipal utility not directly subject to FPA regulation. *Id.* P 36 & n.39 (citing *Alliant Energy Inc. v. Neb. Pub. Power Dist.*, 347 F.3d 1046, 1050 (8th Cir. 2003) (*Alliant Energy*)), JA 681-682.

The Commission went on to distinguish Vernon’s reliance on *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005) (*Bonneville Power*), which denied FERC’s authority to order refunds by non-jurisdictional utilities based on their participation in the regulated energy market. Opinion No. 479-B P 39, JA 683. Unlike the situation in *Bonneville Power*, the Commission explained,

Vernon’s refund “is for a component of a [California ISO] jurisdictional rate that was over-collected.” *Id.* P 40, JA 683.

Finally, Opinion No. 479-B rejected Vernon’s claim that the Tenth Amendment of the Constitution of the United States barred the refunds ordered here, as the Commission was “not compelling a state (in this case California, of which . . . Vernon is an extension) . . . “to enact or enforce a federal regulatory program or legislation.” *Id.* P 44, JA 685.

SUMMARY OF ARGUMENT

I.

TANC's petition for review should be dismissed for lack of standing. TANC solely alleges that its members are governmental entities considering whether to become Participating Transmission Owners. Thus, neither TANC nor its members can claim direct and immediate injury, arising from the contested orders reviewing Vernon's and the California ISO's rates, necessary to maintain standing.

II.

The Commission reasonably read *PG&E* to hold that the Commission had discretion with respect to its review of Vernon's Transmission Revenue Requirement, but that such review had to be sufficient to ensure that the California ISO's Transmission Access Charge rate, of which Vernon's revenue requirement is a cost component, is just and reasonable under FPA section 205. The Commission also reasonably concluded that a full section 205 review of Vernon's Transmission Revenue Requirement was necessary to ensure that the just and reasonable standard was met.

Vernon argues that *PG&E* prohibits such review because of Vernon's exempt non-jurisdictional status under the FPA. However, Vernon's view cannot be reconciled with either the language or holding of the case. Similarly, Vernon's

claim that *PG&E* requires the Commission to review only the California ISO's ultimate Transmission Access Charge, rather than Vernon's Transmission Revenue Requirement, runs afoul of the Court's specific endorsement of the procedure ultimately employed by the Commission on remand.

Vernon contends that the Commission's action contravenes various court decisions emphasizing the Commission's limited authority over non-jurisdictional utilities. However, these cases fail to overrule, explicitly or implicitly, the mandate of *PG&E*, by which the Commission was necessarily guided on remand.

III.

The Commission acted within its FPA authority to require Vernon to make refunds, which Vernon explicitly agreed to do in section 16.2 of its Transmission Control Agreement with the California ISO. Here, unlike in cases cited by Vernon, a non-jurisdictional party specifically agreed to comply with a FERC refund order in a jurisdictional contract.

Vernon also argues that only a court can enforce its contractual refund obligation. However, the Court should sustain the Commission's denial of this attempt to restrict the agency's regulation of an FPA-jurisdictional agreement. For similar reasons, the Tenth Amendment has no application here, as Vernon voluntarily entered into a jurisdictional contract in order to implement its participation in the California ISO, a jurisdictional utility.

ARGUMENT

I. STANDARD OF REVIEW

The “deferential standard” of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), applies to “an agency’s interpretation of its own statutory jurisdiction.” *TAPS*, 225 F.3d at 694; see *National Association of Regulatory Utility Commissioners v. FERC*, 2007 U.S. App. LEXIS 626 *4 (D.C. Cir. 2007). On other issues, the Commission’s orders are reviewed under the arbitrary and capricious standard, pursuant to which a “court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency.” *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (citations and internal quotation marks omitted). See also, e.g., *Central Vermont Pub. Serv. Corp. v. FERC*, 214 F.3d 1366, 1369 (D.C. Cir. 2000).

Also relevant here is the Court’s recognition that “Congress explicitly delegated to FERC broad powers over ratemaking, including the power to analyze relevant contracts.” *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992) (quoting *Tarpon Transmission Co. v. FERC*, 860 F.2d 439, 441-42 (D.C. Cir. 1988), and *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987)). Thus, the court applies “substantial deference to the

FERC's interpretation" of jurisdictional contracts. *National Gas Clearinghouse*, 965 F.2d at 1070.

