UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

City of Vernon, California — Docket Nos. EL00-105-009 and ER00-2019-018

OPINION NO. 479-B

ORDER DENYING REHEARING

(Issued June 7, 2006)

1. This case concerns the establishment of the appropriate base Transmission Revenue Requirement (TRR) for the City of Vernon, California (Vernon), a new Participating Transmission Owner in the California Independent System Operator Corporation (ISO or CAISO). In Opinion No. 479,[1] the Commission affirmed, as modified, the Initial Decision issued in this proceeding.[2] In Opinion No. 479-A, the Commission ordered Vernon to pay refunds. Opinion No. 479-A stated that the equities strongly favored refunds by Vernon except with respect to the operational control issue (*i.e.*, for that portion of the TRR representing the costs of the Mead-Adelanto Project (MAP) and Mead-Phoenix Project (MPP) facilities).

2. Vernon seeks rehearing of Opinion No. 479-A on the matter of refunds. Specifically, Vernon requests that the Commission determine that Vernon has no refund liability as to its TRR. In this order, we deny the request for rehearing.

I. Background

3. This proceeding determined the appropriate base TRR for Vernon, a new Participating Transmission Owner in the CAISO. Vernon is reimbursed for its TRR by

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[1] *City of Vernon, California*, Opinion No. 479, 111 FERC ¶ 61,092 (2005).

[2] *City of Vernon, California*, 109 FERC ¶ 63,057 (2004) (Initial Decision).

the ISO through the ISO's collection of a Transmission Access Charge (TAC) from all users of the ISO grid. The TAC rate is a formula rate based on the TRRs of all Participating Transmission Owners.[3]

4. On August 30, 2000, Vernon filed a petition for declaratory order requesting that the Commission determine that its TRR was acceptable;[4] Vernon proposed an annual TRR of $13,080,189. In an order issued on October 27, 2000, the Commission found that Vernon's proposed rate methodology and resulting high voltage TRR were just and reasonable subject to certain modifications.[5] Vernon then re-filed its TRR on November 9, 2000, incorporating the Commission's required modifications. On March 28, 2001, the Commission accepted Vernon's filing and the modified TRR of $10,216,178 as consistent with the methodology previously approved by the Commission.[6]

5. Pacific Gas and Electric Company (PG&E) appealed the Commission's orders to the United States Court of Appeals for the District of Columbia Circuit. On October 15, 2002, the D.C. Circuit issued a decision[7] remanding to the Commission the question of whether the review conducted by the Commission of the TRR of a non-jurisdictional

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[3] See California Independent System Operator Corp., Opinion No. 478, 109 FERC ¶ 61,301 (2004).

[4] Because Vernon is a municipality not subject, as relevant here, to the Commission's ratemaking authority under the Federal Power Act (FPA), *see* 16 U.S.C. § 824(f) (2000), its submission was voluntary, pursuant to a modification of the CAISO Tariff directed by the Commission. *California Independent System Operator Corp.*, 93 FERC ¶ 61,104 (2000).

[5] City of Vernon, California, 93 FERC ¶ 61,103 (2000) (October 2000 Order), order on *reh'g*, California Independent System Operator Corp., 94 FERC ¶ 61,148 (2001).

[6] *City of Vernon, California*, 94 FERC ¶ 61,344, *order on reh'g*, 95 FERC ¶ 61,274 (2001).

[7] *Pacific Gas & Electric Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002) (*PG&E*).

entity – Vernon – which is a part of the rate of a jurisdictional independent system operator – CAISO – was sufficient to ensure that the CAISO's rates will be just and reasonable under section 205 of the FPA.[8]

6. On December 23, 2003, the Commission initiated settlement procedures in response to the remand.[9] On February 17, 2004, negotiations having fallen through, the Commission set Vernon's TRR for hearing.[10]

7. In the Initial Decision, the presiding judge held that: (1) Vernon's TRR should be subject to a "section 205 like" review, in order to ensure that its inclusion in the TAC results in just and reasonable TAC rates; (2) the MAP and MPP should be included in Vernon's TRR only as of January 1, 2003, the date on which the CAISO actually assumed operational control of those facilities; (3) Vernon is not entitled to increase its asset accounts for Allowance for Funds Used During Construction (AFUDC); (4) the California-Oregon Transmission Project (COTP) facility entitlement must be depreciated beginning in March 1993; and (5) Vernon's overall rate of return should be 9.29 percent.

