No. 10-1124

In the Supreme Court of the United States

TURLOCK IRRIGATION DISTRICT, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission had authority under the Federal Power Act, 16 U.S.C. 791a *et seq.*, to review the filing by the California Independent System Operator Corporation (California ISO), which proposed a revision to the tariff governing the calculation of rates for wholesale electricity sales over the California ISO-controlled grid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 628 F.3d 538. The orders of the Federal Energy Regulatory Commission (Pet. App. 33a-220a, 221a-393a) are reported at 124 F.E.R.C. ¶ 61,271 and 128 F.E.R.C. ¶ 61,103.

JURISDICTION

The judgment of the court of appeals (Pet. App. 410a-411a) was entered on December 10, 2010. The petition for a writ of certiorari was filed on March 10, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, gives the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Proposed rates for the sale or transmission of power within FERC's jurisdiction are subject to FERC review to ensure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To that end, the FPA provides that every "public utility" must file, "[u]nder such rules and regulations as the Commission may prescribe, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. 824d(c). See *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 531-532 (2008). If, after a hearing on its own motion or on complaint, the Commission determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." 16 U.S.C. 824e(a).

The FPA defines a "public utility" as a "person who owns or operates facilities subject to the jurisdiction of the Commission." 16 U.S.C. 824(e). The term "person," in turn, is defined as an "individual or a corporation," 16 U.S.C. 796(4), and the statutory definition of "corporation" specifically excludes "municipalities," see 16 U.S.C. 796(3), which include any "city, county, * * * or other political subdivision or agency of a State," 16 U.S.C. 796(7). Thus, utilities operated by states and localities, although "public" in the sense of governmental, are not "public utilities" under the FPA.

2. "Historically, electric utilities were vertically integrated, owning generation, transmission, and distribution facilities and selling these services as a 'bundled' package to wholesale and retail customers in a limited geographical service area." *Public Util. Dist. No. 1* v. *FERC*, 272 F.3d 607, 610 (D.C. Cir. 2001). In 1996, the Commission adopted Order No. 888, which directed public utilities subject to FERC's jurisdiction to offer nondiscriminatory, open-access transmission service.[*] To implement that directive, the Commission ordered the functional unbundling of wholesale generation and transmission services. See *New York* v. *FERC*, 535 U.S. 1, 11 (2002). "Functional unbundling" requires each public utility to announce separate rates for its wholesale generation, transmission, and ancillary services. See *ibid*. Utilities must take transmission service for their own wholesale sales and purchases under the same general tariff applicable to others, and they must separate their transmission and generation marketing functions and communications. See *ibid*. In its decision in *New York*, this Court upheld Order No. 888.

As one means of compliance with Order No. 888's open-access policies, public utilities were encouraged to participate in Independent System Operators (ISOs). An ISO "would assume operational control—but not

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[*] See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, 61 Fed. Reg. 21,540 (1996) (Order No. 888), clarified, 76 F.E.R.C. ¶¶ 61,009 and 61,347 (1996), order on reh'g, 62 Fed. Reg. 12,274 (1997) (Order No. 888-A), order on reh'g, 62 Fed. Reg. 64,688 (1997) (Order No. 888-B), order on reh'g, 82 F.E.R.C. ¶ 61,046 (1998) (Order No. 888-C), aff'd *sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

ownership—of the transmission facilities owned by its member utilities, thereby separat[ing] operation of the transmission grid and access to it from economic interests in generation." *Midwest ISO Transmission Owners* v. *FERC*, 373 F.3d 1361, 1364 (D.C. Cir. 2004) (Roberts, J.) (internal quotation marks omitted) (brackets in original); see also, *e.g.*, *California Indep. Sys. Operator Corp.* v. *FERC*, 372 F.3d 395, 397 (D.C. Cir. 2004).

In 1996, the State of California chartered the California ISO as a "non-profit organization that took over operation (but not ownership) of many transmission facilities in the state." *Sacramento Mun. Util. Dist.* v. *FERC,* 616 F.3d 520, 523 (D.C. Cir. 2010) (citation omitted) (*Sacramento MUD)*. To that end, the "California ISO maintains a tariff, subject to approval by the Commission, setting forth the terms, conditions, and rates under which it provides electricity service to customers." *Ibid*. The ISO's customers are load-serving entities (utilities), which generally use the transmission service of the California ISO and participate in the ISO-administered wholesale electricity market for the acquisition and delivery of power to their end-use consumers.

