

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

CALIFORNIA PUBLIC UTILITIES  
COMMISSION,

*Petitioner,*

MIRANT AMERICAS ENERGY  
MARKETING, LP; NEVADA POWER  
COMPANY; SIERRA PACIFIC POWER  
COMPANY; CITY OF SEATTLE; CITY  
OF GLENDALE; MIECO, INC.,

*Intervenors,*

and

CITY OF GLENDALE, CALIFORNIA,

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

No. 01-71934

FERC No.  
EL00-000, et al.

OPINION

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA , Attorney General,

*Petitioners,*

No. 01-71944

NEVADA POWER COMPANY; SIERRA  
PACIFIC POWER COMPANY; CITY OF  
SEATTLE; MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

SOUTHERN CALIFORNIA EDISON  
COMPANY,

*Petitioner,*

NRG POWER MARKETING, INC.;  
PUBLIC UTILITY DISTRICT NO. 2 OF  
GRANT COUNTY, COMMISSION OF  
THE STATE OF CALIFORNIA; PORT OF  
SEATTLE, WASHINGTON; CITY OF  
TACOMA, WASHINGTON; THE  
PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General; EL  
PASO MERCHANT ENERGY L.P.;  
SACRAMENTO MUNICIPAL UTILITY  
DISTRICT; MIRANT AMERICAS  
ENERGY MARKETING, LP; MIRANT  
CALIFORNIA, LLC; MIRANT DELTA,  
LLC, MIRANT POTRERO, LLC;  
DYNEGY POWER MARKETING, INC.;  
EL SEGUNDO POWER LLC, LONG

No. 02-70219

BEACH GENERATION, LLC;  
CABRILLO POWER I, LLC; CABRILLO  
POWER II, LLC; PORTLAND  
GENERAL ELECTRIC COMPANY;  
PACIFICORP; TRANSMISSION  
AGENCY OF NORTHERN CALIFORNIA  
(TANC); NORTHERN CALIFORNIA  
POWER AGENCY, PUBLIC SERVICE  
COMPANY OF NEW MEXICO; CORAL  
POWER, L.L.C., CONSTELLATION  
POWER SOURCE; CORAL POWER,  
L.L.C.; CONSTELLATION ENERGY  
COMMODITIES GROUP, INC.;  
CALIFORNIA INDEPENDENT SYSTEM  
OPERATOR CORPORATION; SALT  
RIVER PROJECT AGRICULTURAL  
IMPROVEMENT AND POWER  
DISTRICT; CA STATE ASSEMBLY;  
PACIFIC GAS & ELECTRIC COMPANY,  
*Intervenors,*

PORT OF SEATTLE; CITY OF TACOMA;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA; CITY OF SAN DIEGO;  
CA STATE ASSEMBLY,  
*Petitioners-Intervenors,*

NEVADA POWER COMPANY; SIERRA  
PACIFIC POWER COMPANY; CITY OF  
SEATTLE,  
*Intervenors,*

CITY OF PASADENA,  
*Petitioner-Intervenor,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

CALIFORNIA PUBLIC UTILITIES  
COMMISSION,  
*Petitioner,*

No. 02-71426

SOUTHERN CALIFORNIA EDISON  
COMPANY; THE PEOPLE OF THE  
STATE OF CALIFORNIA, EX REL.  
XAVIER BECERRA, Attorney  
General; CITY OF TACOMA,  
WASHINGTON; PORT OF SEATTLE  
WASHINGTON,  
*Petitioners-Intervenors,*

PORTLAND GENERAL ELECTRIC  
COMPANY; AVISTA CORPORATION;  
EL PASO MERCHANT ENERGY L.P.;  
CORAL POWER, L.L.C.; NORTHERN  
CALIFORNIA POWER AGENCY;  
AVISTA ENERGY, INC.; MORGAN  
STANLEY CAPITAL GROUP, INC.;

MERRILL LYNCH CAPITAL SERVICES  
INC.; DUKE ENERGY NORTH  
AMERICA, LLC, DUKE ENERGY  
TRADING AND MARKETING, LLC,  
(COLLECTIVELY, “DUKE ENERGY”);  
PACIFIC GAS & ELECTRIC COMPANY;  
PACIFICORP; MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent,*