8. The Initial Decision, as relevant here, rejected Vernon's argument that the Commission did not have refund authority in this proceeding because the Commission found that refunds were not actually at issue:

> Suffice to state that "refunds" are not being ordered in this case. The decision above means that the ISO over collected concerning Vernon's TRR. Consequently, this overage can be netted out in the ISO's balancing account. *But cf. San Diego Gas & Electric*, 96 FERC ¶ 61,120 (2001) (refunds in the California spot markets ordered by the Commission).[11]

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[8] 16 U.S.C. § 824d (2000).

[9] *City of Vernon, California,* 101 FERC ¶ 61,353 (2002) (Remand Order).

[10] *City of Azusa, California,* 106 FERC ¶ 61,143 (2004) (February 2004 Order).

[11] Initial Decision at P 58 n.41.

9. In Opinion No. 479, the Commission held that, under the specific facts of this case, it was necessary to subject Vernon's TRR, voluntarily submitted as a component of a jurisdictional rate, to a full and complete section 205 review. In Opinion No. 479, however, the Commission did not reach the refund issue. The Commission required a remedy only on a prospective basis.

10. Opinion No. 479 also determined that Vernon's rate of return must be updated. However, we postponed consideration of "what, if any, remedy" might be imposed as a result of the "compliance phase of this proceeding."[12]

11. In Opinion No. 479-A, the Commission concluded upon further consideration that it should not postpone deciding the refund issue. We stated that the issue of our authority to order refunds in this proceeding was decided by the terms of section 16.2 of the ISO's Transmission Control Agreement (TCA), to which Vernon is a signatory. Section 16.2 provides:

> Each Participating [Transmission Owner] whether or not it is subject to the rate jurisdiction of FERC under section 205 and section 206 of the Federal Power Act shall make all refunds, adjustments to its Transmission Revenue Requirement, and adjustments to its [Transmission Owner] Tariff, and do all other things required of a Participating [Transmission Owner] to implement any FERC order related to the ISO Tariff, including any FERC Order that requires the ISO to make payment adjustments or pay refunds to, or receive prior period overpayments from, any Participating [Transmission Owner]. All such refunds and adjustments shall be made, and all other actions taken, in accordance with the ISO Tariff, unless the applicable FERC order requires otherwise.[13]

Opinion No. 479-A stated that it was difficult to read this provision as anything but an explicit agreement by non-jurisdictional Participating Transmission Owners

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[12] Opinion No. 479 at P 110 n.5.

[13] *See* Ex. S-3 in Docket No. ER00-2019 *et al.*

to make refunds arising from any Commission order to the ISO, from which they would otherwise be immune by statute.[14]

12. The Commission explained that, if it determines that a previously-authorized TRR of any Participating Transmission Owner is excessive, the ISO would have to recalculate its TAC, and refunds would have to be made to the transmission customers who overpaid. However, because the ISO is a non-profit entity with no funds of it own, such refunds must be the responsibility of the Participating Transmission Owner "that received the excessive revenues collected by the ISO under the [TAC] that are subject to recalculation."[15] Thus, because a non-jurisdictional Participating Transmission Owner (in contrast to a jurisdictional Participating Transmission Owner) would not be bound by a Commission order requiring refunds, specific language was included in section 16.2 of the TCA to ensure that they would be on the same footing as jurisdictional Participating Transmission Owners with respect to refunds.

13. As we explained in the order approving this provision of the TCA, the ISO had proposed section 16.2 specifically to remedy the situation in which a "non-jurisdictional Participating Transmission Owner, such as Vernon, will not be obligated to adjust rates or make refunds in accordance with the ISO Tariff." [16] In approving this provision, we went on to state:

> The ISO explains the need, under Commission precedent, for a contractual provision to bind Vernon to pay refunds. The provision is not intended to, and would not, expand the Commission's jurisdiction to non-public utility entities, such as Vernon. *Rather, the section will create a contractual obligation to contribute to refund payments, should they be required.* On this basis, we find proposed section 16.2 reasonable.[17]

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[14] Opinion No. 479-A at P 75.

