ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

==========

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

Nos. 05-1401 and 06-1422

PACIFIC GAS AND ELECTRIC COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

BETH G. PACELLA
SENIOR ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, DC 20426

DECEMBER 10, 2007
FINAL BRIEF: FEBRUARY 12, 2008

==========

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioner's Rule 28(a)(1) certificate.

B. Rulings Under Review:

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *California Independent System Operator Corporation*, 112 FERC ¶ 61,009 (July 1, 2005) ("First Order"), JA 152;

2. *California Independent System Operator Corporation*, 112 FERC ¶ 61,231 (August 26, 2005) ("Second Order"), JA 273;

3. *California Independent System Operator Corporation*, 115 FERC ¶ 61,237 (May 24, 2006) ("Third Order"), JA 340; and

4. *California Independent System Operator Corporation*, 117 FERC ¶ 61,148 (November 1, 2006) ("Fourth Order"), JA 393.

C. Related Cases:

This case has not previously been before this Court or any other court. There are no related cases pending judicial review.

_____

Beth G. Pacella
Senior Attorney

February 12, 2008

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

TABLE OF AUTHORITIES

STATUTES:

Federal Power Act

GLOSSARY

Commission	Federal Energy Regulatory Commission
Compliance Orders	The orders on review, collectively
California ISO	California Independent System Operator Corporation
FERC	Federal Energy Regulatory Commission
First Order	*California Independent System Operator Corp.*, 112 FERC ¶ 61,009 (2005), JA 152
Fourth Order	*California Independent System Operator Corp.*, 117 FERC ¶ 61,148 (2006), JA 393
ISO	Independent System Operator
Old Dominion	Old Dominion Electric Cooperative
PG&E	Petitioner Pacific Gas and Electric Company
RTO	Regional Transmission Organization
Second Order	*California Independent System Operator Corp.*, 112 FERC ¶ 61,231 (2005), JA 273
Third Order	*California Independent System Operator Corp.*, 115 FERC ¶ 61,237 (2006), JA 340

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

Nos. 05-1401 and 06-1422

PACIFIC GAS AND ELECTRIC COMPANY,
PETITIONER,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

The issue presented for review is whether the Federal Energy Regulatory Commission ("FERC" or "Commission") appropriately relied on an industry-wide rulemaking dealing with the interconnection of electricity generation to the transmission grid in reviewing the interconnection study variation proposed in filings, made in compliance with the rulemaking, by the California Independent System Operator Corporation ("California ISO") and its three Transmission

Owners, San Diego Gas & Electric Company, Southern California Edison Company, and Petitioner Pacific Gas and Electric Company ("PG&E").

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

INTRODUCTION

The challenged orders addressed the compliance filings made by the California ISO and its Transmission Owners in response to the Commission's rulemaking on generator interconnection, Order No. 2003.[1] *California Independent System Operator Corp.*, 112 FERC ¶ 61,009 ("First Order"), JA 152, *order on clarification and reh'g*, 112 FERC ¶ 61,231 (2005) ("Second Order"), JA 273, *order on compliance filings and clarification*, 115 FERC ¶ 61,237 ("Third Order"), JA 340, *order on reh'g*, 117 FERC ¶ 61,148 (2006) ("Fourth Order"), JA 393 (collectively, "Compliance Orders").

The Order No. 2003 Compliance Orders resolved numerous issues raised by numerous parties. The only issue on appeal, however, is PG&E's challenge to the

[1] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd*, *National Association of Regulatory Utility Commissioners v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).

Commission's determinations regarding the interconnection study variance proposed by the California ISO and the Transmission Owners in the compliance filings.

Order No. 2003 required that the California ISO conduct interconnection studies. Asserting, in response to Order No. 2003-A, that the Transmission Owners have historical and technical knowledge of their individual systems that the California ISO does not have, the California ISO and its Transmission Owners proposed a variance under which the Transmission Owners would conduct all interconnection studies, with limited California ISO involvement and oversight. R. 3, Proposed Interconnection Procedures, Transmittal Letter at 24, JA 130.

The Compliance Orders granted a variance, but only to the extent possible consistent with the undue discrimination concerns underlying Order No. 2003. Thus, the Commission found that the California ISO Transmission Owners, including PG&E, could conduct, under the direction and oversight of the California ISO, those interconnection studies that involve non-transferable Transmission Owner expertise or data. Second Order at P 21, JA 278.

STATEMENT OF FACTS

I. Events Leading To The Challenged Orders

A. Order No. 888[2] Rulemaking On Open Access Transmission Service

"Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling those services as a 'bundled' package to wholesale and retail customers in a limited geographical area." *Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). Significant economic changes and technological advances in generation and transmission, however, fostered the introduction of new generators which, because of their efficient operations, could generate energy at lower costs than many existing utilities. *Id.*

Nonetheless, "a persistent barrier to the development of a competitive wholesale power sale market remained." *Transmission Access*, 225 F.3d at 682. As this Court has explained:

---

[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1996), *on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274, *clarified*, 79 FERC ¶ 61,182 (1997), *on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248, 62 Fed. Reg. 64,688 (1997), *on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd, New York v. FERC*, 535 U.S. 1 (2002).