Likewise, "[a]n agency's interpretation of its own precedent is entitled to deference by the court." *Entergy Services, Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003) (citing *Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998)).

Finally, the findings of the Commission as to the facts, if supported by substantial evidence, are conclusive. FPA § 313(b), 16 U.S.C. § 825l(b).

II. PETITIONER TANC'S APPEAL SHOULD BE DIMISSED FOR LACK OF STANDING, AS TANC HAS ALLEGED NO INJURY ARISING FROM THE CONTESTED ORDERS.

TANC invokes the Court's jurisdiction pursuant to section 313(b), 16 U.S.C. § 825l(b), to seek review of the Commission's orders requiring Vernon to make refunds. Pet. Br. 1. However, this Court has firmly established that, under this provision, only parties themselves aggrieved by FERC orders may obtain judicial review. *Public Utility Dist. Snohomish Cty. v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001).

To be so aggrieved, a party must establish Article III constitutional standing by showing: (1) that it has suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) that there is a causal connection between the injury alleged and the conduct complained of; and (3) that

it is likely, as opposed to merely speculative, that a favorable decision will redress the injury. *Public Utility Dist. Snohomish Cty.*, 272 F.3d at 613 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Courts strictly construe such jurisdictional requirements, as the express statutory limitations they impose on jurisdiction cannot be relaxed. *E.g.*, *Town of Norwood*, 906 F.2d at 772, 774 (D.C. Cir. 1990); *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1107-09 (D.C. Cir. 1989).

Here, TANC cannot establish injury-in-fact regarding the challenged orders. TANC's sole allegation that it has standing is that "[t]he TANC Parties . . . are governmental entities . . . , and FERC's Orders are an important factor in determining whether ever becoming a [Participating Transmission Organization] is advisable for these entities." Pet. Br. 20.

Unlike Vernon, then, neither TANC nor its members participate in the California ISO, have revenue requirements developed for such participation or reviewed by the Commission, or have been ordered to pay refunds. TANC's concerns – that such a refund obligation might have an impact if TANC members ever actually join the California ISO – are self-evidently of a speculative nature, rather than the direct immediate injury required for standing. See *Alabama Mun. Distributors Group v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002)("[p]recedential effect" of Commission order "clearly insufficient" to meet standing requirements).

Thus, TANC's petition should be dismissed for lack of jurisdiction.

III. THE COMMISSION'S SECTION 205 REVIEW OF VERNON'S TRANSMISSION REVENUE REQUIREMENT WAS NECESSARY TO FULFILL THE COURT'S MANDATE IN *PG&E*.

A. The Commission Reasonably Interpreted And Implemented *PG&E*.

In the orders remanded in *PG&E*, the Commission had reviewed Vernon's Transmission Revenue Requirement in a cursory fashion, measuring it only in terms of the previously-approved revenue requirement of jurisdictional Participating Transmission Owner Southern California Edison Company, and approving it on that basis with certain revisions. *City of Vernon*, 93 FERC ¶ 61,103 (2000), JA 228, *reh'g denied*, *Cal. Ind. Sys. Operator Corp.*, 94 FERC ¶ 61,148 (2001), JA 236.

The Court's analysis began with the statutory framework. While "publicly-owned utilities" like Vernon "are not subject to FERC's §§ 205 and 206 jurisdiction," the Court nonetheless explained that "FERC may analyze and consider rates of non-jurisdictional utilities to the extent that those rates affect jurisdictional transactions." 306 F.3d at 1114 (citing *Pub. Utils. Comm'n v. FERC*, 660 F.2d 821, 826 (D.C. Cir. 1981); *S.C. Pub. Serv. Auth.*, 75 FERC ¶ 61,209 at 61,696 & n.7 (1996)).

The Court was not troubled by the Commission's "general approach" to reviewing Vernon's Transmission Revenue Requirement. 306 F.3d at 1116. In the

Court's view, the agency's procedures, in which "a non-jurisdictional entity . . . file[s] its costs directly with the FERC," which then reviews the "filed costs," *i.e.*, Vernon's Transmission Revenue Requirement, "to evaluate whether the [California ISO's] jurisdictional rates are permissible," was a legitimate form of "indirect regulation." *Id.* (citing *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974)).

Not only did the Court consider this ratemaking procedure to be consistent with the agency's FPA responsibility, but also made clear that no party had argued otherwise on appeal:

Neither FERC nor Vernon suggest that FPA § 201, exempting "a State or any political subdivision of a State from the review provisions of § 205," 16 U.S.C. § 824(f), bars FERC's review of Vernon's [Transmission Revenue Requirement] to the extent necessary to ensure that the [California ISO's] rates are just and reasonable.

