UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

City of Vernon, California	)	**Docket Nos. EL00-105-___**
	)	**ER00-2019-___**
	)	**(on Remand)**
	)	

ANSWER OF
THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
TO ANSWER OF THE CITY OF VERNON TO
MOTION FOR ORDER ON REMAND AUTHORIZING
ADJUSTMENT OF RATES AND REFUNDS AND
CONFIRMING AUTHORITY TO RECOVER AMOUNTS REFUNDED

Pursuant to Rule 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R §§ 385.212, 213, the California Independent System Operator Corporation ("CAISO") hereby moves the Commission for leave to file an answer and provides its Answer to the City of Vernon's ("Vernon's") Answer to the CAISO's Motion for Order On Remand Authorizing Adjustment of Rates And Refunds and Confirming Authority to Recover Amounts Refunded ("Answer"), filed on November 28, 2007.

The CAISO has requested that the Commission, on remand, confirm the CAISO's interpretation of jurisdictional documents – the CAISO Tariff, the Transmission Control Agreement, and the Commission's decisions in this docket. The CAISO believes that those document provides that the CAISO has the authority and obligation to adjust its transmission Access Charge ("Access

Charge") to reflect the just and reasonable rate as determined by the Commission; to make necessary refunds; and to recover the amount of the refunds from Vernon. Such a ruling is fully within the Commission's jurisdiction, and nothing in the Answer demonstrates otherwise.

I. INTRODUCTION AND SUMMARY

This proceeding is on remand from *Transmission Agency of Northern California v. FERC,* 495 F.3d 663 (D.C. Cir. 2007) ("*TANC*"). In *TANC*, the court ruled that the Commission had the authority to review Vernon's proposed Transmission Revenue Requirement ("TRR"), a component of the CAISO's formula rate transmission Access Charge, under the just and reasonable standard in order to ensure that the Access Charge is itself just and reasonable. The court also concluded, however, that the Commission did not have the authority to *order Vernon* to pay refunds of amounts in excess of the just and reasonable TRR that it has collected from January 1, 2001. In the CAISO's pending Motion for Order On Remand Authorizing Adjustment of Rates and Refunds and Confirming Authority to Recover Amounts Refunded, the CAISO has asked the Commission to confirm the CAISO's interpretation of the CAISO Tariff, the Transmission Control Agreement ("TCA"), and the Commission's decisions in this docket. Specifically, the CAISO believes that those documents (1) authorize the CAISO to calculate the Access Charge, effective January 1, 2001, using the TRR for Vernon that the CAISO calculated to be in compliance with the Commission's prior determination of the just and reasonable TRR in Opinion No. 479; (2) obligate the CAISO to

make refunds of Access Charges that have been over-collected since January 1, 2001; and (3) authorize the CAISO to invoice Vernon for the amounts refunded.

In the Answer, Vernon contends that the Commission's authority to provide CAISO's requested relief has already been rejected in *TANC.* The court in *TANC,* however, never discussed, let alone, rejected the CAISO's requested relief or the CAISO's arguments why that relief is permissible. Neither do the caselaw and the legal principles underlying *TANC* preclude such relief.

The CAISO has only asked that the Commission interpret its own orders, as well as contracts and tariffs under its jurisdiction. The Commission's authority to do so cannot be disputed. Further, under well-established law, such interpretations are binding on all parties to the agreements and all entities that take service under the tariffs. *See, e.g., Alliant Energy v. Nebraska Public Power District*, 347 F.3d 1046 (8th Cir. 2003) ("*Alliant*").

It is also well-established, including in a previous appellate court decision in these proceedings, that the Commission has the authority and duty to ensure that CAISO Access Charge is just and reasonable, and that in doing so it may review the components that apply to non-jurisdictional entities. *See Pacific Gas & Electric Co. v. FERC*, 306 F.3d 1112, 1117-19 (D.C. Cir. 2002) ("*PG&E*"). The CAISO must apply that just and reasonable rate non-discriminatorily to all parties taking service – again including non-jurisdictional entities such as Vernon. If non-jurisdictional entities were exempt from the operation of jurisdictional tariffs,

organized electricity markets simply could not function. The Federal Power Act ("FPA") does not compel, or even contemplate, such a result.

Because the relief requested by the CAISO is within the Commission's jurisdiction and will allow the implementation of the just and reasonable Access Charge as determined by the Commission in this proceeding, the Commission should grant the Motion.

