IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-74506

STATE WATER CONTRACTORS, *et al.*
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF 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 7, 2007

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

Administrative Procedure Act

Federal Power Act

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-74506

STATE WATER CONTRACTORS, *et al.*
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

This case involves a complex electric rate proceeding, involving many parties and many issues. In that proceeding, the Federal Energy Regulatory Commission (FERC or Commission), pursuant to section 205 of the Federal Power Act, 16 U.S.C. § 824d, reviewed certain revisions filed by the California Independent System Operator Corporation (ISO) of its Transmission Access Charge rate. On appeal, the sole remaining issue is:

Whether the Commission reasonably found, based on substantial record

evidence, that petitioners State Water Contractors and the Metropolitan Water District of Southern California (collectively, State Water Contractors) and the California Department of Water Resources (California Department) did not sustain their burden of demonstrating that the Commission must compel the California ISO to abandon its previously-approved form of rate design, for another favored solely by petitioners.

STATUTORY AND REGULATORY PROVISIONS

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

STATEMENT OF THE CASE

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

This case concerns an aspect of the Transmission Access Charge, through which the California ISO recovers the costs of the electric grid facilities it owns and operates. The revenue derived from the Transmission Access Charge is then passed on by the ISO to the Transmission Owners, which retain ownership of their grid facilities and entitlements, but have ceded operational control to the ISO. The revenue makes up the Transmission Revenue Requirements of the Transmission Owners. *See generally Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002) (explaining development of California ISO markets and

development of Transmission Access Charge).

The specific issue raised in the briefs of both petitioners is whether the Transmission Access Charge is just and reasonable under section 205 of the Federal Power Act, 16 U.S.C. § 824d, without employing some type of "time of use" rate design method. A subsidiary issue is whether the Commission properly held that the petitioners had the burden of proof with respect to this issue.

After a hearing, a FERC administrative law judge held that the Commission had previously approved the ISO's "flat" volumetric rate on a per megawatt hour (MWh) basis as just and reasonable, and that the burden of proof was on the parties contesting the existing methodology. Initial Decision, *California Independent System Operator Corp.*, 108 FERC ¶ 63,026 P 316 (2004), Petitioners' Record Excerpts (PRE) 456.

Petitioners filed with the Commission exceptions to these determinations. In the first order on review here, Opinion No. 478, Opinion Affirming in Part and Reversing in Part Initial Decision, Affirming Partial Initial Decision, Denying Rehearing and Dismissing Compliance Filing, *California Independent System Operator Corp.*, 109 FERC ¶ 61,301 P 11 (2004), PRE 460, 461, the Commission summarily affirmed the relevant findings by the administrative law judge.

State Water Contractors and California Department of Water Resources both

sought rehearing with the Commission on these issues. In the second order on appeal, Order Denying Rehearing and Granting Clarification, *California Independent System Operator Corp.*, 111 FERC ¶ 61,337 PP 72-88 (2005), PRE 477, 487-489 (Rehearing Order), the Commission addressed their claims and denied rehearing.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

The Federal Power Act grants the Commission jurisdiction over the transmission and wholesale sale of electric energy in interstate commerce, but leaves regulation of retail sales and local distribution of electric power to the states. *See* 16 U.S.C. § 824(b)(1). *See also, e.g., New York v. FERC*, 535 U.S. 1 (2002) (explaining scope of federal regulatory authority). Under the Act, utilities may only charge rates and engage in practices that are just, reasonable and not unduly discriminatory, and all such rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they meet these standards. 16 U.S.C. § 824d(a), (b), (e).

The Federal Power Act requires public utilities to file all "rates and charges" for jurisdictional services, all "practices and regulations affecting such rates and charges," and all "contracts which in any manner affect or relate to such rates,

charges . . . and services." 16 U.S.C. § 824d(c). The Act prohibits public utilities from making any change in such rates or services prior to giving the Commission and the public 60 days advance notice. *Id.* § 824d(d). The Federal Power Act notice and filing requirements provide the statutory basis for the "filed rate doctrine," which prohibits public utilities from charging rates and engaging in practices not specified in their tariffs. *See, e.g.*, *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 576-79 (1980) (construing analogous provisions of the Natural Gas Act).

Under section 205(e) of the Federal Power Act, the filing utility has "the burden of proof to show that [an] increased rate or charge is just and reasonable." 16 U.S.C. § 824d(e). However, if a party is contesting a rate already on file, which the utility does not propose to change, section 206 of the Act comes into play. In that event, "the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant." 16 U.S.C. § 824e(b).

B. Prior ISO Rate Proceedings Before The Commission

On March 31, 1997, the California ISO and its original Participating

Transmission Owners[1] made a number of filings with the Commission. Among them was the ISO's Operating Agreement and Tariff (ISO Tariff), which would govern the development of the ISO's Transmission Access Charge (under which market participants would pay a single, non-pancaked rate for access to the ISO grid), and a congestion usage charge that would apply only to users of congested transmission paths. On July 30, 1997, in its Order Providing Guidance and Establishing Procedures, *Pacific Gas and Electric Co.*, 80 FERC ¶ 61,128 (1997) (*Guidance Order*), the Commission accepted the ISO Tariff which contained these charges, to become effective January 1, 1998. *See Guidance Order*, 80 FERC at 61,428, 61,435.[2]

The Transmission Access Charge accepted for filing by the Commission in the *Guidance Order* incorporated the flat (non-time sensitive) rate design contested by State Water Contractors and the California Department in this appeal. The

[1] The original Participating Transmission Owners were Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company.

[2] In a prior order, *Pacific Gas and Electric Co., et al.*, 77 FERC ¶ 61,204 (1996), the Commission had approved the concept of transmission access charge rates designed to recover the Participating Transmission Owners' revenue requirements, and preliminarily accepted the congestion pricing and usage charge proposal. *See Guidance Order*, 80 FERC at 61,248.

