

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

Nos. 04-70635, *et al.*

**PACIFIC GAS AND ELECTRIC COMPANY, *ET AL.*,
Petitioners,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.**

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

**BRIEF OF RESPONDENT FEDERAL ENERGY
REGULATORY COMMISSION**

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TABLE OF CONTENTS

	<u>PAGE</u>
STATEMENT OF THE ISSUES.....	1
STATUTES AND REGULATIONS.....	2
COUNTER-STATEMENT OF JURISDICTION.....	2
STATEMENT OF THE CASE.....	2
I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW.....	2
II. STATEMENT OF FACTS.....	6
A. Events Leading to the Challenged Orders.....	6
B. The Challenged Orders.....	11
1. The November 14 Order.....	11
2. The Rehearing Order.....	12
SUMMARY OF ARGUMENT.....	15
ARGUMENT.....	16
I. Standard of Review.....	16
II. The Court Lacks Jurisdiction To Address PG&E’s Claims Because They Constitute An Impermissible Collateral Attack On Prior FERC Orders.....	17
III. The Court Lacks Jurisdiction To Address CAISO’s Claims Because They Challenge An Unreviewable Determination By The Commission Not To Exercise Its Enforcement Authority.....	23

TABLE OF CONTENTS

	<u>PAGE</u>
CONCLUSION.....	27
STATEMENT OF RELATED CASES.....	27
ADDENDUM.....	A-1

TABLE OF AUTHORITIES

<u>COURT CASES:</u>	<u>PAGE</u>
<i>Baltimore Gas and Electric Co.</i> , 252 F.3d 456 (D.C. Cir. 2001).....	17, 25, 26
<i>City of Fremont v. FERC</i> , 336 F.3d 910 (9th Cir. 2003).....	16
<i>City of Nephi v. FERC</i> , 147 F.3d 929 (D.C. Cir. 1998).....	19
<i>Entergy Services, Inc. v. FERC</i> , 319 F.3d 536 (D.C. Cir. 2003).....	17, 20
<i>Friends of the Cowlitz v. FERC</i> , 253 F.3d 1161 (9th Cir. 2001), <i>amended in other parts</i> , 282 F.3d 609 (9th Cir. 2002).....	17, 25, 26
<i>Georgia Industrial Group v. FERC</i> , 137 F.3d 1358 (D.C. Cir. 1998).....	19
<i>Heckler v. Chaney</i> , 470 U.S. 821 (1985).....	17, 25, 26
<i>California Power Exchange Corp.</i> , 245 F.3d 1110 (9th Cir 2001).....	6
<i>Mid-Continent Area Power Pool v. FERC</i> , 305 F.3d 780 (8th Cir. 2002).....	17, 20
<i>Southwest Gas Corp. v. FERC</i> , 145 F.3d 365 (D.C. Cir. 1998).....	17, 20
<i>Transwestern Pipeline Co. v. FERC</i> , 988 F.2d 169 (D.C. Cir. 1993).....	19

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES:</u>	<u>PAGE</u>
<i>American Electric Power Service Corp.</i> , 103 FERC ¶ 61,345 (2003).....	14, 24
<i>California Independent System Operator Corp.</i> , 90 FERC ¶ 61,006, <i>order on reh’g</i> , 91 FERC ¶ 61,026 (2000).....	13, 19
<i>California Independent System Operator Corp.</i> , 93 FERC ¶ 61,239, <i>order on reh’g</i> , 97 FERC ¶ 61,275 (2001).....	13, 19
<i>California Independent System Operator Corp.</i> , 103 FERC ¶ 61,331 (2003).....	9
<i>California Independent System Operator Corp.</i> , 105 FERC ¶ 61,203 (2003)(“November 14 Order”).....	5, 11, 12, 17, 24
<i>California Independent System Operator Corp.</i> , 106 FERC ¶ 61,099 (2004)(“Rehearing Order”).....	5, 12, 13, 14, 17-24
<i>Cities of Anaheim, et al. v. California Independent System Operator Corp.</i> , 94 FERC ¶ 61,268, <i>orders on reh’g</i> , 95 FERC ¶ 61,197 (2001), 102 FERC ¶ 61,274, 105 FERC ¶ 61,021 (2003), 106 FERC ¶ 61,205 (2004).....	13, 19
<i>Enron Power Marketing, Inc.</i> , 102 FERC ¶ 61,316 (2003)(“Show Cause Proceeding”).....	5, 12, 14, 16, 23, 24, 26
<i>San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange</i> , 92 FERC ¶ 61,172 (2000).....	6

