ORAL ARGUMENT IS SCHEDULED FOR NOVEMBER 29, 2005

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

No. 04-1145

IDACORP ENERGY L.P., *et al.*
PETITIONERS,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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WASHINGTON, D.C. 20426

October 18, 2005

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

All parties appearing before the Commission and this Court are listed in Petitioners' 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. *Cities of Anaheim v. California Independent System Operator Corp.*, 94 FERC ¶ 61,268 (March 14, 2001);

2. *Cities of Anaheim v. California Independent System Operator Corp.*, 95 FERC ¶ 61,197 (May 14, 2001);

3. *Cities of Anaheim v. California Independent System Operator Corp.*, 102 FERC ¶ 61,274 (March 12, 2003);

4. *Cities of Anaheim v. California Independent System Operator Corp.*, 105 FERC ¶ 61,021 (October 3, 2003); and

5. *Cities of Anaheim v. California Independent System Operator Corp.*, 106 FERC ¶ 61,205 (March 3, 2004).

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
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October 18, 2005

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GLOSSARY

CAISO	California Independent System Operator Corporation
IDACORP	IDACORP Energy, L.P.
ISO	California Independent System Operator Corporation
March 2001 Order	*Cities of Anaheim v. California Independent System Operator Corp.*, 94 FERC ¶ 61,268 (2001) (“
March 2003 Order	*Cities of Anaheim v. California Independent System Operator Corp.*, 102 FERC ¶ 61,274 (2003)
March 2004 Order	*Cities of Anaheim v. California Independent System Operator Corp.*, 106 FERC ¶ 61,205 at PP 18-21, 23 (2004) (“
May 2001 Order	*Cities of Anaheim v. California Independent System Operator Corp.*, 95 FERC ¶ 61,197 (2001)
October 2003 Order	*Cities of Anaheim v. California Independent System Operator Corp.*, 105 FERC ¶ 61,021 (2003)
OOM	Out-of-market
Settling Parties	CAISO, Southern Cities, and SRP
SRP	Salt River Agricultural Improvement and Power District

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

Nos. 04-1145, *et al.*

IDACORP ENERGY L.P., *et al.*
PETITIONERS,

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 ISSUES

The issues presented for review are:

1. Whether this Court lacks jurisdiction over the California Independent System Operator Corporation's ("CAISO" or "ISO") petitions for review because:

   (a) CAISO is not aggrieved by the challenged orders;

   (b) CAISO's May 8, 2003 petition for court review was incurably premature;

(c) CAISO's April 28, 2004 petition for court review was filed too late.

2. Whether the Commission reasonably determined that CAISO Tariff Sections 11.2.9 and 11.2.9.1 set out CAISO neutrality adjustment charge components and their hourly limit.

3. Whether the Commission reasonably determined that CAISO Tariff Section 11.2.9 does not obviate CAISO's FPA § 205 obligation to file Tariff sheets, and to seek Commission approval, prior to increasing its neutrality adjustment charge limit.

4. Whether the Commission appropriately exercised its discretion to:

(a) accept CAISO's filing in substantial compliance with FERC directives; and

(b) deny IDACORP Energy, L.P.'s ("IDACORP") out-of-time motion to intervene for lack of good cause.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory and regulatory provisions are contained in Appendix A to this Brief.

COUNTER STATEMENT OF JURISDICTION

CAISO invokes this Court's jurisdiction under FPA § 313, 16 U.S.C. § 825*l*. Pet. Br. at 1. As shown in Point I of the Argument below, this Court does not have jurisdiction over CAISO's petitions for review because CAISO failed to satisfy several jurisdictional prerequisites to judicial review: (1) CAISO is not aggrieved by the challenged orders; (2) CAISO's first petition for review was incurably premature; and (3) CAISO's second petition for review was not filed within 60 days of the order addressing its petition for rehearing. CAISO's petitions should be dismissed on these alternative bases.

STATEMENT OF THE CASE

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

This proceeding involves FERC's resolution of two complaints filed in 2000 and 2001. R. 1; R. 48. Both complaints alleged that CAISO had violated its Tariff by exceeding the hourly neutrality adjustment charge limit contained in § 11.2.9.1. The second complaint also alleged that CAISO violated FPA § 205 when it increased § 11.2.9.1's limit without seeking Commission approval to do so. R. 48.

At first it appeared that CAISO had exceeded Tariff § 11.2.9.1's hourly limit because, for administrative convenience, CAISO had been including certain non-

neutrality adjustment charges, including out-of-market ("OOM") charges,[1] in its neutrality adjustment charge billings. *Cities of Anaheim v. California Independent System Operator Corp.*, 102 FERC ¶ 61,274 (2003) ("March 2003 Order") at P 42, JA 498. The Commission directed CAISO to remove all non-neutrality adjustment charges from those billings. CAISO's filing in compliance with that directive established that the true neutrality adjustment charges were *de minimis*, and that no refunds were due. *Id.* at PP 42, 46, JA 498, 499.

On the second allegation, FERC found that CAISO had violated FPA § 205 when it increased Tariff § 11.2.9.1's limit without seeking FERC approval to do so. *Id.* at P 47, JA 499. Section 11.2.9.1, setting out CAISO's internal procedure to increase the limit, did not eliminate CAISO's obligation to comply with FPA § 205's mandate that it seek FERC approval to change its filed rate. *Id.*

II. STATEMENT OF FACTS

A. Southern Cities' Complaint

CAISO administers an imbalance energy market to meet real-time energy needs. *Cities of Anaheim v. California Independent System Operator Corp.*, 105 FERC ¶ 61,021 (2003) ("October 2003 Order") at P 2, JA 569. When this market

[1] OOM charges recoup CAISO's costs for spot energy purchases from outside its organized markets to protect grid reliability. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services*, 109 FERC ¶ 61,218 at P 66 (2004).

produces insufficient resources, CAISO makes OOM purchases. *Id.* During the period at issue, CAISO recovered its OOM costs by including them in its neutrality adjustment charge billings to Scheduling Coordinators, such as IDACORP.

On September 15, 2000, several California cities ("Southern Cities") filed a complaint against CAISO alleging, in pertinent part, that, on a number of occasions since CAISO Tariff § 11.2.9.1[2] became effective on June 1, 2000, CAISO exceeded that section's neutrality adjustment charge limit of $0.095/MWh. R. 1.

CAISO responded that Southern Cities' complaint was unfounded because: (1) the neutrality adjustment charge was intended to assure that the non-profit CAISO remained in a cash neutral position, R. 17 at 3, JA 70; and (2) § 11.2.9.1's limit was intended to apply annually, not hourly, *id.* at 4, 7-11, JA 71, 74-78. In support of the latter argument, CAISO stated that the version of § 11.2.9.1 its Governing Board approved for filing with FERC "explicitly described the cap as an annual cap," *id.* at 11 n.5, JA 78 (citing *id.* at Appendix I Attachment A), but the "word 'annual' was inadvertently omitted from [§ 11.2.9.1] as filed . . . ," *id.*

[2] Tariff § 11.2.9.1 provides:

> The total charges levied under Section 11.2.9 shall not exceed $0.095/MWh, applied to Gross Loads in the ISO Control Area and total exports from the ISO Controlled Grid, unless: (a) the ISO Governing Board reviews the basis for the charges above that level and approves the collection of charges above that level for a defined period; and (b) the ISO provides at least seven days' advance notice to the Scheduling Coordinators of the determination of the ISO Governing Board.

Furthermore, CAISO contended that "Section 11.2.9.1 does not specify the interval over which the cap will be applied, so the use of the intended annual interval is permitted by the ISO Tariff, as now in effect." *Id.*

B. The March and May 2001 Orders

In *Cities of Anaheim v. California Independent System Operator Corp.*, 94 FERC ¶ 61,268 (2001) ("March 2001 Order"), the Commission found that the plain language of Tariff § 11.2.9.1 establishes that the CAISO neutrality adjustment charge limit applies on an hourly basis:

> [T]he as-filed language in section 11.2.9.1 of the ISO Tariff states, in pertinent part, that the neutrality adjustment charge "shall not exceed $0.095/MWh," and, as the ISO itself acknowledges, the provision does not include language supporting the ISO's argument that the limit is stated solely for the purpose of projecting neutrality adjustment charges on an annualized basis. The provision also does not include language indicating that the limit – which, we note, is stated using a "per megawatt-hour" unit, is not intended for application on an hourly basis.