Guidance Order required various changes to be made in the ISO's proposed tariff, but not in the basic two-part tariff structure of a volumetric access charge, accompanied by a congestion charge. The changes ordered were accepted in a Commission order issued on October 30, 1997. *Pacific Gas and Electric Co.*, 81 FERC ¶ 61,122 (1997).

C. The ISO's Amendment 27 Filing

On March 31, 2000, the ISO filed with the Commission Amendment No. 27 to the ISO Tariff, which began the proceedings leading to this appeal. Under the ISO's proposal, the prior Transmission Access Charge would continue until a new Participating Transmission Owner joined the ISO. *See Initial Decision* P 2, Supplemental Record Excerpts (SRE) 802.[3] While formerly the Transmission Access Charge had consisted of separate rates based on the Transmission Revenue Requirements of the original Participating Transmission Owners, the rate would now be assessed on the combined revenue requirements of all transmission owners in specific areas, and eventually, after a ten-year transition period, form a single

[3] The ISO filed several further amendments which were also addressed in the proceeding below. However, as none of them affect the issue raised in the current appeal, for convenience we refer solely to Amendment No. 27. *See Initial Decision* PP 8-9, 15; SRE 805, 806.

ISO grid-wide charge. *Id.* PP 2-4, SRE 802-804.[4] (As relevant to this appeal, we emphasize that none of the Amendment No. 27 changes proposed by the ISO to its Transmission Access Charge had any effect on the flat rate design or the congestion charge).

In an order issued on May 31, 2000, the Commission accepted the ISO's proposed revisions, suspended them and set them for hearing, which was then held in abeyance pending settlement proceedings. *Cal. Ind. Sys. Operator Corp.*, 91 FERC ¶ 61,205 (2000).

D. The Proceedings Before The Administrative Law Judge And The Initial Decision

In 2002, settlement proceedings having been terminated, the Amendment No. 27 proceeding began before the administrative law judge. The administrative proceeding involved more than twenty parties raising numerous issues. After the parties, including State Water Contractors and the California Department, filed extensive testimony and exhibits, the judge held an evidentiary hearing that lasted from October 21, 2003, until November 14, 2003. The parties then filed initial

[4] The Amendment No. 27 blending of the Participating Transmission Owners' Transmission Revenue Requirements was triggered by the City of Vernon, California, joining the ISO, effective January 1, 2001. *See Cal. Ind. Sys. Operator Corp.*, 94 FERC ¶ 61,141 (2001).

briefs and reply briefs on their various issues, including the rate design issues petitioners pursue on appeal.

On March 11, 2004, the judge issued the Initial Decision, resolving a number of significant and hotly-contested issues raised by the parties concerning the ISO's Amendment 27 proposal to revise its Transmission Access Charge rate. As relevant here, she addressed petitioners' arguments attacking the ISO's volumetric rate design as unjust and unreasonable because it was not time sensitive, as well as the California Department's contention that the ISO had the burden of proof on the issue.

With respect to the latter question, the judge analyzed the relevant provisions of sections 205 and 206 of the Federal Power Act. She acknowledged that section 205(e) provides that, "in a rate increase proceeding, 'the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility.'" Initial Decision P 56, PRE 453 (quoting 16 U.S.C. § 824d(e)). However, the judge indicated, this was not the case for a challenge to a utility's currently existing rate. Rather, she noted that "the condition precedent" to the Commission changing a utility's rate already on file, pursuant to Federal Power Act section 206(a), 16 U.S.C. § 824e(a), "is a finding that the existing rate" is unjust and unreasonable, unduly discriminatory or preferential. *Id.* P 58 (quoting

FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956)). Thus, she concluded:

> [I]f a party wishes to challenge a feature of the [Transmission Access Charge] that is unchanged from the previous rate that the Commission has approved as just and reasonable, then that party bears the burden of coming forward with evidence sufficient to establish that the feature in question is unjust or unreasonable.

Id. (citing *Public Serv. Comm'n of New York v. FERC*, 642 F.2d 1335, 1345 (D.C. Cir. 1980)).

Applying this principle here, the judge found that "[i]n the instant proceeding, the 'volumetric' MWh rate is an aspect of the ISO's rate design that is unchanged by Amendment[] No. 27[.]" Initial Decision P 59, PRE 483. It followed, she reasoned, that the parties seeking to challenge the flat rate design of the Transmission Access Charge bore the burden of proof on the issue.

In so holding, the judge specifically denied the California Department's arguments that the ISO bore the burden of proof because its original Transmission Access Charge flat rate methodology was an interim rate, or because "[t]he ISO had not complied with Tariff requirements that the ISO examine, in developing a successor methodology, the introduction of off-peak rates." *Id.* P 60 (citation omitted). She also rejected the precedent on which the California Department had relied in advancing these contentions as "factually inapposite" and not controlling.

Id. & n.35 (citing *S. Ga. Natural Gas Co.*, 73 FERC ¶ 61,354 (1995), and *Tenn. Gas Pipeline Co.*, 59 FERC ¶ 61,045 (1992)).

On the merits of the rate design issue, the judge concluded that since "[t]he Commission has already approved the flat MWh-based rate methodology as just, reasonable and not unduly discriminatory[,] extended discussion of this issue is moot for the purposes of this proceeding at this time." Initial Decision P 317 (footnote omitted), PRE 456.

Various parties, including State Water Contractors and the California Department, filed briefs with the Commission objecting to the Initial Decision on a number of issues.

E. The Commission's Decision

In Opinion No. 478, the Commission rejected without discussion the petitioners' contentions on the rate design issue relevant here. Opinion No. 478 P 11, PRE 461. State Water Contractors and the California Department requested rehearing on this issue (California Department raised several other issues as well, which it does not pursue on appeal).