TABLE OF AUTHORITIES

<u>ADMINISTRATIVE CASES:</u>	<u>PAGE</u>
<i>San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange,</i> 93 FERC ¶ 61,121 (2000).....	2, 6
<i>San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange,</i> 96 FERC ¶ 61,120 (2001).....	3, 6
<i>San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator Corp. and the California Power Exchange,</i> 101 FERC ¶ 63,026 (2002)(“ALJ’s Proposed Findings”).....	4, 7, 18, 21, 22
<i>San Diego Gas & Electric Co. v. Sellers of Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange,</i> 102 FERC ¶ 61,317 (2003)(“March 26 Order”).....	4, 8, 10, 13, 18, 21, 22
<i>San Diego Gas & Electric Co. v. Sellers of Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange,</i> 105 FERC ¶ 61,066 (2003)(“October 16 Order”).....	4, 8, 11, 13, 18, 21, 22
 <u>STATUTES:</u>	
Administrative Procedure Act	
5 U.S.C. § 701(a)(2).....	16, 17, 24, 25, 26
5 U.S.C. § 706(2).....	16

TABLE OF AUTHORITIES

STATUTES:

PAGE

Federal Power Act

Section 206, 16 U.S.C. § 824e.....6

Section 307(a), 16 U.S.C. § 825f(a).....25

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

STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction to address Petitioner Pacific Gas and Electric Company's ("PG&E") claims because they constitute an impermissible collateral attack on prior Federal Energy Regulatory Commission ("FERC" or "Commission") orders?
2. Whether the Court lacks jurisdiction to address Petitioner California Independent System Operator Corporation's ("CAISO") claims because

they challenge an unreviewable FERC determination as to how it will exercise its enforcement authority?

STATUTES AND REGULATIONS

Pertinent sections of the Federal Power Act (“FPA”) and the Commission’s implementing regulations are set out in the Addendum to this brief.

COUNTER-STATEMENT OF JURISDICTION

As shown in the Argument below, this Court does not have jurisdiction to address any of petitioners’ contentions on appeal and, therefore, the petitions for review should be dismissed.

STATEMENT OF THE CASE

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

The origins of the instant appeal go back to November 1, 2000, when FERC determined, in FERC Docket No. EL00-95, *et al.*, that market power may have been exercised in certain CAISO markets, and established an evidentiary hearing proceeding (“Refund Proceeding”) to develop a factual record regarding appropriate refunds for the period October 2, 2000 to June 20, 2001. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶61,121 at 61,349, 61,350 (2000); *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by*

the California Independent System Operator and the California Power Exchange, 96 FERC ¶61,120 at 61,499 (2001). To determine the appropriate level of refunds, the Commission directed CAISO to rerun all transactions subject to refund using FERC's mitigated price methodology. *Id.* at 61,519-20.

One of the contested issues in the Refund Proceeding concerned energy exchange transactions. An energy exchange transaction occurs when, to acquire energy needed to maintain grid reliability, CAISO receives out-of-market energy in one time period and, rather than pay for the energy as a purchase, CAISO returns (exchanges) energy in a different time period. R. 30 Att. A at 4, PG&E's ER 41. Although called exchanges, both the quantity and price of incoming exchange energy will differ from those of outgoing exchange energy. The quantity differs because the amount of energy returned is the amount obtained, multiplied by an exchange ratio. *Id.* The price differs because incoming and outgoing energy exchanges are dispatched in different time periods, and, therefore, generally will have different market clearing prices. *Id.*

In the Refund Proceeding, over the same PG&E retroactive ratemaking objection made here, the ALJ and the Commission approved CAISO's plan to rerun its settlement and billing processes to account for energy exchange transactions in accordance with the methodology approved in Docket No. ER01-

2886.¹ *San Diego Gas & Electric Co. v. Sellers of Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 101 FERC ¶63,026 at ¶530-36 (2002) (“ALJ Proposed Findings”), 102 FERC ¶61,317 at ¶5N (“March 26 Order”), 105 FERC ¶61,066 at ¶3 and nn. 4 and 17 (2003) (“October 16 Order”). Thus, CAISO’s energy exchange transaction costs would be settled and invoiced to those entities causing CAISO to enter into the exchange transaction based on the date the energy was received. CAISO August 20, 2001 filing in Docket No. ER01-2886 at 3. Also, already settled and invoiced energy exchange transactions occurring since November 14, 2000, would be rerun under this methodology as the accounting methodology for energy exchange transactions approved in Docket No. ER01-2886 was to apply to all CAISO energy exchange transactions as of that date. *Id.* at n. 17.

To assure accurate baseline data would be available for use in the Refund Proceeding rerun, CAISO proposed in the instant FERC proceeding to conduct a preparatory rerun of a number of issues that previously had been run erroneously, including energy exchange transactions (Issue No. 7) and unavailable ancillary

¹ That docket addressed an energy exchange agreement between CAISO and the Bonneville Power Administration (“BPA”).

services transactions (Issue No. 13).² R. 1 at 2, PG&E's ER 2; R. 30 at 5, Att. A at 1, 2, 4-5, 7, PG&E's ER 32, 38, 41-42, 44; R. 31 App. 1 at 1, CAISO's ER 24.

