
**In the United States Court of Appeals
for the Ninth Circuit**

Nos. 09-72762, 09-72775, 09-72778, 09-72789, 09-72791, 09-72793,
09-72794, 09-72796 and 09-72797 (consolidated)

NORTHERN CALIFORNIA POWER AGENCY, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

—————

STATEMENT OF ISSUES

1. Whether Petitioners Indicated Public Entity Petitioners (Public Entities) and Bonneville Power Administration and Western Area Power Administration (collectively Bonneville) have standing to challenge Federal Energy Regulatory Commission (FERC or Commission) orders in which they substantially prevailed and which cause petitioners no immediate or concrete harm?

2. Assuming jurisdiction, whether the Commission reasonably concluded that it reset the market clearing prices for the California Independent System Operator (California ISO) and the California Power Exchange (California PX) to just and reasonable levels during the refund period provided under Federal Power Act (FPA) § 206(b), 16 U.S.C. § 824e(b), in determining appropriate refunds?

STATUTES AND REGULATIONS

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

STATEMENT OF THE CASE

Petitioners are municipal and federal governmental entities that sold power in the California ISO and PX markets during the now very familiar California energy crisis of 2000 and 2001. In *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005), this Court held that the Commission lacked statutory authority under the FPA to order governmental entities such as petitioners to refund amounts collected for sales in the California ISO and PX markets in excess of the just and reasonable rate.

On remand from *Bonneville*, the Commission issued the orders under review. *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 Corp.*, 121 FERC ¶ 61,067 (2007) (Remand

Order), EOR 18, *on clarification*, 121 FERC ¶ 61,188 (2007) (Clarification Order), EOR 15, *on rehearing*, 127 FERC ¶ 61,191 (2009) (Rehearing Order), EOR 1. In compliance with *Bonneville*, the challenged orders vacated the Commission's California refund orders, *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Service*, 96 FERC ¶ 61,120 (2001) (Refund Order), *on reh'g*, 97 FERC ¶ 61,275 (2001) (Refund Rehearing Order) (collectively Refund Orders), *petitions for review granted*, *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005), *petitions for review granted in part and denied in part*, *Public Utils. Comm'n of California v. FERC*, 462 F.3d 1027 (9th Cir. 2006), to the extent that they subjected certain non-public utility entities, including petitioners, to refund liability for California ISO and PX sales. Thus, petitioners here substantially prevailed in the challenged Commission orders, which *absolved* petitioners from FERC refund jurisdiction under FPA § 206(b), 16 U.S.C. § 824e(b).

The issue here arises from a statement made in the Clarification Order, as affirmed in the Rehearing Order, that the Commission's Refund Orders reset the market clearing prices in the California ISO and PX markets to just and reasonable levels. The Commission rejected petitioners' arguments that FPA § 206(b) proceedings do not permit retroactive resetting of rates, but rather only provide a mechanism for the Commission to impose refunds on jurisdictional entities. While it is true that § 206(a) directs the Commission to set rates or charges to be

“thereafter observed,” this language must be read together with § 206(b), which expressly provides that the Commission may order refunds ““for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force.”” Rehearing Order P 16, EOR 4 (quoting FPA § 206(b), 16 U.S.C. § 824e(b)).

FPA § 206(b) therefore specifically provides that the Commission may order refunds of amounts paid in excess of those which would have been paid under the just and reasonable rate, as determined by the Commission. *Id.* Absent the resetting of rates during the refund period to just and reasonable levels, the Commission would be unable to determine what amount would be in excess of a just and reasonable rate. *Id.* P 20, EOR 5. The argument that the Commission may not reset prices would, in effect, bar the Commission from ever ordering refunds because the ordering of refunds, by its very nature, involves the resetting of rates in a past period. *Id.* P 19, EOR 4.

COUNTER-STATEMENT OF JURISDICTION

As this Court has recognized, the FPA “limits judicial review to those parties who have been ‘aggrieved by an order of the Commission.’” *Port of Seattle v. FERC*, 499 F.3d 1016, 1028 (9th Cir. 2007) (quoting FPA § 313(b), 16 U.S.C. §

825l(b)). In addition, petitioners are held to the constitutional requirements of standing. *Id.* Both aggrievement and standing require that petitioners establish, at a minimum, injury in fact to a protected interest. *Id.*

As demonstrated fully below in Argument Section II *infra*, petitioners cannot establish the requisite injury. Petitioners were the prevailing parties in the challenged orders, which *absolved* petitioners of any refund liability under FPA § 206(b). “The general rule is that a party may not appeal from a decree in its favor.” *Id.* Disagreement with the rationale espoused by the agency in a substantively favorable decision does not constitute injury sufficient for standing. *Id.* Rather, it is the concrete effect of the agency’s adjudicatory action that determines standing. *See Shell Oil Co. v. FERC*, 47 F.3d 1186, 1202 (D.C. Cir. 1995). Here, there is no concrete effect of the agency’s action on petitioners, as the orders impose no refund obligation on petitioners.

STATEMENT OF FACTS

I. THE CALIFORNIA ENERGY CRISIS

The California energy crisis of 2000-2001, and its consequences, are all too familiar to this Court. *See, e.g., In re California Power Exchange Corp.*, 245 F.3d 1110, 1115 (9th Cir. 2001) (describing events). *See also, e.g., California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008 (9th Cir. 2004) (*Lockyer*); *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 758-

59 (9th Cir. 2004); *Bonneville*, 422 F.3d at 911-14; *Public Utils. Comm'n of the State of California v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (*PUC of California*).

In short, the energy crisis resulted in a sharp rise in wholesale electricity prices throughout the West, frequent system emergencies and occasional blackouts in California, and severe financial distress to certain utilities, energy consumers and other market participants. In response, the Commission initiated a series of adjudicatory and investigative proceedings, intended both to settle and reform markets going forward and, where appropriate, to provide ratepayer relief retroactively.

Unfortunately, but predictably, given the magnitude of the energy crisis and the huge sums of money involved, the Commission's actions generated a flood of litigation on appellate review of FERC orders. To manage the case load, this Court adopted complex case management procedures. *See Order, Pub. Utils. Comm'n of California v. FERC*, Nos. 01-71051, *et al.* (9th Cir. Aug. 2, 2006) ("We direct Senior Circuit Judge Edward Leavy to oversee and explore with the parties possible resolution through mediation."); *PUC of California*, 462 F.3d at 1034 n.1 (noting the mediation of Senior Judge Edward Leavy and other Court officials). Out of the dozens of pending FERC appeals, the Court selected a representative few to go forward first for appellate review. *See PUC of California*, 462 F.3d 1027 (refund effective date and scope issues); *Bonneville*, 422 F.3d 908 (FERC

jurisdiction over governmental entities); *Port of Seattle*, 499 F.3d 1016 (Pacific Northwest Refund Proceeding). This case concerns Commission orders on remand from *Bonneville*.

Following issuance of *PUC of California*, 462 F.3d 1027, in 2006, further efforts have been made to settle cases arising from the Western energy crisis. Settlement and case management conferences have been held periodically. Many orders have been issued in this Court's Docket No. 01-71051 (or related dockets) on this topic, halting litigation and encouraging settlement. *See, e.g.*, Orders issued in Docket Nos. 01-71051, *et al.*, on August 2, 2006, August 4, 2006, October 23, 2006, February 16, 2007, April 25, 2007, June 12, 2007 and August 6, 2007. Similar efforts have been undertaken to encourage settlement of the Pacific Northwest Refund Proceeding. *See* Orders of September 18, 2007 and January 7, 2008 in Docket Nos. 03-74139, *et al.*

Congress itself has urged the resolution of Western energy crisis claims. In the Energy Policy Act of 2005, Pub. L. No. 109-58, section 1824, 119 Stat. 594, Congress directed the Commission to "seek to conclude its investigation into the unjust or unreasonable charges incurred by California during the 2000-2001 electricity crisis as soon as possible," and to submit a report by December 31, 2005 describing the actions taken by the Commission to date. In the Commission's report, the Commission emphasized the importance of expeditious resolution --

preferably through means other than litigation -- of energy crisis claims. *See* Report to Congress at 4, 25-26 (Dec. 27, 2005) (<http://www.ferc.gov/legal/staff-reports/comm-response.pdf>). Settlement efforts, sometimes successful, continue. *See* Apr. 28, 2010 Press Release, “Governor, Attorney General, and CPUC Announce \$400 Million Energy Crisis Settlement With Sempra Energy” (http://docs.cpuc.ca.gov/PUBLISHED/NEWS_RELEASE/117075.htm).

II. THE REGULATORY FAIRNESS ACT OF 1988

Prior to 1988, in proceedings challenging an existing rate, FPA § 206(a) authorized the Commission only to grant relief prospectively from the date of the Commission order fixing the new just and reasonable rate “to be thereafter observed.” *See, e.g., FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956) (Commission authority under FPA § 206(a) “is limited to prescribing the rate ‘to be thereafter observed’ and thus can effect no change prior to the date of the order”).