[15] *Id.* at P 76.

[16] Opinion No. 479-A at P 77; *California Independent System Operator Corp.*, 94 FERC ¶ 61,141 at 61,150 (2001).

[17] *Id.* (emphasis added).

14. The Commission went on to state that, while the Commission was reviewing Vernon's TRR filing pursuant to its section 205 authority, in order to assure the justness and reasonableness of the CAISO's TAC, Vernon itself is not subject to section 205 and its TRR filing was not made pursuant to section 205. It followed that the Commission was not governed by the requirements of section 205 in accepting the filing and, after the court's remand, setting it for hearing. Opinion No. 479-A found that Vernon's obligation to make refunds in this proceeding did not arise from any statutory requirement, but from the contractual obligation to which Vernon is bound pursuant to section 16.2 of the TCA.

15. The Commission also discussed the equitable considerations involved in any refund the Commission may order in this proceeding. Applying the standard in *Towns of Concord v. FERC*, 955 F.2d 67 (D.C. Cir. 1992) (*Concord*), we affirmed Opinion No. 479's conclusion that refunds are inappropriate concerning its over-collection in connection with the operational control of MAP and MPP, but necessary and proper with respect to Vernon's over-collection of its TRR in other respects.[18] The Commission concluded that the equities strongly favored that refunds should be made by Vernon, except with respect to the operational control issue (*i.e.*, for that portion of the TRR representing the costs of the MAP and MPP facilities).[19]

16. A timely request for rehearing of Opinion No. 479-A was filed by Vernon. On October 7, 2005, Southern California Edison Company (SoCal Edison) filed an answer to Vernon's request for rehearing. On October 24, 2005, Vernon filed an answer to SoCal Ed's answer.

II. Discussion

A. Procedural Matters

17. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2005), prohibits an answer to a request for rehearing and we reject SoCal Edison's and dismiss Vernon's answers on this basis.

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[18] Opinion No. 479-A at P 82.

[19] *Id.* at P 85-86.

B. Refund Authority

Vernon's Request for Rehearing

18. Vernon requests rehearing of the Commission's determination ordering Vernon to pay refunds.

19. Vernon argues that the Commission does not have authority to order Vernon to make refunds. It states that Opinion No. 479-A errs because it "purports to act beyond the clear lines of demarcation established by Congress defining and limiting the Commission's jurisdiction."[20] It asserts that the Commission's rate setting authority and refund jurisdiction do not extend to municipalities such as Vernon.[21]

20. Further, in this regard, Vernon cites to a Ninth Circuit decision issued after Opinion No. 479-A, which it claims has clarified that the Commission cannot order a municipal utility like Vernon to pay refunds.[22] According to Vernon, *BPA* states that the Commission: (1) lacks authority under FPA section 205 to judge whether a municipal utility's rates are just and reasonable; (2) lacks authority under FPA section 206 to require any municipal utility to pay a refund; and (3) does not gain jurisdiction over a municipal utility under sections 205 and 206 merely because the municipal utility participates in a market or public utility which is subject to the Commission's jurisdiction. Vernon also states that a municipal utility can neither consent to nor waive objections to the Commission's jurisdiction. Therefore, Vernon asserts that the Commission's directing Vernon to pay refunds is beyond the Commission's jurisdiction.

21. Vernon argues that ordering refunds is not supported by substantial evidence. It states that the Commission has not determined that CAISO's TAC, taken as a whole (including Vernon's TRR), is not just and reasonable and, in turn, has not imposed a refund obligation on the CAISO itself. Therefore, it reasons, there is no need to

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[20] Vernon Rehearing Request at 21-22 (Vernon).

[21] *Id.* at 22.

