ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 05-1231

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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MARCH 24, 2006
FINAL BRIEF: MAY 15, 2006

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties are as stated in Petitioner's brief, with the addition of Pacific Gas and Electric Company as a party in the FERC proceeding.

B. Rulings Under Review

1. Order Accepting Notices of Cancellation and Rate Schedules, Subject to Compliance, *Pacific Gas and Electric Company*, Docket Nos. ER04-688, *et al.*, 109 FERC ¶ 61,255 (Dec. 3, 2004); and

2. Order Denying Rehearing, *Pacific Gas and Electric Company*, Docket No. ER04-689, 111 FERC ¶ 61,175 (May 6, 2005).

C. Related Cases

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

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Carol J. Banta
Attorney

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1967 Contract	Contract Between California Companies and Sacramento Municipal Utility District For Extra High Voltage Transmission And Exchange Service
California Companies	PG&E, San Diego Gas & Electric Co., and Southern California Edison Company, collectively
California DWR	California Department of Water Resources
California ISO	California Independent System Operator Corporation
Commission or FERC	Federal Energy Regulatory Commission
Complaint Orders	Order Denying Complaint, *Sacramento Municipal Utility District v. Pacific Gas and Electric Company*, 105 FERC ¶ 61,358 (2003), and Order On Rehearing, *Sacramento Municipal Utility District v. Pacific Gas and Electric Company*, 107 FERC ¶ 61,237 (2004)
Initial Order	Order Accepting Notices of Cancellation and Rate Schedules, Subject to Compliance, *Pacific Gas and Electric Company*, Docket Nos. ER04-688, *et al.*, 109 FERC ¶ 61,255 (Dec. 3, 2004), R. 156, JA 150
kV	kilovolt
MW	megawatt
Orders	Initial Order and Rehearing Order

GLOSSARY

PG&E	Pacific Gas and Electric Company
Pacific Intertie	Pacific Northwest-Pacific Southwest Intertie, a transmission facility owned by PG&E and Western that runs from the Pacific Northwest through California
Rehearing Order	Order Denying Rehearing, *Pacific Gas and Electric Company*, Docket No. ER04-689, 111 FERC ¶ 61,175 (May 6, 2005), R. 168, JA 216
Rehearing Request	Request for Rehearing of the Sacramento Municipal Utility District, R. 160, JA 194
Sacramento	Petitioner Sacramento Municipal Utility District
Sacramento I	*Sacramento Municipal Utility District v. FERC*, 428 F.3d 294 (D.C. Cir. 2005) (denying in part and dismissing in part petition for review of Complaint Orders)
Transmission Exchange Agreement	Transmission Exchange Agreement among Western, California ISO, and PG&E, approved in Initial Order
Western	Western Area Power Administration

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly accepted Pacific Gas and Electric Company's ("PG&E") termination of a long-term contract for physical transmission rights upon the expiration of the contract by its own terms, where the prior business model no longer exists; the transmission customer, Sacramento Municipal Utility District ("Sacramento"), has access to transmission service provided by the California Independent System Operator Corporation ("California ISO") under its tariff; and

the Commission previously found the available service would suffice to replace the terminated service.

2. Whether the Commission reasonably determined that Sacramento's discrimination claim, based on the California ISO's negotiation of a transmission exchange agreement with a transmission owner, is both without merit, because Sacramento is not similarly situated to the transmission owner, and outside the scope of PG&E's contract termination.

COUNTERSTATEMENT OF JURISDICTION

The statutory prerequisites under FPA § 313(b), 16 U.S.C. § 825*l*(b), have not been met with respect to one issue that Sacramento now raises (*see infra* Section III.B), but failed to raise on rehearing.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns Sacramento's latest attempt to obtain long-term firm physical transmission rights that it previously had under an expired contract but that no longer exist in modern California energy markets. Having previously been denied a contract extension based on a right of first refusal, *see Sacramento Municipal Utility District v. FERC*, 428 F.3d 294 (2005) ("*Sacramento I*"), Sacramento now seeks what amounts to a *de facto* extension. Sacramento

contends that the Commission should not have allowed the contract to terminate on its expiration date unless the current transmission provider, the California ISO, offered Sacramento a similar contract.

For several decades before California restructured its energy markets in the mid-1990s, Sacramento received transmission service from PG&E, Southern California Edison Company, and San Diego Gas & Electric Company (collectively, the "California Companies") under a 1967 contract. Following the restructuring, the California ISO took over transmission operations from the California Companies and other utilities in the region. Under its tariff ("California ISO Tariff"), the California ISO does not provide long-term reservation of transmission capacity for a set price, but instead allocates capacity in a *real time* market and charges customers an access fee and variable congestion pricing. *See Sacramento I*, 428 F.3d at 297.

As in *Sacramento I*, at the core of this case is yet another challenge to the adequacy of service available under the California ISO Tariff. *See id.* at 298 ("Sacramento ultimately challenges the validity of the California ISO tariff itself"). Sacramento continues to lament the loss of long-term capacity set-asides and remains dissatisfied with the service available in the restructured market. Thus, this case is not about a termination of service, but about the demise of a service model and Sacramento's effort to retain a physical transmission right that no

longer exists. As such, the Court's prior conclusion is equally true here: "Sacramento cannot assert a right it no longer has and it cannot take service under a business model that no longer exists." *Id.*

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, affords the Commission jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. §§ 824(a)-(b). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). To enable such FERC review, the FPA requires every public utility to file with the Commission "schedules showing all [jurisdictional] rates and charges . . . together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." FPA § 205(c), 16 U.S.C. § 824d(c); *see* 18 C.F.R. § 35.1 (filing obligations). A change in any jurisdictional rate, charge, or contract requires 60 days' advance notice to the Commission and the public, unless the Commission orders otherwise. FPA § 205(d), 16 U.S.C. § 824d(d).