In 1988, Congress enacted The Regulatory Fairness Act of 1988, Pub. L. No. 100-473, 102 Stat. 2299 (1988) (The Regulatory Fairness Act), which, as relevant here, added to FPA § 206 a new subsection (b), providing the Commission authority to order retroactive rate relief through a fifteen month refund period.

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. . . . At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the

refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding.

FPA § 206(b).

The fifteen month refund period authorized in § 206(b) provides a “narrow exception” to the purely prospective relief allowed under FPA § 206(a). *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1211 (D.C. Cir. 2009). Under FPA § 206(b), FERC can order utilities to give back money already collected in excess of the just and reasonable rate during the pendency of the limited refund period. *Id.* at 1215. *See City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) (recognizing that § 206(b) “authorizes retroactive refunds (rate decreases)”).

Thus, FPA § 206(b) expanded FERC’s authority to remedy unjust and unreasonable existing rates under FPA § 206 by giving FERC rate orders under FPA § 206 retroactive as well as prospective effect. *See* Rehearing Order P 20 & n.36, EOR 5 (citing S. Rep. No. 100-491 at 3-4 (1988) (Senate Report); H. Rep. No. 100-384 at 2 (1987) (House Report)). The House Report states that “H.R. 2858 amends Section 206 of the Federal Power Act, the portion of the Act

governing rate refund applications, by requiring the Federal Energy Regulatory Commission (FERC) to establish a ‘refund effective date’ for all proceedings under Section 206. *A FERC decision ordering a rate refund pursuant to Section 206 would be retroactive to the ‘refund effective date.’ Under current law, by contrast, FERC’s rate refund orders under Section 206 are prospective only.*” House Report at 2 (emphasis added). Similarly, the House Report further states that: “H.R. 2858 would change the procedures governing Section 206 rate decrease applications by: . . . (b) *making final Section 206 determinations by the Commission retroactive to the ‘refund effective date.’*” House Report at 3 (emphasis added).

Similarly, the Senate Report states that:

H.R. 2858, as amended by the Committee, would allow the Federal Energy Regulatory Commission (FERC) to grant refunds, subject to certain limitations, under section 206 of the Federal Power Act (FPA). Section 206 governs proceedings in which rate reductions are sought by wholesale power customers or through action initiated by the Commission. *In either case the Commission under current law may only order the rates of public utilities to be reduced prospectively from the date of its decision that existing rates are unlawful.*

H.R. 2858, as amended, would give the Commission the discretion to require public utilities to refund amounts paid in excess of just and reasonable rates for certain periods prior to the Commission’s decision.

Senate Report at 3 (emphasis added).

III. THE REFUND ORDERS

Following a dramatic increase in wholesale electricity prices, in August 2000, San Diego Gas & Electric Co. (San Diego) filed a complaint under FPA § 206 against all sellers of energy and ancillary services into the California ISO and PX markets. *See, e.g., Lockyer*, 383 F.3d at 1009. In response, FERC instituted hearing procedures under FPA § 206 to investigate the justness and reasonableness of rates in the California ISO and PX markets. *Id.* Among other things, FERC ordered an evidentiary hearing to determine the appropriate refunds, pursuant to its authority under FPA § 206(b). *Id.* at 1010.

In the Refund Orders, the Commission found non-jurisdictional governmental entities subject to refund liability under FPA § 206(b), a finding overturned by this Court in *Bonneville*, 422 F.3d at 911. The Commission also established the methodology for calculating refunds under FPA § 206(b) related to transactions in the spot markets operated by the California ISO and PX during the period October 2, 2000 through June 20, 2001.

In calculating the refunds due, the Commission reset the market clearing prices in the California ISO and PX spot markets during the refund period to just and reasonable levels, by means of the mitigated market clearing price methodology, and ordered as refunds the difference between the mitigated market

clearing price and the just and reasonable rate. *PUC of California*, 462 F.3d at 1052. As the Commission explained:

Our action here establishes a revised method for calculating the just and reasonable clearing prices to be applied in those markets for the period beginning October 2, 2000. This is pursuant to the Commission’s authority under FPA Section 206 to fix the just and reasonable rate. *Our action thus revises the market clearing prices that all market participants previously agreed to accept for their sales.*

Refund Order, 96 FERC at 61,512, EOR 151 (emphasis added). *See also* Refund Rehearing Order, 97 FERC at 62,183 (in setting refunds, “*we simply revised the market clearing prices that all market participants previously agreed to accept for their sales*, and ordered refunds to effectuate that revision.”) (emphasis added); *id.* at 62,185 (“[O]ur refund task in this and other cases is to determine objectively the amount of overcollections that should be returned to customers. *Here, that means resetting the auction prices to just and reasonable levels that apply to all sellers in that single price auction market.*”) (emphasis added).

To avoid undercompensating sellers, the Commission permitted cost offsets for individual sellers who were able to demonstrate that the mitigated market clearing price refund methodology would not allow them to recover their costs of selling power into the California ISO and PX markets during the refund period. *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 115 FERC ¶ 61,171 P 26 (2006) (establishing cost offset methodology).

IV. APPELLATE REVIEW OF THE REFUND ORDERS

In *Bonneville*, 422 F.3d at 911, this Court reversed the Commission’s determination in the Refund Orders that governmental entities, like other entities selling into the California markets, could be subject to refund liability under FPA § 206. Among other arguments, this Court rejected the contention that the Refund Orders *only* reset the market-clearing price under the FERC-jurisdictional California ISO and PX tariffs, finding that “FERC’s order *does more than simply reset the market-clearing price* for power in the FERC-jurisdictional ISO and CalPX markets.” *Id.* at 920 (emphasis added). Rather, FERC also ordered governmental entities/non-public utilities to pay refunds, an action the Court found to lie outside “Congress’s clearly expressed intent that FERC’s § 206 refund authority should apply only to public utilities.” *Id.* Accordingly, this Court concluded that “the retroactive imposition of a market price *that effects a refund responsibility* is a regulatory action that falls outside of FERC’s jurisdiction with respect to non-public utilities and governmental entities.” *Id.* (emphasis added).

Bonneville also rejected the argument that the governmental entities were properly subject to refunds because their contracts with the California ISO and PX obligated them to abide by the California ISO and PX tariffs. *Id.* at 925. However, *Bonneville* noted that “[t]he focus on the agreements between the Public Entities

and the ISO and CalPX only serves to demonstrate that the remedy, if any, may rest in a contract claim, not a refund action.” *Id.*

The second appeal arising from the Refund Orders, *PUC of California*, reviewed the Commission’s actions in connection with the mitigation of the California ISO and PX markets, and (in relevant respect) rejected challenges to the Commission’s decision in the Refund Orders to reset prices on a market-wide basis during the refund period using the mitigated market clearing price methodology. *See, e.g., PUC of California*, 462 F.3d at 1052 (affirming FERC determination that a market-wide mitigation methodology was needed in the California ISO and PX auction markets as a result of systemic market dysfunctions); *id.* at 1055 (affirming FERC’s methodology of using individualized analysis of the rates charged in each operating hour to implement its market-wide remedy). The Court found that refunds awarded pursuant to FPA § 206(b) do not violate the rule against retroactive ratemaking; relief under FPA § 206(b) is limited to the post-complaint period and, once a complaint is filed, sellers are on notice that their sales may be subject to refund. *Id.* at 1063. The Court further concluded that San Diego’s August 2000 complaint, which alleged that the rates charged by sellers in the California ISO and PX markets were unjust and unreasonable, “afforded sufficient notice to alert market participants that sales and purchases might be subject to refund.” *Id.* at 1046.

V. THE CHALLENGED ORDERS

On remand from *Bonneville*, the Commission issued the orders under review, vacating the Refund Orders to the extent that they subjected certain non-public utility entities, including petitioners, to FPA § 206(b) refund liability for California ISO and PX sales. Rehearing Order P 1, EOR 1. Thus, the challenged Commission orders *absolved* petitioners definitively from FERC refund jurisdiction under FPA § 206(b).

The issue here arises from the Commission's statement in the Clarification Order, as affirmed in the Rehearing Order, that the Commission's Refund Orders reset the market clearing prices in the California ISO and PX markets. In the Remand Order, the Commission made the following statement:

California Parties assert that the Commission revised the pricing formulations contained in the CAISO/PX tariffs for the period to which the MMCP applies. We disagree. The *Bonneville* court found that the Commission had ordered refunds rather than amending the CAISO/PX tariffs to reset the market clearing price during the refund period. The court further found that the Commission had acted outside its jurisdiction when ordering non-public utility entities to pay these refunds. Therefore, we vacate each of the Commission's orders in the California refund proceeding to the extent that they order non-public utility entities to pay refunds.

Remand Order P 36, EOR 24 (footnotes omitted).

