No. 17-

IN THE

Supreme Court of the United States

PACIFIC GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND SAN DIEGO GAS & ELECTRIC COMPANY,

Petitioners,

v.

UNITED STATES, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the late 1990s, the State of California restructured its energy markets so that wholesale electricity sold in the State would flow through two central market exchanges, akin to stock or commodities exchanges, that facilitated sales between buyers (including Petitioners) and sellers (including two federal power marketing agencies). All market participants, including the two federal agencies, signed contracts agreeing to abide by the Federal Energy Regulatory Commission ("FERC") tariffs governing the exchanges. During the 2000–2001 California energy crisis, sellers in these exchanges, including two federal agencies, sold electricity at prices grossly inflated by market manipulation. FERC found that the market prices were not just and reasonable and implemented a market-wide correction to the prices, which the Ninth Circuit upheld. Petitioners sued the two federal agencies to recover the tens of millions of dollars in overcharges those agencies received above the corrected, lawful levels established by FERC. The lower courts held that Petitioners lacked standing, concluding that Petitioners were not in privity of contract with the federal agencies because the sales occurred through centralized energy exchanges.

The questions presented are:

1. Whether sales of energy through centralized market exchanges form direct contractual privity between buyers of that energy and the federal agencies selling it, such that the Court of Federal Claims has jurisdiction over a suit to recover overcharges from the federal agencies; and

2. Whether Petitioners were in privity with the federal power marketing agencies for those

sales because the energy exchanges acted as the parties' agents in facilitating their transactions.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are as follows:

Petitioners are Pacific Gas & Electric Co., Southern California Edison Co., and San Diego Gas & Electric Co.

Respondents who were plaintiffs-appellants below are the People of the State of California ex rel. Attorney General Xavier Becerra, and California Department of Water Resources, by and through its California Energy Resources Scheduling Division

Respondent is the United States.

Pacific Gas and Electric Corporation has a 10% or greater ownership interest in Pacific Gas and Electric Company ("PG&E"). Pacific Gas and Electric Corporation and a subsidiary hold 100% of the issued and outstanding shares of PG&E common stock. Together they own approximately 95% of the total outstanding, voting stock of PG&E. Holders of PG&E's preferred stock hold approximately 5% of PG&E's total outstanding voting stock.

Southern California Edison Company ("Edison") is an investor-owned public utility primarily engaged in the business of purchasing, generating, transmitting, distributing, and selling electric energy at wholesale and retail in the State of California. Edison has issued equity and debt securities to the public and its preferred and preference stock is held by public investors. Edison is a subsidiary of Edison International, a California corporation and holding company that owns all of the common stock of Edison. Edison International has issued equity and debt securities to the public.

The parent corporation of San Diego Gas & Electric Company, Enova Corporation, owns 100% of the stock of San Diego Gas & Electric Company. Sempra Energy, a publicly traded company, owns 100% of the stock of Enova Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit's opinion is reported at 838 F.3d 1341 (2016) and reproduced at Pet. App. 1a–47a. The opinions of the Court of Federal Claims ("CFC") are reported at 105 Fed. Cl. 420 (2012); 110 Fed. Cl. 135 (2013); 110 Fed. Cl. 143 (2013); 114 Fed. Cl. 146 (2013); 121 Fed. Cl. 281 (2015); and 122 Fed. Cl. 315 (2015), and reproduced at Pet. App. 48a–181a.

JURISDICTION

The Federal Circuit's decision issued on October 3, 2016. The court of appeals denied Petitioners' timely rehearing petition on February 6, 2017. Pet. App. 182a–183a. On May 2, 2017, the Chief Justice extended the time for filing this petition to July 6, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Tucker Act provides, as relevant:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

The Contract Disputes Act provides, as relevant, that,

> in lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

41 U.S.C. § 7104(b)(1). This Act "applies to any express or implied contract … made by an executive agency for":

> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair, or maintenance of real property; or
>
> (4) the disposal of personal property.

Id. § 7102(a).

INTRODUCTION

During the California energy crisis of 2000-2001, two federal power marketing agencies ("Agencies") overcharged Petitioners for sales of electricity by tens of millions of dollars. The Federal Energy Regulatory Commission ("FERC") found that the price levels for all electric sales through the exchanges, including those sales by the Agencies, were unjust and unreasonable, and imposed new corrected prices. However, the government seeks to prevent Petitioners from recovering refunds for the Agencies' overcharges.

Because the Ninth Circuit previously had held that FERC lacks jurisdiction to order the government to directly pay refunds, *Bonneville Power Admin.* v. *FERC*, 422 F.3d 908, 926 (9th Cir. 2005), Petitioners filed a complaint in the CFC. The government argued that the CFC lacks jurisdiction over Petitioners' suit to recover those overcharges because Petitioners were not in privity of contract with the Agencies. The government's argument was accepted by a divided panel of the court of appeals. The majority reasoned that there was no privity because the energy sales at issue took place through a pair of centralized exchanges that acted as clearinghouses to facilitate trades among buyers and sellers, much like stock or commodities exchanges. This holding conflicts with long-standing precedent from this Court and other courts and warrants this Court's review.

As the dissent below recognized, the majority's decision on privity "is not the law of contracts." Pet. App. 42a–43a. It is undisputed that each individual market participant signed a contract with each energy exchange, thus creating privity with the exchanges. But it is also undisputed that every one of those individual contracts explicitly "incorporated herein and made a part thereof" the FERC-approved tariffs regulating the exchanges—which in turn set forth various obligations between and among the market participants. Thus, as the dissent explained, when the Agencies voluntarily signed their agreements with the exchanges, they entered into multi-lateral contracts with the other market participants—including Petitioners. *Id.* at 43a–44a. And those contracts include the obligation to refund amounts that FERC has determined to be unlawfully charged.

The majority's rejection of privity between Petitioners and the Agencies conflicts directly with *Alliant Energy* v. *Nebraska Public Power District*, 347 F.3d 1046 (8th Cir. 2003), which, as the government previously conceded, involves directly analogous circumstances. There, the Eighth Circuit upheld precisely the kind of breach-of-contract claims the majority below rejected: Direct claims for refunds of overcharges based on violations of contracts that incorporated FERC-approved tariffs. See *id.* at 1048–51.

The decision below further conflicts with decisions of two circuits and numerous state appellate courts holding that "[t]he constitution and rules of a stock exchange"—an exchange which is materially indistinguishable from the energy exchanges here—"constitute a contract between all members of the exchange with each other." *E.g.*, *Coenen* v. *R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir. 1972). Under that rule, the tariffs governing the exchanges here constitute a contract among the participants. But the panel majority refused to apply this rule, creating a split of authority on what was until now a settled principle of law. Indeed, the majority's decision conflicts with this Court's recognition long ago that privity of contract exists between purchaser and seller according to the rules of an exchange. *Clews* v. *Jamieson*, 182 U.S. 461, 488 (1901).

The decision below will have potentially dire and disruptive consequences if left unreviewed. Central energy exchanges like those at issue here serve a large and increasing proportion of the Nation's electricity buyers, currently serving buyers in approximately 42 States. Governmental electricity sellers use those exchanges to market power, but those governmental sellers lie beyond FERC's remedial authority to mandate refunds. Contractual remedies are thus the only

possible avenue for market participants to obtain relief from those governmental sellers. If participants cannot have confidence that they will have *some* remedy against overcharging or defaulting sellers, the proper functioning of the now ubiquitous centralized energy markets like these will be severely impaired. And the brunt of such shortfalls will ultimately fall on ratepayers, as they have on the People of California in this case. This Court's review is therefore needed to ensure the proper functioning of the Nation's energy supply system.

STATEMENT OF THE CASE

A. The California Energy Market

Petitioners are three California investor-owned utilities: Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company. These utilities purchase, transmit, distribute, and sell electricity to end-use electricity customers in California. Historically, these utilities generated their own electricity to sell to their customers and, to the extent they needed more power, bought it from suppliers via bilateral contracts. Those suppliers included the two Agencies in this case—the Bonneville Power Administration ("BPA") and the Western Area Power Administration ("WAPA"), represented here by the United States. See Pet. App. 142a–143a.

This changed when California restructured its energy markets in the 1990s. See Pet. App. 4a–6a, 143a. The goal of this restructuring was to encourage more competition in the energy markets, *CPUC* v. *FERC*, 462 F.3d 1027, 1037 (9th Cir. 2006), which was effected largely through the creation of two new non-profit energy markets, the California Power Exchange Corporation (the "Power Exchange" or "PX") and the California Independent System Operator Corporation (the

"ISO") (together, the "Exchanges"). Pet. App. 4a–5a. The investor-owned utilities were required by law to sell many of their power plants to third parties. They were further required to sell all the power they generated from their remaining plants through the Power Exchange and, in turn, to buy through the Power Exchange the far larger amount of power they needed to serve their customers. "[T]he structure of deregulation was that it was a mandatory must-buy, must-sell from this Power Exchange market." Joint Appendix at 2009 ("CAJA"), *PG&E* v. *United States*, No. 15-5082 (Fed. Cir. filed Apr. 14, 2016); Pet. App. 143a. To the extent that the needs of investor-owned utilities were not met through the Power Exchange, they were required to buy power through the ISO market to satisfy the balance. See *CPUC*, 462 F.3d at 1037–38; *Amici Curiae* California Power Exchange Corp. & California Independent System Operator's Brief in Support of Combined Petition For Rehearing 5 ("Exchanges' *Amicus* Br.").

The Power Exchange therefore functioned as "a centralized clearinghouse that would facilitate transactions between buyers and sellers" of energy. CAJA 2026; see Pet. App. 6a–7a, 144a. Its trading parties, referred to as "market participants," would purchase energy via the Power Exchange's auctions for wholesale electric energy. The Power Exchange provided information to market participants, received all bids and offers in its auction markets, and managed the credit of the participants. See Pet. App. 5a–6a. All power sold in each auction interval received the same "market clearing price," regardless of what prices the sellers had offered or the buyers had bid before the auction interval closed. Although the Power Exchange managed the auctions that set the energy price, it served only as a facilitator. The market participants themselves—including Petitioners and the Agencies—were

responsible for paying and receiving the amounts owed to each other as calculated by the Power Exchange. CAJA 2313, 2315–16. In short, the Power Exchange market functioned like a stock or commodities exchange. CAJA 2257.

The ISO operated the transmission grid, monitored the balance of electricity generation and consumption on the grid, maintained nondiscriminatory access to the grid, and ran a real-time spot market for electricity. Pet. App. 5a, 145a. The purpose of the ISO's spot market was to balance out any last-minute disparities between electric consumption and generation, because any positive or negative imbalance could lead to voltage fluctuations that might impair the grid. *Id.* at 5a. Power transactions in the ISO's spot market were also bought and sold at a single market clearing price, paid by all buyers and received by all sellers. The trading parties in the ISO market were known as "scheduling coordinators."[1] CAJA 2053. Again, the market participants were responsible for paying or receiving the amounts owed to each other as calculated by the ISO. CAJA 2255–2257.

The Power Exchange and ISO were each governed by a FERC tariff, which set the rules by which each market and its participants would operate, including the rates that would be charged. The tariffs expressly preserved the parties' rights under section 206 of the Federal Power Act to ask FERC to investigate market prices, in industry-standard language known as a *Memphis* Clause, and, if FERC found prices to be unjust and unreasonable, correct them, see CAJA 470–471, 1040–1041; see 16 U.S.C. § 824e; *CPUC*, 462 F.3d at 1038.

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[1] This petition refers to the participants in both Exchanges as "market participants," except where a distinction is necessary.

To trade in the Power Exchange or ISO, each market participant was required to execute a participation agreement or scheduling coordinator agreement, respectively. Because they wanted access to the California energy market, the Agencies both executed such agreements. Each of these agreements, including those executed by the Agencies, explicitly incorporated the respective tariffs into the agreement itself, providing that the relevant tariff was "incorporated herein and made a part hereof." *E.g.*, CAJA 421, 426. Thus, the FERC-approved tariffs "were incorporated by reference, in their entirety, into" the parties' contracts. Pet. App. 146a.

The tariffs reflect, and the operations of the Power Exchange and ISO confirm, that the Exchanges themselves were *not* counterparties to any energy transactions. Both tariffs said so explicitly, describing the Exchanges not as participants but as agents only: The Power Exchange "will not be, and shall not be deemed to be, a counterparty to any trade transacted through the PX Markets"; instead, "the PX acts as an Agent for the PX Participants and its inclusion in the Payment Flow does not infer [*sic*] that it is a principal in a financial transaction." CAJA 457, 1846. Likewise, "the ISO will not act as principal but as agent for and on behalf of the relevant" market participants. CAJA 753.

Consequently, neither the Power Exchange nor the ISO had any economic interest in any energy transaction; both generated revenue solely from fixed transaction fees. CAJA 2315–2316, 2318–2319, 3026, 3028. Neither Exchange ever took title to any energy in any trade, CAJA 2034, 2049, 2059, 2212–2213, 3026, bought or sold energy, CAJA 2318–2319, 2322–2323, 3024, 3034, or had any direct financial interest at stake if a market participant could not pay for the energy it had purchased, CAJA 2332–2333; see Pet. App.

43a. In fact, given their lack of revenues or assets, neither the Power Exchange nor the ISO would even have qualified as a creditworthy counterparty in these markets. CAJA 2277.

Rather, "[t]he counterparties in the PX market were the PX participants, and the counterparties in the ISO markets were the scheduling coordinators"—that is, the counterparties were the buyers and sellers. CAJA 2053. Consistent with this structure, both tariffs explicitly contemplated legal actions directly between market participants. The ISO tariff required participants to whom amounts were owed to give the ISO notice "before instituting any action or proceedings in any court against an ISO Debtor to enforce payments due to it," and stated that the ISO would provide a certificate that can be used "in any legal proceeding[]" to establish the amount owed. CAJA 1016–1017. Likewise, the Power Exchange tariff required the Power Exchange to identify a defaulting participant to all other affected Power Exchange participants. CAJA 504–505. FERC adopted these parallel terms "so that non-defaulting Participants are able to seek recovery from the defaulting party." *Cal. Power Exch. Corp.*, 92 FERC ¶ 61,096, at 61,379 (2000).

B. The Energy Crisis And Ensuing FERC Litigation

Petitioners' obligation to buy and sell energy exclusively through the Exchanges placed them at the sellers' mercy during the California energy crisis of 2000–2001. And "[s]ellers quickly learned that the California spot markets could be manipulated by withholding power … to create scarcity and then demanding extremely high prices when scarcity was probable." *CPUC*, 462 F.3d at 1039. Through this sort of market manipulation, sellers—including the Agencies—reaped enormous windfall profits by selling energy at

prices inflated exponentially higher than historic levels and far higher than would have been possible without manipulation. The sellers' strategy was best summarized in an internal BPA memorandum instructing its traders who sold power in the Exchanges to "wait till they fall in the tar pit then whomp 'em." CAJA 441.

After months of unprecedented high power prices, Petitioners exercised their rights under the "*Memphis* clauses" of the governing contracts and tariffs by filing a complaint with FERC. Pet. App. 7a. FERC investigated the California markets and found that the electricity rates charged by sellers—including the Agencies—were unjust and unreasonable. *San Diego Gas & Elec. Co.*, 93 FERC ¶ 61,121, at 61,349–50 (2000). In July 2001, FERC corrected the prices, triggering a refund obligation owed by sellers to Petitioners for all sales of electricity in the Exchanges after the statutorily authorized "refund effective date," which FERC had set at October 2, 2000. Pet. App. 150a; see 16 U.S.C. § 824e(b); *San Diego Gas & Elec. Co.*, 96 FERC ¶ 61,120, at 61,500 (2001); *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172, at 61,608 (2000).

The Ninth Circuit affirmed FERC's price correction. *CPUC*, 462 F.3d at 1035. The Ninth Circuit also held, however, that FERC does not have the statutory authority to directly order governmental entities like the Agencies to pay refunds. *Bonneville Power*, 422 F.3d at 910–11. The court observed that, in light of this holding, Petitioners' remedy for the Agencies' overcharges "may rest in a contract claim" against the Agencies. *Id.* at 925; see also *City of Redding* v. *FERC*, 693 F.3d 828, 841 (9th Cir. 2012).

In response, FERC struck its prior orders insofar as they directed the Agencies and other governmental entities to pay refunds, but left in place its corrected prices for all sales in the Exchanges, including the

Agencies' sales. See generally *San Diego Gas & Elec. Co.*, 127 FERC ¶ 61,191 (2009); *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,188 (2007); *San Diego Gas & Elec. Co.*, 121 FERC ¶ 61,067 (2007). The Agencies challenged those orders, but the Ninth Circuit rejected their arguments and "upheld FERC's ability to find the rates charged by all sellers, including the government agencies, to be unjust and unreasonable." Pet. App. 8a; see *City of Redding*, 693 F.3d at 831, 841. Despite FERC's valid exercise of power to correct *all* of the prices charged in those markets—including the Agencies' prices—the Agencies refused to refund their overcharges, even as many other sellers settled with Petitioners, and even as the Agencies themselves (which had also bought power in the Exchanges) pursued refunds from other sellers. See Pet. App. 39a–42a (Newman, J., dissenting); *Amicus* Brief of California Public Utilities Commission & National Association of Regulatory Utility Commissioners 2 ("CPUC & NARUC *Amicus* Br.").

C. Proceedings Below

1. Petitioners brought suit in the CFC in March 2007 to collect the overcharges reaped by the Agencies in excess of the FERC-corrected, lawful price levels. The CFC bifurcated the case into liability and damages phases, and conducted a three-week trial on liability commencing in July 2010.

The CFC found for Petitioners. After careful examination of the extensive evidence, the court concluded that it had jurisdiction. The Tucker Act and Contract Disputes Act permit actions against the United States or its agencies for, and base jurisdiction on, breach of express or implied contracts. 28 U.S.C. § 1491(a)(1); 41 U.S.C. § 7104(b)(1). The court held that "the facts at trial showed that the Agencies contracted with and

owe contract obligations to" Petitioners: "[T]he evidence was clear that in order for the Agencies to have access to the PX and ISO markets, the Agencies were required to sign written contracts that incorporated the[ ] Tariffs, as well as agreeing to abide by the Tariffs' terms and subsequent changes to those Tariffs." Pet. App. 162a. "Since the PX and ISO were pass-through entities or clearinghouses, the contractual relationships of offer, acceptance, and mutual intent ran between the Agencies and" Petitioners. *Id.* at 163a.

The court further held that FERC had properly corrected the tariffed prices after the market participants initiated the investigation and that the Agencies were contractually obliged to refund the difference. Pet. App. 165a–172a. The CFC accordingly scheduled a trial on damages for June 2013.

Before the damages phase could begin, however, the judge who conducted the liability trial retired, and the case was reassigned to a different judge. The successor judge *sua sponte* vacated her predecessor's opinions, including his post-trial opinion that was based on the testimony he observed first-hand. Pet. App. 114a–119a. Then, following additional briefing, the new judge found that Petitioners were not in contractual privity with the Agencies and thus that the CFC lacked jurisdiction over the contract claims. The judge found no direct contractual privity because the Exchanges "engaged in trading, price-setting, and adjusting rates," and thus were not merely "pass-through[s]." See *id.* at 83a–85a. She also rejected Petitioners' alternative arguments that the parties were in privity via the Exchanges, which acted as the parties' agents in facilitating energy sales, or that Petitioners were at least third-party beneficiaries of the Agencies' contracts with the Exchanges. In her view, "the Govern-

ment intended [the Exchanges] to be legal buffers between [the Agencies] and" Petitioners. *Id.* at 90a–91a. Accordingly, she dismissed the case.

2. A divided panel of the Federal Circuit affirmed, holding that Petitioners lacked standing to bring their contract claims in the CFC. As to direct contractual privity, the panel majority agreed with the government "that the only contracts for the purchase and sale of electricity here were between each market participant and the exchanges." Pet. App. 13a. The majority viewed the parties' agreements with the Exchanges as akin to "typical middleman contracts" under the Uniform Commercial Code, under which "courts will treat as a buyer [and seller] a middleman who contracts for the sale of goods to be delivered to a third person," even where title passes directly to the third person. *Id.* at 14a–15a (alteration in original) (quoting 2 *Lawrence's Anderson on the Uniform Commercial Code*, § 2-103:18 (3d ed. 2012)). The majority also emphasized tariff provisions providing that, in the ordinary course of trading, payment would flow through the Exchanges rather than directly among participants. *Id.* at 16a–17a.

The majority acknowledged that this vision of the parties' agreements "conflict[ed]" with the tariff provisions providing expressly that the Exchanges "will not be, and shall not be deemed to be," counterparties. Pet. App. 17a; *supra* at 8. However, it declined to give effect to those provisions because it deemed them less "important" than the provisions it read to designate the Exchanges as middlemen. Pet. App. 17a–18a. Likewise, the majority acknowledged tariff provisions that "contemplate that suits may be brought by one participant against another," but again declared that these provisions "hardly suggest that suits may not be brought by participants against the exchanges or that there are no purchase and sale contracts between the

market participants and the exchanges." *Id.* at a18a–19a; see *id.* at 21a–22a. Finally, the majority attempted to distinguish the long line of state and federal cases holding that "[t]he constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other," *e.g.*, *Coenen*, 453 F.2d at 1211, expressing its view that the contractual privity in such cases was supplied by "separate contract[s]" rather than the exchanges' rules, Pet. App. 24a. And the majority distinguished *Alliant Energy*, 347 F.3d 1046, which upheld contractual claims between participants in an energy exchange market just like the Exchanges, on the same basis. See Pet. App. 25a.

The majority also rejected Petitioners' alternative argument that, even if there is no direct contractual privity, there is privity between buyer and seller via the Exchanges because the Exchanges acted as the parties' agents in facilitating their trades with each other. The majority acknowledged that the tariffs expressly designated the Exchanges as agents rather than principals in the energy trades, see *supra* at 8—indeed, the government actually conceded that "the ISO … was an agent of the" market participants, Pet. App. 31a n.11—but rejected this designation as not controlling. *Id.* at 29a–30a. Rather, the majority found no agency relationship because the participants lacked the ability to control the Exchanges' actions throughout the duration of the relationship. *Id.* at 30a–33a.[2]

Judge Newman dissented. She explained that the majority's holding "is not the law of contracts." Pet. App. 42a–43a. As she aptly summarized:

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[2] The majority also rejected Petitioners' argument that they were at least third-party beneficiaries of the Agencies' contracts with the Exchanges. Pet. App. 33a–36a.

> The United States does not dispute that it overcharged the plaintiffs for electric power, and that it is required to repay the overcharge in accordance with the FERC rate schedule and the governing federal statutes. Nonetheless, the United States' position is that it will not comply with this law, for nobody can sue it to enforce the law.

Id. at 38a. That position is incorrect, as she explained: "Both [Agencies] had agreed, as a condition of participating in the California power market … to accept [the] FERC-regulated tariffs" that were incorporated into the parties' contracts, and "in choosing to do so, they agreed … to be held to the rules and price-setting mechanisms of the FERC-regulated tariffs." *Id.* at 40a–43a. That the parties' trades were conducted through the Exchanges did not defeat privity: "The exchange was not a principal in these transactions, it had explicitly disclaimed any counterparty status, and the electric power was not the property of the exchange. The exchange simply acted as a broker and passed the sales proceeds to the sellers who provided the power." *Id.* at 43a.

In short, as Judge Newman stated: "The *Memphis* clause" in the tariffs, Pet. App. 43a—which confirms FERC's price correction authority, *supra* at 7—

> binds the price charged to FERC determinations; the tariff binds the parties to use the [Exchanges] for sale/purchase of energy; the parties, conducting sales through the [Exchanges] to purchase/supply energy amongst themselves, are bound to each other through their market transactions, the rules of the tariff, and the FERC regulations.

Pet. App. 43a. Judge Newman would therefore have followed the Eighth Circuit's decision in *Alliant Energy*, which recognized contract claims between buyers and sellers in a very similar centralized electric market and affirmed FERC's authority to correct prices pursuant to such contracts, and recognized "this contractual obligation between the federal power sellers and the state purchasers." *Id.* at 43a–44a; see 347 F.3d at 1050.[3]

3. Petitioners timely petitioned for rehearing. They were supported in that effort by the Exchanges themselves, which filed an *amicus* brief explaining that the "panel decision contradicts critical provisions of [the Exchanges'] FERC-approved tariffs," and that "privity between [Petitioners] and other participants was an express and necessary feature of the Exchanges." Exchanges' *Amicus* Br. 1, 3 (capitalization omitted).

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER APPELLATE COURTS AND DEPARTS FROM SETTLED LEGAL PRINCIPLES.

Both of the panel majority's key holdings—as to direct contractual privity and privity-via-agency—depart from settled law and badly misunderstand the structure of multi-party exchange markets. The Court should grant review to resolve the conflicts created by

[3] Alternatively, Judge Newman would have held that the government's conduct in this case amounted to an illegal exaction, also actionable under the Tucker Act: "When overcharges were made and required by the government, this may support a takings claim. And when the overcharges were designated by FERC as illegal and repayment was ordered, their exaction became illegal." *See* Pet. App. 44a–45a.

the decision below and correct the Federal Circuit's misapplication of federal common law.

A. The Conflicts Created By The Federal Circuit's Holding On Privity Warrant This Court's Review.

The panel majority's holding on privity of contract conflicts directly with the Eighth Circuit's decision in *Alliant Energy*. Moreover, its holding cannot be squared with the well-established rule that traders in a stock exchange are in contractual privity with each other, *e.g.*, *Coenen*, 453 F.2d at 1211, a rule that applies equally in these closely analogous exchange markets. And it contradicts the terms of the FERC-approved tariffs governing the Exchanges, as well as FERC's own understanding of those provisions.

1. As the dissent below recognized, see Pet. App. 43a–44a, the panel majority's holding conflicts with and cannot be distinguished from the Eighth Circuit's decision in *Alliant Energy*. As here, *Alliant Energy* involved breach of contract claims brought by electricity market participants—including WAPA, one of the two federal Agencies here—against sellers that charged rates FERC later deemed unlawful. As in this case, each market participant was bound by a contract that expressly incorporated a FERC-approved tariff. 347 F.3d at 1048–49. The Eighth Circuit held that the sellers had, and breached, a contractual obligation to pay refunds to the individual buyers whom they overcharged. See *id.* at 1050–51. Moreover, the court rejected the position (similar to the Agencies' argument below) that it could not order refunds because no express contractual provision required refunds, explaining that the sellers had (as here) "freely entered" into a contract that incorporated FERC's price correction authority. *Id.* at 1050; see Pet. App. 40a (Newman, J.,

dissenting) ("Both [Agencies] had agreed, as a condition of participating in the California power market … to accept FERC-regulated tariffs.").

There can be no serious question that *Alliant Energy* and this case confronted the same question, but reached opposite outcomes. In fact, the Agencies themselves previously told the Ninth Circuit, in challenging the same FERC orders underlying this case, see *supra* at 11, that "[t]he circumstances presented in" the regulatory proceedings underlying *Alliant Energy* "are *directly analogous* to those presented here." Brief of Public Entity Petitioners at 41, *Bonneville Power Admin.* v. *FERC*, No. 02-70262 (9th Cir. Dec. 23, 2004) (emphasis added). Put simply, the decision below conflicts directly with the Eighth Circuit's holding in *Alliant Energy*, which is reason enough for this Court to grant certiorari.

The panel majority acknowledged that *Alliant Energy* found contractual liability where the majority did not, but suggested that the case was distinguishable because the Eighth Circuit focused on whether the contract at issue provided a right of recovery, not whether privity existed. Pet. App. 25a. In the majority's' view, "*Alliant Energy* did not find privity in the absence of an explicit contract." *Id.* But the lack of particular words in the opinion does not change *Alliant Energy*'s holding. The question considered in *Alliant Energy* was the same as it was below: whether sellers in an exchange market owed direct contractual obligations to purchasers *because their contracts incorporated the FERC tariffs*. The Eighth Circuit held unequivocally that the sellers were subject to suit by buyers for breaching such obligations—which necessarily means the parties were in contractual privity. See 347 F.3d at 1050–51. The majority's decision conflicts di-

rectly with *Alliant Energy* and the well-settled contract principles on which it is based. See *infra* at 19–20. This split of authority on the rights of energy market participants to seek contractual remedies against their fellow participants threatens the stability of those markets. *Infra* Part II.

2. The decision below also conflicts with a long line of cases from this Court, other circuits, and state appellate courts addressing the contractual relationship of participants in stock or commodities exchanges, which are closely analogous to the Exchanges here. CAJA 2257. Other circuits and state appellate courts uniformly hold that "[t]he constitution and rules of a stock exchange *constitute a contract between all members of the exchange with each other*." *Muh* v. *Newberger, Loeb & Co.*, 540 F.2d 970, 973 (9th Cir. 1976) (emphasis added); *accord Coenen*, 453 F.2d at 1211; *McMahon* v. *Chi. Mercantile Exch.*, 582 N.E.2d 1313, 1318 (Ill. App. 1991); *AG Edwards & Sons, Inc.* v. *Clark*, 558 So. 2d 358, 361 (Ala. 1990); *Merrill Lynch, Pierce, Fenner* v. *McCollum*, 666 S.W.2d 604, 607 (Tex. App. 1984); *Waddell* v. *Shriber*, 348 A.2d 96, 100 (Pa. 1975); *Fayette Tobacco Warehouse Co.* v. *Lexington Tobacco Bd. of Trade*, 299 S.W.2d 640, 643 (Ky. 1956); *Franklin* v. *Dick*, 28 N.Y.S.2d 426, 428 (N.Y. App. Div.), *aff'd*, 39 N.E.2d 282 (N.Y. 1941); 73 Am. Jur. 2d *Stock and Commodity Exchanges* § 9 (2017); see also *Brown* v. *Gilligan, Will & Co.*, 287 F. Supp. 766, 769 (S.D.N.Y. 1968) (collecting authorities). Thus, for example, one member of a stock or commodities exchange can compel another member to arbitrate their dispute under an arbitration clause in the exchange constitution, even when there is no bilaterally executed contract between the two members. *Muh*, 540 F.2d at 972–73; see also *Merrill Lynch*, 666 S.W.2d at 607–08.

Applying the same principle here plainly leads to the opposite result from that reached by the panel majority below: the "constitution and rules of" the Exchanges—*i.e.*, the FERC-approved tariffs that were expressly incorporated into the parties' participation agreements—"constitute[d] a contract between all [participants] with each other and with the [E]xchange[s]" themselves. Thus, just as stock market participants can bring arbitrations against each other pursuant to the contracts governing their dealings, Petitioners have the right to bring contract actions against the Agencies pursuant to the participation and scheduling coordinator agreements and the incorporated tariffs. In any other circuit, that would have been the outcome.

Moreover, this Court long ago recognized that privity of contract exists between the purchaser and seller of stock bought and sold on an exchange, according to that exchange's rules. *Clews*, 182 U.S. at 488 ("there was sufficient privity of contract between [buyers and sellers over Chicago stock exchange] to sustain this suit."). The conflicts created by the decision below warrant review by this Court.

3. The decision below also conflicts with FERC's rulings on this exact issue. When the Exchanges were first established and their tariffs first adopted, some participants argued that the Exchanges alone should pursue recovery for non-payment. *Pac. Gas & Elec.*, 81 FERC ¶ 61,122, at 61,507 (1997). FERC rejected that approach, holding: "we agree with the ISO that the ISO's duties should not be expanded to include the collection of bad debt of Scheduling Coordinators …. [I]t should be the responsibility of Scheduling Coordinators to recover amounts that they are owed." *Id.* at 61,508–09. The Agencies were parties to those proceedings but did not seek rehearing or appeal. Their

challenge now to the right of market participants to sue one another for obligations under the tariffs conflicts with that decision and permits the Agencies to avoid FERC's ruling. Cf. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (prohibiting collateral attacks on FERC orders, which instead may be challenged only through timely rehearing and appeal of the relevant order in the proceeding where the order was issued).

4. Rather than following *Alliant Energy*, the stock exchange cases, or FERC's directly relevant rulings, the majority below focused myopically on whether the market participants were in privity *with the Exchanges*. *E.g.*, Pet. App. 14a. But privity with the Exchanges is not the issue. The issue is whether the market participants were *also* in privity with *each other*. In that respect, the majority wholly failed to consider the effect of the individual participation agreements' express incorporation of the governing tariffs. The point is not, as the majority said, whether each participant merely agreed "to abide by the tariff," *id.* at 19a–20a, although they certainly did; it is that the tariffs were actually "a part [ ]of" the parties' contracts, and thus the contracts themselves explicitly set forth the participants' obligations to each other. CAJA 421, 426; see Pet. App. 146a (the "Tariffs were incorporated by reference, in their entirety, into the PX and SC Agreements"); Exchanges' *Amicus* Br. 4 ("While the Cal-PX Participation Agreement is a relatively simple four-page agreement, through its incorporation of the Cal-PX tariff, it includes the entirety of the exchange operations and the contractual relationship of Cal-PX participants to one another.") (citations omitted). The result was a multilateral contract among all the participants.

Thus, the majority's reliance on the Uniform Commercial Code ("UCC") to determine whether there were "purchase and sale contracts between the market participants and the exchanges," Pet. App. 19a, was misplaced. Even setting aside that the UCC "does not apply … to government contracts," *id.* at 13a, the cited provisions say nothing about multi-party exchange markets like these, *e.g.*, 2 *Lawrence's Anderson on the Uniform Commercial Code* § 2-103:18 (3d. ed. 2016). Nor do they say anything about contractual privity. See 3 *id.* § 2-314:343 (the UCC "does not define privity of contract"). In any event, privity with the Exchanges and privity between individual participants are not mutually exclusive, as the stock exchange cases reflect. *E.g.*, *Waddell*, 348 A.2d at 100 (an exchange participant "contracts to abide by the exchange's constitution and rules *not only with the exchange itself, but also with its members*" (emphasis added)). The majority erred, and created conflicts with the numerous cases described above, by concluding that Petitioners could be in privity with the exchanges, or with the sellers, but not with both.

Nor can the majority's opinion be squared with the reality of exchange markets like these. The purpose of an exchange market is to facilitate transactions among *participants*, pairing interested purchasers with available sellers and establishing a mechanism for the transaction between those parties. As the trial judge and the dissenting judge below recognized, such exchanges serve as mere "pass-through entities or clearinghouses," with no direct financial stake in any sale, Pet. App. 43a, 163a, and without ever taking title to any energy, *id.* at 18a. It is thus "illogical" to find that a purchaser is in privity *only* with the exchange, and not with the actual seller, *id.* at 163a, particularly since many exchanges in such markets—including the Exchanges here—lack the income or assets required to

serve as creditworthy counterparties for sales among participants, see *id.* at 43a; CAJA 2053, 2277.

The majority's opinion thus hinges on the premise that California's investor-owned utilities agreed to engage in tens or hundreds of millions of dollars' worth of transactions, with the intent that their only legal remedies against overcharging or defaulting sellers like the Agencies would be to file suit against the non-profit Exchanges—which cannot possibly satisfy a judgment in such amounts—and hope the Exchanges would turn around and seek to recover the funds from the defaulting party. See Pet. App. 28a. This notion that sophisticated businesses would agree to accept such a cumbersome remedial scheme is not only nonsensical, but also directly contrary to the plain language, and FERC's construction, of the tariffs.

The tariffs explicitly "contemplate that suits may be brought by one participant against another," Pet. App. 18a, by requiring the Exchanges to identify a defaulting participant to any affected party, CAJA 504–505, or to provide a certificate that can be used "in any legal proceeding" to establish the amount owed, CAJA 1016–1017; see *supra* at 9. FERC has explained that it adopted these terms in order to ensure "that non-defaulting Participants are able to seek recovery *from the defaulting party*." *Cal. Power Exch. Corp.*, 92 FERC ¶ 61,096, at 61,379 (emphasis added). That is precisely what Petitioners sought to do through this lawsuit. As the Exchanges explained below, "[t]he majority disregarded FERC's express determination pursuant to the Cal-PX and Cal-ISO tariffs that … the exchanges *are not counterparties* to the buyers' and sellers' trades"

and "participants may sue each other directly." Exchanges' *Amicus* Br. 9.[4]

The majority's response that "these provisions hardly suggest" that participants cannot sue *the Exchanges*, Pet. App. 18a–19a, again mistakes the issue. The question here is whether participants can sue *each other* directly. These provisions—as well as FERC's decisions—clearly confirm that privity exists. The majority's contrary holding cannot be squared with the cases discussed above, the language of FERC tariffs and its decisions, or well-settled contract law.

B. The Federal Circuit's Decision Also Creates Conflicts On Principles Of Agency-Based Privity.

The panel majority's rejection of Petitioners' alternative, agency-based privity argument likewise conflicts with decisions of this Court and long-standing principles of agency law.

This Court, as well as numerous other authorities, recognize that privity exists among parties, even with no direct contractual relationship between them, when they have designated a third party—*i.e.*, an agent—to

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[4] FERC's adoption and construction of these provisions in the years after the California energy crisis also belies the majority's belief that FERC itself concluded there were no contractual relationships among participants. *See* Pet. App. 27a. Although some FERC orders find that refunds would be calculated on a market-wide basis rather than bilaterally between each participant, those orders merely addressed how the Exchanges should calculate refund amounts during the post-crisis litigation process. They did not address the nature of the underlying contractual obligations. *See San Diego Gas & Elec. Co.*, 102 FERC ¶ 61,317, at 62,080 (2003). And FERC has since approved dozens of settlements between the buyers and individual sellers, confirming that bilateral obligations do exist. *See, e.g.*, *San Diego Gas & Elec. Co.*, 108 FERC ¶ 61,002, at 61,002–03 (2004).

coordinate a transaction on their behalf. *E.g.*, *Kern-Limerick* v. *Scurlock*, 347 U.S. 110, 119–21 (1954); *United States* v. *Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983); cf. Restatement (Third) of Agency § 3.14 cmt. c (2006). That is exactly the situation here. The Exchanges were established to facilitate and coordinate electricity sales among market participants. They operated on behalf of, and for the benefit of, the participants, under rules established by contract with the participants.