In the Rehearing Order, the Commission for the first time addressed the merits of the rate design issue. At the outset, the Commission rejected the petitioners' "notion . . . that they were in any manner deprived of the opportunity

to litigate their time-of-use rate proposal." Rehearing Order P 72, PRE 487. In the Commission's view, State Water Contractors and the California Department had "introduced a significant amount of evidence in support of [their] time-of-use rate proposals." *Id.* Rather, the agency concluded, the presiding judge properly "rejected their claim on the merits, finding that the evidence they propounded was not sufficient to meet their burden to demonstrate that the ISO's flat dollar per MWh rate was not just and reasonable." *Id.* P 73.

On the burden of proof issue, the Rehearing Order determined that "the Initial Decision correctly applied the legal principles." *Id.* P 74. The Commission agreed with the judge that the ISO's flat rate design had been approved in the 1997 *Guidance Order* and was currently in effect, and that the ISO's new Transmission Access Charge proposals did not change this aspect of the charge. *Id.* Thus, the agency affirmed the judge's determination that State Water Contractors and the California Department, seeking to change the ISO's choice of rate design, had the burden of proof on this rate issue. *Id.* P 95, PRE 487-488.

The Commission agreed with the petitioners, however, that the administrative law judge had dealt with their time-of-use rate claim in a "conclusory" manner, requiring the agency to address this issue *de novo*. Rehearing Order P 76, PRE 488.

In addressing this question on the merits, the Commission began by "reiterat[ing] our rationale in the *Guidance Order* supporting our original finding that the ISO's volumetric rate design with congestion charges was just and reasonable." *Id.* P 77. As the agency explained, in the *Guidance Order* it had agreed that the ISO's flat rate proposal combined with congestion pricing was "necessary to achieve two important objectives," *i.e.*, "efficiently ration[ing] constrained transmission capacity while providing for the recovery of each Participating [Transmission Owner's] revenue requirements." *Id.* & n.73 (quoting *Guidance Order*, 80 FERC at 61,429) (internal quotation marks omitted). Moreover, the Commission had "expressly measured" the ISO's flat rate design and congestion pricing mechanism against the agency's Transmission Pricing Policy Statement,[5] and found them fully consistent. *Id.*

Against this background, the Commission addressed the claim by State Water Contractors and the California Department that the California ISO's volumetric rate design was not just and reasonable.

[5] *Inquiry Concerning the Commission's Pricing Policy for Transmission Service Provided by Public Utilities Under the Federal Power Act, Policy Statement*, 59 Fed. Reg. 55,031 (Nov. 3, 1994), FERC Stats. & Regs, Regulation Preambles January 1991-June 1996 ¶ 31,005 (1994), *order on reconsideration*, 71 FERC ¶ 61,195 (1995).

The Commission described the California Department as "[e]ssentially . . . argu[ing] that time-sensitive pricing is required because peak demand drives transmission expansion." Rehearing Order P 79, PRE 488. However, the agency observed, ISO witness Pfeiffenberger "explained in some detail" that "peak end-use load (the measure of on-peak/off-peak pricing) on the ISO's system does not necessarily produce the most transmission use and the most congestion." *Id.* Instead, Mr. Pfeiffenberger concluded, "lines are actually sometimes more congested during off-peak hours." *Id.* & n.76 (citing Ex. ISO-36 at 7-11, SRE 924-928); Ex. ISO-37, SRE 959-962; Ex. ISO-43-46, SRE 969-975; Tr. 909-11, SRE 1025-1027; Tr. 1000-1002, SRE 1028-1030)). Moreover, the Commission noted, "the ISO presented evidence that it considers off-peak as well as peak conditions in transmission planning, and that congestion which causes transmission expansion occurs both in off-peak as well as peak periods." *Id.* & n.77 (citing Ex. ISO-36 at 6-11, SRE 923-928).

The Rehearing Order next addressed the assertion by the California Department and State Water Contractors that the California ISO's flat rate design did not provide sufficient price signals. The Transmission Access Charge, the Commission explained, was "designed to recover those portions of the [Transmission Revenue Requirements] not paid for by congestion charges and

[Firm Transmission Right] auction revenues." Rehearing Order P 80, PRE 488. Thus, the Transmission Access Charge rate was not intended "to provide price signals in and of itself." *Id.* & n.78 (citing Ex. ISO-36 at 14, SRE 931). Rather, the Commission concluded, "it is the ISO's congestion pricing mechanism that primarily provides price signals" on the California ISO system. *Id.* & n.79 (citing Ex. ISO-36 at 14, SRE 931; Ex. SCE-29 at 23, SRE 999).

Furthermore, in the Commission's view, the evidence introduced by the California Department and State Water Contractors "fails to establish" that their proposed time-of-use rate design "would be just and reasonable for the ISO's [Transmission Access Charge]." Rehearing Order P 81, PRE 488. While acknowledging that the California Department and State Water Contractors would benefit from their own rate design proposals, the Commission concluded, based on record evidence, that other parties opposed time-of-use rates because they would lead to increased costs for customers.

In this regard, the Commission referred to "what appeared to be unrebutted testimony" of Pacific Gas and Electric Company witness Kozlowski, which explained that if the ISO were to adopt time sensitive rates, the change in how its transmission rates are developed and allocated would cause significant new costs for many customers. Rehearing Order P 82, PRE 489 (quoting PG&E Brief

Opposing Exceptions at 7, quoting Ex. PGE-5 at 8-9, SRE 1021-1022). Thus, the fact that a time-of-use rate design favored by petitioners would benefit them while adding significant costs to most other market participants prevented the Commission from approving such a measure "as just and reasonable for the ISO [Transmission Access Charge]." Rehearing Order P 63, PRE 489.