II. MOTION

Rule 213(a)(2), of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2), prohibits answers to answers unless otherwise ordered by the Commission. The CAISO respectfully moves the Commission for leave to file this answer.

The Commission will permit answers otherwise prohibited by Rule 213 if the answer will aid the Commission in understanding the issues in the proceeding, provide additional information to assist the Commission in the decision-making process, and help to ensure a complete and accurate record in this case. *See, e.g., Entergy Services, Inc.*, 116 FERC ¶ 61,286, at P 6 (2006); *Midwest Independent Transmission System Operator, Inc.*, 116 FERC ¶ 61,124, at P 11 (2006); *High Island Offshore System, L.L.C.*, 113 FERC ¶ 61,202, at P 8 (2005). The CAISO believes its answer will fulfill these purposes.

First, Vernon makes a number of arguments that could not have been anticipated when the CAISO filed the Motion. The answer will assist the Commission in responding to those arguments.

Second, in light of the contentious history of this docket, the Commission's initial ruling on the Motion is not likely to be its final ruling. It would advantage the Commission at this time to be presented with as many of the arguments that might be made as is practical. This will minimize the possibility that the Commission will have to revise its decision at a later point or have to consider repeated rehearing requests.

Therefore, the CAISO believes that good cause exists for the Commission to grant it leave to answer Vernon's Answer.

III. BACKGROUND

The background of these proceedings was fully set forth in the Motion. Vernon's Answer provided its own background statement, which contains extensive discussion of the D.C. Circuit's opinion in *TANC*. The court in *TANC* made two holdings: (1) in order to fulfill its responsibilities under Section 205 of the FPA to ensure that the Access Charge is just and reasonable, the Commission is authorized to review Vernon's TRR under a just and reasonable standard; and (2) because Section 201(f) of the FPA exempts municipals from the Commission's jurisdiction, the Commission cannot order Vernon to pay refunds. Vernon's description of *TANC*, however, attributes a number of additional rulings to the court. Vernon's asserted rulings are not interpretations that are subject to reasonable disagreement; rather they are rulings that the court simply did not make. The discussion below does not include all such inaccuracies, but identifies the most significant.

(1) Vernon states in its introduction that the CAISO's arguments were asserted, and rejected, in *TANC.*[1] The court in *TANC* never mentioned, let alone addressed, whether the CAISO could adjust the Access Charge to reflect the just and reasonable TRR determined by the Commission, could provide refunds based on that adjustment, or could recoup the amounts from Vernon. The CAISO's arguments in the Motion concern specifically these issues.

(2) Vernon states that the CAISO tariff has treated Vernon's TRR as a "non-jurisdictional pass-through cost."[2] Vernon provides no citations for this statement. Contrary to Vernon's contention, the CAISO Tariff treats a non-jurisdictional utility's TRR as a component of the jurisdictional Access Charge, *which component can only be included in the amounts approved by FERC*. Tariff §§ 26.1, 26.2, and Appendix A, Definition of "TRR".

(3) Vernon states, "[T]he D.C. Circuit *rejected* the orders requiring Vernon to retroactively lower its TRR and pay refunds on the amounts 'over-collected' since January 1, 2001."[3] Although, as the CAISO noted in the Motion, it is questionable whether the Commission could *order Vernon* to file a reduced TRR, the Court never discussed that question. More importantly, the Court also never addressed whether the just and reasonable Vernon TRR component, as determined by the Commission, applies retroactively.

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1 Answer at 2.
2 Answer at 3.
3 Answer at 5 (emphasis in original).

(4) Vernon states:

> *TANC* went on to reject arguments that Section 16.2 of the [TCA] constitutes an "explicit agreement" . . . to make refunds arising from any [FERC] order to the ISO," and that "the Commission is within its rights to hold Vernon to its commitment" by ordering Vernon to pay refunds of amount the Commission determined were "overcollected" on Vernon's TRR.[4]

Although the court did rule that Section 16.2 did not provide the Commission with authority to *order Vernon* to pay refunds, *TANC* at 675, it did not reject the argument that Section 16.2 is a binding commitment to make refunds. To the contrary, it found the Commission's interpretation of Section 16.2 to be reasonable. *Id.*

(5) Vernon states, "The TANC court also rejected arguments that *Alliant Energy*[5] provides a basis for recalculating Vernon's TRR and ordering it to pay refunds."[6] The *TANC* court did state that *Alliant* does not provide the Commission with authority to *order Vernon* to pay refunds; it *did not* address the impact of *Alliant* on the Commission's authority to recalculate the portion of Vernon's TRR that could be included as a component of the CAISO's jurisdictional rate. Indeed, the court in *TANC* noted that in *Alliant*, "[the Commission] had not ordered the [non-jurisdictional utility] to pay a refund, but stated only that the [non-jurisdictional utility] *was contractually required to do so*," and that the *Alliant*

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4 Answer at 6 (ellipsis and reference to "FERC" in the original).