The Exchanges cannot be viewed as anything other than "agents" of the participants. Indeed, the tariffs explicitly designate the Exchanges as "agent[s]" of the participants, see CAJA 753, 1846, and the government conceded that at least one of the Exchanges "was an agent" for privity purposes. Gov't Br. 37; *id.* at 32 n.9; CAJA 243.

The panel majority refused to follow this precedent, the government's concession, and the express contractual language, holding instead that no agency relationship exists because the participants lacked the "right to give interim instructions" to the Exchanges. Pet. App. 31a. But the Federal Circuit's own rulings do not support such a requirement in this situation. Rather, that court has asked whether agency "was established by clear contractual consent" and whether "the contract stated that the government would be directly liable." *Johnson Controls*, 713 F.2d at 1551. Here, the contracts explicitly create an agency relationship and contemplate direct liability, see *supra* at 7–9, and they require the Exchanges to operate on the participants' behalf and at their direction—executing trades only upon a bid and only in accordance with rules adopted by the participants. No more is required to form an agency relationship, *e.g.*, *Kern-Limerick*, 347 U.S. at 119–21, or permit a lawsuit.

Because the panel majority's decision on agency-based privity departs from decisions of this Court, as well as other authorities, this Court's review is warranted.

C. This Court's Review Is Warranted To Ensure Uniformity In The Federal Common Law Of Government Contracts.

This Court's review is further warranted because the conflicts created by the Federal Circuit's decision involve the federal common law governing government contracts. This case involves "the 'obligations to and rights of the United States under its contracts,'" and therefore it is governed by "federal common law." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 519 (1988); see Pet. App. 13a, 14a, 30a–31a (applying Restatement principles and federal precedent dealing with "government contracts"); see also *Boyle*, 487 U.S. at 519 (Brennan, J., dissenting) ("The proposition that federal common law continues to govern the 'obligations to and rights of the United States under its contracts' is nearly as old as *Erie* itself."). Accordingly, this Court has a special supervisory responsibility because it has the last word in an area of law that calls for a uniform national rule. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 336–37 (1981) (explaining that federal common law is appropriate "where there is an overriding federal interest in the need for a uniform rule of decision."). There is no recourse to Congress or any other body to resolve the conflicts created by the Federal Circuit's decision or to correct the lower courts' misapplication of federal common law principles. The greater need for uniformity in this area further confirms the need for this Court's immediate intervention in this case.

II. THIS CASE MERITS REVIEW BECAUSE THE DECISION BELOW THREATENS THE STABILITY AND VIABILITY OF ENERGY AND OTHER EXCHANGE MARKETS ACROSS THE COUNTRY.

The Court should also grant the petition to avoid the potentially destabilizing consequences of the Federal Circuit's decision in this case. The panel majority's decision allows the government, acting as a market participant, to escape liability for undisputed overcharges that caused tens of millions of dollars in damages. If accepted, that would leave the Agencies—and any similarly situated seller in this or an equivalent exchange—immune from contractual liability to their counterparties. That result, in turn, risks the stability of these markets, as buyers and sellers alike will be unwilling to participate if, as the panel majority held, buyers have no remedies available for overcharges or other defaults. And for those buyers who are compelled by law to participate, as Petitioners were, they will have no choice but to pass any shortfalls on to their ratepayers.

As the California Public Utilities Commission and the National Association of Regulatory Utility Commissioners explained below, "Healthy market function requires certainty that all market participants will honor their contractual commitments to abide by FERC determinations regarding market prices." CPUC & NARUC *Amicus* Br. 12 (capitalization omitted). For many sellers, that certainty is provided by FERC, which can correct prices and order private sellers to pay refunds. But FERC's remedial authority to compel refunds does not extend to governmental bodies like the Agencies. See *Bonneville*, 422 F.3d at

910–11.[5] Consequently, the *only* remedy available against such sellers is contractual liability. Such liability is therefore "crucial to fairness and healthy market functioning, especially in single-price auctions where buyers have no ability to reject purchases from particular sellers." CPUC & NARUC *Amicus* Br. 3; see *U.S. Steel Prods. Co.* v. *Adams*, 275 U.S. 388, 391 (1928) ("By the general system of our law, for every invasion of right there is a remedy ….").

This problem cannot be avoided, as the panel majority believed, by suggesting Petitioners "could have sought recovery from the [E]xchanges." Pet. App. 28a. The Exchanges were not Petitioners' counterparties and have no stake in whether they are repaid. See CAJA 2212–2213, 2277. In fact, the Exchanges *successfully resisted* the government's attempt to join them as parties below, explaining that they "had no direct interest" in the case. *E.g.*, Conn Decl. ¶¶ 7–8, No. 07-157 (Dec. 3, 2008); see Mem. Op. 2–6, No. 07-157 (June 8, 2011) (finding "no identifiable, realistic interest" on the part of the Exchanges). That decision was not appealed, and has not otherwise been challenged. And, as noted, the Exchanges lack the assets to satisfy a judgment remotely approaching the amounts at issue here. See *supra* at 8.

Nor is this problem isolated to this case. "[G]overnmental power sellers play a major role in electricity markets today," participating extensively in FERC-

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[5] Legislation passed in 2005 (which is inapplicable here) granted FERC limited refund authority over certain other governmental agencies for sales that (1) are at rates established by a FERC-approved tariff and (2) *violate* the terms of the tariff or applicable FERC rules. 16 U.S.C. § 824e(e)(2). But "contract claims remain the only means to obtain refunds for overcharges on electricity sales by governmental agencies that could occur for numerous other reasons." *See* CPUC & NARUC *Amicus* Br. 10–11.

regulated electricity markets "nationwide and especially in the West." CPUC & NARUC *Amicus* Br. 9, 13. "In 2013, federal power agencies alone accounted for over six percent of the electricity generated in the United States, and other publicly owned utilities generated nearly ten percent of the nation's electricity." *Id.* at 13–14. What is more, one of the Exchanges at issue here, the ISO, is expanding its real-time markets throughout the Western part of the Nation, and now reaches power generation sources across seven States in addition to California. See *id.* at 14–15. Similar exchanges operate in approximately 42 States, and governmental power sellers participate in each of those exchanges.

Absent contractual remedies, the brunt of any overcharges and shortfalls involving such sellers will fall on ratepayers—that is, ordinary citizens. Contractual liability is therefore

> necessary to protect ratepayers from exposure to potential net market revenue shortfalls and ensure that the total market revenues 'pencil out' (such that total payments equal receipts). If governmental power agencies are not contractually obligated to pay refunds for sales above FERC-determined just and reasonable market clearing prices, yet they are entitled to collect refunds on their purchases at unjust and unreasonable prices, it results in a net payment shortage.

Id. at 12–13 (emphasis omitted).

In sum, participants in electricity market exchanges—or markets for other commodities with similar structures—must know they have recourse against a counterparty that charges too much, does not deliver, or refuses to pay. Thus, the stability and in-

deed the viability of these markets depend on participants' ability to sue directly when there is a breach—in part because (as here) the exchange lacks any direct interest in the dispute and typically lacks the funds to satisfy a judgment. Only this Court can protect those markets and the reasonable expectations of the market's participants.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT

2015-5082

PACIFIC GAS AND ELECTRIC COMPANY,
SOUTHERN CALIFORNIA EDISON COMPANY,
SAN DIEGO GAS & ELECTRIC COMPANY,
PEOPLE OF THE STATE OF CALIFORNIA EX REL. EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF WATER RESOURCES, BY AND THROUGH ITS CALIFORNIA ENERGY RESOURCES SCHEDULING DIVISION,

Plaintiffs-Appellants

v.

UNITED STATES,

Defendant-Appellee

October 3, 2016

Appeal from the United States Court of Federal Claims in Nos. 1:07-cv-00157-SGB, 1:07-cv-00167-SGB, 1:07-cv-00184-SGB, Judge Susan G. Braden

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OPINION

Before Newman, Dyk, and Wallach, *Circuit Judges*.

Dissenting opinion filed by Circuit Judge Newman.

Dyk, *Circuit Judge*.

Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the state of California (collectively, "appellants"), brought suit against the United States claiming that two federal government agencies selling electricity (the Western Area Power Administration and the Bonneville Power Administration) (collectively, "the government") overcharged appellants for electricity.

The United States Court of Federal Claims (the "Claims Court") dismissed their breach of contract action for lack of standing. Appellants appeal. We conclude that appellants lack privity of contract or any other relationship with the government that would confer standing. Because appellants lack standing, we affirm. This does not, however, suggest that appellants were without a remedy for the alleged overcharges against the parties with whom they are in contractual privity—two California electricity exchanges—or that the exchanges lacked a breach of contract remedy for overcharges against the government agencies that sold them electric power.

BACKGROUND

I

Under the Tucker Act, the Claims Court has jurisdiction over contract cases in which the government is a party. *See* 28 U.S.C. § 1491(a)(1); *Gonzales & Gonzales Bonds & Ins. Agency v. Dept. of Homeland Sec.*, 490 F.3d 940, 943 (Fed. Cir. 2007). Normally, a contract between the plaintiff and the United States is required to establish standing to sue the government on a contract claim. *S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005) ("A plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim.").

This case involves the purchase and sale of electricity in the California market. Appellants contend that they were overcharged for electricity during the period from October 2, 2000, to June 20, 2001 ("the 2000-2001 period"), and seek to recover the overcharges from the United States based on sales by two federal government agencies—the Western Area Power Administration ("WAPA") and the Bonneville Power Administration ("BPA"). Two exchanges were involved in these transactions—the California Power Exchange ("Cal-PX") and the California Independent System Operator ("Cal-ISO"). These exchanges were responsible for acquiring and distributing electricity between producers and consumers in California and setting prices for the electricity. The basic question is whether purchase and sale contracts existed between the exchanges, on the one hand, and the appellants and defendant government agencies, on the other, or whether the contracts were between the appellants and the government agencies—the consumers and producers of electric power. If the contracts were between the exchanges and market participants individually, appellants' remedy is against the exchanges. If the contracts were between the consumers and producers of electricity, appellants' remedy is against the government producers.

Appellants contend that a contract existed between two groups—one group consisting of all consumers of electricity (including appellants) and the other group consisting of all producers of electricity (including the government agencies) in California. Under appellants' theory, appellants and all other power consumers are in privity of contract with all producers in the California markets, including the government sellers. The government, on the other hand, contends that the contracts were only between the middleman entities

that facilitated and operated the California electricity markets—Cal-PX and Cal-ISO—and the consumers and producers individually. Under the government's theory, appellants are in privity of contract with Cal-PX and Cal-ISO, and the government is also in privity of contract with Cal-PX and Cal-ISO, but appellants are not in privity with the government.

II

On the face of it, the only contracts here were between the exchanges—Cal-PX and Cal-ISO—and individual market participants (the consumers and producers). Both of these exchanges entered into individual contracts with each of the consumers and producers of electricity. The basis for appellants' alternative theory requires some understanding of the background.

In the late 1990s, California restructured and deregulated its energy market. In 1996, California established two non-profit organizations to acquire and distribute electricity and to otherwise organize and supervise all of the wholesale energy transactions in the state. One nonprofit, Cal-PX, was designed to facilitate and conduct all wholesale electric power transactions for the state of California. Cal-PX's responsibilities included, *inter alia*, collecting supply and demand bids from sellers and buyers of wholesale electricity respectively, processing those bids to develop aggregate supply and demand curves from the total pool of bids received, setting a market clearing price based on the intersection point of the aggregate supply and demand curves, preparing financial settlements by issuing statements to all market participants, establishing a calendar for payment, and settling payment individually with each market participant by debiting or crediting its Cal-PX account. Cal-PX was

also responsible for determining the proper distribution of funds in the event of an overpayment, collecting the overpaid funds from the overpaid participants, and remitting those funds to the market participants who overpaid.

The other exchange, Cal-ISO, was established to assume operational control over all of California's electric transmission facilities and ensure supply and demand on a real-time basis. Cal-ISO was responsible for, *inter alia*, operating the transmission grid, ensuring the necessary supply of energy, maintaining nondiscriminatory access to the grid, purchasing and providing ancillary services, and maintaining a real-time spot market for electricity to balance out any last-minute disparities between supply and demand in the Cal-PX market. In this regard, Cal-ISO operated as a back-up to the primary Cal-PX market for wholesale energy.

Cal-PX and Cal-ISO filed tariffs with the Federal Energy Regulatory Commission ("FERC"), the independent federal agency with regulatory authority over the interstate sale of all wholesale electricity and transmission service. The tariffs ("Cal-PX Tariff" and "Cal-ISO Tariff," respectively) established the terms and conditions of service and rates for the California markets. The Cal-PX Tariff and the Cal-ISO Tariff both contained clauses known in the industry as *Memphis* clauses, which preserved the ability of consumers and producers in the California markets to exercise their rights under the Federal Power Act ("FPA") to petition FERC for a change in the terms or rates of the tariffs.

All consumers and producers of wholesale energy in the California markets entered into individual agreements with Cal-PX and Cal-ISO, known as

participation agreements. Every Cal-PX participation agreement incorporated the Cal-PX Tariff, and every Cal-ISO participation agreement incorporated the Cal-ISO Tariff. None of the consumers and producers of wholesale energy purported to contract directly with one another; rather, all participants in the California markets executed separate participation agreements with Cal-PX and Cal-ISO only. Indeed, individual contracts between consumers and producers were not feasible since electricity is fungible, and purchases and sales of electricity could not be traced to particular consumers and producers in the California markets.

Appellants entered into participation agreements with Cal-PX and Cal-ISO shortly after California deregulated the market to purchase electricity. WAPA and BPA, the defendant federal power-producing administrations, also executed participation agreements with Cal-PX and Cal-ISO. No agreements were executed between appellants and the federal agencies. In 1999, the government agencies began selling energy into the California markets through Cal-PX and Cal-ISO, along with many other sellers. Appellants were among the many consumers of that energy.

To transact energy in California, potential consumers and producers submitted bids to Cal-PX to buy or sell wholesale electric power. Based on all of the bids received, Cal-PX compiled supply and demand curves to calculate a “market price” that it then applied uniformly to all transactions within a given market. Consumers paid Cal-PX, which organized and disbursed the funds to sellers in proportion to the amount of energy each supplied. Consumers never paid producers directly. Cal-ISO operated in a similar fashion. In this way, Cal-PX and Cal-ISO served as exchanges or centralized clearinghouses, acquiring

electric power from producers and distributing it to consumers and otherwise facilitating wholesale energy transactions for market participants pursuant to the conditions and constraints imposed by the governing tariffs.

As a result of the method of pricing in the California energy market, appellants contend that they and each of the many other consumers were overcharged for purchases during the 2000-2001 period, allegedly as a result of improper pricing mechanisms. Cal-PX set prices on an hourly basis to satisfy short-term demand for "spot markets." While Cal-PX also set prices over a larger period for long-term or "forward contract" markets, most purchases and sales were in the spot markets. *Pac. Gas & Elec. Co. v. United States*, 122 Fed.Cl. 315, 322-23 (2015). Appellants and other consumers became subject to unstable spot market purchases. "Sellers quickly learned that the California spot markets could be manipulated by withholding power . . . to create scarcity and then demanding extremely high prices when scarcity was probable." *Pub. Utilities Comm'n of Cal. v. FERC,* 462 F.3d 1027, 1039 (9th Cir. 2006). By May 2000, the price of wholesale power in the California markets doubled. Blackouts rolled across the state as it descended into an energy crisis.

By August 2000, appellants and all other consumers were charged prices three to four times greater than the market rates of less than a year earlier. Appellants believed the rates established by the exchanges were unjust and unreasonable. Appellants sought relief by filing a complaint with FERC, which, with respect to non-government entities, has the authority to set an effective date, determine whether rates charged after that date are unjust and unreasonable, and order

refunds for rates charged after that date if it determines that they are unjust and unreasonable. Here, FERC set an effective date of October 2, 2000, determined that rates charged after that date were unjust and unreasonable, and ordered that refunds be paid by all sellers in the California market.

A series of appeals to the Ninth Circuit ensued. As is relevant here, the Ninth Circuit held that FERC lacked jurisdiction to order the government to pay refunds, *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 926 (9th Cir. 2005), a determination that is not now contested. This was so because government agencies are not subject to FERC jurisdiction, as § 201(f) of the Federal Power Act makes clear: "No provision of this subchapter shall apply to . . . the United States . . . or any agency, authority, or instrumentality [thereof]." 16 U.S.C. § 824(f); *see also Bonneville*, 422 F.3d at 920. Although FERC lacked the authority to order the government to pay refunds, the Ninth Circuit upheld FERC's ability to find the rates charged by all sellers, including the government agencies, to be unjust and unreasonable. *See City of Redding v. FERC*, 693 F.3d 828, 841 (9th Cir. 2012) (explaining that to the extent that FERC revised or reset the market rate for the 2000-2001 period, this was within FERC's authority, as it "necessarily involved reevaluating the price previously charged by all market participants because the market clearing price was the same for all of them").

Since FERC lacked jurisdiction to order refunds by the government,[1] appellants brought this breach

[1] Later, in August 2005, Congress passed legislation to amend FERC's § 206 refund authority, extending it to cover certain federal entities if they voluntarily make short-term sales of electricity of more than 8 million MWh per year. *See* Energy

of contract action in the Claims Court, alleging that the government producers had breached agreements between the consumers and producers by overcharging appellants and all other consumers and by failing to pay a refund for unjust and unreasonable prices charged during the 2000-2001 period.

After a trial, Judge Smith found in favor of appellants. *See Pac. Gas & Elec. Co. v. United States*, 105 Fed.Cl. 420, 440 (2012). Judge Smith held that "the facts at trial showed that the Agencies contracted with and owe contract obligations to [appellants]." *Id.* at 432. In his view, Cal-PX and Cal-ISO "were pass-through entities or clearinghouses" only, and he therefore concluded that "the payment obligations were between the buyer [consumer] and seller [producer]." *Id.* at 432-33. Judge Smith further held that the government had breached its contract with appellants by failing to pay refunds. *See id.* at 439-40.

Before the damages-phase proceedings began, Judge Smith retired from the bench. His successor, Judge Braden, vacated Judge Smith's opinions and dismissed the case for, *inter alia*, lack of standing. *Pacific Gas*, 122 Fed.Cl. at 329-335, 343. Judge Braden held that while appellants were in privity of contract with the exchanges, they lacked privity with the government. *See id.* at 331. Judge Braden further held that appellants failed to demonstrate the existence of an agency relationship between the government and the exchanges, *see id.* at 334-35, and failed to demonstrate that appellants were third-party beneficiaries of the government's contracts with the

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Policy Act of 2005, Pub. L. No. 109-58, § 1286, 119 Stat. 594, 981; *see also Bonneville*, 422 F.3d at 921 n.10. This legislation is inapplicable here.

exchanges, *see id.* at 332-34.[2] This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

I

Appellants first contend that Judge Braden violated the law of the case doctrine by vacating Judge Smith's rulings.

According to appellants, the law of the case doctrine "counsels particular caution when one judge is asked—or, as here, decides *sua sponte*—to reconsider her predecessor's decisions." Br. of Appellants at 32-33. Appellants assert that this case should be remanded because Judge Braden's decision to reconsider Judge Smith's decisions constituted an abuse of discretion.

But the dispositive issue addressed on reconsideration here—standing—is a pure issue of law, which we review *de novo*. *See S. Cal. Fed. Sav. & Loan Ass'n*, 422 F.3d 1319, 1328 (Fed. Cir. 2005).[3] And the question of standing here depends on contract interpretation, which also is a question of law that we review *de novo*.

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[2] Judge Braden additionally held that the Claims Court lacked subject matter jurisdiction, *see id.* at 336-37, and that, assuming appellants have standing, appellants' breach of contract claim failed on the merits, *see id.* at 341-43. In light of our resolution based on standing, we need not address these other issues.

[3] *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (Every court has an "obligation to assure [itself] of litigants' standing under Article III." (internal quotation marks and citation omitted)); *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515 (4th Cir. 2003) ("Article III standing in particular . . . represents perhaps the most important of all jurisdictional requirements." (internal quotation marks and citation omitted)).

See, e.g., *S. Nuclear Operating Co. v. United States*, 637 F.3d 1297, 1301 (Fed. Cir. 2011). Indeed, appellants agree that "Judge Braden's specific errors in interpreting the contracts and the Ninth Circuit's decisions were purely legal, and are therefore subject to plenary review." Br. of Appellants at 62 n.11. Judge Smith's contract interpretation was also legal in character. Judge Smith made no relevant findings of fact with respect to interpretation of the contract provisions at issue.[4] *See, e.g.*, *Thatcher v. Kohl's Dept. Stores, Inc.*, 397 F.3d 1370, 1373 (Fed. Cir. 2005). Accordingly, even if appellants could demonstrate that Judge Braden erred in reconsidering Judge Smith's

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[4] Appellants contend that "evidence of trade practice and custom plays an important role in contract interpretation," *Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999), and therefore that Judge Smith's consideration of testimony regarding the "industry's established understanding of the tariff language," in particular with respect to the *Memphis* clauses, is owed deference. Reply Br. of Appellants at 6. Appellants rely heavily on testimony of their former employees and former employees of Cal-PX as to the significance of various tariff provisions, but appellants point to no testimony that establishes "a contract term having an accepted industry meaning different from its ordinary meaning" of the sort required for evidence of trade practice to be relevant in contract interpretation. *See, e.g.*, *TEG-Paradigm Envtl., Inc. v. United States*, 465 F.3d 1329, 1338 (Fed. Cir. 2006) (internal quotation marks and citation omitted).

The extrinsic evidence presented in this case simply established that the *Memphis* clauses were understood in the industry as meaning what they said: market participants retained authority to petition FERC for a determination of whether the prices charged were just and reasonable, a finding that is not relevant to the issue before us, as discussed below. The issue of contract interpretation here remains a pure question of law which we review *de novo*.

interlocutory decisions, they have suffered no prejudice, since our review of both decisions of the Claims Court is *de novo*. We thus proceed to consider the issue of standing. *S. Cal. Fed. Sav. & Loan Ass'n*, 422 F.3d at 1328.

II

As noted above, typically "[t]o have standing to sue the sovereign on a contract claim, a plaintiff must be in privity of contract with the United States," *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003), and "[s]tanding is a threshold jurisdictional issue that implicates Article III of the Constitution." *S. Cal. Fed. Sav. & Loan Ass'n*, 422 F.3d at 1328. "Not only is privity a fundamental requirement of contract law, but it takes on even greater significance in cases such as this, because the 'government consents to be sued only by those with whom it has privity of contract.'" *Id.* (quoting *Erickson Air Crane Co. of Wash. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984)). "The effect of finding privity of contract between a party and the United States is to find a waiver of sovereign immunity." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998). We do not lightly presume that the government's actions give rise to contractual obligations when the government is not a named party to the contract in dispute. *See United States v. Algoma Lumber Co.*, 305 U.S. 415, 421, 59 S.Ct. 267, 83 L.Ed. 260 (1939).

Limited exceptions to the privity requirement have been recognized when a "party standing outside of privity by contractual obligation stands in the shoes of a party within privity," such as when a party can demonstrate that it was an intended third-party beneficiary under the contract, *see, e.g.*, *First Hartford Corp. Pension Plan & Tr. v. United States*, 194 F.3d

1279, 1289 (Fed. Cir. 1999), or when a party can demonstrate that a prime contractor acted as purchasing agent on behalf of the government in contracting with a subcontractor. *See Nat'l Leased Hous. Ass'n v. United States*, 105 F.3d 1423, 1435-36 (Fed. Cir. 1997); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1551 (Fed. Cir. 1983).

III

We first address the issue of contractual privity, addressing later in this opinion appellants' alternative theories of agency and third-party beneficiary. The government argues that the only contracts for the purchase and sale of electricity here were between each market participant and the exchanges. We agree. There is no question that each of the many buyers and sellers entered into contracts with the exchanges. Each individual participant in the California markets executed a contract with one or both exchanges incorporating the relevant tariff. Each contract described the parties as being the individual participant and the exchange only. For example, BPA's contract with Cal-PX explicitly provided that "THIS AGREEMENT . . . is entered into, by and between: (1) BONNEVILLE POWER ADMINISTRATION . . . and (2) THE CALIFORNIA POWER EXCHANGE CORPORATION." J.A. 424. No parties other than the individual participant and the relevant exchange were listed on any contract.

While the Uniform Commercial Code ("UCC") does not apply directly to government contracts, *see, e.g.*, *GAF Corp. v. United States*, 932 F.2d 947, 951 (Fed. Cir. 1991), the UCC "provides useful guidance in applying general contract principles," *Hughes Commc'ns Galaxy, Inc. v. United States*, 271 F.3d 1060, 1066 (Fed. Cir. 2001); *see also Diversified Energy, Inc. v. Tenn. Valley Auth.*, 339 F.3d 437, 446 n.9 (6th Cir.

2003); *Tech. Assistance Int'l, Inc. v. United States*, 150 F.3d 1369, 1372 (Fed. Cir. 1998). The parties appear to agree that the provision of electricity involves the sale of a good which would invoke the UCC. *See, e.g.*, Br. of Appellants at 41 ("Here . . . the Agencies sold the power itself—which is personal property under [41 U.S.C.] § 7102(a)(4) . . . ."). Indeed, we would lack jurisdiction under the Contract Disputes Act if the contracts were interpreted as involving the provision of services rather than goods. *See* 41 U.S.C. § 7102(a). Under the Supreme Court's decision in *United States v. Eurodif, S.A.*, the fact that electricity is fungible suggests that the exchanges bought from and sold electricity to market participants, rather than merely facilitating a transfer between producers and consumers. *See* 555 U.S. 305, 319-20, 129 S.Ct. 878, 172 L.Ed.2d 679 (2009) (explaining that a transaction involving a fungible product is more likely to be viewed as the sale of a good as opposed to the sale of a service).[5]

On the face of the agreements, the exchanges were performing a typical middleman function with respect to transactions in goods as described in commentary on the UCC. *See* Lary Lawrence, 2 *Lawrence's Anderson on the Uniform Commercial Code*, §§ 2-103:18, 103:44 (3d ed. 2012). Under typical middleman contracts, "courts will treat as a buyer [and seller] a middleman

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[5] Some cases suggest that the provision of water or electricity involves the provision of services, *see, e.g.*, *Mattoon v. City of Pittsfield*, 56 Mass.App.Ct. 124, 775 N.E.2d 770, 783 (2002) (water); *Sterling Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 239 A.D.2d 191, 657 N.Y.S.2d 407, 407 (1997) (electricity), but often such suggestion arises only because courts have concluded that the provision of water or electricity involves both a service and a good. *E.g.*, *Mattoon*, 775 N.E.2d at 783.

who contracts for the sale of goods to be delivered to a third person." *Lawrence*, at § 2-103:18; *see also id.* at §§ 2-103:19, 103:44-45. Though the title to the electricity passes directly from producers to consumers, the UCC makes quite clear that this is not inconsistent with a middleman contract for purchase and sale. "A middleman making a contract . . . is a 'seller' for the purpose of Article 2, even though the middleman does not have, [nor] will ever have, title to the goods, as title is to pass directly from the supplier to the customer of the middleman." *Id.* at § 2-103:45.

The incorporated tariffs confirm this reading. On their face the tariffs contemplate that the exchanges will acquire energy from the producers and transfer it to the consumers. *See, e.g.*, S.A. 15 ("[Cal-PX] shall . . . allocate to PX Participants costs incurred by the PX under this Tariff and the ISO Tariff in . . . *buying or selling Energy* . . . ." (emphasis added)); S.A. 119 ("The PX shall settle with each PX Participant for Energy traded . . . . Each PX Seller shall be credited with an amount equal to its scheduled *sales* of Energy . . . . Each PX Buyer shall be debited by the PX with an amount equal to its scheduled *purchase* of Energy . . . ." (emphasis added)); S.A. 337 (Cal-ISO "shall *purchase* Ancillary Services capacity." (emphasis added)); S.A. 513 ("Unstructured Imbalance Energy attributable to each [market participant] for each Settlement Period in the relevant Zone *shall be deemed to be sold or purchased*, as the case may be, *by the ISO* . . . ." (emphasis added)); S.A. 519; S.A. 339; S.A. 381.

The tariffs do not just contemplate that the exchanges will provide and distribute electric power; rather, they also contemplate that the exchanges will set the price of the electricity itself. *See, e.g.*, J.A. 456. The tariffs

were also clear that in the event of an overcharge by the producers (the allegation here), the producers were obligated to make payment to the exchange, not the consumers directly. *See, e.g.*, S.A. 59 ("Each PX Participant acknowledges that it incurs separate financial obligations *to the PX* in respect to its PX Core Market Transactions . . . . All PX Participants shall honor their obligations to pay all of the amounts *owed to the PX in a timely manner*." (emphasis added)); S.A. 60 ("If for any reason a PX Creditor receives on any Payment Date more than the amount to which it is entitled under the PX Tariff, . . . [it] shall forthwith pay the excess amount *into a PX Account specified by the PX*." (emphasis added)); S.A. 528-29 ("If for any reason . . . a [market participant] receives an overpayment . . . [it] shall forthwith pay the overpayment into an ISO Account specified by the ISO."); S.A. 529 ("The ISO shall be responsible for payment to those entitled to the sum which has been overpaid.").

This arrangement is confirmed by other provisions of the tariffs concerning settlement obligations. With respect to payment, for example, the Cal-PX Tariff explains that "*[t]he PX* shall settle with each PX Participant for Energy traded in the PX Markets in the manner set forth in Schedule 6." J.A. 466 (emphasis added). Neither tariff contemplates direct payment from consumers to producers, or vice versa; indeed, such payment would be impossible because specific buyers were never matched with and could not be identified by specific sellers. Instead, Cal-PX allocated payment and energy in proportion to the bids submitted by each participant. Cal-PX was responsible for calculating, collecting, and disbursing all payments for energy on the market. "The PX shall (1) calculate the prices at which trades in Energy are transacted in the PX Markets, (2) settle trades in Energy between PX

Participants, (3) . . . allocate to PX Participants costs incurred by the PX under this Tariff . . . [and] (4) prepare and distribute to PX Participants invoices . . . ." J.A. 456. The same was true with respect to Cal-ISO.

Appellants argue that these participant/exchange contracts nonetheless should not be interpreted as contracts for the purchase and sale of goods because of two types of provisions appearing in the tariffs. First, there is a provision in the Cal-PX Tariff which purports to limit the exchange's role in the energy transactions: Cal-PX "will not be, and shall not be deemed to be, a counterparty to any trade transacted through the PX Markets." J.A. 457.[6] The meaning of this provision in the Cal-PX Tariff is unclear. "Counterparty" is defined as "the party with whom one is consummating a contract." *Counterparty*, *Black's Law Dictionary* (10th ed. 2014). But it is undisputed here that Cal-PX contracted directly with each market participant. In saying that the exchange is not a counterparty to any "trade," the above provision appears only to provide that Cal-PX did not take title to any of the energy transferred. As described, this is consistent with Cal-PX's role as a middleman. *See Lawrence*, at § 2-103:44.

In any event, the counterparty provision cannot be read to bar the existence of a purchase and sale contract between the exchanges and each individual market participant, because such a provision would directly conflict with all of the provisions discussed above which clearly contemplate that Cal-PX, as

[6] As discussed below in section VIII, there are also provisions that are claimed to create an agency relationship. These provisions do not prevent the existence of purchase and sale contracts between the exchanges and individual market participants, but rather form the basis of appellants' argument regarding agency.

middleman, contracted for the purchase and sale of electricity. When there is an apparent conflict between contractual provisions, we "enforce the clause[s] relatively more important or principal to the contract." 11 *Williston on Contracts* § 32:15 (4th ed. 2016). Thus, for example, in *Oleson v. Bergwell*, 204 Minn. 450, 283 N.W. 770 (1939), the court held that a contract containing many provisions contemplating the outright sale of stock should be construed to provide for a sale even though the agreement stated that it "shall be deemed and considered by the parties as an *option* to purchase." *Id.* at 772 (emphasis added). Because "the principal purpose of this contract was to effectuate a sale," *id.* at 773, the court treated the contract as a sales contract. *See id.; see also Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 843 (5th Cir. 1983) (enforcing the "dominant" of two conflicting contract provisions by considering the "tenor" of the agreement as a whole).

Here, the lone provision cited by appellants purporting to limit Cal-PX's role is vastly outweighed in both number and significance by the other provisions of the tariff, which clearly establish Cal-PX's role as a middleman purchasing and selling electricity. Accordingly, we do not read the counterparty provision as disclaiming the existence of a middleman contract for the purchase and sale of electricity. There is, moreover, no similar provision in the Cal-ISO Tariff.

Second, appellants rely on provisions that appear to contemplate that suits may be brought by one participant against another. Significantly, as described below, these provisions do not suggest that the groups of all consumers and producers are collectively liable to each other, as appellants contend. In any case, these provisions hardly suggest that suits may not be brought

by participants against the exchanges or that there are no purchase and sale contracts between the market participants and the exchanges. Indeed, as described below, the tariffs make clear that the exchanges had remedies against defaulting participants.[7]

We conclude that the contracts between the exchanges and the participants are middleman contracts for the purchase and sale of electricity.

IV

Appellants nonetheless contend that the above events should be construed as involving contracts directly between the groups of purchasers and consumers of electricity in the California markets. Appellants concede that there are no individual agreements between consumers and producers. The only documents that purport to be contractual agreements are the agreements between the exchanges and the consumers and producers of electricity. As discussed, those agreements on their face are agreements between a particular consumer or producer and each exchange. Appellants' theory is instead that the agreement of each of the consumers and producers to abide by the tariff creates an agreement between all consumers, on the one hand, and all producers, on the other. No written document

[7] There are also provisions in the tariffs which limit the exchanges' liability to acts of negligence or intentional wrongdoing. *See* S.A. 30 (Cal-PX "shall not be liable in damages to any PX Participant for any losses, damages, claims, liability, costs or expenses (including legal expenses) arising from the performance or non-performance of its obligations under this Tariff, except to the extent that they result from negligence or intentional wrongdoing on the part of [Cal-PX]."); S.A. 550 (same for Cal-ISO). We need not decide what limitations these provisions might impose on the ability of the consumers to recover from the exchanges.

purports to be such an agreement, and the various provisions on which appellants rely cannot be read to create such an agreement.

Appellants originally argued that the *Memphis* clauses in the Cal-PX and Cal-ISO tariffs (incorporated into each individual contract) somehow established a contractual obligation by the government agencies to pay refunds in accordance with the FERC order to appellants. Appellants have now abandoned this argument, and wisely so. The *Memphis* clauses simply provide that "[n]othing contained in this Tariff or any service or participation agreement shall be construed as affecting, in any way, the ability of any PX Participant receiving service under this Tariff to exercise its rights under Section 206 of the FPA and pursuant to FERC's rules and regulations promulgated thereunder." J.A. 471; *see also* J.A. 1040 (Cal-ISO Tariff). While the *Memphis* clauses preserve the market participants' rights to petition FERC to limit unjust and unreasonable rates pursuant to the FPA, such rights do not extend from one market participant to another, and cannot be construed as the source of any contractual obligation between market participants.

Instead of relying on the *Memphis* clauses, appellants now primarily rely on the overpayment provisions. *See* S.A. 60 ("The PX shall be responsible for ascertaining the identity of those PX Participants entitled to receive amounts overpaid to another PX Participant and for disbursing those funds to the persons entitled to them promptly after they are returned in accordance with Section 4.3.3 above."); S.A. 529 ("The ISO shall be responsible for payment to those entitled to the sum which has been overpaid."). But such provisions provide that a payment obligation exists only between the market participants and the exchanges, not between

consumers and producers directly. As discussed above, if a market participant learned that it had received excess payment, the tariffs make clear that it was obligated to return those funds "into a PX Account specified by the PX." J.A. 501; *see also* J.A. 1015-16 (Cal-ISO Tariff). In other words, excesses owed were to be paid back to Cal-PX or Cal-ISO, not to the parties directly. Thus, it was the exchanges that were "responsible for ascertaining the identity of those PX Participants entitled to receive amounts overpaid" and for "disbursing those funds to the persons entitled to them," J.A. 501, not the other market participants, *see also* J.A. 1015-16 (Cal-ISO Tariff). Cal-PX and Cal-ISO were solely responsible for collecting from the overpaid participant and remitting proportionately to all owed participants. Contrary to appellants' characterization, this arrangement creates no obligations directly between buyers and sellers.

Nor do the provisions of the tariffs concerning possible legal action between market participants suffice to create a contract. At most there are provisions in the Cal-ISO Tariff which contemplate suit between market participants. *See* S.A. 529 ("Each ISO Creditor shall give notice to the ISO before instituting any action or proceedings in any court against an ISO Debtor to enforce payments due to it."); S.A. 530 ("The ISO shall, on request, certify in writing the amounts owed by an ISO Debtor that remain unpaid and the ISO creditors to whom such amounts are owed and shall provide [a certificate which] . . . may be used as prima facie evidence of the amount due by an ISO Debtor to ISO Creditors in any legal proceedings."). The Cal-PX Tariff contains no such provision, but provides that Cal-PX will identify a defaulting market participant to other affected participants. *See* S.A. 64 (Cal-PX "will identify the defaulting Participant to all other affected

PX Participants by the most expeditious means available."). These provisions do not purport to create a right of action by one market participant against another, nor do they create any payment obligation between market participants. These provisions do not support appellants' theory of collective liability, and fall well short of creating obligations between consumers and producers.