> Entry into the transmission market is difficult and restricted, so those utilities that already own transmission facilities enjoy a natural monopoly over that field. The transmission-owning utilities can use their position to favor their own generated electricity and to exclude competitors from the market, whether by denying transmission access outright, or by providing transmission to competitors only at comparatively unfavorable rates, terms, and conditions. Utilities that own or control transmission facilities naturally wish to maximize profit. The transmission-owning utilities thus can be expected to act in their own interest to maintain their monopoly and to use that position to retain or expand the market share for their own generated electricity, even if they do so at the expense of lower-cost generation companies and consumers.

Transmission Access, 225 F.3d at 683-84; *see also id.* at 682 (noting that the "Commission found that utilities owning or controlling transmission facilities possess substantial market power; that, as profit maximizing firms, they have and will continue to exercise that market power in order to maintain and increase market share, and will thus deny their wholesale customers access to competitively priced electric generation; and that these unduly discriminatory practices will deny consumers the substantial benefits of lower electricity prices.") (internal quotation omitted); *New York*, 535 U.S. at 9 ("public utilities retain ownership of the transmission lines that must be used by their competitors to deliver electric energy to wholesale and retail customers. The utilities' control of transmission facilities gives them the power either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions.").

Finding this situation unduly discriminatory and anti-competitive, in 1996, the Commission issued Order No. 888. In that rulemaking, the Commission found that:

> The key to competitive bulk power markets is opening up transmission services. Transmission is the vital link between sellers and buyers. To achieve the benefits of robust, competitive bulk power markets, all wholesale buyers and sellers must have equal access to the transmission grid. Otherwise, efficient trades cannot take place and ratepayers will bear unnecessary costs. Thus, market power through control of transmission is the single greatest impediment to competition. Unquestionably, this market power is still being used today, or can be used, discriminatorily to block competition.

New York, 535 U.S. at 10 (quoting *Notice of Proposed Rulemaking*, FERC Stats. & Regs., Proposed Regs. ¶ 32,514 at 33,049, 60 Fed. Reg. 17,662 (1995)); *see also Transmission Access*, 225 F.3d at 682 ("Power generators not permitted to use utilities' transmission lines on reasonable terms have no way to transmit their power to customers"); *National Association*, 475 F.3d at 1279 ("competition clearly depended on generators' having adequate means of getting their power to market.").

Thus, Order No. 888 "established the foundation for the development of competitive wholesale power markets by requiring nondiscriminatory open access transmission services by public utilities." *Snohomish*, 272 F.3d at 610 (citing *Transmission Access*, 225 F.3d at 682). The "open access requirement of Order 888 [was] premised not on individualized findings of discrimination by specific

transmission providers, but on FERC's identification of a fundamental systemic problem in the industry." *Transmission Access*, 225 F.3d at 683; *see also New York*, 535 U.S. at 14 (same).

B. Order No. 2003 Rulemaking On Generator Interconnection To Transmission

"In the period directly after issuing Order No. 888, FERC had monitored one element of the process – the interconnection agreements between operators of generators and transmission facilities – on a case-by-case basis. Finding this approach 'inadequate' and 'inefficient,' FERC issued Order No. 2003 and three successive rehearing orders." *National Association*, 475 F.3d at 1279. To "achiev[e] transparency and prevent[] transmission facility owners from favoring affiliated generators over independents in interconnection, the orders require[d] all transmission facilities to adopt a standard agreement for interconnecting with generators larger than 20 megawatts." *Id.*

The Order No. 2003 rulemaking found that "[i]nterconnection plays a crucial role in bringing much-needed generation into the market to meet the growing needs of electricity customers," and that "relatively unencumbered entry into the market is necessary for competitive markets." Order No. 2003 at P 11. The Commission found, however, that individual, case-specific "requests for interconnection frequently result in complex, time consuming technical disputes

about interconnection feasibility, cost and cost responsibility. This delay undermines the ability of generators to compete in the market and provides an unfair advantage to utilities that own both transmission and generation facilities." *Id.*

To rectify this in circumstances involving facilities under the operational control of a Regional Transmission Organization ("RTO") or Independent System Operator ("ISO"), Order No. 2003 required the Transmission Provider, Transmission Owner, and Interconnection Customer to execute a single interconnection agreement. This would "allow 'one-stop shopping' for Interconnection Customers interconnecting to a facility under the operational control of an RTO or ISO and . . . speed the sometimes lengthy interconnection process." Order No. 2003-A at P 785. Order No. 2003 further determined that:

> while the Transmission Owner is a necessary part of interconnecting to a facility under the operational control of an RTO or ISO, its role in negotiating the agreement will be a limited one. Interconnection Studies and transmission planning remain the providence of the Transmission Provider [*i.e.*, the RTO or ISO]. However, construction scheduling and other construction-related matters must involve and be negotiated by all three Parties [*i.e.*, the Transmission Provider, the Transmission Owner, and the Interconnection Customer].