5 *Alliant Energy v. Neb. Pub. Power Dist.*, 347 F.3d 1046 (8th Cir. 2003)

6 Answer at 7.

court was enforcing that contractual obligation. *TANC* at 675-76 (emphasis added).

(6) Vernon states:

> *TANC* rejects any suggestion that [a review of Vernon's TRR] gives the Commission authority to regulate non-jurisdictional cost components of the [Access Charge], order retroactive amendment of such non-jurisdictional cost components, or require entities such as Vernon to pay refunds for amounts allegedly "overcollected."[7]

Again, Vernon is describing rulings the court never made. The court did not refer to any cost-component of the Access Charge as "non-jurisdictional," and the court (as discussed above) did not reject the Commission's authority to retroactively adjust cost-components of the Access Charge.

(7) Vernon states "Significantly, CAISO's Motion does not request a Commission determination that inclusion of Vernon's TRR renders the CAISO [Access Charge] unjust or unreasonable."[8] Vernon explains that "[i]n order to do so, CAISO would have to demonstrate that the disputed amount . . . would cause the CAISO [Access Charge] . . . to fall outside the 'zone of reasonableness.'"[9] To the contrary, the CAISO explained in the Motion that the Commission's determination that Vernon's TRR is an unjust and unreasonable component of the Access Charge renders the Access Charge unreasonable without additional

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7 Answer at 8.
8 *Id.*.
9 *Id.* at n. 34.

findings.[10] Further, Vernon's contention that the CAISO would need to prove that the Access Charge as a whole is outside the zone of reasonableness is directly contrary to the rulings in *TANC*: the court *rejected* Vernon's argument that the Commission must examine that Access Charge as a whole. *TANC* at 672.

In short, Vernon's effort to shore up its argument with inaccurate descriptions of the court's rulings in *TANC* fails as soon as those descriptions are evaluated against the opinion itself.

IV. ARGUMENT

Two important aspects of Vernon's Answer are immediately apparent. First, although the CAISO devoted a significant part of the Motion to an explanation of the CAISO Tariff and the obligations it imposes on the CAISO, Vernon never contests, or even discusses, this issue. Vernon's implied concession matters because it is the tariff, not a separate Commission order, that authorizes the payment of refunds in excess of the just and reasonable TRR and the recovery of the payments from Vernon. Similarly, Vernon never discusses or contests CAISO's calculation of the portion of Vernon's TRR that may be included in the Access Charge.

Second, what Vernon does is answer a motion that the CAISO did not make. Vernon repeatedly states that the CAISO's Motion asked the Commission to order it to make refunds and collect the amounts from Vernon.[11] The CAISO's

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[10] Motion at 9, 11.

[11] *See, e.g.,* Answer at 1, 8, 12, 15, 17.

motion does no such thing. Although the CAISO believes that the Commission could order the CAISO, a jurisdictional entity, to make refunds of the Access Charge and collect the amount from Vernon under the CAISO Tariff, the CAISO did not ask the Commission to order it to do that. Instead, the CAISO asked the Commission (1) to confirm the accuracy of the CAISO's calculation of Vernon's authorized TRR as determined in Opinion No. 479[12] – *i.e.,* to reiterate those rulings and to interpret its own opinion; and (2) to confirm the CAISO's authority to adjust its rates, make refunds, and collect the amounts from Vernon – *i.e.*, to interpret the CAISO Tariff.

Vernon's argument that the Commission lacks the authority to order the CAISO to make and pay refunds because the Commission cannot do indirectly what it cannot do directly [13] is thus irrelevant to the CAISO's Motion. The CAISO does not ask the Commission to make any ruling that would force Vernon to take any action; the Motion is only concerned with the CAISO's pre-existing tariff authority.[14]

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12 *City of Vernon, Cal.*, 111 FERC ¶ 61,092 (2005).