March 2001 Order at 61,934, JA 94. Thus, reading the word "annual" into § 11.2.9.1 would constitute an inappropriate retroactive substantive change to that section. *Id.* The Commission found that CAISO "exceeded the Tariff's neutrality adjustment charge limit," and directed CAISO to recalculate that charge for the period June 1, 2000 to September 15, 2000, using a $0.095/MWh limit applied on an hourly basis. *Id.*

CAISO sought rehearing, again asserting that § 11.2.9.1's limit applied on an annual, rather than an hourly, basis. R. 45, JA 97-123. The Commission denied rehearing in *Cities of Anaheim v. California Independent System Operator Corp.*, 95 FERC ¶ 61,197 (2001) ("May 2001 Order"), explaining that:

> Regardless of what the ISO intended the tariff language to be, the filed rate doctrine mandates that the ISO charge its customers the actual rate specified in its tariff. Courts have strictly construed that doctrine. "Deviation from it is not permitted upon any pretext . . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed."[3] Thus, the ISO's alleged administrative error is not an excuse for limiting the neutrality adjustment charge on an annual as opposed to on an hourly basis, and charging greater than $0.095/MWh during the period June 1, 2000 through September 15, 2000.

May 2001 Order at 61,687, JA 126.

CAISO again petitioned for rehearing on June 13, 2001, asserting, for the first time, that Tariff § 11.2.9.1's limit did not apply to charges levied to recoup OOM costs as they are not one of the five enumerated charges set forth in § 11.2.9. R. 51, JA 246-341. Rather, OOM charges are recouped under Tariff § 11.2.4.2.1.[4] As CAISO explained:

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[3] Quoting *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990), and *Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).

[4] CAISO Tariff § 11.2.4.2.1 provides that:

> All costs incurred by the ISO for [OOM] dispatch instructions necessary as a result of a transmission facility outage or in order to

> Section 11.2.9 of the ISO Tariff – the only provision to which the $0.095 cap in Section 11.2.9.1 applies (whether it is applied on an annual basis or an hourly basis) – is the Tariff provision which authorizes the ISO to levy "neutrality adjustment charges" with respect to enumerated categories of costs. Other provisions of the ISO Tariff [*i.e.* § 11.2.4.2.1] authorize the ISO to collect certain other charges that, like most of the charge types specified in Section 11.2.9, are assessed against Scheduling Coordinators in proportion to their metered Demands. Because these charges are levied under Tariff provisions other than Section 11.2.9, by the explicit terms of Section 11.2.9.1, the $0.095/MWh cap does not apply to them.
>
> For billing purposes and administrative convenience, the ISO grouped together on Scheduling Coordinators' monthly invoices all of the ISO Tariff charges that are assessed on the basis of Scheduling Coordinators' metered Demands, and did sometime [sic] use the shorthand "neutrality costs" to refer to all of the costs recoverable through the various charges.

Id. 17-18, JA 263-64; *see also id.* at 3, 4, 5 n. 2, 9-13, 19, JA 249, 250, 251, 255-59, 265.

C. SRP's Complaint

In the meantime, on June 1, 2001, Salt River Agricultural Improvement and Power District ("SRP") filed a complaint also alleging that CAISO violated §

> satisfy a location-specific requirement shall be payable to the ISO by the Participating Transmission Owner in whose Service Area the transmission facility is located or the location-specific requirement arose. All costs incurred by the ISO for dispatch instructions other than for a transmission facility outage or a location-specific requirement shall be payable to the ISO by all Scheduling Coordinators in proportion to their Metered Demand (including exports).
>
> R. 1 at 8, JA 8.

11.2.9 of its Tariff by exceeding that section's neutrality adjustment charge $0.095/MWh limit. R. 48. SRP further alleged that CAISO improperly had raised the neutrality adjustment limit from $0.095/MWh to $0.35/MWh as of September 15, 2000, because CAISO did not make an FPA § 205 filing with FERC regarding that tariff revision. *Id.*

CAISO's June 21, 2001 answer to SRP's complaint reiterated the assertions made in its June 13, 2001 rehearing petition. R. 60.

D. Settlement Proceedings

On June 22, 2001, CAISO, Southern Cities, and SRP ("Settling Parties") moved to institute settlement judge procedures. R. 61. The Commission granted the motion, setting the case for settlement judge procedures under Commission Rule 603, 18 C.F.R. § 385.603. R. 66, *Cities of Anaheim v. California Independent System Operator Corp.*, 96 FERC ¶ 61,024 (2001).

The Settling Parties submitted a proposed settlement agreement on July 31, 2002. R. 96. Pacific Gas & Electric Company opposed the proposed settlement, and IDACORP (R. 100, JA 461-68), among others, filed to intervene out-of-time to protest. The Settling Parties, among others, opposed the out-of-time motions because allowing intervention after more than a year of settlement proceedings would unreasonably delay and prejudice the proceedings. On November 1, 2002, the settlement judge issued an order granting the out-of-time intervention motions

"in order to include [the movants] in the next settlement conference which will be directed towards reaching a possible uncontested settlement." R. 122 at P 10, JA 483.

The Settling Parties appealed to the Commission, arguing that, by granting the out-of-time motions to intervene, the settlement judge exceeded his authority under Commission Rule 603(g), 18 C.F.R. § 385.603(g). R. 123. On December 30, 2002, the Commission ruled that "Rule 603 does not empower settlement judges to rule on motions to intervene . . . ." R. 127, *Cities of Anaheim v. California Independent System Operator Corp.*, 101 FERC ¶ 61,392 at P 13 (2002), JA 488. The Commission stated that it would address the motions to intervene in a later order. *Id.*

E. The March 2003 Order

Subsequently, the Commission denied the out-of-time motions to intervene because the movants "fail[ed] to demonstrate good cause warranting late intervention. To permit these entities' late intervention after issuance of several orders and extensive settlement discussions would result in unjustified delay and disruption of the proceeding and undue burden on other parties." March 2003 Order at P 37, JA 497. Moreover, "[a]s the settlement judge's prior order granting the interventions was not authorized under the Commission's regulations, these entities will be treated as if never having had party status." *Id.* at n.23, JA 501. In

any event, persuaded by the objections of Pacific Gas & Electric, the Commission rejected the proposed settlement. *Id.* at PP 39-41, JA 497-98.

Additionally, "[a]fter careful review of the ISO's arguments and related Tariff provisions, [the Commission] agree[d] with the ISO's reasoning that its recovery of OOM dispatch costs is not constrained by section 11.2.9.1's stated hourly limit of $0.095/MWh." March 2003 Order at P 42, JA 498. "[C]harges other than the five enumerated charges set forth in section 11.2.9 (specifically, OOM charges) are not subject to any neutrality limitations." *Id.* at P 46, JA 499. Thus, "proper application of the neutrality adjustment charge allocation mechanism – *i.e.*, recovery of the costs explicitly stated under 11.2.9 – does not include OOM dispatch costs," and the Commission could not "order refunds of any OOM charges on the grounds that they exceeded the neutrality limit, regardless of the period during which they were incurred." *Id.* at P 42, JA 498; *see also id.* at P 46, JA 499.

Accordingly, the Commission directed CAISO "to separate all costs recoverable under section 11.2.9 from all other costs included in the invoiced 'neutrality costs' from June 1, 2000 forward, and to recalculate each customer's charges for each hour." *Id.* at P 42, JA 498. Furthermore, CAISO was directed to provide "a report detailing, among other things, the amounts of the various separated charges and the subsequent neutrality adjustment charge recalculations

and reassessments. The report [was] also [to] detail the recalculated OOM dispatch cost amounts . . . ." *Id.* at P 43, JA 498.