Id. at 1116-1117.

However, the Court faulted the Commission's previous failure to "elaborate on the application of this standard" either to Vernon's Transmission Revenue Requirement or the California ISO's rates: "[I]n other words, it is unclear under what standard FERC reviewed Vernon's [Transmission Revenue Requirement] to ensure that a pass through of its costs by the [California ISO] would be just and reasonable." *Id.* at 1117.

"The only remaining question," in the Court's view, was "what standard of review should apply." *Id.* at 1118. "[O]n this point it is clear," the Court

concluded, “that § 205 imposes a ‘just and reasonable’ standard.” *Id.*

On remand, the Commission reasonably read this language to mean that the Court “gave the Commission discretion concerning the review of Vernon’s [Transmission Revenue Requirement], so long as that review ‘[e]nsures. . . that the [California ISO’s] rates will ultimately be just and reasonable.’” Opinion No. 479 P 35 & n.47 (quoting *PG&E*, 306 F.3d at 1116), JA 422. Thus, the Commission determined, the Court neither endorsed nor ruled out “the possibility of a strict section 205 review” of Vernon’s revenue requirement, mandating only that the agency’s review ultimately determine the ISO’s Transmission Access Charge rate to be just and reasonable. *Id.* P 35, JA 422.

The Commission then turned to how to accomplish this goal in the circumstances presented. Affirming the presiding judge, the agency held that “the *only* way to ensure” the result required by the Court – that the California ISO’s jurisdictional Transmission Access Charge be just and reasonable – “is by examining whether each component of Vernon’s [Transmission Revenue Requirement] is just and reasonable by the same type of rate review we perform for a jurisdictional utility.” Opinion No. 479 P 35 (emphasis in original), JA 422.

In sum, the Commission’s reading of *PG&E*, to require section 205 review of Vernon’s Transmission Revenue Requirement, in order to ensure the justness and reasonableness of the California ISO’s jurisdictional rate, is based directly on

the Court's specific language, and should be sustained. 306 F.3d at 1119, 1121.

Indeed, in view of the holding in *PG&E*, it is difficult to ascertain what alternative was available to the Commission. Certainly none of the alternatives suggested by Vernon is adequate, as we will now demonstrate.

B. Petitioner's Arguments To The Contrary Are Inconsistent With The *PG&E* Mandate.

Vernon maintains that "FERC largely ignored the *PG&E* court's instruction, disregarded Vernon's FPA exemption, and essentially treated Vernon as a jurisdictional entity." Pet. Br. 13. Essentially, Vernon argues, because FPA section 201(f) exempts publicly-owned utilities from the scope of its jurisdiction, the Commission could neither subject Vernon's Transmission Revenue Requirement to section 205 review nor seek to amend it.

However, as the Court remarked, Vernon did not contend in the prior appeal that section 201 barred review of its Transmission Revenue Requirement by the Commission under section 205. 306 F.3d at 1117. In any event, Vernon's theory cannot be reconciled with the specific holding in *PG&E* that the Commission has statutory authority to review Vernon's Transmission Revenue Requirement to the extent necessary to ensure that the California ISO's jurisdictional rate is just and reasonable. *See also National Association of Regulatory Utility Commissioners*, 2007 U.S. App. LEXIS 626 *9 ("[a]ny proper construction of § 201 must give effect to both FERC's jurisdiction over certain transactions occurring over public

utilities and to § 201(f)'s exclusion of state facilities”).

Vernon posits an alternative view of *PG&E* as having directed the Commission to review “the final ISO composite rate (which included Vernon’s requirements) to determine whether it was just and reasonable. . . .” Pet. Br. 36 (quoting *PG&E*, 306 F.3d at 1119) (footnote omitted). However, Vernon has edited the Court’s language to support its argument. The complete sentence, of which Vernon quotes a fragment, states: “While FERC’s approach *might be acceptable* if FERC tested the final ISO composite rate (which included Vernon’s requirements) to determine whether it was just and reasonable, FERC acknowledged at oral argument that the [California ISO’s] rate is filed without such review.” *PG&E*, 306 F.3d at 1119 (emphasis added) (citing *Cal. Pub. Utils. Comm’n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001)).

