1996 WL 34483007 (C.A.D.C.) (Appellate Petition, Motion and Filing)
United States Court of Appeals, District of Columbia Circuit.

NEW YORK STATE ELECTRIC & GAS CORPORATION, Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 95-1314.
October 30, 1996.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

Brief for Respondent Federal Energy Regulatory Commission

Susan Tomasky, General Counsel; Jerome M. Feit Solicitor; Edward S. Geldermann Attorney; For Respondent, Federal Energy Regulatory Commission, Washington, D.C. 20426.

ORAL ARGUMENT IS SCHEDULED FOR DECEMBER 2, 1996

I *CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties*

All parties, intervenors, and amici are listed in Petitioners' brief.

B. *Rulings Under Review*

References to the rulings below appear in Petitioners' brief.

C. *Related Cases*

These cases have not been previously before this Court, nor are there any other related cases pending in this Court or in any other Court of which counsel is aware.

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COURT CASES:

*IX *GLOSSARY*

APA	Administrative Procedure Act
Avoided cost	The incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6)
Cogeneration Facility	Equipment used to produce electric energy and forms of useful thermal energy such as heat or steam, used for industrial, commercial, heating, or cooling purposes, through the sequential use of energy. 18 C.F.R. § 292.202 (1993)
FERC	The Federal Energy Regulatory Commission
FPA	Federal Power Act
Lockport	Lockport Energy Associates,L.P.
LRAC	Long-range avoided cost
NYSEG	New York State Electric & Gas Corporation

NYPSC	New York Public Service Commission (also "state commission" or "New York commission")
Preamble	Preamble to FERCs 1980 Rules, *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*. Order No. 69, 45 Fed. Reg. 12,214 (February 25, 1980), 1977-81 FERC Stats. & Regs., Regulations Preambles ¶ 30,128 (1980)
PURPA	The Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601
QF	Qualifying Facility or QF, *i.e.*, a cogeneration facility or a small power production facilities which produces electricity by the use of renewable resources such as biomass, water power and solar energy. 18 C.F.R. § 292.101(b)(1) (1993)
Saranac	Saranac Power Partners, L.P.
SPPP	Small Power Production Facility, eligible for QF status under Section 201 of PURPA. See 16 U.S.C. 796(17)(A) and § 824a-3(j)

*1 *STATEMENT OF THE ISSUES*

1. Whether this Court lacks jurisdiction to review orders of the Federal Energy Regulatory Commission ("Commission" or "FERC") issued solely under the authority of Section 210 of the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3.

2. Whether, assuming that the orders are reviewable by this Court, the Commission acted reasonably in the circumstances in determining not to institute an enforcement action, or to revise its regulations implementing PURPA § 210.

STATUTES AMD REGULATIONS

The applicable statutes and regulations appear in the Statutory Addendum appended to this brief.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction in this case because the orders here sought to be reviewed were issued solely under the ***2** Comtnission's authority of PURPA § 210 and not under the Federal Power Act (FPA), 16 U.S.C. § 791 *et seq.*

STATEMENT OF THE CASE

I. *Nature of the Case, Course of Proceedings, and Disposition Below*

This appeal involves the question of the reviewability, *vel non*, of orders issued by the Commission under PURPA § 210, and, if reviewable, whether the'Commission's determination not to take any enforcement action or to revise its rules in a manner that would modify the rates for NYSEG's preexisting contracts with two qualifying facilities ("QFs") is lawful under PURPA § 210.

This case commenced with a petition filed by the New York State Electric & Gas Corporation ("NYSEG") seeking a Commission declaration that NYSEG's long-term fixed-price contracts, executed in 1990, with two QFs, Lockport Energy Associates, L.P. ("Lockport") and the Saranac Power Partners, L.P. ("Saranac"), violate PURPA § 210 because the rate specified in each contract allegedly exceeds NYSEG's current, updated forecast of its avoided cost over the remaining life of each contract. Among other things, NYSEG's petition requested that the Commission exercise its enforcement authority under PURPA § 210(h)(2)(A), 16 U.S.C. § 824a-3(h)(2)(A) to direct the New York commission, which had imposed the rates challenged here, to relieve NYSEG of its contractual obligations to pay rates which exceed its current and projected avoided-cost.

The Commission denied NYSEG's petition for a declaratory order, explaining that NYSEG's contracts with Lockport and ***3** Saranac did not violate § 210 or regulations thereunder because, in the Commission's view, § 210 of PURPA allows state commissions to establish rates for purchases from QFs to be based on estimates of a utility's avoided costs calculated at the time a contractual obligation is incurred, even though the rate so calculated may subsequently differ (may be higher or lower) from the utility's actual avoided costs during the life of the contract. The Commission also found that it was too late for NYSEG to seek to undo these contracts since it had failed to raise a timely challenge to the rates at the time NYSEG signed them in 1990. These orders are: *New York State Electric & Gas Corp.*, "Order Denying Petition For A Declaratory Order," FERC Docket No. EL95-28-000, 71 FERC ¶ 61,027 (Apr. 12, 1995) (JA 531-557); and *New York State Electric & Gas Corp.*, "Order Denying Reconsideration," FERC Docket No. EL95-28-001, 72 FERC ¶ 61,067 (July 19, 1995) (JA 590-595).

II. STATEMENT OF THE FACTS

A. *Statutory And Regulatory Background*

1. ***The jurisdictional framework:*** Under PURPA § 210(a), FERC must, after consultation with representatives of federal and state regulatory agencies having ratemaking authority for electrical utilities, prescribe (and from time to time thereafter revise) rules necessary to encourage cogeneration and small power production, which also require utilities to offer to purchase power from, and sell power to, qualifying cogeneration and small power production facilities ("QFs").

***4** Within one year after FERC promulgates such rules (or revised rules) under § 210(a), state regulatory commissions must implement these rules (or revised rules) for each electric utility for which it has ratemaking authority. 16 U.S.C. § 824A-3(f)(1). PURPA § 210(g) provides for judicial review of state commission proceedings conducted for the purpose of implementing "any requirement of a rule under subsection (a)" generally in state court. 16 U.S.C. § 824a-3(g).