In the instant proceeding, the Commission accepted CAISO's proposal to rerun energy exchange transactions, as it complied with the procedure approved in the Refund Proceeding for exchange transaction reruns for the period in question. *California Independent System Operator Corp.* 105 FERC ¶61,203 at ¶25 and n. 7 (2003) ("November 14 Order"), PG&E's ER 73 (citing *San Diego*, 102 FERC at ¶5N; 105 FERC ¶61,066 at n.17). PG&E's challenge to that rerun proposal was an impermissible collateral attack on prior Commission orders. *California Independent System Operator, Inc.* 106 FERC ¶61,099 at ¶¶11-15 (2004) ("Rehearing Order"), PG&E's ER 102-04.

The Commission rejected CAISO's proposal to rerun and rescind payments for unavailable ancillary services because another proceeding, *Enron Power Marketing, Inc.*, 102 FERC ¶61,316 (2003) ("Show Cause Proceeding"), already was addressing the transactions and entities regarding which the Commission determined unavailable ancillary services enforcement action was appropriate. November 14 Order, 105 FERC at ¶31 and n.13, PG&E's ER 75; Rehearing Order at ¶18, PG&E's ER 105.

² Ancillary services capacity is capacity kept in reserve, *i.e.*, not scheduled to serve any load, so it can be dispatched by CAISO if necessary to balance the system. R. 31 App. 1 at 1-2, ER 24-25.

II. STATEMENT OF FACTS

A. Events Leading to the Challenged Orders

In 1996, California began a major restructuring of its power industry. This included establishing CAISO, a FERC-jurisdictional public utility that manages California's electric energy transmission grid. *See California Power Exchange*, 245 F.3d 1110, 1114-15 (9th Cir. 2001). In the summer of 2000, California wholesale electricity prices increased significantly, affecting all markets run by CAISO. *California Power Exchange*, 245 F.3d at 1115; *San Diego Gas & Electric*, 93 FERC at 61,353. On August 2, 2000, an FPA § 206, 16 U.S.C. §824e, complaint was filed with FERC against all sellers of energy and ancillary services into CAISO's markets. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 92 FERC ¶61,172 at 61,603 (2000). FERC instituted hearing procedures to investigate, *inter alia*, the justness and reasonableness of the rates of FERC-jurisdictional sellers into the markets. *Id.*

After determining that market power may have been exercised in certain CAISO markets, FERC established the Refund Proceeding to further develop a factual record related to appropriate refunds for CAISO transactions during the permitted refund period, October 2, 2000 through June 20, 2001. *San Diego*, 96 FERC at 61,499. The Commission directed the administrative law judge ("ALJ")

to certify findings of fact without an initial decision and CAISO to conduct reruns of all transactions subject to refund. *Id.* at 61,519-20. PG&E actively participated in the Refund Proceeding as one of the “California Parties.” ALJ Proposed Findings, 101 FERC at n. 9.

The appropriate energy exchange transaction rerun methodology was explicitly addressed in the Refund Proceeding. As CAISO explained there, in rerunning its settlement and billing processes, it would account for energy exchange transactions in accordance with the methodology set forth in its energy exchange agreement with the BPA in Docket No. ER01-2886.³ *Id.* at ¶¶530-36. PG&E (as one of the California Parties) protested, contending that applying the Docket No. ER01-2886 methodology to CAISO reruns would constitute inappropriate retroactive ratemaking. *Id.* at ¶533.

The ALJ rejected PG&E’s retroactive ratemaking claims after noting that, in approving the energy exchange transaction methodology in Docket No. ER01-2886, the Commission intended that methodology to be applied to all CAISO energy exchange transactions. *Id.* at ¶¶535-36. Furthermore, the ALJ found it

³ Thus, energy exchange transaction costs would be settled and invoiced to those causing CAISO to enter into the exchange transaction based on the date the energy was received. CAISO August 20, 2001 filing in Docket No. ER01-2886 at 3. Also, as in Docket No. ER01-2886-000, already settled and invoiced energy exchange transactions occurring since November 14, 2000, would be rerun under this methodology. *Id.*

“appropriate to account for energy exchange transactions under [CAISO]’s methodology as set forth in its energy exchange agreement with BPA in Docket No. ER01-2886. This methodology allows these transactions to be identically treated in both [CAISO]’s production system and refund calculations and, thus, ensures symmetrical treatment in a just and reasonable manner.” *Id.* at ¶536.

On March 26, 2003, the Commission summarily adopted the ALJ’s proposed findings on the energy exchange issue. March 26 Order, 102 FERC at ¶5N (citing ALJ’s Proposed Findings at ¶¶530-36).

PG&E sought rehearing of the March 26 Order, asserting, *inter alia*, that the Commission erred in allowing the energy exchange transaction methodology in Docket No. ER01-2886 to be used to calculate reruns for other CAISO energy exchange transactions. October 16 Order, 105 FERC at ¶3 and nn. 4 and 17. The Commission found no merit to PG&E’s assertion, explaining that its “prior approval of the CAISO’s accounting methodology for energy exchange transactions in Docket No. ER01-2886 was to be applied to all jurisdictional entities that are similarly situated, including those in this [Refund] [P]roceeding, for the reasons stated in paragraph 536 of the presiding judge’s proposed findings.” *Id.* at n. 17. PG&E petitioned for judicial review of the October 16 Order, which is pending. *Pacific Gas and Electric Company v. FERC*, 9th Circuit Docket No. 03-73887.