In particular, when a jurisdictional rate schedule "is proposed to be cancelled

or is to terminate by its own terms," the utility must notify the Commission at least 60 days before the proposed termination date. 18 C.F.R. § 35.15(a). *See Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 841 (D.C. Cir. 2001) (addressing contract cancellation requirements). This filing requirement applies expressly to the cancellation of all contracts for unbundled transmission service, like the 1967 Sacramento contract at issue, that were executed prior to July 9, 1996. 18 C.F.R. § 35.15(b)(1)(i).

II. The 1967 Contract And The Restructuring Of California Energy Markets

The Court is well-acquainted with the history of the Commission's regulation of electricity transmission services and California's restructuring of its energy markets, as well as with the particulars of Sacramento's long-term contract with the California Companies and its efforts to obtain long-term physical transmission rights upon the expiration of that contract. *See generally Sacramento I*, 428 F.3d at 295-98. Given that familiarity, this brief provides the following overview, principally derived from the Court's own opinion.

In August 1967, Sacramento entered into a power transmission agreement with the California Companies ("1967 Contract"), under which Sacramento obtained the right to 200 megawatts of capacity along a specified transmission path. *See Sacramento I*, 428 F.3d at 295 ("Like many contracts of its era, the Sacramento agreement provided for long-term firm physical transmission

service."). Article 34 of the 1967 Contract provided that it would expire by its own terms on January 1, 2005. *See Pacific Gas & Electric Co.*, 111 FERC ¶ 61,175, at P 2 n.4 (2005), JA 216.[1]

In 1996, the Commission issued Order No. 888,[2] which required utilities to "unbundle" their electricity generation and transmission services and to file new "open access" tariffs guaranteeing non-discriminatory access to their transmission facilities by competing generators. *See* Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,635-36. As this Court has previously noted, "[t]he Commission recognized that the transition to an open access regime would have significant implications for long-term contract-holders." *Sacramento I*, 428 F.3d at 296 (citing Order No. 888 at 31,662-63).

Also in 1996, the State of California chartered the California ISO, an independent entity that would take over transmission operations from California

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[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles [Jan. 1991-June 1996] ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, FERC Stats. & Regs., Regs. Preambles [July 1996-Dec. 2000] ¶ 31,048, *order on reh'g*, 81 FERC ¶ 61,248, *order on reh'g*, 82 FERC ¶ 61,046 (1998).

utilities and file a new tariff with the Commission. The California ISO would allocate transmission capacity in "real time," based on hour-ahead and day-ahead scheduling requests from customers, and charge all customers an access fee, then adjust its "congestion" pricing based on supply and demand. *See generally Sacramento I*, 428 F.3d at 296-97.

The California ISO submitted a proposed tariff to the Commission, which found it consistent with the broad non-discrimination goals of Order No. 888. *See Pacific Gas & Elec. Co.*, 81 FERC ¶ 61,122, at 61,435, 61,446 (1997). As this Court previously explained, "[t]o manage the transition to a new regulatory regime and a completely new service model, the Commission . . . declined to abrogate existing contracts and ordered customers to take service under the California ISO tariff upon contract expiration." *Sacramento I*, 428 F.3d at 297 (citing 81 FERC at 61,463-65) (footnote omitted). Moreover, the Commission also approved the California ISO Tariff's omission of a right of first refusal provision, which might otherwise have allowed parties to long-term contracts to retain the same rights, noting that "the ISO's proposal to schedule transmission on a day-ahead and hour-ahead basis is not compatible with the long-term reservation of discrete physical transmission rights." *Pacific Gas & Elec. Co.*, 81 FERC at 61,472.

The Commission did, however, find that the California ISO Tariff would not provide service "as good as or superior to" that provided under Order No. 888

without some instrument for hedging the risk of congestion charges, especially in the case of incumbent customers with previously guaranteed service. *Pacific Gas & Elec. Co.*, 80 FERC ¶ 61,128, at 61,427 (1997). The Commission conditionally approved the California ISO's proposal for tradeable financial instruments to protect against significant fluctuations in congestion pricing, finding these financial instruments to be a sufficient substitute for firm physical transmission rights. *Cal. Indep. Sys. Operator Corp*., 87 FERC ¶ 61,143, at 61,572 (1999); *see also Cal. Indep. Sys. Operator Corp.*, 88 FERC ¶ 61,156, at 61,525 (1999). The Commission further ordered the California ISO to develop and report on plans for longer-term financial rights, finding the one-year term to be inadequate. *See* 87 FERC at 61,572; *see also* 88 FERC at 61,525. The Commission took no further action on the transmission rights proposal, choosing instead to fold it into an ongoing comprehensive market redesign proceeding initiated in the aftermath of the California energy crisis. *Sacramento I*, 428 F.3d at 298.

III. Related Proceeding: The Complaint Orders And *Sacramento I*

In October 2003, Sacramento filed a complaint against the California Companies, contending that it had the right to extend the 1967 Contract and its existing transmission service under a right of first refusal. The Commission denied the complaint on the grounds that extension of the service "would not be possible" because the only transmission provider is now the California ISO and the only

relevant tariff is the California ISO Tariff, under which "all customers have nondiscriminatory access to transmission service and long-term transmission service is not offered." Order Denying Complaint, *Sacramento Mun. Util. Dist. v. Pacific Gas & Elec. Co.*, 105 FERC ¶ 61,358 at P 23 (2003), *reh'g denied*, 107 FERC ¶ 61,237 (2004) (collectively, the "Complaint Orders"); *see also* 105 FERC ¶ 61,358 at P 23 ("[W]hile [Sacramento] must, upon expiration of its [1967] contract, take service under the rates, terms and conditions of the [California ISO] tariff, it would not be denied access to transmission service."); *accord* 107 FERC ¶ 61,237 at P 12. The Commission also noted that the complaint proceeding was "not the appropriate forum in which to address [Sacramento's] concerns about the [California ISO] market structure. . . . [Sacramento] should pursue its concerns regarding long-term transmission service in [the market redesign] proceeding." *Id.* at P 14.