13 Answer at 12, n.47.

14 In *No. Cal. Power Agency v. FPA*, 514 F.2d 184, 189 (D.C. Cir. 1975), the court noted that the Commission wisely recognized that it could not, as a condition of approving a just and reasonable contract between a jurisdictional and non-jurisdictional entity, require the non-jurisdictional entity to make certain decisions in an unrelated non-jurisdictional activity. In contrast, the Commission can affect a non-jurisdictional entity indirectly when regulating a jurisdictional activity. In distinguishing Intervenors' citation of *National Assoc. of Reg. Util. Com'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) ("*NARUC*") and *United Distribution Companies v. FERC*, 88 F.3d 1105 (D.C.Cir.1996) ("*UDC*"), *see* Joint Br. of Intervenors in Support of Respondent at 24-25, the court stated in *TANC*:

The Commission has faced similar arguments before with regard to its requirement that open access transmission tariffs include provisions requiring certain non-public utilities that wish open access to provide reciprocal open access on their systems. The Commission rejected such arguments, noting that it was not requiring non-public utilities to provide open access. Rather, it was conditioning use of public utility open access tariffs, by all customers including non-public utilities, on an agreement to offer comparable (not unduly discriminatory) services in return. *Order 888-A*,[15] 62 Fed. Reg. 12274 at 12338 (March 14, 1997). Similarly, the Commission did not here order Vernon to file its TRR with the Commission and operate pursuant to the CAISO Tariff provisions applicable to

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> In *NARUC*, we held that [the Commission] may require all electrical transmission facilities-jurisdictional and nonjurisdictional-to adopt a standard agreement for interconnecting with generators, because [the Commission] has jurisdiction over interstate transmissions and wholesale sales. *See* 475 F.3d at 1279-81. Similarly, in *UDC*, we held that when municipally-owned local gas distribution companies (non-jurisdictional entities under the Natural Gas Act) participate in transportation provided by interstate pipelines (services over which [the Commission] has jurisdiction) they must comply with FERC rules governing these services. *See* 88 F.3d at 1153-54. In both cases, however, the Commission's jurisdiction extended to non-jurisdictional entities only insofar as [the Commission] had authority to dictate the terms of their participation in jurisdictional services or transactions. By analogy, [the Commission], in complying with its duty to ensure that CAISO's rates are just and reasonable, may justifiably subject Vernon's TRR to a § 205 review before approving Vernon's participation in CAISO.

TANC at 675 n.9. Here, the impact on the non-jursidictional entity is even more attenuated. The Motion addresses only the jurisdictional transactions of the CAISO – a jurisdictional entity – under its jurisdictional tariff and a jurisdictional contract.

[15] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*.

Participating TOs. Rather, it approved tariff provisions that made such conduct a condition of becoming a Participating TO. The difference is critical. Vernon has not voluntarily subjected itself to Commission jurisdiction; it has voluntary signed an agreement that subjects it to the tariff provisions governing Participating TOs. It cannot now complain when those tariff provisions limit the amounts that can be included in its TRR and allow the CAISO to recoup amounts that Vernon overcollected.

A. The D.C. Circuit Did Not Rule on the CAISO's Arguments.

Vernon argues that the Commission cannot grant the Motion because the CAISO's arguments were before the court in *TANC* and were disposed of.[16] As noted above, they were not.

Intervenors in *TANC* did describe to the Court the CAISO Tariff mechanisms by which the CAISO could make refunds and collect the amounts from Vernon. Intervenors went on to say, "Enforcement mechanisms . . . are not before this Court; the only refund issue the Court must resolve is whether the Commission can issue an order concluding that a jurisdictional agreement obligates Vernon to pay refunds. *PG&E* and *Alliant* resolve that issue."[17] In contrast, the court, however, found that there were two different issues before the Court, "whether FERC has authority (1) to review Vernon's TRR under the just and reasonable standard and (2) to *order Vernon* to refund any overcollection of

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16 Answer at 13-14.

17 Joint Brief of Intervenors Supporting Respondent in Nos. 05-1402, 06-1246 at 24.

its TRR." *TANC* at 666 (emphasis added). It ruled against Vernon on the first issue, and for Vernon on the second. The Court did not rule on, or even mention, the issue posed by Intervenors, which (as noted) was not among the issues that the Court concluded were before it.

B. The Commission May Authoritatively Interpret Obligations Under Jurisdictional Contracts; Nothing in TANC Is to the Contrary.

The court in *TANC* did make an observation that is relevant to the issue that Intervenors wanted the Court to address. It favorably cited the *Alliant* decision, and noted that the *Alliant* court was enforcing a contractual obligation that *the Commission had determined* to exist. *TANC* at 675-76. Vernon nonetheless argues that the ruling in *TANC* precludes a finding that refunds are owed on Section 16.2 or an adjudication of the CAISO's refund claims against Vernon.[18] These arguments have no basis in the ruling. The Court ruled *only* that the Commission could not itself order refunds.