On April 15, 2003, in the FERC docket underlying PG&E's instant appeal, CAISO filed to amend certain provisions of its Tariff. R. 1, PG&E's ER 1-20. CAISO had determined that, to assure accurate baseline data would be available for use in the Refund Proceeding rerun, it had to conduct a preparatory rerun of issues previously run erroneously. R. 1 at 2, PG&E's ER 2. Tariff Amendment No. 51 was necessary because, although CAISO's existing Tariff allowed for reruns,⁴ it required that their results be applied to current trade month invoices. *California Independent System Operator Corp.*, 103 FERC ¶61,331 at ¶3 (2003); R. 1 at 2, PG&E's ER 2; R. 30 at 3, PG&E's ER 30. Tariff Amendment No. 51, by contrast, would allow reruns to "be invoiced separately from monthly market activities," R. 1 at Att. B, PG&E's ER 12, assuring "isolat[ion of] the consequences of such major re-runs to those Market Participants involved in the market during the period covered by the adjustments and re-runs." R. 30 at 3, PG&E's ER 30. On June 13, 2003, the Commission conditionally accepted and suspended Amendment No. 51, pending a further order. *CAISO*, 103 FERC at ¶1. Because CAISO had not sufficiently explained the issues it intended to rerun, however, the Commission directed CAISO to provide additional information in a compliance filing. *Id.* at ¶14.

⁴ CAISO's existing Tariff authorized it "to perform Settlement Statement reruns following approval of the [CAISO] Governing Board." R. 1 at Att. B §11.6.3, PG&E's ER 12.

CAISO's compliance filing explained that its preparatory rerun would cover 17 issues it initially ran erroneously, including energy exchange transactions (Issue No. 7). R. 30 at 5, Att. A at 1, 4-5, PG&E's ER 32, 38, 41-42. CAISO's Tariff did not address how energy exchange transactions should be settled or invoiced, but CAISO had been doing so based on the date the exchange energy was returned. R. 30 Att. A at 1, PG&E's ER 38. As the Commission's March 26 Order, 102 FERC at ¶5N, affirmed that all energy exchange transactions occurring since November 14, 2000 should have been settled and invoiced in accordance with the methodology in Docket No. ER01-2886 (*i.e.*, energy exchange transaction costs are settled and invoiced to those causing CAISO to enter into the exchange transaction based on the date the energy was received), CAISO had to rerun those transactions using that methodology. R. 30 Att. A at 4-5, PG&E's ER 41-42.

CAISO also intended to rerun ancillary services transactions (Issue No. 13). R. 30 at Att. A at 2, 7, PG&E's ER 39, 44; R. 31 App. 1 at 1, CAISO's ER 24. Ancillary services capacity has to be kept in reserve, *i.e.*, not scheduled to serve any load, so it can be dispatched by CAISO if necessary to balance the system. *Id.* at 1-2, CAISO's ER 24-25. CAISO was concerned that, from April 1, 1998 through September 9, 2000, ancillary services capacity scheduled into its system had been scheduled to serve load without instruction from CAISO. *Id.*

B. The Challenged Orders

1. The November 14 Order

The November 14 Order accepted some of CAISO's proposed rerun issues and rejected others. 105 FERC ¶¶61,203, PG&E's ER 66-78. As relevant here, the Commission accepted CAISO's proposal to rerun energy exchange transactions as it simply "comple[d] with the procedure the Commission approved" in the Refund Proceeding for exchange transaction reruns for the period in question, the ER01-2886 methodology. November 14 Order, 105 FERC at ¶¶25 and n. 7, PG&E's ER 73 (citing *San Diego*, 102 FERC at ¶¶5N; 105 FERC ¶¶61,066 at n.17); *see also id.* at ¶¶18 and n.6 (finding claims challenging application of the methodology in Docket No. ER01-2886 to CAISO energy exchange transactions as of November 14, 2000 were moot because the October 16 Order in the Refund Proceeding clarified that the Docket No. ER01-2886 methodology was to apply to all CAISO energy exchange transactions occurring since November 14, 2000), PG&E's ER 71.

The Commission rejected CAISO's proposal to rerun and rescind payments for unavailable ancillary services, however, because that proposal concerned the

double selling⁵ issue already set for hearing in the Show Cause Proceeding. November 14 Order, 105 FERC at ¶31 and n.13, PG&E's ER 75.

PG&E sought rehearing of the Commission's approval of CAISO's proposal to rerun energy exchange transactions. R. 57, PG&E's ER 79-98. CAISO requested rehearing, *inter alia*, of the Commission's rejection of its proposal to rerun allegedly unavailable ancillary services transactions. R. 56, CAISO's ER 92-110.