Finally, the Commission considered and denied petitioners' contention that rejection of their time-of-use rate proposal was inconsistent with relevant precedent on cost causation principles. In this context, the Commission analyzed three cases relied on by petitioners: *Union Electric Co. v. FERC*, 890 F.2d 1193 (D.C. Cir. 1989) (*Union Electric*), *La. Pub. Serv Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999) (*Louisiana Public Service*), and *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1517 (D.C. Cir. 1984) (*ELCON*). As the Commission explained, this "precedent does not require that off-peak users may never pay the same MWh rate as on peak users under any circumstances." Rehearing Order P 88, PRE 489. Rather, the Commission was required to review the record evidence presented in this case, which led to its finding that the ISO's flat "rate design is not inconsistent with the general principles of cost causation." *Id.*

Summing up, the Rehearing Order stated:

> [T]he Commission finds that, based on our review of the evidence in the record and applicable precedent, the ISO's [Transmission Access

> Charge] rate design is just and reasonable, and not unduly discriminatory, and that the opposing parties have not met their burden of showing otherwise.

Rehearing Order P 84, PRE 489.

This appeal followed.

SUMMARY OF ARGUMENT

I. The Commission, agreeing with the administrative law judge, properly held that the California Department and State Water Contractors, which were seeking a change in the rate design of the California ISO's existing filed rate, had the burden of proof in the proceeding below. The ISO's Transmission Access Charge rate design, which operated on a flat or volumetric basis (accompanied by a congestion charge) had been filed with and approved by the Commission in 1997. The filed rate design, was not, as petitioners submit, an "interim" rate, and the ISO did not propose to change it. Therefore, the Commission appropriately applied relevant Federal Power Act precedent that the party seeking to change a filed rate has the burden to demonstrate that it is now unjust and unreasonable.

II. The Commission reasonably found that the California Department and State Water Contractors did not meet their burden to demonstrate that the flat rate design of the Transmission Access Charge had become unjust and unreasonable. The Commission relied on substantial evidence in the record that squarely refuted petitioners' primary claim, namely, that time-sensitive pricing was required because peak demand drives transmission expansion. In fact, testimony and supporting studies indicated that this was not the case with the California ISO. The Commission also reasonably relied on record evidence that the petitioners'

proposals would cause other customers to incur significant expenses.

Because the Commission relied on specific record evidence, its decision on the technical issue of rate design should be sustained.

Petitioners claim that the agency's result is inconsistent with precedent, but as the Commission demonstrated, no case mandates time-of-use rate design where, as here, the evidence supports an alternate configuration.

The Commission also reasonably rejected petitioners' argument that a flat rate design must be found unjust and unreasonable because it cannot send adequate price signals. As the agency explained, the California ISO's Transmission Access Charge was not intended to send price signals. Rather, that function was served in California's system by the ISO's congestion pricing mechanism.

Petitioners contend that the Commission's decision is fatally undermined by demonstrable flaws in the congestion pricing mechanism. However, the Commission is in the process of resolving problems in the ISO's congestion pricing mechanism in another proceeding, a reasonable exercise of the agency's procedural discretion.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews FERC orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g., City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). The Commission's policy assessments are owed "great deference." *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 702 (D.C. Cir. 2000); *see also, e.g., Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) ("We defer to the specific policy decisions of an administrative agency unless they are arbitrary, capricious, or manifestly contrary to statute"). The Commission's ratemaking determinations are accorded similar deference. *See, e.g., Entergy Servs., Inc. v. FERC*, 319 F.3d 536, 541 (D.C. Cir. 2004) (explaining "highly deferential" standard for issues of rate design).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). Substantial evidence "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. If the evidence is susceptible of more than one rational interpretation, we must uphold [FERC's] findings.'" *Bear Lake Watch, Inc. v.*

FERC, 324 F.3d 1071, 1076 (9th Cir. 2003) (quoting *Eichler v. SEC*, 757 F.2d 1066, 1069 (9th Cir. 1985)) (alteration in original); *accord California ex rel. Lockyer v. FERC*, 329 F.3d 700, 714 (9th Cir. 2003); *see also Sierra Pac. Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) (Commission's "conclusions on conflicting engineering and economic issues" must be upheld "so long as its judgment is reasonable and based on the evidence").

II. THE COMMISSION CORRECTLY ASSIGNED THE BURDEN OF PROOF TO THE PARTIES SEEKING TO CHANGE A FILED RATE.

As the Commission explained in the Rehearing Order, the ISO's volumetric MWh-hour-based (*i.e.*, flat) rate design is a rate on file, previously approved by the Commission in the 1997 *Guidance Order*, and unchanged by the ISO's proposed Amendment 27 revisions. *See* Rehearing Order P 74, PRE 487. This being the case, the Commission applied bedrock ratemaking legal principles to establish that State Water Contractors and the California Department bore the burden of proof to show that the ISO's favored flat rate method was unjust and unreasonable unless replaced by a time-sensitive rate design: "It is firmly established that the burden of proof lies with the party proposing a change from a rate design that is already part of a filed rate." *Id.* P 75 & n.72 (citing *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305 (D.C. Cir. 1992); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182,

187 (D.C. Cir. 1986); *Williams Natural Gas Co.*, 77 FERC ¶ 61,277 at 62,209 & n.250 (1996) (*Williams*)).[6]

Thus, the assignment of the burden of proof by both the administrative law judge and the Commission on the time-of-use rate issue to State Water Contractors and the California Department was consistent with both the relevant terms of the Federal Power Act and applicable precedent.

The California Department (but not State Water Contractors) attacks the Commission's burden of proof finding as arbitrary and capricious. However, its brief makes no reference to the cases relied on by the Commission in the Rehearing Order. Rather, the California Department claims that the Commission itself recognized that the *Guidance Order* established only an interim, rather than a final, rate for the ISO. CDW Br. 55-56. According to the California Department (*id.* 56-58), the Commission conceded as much in a later order issued on October 30, 1997, *Pacific Gas and Electric Co.*, 81 FERC ¶ 61,122 (1997) (October 30 Order).