M-S-R PUBLIC POWER AGENCY;  
MODESTO IRRIGATION DISTRICT;  
CITY OF REDDING, CALIFORNIA;  
CITY OF SANTA CLARA,  
CALIFORNIA; DYNEGY POWER  
MARKETING, INC., EL SEGUNDO  
POWER LLC, LONG BEACH  
GENERATION LLC, CABRILLO  
POWER I LLC, AND CABRILLO  
POWER II LLC (COLLECTIVELY,  
“DYNEGY”),

*Respondents-Intervenors.*

PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner,*

No. 02-72136

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Petitioners-Intervenors,*

AVISTA CORPORATION;  
COGENERATION ASSOCIATION OF CA  
(CAC), NEVADA INDEPENDENT  
ENERGY COALITION (NIEC) AND  
COGENERATION COALITION OF WA  
(CCW); CALIFORNIA INDEPENDENT  
SYSTEM OPERATOR CORPORATION;  
PORTLAND GENERAL ELECTRIC  
COMPANY; DYNEGY POWER  
MARKETING, INC.; EL SEGUNDO  
POWER; CABRILLO POWER;  
CABRILLO POWER II LLC; MORGAN  
STANLEY CAPITAL GROUP, INC.;  
MODESTO IRRIGATION DISTRICT;  
CITY OF SANTA CLARA,  
CALIFORNIA; AVISTA ENERGY;  
PUGET SOUND INVESTMENT GROUP;  
THE CITY OF LOS ANGELES  
DEPARTMENT OF WATER AND  
POWER; CORAL POWER, L.L.C.;  
MIRANT AMERICAS ENERGY  
MARKETING, LP, MIRANT CA, LLC,  
MIRANT DELTA, LLC, AND MIRANT

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POTEREO, LLC (COLLECTIVELY,  
“MIRANT”; TRANSCANADA ENERGY  
LTD.; NORTHERN CALIFORNIA  
POWER AGENCY; CITY OF TACOMA,  
WASHINGTON; PORT OF SEATTLE  
WASHINGTON; PACIFICORP;  
PACIFICORP; SALT RIVER PROJECT  
AGRICULTURAL IMPROVEMENT AND  
POWER DISTRICT; CITY OF REDDING,  
CALIFORNIA; MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent,*

METROPOLITAN WATER DISTRICT OF  
SOUTHERN CALIFORNIA,

*Respondent-Intervenor.*

SOUTHERN CALIFORNIA EDISON  
COMPANY,

*Petitioner,*

PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner-Intervenor,*

SALT RIVER PROJECT  
AGRICULTURAL IMPROVEMENT AND

No. 02-72488

POWER DISTRICT; PACIFICORP;  
MIECO, INC.,  
*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Petitioner,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 02-72548

SAN DIEGO GAS & ELECTRIC  
COMPANY,  
*Petitioner,*

MIECO, INC.,  
*Intervenor,*

No. 02-72585

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CALIFORNIA PUC v. FERC

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v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

CALIFORNIA PUBLIC UTILITIES  
COMMISSION,

*Petitioner,*

PORT OF SEATTLE WASHINGTON;  
MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

No. 03-74471

PORTLAND GENERAL ELECTRIC  
COMPANY,

*Petitioner,*

MODESTO IRRIGATION DISTRICT;  
CITY OF SANTA CLARA; CITY OF  
REDDING; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; TRANSCANADA  
ENERGY; CALIFORNIA PUBLIC

No. 03-74647

UTILITIES COMMISSION; SOUTHERN  
CALIFORNIA EDISON COMPANY;  
CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD; PACIFIC GAS &  
ELECTRIC COMPANY; THE PEOPLE OF  
THE STATE OF CALIFORNIA, EX REL.  
XAVIER BECERRA, Attorney General;  
NORTHERN CALIFORNIA POWER  
AGENCY; PORT OF SEATTLE; TUCSON  
ELECTRIC POWER COMPANY;  
PACIFICORP; EL PASO MERCHANT  
ENERGY L.P.; CONSTELLATION  
ENERGY COMMODITIES GROUP, INC.;  
MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

SOUTHERN CALIFORNIA EDISON  
COMPANY,

*Petitioner,*

MIECO, INC.,

*Intervenor,*

v.