In fact, nothing in *PG&E* requires the Commission to review the ISO’s ultimate Transmission Access Charge, rather than the Transmission Revenue Requirements of the Participating Transmission Owners. Instead, as the Court understood, the time for Vernon to complain of the structure of FERC rate review embodied in the California ISO’s tariff is long past. *See PG&E*, 306 F.3d at 1115 (citing *Cal. Indep. Sys. Operator Corp.*, 93 FERC ¶ 61,104 at 61,287-89 (2000)). Vernon did not object to the structure of the California ISO’s tariff either when it was accepted by the Commission or when it filed its Transmission Revenue

Requirement at the beginning of this proceeding. Thus, its new complaint that “FERC’s approach to regulating the [California ISO Transmission Access Charge] has been fatally flawed from the outset” (Pet. Br. 33) must be rejected as untimely. *See Sacramento Municipal Utility District v. FERC*, 428 F.3d 294, 298-299 (D.C. Cir. 2005).

Nor is it clear what Vernon would gain if the Commission had approved an ISO rate mechanism in which it reviewed the Transmission Access Charge as a whole, rather than by individual Transmission Revenue Requirements. In reviewing the justness and reasonableness of that rate, the Commission would still be authorized to scrutinize the rate’s individual components under the just and reasonable standard.⁴

Vernon also suggests the Commission could have implemented alternative review methods acceptable to Vernon that would have complied with the *PG&E* mandate. In this regard, Vernon argues that the Commission has failed to explain

⁴ Vernon also claims (*see* Pet. Br. 15 & n.36, 35, 36 n.60) that before the administrative law judge, Commission staff advised that there was sufficient evidence in the record for the agency to review the California ISO’s rate, rather than Vernon’s Transmission Revenue Requirement (citing Initial Decision P 13, JA 364 (in turn citing Staff Initial Brief at 7)). Actually, what the staff brief states at the cited page is that “[t]here is ample documentation to permit the Commission to fully examine Vernon’s proposed [Transmission Revenue Requirement] and to determine if the costs claimed there are fully supported and comparable to the costs recovered by other [Participating Transmission Owners] in their [[Transmission Revenue Requirements].” R. 482, JA 283.

“why it must act under something other than the usual ‘prudence’ standard in reviewing Vernon’s non-jurisdictional [Transmission Revenue Requirement].” Pet. Br. 37 (citing *PG&E*, 306 F.3d at 1116).

However, contrary to Vernon’s assertion, *PG&E* did not endorse Commission review under a prudence standard. Rather, the Court refers to FERC’s brief on appeal as indicating that the agency “generally judges pass-through costs” using a “prudence standard.” 306 F.3d at 1117 (citing *Ind. & Mich. Mun. Distribs. Ass’n*, 62 FERC ¶ 61,189 at 62,237 (1993), *aff’d sub nom. Ind. Mun. Power Agency v. FERC*, 56 F.3d 247 (D.C. Cir. 1995)). The Court goes on to reject this as a basis for affirming the Commission, “as this prudence standard is nowhere to be found in the Orders at issue.” *Id.* Thus, *PG&E* never reached this issue.

In any case, it is difficult to see the relevance of Vernon’s argument. The “prudence standard” generally refers to the requirement that a complainant contesting some aspect of a utility’s rate or practice as unjust and unreasonable “present evidence sufficient to raise serious doubt that a reasonable utility manager, under the same circumstances and acting in good faith, would not have made the same decision and incurred the same costs.” *Indiana Municipal Power Agency v. FERC*, 56 F.3d at 253. In other words, the standard is merely an evidentiary tool that can be used to assess whether costs are just and reasonable.

As we have explained, however, the Commission properly applied the just and reasonable standard to Vernon's costs in response to the Court's mandate in *PG&E*, and Vernon does not contest the Commission's specific findings.

Vernon also observes that TANC offered the Commission "an alternative approach" consistent with *PG&E* and FERC precedent, namely "a comparability standard." Pet. Br. 36. However, Vernon should not be allowed to raise this contention on appeal, either. TANC, as we demonstrated previously, is not properly before this Court, and only TANC raised this contention before the Commission. As this Court has made clear, "[p]arties seeking review of FERC orders must petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal." *Entergy Services, Inc. v. FERC*, 391 F.3d 1240, 1247 (D.C. Cir. 2004) (quoting *Platte River Whooping Crane v. FERC*, 875 F.2d 109, 113 (D.C. Cir. 1989) (emphasis in original)).