On the other hand, *Alliant* definitively established the Commission's authority to determine contractual obligations:

> 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. *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 determination, even though they

[18] Answer at 13, 21.

> were not directly subject to FERC's jurisdiction); *Holbein v. Austral Oil Co*., 609 F.2d 206, 208 & n. 3 (5th Cir.1980) (holding that all parties to a gas purchase contract, which was "subject to all present and future ... lawful orders of all regulatory bodies ... having jurisdiction[,]" had to follow the mandates of FERC's predecessor-whether they were subject to the agency's jurisdiction or not).

Alliant at 1050.

Vernon asserts that the CAISO, relying on *Alliant,* is asserting that its arguments are different than those before the D.C. Circuit in *TANC* because it is asking for the enforcement of a contract rather than a Commission modification.[19] The CAISO makes no such argument. The CAISO has not asked the Commission to "enforce" the contract or "exercise refund authority"[20] under a different guise. It is asking the Commission to interpret the TCA, the CAISO Tariff, and the Commission's own order. In this regard, the Commission's exercise of its jurisdiction would be no different than that at issue in *Alliant.* There, in the proceedings below, the Commission had modified the underlying agreement such that it required all parties to pay refunds. The *Alliant* court ruled:

> [The Commission] . . . ordered the [Mid-Continental Area Power Pool ("MAPP")] members over which it had jurisdiction to remove the Section and required them to refund any such tariffs retroactively to March 1, 1997. . . . FERC's amendment to terms of the agreement modified the obligations of *all* parties to the agreement, including [the non-jurisdictional utility]. Or, in other words, because [the non-jurisdictional utility] is a member of MAPP and a signatory to the

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19 Answer at 22.

20 *Id.*

> Restated Agreement, it too is contractually required to refund the tariffs imposed under Section 2.4-regardless of whether the contract expressly provides for it.

Alliant at 1050 (emphasis in original).

Cases other than *Alliant* have similarly upheld the Commission's ability to interpret jurisdictional contracts. In another instance, the D.C. Circuit stated, "'Congress has explicitly delegated to [the Commission] broad powers over ratemaking, including the power to analyze relevant contracts.'" *S. Co. Servs., Inc. v. FERC*, 353 F.3d 29, 34 (D.C. Cir. 2003) (*quoting Baltimore Gas & Elec. Co. v. FERC,* 26 F.3d 1129, 1135 (D.C. Cir. 1994)) (additional citations omitted). That non-jurisdictional entities may be parties to the contract does not alter the Commission's authority over the contract. In *Transmission Agency of N. Cal. v. Sierra Pacific Power Co.*, 295 F.3d 918, 931-32 (9th Cir. 2002), the Ninth Circuit concluded the FPA pre-empted municipal entities' state law contract claims regarding transmission capacity allocation because the contracts were on file with the Commission. The Commission's broad authority over contracts necessarily includes the determination of all parties' rights and obligations under those contracts.[21] The Commission's contract determinations are binding on all parties, who must comply with Commission's determination of their contractual obligations regardless of their jurisdictional status. Nothing in *TANC* undermines the Commission's ability to authoritatively determine obligations under

[21] *E.g., Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1572-74 (D.C. Cir. 1987) (Commission denial of retroactive rate adjustment affirmed, because settlement agreement properly interpreted by FERC prohibited the adjustment).

jurisdictional contract; it only precludes the Commission from itself enforcing that determination.

Vernon argues that Section 16.2 cannot expand the Commission's rate jurisdiction[22] and that Vernon cannot, by executing the TCA, subject itself to Commission jurisdiction.[23] These well-established principles are not relevant to the CAISO's argument, and Vernon's efforts to make them so are unpersuasive. The CAISO has not suggested that Section 16.2 subjects Vernon to the Commission's jurisdiction. Neither is it contending that the Commission "may grant CAISO refund authority that [the Commission] itself does not have."[24] Rather, the CAISO's irrefutable proposition is that the TCA (including Section 16.2) and the CAISO Tariff are within the jurisdiction of the Commission and the Commission can authoritatively interpret them. The CAISO is not asking the Commission to grant it the authority to order Vernon to pay refunds; it is asking the Commission to interpret its legal rights and obligations so that the CAISO can properly administer its responsibilities under the documents.