PURPA § 210(h) provides for enforcement of any rules prescribed by the Commission pursuant to subsection (a), and of the state commissions' obligation to implement such rules under subsection (f)(1). The Commission may enforce the requirements of subsections (a) and (f)(1) of PURPA § 210 against QFs, electric utilities and state commissions only in a federal district court. *See* 16 U.S.C. § 824a-3(h)(2)(A); *Industrial Coaenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995). For purposes of such enforcement actions, FERC rules prescribed under § 210(a) -- and the requirement of § 210(f)(1) that state commissions implement such rules -- shall be treated as rules "enforceable" under the Federal Power Act. PURPA § 210(h) further provides that an electric utility or QF may petition the FERC to enforce the implementation of § 210(f) against state commissions, and that if the Commission does not initiate an such an enforcement action within 60 days, the utility or QF may commence its own enforcement action in federal district court.

5** **2.** ***The Requirements of Full "Avoided Cost": Section 210(b) of PURPA requires that the "rules prescribed under subsection (a)" shall ensure that the rates for PURPA-mandated utility-purchases from QFs are "just and reasonable and in the public interest," and shall not discriminate against QFs, nor "provide for a rate which exceeds the incremental cost to the

electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b). Under § 210(f)(1), the "states play the primary role in calculating avoided cost and in overseeing the contractual relationship between QFs and utilities operating under the regulations promulgated by the Commission." *Independent Energy Producers Ass'n v. California Public Utilities Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994).

In Order No. 69, [1] the Commission adopted regulations to encourage cogeneration and small power production, as PURPA § 210(a) requires. These regulations, like PURPA § 210 itself, require electric utilities to purchase capacity and energy made available by a QF. 18 C.F.R. § 292.303(a) (1994). In Section 292.304, the PURPA regulations also provide that while a rate for purchases will be deemed "just and reasonable" and "not discriminat[ory] against [QFs]" if it equals avoided costs, 18 C.F.R. § 292.304(b)(2), "nothing in this subpart requires any electric utility to pay more than avoided costs for purchases." ***6** 18 C.F.R. § 292.304(a)-(2). This regulation goes on to provide that the rates for the sale of QF power may, at the QF's option, be based on the utility's avoided cost calculated either "at the time the obligation is incurred," 18 C.F.R. § 292.304 (d)(2)(ii), or "at the time of delivery." *Id*. at § 292.304(d)(2)(I). [2]

B. ***The Facts Of This Case***

1. On February 14, 1995, NYSEG filed a petition with the Commission seeking to be relieved from two long-term power purchase agreements it had executed in 1990 with two QFs, Saranac and Lockport, pursuant to the mandatory purchase requirements of PURPA § 210(a). [3]

In its petition, NYSEG complained that the New York State Public Service Commission ("state commission" or "New York commission") required NYSEG to enter into those agreements with Lockport and Saranac at fixed prices based on the New York ***7** Commission's estimates, made during the late 1980s, of each QF's "long-run avoided cost." JA 18-20. NYSEG alleged that some years later it had retained two independent analysts, and that each had made new long-range projections of avoided costs and predicted that NYSEG's payments to Lockport and Saranac under the QF agreements would substantially exceed NYSEG's avoided costs throughout the terms of those agreements. JA 23. Based on these projections, NYSEG asserted that the rates violated PURPA. JA 32-36.

It accordingly requested the Commission to issue an order declaring that the rates established in the Lockport and Saranac contracts exceed NYSEG's current and projected avoided cost. JA 15. NYSEG also requested that the FERC take action itself under Section 210(b) of PURPA [4] or, under Section 210(h) of PURPA, [5] to require the New York commission to relieve NYSEG of its obligation to make payments in excess of its avoided cost. *Id.* In addition, NYSEG asked the Commission to make whatever revision or waiver of its PURPA rules that might be necessary to grant the requested relief. JA 16, 51.

Lockport and Saranac intervened in this proceeding in opposition. JA 90, 148. They maintained that Section 292.304 of the Commission's regulations, 18 C.F.R. § 292.304, expressly ***8** authorizes avoided cost to be calculated as of the date the contractual obligation was incurred, and asserted that this regulation could not be altered without a full notice-and-comment rulemaking. (JA 110-111; 211.)

2.a. On April 12, 1995, the Commission issued the first order under review, denying NYSEG's petition for a declaratory order and other relief. JA 531.

In this order, the Commission explained (71 FERC at p. 61,116; JA 550) that Sections 292.304 (b)(5) and (d)(2) of its regulations, 18 C.F.R. §§ 292.304 (b)(5) and (d)(2), specifically allow QF contract rates to be based on avoided costs calculated at the time the obligation is incurred. In the Commission's view, it was "far too late in the Commission's implementation of PTJRPA

for NYSEG to argue, for the first time, that these regulations have legal and policy flaws requiring that we abrogate contracts entered into under these regulations." 71 FERC at p. 61,116; JA 552 (emphasis omitted).

The Commission also reasoned that since NYSEG never alleged that the New York commission had imposed rates that exceeded avoided cost at the time Saranac and Lockport executed their contracts with NYSEG, [6] and did not appeal the NYPSC orders ***9** mandating the QF agreements in state court on the grounds that the contracts exposed NYSEG to the possibility of contract rates that could exceed avoided cost of the terms of the contracts, there was no reason to disturb these agreements. *See* 71 FERC at p. 61,117; JA 554. The Commission stated that this approach was consistent with its settled practice of "relying on the states to make factual determinations of utilities' avoided costs," *id.* at p. 61,116; JA 552, limiting the Commission's role "to ensuring [that] the process used to calculate the per unit charge (*i.e.*, implementation) accords with [PURPA] and our regulations." *Id.* (Citation omitted.)

The Commission also rejected NYSEG's assertion that the Commission's ruling in *CL&P* [7] should serve as precedent for relieving NYSEG from liability to pay the rates established by the Saranac and Lockport agreements because, in *CL&P*, the Commission had concluded that a state-mandated purchase rate which may have exceeded the utility's avoided cost "*at the time the rates were imposed*" would violate, and therefore, be ***10** preempted by, PURPA. 71 FERC at 61,117; JA 553 (emphasis in original). "Here, in contrast, the contracts at issue reflect State implementation consistent with PURPA and our regulations." 71 FERC at p. 61,117, JA 554.

