ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

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

No. 05-1286

BRAZOS ELECTRIC POWER COOPERATIVE, INC.,
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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MAY 10, 2006
FINAL BRIEF: JUNE 29, 2006

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, all parties are presented in Petitioner's brief.

B. Rulings Under Review

1. Order Affirming Initial Decision, *Investigation of Certain Enron-Affiliated QFs*, Docket Nos. EL03-47 & QF94-84, 111 FERC ¶ 61,013 (Apr. 8, 2005), R. 238, JA 352; and

2. Notice of Denial of Rehearing by Operation of Law, *Investigation of Certain Enron-Affiliated QFs*, Docket Nos. EL03-47 & QF94-84, 111 FERC ¶ 61,310 (May 27, 2005), R. 240, JA 390.

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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ALJ Decision	Initial Decision Granting Joint Motion for Summary Disposition, *Investigation of Certain Enron-Affiliated QFs*, Docket Nos. EL03-47 & QF94-84, 108 FERC ¶ 63,001 (July 1, 2004), R. 203, JA 230
Brazos	Petitioner Brazos Electric Power Cooperative, Inc.
Br.	Petitioner's Brief
Cleburne Facility	Cogeneration facility located in Cleburne, Texas
Commission or FERC	Federal Energy Regulatory Commission
Enron	Intervenor Enron Corporation
Enron Parties	Intervenors Enron and Enron North America Corporation
FERC Order	Order Affirming Initial Decision, *Investigation of Certain Enron-Affiliated QFs*, Docket Nos. EL03-47 & QF94-84, 111 FERC ¶ 61,013 (Apr. 8, 2005), R. 238, JA 352
FPA	Federal Power Act
Joint Motion	Joint Motion for Summary Disposition of FERC Trial Staff, Ponderosa, and Enron Parties (filed Mar. 26, 2004), R. 156
Ponderosa	Ponderosa Pine Energy Partners, Ltd.
Ponderosa Arbitration	Arbitration proceeding concerning claims between Ponderosa and Brazos
PUHCA	Public Utility Holding Company Act of 1935 (now repealed)

GLOSSARY

PURPA	Public Utility Regulatory Policies Act of 1978
QF	"Qualifying Facility" under PURPA
SEC	Securities and Exchange Commission
SEC Order	*In re Enron Corp.*, 2003 SEC LEXIS 3075 (Dec. 29, 2003)
Tenaska Litigation	Action between Brazos and other parties pending in Texas state court

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether, assuming jurisdiction, the Federal Energy Regulatory Commission ("Commission" or "FERC") reasonably affirmed the administrative law judge's determination that a cogeneration facility satisfied the ownership criteria for qualifying facility status under the Public Utility Regulatory Policies Act of 1978, based on an earlier application to the Securities and Exchange Commission ("SEC") for an exemption under Section 3 of the Public Utility Holding Company Act, where the SEC made no finding that the application had not been filed "in

good faith."

COUNTERSTATEMENT OF JURISDICTION

In addition to satisfying the requirements of Section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), for judicial review of FERC rulings, Petitioner Brazos Electric Power Cooperative, Inc. ("Brazos") must satisfy the requirements of Article III of the United States Constitution to show that it has standing. As set forth more fully in Part I of the Argument, *infra*, Brazos lacks standing because its only claimed stake in this appeal is based on potential arguments by other parties in collateral state court litigation. In addition, to the extent Brazos seeks review under the enforcement provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), it must first file in federal district court; to the extent Brazos seeks review under the eligibility provisions of the FPA, as amended by PURPA, the Commission's investigative and enforcement decisions are committed to its discretion.

STATUTORY AND REGULATORY PROVISIONS

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

INTRODUCTION

This case concerns Brazos's dissatisfaction with two federal agencies' resolution of inquiries under their respective statutes regarding Enron's ownership interests in power plants. In this appeal, Brazos objects to FERC's handling of its

investigation of Enron Corporation's involvement with plants that had claimed "qualifying facility" status under PURPA, and, in particular, FERC's ultimate determination that Enron's interest did not deprive a specific facility of such status. Underlying this challenge as well is Brazos's disappointment that the SEC did not find that Enron had applied for exemption under the Public Utilities Holding Company Act of 1935 ("PUHCA") in bad faith. Because Enron's earlier PUHCA application also affected the later PURPA inquiry, Brazos wanted FERC to make the bad faith finding that the SEC did not.

FERC's ruling in this matter hinges on the former relationship between two federal statutes separately implemented by FERC and the SEC. (Congress has since repealed PUHCA and modified PURPA.) Under FERC's regulations, an exemption from PUHCA's requirements would likewise exclude a company from PURPA's ownership limitations. PUHCA included a safe harbor for pending exemption applications filed with the SEC "in good faith." Thus, in the orders challenged here, affirming the decision of an administrative law judge, FERC ruled that an SEC application triggered the regulatory exception under PURPA, but that the SEC was the proper agency to rule on allegations that an SEC application was not filed in "good faith." *See Investigation of Certain Enron-Affiliated QFs*, 111

FERC ¶ 61,013 at P 19 (2005), R. 238, JA 357[1]; *Investigation of Certain Enron-Affiliated QFs*, 108 FERC ¶ 63,001 at PP 31, 33 (2004), R. 203, JA 242, 244. Therefore, where the SEC had addressed the merits of an application without finding that it was not filed in good faith, FERC declined to make its own finding to the contrary.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

A. Public Utility Holding Company Act of 1935 (PUHCA)

The Public Utility Holding Company Act of 1935, 15 U.S.C. § 79a *et seq.*, established SEC oversight of public utility holding companies and set forth various reporting and other requirements. Though PUHCA was repealed by the Energy Policy Act of 2005, Pub. L. No. 109-58, tit. XII, subtit. F, § 1263, 119 Stat. 594, 974, it was in force at all times relevant to the instant petition for review.[2]

PUHCA § 3 provided exemptions of holding companies from the Act's requirements, under certain circumstances and with SEC approval. Among the grounds for exemption were that the holding company was "only incidentally a