2. The Rehearing Order

On rehearing, the Commission found CAISO's proposal to preliminarily rerun November 14, 2000 through June 20, 2001 energy exchange transactions "appropriate and consistent with how other out-of-market costs are accounted for," Rehearing Order, 106 FERC at ¶13, PG&E's ER 103, and PG&E's challenge to that proposal an impermissible collateral attack on prior Commission orders. Rehearing Order, 106 FERC at ¶¶11-15, PG&E's ER 102-04.

The approved Docket No. ER01-2886 methodology accounts for energy exchange transaction costs consistently with the treatment of all other out-of-market dispatch costs -- at the hour and date CAISO receives the energy rather

⁵ Double selling occurs when an entity schedules ancillary services capacity into CAISO's system (to be held in reserve for scheduling if needed by CAISO), but also sells that same capacity to serve load.

than the hour and date CAISO returns the energy. *Id.* at ¶14, PG&E’s ER 104. That methodology applied to all energy exchange transactions as of November 14, 2000. *Id.* (quoting CAISO’s statement in Docket No. ER01-2886 that “[f]or previous trade dates (November 14, 2000 through May 31, 2001), Settlement reruns will be conducted using the new methodology.”). As the Refund Proceeding orders clarified, in approving the Docket No. ER01-2886 energy exchange transaction methodology, the Commission intended it to apply to all CAISO energy exchange transactions as of November 14, 2000. *Id.* at ¶15 and n.8, PG&E’s ER 104 (citing March 26 Order, 102 FERC ¶61,317; October 16 Order at n.17).

Furthermore, to the extent PG&E was challenging CAISO’s intent to rerun energy exchange transaction costs to reallocate them among Scheduling Coordinators, that challenge was an impermissible collateral attack on Commission orders in Docket Nos. ER00-555,⁶ ER01-607,⁷ and EL00-111.⁸ Rehearing Order at

⁶ See *California Independent System Operator Corp.*, 90 FERC ¶61,006, *order on reh’g*, 91 FERC ¶61,026 (2000).

⁷ See *California Independent System Operator Corp.*, 93 FERC ¶61,239 (2000), *order on reh’g*, 97 FERC ¶61,275 (2001).

⁸ See *Cities of Anaheim, et al. v. California Independent System Operator Corp.*, 94 FERC ¶61,268, *orders on reh’g*, 95 FERC ¶61,197 (2001), 102 FERC ¶61,274, 105 FERC ¶61,021 (2003), 106 FERC ¶61,205 (2004).

¶13, PG&E's ER 103. Those orders determined how CAISO is to allocate out-of-market costs among Scheduling Coordinators; the rerun here simply complied. *Id.*

The Commission also denied rehearing on the unavailable ancillary services capacity issue raised by CAISO, explaining that:

In the Show Cause Proceedings, the Commission identified four parties that may have engaged in double selling of ancillary services.⁹ The time period covered in the Show Cause Proceedings was January 1, 2000 through June 20, 2001. In the CAISO's adjustment for rescission of ancillary services in this proceeding, the CAISO proposes to address the time period of April 1, 1998 to September 9, 2000 and encompass ten other entities that were not covered in the Show Cause Proceeding. In the Show Cause Proceedings the Commission determined that the relevant time period was January 1, 2000 to June 20, 2001 to explore certain gaming issues, including double selling. Also, in the Show Cause Proceedings the Commission investigated and determined there was only enough evidence to proceed with four parties on the double selling issue. We reject the CAISO's attempt to use the re-run adjustment in this docket to expand the transactions covered under the Show Cause Proceedings. We find that the Show Cause Proceedings are the proper forum to resolve disputed legal and factual issues related to alleged double selling. Therefore, we will reject the CAISO's adjustment to rescind payments for ancillary services and we will deny the CAISO's request for rehearing on this issue.

Rehearing Order, 106 FERC at ¶18, PG&E's ER 105.

The petitions for review followed.

⁹ Citing *American Electric Power Service Corporation*, 103 FERC ¶61,345 at ¶53 (2003).

SUMMARY OF ARGUMENT

I

This Court lacks jurisdiction to address PG&E's challenges to FERC's orders because they constitute an impermissible collateral attack on prior FERC orders. In prior proceedings, the Commission already had rejected PG&E's claims that it would violate the prohibition against retroactive ratemaking to allow the Docket No. ER01-2886 energy exchange transaction accounting methodology to be applied to rerun CAISO energy exchange transactions occurring between November 14, 2000 and June 20, 2001.

Similarly, in other prior proceedings in which PG&E participated, FERC already had resolved how CAISO is to allocate out-of-market costs among Scheduling Coordinators. Thus, PG&E's protest in the instant proceeding challenging CAISO's intent to rerun energy exchange transaction costs to allocate them in accordance with the out-of-market transaction methodology previously established in those prior proceedings was an impermissible collateral attack on the FERC orders in those dockets.

PG&E's attempts to escape this result by interpreting FERC's prior orders as not resolving the matters it raises here fail. FERC's, not PG&E's, interpretation of FERC's prior orders, including those orders' intended effect and breadth, is due deference and, therefore, controlling.