While the Commission in the October 30 Order did refer to its intention to "provid[e] interim and conditional authorization under sections 203 and 205 of the

[6] As the Commission observed, "while these cases happen to arise under the Natural Gas Act, the analogous terms of the [Federal Power Act] are interpreted identically." Rehearing Order P 75 n.72, PRE 487-488 (citing *Arkansas Louisiana Gas Co.*, 453 U.S. at 577 n.7 (1981)).

Federal Power Act . . . to the ISO" to commence operations, 81 FERC at 61,435, the agency did not intend (and could not have intended) this language to have any effect on the quality or substance of the Transmission Access Charge as the ISO's filed rate, approved in the earlier *Guidance Order*. Under FERC's statutory authority, once a rate has been accepted by the Commission, and is not subject to suspension and refund, it is then established as the filed rate – there is no provision in the FPA referring to an "interim" rate. Thus, the ISO rate that went into effect as a result of the 1997 *Guidance Order* – including the flat, volumetric rate design – was the ISO's filed rate from that day forward.

Williams, cited by the Rehearing Order, explains this point. There, a pipeline customer argued that the pipeline (analogous to the utility here) should bear the burden of proof with respect to an allocation method contained in the pipeline's rate because the Commission had somehow not "knowingly" approved the method employed when previously accepting the pipeline's rate. 77 FERC at 62,208. The Commission rejected the customer's argument:

> Once the Commission accepted the zone gate method [i.e., the allocation method about which the customer complained] and no one sought rehearing, it became the lawful method on [the pipeline]. Any party seeking to change it, other than the pipeline, bears a section 5 [Natural Gas Act, analogous to Federal Power Act section 206] burden of proof. It does not matter how the rate or practice became the existing rate, whether by a merits decision in a contested case or by an uncontested settlement, it is the existing rate and any party

challenging it must bear a section 5 burden of proof.

Id. at 62,209 & n.250 (citing numerous cases).

On this issue, the California Department also relies on language included in the ISO tariff that the ISO Governing Board was required to file a new rate within two years, in which it "shall base its decision on such principles it approves (including, but not limited to, the introduction of off-peak transmission rates . . . ." CDW Br. 59-60 (quoting Former ISO Tariff § 7.1.6, PER 3-4 (emphasis deleted)). However, this language, merely requiring the ISO to consider the introduction of off-peak rates in later amending the Transmission Access Charge, does not in any way undermine the legitimacy of the then-existing Transmission Access Charge, with its flat rate design, as the FERC-approved ISO filed rate, or otherwise compel the ISO to later adopt a time-sensitive rate design.

The California Department also finds support in the Commission's acknowledgement in the October 30 Order "that the initial ISO pricing methodology will be afforded no precedential effect." CDW Br. 61 (quoting 81 FERC at 61,503). However, this language described the California Department's view, not the Commission's. In fact, the Commission plainly states that it will further consider the contentions of the California Department and other parties "when the ISO files a new, or successor, rate methodology pursuant to section

7.1.6" of its tariff. October 30 Order, 81 FERC at 61,505. Indeed, this is exactly what the Commission did in the course of reviewing the ISO's Amendment 27 rate proposals. However, nothing in the October 30 Order or elsewhere indicates that the Commission contemplated some extra-statutory revision of the Federal Power Act section 206 burden of proof in the subsequent rate proceeding.

In sum, the California Department fails to show that the Commission's interpretation of its prior orders as approving the ISO's filed rate, including the flat volumetric rate design, which the ISO did not propose to change in the instant rate proceeding is unreasonable. *See, e.g.*, *California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1993) ("[A]n agency's interpretation of its own . . . prior orders is entitled to deference.").

III. THE COMMISSION REASONABLY CONCLUDED THAT PROTESTING PARTIES FAILED TO DEMONSTRATE THAT THE ISO'S FLAT RATE DESIGN WAS UNJUST AND UNREASONABLE.

A. The Commission's Decision Is Supported By Substantial Evidence.

1. In the Rehearing Order, the Commission addressed the claim of State Water Contractors and the California Department that the California ISO's volumetric rate design was unjust and unreasonable because it was not time sensitive. In rejecting petitioners' contention, the agency primarily relied on the testimony of the ISO witness Pfeiffenberger and Pacific Gas and Electric witness

Kozlowski. Rehearing Order PP 79-80 & nn.76-79 (citing Ex. ISO-36 at 6-11, SRE 923-928; Ex. ISO-37, SRE 959-963; Ex. ISO-43-46, SRE 969-974); P 82 & n.82 (citing Ex. PGE-5 at 8-9, SRE 1021-1022).

First, the Commission determined that, while the petitioners argued that time-sensitive pricing was required because peak demand drives transmission expansion, Mr. Pfeiffenberger demonstrated that this was not the case in California. In fact, the record reveals, Mr. Pfeiffenberger performed a study of all the major transmission paths in California from April 1998 through March 2003 and concluded that there was no correlation between on-peak demand and congestion. In fact, he specifically testified that, based on the ISO's relevant data, "not only does congestion frequently occur during off-peak hours, but on some paths congestion occurred more often during off-peak hours than during peak load hours." Ex. ISO-36 at 9, SRE 926. He further testified that the data indicated that "congestion prices frequently were higher during off-peak hours than during peak load hours," and that "even when transmission congestion occurs during peak load hours, it often is more frequent during off-peak seasons." *Id.* at 9-10, SRE 926-927. In sum, Mr. Pfeiffenberger concluded, "transmission congestion in California is not primarily a peak load phenomenon." *Id.* at 10.