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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] The Energy Policy Act of 2005 included a subtitle designated as the Public Utility Holding Company Act of 2005 (*see* Pub. L. No. 109-58, tit. XII, subtit. F, § 1261 *et seq.*, 119 Stat. 594, 972-78); for purposes of this brief, however, all references to "PUHCA" pertain to the now-repealed Act of 1935.

holding company," being primarily engaged in non-utility businesses (§ 3(a)(3)), or that it "derive[d] no material part of its income" from subsidiaries that were public utility companies (§ 3(a)(5)). 15 U.S.C. § 79c(a)(3), (5). Section 3(c) provided a safe harbor during the pendency of a § 3 exemption application before the SEC:

> The filing of an application in good faith under subsection (a) of this section by a person other than a registered holding company shall exempt the applicant from any obligation, duty, or liability imposed in this [chapter] upon the applicant as a holding company until the [Securities and Exchange] Commission has acted upon such application.

15 U.S.C. § 79c(c). *See also* PUHCA § 2(a)(3), 15 U.S.C. § 79b(a)(3) (providing similar safe harbor in definition of "electric utility company": "The filing of an application hereunder in good faith shall exempt such company (and the owner of the facilities operated by such company) from the application of this paragraph until the Commission has acted upon such application.").

B. Public Utility Regulatory Policies Act of 1978 (PURPA)

Congress enacted PURPA to reduce reliance on fossil fuels and to encourage development of new types of generating facilities. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982). To that end, Congress directed FERC to prescribe rules "to encourage cogeneration and small power production," including requiring electric utilities to purchase power from "qualifying" facilities ("QFs"). *See, e.g., id*. at 750-51; *American Paper Inst., Inc. v. American Elec. Power Serv. Corp*., 461

U.S. 402, 404-05 (1983). Though PURPA was amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, tit. XII, subtit. E, §§ 1251-1254, 119 Stat. 594, 962-71, the prior version, and the regulations promulgated thereunder, are at issue in this appeal. *See also Southern Cal. Edison Co. v. FERC*, 443 F.3d 94 (D.C. Cir. 2006) (discussing PURPA's goals, pertinent requirements, and subsequent amendment in 2005, and FERC's implementation).

Under PURPA § 201, which amended the definitional section of the FPA (16 U.S.C. § 796), one of the Commission's principal tasks is to determine which "cogeneration facilities" and "small power production facilities" are QFs entitled to various regulatory benefits under PURPA. *See* FPA § 3(17)-(18), 16 U.S.C. § 796(17)-(18). A "cogeneration facility" must produce both electric energy and another form of useful energy. *See* FPA § 3(18)(A)-(B), 16 U.S.C. § 796(18)(A)-(B). An additional requirement relevant to this case mandated that a "qualifying cogeneration facility" must be "owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities)." FPA § 3(18)(B)(ii), 16 U.S.C. § 796(18)(B)(ii). *See also* 18 C.F.R. §§ 292.201-.207 (setting out standards and procedures for determining eligibility as PURPA QFs).

The Commission's regulations implementing this PURPA ownership requirement, prior to the enactment and implementation of the Energy Policy Act

of 2005, incorporated certain exemptions by the SEC under PUHCA. The ownership criteria provided that a cogeneration facility would fail the QF ownership test if more than 50 percent of the equity interest were held by an electric utility or its subsidiary. *See* 18 C.F.R. § 292.206(b). But the regulation further stated that a company would not be considered an "electric utility" for purposes of that test if it were "a subsidiary of an electric utility holding company which is exempt by rule or order adopted or issued pursuant to section 3(a)(3) or 3(a)(5) of [PUHCA] . . . ." 18 C.F.R. § 292.206(c)(1).[3] Similarly, 18 C.F.R. § 292.202(n) defined "electric utility holding company," for purposes of the Commission's PURPA ownership regulations, as excluding any holding company that was "exempt by rule or order adopted or issued pursuant to sections 3(a)(3) or 3(a)(5) of [PUHCA] . . . ."

II. SEC Proceeding

On April 12, 2000, Enron Corporation ("Enron") filed an application with the SEC for exemption under PUHCA § 3(a)(3) and § 3(a)(5), 15 U.S.C. § 79c(a)(3), (5). Almost three years later, an SEC administrative law judge denied the application, finding that Enron had failed to make the showing required under

[3] The regulation also provided an exception correlating to PUHCA § 2(a)(3) (defining "electric utility company"): "a company shall not be considered to be an 'electric utility' company if it . . . [i]s declared not to be an electric utility company by rule or order of the [SEC] pursuant to section 2(a)(3)(A) of [PUHCA] . . . ." 18 C.F.R. § 292.206(c)(2).

those sections of PUHCA. *In re Enron Corp.*, 2003 SEC LEXIS 316 (Feb. 6, 2003).

On appeal from the ALJ's decision, the SEC issued an order on December 29, 2003, in which it likewise denied Enron's application for a PUHCA § 3 exemption. *In re Enron Corp.*, 2003 SEC LEXIS 3075 (Dec. 29, 2003) ("SEC Order").[4] In particular, the SEC concluded that Enron could not make the requisite showing that it was only incidentally a holding company, because it had no reliable financial statements for the relevant period and failed to submit other necessary data. *Id.* at *52-*57.

The SEC Order was not appealed and there were no further proceedings before the SEC.

III. FERC Proceeding

A. FERC Investigation

On February 24, 2003, FERC initiated an investigation into Enron and its ownership of two cogeneration facilities. *Investigation of Certain Enron-Affiliated QFs*, 102 FERC ¶ 61,199 (2003). FERC set for hearing the issue of whether those facilities satisfied the statutory and regulatory requirements for QF status, and specifically whether Enron's ownership interests affected the facilities' compliance with QF ownership criteria. *Id.* at P 11 ("It has come to the Commission's

[4] A copy of the SEC Order is attached in an Addendum to this Brief.

attention that some facilities may have, at times, used the self-certification procedures [available under FERC's regulations] to avoid a thorough examination of whether a facility satisfies the criteria for QF status."); *id.* at P 21 ("[I]t appears that Enron affiliates may control [certain facilities that claimed they met the requirements for QF status] . . . . If true, . . . [those facilities] may not have been QFs.").