Finally, the tariffs explicitly grant the exchanges remedies against a defaulting participant. "If the PX Participant fails to pay any sum or to perform any other obligation *to the PX* . . . when due, then *the PX may, in its sole discretion* and without further notice to the defaulting PX Participant or regard to formalities of any kind, *pursue all remedies* under [this] Section," J.A. 504-05 (emphasis added), including the right to "recoup, set-off and apply any amount to which any defaulting PX Participant is entitled towards satisfaction of any of that PX Participant's debts," S.A. 68. *See also* J.A. 501-03; J.A. 1013-14 (Cal-ISO Tariff). The tariffs provide that Cal-PX "and PX Participants . . . may be parties to a dispute [in arbitration]" arising under the contracts, arbitration being the specified dispute resolution mechanism. S.A. 141; *see also* S.A. 536 (Cal-ISO). Accordingly, these provisions concerning possible legal action between consumers and producers do not create a contract between groups of consumers and producers.

Quite apart from the lack of any written document reflecting an agreement between buyers and sellers, the alleged agreements cannot satisfy the requirement of reasonable certainty applicable to the essential terms of all contracts. *See* Restatement (Second) of Contracts § 131 (Am. Law. Inst. 1981) (a contract within the

Statute of Frauds must "state[ ] with reasonable certainty the essential terms of the unperformed promises in the contract," and the "parties must be reasonably identified"); 10 *Williston on Contracts*, § 29:8 (a contract "must contain the essential or material terms . . . including the parties, the subject matter, a description of the property or goods affected, and in at least some jurisdictions, the price or consideration and an indication that the parties have mutually assented to the terms of the agreement"); *see also* U.C.C. § 2-201 (Am. Law Inst. & Unif. Law Comm'n 1977) ("[A] contract for the sale of goods . . . is not enforceable . . . unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought."). Although under the UCC an omitted term does not necessarily render a sales contract unenforceable, *see* § 2-204(3), "it is still necessary for the person claiming the benefit of the contract to establish that, in fact, there was a contract and to establish its terms," 2 *Lawrence*, § 2-201:15. There is no basis here for determining the groups that are supposed parties to the contracts at any particular time or the particular obligations that each group owes to the other. Nor is there any basis for determining the duration or other material terms of the alleged agreement(s). The certainty required for the existence of a contract is simply lacking.

V

Appellants additionally argue by analogy to the law of stock exchanges that "participants in an exchange may assert claims against one another based on provisions of the governing contract." Br. of Appellants at 45. The two cases upon which appellants rely, *Muh v. Newburger, Loeb & Co.*, 540 F.2d 970 (9th Cir. 1976),

and *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972), do not support such a broad proposition. In *Muh*, the Ninth Circuit held that the arbitration provision of a stock exchange's constitution was binding in a lawsuit brought by one member of the exchange against another member for breach of a separate contract. *Muh*, 540 F.2d at 973. There was no dispute in *Muh* that the members were in privity of contract with respect to the contract involved in the action for breach. *See id.* at 971-72. Similarly, in *Coenen* the Second Circuit held that an arbitration provision of a stock exchange's constitution applied to a lawsuit brought by one member against another for refusal to allow the transfer of certain shares of stock under a separate agreement. *Coenen*, 453 F.2d at 1210-11. There was also no dispute in *Coenen* that the members were in privity with respect to the separate agreement. *See id.* Thus in neither case was the constitution of the stock exchange itself the source of privity between the parties in suit. Rather the courts simply read into the explicit separate contracts between exchange members a clause of the exchanges' governing constitutions.

It is well-settled that the constitution of a stock exchange does not automatically confer privity upon all those who transact in the exchange. In the analogous context of suits brought by purchasers of stock against insider traders, courts have recognized that there is no direct privity of contract in the traditional sense between buyers and sellers on the exchange. *See, e.g.*, William H. Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5*, 65 Colum. L. Rev. 1361, 1372-73 (1965); *see also Cochran v. Channing Corp.*, 211 F.Supp. 239, 245 (S.D.N.Y. 1962); *Joseph v. Farnsworth Radio & Television Corp.*, 99 F.Supp. 701,

706 (S.D.N.Y. 1951), *aff'd*, 198 F.2d 883 (2d Cir. 1952). It was for this very reason that the implied private right of action under section 10(b) of the Securities Exchange Act was fashioned to avoid any requirement of traditional privity to bring suit. *See* Veronica M. Dougherty, *A [Dis]semblance of Privity: Criticizing the Contemporaneous Trader Requirement in Insider Trading*, 24 Del. J. of Corp. L. 83, 89-90 (1999). Because there is no private right of action upon which appellants can rely here, appellants' argument by analogy to the law of stock exchanges is unavailing.

Appellants also rely on one court decision holding a contracting party liable as a result of the incorporation of a tariff into a separate contract. *See Alliant Energy v. Neb. Pub. Power Dist.*, 347 F.3d 1046 (8th Cir. 2003). *Alliant Energy* does not lend support to the notion that buyers and sellers in an energy exchange are in contractual privity. In that case, there was a contract for the provision of services between parties to an energy exchange. *See Alliant Energy, Inc. v. Neb. Pub. Power Dist.*, No. 00-2139 ADM/FLN, 2001 WL 1640132, at *1 (D. Minn. Oct. 18, 2001). A tariff governed the terms of those services. *See id.* at *1-2. The court held that a FERC finding that the rates charged for those services were discriminatory required a refund under the contract. *See Alliant Energy*, 347 F.3d at 1049-50 ("When a contract provides that its terms are subject to a regulatory body, *all parties to that contract* are bound by the actions of the regulatory body." (emphasis added)). The court in *Alliant Energy* did not find privity in the absence of an explicit contract.

Nor is this a situation in which appellants are entitled to step into the shoes of the exchanges and sue the government directly. Indeed, appellants make no such argument. It is well-settled that a party cannot

step into the shoes of another party to pursue a contract claim absent explicit assignment of the claim or assignment by operation of law under equitable subrogation. *See, e.g.*, *Lumbermens Mut. Cas. Co. v. United States*, 654 F.3d 1305, 1312-13 (Fed. Cir. 2011). There has been no suggestion here that the contracts between the exchanges and market participants were assigned or that appellants are subrogated to the rights of the Cal-PX and Cal-ISO. Nor could there be. We have held that equitable subrogation is a narrow exception to the traditional privity requirement, and we have only found equitable subrogation in the surety context. *See Ins. Co. of the W. v. United States*, 243 F.3d 1367, 1370 (Fed. Cir. 2001); *Admiralty Constr., Inc. v. Dalton*, 156 F.3d 1217, 1222 (Fed. Cir. 1998).

VI

Significantly, both FERC and the Ninth Circuit understood that the contracts between individual market participants and the exchanges were middleman contracts for the purchase and sale of electricity, and that no contractual privity existed between market participants. In a related proceeding, FERC explained that "[i]n these circumstances, we believe it is reasonable to construe both the bidding participants and the PX to be engaged in sales of electric energy. Accordingly, we conclude that the bidding PX participants will be engaged in sales of electric energy at wholesale *to the PX*, *who will then resell that energy* to wholesale and retail customer participants." *S. Cal. Edison Co.*, 80 FERC 61,262, 61,946 (1997) (emphasis added). FERC described that Cal-PX "will be the intermediary that contracts with the entities that sell into the PX as well as with the wholesale and retail customers that purchase *from the PX*." *Id.* (emphasis added). Similarly, in a related proceeding, FERC held

that "*there are no sales contracts between sellers and buyers of electricity sold into the PX.*" *S. Cal. Edison Co.*, 80 FERC at 61,945 (1997) (emphasis added). FERC further explained, "[i]n this proceeding, we are faced with a new market institution in which *sellers and buyers of electric energy will not contract directly with one another*, as has been traditionally done in the industry, *but instead will contract with the PX.*" *Id.* (emphasis added). Indeed, FERC understood that, as a consequence of this lack of privity between buyers and sellers, any refunds due as a result of a FERC refund order would be paid to the exchanges, not directly to the underpaid market participants. *See San Diego Gas & Elec. v. Sellers of Energy & Ancillary Servs.*, 102 FERC 61,317, 62,079-80 (2003). These interpretations were echoed by the Ninth Circuit. *See S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 800 (9th Cir. 2002) (holding that market participant SoCal Edison "is in privity with the California Power Exchange Corporation, not with [other market participants]").

VII

Finally, appellants argue that it would be unfair to deny appellants a remedy for the government's overcharges and to allow the government to retain the windfall profits. Appellants assert that, without a finding of privity between consumers and producers here, "the [government] [is] wholly immunized from public or private accountability." Br. of Appellants at 71. But the absence of an agreement between consumers and producers hardly suggests the lack of a remedy. It may well be that the producers of electric power would have been liable to the exchanges for any overcharges, and that the exchanges in turn would have been liable to the appellant consumers. The procedural mechanisms for such suits clearly exist under the tariffs.

Although interpleader, which is ordinarily the remedy for a party in appellants' position, is not available here because the government is a party, *see Gonzales*, 490 F.3d at 943, appellants could have sought recovery from the exchanges, with which they are in direct privity of contract, as is clearly contemplated by the arbitration dispute resolution procedures established by the tariffs. *See* S.A. 141, 535. The exchanges in turn could have sought contribution from the government under the same arbitration procedures, which may have provided for a mechanism similar to traditional interpleader.[8] Appellants failed to pursue this course, however, and instead would have us manufacture privity among all buyers and sellers in the California markets where there is none. This we decline to do.

VIII

Alternatively, appellants contend that they have standing under an agency theory. Appellants argue that, even if the only contracts are between the exchanges and market participants, the exchanges acted as agents for all consumers and producers in the California markets in every energy transaction. Under certain circumstances, an entity not in direct contractual privity with another party may nevertheless sue if it contracted with a third entity, and an agency relationship is demonstrated between that third entity and the defendant. *See Nat'l Leased Hous. Ass'n v. United States*, 105 F.3d 1423, 1435-36 (Fed. Cir. 1997);

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[8] We have no occasion to decide here whether the arbitration remedy would now be foreclosed by the passage of time, or by waiver. Nor do we decide whether the exchanges could have recovered in arbitration against the federal government defendant agencies.

United States v. Johnson Controls, Inc., 713 F.2d 1541, 1551 (Fed. Cir. 1983).

"The relationship of principal and agent is created by a manifestation of assent by both parties." 12 *Williston on Contracts* § 35:1 (4th ed. 2016). "The consent of both principal and agent is necessary to create an agency." *Id.* "[T]he principal must intend for the agent to act for the principal, and the agent must intend to accept the authority and act on it; and the intention of the parties must find expression either in words or other conduct between them." *Id.* As a "general rule, the party asserting the agency has the burden of proving both the existence of the relationship and the authority of the agent." 12 *Williston on Contracts* at § 35:2; *see also* Restatement (Third) of Agency § 1.02(d) (Am. Law Inst. 2006) ("The party asserting that a relationship of agency exists generally has the burden in litigation of establishing its existence.").

Here, appellants rely on two provisions of the tariffs that they argue created an agency relationship between all consumers on the one hand and all producers on the other, with the exchanges acting as agent for both groups. Appellants cite the Cal-PX Tariff, which provides that "the PX acts as an Agent for the PX Participants and its inclusion in a Payment Flow does not infer that it is a principal in the financial transaction," J.A. 1846, and the Cal-ISO Tariff, which provides that "[i]n contracting for Ancillary Services and Imbalance Energy the ISO will not act as principal but as agent for and on behalf of the relevant [market participants]," J.A. 753.[9]

[9] The Cal-ISO Tariff also provides that "[Cal-]ISO may bring proceedings against any [market participant] on behalf of those [market participants] who have indicated to the ISO their

Even if those provisions are read to address an agency relationship for the purchase and sale of electricity, it is well established that parties' statements in a contract are not dispositive as to the existence of an agency relationship. "Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling." Restatement (Third) of Agency § 1.02; *see also, e.g.*, *Matter of Carolin Paxson Advert., Inc.*, 938 F.2d 595, 598 (5th Cir. 1991). The key to the existence of an agency relationship is not any characterization in a contract,[10] but rather is set forth in section 1.01 of the Restatement of Agency. An agency relationship "arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents to so act." Restatement (Third) of Agency § 1.01. Agency thus requires "control" by the principal. *See Hollingsworth v. Perry*, ––– U.S. ––––, 133 S.Ct. 2652, 2666, 186 L.Ed.2d 768 (2013) ("An essential element of agency is the principal's right to control the agent's actions." (internal quotation marks and citations omitted)). "[T]he principal's right to control the agent . . . differentiates . . . agency relationships from nonagency relationships."

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willingness for the ISO first so to act, for the recovery of any amounts due by that [market participant]." S.A. 530.

[10] Appellants additionally rely on statements made by a Vice President for one of the government agencies suggesting that the exchanges acted as an "agent." *See* Br. of Appellants at 60, J.A. 3726-27. But the fact that various individuals participating in the process may have characterized the relationship as an agency similarly does not establish an agency relationship as a matter of law. Restatement (Third) of Agency § 1.02.

Restatement (Third) of Agency § 1.01 cmt. e. Here the requisite control is clearly deficient.

"A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, *and the principal has the right throughout the duration of the relationship to control the agent's acts*." *Id.* at § 1.01 cmt. c (emphasis added). It is for this reason that a mere "middleman" is not typically an agent. *Id.* at cmt. h. The control necessary to demonstrate an agency relationship requires that "a principal [have] the right to give interim instructions or directions to the agent once their relationship is established." *Id.* at cmt. f; *see also Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448, 123 S.Ct. 1673, 155 L.Ed.2d 615 (2003).

Judge Braden recognized that, notwithstanding the provisions purporting to create an agency relationship, no agency relationship exists because, *inter alia*, the government lacked sufficient control over the exchanges. *See Pacific Gas*, 122 Fed.Cl. at 334. We agree.[11]

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[11] Appellants contend that the government conceded that an agency relationship exists with respect to Cal-ISO. While the government's position regarding Cal-ISO is confusing and appears to be self-contradictory, *compare* Br. of Appellees at 37-38 ("Even though the ISO (as opposed to the PX) was an agent of the scheduling coordinators, the Buyers do not have standing to pursue claims upon the ISO contracts on their own."), *with id.* at 40 ("the ISO cannot be an agent"), the absence of an agency relationship is clear for both exchanges. We have an independent obligation to address standing regardless of any position the government has taken in the case. *See, e.g.*, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994); *see also Gonzalez v. Thaler*, ––– U.S. ––––, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012).

Here, the alleged principals—the buyers and sellers—lack any meaningful control over the exchanges. The tariffs provide that the exchanges have plenary control over, *inter alia*, setting prices; charging, collecting, and remitting payments; ensuring the transfer of the appropriate amount of energy from each transaction; and collecting and remitting money in the event of overpayment. Indeed it is the exchanges that are explicitly empowered with the ability to issue instructions, detailing, *inter alia*, settlement and payment obligations to the buyers and sellers, not the other way around. Appellants point to no provision of the tariffs that affords the government meaningful control over the exchanges. Without such evidence of the alleged principal's control over the alleged agent, there can be no agency relationship.[12]

Nothing in this court's decisions contemplating an agency exception to the privity requirement suggest that control is not required for agency. Indeed, those cases, which have been limited to the prime-contractor/subcontractor context, hold that a subcontractor cannot sue the government directly unless, *inter alia*, there is an explicit provision in the contract which

[12] *See, e.g.*, *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848-50 (D.C. Cir. 2000) (a subsidiary corporation was not the agent of its parent because the parent did not exercise "control over the subsidiary in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors"); *Johnston v. Warren Cty. Fair Ass'n*, 110 F.3d 36, 38 (8th Cir. 1997) (holding that the lack of evidence of the alleged principal's control over the alleged agent "precludes the finding of an agency relationship"); *Matter of Carolin Paxson*, 938 F.2d at 598-99 (finding no agency relationship for lack of sufficient control because the alleged principals had "no control over the method by which" the alleged agent performed its duties).

provides that the government will be "directly liable to the vendors for the purchase price." *Nat'l Leased Housing*, 105 F.3d at 1436 (quoting *Johnson Controls,* 713 F.2d at 1551). Even assuming that this situation was comparable to the prime-contractor/subcontractor context, it is undisputed that there is no such provision in the contracts here.

We conclude that the agreements cannot be interpreted as creating agency relationships.

IX

Finally, appellants contend that they have standing to sue the government because they are third-party beneficiaries of the government's contracts with Cal-PX and Cal-ISO. One of the "[l]imited exceptions" to the general privity requirement for standing is when the plaintiff can demonstrate that it was an intended third-party beneficiary under the contract. *S. Cal. Fed. Sav. & Loan Ass'n*, 422 F.3d at 1328; *First Hartford*, 194 F.3d at 1289.

"Third party beneficiary status is an 'exceptional privilege,' " *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001) (quoting *German All. Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230, 33 S.Ct. 32, 57 L.Ed. 195 (1912)), and the requirements to demonstrate third-party beneficiary status are "stringent," *Anderson*, 344 F.3d at 1352. "Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement to which he is not a party, he must, at least, show that it was intended for his direct benefit." *German All.,* 226 U.S. at 230, 33 S.Ct. 32. To demonstrate third-party beneficiary status, therefore, a party must prove that "the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party

directly." *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1259 (Fed. Cir. 2005) (quoting *Glass*, 258 F.3d at 1354). Third-party beneficiary status is not established "merely because [a] contract would benefit [a party]." *Fed. Deposit Ins. Corp. v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003).

As the Restatement makes clear, typical third-party beneficiary situations arise when, for example, one party promises another to pay a debt to a third party. In such circumstances, the third party is a third-party beneficiary with standing to sue on the contract. *Restatement (Second) of Contracts* § 302 illus. 1 (Am. Law Inst. 1981). While a third-party beneficiary need not always be named explicitly in the contract, have the "direct right to compensation[,] or the power to enforce that right against the promisor," the contract must demonstrate a clear intent to benefit a third-party beneficiary "personally, independent of his or her status" as a member of a group generally benefited by a contract's performance. *Anderson*, 344 F.3d at 1352 (internal quotation marks and citations omitted); *see also Castle v. United States*, 301 F.3d 1328, 1338 (Fed. Cir. 2002). In other words, at a minimum there must be a particular, identifiable benefit that was clearly intended to flow to the third party.

Anderson v. United States is instructive. In *Anderson* we held that two individuals were not third-party beneficiaries of an alleged contract with the government simply because they were named beneficiaries of a trust which was owed certain contractual obligations from the government. *See* 344 F.3d at 1351-52. We explained that, "[u]nder the contract, every promise the government allegedly failed to keep . . . pertains to the regulatory treatment of [the Trust]. Nothing suggests that the government made any promises

expressly intended to benefit [the individuals] personally, independently of their status as beneficiaries of the Trust." *Id.* at 1352. Similarly, in *Glass v. United States* we held that shareholders of a corporation were not third-party beneficiaries of a contract between the corporation and the government because the contract manifested no intent to benefit the shareholders individually, independent of their status as shareholders. 258 F.3d at 1354-55.

Here appellants contend that they are third-party beneficiaries based on the overpayment provisions of the tariffs. But, as discussed, the overpayment provisions create obligations and remedies for Cal-PX and Cal-ISO, not the market participants. Contrary to appellants' assertion that these provisions gave appellants "an explicit contractual right to a refund by sellers of any overpayments [appellants] made when purchasing electricity," Br. of Appellants at 58, the very text quoted by appellants reveals that the overpayment procedures hold Cal-PX and Cal-ISO solely responsible for collecting and disbursing overpayments. "*The PX shall be responsible* for ascertaining the identity of those PX Participants entitled to receive amounts overpaid to another PX Participant *and for disbursing those funds* to the persons entitled to them promptly." J.A. 501; *see also* J.A. 1016 (Cal-ISO Tariff). There is no specific, identifiable benefit that flows directly from producer to consumer under the tariffs.

The only opinion appellants cite in which we have recognized third-party beneficiary standing is *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984). In *H.F. Allen*, the plaintiffs were farmers in the State of Washington who were members of water-user associations. *See H.F. Allen Orchards v.*

United States, 4 Cl.Ct. 601, 603 (1984). Those associations contracted with the federal government regarding a federal water project. *See id.* In 1943, a federal district court entered a consent decree setting forth the allotment of water from the federal project to the water-user associations. *Id.* The plaintiff farmers later brought suit against the federal government for an alleged breach of the consent decree. *H.F. Allen Orchards*, 749 F.2d at 1572. The Claims Court held that plaintiffs lacked standing to sue the government. *Id.* On appeal, we disagreed. *See id.* at 1576. We explained that the water-user associations "act[ed] as a surrogate for the aggregation of farmers." *Id.* The farmers themselves held a "property right in the water to the extent of their beneficial use thereof," and a specific, identifiable benefit flowed from the government to each farmer under the consent decree. *Id.* Accordingly, we held that the farmers were the "true parties in interest" to sue under the decree. *Id.*

Here there is no identifiable benefit flowing from the particular government agencies to the particular appellants. Appellants were simply some of the many participants on the buy-side of the California wholesale energy market, and it is impossible to trace the transfer of electric power from producers to consumers. Appellants cannot demonstrate any particular benefit flowing to them from the government agencies, let alone that the exchanges' contracts with the government intended to benefit them specifically, independent of all other market participants. Accordingly, appellants fail to establish the "stringent" requirements to demonstrate the "exceptional privilege" of third-party beneficiary status. *Anderson*, 344 F.3d at 1352; *Glass*, 258 F.3d at 1354. As such, appellants lack third-party beneficiary standing.

X

Because appellants are not in direct privity of contract with the government, fail to demonstrate an agency relationship, and do not qualify as third-party beneficiaries on the contract, appellants lack standing to sue the government on the contract claims asserted here. Accordingly, we affirm the decision of the Claims Court dismissing appellants' suit for lack of standing.

AFFIRMED

COSTS

Costs to the United States.

Newman, Circuit Judge, dissenting.

The United States does not dispute that it overcharged the plaintiffs for electric power, and that it is required to repay the overcharge in accordance with the FERC rate schedule and the governing federal statutes. Nonetheless, the United States' position is that it will not comply with this law, for nobody can sue it to enforce the law. We agree that FERC, a federal agency, cannot order a refund of the overages charged by the United States, but that does not insulate the United States from suit by the overcharged buyers of electric power from the United States. My colleagues on this panel strain to find a remedy, by announcing that maybe these buyers can recover something from the exchanges that brokered the overcharged transactions—but my colleagues hold that there is no other remedy for the government's refusal to comply with the statute that the government admits to have violated.

The first assigned judge of the Court of Federal Claims rejected this position, on proceedings that lasted seven years. However, the successor judge of that court discarded the prior adjudication, and held that the court is helpless to act. The Federal Circuit now agrees. I respectfully dissent.

Legal protection of property rights is a cornerstone of our government

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

> Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.

The Complete Madison at 45 (Saul K. Padover ed. 1953), letter to James Monroe, Oct. 15, 1786 (emphasis in original).

Our court is reminded of this high obligation by these watchwords of the Nation's duty to citizens, carved on the wall of this courthouse, welcoming those who seek justice in suit against the government:

> It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.

President Abraham Lincoln, First Annual Message Before the U.S. Senate and House of Representatives (Dec. 3, 1861); engraved in the Lobby of the Howard T. Markey National Courts Building, 717 Madison Place, NW, Washington, DC 20439.

These obligations are formalized in the Tucker Act and other implementing legislation, and are assigned to this court.

The overcharge and the statutory refund obligation are not disputed

The overcharge is not disputed: the plaintiffs paid money to the federal power agencies at prices set by FERC-regulated auction markets, and the federal sellers of power and others made windfall profits. FERC then required that these profits be refunded, on

the basis of just and reasonable market clearing prices. All of the FERC-ordered refunds to the affected purchasers have been paid by the obligated entities, with the exception of the federal agencies the Bonneville Power Administration (BPA) and the Western Area Power Administration (WAPA) (collectively, the Power Administrators).[1]

Both the BPA and the WAPA had agreed, as a condition of participating in the California power market (CalPX and ISO) to accept FERC-regulated tariffs. However, BPA and WAPA have refused to make the designated repayments in accordance with the FERC-ordered retroactive market clearing prices, which, as the Ninth Circuit held, reach the entirety of the market, not just a portion of the market transactions. *City of Redding v. FERC*, 693 F.3d 828, 842 (9th Cir. 2012). My colleagues hold that the courts cannot require such compliance with law. This cannot be, for compliance with law is the judicial role, and federal compliance is assigned to the Court of Federal Claims and the Federal Circuit.

The Power Administrators acknowledge the overcharges, and do not disagree that the statute requires them to refund the overcharges. The overpayment is not disputed by the government. The panel majority provides details, *see* Maj. Op. 1348 ("By August 2000, appellants and all other consumers were charged prices three to four times greater than the market rates of less than a year earlier . . . . FERC . . . ordered that refunds be paid by all sellers in the California market.").

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[1] This suit is concerned only with the BPA and WAPA and their power sales in California.

The Ninth Circuit upheld FERC's authority to find the rates charged by all sellers, including the federal agencies, to be unjust and unreasonable. *City of Redding*, 693 F.3d at 842 ("[FERC's] July 2001 Order 'reset' the market clearing prices in the CalPX and ISO spot markets during the refund period to just and reasonable levels for the purpose of calculating the amount of refund due [from FERC-regulated entities]. This calculation necessarily involved reevaluating the price previously charged by all market participants because the market clearing price was the same for all of them.").

It is not disputed that the overage charges are able to be determined, and the refunds properly allocated. The charges, overages, refund allocations, and the like have already been litigated, settled, or otherwise disposed of via FERC's California Refund Proceeding and related litigation, much of which has received judicial review in the Ninth Circuit. *See, in summary,* FEDERAL ENERGY REGULATORY COMMISSION, THE COMMISSION'S RESPONSE TO THE CALIFORNIA ELECTRICITY CRISIS AND TIMELINE FOR DISTRIBUTION OF REFUNDS (*available at* www.ferc.gov/legal/staff-reports/comm-response.pdf); *see also, e.g.,* 102 FERC ¶ 61120 (establishing a mitigated market clearing price ("MMCP")). "Under the MMCP methodology, refunds were to be determined by the difference between the market clearing price, which was the price charged by all electricity suppliers at a given time, and the MMCP calculated for each hour of the Refund Period, subject to certain adjustments." *PUC v. FERC*, 462 F.3d 1027, 1043 (9th Cir. 2006).

Yet the BPA and the WAPA refuse to make the refunds, stating that neither FERC nor the courts have jurisdiction to force them to meet these

obligations. BPA/WAPA Br. at 8 ("FERC has no . . . jurisdiction over [the agencies]."); *Id*. at 18 ("The Court of Federal Claims . . . does not possess jurisdiction."); *Id*. at 58 ("Court of Federal Claims had no jurisdiction."). However, that is incorrect. Jurisdiction is indeed possessed by the Court of Federal Claims and this court.

The Constitution and the Tucker Act provide remedy, whether on a theory of contract or taking of property

My colleagues hold that no court or agency possesses authority to enforce payment of the refunds due from the United States to the Appellants. The court refuses to apply the standard that FERC requires and enforces of private actors in the same position. All power generators and power purchasers affected by the rates that FERC corrected on the California energy markets are bound by this standard. The Tucker Act formalizes the judicial authority whereby this standard is enforced against the federal suppliers of power. The Tucker Act provides jurisdiction to render judgment upon any claim against the United States "founded either on the Constitution, or any Act of Congress or any regulation of an executive department, or any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

(a) The contract claim

My colleagues hold that since there was an "exchange" acting as broker between the federal power sellers and the state power purchasers, the purchasers can sue only the exchange on the federal overcharges. My colleagues hold that only the broker "middle-man" is in privity with the government. This is not the law of contracts. The exchange was not a principal in these

transactions, it had explicitly disclaimed any counter-party status, and the electric power was not the property of the exchange. The exchange simply acted as a broker and passed the sales proceeds to the sellers who provided the power. My colleagues err in holding that the exchanges alone are liable for payment of the overcharges that were charged by the federal sellers of power.

The court is correct that claims against the BPA and WAPA are separate from the FERC statutory jurisdiction. The BPA and the WAPA were not obligated to sell power in areas covered by the CalPX and ISO, but, in choosing to do so, they agreed, as a condition of their participation in that market, to be held to the rules and price-setting mechanisms of the FERC-regulated tariffs. In doing so, the BPA and the WAPA agreed to the *Memphis* clause, which my colleagues hold has no role in the resolution of this case. Maj. Op. at 1354-55. The majority correctly states that the *Memphis* clause does not serve as a "source of any contractual obligation between market participants," *id.* but this means only that prices charged under the tariff contract are not "fixed," but rather are subject to review and change by FERC. These are the prices charged by suppliers like the BPA and the WAPA to the consumers like PG&E, through the CalPX and ISO.

The *Memphis* clause binds the price charged to FERC determinations; the tariff binds the parties to use the CalPX and ISO for sale/purchase of energy; the parties, conducting sales through the CalPX and ISO to purchase/supply energy amongst themselves, are bound to each other through their market transactions, the rules of the tariff, and the FERC regulations. "When a contract provides that its terms are subject to a regulatory body, all parties to that contract are

bound by the actions of the regulatory body." *Alliant Energy v. Neb. Pub. Power Dist.*, 347 F.3d 1046, 1050 (8th Cir. 2003). *See Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184, 187 (8th Cir. 1988) (holding that parties to a contract which provided that its rates "may be approved, ordered or set by any valid law, order, rule or regulation of any . . . regulatory authority . . . having jurisdiction," were bound by a FERC rate determination, even though they were not directly subject to FERC's jurisdiction). The sellers and buyers of power achieved privity through the sale and purchase of electricity, brokered by the exchange.

FERC has the statutory authority to determine the "just and reasonable" rate on and after the Refund Effective Date, and all parties had previously agreed to be bound by such rates. The Ninth Circuit recognized that FERC could not order the United States to pay these mandated refunds. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 926 (9th Cir. 2005). This is where the Tucker Act comes in, for this contractual obligation between the federal power sellers and the state purchasers.

(b) Other Tucker Act Authority

In addition to the contractual relation between the Power Administrators, as sellers, and the Appellants, as buyers, the Tucker Act also provides remedy on a Constitution-based theory of property taking, just compensation, and/or illegal exaction. An illegal exaction arises when "the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum" that "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct.

Cl. 1967). This cause arises when "some specific provision of law commands expressly or by implication the payment of money, upon proof of conditions he is said to meet." *City of Manassas Park v. United States*, 633 F.2d 181, 183 (Ct. Cl. 1980).

When overcharges were made and required by the government, this may support a takings claim. And when the overcharges were designated by FERC as illegal and repayment was ordered, their exaction became illegal. On either theory, the Fifth Amendment provides for recovery of the overpayment. Even on the theory that there was no contractual relationship between the federal power sellers and the state power buyers, repayment of the overcharge is required, for it is not disputed that "the Government has the citizen's money in its pocket," money to which the government concedes it has no right. *Clapp v. United States*, 117 F.Supp. 576, 580 (Ct. Cl. 1954).

The claimant must demonstrate that the statute or provision causing the exaction provides, either expressly or by "necessary implication," that "the remedy for its violation entails a return of money unlawfully exacted." *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1373 (Fed. Cir. 2000). The Power Administrators imposed an "unjust and unreasonable" price on the appellants, who "paid money over to the Government, . . . and seek[ ] return of all or part of that sum" that "was improperly paid . . . in contravention of [statute and regulation]." *Eastport S.S. Corp.*, 372 F.2d at 1007. This standard is met here, and the remedy laid out by statute is refund of the overpayment.

The court has previously addressed similar issues. In *Ontario Power Generation, Inc. v. United States* this court recognized that "there are some circumstances under which jurisdiction exists even though the

plaintiff did not pay money directly to the government." 369 F.3d 1298, 1302 (Fed. Cir. 2004). In *Camellia Apartments, Inc. v. United States*, 334 F.2d 667 (Ct. Cl. 1964), the court held that Tucker Act jurisdiction existed even though the plaintiff had not paid the exacted sums directly to the government. In that case, the Federal Housing Administration required that the plaintiff pay a "prepayment premium charge" to its mortgagees as a precondition to refinance its properties with private lenders. *Id*. at 669. The mortgagees then transmitted the premium to the Federal Housing Administration. In rejecting the government's motion to dismiss for lack of jurisdiction, the court said:

> The fact that the FHA acted through the mortgagees in requiring the payments of which plaintiffs complain is immaterial; under the pertinent regulation, the mortgagees were required to collect these funds and to remit them to the Commissioner. Therefore, we do not think that defendant can seriously deny plaintiffs' allegation that the mortgagees acted solely as the FHA's agents in so doing.

Id. Similarly here, the BPA and the WAPA collected the overcharges through the CalPX and ISO. "Under decisions of the Supreme Court and this court, a compensable taking does not occur unless the government's actions on the intermediate third party have a 'direct and substantial' impact on the plaintiff asserting the takings claim." *Casa De Cambio Comdiv S.A. De C.V. v. United States*, 291 F.3d 1356, 1361 (Fed. Cir. 2002). It cannot be denied that the retention of the "unjust and unreasonable" rate charges by the government has, and continues to have, a "direct and substantial impact" on the Appellants.

Whether under either a theory of contract or taking, the Court of Federal Claims has jurisdiction of this claim against the government, as it initially held.

Conclusion

It is contrary fundamental law to exclude this claim from access to judicial review and remedy. "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). The judicial obligation and authority is to remedy the "unjust and unreasonable" rate charges as determined by FERC and confirmed on Ninth Circuit review. The remedy is assigned to the Court of Federal Claims and to the Federal Circuit.

I respectfully dissent from the court's rejection of that assignment.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 07-157C & 07-167C
Consolidated No. 07-184C

PACIFIC GAS AND ELECTRIC COMPANY, AND
SOUTHERN CALIFORNIA EDISON COMPANY,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

SAN DIEGO GAS & ELECTRIC COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN JR., ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, AND THE
CALIFORNIA DEPARTMENT OF WATER RESOURCES BY
AND THROUGH ITS CALIFORNIA ENERGY
RESOURCES SCHEDULING DIVISION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

MEMORANDUM OPINION AND FINAL ORDER DISMISSING PLAINTIFFS' REMAINING CLAIMS

BRADEN, Judge.

On March 12, 2007, Pacific Gas & Electric and Southern California Edison filed a Complaint in the United States Court of Federal Claims, alleging that the "voluntary sales of electric power in the California wholesale markets [,] pursuant to the ISO and PX Tariffs[,] and pursuant to certain written agreements[,] gave rise to binding contractual obligations that [WAPA and BPA] owed to the other market participants, including the [Cal-IOUs,] . . . direct parties to and expressly intended beneficiaries of [WAPA and BPA's] contractual obligations." 3/12/07 Compl. ¶ 2. "The signatories to the [WAPA and BPA] agreements had authority to enter into the agreements and to bind [WAPA and BPA] contractually. [WAPA and BPA] have breached their contractual obligations[.]" 3/12/07 Compl. ¶ 2.

On March 13, 2007, San Diego Gas & Electric filed an almost identical Complaint in the United States Court of Federal Claims. *See San Diego Gas & Elec. Co. v. United States,* No. 07167 ("3/13/07 Compl."). And, on October 3, 2008, California and the California Department of Water Resources filed a similar Second Amended Complaint. *See California v. United States,* No. 07-184 ("10/3/08 Compl.").

On March 16, 2015, the court issued a Memorandum Opinion And Final Order Regarding Plaintiffs' Breach Of Contract Claim, dismissing Plaintiffs' breach of contract claim. *See Pac. Gas & Elec. Co. v. United States,* 2015 WL 1186301, No. 07-157 (Fed.Cl. Mar. 16, 2015). In addition to laying out the factual and procedural background of the case, the court

determined that Plaintiffs lacked privity of contract with the Government. *Id.* at *19. Accordingly, the court granted the Government's July 1, 2014 Motion For Entry Of Judgment Dismissing Claim I of Plaintiffs' March 12, 2007, March 13, 2007, and March 16, 2007 Complaints.[1] *Id.* at *26.

On April 1, 2015, Plaintiffs filed a Motion For Clarification Of The Status Of Remaining Claims, admitting that the remaining claims "are premised on the same [alleged] contracts as the breach of contract claim dismissed by the [c]ourt in its March 16, 2015 order." Pl. Mot. at 1. On April 13, 2015, the Government filed a Response ("Gov't Resp.").

Because the court has determined that Plaintiffs lack privity of contract with the Government, the court does not have jurisdiction to adjudicate Plaintiffs' remaining claims. *See* 28 U.S.C. § 1491(a); *see also* RCFC 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Dismissing all remaining claims also will facilitate an expeditious and comprehensive appeal. *See* Rule 1 of the Rules of the United States Court of Federal Claims ("RCFC") ("[The RCFC] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

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[1] On March 16, 2015, the court incorrectly dismissed Claim I of California's March 16, 2007 Complaint, when it should have dismissed Claim I of California's October 3, 2008 Second Amended Complaint. But, any error is harmless, because the court has determined that the entire October 3, 2008 Second Amended Complaint now should be dismissed.

For these reasons, the Clerk is directed to dismiss Plaintiffs' March 12, 2007, March 13, 2007, and October 3, 2008 Complaints.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

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Nos. 07-157C, 07-167C, 07-184C

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PACIFIC GAS AND ELECTRIC COMPANY, and
SOUTHERN CALIFORNIA EDISON COMPANY,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

———

SAN DIEGO GAS & ELECTRIC COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

———

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL.
EDMUND G. BROWN JR., ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, AND THE
CALIFORNIA DEPARTMENT OF WATER RESOURCES BY
AND THROUGH ITS CALIFORNIA ENERGY
RESOURCES SCHEDULING DIVISION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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MEMORANDUM OPINION AND FINAL ORDER REGARDING PLAINTIFFS' BREACH OF CONTRACT CLAIMS

BRADEN, Judge.