The California Parties (representing purchasers of electricity, seeking refunds from suppliers such as petitioners here) sought clarification of P 36. They argued that the paragraph misleadingly implied that the Commission did not reset

the market clearing prices under the California ISO and PX tariffs, and mischaracterized the holding in *Bonneville*. See Clarification Order P 4, EOR 15. The Commission agreed with the California Parties. *Id.* PP 10-13, EOR 16-17. The Commission made clear in the Refund Order that it was resetting the market clearing prices. *Id.* P 10, EOR 16 (quoting Refund Order, 96 FERC at 61,152, EOR 151, finding that “[o]ur action thus revises the market clearing prices that all market participants previously agreed to accept for their sales”). Paragraph 36 of the Remand Order “inadvertently fails to acknowledge this point.” *Id.*

Accordingly, the Commission amended P 36 of the Remand Order to read as follows:

California Parties assert that the Commission revised the pricing formulations contained in the CAISO/PX tariffs for the period to which the MMCP applies. We *do not* disagree. The *Bonneville* court found that the Commission had ordered refunds *by non-jurisdictional entities* rather than *merely* amending the CAISO/PX tariffs to reset the market clearing price during the refund period. The court further found that the Commission had acted outside its jurisdiction when ordering non-public utility entities to pay these refunds. Therefore, we vacate each of the Commission’s orders in the California refund proceeding to the extent that they order non-public utility entities to pay refunds.

Clarification Order P 13, EOR 17.

On rehearing, petitioners argued that the Commission has authority only to order prospective changes in rates under FPA § 206(a), and the refund authority provided in FPA § 206(b) does not modify the prospective-only nature of the FPA

§ 206(a) authority. Rehearing Order P 5, EOR 2. Petitioners asserted that refunds ordered under FPA § 206(b) are merely measured by the prospective changes ordered under § 206(a). Petitioners also argued that the Commission’s actions in the Clarification Order violated the filed rate doctrine and the rule against retroactive ratemaking by impermissibly retroactively changing an existing rate. *Id.* P 9, EOR 3.

The Commission found that its actions were well within the authority granted to it under FPA § 206, which specifically provides that the Commission may reset prices in Commission-jurisdictional tariffs and order refunds back to the refund effective date. *Id.* P 15, EOR 4. While § 206(a) directs the Commission to set rates “to be thereafter observed,” this language must be read together with § 206(b), which expressly provides that, whenever the Commission institutes a proceeding under FPA § 206, it is obligated to establish a refund effective date and may order refunds “for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force.” *Id.* P 16, EOR 4 (quoting FPA § 206(b)). FPA § 206(b) “thus specifically provides that the Commission may order refunds of amounts paid in excess of those which would have been paid under the just and reasonable rate or charge, as determined by the Commission.” *Id.* Absent

resetting the rates during the refund period, the Commission would be unable to determine what amount would be in excess of a just and reasonable rate, and, therefore, the Commission would be incapable of complying with its statutory obligations under § 206(b). *Id.* PP 20, 23, EOR 5.

The Commission further rejected arguments that its actions were at odds with the filed rate doctrine or the rule against retroactive ratemaking. *Id.* P 25, EOR 6. The Commission's actions are authorized by the statute. *Id.* Further, these doctrines are designed to assure notice to parties when an approved rate is subject to change. *Id.* P 27, EOR 6. Here, as *PUC of California* found, “[a]s a result of SDG&E’s complaint and the Commission’s subsequent orders establishing a refund date, sellers into the CAISO/PX markets were put on sufficient notice that the rates under the CAISO/PX tariffs were potentially subject to later revision by the Commission and potentially subject to 15 months of refunds beginning as of the refund effective date.” *Id.* P 28, EOR 7 (citing *PUC of California*, 462 F.3d at 1047). *See also id.* PP 36-37, EOR 8-9.

Bonneville also argued that the Commission exceeded its authority in reviewing federal, nonjurisdictional rates. *See id.* P 59, EOR 13. However, because the Commission is not ordering Bonneville to pay refunds, Bonneville’s previously-approved rates have not been modified. Therefore, the Commission’s ability to review Bonneville’s rates is not at issue. *Id.* P 62, EOR 13. *See also*

Remand Order P 44, EOR 25 (same). While the Commission may have a limited statutory ability to review Bonneville's previously-approved rates, this limitation is not relevant to whether the Commission may under FPA § 206 reset rates in tariffs of jurisdictional entities, the California ISO and PX. Rehearing Order P 62, EOR 13.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over these petitions for review because petitioners cannot show injury sufficient to establish aggrievement under FPA § 313(b), 16 U.S.C. § 825l(b), or constitutional standing. Petitioners prevailed in the challenged orders, which, following the mandate of this Court in *Bonneville*, absolved petitioners of any refund liability imposed by the Commission under FPA § 206(b), 16 U.S.C. § 824e(b). Petitioners may not appeal from the Commission's decision in their favor; disagreement with the Commission's rationale in a substantively favorable decision does not constitute injury sufficient for standing. Likewise, speculation about the potential effect of the Commission's statements in contract litigation pending in state and federal court – which may or may not be resolved in petitioners' favor and may or may not turn on the issue involved here – fails to establish the requisite injury.

Assuming jurisdiction, the Court should defer to the Commission's reasonable interpretation of FPA § 206(b) as permitting the Commission to reset rates during the refund period to just and reasonable levels for the purpose of ordering refunds. It is undisputed that FPA § 206(b) authorizes the Commission to order refunds, for a fifteen-month period dating from the refund effective date, in the event that a rate is found unjust and unreasonable. The Commission must determine the just and reasonable rate applicable during the refund period to

determine the appropriate amount of refunds. Absent such resetting of rates during the refund period, the Commission would be unable to determine what amount is in excess of a just and reasonable rate.

Indeed, the Commission did reset the market clearing prices in the California ISO and PX markets to just and reasonable levels on an hourly basis to determine the refunds payable by jurisdictional public utilities, and the Commission consistently represented in the refund proceeding that it was resetting the market clearing prices. This Court's decision in *PUC of California*, on review of the Commission's Refund Orders, rejected challenges to the Commission's choice of a market-wide remedy.

Thus, the Commission in the challenged orders reasonably rejected arguments that FPA § 206(b) proceedings do not permit retroactive resetting of rates. While it is true that § 206(a) directs the Commission to set rates or charges to be "thereafter observed," this language must be read together with § 206(b). Section 206(b) expressly provides that, whenever the Commission institutes an FPA § 206 proceeding, the Commission may order refunds "of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate . . . which the Commission orders to be thereafter observed and in force." FPA § 206(b), 16 U.S.C. § 824e(b). The

Commission's interpretation of FPA § 206(b) does not read the prospective language of FPA § 206(a) out of the statute. To the contrary, FPA § 206(b) *expands* the authority of the Commission to permit retroactive relief for rates found not to be just and reasonable.

The Commission's resetting of rates during the refund period, pursuant to its authority under FPA § 206(b), does not constitute retroactive ratemaking. Rather, the filing of the complaint provides notice to sellers of the potential for refunds, and therefore the remedies provided under FPA § 206(b) are prospective from the filing of the complaint. Here, as this Court found in *PUC of California*, the filing of San Diego's complaint regarding prices in the California ISO and PX markets, as well as the Commission's post-complaint setting of a refund effective date, provided notice to the market that the Commission might reset market clearing prices to just and reasonable levels and order refunds.

The Commission also did not improperly regulate Bonneville's rates. Consistent with this Court's *Bonneville* decision, the Commission rescinded its order to Bonneville, as a nonjurisdictional entity, to pay refunds. Any limitation on the Commission's authority to review Bonneville's rates is not relevant to whether the Commission could under FPA § 206(b) reset the rates of jurisdictional entities, the California ISO and PX.

ARGUMENT

I. STANDARD OF REVIEW

The Court’s review of FERC’s interpretation of the Federal Power Act is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). *See Bonneville*, 422 F.3d at 914 (explaining two-step *Chevron* analysis). Under *Chevron*:

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

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

The Court also defers to the Commission’s reasonable interpretation of its own orders. *California Trout v. FERC*, 572 F.3d 1003, 1013 (9th Cir. 2009) (“Likewise, we must give deference to the Commission's interpretation of its own orders.”) (citing *California Dep’t of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007)). For all purposes, the Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. §825l(b).

II. PETITIONERS LACK STANDING TO CHALLENGE THE COMMISSION ORDERS.

A. Petitioners Cannot Show The Requisite Injury Because They Substantially Prevailed In The Challenged Orders.

As this Court has recognized, the FPA “limits judicial review to those parties who have been ‘aggrieved by an order of the Commission.’” *Port of Seattle*, 499 F.3d at 1028 (quoting FPA § 313, 16 U.S.C. § 825l). In addition, petitioners are held to the constitutional requirements of standing. *Id.* (citing *Shell Oil*, 47 F.3d at 1200). Constitutional standing requires a showing of an actual or imminent injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Thus, both aggrievement and standing require “‘that petitioners establish, at a minimum, ‘injury in fact’ to a protected interest.’” *Port of Seattle*, 499 F.3d at 1028 (quoting *Shell Oil*, 47 F.3d at 1200).