C. The Commission Should Reject Vernon's Efforts to Limit Its Jurisdiction Beyond the Specific Prohibitions of the FPA.

The Commission should not countenance Vernon's attempt to limit the Commission's jurisdiction beyond all statutory grounds. In a rare, but not quite accurate, acknowledgement of the true nature of the relief the CAISO requests,

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22 Answer at 13.
23 Answer at 21.
24 *Id.*

Vernon insists there is no difference between the Commission confirming or authorizing a refund obligation and the Commission's ordering Vernon to provide refunds. It relies upon the D.C. Circuit's statement that the exclusion of municipalities from the Commission's jurisdiction is "categorical" under section 201(f) of the FPA.[25] Although the exclusion may be "categorical," it applies to direct regulation of municipalities; it does not preclude all Commission orders that may affect municipalities. *See, e.g., Nat'l Assoc. of Reg. Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007) ("*NARUC*").

Limitations on the Commission's jurisdiction beyond the express limitations of the statute are disfavored. The Supreme Court has held that exceptions to the Commission's jurisdiction are to be strictly construed. *United States v. Pub. Util. Comm'n of Ca.*, 345 U.S. 295, 310-11 (1953). Yet Vernon would have the Commission conclude that its lack of jurisdiction over Vernon precludes the CAISO from applying tariff limitations to Vernon. If Vernon's limitation were accepted, the consequences would destroy the Commission's ability to ensure that energy markets are just and reasonable. The CAISO, for example, would not be able to apply Commission directed price caps to bids of non-jurisdictional entities. The CAISO could not apply sanctions specified in the CAISO Tariff to entities that engage in the conduct for which sanctions are permitted. In other words, Vernon's theory would exempt municipals from the tariff rules that apply to all Market Participants. The only way to remedy the

[25] Answer at 14-15.

resulting discriminatory treatment and market disruption would be to bar municipals from organized markets. Despite Vernon's arguments, neither *TANC* nor *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005), compel such a result.

The Commission can, and should, determine that Congress did not contemplate such limitations on its jurisdiction. Where jurisdictional matters are not controlled by the express language of the FPA, the courts will defer to the Commission's reasonable interpretation. *See Detroit Edison Co. v. FERC*, 334 F.3d 48, 54 (D.C. Cir. 2003). Even if Vernon's interpretation of Section 201(f) were plausible, the Commission's rejection of that interpretation in order to protect its ability to ensure just and reasonable rates would surely be reasonable.

D. The Commission Can Determine the Amount of Vernon's TRR to Be Included in, and Recovered Through, the Access Charge.

Vernon contends that the Commission cannot "regulate Vernon's Non-Jurisdictional TRR."[26] What the Commission can do, however, is determine the amount of Vernon's proposed TRR that can be included in the Access Charge (and, therefore, recovered by Vernon). This is precisely what the *TANC* Court concluded.

Vernon asserts that, because the Commission has found that Access Charge formula to be just and reasonable and because the Access Charge requires the pass-through of Vernon's TRR, the Commission cannot retroactively adjust the

[26] Answer at 23.

TRR or authorized the CAISO retroactively to make refunds and collect the amounts from Vernon.[27] It cites *FPC v. Conway Corp.,* 426 U.S. 271 (1976), for the proposition that the Commission cannot regulate a non-jurisdictional rate in order to make a regulated rate just and reasonable, and contends that "*as . . . in CPUC*,"[28] the only remedy is prospective adjustment of the formula. Vernon misstates the CAISO Tariff and the law.

The CAISO Tariff does not require the "pass-through" of Vernon's "non-jurisdictional TRR," and Vernon does not cite any provision of the tariff that would support this contention. The tariff actually provides that the Access Charge and disbursement will be determined by the Participating TO's TRR, which is defined as "the total annual *authorized* revenue requirements associated with transmission facilities and Entitlements turned over to the Operational Control of the ISO by a Participating TO, and disbursement." CAISO Tariff, Appendix A (emphasis added). At the time Vernon became a Participating TO, Section 9 of Schedule 3 of the CAISO Tariff gave a non-jurisdictional Participating TO the option of submitting its *proposed* TRR to the CAISO for the determination of the just and reasonable amount or submitting the TRR to the Commission according to the Commission's rules and standards. In other words, the CAISO Tariff provides that only the just and reasonable TRR will be an input into the CAISO's formula

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[27] Answer at 23-24.