II

The Court also lacks jurisdiction to address CAISO's challenges to FERC's determination not to expand enforcement action regarding alleged past ancillary services violations beyond that already occurring in the Show Cause Proceeding. FERC determined in the Show Cause Proceeding the transaction period and the entities regarding which unavailable ancillary services enforcement action was appropriate, as well as the proper forum for that enforcement action. As it was wholly within the Commission's discretion not to expand enforcement regarding alleged past ancillary services violations beyond that already occurring in the Show Cause Proceeding, the Commission's determination not to allow CAISO to undertake reruns of other past ancillary services transactions is immune from judicial review under APA §701(a)(2). Accordingly, CAISO's challenge to FERC's ruling on this point must be dismissed.

ARGUMENT

I. Standard of Review

Generally, the Court reviews FERC's orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) (citing Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)). FERC's decision not to take enforcement action, however, is presumed immune from judicial review

under APA §701(a)(2). *Heckler v. Chaney*, 470 U.S. 821, 828, 831-33 (1985); *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1162, 1170-72 (9th Cir. 2001), *amended in other parts*, 282 F.3d 609 (9th Cir. 2002); *Baltimore Gas and Electric Co. v. FERC*, 252 F.3d 456, 458-62 (D.C. Cir. 2001). In addition, substantial deference is due to FERC's interpretation of its own orders, including those orders' intended effect and breadth. *See, e.g., Entergy Services, Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2003); *Mid-Continent Area Power Pool v. FERC*, 305 F.3d 780, 783 (8th Cir. 2002); *Southwest Gas Corp. v. FERC*, 145 F.3d 365, 370 (D.C. Cir. 1998).

II. The Court Lacks Jurisdiction To Address PG&E's Claims Because They Constitute An Impermissible Collateral Attack On Prior FERC Orders

In the instant proceeding, PG&E alleged that it would violate the prohibition against retroactive ratemaking to allow the Docket No. ER01-2886 energy exchange transaction accounting methodology to be applied to rerun CAISO energy exchange transactions occurring between November 14, 2000 and June 20, 2001. *See, e.g.,* Rehearing Order at ¶12, PG&E's ER 103. As the Commission found, however, PG&E made, and the Commission rejected, that very claim in the earlier Commission Refund Proceeding. November 14 Order at ¶¶18, 25, PG&E's ER 71, 73; Rehearing Order at ¶¶14-15, PG&E's ER 104.

In the Refund Proceeding, the Commission clarified that, when it approved the Docket No. ER01-2886 methodology, it intended that methodology to be applied to **all** CAISO energy exchange transactions as of November 14, 2000. October 16 Order, 105 FERC at n.17; *see also* March 26 Order at ¶5N (summarily adopting the ALJ's finding, 101 FERC at ¶¶535-36, that, in approving the Docket No. ER01-2886 methodology, the Commission intended it to apply to all CAISO energy exchange transactions as of November 14, 2000). PG&E actively participated in the Refund Proceeding as one of the "California Parties," objecting there, as it does here, that applying the Docket No. ER01-2886 methodology to all energy exchange transactions would violate the prohibition against retroactive ratemaking. October 16 Order at ¶3 and nn.4 and 17. When PG&E again asserted the very same claim in the instant proceeding, the Commission appropriately rejected it as an impermissible collateral attack on the orders in the Refund Proceeding and Docket No. ER01-2886. Rehearing Order, 106 FERC at ¶¶14-15, PG&E's ER 104.

Likewise, the Commission appropriately found PG&E's instant challenge to CAISO's intent to rerun energy exchange transaction costs to allocate them in accordance with the out-of-market transaction methodology previously established

in Docket Nos. ER00-555,¹⁰ ER01-607,¹¹ and EL00-111¹² to be an impermissible collateral attack on the FERC orders in those dockets. Rehearing Order at ¶13, PG&E's ER 103. Those proceedings had resolved how CAISO is to allocate out-of-market costs among Scheduling Coordinators, and PG&E had actively participated in all three proceedings.¹³ *Id.*

As PG&E's claims regarding CAISO's application of the methodologies approved in prior Commission proceedings constitute impermissible collateral attacks on the orders issued in those proceedings, they were properly rejected by the Commission and cannot be considered on appeal of the instant orders. *City of Nephi v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998); *Georgia Industrial Group v. FERC*, 137 F.3d 1358, 1363 (D.C. Cir. 1998) (the court lacked jurisdiction to consider petitioner's contention because FERC already had rejected that contention in a prior order); *Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 174 (D.C. Cir.

¹⁰ See *California Independent System Operator Corp.*, 90 FERC ¶61,006, *order on reh'g*, 91 FERC ¶61,026 (2000).

¹¹ See *California Independent System Operator Corp.*, 93 FERC ¶61,239 (2000), *order on reh'g*, 97 FERC ¶61,275 (2001).

¹² See *Cities of Anaheim*, 94 FERC ¶61,268, *orders on reh'g*, 95 FERC ¶61,197, 102 FERC ¶61,274, 105 FERC ¶61,021, 106 FERC ¶61,205.