If the Court were to reach this argument, it should be rejected. The Commission denied TANC's contention that the comparability standard was relevant, explaining that it only "applie[s] to non-jurisdictional rates," and "therefore an inappropriate standard to apply to the component of a jurisdictional rate that will not be subject to further section 205 review." Opinion No. 479-A P 36, JA 602. Vernon makes no effort to counter this reasonable interpretation.

C. None Of The Precedent Cited By Vernon Is Inconsistent With *PG&E*.

Rather than squarely facing the mandate of *PG&E*, Vernon contends that this case is instead governed by the Court's decision in *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City*). Pet. Br. 24-26. Vernon particularly relies on language in *Atlantic City* that "FERC has no power to force public utilities to file particular rates unless it first finds the existing filed rates are unjust and unlawful." *Id.* 24 (quoting *Atlantic City*, 295 F.3d at 10).

The quoted language, however, is irrelevant to this case, where "Vernon . . . voluntarily submitted its [Transmission Revenue Requirement] for FERC review," *PG&E*, 306 F.3d at 1115, in order to participate as a member of the California ISO. Having done so, Vernon's costs became "a cost of the [California ISO's]" jurisdictional rates, *id.* at 1116. In short, as the Court recognized in *PG&E*, the price of Vernon's participation in this ISO is that its revenue requirement must be reviewed by FERC to ensure that the ISO's jurisdictional rates are just and reasonable.

Vernon also makes much of *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005) (*Columbia Gas*), where the Court held that the Commission could not assert Natural Gas Act jurisdiction over provisions in an otherwise jurisdictional natural gas transmission tariff purporting to regulate statutorily-exempt natural gas gathering facilities. Vernon contends that the

Commission here has run afoul of *Columbia Gas*, which holds that a party's filing cannot itself confer jurisdiction on the Commission. Pet. Br. 27-28.

As the Commission explained, however, unlike the situation presented in *Columbia Gas*, “the Commission is not claiming jurisdiction over a non-jurisdictional activity of Vernon.” Opinion No. 479-A P 30, JA 600. Rather, FPA jurisdiction here derives from the fact that the Transmission Revenue Requirement the Commission is reviewing “is an integral part of an admittedly jurisdictional rate” charged by the jurisdictional California ISO. *Id.*

Similarly, Vernon relies on language in both *Columbia Gas* and *Bonneville Power* to the effect that utilities cannot waive limitations on FERC's statutory authority by volunteering for jurisdiction. Pet. Br. 27-28, 30-31. However, these decisions must be read in harmony with *PG&E*, which “accepted the Commission's approach of allowing otherwise non-jurisdictional entities, like Vernon, to submit their costs to the Commission, and of allowing their costs to be subject to review by the Commission to evaluate whether the resulting [California ISO] jurisdictional rates are reasonable.” Opinion No. 479-B P 40, JA 683. Thus, unlike the situation in *Columbia Gas* or *Bonneville Power*, the Commission reviewed Vernon's filing in order to comply with its jurisdictional mandate to review the California ISO's jurisdictional rate.

At bottom, the *Atlantic City*, *Columbia Gas*, and *Bonneville Power* cases,

none of which mentions *PG&E*, cannot be read to limit the specific holding of *PG&E* or the Commission’s responsibilities here on remand. As the Commission observed, the precedent on which Vernon relies does not “come[] to terms with the [C]ourt’s actual language” in *PG&E*, that the agency is indeed authorized to review Vernon’s Transmission Revenue Requirement under section 205. Opinion No. 479-A P 28, JA 600.

IV. THE COMMISSION HAS AUTHORITY TO ENFORCE VERNON'S CONTRACTUAL OBLIGATION TO MAKE REFUNDS.

A. The Commission’s Refund Order Is Well Within Its FPA Authority.

As we described above, the Commission in this proceeding concluded that the terms of the contract Vernon entered into with the California ISO explicitly obligated Vernon to “make all refunds . . . required of a Participating [Transmission Owner] to implement any FERC order related to the ISO Tariff.” Opinion No. 479-A P 75 (quoting Transmission Control Agreement § 16.2), JA 613-614; *see also* Opinion No. 479-B P 33-36, JA 680-682. Because Vernon had bound itself contractually to make such refunds, the Commission determined that it was authorized “to hold Vernon to its commitment, even though Vernon is otherwise not a public utility subject to the Commission’s ratemaking authority under the FPA.” Opinion No. 479-B P 36, JA 681.