This Court affirmed the Complaint Orders, concluding that "Sacramento cannot assert a right it no longer has and it cannot take service under a business model that no longer exists." *Sacramento I*, 428 F.3d at 298. The essence of Sacramento's complaint was a challenge to "the validity of the California ISO tariff itself" and to the service available thereunder; as such, it was an impermissible collateral attack on the earlier orders approving that tariff. *Id.* at 298-99.

IV. Instant Proceeding: Termination Of The 1967 Sacramento Contract

A. Initial Order

On March 31, 2004, the California Companies submitted for filing notices of cancellation of rate schedules underlying a number of long-term contracts, including the 1967 Contract, beginning proceedings in four separate FERC dockets. Though the dockets were not consolidated, the Commission ruled on those cancellations, as well as several settlements and proposed agreements, in a single order issued on December 3, 2004. Order Accepting Notices of Cancellation and Rate Schedules, Subject to Compliance, *Pacific Gas & Electric Co.*, 109 FERC ¶ 61,255 (2004) (FERC Docket Nos. ER04-688, ER04-689, ER04-690, ER04-693) ("Initial Order"), R. 156, JA 150.

In relevant part (FERC Docket No. ER04-689), PG&E requested termination of service under extra high voltage transmission and exchange service contracts with Sacramento and with the California Department of Water Resources ("California DWR"). Initial Order at P 58, JA 165. Both long-term contracts were executed in 1967 as part of a set of contracts related to the construction and use of the Pacific Northwest-Pacific Southwest Intertie ("Pacific Intertie"); both provided bi-directional transmission service to and from the California-Oregon border, allowing Sacramento and the California DWR to purchase, sell, and exchange power with entities in or accessible via the Pacific Northwest; and both were set to

expire by their own terms on January 1, 2005. *Id.* at PP 58-59, JA 165.

The Commission accepted the proposed notices of cancellation of the underlying PG&E and Southern California Edison Company rate schedules. *Id.* at P 70, JA 168. The Commission denied Sacramento's request for a hearing, noting the previous ruling in the Complaint Orders denying extension of the contracts and concluding that Sacramento (and California DWR) would have to take service under the California ISO Tariff, and thus would not be denied access to transmission service. *Id.* at P 71, JA 168; *see also id.* at P 58 n.17, JA 165. The Commission disagreed with Sacramento's contention that it was similarly situated to the Western Area Power Administration ("Western") and should be offered a new contract similar to the Transmission Exchange Agreement among Western, the California ISO, and PG&E, approved to replace a terminated contract between Western and the California Companies. *Id.* at P 72, JA 169; *see also id.* at PP 11-57, JA 153-64 (addressing Transmission Exchange Agreement). The Commission concluded that Sacramento "ha[d] raised no issues of material fact that warrant a hearing," and that it would not direct the California ISO to negotiate an exchange arrangement with Sacramento. *Id.* at P 73, JA 169.

B. Rehearing Order

Sacramento filed a timely request for rehearing, challenging the termination of the 1967 Contract and the California ISO's refusal to negotiate a capacity

exchange agreement with Sacramento. Request for Rehearing of the Sacramento Municipal Utility District ("Rehearing Request"), R. 160, JA 194. On May 6, 2005, the Commission issued an Order Denying Rehearing, 111 FERC ¶ 61,175 (2005) ("Rehearing Order," and together with the Initial Order, the "Orders"), R. 168, JA 216.

The Commission again concluded that a trial-type evidentiary hearing was not required. *Id.* at P 17, JA 220. Specifically, the Commission found that Sacramento's allegations that termination of the 1967 Contract contravened Congressional intent and Sacramento's expectations were issues of law, and that Sacramento's claim that no comparable service was available could be resolved on the written record. *Id.* at P 18, JA 220. The Commission distinguished the cases cited by Sacramento, in which there were no contractually defined termination dates. *Id.* at PP 18-20, JA 220-21; *see also id.* at P 25, JA 222-23. The Commission reiterated its previous finding that Sacramento is not being denied access to the transmission system and is in the same position as all other California ISO customers, and again explained that Sacramento's concerns regarding long-term transmission service under the California ISO Tariff should be raised in the ongoing market redesign proceeding. *Id.* at PP 21, 22, JA 221-22.

The Commission also again rejected Sacramento's claim that it is similarly situated to Western — which, unlike Sacramento, owns part of the Pacific Intertie

and, through the agreement with the California ISO, provides capacity allowing the California ISO's customers open access to the Pacific Northwest — and noted that the Commission cannot force the California ISO to negotiate a contract with Sacramento. *Id.* at PP 23-24, 26, JA 222, 223. Finally, the Commission determined that Sacramento's claim that the California ISO discriminated by offering a special arrangement for service outside its Tariff to Western and not to Sacramento was outside the scope of the rehearing of PG&E's termination of service under the 1967 Contract. *Id.* at P 24, JA 222.

This petition followed.

SUMMARY OF ARGUMENT

The Commission properly accepted PG&E's termination of the 1967 Sacramento contract and did not abuse its discretion in declining to hold a trial-type hearing.