Here, petitioners cannot demonstrate the requisite injury. Petitioners prevailed in the challenged orders, which absolved them from any liability for refunds under FPA § 206(b). “The general rule is that a party may not appeal from a decree in its favor.” *Id.* (citing *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 176 (1934)). *See also HCA Health Services of Virginia v. Metropolitan Life Ins. Co.*, 957 F.2d 120, 123 (9th Cir. 1992) (“Generally a prevailing party is not aggrieved by the judgment and may not appeal on the ground that the trial court based its decision on a reason other than the one the party may have wished.”).

In *Port of Seattle*, this general rule was not applied to Puget Sound Energy, even though Puget Sound substantially prevailed before the Commission, because Puget Sound as a cross-appellant “might become aggrieved upon reversal of the direct appeal” based upon petitions for review filed by opposing parties. 499 F.3d at 1028. Here, by contrast, there are no cross-appellant petitioners, and there is no risk that petitioners might become aggrieved by the granting of any other party’s petition for review.

Petitioners complain about the challenged orders only insofar as they state that the Commission reset the market clearing prices in the jurisdictional California ISO and PX markets to just and reasonable levels during the refund period. Joint Brief of Indicated Public Entity Petitioners (PE Br.) 29, Brief of Petitioners Bonneville Power Administration and Western Area Power Administration (BPA

Br.) 16. However, “[a] party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree.” *United States v. Good Samaritan Church*, 29 F.3d 487, 488 (9th Cir. 1994) (quoting *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939)). “[M]ere disagreement with an agency’s rationale for a substantively favorable decision, even where such disagreement focuses on an interpretation of law to which a party objects, does not constitute the sort of injury necessary for purposes of Article III standing” *Port of Seattle*, 499 F.3d at 1028 (quoting *Shell Oil*, 47 F.3d at 1202). *See also Exxon*, 571 F.3d at 1219 (“We have previously made clear, however, that a mere interest in FERC’s legal reasoning and the possibility of a ‘collateral estoppel effect’ are insufficient to confer a cognizable injury in fact.”); *Louisiana Pub. Serv. Comm’n. v. FERC*, 551 F.3d 1042, 1046 (D.C. Cir. 2008) (a party may only invoke the court’s jurisdiction if aggrieved by a FERC order, “not to challenge agency dicta unrelated to the order actually entered in the particular case”).

It is the concrete effect of the agency’s adjudicatory action that determines standing. *See Shell Oil*, 47 F.3d at 1202 (no standing where petitioner had not demonstrated that it “suffered any cognizable injury that is linked to the agency’s substantive adjudication.”); *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 674 (D.C. Cir. 1994) (no concrete injury in fact conferring standing where an

advisory opinion was substantively in petitioner’s favor but contained dicta to which petitioner objected); *Telecomm. Research and Action Ctr. v. FCC*, 917 F.2d 585, 588 (D.C. Cir. 1990) (“[Petitioner’s] interest in the Commission’s legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is ‘uncoupled’ from any injury in fact caused by the substance of the FCC’s adjudicatory action.”). Hypothetical future scenarios, even if not inconceivable, are not imminent and do not satisfy the requirements of standing. *Shell Oil*, 47 F.3d at 1202. *See, e.g., Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 670 (D.C. Cir. 2007) (certain governmental entities lacked standing to challenge FERC order regarding the rate treatment of another governmental entity’s ISO transmission revenue requirement, where their potential injury from the precedential value of the orders was speculative). Here, the Commission orders cause no concrete injury to petitioners, who by virtue of these orders are absolved from FERC-imposed refund liability.

B. Speculation Regarding The Potential Effect Of The Commission’s Orders In Subsequent Contract Litigation Does Not Suffice To Create Standing.

Petitioners assert that the Commission’s statement regarding the resetting of rates will in some way assist the California Parties in contract litigation the California Parties are pursuing in state and federal court. PE Br. 5-6; BPA Br. 3-4. Such speculation regarding the effect of the Commission’s statement in actions

pending before other tribunals -- that may or may not be resolved in petitioners' favor and may or may not turn on the issue discussed here -- is insufficient to establish standing or aggrievement. In *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944), the Court found unreviewable Commission orders finding past pipeline rates unlawful where the Commission had no authority to order refunds for past charges, even though the findings might affect *state* rate regulation. *Id.* at 618-19. As the Commission had no authority to enforce its findings, the findings were “only a preliminary, interim step towards possible future action – action not by the Commission but by wholly independent agencies.” *Id.* at 619. “The outcome of those proceedings may turn on factors other than these findings. These findings may never result in the respondent feeling the pinch of administrative action.” *Id.* Thus, “where ‘the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action,’ it is not reviewable.” *Id.* (quoting *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 130 (1939)).

More recently, in *Wisconsin Public Power Inc. v. FERC*, 493 F.3d 239, 295-96 (D.C. Cir. 2007), cooperatives lacked standing to challenge Commission orders that did not impose charges on the cooperatives, even where the reasoning in the challenged orders might govern future proceedings in which charges could be imposed. “A petitioner’s ‘interest in the Commission’s legal reasoning and its

potential precedential effect does not by itself confer standing where, as here, it is ‘uncoupled’ from any injury in fact caused by the substance of [FERC’s] adjudicatory action.’” *Id.* at 295 (quoting *Telecomm. Research*, 917 F.2d at 588). “[N]either standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect.” *Alabama Mun. Distribs. Group v. FERC*, 312 F.3d 470, 474 (D.C. Cir. 2002) (potential future collateral estoppel effect of ruling in later rate case insufficient to confer standing). *See also, e.g., PNGTS Shippers’ Group v. FERC*, 592 F.3d 132, 137 (D.C. Cir. 2010) (potential for economic injury in a future rate case from the ruling in the challenged orders is insufficient for standing).

Similarly, here, whatever the Commission’s findings on the lawfulness of the past rates in the California ISO and PX markets, the Commission has no authority to make any order of refunds against petitioners, nor does the Commission have authority to compel payment of damages under contractual agreements that may obligate petitioners to make refunds. *Bonneville*, 422 F.3d at 925 (FERC has no authority to order refunds even if required by the governmental entities’ agreements with the California ISO and PX); *Transmission Agency*, 495 F.3d at 675 (FERC has no authority to order refunds even if authorized under governmental entity’s contract with the California ISO). Rather, enforcement of any financial obligation of petitioners could only occur as a result of enforcement

of a contract by a court. It cannot occur as a result of the enforcement of the FERC orders. *Alliant Energy v. Nebraska Public Power Dist.*, 347 F.3d 1046, 1050-51 (8th Cir. 2003) (“when a contract provides that its terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body. As a result, we are not enforcing the FERC order; instead we are enforcing an agreement, which [the governmental entity] freely entered”); *Transmission Agency*, 495 F.3d at 675-76 (a court finding a nonjurisdictional entity contractually bound to pay refunds is a *judicial* order of refunds, not an agency order, and thus the Court is enforcing the agreement, not the FERC orders).

Consequently, whatever the Commission’s findings, further action by some other body, such as a court, is necessary for petitioners to suffer any injury, and there may never be any injury. Accordingly, this Court lacks jurisdiction over this matter because petitioners lack injury sufficient to establish constitutional standing or statutory aggrievement.

III. THE COMMISSION CORRECTLY FOUND THAT IT HAD RESET MARKET CLEARING PRICES IN THE CALIFORNIA ISO AND PX MARKETS TO JUST AND REASONABLE LEVELS IN DETERMINING REFUNDS UNDER FPA SECTION 206(b).

A. The Commission Reasonably Interpreted FPA § 206(b) To Authorize The Resetting Of Market Clearing Prices In The California ISO And PX Markets.

1. The Refund Authority Provided In FPA § 206(b) Necessarily Encompasses Authority To Reset Rates Retroactively To Just And Reasonable Levels During The Refund Period.

Petitioners concede, as they must, that FPA § 206(b) authorizes FERC to award refunds back to the refund effective date, and that those refunds must be calculated with reference to a Commission-determined just and reasonable rate. BPA Br. 23-24; PE Br. 35-36. *See also* Brief of Petitioner-Intervenor City of Pasadena, California (Pasadena Br.) 5. Nevertheless, petitioners maintain that the Commission does not, in establishing refunds, reset the rates previously charged during the refund period to a just and reasonable level. BPA Br. 23; PE Br. 36. Petitioners' interpretation rests upon the language of FPA § 206(a), which authorizes the Commission, upon finding an existing rate unjust and unreasonable, to "determine the just and reasonable rate . . . to be thereafter observed and in force." PE Br. 32-33; BPA Br. 21-23. According to petitioners, this language compels the conclusion that a just and reasonable rate determined by the Commission in an FPA § 206 proceeding can only be given prospective effect. BPA Br. 24; PE Br. 35.