Id.

Moreover, the Commission determined that "the independent oversight exercised by the RTO or ISO will guard against" the "concern that generating

facilities associated with a Transmission Owner could receive preferential treatment . . . ." Order No. 2003-A at P 786. As the Commission pointed out, "when the Transmission Provider is an independent entity, the Commission is much less concerned that all generation owners will not be treated comparably because independence ensures that the Transmission Provider has no incentive to treat Interconnection Customers differently." Order No. 2003 at P 701. *See* R. 2, Proposed Interconnection Agreement, Transmittal Letter at 13, JA 94 ("A primary purpose of Order No. 2003 was to prevent undue discrimination in the form of transmission providers 'favoring' their own generation or affiliate-owned generation in the interconnection process. That problem does not exist with regard to the ISO Controlled Grid, because the ISO does not own generation and does not have an affiliate that owns generation.") (citing Order No. 2003 at P 822)); R. 3, Proposed Interconnection Procedures, Transmittal Letter at 15, JA 121 (same).

The Commission determined, therefore, that an RTO or ISO would have greater flexibility than a non-independent Transmission Provider to propose variations from Order 2003 requirements. *Id.* at P 823; *see also id.* at P 827 (an ISO "is less likely to act in an unduly discriminatory manner than a Transmission Provider that is a market participant. The RTO or ISO shall therefore have greater flexibility to customize its interconnection procedures and agreements to fit regional needs.").

This Court affirmed the Order No. 2003 interconnection requirements in *National Association*, 475 F.3d 1277.

C. The Proposed Interconnection Procedures and Interconnection Agreement

On January 5, 2005, the California ISO and its three Transmission Owners, San Diego Gas & Electric Company, Southern California Edison Company, and Petitioner PG&E, filed, in purported compliance with Order 2003-A, their proposed *pro forma* interconnection agreement (R. 2).[3] On the same date, the California ISO also filed its proposed Order 2003-A compliance interconnection procedures (R. 3).

Both filings proposed a number of variations from Order No. 2003 requirements, including a category of changes asserted as necessary because, purportedly, "[t]he ISO does not have the legal authority and is not structured to perform all aspects of Interconnection Service." R. 2, Proposed Interconnection Agreement, Transmittal Letter at 14, JA 95; R. 3, Proposed Interconnection Procedures, Transmittal Letter at 17, JA 123. For example, it was proposed that, "because of [the Transmission Owners'] historical and technical knowledge of their individual systems, it [would be] appropriate, and superior [to the Order No.

[3] The California ISO is the Transmission Provider that exercises operational control over the transmission facilities owned by San Diego Gas & Electric, Southern California Edison, and Petitioner PG&E. Third Order at P 3, JA 342.

2003 *pro forma* interconnection procedures], to have the [Transmission Owners] conduct, in the first instance, the studies necessary to evaluate Interconnection Requests to their systems." R. 3, Proposed Interconnection Procedures, Transmittal Letter at 24, JA 130. *See also* PG&E Br. at 16 ("By its literal terms, Order No. 2003 required that the 'Transmission Provider' perform interconnection studies . . . .[4] A regional variation was needed in California, because under existing tariffs the California ISO – the 'Transmission Provider' in California – has only a limited role in performing interconnection studies . . . .").

The Cities of Anaheim, Azusa, Banning, Colton, and Riverside, California protested the filing, arguing that the proposed variations "undermine[d] the basic purpose of the Order No. 2003 process and should be rejected." R. 19 at 7, JA 149. The protestors pointed out that "[t]he fact that the ISO will have some role in the interconnection process does not eliminate the potential adverse consequences of substantive departures from the Order No. 2003-A *pro forma* provisions. The [proposed variance] make[s] clear that the ISO's role in the interconnection process is limited, and that 'the primary interaction under the [interconnection] agreement remains between the [Transmission Owner] and the Interconnection

[4] Citing Order No. 2003, 68 Fed. Reg. at 49,866-67.

Customer.'" *Id.* (quoting R. 2, Proposed Interconnection Agreement Transmittal Letter at 19, JA 100).

II. The Challenged Orders

A. The First Order

In the First Order, the Commission addressed the numerous issues raised regarding the California ISO and Transmission Owners' Order No. 2003 compliance filings. As to the only matter at issue here -- the interconnection study proposal -- the Commission determined that, while the proposal would "standardize the system study process to provide a more uniform approach to studies for the [California ISO] Controlled Grid," the studies "would still be conducted by the individual [Transmission Owner] looking only at its own service territory." First Order at P 55, JA 168. Thus, "a generator could be required to coordinate and pay for studies conducted by all three [Transmission Owners] instead of having one set of studies that would examine the effect of the interconnection and additional generation on the [California ISO] grid as a whole." *Id.*

The Commission was concerned that "[i]f, as proposed, the interconnecting [Transmission Owner] continues to conduct studies, there is a risk that separate transmission investments will work at cross-purposes and possibly even hurt reliability." *Id.* The Commission also was concerned that "allowing the

[Transmission Owners] to conduct the studies [would] undermine[] the very independence on which the Commission relies when it approves an ISO's deviations from Order No. 2003 under the more flexible independent entity variation standard." *Id.* (citing Order No. 2003 at P 827).