First, the instant petition revisits Sacramento's challenge to the adequacy of service provided by the California ISO — a dispute that the Commission has repeatedly directed Sacramento to pursue in the comprehensive market redesign proceeding and that this Court previously dismissed as a collateral attack on the California ISO Tariff. Sacramento unquestionably has access to transmission service under the California ISO Tariff at the same rates, terms, and conditions available to other customers, which the Commission has repeatedly found suffices to replace the terminated service. Moreover, the 1967 Contract expired by its own terms, as all parties, throughout the extensive proceedings regarding the transition to a new service model, recognized would occur. Thus, the Commission reasonably found the termination appropriate under Section 205 of the Federal Power Act.

Second, Sacramento's discrimination claim fails because the Commission reasonably determined that Sacramento and Western are not similarly situated. Western, unlike Sacramento, owns transmission facilities that form part of the critical Pacific Intertie. Through its transmission exchange agreement with the

California ISO, Western makes 1200 MW of import capacity from the Pacific Northwest available to California ISO customers, reducing rates and enhancing system access and reliability. The Commission approved that "unique" arrangement based on its substantial benefits to all customers in both Western's and the California ISO's markets. Sacramento's proposal to the California ISO did not offer similar benefits to market participants; indeed, the arrangement it sought would give it an unfair advantage over other California ISO customers.

Furthermore, Sacramento's discrimination claim is based, not on PG&E's termination of service, but on the California ISO's purported refusal to negotiate a contract with Sacramento. In the Rehearing Order, the Commission determined the California ISO's conduct was outside the scope of rehearing of the termination; Sacramento is jurisdictionally barred from challenging that procedural ruling in the first instance on appeal.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). Absent evidence of an abuse of discretion, the Court defers to the Commission's determination that a controversy raises no disputed issues. *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993). "And 'even where there are such disputed issues, FERC need not conduct . . . a hearing if they may be adequately resolved on the written record.'" *Id.* (quoting *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993)).

II. THE COMMISSION'S APPROVAL OF TERMINATION UPON THE EXPIRATION OF THE 1967 CONTRACT WAS REASONABLE

Having failed to win an extension of the 1967 Contract in the previous litigation, Sacramento renews its effort to continue the same service under a new theory: that, because the currently available transmission service is not the same as the service provided under the 1967 Contract, the contract could not be terminated. Once again, its arguments fail. First, as in *Sacramento I*, Sacramento cannot challenge the adequacy of the available service under the California ISO Tariff in this proceeding. Second, the Commission made the requisite finding that

termination comported with FPA § 205.

A. As In *Sacramento I,* Sacramento's Challenge Is To The Adequacy Of Service Available Under The California ISO Tariff

The issue in this case, as in *Sacramento I,* has never been whether Sacramento would continue to have access to transmission service after termination of the 1967 Contract. There is no question that it does. *See* Rehearing Order at P 21 ("[Sacramento] is not being denied access to the transmission system"), JA 221; Initial Order at P 71 (noting same finding in the Complaint Orders), JA 168; *see also* Rehearing Order at P 18 (reaffirming finding that service available under the California ISO Tariff "suffices to replace the service [Sacramento] received under its [1967] Contract"), JA 220. In its Brief, Sacramento focuses on the lack of multi-year firm service under the California ISO Tariff, but never alleges that it lacks access to transmission service altogether. *See, e.g.,* Br. 26-27.

Thus, at its core, this case is not about the termination of service by PG&E but about Sacramento's dissatisfaction with the *adequacy* of the service available under the California ISO Tariff — a challenge that this Court already rejected. *See Sacramento I,* 428 F.3d at 298-99 (dismissing Sacramento's challenge to adequacy of service under California ISO tariff as collateral attack on prior FERC orders); *cf.* Br. 26 (discussing "inadequacy" of service).

The Commission has recognized the impact of the California ISO Tariff on

customers that previously had guaranteed service under long-term contracts and has previously considered and rejected challenges to that Tariff based on the absence of a right of first refusal and the nature of firm transmission rights available. *See Sacramento I*, 428 F.3d at 297, 299. Nevertheless, the Commission has concluded, and has consistently maintained, that the best forum to address concerns regarding long-term transmission service under the California ISO Tariff is the comprehensive market redesign proceeding. Rehearing Order at P 22 ("That proceeding is best suited for determining whether or not, and in what manner, the [California ISO] should offer long-term transmission service. [Sacramento] should pursue its concerns regarding long-term transmission service in that proceeding."), JA 222; Complaint Order on Rehearing, 107 FERC ¶ 61,237 at P 14 ("[T]his is not the appropriate forum in which to address [Sacramento's] concerns about the [California ISO] market structure.").[3]

That determination is the Commission's to make: "It is firmly established that it is within the Commission's purview to determine how best to allocate its

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[3] The market redesign proceeding is continuing. *See California Indep. Sys. Operator Corp*., 112 FERC 61,013 (2005) (approving in principle and providing guidance on California ISO's proposed revisions to its market redesign proposal), *order on reh'g*, 112 FERC 61,310 (2005), *appeal pending, Northern Cal. Power Agency v. FERC*, D.C. Cir. No. 05-1431 (FERC motion to dismiss, for lack of finality and ripeness, filed Jan. 5, 2006).

resources for the most efficient resolution of matters before it." Rehearing Order P 22, JA 221-22; *id.* n.13 (citing cases), JA 222. *See, e.g., Michigan Pub. Power Agency v. FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992) (agencies accorded substantial deference in ordering their proceedings); *Richmond Power & Light Co. v. FERC*, 574 F.2d 610, 624 (D.C. Cir. 1978) ("Agencies have wide leeway in controlling their calendars") (citing *City of San Antonio v. Civil Aeronautics Bd.*, 374 F.2d 326, 329 (D.C. Cir. 1967)). Notwithstanding Sacramento's impatience with the progress of the market redesign proceeding,[4] it is within the Commission's discretion to require Sacramento to pursue its complaints about the California ISO's service options in the (market redesign) proceeding it deems best suited to resolve these (and related) complaints.