In addition, the Commission found that CAISO violated FPA § 205 filing requirements when it increased the neutrality adjustment charge limit to $0.35/MWh in September 2000. Tariff § 11.2.9 provides that the CAISO Governing Board can "approve[] the collection of charges above [the $0.095/MWh] limit for a defined period," but:

> that tariff language does not eliminate the need for the ISO to seek Commission approval of its increase under FPA Section 205 and to file tariff sheets reflecting the revised limit. The effect of the section is to explain the ISO's process for modifying the neutrality limit above and beyond the statutory filing requirement. Hence, the neutrality limitation remains $0.095/MWh, as provided in the ISO's tariff, for all of 2000. The ISO is directed to use that limitation in its recalculations of the neutrality adjustment charges owed in each hour.

March 2003 Order at P 47, JA 499.

IDACORP sought reconsideration of the denial of its out-of-time intervention motion. R. 130, JA 502-07. CAISO petitioned for rehearing, challenging the Commission's finding that it had violated FPA § 205 when it increased the neutrality adjustment charge limit. R. 131 at 4, JA 511.

F. CAISO's Compliance Filing

CAISO submitted its compliance filing on June 10, 2003. R. 136, JA 531-38. After calculating the dollar value of each of the five Tariff § 11.2.9 cost categories, CAISO found that only one (§ 11.2.9(c)) yielded any dollar impacts,

which, when allocated to Scheduling Coordinators pro rata for each hour, were, without exception, below the neutrality limitation of $0.095/MWh. *Id.* Transmittal Letter at 2-5, JA 532-35. Thus, CAISO concluded, the costs charged would not change, and revised invoices and hourly breakdowns of the costs recoverable under provisions other than Tariff § 11.2.9 were unnecessary. *Id.* Transmittal Letter at 5-7, JA 535-37.

Notice of the compliance filing issued on June 13, 2003, informing persons desiring to intervene or protest to do so by July 10, 2003. R. 138. IDACORP timely moved to intervene and protested CAISO's filing, contending that it failed to comply with the Commission's directives: (1) to separate non-neutrality adjustment charges by type; (2) to report the revised neutrality adjustment charges on an hourly basis; and (3) to calculate prices per MWh. R. 139.

CAISO opposed IDACORP's motion to intervene, asserting that it was "a subterfuge to end-run the Commission's rejection of its previous effort to intervene . . . ." R. 142 at 3, JA 555. CAISO also substantively countered IDACORP's protest regarding its calculations, R. 142 at 5-6, JA 557-58, noting that "*only IDACORP* submitted a filing critical of the Compliance Filing; no other 'affected Scheduling Coordinator,' including the complainants in this proceeding, appears to believe it lacks the ability to confirm the accuracy of the Compliance Filing to the extent it feels a need to do so," *id.* at 6, JA 558.

"Because no refunds were owed, and the total amounts on any revised invoices would be the same as the total amounts shown on the original invoices, the ISO believed it would be a pointless exercise to 'break out' the separate costs recoverable other than under Section 11.2.9 for each Scheduling Coordinator for each hour." *Id.* at 9, JA 561 (citing R. 136 Transmittal Letter at 6-7, JA 536-37). In support, CAISO explained that:

> breaking out the separate costs recoverable other than under Section 11.2.9 would require the individual examination, by personnel rather than through a fully automated process, of approximately 12,000,000 records for the time period from June 1, 2000 through December 31, 2000. The ISO would then have to conduct a manual re-run based on the results of its examination. The entire process would take at least a year of concentrated effort by several persons. On a prospective basis, the ISO intends to break out the costs recoverable other than under Section 11.2.9. *See* [R. 136] Transmittal Letter at 7 [JA 537]. However, on a retrospective basis, the ISO reiterates that it would serve no purpose to require the ISO to expend time and resources to conduct such an exercise, in light of the other important matters that require the ISO's attention.

Id. at 9-10, JA 561-62.

Moreover, CAISO asserted, the Commission "directed the ISO to recalculate the costs credited or debited pursuant to Section 11.2.9 on an hourly basis but did not require the ISO to violate its Settlement process." *Id.* at 7, JA 559. Thus, CAISO believed it had complied with the Commission's mandate to report the revised neutrality adjustment charges on an hourly basis. *Id.* (citing R. 136 Transmittal Letter at 2-5, JA 532-35).

Finally, CAISO acknowledged that its charges were calculated per hour rather than per MWh, *id.* at 8, 11, JA 560, 563, but contended that its per hour calculation complied with the Commission's mandate, *id.* at 8, JA 560. In any event, CAISO added, once it determined that the charges per hour under Tariff § 11.2.9 were uniformly negative, "it was obvious that there was no possibility of the $0.095/MWh limitation being exceeded with regard to those charges." *Id.* at 11, JA 563. As charges per megawatt-hour are calculated by multiplying charges per hour by a fraction consisting of one over the amount of metered demand, "the fact that all of the charges per hour were negative means that, when such charges are multiplied by the fraction described above, the resulting amount of charges per megawatt-hour will also be negative, and thus below the $0.095/MWh limitation. For this reason, there was no need for the ISO to conduct this multiplication exercise in the Compliance Filing." *Id.* at 11-12, JA 563-64.

G. The October 2003 Order

The Commission denied reconsideration of IDACORP's out-of-time motion to intervene in opposition of the settlement proposal, again finding that IDACORP failed to establish good cause to justify it. October 2003 Order at P 47, JA 579. IDACORP should have known, long before its untimely August 2002 motion to intervene, that its rights as a Scheduling Coordinator could be affected by this proceeding:

> [T]he May 2001 Order ruled that relief previously ordered for Riverside should be applicable to **any Scheduling Coordinator that was overcharged**, and broadened the directive in the March 2001 Order for the ISO to recalculate the neutrality adjustment charges assessed to **all Scheduling Coordinators**. When the Commission subsequently established Settlement Judge procedures, IDACORP had an opportunity to seek to participate, but did not avail itself of the opportunity. Seeking to intervene after the submission of an Offer of Settlement, in order to oppose the proposed settlement, was in its very nature disruptive, and hence was not the appropriate time to seek party status.

Id. Nor could IDACORP reasonably have believed that neutrality adjustment charge refunds would be available in a different complaint proceeding (the Docket No. EL00-95 Refund Proceeding), as neutrality adjustment charges were outside the scope of that proceeding. *Id.*

Because it was timely filed after notice of CAISO's 2003 compliance filing, however, the Commission granted IDACORP's July 10, 2003 motion to intervene to protest that filing. *Id.* at PP 20, 48 and n.13, JA 573, 579, 580. The Commission noted that "IDACORP must accept the record as it had developed as of [July 10, 2003], and its participation is limited to the issues raised in the ISO's report, and any future pleadings in this proceeding." *Id.* at P 48, JA 579.

In addition, the October 2003 Order accepted the compliance filing, as it "calculated the amount of neutrality adjustment charges for each hour of the period June 1, 2000 through December 31, 2000, as directed, and the data demonstrate that the charges never exceeded the $0.095/MWh limit." *Id.* at P 21, JA 573.

FERC found no merit to any of IDACORP's objections. First, "it was reasonable for the ISO to calculate only the amounts due under Section 11.2.9" because "the March [2003] Order found that refunds of other charges (specifically, OOM charges) were not warranted." *Id.* at P 22. Moreover, "the ISO adequately explained how it determined amounts due under each of the five charge types enumerated in Section 11.2.9." *Id.* Furthermore, while CAISO's hourly cost calculations "were measured using a different unit ($/hour) than the unit used to measure the neutrality adjustment charge limitation ($0.095/MWh)," CAISO "reasonably explain[ed] that since all of the charges per hour were negative, they necessarily were under the limitation in Tariff Section 11.2.9.1." *Id.* at P 23, JA 574.