This case arises from the California Energy Crisis of 2000-2001, during which electricity prices soared to record levels. Plaintiffs first attempted to obtain relief from the Federal Energy Regulatory Commission ("FERC") or the United States Court of Appeals for the Ninth Circuit. These efforts were unsuccessful. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005) ("*Bonneville* ") ("We conclude that FERC does not have refund authority over wholesale electric energy sales made by governmental entities and non-public utilities."), *cert. denied*, 552 U.S. 1076, 128 S.Ct. 804, 169 L.Ed.2d 606 (2007); *see also City of Redding v. FERC*, 693 F.3d 828, 841 (9th Cir. 2012) ("FERC clearly acknowledged that it did not have authority to order refunds from the nonpublic utilities and explained that it was establishing just and reasonable rates in order to determine the appropriate refund amount for public entities[.]"). On March 12, 2007, three California-based investor-owned or public utilities and the State of California filed refund claims for overcharges in the above-captioned cases in the United States Court of Federal Claims. The Complaints allege that because two federal power authorities were liable for breach of power exchange agreements with two non-profit California corporations, these federal power authorities were in breach of contract with Plaintiffs, because the power exchange agreements were subject to the FERC tariffs incorporated therein.

To facilitate review of this Memorandum Opinion and Final Judgment, the court has provided the following outline.

I. REGULATORY BACKGROUND.

A. Prior To September 24, 1996, The Electric Utility Industry In The State Of California Was Subject Both To Federal And State Regulation.

B. On September 24, 1996, The State Of California Decided To Deregulate The Electric Utility Industry, But That Decision Resulted In An Energy Crisis In 2000-Mid-2001.

II. PROCEDURAL HISTORY.

A. 2000-2006 Proceedings In The Federal Energy Regulatory Commission And The United States Court Of Appeals For The Ninth Circuit.

B. 2007-2012 Proceedings In The United States Court Of Federal Claims And May 12, 2012 Liability Decision.

C. The August 27, 2012 Decision Of The United States Court Of Appeals For The Ninth Circuit.

D. The Government's November 2, 2012 Motion For Reconsideration In The United States Court Of Federal Claims And April 2, 2013 Order Denying Reconsideration.

E. 2013 Reassignment Of This Case, December 20, 2013 Decision To Vacate, And Subsequent Proceedings In The United States Court Of Federal Claims.

III. DISCUSSION.

A. Whether Plaintiffs Have Standing.

1. Neither The California Investor-Owned Utilities Nor The State Of California Were In Privity Of Contract, Either With The Western Power Administration Or The Bonneville Power Administration.

2. Neither The California Investor-Owned Utilities Nor The State Of California Were Third-Party Beneficiaries To A Contract With Either The Western Power Administration Or The Bonneville Power Administration.

3. Neither Cal-PX Nor Cal-ISO Was An Agent Of The Cal-IOUs Or The State Of California.

B. Jurisdiction

C. Assuming *Arguendo,* Plaintiffs Have Standing, Count I Of Plaintiffs' Refund Period Breach Of Contract Claims Must Be Dismissed.

1. The Government's Argument.

2. Plaintiffs' Response.

3. The Government's Reply.

4. The Court's Resolution.

D. Plaintiffs' July 1, 2014 Motion To Reinstate The May 2, 2012 Liability Decision And For Certification Of Orders For Interlocutory Appeal Is Denied.

IV. CONCLUSION.

I. REGULATORY BACKGROUND.

To understand this *sui generis* case, a review of the labyrinth of state and federal law and regulations that governed the electric utility industry in the State of California is required.

A. Prior To September 24, 1996, The Electric Utility Industry In The State Of California Was Subject Both To Federal And State Regulation.

In 1935, Congress enacted the Federal Power Act, 16 U.S.C. §§ 791a *et seq*. This Act "had two primary and related purposes: to curb abusive practices of public utility companies by bringing them under effective control, and to provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 758, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973). To accomplish this end, Congress created the Federal Power Commission ("FPC"). *Id.*

In 1977, in response to power shortages and rising energy costs, Congress consolidated all federal energy-related programs and agencies in the new Department of Energy ("DOE"). *See* Department of Energy Organization Act, *codified at* 42 U.S.C. §§ 7101 *et seq.* (1977). That Act established the Federal Energy Regulatory Commission ("FERC") as an independent agency to assume most of the functions previously delegated to the FPC, including expanded regulatory authority over the interstate sale of all wholesale electricity and transmission service.[1] *Id*. §§ 7171-72; *see also* Department of Energy, Power Marketing Rates, Delegation

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[1] The sale of wholesale electric power entails "generation, transmission, and distribution functions." *See Pub. Utils. Comm'n of*

Order For Confirmation and Approval, 43 FED. REG. 60636-60637 (Dec. 22, 1978).

In 1978, Congress enacted the Public Utility Regulatory Policies Act to conserve the use of fossil fuels and promote development of new generating facilities with equitable rates. *See* 16 U.S.C. §§ 2601 *et seq.* By that time, the number of electricity generators in the country was growing, because technological advances made it possible to transmit electric power over long distances at a lower cost by "wheeling," *i.e.*, "an arrangement in which one electric company allows another company to use its lines to transmit power to customers in its service area." FED. REGULATORY DIRECTORY 172 (16th ed. 2014).

On April 24, 1996, FERC issued Order No. 888, finding that the nation's larger public utilities had discriminated in "the wholesale bulk power marketplace" by providing inferior or no access to third-party power wholesalers. *See* 61 FED. REG. 21540, 21541 ("FERC Order No. 888"); *see also Transmission Access Policy Study Grp. v. FERC,* 225 F.3d 667, 683 (D.C. Cir. 2000) ("[T]he open access requirement of [FERC] Order 888 is premised . . . on FERC's identification of a fundamental systemic problem in the industry."), *aff'd, New York v. FERC*, 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002). To remedy this situation, FERC ordered all investor-owned electric utilities engaged in interstate transmission to file a single open access, non-discriminatory tariff that offered "network, load-based service and point-to-point, contract-

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Cal. v. FERC, 462 F.3d 1027, 1036 (9th Cir. 2006). "Generation" is defined as "the production of power." *Id*. "Transmission" is defined as the "conveyance of high voltage electric power from the points of generation to substations for conversion to delivery voltages." *Id*.

based service." FERC Order No. 888, at 21,541. "The theory behind separating these functions, known as 'unbundling,' was that wholesale power competition would be promoted, and consumers would benefit, if public utilities were required to provide nondiscriminatory, open access, transmission." *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1036 (9th Cir. 2006) ("*CPUC* ").

B. On September 24, 1996, The State Of California Decided To Deregulate The Electric Utility Industry, But That Decision Resulted In An Energy Crisis In 2000-Mid-2001.[2]

On September 24, 1996, in response to FERC Order No. 888, California enacted Assembly Bill 1890 ("AB 1890") to establish a deregulated market for wholesale electric power in California, where prices would be set by a competitive process to facilitate consumer choice. *See* Cal. Pub. Util. Code §§ 330-398.5. At this time, three investor-owned electric utilities operated in the State of California: Pacific Gas & Electric Company ("PG & E"); San Diego Gas and Electric Company ("SG & E"); and Southern California Edison ("SC Edison") (collectively hereinafter "the Cal-IOUs"). The Cal-IOUs generated and purchased wholesale power and also owned, operated, and maintained transmission

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[2] The facts discussed herein were adjudicated in related FERC or federal district court proceedings and adopted by the United States Court of Appeals for the Ninth Circuit in: *CPUC*, 462 F.3d at 1033-46; *Bonneville,* 422 F.3d at 911-14; *In re Cal. Power Exch. Corp*., 245 F.3d 1110, 1114-19 (9th Cir. 2001). Additional facts were derived from 3/23/10 Stipulated Facts of the parties in the United States Court of Federal Claims in Case Nos. 07-157 and 07-167 ("SF ¶¶ 1-26"); Plaintiffs' Exhibits ("PE 1-256") and the Government's Exhibits ("DE 1-626") admitted at trial.

and distribution systems. PE Ex. 214 at 316-17. The terms, conditions, and prices for these services were set forth in tariffs and rates filed with FERC. *See Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1114 (D.C. Cir. 2002) (explaining that the Cal-IOUs "originally consisted of three investor-owned utilities (PG & E, [SC] Edison, and [SG & E]), each of which is subject to FERC's jurisdiction"). Retail rates, however, were subject to the jurisdiction of the California Public Utilities Commission ("CPUC"). *See* Cal. Pub. Util. Code § 330(c)-(d); *see also CPUC,* 462 F.3d at 1037.

AB 1890 first required that the Cal-IOUs divest their fossil fuel generating plants and then sell all wholesale power generated by hydroelectric and nuclear power plants to the California Power Exchange ("Cal-PX"), a non-profit corporation established to conduct wholesale electric power transactions.[3] *See* Cal. Pub. Util. Code § 300(k)(1), (*l*)(1). The process was to work in the following manner: Cal-PX would file a tariff with the FERC, establishing the terms and conditions of service and rates, known as the "Cal-PX FERC Tariff." The potential purchasers would enter into Participation Agreements with Cal-PX incorporating the Cal-PX FERC Tariff. A central provision of this tariff provided that the participants agreed to "abide by, and . . . perform all of the obligations under the [Cal-PX FERC Tariff,] in respect of all matters set forth therein including, without limitation, all matters relating to the trading of Energy by it through the [Cal-PX] markets . . . [and] billing and payments[.]" PE

[3] Subsequently, this tariff was revised on three occasions. The last revision was on August 2, 2000 and is cited herein as Cal-PX FERC Tariff. PE 57.

57 at 1056 (Cal-PX FERC Tariff, Participation Agreement § II(B)).

Next, potential purchasers or sellers would submit bids to Cal-PX to buy or sell wholesale power. Based on the bids received, Cal-PX set a "market price" for those transactions.[4] Initially, Cal-PX set prices on an hourly basis to satisfy short-term demand or spot markets, *i.e*., "sales that are 24 hours or less and that are entered into the day of or day prior to delivery." 95 FERC ¶¶ 61418, 62545 n.3.

AB 1890 also established a non-profit corporation, the California Independent System Operator ("Cal-ISO"), to assume operational control over all of California's electric transmission facilities and ensure supply and demand on a real-time basis. *See CPUC*, 462 F.3d at 1038. The Cal-ISO scheduled requested transmission services for day-after purchase or spot market sales, subject to FERC oversight and regulation. The Cal-ISO also was required to file a tariff setting forth the terms and conditions of services and rates ("Cal-ISO FERC Tariff"). PE 66 at 1-390; *see also CPUC,* 462 F.3d at 1038-39. The Cal-ISO FERC Tariff also was incorporated into Scheduling Coordinator Agreements ("SC Agreements") between Cal-ISO and each firm that scheduled wholesale power and ancillary services on the Cal-ISO controlled grid. PE 66 at 388 (Cal-ISO FERC Tariff § (A)). A central provision of the Cal-ISO

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[4] On each trading day, the Cal-PX compiled energy supply and demand curves, based on offers to supply and demands for energy. The "market price" was then determined by the price point at which supply equals demand, so that all participants paid the same price. PE 57 at 910 (Cal-PX PX FERC Tariff § 3.8 (Market Clearing Price Determination)); PE 57 at 959-62 (Cal-PX FERC Tariff Schedule 3 ("market price" formula)); PE 57 at 1076 (Cal-PX FERC Tariff Appx. B ("Market Clearing Price" defined)).

FERC Tariff provided that the participants agreed to "abide by, and . . . perform all of the obligations under the [Cal-ISO FERC] Tariff placed on Scheduling Coordinators in respect of all matters set forth therein including, without limitation, all matters relating to the scheduling of Energy and Ancillary Services on the [Cal-]ISO Controlled Grid . . . [and] billing and payments[.]" PE 66 at 388 (Cal-ISO FERC Tariff, § 2(B)); PE 30 at 616-17 (SC Agreement between Bonneville and Cal-ISO with identical language); PE 23 at 601-02 (SC Agreement between WAPA and Cal-ISO with identical language). The Cal-IOUs entered Participation Agreements with Cal-PX and SC Agreements with Cal-ISO. PE 15, PE 23, PE 25, PE 26, PE 37, PE 234, PE 250, PE 251. The California Department of Water Resources also executed a Participation Agreement with Cal-PX and an SC Agreement with Cal-ISO. PE 248, PE 249.

The Western Area Power Administration ("WAPA"), a federal power-marketing administration, generated and transmitted wholesale power into California. *See N. Star Steel Co. v. United States*, 477 F.3d 1324, 1326 (Fed. Cir. 2007) (WAPA "market[ed] and deliver[ed] cost-based hydroelectric power and related services within a 15-state region of the central and western United States," including California). In all, fifty-seven "power plants operated by the Department of the Interior's Bureau of Reclamation, the U.S. Army Corps of Engineers, and the International Boundary and Water Commission," utilize WAPA's transmission system. *Id.* "By [federal] statute, the rates [that] WAPA charge[d] in selling power [had to] be at least sufficient to recover the costs associated with its operations, maintenance, and the federal construction investment." *Id.* (citing 43 U.S.C. § 485h(c)).

The Bonneville Power Administration ("BPA"), also a federal power-marketing administration, generated wholesale power from the Federal Columbia River Power System and other federal hydroelectric facilities in the Pacific Northwest, and transmitted and sold excess power into California. *See* 16 U.S.C. §§ 832-832*m*, 839-839h; *see also* 42 U.S.C. § 7152(a)(1)(C) ("There are transferred to, and vested in, the Secretary all functions of the Secretary of the Interior . . . with respect to the Bonneville Power Administration including but not limited to the authority contained in the Bonneville Power Act of 1937[.]"); *City of Burbank v. United States*, 273 F.3d 1370, 1373 (Fed. Cir. 2001) ("The BPA markets, transmits, purchases, exchanges, and sells electric energy in the wholesale market. Federal dams in the Pacific Northwest generate the hydroelectric energy the BPA sells in this market.").

In 1999, WAPA and Bonneville decided to participate in the wholesale power and transmission transactions conducted by Cal-PX and Cal-ISO. Consequently, on May 28, 1999 and June 22, 1999, WAPA executed Participation Agreements with Cal-PX that incorporated, by reference, a tariff filed with FERC. PE 43 at 657 PE 45 at 662; PE 57 (Cal-PX FERC Tariff). On February 12, 1998, WAPA executed a SC Agreement with the Cal-ISO. PE 23. On March 18, 1998, BPA entered into a Participation Agreement with Cal-PX. PE 26. On April 30, 1998, BPA entered into an SC Agreement with Cal-ISO. PE 30.

In the summer of 1999, the CPUC authorized the Cal-IOUs to purchase some wholesale power in the Cal-PX long-term or "forward contract" market, but the remainder had to be purchased in the Cal-PX spot market. *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110 (9th Cir. 2001) (explaining that over-reliance on

the spot market "prevented [the Cal-IOUs] from managing their risks more effectively through long-term contracting"). But, the Cal-IOUs became reliant on unstable spot market purchases that were higher priced. *Id*. at 1116.

By May 2000, the price of wholesale power in the Cal-PX spot markets doubled. *See CPUC*, 462 F.3d at 1040. Rolling blackouts also began to occur, requiring Cal-ISO to declare thirty-nine system emergencies. *Id.*

Blame for the high prices was placed on the hot weather and other externalities, including a retail rate freeze imposed by the CPUC and the inability of the Cal-IOUs "to hedge through forward markets, bilateral contracts, and self-provision,"[5] but the truth was, as the United States Court of Appeals for the Ninth Circuit observed, that:

> the best laid regulatory plans went astray, [because California's] plan to establish a competitive market . . . failed to account for energy economics and the sophistication of modern energy trading. As became clear in hindsight, even those who controlled a relatively small percentage of the market had sufficient market power to skew markets artificially . . . . With the new [market] structure, over 80% of the [wholesale electric power] transactions were being made in spot markets—the converse of most other electricity markets, in which more than 80% of the transactions are made through long term forward contracts, lending stability to the markets. Sellers quickly learned that the California spot markets could be manipulated by withholding power . . . to

[5] PE 225 at 01365 (8/14/00 Motion To Intervene And Response Of SG & E in FERC Dkt. No. E1-00-95-000).

> create scarcity and then demanding extremely high prices when scarcity was probable.

Id. at 1039.

II. PROCEDURAL HISTORY.

A. 2000-2006 Proceedings In The Federal Energy Regulatory Commission And The United States Court Of Appeals For The Ninth Circuit.

By August 2000, SG & E experienced price increases "by a multiple of three or four." *See* 92 FERC ¶ 61172, 61604 (2000).[6] In response, SG & E filed a petition

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[6] PG & E and SC Edison also experienced a dramatic spike in wholesale prices at this time; however, because they were subject to a rate freeze imposed by AB 1890, they were prohibited from passing on those increases to retail and industrial customers, forcing them to assume billions in debt. *See S. Cal. Edison Co. v. Peevey,* 31 Cal.4th 781, 789-90, 3 Cal.Rptr.3d 703, 74 P.3d 795 (2003).

On October 5, 2001, the United States District Court of the Central District of California entered a Stipulated Judgment with the CPUC to allow SC Edison to maintain retail rates for a two-year period to recover $3.3 billion of the $6.3 billion losses that were incurred during the CPUC-imposed retail rate freeze. *See* Stipulated Judgment Order, *S. Cal. Edison Co. v. Lynch*, No. 00-cv-12056, Dkt. No. 290 (C.D. Cal. Oct. 5, 2011). On September 23, 2002, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's entry of the Stipulated Judgment, but certified certain questions of state law. *See S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 809-15 (9th Cir. 2002). On August 21, 2003, the Supreme Court of California concluded that the Stipulated Judgment "did not violate California law." *S. Cal. Edison Co*., 3 Cal.Rptr.3d 703, 74 P.3d at 797. On January 12, 2004, the United States Court of Appeals for the Ninth Circuit issued a mandate, affirming the District Court's decision in all respects. *See S. Cal. Edison Co. v. Lynch*, No. 00-cv-12056, Dkt. No. 339 (C.D. Cal. Jan. 12, 2004).

with FERC for an emergency order to cap alleged "unjust [and] unreasonable" prices for wholesale and ancillary services set by Cal-PX and Cal-ISO and to amend the market-based rate schedules. *Id*. at ¶ 61605.

On November 1, 2000, however, FERC declined to issue an emergency order, but initiated an investigation that found:

- short-term wholesale power rates in California were "unjust and unreasonable";
- the restructuring plan required by AB 1890 was "seriously flawed"; and
- there was "clear evidence" that the California market structure provided electricity sellers with opportunities to exercise market power that can result in result in unjust and unreasonable rates under the FPA.

93 FERC ¶¶ 61121, 61349-50 (2000).

Subsequently, FERC also made structural changes to the operation of Cal-PX and Cal-ISO by: eliminating the requirement that the Cal-IOUs must buy and sell wholesale power exclusively through Cal-PX; allowing participants to schedule 95 percent of their transactions in the day-ahead market; replacing Cal-PX and Cal-ISO board members; and requiring Cal-ISO to file generation interconnection procedures with FERC. *See id.* ¶¶ 61350-51. In addition, on September 11, 2000, FERC convened a congressional hearing to ascertain whether refunds were due to the Cal-IOUs for spot market transactions conducted from October 2, 2000 through December 31, 2002. *See id.* ¶ 61370.

On December 15, 2000, FERC issued an Order allowing the Cal-IOUs to resume generating some of

their wholesale requirements. *See* 93 FERC ¶ 61294, 61982 (2000). That Order eliminated the Cal-PX requirement that the Cal-IOUs must sell and purchase all their wholesale power requirements through the Cal-PX, relieving the Cal-IOUs from dependence on the spot market. *See id.* FERC also terminated the Cal-PX wholesale tariff and rate schedules and, instead imposed a "soft cap" on all purchases of electric power from in the Cal-PX and Cal-ISO markets. *Id*. ¶¶ 61982-83. In addition, as it had in the November 1, 2000 Order, FERC observed that retroactive relief funds from the wholesale sellers of electric power may be warranted for the period October 2, 2000 through December 31, 2000. *Id.* ¶¶ 62010-11.

On December 22, 2000, the City of San Diego filed a petition with the United States Court of Appeals for the Ninth Circuit, contending that "FERC . . . unreasonably delayed taking action on California wholesale power purchasers' request for refunds" and requesting a Writ of Mandamus requiring FERC to "come to a decision as to [California] wholesale sellers' refund liability" for the period of October 2, 2000 to December 31, 2000. *See In re Cal. Power Exch. Corp*., 245 F.3d 1110, 1119, 1124 (9th Cir. 2001). On December 26, 2000, SC Edison also challenged FERC's failure to ensure that wholesale electricity was sold at "reasonable" rates. *CPUC,* 462 F.3d at 1042.

On January 17, 2001, the Governor of California declared a State of Emergency and ordered the California Department of Water Resources to purchase sufficient power to end the rolling blackouts that cost California more than $5 billion. *See* Proclamation by

the Governor of the State of California (January 17, 2001).[7]

On January 30, 2001, Cal-PX suspended operations and, on March 9, 2001, filed for bankruptcy. *See In re Cal. Power Exch. Corp*., 245 F.3d at 1119.

On March 9, 2001, FERC issued an Order directing wholesale sellers of electric power to provide refunds to customers for sales made during January 2001 that were in excess of a proxy market clearing price or, in the alternative, provide additional justification for the surcharges. *See* 94 FERC ¶¶ 61245, 61863 (2001). FERC specified, however, that any refunds were to be extended only to "public utility sellers," *i.e.,* investor-owned utilities, not federal governmental entities, like WAPA and BPA. *Id*. ¶ 61864.

On April 6, 2001, PG & E filed for bankruptcy, but SC Edison and SG & E were able to achieve arrangements with creditors. *See CPUC,* 462 F.3d at 1042-43.

On April 11, 2001, the United States Court of Appeals for the Ninth Circuit held that FERC's December 15, 2000 decision to give higher priority to structural remedies, instead of retroactive refund requests, did not warrant a writ of mandamus. *See In re Cal. Power Exch. Corp*., 245 F.3d 1110, 1119, 1125 (9th Cir. 2001).

On April 26, 2001, FERC issued an Order establishing a new market monitoring and mitigation plan for sales made in the ancillary services and spot markets operated by Cal-ISO. *See* 95 FERC ¶¶ 61115, 61351. In addition, FERC authorized an investigation into the reasonableness of the rates, terms, and conditions of public utility sales in the spot markets in the entire

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[7] Available at http://www.calema.ca.gov/ChiefofStaff/Pages/Emergency-Proclamations.aspx (last visited March 10, 2015).

Western Systems Coordinating Counsel, because “the California [energy] market is integrated with those of other states.” *Id.* ¶ 61356.

On June 19, 2001, FERC issued an Order imposing prospective price caps on all spot market sales in California from June 20, 2001 to September 30, 2002. *See* 95 FERC ¶¶ 61418, 62545-49. FERC also implemented other steps to mitigate prices. *Id.* ¶¶ 62547-49.

On July 25, 2001, FERC issued an Order to establish the “scope of and methodology for calculating refunds related to transactions in the spot markets operated by [Cal-ISO] and [Cal-PX] during the period October 2, 2000 through June 20, 2001.” 96 FERC ¶¶ 61120, 61499. Refunds were to be determined by the difference between the market clearing prices charged by electric power suppliers and a mitigated market clearing price (“MMCP”), calculated for each hour from October 2, 2000 to June 20, 2001 (“the Refund Period”), subject to certain adjustments. *See* 96 FERC ¶¶ 61516-17. The amount of refunds due was estimated at $2.3 billion, plus $3.5 billion from sales to the California Energy Resources Scheduler (“CERS”). *See CPUC*, 462 F.3d at 1043.

On December 19, 2001, FERC issued an Order to reaffirm price mitigation plans for all regulated spot market sales and established October 2, 2000 as the effective date for refunds. *See* 97 FERC ¶ 61275.

On February 13, 2002, FERC initiated an enforcement proceeding concerning market manipulation of energy in the western United States. *See* 98 FERC ¶ 61165. This proceeding initially was aimed at the conduct of the bankrupt Enron Corporation. On March 20, 2002, however, the California Attorney General

filed a Complaint alleging that sellers in markets operated by Cal-PX and Cal-ISO, as well as those making spot market energy sales to CERS, violated FPA § 205. *See* 99 FERC ¶¶ 61247, 62055.

On March 20, 2002, California filed a Complaint "against all sellers of power and ancillary services subject to FERC jurisdiction in markets operated by the ISO and Cal[-]PX and sellers of power to CERS . . . alleging that FERC's market-based rate filing requirements violated the FPA and that, even if valid, the reports filed by electricity sellers did not contain the transaction-specific information the FPA requires." *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1010 (9th Cir. 2004).

On May 31, 2002, FERC dismissed California's March 20, 2012 action as an impermissible collateral attack on prior FERC orders. 99 FERC ¶ 61247, 62055. Also on May 31, 2002, FERC issued an opinion that "the failure to report transactions in the format required by [FERC] for quarterly reports is essentially a compliance issue," for which "re-filing of quarterly reports to include transaction-specific data is an appropriate and sufficient remedy." *Id.* ¶ 62068.

On December 12, 2002, a FERC Administrative Law Judge ("ALJ") determined that the sellers of wholesale power in the spot markets owed Cal-PX and Cal-ISO refunds of approximately $1.8 billion. 101 FERC ¶¶ 63026, 65132-33. But, the ALJ also found that these sellers were owed approximately $3 billion in refunds, or a net total of $1.2 billion after refunds. *See id.*[8]

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[8] Of the total $3 billion owed to sellers of wholesale power, approximately $1.8 billion specifically was owed to PG & E, with the $1.2 billion remainder to Cal-PX. *See* 102 FERC ¶¶ 61317, 62063.

On March 26, 2003, FERC reaffirmed its prior Orders, substantially adopting the ALJ's December 12, 2002 refund findings, and advised the public that refunds would be distributed by the end of summer 2003. *See* 102 FERC ¶ 61317.

On September 9, 2004, the United States Court of Appeals for the Ninth Circuit granted California's petition to review FERC's May 31, 2002 Order, but held that FERC's decision to approve market-based tariffs in the wholesale electric market did not violate the FPA. *See California ex rel. Lockyer*, 383 F.3d at 1013-17. But, the appellate court held that FERC erred in concluding that retroactive refunds were not available under FPA § 205. *Id*. at 1017-18.

On September 6, 2005, in response to approximately 200 petitions for review of various FERC Orders, the United States Court of Appeals for the Ninth Circuit held that "FERC does not have refund jurisdiction under FPA § 206 with respect to governmental entities and non-public utilities." *Bonneville*, 422 F.3d at 926.[9] By this holding, the Ninth Circuit affirmed Congress' decision to not subject federal power marketing administrations to FERC jurisdiction. *Id*. at 924.

On August 31, 2006, the United States Court of Appeals for the Ninth Circuit considered scope/ transaction issues concerning refunds, not addressed in *Bonneville*, and held that, although FERC may order public utilities to issue refunds *after* a "refund effective date," FERC is not authorized under FPA § 206(a) to order refunds *prior* to the filing of a complaint. *See CPUC v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006) ("Under the express language of § 206,

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[9] SC Edison and California were also parties subject to this decision.

however, FERC may not order refunds for any period prior to the filing of the complaint."). The Ninth Circuit also held that FPA § 309 authorized FERC to "order refunds if it finds violations of the filed tariff and imposes no temporal limitations." *Id*. The Ninth Circuit concluded that the FERC Order establishing October 2, 2000 as the refund effective date for FPA § 206 proceedings did not violate the FPA and remanded that case to FERC for further proceedings. *Id.* at 1046, 1065.

B. 2007-2012 Proceedings In The United States Court Of Federal Claims And May 12, 2012 Liability Decision.

On March 12, 2007, PG & E, and SC Edison filed a Complaint in the United States Court of Federal Claims, alleging that the "voluntary sales of electric power in the California wholesale markets[,] pursuant to the ISO and PX Tariffs [,] and pursuant to certain written agreements[,] gave rise to binding contractual obligations that [WAPA and BPA] owed to the other market participants, including the [Cal-IOUs,] . . . direct parties to and expressly intended beneficiaries of [WAPA and BPA's] contractual obligations." 3/12/07 Compl. ¶ 2. "The signatories to the [WAPA and BPA] agreements had authority to enter into the agreements and to bind [WAPA and BPA] contractually. [WAPA and BPA] have breached their contractual obligations[.]" 3/12/07 Compl. ¶ 2. This case was assigned to now-retired Senior Judge Loren Smith ("the prior trial court").

On March 13, 2007, SG & E filed an almost identical complaint in the United States Court of Federal Claims. *See San Diego Gas & Elec. Co. v. United States*, No. 07-167 ("3/13/07 Compl."). And, on March 16, 2007, California and the California Department of Water

Resources filed a similar complaint. *See California v. United States*, No. 07-184 ("3/16/07 Compl."). Both of these cases also were assigned to the prior trial court.

On February 7, 2008, the Government filed a Motion To Dismiss Cases 07-157 and 07167. On March 28, 2008 the Government also filed a Motion To Dismiss Case 07-184.[10]

On June 24, 2008, the prior trial court heard oral argument on the Government's February 7, 2008 Motion. 6/24/08 TR at 1-175. On July 9, 2008, the prior trial court issued an Order denying the Government's February 7, 2008 Motion without providing either the basis of or reasoning for this ruling. *See* Order, Dkt. No. 47 (July 9, 2008).

On October 3, 2008, the Government filed a Motion to Dismiss the California Electricity Oversight Board ("CEOB"), and a Motion For Joinder, seeking to join Cal-PX and Cal-ISO as plaintiffs, pursuant to RCFC 19 and 21. On that date, the Government also filed an Answer. On November 4, 2008, the Government's February 7, 2008 Motion To Dismiss all claims alleged by the CEOB was granted.

On February 10, 2009, the prior trial court convened an oral argument on the Government's October 3, 2008 Motion for Joinder. On February 17, 2009, the court denied the Government's October 3, 2008 Motion for Joinder, again without providing either the basis of or

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[10] The procedural history for Case 07-184, regarding substantive matters, are identical to the procedural history in Cases 07-157 and 07-167.

reasoning for this ruling.[11] *See* Order, Dkt. No. 78 (Feb. 17, 2009).

On December 22, 2009, the Government filed a third Motion to Dismiss, arguing that the Cal-IOUs failed to submit certified claims to a contracting officer, before filing a complaint in the United States Court of Federal Claims, as required by the Contracts Disputes Act, 41 U.S.C. §§ 601-13 ("CDA").

On April 16, 2010, the prior trial court held oral argument on the Government's December 22, 2009 Motion. On May 5, 2010, the prior trial court denied the Government's December 22, 2009 Motion, without providing either the basis of or reasoning for this ruling, and set a trial date on liability. *See* Order, Dkt. No. 142 (May 5, 2010).

On July 12-15, 19-22, 26-29, and August 2, 2010, the prior trial judge convened a trial in San Francisco regarding the breach of contract claims alleged by the Cal-IOUs and California. TR 1-2380.[12]

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[11] On November 19, 2009, FERC ordered an ALJ to convene an evidentiary hearing to determine: (1) whether public utility sellers violated relevant tariffs prior to October 2, 2000 in markets operated by the Cal-ISO or Cal-PX; and (2) if such violations occurred, whether any violation affected the market clearing price for the trading hour within which it occurred. *See* 129 FERC ¶¶ 61147, 61622.

[12] On September 7, 2010, FERC requested public comment on whether the "list of violations under consideration in [the FERC remand proceedings should] be expanded." 132 FERC ¶ 61209, 62087. On May 26, 2011, FERC issued an Order expanding the scope of the ALJ's inquiry to include whether: "(1) market practices that were previously excluded from the list and definitions of [Market Monitoring and Information Protocol] violation categories in the Show Cause Proceedings; (2) other [Cal-ISO] and [Cal-PX] tariff violations [occurred]; (3) [other] violations of

On May 2, 2012, the prior trial court issued an Opinion and Order determining that privity of contract existed between the parties in this case. *See Pac. Gas & Elec. Co. v. United States*, 105 Fed.Cl. 420, 432-33 (2012); *see also California ex rel. Brown v. United States*, 105 Fed.Cl. 18, 28-29 (2012) (same regarding Case No. 07-184) (collectively, "May 2, 2012 Opinions"). In addition, the prior trial court ruled that WAPA and BPA "breached its present contractual duty to pay the refunds they owe, and they have breached that duty by nonpayment." *Pac. Gas & Elec.*, 105 Fed.Cl. at 440.

C. The August 27, 2012 Decision Of The United States Court Of Appeals For The Ninth Circuit.

On August 27, 2012, approximately three months after the prior trial judge issued a decision in *Pacific Gas & Electric*, the United States Court of Appeals for the Ninth Circuit reaffirmed its holding in *Bonneville* that FERC had authority, under FPA § 206, to "investigate rates and to order refunds only from public utilities," but *not from governmental entities such as BPA and WAPA*. *See City of Redding*, 693 F.3d at 831 (emphasis added); *see also id*. at 839 ("FERC has asserted that it has the authority to retroactively reset

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Commission orders [occurred; (4)] violations of individual sellers' tariffs [occurred; and (5)] market practices, such as wash trading, gas market manipulation, false reporting to publications that compile price indices, and collusion, to the extent such conduct violated [the] current tariff." 135 FERC ¶¶ 61183, 62088. PG & E, SC Edison, and California, among others, requested a rehearing, arguing that they also should be allowed to introduce evidence of tariff violations by sellers in the Cal-PX and Cal-ISO markets, even if those sellers reached a settlement with other Cal-IOUs. *See* 141 FERC ¶ 61087. On November 2, 2012, FERC denied the rehearing. *Id*. at P 1.

the market rates for all market participants through the exercise of its § 206(b) refund authority over public utilities. *We hold that it does not* . . . . As we previously held in *Bonneville,* FERC's refund authority does not *extend to non-jurisdictional governmental entities*[.]") (emphasis added). In addition, to the extent that FERC revised or reset the market rate for the Refund Period, the Ninth Circuit held that this discrete activity was within FERC's authority, as it "necessarily involved reevaluating the price previously charged by all market participants[,] because the market clearing price was the same for all of them[.]" *Id*. at 841. PG & E, SC Edison, and California were parties to that case.

Significantly, the Ninth Circuit observed:

> We are not blind to the potential impact of FERC's determination of the just and reasonable prices. In the contract actions brought in other forums, it is claimed that the Petitioners before us are liable for charges collected by them in excess of the just and reasonable prices subsequently calculated by FERC. Petitioners seek to protect themselves against those claims by preventing FERC from recalculating the market rates. But FERC's recalculation was not an empty exercise, because it had to determine just and reasonable market clearing prices in order to calculate the refunds to be ordered from [jurisdictional entities] from which it could order refunds. What impact this calculation might have on the contract actions pending in [the United States Court of Federal Claims concerning non-jurisdictional governmental entities] is not for us to say.

Id. at 842.

D. The Government's November 2, 2012 Motion For Reconsideration In The United States Court Of Federal Claims And April 2, 2013 Order Denying Reconsideration.

On November 2, 2012, the Government filed a Motion For Reconsideration of the prior trial court's decision in *Pacific Gas & Electric Co.* Therein, the Government argued that *City of Redding* held that FERC had no retroactive rate-setting authority; thus, the prior trial court erred in finding that the PX and ISO tariffs "bind the Government to FERC action with respect to past sales." Gov't Recon. Mot. at 3. According to the Government, the court "misinterpreted FERC's May 29, 2009 [O]rder as creating for BPA and WAPA contractual obligations through something . . . that the [O]rder did not accomplish, and could not have accomplished." Gov't Recon. Mot. at 6.

On April 2, 2013, the Government's November 2, 2012 Motion For Reconsideration was denied by the prior trial court. *See Pac. Gas & Elec. Co. v. United States*, 110 Fed.Cl. 135 (2013).

E. 2013 Reassignment Of This Case, The December 20, 2013 Decision To Vacate, And Subsequent Proceedings In The United States Court Of Federal Claims.

On April 15, 2013, former Chief Judge Emily C. Hewitt reassigned this case to the undersigned judge. On May 9, 2013, the court convened telephone conference to discuss the May 2, 2012 Opinions, because the court was concerned about the lack of citations to the record supporting the factual findings in *Pacific Gas & Electric*, 105 Fed.Cl. at 424-26, 432-33. The court requested that the parties supply these citations. On June 21, 2013, the Government submitted a Status

Report "respectfully declin[ing] to furnish annotations or citations for the [c]ourt's May 2, 2012 interlocutory decision[s]." Gov't Status Report at 2. Instead, the Government proposed five alternatives, including, *inter alia*, that the court vacate the May 2, 2012 Opinion or allow the parties to file proposed findings of fact and conclusions of law to assist the court in issuing new opinions. Gov't Status Report at 3. On July 3, 2013, Plaintiffs submitted a Status Report that included a copy of the May 2, 2012 Opinion, annotated with record citations, and responded to the Government's June 21, 2013 Status Report. On July 17, 2013, the Government filed a Response. On September 27, 2013, Plaintiffs filed a Reply. On October 9, 2013, the court began an independent examination of each sentence of the May 2, 2012 Opinion, together with the record citations provided by Plaintiffs.

On December 20, 2013, the court determined that the interests of justice required that the May 2, 2012 Opinions be vacated[13] and reconsidered in light of jurisdictional issues that previously were raised, but summarily rejected without an opinion. *See Pac. Gas & Elec. Co. v. United States*, 114 Fed.Cl. 146 (2013).

On February 26, 2014, the court requested that the parties appear at an oral argument to provide their views as to "why the court, on reconsideration, should not dismiss these cases, because of plaintiffs' failure to establish the requirements of standing to sue on a government contract, thereby depriving the court of jurisdiction." Notice of Oral Argument, Case No. 07157, Dkt. No. 312, at 2.

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[13] Specifically, the court vacated *Pac. Gas & Elec. Co. v. United States*, 105 Fed. Cl. 420 (2012) and *California ex rel. Brown v. United States*, 105 Fed. Cl. 18 (2012).

On June 5, 2014, the court heard oral arguments from the parties regarding standing and the court's jurisdiction. *See* Case No. 07-157, Dkt. No. 332 (6/5/14 TR 1-141).

On July 1, 2014, the Government filed a Motion For Dismissal Or Entry Of Judgment Upon Plaintiffs' Refund Period Claims ("Gov't Mot."). On July 25, 2014, Plaintiffs filed a Response ("Pl. Resp."). On August 4, 2014, the Government filed a Reply ("Gov't Reply").