In the meantime, Sacramento is in the same position as other California ISO customers:

> [Sacramento] is in the same position as all other [California ISO] customers. To require additional service would give [Sacramento] an unfair advantage over competitors. . . . [Sacramento] is not being denied access to the transmission system, it is merely required to access it in the same manner as other [California ISO] customers.

Rehearing Order at P 21, JA 221; *see also* Initial Order at P 71 (while Sacramento

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[4] *See* Br. 27 (complaining that it "needs longer than one-year transmission service now, not at some future date when the market redesign is finally finished").

"would take service under the rates, terms and condition[s] of the [California ISO] tariff, it would not be denied access to transmission service"), JA 168; *see also* Br. 26 ("all [California ISO] transmission customers are subject to this same inadequate level of service"). In particular, it is telling that Sacramento does not attempt to distinguish its situation from that of the California Department of Water Resources, which had a similar contract for extra high voltage transmission service, also executed in 1967, also expiring on January 1, 2005, and also subject to termination as approved in the Initial Order. *See* Initial Order at PP 58-59, 70, JA 165, 168.[5] Like Sacramento, the California Department of Water Resources no longer receives long-term firm physical transmission service, and must now take service under the California ISO Tariff.

Nevertheless, Sacramento insists that it should be given preferential service. *See, e.g.*, Br. 25 (Sacramento's "transmission needs differ from those of other transmission customers"); *id.* 27 (Sacramento "needs longer than one-year

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[5] A settlement between the California DWR and PG&E, also approved in the Initial Order, is no basis for distinction. That settlement involved a discrete issue (revision of certain terms regarding Remedial Action System compensation in an existing comprehensive agreement), and, according to the parties, did not resolve any other issues. *See* Initial Order at PP 62, 65, JA 166, 167. With regard to obtaining transmission service after the contract termination, the California DWR and Sacramento are in the same position.

transmission service now"). It asserts its needs are different from other customers but does not explain why, stating only that it "presented testimony that it will be 'unable to secure firm delivery of power it has purchased under long-term firm supply,' if its service were cancelled." Br. 28 (internal citation omitted); *see also id.* 16. Sacramento's "evidence" amounts to nothing more than repetition of its policy argument: that the transmission service available under the California ISO Tariff is not as good as service under the former business model.

For that reason, the Commission did not abuse its discretion in determining that an evidentiary hearing was unnecessary, as the issues raised by Sacramento could be resolved on the written record. Initial Order at P 71, JA 168; Rehearing Order at P 18, JA 220; *see also Moreau*, 982 F.2d at 568. Sacramento's claims, at most, "pose legal and policy disputes . . . and as such do not warrant a hearing." *Pacific Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (citations omitted).

B. The Commission Properly Accepted Termination Upon Expiration Of The 1967 Contract

Sacramento contends the Commission erred in failing to make a specific determination that allowing service under the 1967 Contract to terminate upon the contract's expiration was in the public interest. Br. 19. This is a red herring: the fundamental issue is that the Commission had already found the replacement service following termination — service under the California ISO Tariff — to be

sufficient, and reaffirmed that finding in this case. Therefore, the Commission found the termination to be appropriate.

First, the Commission specifically relied on its previous findings in the Complaint Orders that "[Sacramento] would have to take service under the [California ISO] Tariff upon termination of the [1967] Contract" and "[Sacramento] would not be denied access to transmission service." Initial Order at P 71, JA 168; *see also* Rehearing Order at PP 18, 21, JA 220, 221; 105 FERC ¶ 61,358 at P 23; 107 FERC ¶ 61,237 at P 12. On that basis, the Commission found the termination to be appropriate. Rehearing Order at P 18, JA 220.

In addition, the Commission found that termination of the 1967 Contract did not upset the parties' settled expectations. Rehearing Order at PP 18-20, JA 220-21. To the contrary, the contract provided for expiration by its own terms on January 1, 2005. *Id.* at P 2 & n.4 (citing Art. 34 of 1967 Contract), JA 216. That distinguished it from the cases cited by Sacramento (Br. 21-22), none of which involved a valid contractual termination date. Indeed, *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952) ("*Penn Water*"), on which Sacramento principally relies, did not involve an expiring contract at all; the utility was not seeking to break an ongoing contract, but rather was challenging a reduction of rates ordered by the Commission. *Id.* at 417, 424; Rehearing Order at P 19, JA 221. Nor was a valid termination date at issue in *Florida Power & Light*

Company, 3 FERC ¶ 61,081 (1978) ("*Florida Power*"). In that case, the utility filed a contract that specified a termination date; the purchaser contended it had never agreed to the termination provision, so the Commission struck that paragraph from the contract. *Id.* at 61,231; Rehearing Order at P 18, JA 220-21. *See also Public Serv. Co. of Indiana, Inc.*, 10 FERC ¶ 61,277, at 61,537 (1980) (proposed termination of ongoing contract based on alleged "understanding . . . that this service was temporary," but not on any specified expiration date).

Furthermore, the Commission and all parties, including Sacramento, have long understood — through the Order No. 888 rulemaking, the myriad, lengthy proceedings concerning the California ISO Tariff, the comprehensive market redesign proceeding, and the *Sacramento I* litigation — that this day would come. A central premise of those proceedings was that the remaining long-term contracts from an earlier era, such as the 1967 Contract, would expire on their own terms and the provision of long-term transmission service outside the California ISO Tariff would end at that time:

> Now that the California utilities have ceded their transmission operations to the California ISO, they no longer offer service under the open access tariffs; requests for service *upon expiration of existing contracts* are governed by the California ISO tariff. . . . Sacramento cannot assert a right it no longer has and it cannot take service under a business model that no longer exists.