To the contrary, as the Commission found, although § 206(a) provides for the Commission to fix a rate "to be thereafter observed," this language does not stand alone. Rehearing Order PP 16, 20, EOR 4, 5. Rather, it must be read together with § 206(b), which "expressly provides that, whenever the Commission

institutes a proceeding under FPA section 206, it is obligated to establish a refund effective date and may order ‘refunds of any amounts paid . . . *in excess of those which would have been paid under the just and reasonable rate . . .* to be thereafter observed and in force.’” *Id.* (quoting FPA § 206(b), 16 U.S.C. § 824e(b)). FPA § 206(b) “thus specifically provides that the Commission may order refunds of amounts paid in excess of those which would have been paid under the just and reasonable rate or charge, as determined by the Commission.” *Id.* P 16, EOR 5.

Essential to the Commission’s ability to exercise refund authority during the refund period is the identification for that period of the just and reasonable rate. *Id.* P 19, EOR 4. Indeed, “it would be problematic for this Commission to develop a refund that would withstand scrutiny unless we were able to rely on a measure of what a just and reasonable rate would be for the refund period.” *Id.* The measure for calculating refunds is the revised just and reasonable rate determined by the Commission. *Id.* The Senate Report on the Regulatory Fairness Act, as well as the Commission’s November 1, 2000 Order setting the refund effective date in this proceeding (*San Diego Gas & Elec. 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 (2000) (November 2000 Order), EOR 227), make clear that any potential refund is limited to the difference between the rate charged and the rate determined to be just and reasonable.

Rehearing Order P 19, EOR 4 (citing Senate Report at 6 (“[i]n general, refunds may only be ordered for amounts paid in excess of lawful rates during the period within 15 months of the refund effective date”); and November 2000 Order at 61,377, EOR 227 (Congress “substantially revised Section 206 to permit limited authority to order retroactive refunds of rates found to be unjust and unreasonable”).

The D.C. Circuit in fact has recognized that FPA § 206(b) “authorizes retroactive refunds (rate decreases).” *City of Anaheim*, 558 F.3d at 524. The fifteen month refund period authorized in § 206(b) provides a “narrow exception” to the rule that “FERC may not retroactively alter a filed rate to compensate for prior over- or underpayments.” *Exxon*, 571 F.3d at 1211. Under this exception, FERC can order utilities to give back money already collected in excess of the just and reasonable rate during the pendency of the limited refund period. *Id.* at 1215. *See also East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 945 n.21 (D.C. Cir. 1988) (noting that the amendment to the FPA to add limited refund authority in § 206(b) “introduced a significant difference” in the regulatory approach taken with regard to retroactive rate relief as compared to the otherwise analogous Natural Gas Act, which was not amended to provide refund authority).

Accordingly, the Commission’s reasonable interpretation of FPA § 206(b) should be upheld. *See, e.g., Port of Seattle*, 499 F.3d at 1030-32 (upholding the

Commission's reasonable interpretation of FPA § 206(b) in selecting a refund effective date). *Exxon* and *Anaheim* support, rather than undermine (see PE Br. 38-40; BPA Br. 22-23, 27), the Commission's interpretation. *Exxon* affirmed the Commission's determination that generator refunds (taken in the form of transmission credits) were properly limited to the fifteen month refund period defined in the statute. 571 F.3d at 1217. Nothing in *Exxon* purported to reject the notion that the Commission may (indeed must) reset prior rates to just and reasonable levels in order to determine the amount of an appropriate refund; rather, the court expressly determined that § 206(b) is an *exception* to the rule against retroactively altering rates. *Id.* at 1211. Likewise, *City of Anaheim*, 558 F.3d at 524, reversed FERC orders applying a just and reasonable rate *increase* retroactively, finding that § 206(b) authorizes only retroactive rate *decreases*, not increases. Here, the Commission engaged in a retroactive rate *decrease*, which *City of Anaheim* found authorized by the statute.

Indeed, "the ordering of refunds by its very nature involves the resetting of rates in a past period." Rehearing Order P 19, EOR 5. Accordingly, courts have recognized that under FPA § 205, 16 U.S.C. § 824d, and § 4 of the Natural Gas Act (NGA), 15 U.S.C. § 717c(e), the Commission's authority to accept a newly-filed rate subject to refund provides a means by which the Commission can make its determination of a just and reasonable rate retroactive. *United Gas Pipe Line*

Co. v. Mobile Gas Service Corp., 350 U.S. 332, 341 (1956); *FPC v. Hunt*, 376 U.S. 515, 522 (1964). If the newly-filed rates are not shown to be just and reasonable, the Commission modifies the rates, and “[t]his modification may be made retroactive through the Commission’s refund power to the date the increased rates became effective.” *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 807 (10th Cir. 1986).

Thus, refund authority permits the Commission to retroactively change the rate. *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988) (if the Commission determines a proposed rate to be unjust and unreasonable, NGA § 4 “authorizes the Commission to order that the pipeline pay refunds to any customers who purchased gas at the (filed) proposed rate, *thereby retroactively changing that rate*”) (emphasis added); *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1488 (10th Cir. 1995) (same); *Natural Gas Pipeline Co. v. FERC*, 904 F.2d 1469, 1471 (10th Cir. 1990) (same). *See also Public Utils. Comm’n of California v. FERC*, 894 F.2d 1372, 1382-83 n.8 (D.C. Cir. 1990) (refund authority associated with suspension of newly-filed rate is a “limited form of retroactive rate collection”); *Sithe New England Holdings, LLC v. FERC*, 308 F.3d 71, 78 (1st Cir. 2002) (“every time that FERC or any comparable agency decides that an existing rate is unjust and orders refunds to buyers for a past period, it is engaging in permissible ‘retroactive ratemaking’ in a vernacular sense”).

2. Petitioners' Arguments To The Contrary Are Unavailing.

Petitioners contend that FERC's interpretation of § 206(b) reads the prospective language of § 206(a) out of the statute. PE Br. 41; BPA Br. 26-27. To the contrary, as intended by Congress, FPA § 206(b) exists for the purpose of *expanding* the ability of the Commission to order refunds under the FPA for rates found not to be just and reasonable. Rehearing Order P 20, EOR 5 (citing Senate Report at 3-4; House Report at 2). *See* House Report at 2 (stating that, under the amended statute, “[a] FERC decision ordering a rate refund pursuant to Section 206 would be retroactive to the ‘refund effective date.’ Under current law, by contrast, FERC’s rate refund orders under Section 206 are prospective only”); House Report at 3 (“H.R. 2858 would change the procedures governing Section 206 rate decrease applications by: . . . (b) making final Section 206 determinations by the Commission retroactive to the ‘refund effective date.’”); Senate Report at 3 (“[T]he Commission under current law may only order the rates of public utilities to be reduced prospectively from the date of its decision that existing rates are unlawful. H.R. 2858, as amended, would give the Commission the discretion to require public utilities to refund amounts paid in excess of just and reasonable rates for certain periods prior to the Commission’s decision.”).

Thus, FPA § 206(b) does not change the Commission’s ability to order prospective relief for unjust and unreasonable rates, but instead provides the

Commission with *additional* authority to apply the just and reasonable rate retroactively and order refunds. Rehearing Order P 20, EOR 5. The Commission’s interpretation therefore accords with the legislative purpose in enacting the statute. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (in determining the meaning of a statute, the Court looks “not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy”) (quoting *Crandon v. United States*, 494 U.S. 152, 158 (1990)). *See also Cooper v. FAA*, 596 F.3d 538, 545 (9th Cir. 2010) (same).

In contrast, petitioners’ interpretation of the statute – where the language of FPA § 206(a) trumps that of § 206(b) – effectively reads section 206(b) out of the statute and would be directly contrary to the very purpose of Congress in giving the Commission additional refund authority for rates found not to be just and reasonable. Rehearing Order P 20, EOR 5. Interpreting FPA § 206, as petitioners do, to mean that the Commission lacks the ability to reset rates during the refund period could in effect eliminate refunds because the ordering of refunds requires the determination of just and reasonable rates and their application to the refund period. *Id.* P 23, EOR 5. Thus, petitioners’ unreasonable interpretation of the statute, ignoring FPA § 206(b), must fail. *Id.* P 20, EOR 5.

Because petitioners’ interpretation of the statute is unreasonable, it is insufficient even to buttress a finding of ambiguity. A finding of ambiguity

requires the presence of two reasonable interpretations of the statute. *DeGeorge v. United States Dist. Court*, 219 F.3d 930, 939 (9th Cir. 2000); *A-Z International v. Phillips*, 179 F.3d 1187, 1192 (9th Cir. 1999). Even if the Court were to find ambiguity in the statute, however, the Court nonetheless defers under *Chevron* to the Commission’s permissible interpretation. *Queen of Angels/Hollywood Presbyterian Medical Ctr. v. Shalala*, 65 F.3d 1472, 1477 (9th Cir. 1995). “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n.11. *See also Queen of Angels*, 65 F.3d at 1477 (The Court “need not conclude that the agency's answer is the only reasonable one, or even the ‘best’ one.”).

Petitioners also point to the fifteen-month limitation in § 206(b) as evidence that rates under FPA § 206(b) are not reset as of the refund effective date. PE Br. at 36; 46-47; BPA Br. 28-29. Petitioners assert that the limited duration of the refund period precludes the finding that the rates were restated, as, after the expiration of fifteen months, the prior rate “springs” back into place. BPA Br. 28-29; PE Br. 46-47.