On July 1, 2014, Plaintiffs also filed a Motion To Reinstate The May 2, 2012 Liability Decision And For Certification For Orders For Interlocutory Appeal ("Pl. Mot."). On July 18, 2014, the Government filed its Opposition ("Gov't Opp."). On August 8, 2014, Plaintiffs filed a Reply ("Pl. Reply").

On November 18, 2014, Plaintiffs filed a Notice Of Additional Authority that brought to the court's attention FERC's November 10, 2014 decision in 149 FERC ¶ 61116 (2014). On November 19, 2014, the Government also filed a Notice Of Additional Authority regarding the same FERC decision. On November 26, 2014, Plaintiffs filed a Response.

On January 22, 2015, the court held a final oral argument in San Francisco, California ("1/22/15 TR 1-92").

III. DISCUSSION.

A. Whether Plaintiffs Have Standing.

As a matter of law, a "plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim." *S. Cal. Fed. Sav. & Loan Ass'n v. United States*, 422 F.3d 1319, 1328 (Fed. Cir. 2005). Privity "takes on even greater significance in cases such as this, because the 'government consents

to be sued only by those with whom it has privity of contract.'" *Id.* (quoting *Erickson Air Crane Co. of Wash. v. United States,* 731 F.2d 810, 813 (Fed. Cir. 1984)); *see also Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003) (holding that "privity is lacking," where plaintiffs were not signatories to the contractual documents); *see also id*. ("To have standing to sue the sovereign on a contract claim, a plaintiff must be in privity of contract with the United States."). "Absent privity between [Plaintiffs] and the [G]overnment, there is no case." *Katz v. Cisneros,* 16 F.3d 1204, 1210 (Fed. Cir. 1994).

Two exceptions to the general rule of privity are relevant here: third-party beneficiary status and agency relationships. *See First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1289 (Fed. Cir. 1999) (stating that, "despite [a] lack of privity, . . . suits may be brought against the [G]overnment in the [United States] Court of Federal Claims by an intended third-party beneficiary"); *see also Christos v. United States*, 48 Fed.Cl. 469, 477-78 (2000) ("Third-party beneficiary status is an exception to the privity requirement . . . . Another exception to the privity requirement is an agency relationship."), *aff'd,* 300 F.3d 1381 (Fed. Cir. 2002).

Therefore, to establish standing, the Cal-IOUs and California must be in privity of contract with WAPA and BPA, or have a third-party beneficiary relationship with Cal-PX and Cal-ISO, or an agency relationship Cal-PX and Cal-ISO.

1. Neither The California Investor-Owned Utilities Nor The State Of California Were In Privity Of Contract, Either With The Western Power Administration Or The Bonneville Power Administration.

The Cal-IOU Complaint in the United States Court of Federal Claims alleges that WAPA and BPA:

> signed agreements that . . . expressly agreed to abide by their terms and conditions. Moreover, by voluntarily electing to transact in the ISO and PX markets [WAPA and BPA] are charged with knowledge, and are deemed to have accepted the terms of the Tariffs, which set forth the mutual rights and obligations among market participants. The terms of the [Cal-ISO FERC and Cal-PX FERC] Tariffs create enforceable contractual obligations binding on [WAPA and BPA].

03/12/07 Compl. ¶ 28 (citing Cal-PX Tariff ¶ 17 ("Obligations and liabilities under this Tariff" are binding on the "successors and assigns of the parties")[14]; Cal-ISO Tariff ¶ 17 (same); Cal-PX Tariff ¶ 14.3 (indemnity provisions); Cal-ISO Tariff ¶ 14.3 (same); Cal-ISO Tariff ¶ 20.7 (choice-of-law, venue clauses); Cal-PX

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[14] Paragraph 17 of the Cal-PX Tariff did not set forth any obligations between buyers and sellers of wholesale power, but only addressed obligations and liabilities between the Cal-PX Participant and the Cal-PX:

> No assignment of any service or participation agreement shall relieve the original PX Participant *from its obligations or liabilities to the PX* under this Tariff or any such service or participation agreement arising or accruing due prior to the date of assignment.

PE 57 ¶ 17 (emphasis added).

Tariff ¶ 19.6 (same); Cal-ISO Tariff ¶ 15 (consequences of uncontrollable force); Cal-PX Tariff ¶ 16.11 (same); Cal-PX Tariff ¶ 16.2 (duty of mitigate)). The California Complaint is substantially similar. *See* 03/16/07 Compl. ¶ 24, Case No. 07-184 (citing Cal-ISO Tariff ¶¶ 14.3, 15, 17, 20.7).

None of these tariff provisions, however, evidence any the three core elements required to "form an agreement binding upon the government ... (1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration[.]" *Anderson,* 344 F.3d at 1353. Instead, the Cal-PX and Cal-ISO Tariffs set forth only the legal duties and obligations WAPA and BPA owed to Cal-PX and Cal-ISO.

Nevertheless, the prior trial court found that:

> the *facts at trial* showed that [WAPA and BPA] *contracted with and owe contract obligations* to the Plaintiffs. First, the evidence showed that the PX . . . [was a] 'public utilit[y]' under the FPA. Second, as a public utility, all the sales and all the purchases of power in those markets were governed by FERC-regulated tariffs. Third, the applicable Tariffs in this case which were filed with FERC, specified the rules to abide by in order to participate in these markets. The Tariffs included when and in what form participants would submit bids to buy and sell power, and the formulas used to establish prices for all purchase-sale transactions[,] as well as prescribing the financial settlements resulting from market transactions. The Tariffs also allocated risks as between the markets and the market participants. Fourth, because the Tariffs were FERC regulated, FERC could alter or amend them, including their pricing formulas, and to

> review and correct the market-clearing prices. And finally, the Tariffs authorized market participants to seek FERC's review and correction of prices set under the Tariff formulas.

Pac. Gas & Elec. Co., 105 Fed.Cl. at 432 (emphasis added).

Although each of these statements is true, none individually or collectively establishes a contractual relationship between WAPA and BPA either with the Cal-IOUs or California. First, the fact that Cal-PX was a public utility is not relevant to whether the Cal-IOUs and California were in privity of contract with WAPA or BPA. Second, the fact that a public utility is subject to FERC regulated tariffs likewise is irrelevant. Third, although the Cal-PX and Cal-ISO Tariffs specified the terms and conditions of service, neither of these Tariffs reflects any express or implied intent by WAPA or BPA to undertake any legal duties to or assume obligations of either the Cal-IOUs or California. PE 57 ¶ 3 (Cal-PX Tariff "Responsibilities of the PX and PX Participants"); PE 66 ¶ 5 (Cal-ISO Tariff "Relationship Between ISO and Generators"). In fact, as FERC recognized, "[W]e are faced with a new market institution, in which sellers and buyers of electric energy *will not contract* directly with one another, as has been traditionally done in the industry, but instead will contract with the [Cal-PX and Cal-ISO]." 80 FERC ¶¶ 61262, 61946 (1997) (emphasis added).

The prior trial court found that WAPA and BPA had privity of contract with the Cal-IOUs and California:

> [I]n order for [WAPA and BPA] to have access to the [Cal-PX] Markets, [they] were required to sign written contracts that incorporated these Tariffs, as well as agreeing to abide by the Tariffs' terms

> and subsequent changes to those Tariffs. In the ISO, the Scheduling Coordinators were also required to sign a Scheduling Coordinator Agreement. Thus, the evidence is clear and uncontested that when [WAPA and BPA] signed the PX and SC Agreements, they agreed to accept the prices, terms, and conditions established by the [Cal-PX FERC Tariff and Cal-ISO FERC Tariff], as determined and modified from time to time by FERC.

Pac. Gas & Elec. Co., 105 Fed.Cl. at 432-33.

But, the undersigned judge has concluded otherwise. The fact that WAPA and BPA agreed to abide by FERC's "policies, terms, and conditions" does not establish, as a matter of law, contractual privity between WAPA and the Cal-IOUs or California or BPA with the Cal-IOUs or California. WAPA and BPA's promises were made to Cal-PX and Cal-ISO, not to the Cal-IOUs or California. Moreover, there is no text in the Cal-PX Agreements or Cal-ISO SC Agreements manifesting any intent by WAPA or BPA to assume any legal duties to the Cal-IOUs or California. Nor was there any "direct, unavoidable contractual liability [that is] necessary to trigger a waiver of sovereign immunity." *Nat'l Leased Hous. Ass'n v. United States*, 105 F.3d 1423, 1436 (Fed. Cir. 1997).

In the alternative, the prior trial court judge also concluded that the Cal-IOUs and California had privity with WAPA and BPA, because it viewed Cal-PX as a:

> *facilitator*[ ] *only*, and that the payment obligations were between the buyer and seller. Since the [Cal-]PX [was a] pass-through entit[y] or clearinghouse [ ], the contractual relationships of

> offer, acceptance, and mutual intent ran between the Agencies and the [Cal-]IOUs, the Plaintiffs. The [Government's] argument is illogical that there is no relationship between [WAPA and BPA] and [the Cal-IOUs and California]. For example, when one pays a bill with a check, the money may go into the creditor's bank account, but it is the legal property of the creditor. It meets the debtor's legal obligations. The same relationship existed here. The [Cal-]PX . . . [was] like a bank, and [WAPA and BPA] and the [Cal-IOUs and California] had the obligations.

Pac. Gas & Elec. Co., 105 Fed.Cl. at 433.

The prior trial court's analogy, however, is unsupported by any record citations and misconstrues the record that evidences that Cal-PX and Cal-ISO were not passive, neutral "banks," simply facilitating pass-throughs of electricity and money. Instead, the Cal-PX and the Cal-ISO actively engaged in trading, price-setting, and adjusting rates. PE 66 at § 2.2.2 ("To fulfill its obligations with respect to scheduling Energy and Ancillary Services, the ISO shall: provide Scheduling Coordinators with operating information and system status . . . ; determine whether Preferred Schedules submitted by Scheduling Coordinators meet [certain] requirements . . . ; prepare Suggested Adjusted Schedules . . . ; validate all Ancillary Services bids . . . ; reduce or eliminate Congestion based on Adjustment Bids . . . ; and [i]f necessary, make mandatory adjustments to Schedules[.]"); PE 57 at § 3.1 ("The PX shall (1) calculate the prices at which trades in Energy are transacted in the PX Markets, (2) settle trades in Energy between PX Participants, (3) receive Meter Data from the Scheduling Coordinator Metered Entities . . . , (4) prepare and distribute to PX Participants

invoices reflecting the amounts payable and receivable . . . , and (5) operate the funds transfer system[.]"). Thus, Cal-PX and Cal-ISO were active, independent parties to the contracts with WAPA and BPA, not simply facilitators such that WAPA and BPA were in privity with the Cal-ISOs and California.

For these reasons, the court has determined that WAPA and BPA were not in privity of contract either with the Cal-IOUs or California.

2. Neither The California Investor-Owned Utilities Nor The State Of California Were Third-Party Beneficiaries To A Contract With Either The Western Power Administration Or The Bonneville Power Administration.

The prior trial court also decided that there was no need to "address whether the Plaintiffs are third party beneficiaries as the evidence proved that they are direct beneficiaries." *Pac. Gas & Elec. Co*., 105 Fed.Cl. at 433 n.2. In light of today's privity ruling, the court is obligated to reconsider that determination, because a third-party beneficiary status is a jurisdictional exception to privity, *i.e.,* only an intended third-party beneficiary has standing to enforce a contract to which it is not a direct party. *See* 13 WILLISTON ON CONTRACTS § 37.1 (4th ed. 2013) ("[A]n exception to the need for privity was developed through the doctrine of third party beneficiaries."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) ("[A] beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either[:] (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that

the promisee intends to give the beneficiary the benefit of the promised performance.").

To establish third-party beneficiary status, a contract need not afford a third-party the "direct right to compensation or the power to enforce that right against the promisor." *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001); *see also Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997) (same); *Flexfab*, *L.L.C. v. United States*, 424 F.3d 1254, 1260 (Fed. Cir. 2005) ("[T]hird-party beneficiary status is not reserved [solely] for those parties who benefit expressly under a given contract."). Instead, third-party beneficiary status may be established where the party "fall[s] within a class clearly intended to be benefited" by the contract. *See Montana*, 124 F.3d at 1273; *see also JGB Enters*., *Inc. v. United States*, 497 F.3d 1259, 1261 n.1 (Fed. Cir. 2007) (observing that a subcontractor was a third-party beneficiary, where "the [contracting officer] knew or should have known that the [G]overnment's payment on the contract was intended to directly benefit the subcontractor").

The United States Court of Appeals for the Federal Circuit has held that third-party beneficiary status is not established "merely because [a] contract would benefit [a party]." *Fed. Deposit Ins. Corp. v. United States*, 342 F.3d 1313, 1319 (Fed. Cir. 2003) ("*FDIC* "); *see also US Ecology*, *Inc. v. United States,* 245 F.3d 1352, 1356 (Fed. Cir. 2001) (holding that the Government's cooperation with a third-party is not sufficient to establish a third-party beneficiary relationship). Instead, "[t]hird party beneficiary status is an 'exceptional privilege' and, to avail oneself of this . . . privilege, a party must 'at least show that [the contract] was intended for his direct benefit.' " *FDIC*, 342 F.3d at 1319 (quoting *Glass,* 258 F.3d at 1354); *see also*

Flexfab, 424 F.3d at 1259 (holding that an "incidental beneficiary"[15] does not have standing to sue for breach of a contract). And, that privilege "should not be granted liberally." *Id.*; *see also Anderson*, 344 F.3d at 1352 (referring to "the stringent requirements which must be satisfied to establish third-party beneficiary status."); *see also G4S Tech. LLC v. United States*, 779 F.3d 1337, 1344 (Fed. Cir.2015) (holding that there was no third-party beneficiary status, despite contrary circumstantial evidence, when "the [G]overnment's actions never deviated from the scope of its sovereign responsibilities to safeguard taxpayer funds and advance the public interest").

In addition, a government contract must reflect the express or implied intention of the contracting parties to benefit a specific third-party. *See Montana*, 124 F.3d at 1273 (holding that a plaintiff "must fall within a class clearly intended to be a beneficiary thereby"). The party asserting third-party beneficiary status also must "at least, show that [the contract] was intended for his *direct* benefit." *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230, 33 S.Ct. 32, 57 L.Ed. 195 (1912). In sum, the trial court must consider the intent of the contracting parties as the "cornerstone" of the third-party beneficiary status inquiry. *See Flexfab*, 424 F.3d at 1259.

In this case, neither the specific language of the Cal-PX Participation Agreements nor the Cal-ISO SC Agreements refer to the Cal-IOUs or California by name, much less reflect any benefit intended on their behalf by WAPA or BPA. In addition, neither the PX

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[15] The RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) defines an "incidental beneficiary" as "a beneficiary who is not an intended beneficiary."

Agreements nor SC Agreements demonstrate "that a [G]overnment agent with authority to contract on behalf of the [G]overnment intended to [convey a] benefit" on Cal-IOUs or California. *See Flexfab*, 424 F.3d at 1256. And, there is no testimony in the record that establishes any authorized agent of WAPA or BPA intended to convey any benefit to the Cal-IOUs or California. At most, the Cal-IOUs and California were incidental beneficiaries. As such, they lack third-party beneficiary standing. *See* RESTATEMENT (SECOND) OF CONTRACTS § 315 (stating that an incidental beneficiary "acquires by virtue of the promise no right against the promisor or the promisee").

For these reasons, the court has determined that the Cal-IOUs and California were not third-party beneficiaries to the contract between Cal-PX and Cal-ISO with WAPA and BPA.

3. Neither Cal-PX Nor Cal-ISO Was An Agent Of The Cal-IOUs Or The State Of California.

An agency relationship can arise when:

> Two or more principals . . . authorize the same agent to make separate contracts for them. If the agent makes a single contract with a third party on the principals' behalves that combines the principals' separate orders or interests and calls for a single performance by the third party . . . , unless the agent acted with actual or apparent authority . . . , the third party is not subject to liability on the combined contract to any of the separate principals.

RESTATEMENT (THIRD) OF AGENCY § 6.05(2)(c). "An agent acts with actual authority when, at the time of taking action that has legal consequences for the

principal, the agent reasonably believes . . . that the principal wishes the agent so to act." *Id.* at § 2.01. "Apparent authority is the power held by an agent . . . to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* at § 2.03.

The cases that United States Court of Appeals for the Federal Circuit has considered to date concerning agency arise in the context of a prime/subcontractor relationship. For example, the appellate court has recognized that privity may be established by an agency relationship between the Government and a subcontractor, only if the "prime" contractor is an agent for the Government. *See United States v. Johnson Controls*, *Inc*., 713 F.2d 1541, 1551 (Fed. Cir. 1983) (citing *Kern-Limerick*, *Inc. v. Scurlock*, 347 U.S. 110, 120-21, 74 S.Ct. 403, 98 L.Ed. 546 (1954) and *W. Union Tel. Co. v. United States*, 66 Ct.Cl. 38, 50 (1928)). But to do so, the facts must establish that the "prime" contractor was "(1) acting as a *purchasing* agent for the [G]overnment, (2) the agency relationship between the [G]overnment and the prime contractor was established by clear contractual consent, and (3) the contract stated that the [G]overnment would be directly liable to the vendors for the purchase price." *Johnson Controls,* 713 F.2d at 1551 (internal citations omitted) (emphasis in original); *see also Nat'l Leased Hous. Ass'n*, 105 F.3d at 1435-36 (same).

In this case, the record reflects that no financial transaction ever took place between the Cal-IOUs or California and WAPA or BPA. Cal-PX obtained bids for wholesale power from utilities that signed a Participation Agreement. PE 57 at ¶ 3 (Responsibilities of

PX and PX Participants). Then, Cal-PX set a market price, "based in the most expensive generation needed to meet demand" and awarded wholesale power at that market price. PE 199 at 32060; 6/24/08 TR at 27-29. Thereafter, each of the Cal-IOUs received individual billing statements, invoices, and supporting data specifying the amount due to or from Cal-PX. PE 57 at ¶ 4 (PX Accounting and Administrative Charge), ¶ 6 (Settlements and Billing); 7/14/10 TR at 587-93 (confirming that Cal-PX and Cal-ISO handled billing and settlements). The Cal-IOUs then made payments directly to Cal-PX for power purchased. PE 57 at ¶ 4 (PX Accounting and Administrative Charge). The Cal-PX also required that all signatories to a Participation Agreement provide collateral and maintain a financial reserve account, held in trust. PE 188 (Cal-PX Operating Manual ¶ 2 (Bank Accounts)). The Participation Agreements indemnified Cal-PX for the risk of any losses. PE 57 at ¶ 14.3. Although market participants reserved the right to pursue delinquent or non-paying participants by a separate lawsuit, they could do so only after providing notice to Cal-PX. PE 66 at § 11.19; *see also* 6/24/08 TR at 29-33. These facts evidence that Cal-PX was not an agent of the Cal-IOUs and California.

Moreover, in *Johnson Controls,* the United States Court of Appeals for the Federal Circuit emphasized that, in that case, although the Government "retained a great deal of control" over the prime contractor, it was "also apparent that the [G]overnment meant to use [the prime contractor] as a buffer between it and the claims of the subcontractors." 713 F.2d at 1552. Thus, the subcontractor did not have standing to pursue its claim. *Id.* at 1557. Similarly here, WAPA and BPA were in privity with Cal-ISO and Cal-PX; thus, the Government intended Cal-ISO and Cal-PX to be

legal buffers between them and the Cal-IOUs and California. Moreover, the third *Johnson Controls* factor, *i.e.* "the contract stated that the [G]overnment would be directly liable to the vendors for the purchase price," is not satisfied here. *Id.* at 1551. Nothing in the Cal-PX or Cal-ISO contracts provides that WAPA or BPA would be liable to the Cal-IOUs or California.

Likewise, *Christos v. United States*, 48 Fed.Cl. 469 (2000), *aff'd*, 300 F.3d 1381 (Fed. Cir. 2002), is instructive. There, plaintiffs were employees who had been laid off by Westinghouse Savannah River Company ("WSRC"). *Id.* at 472. WSRC contracted with DOE for cost-reimbursement management and operation. *Id.* The contract between WSRC and DOE included "a Personnel Appendix setting forth allowable personnel administration costs," including severance pay. *Id.* at 472-73. Plaintiffs sued DOE for severance pay. *Id.* at 474. The court analyzed the *Johnson Controls* factors and determined that "DOE specifically stated in the [relevant] Contract's disclaimer provision that it is not directly liable to third parties like plaintiffs . . . . [Thus,] plaintiffs cannot establish the third prong of the agency test," *i.e.,* "the contract stated that the government would be directly liable." *Id.* at 478. Importantly, the contract contained "no 'reasonably clear indications' that the [G]overnment intended to create a relationship or that it permits the type of suit plaintiffs have filed. Plaintiffs, therefore, cannot establish the second prong of the agency test either." *Id.* The same analysis applies to this case. The Cal-IOUs and California contracted with Cal-PX and Cal-ISO, not WAPA or BPA. PE 23 (Scheduling Coordinator Agreement between WAPA and Cal-ISO); PE 26 (PX Participation Agreement between BPA and Cal-PX); PE 30 (Scheduling Coordinator Agreement between BPA and Cal-ISO); PE 43 (05/28/99 PX Participation

Agreement between WAPA and Cal-PX); PE 45 (06/22/99 PX Participation Agreement between WAPA and Cal-PX). There is no "reasonably clear indication" in any contract that WAPA or BPA was to be directly liable to the Cal-IOUs or California. *See Christos*, 48 F.3d at 478; *see also S. Cal. Edison Co. v. Lynch*, 307 F.3d at 803 ("SoCal Edison is in privity with [Cal-PX] *not* with [other wholesale electric] power companies." Instead, the latter's relationship is based on a contingent "*unsecured claim against a third-party debtor*.") (emphasis added).

The fact that the term "agency" appears in the Cal-PX and Cal-ISO contracts does not change this conclusion. PE 188 at ¶ 5 (Determination of Real Time Market Supplier Trading) (referring throughout to the Cal-PX and Cal-ISO as "acting as agents"); PE 57 ¶ 3.1 (Cal-PX "will not be, and shall not be deemed to be a counterparty to any trade transacted through the PX Markets."). As a matter of law, however, Cal-ISO stated it would "not act as principal but as agent for and on behalf of the relevant Scheduling Coordinators." PE 66 ¶ 2.2.1. Cal-PX acted as the Scheduling Coordinator for some of the Cal-IOUs and California. PE 57, Schedule 4, ¶ 1.1.1 ("The PX operates as an Energy auction for the PX Markets on behalf of PX Participants. The PX also acts as a Scheduling Coordinator for certain PX Participants . . . for submitting Schedules to the [Cal-]ISO."); PE 25 (SCE PX Participation Agreement); PE 37 (PG & E PX Participation Agreement); PE 249 (California PX Participation Agreement). Each of these three Agreements incorporates the Cal-PX tariff; but none exempts the Participant from using Cal-PX as its Scheduling Coordinator with Cal-ISO. PE 25, PE 37, PE 249. Thus, because Cal-ISO acted as an agent on behalf of Scheduling Coordinators, and Plaintiffs contracted

with Cal-PX to be their Scheduling Coordinator, on first impression, it appears that Plaintiffs met the agency exception to privity.

But, WAPA and BPA also entered into similar Participation Agreements with Cal-PX and Cal-ISO. PE 23 (WAPA ISO Scheduling Coordinator Agreement), PE 43, 45 (WAPA PX Participation Agreements), PE 26 (BPA PX Participation Agreement), PE 30 (BPA ISO Scheduling Coordinator Agreement). Cal-ISO cannot be an agent to parties on both sides of a transaction. *See* RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."); *see also Pegram v. Herdrich*, 530 U.S. 211, 224, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000) ("[T]he common law (understood as including what were once the distinct rules of equity) charges fiduciaries with a duty of loyalty[.]"). To the extent that Cal-ISO purports to be an agent to parties on both sides of this dispute, the Cal-IOUs and California cannot claim an agency exception to privity.

For these reasons, the court has determined that the Cal-IOUs and California have established neither privity nor either of the exceptions thereto.

B. Jurisdiction.

The United States Court of Federal Claims has jurisdiction under the Tucker Act, 28 U.S.C. § 1491, "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act, however, is "a

jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . . [T]he Act merely confers jurisdiction upon [the United States Court of Federal Claims] whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976).

To pursue a substantive right under the Tucker Act, a plaintiff must identify and plead an independent contractual relationship, Constitutional provision, federal statute, and/or executive agency regulation that provides a substantive right to money damages. *See Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) ("[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act[.]"); *see also Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc*) ("The Tucker Act . . . does not create a substantive cause of action; . . . a plaintiff must identify a separate source of substantive law that creates the right to money damages . . . . [T]hat source must be 'money-mandating.'"). Specifically, a plaintiff must demonstrate that the source of substantive law upon which he relies "can fairly be interpreted as mandating compensation by the Federal Government[.]" *Testan*, 424 U.S. at 400, 96 S.Ct. 948. And, the plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) ("[O]nce the [trial] court's subject matter jurisdiction [is] put in question . . . . [the plaintiff] bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence.").

Plaintiffs claim that the court "has jurisdiction over [their] claims for relief pursuant to the Contract Disputes Act ("CDA"), 41 U.S.C. § 609(a)(1), and the Tucker Act, 28 U.S.C. §§ 1491(a)(1) and 1491(a)(2)." Compl. ¶ 12. The Government has not contested subject-matter jurisdiction under either statute, but the court has an obligation to consider the issue *sua sponte*. *See Gonzalez v. Thaler*, —— U.S. ——, 132 S.Ct. 641, 648, 181 L.Ed.2d 619 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. Subject-matter jurisdiction can never be waived or forfeited.") (internal citation omitted).

Plaintiffs first assert that the court has jurisdiction under the CDA § 609(a)(1).[16] But, "[t]he CDA applies to contracts entered into by an executive agency for: (1) the procurement of property, other than real property in being; (2) the procurement of services; (3) the procurement of construction, alteration, repair or maintenance of real property; or (4) the disposal of personal property." *N. Star Steel Co. v. United States*, 477 F.3d 1324, 1332-33 (Fed. Cir. 2007) (citing 41 U.S.C. § 602(a)). WAPA "markets and delivers cost-based hydroelectric power and related services[.]"

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[16] At the time of Plaintiff's March 12, 2007 Complaint, Section 609(a)(1) provided:

> Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

41 U.S.C. § 609(a)(1) (effective to Jan. 3, 2011).

Id. at 1326. Similarly, "BPA markets, transmits, purchases, exchanges, and sells electric energy in the wholesale market." *City of Burbank*, 273 F.3d at 1373. In the relevant *North Star Steel* contract, "WAPA agreed to provide both non-firm transmission service . . . and regulating services[.]" *N. Star Steel Co*., 477 F.3d at 1327. The United States Court of Appeals for the Federal Circuit held that "[t]he CDA does not apply to [WAPA's contract] because it was a contract for the provision of services *by* the [G]overnment." *Id.* at 1332. This case is different, because WAPA and BPA were both buying *and* selling electric services. *See* 95 FERC ¶ 61418, 62546 (2001) (eliminating the mandatory buy-sell requirement). Thus, the court has jurisdiction over claims relating to WAPA and BPA's procurement of electric power and scheduling services of electric power under the CDA; it does not have jurisdiction over claims relating to their sales. *See* 41 U.S.C. § 7102(a)(2).[17]

In *North Star Steel,* the United States Court of Appeals for the Federal Circuit nonetheless held that "[b]ecause North Star's claim arose out of . . . an express contract with the United States, the exercise of jurisdiction by the Court of Federal Claims was proper under the Tucker Act." *N. Star Steel Co*., 477 F.3d at 1332. In this case, Plaintiffs assert that the Tucker Act provides the court with jurisdiction over their claims. Compl. ¶ 12. But, unlike *North Star Steel*, the court has determined that there was no "express contract with the United States." *See supra* Section III.A. For the same reasons Plaintiffs lack standing,

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[17] On January 4, 2011, 41 U.S.C. § 602 was renumbered 41 U.S.C. § 7102.

the court also does not have jurisdiction to adjudicate Plaintiffs' contract claims under the Tucker Act.

C. Assuming *Arguendo,* Plaintiffs Have Standing, Count I Of Plaintiffs' Refund Period Breach Of Contract Claims Must Be Dismissed.

1. The Government's Argument.

The Government argues that the court should enter judgment as to Count I of the Plaintiffs' Complaints "because the predicate for those breach of contract claims—the alleged correction by [FERC] of refund period sales prices pursuant to section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e—never happened." Gov't Mot. at 4.[18] "[P]laintiffs' theory of recovery is factually dependent on FERC having retroactively reset the Market Clearing Price for *all* market participants." Gov't Mot. at 8 (emphasis added). Plaintiffs' Complaints allege that WAPA and BPA are "contractually obligated to reimburse [the IOUs and California] for the difference between the rates that [BPA and WAPA] initially charged for [their] sales in the ISO and PX markets . . . and the [Mitigated Market Clearing Price]." Gov't Mot. at 8 (quoting Compl., Nos.

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[18] The Government also argues the court should dismiss Count 1 of the Plaintiffs' Complaints, because they "did not present sum-certain claims to a contracting officer." Gov't Mot. at 2. The Contract Disputes Act, however, does not require sum-certain claims. Instead, the sum-certain language appears in the Federal Acquisition Regulations ("FAR"). The FAR applies to Government acquisitions, not sales. *See Precision Pine & Timber*, *Inc. v. United States*, 75 Fed.Cl. 80, 87 (2006) (holding that the FAR does not apply when "the Government is not 'acquiring,' but rather, is selling a commodity"). Here, the Government sold electricity. As such, the FAR does not apply, and Plaintiffs were not required to submit a sum-certain claim.

07-157C ¶ 75, 07-167C ¶ 75; 2nd Am. Compl., No. 07-184C ¶ 71). The problem is that "FERC never 'corrected' or 'revised' refund period sales prices; indeed, it never had any authority to do so." *City of Redding,* 693 F.3d at 840-41. As the United States Court of Appeals for the Ninth Circuit held, FERC had "authority to determine a rate only prospectively, and cannot engage in the retroactive resetting of rates ... either on a market-wide basis or on an individual basis." Gov't Mot. at 9 (citing *City of Redding*, 693 F.3d at 840). Because FERC cannot order retroactive refunds under FPA § 206, the factual predicate for Plaintiffs' breach of contract never occurred. Gov't Mot. at 9.

The Government further disputes Plaintiffs' position that the Cal-PX FERC Tariff Section 13 and Cal-ISO FERC Tariff Section 19 "mean that 'the Agencies contractually committed to abide by FERC-established pricing[.]' " Gov't Mot. at 10 (quoting Pl. Reply in Response to the court's March 19 and March 20 Orders, at 9 (May 23, 2014) (Dkt. No. 327)). Instead, these sections reserve the "Participant's ability 'to exercise its rights under Section 206 of the FPA.' " Gov't Mot. at 10 (quoting PE 57 at 919; PE 66 at 316-17). Those rights, however, extend only as far as FPA § 206 permits. Gov't Mot. at 10. In other words, a Participant is free to petition FERC to exercise its refund authority under FPA § 206(b), but the FERC's authority is limited to "determin [ing] what the just and reasonable price 'would have been' for any refund period," not "establish[ing] any actual rates." Gov't Mot. at 10-11. Section 206(b) of the FPA authorizes FERC only to assess refund liability over "jurisdictional sellers." Gov't Mot. at 11. WAPA and BPA are not subject to FERC jurisdiction.

According to Plaintiffs, *Alliant Energy v. Nebraska Public Power Dist.*, 347 F.3d 1046 (8th Cir. 2003), "support[s] the notion that . . . FERC refund orders, otherwise unenforceable against a non-jurisdictional utility, may nevertheless be enforced via contract." Gov't Mot. at 11-12 (citing Pl. Br. in Response to the court's March 19 and March 20 Orders, at 41 (Apr. 18, 2014) (Dkt. No. 324); Pl. Reply in Response to the court's March 19 and March 20 Orders, at 10, 12 (May 23, 2014) (Dkt. No. 327)). [T]he reference to *Alliant* in *Bonneville* only suggested that the remedy, 'if any,' would be contractual. Gov't Mot. at 12. Moreover, the United States Court of Appeals for the Ninth Circuit "[took] no position on remedies available outside of the FPA." Gov't Mot. at 12 (quoting *Bonneville*, 422 F.3d at 926). "*Alliant* did not once mention the FPA, let alone § 206[.]" *City of Redding*, 693 F.3d at 840. In addition, the tariff in *Alliant* was established under FPA § 205, but this tariff was issued under FPA § 206. Gov't Mot. at 12. "*Alliant* presented an entirely different basis for contractual liability" under Section 205—not subject to the same jurisdictional constraints as Section 206. Gov't Mot. at 12. The *Alliant* tariff was a provisional rate that FERC accepted "subject to refund if that tariff was ultimately found to be unreasonable under FPA Section 205"; thus, the Government expressly was liable for a rate it knew could be subject to a refund. Gov't Mot. at 13 (citing *Mid-Continent Area Power Pool*, 87 FERC ¶ 61075, 61324 (April 15, 1999) ("*MAPP*")). In this case, however, "FERC itself said that these rates were accepted as final and were not subject to revision under Section 205." Gov't Mot. at 13 (citing 96 FERC ¶ 61120, 61508 (July 25, 2001)). As such, "[t]here is no corresponding contractual obligation," because "*City of Redding* now makes plain that no such retroactive change of a rate

may ever be made under Section 206[.]" Gov't Mot. at 14.

2. Plaintiffs' Response.

Plaintiffs respond that *City of Redding* does not concern the court's jurisdiction, but "whether the parties' contracts were breached." Pl. Resp. at 10 n.13. The prior trial court "previously rejected the same argument . . . concerning FERC's correction of Refund Period PX and ISO prices." Pl. Resp. at 10 (citing Reconsideration Order, 110 Fed.Cl. at 136; *California ex rel. Brown v. United States*, 110 Fed.Cl. at 140). The Government has not "provide [d] any reason why that order may be reconsidered now." Pl. Resp. at 11. Indeed, at trial, the Government "pursued . . . the very same 'retroactive ratemaking' argument it makes here and that the Court made fact-based determinations rejecting that argument." Pl. Resp. at 12 (citing *Pac. Gas & Elec.,* 105 Fed.Cl. at 435-36, *vacated*, 114 Fed.Cl. 146 (2013)). Plaintiffs recite the relevant evidence produced at trial[19] and insist that "this Court

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[19] Plaintiffs claim that, at trial, they "demonstrated that [the Government's expert] Mr. [Jeffrey] Tranen did not correctly apprehend [sic] the FPA or the nature and scope of FERC's price correction authority." Pl. Resp. at 12. Plaintiffs' expert, Robert Gee, however, testified that the PX and ISO tariffs contained clauses that "represent a contractual agreement that market participants could petition FERC to investigate whether prices being charged are just and reasonable and, if FERC found they were not, to correct those prices to just and reasonable levels." Pl. Resp. at 12 (citing TR 1656-1657 (A-0334-335)). The prior trial court concluded that Mr. Tranen "misunderstood how FPA Section 206(b) operates" and his testimony had "no probative value." *Pac. Gas & Elec. Co.*, 105 Fed.Cl. at 435-36. Therefore, the prior trial court concluded that the tariff clauses did "represent a contractual agreement[.]" *Id.* at 435.

must defer" to the findings in the May 2, 2012 Order. Pl. Resp. at 12-13.

Plaintiffs also argue that "FERC was authorized under the FPA to correct prices in the PX and ISO markets." Pl. Resp. at 14. The Government contrasts Sections 205 and 206, but "[t]his putative distinction . . . is make-believe." Pl. Resp. at 14. Plaintiffs view Sections 205 and 206 as "grant[ing] FERC parallel authority to keep new or contested rates in place on a provisional basis, subject to correction and refund at the end of the FERC proceeding." Pl. Resp. at 14 (citing *Port of Seattle v. FERC*, 499 F.3d 1016, 1031-32 (9th Cir. 2007); *CPUC,* 462 F.3d at 1046-47). Section 205 governs rate proposals filed by public utilities. *See* 16 U.S.C. § 824d(d). Section 206 governs the investigation of existing rates initiated on behalf of the customers of public utilities. *See* 16 U.S.C. § 824e. The only difference between the two Sections is "which entity initiates the proceeding." Pl. Resp. at 15. Therefore, "[s]ection 206(b), just like Section 205, allows FERC to correct prices from the effective date established for the proceeding[.]" Pl. Resp. at 15 & n.17 (citing *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 352 (D.C. Cir. 2014) ("The statutory 'just and reasonable' standard is the same under section 205 and section 206.")). In 1988, Congress added Section 206(b) to "establish[ ] more symmetry between the procedures for rate reductions and rate increases." Pl. Resp. at 16 (quoting 134 Cong. Rec. S12063, S12064 (1988)). The key elements of Section 206(b) "parallel the procedures for rate increase applications under Section 205." Pl. Resp. at 16 (quoting H.R.Rep. No. 100-384, at 3 (1987)). Under Section 206(b), "[FERC] may order refunds of any amounts paid . . . in excess of those which would have been paid under the just and reasonable rate[.]" 16 U.S.C. § 824e(b). Just like Section

205, Section 206 also "permit[s] FERC to correct prices under the PX and ISO tariffs, because the [Cal-]PX and [Cal-]ISO are 'public utilities' under the FPA." Pl. Resp. at 17 (citing *CPUC,* 462 F.3d at 1038-39). "The *Bonneville* decision addresses Sections 205 and 206 in tandem throughout, making clear that there is no distinction with respect to FERC's ratesetting authority under either statute." Pl. Resp. at 18 (citing *Bonneville*, 422 F.3d at 911, 913-19, 921-22, 925).