Sacramento I, 428 F.3d at 298 (emphasis added); *see also id.* at 297 ("To manage the transition to a new regulatory regime and a completely new service model, the

Commission again declined to abrogate existing contracts and ordered customers to take service under the California ISO Tariff *upon contract expiration*.") (citing *Pacific Gas & Elec. Co.*, 81 FERC at 61,463-65) (emphasis added).

Ignoring that necessary context, Sacramento contends that, in this particular case, the Commission failed to make a specific "public interest" finding before terminating the firm physical transmission service, as expected, at the end of the 1967 Contract. But Sacramento fails to explain how such a determination would differ from the Commission's analysis in this case.[6] Nor do the cited cases suggest any different standard than an ordinary finding under FPA § 205. *See* § 205(a) (providing all rates and charges must be "just and reasonable"), 16 U.S.C. § 824d(a); § 205(b) (prohibiting "undue preference or advantage" or "unreasonable difference"), 16 U.S.C. § 824d(b).

In *Penn Water*, the Court noted (as had the Commission) that, if Penn Water did wish to discontinue any of the services it provided (which it had not sought to do in that case), the appropriate procedure for doing so would be a filing under

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[6] Sacramento does not appear to be suggesting the hard-to-meet *Mobile-Sierra* standard. *See FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 342-44 (1956). In any event, that standard is designed to protect settled expectations under contracts. *See generally id.* at 344. Here, as discussed above, termination furthers such expectations.

FPA § 205(d) — exactly as PG&E made here — which "opens up a way [to discontinue service] provided Penn Water can prove that its wishes are consistent with the public interest." 343 U.S. at 423. *Florida Power* likewise did not concern a filing under § 205(d) to terminate service; at issue was the initial filing of a contract under § 205(c). The Commission noted that termination of service would require a filing under 18 C.F.R. § 35.15, and echoed *Penn Water*'s observation that a proposed termination "must be shown to be consistent with the public interest" under § 205. 3 FERC at 61,231; *see also Public Serv. Co. of Indiana*, 10 FERC at 61,537 (1980) (finding proposed termination "has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful").

Thus, based on the extensive prior proceedings concerning the relationship between anachronistic contracts and the new business model of the California ISO, and specifically citing its prior findings that Sacramento would have access to transmission service after termination and that the available service sufficed to replace the terminated service, the Commission reasonably concluded that termination of the 1967 Contract was just and reasonable. In addition, as shown in the next Section, the Commission further found that Sacramento's claims of discriminatory or preferential service were both meritless and not related to PG&E's termination of service. Thus, it fully considered Sacramento's allegations

and determined that the standards of FPA § 205 were met.

III. THE COMMISSION REASONABLY DETERMINED THAT SACRAMENTO'S DISCRIMINATION CLAIM IS WITHOUT MERIT AND OUTSIDE THE SCOPE OF THE PROCEEDING

A. The Commission Reasonably Determined That Sacramento And Western Are Not Similarly Situated

To make a claim of undue discrimination, a party must show differential treatment between customers that are similarly situated. *See, e.g., Southwestern Elec. Coop., Inc. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003); *"Complex" Consol. Edison Co. v. FERC*, 165 F.3d 992, 1012 (D.C. Cir. 1999). The Commission properly rejected Sacramento's discrimination claim in this case because it determined that Sacramento and Western are not similarly situated.

Western is a transmission owner — and the transmission facilities it owns include a key portion of the Pacific Northwest-Pacific Southwest Intertie ("Pacific Intertie"), providing a vital link between California energy markets and the Pacific Northwest.[7] Indeed, the Commission found that the only alternative to the Transmission Exchange Agreement that could offer comparable benefits would be

[7] The Pacific Intertie is a transmission facility consisting of two 500 kV lines that runs from the Pacific Northwest through California, making it possible to buy and sell power between those regions. Initial Order at P 4, JA 151. While PG&E owns one of the lines and most of the other (facilities that are now under the operational control of the California ISO), Western owns a portion of the second line, in addition to other related transmission facilities. *Id.* at P 9, JA 153.

Western's becoming a Participating Transmission Owner under the California ISO's Transmission Control Agreement. Initial Order at P 55, JA 164. Western had, however, considered and rejected that option. *Id.*

Under the Transmission Exchange Agreement, the California ISO and Western exchange transmission service over their respective systems without paying one another transmission rates, administrative charges, or congestion charges. Initial Order at P 11, JA 153. Western provides the California ISO with 1,200 MW north-to-south and 919 MW south-to-north between two substations of the Pacific Intertie, and makes any unused capacity available to the California ISO. *Id.* at PP 16, 19, JA 155-56. The California ISO, in turn, provides Western with 400 MW of bi-directional transmission capacity. *Id.* at PP 8, 17 & n.7, 53-54, JA 152, 155, 163-64.

The Commission found that, taken as a whole, "substantial benefits result" from the Transmission Exchange Agreement, including the California ISO's access to 1,200 MW of service from the Pacific Northwest. *Id.* at P 49, JA 162. The Agreement "is a unique agreement which is beneficial to all parties" and "provides substantial benefits to the [California ISO], Western, PG&E, and their respective customers." *Id.* at PP 49, 50, JA 162, 163.