[28] *Pub. Util. Comm'n of Cal. v. FERC,* 254 F.3d 250, 254 (D.C. Cir. 2001) ("*CPUC*").

rate; it does not provide for an automatic pass-through of any entity's unapproved TRR.

Commission review of the TRR components of the Access Charge is consistent with Commission policy regarding formula rates – as recognized in *PG&E*. Generally, by accepting a formula rate, the Commission can waive the filing requirements of FPA Section 205 as to the components, and the utility's charges can change repeatedly without notice as long as they remain consistent with the formula. *CPUC* at 254. Nonetheless, the Commission can and does insist upon review, including in some instances Section 205 filings, in connection with components of formula rates "for matters that are central to the determination of a level of payments that affect the rate charged for jurisdictional service." *CPUC*, 254 F.3d at 254.[29] This authority allows the Commission to require its approval of changes in rates of return; the allocation of costs among distribution, transmission, and generation; depreciation rates; the type of facilities included in the revenue requirement; and other matters affecting the cost of jurisdictional service. Here, the TRRs of Participating TOs are reviewable components of the CAISO's formula-rate Access Charge.

[29] In fact, retroactive refunds are available when a utility uses excessive formula rate components, because failure to have proper components means that the utility is not properly charging the filed rate. *See, e.g., Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (authorizing retroactive refunds on the grounds that a utility imposed "charges not in conformity with its rate schedules"); *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (holding that FERC can "enforce the terms of a filed rate and order refunds for past violations of one").

Thus, the Commission's review and adjustment of Vernon's proposed TRR is a review of a jurisdictional rate – the CAISO's Access Charge. Vernon nonetheless argues that *TANC* rejected the contention that the Commission had authority to "apply Section 205" to Vernon. It also asserts that *PG&E* and *TANC* held that the Commission has the authority to review, not regulate, Vernon's TRR in the context of the jurisdictional Access Charge. The language that Vernon quotes only concludes that the Commission's jurisdiction of the Access Charge does not give it authority to order Vernon to make a refund; it goes no further. *TANC* at 674. As the Court in *PG&E* and *TANC* concluded, in reviewing Vernon's TRR, the Commission is not regulating Vernon's TRR; it is regulating the CAISO's Access Charge. *TANC* at 671-72; *PG&E* at 1116-19.

Vernon's assertion that the Commission has jurisdiction only to review its TRR, and not to determine what can be included in the CAISO's Access Charge, is untenable. Both *TANC* and *PG&E* stated that the Commission must *ensure* that the CAISO's Access Charge is just and reasonable. *Id.* *PG&E* states that just and reasonable rates for the CAISO as the *necessary* result. *PG&E* at 295. *TANC* stated that the Commission is not obligated to review the CAISO's Access Charge as a whole. *TANC* at 672. Further, contrary to Vernon's assertion; the Commission could not change the formula as the result of a finding that Vernon's proposed TRR would not produce a just and reasonable Access Charge; the proceeding did not include any CAISO proposal to change the formula, and the Commission bears the burden of proof in changing a portion of a rate that a utility

does not propose change. *See Public Serv. Comm'n of NY v. FERC,* 642 F.2d 1335, 1345 (D.C. Cir. 1980). Because the proceeding included no evidence about whether the formula was just and reasonable, the Commission has no authority to modify the formula. If the Commission (1) must ensure a just and reasonable Access Charge, (2) is not required to review the entire Access Charge, and (3) cannot change the formula, then *PG&E* can only mean that the Commission may adjust the component – *i.e.,* the authorized TRR for Vernon.

Conway is simply not on point. The relevant language in *Conway* did not concern the regulation of a component of a jurisdictional rate. It was simply a statement, with which the Federal Power Commission concurred, that the Federal Power Commission had no authority to *directly* control a non-jurisdictional retail rate in order to eliminate discrimination against wholesale customers through the jurisdictional rate. 426 U.S. at 277. The only issue was whether the Commission must consider the discrimination caused by the retail rate in setting the wholesale rate within the zone of reasonableness. *Id.* at 278-80.

CPUC is similarly off-point. It concerned whether a particular type of change to a formula rate component must be subject to prior review, and determined that it did not. *CPUC* at 255-57. Moreover, it never suggested that changing the formula was the proper remedy for an unjust component. *CPUC* specifically pointed out the ability to challenge components did not even preclude challenges under Section 206 of the FPA to components that are not subject to prior review. *Id.* at 258. The only mention of changing the formula was the

court's statement that if the petitioner were to show that the formula itself is unjust, the remedy would be to change the formula. *Id.* at 257. It did not remotely suggest that the only relief regarding an unjust or unreasonable component that *was subject to prior review* – as in this proceeding – was changing the formula, or even that such a remedy would be possible in a proceeding, such as this, that did not involve the formula.