The Commission’s interpretation of section 16.2 of the Transmission

Control Agreement, a filed jurisdictional contract, is reasonable and should be affirmed by this Court. Indeed, as the Commission observed in rejecting a contrary interpretation of the language by Vernon (which Vernon does not raise before this Court), “[i]t is difficult to read this provision as anything but an explicit agreement by non-jurisdictional Participating Transmission Owners to make refunds arising from any Commission order to the ISO, from which they would otherwise be immune by statute.” Opinion No. 479-A P 75, JA 614.

On appeal, Vernon maintains that, regardless of the terms of the Transmission Control Agreement, the Commission is without statutory authority to order Vernon to refund the amounts it over-collected from the ISO and, in turn, from the ISO’s customers.

However, it is worth noting that this was not Vernon’s initial position on this issue. In its August 30, 2000, filing, seeking Commission review of its Transmission Revenue Requirement, Vernon requested that the Commission “allow the [Transmission Revenue Requirement] to go into effect on January 1 and be used by the [California] ISO for rate setting and rate collection purposes, *subject to refund* if on final Commission order a different [Transmission Revenue Requirement] is found to be proper.” *Id.* 2, JA 167 (footnote omitted; emphasis added). Furthermore, Vernon pledged that, “[s]olely for purposes of this filing, Vernon consents to procedures in the nature of refund obligations for

overpayments it receives from the ISO for Vernon’s [Transmission Revenue Requirement].” *Id.* 2 n.7, JA 167.

As we now demonstrate, Vernon’s initial view was correct.

1. Vernon’s Contentions With Respect To The Commission’s Authority Are Without Merit.

Not surprisingly, Vernon backs away from arguing that the terms of section 16.2 of the Transmission Control Agreement do not bind it to make the refunds ordered by the Commission. Rather, Vernon’s fundamental contention is that, regardless of its contractual obligation, the Commission has no authority to enforce the contract terms requiring such refunds.

Vernon primarily bases its position upon the decision of the Ninth Circuit in *Bonneville Power*. See Pet. Br. 21, 23, 27, 29, 31, 32. According to Vernon, “FERC’s claim that its authority derives from Vernon’s ‘agreement’ to ‘make refunds’ is the very same ‘volunteer’ theory advanced by FERC and rejected by the court in [*Bonneville Power*], and is therefore without merit.” *Id.* 27.

In *Bonneville Power*, the court reviewed Commission orders involving the participation by non-jurisdictional entities (*e.g.* municipal utilities) in a centralized, single-clearing price auction operated by the California ISO and the now-defunct California Power Exchange. The Commission ordered non-jurisdictional entities to make refunds for sales at prices in excess of the clearing prices established for the auction. On review, the court rejected the Commission’s claim of subject-

matter jurisdiction over the transactions at issue:

FERC's attempt to order refunds based on its *general* jurisdiction over wholesale sales of electric energy in interstate commerce contained in § 201(b)(1) contravenes the more *specific* provisions of the FPA that limit FERC's authority over governmental entities, *see* § 201(f), and limit FERC's authority to ensure just and reasonable rates and to order refunds to "public utilities," *see* §§ 205, 206(b).

422 F.3d at 920 (emphasis the court's).

Nothing in *Bonneville Power* prevents the Commission from ordering Vernon to make the refunds to which it has contractually obligated itself in this case. First, as *PG&E* made clear, the agency here is legitimately employing its section 205 authority to assure that a jurisdictional rate of a jurisdictional utility, the California ISO, is just and reasonable. *See* 306 F.3d 1116-1117; Opinion No. 479-B P 40, JA 683. There was no such jurisdictional nexus in *Bonneville Power*.

Second, unlike the parties in *Bonneville Power*, Vernon is specifically contractually obligated to make the refund here. As *Bonneville Power* recognized, a contractual obligation puts the refund situation on a different footing, as this would mean that "the remedy, if any, may rest in a contract claim, not a refund action." 422 F.3d at 925. Quoting *Alliant Energy*, the court went on to state:

[W]hen a contract provides that its terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body. As a result, we are not enforcing the FERC order; instead, we are enforcing an agreement which [the non-jurisdictional party] freely entered.

Id. at 926 (quoting 347 F.3d at 1050) (internal citations and footnote omitted).