The Commission did not focus only or even primarily on the benefits of the service provided to Western itself; rather, it analyzed the benefits (and avoided

harms) to the customers (including Sacramento) of the California ISO and Western in their respective markets. In particular, the Commission found that the agreement would "eliminate the potential for rate pancaking . . . ." *Id.* at P 50, JA 163; *see also id.* at P 54 (explaining how customers would otherwise have to pay both the California ISO and Western under their respective tariffs for transmission service across two systems), JA 164. Other key benefits included access and reliability:

> [I]n this proceeding, we have the exchange of capacity for the benefit of Western's and [the California ISO's] customers and enhanced reliability resulting from seamless operation of parallel operating systems. Although Western would receive exchange service outside the terms and conditions of the [California ISO] Tariff, there are substantial benefits accruing to the [California ISO] customers, *i.e.*, in exchange for 400 MW of capacity between the Round Mountain and Tracy substations, the [California ISO] would receive 1,200 MW of capacity between Malin and Round Mountain substations, the portion of the Pacific Intertie belonging to Western. . . . Accordingly, both parties would continue to be able to access power available from the Pacific Northwest and ensure reliability. Significantly, both the [California ISO] and Western would have operational control over capacity exchanged and made available to them under the Transmission Exchange Agreement. Such capacity would then be available to transmission customers under either the [California ISO] Tariff or Western's [open access tariff].

Id. at P 53, JA 163; *see also id.* at P 55 (arrangement "allows the [California ISO] continued access to import capacity from the Pacific Northwest"), JA 164.

Given the Commission's emphasis on the benefits to all customers in both markets, the Commission's determination that Sacramento is not similarly situated

is patently reasonable. Simply put, Sacramento "does not own any portion of the Pacific Intertie and cannot offer a similar capacity exchange between California and the Pacific Northwest markets." Rehearing Order at P 23, JA 222. Thus, it did not, in fact, propose the same kind of agreement that Western received. *See* Initial Order at P 72 (finding the type of agreement Sacramento sought "is unlike the Transmission Exchange Agreement"), JA 169. It has nothing similar to offer for the benefit of other California ISO market participants.

Indeed, quite the opposite: giving Sacramento the arrangement it proposed, a continued reservation of capacity under terms comparable to those in the 1967 Contract, "would give [Sacramento] an unfair advantage over potential competitors who must acquire transmission service in the [California ISO] Tariff Day-Ahead and Hour-Ahead markets." Initial Order at P 72, JA 169; *see id.* ("[Sacramento] is requesting a long-term 'set aside' of capacity to satisfy its own business requirements and to its own benefit."). Though Sacramento disputes the Commission's characterization of an "unfair advantage," it suggests only that giving Sacramento what it wants would not necessarily "hinder" other customers

from acquiring service in the California ISO markets. Br. 28.[8] Sacramento fails, however, to show that giving it long-term capacity rights would offer any benefit to other market participants, as the arrangement with Western does. Thus, Sacramento's arguments pose no challenge to the Commission's reasonable determination that Sacramento was not similarly situated to Western.

Sacramento, however, ignores the Commission's focus on the benefits to other market participants. Rather, in claiming that the California ISO discriminated based on Sacramento's inability to offer in-kind exchange as payment for service, Br. 32-33, Sacramento downplays the significance of Western's partial ownership of the Pacific Intertie and reduces Western's provision of 1,200 MW of import capacity from the Pacific Northwest to nothing more than a form of payment for 400 MW of transmission service from the California ISO. *See, e.g.*, Br. 17 (suggesting its proposal "was the cash equivalent of the capacity exchange in the Western agreement"); *id.* at 30 (Sacramento "was willing to enter into a comparable arrangement with some in-kind value").

Sacramento likewise misses the point of the Commission's ruling in *Mid-*

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[8] *But see Sacramento I*, 428 F.3d at 297 n.5 ("The existing contracts are considered 'encumbrances' on the California ISO . . . . [P]roviding service under old models is a significant administrative burden . . . .") (citing *Pacific Gas & Elec. Co.*, 81 FERC at 61,472).

Continent Area Power Pool Agreement, 58 FPC 2622 (1977), *aff'd*, *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979). The Commission did not, as Sacramento suggests, find it was "discriminatory to deny a transmission service to a party based on its inability to offer an in-kind exchange, so long as it is willing to compensate the provider for the service monetarily." Br. 32.[9] That case concerned a pool agreement under which a number of generators would coordinate operation of their generation facilities to promote reliable and economical operation of the interconnected regional network. The agreement set forth membership criteria that excluded small generators that could not provide reciprocal access to transmission facilities. 58 FPC at 2635. The Commission ruled the size requirement was discriminatory because it was "not reasonably related to" the pool's fundamental objectives of developing generation and maximizing reliability and economy through regional coordination of generation facilities. *Id.* at 2632, 2635; *accord Central Iowa*, 606 F.2d at 1172. The side benefit of simplifying compensation for short-term use of transmission facilities was not a "germane objective." 58 FPC at 2632.

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[9] Of course, as discussed previously, Sacramento has not been "denied transmission service" in any event; it obtains sufficient service under the California ISO Tariff. *See* Rehearing Order at P 21, JA 221, and *supra* Section II.A.

Here, the fundamental objective of the Transmission Exchange Agreement with Western is to maintain transmission access over the Pacific Intertie: "As part owner of the Pacific Intertie, Western is able to exchange transmission capacity over the very lines created by the various contracts used to build that Intertie. . . . Allowing the capacity exchange between the [California ISO] and Western will continue" the private-public partnership that Congress intended in order to give California utilities access to the Pacific Northwest. Rehearing Order at P 23, JA 222. In contrast to *Mid-Continent*, in which the purpose was generator coordination and where small generators' inability to provide in-kind transmission access was merely incidental, here Western's ability to provide the California ISO (and its customers) with access to the Pacific Northwest is anything but incidental — it is the very reason for the agreement. Therefore, the Commission justifiably deemed the arrangement "unique." Initial Order at P 49, JA 162. Sacramento's proposal to pay a "cash equivalent" (Br. 17) for transmission service is plainly not comparable.