No. 03-74729

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CALIFORNIA PUC v. FERC

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FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Petitioner,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 04-70564

SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Petitioner,*

CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD; MIECO, INC.,  
*Intervenors,*

v.

No. 04-72162

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent,*

CALIFORNIA INDEPENDENT SYSTEM  
OPERATOR CORPORATION,

*Intervenor,*

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PORT OF SEATTLE WASHINGTON;  
AVISTA ENERGY INC.; CALIFORNIA  
ELECTRICITY OVERSIGHT BOARD;  
DYNEGY POWER MARKETING, INC.,  
EL SEGUNDO POWER LLC, LONG  
BEACH GENERATION LLC,  
CABRILLO POWER I LLC, AND  
CABRILLO POWER II LLC  
(COLLECTIVELY, “DYNEGY”),  
*Applicants-Intervenors.*

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General,

*Petitioner,*

CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD; PORT OF  
SEATTLE; MIECO, INC.,

*Intervenors,*

v.

No. 04-72169

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent,*

CALIFORNIA INDEPENDENT SYSTEM  
OPERATOR CORPORATION,

*Intervenor,*

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PORT OF SEATTLE WASHINGTON;  
CORAL POWER, L.L.C.; AVISTA  
ENERGY INC.; PUGET SOUND  
ENERGY, INC; CALIFORNIA  
ELECTRICITY OVERSIGHT BOARD;  
DYNEGY POWER MARKETING, INC.,  
EL SEGUNDO POWER LLC, LONG  
BEACH GENERATION LLC,  
CABRILLO POWER I LLC, AND  
CABRILLO POWER II LLC  
(COLLECTIVELY, “DYNEGY”),  
*Applicants-Intervenors.*

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PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner,*

MIECO, INC.,

*Intervenor,*

v.

No. 04-72210

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent,*

CALIFORNIA INDEPENDENT SYSTEM  
OPERATOR CORPORATION,

*Intervenor,*

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DUKE ENERGY NORTH AMERICA,  
LLC, DUKE ENERGY TRADING AND  
MARKETING, LLC, (COLLECTIVELY,  
“DUKE ENERGY”); SOUTHERN  
CALIFORNIA EDISON COMPANY,  
(EDISON); PORT OF SEATTLE  
WASHINGTON; CORAL POWER,  
L.L.C.; AVISTA ENERGY, INC.;  
CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD; DYNEGY POWER  
MARKETING, INC., EL SEGUNDO  
POWER LLC, LONG BEACH  
GENERATION LLC, CABRILLO  
POWER I LLC, AND CABRILLO  
POWER II LLC (COLLECTIVELY,  
“DYNEGY”),

*Applicants-Intervenors.*

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CALIFORNIA PUC v. FERC

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| PACIFIC GAS & ELECTRIC COMPANY,<br><i>Petitioner,</i>          |
| MIECO, INC.,<br><i>Intervenor,</i>                             |
| v.                                                             |
| FEDERAL ENERGY REGULATORY<br>COMMISSION,<br><i>Respondent.</i> |

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No. 04-72539

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|----------------------------------------------------------------|
| SOUTHERN CALIFORNIA EDISON<br>COMPANY,<br><i>Petitioner,</i>   |
| MIECO, INC.,<br><i>Intervenor,</i>                             |
| v.                                                             |
| FEDERAL ENERGY REGULATORY<br>COMMISSION,<br><i>Respondent.</i> |

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No. 04-72756

PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner,*

No. 04-73242

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

THE PEOPLE OF THE STATE OF  
CALIFORNIA; XAVIER BECERRA,  
Attorney General,  
*Petitioners,*

No. 04-73259

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

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CALIFORNIA PUC v. FERC

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CALIFORNIA PUBLIC UTILITIES  
COMMISSION; CALIFORNIA  
ELECTRICITY OVERSIGHT BOARD,  
*Petitioners,*

No. 04-73405

PORT OF SEATTLE, WASHINGTON;  
MIECO, INC.,  
*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

THE PEOPLE OF THE STATE OF  
CALIFORNIA; XAVIER BECERRA,  
Attorney General,  
*Petitioners,*

No. 04-73491

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner,*

No. 04-74984

CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD; SOUTHERN  
CALIFORNIA EDISON COMPANY,  
*Petitioners-Intervenors,*