The October 2003 Order also addressed claims on rehearing of the March 2003 Order. The Commission rejected the claim by the California Department of Water Resources that "the March [2003] Order imposed retroactive ratemaking by directing the ISO to remove OOM charges from its recalculation of neutrality charges." *Id.* at PP 25, 29, JA 574, 575

> The March [2003] Order finds that the ISO erred by treating OOM charges as neutrality adjustment charges and requires the assessment and billing of OOM charges as provided by the Tariff. The order does not allow the ISO to change its rate structure . . .; rather, it requires the ISO to correct an invoicing mistake. . . . As the Commission is enforcing the Tariff, as filed, and not adjusting it, the directives in the March [2003] Order do not constitute retroactive ratemaking . . . .

Id. at P 29, JA 575.

Nor was there merit to CAISO's claim on rehearing that the Commission erred in finding that CAISO needed to make a filing under FPA § 205 in order to increase the level of the neutrality adjustment charge limit. *Id.* at P 42, JA 578. The "language in Section 11.2.9.1 sets forth the ISO's process for modifying the limit on neutrality adjustment charges, but does not eliminate the need for the ISO to seek Commission approval of any increase under FPA section 205 and to file tariff sheets reflecting the revised limit." *Id.* The Commission's silence, prior to the March 2003 Order, regarding CAISO's increase of the neutrality adjustment charge limit did not indicate that an FPA § 205 filing was unnecessary. The March 2003 Order was the first one in which the Commission addressed the notion of CAISO increasing the limit without making an FPA § 205 filing. *Id.*

IDACORP alone sought rehearing, arguing that the Commission erred in accepting the compliance filing because it did not comply with the Commission's directives. R. 145 at 5-10, 13-16, JA 587-92, 595-98. Additionally, reiterating a contention already rejected in the October 2003 Order at PP 25, 29, JA 574, 579, IDACORP asserted that the Commission engaged in retroactive ratemaking when it directed CAISO to remove OOM charges from neutrality adjustment charges. R. 145 at 11, JA 593.

H. The March 2004 Order

Although the Commission agreed that the Compliance Filing was not prepared exactly as directed, *i.e.*, the amounts were not calculated on an hour-by-hour basis, the March 2004 Order found further recalculation unwarranted. *Cities of Anaheim v. California Independent System Operator Corp.*, 106 FERC ¶ 61,205 at PP 18-21, 23 (2004) ("March 2004 Order"), JA 603, 604.

> Given that the data provided by the ISO shows that the amounts at issue were very small (and were actually negative in all months),[5] we find that the administrative burden involved in performing further calculations to comply precisely with our earlier directive in every hour of the seven months at issue, for every Scheduling Coordinator, would be extremely costly while potentially causing substantial delay in both this proceeding and the Refund Proceeding in Docket Nos. EL00-95-045 and EL00-98-042 by depleting the ISO's limited resources.

March 2004 Order at P 19, JA 603.

Likewise, although CAISO did not individually break down the non-neutrality adjustment amounts included in the original billings, the Commission found that, "because no refunds [were] warranted, it would be unreasonable to burden the ISO to go back and separate the aggregated non-neutrality adjustment amounts for compliance with [its] order." *Id.* at P 20, JA 603.

In short, the Commission concluded that "CAISO substantially complied with" its directives, *id.* at P 23, JA 604, as "the manner in which [CAISO] chose to proceed was adequate for the purposes for which the Commission needed the data. Considering the additional administrative burden that the ISO would have incurred, and the potential for delay, the ISO's approach was preferable," *id.* at P 21, JA 603.

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[5] For example, "the amount of costs credited or debited as of the end of June 2000 with regard to the entire market was ($798.11). [R. 136] Transmittal Letter at 3 [JA 533]. The amount per Scheduling Coordinator would be a fraction thereof. All other months reflect similarly minimal, negative amounts." March 2004 Order at n.9, JA 604.

I. Petitions For Review

On May 8, 2003, while its petition for rehearing of the March 2003 Order was still pending, CAISO filed a petition for review in the Ninth Circuit of the March 2001, May 2001, and March 2003 Orders. Then, on April 28, 2004, CAISO filed a second petition for review in the Ninth Circuit, this time seeking review of the March 2001, May 2001, March 2003, October 2003, and March 2004 Orders. IDACORP filed a petition for review in the D.C. Circuit of the March 2003, October 2003, and March 2004 Orders on April 30, 2004.

On June 23, 2004, the Ninth Circuit granted IDACORP's motion to transfer CAISO's petitions for review to the D.C. Circuit.

SUMMARY OF ARGUMENT

I

CAISO's petitions for review should be dismissed for lack of jurisdiction on three alternative bases.

First, as CAISO concedes, it is not aggrieved by the challenged orders, which ruled in CAISO's favor. Nor can CAISO maintain its petitions under the theory that they constitute a cross-appeal, as cross-appeals by a prevailing party are not available on review of FERC orders.

Second, CAISO's May 8, 2003 petition for review should be dismissed as incurably premature, as it was filed while its request for rehearing of one of the

orders challenged in the petition (the March 2003 Order) was still pending. This Court is not estopped from addressing this jurisdictional issue if, as CAISO contends, the Ninth Circuit already addressed it. A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance.

Third, CAISO's April 28, 2004 petition for review should be dismissed as it was filed more than 60 days after issuance of the order addressing CAISO's final application for rehearing, the October 2003 Order. CAISO did not seek review of the March 2001, May 2001, March 2003, and October 2003 Orders until April 28, 2004, well beyond the 60-day deadline, leaving this Court without jurisdiction to review CAISO's objections to them.

II

FERC did not engage in retroactive ratemaking when it directed CAISO to remove OOM costs from neutrality adjustment charge billings; under CAISO's Tariff, OOM costs are not neutrality adjustment charges. The Commission's directive did not alter, but acted consistently with, CAISO's Tariff.

Furthermore, FERC appropriately accepted CAISO's compliance filing. Although not prepared exactly as originally directed, the filing substantially complied with the FERC's directives, as it provided the information necessary for FERC to rule on the complaints. Moreover, having determined that the aggregated charges were very small (and were actually negative in all months), and that

requiring further compliance would usurp the ISO's limited resources, thereby delaying this and other Commission proceedings of greater priority, the Commission appropriately exercised its unreviewable discretion not to exercise its enforcement authority regarding these particular allegations of past misconduct.

FERC also appropriately denied IDACORP's out-of-time motion to intervene, as IDACORP had not established good cause for the untimely motion. While IDACORP should have known, at least by the time the May 2001 Order issued, that its rights as a Scheduling Coordinator could be affected by this proceeding, it did not move to intervene until August 2002.

Assuming jurisdiction, the Court also should reject CAISO's claim that FERC erred in determining that Tariff § 11.2.9.1's plain language established that the neutrality adjustment charge applied on an hourly basis. Reading the word "annual" into § 11.2.9.1 would have retroactively changed that section in violation of the filed rate doctrine.

Finally, assuming jurisdiction, the Court should reject CAISO's challenge to FERC's determination that CAISO violated FPA § 205 by increasing the Tariff's stated neutrality adjustment charge limit without first seeking FERC approval to do so. The neutrality adjustment charge limit is not a formula rate, as CAISO contends for the first time on appeal.

ARGUMENT

I. CAISO'S PETITIONS FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. The Statutory Provisions

FPA § 313(a), 16 U.S.C. § 825*l*(a), provides that:

> Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. . . . No proceeding to review any orders of the Commission shall be brought by any person unless such person shall have made application to the Commission for rehearing thereon.

FPA § 313(b) adds that:

> Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing; a written petition praying that the order of the Commission be modified or set aside in whole or part. . . . No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.