For these reasons, the Commission did not abuse its discretion in determining that Sacramento's arguments raised issues of law and policy and could be resolved on the written record, and thus did not warrant a trial-type hearing. Initial Order at PP 72-73, JA 169; Rehearing Order at PP 18, 23, JA 220, 222; *see also Moreau*, 982 F.2d at 568.

B. Sacramento's Claim That The California ISO Discriminated Is Outside The Scope Of The Termination Proceeding And Is Jurisdictionally Barred On Appeal

Although, as shown in the preceding section, Sacramento's discrimination claim would fail outright on the merits because it was not similarly situated to Western and did not propose a comparable arrangement, the Court should not even reach the issue because it is outside the scope of PG&E's termination filing and is jurisdictionally barred. Sacramento's argument is based on the California ISO's, not PG&E's, conduct — that is, the California ISO's purported refusal to negotiate a contract with Sacramento despite having negotiated the Transmission Exchange Agreement with Western. But in the Rehearing Order, the Commission determined that Sacramento could not pursue its claim that the California ISO had discriminated without seeking rehearing of the Commission's approval of the allegedly preferential Transmission Exchange Agreement. *See* Rehearing Order at P 24 (noting Sacramento did not object to filing of Transmission Exchange Agreement with Western and did not request rehearing of its acceptance; ruling Sacramento's claim of discrimination is "outside the scope of this proceeding"), JA 222. Sacramento challenges that finding for the first time on this appeal, having failed to seek rehearing before the Commission.

In its brief, Sacramento tries to obscure the procedural distinction by framing its discrimination argument to focus on PG&E's termination of the 1967

Contract without a successor agreement, but its argument in fact is — and unmistakably was before the Commission — that the California ISO offered preferential service to Western under the Transmission Exchange Agreement. *See, e.g.*, Rehearing Request at 10 ("The [California ISO] extended long-term firm, congest[ion]-protected transmission service to Western under the Transmission Exchange Agreement while denying [Sacramento] a comparable successor arrangement."), JA 203; Br. 17, 32-33 (arguing that Sacramento's proposal was equivalent to Western's, so the California ISO discriminated by denying Sacramento the same deal); *id.* 36. Sacramento argues that it can be unduly discriminatory not to provide "[a]n otherwise just and reasonable service" to "all similarly situated customers" (*id.*), and contends that the Commission must "explore whether it was unduly discriminatory to give a favorable deal to one customer that is not extended to other customers in similar circumstances" (*id.* 37) — but the entity alleged to have given the "favorable deal" to Western and to have declined to negotiate with Sacramento is the California ISO.

Sacramento requested rehearing only in FERC Docket No. ER04-689, the proceeding concerning PG&E's notice of termination of the 1967 Sacramento contract. *See* Rehearing Request at 1, JA 194. The only California ISO service addressed in the Initial Order was the approval of the Transmission Exchange Agreement with Western in Docket No. ER04-688. *See* Initial Order at PP 11-57,

JA 153-64. Therefore, to pursue a claim that the California ISO offered discriminatory or preferential service, Sacramento would have had to seek rehearing in that contemporaneous proceeding; it did not do so.[10] *See* Rehearing Order at P 24 ("[N]either [Sacramento] nor any other party requested rehearing of the acceptance of the Transmission Exchange Agreement."), JA 222; *see also* Initial Order at P 53 (finding Western agreement to be "just and reasonable" and not "unduly discriminatory"), JA 163. Therefore, on rehearing of the termination proceeding in ER04-689, the Commission properly found Sacramento's claim of discriminatory or preferential service by the *California ISO* to be "outside the scope of this proceeding." Rehearing Order at P 24, JA 222.

Sacramento assails that determination as "incongruous[]," "proffered for the first time in the proceeding" in the Rehearing Order, and a "last minute switch in rationale." Br. 34. But if Sacramento wished to challenge on appeal the

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[10] Though Sacramento argues that it did not oppose the terms of the Transmission Exchange Agreement with Western, its discrimination claim necessarily derives from the approval of that agreement. As the Commission noted, it cannot force the California ISO to negotiate a similar contract with Sacramento. *See* Rehearing Order at P 24 ("The Commission cannot force utilities to enter into contracts, and cannot force the [California ISO] to negotiate with [Sacramento] for a capacity exchange agreement."), JA 222. Thus, Sacramento's argument can only be that the California ISO unlawfully offered preferential service to Western in the Transmission Exchange Agreement.

Commission's procedural determination, it was required to file a second rehearing application. "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 to do so." FPA § 313(b), 16 U.S.C. § 825*l*(b)); *see also, e.g.*, *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002) (strictly construing jurisdictional requirement); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990) (same). In addition to being an express statutory prerequisite for jurisdiction, rehearing serves the important purpose of "enabl[ing] the Commission to correct its own errors, which might obviate judicial review, or to explain in its expert judgment why the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).[11]

Sacramento never gave the Commission an opportunity to reconsider its "outside the scope" finding. Having chosen to proceed directly to court,

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[11] *See also, e.g.*, *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) ("The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny."); *Canadian Ass'n of Petroleum Producers v. FERC*, 308 F.3d 11, 15 (D.C. Cir. 2002) ("Simply put, the court cannot review what the Commission has not viewed in the first instance.").

Sacramento is accordingly foreclosed from challenging that determination on appeal (*see, e.g.*, Br. 34-36).

CONCLUSION

For the reasons stated, the challenged FERC Orders should be affirmed in all respects.

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