MODESTO IRRIGATION DISTRICT;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General; AVISTA  
ENERGY INC.; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; ENRON POWER  
MARKETING INC.; MIECO, INC.,  
*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent,*

DYNEGY POWER MARKETING, INC.;  
MODESTO IRRIGATION DISTRICT;  
NORTHERN CALIFORNIA POWER  
AGENCY; CALIFORNIA INDEPENDENT  
SYSTEM OPERATOR CORPORATION;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General,  
*Respondents-Intervenors.*

CALIFORNIA PUC v. FERC

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SOUTHERN CALIFORNIA EDISON  
COMPANY,

*Petitioner,*

MODESTO IRRIGATION DISTRICT;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
SEMPRA ENERGY TRADING CORP.;  
AVISTA ENERGY INC.; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; ENRON POWER  
MARKETING INC.; CITY OF LOS  
ANGELES DEPARTMENT OF WATER  
AND POWER; WILLIAMS POWER  
COMPANY, INC; MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

No. 04-75496

CALIFORNIA PUBLIC UTILITIES  
COMMISSION; CALIFORNIA  
ELECTRICITY OVERSIGHT BOARD,

*Petitioners,*

MODESTO IRRIGATION DISTRICT;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER

No. 04-75503

BECERRA, Attorney General;  
SEMPRA ENERGY TRADING CORP.;  
AVISTA ENERGY INC.; ENRON  
POWER MARKETING INC.; WILLIAMS  
POWER COMPANY, INC; MIECO, INC.,  
*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent,*

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General,  
*Respondent-Intervenor.*

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PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner,*

No. 04-75609

MODESTO IRRIGATION DISTRICT;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
SEMPRA ENERGY TRADING CORP.;  
AVISTA ENERGY INC.; PUGET SOUND  
ENERGY, INC; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; ENRON POWER

MARKETING, INC.; WILLIAMS POWER  
COMPANY, INC; MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

SOUTHERN CALIFORNIA EDISON  
COMPANY,

*Petitioner,*

TUCSON ELECTRIC POWER  
COMPANY,

*Intervenor,*

MODESTO IRRIGATION DISTRICT,

*Respondent-Intervenor,*

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General; AVISTA  
ENERGY INC.; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; ENRON POWER  
MARKETING INC.; WILLIAMS POWER  
COMPANY, INC; MIECO, INC.,

*Intervenors,*

v.

No. 04-75720

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent,*

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WILLIAMS POWER COMPANY, INC;  
PACIFICORP,  
*Applicants-Intervenors.*

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THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General,  
*Petitioner,*

MODESTO IRRIGATION DISTRICT;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General; AVISTA  
ENERGY INC.; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; ENRON POWER  
MARKETING, INC.; WILLIAMS POWER  
COMPANY, INC; MIECO, INC.,  
*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 04-75838

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General,  
*Petitioner,*

No. 04-75840

MODESTO IRRIGATION DISTRICT;  
THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
SEMPRA ENERGY TRADING CORP.;  
AVISTA ENERGY INC.; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; ENRON POWER  
MARKETING, INC.; CALIFORNIA  
INDEPENDENT SYSTEM OPERATOR  
CORPORATION; CITY OF LOS  
ANGELES DEPARTMENT OF WATER  
AND POWER; AVISTA ENERGY INC.;  
WILLIAMS POWER COMPANY, INC;  
SEMPRA ENERGY TRADING CORP.;  
MIECO, INC.,  
*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

CALIFORNIA PUBLIC UTILITIES  
COMMISSION; CALIFORNIA  
ELECTRICITY OVERSIGHT BOARD,  
*Petitioners-Appellants,*

No. 04-76095

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General; AVISTA  
ENERGY INC.; ENRON POWER  
MARKETING INC.; MIECO, INC.,  
*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent-Appellee.*

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PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner,*

No. 05-71761

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

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CALIFORNIA PUC v. FERC

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| SOUTHERN CALIFORNIA EDISON<br>COMPANY,<br><br><i>Petitioner,</i><br><br>MIECO, INC.,<br><br><i>Intervenor,</i><br><br>v.<br><br>FEDERAL ENERGY REGULATORY<br>COMMISSION,<br><br><i>Respondent.</i> |
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No. 05-72614