On May 2, 2003, the Commission initiated an investigation into Enron and its ownership of three additional facilities that had self-certified QF status. *Investigation of Certain Enron-Affiliated QFs*, 103 FERC ¶ 61,122 (2003). The Commission also expanded the scope of its investigation: "[W]e believe that it is necessary to review all ownership interests by Enron or Enron affiliates in any facility claiming QF status to assure that those facilities satisfy the Commission's ownership criteria for QF status." *Id.* at P 17.

Following a subsequent compliance filing by Enron, thirteen additional facilities in which Enron or its affiliates or employees had any ownership interest or control, including the Cleburne Facility, were included in the investigation. *See Investigation of Certain Enron-Affiliated QFs*, 108 FERC ¶ 63,001 at PP 2-4 (2004), JA 231. At the request of all parties, an administrative law judge separated the facilities into groups and established settlement procedures. *See id.* at P 5, JA 231-32.

One of the subject facilities was a cogeneration facility in Cleburne, Texas (the "Cleburne Facility") owned by Ponderosa Pine Energy Partners, Ltd. ("Ponderosa"). The Cleburne Facility was originally certified as a PURPA QF in 1995 and commenced operation in January 1997. Pursuant to a long-term power sales contract, it sells its entire energy output to Brazos. An Enron affiliate, Enron North America Corporation, had certain interests in the facility from June 2000 until September 30, 2002.[5] *See Investigation of Certain Enron-Affiliated QFs*, 111 FERC ¶ 61,013 at PP 10-11 (2005), JA 355.

B. ALJ Decision

Following numerous settlement conferences, FERC Trial Staff, Ponderosa, and Enron Corporation and Enron North America Corporation (the latter two together, the "Enron Parties") jointly moved for summary disposition ("Joint

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[5] The Cleburne Facility was owned by Tenaska IV Texas Partners, Ltd., until June 2000, when Ponderosa acquired all the general partnership interests and 90 percent of the equity interest in the Facility; Enron North America Corporation indirectly owned 10 percent equity interest. 108 FERC ¶ 63,001 at P 13, JA 234. Brazos's claims against Ponderosa in a now-settled arbitration proceeding ("Ponderosa Arbitration") and against various parties in an ongoing action in Texas state court ("Tenaska Litigation") arose from the transaction in June 2000. Br. 2-4. *See also infra* pages 17-21 (discussing collateral litigation).

Litigation over the Cleburne Facility, however, did not begin with the 2000 sale. Locked into a long-term contract that turned out to be uneconomic, Brazos petitioned FERC to revoke the Facility's QF status (on grounds unrelated to the instant case) in August 1997; FERC denied the request and was affirmed on appeal. *Brazos Elec. Power Coop. Inc. v. FERC*, 205 F.3d 235 (5th Cir. 2000).

Motion"). R. 156. Specifically, they sought a resolution that, as a matter of law, Enron's participation with Ponderosa had no effect on the QF status of the Cleburne Facility. *See id.*

Brazos opposed the Joint Motion and filed its own motion for partial summary disposition. Brazos sought a determination that Enron's April 2000 exemption application before the SEC did not entitle Enron's subsidiaries to the exemption under the safe harbor provision of PUHCA § 3. R. 162.

The presiding administrative law judge granted the Joint Motion on July 1, 2004. Initial Decision Granting Joint Motion for Summary Disposition, *Investigation of Certain Enron-Affiliated QFs*, 108 FERC ¶ 63,001 (2004) ("ALJ Decision"), R. 203, JA 230.[6] Citing the Commission's prior determination, with regard to another of the Enron-affiliated QFs, "that from April 12, 2000 through December 29, 2003, Enron was entitled to be considered exempt from the utility ownership prohibition of the PURPA during the pendency of its application with

[6] In a separate, unreported order issued on the same date, the presiding judge also denied Brazos's motion for summary disposition. Order Denying Motion For Partial Summary Disposition And Granting Joint Motion For Summary Disposition, *Investigation of Certain Enron-Affiliated QFs*, slip op. (July 1, 2004), R. 202, JA 245. The judge found Brazos "cannot sufficiently explain why its own failure to challenge the issue of 'good faith' before the SEC when Enron's application was pending before the SEC[] does not preclude it from now making this challenge in the instant matter." *Id.* at P 9, JA 248. The judge also rejected Brazos's attempt to distinguish *Investigation of Certain Enron-Affiliated QFs and Green Power Partners I, LLC*, 106 FERC ¶ 61,030 (2004). R. 202 at P 10, JA 249. Brazos did not file exceptions to the judge's order.

the SEC," the judge concluded that "any interests obtained by Enron, during the pendency of the SEC PUHCA exemption application, would not cause the Cleburne Facility to fail to satisfy the Commission's QF requirements." *Id.* at P 26 (citing *Investigation of Certain Enron-Affiliated QFs and Green Power Partners I, LLC*, 106 FERC ¶ 61,030 (2004) ("*Green Power Partners*")), JA 240.

In relevant part, the judge rejected Brazos's argument that the Commission must independently decide whether Enron's SEC application met the "good faith" standard under PUHCA:

> The question of whether Enron's SEC applications were made in good faith should have properly been challenged before the SEC. As the SEC did not make a determination that Enron's PUHCA exemption applications were not made in "good faith," Enron is exempt from PURPA ownership requirements pending the SEC's determination.

ALJ Decision at P 33, JA 244. The judge also concluded that "challenging the application on 'good faith' questions at this juncture is simply a collateral attack of the SEC's determination denying Enron's PUHCA exemptions application." *Id.* at P 31 & n.38 (citing SEC Order), JA 242. Finding that Enron did not possess any relevant interests in the Cleburne Facility beyond December 29, 2003 (*see* ALJ Decision at P 29, JA 241), when the SEC denied its application, the judge concluded that summary disposition, finding that Enron's ownership interest did not deprive the Cleburne Facility of QF status, was appropriate as a matter of law. *Id.* at P 33, JA 244.