The Commission disagreed that the fifteen-month limitation supported petitioners’ interpretation. “To the contrary, the common sense application of

sections 206(a) and (b) taken together, as intended by Congress, is that the Commission resets the just and reasonable rate as of the refund effective date but is limited in its discretion to order refunds for no more than 15 months of the period between the refund effective date and the date the Commission issues its order determining the just and reasonable rate.” Rehearing Order P 21, EOR 5. Tariffs and rates can have a defined lifespan with not only a beginning date, but also an end date. *Id.* (citing 18 C.F.R. § 35.15(b)(2) (providing for automatic termination, without the need for a Commission filing, of certain power sales contracts)). As such, a tariff revision and rate change can have a fifteen-month life, coincident with the fifteen months following a refund effective date. *Id.*

Indeed, Congress recognized in passing the Regulatory Fairness Act that it would in many instances take the Commission longer than fifteen months to resolve proceedings initiated under FPA § 206. Rehearing Order P 22, EOR 5. The Senate and House Reports on the Regulatory Fairness Act acknowledge that resolution of an FPA § 206 proceeding requires two years on average. *Id.* (citing Senate Report at 3; House Report at 2). Contrary to petitioners’ contentions, then, the fifteen-month period is not an absolute limit on tariff changes, but instead serves the distinctly different purpose of limiting the length of time that public utilities may be subject to potential refunds when the Commission needs more time

to act. *Id.* See, e.g., Senate Report at 6 (describing the fifteen-month refund period as a limit on “the time period during which refund liability can accrue”).

Moreover, as Public Entities correctly point out, the fifteen-month period can be extended if FERC determines that it could not resolve the matter within fifteen months “primarily because of dilatory behavior by the public utility.” PE Br. 36 (quoting 206(b)). This simply reinforces the Commission’s view that the fifteen month limitation was designed as a limitation on a utility’s refund exposure, except in cases where regulatory delay is attributable to the fault of the utility itself.

Public Entities also point to *ExxonMobil Corp. v. Entergy Servs., Inc.*, 119 FERC ¶ 61,261 P 8, 20-22 (2007), *aff’d*, *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208 (D.C. Cir. 2009), as evidence that the Commission orders refunds without resetting the tariff retroactively. PE Br. 45-46. See also Pasadena Br. 9-11 (same). In *ExxonMobil*, Exxon filed a § 206 complaint seeking transmission credits associated with the reclassification of a facility. *ExxonMobil*, 119 FERC ¶ 61,261 P 5. The Commission granted the complaint, directing the transmission provider to file a revised interconnection agreement reflecting the payment of transmission credits due in the future, and also ordered the transmission provider to provide transmission credits for the refund period. *Id.* Public Entities assert that the failure of the Commission to order the revised interconnection agreement backdated to the

refund effective date means that there was no retroactive resetting of the rate. PE Br. 45.

The Commission found this to be an unreasonable reading of *ExxonMobil*. Rehearing Order P 24, EOR 6. *ExxonMobil* directed a revised interconnection agreement for prospective application to determine transmission credits going forward. *Id.* The Commission also ordered retroactive refunds, in the form of transmission credits, for the refund period. *Id.* In directing revision of the interconnection agreement on a prospective basis, the Commission did not somehow implicitly reverse its order with regard to the payment of refunds for the refund period. *Id.*

B. Exercising Its FPA § 206 Refund Authority, The Commission Did Reset Market Clearing Prices To Just And Reasonable Levels For the Refund Period, And Consistently Represented That It Was Doing So.

1. The Commission Determined The Just And Reasonable Mitigated Market Clearing Price For Each Hour Of The Refund Period, And This Court Rejected Challenges To The Commission's Market-Wide Remedy.

In the Refund Orders, the Commission in fact did determine just and reasonable market clearing prices for each hour of the refund period for the purpose of ordering refunds under FPA § 206. Rehearing Order PP 18-19, EOR 4. In the California ISO and PX auctions, all sellers received a single market clearing price for their sales. *See* Remand Order PP 4, 6, EOR 19; *PUC of California*, 462

F.3d at 1038. Accordingly, to order refunds, the Commission had to determine just and reasonable market clearing prices (the mitigated market clearing price) for the refund period. Rehearing Order P 37, EOR 9; *PUC of California*, 462 F.3d at 1052. As the Commission noted, this Court in *PUC of California* found that the mitigated market clearing price methodology was adopted “to calculate just and reasonable rates for Cal-ISO and CalPX.” Rehearing Order P 57, EOR 12 (quoting *PUC of California*, 462 F.3d at 1052). This Court further stated that “[t]he [mitigated market clearing price] was the benchmark for determining the amount of refunds that sellers had to pay – FERC simply looked at their transactions during the refund period and then ordered them to pay the difference between the rate and the [mitigated market clearing price].” *Id.* (quoting *PUC of California*, 462 F.3d at 1052). *See also* Refund Order, 96 FERC at 61,517, EOR 156.

Refunds were determined by the difference between the market clearing price and the mitigated market clearing price calculated *for each hour* of the Refund Period, subject to certain adjustments. *PUC of California*, 462 F.3d at 1043, 1052; Rehearing Order P 57, EOR 12 (citing Refund Order, 96 FERC at 61,512, EOR 151).

PUC of California rejected challenges to the Commission’s decision to reset prices on a market-wide basis during the refund period, using the mitigated market clearing price to calculate just and reasonable rates for the California ISO and PX

markets. Rehearing Order PP 30, 57, EOR 7, 12 (citing *PUC of California*, 462 F.3d at 1052) (affirming FERC determination that a market-wide mitigation methodology was needed in the California ISO and PX auction markets as a result of systemic market dysfunctions). This Court also affirmed FERC’s methodology of using individualized analysis of the rates charged in each operating hour to implement its market-wide remedy. *PUC of California*, 462 F.3d at 1055. Thus, as approved by this Court in *PUC of California*, the Commission properly calculated a just and reasonable market clearing price for each hour of the refund period.

This Court’s decision in *Bonneville* does not contradict the findings in *PUC of California*. Rehearing Order P 46, EOR 10. While *Bonneville* found that FERC lacked authority to order refunds from governmental entities, PE Br. 50, BPA Br. 40, *Bonneville* did not disapprove of, or even call into question, the Commission’s resetting of prices under the California ISO and PX tariffs. Rehearing Order PP 29, 47, EOR 7, 10. Rather, *Bonneville* recognized that, in imposing refunds on non-jurisdictional entities, the Commission did “*more than* simply reset the market-clearing price for power in the FERC jurisdictional ISO and PX markets.” *Id.* P 45, EOR 10 (quoting *Bonneville*, 422 F.3d at 919-20). *See also Bonneville*, 422 F.3d at 919 (FERC’s action was the “*retroactive imposition of a market price that effects a refund responsibility*”) (emphasis added).

This language evidences recognition that, in the Refund Orders, the Commission first reset tariff prices and then ordered non-jurisdictional entities to pay refunds based on those reset prices. Rehearing Order P 45, EOR 10. *Bonneville* held that the Commission lacked authority to order the governmental entities to pay refunds. *Id.* (citing *Bonneville*, 422 F.3d at 920). Therefore, “it was only the Commission’s action of ordering refunds from governmental entities and other non-public utilities, after having reset tariff prices, that *Bonneville* found exceeded the Commission’s FPA section 206 authority.” *Id.* See also Clarification Order P 13, EOR 17 (finding that *Bonneville* rejected the Commission’s attempt to order refunds in addition to resetting the market clearing prices).

Further, *Bonneville* implicitly addressed the issue of resetting tariff rates by suggesting that a remedy may exist for parties who wished to pursue claims against governmental entities in the form of a contract claim. Rehearing Order P 29, EOR 27 (citing *Bonneville*, 422 F.3d at 925). *Bonneville* did not definitively rule on the availability of contractual remedies which were not before it. See PE Br. 45 n.51, BPA Br. 41-42. Nevertheless, if the Commission’s authority to fix a just and reasonable rate does not include the ability to reset the market clearing prices, then this Court’s suggestion that a remedy may rest on a contract claim, rather than a refund action, would be without substantive effect. Rehearing Order P 29, EOR 7. *Bonneville*’s arguments regarding what contractual commitments it made in

engaging in California ISO and PX auctions, *see* BPA Br. 42, are properly addressed in the contract actions pending against Bonneville. *See* Remand Order P 43, EOR 25 (holding that the Commission “will not interfere in state/federal contract claims”).

2. The Commission Consistently Has Held That It Reset The Market Clearing Prices For The California ISO And PX Markets During The Refund Period.

Contrary to petitioners’ assertions, PE Br. 48-49; BPA Br. 22, throughout the Refund proceedings, the Commission consistently “made clear that it was resetting the market clearing prices:”

Our action here establishes a revised method for calculating the just and reasonable clearing prices to be applied in those markets [the CAISO and PX wholesale electricity markets] for the period beginning October 2, 2000. This is pursuant to the Commission’s authority under FPA Section 206 to fix the just and reasonable rate. *Our action thus revises the market clearing prices that all market participants previously agreed to accept for their sales.*

Clarification Order P 10, EOR 16 (quoting Refund Order, 96 FERC at 61,512, EOR 151); Rehearing Order P 55, EOR 12 (same).