[22] *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, (9th Cir. 2005) (*BPA*).

apportion responsibility for such a refund. Rather, Vernon argues, Opinion No. 479-A seeks to impose a refund obligation directly on Vernon (a non-jurisdictional entity) while ignoring CAISO.

22. Further, in this regard, Vernon claims that the court in *PG&E* stated that the Commission's responsibility in this proceeding is to ensure that the rate charged by CAISO, not by Vernon, is just and reasonable. It states that the court ordered the Commission, on remand, to "articulate with clarity what approach and standard are governing its review and how both ensure that *CAISO's rates* are just and reasonable under [section] 205."[23] Further, Vernon states that Opinion No. 479-A did not determine that the CAISO's TAC is unjust and unreasonable. In this regard, Vernon explains that the Commission never found that the costs included in Vernon's TRR that were deemed unjustified made the CAISO's TAC unjust and unreasonable.

23. Vernon also asserts that there is no construction of the FPA that would allow the Commission to lawfully supplant the rate-making decisions of the Vernon City Council and that any attempt to do so would violate the Tenth Amendment, which prohibits the Commission from issuing orders that usurp the authority of a duly constituted state entity to provide for the general welfare of its citizens.[24] It claims that, in *FERC v. Mississippi*, the command to consider federal standards was accepted by the Supreme Court only because it occurred in an area that would otherwise be subject to pre-emption (regulation of *private* utilities) and because the command under review did not directly alter sovereign discretion and did not direct a specific result.[25] According to Vernon, in ordering Vernon to pay refunds and file a refund report, Opinion No. 479-A issues specific commands to, and directs several specific results from Vernon, similar to those found unconstitutional in *Printz*.[26]

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[23] Vernon at 25 (citing *PG&E*, 306 F.3d at 1119 (emphasis added by Vernon)).

[24] *Id.* at 28 (citing *FERC v. Mississippi*, 456 U.S. 742 (1982) (*Mississippi*), *Printz v. United States*, 521 U.S. 898 (1997) (*Printz*), and *New York v. United States*, 505 U.S. 144 (1992) (*New York*)).

[25] *Id*. at 28-29 (citing *Mississippi*, 456 U.S. at 764-66).

[26] *Id*. (citing *Printz*, 521 U.S. at 935).

24. Vernon also argues that the Commission cannot rely on section 16.2 of the TCA to order it to pay refunds. It asserts that the refunds contemplated by the TCA are refunds to be allocated between and among Participating Transmission Owners when necessitated by Commission determinations regarding CAISO refund obligations. According to Vernon, Opinion No. 479-A acknowledged this distinction by stating that section 16.2 is "an explicit agreement by non-jurisdictional Participating Transmission Owners to make refunds *arising from any Commission order to the ISO*, from which they would otherwise be immune by statute."[27] The Commission, Vernon claims, ignores this requirement and imposes a refund obligation on Vernon without first imposing a refund obligation on the CAISO. Further, Vernon asserts that no contract, including the TCA, can expand the Commission's refund authority beyond its statutory limits.[28]

25. In this regard, according to Vernon, the Ninth Circuit in *BPA* acknowledged that a municipal utility might be contractually liable to pay refunds required by Commission orders but only when the orders were directed to an association of public and non-public utilities; in such a case, the court would be enforcing a contract allocating responsibility among members of the association, not enforcing a Commission order against any particular member.[29] Vernon also argues that the Commission's argument for having jurisdiction to order a refund of Vernon is circular: the Commission has authority to order a refund by Vernon because the Commission has authority to order CAISO to make such a refund, and the Commission can order CAISO to make such a refund because Vernon is liable for such a refund. It argues that the Commission must look to the CAISO's TAC and determine if it is just and reasonable, whether CAISO should pay a refund, and whether Vernon's TRR is just and reasonable and subject to refund.

26. In addition to addressing the issue of whether the Commission has statutory authority to order Vernon to pay refunds, Vernon states that the Commission erred in not

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[27] Opinion No. 479-A at P 75 (emphasis added by Vernon).

[28] Vernon at 31-32.