Accordingly, the Commission rejected the filings in relevant respect and "direct[ed] [the California ISO] and the [Transmission Owners] to adopt a centralized study process" as required by Order No. 2003. First Order at P 56, JA 168-169. This included the requirement that the California ISO itself conduct all interconnection studies. First Order at P 57, JA 169.

B. PG&E's Request For Clarification Or, In The Alternative, Rehearing

PG&E, Southern California Edison, and San Diego Gas & Electric filed for clarification or, in the alternative, rehearing regarding the study process. R. 57, JA 237-272. As relevant here, the filing sought "clarification" that the Commission: (1) "intended to direct the [California ISO] to develop [the] centralized [study] process in coordination with the [Transmission Owners] and other relevant stakeholders;" (2) "did not intend to preclude the [Transmission Owners] from physically performing all or a portion of the interconnection studies, . . . as long as the [California ISO] itself directs and coordinates, *i.e.*, conducts, the study process;" and (3) "intended that the [California ISO] would develop a process in

which the [Transmission Owners], as owners of the transmission facilities, would have a right to review any studies performed by the [California ISO] and consent to the study results . . . ." *Id.* at 8, JA 244.

The filing further provided that, "[i]f the Commission decline[d] to grant th[ese] requested clarification[s], then PG&E, Southern California Edison, and San Diego Gas requested rehearing of th[ese] rulings." *Id.*; *see also id.* at 17, JA 253 (the Transmission Owners "believe that the only feasible approach is for the [California ISO] to direct and coordinate the study process, while the [Transmission Owners] continue to perform portions of the actual studies. Barring that, however, the centralized study process, at a minimum, must include an opportunity for the [Transmission Owners] to review and consent to all study results"); *id.* at 19-20, JA 255-256 (the Transmission Owners "seek clarification that the Commission did *not* intend to prohibit the [Transmission Owners] from continuing to physically perform all or part of the interconnection studies . . . . If the Commission declines to grant this clarification, then the [Transmission Owners] seek rehearing of this issue.").

C. The Second Order

The Commission granted the first requested clarification, explaining that the California ISO "should collaborate with interested stakeholders, including the

[Transmission Owners], to develop a proposal for a centralized system study process." Second Order at P 19, JA 277-278.

The Commission also granted the second requested clarification, finding that PG&E and other Transmission Owners may continue to conduct certain studies under the California ISO's direction:

> as an independent entity, [the California ISO] must manage its interconnection policy and procedures including its system study process so that an interconnecting generator is not unduly burdened by coordinating multiple studies with the [Transmission Owners]. Therefore, the revised centralized study procedures resulting from the ISO's proposed collaborative stakeholder process may allow the [Transmission Owners] to participate in the studies, including conducting certain studies, under the direction and oversight of [the California ISO]. However, those studies should generally be limited to areas where . . . the [Transmission Owners] have very specific and non-transferable expertise or data and it is determined that it is most efficient and cost effective for the [Transmission Owners] rather than [the California ISO] to conduct those studies.

Second Order at P 21, JA 278; *see also id.* at P 20, JA 278 ("On the question of whether [Transmission Owners] may participate in studies, we find that they may do so, with the qualifications described below.").

Finally, the Commission granted the third requested clarification in part, explaining that, "if [the California ISO] does physically conduct interconnection studies, the [Transmission Owners] should have adequate review and recommendation rights." Second Order at P 22, JA 278. The Commission denied the request that Transmission Owners be granted "consent rights," because that

"would be equivalent to allowing the [Transmission Owners] to control the study process." *Id.*

D. The Revised Order No. 2003 Compliance Filings

On November 1, 2005, the California ISO and its Transmission Owners submitted revised Order No. 2003 compliance filings, which proposed a centralized study process intended to "strike an appropriate balance between [the California ISO]'s primary and independent role in conducting Interconnection Studies and evaluating grid-wide effects and solutions, and the [Transmission Owners'] ownership interest, specialized knowledge, experience and engineering expertise, thus ensuring the safety and reliability of the [California ISO] Controlled Grid." Third Order at P 41, JA 353 (citing R. 94, California ISO's November 1, 2005 Interconnection Procedures Proposal at 7, JA 286).

Under this proposed interconnection study variation, the California ISO would, among other things:

> ([1]) provide oversight, direction, and approval of all Interconnection Feasibility, System Impact, and Facilities Studies; ([2]) approve all Base Cases and study plans for all interconnection studies, including contingency lists to be studied; ([3]) ensure that all potential effects on the [California ISO] Controlled Grid will be studied; ([4]) perform the power flow, stability, and post-transient analysis associated with the Interconnection System Impact Study and recommend solutions where the ISO determines that effects on the [California ISO] Controlled Grid are probable; [and] ([5]) finalize and approve all interconnection studies[.]