¹³ See, e.g., *CAISO*, 90 FERC at 61,010 (Docket No. ER00-555); *CAISO*, 97 FERC at 62,174 (Docket No. ER01-607); *Cities of Anaheim*, 94 FERC at 61,933 (Docket No. EL00-111).

1993) (same). PG&E's only judicial recourse, if any, is on review of the orders in the Refund Proceeding and Docket Nos. ER01-2886, ER 00-555, ER01-607 and EL00-111.

PG&E attempts to escape this result by claiming that the Tariff issues in Docket Nos. ER00-555, ER01-607, and EL00-111 "had nothing to do with the allocation of energy exchange costs." Br. at 21-22. FERC found otherwise. Rehearing Order at ¶13, PG&E's ER 103. Docket Nos. ER00-555, ER01-607, and EL00-111 resolved "the proper methodology CAISO is to utilize for collecting out-of-market costs," which includes the energy exchange costs at issue in the instant case. *Id.* FERC's, not PG&E's, interpretation of FERC's prior orders, including those orders' intended effect and breadth, is due deference and, therefore, controlling. *Entergy*, 319 F.3d at 541; *Mid-Continent*, 305 F.3d at 783; *Southwest*, 145 F.3d at 370.

For the same reason, PG&E's strained interpretation of the Refund Proceeding orders fails as well. PG&E asserts those orders were limited to addressing whether "the rates . . . for energy exchange transactions were unjust and unreasonable and should be mitigated."¹⁴ Br. at 29. FERC's interpretation that the Refund Proceeding orders clarified that the Docket No. ER01-2886 methodology

¹⁴ The orders themselves plainly establish otherwise. *See* ALJ Proposed Findings, 101 FERC at ¶¶530-36; March 26 Order, 102 FERC at ¶5N; October 16 Order, 105 FERC at n.17.

was to apply to all CAISO energy exchange transactions as of November 14, 2000, Rehearing Order, 106 FERC at ¶¶14-15, PG&E's ER 104, not PG&E's interpretation of those orders, is due deference and, therefore, controlling. *Energy*, 319 F.3d at 541; *Mid-Continent*, 305 F.3d at 783; *Southwest*, 145 F.3d at 370.

Next, PG&E argues that its retroactive ratemaking claims do not collaterally attack the Commission's prior determinations because PG&E "was not involved in [Docket No. ER01-2886], nor was there any indication or notice that FERC intended to retroactively change policy." Br. at 23. PG&E was, however, a party to the Refund Proceeding in which: parties, including PG&E, presented evidence and arguments regarding whether the Docket No. ER01-2886 methodology applied to **all** CAISO energy exchange transactions occurring since November 14, 2000 (ALJ's Proposed Findings, 101 FERC at ¶¶531-35); the ALJ found the Commission intended it to (ALJ's Proposed Findings, 101 FERC at ¶¶535-36); and the Commission agreed, clarifying that, when it approved the methodology in Docket No. ER01-2886, it intended that methodology to be applied to **all** CAISO energy exchange transactions as of November 14, 2000 (October 16 Order, 105 FERC at ¶3 and nn.4 and 17; *see also* March 26 Order at ¶5N (summarily adopting the ALJ's finding, 101 FERC at ¶¶535-36, that the Commission intended the Docket No. ER01-2886 methodology to be applied to all CAISO energy exchange

transactions as of November 14, 2000)). Thus, PG&E had notice, a full opportunity, and, in fact, did present its retroactive ratemaking claims regarding CAISO's plan to rerun energy exchange transactions occurring since November 14, 2000 to comply with the methodology established in Docket No. ER01-2886.

Nor is there any truth to PG&E's claim that "the treatment of energy exchange transactions in the [Refund] Proceeding does not govern the treatment of energy exchange reallocation proposed in the Tariff Amendment No. 51 proceeding." Br. at 28 (capitalization altered). As already explained, in prior proceedings the ALJ and the Commission found **all** CAISO energy exchange transactions occurring since November 14, 2000 were to be rerun in accordance with the Docket No. ER01-2886 methodology. ALJ Proposed Findings, 101 FERC at ¶¶530-36; March 26 Order, 102 FERC at ¶5N; October 16 Order, 105 FERC at n.17. The energy exchange transaction rerun at issue in the instant case is identical to that in the Refund Proceeding, as they both cover the same period (November 14, 2000-June 20, 2001) and apply the same methodology. Rehearing Order, 106 FERC at ¶¶11, 14, 15, PG&E's ER 102, 104; ALJ Proposed Findings, 101 FERC at ¶¶530-36; March 26 Order, 102 FERC at ¶5N; October 16 Order, 105 FERC at n.17; CAISO's August 20, 2001 filing in Docket No. ER01-2886 at 3. Accordingly, the answer to PG&E's query (Br. at 28) -- "whether the [Refund]

Proceeding put parties on notice of the allocation now proposed by the CAISO in the [instant] proceeding” -- is a resounding “yes.”¹⁵

PG&E’s complaint that the appropriateness of the rerun methodology is not supported “on the record of this proceeding,” Br. at 30-32, misses the point. The appropriateness of the rerun methodology already had been addressed in Docket No. ER01-2886 and the Refund Proceeding. Thus, the matter was joined and a finding made in prior Commission proceedings, based on the record in those proceedings. There was no need to duplicate that process here. The Commission’s statement regarding the appropriateness of the rerun methodology here simply reiterated its determination made on a fully developed record in those prior proceedings.