Therefore, correcting prices under Section 206(b) "is not unlawful retroactive ratemaking, any more than is FERC's correction of rates under Section 205." Pl. Resp. at 18. In fact, the Government concedes that FERC lawfully may correct prices under Section 205. *See* Gov't Mot. at 13-14. And, since "the statutory structure of Sections 205 and 206 is identical," FERC may lawfully correct prices under 206. Pl. Resp. at 19 (citing *La. Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007) (remanding FERC's decision that it was unauthorized to order refunds back "for a more considered determination")). Although *City of Redding* held that FERC does not have "the authority to retroactively reset the market rates for all market participants," it also held "that the specific FERC price correction orders on which this action is based did not overstep that boundary." 693 F.3d at 839. Therefore, *City of Redding* did not "reject[ ] FERC's correction of the PX and ISO market clearing prices." Pl. Resp. at 20-21. Instead, that decision clarified that "FERC had authority to correct prices in the PX and ISO markets from the effective date established in the FERC proceeding and forward." Pl. Resp. at 21. For this reason, the United States Court of Appeals for the Ninth Circuit repeatedly upheld FERC orders correcting prices for all PX and ISO sales. Pl. Resp. at 21 (citing *City of Redding* and *CPUC*). In sum, *City of Redding*

says "exactly what Plaintiffs have been arguing all along . . . as the basis for their contract claim-FERC corrected the prices charged by all market participants[.]" Pl. Resp. at 25 (citing *City of Redding*, 693 F.3d at 841). And, since *City of Redding*, FERC has continued "to issue orders holding that it has corrected prices for all transactions during the Refund Period." Pl. Resp. at 26 (citing 148 FERC ¶ 61006 at P 11 (2014)).

Next, Plaintiffs argue that "[u]nder the FPA, th[e c]ourt does not have subject matter jurisdiction to review FERC's orders." Pl. Resp. at 26. FPA Section 213(b) "confer[s] exclusive jurisdiction upon the federal courts of appeals to hear challenges to FERC orders." Pl. Resp. at 26 (citing 16 U.S.C. § 825*l*). The FPA "prescribe[s] the specific, complete and exclusive mode for judicial review of the Commission's orders[.]" *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958). As such, the United States Court of Federal Claims may not "consider, much less decide, whether [FERC's price correction] orders were correctly made." Pl. Resp. at 27. The Government admitted as much at the *City of Redding* oral argument. Pl. Resp. at 28 (citing *City of Redding v. FERC*, Court of Appeals, Ninth Circuit, Nos. 09-72775, 09-72789, 0972791, 09/23/14 TR 14 ("If FERC says that the moon is made of green cheese under the Federal Power Act, Court of Federal Claims is [going to] have that as binding[.]")).

For this reason, *Alliant* is "exactly on point." Pl. Resp. at 29. In *Bonneville,* the Government argued that the *Alliant* circumstances were "directly analogous to those presented here." Joint Brief of Public Entity Petitioners and Petitioner/Intervenors on the Jurisdictional Cases, *Bonneville Power Admin. v. FERC*

(9th Cir. Dec. 23, 2004) at 41 (A-0135). The Government "embraced" *Alliant,* even though it "arose under Section 205 rather than Section 206." Pl. Resp. at 29. "[T]he fact that *Alliant* arose under Section 205 does not affect the outcome here in the least." Pl. Resp. at 32. "Because FERC lacks authority under either Sections 205 or 206 to order governmental entities to pay refunds, the outcome in *Alliant* is due solely to the fact that [the Government] was contractually bound by the FERC determination changing the tariffed charges it had previously collected. That conclusion is directly applicable here." Pl. Resp. at 32-33.

Finally, prior to the PX and ISO markets becoming operational, BPA and WAPA "actively pursued authority to receive the same PX and ISO prices as all other sellers." Pl. Resp. at 33 (citing Motion to Intervene and Protest of Bonneville Power Administration (June 6, 1997), PE 11 at 533-36 (A-0417-420)). In addition, since 2001, "the Agencies have fought to avoid honoring the very contract terms that they wanted and eagerly solicited from FERC in the first place[.]" Pl. Resp. at 33. The Agencies "have sought and obtained refunds from other market participants for overcharges on the Agencies' purchases, while consistently refusing to pay refunds for the Agencies' sales to their purchasers in the market, who suffered exactly the same injury." Pl. Resp. at 33-34 (citing 96 FERC ¶ 61120, 61513 n.56). There is just no reason why the Agencies "should be allowed to retain their windfall profits, and [the Government] offers no such reason—only hypertechnical excuses for why it should not be held to the contracts that it eagerly sought and freely entered." Pl. Resp. at 35.

3. The Government's Reply.

The Government makes five points in its Reply. First, "[i]t has long been recognized that courts have the inherent power to modify interlocutory orders before entering a final judgment." Gov't Reply at 1 (quoting 12/20/13 Order at 3). All relevant orders in this case are interlocutory pursuant to Rule of the United States Court of Federal Claims ("RCFC") 54(b); thus, the court may revisit them now. Gov't Reply at 1-2. The law-of-the-case doctrine requires trial courts to follow appellate court rulings, but it "does not otherwise bind a court to strict adherence to its own prior interlocutory decisions." Gov't Reply at 2. Therefore, Plaintiffs wrongly impose RCFC 59(a)'s "showing of extraordinary circumstances" standard onto the RCFC 54(b) orders in this case. Gov't Reply at 2-3.

Second, "Plaintiffs ignore the public entity exemption in Section 201(f) of the Federal Power Act." Gov't Reply at 8. As the Ninth Circuit held, Section 201(f) is "a 'huge' exemption [that] removes Governmental entities from FERC's regulatory powers under sections 205 and 206." Gov't Reply at 8 (quoting *Bonneville*, 422 F.3d at 915-16). BPA and WAPA fall into that "huge" exemption. Gov't Reply at 8-9 (citing 125 FERC ¶ 61297).

Third, Plaintiffs also fail to respond to *Bonneville*'s holding that "FERC's authority to investigate rates and to order refunds is limited to any rate collected by 'any public utility'; the statute carries no reference to nonpublic utilities." *Bonneville*, 422 F.3d at 911. According to the United States Court of Appeals for the Ninth Circuit, "the fact that ISO and CalPX were public utilities is irrelevant because FERC is ordering refunds from the governmental entities/non-public utilities, not ISO or CalPX themselves." *Id.* at 920.

FERC's actions "have no effect on" governmental entities; thus, the proper focus is on sellers' rates, not PX and ISO tariffs. Gov't Reply at 10.

Fourth, *City of Redding* is clear that "FERC has no authority to retroactively change rates for the Refund Period rates. Instead, FERC may calculate the 'would have been' rate for the Refund Period for the sole and limited purpose of assessing a refund liability on jurisdictional sellers." Gov't Reply at 10 (citing *City of Redding*, 693 F.3d at 839-41). "[B]oth the majority and the dissent in *City of Redding* agree that FERC does not have authority retroactively to change prices market-wide for the Refund Period." Gov't Reply at 11 (citing *City of Redding,* 693 F.3d at 842). The Government contends that Plaintiffs' "entire basis for breach is their belief [is] that FERC's May 29, 2009 order retroactively reset the Market Clearing Price for *all* market participants." Gov't Reply at 11 (citing Pl. Resp. at 23-24). FERC, however, has no authority to revise any past prices, either individually or market-wide. Gov't Reply at 12 (citing *City of Redding,* 693 F.3d at 842 ("[W]e reject the argument that FERC has an expansive statutory authority to retroactively reset rates.")).

Finally, the Government accuses Plaintiffs of "badly mischaracterize[ing] the *Alliant* case" and the Public Entity Petitioners' brief to the Ninth Circuit in *Bonneville*. Gov't Reply at 12-13. That brief simply noted that FERC's position in *MAPP* was inconsistent with that in *Bonneville*. Gov't Reply at 13. Moreover, "[t]here are major factual and legal differences between" *MAPP* and this case. Gov't Reply at 13. *MAPP* involved a provisional rate under Section 205, giving FERC the undisputed power to subsequently alter the rate. Gov't Reply at 13-14 (citing 87 FERC ¶ 61323, 61324 (1999)).

In this case, however, "FERC specifically held that the rates at issue in the Refund Period were final rates, not provisional, and refused to change those rates on that basis." Gov't Reply at 14 (citing 96 FERC ¶ 61120, 61508 (2001)). Here, FERC did not change any rate under Section 205. Gov't Reply at 14. As for Section 206, "*City of Redding* expressly rejected [P]laintiffs' and FERC's argument that FERC's Section 206 powers were analogous to FERC's power to change provisional rates filed under Section 205." Gov't Reply at 14 (citing *City of Redding*, 693 F.3d at 840-41). Plaintiffs' attempt to characterize FERC's actions as retroactive ratemaking is misguided, because "that retroactive revision never occurred." Gov't Reply at 15. Any "provisions in the ISO and PX tariffs to return the settlement amounts owed to sellers if errors, FERC directives, or other good cause dictates" are "immaterial to the resolution of this case." Gov't Reply at 15. Such an obligation would arise only if FERC revised BPA's and WAPA's rates, which it did not, as *City of Redding* held. Gov't Reply at 15.

4. The Court's Resolution.

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3). Plaintiffs argue that the United States Court of Federal Claims may not "review" the FERC Orders that are the predicate for their contract claim. *See* 16 U.S.C. § 825*l* (b) (requiring that parties aggrieved by FERC orders "obtain a review to such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia"). But, the court is not "reviewing" FERC's Orders or questioning its

factual findings. Instead, the court has analyzed the FERC Orders to determine whether Plaintiffs have a valid contract-based claim against the Government.

In that regard, two issues require resolution. First, does Section 206 of the FPA, 16 U.S.C. § 824e, authorize FERC retroactively to correct the Market Clearing Price of wholesale electricity sales for participants in the Cal-PX and Cal-ISO markets? Second, is the Government contractually liable for the difference between the rates that it charged wholesale customers and the rates that FERC later determined to be "just and reasonable"?

The United States Court of Appeals for the Ninth Circuit extensively examined these very issues in *Bonneville* and again in *City of Redding*. Although not bound by the Ninth Circuit's holdings,[20] the court finds that appellate court's reasoning to be persuasive and Plaintiffs here have done little to refute the conclusion that FPA Sections 201, 205, and 206 do not authorize the FERC to issue retroactive refunds.

Section 201(f) states:

> No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, . . . or any corporation which is wholly owned, directly or

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[20] *See*, *e.g.*, *Gibraltar Fin. Corp. of Cal. v. United States*, 825 F.2d 1568, 1572 (Fed. Cir. 1987) ("We are, of course, not bound by the Ninth Circuit's ruling."). Federal courts, however, generally "do not create conflicts among the circuits without strong cause." *Wash. Energy Co. v. United States*, 94 F.3d 1557, 1561 (Fed. Cir. 1996) (citation omitted). Although each circuit has an obligation independently to analyze the cases before it, the court "accord[s] great weight to the decisions of the other circuits on the same question." *Id.*

> indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

16 U.S.C. § 824(f).

As the United States Court of Appeals for the Ninth Circuit observed:

> The sweep of this exemption is huge . . . . [BPA] falls within the general exclusion. The BPA is an agency of the United States . . . . A search of subchapter II for specific reference to FERC's jurisdiction over governmental entities for refund purposes comes up empty-handed for FERC.

Bonneville, 422 F.3d at 915-16.[21]

The United States Court of Appeals for the Ninth Circuit further explained that "[w]hen Congress wanted a provision of the FPA subchapter II to apply to governmental entities, it knew how to so specify." *Id.* at 916 (citing FPA Sections 210-213). Congress, however, did not state that Sections 205 or 206 should apply to governmental entities in any respect. In fact, it limited those Sections' application to "public utilities." *See* 16 U.S.C. § 824d(a) ("All rates and charges made, demanded, or received by any public

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[21] Although WAPA was not a party in *Bonneville,* it too falls within the Section 201(f) exemption as an agency of the United States. *See* Western Area Power Administration, History, http://ww2.wapa.gov/sites/western/about/history/pages/default.aspx (last visited March 10, 2015) ("On Dec. 21, 1977, high gas prices and an emphasis on conservation led Congress to create the Department of Energy, including Western Area Power Administration—a new agency to sell and deliver hydropower across 15 central and western states.").

utility[.]"); 16 U.S.C. § 824e(a) ("Whenever the Commission . . . shall find that any rate . . . collected by any public utility[.]"). A public utility is defined as "any person who owns or operates facilities *subject to the jurisdiction of the Commission* under this subchapter." 16 U.S.C. § 824e (emphasis added). Neither BPA nor WAPA falls within this definition, because, pursuant to Section 201(f), they are not "subject to the jurisdiction of [FERC]." Thus, Sections 205 and 206 do not apply to BPA or WAPA.

In fact, FERC recently issued an Order affirming that it "is precluded from ordering a remedy for the transactions involving BPA, and WAPA[.]" 149 FERC ¶ 61116 at P 22 (2014). And, it dismissed BPA and WAPA from that proceeding, because "at the current stage of the proceeding, where the Commission will be ordering a remedy . . . , it is appropriate to dismiss the non-jurisdictional entities from the proceeding." *Id.* As FERC stated, there was "no reason for [BPA and WAPA's] continued participation," because FERC had no authority to order a retroactive remedy from a non-public utility.[22] *Id.* Based on this recent FERC Order, as well as the United States Court of Appeals for the Ninth Circuit's rulings in *Bonneville* and *City of Redding*, the court concludes that Section 206 of the FPA does not authorize FERC retroactively to correct the market clearing price for participants in the Cal-PX and Cal-ISO Markets. Plaintiffs contend that if

[22] FERC declined to vacate earlier "findings regarding the transactions involving these non-jurisdictional entities, as there are no grounds to do so. The Commission precedent is clear that while it is precluded from ordering these entities to pay refunds, the Commission may consider the facts and circumstances of governmental entities as part of its investigation of jurisdictional rates." 149 FERC ¶ 61116 at P 23 (2014).

they cannot obtain relief from the FERC, they should at least be entitled to the difference between actual and corrected prices under contract law. Compl. ¶ 3 ("The Agencies are now contractually liable to reimburse the California IOUs for the difference between the rates that the Agencies charged during the Refund Period and the lawful, corrected rates under the tariffs."). According to Plaintiffs, "the Agencies contractually agreed to be bound by the provisions of the ISO and PX Tariffs, which incorporate FERC's power to correct prices that it determines to be unjust, unreasonable, or unlawful." Compl. ¶ 73. But, even assuming that the FERC Tariffs included the full extent of the FPA's Section 206 authority, Plaintiffs still have no cognizable contract claim against WAPA or BPA. Section 206 does not authorize FERC to order retroactive refunds, and neither the Cal-PX Agreements nor the SC Agreements contained any textual direction obligating them to do so.

D. Plaintiffs' July 1, 2014 Motion To Reinstate The May 2, 2012 Liability Decision And For Certification Of Orders For Interlocutory Appeal Is Denied.

Plaintiffs July 1, 2014 Motion requests that the court reinstate the prior trial judge's May 2, 2012 Order and certify it to the United States Court of Appeals for the Federal Circuit.

For the reasons stated in the court's December 20, 2013 Order, the former trial court's May 2, 2012 Orders required reconsideration, because "jurisdictional issues that were previously raised, but summarily rejected without a formal opinion." Reconsideration Order, *Pac. Gas & Elec.*, Dkt. No. 311 at 2 (Dec. 20, 2013). As discussed herein, the United States Court of Appeals for the Ninth Circuit's recent decision in *City*

of Redding completely undercuts the May 2, 2012 Order.

Reinstating and certifying the May 2, 2012 Order would not expedite this litigation. The most efficient way to resolve the jurisdictional issues raised is by "entry of a final judgment as to one or more, but fewer than all, claims or parties." RCFC 54(b).[23]

IV. CONCLUSION.

For the reasons discussed herein, the April 2, 2013 Orders denying the Government's November 2, 2012 Motion For Reconsideration, *Pac. Gas & Elec. Co. v. United States*, 110 Fed.Cl. 135 (2013), are *vacated*; Plaintiffs' July 1, 2014 Motion To Reinstate The May 2, 2012 Liability Decision And For Certification Of Orders For Interlocutory Appeal is *denied*; the Government's July 1, 2014 Motion for Entry of Judgment Dismissing Claim I of Pacific Gas & Electric Co.'s March 12, 2007 Complaint, pursuant to RCFC 54(b), is *granted*; the Government's July 1, 2014 Motion for Entry of Judgment Dismissing Claim I of San Diego Gas & Electric Co.'s March 13, 2007 Complaint is

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[23] RCFC 54(b) provides:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

RCFC 54(b).

granted; the Government's July 1, 2014 Motion for Entry of Judgment Dismissing Claim I of California's March 16, 2007 Complaint is granted; and the Government's July 1, 2014 Motion To Dismiss is *denied*.

Pursuant to RCFC 54(b), there being no just cause for delay, the Clerk is directed to dismiss Claim 1 of Plaintiffs' March 12, 2007, March 13, 2007, and March 16, 2007 Complaints.

IT IS SO ORDERED.

APPENDIX D

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

No. 07-157C, No. 07-167C,
No. 07-184C

PACIFIC GAS AND ELECTRIC COMPANY and
SOUTHERN CALIFORNIA EDISON COMPANY,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

SAN DIEGO GAS & ELECTRIC COMPANY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL.,
EDMUND G. BROWN JR., ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA, and the
CALIFORNIA DEPARTMENT OF WATER RESOURCES BY
AND THROUGH ITS CALIFORNIA ENERGY
RESOURCES SCHEDULING DIVISION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Susan G. Braden, *Judge*

MEMORANDUM OPINION AND ORDER TO VACATE

I. PROCEDURAL HISTORY.

The Complaints in the above-captioned cases were filed on: March 12, 2007; March 13, 2007; and March 16, 2007.[1] Following a trial from July 12, 2010 to August 2, 2010, former Senior Judge Loren A. Smith issued May 2, 2012 Opinions determining that Defendant ("the Government") was liable for a breach of contract, because the Government failed to refund electricity overcharges paid by Plaintiffs in their capacity as participants in the ISO and PX markets during the Energy Crisis of 2000-2001 in the State of California. *See California ex rel. Brown v. United States*, 105 Fed. Cl. 18 (2012); *Pac. Gas & Elec. Co. v. United States*, 105 Fed. Cl. 420 (2012) (collectively the "May 2, 2012 Opinions").

On April 15, 2013, former Chief Judge Emily C. Hewitt issued an Order transferring these cases to the undersigned judge, pursuant to RCFC 40.1(c).

On May 9, 2013, a telephone conference was convened to discuss the May 2, 2012 Opinions, during which the court expressed concern about the lack of

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[1] Case number 07-157C was filed on March 12, 2007; Case number 07-167C was filed on March 13, 2007; and Case number 07-184C was filed on March 16, 2007. On May 23, 2007 the court granted the Government's Motion To Consolidate case number 07-157C with 07-167C. Case number 07-157C was designated the lead case. Pursuant to the court's July 21, 2010 Order, all evidence presented in the above-captioned proceedings was made part of the record in all three actions. Case number 07-184C, however, was not consolidated with the other related cases.

citations to the record supporting the factual findings contained therein. The court requested that the parties provide citations to the record that supported the factual findings. On June 21, 2013, the Government submitted a Status Report "respectfully declin[ing] to furnish annotations or citations for the [c]ourt's May 2, 2012 interlocutory decision[s]." Gov't Status Report at 2, *Pac. Gas & Elec. Co. v. United States* (No. 07-157), Dkt. No. 303. Instead, the Government proposed five alternatives, including, *inter alia*, that the court vacate the May 2, 2012 Opinions or allow the parties to file proposed findings of fact and conclusions of law to assist the court in issuing new opinions. *Id.* at 3.

On July 3, 2013, Plaintiffs submitted a Status Report that included a copy of the May 2, 2012 Opinions, annotated with record citations and responding to the Government's June 21, 2013 Status Report. On July 17, 2013, the Government filed a Response. On July 26, 2013, Plaintiffs requested to file a Reply. On September 24, 2013, the court convened a telephone conference and granted Plaintiffs leave to file a Reply. On September 27, 2013, Plaintiffs re-filed the July 26, 2013 Reply.

On or about October 9, 2013, the court began an independent examination of each sentence of the May 2, 2012 Opinions, together with the record citations provided by Plaintiffs. In addition, the court reviewed the substantive analysis of the May 2, 2012 Opinions.

II. DISCUSSION.

The May 2, 2012 Opinions are interlocutory. It has long been recognized that courts have the inherent power to modify interlocutory orders before entering a final judgment. *See Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47-48 (1943) (stating that a

court has power "at any time prior to entry of its final judgment . . . to reconsider any portion of its decision and reopen any part of the case"); *see also John Simmons Co. v. Grier Bros. Co.*, 258 U.S. 82, 88 (1922) ("If [the order is] only interlocutory, the court at any time before final decree may modify or rescind it."). In other words, at "an interlocutory stage, the common law provides that the court has power to reconsider its prior decision on any ground consonant with application of the law of the case doctrine." *Wolfchild v. United* States, 68 Fed. Cl. 779, 784-85 (2005) (citing *Fla. Power & Light Co. v. United States*, 66 Fed. Cl. 93, 95 (2005) (when an opinion and order is not a final judgment, "the strict rules governing motions to amend and alter final judgments under Rule 59 do not apply.")). In sum, the trial court is not required to "adhere to . . . previous rulings if they have not been adopted, explicitly or implicitly, by the appellate court's judgment." *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991). Instead, the court "has the power to reconsider its decisions until a judgment is entered." *Id.*

Pursuant to RCFC 54(b), "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and *may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities*." RCFC 54(b) (emphasis added). Therefore, the court may reconsider all or some of the issues, for any reason sufficient to justify rehearing in a suit at law or in equity in federal court. *See* RCFC 59(a)(1)(A)-(B); *see also Wolfchild*, 68 Fed. Cl. at 784 ("Correlatively, RCFC 59(a)(1) provides that 'reconsideration may be granted to all or any of the parties and on all or part of the issues, for any of

the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States'") (quoting RCFC 59(a)(1)).

Where, as here, one judge "has rendered an order or judgment and the case is then transferred to another judge," the "successor judge has the same discretion to reconsider an order as . . . the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." *United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997). "To the extent that a trial judge can alter a previous ruling, so too can a successor judge." *Exxon Corp.*, 931 F.2d at 878. And, of course, "[t]he decision whether to grant reconsideration lies largely within the discretion of the [trial] court." *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *see also Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 833 (Fed. Cir. 2010) (The "trial court 'may' reopen a judgment after a bench trial to take additional evidence or amend its findings, [and] the decision to do so rests within the sound discretion of the trial court." (quoting Fed. R. Civ. P. 59(a)(2))).

With the foregoing authorities in mind, the court has determined that the interests of justice require that the May 2, 2012 Opinions be vacated[2] and both the factual and legal rulings therein be reconsidered, particularly jurisdictional issues that previously were raised, but summarily rejected without a formal opinion. *See* Order, *Pac. Gas & Elec. Co. v. United States*, (No. 07-157C), Dkt. No. 47; and Order, *California*

[2] Specifically, the court vacates: Published Opinion, *Pac. Gas & Elec. Co. v. United States*, (No. 07-157C), Dkt. No. 259, 105 Fed. Cl. 420 (2012) and Published Opinion, *California ex rel. Brown v. United States*, (No. 07-184C), Dkt. No. 228, 105 Fed. Cl. 18 (2012).

ex rel. Brown v. United States, (No. 07-184C), Dkt. No. 55.

The court has not reached this decision without a careful consideration of the prior briefing and record developed by the parties. In that regard, neither party should make any assumption about the court's decision to reconsider, other than it intends to issue a memorandum opinion and order that provides revised factual findings and a more detailed legal analysis of issues that likely will arise on appeal. To date, the court has done a considerable amount of work toward that end and will endeavor to complete this process, by the end of February 2014. At present, the court requires no further briefing or argument by the parties.

IT IS SO ORDERED.

APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

Case Nos. 07-157C and 07-167C

PACIFIC GAS AND ELECTRIC COMPANY, AND
SOUTHERN CALIFORNIA EDISON COMPANY,

Plaintiffs

v.

THE UNITED STATES,

Defendant.

Motion to Reconsider; *City of Redding v. FERC*, 693 F.3d 828 (9th Cir. 2012) *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005)

Filed: April 2, 2013

OPINION AND ORDER

Smith, Judge.

Before the Court is Defendant's Motion to Reconsider this Court's Opinion and Order dated May 2, 2012. Plaintiffs have not responded directly to this Motion nor has the Court requested a response to this particular Motion. However, Defendant has raised the same arguments in prior motions before this Court to which the Plaintiffs have responded. The parties were heard on those on September 7, 2012. Additionally, supplemental briefs were filed with regard to these

issues. For the reasons set forth below and after careful consideration, the Court DENIES Defendant's Motion to Reconsider.

INTRODUCTION

In its Opinion and Order, *PG&E v. United States*, 105 Fed. Cl. 420 (2012), this Court found that Defendant breached its contractual duty to pay refunds owed to certain participants in the California Power Exchange (PX) and California Independent System Operator (ISO) markets. *Id.* at 440. Defendant now asks this Court to reconsider its Opinion and Order based upon the Ninth Circuit's decision in *City of Redding v. FERC*, 693 F.3d 828 (9th Cir. 2012) and to find that Defendant did not breach any contracts with Plaintiffs with respect to the refund period claims and, as such, enter judgment dismissing Plaintiffs' refund period claims altogether. To this end, Defendant argues that the Court interpreted Section 206 of the Federal Power Act (FPA), 16 U.S.C. § 824e, in a manner inconsistent with the Ninth Circuit's decision in *City of Redding*. Specifically, Defendant argues that this Court found that § 206 of the FPA permitted FERC to retroactively adjust rates, contrary to the *City of Redding* decision. Defendant argues that in the *City of Redding* decision, the Ninth Circuit held that § 206(a) permits FERC to adjust rates only prospectively and that § 206(b) permits FERC only to determine just and reasonable rates to order refunds from jurisdictional sellers. Therefore, Defendant argues, because FERC may not retroactively reset rates for non-jurisdictional sellers, this Court erred in finding that the PX and ISO tariffs bind the government to FERC's determination of just and reasonable rates for the whole market.

DISCUSSION

The City of Redding Decision

To determine whether this Court's Opinion and Order is inconsistent with *City of Redding*, the Ninth Circuit's decision must be reviewed. In *City of Redding*, the Ninth Circuit had to determine if specific FERC orders related to the PX and ISO electricity market rate adjustments exceeded FERC's authority. *City of Redding*, 693 F.3d at 831. This series of orders begins with a November 2000 order stating that FERC planned to investigate the rates being charged in the PX/ISO markets. *Id.* at 832. FERC then determined the PX/ISO rates to be unreasonable in its March 9, 2001 Order and established a "market clearing price" that would have been in effect if "[there] had . . . been competitive forces at work . . . ." *Id.* (quoting the March 9, 2001 Order, 94 FERC ¶ 61,245, at 61862). A subsequent order, the July 2001 Order, stated that FERC had the authority to retroactively reset rates and require refunds from jurisdictional and non-jurisdictional entities. *City of Redding*, 693 F.3d at 832-833. The non-jurisdictional entities affected by the order brought suit disputing FERC's authority to order the non-jurisdictional refund, *Id*. at 833, and the Ninth Circuit in *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005), held that "FERC does not have refund authority over . . . sales made by governmental entities and non public utilities." *Id.* at 911.

After *Bonneville*, FERC issued a series of orders amending the July Order, culminating with the May 2009 Order that stated FERC's actions in regard to the PX/ISO market rates were not a retroactive resetting of rates, but instead a determination of a just and reasonable rate for the purposes of ordering refunds

from jurisdictional sellers. *City of Redding*, 693 F.3d at 834. The court in *City of Redding* reviewed whether FERC exceeded its authority in the post-*Bonneville* orders. *Id.* at 831. First, the Ninth Circuit found that § 206 of the FPA does not give FERC the power to retroactively reset rates for all market participants. *Id.* at 838 (noting that the FPA gives FERC the authority under § 206(a) to set rates prospectively and under § 206(b) the authority to order refunds from jurisdictional sellers). In finding this, the *City of Redding* court dismissed FERC's argument that the ability to set rates retrospectively was necessary in determining the refund amounts for jurisdictional entities. *Id.* at 839. Instead, the court said that under § 206(b), FERC may only determine a just and reasonable rate for the purpose of calculating the jurisdictional sellers' refund amount. *Id.* at 841. The court also found that in reviewing the post-*Bonneville* orders, FERC acknowledged that it lacked the authority to order refunds from non-jurisdictional entities, and because of this, the court found that FERC did not exceed its authority in issuing the those orders. *Id.* at 842.

While the Ninth Circuit in *Bonneville* and *City of Redding* forbid FERC from ordering non-jurisdictional entities to pay refunds, neither case forecloses other remedy possibilities for injured market participants. In fact, the court in *Bonneville* left open the possibility that the remedy for injured market participants could be contract claims. *Bonneville*, 422 F.3d at 925 ("[T]he remedy, if any, may rest in a contract claim, not a refund action."). The *Bonneville* court confirmed that the non-jurisdictional entities entered into agreements with the PX and ISO that obligated the market participants to follow the tariffs, which are subject to FERC regulation. *Id.* ("FERC...emphasize[s] that the Public Entities entered into agreements with the ISO

and CalPX that obligated them to abide by the ISO and CalPX tariffs . . . All of this is true."). While mentioning the possibility of a contract claim, the *Bonneville* court avoided making any determination as to remedies other than refund actions. *Id.* at 926 ("[W]e take no position on remedies available outside of the FPA."). The *City of Redding* decision reestablished the *Bonneville* opinion as to contract claims. *City of Redding* at 834. ("[Contract] actions loom large on the outskirts of this appeal and explain the motivation of most of the parties, but they are not before this court and we do not consider the contract-related arguments."). Even so, the *City of Redding* decision goes somewhat further than *Bonneville* as to what the just and reasonable prices established by FERC mean to non-jurisdictional entities:

> We are not blind to the potential impact of FERC's determination of the just and reasonable prices. In the contract actions brought in other forums, it is claimed that the Petitioners before us are liable for charges collected by them in excess of the just and reasonable prices subsequently calculated by FERC. Petitioners seek to protect themselves against those claims by preventing FERC from recalculating the market rates. *But FERC's recalculation was not an empty exercise, because it had to determine just and reasonable market clearing prices in order to calculate the refunds to be ordered from sellers from which it could order refunds.* What impact this calculation might have on the contract actions pending in other courts is not for us to say.

Id. (emphasis added). As the Ninth Circuit decision in *City of Redding* avoids making a determination as to what the just and reasonable rates mean to non-

jurisdictional contract claims, it allows the courts hearing the contract claims, the California state courts and the United States Court of Federal Claims, to make the decision as to what that effect is.

Defendant's Contractual Obligation Argument

In the Motion to Reconsider, Defendant states that Plaintiffs are foreclosed from relying on the PX and ISO tariffs for a contractual remedy because having FERC effect a contractual remedy on non-jurisdictional entities is outside of FERC's § 206 authority. But that is not what is happening. The contract was determined by the parties, the FPA, and the PX and ISO, not FERC. FERC is merely and permissibly determining what a just and reasonable rate for the subject period is. The contract determines the consequence of this price with respect to the contractual rights of the parties. It also seems clear from the Ninth Circuit decision that this is a necessary FERC action in order to assess refunds for jurisdictional sellers. The Defendant's argument also ignores the fact that *City of Redding* and *Bonneville* both provide the possibility of the contractual remedy as an alternative to the disallowed FERC refund order. *See Bonneville*, 422 F.3d at 925, 926; *see also City of Redding*, 693 F.3d at 834. Further, in *City of Redding*, the Ninth Circuit states its understanding as to why the non-jurisdictional entities would want the court to find the FERC orders outside of FERC's authority since doing so would prevent a recalculated rate for the market to be determined. *Id.* at 842. ("Petitioners seek to protect themselves against [the contract] claims by preventing FERC from recalculating the market rates.").

The *Bonneville* decision describes how the Eighth Circuit permitted the contractual remedy in the Mid-Continent Area Power Pool (MAPP) proceedings in

Alliant Energy v. Nebraska Public Power District, 347 F.3d 1046 (8th Cir. 2003). Like the PX and ISO markets, MAPP is a power pool that includes both government utilities (outside of FERC's refund authority) and non-government utilities (within FERC's refund authority). *Id.* at 1048. The Eighth Circuit found that while FERC could not order the government entities to pay a refund, the terms of the contractual agreement into which MAPP participants entered subjected all participants to FERC's regulatory authority. *Id.* at 1050. This permitted the court to enforce the agreement and order the government entity to pay the refund. *Id. Bonneville*'s discussion of the contractual remedy used in the *Alliant* decision shows the Ninth Circuit's understanding that the *Alliant* decision remedy and a valid contract claim, based upon a FERC determination of the just and reasonable rate for the whole market, is not inconsistent with its decision at issue here, contrary to the Defendant's arguments. In addition, the Ninth Circuit's *City of Redding* decision does nothing to dispute the potential of a contractual claim remedy. It leaves in place *Bonneville*'s discussion of the remedy process from the *Alliant* decision, only mentioning *Alliant* when looking for cases discussing whether FERC had the authority to retroactively reset tariff rates. *City of Redding*, 693 F.3d at 839-840. The discussion of the contract remedy availability in *Bonneville* and *City of Redding* shows that the Ninth Circuit leaves available the potential to bring a contract claim against the non-jurisdictional parties.

Finally, the contracts into which the non-jurisdictional entities entered to participate in the PX and ISO markets clearly state that the markets were subject to FERC's regulation. *Bonneville*, 422 F.3d at 925. The question remains as to whether the tariff language

permitting a market participant to "exercise its rights under Section 206 of the FPA," *PG&E*, 105 Fed. Cl. at 434 (quoting the language of PX Tariff Section 13, which substantively identical to ISO Tariff Section 19), permits injured market participants to rely on FERC's determination of just and reasonable rates in their contract claims. Section 206 permits FERC to determine a just and reasonable rate for the purpose of calculating a refund obligation for jurisdictional sellers. *City of Redding*, 693 F.3d at 834. *City of Redding* leaves open how the recalculated rates may be used in determining the non-jurisdictional entities' contractual obligation. *Id.* at 842. Thus, Defendant's main argument in the Motion to Reconsider is defeated by the fact that the Ninth Circuit avoids making a determination on the merits of the contract claims cases and leaves finding how the just and reasonable rates may be used to the United States Court of Federal Claims. Furthermore, because these issues have not been decided but have been left open by the Ninth Circuit, Defendant's argument with regard to issue preclusion and collateral estoppel is without merit.

CONCLUSION

It is clear to this Court that its Opinion and Order is consistent with the decision in *City of Redding*. In light of this, the Court hereby DENIES Defendant's Motion to Reconsider.

IT IS SO ORDERED.

APPENDIX F

IN THE UNITED STATES COURT OF
FEDERAL CLAIMS

Case Nos. 07-157C and 07-167C

PACIFIC GAS AND ELECTRIC COMPANY, AND
SOUTHERN CALIFORNIA EDISON COMPANY,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Filed: April 2, 2013

Declaratory Judgment; California Power Crisis

OPINION AND ORDER

Smith, *Senior Judge.*

Plaintiffs brought this action to determine whether the Defendant is contractually bound to retain no more than the just and reasonable prices the Federal Energy Regulatory Commission (FERC) set for electric power sales by Bonneville Power Administration (BPA) and Western Area Power Administration (WAPA) during the California Energy Crisis. The requested refunds fall into three categories: Refund Period sales, Excluded Transactions, and Summer Period sales.

The Court held a trial on Plaintiffs' claims and, thereafter, issued an opinion, *PG&E v. United States*, 105 Fed. Cl. 420 (2012). The opinion addressed the

Refund Period sales for which Plaintiffs sought liability rulings. Although evidence was presented at trial for sales involving Excluded Transactions and Summer Period sales, the opinion did not address those claims. Thus, Plaintiffs have filed a Motion for Entry of Findings of Fact and Conclusions of Law seeking declarations that Defendant is contractually obligated to refund any overcharges for Excluded Transactions and Summer Period sales, if and when, FERC resets prices for those sales.

For the reasons set forth below and after careful consideration, the Court hereby GRANTS Plaintiffs' Motion for Entry of Findings of Fact and Conclusions of Law finding that when FERC corrects the prices to just and reasonable prices for the Excluded Transactions and Summer Period Sales, Defendant will be contractually obligated to abide by the reset prices and refund any overcharges that the Agencies collected.

BACKGROUND

This issue stems from the BPA's and WAPA's participation in the California Power Exchange (PX) and California Independent System Operation Corporation (ISO), two FERC-regulated California electric energy markets. After market participants asked FERC to look into the pricing in the PX and ISO markets, FERC took action under their Federal Power Act (FPA) authority to establish a refund period that put sellers on notice that during their investigation if any prices charged during that time were found to be unjust and unreasonable, the sellers may be subject to a refund liability. FERC found the prices to be unfair and reset them. The recalculated prices established the refund obligation of market participants under FERC's enforcement authority (jurisdictional entities). Jurisdictional entities did not include Federal government

market participants, like BPA and WAPA, but participation in the PX and ISO markets required all participants to sign an agreement consenting to FERC's oversight of the markets.

In July 2001, FERC issued an order that it had the authority to retroactively reset rates and require refunds from jurisdictional and non-jurisdictional entities. *City of Redding v. FERC*, 693 F.3d 828, 832-833 (9th Cir. 2012). The non-jurisdictional entities affected by the order brought suit disputing FERC's authority to order the non-jurisdictional refund, *Id*. at 833, and the Ninth Circuit in *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005), held that "FERC does not have refund authority over . . . sales made by governmental entities and non public utilities." *Id.* at 911. After *Bonneville*, FERC issued a series of orders amending the July 2001 Order, culminating with the May 2009 Order that stated FERC's actions in regard to the PX/ISO market rates were not a retroactive resetting of rates, but instead a determination of a just and reasonable rate for the purposes of ordering refunds from jurisdictional sellers. *City of Redding*, 693 F.3d at 834.