[29] *Id.* at 32 (citing *BPA*, 422 F.3d at 925-926).

addressing Vernon's arguments concerning the requirements of section 205 and related precedent, such as whether Vernon's TRR is an "initial" rate and the need to first suspend the rates and to make them effective "subject to refund."

27. Vernon also states that it is error for the Commission to order Vernon to make refunds when it would not require a similarly-situated jurisdictional Participating Transmission Owner to do so in light of the requirements of section 205 and, in particular, because a similarly-situated jurisdictional Participating Transmission Owner's TRR would be an "initial" rate. Such a result, Vernon contends, demonstrates the discriminatory nature of Opinion No. 479-A. According to Vernon, Opinion No. 479-A subjects municipal Participating Transmission Owners to far greater refund exposure than it would jurisdictional Participating Transmission Owners in the same circumstances (in fact, the Commission would have no authority to order a jurisdictional Participating Transmission Owner to make refunds under the FPA and precedents applied to jurisdictional utilities) and does so while admitting that Vernon is exempt from section 205.

28. In this regard, according to Vernon, the "Commission-authorized" TRR for a Participating Transmission Owner is the one legally in effect for any given time period. A Participating Transmission Owner's "Commission-authorized" TRR is the specific rate figure set forth on an effective tariff sheet of a rate schedule that is part of the Participating Transmission Owner's Transmission Owner (TO) Tariff on file with the Commission. In Vernon's case, as a non-jurisdictional Participating Transmission Owner, Vernon's TRR is posted as the same rate sheet of the same rate schedule as a part of Vernon's municipal utility tariff. Vernon also argues that it cannot charge less than its posted rate, which is what it would be doing if Vernon made refunds that were not based upon the authorized rate that is the filed rate. Thus, Vernon asserts, the "authorized TRR" referred to in the ISO Tariff is not a number to be calculated by the ISO to be included in the TAC, but is the specific rate figure set forth in the Participating Transmission Owner's TO Tariff. Vernon's authorized TRR is that formally set out on Sheet No. 22 of Vernon's TO Tariff, which the Commission required Vernon to file with the Commission, and which the Commission has designated and approved as FERC Electric Tariff, Original Volume No. 1, Original Sheet Nos. 1-23, not subject to refund. Tariff sheets setting out the TRRs for non-jurisdictional Participating Transmission Owners should be treated by the Commission with the same formalities as tariff sheets of a jurisdictional utility.

29. Finally, Vernon argues that, in the circumstances of this case, it is an abuse of the Commission's discretion to order refunds from Vernon. Vernon claims that, even to the extent that a proper determination has been made that the CAISO TAC is not just and reasonable with the inclusion of Vernon's TRR and that, therefore, a refund is possible,

refunds are not mandatory. Vernon claims that imposition of a refund obligation would be unjust and inequitable, as it was never given notice that its TRR, which was originally "approved" by FERC as "just and reasonable," would be subject to re-opening and refund. Vernon asserts that the deficiencies in its TRR, cited in Opinion No. 479-A, relate to Vernon's methods of accounting for assets, and at the time they were acquired (*i.e.*, prior to the restructuring of the California energy markets) it had not anticipated that they would be made part of a jurisdictional ISO and become subject to Commission review, let alone full section 205 scrutiny.

Commission Determination

30. Only one issue – what refund obligation is created by the TCA – is ripe for extended discussion. Therefore, we need not and do not discuss at length Vernon's arguments concerning the Commission's authority or duties under the FPA.

31. Essentially, Vernon argues that, as a municipal utility and thus an exempt utility,[30] the Commission cannot, pursuant to section 205 (which applies only to public utilities), order refunds, and in any event, the Commission did not abide by the requirements of section 205[31] when it ordered refunds. These two arguments are, of course, internally inconsistent. If section 205's language, authorizing the Commission to direct that public utilities refund excessive rates and charges, does not allow the Commission to order Vernon to make refunds here – and we acknowledge that, as a municipal utility and thus an exempt utility, section 205 (which applies only to public utilities) does not allow the Commission to order Vernon to make refunds here – then the requirements of section 205[32] are equally inapplicable here. Rather, the critical issue is whether the TCA that Vernon executed, and that was filed with and accepted by the Commission, provides a basis to order Vernon to pay refunds. We find, as we did in Opinion No. 479-A, that it does.