Courts strictly construe these jurisdictional requirements, as the express statutory limits they impose on a court's jurisdiction cannot be relaxed. *California Department of Water Resources v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002); *Town of Norwood v. FERC*, 906 F.2d 772, 774 (D.C. Cir. 1990); *Tennessee Gas*

Pipeline Co. v. FERC, 871 F.2d 1099, 1107, 1109 (D.C. Cir. 1989); *ASARCO, Inc. v. FERC*, 777 F.2d 764, 775 (D.C. Cir. 1985). [6]

B. CAISO Is Not Aggrieved By The Challenged Orders

CAISO seeks judicial review under FPA § 313(b) (CAISO Br. at 1), which provides that only parties aggrieved by FERC orders may obtain judicial review. FPA § 313(b); *California*, 306 F.3d at 1126; *Public Utility Dist. of Snohomish Cty. v. FERC*, 272 F.3d 607, 613 (D.C. Cir. 2001). To be aggrieved, a party must establish Article III constitutional standing by showing: (1) that it has suffered 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 there is a causal connection between the injury and the conduct complained of; and

[6] Cases interpreting FPA § 313 and Section 19 of the Natural Gas Act ("NGA"), 15 U.S.C. § 717r, which are substantially identical provisions, are cited interchangeably in this section. *See, e.g., Granholm ex rel. Michigan Dept. of Natural Resources v. FERC*, 180 F.3d 278, 280 n.2 (D.C. Cir. 1999) (substantially identical provisions, such as FPA § 313 and NGA § 19, are to be interpreted consistently).

(3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *California*, 306 F.3d at 1126; *Snohomish*, 272 F.3d at 613.

The March 2003 Order agreed with CAISO that, under CAISO's Tariff, OOM costs are not included in the five enumerated neutrality adjustment charges, and therefore, charges to recoup OOM costs are not constrained by the Tariff's neutrality adjustment charge limit. Indeed, CAISO concedes that it cannot demonstrate injury-in-fact regarding the challenged orders because FERC ruled in its favor. Br. at 15. Nonetheless, CAISO asserts that it should be permitted to maintain its petition as a "protective cross-appeal," as CAISO believes it "will be aggrieved **if** IDACORP is successful in its challenge to the FERC-ordered separation of the OOM costs and other costs from the neutrality charges." Br. at 15 (emphasis added). CAISO is wrong.

Cross-appeals by a prevailing party are not available on review of FERC orders. FPA § 313(b) allows only parties aggrieved by a FERC order to obtain review of that order. Likewise, the Administrative Procedure Act, 5 U.S.C. § 702, restricts the ability to seek review of agency orders to parties aggrieved by those orders.

It is not surprising, therefore, that, despite the multitude of agency cases reviewed by the courts each year, CAISO cites to only one case involving review

of agency orders that even mentions the notion of a party prevailing at the agency level filing a conditional cross-appeal. Br. at 16 n.30 (citing *Sea-Land Service, Inc. v. Department of Transportation*, 137 F.3d 640, 649 (D.C. Cir. 1998)). Indeed, none of the cases upon which *Sea-Land*'s discussion of this notion is based is an agency case; rather, each involves only private litigants. *Sea-Land*, 137 F.3d at 649 (citing *Great American Audio Corp. v. Metacom, Inc.*, 938 F.2d 16, 19 (2d Cir. 1991), and 15A Charles A. Wright *et al.*, Federal Practice & Procedure § 3902 at 78-79 (1992) (collecting cases)). Moreover, *Sea-Land*'s mention of cross-appeals appears to be dicta. After explaining that Sea-Land had not employed the "usual way for prevailing parties to protect themselves on appeal from the risk that the appellate court may reverse the decisions attacked by the appellants" -- intervening and urging affirmance -- the opinion *sua sponte* raised (and ultimately rejected) the possibility of addressing Sea-Land's arguments as a conditional cross-appeal. *Id.*

A CAISO cross-appeal is inappropriate on an additional basis as well. Even if the Court were to grant IDACORP's petition, vacating and remanding the challenged orders as IDACORP has requested, IDACORP Br. at 25, CAISO still would not be aggrieved. Before CAISO could be aggrieved, FERC would have to issue hypothetical, future remand orders requiring CAISO to provide refunds of amounts charged in excess of the $0.095/MWh neutrality adjustment charge limit.

FERC's discretion is at its zenith in determining whether, and, if so, how, to remedy a past violation, however, and FERC might choose not to order refunds or to provide any remedy at all in the hypothetical remand proceeding. *Heckler v. Chaney*, 470 U.S. 821 (1985); *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460-61 (D.C. Cir. 2001); *Connecticut Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000); *Towns of Concord v. FERC*, 955 F.2d 67, 72-73, 76 n.8 (D.C. Cir. 1992). In any event, if FERC's hypothetical remand orders required CAISO to provide refunds, CAISO would have the right, under FPA § 313, as an aggrieved party, to petition the Court for review of those orders.

In sum, CAISO is not aggrieved by the challenged orders as required under FPA § 313(b), and its attempt to maintain a cross-appeal cannot stand. Accordingly, CAISO's petitions for review should be dismissed.

C. CAISO's May 8, 2003 Petition For Review Was Incurably Premature

On May 8, 2003, while CAISO's April 11, 2003 petition for rehearing of the March 2003 Order was still pending, CAISO filed a petition seeking judicial review of the March 2001, May 2001 and March 2003 Orders (originally Ninth Cir. Docket No. 03-71938, now D.C. Cir. Docket No. 04-1287). As CAISO's petition sought judicial review of Commission orders for which it simultaneously sought agency rehearing, that petition for judicial review was "incurably premature." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110-12 (D.C. Cir. 2002)

("A request for administrative reconsideration renders an agency's otherwise final action non-final with respect to the requesting party."); *Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980 (D.C. Cir. 1993); *Wade v. FCC*, 986 F.2d 1433 (D.C. Cir. 1993); *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133-34 (D.C. Cir. 1989) (A Court "does not have jurisdiction to consider [a] prematurely-filed petition for review, even after the agency rules on the rehearing request.").

Accordingly, on June 3, 2003, FERC moved to dismiss the May 8, 2003 petition as incurably premature. Appendix B.[7] CAISO did "not oppose dismissal of the petition without prejudice to the ISO's re-filing a petition for review of all issues that are the subject of the current petition following FERC action on the ISO's pending rehearing request." Appendix C at 4.

On September 24, 2003, the Ninth Circuit issued an order stating:

> Respondent's motion to dismiss this petition for lack of jurisdiction is denied. *See* 16 U.S.C. § 825*l*(a) ("Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.").

[7] If CAISO were aggrieved after the October 2003 Order addressing CAISO's request for rehearing issued, it could have obtained judicial review of the March 2001, May 2001, March 2003 and October 2003 Orders by filing a petition for review of those orders within 60 days of the October 2003 Order. *TeleSTAR*, 888 F.2d at 133; *see also Clifton Power*, 294 F.3d at 110 ("a party that had sought administrative reconsideration may, if reconsideration is denied, challenge that denial as well as the agency's original order by filing a timely petition for review of both orders"); FPA § 313(b).

Appendix D at 1.

After the Ninth Circuit transferred CAISO's petitions for review to this Court, in response to this Court's order that the parties file motions to govern future proceedings regarding the CAISO and IDACORP petitions, FERC moved to dismiss CAISO's May 8, 2003 petition as incurably premature. Appendix E at 4-7.

CAISO contends that this Court cannot address FERC's motion to dismiss because "the Ninth Circuit has previously denied FERC's motion to dismiss on the same ground." Br. at 18. Whether the Ninth Circuit actually denied FERC's motion to dismiss for incurable prematurity is not clear, as the stated basis for the September 24, 2003 order – "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied" – was not responsive to FERC's motion.

Even if the Ninth Circuit's September 24, 2003 order did deny FERC's motion to dismiss CAISO's petition for incurable prematurity, this Court has the power to address FERC's pending motion. *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance"); *Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739-40 (D.C. Cir. 1995) ("Law of the case is a prudential rule rather than

a jurisdictional one"); *see also National Industries, Inc. v. Republic National Life Insurance Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (denial of motion does not foreclose later reconsideration of the argument on brief).