Third Order at n.36, JA 356; *see also id.* at P 51, JA 355-356 (the California ISO would, under the proposal, "execute the interconnection study agreements, collect funds, and coordinate, oversee, and approve all aspects of the interconnection studies for the entire [California ISO] Controlled Grid."). In addition, the Transmission Owners would:

> (1) perform the short circuit analyses associated with the Interconnection Studies, review the results of power flow, stability, and post-transient studies, perform the detailed engineering design, perform assessments of costs and construction scheduling, and review [the California ISO]'s recommendations concerning the various study functions to be performed by [the California ISO] and (2) if no effects on the ISO Controlled Grid or congestion issues are identified by [the California ISO], the [Transmission Owners] will perform, under the direction and oversight of [the California ISO], the Interconnection System Impact and Facilities Studies, and deliver these studies to [the California ISO].

Third Order at n.36, JA 356.

E. The Third And Fourth Orders

The Commission approved the proposed, more limited study variation, "find[ing] that [California ISO]'s management of Interconnection Services, including direction and oversight of all aspects of the centralized study process, with participation from the [Transmission Owners], is reasonable, will facilitate the interconnection process, and will thereby support the reliable transmission of electric energy in the California market." Third Order at P 52, JA 357.

The Commission found no merit to PG&E's claim "that, in directing [the California ISO] to centralize its study procedures, the Commission failed to meet the requirements of Federal Power Act ("FPA") section 206 and the filed rate doctrine." Fourth Order at PP 60-71, JA 410-415; Third Order at PP 76-80, JA 365-366. As the Commission explained, it "relied on Order No. 2003 when it directed [the California ISO] to centralize its interconnection study function." Fourth Order at P 65, JA 412 (citing Order No. 2003 at PP 18-20); Third Order at P 79, JA 366 (citing Order No. 2003 at PP 18-20).

Order No. 2003 was "intended to provide interconnection customers with 'one-stop' shopping where interconnection studies would be uniformly conducted under the supervision of one entity who has knowledge of the full control area rather than a piecemeal approach to interconnection studies." Fourth Order at P 65, JA 412 (citing Order No. 2003-A at P 785). As, "Order No. 2003-A stated[,] 'it [was] [the Commission's] intent that, while the Transmission Owner is a necessary part of interconnecting to a facility under the operational control of an RTO or ISO, its role in negotiating the agreement will be a limited one. Interconnection Studies remain the providence of the Transmission Provider.'" *Id.* (quoting Order 2003-A at P 785).

SUMMARY OF ARGUMENT

The challenged Compliance Orders did not need to make a finding that the California ISO's existing interconnection study procedures had become unjust and unreasonable, as Order No. 2003, the industry-wide rulemaking in response to which the California ISO and PG&E made the compliance filings reviewed in the challenged orders, earlier made that finding. Order No. 2003 – recently affirmed by this Court -- explicitly found that any existing interconnection procedures that did not conform to Order No. 2003's procedures were unduly discriminatory in contravention of FPA § 206, 16 U.S.C § 824e, and needed to be replaced either by the standard procedures or a Commission-approved variation.

Moreover, Order No. 2003 mandated a "one-stop shopping" procedure for interconnection customers under which the ISO or RTO would conduct any necessary interconnection studies. The California ISO and its Transmission Owners, including PG&E, were on notice of that requirement, as their compliance filings requested a variance that would permit the Transmission Owners to conduct interconnection studies.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *E.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Under that standard, the Commission's decision must be reasoned and responsive to the arguments presented. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence in the record. FPA § 313(b), 16 U.S.C. § 825*l*(b). In addition, the Court "defer[s] to FERC's interpretation of its orders so long as the interpretation is reasonable." *Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004).

II. THE COMMISSION APPROPRIATELY RELIED ON ORDER NO. 2003'S FINDINGS AND MANDATES IN REVIEWING THE INTERCONNECTION STUDY VARIATION PROPOSED IN THE ORDER NO. 2003 COMPLIANCE FILINGS AT ISSUE

A. Order No. 2003 Found Unduly Discriminatory All Existing Procedures That Did Not Conform To The Interconnection Procedures And Agreements Established In That Rulemaking

PG&E contends that the Commission never found that the California ISO's interconnection study procedures in effect when Order No. 2003 issued were unjust, unreasonable, unduly discriminatory, or otherwise unlawful and, therefore,

that the Commission could not require those procedures to be modified to comply with Order No. 2003 mandates. Br. at 37-55. PG&E is mistaken.