The presiding judge also ruled, with regard to issues not presented in this appeal, that there was no material issue of fact in dispute and that Brazos was not entitled to conduct discovery. *See id.* at PP 30, 32, 33, JA 241-42, 243, 244.

C. FERC Orders

Brazos filed a timely brief on exceptions to the ALJ Decision, R. 210, while FERC Trial Staff, Ponderosa, and the Enron Parties filed briefs opposing exceptions. R. 211; R. 212; R. 213.

On April 8, 2005, the Commission issued its Order Affirming Initial Decision, *Investigation of Certain Enron-Affiliated QFs*, 111 FERC ¶ 61,013 (2005) ("FERC Order"), R. 238, JA 352. The Commission began by stating that "we affirm and adopt the [ALJ] Decision." *Id.* at P 1, JA 352; *see also id.* at P 19 ("We . . . summarily affirm and adopt the [ALJ] Decision as our own decision."), JA 357. The Commission explained that it found, "having reviewed the [ALJ] Decision, the record, and the parties' briefs, that all of the issues raised by the parties were properly resolved by the [ALJ] Decision." *Id.* at P 19, JA 357; *see also id.* at P 13-15 (summarizing ALJ Decision), JA 355-56. Affirming the ALJ's finding that Enron had a PUHCA exemption until the SEC denied its application on December 29, 2003, the Commission agreed that "the SEC is the proper agency to determine whether applications filed with it were made in 'good faith.' In the absence of a finding by the SEC that Enron's application was not made in 'good

faith,' we cannot conclude otherwise." *Id.* at P 19, JA 357.

Brazos filed a timely request for rehearing. Brazos Electric Power Cooperative, Inc. Request for Rehearing ("Rehearing Request"), R. 239, JA 358. On May 27, 2005, the Commission issued a Notice of Denial of Rehearing by Operation of Law, *Investigation of Certain Enron-Affiliated QFs*, 111 FERC ¶ 61,310 (2005) (together with the FERC Order, the "Orders"), R. 240, JA 390. The Notice stated that the Commission had decided to take no action on the Rehearing Request and that the Request was thus denied pursuant to 18 C.F.R. § 385.713(f).

This petition followed.

SUMMARY OF ARGUMENT

The Commission properly affirmed the presiding judge's reasonable determination that Enron's exemption application with the SEC satisfied the regulatory exception from PURPA's ownership test, and appropriately declined to make a bad faith finding under PUHCA that the SEC itself had not made.

First, as to jurisdiction, Brazos lacks Article III standing because its only asserted stake in this appeal is based on the potential effect of the FERC Orders in state court litigation. This Court has generally rejected such standing arguments; in any event, Brazos itself denies that the FERC Orders should have any preclusive effect in the collateral litigation, and instead merely contends that third parties in state court litigation may mischaracterize the FERC Orders. Brazos also lacks standing under the statutory authorities on which it relies. To the extent it seeks to challenge the Commission's enforcement of PURPA, the statute requires judicial review to be sought in district court; to the extent Brazos seeks to challenge the Commission's exercise of its enforcement authority under the FPA, the Commission's decisionmaking is committed to its discretion.

On the merits, the Commission's order, affirming and adopting as its own the administrative law judge's decision, was reasonable. The Commission had long held that exemption under PUHCA's safe harbor provision was sufficient to meet the Commission's regulatory exception from the PURPA's QF ownership

test; indeed, the Commission had previously ruled that Enron's April 2000 application to the SEC met that exception until the SEC's denial of the application in December 2003. In addition, the Commission reasonably determined that the question whether Enron filed the PUHCA application with the SEC in good faith was not for FERC to make and must be raised, if at all, before the SEC. The Commission's ruling was consistent with its previous approach to the same application, and was reasonable because the "good faith" condition was set forth in PUHCA and referred to the filing made with the SEC. Furthermore, the Commission's restraint was appropriate in light of the SEC's own careful consideration of the merits of, and objections to, Enron's application, and the SEC's familiarity with the facts regarding the financial data, allegations of bad faith, and the import of the safe harbor exemption period.

ARGUMENT

I. THE COURT HAS NO SUBJECT MATTER JURISDICTION OVER BRAZOS'S PETITION

A. Brazos Lacks Article III Standing

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Public Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2002) (party is not "aggrieved" within the meaning of FPA § 313(b), 16 U.S.C. § 825*l*(b), unless it can establish constitutional and prudential standing). The "irreducible constitutional minimum" for standing requires the petitioner to have suffered (1) an "injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," (2) that has a "causal connection" with the challenged agency action, and (3) that likely "will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Brazos no longer has any cognizable stake in the dispute over the Cleburne Facility's QF status that was the subject of the FERC Orders. Brazos has settled its disputes with Ponderosa (which accordingly has withdrawn as an intervenor in this appeal) and is now the owner of the Cleburne Facility. *See* Br. 4. As set forth in its Opening Brief, Brazos's only claimed stake in this litigation lies in the Orders'

potential impact on collateral litigation in Texas state court (the "Tenaska Litigation"). *See* Br. 4-10.

This Court has declined to base justiciability on a mere possible collateral effect on other (actual or potential) litigation:

> [I]t seems inescapable that neither standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect. The argument for standing would necessarily have a bootstrap quality; it would infer standing in an initial case from the possibility of collateral estoppel in a later one — a possibility that of course could only materialize *if* standing were found in the first case. To create standing out of the preclusive effect that *would* flow from granting standing is to create it ex nihilo.