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[30] 16 U.S.C. § 824(f) (2000).

[31] *E.g.*, matters such as whether the rate at issue is an "initial rate" under section 205 or whether the rate needed to be suspended and made effective "subject to refund" under section 205.

[32] *See supra* note 31.

32. In Opinion No. 479-A, we determined that the issue was "decided by the terms of section 16.2 of the ISO's Transmission Control Agreement, to which Vernon is a signatory."[33] Section 16.2 of the TCA, from which the Commission derives its refund authority with respect to Vernon, requires Participating Transmission Owners (regardless of their jurisdictional status) to implement any order "related to" the ISO Tariff.[34] Certainly, Opinion No. 479-A requiring Vernon to make refunds in light of an excessive TRR is an order related to the ISO tariff.

33. Contrary to Vernon's assertions, the Commission, in Opinion No. 479-A, did not require that CAISO first be ordered to pay a refund, before Vernon could be ordered to pay a refund. The language which Vernon quotes, that section 16.2 is "an explicit agreement by non-jurisdictional [Participating Transmission Owners] to make refunds arising from any Commission order to the ISO,"[35] is but half of the Commission's paraphrasing of the actual language of section 16.2. Section 16.2 states that each Participating Transmission Owner:

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[33] Opinion No. 479-A at P 75.

[34] *See* Ex. S-3 in Docket No. ER00-2019 *et al*. Just as Vernon, a nonjurisdictional Participating Transmission Owner that is a signatory to the TCA, is bound by the TCA, so equally, a similarly-situated jurisdictional Participating Transmission Owner that is a signatory to the TCA would be bound by the TCA. In this regard, section 16.2 of the TCA states that:

> Each Participating [Transmission Owner] *whether or not it is subject to the rate jurisdiction of FERC* under section 205 and section 206 of the Federal Power Act shall make all refunds, adjustments to its Transmission Revenue Requirement, and adjustments to its [Transmission Owner] Tariff, and do all other things required of a Participating [Transmission Owner] to implement any FERC order related to the ISO Tariff.. . . (emphasis added)

Accordingly, and contrary to Vernon's assertion, refunds would have been ordered for a similarly-situated jurisdictional Participating Transmission Owner that is a signatory to the TCA as well.

[35] Vernon at 30 (quoting Opinion No. 479-A at P 75).

> "*shall* make all refunds, . . . and do all other things required of a Participating [Transmission Owner] to implement any FERC order *related to* the ISO Tariff, including any FERC Order that requires the ISO to make payment adjustments or pay refunds to, or receive prior period overpayments from, any Participating [Transmission Owner]."[36]

34. Moreover, in Opinion No. 479-A, we completed our analysis of section 16.2 by adding that "the Transmission Control Agreement binds Vernon to pay any refund the Commission orders *in connection with* the over collection of its TRR."[37]

35. In ordering refunds, the Commission is not claiming authority to order refunds on the basis of Vernon's waiver of the limits on the Commission's statutory authority. Neither do we consider Vernon to have volunteered to be subject to the Commission's jurisdiction through mere participation in CAISO. Rather, Vernon specifically bound itself to contribute to any Commission-ordered refunds related to the ISO Tariff – by express agreement in a filed jurisdictional rate schedule (*i.e.*, section 16.2 of the TCA).[38]

36. Having bound itself contractually, the Commission is within its rights to hold Vernon to its commitment, even though Vernon is otherwise not a public utility subject to the Commission's ratemaking authority under the FPA; "when a contract provides that its

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[36] *See* Ex. S-3 in Docket No. ER00-2019 *et al*. (emphasis added).

[37] Opinion No. 479-A at P 81 (emphasis added). The "including" language simply makes more explicit that orders "related to" the ISO Tariff are just one of the types of orders (but not the only type - after all, section 16.2 uses "including" rather than "*i.e.*,") that would be considered to be "related to" the ISO Tariff. The language also refers, we add, to the ISO recovering overpayments from the Participating Transmission Owner, and hence contemplates funds flowing between the ISO and the Participating Transmission Owners in both directions, and not just flowing from the ISO to the Participating Transmission Owners.