The California ISO is also the balancing authority for the ISO-controlled grid, the system of transmission lines and associated facilities it operates. A balancing authority (formerly referred to as a "control area operator") is an entity responsible for maintaining a balance of electric loads and resources in a particular area in order to comply with the reliability standards administered by the North American Electric Reliability Corporation. See *California Indep. Sys. Operator Corp.*, 123 F.E.R.C. ¶ 61,092 (2008).

3. In response to the California energy crisis of 2000, the Commission directed the California ISO to

undertake a comprehensive redesign of its wholesale electricity market in order to improve its efficiency and reliability. See, *e.g.*, *California Indep. Sys. Operator Corp.*, 116 F.E.R.C. ¶ 61,274 (2006); *California Indep. Sys. Operator Corp.*, 105 F.E.R.C. ¶ 61,140, at 61,744 (2003); *California Indep. Sys. Operator Corp.*, 90 F.E.R.C. ¶ 61,006, at 61,013-61,014, order on reh'g, 91 F.E.R.C. ¶ 61,026 (2000); *San Diego Gas & Elec. Co.* v. *Sellers of Energy and Ancillary Servs.*, 97 F.E.R.C. ¶ 61,275, at 62,245 (2001). In 2006, after more than six years of expert analysis, broad stakeholder input from those within and outside California, coordination with state authorities, and Commission guidance, the California ISO submitted its comprehensive Market Redesign Tariff. A key feature of that tariff was setting wholesale energy sales at locational marginal prices, in order to more accurately price energy and ancillary services. Under a locational-marginal-price rate design, energy prices vary by location and time in order to reflect the cost of energy, including the cost of transmission losses and congestion, at each location. *Sacramento MUD*, 616 F.3d at 524-525.

In a series of orders, the Commission approved the ISO's proposed tariff under Section 824d, finding that it was just and reasonable. *California Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274 (2006), order on reh'g, 119 FERC ¶ 61,076, order on reh'g, 120 FERC ¶ 61,023 (2007), order on reh'g, 124 FERC ¶ 61,094 (2008). In *Sacramento MUD*, *supra*, the D.C. Circuit upheld the Commission's analysis and affirmed those orders.

4. Petitioner, a municipal utility in Turlock, California, provides retail electric service to customers in its service territory; it also buys and sells electricity in the California ISO market. Petitioner and the Sacramento

MUD were part of the California ISO's balancing authority until 2005 and 2002, respectively, when they seceded to form their own balancing area authorities. Their electric transmission systems are highly integrated with that of the California ISO.

In the proceeding below, the California ISO proposed a modification to the Market Redesign Tariff under which the existing Turlock and Sacramento balancing authority areas would be treated as a single balancing authority, referred to as an Integrated Balancing Authority Area, for energy imports and exports between the California ISO market and either petitioner or the Sacramento MUD. Under that mechanism, the California ISO's locational marginal price under its Market Redesign Tariff would be calculated on a different basis for petitioner and the Sacramento MUD than for other customers.

As relevant here, petitioner argued that the Commission lacked jurisdiction to approve the California ISO's Balancing Authority proposal. The Commission rejected that argument, reasoning that because it "has jurisdiction over the [California ISO] and its tariff under the FPA, * * * the regulation of proposals concerning [its] tariff," such as the proposed Balancing Authority amendment, "is within that core authority." Pet. App. 231a & n.13. The Commission explained that, when it approved the California ISO's Market Redesign Tariff, "it was allowing the [California ISO] to charge for services the [California ISO] provided under its tariff for use of [California ISO]-controlled facilities." *Id.* at 232a (footnote omitted). "The [Balancing Authority] proposal," the Commission observed, "is similarly limited, only applying to scheduled transactions that impact the [California ISO]-controlled grid." *Ibid.*