The second important evidentiary finding by the Commission was that the

evidence introduced by State Water Contractors and the California Department "fails to establish" that a time-of-use rate design "would be just and unreasonable for the ISO's [Transmission Access Charge]." Rehearing Order P 81, PRE 488. In this regard, the Commission relied on record evidence presented by Pacific Gas and Electric witness Kozlowski that, while the time-of-use rate design would definitely benefit its proponents, such a regime would cause a "large number of market participants [to] incur significant expense in modifying their scheduling and settlement systems," and new "metering would be required for millions of end-use customers served by the ISO controlled grid." Rehearing Order P 82 & n.82 (quoting PG&E Brief Opposing Exceptions at 7 (quoting Ex. PGE-5 at 8-9, SRE 1021-1022)).

Thus, the Commission's review of the evidence led it to conclude not only that State Water Contractors and the California Department could not meet their burden to show that the ISO's flat rate design was not just and reasonable, but also that they could not demonstrate that their alternate proposal would be just and reasonable. As the Commission explained:

> That the [California Department] and [State Water Contractors] would be the sole beneficiaries of their rate design proposals and that their proposals would add significant additional costs to most other market participants pose considerable stumbling blocks to these proposals being approved by the Commission as just and reasonable for the ISO [Transmission Access Charge].

Rehearing Order P 83, PRE 489; *see also id*. at P 81, PRE 488 (citing record testimony that the California Department and State Water Contractors take most of their electrical needs from the grid during off-peak hours, unlike the "numerous intervenors in this proceeding" that have different systems and that understandably do not support the time-of-use rate design proposal).

2. As discussed above, the Court must sustain the Commission's factual findings "[i]f the evidence is susceptible of more than one rational interpretation." *Bear Lake Watch, Inc.*, 324 F.3d at 1076 (quoting *Eichler*, 757 F.2d at 1069). In other words, in a substantial evidence case involving ratemaking, the question for the court is "not whether record evidence supports [the petitioners'] version of events, but whether it supports FERC's." *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003).

Related to this standard is the fundamental concept of ratemaking under the Federal Power Act, as expressed by the judge below: "For the rate design proposal to be acceptable, it need be neither perfect nor even the most 'desirable'; it need only be reasonable." Initial Decision P 57, PRE 453 (citing *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (*OXY*); *City of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984)); *New England Power Co.*, 52 FERC ¶ 61,090 at 61,336 (1990), *reh'g denied*, 54 FERC ¶ 61,055 (1991), *aff'd sub nom. Town of*

Norwood v. FERC, 962 F.2d 20 (D.C. Cir. 1992)). In fact, as the court explained in *OXY*, as long as the Commission is approving a reasonable rate methodology, "it need not be the only reasonable methodology or even the most accurate." 64 F.3d at 692.

Petitioners' attacks on the evidentiary basis of the Commission's decision never come to grips with these basic principles. For example, State Water Contractors explicitly frames an issue to be decided here in terms of whether the Commission erred by finding that its preferred rate design was not just and reasonable. SWC Br. 2. But as the cases cited above demonstrate, this is not an accurate description of the Commission's task. Rather, the agency must determine whether the utility's current rate design has not been shown to be unjust and unreasonable. Under Federal Power Act section 206, the agency need not turn to the reasonableness of the protestors' proposed substitute rate design if it has not first found that the existing rate design is no longer just and reasonable. *See City of Bethany v. FERC*, 727 F.2d at 1136.

Likewise, both petitioners spend a significant portion of their briefs describing their witnesses' testimony below in support of their alternate time-of-use rate designs. SWC Br. 54-66; CDW Br. 27-39, 48-52. In other words, petitioners would prefer the Court to review this case through the perspective of

their version of the relevant events and ignore the Commission's, which is not the proper standard of review.

Turning to the actual evidence reviewed by the Commission, petitioners rely on largely exaggerated claims. For example, State Water Contractors argue that the Commission's finding that in the ISO's system, "transmission investment costs cannot be primarily tied to meeting peak reliability is contrary to the record as to the ISO and over 30 years of experience as to the industry." SWC Br. 47 & n.145 (citing Ex. SWC-1 at 24:14-15, PER 152). However, the evidence cited is general testimony by State Water Contractors' witness Russell concerning transmission system planning, without specific reference to the California ISO's system.

Similarly, the California Department maintains that ISO witness "Mr. Pfeiffenberger admitted that the *primary* focus and criterion for ISO transmission planning is reliability at the time of peak demand." CDW Br. 43 (emphasis petitioner's) (citing Tr. 2080-81, PRE 427-428). The cited evidence, however, is Mr. Russell's testimony that, in his opinion, Mr. Pfeiffenberger, "by implication" concedes this because certain high-voltage transmission upgrades incorporate "reliability considerations" as well as "economic considerations," Tr. 2081-82 (SRE 1031-1032), hardly the same thing.

Petitioners also take issue with the Commission's concern that their

proposed alternative rate designs would shift costs to other ISO customers. Thus, the California Department faults the Commission concern about the expenditures for grid users caused by time-based rates, pointing out that any significant rate revision will cause such expenditures. CDW Br. 51. Similarly, State Water Contractors complain that the Commission erred by not permitting a rate from which they would benefit because of a rate design "popularity contest." SWC Br. 60.

The short answer to petitioners' argument is found in the venerable principle that a "[a] major purpose of the [Federal Power] Act is to protect power consumers against excessive prices." *Pennsylvania Power Co. v. FPC*, 343 U.S. 414, 418 (1952). In accordance with this principle, the Commission reasonably took into account record evidence that most of the affected customers opposed petitioners' rate proposals in view of the negative cost impact it might have on them, even though the proposals would benefit petitioners.