Initially, FERC issued orders stating that it did not have the authority to correct the prices for the period between May 1, 2000 and October 1, 2000 (Summer Period) and for Refund Period energy exchanges and multi-day sales (Excluded Transactions). *PG&E v. United States*, 105 Fed. Cl. at 430. However, in *CPUC v. FERC*, 462 F.3d 1027 (9th Cir. 2006), the Ninth Circuit reversed FERC's denial of relief during the Summer Period and Excluded Transactions and remanded the case to FERC to reconsider. *Id.* at 1035. From April 11, 2012 until July 19, 2012, the FERC administrative law judge held trial to determine the

refund requirements for the Excluded Transactions and the Summer Period transactions. Declaratory J. Oral. Arg. at 15. The FERC administrative law judge had until February 15, 2013 to rule on the case. *Id*. at 16.

On February 15, 2013, FERC issued its decision. *San Diego Gas & Elec. Co*., 142 FERC ¶ 63,011, FERC Docket No. EL00-95-248 (Feb. 15, 2013). In its decision, FERC found that the Agencies engaged in Excluded Transactions are subject to mitigation, and per FERC's instruction are "to calculate the refunds." *Id*. at ¶ 131. The ALJ also found that the Agencies collectively owed refund for those transactions in the amount of $60,213,705 (before interest). *Id*. at 127, 147, 149, 151. With regard to the Summer Period sales, the ALJ found that the Agencies engaged in anomalous bidding that violated the tariffs, and that over the Summer Period there were over 20,000 total tariff violations that distorted the market prices. *Id*. at ¶¶ 14, 34-35. The impact of this decision is that now FERC can make a ruling on whether and to what extent the Agencies' prices for the Excluded Transactions and Summer Period sales are not just and reasonable.

DISCUSSION

Plaintiffs' complaint in this matter involves seven claims for relief. This opinion will address Plaintiffs' Fourth and Fifth Claims seeking declaratory relief. Specifically, the Fourth Claim seeks a declaration that when FERC resets prices for the Agencies' Excluded Transactions, Defendant will be contractually bound to refund the value that the Agencies received in excess of the mitigated prices. The Excluded Transactions include the Refund Period energy exchanges and multi-day sales. The Fifth Claim similarly seeks a declaration that when FERC resets prices for the

Agencies' Summer Period, transactions that took place from May 1, 2000 through October 1, 2000, Defendant will be contractually bound to refund value the Agencies received in excess of the mitigated prices.[1]

During the liability trial, evidence was presented regarding the Excluded Transactions and Summer Period sales. Specifically, evidence was given by Gary Stern, Stephen Oliver, Sean Sanderson and Jeffrey Ackerman.[2]

In its May 2, 2012, Opinion and Order, the Court found that BPA and WAPA breached their contractual obligation to refund overcharges incurred during the Refund Period. *PG&E v. United States,* 105 Fed. Cl. at 440. The Court did not make any findings as to the disposition of the Excluded Transactions and the Summer Period transactions because that issue was with FERC for reconsideration. *Id.* at 430.

A. Jurisdiction

Though created in 1855, United States Court of Federal Claims jurisdiction received much of its present day reach from the Tucker Act of 1887, 28 U.S.C. § 1491. The Act gave the court the jurisdiction to "render judgment upon any claim against the United States, founded upon the Constitution, [Congressional Act],

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[1] The People's case is a related case in this matter, 07-184C. As such, some of the People's claims for relief are numbered differently from the IOUs' claims. The People's Fifth and Sixth Claims correspond to the IOUs' Fourth claim, and the People have no claim corresponding to the IOUs' Fifth Claim. This opinion addresses the IOUs' Fourth and Fifth claim as well as the People's Fifth and Sixth claims which shall be collectively referred to as "Plaintiffs' claims."

[2] For a complete list of witnesses and titles see *PG&E v. United States*, 105 Fed. Cl. 420, 431 (2012).

[federal regulation], or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2011). In interpreting what "claim" means as within the Tucker Act, the United States Supreme Court held that for a claim to be within the Unites States Court of Federal Claims' jurisdiction, the claim must be for "actual, presently due money damages from the United States." *United States v. King*, 395 U.S. 1, 3 (1969).

Congress expanded the Court of Federal Claims' authority when it amended the Tucker Act to provide for "equitable relief ancillary to claims for monetary relief over which it has jurisdiction," *National Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998), the Court does have the authority to hear or decline to hear or to dismiss declaratory judgment proceedings. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999).

In reviewing whether declaratory relief is proper in a matter before the Court of Federal Claims, the Court has the discretion to "consider the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests." *Id.* In addition, the court may consider declaratory relief, even when there is the potential for damage claims in the future. *Emery Worldwide Airlines, Inc. v. United States*, 47 Fed. Cl. 461, 472 (2000) ("The court rejects defendant's position that we should dismiss [the declaratory relief claim] because plaintiff may, at some point, have a claim for

damages.”). In making its determination on declaratory relief, the court may take into consideration whether present monetary damages would be sufficient. *Alliant Techsystems*, 178 F.3d at 1271.

B. Arguments

At trial, as well as through their motions and arguments during hearings, the Plaintiffs and Defendant have set out their evidence and arguments as to whether the Court should grant declaratory relief to the Plaintiffs.

Plaintiffs argue that the Court should grant a declaratory judgment. In support, Plaintiffs argue BPA and WAPA breached their contractual duty to refund overcharges for the Excluded Transactions and the transactions that occurred during the Summer Period. In making their argument, Plaintiffs set out two main reasons supporting their request. First, Plaintiffs make the argument for judicial efficiency. Plaintiffs argue that the Court has already heard the claims and the facts on which the claims rely, and as such, it would be time-consuming and inefficient to have to retry each set of transactions individually, especially since they are all connected by the fact that the BPA and WAPA entered into a contract that allowed participants to request that FERC adjust unjust and unreasonable market rates. Second, Plaintiffs argue that if the Court enters a declaratory judgment it could facilitate settlement discussions. The parties have acted in good faith throughout the process and only disagree as to the refund obligation.

Defendant argues that *City of Redding* precludes Plaintiffs’ arguments. The Court addressed these arguments in its Opinion and Order dated April 2,

2013, denying Defendant's Motion for Reconsideration. As such, Defendant's arguments with regard to *City of Redding* precluding Plaintiffs' claims are moot. Additionally, as Defendant reads *City of Redding*, FERC cannot reset prices. But, *City of Redding* found that FERC could determine what a just and reasonable rate was. This Court's earlier decision found that this allows Plaintiffs to assert the amount over "just and reasonable rates" as a valid contract claim. As its decision clearly states, the ALJ has found that the Excluded Transactions are subject to mitigation, and per FERC's instruction are due refunds. The ALJ similarly found various tariff violations that distorted the market prices during the Summer Period sales. Hence, Defendant's argument is without merit. The Court will, therefore, turn its attention to the facts presented at trial.

C. Findings of Fact

It is true that the contractual basis for the Agencies' refund obligations on the Excluded Transactions and Summer Period sales arises from the same legal principles and many of the same facts as those for the Agencies' Refund Period sales that this Court has already ruled upon in its May 2, 2012 Opinion and Order. For instance, in that Opinion and Order the Court has already found the existence of a contract between the Agencies and Plaintiffs incorporating the PX and ISO Tariffs; that the Agencies are contractually bound by FERC's correction of tariff prices; that the Tariffs require repayment of overcharges; and that Plaintiffs have standing to bring these claims against the Agencies as direct parties.

At trial, Plaintiffs also presented facts relevant to the Excluded Transactions and Summer Period sales. Mr. Stern testified that the Excluded Transactions

included "multi-day" and "exchange" transactions. He testified that these were transactions where the ISO arranged for delivery of power over more than a 24-hour period. Exchange transactions involved sales in kind through the ISO, where the selling party was repaid by the delivery of electric energy at a later date, rather than in cash and that both BPA and WAPA engaged in such transactions.

With regard to the Summer Period, May 1 to October 1, 2000, both Mr. Oliver and Mr. Sanderson testified that each of the Agencies also made sales through the PX and ISO during the Summer Period. Mr. Stern testified that the only difference between the Refund Period Transactions and the Summer Period and Excluded Transactions was that they were at different stages at FERC. As the only difference is the timing of the claims at FERC, the Court finds that the same legal principles that were found in its May 2, 2012 Opinion and Order with regard to the Refund Period apply to the Excluded Transactions and Summer Period sales as well. Specifically, the Court finds that existence of a contract between the Agencies and Plaintiffs incorporating the PX and ISO Tariffs; that the Agencies are contractually bound by FERC's correction of tariff prices; that the Tariffs require repayment of overcharges; and that Plaintiffs have standing to bring these claims against the Agencies as direct parties.

D. Declaratory Relief

As this Court has been granted the power to order declaratory relief, it is within this Court's discretion to make a determination as to the parties' contract rights upon the future occurrence of FERC's correction of prices for the Excluded Transaction and Summer Period sales. In making its determination, the Court must consider the appropriateness of declaratory

relief. As stated earlier, in order to determine the appropriateness, the Court must determine whether "the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests." *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1271 (Fed. Cir. 1999).

Here, it is clear, all three parts are satisfied. First there is a "live" dispute between the parties. Specifically, there is a live dispute regarding Defendant's obligation to refund overcharges with regard to the parties' contract rights if and when FERC makes a correction of prices. This Court notes that other courts have held such relief proper even where the future events were much less imminent. In *CW Government Travel, Inc. v. United States*, 63 Fed. Cl. 369, 389-90 (2004), the plaintiff sought a declaratory judgment that its contract made it the exclusive provider of certain commercial travel services. The United States argued there was no "live dispute" because there was no imminent decision by the Army to reduce plaintiff's provision of services under the contract, so that plaintiff was seeking an "advisory opinion" about the consequences of "a possible future event." *Id.* at 389. The court disagreed, holding that while the contract had not yet been breached, the facts "sufficiently evidence[d]" the government's intent to breach the contract in the future to allow the court to grant declaratory judgment relief. *Id.* at 390. Here, Defendant argues that in essence this opinion is also just an advisory opinion. That is not so. Like *CW*, the facts and law sufficiently show the Defendant's obligation to refund overcharges if, and when, FERC makes a correction of prices.

Second, in making a declaration, the dispute will be resolved. And third, the legal remedies available in the future will not adequately protect the Plaintiffs' rights since trial might have to be repeated, all the evidence has been presented, and in the future live witnesses' testimony may be lost. This is particularly true in light of the length of some of the necessary FERC investigations and calculations. And, of course, only if FERC orders a reset of prices will any refund for overcharges be allowed.

CONCLUSION

For the reasons set forth above the Court hereby GRANTS Plaintiffs' Motion.

IT IS SO ORDERED.

s/ Loren A. Smith
LOREN A. SMITH
Senior Judge

APPENDIX G

UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 07-157C, 07-167

PACIFIC GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND CALIFORNIA ELECTRICITY OVERSIGHT BOARD,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

May 2, 2012

OPINION AND ORDER

SMITH, *Judge.*

Plaintiffs bring this breach of contract case to recover refunds from overcharges of electricity prices during the Energy Crisis of 2000-2001 in the state of California. In this liability phase, the Court held a four week trial in San Francisco, CA. After consideration of all the evidence, briefs and arguments, the Court finds that the United States breached its contract with the Plaintiffs.

INTRODUCTION

During the summer of 2000 through 2001, California experienced a power crisis which dramatically affected the price of electricity. During that time, the electricity used in the California market was sold in two new

centralized auction electricity markets, one run by the California Independent System Operation Corporation ("ISO") and one run by a centralized market called the California Power Exchange (PX). In both of these markets, participants signed contracts binding themselves to the terms of tariffs that governed the operations of the markets. Plaintiffs now bring these suits based upon these contracts and tariffs and seek refunds of the overcharges on electric power the Agencies sold between May 1, 2000 and June 20, 2001 in wholesale markets operated by the PX and ISO. Specifically, in their complaint, Plaintiffs allege two breach of contract claims. First, Plaintiffs allege breach by anticipatory repudiation. Second, Plaintiffs allege a present breach, as well as declaratory relief claims.

The Court held trial in San Francisco, CA. The record in this case, including all the briefing, the trial testimony, and the exhibits is extensive. Much of the evidence at trial was to provide the Court with an explanation of the market structure and the economics that gave rise to Plaintiffs' claims. However, Plaintiffs assert that most of the evidence is not necessary to decide the issues before the Court.

Despite the daunting complexity of the tariffs, at least to one not schooled in utility economics, of the transaction at issue, and of the variety of litigation related to the power crisis, Defendant also asserts that these cases are quite simple. Defendant argues that the agencies have no obligation to pay the Plaintiffs anything. Instead, Defendant argues that the contracts signed by the agencies were with the ISO and the PX, not with the Plaintiffs. Further, Defendant argues that by Plaintiffs' own admission, no obligations have arisen under the contracts.

Even though both parties claim that these cases are quite simple, however, in order to fully understand this case, the Court must delve into the novel utility markets created by the State of California, as well as the economy of the time. The Court will, therefore, begin its opinion with the parties in this litigation, the history of the electricity market, and then the tariffs. The Court will thereafter move into the FERC and Ninth Circuit litigation and, thereafter, the issues before the Court.

BACKGROUND AND FINDINGS OF FACT

A. The Parties

1. The Plaintiffs

Plaintiffs Pacific Gas and Electric ("PG & E"), Southern California Edison Company ("SCE") and San Diego Gas & Electric ("SDG & E") are investor owned utilities (IOUs) engaged in the purchase, transmission, distribution, and sale of electric energy within California. The IOUs provide electric power to the vast majority of California's businesses and residences, and together serve about 70 percent of all electric customers in the State.

PG & E is one of the nation's largest IOUs, providing electricity to approximately 15 million people in northern and central California. SCE serves approximately 15 million people in 15 Southern California counties. SDG & E services approximately 14 million people in both San Diego County and southern Orange County.

Plaintiffs the People are represented by the California Attorney General's Office on behalf of the ratepayers of the State and the California Energy Resources Scheduling Division ("CERS"). CERS is a state governmental entity created in January 2001 to serve as the

power buyer of last resort for the State's electricity customers. CERS is a division within California's Department of Water Resources ("DWR").

2. The Agencies

The United States is defending Plaintiffs' claims on behalf of Bonneville Power Administration ("BPA") and Western Area Power Administration ("WAPA"), which are federal agencies responsible for marketing hydroelectric power generated by certain federal and non-federal facilities. BPA markets more than 20,000 megawatts of power per year generated by a nuclear power plant and 31 federal hydro projects that constitute the federal Columbia River power system in the Pacific Northwest. WAPA markets and transmits about 10,000 megawatts of power per year from some 55 hydro power plants to a 15-state region in the central and western United States, selling about 40 percent of all the hydroelectric power generated in that region.

B. Acquisition of Power from the Agencies Prior to 1998

Prior to 1998, the IOUs were vertically integrated. Specifically, the IOUs owned and operated their own generation, transmission, and distribution systems. The power rates which the IOUs could charge were regulated by the California Public Utilities Commission ("CPUC"). For the wholesale power bought and sold by the IOUs on the Western transmission grid, FERC regulated such activities. *See CPUC v. FERC,* 462 F.3d 1027 (9th Cir.2006).

During this time, the IOUs generated through their own facilities the power needed to serve their customers. To meet their demand, if necessary, the IOUs would purchase electricity from other suppliers. In

order to effectuate the sale, the IOUs and out-of-state suppliers would enter into bilateral contracts. The IOUs had such agreements with BPA and WAPA, and some IOUs continue to do so today. The bilateral contracts negotiated price and volume, the specific source from which the power would be delivered to the transmission grid, and defined the transmission path through which the power would be distributed. In order to determine how much was owed, the parties used a settlement process basing the amount owed on metering data showing how much power was actually generated, transmitted, and received.

C. Acquisition of Power from the Agencies After 1998

In 1996, California enacted Assembly bill 1890 ("AB 1890"), which restructured California's electric power markets. This bill created two new wholesale electricity markets: the PX and the ISO. Both the PX and ISO are non-profit, public benefit corporations organized under California law and they are FERC jurisdictional public utilities which commenced operations in 1998.

Under AB 1890, the IOUs were required to "unbundle" their functions by separating their generation, transmission, and distribution functions. The IOUs had to divest substantial amounts of their power generation facilities and to transfer control of their transmission systems to the ISO. In addition, the IOUs were not permitted to use their remaining generating capacity to serve their customers, but instead were required to sell all of the power they generated, and buy substantially all of the power they needed through the PX and ISO. This buy-sell requirement applied only to the three IOUs in this case.

1. The PX

The PX was deemed a public utility pursuant to the Federal Power Act (FPA) and, as such, its operations and transactions were governed by a tariff approved by FERC. The PX was a nonprofit corporation that provided a centralized clearinghouse, similar to a stock exchange, which facilitated electricity transactions between sellers and buyers. The trading parties were called "market participants" and, therefore, the IOUs, CERS, and the Agencies all were considered Market Participants who bought and sold power in the PX.

Pursuant to its FERC-regulated Tariff, the PX operated daily auctions in which buyers purchased power for the following day, as well as hourly auctions that allowed buyers to make any necessary adjustments to purchases. As with any trading exchange, sellers submitted offers ("bids") to sell power in each auction and buyers submitted demand bids for the amount of electricity they wanted to buy. For each auction, the PX ranked the sellers offers to buy from low to high with a resulting supply curve. Price was mapped vertically and quantity horizontally, and the chart would depict the supply curve slopped upward because as the price increased, sellers were willing to sell more. On the other hand, the buyers' offers formed the "demand curve" which sloped downward because as the price increased, purchasers were willing to purchase less. Like all supply and demand curves, the point where the lines intersected represented the quantity sold in that auction and the "market clearing price" ("MCP") for that power.

The PX and ISO Tariffs provided the formula for the price; thus, the price of the last accepted seller's bid (the highest price) set the MCP for all of the power sold in that auction. PX Tariff § 3.8, Pls. Exh. 57 at 910; *id.,*

Schedule 3, Pls. Exh. 57 at 958; *id.,* Appendix B, Master Definitions Supplement, Pls. Exh. 57 at 1061. After the MCP was set, the PX informed the participants whose bid had been accepted, and the winning buyer and sellers would submit a "schedule" to the PX in which the sellers provided the location where the power would be delivered and the buyers identified the location where the power would be received.

2. The ISO

Unlike the PX, the ISO acted as the buyers' agent for all buyers in the market. ISO Tariff § 2.2.1. The role of the ISO was to maintain a stable power supply and adequate reserves as well as ensuring nondiscriminatory access to power. After the restructuring, the IOUs continued to own and maintain their transmission lines, but the ISO controlled access to and transmission over these lines, including minute-by-minute balancing of power supply and demand. The ISO, therefore, operated the electricity grid, and directed the necessary power to the loads of the IOUs. The parties who participated in the buying and selling of power in the ISO markets were called "Scheduling Coordinators." Hence, the IOUs, CERS, and the Agencies all were ISO Scheduling Coordinators. Additionally, by statute, the PX also was authorized to act as a Scheduling Coordinator for the PX market participants.

After the PX held the auctions, the ISO then accepted the schedules for power supply and usage. The ISO also procured additional electric power to make up the difference between the amount sold in the PX and the amount the ISO determined would actually be necessary to meet the demand. To accomplish this, the ISO set a single market clearing price for each interval and then the MCP was paid to every seller whose bid was

accepted, even if that seller's bid was below the MCP. The cost of the additional supply was paid by the IOUs and other entities that used power from the system during that time interval, in proportion to its usage.

At times, the ISO had to obtain power outside the auction process to maintain the reliability of California's electric grid. This outside power was known as "out-of-market" or "OOM" power. The Tariff allowed for these types of transactions, *see* ISO Tariff § 2.3.5.1.5, and when the ISO acquired the power in this way, the costs were passed on to the market participants that used it. During the crisis, both WAPA and BPA made OOM sales to the ISO by way of "energy exchanges" in which the Agencies delivered energy in exchange for the ISO's agreement that they would be paid "in kind" rather than in cash by a subsequent return of an agreed amount of energy to the Agencies.

D. The Contracts

In order for the Agencies to have access to the PX and ISO markets, the Agencies were required to sign written contracts that incorporated the entire Tariffs, as well as agreeing to abide by the Tariffs' terms and subsequent changes to those Tariffs. PX participants were required to sign a PX Participation Agreement ("PX Agreement"). PX Tariff § 2.6.2(f), P.Ex. 57 at 903. In the ISO, the Scheduling Coordinators were also required to sign a Scheduling Coordinator Agreement ("SC Agreement"). ISO Tariff § 2.2.3.1., Pls. Exh. 66 at 31. The PX and ISO Tariffs were incorporated by reference, in their entirety, into the PX and SC Agreements. PX Tariff, Appendix A, PX Agreement §§ II, 8, Pls. Exh. 57 at 1056, 1058; ISO Tariff, Appendix B, SC Agreement §§ 2, 8, Pls. Exh. 66 at 388, 390. As the Tariffs were incorporated in their entirety, the Participants were obligated to abide by not only the PX and

ISO Agreements, but were obligated to abide by the Tariffs as well.

Specifically, the PX Agreements stated that the Agencies would "abide by and will perform all of the obligations under the PX Tariff in respect to all matters set forth therein including, without limitation all matters relating to the trading of Energy by [them] through the PX Markets . . . [and] billing payments." PX Tariff, Appendix A, Participation Agreement § II(B), Pls. Exh. 57 at 1056. With regard to the SC Agreements, those agreements specifically stated that the Agencies would "abide by, and will perform all of the obligations under the ISO Tariff placed on Scheduling Coordinators in respect of all matters set forth therein including, without limitation, all matters relating to the scheduling of Energy and Ancillary Services on the ISO Controlled Grid, . . . [and] billing and payments. . . ." ISO Tariff, Appendix B, SC Agreement § 2(b), Pls. Exh. at 388.

FERC LITIGATION

A. The FPA and FERC Jurisdiction

The Federal Power Act ("FPA") gives FERC exclusive jurisdiction over all wholesale power transactions by "public utilities." The term only applies to private market participants such as the IOUs, the PX, and the ISO, but not governmental entities such as the Agencies. FPA § 201(b), (e), 16 U.S.C. § 824(b), (e) (2000). *See generally N.Y. v. FERC,* 535 U.S. 1, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002). Although governmental entities such as the Agencies are not "public utilities" under the FPA, (FPA § 201(f), 16 U.S.C. § 824(f) (2000)), they may contract to abide by FERC-regulated rates. *See Bonneville,* 422 F.3d at 925-26. The rates, terms, and conditions for all wholesale sales

of power must be filed with and approved by FERC. FPA § 205(a), 16 U.S.C. § 824d(a) (2000). FERC's regulatory authority extends not only to particular prices, but also to rate formulas, practices, and other terms and conditions of service. *See Pub. Utils. Comm'n of the State of Cal. v. FERC,* 254 F.3d 250, 254 (D.C.Cir.2001).

Interested parties, and FERC itself, may initiate complaint proceedings to challenge electric rates under FPA Section 206, 16 U.S.C. § 824e (2000). When a party files a challenge under FPA Section 206, FERC must investigate whether the rates being charged under the tariff are unjust, unreasonable, or otherwise unlawful. *Id.* § 824e(a). If the rates are not just and reasonable, FERC must determine the just and reasonable rate, *id.,* and has authority to order refunds for transactions occurring after a FERC-specified "refund effective date." The "refund effective date" established by FERC must be at least sixty days after the filing of the complaint. FPA § 206(b), 16 U.S.C. § 824e(b) (2000). Pursuant to Section 309 of the FPA, FERC may also order refunds for the period prior to the refund effective date if it finds that there has been a tariff violation. *Id.* § 825h (2009); *CPUC v. FERC,* 462 F.3d at 1045.

B. The PX and ISO Tariffs and FERC

As already noted, the PX and ISO were "public utilities" under the FPA, therefore, all sales and purchases of power in those markets were governed by FERC-regulated tariffs. *See* FPA § 201(b), (d), (e), 16 U.S.C. § 824(b), (d), (e) (2000). *Automated Power Exch. v. FERC,* 204 F.3d 1144 (D.C.Cir.2000) (upholding FERC jurisdiction over power exchanges that facilitate power trading in California). The Tariffs, which were filed with FERC, specified the rules to abide by

in order to participate in these markets, including when and in what form participants would submit bids to buy and sell power, and the formulas used to establish prices for all purchase-sale transactions. The Tariffs also prescribed the financial settlements resulting from market transactions. They also allocated risks as between the markets and the market participants. FERC could alter or amend the Tariffs, including their pricing formulas, and to review and correct the market-clearing prices. *See San Diego Gas & Elec. Co.,* 127 FERC ¶ 61,191, at P 31 (2009) ("May 29, 2009 Order"); *CPUC v. FERC,* 462 F.3d at 1043-44. Both Tariffs authorized market participants to seek FERC's review and correction of prices set under the Tariff formulas. PX Tariff § 13, Pls. Exh. 57 at 918-19 (preserving PX participants' rights to seek FERC review of prices under FPA Section 206); ISO Tariff § 19, Pls. Exh. 66 at 316-17. Thus, it is uncontested that when the Agencies signed the PX and SC Agreements, they agreed to accept the prices, terms, and conditions established by the PX and ISO Tariffs, as determined and modified from time to time by FERC.

C. FERC Determined that PX and ISO Sellers' Prices Were Unjust and Unreasonable

SDG & E filed a complaint with FERC on August 2, 2000 against all sellers of electricity into the PX and ISO markets, alleging that the California wholesale power markets were not competitive, and that FERC should grant relief consistent with its statutory charge to assure that wholesale rates are just and reasonable.[1] PG & E, SCE, and the People all intervened in

[1] Complaint of SDG & E, FERC Docket No. EL00-95 (Aug. 2, 2000), Pls. Exh. 58.

that proceeding, asking FERC to investigate the markets, place caps on prices, and to change the markets' rules if FERC found the rules were not working as intended and were contributing to the market dysfunction, as well as order refunds.

Thereafter, on August 23, 2000, FERC opened an investigation into whether sellers' rates were just and reasonable. *San Diego Gas & Elec. Co.,* 92 FERC ¶ 61,172, at 61,603, 61,609 (2000) ("August 23, 2000 Order") ("Remedy Proceeding"). The Agencies were respondents to the initial SDG & E complaint, and they also formally intervened as parties and gained full participatory rights in the Remedy Proceeding. Pls. Exh. 67, 69.

In the August 23, 2000 Order, FERC established a "refund effective date" to begin October 2000 and end June 20, 2001 ("refund period") putting sellers on notice that any sales they made between these dates might be subject to refund if FERC concluded, following investigation, that prices must be corrected. August 23, 2000 Order, 92 FERC at 61,609; *see also San Diego Gas & Elec. Co.,* 93 FERC ¶ 61,121, at 61,370 (2000) ("November 1, 2000 Order"); *CPUC v. FERC,* 462 F.3d at 1046-47. Additionally, FERC announced that its investigation would consider modification of the PX and ISO Tariffs and related agreements. August 23, 2000 Order, 92 FERC, at 61,606; PX Tariff § 13, Pls. Exh. 57 at 918-19; ISO Tariff § 19, Pls. Exh. 66 at 316-17. FERC has been granted this authority and it is undisputed, as WAPA's own witness Mr. Sanderson conceded that FERC has power to amend the PX and ISO Tariffs, including revising the prices set under the Tariffs, and that the Agencies are bound to follow the Tariffs as amended by FERC.

In its November Order, FERC acknowledged that serious flaws in the market structure and rules, along with an artificially created imbalance of supply and demand, were causing unjust and unreasonable electricity rates. November 1, 2000 Order, 93 FERC ¶ 61,121, at 61,349-50. *See also CPUC v. FERC,* 462 F.3d at 1039-40 (discussing the potential for manipulation by sellers under the market rules and Enron fraudulent strategies).

In the case at bar, during trial, Plaintiffs put forth evidence that showed that during the Energy Crisis, the Agencies sought to "cash in" on the market dysfunction and stratospheric prices. For instance, the evidence showed that BPA gave instructions to its traders dealing with the PX and ISO through documents called "Operations Memos" or "UFNs" ("Until Further Notice") and that BPA's September 15, 2000 UFN stated that the ISO expected Stage 2 and possibly Stage 3 emergencies, and went on to say: "[T]he [ISO] called this morning to warn us of their expected heavy loads early next week. . . . Our ability to aid *(cash in)* in there [sic] anticipated crisis would be limited by transmission space." Pls. Exh. 65 at 119675 (emphasis added); Trial Tr. 2101:5-13 (Oliver). The evidence is clear that the Agencies' traders recognized that the Energy Crisis provided the Agencies an opportunity to reap windfall profits. As BPA explained in another UFN, "[s]elling at such times is an ancient but still true marketing strategy derived from Neanderthal hunting philosophy translated from cave paintings: '*wait till they fall in the tar pit then whomp 'em.*'" BPA June 22, 2000 Operations Memo, Pls. Exh. 54 at 119648 (emphasis added); *see* Trial Tr. 2103:10-2104:5 (Oliver).

D. FERC Corrected Prices Charged in the PX and ISO Markets During the Refund Period

FERC eventually altered the pricing formulas in the PX and ISO Tariffs and corrected prices set under those formulas for sales in the PX and ISO markets. Specifically, in its July 25, 2001 Order, FERC corrected the prices for the PX and ISO auction and OOM sales during the refund period. *San Diego Gas & Elec. Co.,* 96 FERC ¶ 61,120 (2001) ("July 25, 2001 Order"). FERC adopted a methodology to recalculate, on a market-wide basis, the maximum prices that would have existed in the PX and ISO markets if sellers had charged just and reasonable rates. *Id.* at 61,516-19. The corrected, maximum rates were called the "Mitigated Market Clearing Price," or "MMCP." FERC rejected requests by various market participants to set different MMCPs for different classes of sellers, and crafted the MMCP as a single, market-wide remedy. *See, e.g.,* December 19, 2001 Order, 97 FERC ¶ 61,275, at 62,218. FERC's price correction included an interest component to compensate market participants who had originally overpaid for their power purchases, as authorized by the Tariffs. PX Tariff § 15.6, Pls. Exh. 57 at 922; ISO Tariff § 12.6, Pls. Exh. 66 at 298; *see also* July 25, 2001 Order, 96 FERC ¶ 61,120, at 61,519; 18 C.F.R. § 35.19(a)(2).

On appeal from FERC's July 25, 2001 Order and related orders, the Ninth Circuit affirmed FERC's authority to correct the market clearing price that all sellers, including the Agencies, agreed to accept for their sales during the Refund Period, including OOM sales. *CPUC v. FERC,* 462 F.3d at 1051-53. The court held that FERC's price corrections were not impermissibly "retroactive;" in fact, FERC complied with the rule against retroactive ratemaking by limiting its

remedies to the period following the refund effective date. *Id.* at 1063.

E. The PX and ISO Recalculated Prices and Published Settlement Statements

The PX and ISO were responsible for tracking how much power each market participant bought and sold and the price associated with each transaction in those markets. PX Tariff §§ 3.1, 6.2, Pls. Exh. 57 at 904-905; ISO Tariff §§ 11.1, 11.2, Pls. Exh. 66 at 274-75. For each "Settlement Period," the PX and ISO calculated each PX Participant's and Scheduling Coordinator's respective purchases and sales, netted out the credits and debits attributable to each buyer and seller, and prepared and distributed "settlement statements" reflecting the amounts payable and receivable by market participants in connection with their transactions. PX PSABP § 5.4, Pls. Exh. 188 at 1743-44; ISO Tariff § 11.9, Pls. Exh. 66 at 289.

FERC directed the PX and ISO to apply the MMCP to sales for each auction interval during the refund period in order to recalculate the corrected prices that all sellers should have charged and to re-run their settlement and billing processes under their respective Tariffs. July 25, 2001 Order, 96 FERC ¶ 61,120, at 61,513, 61,516-20. The PX and the ISO complied with the directive and recalculated the accounts of all sellers and buyers in their markets to reflect the corrected prices for the Refund Period. BPA never raised any objection to those.

In order to apply the MMCP, the ISO needed factual data related to the sellers' actual generation costs. Evidentiary hearings were held to establish the facts needed to calculate the MMCP and resulting refunds, July 25, 2001 Order, 96 FERC ¶ 61,120, at 61,519-20,

and thereafter proposed findings were issued on December 12, 2002. On March 26, 2003, FERC issued an order largely adopting the proposed factual findings regarding the various market transactions and related costs. *San Diego Gas & Elec. Co.,* 102 FERC ¶ 61,317 (2003).

The PX and ISO then applied the MMCP to the Agencies' sales data to calculate the Agencies' refund obligations—the amounts the Agencies charged for each of their sales transactions during the Refund Period in excess of the MMCP—including the interest component authorized by the Tariffs. In 2004-2005 the PX and ISO furnished those calculations to the Agencies in the form of revised settlement statements known as "refund rerun settlement statements." *See* Forty-Fifth Status Report of the California Independent System Operator Corporation on Settlement Re-Run Activity (Jul 16, 2010) ("ISO 45th Status Report"), Pls. Exh. 254 at 1969, 1982.

The PX furnished PX market participants with preliminary refund rerun settlement statements on February 8, 2005. *See* PX's February 9, 2005 market notice, Pls. Exh. 127 ("[y]esterday, February 8, 2005, all CalPX settlement statements in the FERC [Remedy Proceeding] were published"); Trial Tr. 1033:23-1034:3 (Conn) (explaining that PX's February 9, 2005 market notice notified market participants that "the refund calculations were complete and that the settlement statements were available for review"). Final refund rerun settlement statements were published on May 17, 2005. *See* PX's May 17, 2005 market notice, Pls. Exh. 132; Trial Tr. 1041:22-1042:13 (Conn) (explaining that PX's May 17, 2005 market notice notified market participants that PX had published final refund rerun settlement statements).

Following the PX action, the ISO furnished Scheduling Coordinators with refund rerun settlement statements covering the Refund Period on a rolling basis between October 25, 2004 and February 17, 2006. For a seller, these settlement statements showed the amount of the seller's refund obligation.

The evidence is undisputed that the refund calculations are complete, and there are no outstanding or unresolved disputes concerning BPA or WAPA. *See* Forty-Third Status Report of the California Independent System Operator Corporation on Settlement Re-Run Activity (May 8, 2009) ("ISO 43rd Status Report"), Pls. Exh. 178 at Attachment A; ISO 45th Status Report, Pls. Exh. 254 at 1968. At trial, Dr. Conn explained that the PX's remaining adjustments to the refund calculations are items that will be allocated to buyers, not sellers like BPA and WAPA. Mr. Bouillon of the ISO confirmed that ongoing adjustments to refund obligations for fuel costs and emissions do not apply to the Agencies as sellers. Although BPA's Stephen Oliver initially claimed that the calculation of refunds remained incomplete because adjustments were being made to the refund figures, he later admitted that none of the adjustments had any bearing on BPA's refund obligations.

F. Current FERC Litigation

The Agencies also made sales for which FERC is in the process of determining corrected prices pursuant to the Ninth Circuit's decision. *See* infra pp. 430-31. FERC has already corrected prices for many of the transactions, however, it had concluded that it lacked authority to order refunds for the Summer Period (May 1, 2000 to October 1, 2000), and thus denied relief for that period. *CPUC v. FERC,* 462 F.3d at 1045-1048. FERC also refused to correct the rates for

Refund Period energy exchanges and multi-day sales (sales of power for periods longer than 24 hours), which are collectively referred to as the "Excluded Transactions." *Id.* at 1055, 1059.

The Ninth Circuit reversed FERC's orders refusing to grant such relief. *Id.* at 1065. The court held that FERC failed to provide any valid reason for its refusal to apply its MCP methodology to the Excluded Transactions, *id.* at 1057-58 (multi-day transactions), 1059-61 (energy exchanges), and granted Plaintiffs' petitions "challenging FERC's exclusion of such transactions." *Id.* at 1065. Similarly, as to Summer Period transactions, the court held that FERC provided insufficient justification for its refusal to consider a market-wide remedy. *Id.* Noting that Plaintiffs provided "significant evidence of pervasive tariff violations," *id.* at 1049, the court held that "FERC's categorical rejection of the California Parties' request for . . . relief was arbitrary, capricious, and an abuse of discretion." *Id.* at 1051. This matter is still moving forward on remand.

G. Ninth Circuit Litigation

FERC's July 25, 2001 Order contained two distinct rulings relating to the Agencies' refund obligations. First, FERC adopted the MMCP, altering the Tariffs' pricing formulas, to correct the prices that all sellers—public utilities and governmental agencies alike—agreed to accept for their sales during the refund period. That action was upheld by the Ninth Circuit. *CPUC v. FERC,* 462 F.3d at 1043-44. In its second ruling, FERC held that its power to enforce sellers' payment of their refund obligations under the FPA extended to governmental entities such as the Agencies. This was reversed on appeal holding that FERC lacked statutory authority to enforce governmental entities' refund obligations. *Bonneville Power Admin. v. F.E.R.C.,*

422 F.3d 908, 911 (9th Cir.2005). The effect of that holding was that, after *Bonneville,* Plaintiffs' refund claims against the Agencies were no longer being determined within the Remedy Proceeding but would be decided by the Court. At the same time, FERC retained jurisdiction over the Agencies' claims against the IOUs for the amounts the IOUs still owe for their purchases of the Agencies' power, and for refunds owed by the IOUs or other sellers for overcharges on any purchases by the Agencies. October 19, 2007 Order, 121 FERC ¶ 61,067, at PP 42, 57.