City of Gallup v. FERC, 702 F.2d 1116, 1124 (D.C. Cir. 1983), cited by CAISO, Br. at 18, does not hold otherwise. That case simply stands for the inapposite proposition that, while a petition is pending in another circuit, this Court will not decide whether that petition was filed prematurely. *Id.* at 1124 ("It would be precipitous for one court to act on its opinion of the validity of another court's case.").

Although CAISO now contends that "[t]he transfer would have been improper if this Court were to dismiss it on the ground of being incurably premature" because "a case cannot be transferred if the transferee court lacks jurisdiction," Br. at 19, CAISO's opposition to IDACORP's motion to transfer did not include the ground that this Court would not have jurisdiction over its petition. Rather, CAISO's opposition asserted only that the court should deny the motion to transfer because "[t]his proceeding concerns a matter of interest specifically to California," Appendix C at 4, and the Ninth Circuit had "gained familiarity with the FERC orders and issues involved," putting it "in the best position to decide the issues in the case," Appendix C at 5.

CAISO's equity argument, Br. at 19-20, fails as well. There is no concern

that the merits of FERC's action will evade review if CAISO's petition is dismissed. The challenged orders ultimately decided the matter in favor of CAISO; the issues raised by the only aggrieved party, IDACORP, are being reviewed by the Court; and, if the Court hypothetically were to vacate and remand the challenged orders, and CAISO were aggrieved by FERC's orders on remand, CAISO will have an opportunity to petition for their review.

Accordingly, CAISO's May 8, 2003 petition for review should be dismissed.[8]

[8] CAISO cannot rely on its May 8, 2003 petition to challenge FERC's ruling that it violated FPA § 205 when it increased Tariff § 11.2.9.1's limit even under Ninth Circuit precedent because CAISO simultaneously sought FERC rehearing (in its April 11, 2003 request for rehearing) and petitioned for Court review (in its May 8, 2003 petition for review) of that ruling. Appendix C at 2-3; *California Department of Water Resources v. FERC*, 361 F.3d 517, 520 (9th Cir. 2004) ("a party cannot seek agency reconsideration and judicial review of the same issue at the same time.").

D. CAISO's April 28, 2004 Petition For Review Was Filed More Than 60 Days After Issuance Of The Order Addressing CAISO's Final Application For Rehearing

CAISO filed its final application for rehearing, challenging the March 2003 Order, on April 11, 2003. CAISO did not seek rehearing of the Order addressing its application for rehearing (the October 2003 Order), making the March 2001, May 2001, March 2003, and October 2003 Orders final as to it. *ICG Concerned Workers Ass'n v. U.S.*, 888 F.2d 1455, 1457-58 (D.C. Cir. 1989) (finality regarding agency action is party-based). In order to preserve any right CAISO arguably might have had to judicial review of those orders, therefore, CAISO was required to file a petition for review "within sixty days after the [October 2003] order of the Commission upon the application for rehearing," FPA § 313(b), that is, by December 2, 2003. As CAISO did not seek review of the March 2001, May 2001, March 2003, and October 2003 Orders until April 28, 2004, well beyond the 60-day deadline, this Court does not have jurisdiction to review CAISO's objections to them. *Tennessee Gas*, 871 F.2d at 1107 ("courts are without jurisdiction to review any order unless such a petition has been timely filed.").

The subsequent issue of the March 2004 Order, in response to IDACORP's rehearing petition, did not trigger the start of a new 60-day filing deadline for CAISO to challenge the earlier orders. As explained, when the October 2003 Order became final as to CAISO (*ICG*, 888 F.2d at 1457-58), December 2, 2003

became the statutory deadline for CAISO to petition for review of it and the earlier Orders. This express statutory limitation cannot be superseded by a different deadline related to a later order responding to another party's objections. *See Norwood*, 906 F.2d at 774; *Tennessee Gas*, 871 F.2d at 1109.

CAISO attempts to avoid the consequences of failing to timely file its second petition for review by pointing to a Third Circuit case, *Cities of Newark v. FERC*, 763 F.2d 533, 539 (3d Cir. 1984), under which, CAISO asserts, its April 28, 2004 petition was timely. Br. at 17-18. This Court's long-standing party-based finality jurisprudence is not trumped, however, by purportedly contrary Third Circuit case law.[9]

Accordingly, CAISO's April 28, 2004 petition for review should be dismissed.

II. THE COMMISSION'S DETERMINATIONS WERE APPROPRIATE

A. The Standard Of Review

Assuming jurisdiction, 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 based upon

[9] Ironically, while CAISO's answer to the motion to dismiss its May 8, 2003 petition argued in favor of piecemeal litigation, CAISO's answer to this jurisdictional issue argues against piecemeal litigation.

substantial evidence in the record. For this purpose, the Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b). The Court gives substantial deference to FERC's interpretation of the FPA, *Domtar Maine Corp., Inc. v. FERC*, 347 F.3d 304, 314 (D.C. Cir. 2003), and of Tariffs, *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 814 (D.C. Cir. 1998).

B. FERC Reasonably Interpreted CAISO Tariff § 11.2.9.1's Neutrality Adjustment Charge Limit To Apply Only To The Five Enumerated Charges Set Forth In Tariff § 11.2.9

After reviewing CAISO's Tariff to determine whether CAISO had violated § 11.2.9.1's neutrality adjustment charge limit, the Commission found the limit applied only to the five neutrality adjustment charges enumerated in § 11.2.9. March 2003 Order at PP 42, 46, JA 498, 499. Those five charges did not include OOM dispatch and certain other costs that, for administrative convenience, CAISO had been including as part of its neutrality adjustment charge billings. March 2003 Order at PP 42, 46, JA 498, 499. Thus, to ascertain whether CAISO exceeded § 11.2.9.1's limit, FERC directed CAISO to separate the true § 11.2.9 costs from all other costs that had been invoiced as neutrality costs, including OOM costs. *Id.* at P 42, JA 498.

IDACORP contends that, "[b]y permitting CAISO to move OOM charges from the neutrality adjustment Charge Type to some other Charge Type that was already billed, paid, and final, FERC engaged in retroactive ratemaking." Br. at

12, *see also* Br. at 11-17. There is no merit to this contention. The March 2003 Order found "that the ISO erred by treating OOM charges as neutrality adjustment charges and require[d] the assessment and billing of OOM charges as provided by the Tariff. The order does not allow the ISO to change its rate structure . . .; rather, it requires the ISO to correct an invoicing mistake. . . ." October 2003 Order at P 29, JA 575. Accordingly, "the Commission [was] enforcing the Tariff, as filed, and not adjusting it," and "the directives in the March [2003] Order do not constitute retroactive ratemaking . . . ." *Id.*[10]

Nor is there merit to IDACORP's claim, Br. at 12, 14-15, that Scheduling Coordinators were not on notice that the Commission could direct CAISO to correct its billing errors. The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Western Resources, Inc. v. FERC*, 72 F.3d 147, 149 (D.C. Cir. 1995). Thus, IDACORP and the other Scheduling Coordinators were on notice that FERC could direct CAISO to correct its billing errors to assure compliance with its Tariff, and, therefore, with the filed rate doctrine, as occurred here.

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[10] This disposes of IDACORP's claim that the Commission "wholly failed to address" the retroactive ratemaking claim. Br. at 16-17. The Commission already had rejected the same claim in this proceeding, leaving no need for the Commission to readdress it.