B. The Commission's Decision Is Fully Consistent With Precedent.

1. Having determined that specific evidence supported the continuing justness and reasonableness of the California ISO's volumetric (flat) rate design, the Commission went on to reject petitioners' claim "that this result is inconsistent with relevant precedent concerning cost causation." Rehearing Order P 85, PRE

489. As the Commission explained, none of the cases relied on by State Water Contractors and the California Department -- *Union Electric*, *Louisiana Public Service* and *ELCON* -- stand for the broad principle that a time-of-use rate design is mandated under the FPA. *Id.* PP 85-87. We discuss these cases below.

2. Nonetheless, both State Water Contractors and the California Department maintain that the Commission's rejection of their time-of-use rate proposals represents an unexplained departure from standard FERC ratemaking principles. *E.g.*, SWC Br. 26; CDW Br. 27.

On this point, the California Department observes that "FERC has long recognized that time-based electric transmission rates contribute to economic efficiencies, lower overall costs, and system reliability." CDW Br. 27, citing *American Electric Power Service Corp.*, 88 FERC ¶ 61,141 at 61,453-54 (1999). The California Department also finds support in Order No. 888,[7] which it describes

[7] 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), *aff'd in most respects*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, *New York v. FERC*, 535 U.S. 1 (2002).

as "mandat[ing] a transmission rate methodology in which 'system costs are allocated based on the average of the customer's usage *at the time of the utility's 12 monthly peaks*,' unless it were proved that another methodology was used for system transmission planning." *Id.*, quoting Order No. 888 at 31,736 n.441 (emphasis the petitioner's).

In addressing such arguments by petitioners, we must emphasize that, under the FPA, there is no single "just and reasonable" cost allocation method. As this Court has explained:

> In considering FERC's tariff-approving authority, the Supreme Court has emphasized "that the just and reasonable standard does not compel the Commission to use any single pricing formula". . . The Court has recognized that the "just and reasonable" requirement accords FERC "broad rate-making authority."

California ex rel. Lockyer v. FERC, 383 F.3d 1006, 1012 (9th Cir. 2004) (*Lockyer*) (quoting *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Co.*, 498 U.S. 211, 224 (1991) (*Mobil Oil Exploration*)).

There is no question that the Commission has often, in other circumstances and based on other records, approved time-sensitive rate designs as just and reasonable. However, as *Lockyer* and *Mobil Oil Exploration* make plain, it does not follow California ISO's rate design is necessarily unjust and unreasonable if it is based on a different model.

In fact, the time-of-use rate design cases on which the State Water Contractors and California Department rely are based on the rate design systems in other regions, where customers pay a reservation charge for firm point-to-point transmission. The California ISO, however, has a load-based rate design, where there is no reservation of capacity. Rather, as the Commission explained in the October 30 Order, under the ISO's rate design, "transmission customers pay an access charge based on the rolled-in embedded cost of the Transmission Owner's transmission system where scheduled power leaves the ISO Controlled Grid." October 30 Order, 81 FERC at 61,455; *see also id.* at 61,486 (Commission recognized "that transmission service in the restructured California will be based on a different set of rights and relationships than those that underlie the *pro forma* Tariff" governed by Order No. 888 and generally applicable elsewhere). "Therefore," the Commission observed, "all transmission customers will have access to the entire ISO Controlled Grid at non-pancaked rates." *Id.*

Contrary to the California Department's contention, the Commission explicitly differentiated between the generally-applicable Order No. 888 model, which "address[ed] the firm reservation of physical transmission rights," and the California ISO's Transmission Access Charge model:

> The ISO Tariff does not provide for the long-term reservation of transmission capacity. As proposed, the ISO will attempt to

> accommodate the transmission service schedules of participants on a daily basis. To the extent that the ISO receives more requests than it can accommodate, it will attempt to efficiently ration constrained transmission capacity through congestion pricing.

Id. at 61,472.

The fact that the ISO's rate design is based on different principles likewise disposes of the State Water Contractors' argument that *Union Electric*, *Louisiana Public Service*, and *ELCON* govern here. SWC Br. 33, 36, 40-41, 51. As the Commission determined in the Rehearing Order, *Union Electric* does not hold, as the California Department would have it, that any rate method which does not differentiate pricing between on-peak and off-peak users is inherently unreasonable. Rather, the Commission explained:

> In *Union Electric*, which involved generation rather than transmission rates, the Commission "had sought to impose a higher portion of fixed costs on off-peak users by adopting a new billing form for the demand charge." This resulted, the court explained, in a charge "solely on users whose off-peak consumption is high relative to their peak use," a deviation from prior Commission practice on which the complaining generation customers had relied.

Rehearing Order P 85 (quoting *Union Electric*, 890 F.2d at 1198) (footnotes omitted), PRE 489. Thus, the Commission concluded, *Union Electric* "can hardly be read to demand time-sensitive transmission rates in all circumstances." *Id.*

Likewise, the agency opined, *Louisiana Power Commission* does not stand for such a broad principle. There, the court rejected as arbitrary FERC's

permitting the "assessment of capacity charges for interruptible service when there was no evidence that such service caused the addition of new capacity." Rehearing Order P 86, PRE 489. Here, however, the Commission determined that the California ISO's Transmission Access Charge rate design was based on "specific evidence that peak use did not determine investment in capacity" on the ISO system. *Id.* P 87. Thus, FERC here was reasonably relying on "record evidence and reasoned decisionmaking," as opposed to "mere economic theory." *Id.* (quoting *ELCON*, 747 F.2d at 1517).

Indeed, in *ELCON*, the court sustained the Commission's approval of particular time-of-use rates because they were based on specific record evidence. 747 F.2d at 1513. Here, however, as we have discussed above, the Commission relied on specific record evidence which supported a flat, volumetric rate design.

State Water Contractors also contend that the Commission's decision here is inconsistent with the Commission's Transmission Pricing Policy. SWC Br. 22, 41-43. However, as described above, in the 1997 *Guidance Order* the Commission specifically determined that the ISO's flat rate design, in conjunction with its congestion pricing mechanism, fully comported with applicable ratemaking policy. *See* Rehearing Order P 77, PRE 488; *Guidance Order* at 61,429.