Alabama Mun. Distribs. Group v. FERC, 312 F.3d 470, 474 (D.C. Cir. 2002) (emphases in original); *see also Sea-Land Serv., Inc. v. Department of Transp.*, 137 F.3d 640, 648 (D.C. Cir. 1998) ("[A]n argument from collateral estoppel consequences has elements of circularity. As collateral estoppel does not apply to an unappealable determination, simply holding a ruling unappealable eliminates any prospect of preclusion.") (internal citations omitted)[7]; *cf. Shell Oil Co v.*

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[7] *Sea-Land* also questioned the interpretation of *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), advanced here by Brazos (*see* Br. 6-7), as holding collateral estoppel to be a cognizable harm: "[R]eview in *Electrical Fittings* of the findings against the winning party did not turn on collateral estoppel effects; as the Court later noted [in *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 334-35 (1980)], the *Electrical Fittings* Court did not question the court of appeals's statement that there would be no preclusive effect." *Sea-Land*, 137 F.3d at 648. Rather, the Supreme Court simply ruled that a party could maintain an appeal from an adjudication on a litigated issue even where the party had

FERC, 47 F.3d 1186, 1202 (D.C. Cir. 1995) (rejecting interest in "potential precedential effect" as basis for standing) (citation omitted).

Contrary to Brazos's argument (Br. 8-9), this case is nothing like *AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003). In that case, it was clear that the challenged agency order before this Court would directly affect the outcome of collateral litigation. A district court considering a payment dispute between two telecommunications carriers had referred the case to the Federal Communications Commission under the doctrine of primary jurisdiction. *See id.* at 231, 238. Therefore, "[u]pon the resumption of the litigation, the district court *will be bound* to follow the [challenged FCC order], giving it *a preclusive effect more akin to law of the case* than to mere collateral estoppel." 317 F.3d at 238 (emphases added). Based on that direct, binding effect of the FCC order, this Court found it appropriate to afford Article III standing to the petitioner seeking review of the order.

Here, by contrast, Brazos does *not* contend that the FERC Orders regarding the Cleburne Facility's QF status will be binding in any way on the Texas court in considering the tortious interference claims. To the contrary, Brazos insists that the FERC Orders should have no preclusive effect, or even persuasive effect, in the

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ultimately prevailed below on a different ground. *See Electrical Fittings*, 307 U.S. at 242; *Deposit Guaranty*, 445 U.S. at 335.

Tenaska Litigation. *See* Br. 5 (citing Brazos's "belief and contention that the FERC proceedings were not (and are not) relevant to the Arbitration or Tenaska Litigation"); *id.* at 9 ("Brazos Electric rejects the notion that FERC's ruling is controlling . . . in the Tenaska Litigation").

Indeed, by Brazos's own account, another forum has already declined to give preclusive effect to the FERC Orders. Brazos explains that Ponderosa argued, in an arbitration proceeding concerning a contractual dispute, that FERC's determination regarding Enron's exception from the PURPA ownership test was a determination as a matter of law that Enron was not an "electric utility" for purposes of interpreting a contractual provision. Br. 4. The arbitration panel, however, properly (according to Brazos) rejected the argument. *Id.* at 5; *see also id.* at 9. Brazos offers no basis to presume (and, in fact, does not even suggest) that the Texas court would consider the FERC Orders relevant. Thus, the present case is nothing like the situation before the Court in *AT&T*.

On closer examination, in fact, Brazos's defense of its standing is even more attenuated: its professed stake in this appeal rests solely on its concern that other parties in the Tenaska Litigation might *argue* (incorrectly, in Brazos's view) that the FERC Orders are dispositive of issues in that case: "Although Brazos Electric rejects the notion that FERC's ruling is controlling of the determination of any issue in the Tenaska Litigation . . . others may argue that it is." Br. 9; *see also,*

e.g., Br. 5 ("Brazos Electric possesses a similar concern that the defendants in the Tenaska Litigation . . . may attempt to resurrect this argument"); *id.* at 8 (FERC's ruling "may be wrongly characterized by defendants in the Tenaska Litigation"); *id.* at 9 ("this Court must be concerned that the defendants in the Tenaska Litigation will attempt, wrongfully, to argue the alleged preclusive effect of the challenged, erroneous order in this case"). Of course, Brazos has cited no case in which this (or any) Court has found Article III standing based on the hypothetical, allegedly erroneous *citation* of a challenged order by parties in other litigation.

In sum, Brazos's claim to Article III standing depends on speculation about potential arguments of third parties in state court litigation, with the implicit and unsupported premise that the state court may be influenced by such arguments (even as Brazos contends the FERC Orders are not relevant). As such, Brazos strains Article III standing beyond precedent or reason.

B. Brazos Lacks Standing Under The Statutory Authorities On Which It Relies

Brazos claims jurisdiction under both the FPA and PURPA. *See* Br. 1 ("This Court has jurisdiction under 16 U.S.C. § 825, by virtue of 16 U.S.C. § 824a-3(h) . . . for purposes of enforcement and judicial review."). Turning to the latter authority first, to the extent Brazos seeks to challenge the FERC's enforcement of PURPA under § 210, 16 U.S.C. § 824a-3(h), which did not amend the FPA, such a challenge may not be brought to this Court in the first instance. Rather, as this

Court repeatedly has explained, the specific enforcement and review scheme underlying PURPA § 210 contemplates initial judicial review of FERC's PURPA enforcement decisions in the federal district court, not the court of appeals. *See Xcel Energy Servs., Inc. v. FERC*, 407 F.3d 1242, 1243-44 (D.C. Cir. 2005) ("Under the PURPA's enforcement scheme, however, 'it is always the district court that first passes upon the merits of whatever position the Commission may take concerning the implementation of the PURPA.'") (quoting *New York State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473, 1476 (D.C. Cir. 1997)).

To the extent Brazos purports to challenge the Commission's conduct or resolution of its investigation into the Cleburne Facility's compliance with QF ownership requirements added to the FPA by PURPA § 201, *see supra* page 6, this Court has limited, if any, jurisdiction to consider that dispute. At its core, Brazos's objection is that the Commission did not carry out its investigation to Brazos's satisfaction, and then improperly concluded the investigation. *See, e.g.*, Br. 12 ("This case arises from a FERC order terminating FERC's investigation into Enron's ownership interest in the Cleburne Plant for purposes of administering and enforcing PURPA."); *id.* at 23 ("Based upon this finding [that Enron was exempt] FERC terminated its QF investigation concerning Enron and the Cleburne Plant."); *id.* at 44 ("FERC's investigation was a masquerade, a Potemkin village: . . . FERC dreamed up an excuse to shut it down."); *see also id.* at 2, 5 (likewise contending

FERC improperly terminated its investigation).