In an attempt to buttress its lack-of-notice claim, IDACORP argues for the first time on appeal that: (1) "OOM charges were a component of neutrality adjustment charges," Br. at 12-13; (2) "Section 11 of the Tariff provides for the finality of the bills it issues to Scheduling Coordinators," Br. at 13-14; and (3) "[i]f there is a charge type to which the OOM charges were reassigned, it must be presumed that CAISO's original charges for that Charge Type were just and reasonable at their original levels as required under the FPA. *See* 16 U.S.C. § 824d(a),"[11] Br. at 15. Even if IDACORP's November 2003 rehearing request somehow preserved its right to judicial review of a holding in the March 2003 Order, the Court has jurisdiction to consider only those matters specifically raised in the rehearing request. FPA § 313(b); *Office of Consumers' Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990); *Norwood*, 906 F.2d at 775; *Tennessee Gas*, 871 F.2d at 1110. As a result, there is no jurisdiction for the Court to consider these claims, which IDACORP raises for the first time on appeal. In any case, these claims do not undercut the Commission's determination that CAISO should correct its billings to assure compliance with its Tariff and the filed rate doctrine.

C. FERC Appropriately Accepted CAISO's Compliance Filing

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[11] IDACORP made a different claim on rehearing, R. 145 at 13, JA 595: "The Commission's dismissal of Southern Cities' complaint alleging that the OOM charges were unjust and unreasonable necessarily carried with it the presumption that the CAISO's charges for the charge types to which OOM costs have now been relocated were just and reasonable at their existing levels."

Although CAISO's compliance filing was not prepared exactly as originally directed, FERC accepted it because it "substantially complied" with the directives, as "the manner in which [CAISO] chose to proceed was adequate for the purposes for which the Commission needed the data." March 2004 Order at PP 18-21, 23, JA 603, 604. In fact, "[c]onsidering the additional administrative burden that the ISO would have incurred and the potential for delay, the ISO's approach was preferable." *Id.* at P 21, JA 603; *see* R. 136 transmittal Letter at 7, JA 573; R. 142 at 9-10, JA 561-62.

IDACORP incorrectly asserts that FERC was required to reject CAISO's compliance filing because it did not comply with all Commission directives. Br. at 17-23. FERC has broad discretion to "relax, modify, or waive its filing requirements." *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 242 (D.C. Cir. 1980).

Moreover, FERC's determination to modify its compliance directives was reasonable. Where, as here, FERC "employs a flexible standard of 'substantial compliance,'"[12] whether that standard has been satisfied "can best be judged by the Commission in the light of its own needs." *Id.* at 241-42; *see also City of Groton v. FERC*, 584 F.2d 1067, 1070 (D.C. Cir. 1978) (FERC's "filing requirements are

[12] FERC accepts compliance filings that "substantially comply" with the order directing the filing. *E.g.*, *Northern Border Pipeline Co.*, 78 FERC ¶ 61,330 at 62,415 (1997).

mere aids to the exercise of the agency's independent discretion, and . . . leave room for a doctrine of 'substantial' or 'reasonable' compliance.") (quoting *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970)).

The Commission issued the directives to aid it in determining whether CAISO had violated its Tariff's neutrality adjustment charge limit. Once the Commission found that it could make the necessary determination based upon the information provided in the compliance filing, the Commission appropriately exercised its discretion to modify the directives and to accept the filing. This is particularly so, as requiring full compliance would "be extremely costly" and "potentially caus[e] substantial delay in both this proceeding and the Refund Proceeding . . . by depleting the ISO's limited resources." March 2004 Order at P 19, JA 603

IDACORP complains that "it is illogical to conclude that small or negative monthly *aggregated* charges mean that all *hour-by-hour* charges within the aggregation period are less than the $0.095/MWh limit, because aggregation reflects offsetting of credits and debits," Br. at 20, that CAISO's $/hour calculations "cannot be used as a comparison to the $0.095/MWh limit,"[13] Br. at

[13] As CAISO explained, charges per megawatt-hours are calculated by multiplying charges per hour by a fraction consisting of one over the amount of metered demand, and, therefore, "the fact that all of the charges per hour were negative means that, when such charges are multiplied by the fraction described

21-22, and that "FERC's concern with another proceeding – the Refund proceeding – is not a reasoned basis to accept" the filing, Br. at 22-23. Having determined that the aggregated charges "were very small (and were actually negative in all months)," and that requiring further compliance would usurp the ISO's limited resources, thereby delaying this and other Commission proceedings of greater priority, March 2004 Order at P 19, JA 603, however, the Commission appropriately exercised its unreviewable discretion not to exercise its enforcement authority regarding these particular allegations of past misconduct. *Chaney*, 470 U.S. at 828, 831-33; [14] *Baltimore Gas and Electric*, 252 F.3d at 459-62; *cf. Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1281 (D.C. Cir. 1999) (a decision not to prosecute is made for many reasons, including reasons unrelated to the merits of the charge); *Block v. SEC*, 50 F.3d 1078, 1081-82 (D.C. Cir. 1995) (under *Chaney*, an agency decision not to determine whether a violation has occurred or not to proceed against a violation is unreviewable); *Roosevelt v. E.I. Du Pont Nemours &*

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above, the resulting amount of charges per megawatt-hour will also be negative, and thus below the $0.095/MWh limitation." R. 142 at 11-12, JA 563-64.

14 None of the circumstances under which the presumption of non-reviewability might be rebutted exists here. *Chaney*, 470 U.S. at 832-33 and n.4. The FPA does not limit FERC's enforcement discretion by setting substantive priorities or by otherwise circumscribing FERC's power to discriminate among issues or cases it will pursue; FERC's determination not to take enforcement action is not based on the mistaken belief that it lacked jurisdiction; and FERC has not "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.*

Co., 958 F.2d 416, 423 (D.C. Cir. 1992) (under *Chaney*, courts generally lack authority to review an agency's enforcement agenda and resource-allocation decisions).

D. FERC Appropriately Denied IDACORP's Out-Of-Time Motion To Intervene For Lack Of Good Cause

Although not claiming any harm from FERC's denial of its out-of-time motion to intervene, IDACORP asserts that FERC "fail[ed] to articulate any reasoned basis for its assertion that good cause for untimeliness was not established." Br. at 23; *see also* Br. at 23-25. This is untrue.

FERC reasonably denied IDACORP's out-of-time intervention motion as:

> [FERC] did not agree that IDACORP had no way of knowing before August 2002 that its rights could be affected by this proceeding, because the May 2001 Order ruled that relief previously ordered for Riverside should be applicable to **any Scheduling Coordinator that was overcharged**, and broadened the directive in the March 2001 Order for the ISO to recalculate the neutrality adjustment charges assessed to **all Scheduling Coordinators**. When the Commission subsequently established Settlement Judge procedures, IDACORP had an opportunity to seek to participate, but did not avail itself of the opportunity. Seeking to intervene after the submission of an Offer of Settlement, in order to oppose the proposed settlement, was in its very nature disruptive, and hence was not the appropriate time to seek party status.

October 2003 Order at P 47, JA 579. Nor could IDACORP reasonably have believed that neutrality adjustment charge refunds would be available in the California Refund Proceeding (Docket No. EL00-95), as neutrality adjustment charges were outside the scope of that proceeding. *Id.*

IDACORP is not helped by its assertion that allowing its late intervention would not have been disruptive. Br. at 24-25. Whether late intervention will be disruptive can become a factor only after the movant first establishes good cause why the time limitation should be waived. *City of Orville v. FERC*, 147 F.3d 979, 988 (D.C. Cir. 1998) ("Although necessary, a showing of 'good cause' may not alone be sufficient to grant a late intervention motion."); 18 C.F.R. § 385.214(b)(3) (requiring a "show[ing of] good cause why the time limitation should be waived."); 18 C.F.R. § 385.214(d)(1)(ii) ("In acting on any [late] motion to intervene . . . [the Commission] may consider whether . . . [a]ny disruption of the proceeding might result from permitting intervention."). As the Commission found, IDACORP did not make that showing here.

E. FERC Reasonably Interpreted Tariff § 11.2.9.1 As Applying On An Hourly Basis

Although CAISO's claim that Tariff § 11.2.9.1's limit applied on an annual basis was rendered moot when the Commission concluded that CAISO had not exceeded the hourly limit, CAISO persists in challenging the Commission's interpretation of § 11.2.9.1's limit on appeal (Br. at 20-24).