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| THE PEOPLE OF THE STATE OF<br>CALIFORNIA,<br><br><i>Petitioner,</i><br><br>PORT OF SEATTLE,<br><br><i>Petitioner-Intervenor,</i><br><br>PORTLAND GENERAL ELECTRIC<br>COMPANY; EL SEGUNDO POWER<br>LLC; CALIFORNIA EDISON COMPANY,<br><br><i>Intervenors,</i><br><br>MIECO, INC.,<br><br><i>Intervenor,</i><br><br>and<br><br>PINNACLE WEST COMPANY, |
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No. 05-72678

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent,*

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SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Applicant-Intervenor.*

CALIFORNIA PUBLIC UTILITIES  
COMMISSION; CALIFORNIA  
ELECTRICITY OVERSIGHT BOARD,  
*Petitioners,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 05-72954

PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioner,*

SOUTHERN CALIFORNIA EDISON  
COMPANY; THE PEOPLE OF THE

No. 06-71320

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STATE OF CALIFORNIA, EX REL.  
XAVIER BECERRA, Attorney General,  
*Petitioners-Intervenors,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent,*

TUCSON ELECTRIC POWER  
COMPANY; PACIFICORP,  
*Respondents-Intervenors,*

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CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD; WILLIAMS  
POWER COMPANY, INC;  
CONSTELLATION ENERGY  
COMMODITIES GROUP, INC.;  
PORTLAND GENERAL ELECTRIC  
COMPANY; AVISTA ENERGY INC.;  
CONSTELLATION ENERGY  
COMMODITIES GROUP, INC.; ENRON  
POWER MARKETING, INC.; CITY OF  
SEATTLE, WASHINGTON; MIDWAY  
SUNSET COGENERATION COMPANY,  
*Applicants-Intervenors.*

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THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General,  
*Petitioner,*

No. 06-71642

SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Petitioner-Intervenor,*

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent,*

PACIFIC GAS & ELECTRIC COMPANY;  
AVISTA ENERGY; THE CITY OF LOS  
ANGELES DEPARTMENT OF WATER  
AND POWER; ENRON POWER  
MARKETING INC.; PORTLAND  
GENERAL ELECTRIC COMPANY;  
CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD; MIECO, INC.,  
*Intervenors,*

v.

MODESTO IRRIGATION DISTRICT; THE  
CITY OF SANTA CLARA; CITY OF  
REDDING,  
*Respondents-Intervenors.*

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CALIFORNIA PUC v. FERC

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CALIFORNIA PUBLIC UTILITIES  
COMMISSION; CALIFORNIA  
ELECTRICITY OVERSIGHT BOARD,  
*Petitioners,*

No. 06-72006

SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Petitioner-Intervenor,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

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SOUTHERN CALIFORNIA EDISON  
COMPANY,  
*Petitioner,*

No. 06-72195

PACIFIC GAS & ELECTRIC COMPANY;  
CORAL POWER, L.L.C.; MIECO, INC.,  
*Intervenors,*

and

CALIFORNIA ELECTRICITY  
OVERSIGHT BOARD,

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v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; PACIFIC GAS &  
ELECTRIC COMPANY; SOUTHERN  
CALIFORNIA EDISON COMPANY,  
*Petitioners,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 08-74306

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; PACIFIC GAS &  
ELECTRIC COMPANY; SAN DIEGO

No. 08-74834

GAS & ELECTRIC COMPANY;  
SOUTHERN CALIFORNIA EDISON  
COMPANY,

*Petitioners,*

SACRAMENTO MUNICIPAL UTILITY  
DISTRICT; CITY OF PASADENA,  
CALIFORNIA; MIECO, INC.,

*Intervenors,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; SOUTHERN  
CALIFORNIA EDISON COMPANY;  
PACIFIC GAS & ELECTRIC COMPANY,

*Petitioners,*

MIECO, INC.,

*Intervenor,*

v.