In reaching that conclusion, the Commission observed that its "authority includes all aspects of wholesale sales." Pet. App. 232a. The Commission cited *National Association of Regulatory Utility Commissioners* v. *FERC*, 475 F.3d 1277, 1280 (2007), cert. denied, 552 U.S. 1230 (2008) (*NARUC*), in which the D.C. Circuit recognized that the Commission has authority to "regulate the 'relationship between parties with respect to electricity flowing over facilities,'" even if "this regulation may affect the conduct of non-jurisdictional entities"—*i.e.*, entities that would not themselves be subject to FERC's direct regulatory authority. Pet. App. 232a (quoting *NARUC*, 475 F.3d at 1280-1281). "Similarly, here," the Commission concluded, "the [Balancing Authority] Proposal concerns wholesale transactions that flow over facilities, not the regulation of the non-jurisdictional entities themselves." *Ibid.*

5. Petitioner and other municipalities sought review of the Commission's orders, and the court of appeals denied the petitions for review. Pet. App. 1a-32a. The court held that the question of FERC's jurisdiction was controlled by *Sacramento MUD*, which had rejected a challenge to the Commission's jurisdiction to approve the initial phases of the California ISO's Market Redesign, "including its decision to implement locational marginal pricing." *Id.* at 11a. As the court explained, the California ISO charges in question in that case "stemmed solely from [a municipal utility's] use of [California ISO]-controlled facilities and attendant services." *Id.* at 12a. In this case, the court emphasized, the Commission found that the California ISO's Balancing Authority proposal "establishes only the rates, terms and conditions for sales in the [California ISO's] markets," so that "the Commission is only regulating the [ISO's]

actions and the manner in which it calculates rates on the [California ISO]-controlled grid." *Id.* at 12a-13a. The court observed that petitioner's non-jurisdictional rates "are not the object of the Commission's Orders, and the Commission does not purport to interfere impermissibly with the manner in which * * * municipalities calculate their own rates." *Id.* at 13a.

ARGUMENT

In the orders at issue here, FERC reasonably determined that it had jurisdiction to review and approve the California ISO's Balancing Authority amendments to its Market Redesign Tariff. The court of appeals correctly upheld the agency's order, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner argues (Pet. 12-18) that the decision below disregards the limits of federal jurisdiction established by the FPA, in that it permits FERC to regulate municipal rates that are outside of its jurisdiction. That argument rests on an erroneous factual premise.

In the orders at issue here, the Commission did not review petitioner's rates; instead, it reviewed a rate to be charged by the California ISO, an entity indisputably subject to FERC jurisdiction, for services provided under its tariff to load-serving entities for use of California ISO-controlled facilities. Pet. App. 231a-232a. In other words, as the court of appeals explained, "the Commission is only regulating the [California ISO's] actions and the manner in which it calculates rates on the [California ISO]-controlled grid." *Id.* at 12a-13a.

For that reason, petitioner's observation (Pet. 16-17) that 16 U.S.C. 824(f) generally exempts municipalities from FERC regulation of the electric rates they charge,

although correct, is not relevant here. As the court of appeals put it, the "Municipals' rates are not the object of the Commission's Orders, and the Commission does not purport to interfere impermissibly with the manner in which these municipalities calculate their own rates." Pet. App. 13a. The California ISO's Balancing Authority amendment to its Market Redesign Tariff, which the Commission approved here, calculates the locational marginal price that the *California ISO* charges petitioner for the use of the ISO's transmission grid within the ISO's electric market. As the court of appeals properly recognized, the Commission's review of that rate, charged by the FERC-jurisdictional California ISO under a FERC-jurisdictional tariff, is within its FPA authority.

Petitioner asserts (Pet. 15) that the California ISO "is neither a seller nor a purchaser of power," and it suggests that the case involves its own sales of "power through the [California ISO] markets and [California ISO] market participants (some of whom may be FERC-regulated entities) who buy it." While petitioner is correct that the California ISO is not technically "selling power," the ISO is (through its FERC-jurisdictional tariff) establishing the price that sellers and purchasers of wholesale electricity will pay or be paid for both energy and ancillary services in its day-ahead and real-time markets. Like any market participant, petitioner will pay or be paid the California ISO's jurisdictional market price for energy transactions in the ISO market, as determined by the ISO's FERC-jurisdictional tariff. Petitioner cites no authority for the proposition that the payment of jurisdictional rates by a governmental entity in and of itself violates the FPA. Significantly, when petitioner sells power, its sales rate is not regulated by

FERC. Rather, the Commission merely permits the California ISO to take into account the price petitioner sets for energy sales in calculating the locational marginal price for energy transactions on the ISO-controlled grid. See *Transmission Agency* v. *FERC*, 495 F.3d 663, 671-672 (D.C. Cir. 2007).