The Ninth Circuit suggested in *Bonneville* that although FERC could not enforce governmental sellers' refund obligations, market participants could obtain "the equivalent refund relief" by bringing claims in court directly against the Agencies to enforce the contractual obligations created by the Tariffs and related agreements. *Bonneville,* 422 F.3d at 925-26. On remand and in light of *Bonneville,* FERC reaffirmed that it had found prices in the PX and ISO markets excessive and had reset the prices that all parties in those markets, including the Agencies, agreed to accept for sales in those markets. *San Diego Gas & Elec. Co.,* 121 FERC ¶ 61,188, at PP 10-13 (2007), clarifying October 19, 2007 Order, 121 FERC ¶ 61,067, at P 36 (confirming FERC "revised the pricing formulations contained in the CAISO/PX tariffs" to "reset the market clearing prices" for PX and ISO transactions during refund period).

However, as the Ninth Circuit ruled in *Bonneville* that FERC did not have authority to enforce the corrected prices with respect to governmental entities, FERC vacated its orders that had previously required governmental entities to refund their overcharges, and ruled that the PX and ISO should disburse any

remaining payments for the Agencies' sales to them in the first instance at the original, unmitigated prices, without withholding the refunds they owe. October 19, 2007 Order, 121 FERC ¶ 61,067, at PP 23-24, 36, 57. FERC expressly left the determination of the Agencies' refund obligations to this Court, holding that "[a]mounts owed and payments thereof by [governmental sellers], if any, as a result of these contractual claims are a matter to be resolved by the relevant court." October 19, 2007 Order, 121 FERC ¶ 61,067, at P 76, PP 3, 37, 59. FERC further held that the PX and ISO should finish calculating the governmental entities' refund liabilities, and that the shortfall resulting from these entities' refusal to pay refunds would be re-allocated to other market participants, including Plaintiffs. *Id.* at PP 38-39.

WITNESSES

Several witnesses testified at trial. For Plaintiff PG & E, Roy Kuga, Vice President, Energy Supply Management, Veronica Andrews, Senior Director of Short Term Electric Supply, and Joseph Castillo Manager of FERC Refund Settlements, testified. For SCE, Gary Stern Director of Market Strategy and Resource Planning testified. Michael Strong Manager of Settlements and Systems testified for SDG & E. Peter Garris, (former) Deputy Director for CERS, and Susan Lee, (former) Manager of Trading and Scheduling for CERS testified for The People.

Other witnesses who testified for the PX and ISO included Lawrence Conn, Director of Operations and John Melby, (former) Senior Director of Marketing and Product Development as well as Bradley Bouillon Settlements Manager, Michael Epstein, Director of Financial Planning, and William Regan, (former) ISO Chief Financial Officer.

BPA had testify on its behalf Stephen Oliver, Vice President, Generation Asset Management and Donald Wolfe (by deposition), Public Utilities Specialist. WAPA called Jeffrey Ackerman, Manager of the Colorado River Storage Project Energy Management and Marketing Office and Sean Sanderson, Billing and Settlements Manager.

Two experts were called. Robert Gee, President, Gee Strategies Group LLC for the Plaintiffs, and Jeffrey Tranen, Senior Vice President, Compass Lexecon, for the Defendant.

DISCUSSION

Plaintiffs have brought this suit under two independent alternative legal theories of contract recovery. First, Plaintiffs assert that the Agencies anticipatorily breached their contracts by repudiating their obligation to refund their overcharges to Plaintiffs, entitling Plaintiffs to sue now for damages. PG & E and SCE Complaint, Docket No. 1, Case No. 07-157 (Mar. 12, 2007) ("Compl.") ¶¶ 78-79. To constitute repudiation, the Agencies' renunciation of their contract obligation need only be "sufficiently positive to be reasonably interpreted to mean that [they] will not or cannot perform." Restatement § 250 cmt. b. The promisor's repudiation of its contractual obligations "ripens into a breach" if and when the promisee "elects to treat it as such." *Franconia,* 536 U.S. at 143-44, 122 S.Ct. 1993. Second, and alternatively, Plaintiffs argue that the Agencies have a present contractual duty to pay the refunds they owe, and they have breached that duty by nonpayment. Compl. ¶¶ 73-76. Plaintiffs argue that the Agencies contractually agreed to abide by the prices set by FERC, and are obligated to refund the amounts they charged in excess of those prices. *Id.* It is true and the evidence is undisputed that the Agencies

have not paid the refunds FERC has determined they owe. BPA's rejection of IOUs' claims, Pls. Exh. 162; WAPA's rejection of IOUs' claims, Pls. Exh. 165; BPA's rejection of the Peoples' claim, Pls. Exh. 163; WAPA's rejection of the Peoples' claim, Pls. Exh. 166.

Plaintiffs assert that between July 25, 2001, when FERC corrected the prices for the refund period, and September 6, 2005, when the Ninth Circuit issued its *Bonneville* decision, FERC was exerting exclusive jurisdiction over the refund obligations of all PX and ISO sellers. That meant that the Agencies' contractual refund obligations—the amount, and when and how the refunds would be paid—could be determined only through the FERC regulatory process, and would be enforced by FERC order. After the *Bonneville* decision, the Agencies could not be compelled to refund their overcharges through the FERC process. Plaintiffs claim, therefore, that the Agencies breached their contracts by failing and refusing to refund their overcharges within a reasonable time after the *Bonneville* decision, and, in any event, no later than March 2006, when the Agencies denied Plaintiffs' CDA claims demanding payment of the refunds the Agencies owe. Pls. Post-Trial Brief 59.

On the other hand, Defendant raises several arguments in its post-trial brief asserting that the Plaintiffs' breach of contract claims must fail. To begin, Defendant asserts that Plaintiffs have failed to demonstrate that the United States breached the SC Agreements that it entered into with the ISO or PX. Def. Post Trial Br. at 2. Additionally, Defendant asserts that the IOUs are estopped from asserting that they are in privity with the United States regarding the PX transactions. *Id.* Next, Defendant argues that the IOUs failed to demonstrate that they are third-

party beneficiaries of the agreements between the United States and the PX, as well as arguing that the State of California failed to demonstrate that is was a surety for the IOUs ISO power purchases. *Id.* And lastly, Defendant argues that Plaintiffs failed to demonstrate that they are entitled to declaratory relief. *Id*

In the alternative, Defendant asks this Court to defer judgment in these cases until the question of the authority of the FERC to "reset" rates retroactively has been determined. *Id.* That question is presently before the United States Court of Appeals for the Ninth Circuit. Defendant requests this in order "[t]o avoid the prejudice to the United States of potentially inconsistent judgments in that litigation and this [litigation] . . . before deciding whether the United States has breached any obligation of its agreements with the ISO or the PX." *Id.*

The Court DENIES Defendant's request to defer judgment. If this was the only case with this issue the Court might be persuaded to stay but since there are cases that say that FERC is entitled to reset prices, this Court is not persuaded to stay this case. *See e.g. Bonneville Power Admin. v. F.E.R.C.,* 422 F.3d 908 (9th Cir.2005); *CPUC v. FERC,* 462 F.3d 1027 (9th Cir.2006). Furthermore, for the reasons set forth below, the Court finds that the evidence Plaintiffs produced at trial proves that there was a contract and that Defendant breached its present contractual obligation to refund its overcharges.

I. Are the Plaintiffs Estopped from Asserting Privity?

Throughout this case, Defendant has argued that Plaintiffs lack privity with the Agencies. As held above, the facts at trial showed that the Agencies

contracted with and owe contract obligations to the Plaintiffs. First, the evidence showed that the PX and ISO were "public utilities" under the FPA. Second, as a public utility, all the sales and all the purchases of power in those markets were governed by FERC-regulated tariffs. Third, the applicable Tariffs in this case which were filed with FERC, specified the rules to abide by in order to participate in these markets. The Tariffs included when and in what form participants would submit bids to buy and sell power, and the formulas used to establish prices for all purchase-sale transactions as well as prescribing the financial settlements resulting from market transactions. The Tariffs also allocated risks as between the markets and the market participants. Fourth, because the Tariffs were FERC regulated, FERC could alter or amend them, including their pricing formulas, and to review and correct the market-clearing prices. And finally, the Tariffs authorized market participants to seek FERC's review and correction of prices set under the Tariff formulas.

At trial, the evidence was clear that in order for the Agencies to have access to the PX and ISO markets, the Agencies were required to sign written contracts that incorporated these Tariffs, as well as agreeing to abide by the Tariffs' terms and subsequent changes to those Tariffs. In the ISO, the Scheduling Coordinators were also required to sign a Scheduling Coordinator Agreement. Thus, the evidence is clear and uncontested that when the Agencies signed the PX and SC Agreements, they agreed to accept the prices, terms, and conditions established by the Tariffs, as determined and modified from time to time by FERC. Thus the facts at trial proved that the PX and ISO were facilitators only, and that the payment obligations

were between the buyer and seller.[2] Since the PX and ISO were pass-through entities or clearinghouses, the contractual relationships of offer, acceptance, and mutual intent ran between the Agencies and the IOUs, the Plaintiffs. The Defendant's argument is illogical that there is no relationship between the Agencies and Plaintiffs. For example, when one pays a bill with a check, the money may go into the creditor's bank account, but it is the legal property of the creditor. It meets the debtor's legal obligations. The same relationship existed here. The PX and ISO were like a bank, and the Agencies and the Plaintiffs had the obligations.

It appears that now, as a last resort, Defendant revives another previously rejected argument, that the IOUs are collaterally estopped from asserting privity. Def. Post-trial Br. 22-25. In support of its argument, Defendant argues that a FERC order, *Southern California Edison Co.,* 80 FERC ¶ 61,262 (1997) ("*Edison*"), estops the IOUs from asserting privity in PX transactions. Def. Br. 24. The Court must, therefore, turn its attention to the question as to whether collateral estoppels applies.

A court's determination of whether collateral estoppel is appropriate turns on a four-part test. *Ammex, Inc.*

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[2] In light of this finding, the Court need not address whether the Plaintiffs are third party beneficiaries as the evidence proved that they are direct beneficiaries. Furthermore, the Court need not address whether the State of California is a surety. The facts proved that under the terms of the market, CERS was a market participant as California bought power through the PX and ISO. As a market participant, CERS had a direct contract relationship with the Government. Therefore, the State of California has the same relationship as any market participant.

v. U.S., 384 F.3d 1368, 1371 (Fed.Cir.2004). To collaterally estop Plaintiffs from asserting a contractual relationship, Defendant bears the burden of showing that: (1) the issue is identical to the issue decided in a former proceeding; (2) the issue was actually litigated in the former proceeding; (3) the issue was necessarily decided in the former proceeding; and (4) the party against whom preclusion is sought had a full and fair opportunity to litigate its position. *Id.*

In addressing *Edison,* Defendant asserts at most that only *two* parts of the test are met. Thus Defendant ignores the first step, that the issues in the two proceedings must be identical. In *Edison,* SCE sought an order declaring whether sales through the PX should be considered wholesale or retail sales under the Public Utility Company Holding Act. Here, the issue is whether PX market participants can sue one another under the terms of the PX Tariff. Thus, as the four part test is not satisfied, Defendant's collateral estoppel argument must fail.

Defendant also contends that SCE should be collaterally estopped from asserting privity with respect to PX transactions on the basis of *Southern California Edison Co. v. Lynch,* 307 F.3d 794 (9th Cir.2002) ("*Lynch*"). Def. Post-trial Br. 24-25. Once again, Defendant does not and cannot demonstrate that *Lynch* meets the four-part test. Again, there is no identity of issues. The issue in *Lynch* was whether two generators that were owed money for power they had sold in the PX markets could intervene to challenge the settlement of a lawsuit in which SCE sought to compel the California Public Utilities Commission to increase SCE's retail rates during the Energy crisis—not, as here, whether SCE and generators could sue one another to enforce obligations under the PX Tariff.

Accordingly, the Court finds Defendant has established no grounds on which estoppel could properly be applied. Having found that privity exists and that estoppel does not apply, the Court moves on to the merits of this case.

II. Did Defendant Breach its Contractual Obligation to Refund its Overcharges?

Defendant raises several arguments with respect to its contention that the Defendant did not breach any contract. Defendant first raises the defense that it is not obligated to pay the Plaintiffs anything because the contracts signed by the agencies were with the ISO and the PX, not with the Plaintiffs. Defendant further argues that no obligations have arisen under the contracts nor have Plaintiffs identified a tariff provision that they allege defendant breached as well as failing to identify the breach of any contract provision that governs how and when that alleged refund obligation was to have been satisfied. The Court will, therefore, turn its attention to these arguments.

A. Did the Tariffs Allow Prices to be Corrected by FERC?

Defendant contends that because FERC was not authorized to reset ISO and PX prices for the Agencies' sales, the Agencies did not agree to refund their overcharges when they agreed to be bound by the Tariffs. Def. Post Trial Br. 4-5.

First, Defendant argues that the ISO Scheduling Coordinating Agreements and PX Participation Agreements, which, incorporated the ISO and PX Tariffs provide that the Tariffs govern bidding and settlement. Pls. Exh. 23 at 600 ¶ 2, 603 § 8; Pls. Exh. 26 at 606 § II.A, 608 § 8. These provisions, Defendant argues, do not contain language that the prices that the agencies

received for power were subject to retroactive revision, or to any revision of rate change at which the United States agreed to sell power. Def. Post Trial Br. 4.

Second, Defendant argues that Plaintiffs reliance on PX Tariff § 13 and ISO Tariff § 19 is misplaced as Defendant contends these provisions merely preserve the ability of scheduling coordinators and market participants to exercise rights under sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d, 824e(a), "and FERC's rules and regulations thereunder." Pls. Exh. 57 at 918-19 § 13; Pls. Exh. 66 at 316-17 § 19, Def. Post Trial Br. 4. As FERC's rate jurisdiction under sections 205 and 206 expressly applies only to public utilities, Defendant asserts that governmental entities such as BPA and WAPA cannot be regulated under such provisions. *Bonneville Power Admin. v. F.E.R.C.,* 422 F.3d 908, 918 (9th Cir.2005).

Defendant's arguments notwithstanding, the Court finds that the evidence at trial showed that the Tariffs contain provisions as a matter of contract law allowing FERC to reset prices for all PX and ISO transactions during the relevant time period. This role for FERC is created by a contract between all market participants, both private and governmental. The evidence showed that the PX and ISO Tariffs gave Plaintiffs the *contractual* right to ask FERC to review and modify the prices charged under those Tariffs during the Energy Crisis.[3] It makes FERC an arbitrator under

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[3] In *Bonneville,* the Ninth Circuit validated this premise on which Plaintiffs' contract claim is based:

> FERC and intervenor California Parties [Plaintiffs here] emphasize that the [Agencies] entered into agreements with ISO and CalPX that obligated them to abide by the ISO and CalPX tariffs. They argue that these agreements made it obvious to the [Agencies] that the tariffs setting the prices

the contract apart from any independent authority FERC has under Federal law over government participants in the PX and ISO markets. Specifically, PX Tariff Section 13 states:

> Any amendment or other modification of any provision of this PX Tariff must be in writing and approved by the PX Governing Board in accordance with the bylaws of the PX. Any such amendment or modification shall be effective upon the date it is permitted to become effective by FERC. . . . *Nothing contained in this Tariff or any service or participation agreement shall be construed as affecting, in any way, the ability of any PX Participant receiving service under this Tariff to exercise its rights under Section 206 of the FPA* and pursuant to FERC's rules and regulations promulgated thereunder.

Pls. Exh. 57 at 918-919 (emphasis added.) Section 19 of the ISO Tariff is substantively identical. Pls. Exh. 66 at 316-17.

The intention of the parties in creating a contract is key to its interpretation. *Beta Sys., Inc. v. United States,* 838 F.2d 1179, 1185 (Fed.Cir.1988). Defendant argues that when they entered into the agreements with the ISO and the PX, the agencies could not have intended to be bound by a retroactive revision of rates implemented by FERC because such a revision would have been entirely novel and unforeseeable. Def. Post Trial Br. 4-5. However, in determining the meaning of terms in a contract, the Court may receive and review

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> in the ISO and CalPX markets would be subject to FERC regulation. . . . All of this is true.

422 F.3d at 925.

evidence of trade practice and custom. *See e.g., Metric Constructors, Inc. v. NASA,* 169 F.3d 747, 752-53 (Fed.Cir.1999) (considering evidence of trade practice and custom); *Bos. Edison Co. v. FERC,* 441 F.3d 10, 13-16 (1st Cir.2006).

The evidence at trial showed, and as Plaintiffs' expert witness, Robert Gee explained, PX Tariff Section 13 and ISO Tariff Section 19 have a well understood meaning in the specialized practice and custom of the energy industry. These provisions, he testified, are known in the industry as "*Memphis* clauses," and signify that prices charged under the contract are not "fixed," but rather are subject to review and change by FERC. Additionally, Defendant's own expert, Jeffrey Tranen, conceded that PX Tariff Section 13 and ISO Tariff Section 19 are "*Memphis* Clauses" that expressly give the contracting parties the right to seek FERC correction of prices for sales made under the Tariffs. The Court finds that under industry usage, PX Tariff § 13 and ISO Tariff § 19 represent a contractual agreement of the market participants. That agreement is that the participants could petition FERC to investigate whether prices being charged are just and reasonable and, if FERC found they were not, correct those prices to just and reasonable levels.

In addition, the Court holds that FERC's correction of prices for PX and ISO market sales is, therefore, contemplated by the contract and contractually binding on the Agencies. Although FERC's regulatory jurisdiction applies only to the rates charged by "public utilities" the ISO and PX are public utilities and the Agencies voluntarily contracted to abide by prices set under the FERC regulated ISO and PX Tariffs because they wanted to trade in those markets. Therefore, the Court finds that the Agencies contractually bound

themselves to the corrected rates even though FERC lacked jurisdiction to regulate the Agencies directly.

Even so, Defendant argues that pursuant to § 206(a) of the FPA, FERC possesses the authority to determine a rate only prospectively. Def. Post Trial Br. 4-5. Thus, according to Defendant, FERC does not possess authority pursuant to § 206(a) to reset rates retroactively and, therefore, FERC's action of resetting rates retroactively is beyond its authority. Thus says Defendant, this action has no effect upon the agencies' contract obligations. *Cf. Del-Rio Drilling Programs, Inc. v. United States,* 146 F.3d 1358, 1362 (Fed.Cir.1998) (holding that the *ultra vires* conduct of a Government official cannot affect a governmental taking). Defendant relies on the testimony of its expert witness Jeffery Tranen that "under the Federal Power Act . . . FERC cannot engage in the retroactive resetting of rates." Trial Tr. 2277:9-14 (Tranen). In support of this position, Mr. Tranen testified that before and after this case, FERC has only ever changed rates on a prospective basis. During his testimony, Mr. Tranen discussed his understanding of section 206; and in his opinion, FERC does not retroactively reset rates. He further opined that market participants could not have been on notice that FERC would retroactively reset rates basing his opinion upon his direct experience, as an industry executive, with FERC's customs and practices in cases in which he was involved.

Plaintiffs assert, and the Court agrees, that Defendant's argument and the testimony provided is contrary to FERC's own rulings addressing its authority to reset prices for sales under the PX and ISO Tariffs. The testimony provided by Mr. Tranen indicates that he misunderstood how FPA Section 206(b) operates.

Under Section 206(b), a market participant files a complaint and FERC initiates proceedings to assess the complaint. As part of that process FERC establishes a "refund effective date" 60 days after the date the complaint is filed. FPA § 206(b), 16 U.S.C. § 824e(b) (2000). The imposition of a refund effective date places market participants on notice that prices charged *after the refund effective date* are provisional and subject to change. *CPUC v. FERC,* 462 F.3d at 1046-47. FERC's price correction is *prospective* from the refund effective date, not retroactive. As Senator Bumpers, the sponsor of the Regulatory Fairness Act, the bill that added this particular provision to FPA Section 206 explained, the statute "would provide that rate reductions ordered by FERC be *prospective from a refund effective date set by the Commission* as contrasted to the date of the final Commission order." 134 Cong. Rec. 22,906, 22,907 (1988) (statement of Sen. Bumpers) (emphasis added); Pls. Post Trial Br. 53. On cross-examination, Mr. Tranen admitted he was unaware of these facts.

Moreover, Mr. Tranen purported to base his opinion on Court of Appeals decisions that discussed retroactive ratemaking generally, but he was unaware of specifically relevant decisions. For instance, in *Public Utilities Commission of the State of California v. FERC,* 988 F.2d 154 (D.C.Cir.1993), the court explained that "when determining whether a FERC order violates either the filed rate doctrine or the rule against retroactive ratemaking, this court inquires whether, *as a practical matter,* the [parties] . . . had sufficient notice that the approved rate was subject to change." *Id.* at 164 (emphasis added). Significantly, notice does not mean that the rule against retroactive ratemaking does not apply; rather, notice, such as that provided by a refund effective date, "changes what would be purely

retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision." *Id.* (internal quotations and citations omitted). Mr. Tranen did not consider this authority, and others, in formulating his opinion. As such, the Court finds Mr. Tranen's testimony with regard to this issue of no probative value.

Likewise, it is well settled that FERC's orders are binding law, unless and until overturned on direct review by a federal court of appeals. As Defendant concedes, this Court has no jurisdiction to consider this attack on FERC's authority, or to take any action on the assumption that a FERC order may be erroneous. As both FERC and the Ninth Circuit have held,

> The Commission's actions in this proceeding are well within the authority granted to it under section 206, which specifically provides that the Commission may reset prices in Commission jurisdictional tariffs and order refunds back to the refund effective date.
>
> *Contrary to the [governmental sellers'] argument, the Commission . . . is not engaging in impermissible retroactive action with respect to rate changes [under the PX and ISO Tariffs].* Rather, in the November 2000 Order, we determined rates charged under the jurisdictional CAISO/PX tariffs to be unjust and unreasonable. Pursuant to the statutory requirement placed upon the Commission by Congress under FPA section 206(b), we established a refund effective date of October 20, 2000. FPA section 206(b) also permits the Commission to order refunds for the period subsequent to the refund effective date through a

> date fifteen months after such refund effective date. That is what occurred here.

May 29, 2009 Order, 127 FERC ¶ 61,191, at PP 15, 18 (emphasis added). That Order is currently in effect and as such constitutes the governing federal law, unless and until it is overturned. *See* 18 C.F.R. § 385.2007(c) (2008). Hence, FERC's actions in correcting prices are consistent with its authority under the FPA as the law now stands and the Agencies are bound by the rulings.

B. Did Plaintiffs Place in Evidence Transactions Showing Overcharges?

Defendant asserts that Plaintiffs have failed to identify transactions in which Plaintiffs were overcharged by the Agencies. Def. Post Trial Br. 6. This assertion ignores the undisputed evidence at trial. Pursuant to their Tariffs, the PX and ISO issued settlement statements to the Agencies showing each of the Agencies' transactions. PX PSABP § 5.4, Pls. Exh. 188 at 1743-44; ISO Tariff § 11.9, Pls. Exh. 66 at 289.

After FERC revised the market-clearing prices for the refund period sales, the PX and ISO issued "refund re-run settlement statements" showing the corrected prices for each of the Agencies' transactions. Specifically, as the evidence showed, in the July 25, 2001 Order and subsequent orders, FERC directed the PX and ISO to apply the MMCP to sales for each auction interval during the Refund Period in order to recalculate the corrected prices that all sellers should have charged and to re-run their settlement and billing processes under their respective Tariffs. July 25, 2001 Order, 96 FERC ¶ 61,120, at 61,513, 61,516-20; Tr. 261:4-17 (Kuga); Tr. 1022:11-21 (Conn).

Thereafter, and pursuant to FERC's directive, the PX and the ISO recalculated the accounts of all sellers and buyers in their markets to reflect the corrected prices for the refund period. The evidence showed that BPA never raised any objection to those calculations. Trial Tr. 2069:8-14 (Oliver). The evidence further showed that the PX and ISO then applied the MMCP to the Agencies' sales data to calculate the Agencies' refund obligations—the amounts the Agencies charged for each of their sales transactions during the Refund Period in excess of the MMCP—including the interest component authorized by the Tariffs. In 2004-2005 the PX and ISO furnished those calculations to the Agencies in the form of revised settlement statements known as "refund rerun settlement statements." *See* Forty-Fifth Status Report of the California Independent System Operator Corporation on Settlement Re-Run Activity (Jul 16, 2010) ("ISO 45th Status Report"), Pls. Exh. 254 at 1969, 1982; Trial Tr. 261:4-22 (Kuga); Trial Tr. 1030:20-1031:4, 1032:16-24, 1035:8-1036:8, 1064:18-24 (Conn); Trial Tr. 1301:20-24, 1302:22-1303:4; Trial Tr. 1327:19-21 (Bouillon); Trial Tr. 1492:25-1493:5 (Andrews).

On February 8, 2005, the PX furnished PX market participants with preliminary refund rerun settlement statements. *See* PX's February 9, 2005 market notice, P.Ex. 127 ("[y]esterday, February 8, 2005, all CalPX settlement statements in the FERC [Remedy Proceeding] were published"); Trial Tr. 1033:23-1034:3 (Conn) (explaining that PX's February 9, 2005 market notice notified market participants that "the refund calculations were complete and that the settlement statements were available for review"). The evidence conclusively showed that the final refund rerun settlement statements were provided on May 17, 2005. *See* PX's May 17, 2005 market notice, Pls. Exh. 132; Trial Tr.

1041:22-1042:13 (Conn) (explaining that PX's May 17, 2005 market notice notified market participants that PX had published final refund rerun settlement statements).

In the ISO market, the ISO furnished Scheduling Coordinators with refund rerun settlement statements covering the Refund Period on a rolling basis between October 25, 2004 and February 17, 2006. Trial Tr. 1307:22-1308:2 (Bouillon); ISO 45th Status Report, Pls. Exh. 254 at 1982. For a seller, these settlement statements showed the amount of the seller's refund obligation, or "delta," i.e., the difference between the original price (MCP) and the FERC-corrected price (MMCP) per unit of power, multiplied by the quantity. *See* Forty-Fifth Status Report of the California Independent System Operator Corporation on Settlement Re-Run Activity (Jul 16, 2010) ("ISO 45th Status Report"), Pls. Exh. 254 at 1969, 1982; Trial Tr. 261:4-22 (Kuga); 1030:20-1031:4, 1032:16-24, 1035:8-1036:8, 1064:18-24 (Conn); Trial Tr. 1301:20-24, 1302:22-1303:4; Trial Tr. 1327:19-21 (Bouillon); Trial Tr. 1492:25-1493:5 (Andrews). (Feb. 23, 2006), Pls. Exh. 157; Trial Tr. 1050:10-11 (Conn).

It is clear from the evidence that the Agencies have validated those statements, which are, therefore, binding on them. The evidence showed that the IOUs purchased power in every auction in which the Agencies sold power, therefore, the IOUs are entitled to a proportionate share of refunds on every sale the Agencies made at a price exceeding the MMCP during the Refund Period. The trial testimony established that the refund re-run settlement data can be used to identify all such sales and that the specific amount that each Agency owes to each of the IOUs can be calculated from the data shown on the refund re-run

settlement statements. *See* Trial Tr. 1506:9-14 (Andrews); 1570:17-1571:1 (Castillo). *Cf.* Def. Br. 12-13. Contrary to Defendant's assertion, to establish liability, Plaintiffs need only show they have been injured by Defendant's refusal to pay the refunds the Agencies owe. *Fireman's Fund Ins. Co. v. U.S.,* 92 Fed.Cl. 598, 698 (2010) (citing *Lindemann Maschinenfabrik GmbH v. Am. Hoist & Derrick Co.,* 895 F.2d 1403, 1406 (Fed.Cir.1990)). The Court finds that Plaintiffs have done so.

C. Do the Plaintiffs Get Paid Directly?

Next, Defendant asserts that Plaintiffs' have failed to identify any agency obligation to pay them directly. Def. Post Trial Br. 6. Plaintiffs assert that this mischaracterizes their claims as alleging the Agencies must pay refunds *directly to* Plaintiffs, rather than through the PX and ISO. Pls. Reply at 5 (emphasis in the original). The Court agrees. Here, in the liability phase, Plaintiffs are suing to establish the Agencies' breach of their contractual duty to pay refunds. How damages eventually will be paid is irrelevant to the existence of the Agencies' liability to refund their overcharges. Plaintiffs have been damaged by the Agencies' nonpayment regardless of whether payment was to be made directly to Plaintiffs or through the PX and ISO, though the evidence clearly shows the PX and ISO were only conduits for exchanges between Plaintiffs and Defendant. As the Court has already observed during trial, "Plaintiffs will tell [Defendant] if they win" how Defendant should pay the judgment." Trial Tr. 1527:9-14, 23-25. Whether payment should be made directly or through the PX and ISO is an issue for the Court to resolve after it determines liability.

D. Did Plaintiffs Establish that the Agencies Owe Refunds?

Defendant claims that the letters it solicited from the PX and ISO show that the Agencies owe no refunds. Def. Post Trial Br. 10-11. The undisputed evidence from the PX and ISO witnesses at trial, however, was unambiguously to the contrary. As the PX and ISO witnesses explained at trial, these letters state on their faces that they do not reflect the amounts of the Agencies' existing refund obligations, which the PX and ISO have calculated but which are reflected in different accounts. Specifically, Dr. Lawrence Conn of the PX testified that the amounts reflected on the PX's letters to the Agencies, which he wrote, merely reflect the unpaid balances for the Agencies' PX and ISO sales, and do not include the Agencies' refund obligations. Trial Tr. 1077:21-1078:14 (Conn). The PX's letters themselves state that they "do [ ] not provide a complete picture of a participant's final balance with CalPX." June 24, 2010 letter from PX to WAPA, Pl. Exh. 238 at 2045. The letters then list four adjustments that were excluded from the cash balance amounts reported in the letters; one of those adjustments is the PX's calculation of the Agencies' refund obligations. *Id.* at 2046.

The ISO's letters are similar. Michael Epstein of the ISO explained that its letters do not "indicate anything about whether BPA and WAPA have any refund liability for the refund period." Tr. 1422:13-17 (Epstein). Rather, the letters refer only to the amount of any invoices issued to the Agencies that remain unpaid nor do the letters refer to the amounts shown on settlement statements issued to the Agencies for the Refund Period. Trial Tr. 1420:8-9, 1417:14-23, 1420:3-11 (Epstein).

In addition, Defendant maintains that it has no obligation to pay refunds until it receives invoices from the PX and ISO. Def. Post Trial Br. 11-12. However, this is impossible in light of FERC's clear direction in its October 19, 2007 Order, that in light of *Bonneville,* the collection of the refund payments from the Agencies will not be conducted by the PX and ISO through the issuance of invoices, but pursuant to this Court's orders when liability is determined in this action. Furthermore, it is clear that the Tariffs do not make invoices a condition precedent to the obligation to pay. Defendant argues that the invoice shows the amount due and a payment date. But the evidence clearly demonstrated that invoices were merely a convenience, a prompt for payment and a summary of the obligation shown on the settlement statements. The invoice did not create the legal obligation to pay a specific amount on a specific date. *E.g.* Trial Tr. 430:23-34 (Melby); Trial Tr. 1946:4-1947:1, 1947:8-1949:14 (Oliver).

Agency witnesses did not dispute that the refund rerun settlement statements, which they have validated, establish a binding obligation for payment of a specific amount, without the need of an invoice. As Dr. Regan testified, the preliminary settlement statement "is a firm binding obligation for settlement." Trial Tr. 1182:12-14 (Regan). BPA's Stephen Oliver acknowledged that the settlement statements establish the amount owed, Trial Tr. 2075:6-8 (Oliver), and stated: "I understand that the basis for the obligations that were in those invoices are established by the settlement statements." Trial Tr. 2075:13-15 (Oliver). If the Court were to accept Defendant's position, that even though the Agencies received binding settlement statements establishing their obligations, the absence of an invoice would allow them to retain prices that far

exceed those set under their contracts. Thus, to accept Defendant's argument that the contracts make invoicing a condition precedent to the duty to pay, the Court would have to ignore provisions in the same contracts that set prices for the Agencies' sales.

In *Unisys Corp. v. United States,* 48 Fed.Cl. 451 (2001), the court held that the only reasonable interpretation of the contract was that the United States must refund overpayments it received under a settlement agreement, even though the contract did not expressly provide for refunds, because the United States' interpretation would render meaningless the provisions setting the amount to be paid under the contract. *Id.* at 455. Similarly, an interpretation that the ISO and PX Tariffs do not require payment of refunds—merely because no invoice has been issued—would render meaningless the provisions setting the prices for transactions, as corrected by FERC. While the *Bonneville* decision and the October 19, 2007 Order have compelled Plaintiffs to resort to this Court to obtain payment from the Agencies rather than relying on the ordinary invoicing and payment process under the Tariffs, that fact does not entitle the Agencies to simply retain their overcharges. Instead, the Court reads the invoicing and pricing provisions as consistent with each other so that the mere lack of an invoice does not allow the Agencies to keep funds to which they are not contractually entitled.

III. Do Plaintiffs' Contract Disputes Act Claims Satisfy the Statutory Requirements?

Defendant contends that the Court lacks jurisdiction over Plaintiffs' claims "because plaintiffs did not submit sum-certain claims to a contracting officer." Def. Post-trial Br. 21. The Court previously rejected this argument in denying Defendant's December 22,

2009 motion to dismiss. *See* Order, Docket No. 142, Case No. 07-0157 (May 5, 2010); *see also* April 16, 2010 Hearing Tr. at 72:4-5. Moreover, the sum certain requirement, which is found in the Federal Acquisition Regulations ("FAR"), does not even apply to the Agencies' sales of electricity. *See Little River Lumber Co. v. United States,* 21 Cl.Ct. 527, 534-35 (1990) (timber sales by U.S.); FAR § 2.101 (48 C.F.R. 2.101); *id.* § 52.233.1 (48 C.F.R. 52.233.1). Rather, whether a CDA claim satisfies the requirements of the CDA depends on the terms of the contract, any applicable regulations, and the facts of the case. *Garrett v. Gen. Elec. Co.,* 987 F.2d 747, 749 (Fed.Cir.1993). "[T]he submission to the contracting officer must include the amount claimed or some method or supporting material by which the total amount then claimed to be involved can be ascertained." *25 New Chardon St. L.P. v. U.S.,* 19 Cl.Ct. 208, 210 (1990); *see also United States v. Gen. Elec. Corp.,* 727 F.2d 1567, 1569 (Fed.Cir.1984).

Here, the claims asserted that the Agencies were "contractually obligated to reimburse purchasers for the difference between the rates [they] initially charged in [their] sales in the ISO and PX markets and the lower FERC adjusted lawful rates" and that Plaintiffs sought to recover from the Agencies their "overcharges in the ISO and PX markets" pursuant to the revised prices set by FERC. IOUs' Amended Claim to WAPA, Pls. Exh. 143 at 17; IOUs' Amended Claim to BPA, Pls. Exh. 144 at 6; the Peoples' Claim to WAPA, Pls. Exh. 145 at 799-800; the Peoples' Second Amended Claim to BPA, Pls. Exh. 151 at 813. The IOUs' CDA claims gave notice that the IOUs were owed "approximately $49.8 million" by BPA and "approximately $24.3 million" by WAPA. IOUs' Amended Claim to WAPA, Pls. Exh. 143 at 17; IOUs' Amended Claim to BPA, Pls. Exh. 144 at 6. The People's claims gave notice that BPA was

estimated to owe "$119 million" and WAPA owed "approximately $5.2 million." The Peoples' Claim to WAPA, Pls. Exh. 145 at 800; the Peoples' Second Am Amended Claim to BPA, Pls. Exh. 151 at 814. The CDA claims thus informed the contracting officers of the amount of the claims and the method by which damages were calculated.

The IOUs also explained that their stated estimates of the amounts of their damages claims were based on revised market data published by the ISO and PX, but did not reflect more recent refund rerun data from the ISO and PX. Letter from California Parties to BPA (Feb. 1, 2006), Pls. Exh. 152 at 34788; Letter from California Parties to WAPA (Feb. 1, 2006), Pls. Exh. 153 at 34790. There is no dispute that these data were provided to the Agencies. Nor is there any dispute that the Agencies could have determined their refund obligation from the refund rerun settlement data. Under these circumstances, Plaintiffs provided the best information available to them of the amounts of their Claims—all that is needed to satisfy the statutory requirements. *See Sun Cal, Inc. v. United States,* 21 Cl.Ct. 31, 35 (1990) (where components of claims "could not be ascertained with certainty at the time the claim was filed, it was necessary to estimate them"). And, even if the sum certain applied, that requirement is satisfied by Plaintiffs' submission of their "[b]est, good faith estimate at the . . . time" of the claim. *Hernandez, Kroone & Assocs., Inc. v. United States,* No. 07-165C, 2009 WL 5549368, at *1 (Fed.Cl. Oct. 5, 2009).

The evidence is clear, Plaintiffs submitted their claim to the contracting officer. Plaintiffs gave adequate notice of their claim by providing the method of their calculations. Therefore, the Government had

notice of Plaintiffs claim, with the best available evidence satisfying the CDA requirements.

CONCLUSION

For the reasons set forth above, the Court hereby finds Defendant breached its present contractual duty to pay the refunds they owe, and they have breached that duty by nonpayment.

IT IS ORDERED.

APPENDIX H

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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PACIFIC GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, PEOPLE OF THE STATE OF CALIFORNIA EX REL. EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF WATER RESOURCES, BY AND THROUGH ITS CALIFORNIA ENERGY RESOURCES SCHEDULING DIVISION,

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

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2015-5082

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Appeal from the United States Court of Federal Claims in Nos. 1:07-cv-00157-SGB, 1:07-cv-00167-SGB, 1:07-cv-00184-SGB, Judge Susan G. Braden.

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ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, *Circuit Judges.*[*]

PER CURIAM.

ORDER

Appellants Pacific Gas and Electric Company, et al. filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by Appellee United States. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service. A poll was requested and taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The petition for rehearing en banc is denied.

The mandate of the court will issue on February 13, 2017.

FOR THE COURT

February 6, 2017 — /s/ Peter R. Marksteiner
Date — Peter R. Marksteiner
Clerk of Court

[*] Circuit Judge Hughes did not participate.