III. The Court Lacks Jurisdiction To Address CAISO’s Claims Because They Challenge An Unreviewable Determination By The Commission Not To Exercise Its Enforcement Authority

In a separate Show Cause Proceeding, FERC determined that four entities may have engaged in ancillary services violations in CAISO’s markets from January 1, 2000 through June 20, 2001, and ordered a trial-type hearing before an ALJ to address the matter. Rehearing Order, 106 FERC at ¶¶16, 18 (citing Show

¹⁵ This also disposes of PG&E’s hollow claim, Br. at 30, that it is unclear whether, in the Refund Proceeding, FERC simply approved an accounting change rather than an actual energy exchange transaction rerun in accordance with the methodology in Docket No. ER01-2886-000.

Cause Proceeding, 102 FERC ¶61,316; *American Electric*, 103 FERC ¶61,345 at ¶53), PG&E's ER 104-05; *see also* November 14 Order, 105 FERC at ¶31 and n.13, PG&E's ER 75. In the instant case, CAISO proposed to rerun ancillary services transactions occurring between April 1, 1998 and September 9, 2000, involving ten additional entities, because it was concerned that there may have been additional ancillary services violations. *Id.*; R. 31 App. 1 at 1-2, CAISO's ER 24-25. The Commission "reject[ed] CAISO's attempt to use the re-run adjustment . . . to expand the transactions [and entities] covered under the Show Cause Proceedings." Rehearing Order, 106 FERC at ¶18. The Show Cause Proceeding determined the transaction period and the entities regarding which enforcement action was appropriate, as well as the proper forum for that enforcement action. *Id.*

On appeal, CAISO challenges FERC's decision not to expand enforcement action to include alleged past ancillary services violations CAISO thinks may have occurred between April 1, 1998 and September 9, 2000. Under Administrative Procedure Act ("APA") §10, 5 U.S.C. §701(a)(2), however, judicial review is unavailable "to the extent that . . . agency action is committed to agency discretion by law." FERC's decision not to expand enforcement action of alleged past ancillary services violations beyond those in the Show Cause Proceeding was wholly within its discretion, and, therefore, immune from judicial review under

APA §701(a)(2). *Chaney*, 470 U.S. at 828, 831-33; *Cowlitz*, 253 F.3d at 1162, 1170-72;¹⁶ *Baltimore Gas*, 252 F.3d at 458-62.

In contrast to affirmative agency actions which are subject to the application of meaningful standards of review, . . . decisions not to enforce are typically committed to the agency's absolute discretion, such that a court would have no meaningful standard against which to judge the agency's exercise of discretion. . . . As such, the [Supreme] Court likened such decisions to the choice of a prosecutor not to indict, and noted that they necessarily involve a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise

Cowlitz, 253 F.3d at 1170-71 (internal quotation and citations omitted); cf. *Chaney*, 470 U.S. at 831-33; *Baltimore Gas*, 252 F.3d at 459.

While the presumption of non-reviewability may be rebutted where the substantive statute has provided guidelines for an agency to follow in exercising its enforcement powers, “the relevant provisions of the FPA reveal[] no such establishment of priorities or meaningful guidelines.” *Cowlitz*, 253 F.3d at 1171. FPA §307(a), 16 U.S.C. §825f(a) “plainly states that the Commission ‘*may investigate any facts, conditions, practices, or matters which it may find necessary or proper* in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter’” *Id.* at 1172

¹⁶ This is true whether or not FERC based its ruling here on its discretion not to enforce alleged violations. *Cowlitz*, 253 F.3d at 1164.

(emphasis added by Court). Accordingly, investigative and enforcement decisions “are firmly committed to [FERC’s] discretion,” and “unreviewable by this court.”

Id.

As it was wholly within the Commission’s discretion not to expand enforcement action regarding alleged past ancillary services violations beyond that occurring in the Show Cause Proceeding, the Commission’s determination not to allow CAISO to undertake reruns of other past ancillary services transactions is immune from judicial review under APA §701(a)(2). *Chaney*, 470 U.S. at 828, 831-33; *Cowlitz*, 253 F.3d at 1162, 1170-72; *Baltimore Gas*, 252 F.3d at 458-62. Accordingly, CAISO’s challenge to FERC’s ruling on this point must be dismissed.

CONCLUSION

For the foregoing reasons, the petitions for review should be dismissed for lack of jurisdiction.

STATEMENT OF RELATED CASES

Respondent FERC is aware of the following related case pending in this court: *Pacific Gas and Electric Company v. FERC*, 9th Circuit Docket No. 03-73887.

Respectfully submitted,

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