But the Commission's decision how to exercise its enforcement authority (or not to exercise it at all) is committed to its discretion and is not subject to judicial review where, as under the FPA, that discretion is not limited in any meaningful way. *See Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1170-72 (9th Cir. 2001); *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)); *see also New York State Dep't of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (agency's discretion extends to its decision to settle or dismiss an enforcement action). Brazos's criticism notwithstanding, FERC's decisionmaking as to how to manage, and ultimately to resolve, its investigation of Enron's involvement in QFs is entrusted to its discretion.

II. THE COMMISSION REASONABLY DETERMINED THAT ENRON'S SEC FILING FOR A PUHCA EXEMPTION SATISFIED THE QF OWNERSHIP TEST UNDER PURPA

A. 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). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs.*

Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

The Court "review[s] FERC's decision not to hold a hearing only for 'abuse of discretion.'" *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993). The Court defers to the Commission's determination that a controversy raises no disputed issues of material fact. *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*, 982 F.2d at 568).

B. The Commission Properly Applied The Regulatory Exception Under PURPA Without Making Its Own Good Faith Finding Under PUHCA

The Commission, affirming its administrative law judge, found that Enron's pending SEC application meant it was not an electric utility company for purposes of the QF ownership test:

> [I]f Enron had a PUHCA exemption, Ponderosa satisfied the ownership requirements for QF status. And Enron had a PUHCA exemption until December 29, 2003, when the SEC denied its application for exemption, because, until then, there was a "good faith" application pending before the SEC.

FERC Order at P 19, JA 357.[8]

The crux of Brazos's challenge is that the Commission, in applying its own regulation that deferred to exemption under PUHCA, was required to make its own substantive determination of Enron's eligibility for the PUHCA exemption. But the Commission reasonably concluded, in agreement with the presiding judge, that the question of "good faith" under PUHCA was properly left to the SEC: "[T]he SEC is the proper agency to determine whether applications filed with it were made in 'good faith.' In the absence of a finding by the SEC that Enron's application was not made in 'good faith,' we cannot conclude otherwise." FERC Order at P 19, JA 357; *see also id.* at P 15 (summarizing judge's determination, adopted by the Commission, "that the issue of the 'good faith' of Enron's application for exemption from PUHCA was one for the SEC to decide. . . . [T]he appropriate forum for Brazos to have challenged the 'good faith' of Enron's

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[8] *See also* ALJ Decision at P 26, JA 240:

> . . . Enron was entitled to be considered exempt from the utility ownership prohibition of the PURPA during the pendency of its application with the SEC. Therefore, any interests obtained by Enron, during the pendency of the SEC PUHCA exemption application, would not cause the Cleburne Facility to fail to satisfy the Commission's QF requirements.

Accord, FERC Order at P 13, JA 356.

application for exemption was the SEC . . . ."), JA 356.[9]

The Commission's decision to apply the regulatory exception, but not to make an independent finding under PUHCA regarding Enron's filing with the SEC, was both consistent with FERC precedent on PUHCA exemptions and logical in itself.

1. Exemption Under PUHCA's Safe Harbor Provision Was Sufficient To Meet The Exception To The QF Ownership Test Under PURPA

As noted above, FERC's PURPA regulations, prior to their amendment to implement the Energy Policy Act of 2005, provided an exception for purposes of the QF ownership test for subsidiaries of holding companies that were exempt "by rule or order" under PUHCA. 18 C.F.R. § 292.206(c)(1) (such subsidiary "shall not be considered to be an 'electric utility' company"); *see supra* page 7. The Commission had long held that this regulatory exception applied not only to companies with SEC-approved exemptions but also to those subject to the safe harbor under PUHCA § 3(c) during the pendency of an exemption application. *See, e.g., Doswell Ltd. P'ship*, 56 FERC ¶ 61,170 (1991), *cited in* ALJ Decision at

[9] *See also* ALJ Decision at P 31 ("[I]f Brazos truly doubted the 'good faith' of Enron's application, then the appropriate forum would have been to challenge Enron's application before the SEC. . . . [Therefore,] the question of good faith should have been challenged before the SEC and not at this juncture."), JA 242; *see also id.* at P 33 ("The question of whether Enron's SEC applications were made in good faith should have been properly challenged before the SEC."), JA 244.

P 19 n.21, JA 236. In fact, Brazos concedes this rule is "long settled and not at issue here." Br. 13.

In *Doswell*, the Commission held that, even though its regulation specifically referred to an SEC "rule or order," it was appropriate to afford the same exempt treatment to the safe harbor in PUHCA § 3(c) for SEC filings:

> [R]eliance on the statutory PUHCA section 3(c) "safe harbor" is not inconsistent with our regulations.[] In our view, treating a pending good faith SEC application differently than the SEC 'rule or order' language in the regulations concerning granting an exemption would be inconsistent with the intent of section 292.202(n).

56 FERC at 61,590 (footnote omitted) (citing "similar finding" in *Long Lake Energy Corp.*, 51 FERC ¶ 61,262, at 61,773 (1990), regarding parallel safe harbor from "electric utility company" status set forth in PUHCA § 2(a)(3), 15 U.S.C. § 79b(a)(3)). The Commission went on to explain that

> This is particularly true considering PUHCA section 3(c)'s treatment of pending good faith applications for exemptions, i.e., that the applicant shall be exempt from the obligations, duties, or liabilities imposed by PUHCA upon holding companies, until the SEC acts upon the pending application.

Doswell, 56 FERC at 61,590. "Accordingly, in these circumstances, the Applicants' pending 3(a)(5) exemption application is *equivalent* to an SEC 'rule or order' exempting [their parent company] from the status as a holding company under PUHCA." *Id.* (emphasis added).