As explained above, that locational marginal price includes the cost of transmission losses and congestion—in other words, costs that are specifically incurred in transactions on the ISO-controlled grid in connection with "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce," which are at the heart of FERC jurisdiction under the FPA. 16 U.S.C. 824(b)(1). For that reason, the court of appeals was correct when it observed that the California ISO's "[Balancing Authority] Proposal sets rates only for transactions on the [California ISO]-controlled grid." Pet. App. 14a.

2. As the court of appeals acknowledged, the Commission's regulation of the California ISO's tariff may have an indirect effect on petitioner's sale of energy. Pet. App. 13a (observing that "[i]n the highly integrated and complex California energy market, the Commission's regulation of a jurisdictional entity, such as the [California ISO], 'may, of course, impinge as a practical matter on the behavior of non-jurisdictional ones'") (quoting *National Ass'n of Regulatory Util. Comm'rs* v. *FERC*, 475 F.3d 1277, 1280 (D.C. Cir. 2007), cert. denied, 552 U.S. 1230 (2008). Contrary to petitioner's suggestion (Pet. 12-14), however, that indirect effect is not a basis for concluding that the Commission has exceeded its jurisdiction under the FPA.

In *New York* v. *FERC*, 535 U.S. 1 (2002), this Court upheld FERC's Order No. 888, which asserted jurisdic-

tion to comprehensively regulate the unbundled transmission of electricity, even to retail customers otherwise subject to state, not federal, regulation. The Court rejected claims that the order amounted to direct regulation by the Commission of retail transactions. *Id.* at 18-20. Instead, the Court specifically distinguished between the Commission's direct regulation of unbundled transmission, which is subject to FERC's authority under the FPA, and the indirect effect of its regulation on bundled retail transactions, which are subject to state authority. *Id.* at 23. "Because federal authority has been asserted only over unbundled *transmissions*," the Court explained, "New York retains jurisdiction of the ultimate sale of the *energy*" to retail customers. *Ibid.* The same is true here: the Commission is regulating the California ISO's locational marginal price for providing service on its grid and in its organized market, a wholesale sale of electricity. While that regulation may have an indirect effect on petitioner's sale of energy, petitioner's sales are not being subjected to FERC jurisdiction.

3. Finally, petitioner argues (Pet. 18-21) that the decision below conflicts with the Ninth Circuit's decision in *Bonneville Power Administration* v. *FERC*, 422 F.3d 908 (2005), cert. denied, 552 U.S. 1076 (2007) (*Bonneville*). According to petitioner (Pet. 19), the "key holding" of that case is "that FERC's jurisdiction is determined by the identity of the seller, not the subject matter of the transaction." That is incorrect.

The Ninth Circuit's discussion of "the identity of the seller" in *Bonneville* applied only to "FERC's authority to order refunds," not to its general authority to regulate rates. 422 F.3d at 911. The court's holding was that the FPA did not, as it existed at the time, give "FERC

* * * refund authority over wholesale electric energy sales made by governmental entities." *Ibid.* As the court of appeals recognized here, this case does not involve an order that petitioner—or any other governmental entity—pay refunds. Pet. App. 13a. In cases that do involve refunds, the D.C. Circuit has applied the same rule as that adopted by the Ninth Circuit in *Bonneville*. *See ibid.* (noting that the Commission's review of the California ISO's Balancing Authority proposal "does not run afoul of the prohibition in *Bonneville*, adopted by this court in [*Transmission Agency*], that the Commission's refund authority under the FPA is ultimately determined by the identities of the sellers subject to the refund order") (internal quotation marks and citation omitted).

Moreover, as the court below observed, *Bonneville* specifically distinguished "a circumstance," like that present here, "in which [FERC] orders the [California ISO], as opposed to a governmental entity, to 'operate the market in a different fashion or to set a market clearing price for power on a going-forward basis.'" Pet. App. 13a (quoting *Bonneville*, 422 F.3d at 920). Accordingly, there is no reason to believe that the Ninth Circuit would have reached a different result in the circumstances of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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