As the Commission explained, "in Order No. 888, [it] found that public utilities owning or controlling jurisdictional transmission facilities had the incentive to engage in, and had engaged in, unduly discriminatory transmission practices," and remedied this by requiring the adoption of *pro forma* Open Access Transmission Tariffs. Third Order at P 77, JA 365 (citing Order No. 888 at 31,679-84; Order No. 888-A at 30,209-10). This Court "found that 'the Commission has the authority under FPA [sections] 205 and 206 to require open access as a generic remedy to prevent undue discrimination,'" and the Supreme Court affirmed. *Id.* (quoting *Transmission Access*, 225 F.3d at 687; citing *New York*, 535 U.S. 1).

Subsequently, in Order No. 2003, which this Court recently upheld in *National Association*, the Commission found that "[i]nterconnection is a critical component of open access transmission service," and that standard interconnection procedures and a standard interconnection agreement were necessary to: "(1) limit opportunities for Transmission Providers to favor their own generation, (2) facilitate market entry for generation competitors by reducing interconnection costs and time, and (3) encourage needed investment in generator and transmission infrastructure." Order No. 2003 at P 12; *see also* Third Order at P 78, JA 365.

As the Commission explained, "[a] standard set of procedures as part of the [Open Access Transmission Tariff] for *all* jurisdictional transmission facilities will minimize opportunities for undue discrimination and expedite the development of new generation, while protecting reliability and ensuring that rates are just and reasonable." Order No. 2003 at P 11 (emphasis added); *see also* Order No. 2003-A at P 3 ("At its core, Order No. 2003 ensures that generators independent of Transmission Providers and generators affiliated with Transmission Providers are offered Interconnection Service on comparable terms.").

Thus, "[i]n Order No. 2003, pursuant to [its] responsibility under sections 205 and 206 of the [FPA] to remedy undue discrimination, the Commission required all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to append the *pro forma* [interconnection procedures] and *pro forma* [interconnection agreement] to their open access transmission tariffs . . . ." First Order at P 2, JA 153-154; *see also* Order No. 2003 at PP 2, 11 (same); *id.* at P 4 ("The Commission here adopts standard procedures and a standard agreement to be used by Transmission Providers with Interconnection Customers proposing to interconnect" with the Transmission Provider's system).

The Commission, however, permitted Transmission Providers to propose, in their Order No. 2003 compliance filings, variations from the *pro forma*

requirements. Order No. 2003 at P 822. Proposed variations would be reviewed by the Commission under more or less flexible standards depending on whether the proponent was an independent (*i.e.*, an RTO or ISO) or non-independent Transmission Provider. *Id.*

Order No. 2003 further found that it was appropriate to "order generic interconnection terms and procedures under its authority to remedy undue discrimination and preferences under FPA sections 205 and 206" because the Commission had determined that "[i]nterconnection [was] an element of transmission service that must be provided under the [*pro forma* Open Access Transmission Tariff]." Third Order at P 78, JA 365; *see also* Fourth Order at P 71, JA 415 (same); Order No. 2003 at P 20 (same); *id.* at P 4 (The Commission's "authority to require the addition of the Final Rule [interconnection agreement] and [interconnection procedures] to the [Open Access Transmission Tariff] derives from its findings of undue discrimination . . . that formed the basis for Order No. 888.").

Accordingly, despite PG&E's claim to the contrary, Br. at 53, Order No. 2003 found that any existing interconnection procedures that did not conform to Order No. 2003's procedures (including the California ISO's interconnection study procedures that were approved in 1997, six years before Order No. 2003 issued) were unduly discriminatory in contravention of FPA § 206, 16 U.S.C. § 824e, and

needed to be replaced either by the *pro forma* procedures or a Commission-approved variation. PG&E correctly points out that "this case boils down to the question: Did the Commission make the requisite Section 206 findings in some other docket – specifically, in Order No. 888, or in Order No. 2003?" Br. at 50. As the Commission explained, the answer is yes. *See* Br. at 16 ("By its literal terms, Order No. 2003 required that the 'Transmission Provider' perform interconnection studies," and therefore, that "[a] regional variation was needed in California, because under existing tariffs the California ISO – the 'Transmission Provider' in California – has only a limited role in performing interconnection studies").

PG&E attempts to liken this case to *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), asserting that, because *Atlantic City* found the Commission was required to make specific findings before upsetting an existing fixed rate contract, the Commission was required to make specific findings regarding the existing California ISO interconnection procedures. Br. at 42-43 (citing *Atlantic City*, 295 F.3d at 15). That case is wholly inapposite.

In *Atlantic City*, the Court found that the Commission failed to follow Order No. 888's determination that existing contracts would not be modified based only on the generic findings made in that order. 295 F.3d at 14. Here, by contrast, the Commission acted entirely in accord with Order No. 2003, which determined that

existing interconnection procedures must be modified to conform to the Order No. 2003 procedures or a Commission-approved variation. First Order at P 2, JA 153-154; *see also* Order No. 2003 at PP 2, 4, 11, 822.