The Commission further held that NYSEG was not similarly situated to the petitioners in *CL&P* in preserving its rights under PURPA. Observing that CL&P's contract rate might be changed if the state commission finds that such rate actually exceeds CL&P's avoided cost, the Commission stated that "this result was appropriate . . . because [CL&P] has been challenging this rate since at least 1987, when the Connecticut Department of Public Utility Control ordered the utility to buy power at the disputed rates." 71 FERC at 61,117; JA 554, *quoting CL&P*, 70 FERC at 61., 029. On the other hand, the Commission explained, NYSEG chose not to appeal the New York commission orders mandating the Lockport and Saranac agreements, *id.*, and concluded that NYSEG was not entitled to the same relief as CL&P since "the appropriate time in which to challenge a state-imposed rate for a QF purchase is up to the time the purchase contract is signed, not years into a contract." *Id.*; JA 554-555 (citation omitted).

b. On May 11, 1995, NYSEG filed a pleading styled a "request for rehearing" of the Commission's April 12 order. JA 559-581. On July 19, 1995, the Commission issued an order which found that "[e]ach of NYSEG's arguments and requests for relief is grounded on the lawfulness of the Lockport and Saranac purchase rates under, and our authority granted by, Section 210 ***11** of PURPA." 72 FERC at p. 61,340; JA 592. The Commission further explained that, in light of this Court's decision in *Industrial Cogenerators v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995), rehearing under the Federal Power Act does not "lie, either on a mandatory or a discretionary basis, in cases that involve solely Section 210 issues." *Id.* The Commission's order thus treated NYSEG's request as though NYSEG had sought reconsideration of the April 12 order, *id.*, and proceeded to deny reconsideration, finding that NYSEG had largely restated arguments made in its original petition. The Commission noted further that:

> the remedy appropriate to this situation is to allow utilities to buy out or buy down such contracts, not to invalidate them. If utilities are prudent [in doing so] ... we have indicated that we will permit the recovery in wholesale rates of a pro rata share of the buy-out or buy-down costs.

72 FERC at p. 61,341; JA 594, *citing West Penn Power Company*, 71 FERC ¶ 61,153 at p. 61,497 (1995).

This appeal followed.

12** ***SUMMARY OF ARGUMENT

I.

Since the orders at issue here did not arise under the FPA, this Court does not possess the statutory authority to review them. PDRPA § 210 did not amend the FPA, and the legislative history of PURPA § 210 confirms that Congress did not intend Commission orders issued solely under PURPA § 210 to be reviewed directly by the courts of appeals.

PURPA § 210 issues are generally not intertwined with orders issued under the FPA. Although PURPA § 201, which amends § 3 of the FPA, prescribes the statutory criteria for eligibility for QF status, the Commission rarely confronts PURPA § 201 "QF certification" issues in the same proceeding as PURPA § 210 "rate" or "service implementation" issues.

PURPA § 210(h) borrows only the enforcement powers of the FPA for purposes of enabling the Commission to commence actions in federal district court. It thus does not grant authority to adjudicate in any manner comparable to the Commission's authority under §§ 31(d) and 206 of the FPA, 16 U.S.C. §§ 823, 824e.

Even if the Court were to find that it may exercise jurisdiction over the instant orders pursuant to FPA § 313(b), it should decline to do so under the doctrine of *Industrial Cogenerators v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995). As in *Industrial Cogenerators*, the Commission's orders here are tied to particular facts subject to PURPA § 210(h)'s enforcement scheme. Review of the Commission's orders at this time would fragment and ***13** disrupt that scheme. And the orders are not reviewable since they are legally ineffectual "apart from [their] ability to persuade" a court in a subsequent enforcement action. *Industrial Cogenerators*, 47 F.3d at 1235. The orders are also unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985), since they represent an agency determination not to undertake its own enforcement action.

II.

In any event, the Commission reasonably determined not to take enforcement actions challenging against the QF contracts at issue here. PURPA § 210 does not specify how avoided cost is to be determined. The legislative history of PURPA § 210 demonstrates that a moment-by-moment calculation of avoided cost was not what Congress had in mind. The Commission's determination that avoided cost may be determined by an estimate of future avoided cost calculated at the time a long-term contractual commitment is made by a QF is a reasonable construction of PURPA §§ 210(a) and (b), and therefore is entitled to *Chevron* step-two deference.

The Commission also correctly determined that it is too late for NYSEG to challenge Saranac's and Lockport's contracts. NYSEG could have and should have timely appealed the NYPSC's order requiring NYSEG to enter into these QF contracts pursuant to PURPA § 210(g). Those orders were ripe for review as soon as they were issued, because NYSEG was aware at the time that the New York commission had denied NYSEG's request for avoided-cost ***14** tracking and periodic reconciliation of the QFs' rates, and thus it had been immediately exposed to allegedly unlawful future financial risk by the New York commission's orders.

NYSEG has not shown that Commission regulations 292.304 (b)(5) and (d)(2), 18 C.F.R. §§ 292.304(b)(5) and (d)(2), are invalid because they were adopted in 1980 based on the Commission's expectation that overestimations of avoided cost would be balanced out by underestimations. Future QF contracts executed during periods of low market prices will reflect underestimations of avoided cost when the market turns upward.

NYSEG may not challenge the validity of 18 C.F.R. §§ 292.304 (b) (5) and (d) (2) because it failed to do so during the *AEP/API* judicial reviews of the Commission's avoided cost regulations back in 1982-83. In any event, even if NYSEG were permitted to challenge these regulations at the time they were applied, the very latest NYSEG could have challenged them was during 1990, when the New York commission applied them, *i.e.*, by ordering NYSEG to enter to the QF contracts at issue here. Since the time for contesting the validity of these rules has long since passed, the Commission correctly determined that it is far too late for NYSEG to challenge them in this proceeding.

Nor does NYSEG have any standing to challenge the Commission's denial of its request to amend its regulations to permit the relief requested here. Even if the Commission had instituted the formal rulemaking procedures prescribed by PURPA § 210(a) necessary to amend 18 C.F.R. §§ 292.304 (b)(5) and ***15** (d)(2), any ensuing amendment of these could only have operated prospectively. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988).

NYSEG's claim that the QF contracts will inexorably lead to non-recoverable stranded costs due to the advent of open-access electric transmission service mandated by Commission Order No. 888 is jurisdictionally barred because it was not raised on rehearing. In addition, Order No. 888 itself is currently pending rehearing by the Commission, and therefore NYSEG's claims based on Order No. 888 are unripe for judicial review. In any event, the Commission acknowledged in the orders challenged here that utilities are encouraged to buy out or buy down power purchase contracts (including those with Qfs) and that utilities which do so would be permitted to recover in wholesale rates a pro rata share of the buy-out or buy-down costs.