State Water Contractors go on to argue that this conclusion by the

Commission is essentially cancelled because the congestion pricing mechanism has significant flaws. SWC Br. 34-39. We deal with this separate argument next.

C. The Commission Appropriately Rejected Petitioners' Claim That The ISO's Flat Rate Design Could Not Be Sustained Because It Did Not Send Proper Price Signals.

1. The Commission rejected petitioners' argument below that rates that did not reflect on-peak/off-peak differences could not send proper price signals. This was because, the Commission concluded, the Transmission Access Charge was designed to recover the revenue requirements of the Participating Transmission Owners, and was not designed to provide such price signals, which instead was a function of the ISO's congestion pricing mechanism. Rehearing Order P 80, PRE 488.

On this issue, the Commission supported its decision by reference to the 1997 *Guidance Order*. There, in accepting the ISO's current rate design, the Commission explained that the ISO's congestion usage charge "sends the proper price signals regarding the opportunity costs of using congested transmission paths," and that "[t]he usage charge will encourage efficient use of the transmission system and facilitate the development of a competitive electric market." Rehearing Order P 78 & n.75, PRE 488 (quoting *Guidance Order*, 80 FERC at p. 61,429). As the agency went on to explain:

> By efficiently pricing the use of constrained transmission capacity, the ISO's proposed usage charge will also send the proper price signals for the location and dispatch of existing and new generating resources. To the extent generation located on the high cost (import) side of a constraint is priced higher as a result of congestion usage charges, generation that would otherwise be more expensive but for the usage charges will be dispatched first. Therefore, new load will have an incentive to locate on the low cost (export) side of the constraint, and new generation will have an incentive to locate on the high cost (import) side of the constraint. Moreover, the ISO's proposed congestion usage charge is also likely to encourage efficient expansion of the transmission system. For example, to the extent that, over time, congestion usage charges are higher than the cost to expand constrained transmission capacity, transmission customers will have an incentive to expand the transmission system.

Id.

On this issue, the Commission also relied (Rehearing Order P 80 & n.78, PRE 488) on the testimony of ISO witness Pfeiffenberger that "[t]he ISO's congestion charges reflect the marginal cost of using constrained transmission paths and thus provide efficient price signals." Ex. ISO-36 at 13, SRE 930. The Commission further cited the testimony of Southern California Edison Company witness Hansen (Rehearing Order P 80 & n.79, PRE 488), who rejected the theory that congestion pricing was insufficient to provide price signals for investment. As Mr. Hansen explained:

> Transmission in the ISO structure is an hourly service, and the hourly prices that result from the ISO's congestion management system reflect the actual economic value of transmission for each hour. A pattern of congestion occurring on a particular transmission line does

> in fact signal the need for a transmission investment. Path 15 is a good example of congestion prices indicating a need for transmission investment. Based on the congestion that has occurred, the ISO has determined that the Path 15 upgrade is needed and soon to be constructed.

Ex. SCE-29 at 23, SRE 999.

2. State Water Contractors maintain that the Commission erred by relying on the ISO's congestion management pricing mechanism to send price signals in coordination with a flat rate design. SWC Br. 26. In this regard, State Water Contractors lay particular emphasis on the Commission's recognition in other proceedings that the ISO's congestion management system is "seriously flawed." *Id.* 30-31 & n.86 (citing *Ca. Ind. Sys. Operator Corp.*, 90 FERC ¶ 61,006 at 61,013-14 (2000)). Thus, State Water Contractors maintain, the Commission here approved the flat volumetric rate design "in complete disregard" of its prior findings that the ISO's congestion management mechanism "must be comprehensively replaced." SWC Br. 21.

However, State Water Contractors' position is not well taken. First, the Commission did not ignore concerns raised about the flaws in the ISO congestion management scheme; rather, it noted that "changes are being made to improve the ISO's congestion pricing in another proceeding before the Commission." Rehearing Order P 80 n.79, PRE 488. Thus, the agency observed, State Water

Contractors' assertion "does not affect [the Commission's] premise here." *Id.*

In fact, treating problems in the congestion management system in a proceeding other than this one is well within the Commission's procedural discretion. As the Supreme Court has held, "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures. . . . and priorities." *Mobil Oil Exploration*, 498 U.S. at 230 (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978), and *Heckler v. Chaney*, 470 U.S. 821, 831-832 (1985)).

Second, although only obliquely referred to by State Water Contractors (SCW Br. at 18 & n.59), [8] the Commission recently issued an order approving the California ISO's new congestion management mechanism, in a proceeding in which both the California Department and the Metropolitan Water District of Southern California participated. *See Ca. Ind. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006) (September 2006 Order), *reh'g pending*.

Significantly for the present case, the new congestion management plan is actually based on a seasonal and time-of-use rate design. September 2006 Order P

[8] The California Department acknowledges the September 2006 Order as "revamping ISO markets and operations," and taking into account demand response. CDW Br. 38.

708. Thus, petitioners' concerns about any insufficiency in the price signals sent by the ISO's congestion pricing have been addressed by the Commission in a separate proceeding. In any event, any remaining concerns petitioners have with the ISO congestion pricing mechanism can be pursued in that proceeding and, if necessary, on appeal. *See Sacramento Municipal Util. Dist. v. FERC*, 474 F.3d 797 (D.C. Cir. 2007), 2007 U.S. App. Lexis 166 at *13-*14 (holding that argument effectively challenging the adequacy of the California ISO's congestion pricing mechanism should properly be brought in ongoing FERC procedure actually addressing and revising that mechanism).

CONCLUSION

For the reasons stated, the petitions should be denied, and the challenged FERC 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) 502-6600
FAX: (202) 273-0901

March 7, 2007