Given this longstanding precedent, Brazos's reference (Br. 30-31) to cases in

which there was no pending SEC application at all is inapposite. In *US West Financial Services, Inc.*, 55 FERC ¶ 61,377 (1991), and *Selkirk Cogen Partners, L.P.*, 51 FERC ¶ 61,264 (1990), FERC held that the exception under 18 C.F.R. § 292.206(c) did not apply, as there was no "rule or order" or (as in *Doswell*) an "equivalent."[10]

The Commission's holding here also was consistent with its ruling in another case involving one of the Enron-affiliated QFs and the same SEC application. *See Green Power Partners*, 106 FERC ¶ 61,030 (2004). In that case, relied upon by the Commission here,[11] the same presiding judge as here had noted

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[10] *See Selkirk*, 51 FERC at 61,785 (parent company "has not filed an application for or obtained an order from the SEC stating that it either is or is not an electric-utility holding company under section 2(a)(7) of PUHCA, or that neither [the parent] nor its subsidiaries . . . are electric-utility companies under section 2(a)(3) of PUHCA, or sought exemption under either section 3(a)(3) or section 3(a)(5) of PUHCA"); *US West*, 55 FERC at 62,148 (no-action letter expressing view of SEC staff was "not sufficient, in itself[,]" to support exemption under § 292.206(c)).

[11] Brazos's argument that the Commission did not rely on *Green Power Partners* is frivolous. Brazos contends the Commission did not cite that case in its "decisional paragraph," Br. 29 n.7, but the Commission not only reiterated the ALJ Decision's reasoning, including its reliance on *Green Power Partners* (*see* FERC Order at P 13, JA 356), but unequivocally "affirm[ed] and [adopt]ed" the ALJ Decision, which relied on *Green Power Partners* (*see* ALJ Decision at PP 27, 31, JA 240, 242), "as our own decision." FERC Order at P 19, JA 357; *accord id.* at P 1, JA 352.

Brazos also contends that *Green Power Partners* is "devoid of precedential value" based on its particular facts (Br. 30 n.7); the Commission, however, could rationally choose to maintain a consistent approach, whether or not its prior

that Enron was entitled to be considered exempt for purposes of the PURPA ownership requirements during the pendency of its PUHCA application with the SEC, so long as the pending application was made in good faith. *See Investigation of Certain Enron-Affiliated QFs and Green Power Partners I, LLC*, 105 FERC ¶ 63,040 at P 10 (2003) (citing *Doswell*). In its notice of finality of the judge's decision, the Commission noted that the exception from the QF ownership test "is valid only up to the date that the SEC issued its decision [on December 29, 2003] denying Enron's application for exemptions from PUHCA and Enron's application that was the basis of the [facility's claim to QF ownership status] is no longer pending." *Green Power Partners*, 106 FERC ¶ 61,030 at P 3.[12]

2. The Commission Reasonably Held That Enron's "Good Faith" Was Not For The Commission To Determine

The Commission did *not*, as Brazos contends (*e.g.*, Br. 23, 24, 25, 38, 39, 41), make a finding that Enron's exemption application was made in good faith. To the contrary, the Commission explicitly declined to rule on the good faith issue. FERC Order at P 19, JA 357. Nor did the Commission improperly ignore evidence (Br. 34-35) or apply an evidentiary presumption (*id.* at 38).

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decision was technically binding.

[12] The same is true in this case, but because Enron's affiliate had interests in the Cleburne Facility only until September 2002, *see supra* page 10, the safe harbor exemption was in place throughout the relevant period. *See* ALJ Decision at P 29, JA 241.

Rather, the Commission determined, as a matter of law, that such a "good faith" determination was not FERC's to make and must be raised, if at all, before the SEC. *See* FERC Order at P 19 ("As the judge correctly found, the SEC is the proper agency to determine whether applications filed with it were made in 'good faith.'"), JA 357; *id.* at P 15 (summarizing judge's findings), JA 356; ALJ Decision at P 31 ("[I]f Brazos truly doubted the "good faith" of Enron's application, then the appropriate forum would have been to challenge Enron's application before the SEC. . . . [T]he question of good faith should have been challenged before the SEC and not at this juncture."), JA 242.[13] Where the SEC had not found the application before it to be made in bad faith, FERC declined to step into the SEC's role: "In the absence of a finding by the SEC that Enron's application was not made in 'good faith,' we cannot conclude otherwise." FERC Order at P 19, JA 357. Whether or not the Commission could reasonably have made a different choice and elected to make its own determination as to good faith, its decision to refrain was not arbitrary and capricious.

First, the Commission's ruling was consistent with its prior explanation that "[t]he 'good faith' of an application under Section 3(a) of PUHCA is a

[13] *See also* ALJ Decision at P 33 ("The question of whether Enron's SEC applications were made in good faith should have properly been challenged before the SEC."), JA 244; FERC Order at P 15 ("Brazos['s] arguments concerning 'good faith' before this Commission constitute a collateral attack on the SEC's action."), JA 356.

determination to be made by the SEC." *Green Power Partners*, 106 FERC ¶ 61,030 at P 2 n.3 (citing 15 U.S.C. § 79c(c)). The Commission held to the same view in the present case, affirming and adopting the judge's reference to *Green Power Partners* to support the conclusion that FERC did not have the expertise and familiarity to make a "good faith" determination as to the SEC filing. *See* ALJ Decision at PP 27 & n.31, 31, JA 240, 242; FERC Order at P 13, JA 356. The Commission's decision to take a consistent approach (especially with regard to the *same* SEC application by Enron) was reasonable.

The statute itself further supports the Commission's ruling. The safe harbor exemption for a filing "in good faith" was provided, not in PURPA or FERC's regulations, but in PUHCA, a statute that had been implemented and administered for the seven decades since its inception by the SEC. *See, e.g., SEC v. Associated Gas & Elec. Co.*, 99 F.2d 795, 798 (2d Cir. 1938) ("[T]he administration of [PUHCA] is the peculiar function of the Securities and Exchange Commission. One of the principal reasons for the creation of such a bureau is to secure the benefit of special knowledge acquired through continuous experience in a difficult and complicated field."). FERC, on the other hand, had neither a Congressional charge nor specialized expertise in administering PUHCA § 3(c). *Cf. United Video, Inc. v. FCC*, 890 F.2d 1173, 1184 n.6 (D.C. Cir. 1989) ("the normal basis for deference to agency interpretations is the agency's familiarity with and

expertise concerning statutes it is entrusted to administer"). Thus, it was reasonable for the Commission to opt not to reach out to make an affirmative finding that was outside its own ambit and within the SEC's.