[38] *See, e.g., Exxon Mobil Corp. v. FERC*, 430 F.3d 1160, 1177 n. 7 (D.C. Cir. 2005) (noting that "sanctity of contract remains an important civilizing concept" and that "[w]ise or not, a deal is a deal.")

terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body."[39] Vernon, in signing on to the TCA, is signing on to a contract which is a filed, jurisdictional rate schedule subject to Commission review, and is therefore bound by Commission action. Vernon cannot now pick and choose which provisions of the contract it must follow, since "a contract is to be interpreted so as to give meaning to all of its provisions."[40]

37. Assuming, arguendo, that Vernon is correct in its assertions that the Commission cannot rely on section 16.2 of the TCA to order Vernon to pay refunds, such a determination would not only produce inequitable results in the instant case (by allowing Vernon to avoid having to pay refunds, while its jurisdictional counterparts would be required to do so under the same circumstances), but would encourage other non-jurisdictional entities to follow in Vernon's footsteps and refuse to comply with the requirements of contracts to which they are signatories. Recognizing that many filed agreements traditionally and even today provide for service by a public utility to an exempt utility such as a municipal utility or cooperative utility, Vernon's argument, carried to its logical conclusion, would allow a public utility to provide service but would permit the exempt municipal or cooperative utility customer to refuse to pay the filed rate for that service; Vernon's argument would deny the Commission the authority to enforce the filed rate.[41]

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[39] Alliant Energy, Inc. v. Neb. Pub. Power Dist., 347 F.3d 1046, 1050 (8th Cir. 2003) (Alliant).

[40] *Id.* at 1051.

[41] The filed rate doctrine, which was initially developed in the context of regulation of railroads and was subsequently carried over to the power industry, applies to both the company providing service and to the customer taking service. Thus, in *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (emphasis added), the Supreme Court explained: "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. *Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it*, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for *paying* or charging either less or more than the rate filed." *Accord MCI Telecommunications Corp. v. Ohio Bell*

38. In its request for rehearing, Vernon states that *BPA* places a "clear statutory constriction on FERC's jurisdiction."[42] We dispute Vernon's misapplication of *BPA* to this proceeding and find that *BPA* is distinguishable from this proceeding.

39. In its orders leading up to the Ninth Circuit's decision in *BPA*, the Commission ordered public and non-public utilities to make refunds for sales whose prices were in excess of a "break-point" price in a centralized, single clearing price auction.[43] The Ninth Circuit found that the Commission did not have refund authority over wholesale electric energy sales made by governmental entities and other exempt utilities.[44]

40. Unlike in *BPA*, the refund being sought in the present case is for a component of a CAISO jurisdictional rate that was over-collected. As the D.C. Circuit determined in *PG&E,* "the TRR of each participating transmission owner can be conceptualized not as its own rate, but rather as a cost of the CAISO,"[45] and CAISO is a jurisdictional public utility whose rates are subject to Commission review. The *PG&E* court thus accepted the Commission's approach of allowing otherwise non-jurisdictional entities, like Vernon, to submit their costs to the Commission, and of allowing their costs to be subject to review by the Commission to evaluate whether the resulting CAISO jurisdictional rates are reasonable. The *PG&E* court, by analogy to *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974),

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Telephone Co., 376 F.3d 539, 547 (6th Cir. 2004) ("The filed rate doctrine requires that common carriers *and their customers* adhere to tariffs filed and approved by the appropriate regulatory agencies." (emphasis added)).

[42] Vernon at 23.

[43] 97 FERC ¶ 61,275 at 62,182-83; 96 FERC ¶ 61,120 at 61,512.

[44] *BPA*, 422 F.3d at 911.