No. 09-71953

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; SOUTHERN  
CALIFORNIA EDISON COMPANY;  
PACIFIC GAS & ELECTRIC COMPANY,  
*Petitioners,*

MIECO, INC.,  
*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 09-71961

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; PACIFIC GAS &  
ELECTRIC COMPANY; SOUTHERN  
CALIFORNIA EDISON COMPANY,  
*Petitioners,*

No. 10-71708

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; PACIFIC GAS &  
ELECTRIC COMPANY; SOUTHERN  
CALIFORNIA EDISON COMPANY,

*Petitioners,*

MIDWAY SUNSET COGENERATION  
COMPANY,

*Intervenor,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,

*Respondent.*

No. 11-71542

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; PACIFIC GAS &  
ELECTRIC COMPANY; SOUTHERN  
CALIFORNIA EDISON COMPANY,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 12-70406

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; PACIFIC GAS &  
ELECTRIC COMPANY; SOUTHERN  
CALIFORNIA EDISON COMPANY,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 12-70407

THE PEOPLE OF THE STATE OF  
CALIFORNIA, EX REL. XAVIER  
BECERRA, Attorney General;  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION; PACIFIC GAS &  
ELECTRIC COMPANY; SOUTHERN  
CALIFORNIA EDISON COMPANY,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY  
COMMISSION,  
*Respondent.*

No. 12-71034

On Petition for Review of an Order of the  
Federal Energy Regulatory Commission

Argued and Submitted March 22, 2017  
San Francisco, California

Filed April 21, 2017

Before: Sidney R. Thomas, Chief Judge, and M. Margaret  
McKeown and Richard R. Clifton, Circuit Judges.

Opinion by Chief Judge Thomas

**SUMMARY\*\***

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**Federal Energy Regulatory Commission**

The panel granted in part, and denied in part, a petition for review brought by various entities challenging the Federal Energy Regulatory Commission (“FERC”)’s calculation of certain refunds arising out of the California energy crisis in 2000 and 2001.

The panel held that FERC did not act arbitrarily or capriciously in its construction of tariffs, and denied the petition as to the question of whether refunds should be netted hourly or across the entire refund period. FERC found that in order to calculate the total refund shortfall resulting from *Bonneville Power Administration v. FERC*, 422 F.3d 908 (9th Cir. 2005), the California Independent System Operator Corporation should net sales and purchases over hourly intervals. FERC applied the same rationale to the California Power Exchange Corporation (“Cal-PX”), and directed it to perform its final refund netting purchases and sales over hourly intervals to reflect the period during which the obligation was incurred.

Addressing a \$5 million deficit in the Cal-PX settlement clearing account that resulted from a transfer of funds from the settlement clearing account to the operating account in March 2001, the panel held that FERC acted arbitrarily and capriciously in allocating the refund only to net buyers and

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

not to all market participants. The panel granted the petition as to this issue.

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**COUNSEL**

Stan Berman (argued) and Eric Todderud, Sidley Austin LLP, Seattle, Washington; Mark D. Patrizio and Joshua S. Levenberg, Pacific Gas and Electric Company; for Petitioner Pacific Gas and Electric Company.

Candace J. Morey; Arocles Aguilar, General Counsel; San Francisco, California; as and for Petitioner Public Utilities Commission of the State of California.

Kevin J. McKeon, Judith D. Cassel, and Whitney E. Snyder, Hawke McKeon & Sniscak LLP, Harrisburg, Pennsylvania; Danette E. Valdez, Supervising Deputy Attorney General; Martin Goyette, Senior Assistant Attorney General; Mark Breckler, Chief Assistant Attorney General; Office of the Attorney General, San Francisco, California; for Petitioners People of the State of California ex rel. Xavier Becerra, Attorney General.

Richard L. Roberts and Catherine M. Giovannoni, Steptoe & Johnson LLP, Washington, D.C.; Russell C. Swartz, J. Eric Isken, and Russell A. Archer, Southern California Edison Company, Rosemead, California; for Petitioners Southern California Edison Company.

Beth Guralnick Pacella (argued), Deputy Solicitor; Robert H. Solomon, Solicitor; Max Minzner, General Counsel; Washington, D.C., for Respondent Federal Energy Regulatory Commission.

**OPINION**

THOMAS, Chief Judge:

This petition for review returns to us as part of a long series of administrative cases arising out of the California energy crisis in 2000 and 2001, the background of which we have described in detail in earlier opinions.<sup>1</sup> This petition requires us to determine whether the Federal Energy Regulatory Commission (“FERC” or “Commission”) acted arbitrarily or capriciously in calculating certain refunds.