16** ***ARGUMENT

I. THE PETITIONS FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION

The petitions for review of the Commission's orders are not directly reviewable by this Court because it does not possess statutory authority to review the orders pursuant to Section 313(b) of the Federal Power Act, and, because appellate review of the orders by this Court would unduly disrupt the enforcement process prescribed by Section 210(h), as interpreted by this Court in *Industrial Cogenerators v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995). We have briefed these questions in the companion case.[8] We hereinafter restate these arguments as relevant to the particular facts and issues of this case.

A. ***The Commission's Orders Are Not Directly Reviewable In A Court of Appeals Because Section 313(b) of the Federal Power Act Does Not Confer Review Jurisdiction Over Commission Orders Issued Solely Under PURPA § 210***

Petitioner (joined by Lockport and Saranac on this jurisdictional issue) claim (Br. 17-19) that this Court has statutory authorization under Section 313(b) of the FPA to directly review the Commission's orders challenged here. This claim is flawed. Section 313(b) does not confer jurisdiction over the subject orders because they were issued solely under the authority of PURPA § 210, a provision with its own judicial review and enforcement scheme that is entirely separate from the FPA. Nor is there any genuine issue in this case "arising under" ***17** the FPA which might serve as a predicate for FPA § 313(b) review jurisdiction of the § 210 issue here.

1. ***Congress Did Not Intend That 5210 PURPA Orders Be Reviewable In The Courts Of Appeals Under 5313 fb) Of The FPA.***

It is settled doctrine that "Congress 'may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had.' " *Rochester v. Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979), *quoting*, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). *See also* 5 U.S.C. § 703; *FCC v. ITT World Communications Inc.*, 466 U.S. 463, 468 (1984); *Internat'1 Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). "If Congress makes no specific choice of this type in the statute pursuant to which the agency action is taken, or in another statute applicable to it . . . then an aggrieved person may get 'nonstatutory review' . . . in federal district court pursuant to the general 'federal question' jurisdiction of that court. *Five Flags Pipe, Line Co. v. Department of Transportation*, 854 F.2d 1438, 1439 (D.C. Cir, 1988); *see also Robbins v. Reagan*, 780 F.2d 37, 42-43 (D.C. Cir. 1985); *Internat'1 Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). ("[U]nless a statute provides otherwise, persons seeking review of agency action go first to district ***18** court rather than to a court of appeals").[9] These principles are fully applicable here.

FPA § 313(b), in express terms, limits this Court's power of review to those Commission orders which have been issued in "a proceeding under this Act," *i.e.*, the Federal Power Act, and, as the Commission acknowledged, *see* 72 FERC at p. 61,340; JA 592; *id*. at p. 61,339 n.3; JA 590 n.3, the Commission's *NYSEG* orders were not issued in a proceeding under the FPA. Rather, as the Commission found (*id.*), these cases involved solely PURPA § 210 issues. Since PURPA § 210 itself contains no provision for direct court of appeals review, judicial review of the instant orders must lie, if anywhere, in the federal district courts.

2. ***No Argument Made By Petitioner Warrants A Different Conclusion.***

Nevertheless, petitioners make a variety of arguments seeking to establish some FPA nexus to the Commission's orders challenged here. As we now explain, none of these claims has merit.

a. Initially, NYSEG asserts that PURPA and the FPA are both part of the same chapter of the U.S. Code, and FPA § 313(b) provides for review of FERC proceedings "under this chapter." (Br. 20). This claim has no substance because this Court's jurisdiction cannot rest on a view that the orders under review ***19** were issued in a "proceeding under the Federal Power Act," based simply on PURPA § 210's appearance in Title 16 of the U.S. Code. Even though Section 210 of PURPA has been codified along with the Federal Power Act's provisions in the same chapter of Title 16 of the United States Code, *see* 16 U.S.C. § 824a-3, the "Historical Note" to 16 U.S.C. § 824a-3 makes clear that PURPA § 210 "was enacted as part of the Public Utility Regulatory Policies Act of 1978, and *not* as part of the Federal Power Act which generally comprises this chapter." (Emphasis added.)

For this reason, 16 U.S.C § 8251(b), which purports to represent the codified language of FPA § 313(b), cannot be applied literally. While FPA § 313(b), as it appears in the Statutes at Large (*see* 49 Stat. 860), vests jurisdiction in this Court over Commission orders issued in a proceeding "*under this Act*," there is a conflict between the scope of FPA § 313(b) in the Statutes at Large, and the scope of 16 U.S.C. § 8251(b), the codified version of FPA § 313, which extends this Court' review authority to orders issued in a "proceeding *under this chapter*." (Emphasis added.) Where such conflict in language arises, the Statutes at Large provisions of the statute are considered to be "legal evidence of laws," *i.e.*, the official enactment, *see* 1 U.S.C. § 112, and must prevail over inconsistent language in the United States Code, which is considered unofficial, and only *prima facie* evidence of the enactment. *See* 1 U.S.C. § 204(a); ***20** *Five Flags Pipe Line Co. v. Department of Transportation*, 854 P.2d 1438, 1440-41 (D.C. Cir. 1988); *see also Industrial Cogenerators*, 47 F.3d at 1234.

b. Petitioner (Pet Br. 20) next maintains that FPA § 313(b) must apply to the orders challenged here since rules prescribed under PURPA § 210(a) are treated as rules enforceable under the FPA for purposes of enforcement under PURPA § 210(h). *See* 16 U.S.C. § 824a-3 at (h)(1), (h)(2)(A). This claim is also devoid of merit. If, from the outset, Congress had regarded the Commission's PURPA § 210 rules and orders to have been issued in proceedings arising under the Federal Power Act, it would have been entirely redundant for it to specify, as it did in PURPA § 210(h)(1), that "*for purposes of enforcement* any rule prescribed under subsection (a)" shall be treated as a "rule under the Federal Power Act." 16 U.S.C. § 824a-3(h)(1) (emphasis added); *see also* PURPA § 210 (h)(2)(A) (requirement that states implement PURPA § 210(a) rules "shall be treated as enforceable under the [FPA]"). That the Congress instead included this authority only in PURPA § 210(h) --a provision that deals exclusively with enforcement authority -- is clear evidence that it considered PURPA § 210 and the Federal Power Act to be distinct and independent statutory frameworks, and meant for the FPA to apply only when and how Congress specified -- namely in an *enforcement* context.