Similarly, in the Refund Rehearing Order, the Commission reiterated that:

In the [Refund Order], we acted appropriately pursuant to our authority under FPA Section 206 to fix the just and reasonable rate by revising the method for calculating the FERC-regulated PX and ISO spot market clearing prices as of October 2, 2000. In doing so, *we simply revised the market clearing prices that all market participants previously agreed to accept for their sales*, and ordered refunds to effectuate that revision.

Refund Rehearing Order, 97 FERC at 62,183 (emphasis added). *See also id.* at 62,185 (“[O]ur refund task in this and other cases is to determine objectively the amount of overcollections that should be returned to customers. *Here, that means resetting the auction prices to just and reasonable levels that apply to all sellers in that single price auction market.*”) (emphasis added). *See also San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 121 FERC ¶ 61,184 P 3 (2007) (order regarding evidentiary requirements for sellers to demonstrate revenue shortfall under the mitigated market clearing price methodology) (“Early in this proceeding, the Commission determined that the California electric market structure and rules for wholesale sales of electric energy were seriously flawed and that, along with other factors, resulted in unjust and unreasonable rates. To remedy this, the Commission held that prices for the Refund Period must be reset to just and reasonable levels.”); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 110 FERC ¶ 61,293 P 3 (2005) (order clarifying the methodology for the California ISO and PX spot market refunds) (After determining that the rates produced by the California ISO and PX spot markets were unjust and unreasonable during the refund period, “the Commission declared that prices for this period must be reset.”)

Thus, there is no “unexplained reversal” of position. PE Br. at 48. In the challenged orders, “the Commission is not changing prior policies or precedents,

rather it is clarifying an inadvertent error that conflicts with established precedent.” Rehearing Order P 56, EOR 12. The Clarification Order clarified paragraph 36 of the Remand Order so that it would not contradict the recognized position of the Commission. *Id.* Therefore, the Commission rejected the argument that its conclusion that it reset prices in the California ISO and PX tariffs departs from prior Commission orders. *Id.*

Even if the Commission could be deemed to have reversed course, the Commission is entitled to change its mind, and its determination still is entitled to *Chevron* deference. “An administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes.” *NLRB v. Int’l Ass’n of Bridge, Structural & Ornamental Ironworkers*, 434 U.S. 335, 351 (1978). *See also Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1033 (9th Cir. 2008) (same). While an agency may not “depart from a prior policy *sub silentio*,” there is no heightened standard for reviewing agency changes, and the agency is required only to provide a reasoned explanation for its action. *FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009). Here, the Commission in the challenged orders fully explained the reasons for its decision, which is all that is required. *See, e.g., Entergy Servs. v. FERC*, 319 F.3d 536, 542 (D.C. Cir. 2003) (Commission did not

impermissibly depart from prior precedent where, in the challenged orders, the Commission was clarifying inadvertent statements in prior orders, and even if the orders constituted more than a clarification, the Commission provided a “reasoned explanation for the change in policy”).

Petitioners point to a statement in the Refund Order that “[i]n amending FPA Section 206, Congress did not give the Commission authority to modify unjust and unreasonable rates retroactively.” PE Br. 34, 44, 48, BPA Br. 22 (quoting Refund Order at 61,505, EOR 144). Petitioners have taken the statement out of context. Rehearing Order P 33, EOR 8. The statement was made in response to the argument that the Commission has authority to order retroactive refunds for *all* rates found unjust and unreasonable. *Id.* The Commission explained that FPA § 206 does not grant the Commission *unlimited* authority to modify unjust and unreasonable rates retroactively, but rather limits the Commission’s refund authority to fifteen months following the refund effective date. Rehearing Order P 33, EOR 8; Refund Order at 61,505, EOR 144.

Bonneville asserts that the Commission’s refund methodology could not have reset the market clearing prices because the Commission permits consideration of individual seller’s costs in setting individual seller refunds.¹ BPA

¹ The Commission established a cost-filing process to provide individual sellers the opportunity to demonstrate that the mitigated market clearing price refund methodology does not allow them to recover their costs of selling power

Br. 27-28, 32-33. In Bonneville’s view, the mitigated market clearing prices could not constitute a tariff rate because “there is nothing discretionary about a “tariff.”” *Id.* at 32. *See also* Pasadena Br. 9 (arguing that FERC could not have reset the California ISO and PX rates down to the mitigated market clearing price because consideration of individual seller costs will result in amounts tailored to each seller).

The Commission reasonably rejected these arguments. Rehearing Order P 48, EOR 11. The Commission has authority not only to establish a single just and reasonable rate, but also the authority to implement a methodology for calculating a just and reasonable rate. *Id.* PP 48, 57, EOR 11-12. FPA § 206(a) states that whenever the Commission “shall find that any rate, charge, or classification . . . collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission . . . is unjust, unreasonable, unduly discriminatory or preferential, *the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed.*” Rehearing Order P 49, EOR 11 (quoting FPA § 206(a), 16 U.S.C. § 824e(a)). FPA § 206(b) similarly states that the Commission may order refunds

into the California ISO and PX markets during the refund period. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Services*, 115 FERC ¶ 61,171 P 26 (2006). Sellers who successfully demonstrate that they have a revenue shortfall under the mitigated market clearing price methodology have approved cost offsets in the amount by which they were undercompensated. *Id.* P 27.

“of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed.” *Id.* (quoting FPA § 206(b), 16 U.S.C. § 824e(b)). As such, FPA § 206 does not distinguish between the authority of the Commission to establish a single just and reasonable rate and its authority to implement a methodology for calculating a just and reasonable rate. *Id.* “Instead, Congress wrote the statute with sufficient breadth to encompass both.” *Id.*

Bonneville complains that, because governmental entities were not *required* by the Commission to file cost reports as sellers, in the contract actions pending against them the governmental entities may be subject to the mitigated market clearing price without the benefit of any adjustment for its costs. BPA Br. 33-34. However, the governmental entity sellers were excused from the cost filing obligation precisely because FERC cannot order them to pay refunds – the “purpose of the cost filings is to prevent a confiscatory result for sellers required to make refunds.” Remand Order P 43, EOR 25. The Commission expressly stated that it “will not interfere in state-federal contract claims and therefore [it] will not speculate as to how such courts will view the absence of costs filings by non-public utility entities.” *Id.* Bonneville may make whatever argument it chooses in

court regarding its costs and their proper impact upon any contractual liability Bonneville may possess.

C. In Resetting The Market Clearing Prices, The Commission Did Not Engage In Prohibited Retroactive Ratemaking.

Petitioners assert that resetting the rates to just and reasonable levels during the refund period violates the rule against retroactive ratemaking. BPA Br. at 31; PE Br. 36-37 (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981)). *See also* Pasadena Br. 7. The Commission reasonably rejected this contention. Rehearing Order PP 18, 25, EOR 4, 6.

First, the Commission's actions are authorized by the statute. *Id.* P 25, EOR 6. Here, the Commission followed its statutory authorization in resetting the market clearing prices in the California ISO and PX markets. The Commission found the rates charged under the California ISO and PX tariffs to be unjust and unreasonable in the November 2000 Order (*San Diego Gas & Elec. Co.*, 93 FERC at 61,349-50 (2000), EOR 199-200), and, pursuant to the statutory requirements of FPA § 206, 16 U.S.C. § 824e, the Commission established a refund effective date of October 2, 2000, *id.* at 61,350, EOR 200. Rehearing Order P 18, EOR 4. FPA § 206(b) permits the Commission to order refunds for the period subsequent to the refund effective date through a date fifteen months after the refund effective date. *Id.* That is what occurred here. *Id.* Moreover, as discussed above, in *PUC of California* this Court affirmed the Commission's actions in resetting the prices in

the California ISO and PX markets on a market-wide basis during the refund period. *Id.* P 30, EOR 7 (citing *PUC of California*, 462 F.3d at 1052).

Further, compliance with the statutory authority to order post-complaint refunds is not at odds with the filed rate doctrine or the rule against retroactive ratemaking. Rehearing Order P 25, EOR 6. Predictability is an underlying purpose of both the filed rate doctrine and the rule against retroactive ratemaking. Rehearing Order P 27, EOR 6 (citing *Public Utils. Comm'n of California v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993); *Towns of Concord, Norwood and Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992); *Public Utils. Comm'n of California v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990)). When determining whether a FERC order violates either the filed rate doctrine or the rule against retroactive ratemaking, courts inquire whether, as a practical matter, parties had sufficient notice that the approved rate was subject to change. Rehearing Order P 27, EOR 6 (citing *Pub. Utils. Comm'n*, 988 F.2d at 164). Notice “changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.” *Id.* (quoting *Pub. Utils. Comm'n*, 988 F.2d at 164).