We review FERC decisions to determine whether they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (citing 5 U.S.C. §706(2)(A); *Sithe/Indep. Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999)). “FERC must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record.” *Id.* (quoting *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)). The Court also must ensure that FERC “articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Id.* (alteration in original) (quoting *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

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<sup>1</sup> See, e.g., *MPS Merch. Servs., Inc. v. FERC*, 836 F.3d 1155, 1160 (9th Cir. 2016); *Cal. ex rel. Harris v. FERC*, 809 F.3d 491, 496–98 (9th Cir. 2015); *Pub. Utils. Comm’n of State of Cal. v. FERC*, 462 F.3d 1027, 1036–45 (9th Cir. 2006); *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 911–14 (9th Cir. 2005); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1008–11 (9th Cir. 2004).

We grant the petition in part and deny it in part.

I

After we concluded in *Bonneville Power Administration v. FERC* that FERC had acted outside its jurisdiction when ordering governmental entities/non-public utilities to pay refunds, 422 F.3d 908, 926 (9th Cir. 2005), the Commission vacated each of its orders in the California refund proceeding to the extent that they ordered governmental entities/non-public utilities to pay refunds. *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.* (“2007 Order on Remand”), 121 FERC ¶ 61,067, 61,352–53, 2007 WL 3047581, at \*9 (2007).<sup>2</sup> The Commission directed the California Power Exchange Corporation (“Cal-PX”) and the California Independent System Operator Corporation (“Cal-ISO”) to complete refund calculations with all entities that participated in the Cal-PX and Cal-ISO markets and not to redo the refund calculations to remove the governmental entities/non-public utilities. *Id.*

FERC agreed with the California parties (“California”)<sup>3</sup> that energy sales and purchases should be netted before calculating each party’s refund amount, but it found that netting these sales and purchases over the entire refund period could have the indirect effect of requiring governmental

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<sup>2</sup> All proceedings below share this case name. Orders will be referred to by their year and title for the sake of brevity and to avoid confusion.

<sup>3</sup> Petitioners the California Parties consist of the Public Utilities Commission of the State of California; the People of the State of California *ex rel.* Xavier Becerra, Attorney General; Pacific Gas and Electric Company; and Southern California Edison Company.

entities and other non-public utilities to pay refunds. 2008 Order on Rehearing and Motions for Clarification and Accounting, 125 FERC ¶ 61,214, 62,112–13, 2008 WL 4962565, at \*4–5 (2008). FERC instead found that in order to calculate the total refund shortfall resulting from *Bonneville*, Cal-ISO should net sales and purchases over hourly intervals. *Id.* The Commission noted that under the Cal-ISO Tariff, a settlement period was defined in terms of hourly intervals, and therefore, it directed Cal-ISO to net over hourly intervals to ensure consistency with its tariff requirements. *Id.*

In a later order, FERC applied the same rationale to Cal-PX, whose tariff also specified hourly settlement intervals, and directed Cal-PX to perform its final refund calculations netting purchases and sales over hourly intervals to reflect the period during which the obligation was incurred. 2011 Order Accepting Compliance Filings and Providing Guidance, 136 FERC ¶ 61,036, 2011 WL 2750775, at \*11 (2011).

California argues that the applicable tariffs unambiguously require Cal-ISO and Cal-PX to net for the entire refund period, not over hourly intervals. Although California makes a plausible case for its interpretation, we cannot conclude that FERC acted arbitrarily or capriciously in its interpretation of the tariffs. Though the tariffs provide for netting in certain situations over an interval shorter than an hour or for netting charges over an hour and later summing the charges over the day and over the entire month to generate monthly invoices, nothing suggests that the netting interval should span the entire refund period, which lasted nine months. Similarly, FERC’s interpretation of the tariff amendments was likewise reasonable. Cal-ISO Amendment No. 51 and Cal-PX Amendment No. 23 segregated

transactions during the refund period. The amendments did not address calculating the total net refunds; they related only to performing settlement reruns and invoice adjustments (prerequisites to calculating final refunds). FERC reasonably interpreted the amendments as inapplicable.

California also argues that FERC's decision to net governmental entity sales on an hourly basis departed from its prior orders without explanation. However, the prior orders cited do not address how the refunds should be netted; they address cost offset allocations.