The legislative history of PURPA fully supports this reading of the statute. PURPA § 210(h) proposed to vest authority to enforce § 210 solely in the "Administrator" of the "Federal ***21** Energy Administration," not the Federal Power Commission (FERC's predecessor). Section 522(c) of that bill provided, as relevant here:

> For purposes of enforcement of this section, a rule under this section shall be treated as a rule under the Federal Power Act; except that, for such purposes, any reference in sections 309, 314, 315, and 316 of the Federal Power Act to the Commission shall be deemed a reference to the Administrator.

House Document No. 95-138, 95th Cong., 2d Sess. (April 29, 1977). [10] Significantly, this bill did not include a proviso deeming any reference to the Commission in *section 313* of the Federal Power Act to be a reference to the Administrator, and thus any orders, whether rules or declaratory orders or otherwise, issued by the Administrator pursuant to its Section 522 enforcement authority would not have been reviewable in the court of appeals. In short, it is clear that the language employed by Congress was simply intended to confer upon the Commission enforcement powers that would not otherwise be available since PURPA § 210 did not amend the FPA so as to trigger judicial review rights under § 313(b). But it is equally clear from the foregoing legislative history that Congress did ***22** not intend the PIIRPA § 210 enforcement authority to trigger judicial review rights under FPA § 313(b). [11]

c. Petitioner next contends (Br. 23) that it had been FERC's view for many years that PIIRPA § 210(h) (1) incorporated the FPA's procedure for judicial review, and that both the Supreme Court and this Court have, in the past, treated the FPA judicial review provisions as though they apply to PURPA §'210. (NYSEG Br. 21, *citing* *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd*, *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983)).

Correctly viewed, however, there is no incompatibility between that view and our present position. This is so because the Commission's 1980 rulemakings implementing PURPA § 210 and PURPA § 201 occurred almost simultaneously as part of a coordinated package, and because PURPA § 201 expressly amended ***23** the FPA by adding new Sections 3(17) through 3(22), 16 U.S.C. §§ 796 (17)-(22), to that Act. [12]

To be sure, the jurisdictional issue was never raised when this Court in *American Electric Power* reviewed all legal challenges to both the PURPA § 210 and PURPA § 201 rules. But this is of no legal consequence because judicial review by the court of appeals was appropriate under the settled doctrine that "[w]hen an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the courts of appeals, the entire dec6ision is reviewable exclusively in the appellate court." *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986); *see Shell Oil. Inc. v. FERC*, 47 F.3d 1186, 1194-95 (D.C. Cir. 1995); *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1482 (D.C. Cir. 1994); *Media Access Project v. FCC*, 883 F.2d 1063, 1066-69 (D.C. Cir. 1989). As the Commission recently explained, the only reason this Court possessed jurisdiction in *American Electric Power* to review the Commission's original PURPA § 210 rules was the coexistence of challenges to its PURPA § 201 rules in the same case. *See* Order No. 550-A, FERC Stats. & Regs. [Regulations Preambles] ¶ 30,969 ***24** at p. 30,837 (1993). [13] Indeed, the Supreme Court recognized the basic separateness of the two statutory schemes, by pointing out that the "substantial evidence" standard of review of FPA § 313(b) was not applicable to its review of the PURPA § 210 regulations. *See API*, 461 U.S. at 412 n.7.

In contrast, the Commission's *NYSEG* orders did not involve a joint resolution of issues arising under both the FPA and PURPA § 210. On the contrary, in the *NYSEG* orders, the Commission concluded that only PURPA § 210 issues were involved and accordingly dealt with the entire case on that basis. 72 FERC at p. 61,340 ("[e]ach of NYSEG's arguments and requests for relief is grounded on the lawfulness of the Lockport and Saranac purchase rates . . . under our authority granted by Section 210 of PURPA"). As the sole federal agency charged with administration of PURPA § 210, the Commission's reasonable interpretation of its jurisdiction over the *NYSEG* petition for a ***25** declaratory order (see *id.*) -- is entitled to deference, *see Village of Bergen v. FERC*, 33 F.3d 1385, 1388-89 (D.C. Cir. 1994); *Oklahoma Natural Gas Co, v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994).

d. Citing the Fifth Circuit's decision in *Ecee, Inc. v. FERC*, 611 F.2d 554 (5th Cir. 1980), NYSEG further contends, (Br. 19-20) that "where two statutes are interrelated as completely as the FPA and PURPA, FERC orders will often be based on its authority under both statutes," and, accordingly, "[i]t is a mistake to separate these closely related statutes for purposes of judicial review." In support, petitioner asserts (id.) that, in the preamble to its 1980 PURPA regulations, the Commission cited *Ecee* as support for the proposition that its rules under PURPA are reviewable pursuant to FPA § 313.

In *Ecee*, however, *all* of the statutory provisions analyzed expressly provided for direct review of the Commission's NGPA orders by the courts of appeals, *see* 611 F.2d at 559-561, and the only question was whether the Fifth Circuit should imply a *rehearing requirement* to the rulemaking order at issue. Here, by contrast, no provision of PURPA § 210 prescribes direct review by a court of appeals. In any event, in 1980, the Commission relied on *Ecee* in the context of a coordinated rulemaking package which implemented PURPA § 201 (which expressly amended the FPA) as well as PURPA § 210 (which did not amend the FPA), and, under those circumstances, direct review by a court of appeals was proper.

***26** e. NYSEG next asserts that a cogenerator or a small power production facility may not even avail itself of the rights of a QF under PURPA § 210 unless and until it obtains from the Commission certification of its status as QF under section 3 of the Federal Power Act, as amended by PURPA § 201.