B. Order 2003 Requires That Interconnection Studies Be Conducted By The Transmission Provider, Not The Transmission Owner

"Order No. 2003 'and its progeny'" did not, as PG&E posits, simply "signal a policy preference in favor of a centralized interconnection process, managed by [RTOs] or [ISOs]." Br. at 54. Rather, Order No. 2003 was a rulemaking that mandated a "one-stop shopping" procedure for interconnection customers under which the ISO or RTO would conduct any necessary interconnection studies. Fourth Order at P 65, JA 412 (citing Order No. 2003-A at P 785).

On rehearing of Order No. 2003, Old Dominion Electric Cooperative ("Old Dominion") "expresse[d] concern that, in regions where RTOs exist, Order No. 2003 could let the Transmission Owner exert influence over the interconnection process, with potentially anticompetitive effects. . . . Old Dominion fear[ed] that, while an independent RTO may be willing to negotiate in good faith with the Interconnection Customer, a self-interested Transmission Owner may not be as flexible." Order No. 2003-A at P 784; *see also* Fourth Order at P 66, JA 412-413. Old Dominion requested clarification, therefore, that "the RTO [will] ha[ve] sole

authority over the interconnection process and will not be unduly influenced by the Transmission Owner . . . ." Order No. 2003-A at P 784.

The Commission responded in Order No. 2003-A, finding that, "while the Transmission Owner is a necessary part of interconnecting to a facility under the operational control of an RTO or ISO, its role in negotiating the agreement will be a limited one. Interconnection Studies and transmission planning remain the providence of the Transmission Provider. However, construction scheduling and other construction-related matters must involve and be negotiated by all three Parties," *i.e.*, the Transmission Owner (*i.e.*, PG&E), the Transmission Provider (*i.e.*, the California ISO), and the Transmission Customer. Order No. 2003-A at P 785. Subsequently, Order No. 2003-B reaffirmed the requirement that the "RTO or ISO conducts all studies," and "controls all aspects of the interconnection process" regarding all facilities over which it has operational control. Order No. 2003-B at P 80 and n.25; *see also* Fourth Order at P 69, JA 414-415 ("Order No. 2003-B clearly stated that the RTO or ISO would perform the studies for those facilities that are subject to the RTO or ISO's interconnection process.").

Thus, despite PG&E's claim to the contrary, Br. at 40, 43, it was not the instant Order No. 2003 Compliance Orders, but the earlier Order No. 2003 rulemaking orders, that mandated that interconnection studies be conducted by the independent California ISO rather than its non-independent Transmission Owners.

C. The California ISO And Its Transmission Owners, Including PG&E, Were On Notice That Order No. 2003 Required The California ISO To Perform All Interconnection Studies

PG&E contends that "[t]he Commission in the Order No. 2003 series did not propose, in language that a reasonable person would understand, that interconnection studies for power plant developers henceforth could be performed only by [ISOs] or [RTOs]. The Commission gave no notice that it intended to strip member utilities of this responsibility." Br. at 56; *see also* Br. at 57-60. At the same time, however, PG&E acknowledges that, "[b]y its literal terms, Order No. 2003 required that the 'Transmission Provider' perform interconnection studies," and therefore, that "[a] regional variation was needed in California, because under existing tariffs the California ISO – the 'Transmission Provider' in California – has only a limited role in performing interconnection studies . . . ." Br. at 16 (citing Order No. 2003, 68 Fed. Reg. at 49,866-67). Of these two inconsistent statements, the latter is the correct one.

The California ISO and its Transmission Owners, including PG&E, were on notice of the requirement that the California ISO perform all interconnection studies, as their January 5, 2005 Order No. 2003-A compliance filings requested a variation regarding that very requirement. Specifically, the California ISO's Order No. 2003-A compliance filing proposed that, "because of [the Transmission Owners'] historical and technical knowledge of their individual systems, it [would

be] appropriate, and superior [to the Order 2003 *pro forma* interconnection procedures], to have the [Transmission Owners] conduct, in the first instance, the studies necessary to evaluate Interconnection Requests to their systems." R. 3, Proposed Interconnection Procedures, Transmittal Letter at 24, JA 130.

Additionally, the joint Order No. 2003-A compliance filing by the California ISO and its three Transmission Owners, including PG&E, stated that they had "revised the FERC *pro forma* [interconnection agreement]" by proposing that "the ISO [be] generally given an oversight role[,] . . . while the primary interaction under the agreement [would] remain between the [Transmission Owner] and the Interconnection Customer." R. 2, Proposed Interconnection Agreement, Transmittal Letter at 18-19, JA 99-100; *see also* Br. at 58 ("It was reasonable for the California parties to assume that the Participating Transmission Owners would continue to be responsible for performing interconnection studies . . . under a 'regional variation' of the type the rules contemplated.").

After reviewing the proposed study variance under the more flexible independent entity standard (since the transmission system at issue is operated by an independent ISO), the Commission granted a substantial variance, finding that the California ISO "may allow the [Transmission Owners] to participate in the studies, including conducting certain studies, under the direction and oversight of the [California ISO]." Second Order at P 21, JA 278.