Vernon argues that *Alliant Energy* is distinguishable in that it “stands for the unremarkable proposition that when parties sign a FERC-jurisdictional contract, they agree to be bound by all FERC-ordered modifications of the contract *that FERC has the legal authority to make.*” Pet. Br. 32, citing *Alliant Energy*, 347 F.3d at 1050 (emphasis petitioner’s). But the Commission did not modify the contract to bind Vernon to refunds. Vernon freely entered into a contract, which was subject to FPA jurisdiction and approved by the Commission, holding it liable for any refunds ordered by the Commission.

It is true that *Alliant Energy* involved the judicial order of refunds, rather than those ordered by the Commission. However, the Commission explained, the logic of *Alliant Energy* applies equally here:

Because no contractual obligation existed to carry out a FERC order, in that case only the [jurisdictional] parties themselves could take action to enforce the contract. In the present proceeding, however, the Commission does not need to rely on a contract action brought by other members of the [California ISO] to compel Vernon to pay a refund. Section 16.2 of the [Transmission Control Agreement] sets out the repayment obligation of Vernon: to “make all refunds” to “implement any FERC order related to the ISO Tariff.”

Opinion No. 479-B P 43, JA 685.

Vernon also raises a newly-minted argument that the filed rate doctrine deprives the Commission of the authority to order refunds here. Pet. Br. 33-35. In this regard, Vernon contends that because the Transmission Access Charge itself has not been held unjust and unreasonable, the Commission “therefore has no

authority or grounds to change the approved pass-through.” *Id.* 34.

The Court should not reach this argument, because Vernon failed to preserve it on rehearing before the Commission. *E.g., California Dep’t of Water Resources*, 306 F.3d 1121, 1125 (D.C. Cir. 2002).⁵ In any event, Vernon’s filed rate theory must fail. As the Court recognized in *PG&E*, a utility’s Transmission Revenue Requirement may be “conceptualized. . . as a cost of the [California ISO].” 306 F.3d at 1116. The Commission did not have before it the rate structure of the Transmission Access Charge in this proceeding, but rather was reviewing one utility’s costs that are rolled into that rate. Thus, the Commission’s refund order does not run afoul of the filed rate doctrine. *See, e.g., Consolidated Edison Co. of New York v. FERC*, 347 F.3d 964, 969-970 (D.C. Cir. 2003) (filed rate doctrine no bar to refunds when tariff places parties on notice).

2. Vernon Fails To Confront The Relevant Contract Language.

Vernon’s argument on appeal barely touches on the matter of its contractual obligations, referencing section 16.2 only in the context of its claim that “the Commission’s entire jurisdictional argument rests on the slender reed of its novel and unprecedented ‘contract’ theory.” Pet. Br. 18 (emphasis deleted). The full

⁵In contrast to its position on appeal, Vernon’s request for rehearing of Opinion No. 479-A argues that its Transmission Revenue Requirement is the filed rate. R. 682 at 38-39, JA 661-662.

extent of Vernon’s argument concerning the contract terms is that the Commission is without statutory authority to order Vernon to pay refunds “based *solely* on a third-party contract contemplating pro rata sharing of refunds to be paid by the [California ISO].” *Id.* 18-19 (emphasis in original).

Vernon’s description of the Transmission Control Agreement as a “third-party contract” is presumably meant to refer to the fact that the Commission is not a party to the Transmission Control Agreement. The relevant fact, which Vernon ignores, is that the Transmission Control Agreement, filed by the California ISO, a FERC-jurisdictional entity, and approved by FERC, is a jurisdictional contract which the Commission is charged with enforcing.

Failing to confront the Commission’s interpretation of the language of section 16.2 of the Transmission Control Agreement, Vernon essentially concedes that it is required to make refunds for the over-collection of its costs. Rather, Vernon’s position would appear to be that the contract’s refund requirement cannot be enforced by the Commission, but would have to be enforced, as in *Alliant Energy*, in a judicial action brought by the other Participating Transmission Owners.