[45] *PG&E,* 306 F.3d at 1116.

recognized that such an examination of the component costs that go into jurisdictional rates to ensure the justness and reasonableness of the resulting jurisdictional rates, is a permissible form of regulation of jurisdictional rates.[46]

41. Additionally, the overcollection of wholesale electric energy rates in *BPA* was accomplished by the individual sellers of wholesale electric energy themselves through their own rates, whereas in the present proceeding the overcollection of the TRR was accomplished through CAISO's TAC. Because an excessive TRR would necessarily lead to an excessive TAC (given that the TAC is merely the sum of the various Participating Transmission Owners' TRRs, an unjust and unreasonable TAC is the direct and necessary result of unjust and unreasonable TRRs) for which customers would be entitled to refunds, and because the ISO, as a non-profit entity, lacks its own funds, necessarily any "refunds must be the responsibility of the Participating Transmission Owner 'that received the excessive revenues collected by the ISO under the [TAC] that are subject to recalculation.'"[47]

42. In *BPA*, the Commission attempted to order refunds based on the nature of the transactions various exempt public utilities were engaged in, *i.e.*, based on the Commission's regulatory authority over the sale of electric energy for resale in interstate commerce.[48] As noted in Opinion No. 479-A and as noted above, in the present case, the Commission makes no claim to order refunds on the basis of the FPA. As the Commission stated in Opinion No. 479-A, "Vernon's obligation to make refunds in this proceeding does not arise from any statutory requirement, but from the contractual obligation to which Vernon is bound by the Transmission Control Agreement."[49]

43. If anything, the *BPA* decision lends support to the Commission's authority to require refunds from a non-jurisdictional entity on the basis of contractual liability.

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[46] *Id.*

[47] Opinion No. 479-A at P 76 (citing Companies Request for Rehearing at 13).

[48] *BPA*, 422 F.3d at 910-911.

[49] Opinion No. 479-A at P 79.

Citing the district court decision in *Alliant*, the *BPA* court noted that the Nebraska Public Power District (Nebraska District), a governmental entity and exempt public utility, like Vernon, "was contractually liable to pay refunds as a result of FERC's orders that changed MAPP's FERC-jurisdictional tariff and the MAPP agreement."[50] The Eighth Circuit affirmed that, while the Commission had no direct authority to order the Nebraska District to pay refunds, the Nebraska District could still be ordered to pay refunds based on its contractual commitment.[51] Because no contractual obligation existed to carry out a FERC order, in that case only the MAPP-member parties themselves could take action to enforce the contract. In the present proceeding, however, the Commission does not need to rely on a contract action brought by other members of the CAISO to compel Vernon to pay a refund. Section 16.2 of the TCA sets out the repayment obligation of Vernon: to "make all refunds" to "implement any FERC order related to the ISO Tariff."

44. Finally, Vernon's challenge to the Commission's refund order as a violation of the Tenth Amendment is inapposite. According to Vernon, the line of cases it cites to on rehearing "circumscribe the ways in which federal regulations can be imposed on states (and their political subdivisions) and prohibit the Commission from issuing orders that usurp the authority of a duly constituted state entity to provide for the general welfare of its citizens."[52] However, as noted above, the Commission is not compelling a state (in this case California, of which the city of Vernon is an extension) to take the kind of actions the Supreme Court has found unconstitutional in decisions such as *Printz* and *New York, i.e.*, to enact or enforce a federal regulatory program or legislation. Instead, the Commission is holding Vernon to a contractual obligation to which Vernon bound itself when it chose to become a signatory to the TCA. Because the Commission is merely enforcing an obligation to which Vernon agreed, our order no more usurps state authority than any court order enforcing a contract usurps state authority.

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[50] *BPA*, 422 F.3d at 926.

[51] *Id.* at 925 (citing *Alliant Energy Inc. v. Neb. Pub. Power Dist.*, 2001 U.S. Dist. LEXIS 17802 (D. Minn. Oct. 18, 2001), *aff'd*, 347 F.3d 1046 (8th Cir. 2003)).

[52] Vernon at 28.

The Commission orders:

(A) Vernon's request for rehearing is hereby denied.

(B) Vernon is hereby ordered to make refunds within 30 days of the date of issuance of this order and to file a refund report within 60 days of the date of issuance of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.