PG&E also raises, for the first time on appeal, a separate notice argument -- that "[i]nterested parties such as PG&E were afforded no opportunity to comment on any centralization proposal, as no such proposal appeared in the various orders leading up to adoption of the final rule." Br. at 36; *see also* Br. at 56-59. PG&E did not raise this Administrative Procedure Act "notice and opportunity to be heard" argument to the Commission in either of its petitions for rehearing. R. 57, JA 237-272; R. 115, JA 374-392. As a result, PG&E is precluded from raising this issue on appeal.

FPA § 313(b), 16 U.S.C. § 825*l*(b), provides that "[n]o 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." Courts strictly construe this jurisdictional requirement, as the express statutory limit it imposes on a court's jurisdiction cannot be relaxed. *See, e.g., California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 775 (D.C. Cir. 1985).

In addition to being a jurisdictional prerequisite, rehearing at the Commission level regarding all objections to be raised on court review serves an important purpose. It "enables 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).

In any event, PG&E's new claim has no merit. "It is well established that a final rule need not be identical to the original proposed rule." *Transmission Access*, 225 F.3d at 729 (citing, *e.g.*, *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985); *Trans-Pacific Freight Conference v. Federal Maritime Comm'n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980)). Rather, "[t]o avoid the absurdity that the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary, [this Court] ha[s] held that final rules need only be a 'logical outgrowth' of the proposed regulations." *Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2, 28 (D.C. Cir. 1992) (quoting *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 771 (D.C. Cir. 1988)); *see also, e.g.*, *City of Portland v. EPA*, 2007 U.S. App. LEXIS 25,780 at * 23 (D.C. Cir. Nov. 6, 2007).

Order No. 2003's independent study requirement was plainly a "logical outgrowth" of the proposed open access interconnection regulations. As this Court found in reviewing the Order No. 2003 series of orders, the Commission's intent in requiring standard interconnection procedures was to "prevent[] transmission facility owners from favoring affiliated generators over independents in interconnection . . . ." *National Association*, 475 F.3d at 1279; *see also*, *e.g.*,

Standardizing Generator Interconnection Agreements and Procedures, Advance Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 35,540, 66 Fed. Reg. 55140 at 55141 (2001) ("In order to fully realize the benefits of open access transmission service, interconnection procedures must be established that will encourage needed investment in infrastructure, remove the incentives for transmission providers to favor their own generation, ease entry for competitors, and encourage efficient siting decisions."); *Standardizing Generator Interconnection Agreements and Procedures*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,560 at 34,173, 67 Fed. Reg. 22250 (2002) (same).

The California ISO and PG&E Order No. 2003 compliance filings recognized this, noting that a "primary purpose of Order No. 2003 was to prevent undue discrimination in the form of transmission providers 'favoring' their own generation or affiliate-owned generation in the interconnection process." R. 2, Proposed Interconnection Agreement, Transmittal Letter at 13, JA 94 (citing Order No. 2003 at P 822)); R. 3, Proposed Interconnection Procedures, Transmittal Letter at 15, JA 121 (same).

ISO control of the study process logically resulted during the rulemaking process because, "when the Transmission Provider is an independent entity, the Commission is much less concerned that all generation owners will not be treated comparably because independence ensures that the Transmission Provider has no

incentive to treat Interconnection Customers differently." Order No. 2003 at P 701. And, as the California ISO and PG&E compliance filings acknowledge, "undue discrimination in the form of transmission providers 'favoring' their own generation or affiliate-owned generation in the interconnection process . . . does not exist with regard to the ISO Controlled Grid, because the ISO does not own generation and does not have an affiliate that owns generation." R. 2, Proposed Interconnection Agreement, Transmittal Letter at 13, JA 94; R. 3, Proposed Interconnection Procedures, Transmittal Letter at 15, JA 121 (same).

To the extent PG&E now challenges the Order No. 2003 independent study requirement, PG&E is, as the Commission found (Third Order at P 80, JA 366; Fourth Order at P 69, JA 414-415), making an untimely collateral attack on the final and judicially-affirmed Order No. 2003 rulemaking. *See Sacramento Municipal Utility District v. FERC*, 428 F.3d 294, 298-99 (D.C. Cir. 2005) (citing *City of Nephi v. FERC*, 147 F.3d 929, 934-35 (D.C. Cir. 1998); *Ga. Indus. Group v. FERC*, 137 F.3d 1358, 1363-64 (D.C. Cir. 1998); *Transwestern Pipeline Co. v. FERC*, 988 F.2d 169, 174 (D.C. Cir. 1993)).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Robert H. Solomon
Solicitor

Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6048
Fax: 202-273-0901
E-mail: beth.pacella@ferc.gov

February 12, 2008

Pacific Gas and Electric Co. v. FERC **Docket No. ER04-445**
D.C. Cir. Nos. 05-1401 and 06-1422

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 6,939 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

_____
Beth G. Pacella
Senior Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6048
FAX: (202) 273-0901

February 12, 2008