There can, of course, be no dispute that this Court possesses jurisdiction to directly review Commission orders disposing of QF certification issues (arising under §§ 3(17) and 3(18) of the Federal Power Act) -- in fact, the Commission has already recognized that such cases are reviewable in the courts of appeals, *See* Order No. 550-A, FERC Stats. & Regs. [Regulations Preambles] ¶ 30,969 at p. 30,837, *citing Puerto Rico Electric Power Authority v. FERC*, 848 F.2d 243 (D.C. Cir. 1988). [14] But the mere fact that cogenerators and small power ***27** production facilities must first qualify under Sections 3(17) and 3 (18) of the Federal Power Act before they may enjoy the benefits of PURPA does not aid NYSEG's case here. If the PURPA and FPA issues arise in the same Commission proceeding, both will be reviewable by this Court as in the *American Electric Power* context. But the Commission's experience has shown that it is highly unusual for a Commission proceeding to involve QF certification issues alongside PURPA § 210 rate or service implementation issues because the Commission has exclusive authority to administer the QF certification program, and demonstrating eligibility for QF status is normally an early, if not initial, step in the PURPA process. Indeed, the Commission certified the Lockport and Saranac facilities at issue here as QFs, much earlier in proceedings completely separate from the § 210 proceeding challenged here. *See Empire Energy-Niagara Cogeneration. Inc.*, 45 FERC ¶ 61,241 (1988) (Lockport); *Saranac Energy Co., Inc.*, 57 FERC ¶ 62,211 (1991). On the other hand, avoided cost issues arise separately in the later implementation process to determine the case-specific rate for the QF. *See Independent Energy Producers*, 36 F.2d at 856.

f. Nor is there any merit to petitioner's claim (Br. 19-20) that PURPA § 210 issues are “inextricably intertwined” with Federal Power Act issues because the Commission's regulations implementing PURPA § 210(e) exempt QFs from certain regulatory ***28** responsibilities under the FPA, and because NYSEG in this case (*see* Br. 11) asked the Commission to revoke Lockport's and Saranac's exemptions from the FPA in order to permit the Commission to modify the QF contracts pursuant to FPA § 206. [15] There is no such “inextricable intertwin[ing]” since the Commission, by rule, has already determined to grant all eligible QFs an exemption from these FPA requirements, *see* 18 C.F.R. § 292.601(c)(1995), and thus does not administer exemptions on an individual QF basis. And the Commission declined to exercise any rulemaking authority under PURPA § 210(e) that would affect Lockport's and Saranac's exemption, [16] and therefore, the contracts are not even subject to modification under FPA § 206. Thus, at most, this issue arises solely under PURPA § 210(e) -- the validity of the Commission's refusal to modify its rules granting all QFs an exemption from the FPA -- which is reviewable, if at all, only in federal district court. *See* pages 17-18, *supra*.

g. Next, citing *General Electric Uranium Management Corp. v. Department of Energy*, 764 F.2d 826 (D.C.Cir. 1985) (“*G.E. Uranium*”), NYSEG urges (Br. 25) that where it is unclear whether ***29** a court of appeals jurisdiction or federal district court possesses jurisdiction over a claim, the ambiguity must be resolved in favor of the court of appeals. This claim fails at the outset since there is no such *ambiguity* in PURPA § 210. On the contrary, PURPA § 210 is precise on the subject of judicial review. It creates five opportunities to secure a judicial resolution of PURPA § 210-related disputes, two in state court (*see* PURPA §§ 210(g)(1) and (2)), and three in federal district court (*See* PURPA §§ 210(h)(1), (h)(2)(A), and (h)(2)(B)). Unlike the statute construed in *G.E. Uranium*, which contained three explicit court of appeals review provisions and no express federal district court review provisions, nothing in PURPA § 210 provides for direct court of appeals review.

h. Saranac and Lockport (but not NYSEG) argue (Br. 21-24) that the Commission's enforcement authority under PURPA § 210(h)(1) is no different than its civil money penalty assessment authority under Section 31 of the FPA, 16 U.S.C. § 823b, and its remedial refund authority under Sections 206 of the Federal Power Act, 16 U.S.C. § 824e, where, according to these QFs, "[j]udicial review in the court of appeals of such orders lies long before the commencement of enforcement in the narrow sense that this term is employed under the FPA." Br. 22.

It is undisputed, however, that Congress in FPA §§ 206 and 31 has specifically granted to the Commission the authority to conduct adjudicative administrative proceedings and to issue compliance orders in such proceedings, independent of enforcement ***30** actions in federal district court. Indeed, Congress in FPA § 206, expressly empowered the Commission to hold hearings, to determine the lawfulness of public utility rates, and to "fix the same by order." 16 U.S.C. § 824e(a). Likewise, in FPA § 31(d)(2), Congress explicitly granted the Commission authority to conduct hearings and to assess civil money penalties for violations of the Commission's hydropower regulations or licensing orders. But, unlike sections 31 and 206 of the FPA, nothing in PDRPA § 210 expressly authorizes the Commission to adjudicate disputes arising from contracts between QFs and electric utilities, [17] or to enforce PURPA § 210(a) rules by any means other than commencing an action in federal district court pursuant to PURPA § 210(h)(2)(A). [18] On the contrary, PURPA § 210(h)(2)(A) specifically denies to the Commission the type of authority conferred by FPA §§ 31(d) and 206, by providing that:

No enforcement action may be brought by the Commission under this section other than --
(i) an action against the State regulatory authority . . . for failure to comply with the requirements of subsection (f) or

(ii) an action under paragraph (1).

***31** 16 U.S.C. § 824a-3(h)(2)(A). In all such PURPA § 210(h) enforcement actions, federal district court jurisdiction is exclusive. *See Industrial Cogenerators,* 47 F.3d at 1234, *citing* PURPA § 210(h)(1), § 210(h) (2) (A).

In sum, this Court lacks the requisite statutory authorization to review Commission orders issued here solely under PURPA § 210, see *Five Flags, supra,* 854 F.2d at 1440-42, and therefore should dismiss this petition for lack of jurisdiction.

B. *In Any Event. Under The Rationale Of Industrial Cogenerators. The Orders Here At Issue Are Not Reviewabie In This Court*

In *Industrial Cogenerators v. FERC,* 47 F.3d at 1234-36, this Court explained that section 210 of PURPA creates an enforcement scheme over which federal district courts have exclusive jurisdiction, which precludes appellate review of PURPA § 210(h) declaratory orders. While the *Industrial Cogenerators* court expressly reserved the question whether review in a court of appeals would lie as to actions "not as closely releated to the enforcement scheme," such as a "rule of general application" that is not tied to a particular set of facts potentially subject to the statutory enforcement scheme, *see* 47 F.3d at 1235, this case does not fall into any such potential exception.