E. The Commission Can Retroactively Adjust the Cost Component of the Access Charge that Represents Vernon's Authorized TRR, Resulting in Refund Liability Under the CAISO Tariff.

Vernon makes various arguments based on the fact that the Commission lacks jurisdiction over it and the supposed fact that the CAISO Tariff requires a pass through of its "non-jurisdictional" TRR. Vernon claims that the facts preclude the Commission from retroactively adjusting the authorized TRR that is included in the Access Charge, resulting in a refund liability for Vernon under the CAISO Tariff. These arguments are rebutted by the discussions above. In particular, it is worth noting that the obligations that the Commission imposed, and the court enforced, in *Alliant* included retroactive refunds. *Alliant* at 1050-1051.

Vernon also claims, however, that the Commission cannot order retroactive refunds when a formula rate is lawful, but the rate produced is unjust and unreasonable. Vernon's argument misunderstands the situation before the Commission.

Vernon relies upon *ChevronTexaco Exploration & Production Co. v. FERC*, 387 F.3d 892 (D.C. Cir. 2004). *ChevronTexaco* involved a proceeding

under limited Section 4 proceeding (the Natural Gas Act equivalent of Section 205) concerning an element of a formula rate. The Commission concluded that a formula, which the utility had not proposed to change, had become unjust and unreasonable. The Commission therefore initiated a proceeding under Section 5 (the equivalent of Section 206). Petitioners asserted that the Commission was required to modify the rate in the Section 205 proceeding. Contrary to Vernon's statement, this was not the case of a just and reasonable formula producing an unjust result; the Commission had determined that the *formula* was no longer just and reasonable. The only issue was whether the Commission could change the formula in a Section 4 proceeding that did not involve the formula itself. The Court agreed that the Commission could not. *ChevronTexaco* is simply not applicable to these circumstances.

Here, the Commission has not concluded that the formula itself is unjust and reasonable because it produces an unjust and unreasonable result. Rather, here the result (the Access Charge) is unjust and unreasonable because one of the inputs is unjust and unreasonable. This formula was not at issue. As explained in the Motion, the Commission had, in effect, accepted the input subject to refund. When the Commission requires the filing of a component of a formula, it properly makes the result of its review subject to refund. *See Yankee Atomic Elec. Co., et al.*, 40 FERC ¶ 61,372 at [cite] (1987). More generally, retroactive refunds are available when a utility uses excessive formula rate components, because failure to have proper components means that the utility is not properly charging the filed

rate. *See, e.g., Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (authorizing retroactive refunds on the grounds that a utility imposed "charges not in conformity with its rate schedules"); *Boston Edison Co. v. FERC*, 856 F.2d 361, 369 (1st Cir. 1988) (holding that FERC can "enforce the terms of a filed rate and order refunds for past violations of one"). There is no obstacle to the Commission adjusting Vernon's authorized TRR effective January 1, 2001.

F. Granting the Motion Would Not Violate the Tenth Amendment.

Finally, Vernon resurrects the argument that granting the Motion would "command[ ]" officials of a "political subdivision" to "administer or enforce a federal regulatory scheme" and would "'commandeer' Vernon's legislative/ratemaking processes" contrary to the Tenth Amendment.[30] Of course, granting the CAISO's Motion would not more require Vernon to administer or enforce a regulatory scheme than would requiring Vernon to abide by Environmental Protection Agency regulations or other Federal regulations applicable to municipalities. As to "commandeering" Vernon's legislative/ratemaking processes, it was Vernon itself that agreed to execute the TCA and be subject to the CAISO Tariff requirements that it submit its TRR to the Commission and that only the authorized TRR be included in the Access Charge. The Commission already rejected Vernon's argument in Opinion 479-B.[31] The

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30 Answer at 25.

31 *City of Vernon, Cal.,* 115 FERC ¶ 61,297 (2006).

argument is even less viable now that the Commission is not ordering Vernon to pay a refund. The Commission should reject this argument again.

V. CONCLUSION

For the reasons stated above and in the Motion, the CAISO requests that the Commission grant the Motion.

Respectfully submitted,

/s/ Michael E. Ward

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December 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists for the captioned proceedings, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2010). Dated this 13th day of December, 2007, at Washington, D.C.

/s/ Michael E. Ward
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