California also suggests that the result is unduly discriminatory because hourly netting improperly permits governmental entities and non-public utilities to receive unlawfully excessive rates charged for sales made in one hour (without having to repay sellers for the excessive rates), while collecting refunds if that same entity bought power in another hour or in a different market in that same hour. The data do suggest some disparity. However, that is a natural consequence of our jurisdictional decision in *Bonneville*.

In sum, although the tariffs are not specific on these points, we cannot conclude that FERC acted arbitrarily or capriciously in its construction of the tariffs.

## II

The second issue in the petition for review concerns a \$5 million deficit in the Cal-PX settlement clearing account that resulted from a transfer of funds from the settlement clearing account to the operating account in March 2001; the \$5 million was used for operating expenses. The Commission determined that the deficit was attributable to an accounting

error on the part of Cal-PX and found that, given the delay in discovering that the funds had erroneously been transferred, it appeared unlikely that Cal-PX would “be able to determine how, precisely, this \$5 million was used, separate and apart from other funds in the operating account during the same period.” 2011 Order Accepting Compliance Filings and Providing Guidance, 136 FERC ¶61,067, 2011 WL 2750775, at \*15. Therefore, the Commission determined that the most efficient and equitable solution was to treat the settlement account deficit “like a refund shortfall and allocate the shortfall among all net refund recipients in proportion to their final refund positions.” *Id.* The Commission denied rehearing of its decision, concluding that only net refund recipients (net buyers) would be financially affected by the reduction in the total amount of available funds and that this approach was consistent with its decisions about how to allocate other shortfalls. 2012 Order Denying Rehearing (II), 138 FERC ¶61,092, 61,398, 2012 WL 372854, at \*3 (2012).

California argues that FERC should have allocated the \$5 million deficit to both buyers and sellers, rather than just to net buyers. In this respect, we are guided by *Pacific Gas & Electric*, in which the D.C. Circuit concluded that FERC was required to allocate costs across the entire market. 373 F.3d at 1319–22. *Pacific Gas & Electric* involved Cal-PX “winding up” its business affairs. *Id.* at 1317–18. Because CalPX had no funding source during the wind-up period, FERC allocated the costs of Cal-PX’s wind-up and ongoing operations among its customers on the basis of their prior purchases. *Id.* at 1318, 1320. However, the D.C. Circuit held that “FERC’s imposition of additional charges on Cal-PX’s customers allocated on the basis of their prior purchases without reflection of any new jurisdictional services directly violate[d] the filed-rate doctrine or the rule against retroactive

rulemaking.” *Id.* at 1320. Because Cal-PX’s former customers had already paid the filed rate for the past jurisdictional services, any imposition of new costs based on the previous transactions was prohibited. *Id.* The court also held that FERC’s cost allocation methodology was unreasonable because there was no connection between “the size of [a customer’s] account balance” and the “customer’s likely benefit from . . . [Cal-Px’s] wind-up activities.” *Id.* at 1321.

Here, the allocation of the shortfall is not a new charge but is the result of Cal-PX’s accounting error. Nonetheless, the \$5 million was used for operating expenses and, as noted in *Pacific Gas & Electric*, all market participants benefitted from the continued operation of Cal-PX. *Id.* at 1231. Therefore, consistent with the treatment in *Pacific Gas & Electric*, the shortfall should be allocated among all market participants. *See id.*

FERC argues that its decision was consistent with prior proceedings and, specifically, that the shortfall after *Bonneville* was allocated to refund recipients based on their final net refund positions. *See* 2007 Order on Remand, 121 FERC ¶ 61,067, 61,352–53, 2007 WL 3047581, at \*9. However, allocation of the *Bonneville* shortfall is distinguishable because it was a shortfall in refunds. Because governmental entities could not be ordered to pay refunds, there was less money to be allocated to buyers. Here, on the other hand, the shortfall exists in the account from which refunds will be made, but is unrelated to the refund proceeding.

In sum, we agree with the logic employed by the D.C. Circuit and conclude that FERC acted arbitrarily and

capriciously in allocating the refund only to net buyers and not to all market participants.

III

In conclusion, we deny the petition as to the question whether refunds should be netted hourly or across the entire refund period. We grant the petition as to the allocation of the deficit in the Cal-PX settlement clearing account. Each party shall bear its own fees and costs on appeal.

**PETITION GRANTED IN PART; DENIED IN PART.**