1. In both *Industrial Cogenerators* and *NYSEG*, the Commission set forth a legal interpretation of how PURPA and its regulations implementing PURPA regulations should be applied in discrete factual contexts without purporting to bind state ***32** commissions to its views or findings in either case. In *NYSEG*, the Commission interpreted PURPA and its regulations to permit QFs to opt for rates in long-term contracts that are based on accurate assessments of the purchasing utility's avoided cost at the time of contracting, even though that utility's avoided cost may subsequently decline during the term of the contract. The Commission made no findings as to the validity of NYSEG's experts' avoided-cost projections, and left undisturbed the factual determinations that the state commission had made concerning NYSEG's avoided cost. *See* JA 552. Similarly, in *Industrial Cogenerators*, the Commission declared that various aspects of the Florida state commission's regulations implementing PURPA may be inconsistent with the Commission's PURPA regulations, without purporting to review or resolve the factual

matters necessary to determine whether the Florida commission actually violated PURPA. *See Industrial Cogenerators v. Florida Public Serv. Comm.*, 43 FERC ¶ 61,545 (1988), at pp. 62,349, 62,351, 62,352, and 62,354. [19]

Moreover, like the orders in *Industrial Cogenerators*, but "unlike the declaratory order of a court," the Commission's *NYSEG* order does not "fix the rights of the parties;" rather, it merely "advised the parties of the Commission's position." *Industrial Cogenerators*, 47 F.3d at 1235. Indeed, "[w]hile knowledge of the FERC's position might affect the conduct of the parties, the ***33** Declaratory Order is legally ineffectual apart from its ability to persuade [or to command the deference of] a court that might later have been called upon to interpret the Act and the agency's regulations in a private enforcement action". *Industrial Cogenerators*, 47 F.3d at 1235.

2. Nor can it be said that the Commission's *NYSEG* order is any less connected to facts potentially subject to PURPA's enforcement scheme than was the case in *Industrial Cogenerators* The Commission's orders in *NYSEG* are inextricably intertwined with a "particular set of facts potentially subject to the statutory enforcement scheme," because NYSEG has made factual allegations and submitted documentary evidence attempting to show that each of two outside experts had conducted an in-depth analysis of NYSEG's cost structure and projected that the rates specified in its contracts with Lockport and Saranac would exceed NYSEG's avoided cost over the remainder of the contract periods by a least $ 2 billion. *See* JA 22-24, 1116-1524. Based on this evidence, NYSEG has specifically requested the Commission to initiate an enforcement action in federal district court under PURPA § 210(h)(2)(A). *See* JA 6, 41, 51. As in *Industrial Cogenerators*, the Commission, in the process of declining to initiate the requested enforcement action, disclosed its non-binding "pre-litigation" statement of position on the legal issues, but took no position on potential factual issues, such as ***34** the accuracy of NYSEG's experts' avoided cost projections. [20] In short, the orders here -- as the Commission's orders in *Industrial CogeneratQrs* -- are not controlling "[ejxcept that a private party bringing an enforcement action might seek to introduce the Declaratory Order in order to show that the FERC supported its position." *Industrial Cogenerators*, 47 F.3d at 1234-35. [21]

Once the Commission denied NYSEG's request to initiate an enforcement action, NYSEG became free to proceed to federal district court with its own complaint against the state commission enforce its views of PURPA's requirements. [22] And in ***35** such circumstances as the court in *Industrial Cogenerators* explained, "the substance of the position that the FERC took in the declaratory order would necessarily be at issue in an enforcement action, whether FERC or a private party is the plaintiff." *Id.* Accordingly, were this Court to assert jurisdiction over the declaratory order here, it "would as a practical matter usurp the role of the district court as the court of first instance, contrary to the enforcement scheme adopted by the Congress in 210(h) of the PURPA." *Id*. at 1235.

3. NYSEG seeks to avoid the reach of *Industrial Cogenerators* (NYSEG Br. 24) by urging that it "is not seeking enforcement against the [state commission] under Section ***36** 210(h)(2)(B)," but rather is seeking only modification of the agreements by the Commission. If that is NYSEG's true objective, then it is clear that it has sought this relief in the wrong forum; individual contract modification requests are clearly a PURPA implementation matter, [23] not a PURPA rulemaking matter, and, under PURPA § 210(f)(1), implementation is the sole responsibility of state commissions. *See Independent Energy Producers Ass'n v. California Public Utilities Comm'n*, 36 F.3d at 856. [24]

***37 II. IN ANY EVENT, THE COMMISSION REASONABLY CONCLUDED THAT PURPA § 210 DOES NOT PROHIBIT THE QF CONTRACT RATES CHALLENGED HERE**

In the orders under challenge, the Commission denied NYSEG's petition for relief from its contracts with Saranac and Lockport because its "regulations specifically allow rates for the purchase of QF energy or capacity pursuant to a contract over a specified term to be based on avoided costs calculated, at the option of the QF, at the time of delivery or at the time the obligation is incurred." 71 FERC at 61,115-16; JA 550, *citing* 18 C.F.R. § 292.304(d)(2) (1994). This was so because "the regulations make clear that, if rates are based on avoided cost estimates at the time the obligation is incurred, the rates are consistent with PURPA's

requirements even if they differ from avoided costs at the time of delivery." *Id.*; JA 550-51, *citing* 18 C.F.R. § 292.304(b)(5). The Commission found no reason to disturb these QF contracts because the manner in which the rates were established by the NYPSC was not prohibited by its PURPA regulations, and because NYSEG, in any event, had failed to challenge the rates in these contracts in a timely manner. These rulings were correct.