However, the FPA obviously contemplates non-jurisdictional parties entering into and being bound by jurisdictional contracts, and further contemplates that FERC should enforce these contracts. *See* Opinion No. 479-B P 37 & n.41, JA

682. Indeed, in regulating such contracts, the Commission has at least on occasion found it necessary to order municipals to make refunds. *See Ohio Power Co.*, 63 FERC ¶ 61,325 (1993) (municipal customers required to refund excess amounts of prior refunds);

Sustaining Vernon's position would mean that the Commission could enforce the terms of such jurisdictional contracts except for those terms requiring refunds. However, there is no statutory basis for such a distinction. As the Commission explained:

Recognizing that many filed agreements traditionally and even today provide for service by a public utility to an exempt utility such as a municipal utility or cooperative utility, Vernon's argument, carried to its logical conclusion, would allow a public utility to provide service but would permit the exempt municipal or cooperative utility customer to refuse to pay the filed rate for that service; Vernon's argument would deny the Commission the authority to enforce the filed rate.

Id. (footnote omitted). The Court should affirm the Commission's rejection of such an illogical result.

B. The Commission's Refund Order Is Not Barred By The Tenth Amendment.

Before the Commission, Vernon maintained that the agency's refund order violated the Tenth Amendment of the United States Constitution as interpreted by the Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997) (*Printz*), and *New York v. United States*, 505 U.S. 144 (1992) (*New York*). Opinion No. 479-B

rejected Vernon’s contention, on the ground that the Commission was not compelling Vernon “to take the kinds of actions the Supreme Court found unconstitutional” in those decisions, “*i.e.* to enact or enforce a federal regulatory program or legislation.” Opinion No. 479-B P 44, JA 685. Rather, the agency concluded:

[T]he Commission is holding Vernon to a contractual obligation to which Vernon bound itself when it chose to become a signatory to the [Transmission Control Agreement]. Because the Commission is merely enforcing an obligation to which Vernon agreed, our order no more usurps state authority than any court order enforcing a contract usurps state authority.

Id.

The Commission’s determination that the Tenth Amendment is inapplicable to its refund order is sound and should be sustained. In *New York*, the Supreme Court invalidated a portion of a federal statute under which the federal government offered state governments a “choice” of either accepting ownership of radioactive waste or regulating waste disposal according to the instructions of Congress. 505 U.S. at 175. The Court held that this provision violated the basic principle of sovereignty that “[t]he Federal government may not compel the States to enact or administer a federal regulatory program.” 505 U.S. at 188. In *Printz*, the Court found that a federal statute, directly requiring state law enforcement officials to perform background checks and related tasks with respect to handgun purchases, “plainly runs afoul” of the rule enunciated in *New York*. 521 U.S. at 933

Here, Vernon volunteered to participate in the California ISO, which is unquestionably subject to federal regulation, entered into a jurisdictional contract to implement its participation, submitted its costs (which would now become part of the ISO's costs) for Commission review, and was compensated by means of a jurisdictional rate collected by the ISO. As it turned out, Vernon received excess compensation, which it was contractually obligated to refund to the ISO for the benefit of the other participants. Thus, the Commission, by enforcing Vernon's contractual obligation to make refunds, has not compelled Vernon to enact or administer a federal regulatory program. Thus, its action does not impinge on Tenth Amendment limitations in any manner. On the contrary, the Supreme Court has upheld federal utility regulation with a substantially greater impact on state functions. *See FERC v. Mississippi*, 456 U.S. 742 (1982). *See also National Association of Regulatory Utility Commissioners*, 2007 U.S. App. LEXIS *14-15 (Tenth Amendment not violated by FERC orders requiring non-discriminatory use of eminent domain by public utilities under state license, as states may choose whether to so license utilities).

Before the Court, Vernon argues that that the Tenth Amendment is violated by the contested orders because they cause the Transmission Revenue Requirement "enacted by Vernon's duly elected city officials" to become one "*established by FERC*," and cause "revenues collected by Vernon" to be "distributed to third

parties *pursuant to FERC's refund orders.*" Pet. Br. 40-41 (emphasis in original).

Putting aside Vernon's somewhat misleading characterizations (FERC only reviewed Vernon's Transmission Revenue Requirement, at Vernon's request; the revenues at issue are a cost component of the California ISO's Transmission Access Charge), under Vernon's theory, any order by a federal entity (court or agency) to require a state or its subdivision to abide by the terms of its contract would be invalid. Vernon cites no case, and we know of none, applying the Tenth Amendment to such a situation.

CONCLUSION

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

Respectfully submitted,

John S. Moot
General Counsel

Robert H. Solomon
Solicitor

Samuel Soopper
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-8134
FAX: (202) 273-0901

March 19, 2007

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D.C. Cir. Nos. 05-1402 and 06-1246

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 9,348 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

Samuel Soopper
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-8154
FAX: (202) 273-0901

March 19, 2007