Indeed, as this Court has recognized, the rule against retroactive ratemaking “underpins the limitations on FERC’s remedies under § 206 to the post-complaint

period.” *PUC of California*, 462 F.3d at 1063. “If FERC finds a rate unjust and unreasonable pursuant to a § 206 complaint, it must order imposition of a just and reasonable rate; however, the refund is limited to periods subsequent to the ‘refund effective date’ established by FERC, which must be at least sixty days after the filing of the complaint.” *Id.* “By this procedure, once a complaint is filed, sellers are on notice that their sales may be subject to refund.” *Id.* Thus, “the overall framework of the statute . . . indicates the primary concern of Congress was to afford notice to market participants of the period of time during which they may be liable for refunds.” *Port of Seattle*, 499 F.3d at 1032. *See also Lockyer*, 383 F.3d at 1017 (finding that the remedies provided under FPA § 206(b) effectively are prospective from the filing of the complaint).

Accordingly, in *Louisiana Pub. Serv. Comm’n v. FERC*, 482 F.3d 510, 520 (2007), the D.C. Circuit rejected the argument that the award of refunds following a complaint under FPA § 206 constituted retroactive ratemaking:

[T]he Commission fails to explain why the requirements of the filed rate doctrine would not be satisfied with respect to the refunds here at issue considering that all parties were on notice as of the filing of Louisiana’s complaint in 1995 that Entergy’s calculation of peak load responsibility might be held unjust or unreasonable. *Cf. Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (“So long as the parties had adequate notice that surcharges might be imposed in the future, imposition of surcharges does not violate the filed rate doctrine”). In fact, the Commission itself has previously taken the position that a refund ordered pursuant to § 206(c) “would be . . . ‘prospective’ from the refund date, rather than

‘retroactive.’” *Blue Ridge Power Agency v. Appalachian Power Co.*, 57 FERC ¶ 61,100 at 61,374 (1991).

Thus, “[t]he filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.” *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1491 (10th Cir. 1995) (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)). *See also, e.g., Sithe*, 308 F.3d at 78 (ordering refunds is “permissible ‘retroactive ratemaking;’” what is prohibited is for the agency to surprise parties without notice that the rate may change).

Here, as this Court found in *PUC of California*, the market had ample notice, by virtue of San Diego’s August 2000 complaint and the Commission’s subsequent orders establishing a refund effective date, that the Commission might reset the market clearing prices for the California ISO and PX spot market sales. Rehearing Order P 28, EOR 7 (citing *PUC of California*, 462 F.3d at 1047). The “gravamen of the SDG&E complaint was that the rates charged by sellers were unjust and unreasonable.” *PUC of California*, 462 F.3d at 1046. As a result of that complaint, the Commission “launched a § 206 investigation into the justness and reasonableness of the rates pursuant to the SDG&E complaint *and* initiated its own investigation into the CalPX and Cal-ISO tariffs and agreements to determine whether market rules required modification.” *Id.* at 1047. Thus, notwithstanding

the fact that the San Diego complaint did not request refunds, “the SDG&E complaint afforded sufficient notice to alert market participants that sales and purchases might be subject to refund.” *Id.* at 1046. Accordingly, the Commission reasonably rejected arguments that it violated the filed rate doctrine and the corollary rule against retroactive ratemaking when it reset the market clearing prices for all spot market sales under FPA § 206. Rehearing Order P 28, EOR 7.

Petitioners argue that the San Diego complaint proceedings could not have provided notice to the governmental entities because the governmental entities are not subject to FERC regulation under FPA § 206. BPA Br. 36-38; PE Br. 50-53. However, notice to the governmental entities of their potential refund liability is not the issue; to the contrary, *Bonneville* and the challenged orders expressly confirm that FERC may not order governmental entities to pay refunds. Rather, the notice relevant here is notice that the Commission might reset the market clearing prices for all spot market sales during the refund period. Rehearing Order P 35, EOR 8 (“certainly from as early as the date of the August 2000 Order, [petitioners] were on notice that the Commission might reset the market clearing prices for all spot market sales during the refund period”). *See also id.* P 36, EOR 9 (rejecting argument that petitioners were “not given appropriate notice of the Commission’s right to revise pricing formulations in the CAISO and PX markets”).

Likewise, statements that the Commission lacked jurisdiction over governmental entities, *see* 94 FERC ¶ 61,245 at 61,894 (2001), EOR 195 (cited BPA Br. 37), “do not suggest that the Commission never intended to, or that the Commission cannot, make the just and reasonable market clearing price it developed applicable to all participants in the CAISO and CalPX markets.” Rehearing Order P 37, EOR 9. “Nor do these statements preclude the Commission from carrying out its obligation under section 206 to determine a just and reasonable market clearing price and thus just and reasonable rates to be applicable during the refund period.” *Id.* Rather, as found by this Court in *PUC of California*, San Diego’s filing of its section 206 complaint provided sufficient notice to participants in the market to satisfy the notice requirements of section 206. *Id.* The Commission was not required to specifically state that the rates of governmental entities might be impacted, *id.*, and, indeed, the Commission has been found to have no jurisdiction over such rates. In other words, ample notice was provided that the market clearing prices would be reset to just and reasonable levels; notice that the rates of governmental entities might be impacted was not required. *Id.*

D. The Challenged Orders Did Not Modify Bonneville’s Previously-Approved Rates.

The BPA brief contains extensive argument that FERC may not regulate Bonneville’s rates under the just and reasonable standard. BPA Br. 43-57. As the

Commission found, because it was not ordering Bonneville to pay refunds, it was not necessary to address issues concerning the Commission's authority to review Bonneville's rates. Remand Order P 44, EOR 25; Rehearing Order P 62, EOR 13. Any limitation on the Commission's ability to review Bonneville's previously-approved rates is not relevant to the issue of whether the Commission may under FPA § 206 reset rates in tariffs of jurisdictional entities, the California ISO and PX. Rehearing Order P 62, EOR 13.

While Bonneville argues that "FERC's FPA authority over jurisdictional entities cannot trump the limitations imposed on FERC's authority under the Northwest Power Act and Western's organic statutes," BPA Br. 56, that assertion is beside the point where the Commission has directed no relief from Bonneville. The Commission merely has revised prices under the tariffs of the jurisdictional California ISO and PX, and that revision required no modification of Bonneville's rate schedules. "Because we are not ordering BPA or Western to pay refunds, BPA and Western's rates are not impacted; therefore, the Commission's ability to review BPA and Western's rates is not at issue here." Rehearing Order P 62, EOR 13.

Whatever the Commission's findings on the lawfulness of the market clearing prices in the California ISO and PX markets, the Commission has no authority to make any order of refunds against Bonneville, nor does FERC have

authority to enforce contractual agreements that may obligate Bonneville to make refunds. *Bonneville*, 422 F.3d at 925 (FERC has no authority to order refunds even if required by the governmental entities' agreements with the California ISO and PX); *Transmission Agency*, 495 F.3d at 675 (FERC has no authority to order refunds even if authorized under the governmental entity's contract with the California ISO). Any future contract enforcement would not be directed by the Commission's orders here. Rather, the judicial enforcement of the refund obligation is enforcement of the contract, not of the FERC order. *Alliant Energy*, 347 F.3d at 1050-51 ("when a contract provides that its terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body. As a result, we are not enforcing the FERC order; instead we are enforcing an agreement, which [the governmental entity] freely entered"); *Transmission Agency*, 495 F.3d at 675-76 (a court finding a nonjurisdictional entity contractually bound to pay refunds is a *judicial* order of refunds, not an agency order, and thus the Court is enforcing the agreement, not the FERC orders).

CONCLUSION

For the foregoing reasons, FERC respectfully requests that the petitions for review be denied and FERC's orders upheld in all respects.

Respectfully submitted,

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May 17, 2010

STATEMENT OF RELATED CASES

Respondent Federal Energy Regulatory Commission has no additions to
Petitioners' Statements of Related Cases.

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. RULE 32(a)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NOS. 09-72762, ET AL. (CONSOLIDATED)**

I certify that:

Pursuant to Fed. R. App. P. 32(a)(7)(B)(i) and (C)(i) and Ninth Circuit Rule 32-1, the attached answering brief of Respondent Federal Energy Regulatory Commission is proportionately spaced, has a typeface of 14 points or more and contains 13,773 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Lona T. Perry
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Regulatory Commission

May 17, 2010

ADDENDUM

STATUTES

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STATUTES:

Federal Power Act

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Section 205 of the Federal Power Act, 16 U.S.C. § 824d, provides as follows:

§ 824d Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or

(2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public

utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; “automatic adjustment clause” defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term “automatic adjustment clause” means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, provides as follows:

§ 824e Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later

than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, 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. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; “electric utility companies” and “registered holding company” defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that

(1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and

(2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.^[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824 (f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the

sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)

(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

Section 313(b), of the Federal Power Act, 16 U.S.C. § 8251(b), provides as follows:

8251. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in

whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section [2112](#) of title [28](#). Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section [1254](#) of title [28](#).

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on May 17, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants.

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