Moreover, the conditions for safe harbor under PUHCA § 3(c) were tied to a filing made with the SEC, not with FERC. For that reason, it made sense to leave any questions about "good faith" filing to the tribunal that actually received and processed the filing:

> The Commission's position in this regard seems to flow logically, as all the documents are presented to the SEC, the application itself is presented to the SEC, and the SEC makes the determination as to whether an entity is entitled to a PUHCA exemption. It therefore seems logical[] that the SEC would make the determination as to whether the application itself was in "good faith."

ALJ Decision at P 31 n.39, JA 242.[14]

The Commission's disinclination to rule on the PUHCA issue was all the more reasonable in light of the SEC's careful consideration of Enron's exemption application. *See* FERC Order at P 12 & n.17 (citing SEC Order), JA 355; ALJ

[14] Indeed, this basic principle prevailed — in Brazos's favor — in the Ponderosa Arbitration. In that dispute, Ponderosa argued that Brazos's challenge to the QF status of the Cleburne Facility before FERC had been brought in bad faith. The arbitration panel, however, ruled that "the appropriate tribunals to consider that contention were the Federal Energy Regulatory Commission or the federal courts. As there was no evidence [Ponderosa] asserted its bad faith claim in either tribunal, the Panel finds it is foreclosed from considering the claim in this proceeding . . . ." Dispositive Second-Phase Award at 5 ¶ 11, attached as Exhibit D to Declaration of David S. Gamble in Support of the Initial Brief of Petitioner, Attachment A to Brazos's Opening Brief.

Decision at P 31 n.38 (same), JA 242. The SEC denied the application in a lengthy order that addressed arguments by Enron and other parties and concluded, *inter alia*, that Enron had failed to make the requisite showing that it was entitled to an exemption. In particular, the SEC found Enron could not support its application with reliable financial data. SEC Order at *55-*57. The SEC plainly was aware of the significance of PUHCA exemption for FERC's QF status determination,[15] of all the facts regarding Enron's financial data,[16] and of allegations that the exemption filing had not been made in good faith.[17] Nevertheless, the SEC made no finding that Enron's application had not been filed in good faith (*see* FERC Order at P 12 n.17, JA 355), nor did it indicate that Enron had not been entitled to

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[15] "Enron's exemption under these provisions would preserve the status as qualifying facilities ('QFs') under [PURPA] of certain electric generation facilities in which Enron has an ownership interest. . . . [PURPA's] ownership restrictions do not apply . . . to holding companies that are exempt under Sections 3(a)(3) or 3(a)(5) of [PUHCA]." SEC Order at *6 (citing 18 C.F.R. §§ 292.206(c) and 292.202(n)); *see also* SEC LEXIS 316 at *2 (ALJ's decision) ("The purpose of the [April 12, 2000] filing is to provide Enron relief from . . . [FERC's] ownership restrictions for [QFs under PURPA] . . . .").

[16] *See, e.g.*, SEC Order at *7, *56-*57. Of course, the financial data that Enron later admitted was unreliable, as well as the Form 8-K filing in which it made that disclosure, were themselves filings submitted to the SEC. *See id.* at *7.

[17] Southern California Edison Company opposed Enron's application, and (unlike Brazos) asked the SEC administrative law judge to make a specific finding that the application had not been filed in good faith, or, in the alternative, that the application had ceased to meet the good faith standard when Enron failed to timely advise the SEC of required revisions to material representations underlying the application. *See* 2003 SEC LEXIS 316, at *24. The judge denied the request. *Id.*

the safe harbor exemption under PUHCA § 3(c) from April 2000 to December 2003, during the pendency of its application before the SEC.[18]

Notwithstanding the SEC's expertise in implementing PUHCA, its unique position as the tribunal in which Enron filed its PUHCA application, and its considered ruling on the merits of that application, Brazos contends that FERC should have taken for itself the task of determining whether Enron filed its SEC application in good faith. *See, e.g.*, Br. 33-36. Thus, Brazos, having conspicuously failed to challenge Enron's filing before the responsible agency,[19] now insists that FERC had an obligation to second-guess the SEC. The Commission appropriately declined to do so. In these circumstances, the

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[18] This omission exposes the logical fallacy of Brazos's argument: the unreliability of Enron's financial data does not necessarily *mandate* a finding, as a matter of law, that Enron's PUHCA exemption application was filed in bad faith. *See* Br. 32-35.

Notably, the SEC ruled on a third party's request to *extend* Enron's safe harbor exemption beyond the denial of the application, in order to preserve certain facilities' QF status under PURPA; the SEC denied the request, but did not cast doubt on Enron's entitlement to the safe harbor exemption from April 2000 until December 2003. *See* SEC Order at *67-*69.

[19] The FERC ALJ found that "Brazos cannot sufficiently explain why its own failure to challenge the issue of 'good faith' before the SEC when Enron's application was pending before the SEC[] does not preclude it from now making this challenge in the instant matter." Order Denying Motion For Partial Summary Disposition And Granting Joint Motion For Summary Disposition at P 9 (*see supra* note 6), R. 202, JA 248; *see also* ALJ Decision at P 31 ("[I]f Brazos truly doubted the 'good faith' of Enron's application, then the appropriate forum would have been to challenge Enron's application before the SEC."), JA 242, *cited in* FERC Order at P 15, JA 356.

Commission's restraint was patently reasonable and its decision should be affirmed.

CONCLUSION

For the reasons stated, the petition should be dismissed for lack of jurisdiction. Alternatively, the petition should be denied on the merits and the challenged FERC Orders should be affirmed in all respects.

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May 10, 2006
Final Brief: June 29, 2006