The pertinent language of CAISO Tariff § 11.2.9.1 provides that "[t]he total charges levied under Section 11.2.9 shall not exceed $0.095/MWh." Both Southern Cities' and SRP's complaints asserted that CAISO had violated Tariff § 11.2.9.1's **hourly** neutrality adjustment charge limitation. *E.g.*, R. 1 at 14, JA 14;

R. 48 at 1, JA 129. CAISO asserted that § 11.2.9.1 was ambiguous as to the limit's time period, and that extrinsic evidence showed it was intended to apply on an annual, rather than hourly, basis.

Despite CAISO's claims to the contrary, Br. at 22-24, the Commission's interpretation of § 11.2.9.1 – that, under its plain language, the limit applied on an hourly basis – was reasonable. March 2001 Order at 61,934, JA 94.[15] The limit

[15] As FERC determined that the plain language of § 11.2.9.1 was not ambiguous, CAISO's assertion that "[c]ustomary usage and the purpose of the measurement are relevant to resolving the ambiguity," Br. at 23, is inapposite. *Ameren Services Co. v. FERC*, 330 F.3d 494, 498 n.7 (D.C. Cir. 2003) (FERC may consider extrinsic evidence in interpreting language only if the language is ambiguous).

was "stated using a 'per megawatt-**hour**' unit," and did not include language refuting that it applied on an hourly basis or indicating that it applied on an annual basis. *Id.* (emphasis added). Under these circumstances, reading the word "annual" into § 11.2.9.1 would constitute an inappropriate retroactive substantive change to that section. *Id.*

> Regardless of what the ISO intended the tariff language to be, the filed rate doctrine mandates that the ISO charge its customers the actual rate specified in its tariff. Courts have strictly construed that doctrine. "Deviation from it is not permitted upon any pretext . . . . Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed." Thus, the ISO's alleged administrative error is not an excuse for limiting the neutrality adjustment charge on an annual as opposed to on an hourly basis . . . .

May 2001 Order at 61,687 (footnote containing citations omitted), JA 126.

CAISO contends that the Commission ignored its assertion that "the megawatt-per-hour measurement is 'used in a wide range of calculations to reach daily, monthly, and annual quantifications of all sorts of electricity transactions.'" Br. at 20-21. That contention does not aid CAISO. Just as here, if another provision's rate were stated using a "per megawatt-**hour**" unit, and the provision did not include language refuting that it applied on an hourly basis or indicating that it applied on some other basis, the provision reasonably would apply on an hourly basis.

In addition, FERC did not ignore CAISO's claims regarding the purpose of the limit, as CAISO contends. Br. at 21. Rather, those claims were inapposite in

light of § 11.2.9.1's plain language. Moreover, CAISO's contention that, "in light of the regulatory and budgeting purposes of the 'per-MWh' neutrality charge limit, it was generally understood to apply on something other than an hourly basis," Br. at 23, is fatally undermined by the complaints themselves, which alleged that CAISO violated § 11.2.9.1's **hourly** limit.

CAISO also castigates the Commission for "ignor[ing]" that its Board intended to include the word "annual" in § 11.2.9.1. Br. at 21-22. As the Commission explained, however, the filed rate doctrine mandated that CAISO charge the rate specified in its Tariff, not the rate CAISO may have meant to specify. May 2001 Order at 61,687, JA 126.

CAISO did not raise in any of its petitions for rehearing (R. 45, JA 96-123, R. 51, JA 246-341, R. 131, JA 508-30) its appellate argument that "the fact that the tariff applies the limit to the 'total' neutrality charges is inconsistent with FERC's requirement that the charge must be broken into hourly segments for purposes of applying the limit," Br. at 22. Thus, there is no jurisdiction to consider this argument. Anyway, the argument lacks merit, as the word "total" could apply on an hourly basis just as readily as it could on an annual basis.

F. FERC Appropriately Determined That CAISO Violated FPA § 205 When It Increased Tariff § 11.2.9.1's Limit Without Filing Tariff Sheets And Seeking Prior Commission Approval

In response to SRP's complaint, the Commission found that CAISO violated FPA § 205 by increasing the neutrality adjustment charge limit to $0.35/MWh in September 2000 without filing tariff sheets and seeking Commission approval. March 2003 Order at P 47, JA 499; October 2003 Order at P 42, JA 578. "[T]he language in Section 11.2.9.1[16] sets forth the ISO's process for modifying the limit on neutrality adjustment charges, but does not eliminate the need for the ISO to seek Commission approval of any increase under FPA section 205 and to file tariff sheets reflecting the revised limit." *Id*.; *see also* March 2003 Order at P 47, JA 499 (§ 11.2.9.1 "does not eliminate the need for the ISO to seek Commission approval of its increase under FPA section 205 and to file tariff sheets reflecting the revised limit. The effect of the section is to explain the ISO's process for modifying the neutrality limit above and beyond the statutory filing requirement.").

CAISO's appellate challenge to this determination, Br. at 24-30, unlike its rehearing challenge below, R. 131 at 13-20, is based primarily on the contentions that, "[i]n accepting Sections 11.2.9 and 11.2.9.1 FERC was approving a 'rate rule' or a 'rate formula' (otherwise known as a 'formula rate')," Br. at 26, and "FERC made an unexplained and arbitrary departure from its previous practice of allowing

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16 The pertinent language of § 11.2.9.1 provides: "The total charges levied under Section 11.2.9 shall not exceed $0.095/MWh . . . unless: (a) the ISO Governing Board reviews the basis for the charges above that level and approves the collection of charges above that level for a defined period; and (b) the ISO provides at least seven days' advance notice to Scheduling Coordinators of the determination of the ISO Governing Board."

utilities to modify charges in accordance with FERC-approved 'rate formulas' or 'rate rules' without any further Tariff filing," Br. at 24 (capitalization in heading altered). The terms 'rate rule,' 'rate formula,' and 'formula rate' do not even appear in CAISO's rehearing request. Accordingly, there is no jurisdiction to address CAISO's arguments based on those contentions.

Tariff § 11.2.9.1 does not, in any event, set forth a formula rate. "The Commission's acceptance of formula rates is premised on the rate design's 'fixed predictable nature,' which both allows a utility to recover costs that may fluctuate over time and prevents a utility from utilizing excessive discretion in determining the ultimate amounts charged to customers." *Public Utilities Commission of the State of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001)(internal citation omitted) (quoting *Ocean State Power*, 69 FERC ¶ 61,146 at 61,552 (1994)). Tariff § 11.2.9.1 does not restrict the level to which CAISO can increase the limit in any way, making it wholly unpredictable. Without an FPA § 205 filing and FERC review, nothing would prevent CAISO from "utilizing excessive discretion in determining the ultimate amounts charged to [its] customers." As § 11.2.9.1 is not a formula rate, it is understandable that FERC did not find that modifications could be made to it without a further tariff filing.

Finally, there is no merit to CAISO's claim that the Commission "abruptly changed its position concerning the procedure CAISO must follow in order to raise

the limit pursuant to Section 11.2.9.1" by concluding in the March 2003 Order that § 11.2.9.1 does not eliminate CAISO's need to comply with FPA § 205. Br. at 29; *see also* Br. at 28-30.[17] FERC had not been informed that CAISO planned to, or had, increased the § 11.2.9.1 limit without making an FPA § 205 filing until SRP filed its complaint in June 2001. October 2003 Order at P 42, JA 578. *Id.* Thus, the March 2003 Order did not change FERC's position regarding the propriety of CAISO increasing the § 11.2.9.1 limit without making an FPA § 205 filing, but addressed it for the first time.

[17] Moreover, there is jurisdiction to address this claim only to the extent it is not based on the contention that § 11.2.9.1 is a formula rate.

CONCLUSION

For the foregoing reasons, IDACORP's petition should be denied, and CAISO's petitions should be dismissed for lack of jurisdiction, or, alternatively, denied.

Respectfully submitted,

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