A. ***The Commission's Regulations At Issue Here Constitute A Reasonable Interpretation Of § 210 Of PURPA And Are Thus Entitled To Chevron Deference***

NYSEG argues (Br. 32-33) that the Commission's rules violate the clear text of § 210 and therefore the Commission's interpretation must be overturned. We urge to the contrary that because Congress has not directly spoken to the issue of how ***38** avoided-costs must be calculated in the case of firm supply-contracts. And, as explained below, because the Commission's interpretation of the meaning of the term "incremental cost of alternative energy," (*i.e.*, "avoided cost") is a reasonable one, *Chevron* step-2 deference is applicable. [25]

1. In the orders in this case (*see* 71 FERC at p. 61,118, JA 555-56), the Commission explained that firm supply contracts providing QFs with rate certainty have been necessary to encourage cogeneration and small power production. As the Commission further recognized (71 FERC at p. 61,118 and n.49), it was Congress itself which in 1978 observed that QFs were "different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities *vis a vis* the sale of power to the utility and whose risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable." *Id.*; JA 555 n.49, *citing* Joint Explanatory Statement of the Conference Committee, Conf. Rep. No. 1750, 95th Cong., 2d Sess. 89, 1978 U.S. Code Cong. & Ad. News ("USSCAN") at p. 7797 (the "1978 PURPA Conf. Rept"). Quoting from its 1980 preamble, the Commission further explained here that "in order to be able to evaluate the financial feasibility of a cogeneration or small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential ***39** investraent before construction of a facility." 71 FERC at p. 61,118 n.50, JA 556 n.50, *quoting* FERC Stats. & Regs., [Regulations Preambles 1977-1981] at 30,868 (the "1980 PURPA preamble"). In short, QFs must be able to "rely on their power purchase agreements to obtain project financing, and . . . [the Commission has] recognized the importance of contractual reliance for this purpose." 71 FERC at p. 61,118; JA 555-56.

At the same time, the Commission recognized its obligation "to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs." 71 FERC at p. 61,116; JA 551, *quoting* the 1980 PURPA preamble at p. 30,880. It further acknowledged that "if the avoided cost of energy at the time it is delivered is less than the price provided in the contract, a utility may be required to pay a rate for purchases that would subsidize the QF at the expense of the utility's other ratepayers." *Id.* Considering all of the variables, however, the Commission adhered to a fixed rate avoided cost concept because "in other cases, the required rate will turn out to be lower than the avoided costs at the time of purchase," and "in the long run, [these] 'over-estimations' and 'underes titrations' will balance out." *Id.*, *quoting* 1980 PURPA preamble at p. 30,880.

2. This balanced interpretation was in no way in contrary to the statutory scheme. To be sure, Congress set ah outer limit of "avoided cost" on the rate which the Commission may authorize ***40** states to impose on QF sales to utilities. See PURPA § 210(d), 16 U.S.C. 1 § 824a-3(b). But NYSEG concedes (Br. 28 n.36), as it must, that PURPA § 210 does not purport to limit the Commission's discretion concerning the methodology for ascertaining avoided cost in the case of firm QF power supply contracts. Indeed, as NYSEG also recognizes (*id.*), "PURPA § 210(b) does not require a "moment-by-moment change in purchase rates to reflect actual or known incremental costs." To the contrary, as NYSEG further concedes (*id.*), "the time frame within which avoided cost may be calculated, for purposes of the statutory cap, is left open by the statute."

The legislative history of PURPA § 210 supports what NYSEG has already conceded in its brief here. In the report accompanying the bill which was ultimately enacted as PURPA § 210, the House and Senate Conferees made clear that, in establishing avoided-cost rules, the Commission was not required to tie its avoided-cost rate methodology only to calculations of avoided-cost which exist at the time of delivery. To the contrary, the conferees rejected such unyielding requirement, stating

that, "[i]n interpreting the term 'incremental cost of alternative energy' the conferees expect that the Commission and the States may look beyond the cost of alternative sources which are instantaneously available to the utility." 1978 PURPA Conf. Rept., USSCAN at pp. 7832-33. As Congress went on to explain:

> The conferees expect that the Commission, in judging whether the electric power supplied by the cogenerator or small power producer will replace future power which the utility ***41** would otherwise have to generate itself either through existing capacity or additions to capacity or purchase from other sources, will take into account the reliability of the power supplied by the cogenerator or small power producer by reason of any legally enforceable obligation of such cogenerator or small power producer to supply firm power to the utility.

Id. at 7833.

Given these congressional pronouncements, it is clear that Congress has not directly spoken to any single avoided-cost rate methodology that the Commission must, through rulemaking, establish for firm power supply contracts between QFs, as sellers, and utilities, as purchasers, but has recognized that no rigid mathematical definition of "avoided cost" can be said to exist. Against this background, it is clear that the Commission regulations, 18 C.F.R. § 292.304 (d)(2)(ii) and 18 C.F.R. § 292.304(b)(5) -- which collectively permit QF rates for long-term contracts to be based on an estimate of avoided cost calculated at the time the obligation is incurred even though the rates may exceed avoided cost at the time of delivery -- reflects a "permissible interpretation of the statute" and is, therefore, entitled to deference. *Chevron*, 467 U.S. at 865.

B. ***No Claim Asserted By Petitioner Warrants A Different Result***

To warrant rejection of the Commission's interpretation of the statutory text, NYSEG cannot simply assert that its own interpretation is "reasonable;" rather, it must show that the Commission's interpretation is "unreasonable." This it has failed to do.

***42** 1. NYSEG claims (Br. 27-30) that a fixed-rate for a firm supply contract established under the Commission's avoided-cost rules is only an "estimate" of avoided cost, and therefore does not satisfy what NYSEG claims is PURPA's § 210(b) standard requiring actual avoided-cost. Initially, we point out that, as NYSEG has admitted (JA 26, 54), it had no reason to doubt the accuracy of the state commission's estimate of NYSEG's long-run avoided-cost ("LRAC") in 1988 when it determined the rates for the Saranac and Lockport agreements.

Beyond this, NYSEG's challenge to the PURPA regulations' reliance on estimates of avoided cost has no merit because it ignores the Commission's sound justification for relying on estimates. In the proceedings which culminated in the rules authorizing the estimates challenged here, the Commission stated:

> In the case of future purchases pursuant to a legally enforceable obligation, the utility's avoided energy or capacity costs may be based on the costs of production facilities which are not built and for which the only available cost data are estimates. When the [QF] actually supplies electricity, the utility's avoided costs may deviate from these estimated figures. The Commission believes that these potential deviations are a normal result of risk allocation resulting from contractual commitments or other legal obligations, and believes that they must be permitted if the Commission is to fulfill its mandate to encourage cogeneration and small power production.

"Small Power Production and Cogeneration--Rates and Exemptions," [1977-1981 Proposed Regulations] FERC Stats. & Regs. ¶ 32,039 at p. 32,441, 44 Fed. Reg. 61,190, 61,196 (Oct. 24, 1979) (copy in Addendum B).

***43** In light of these principles, which had already been in effect for fifteen years when NYSEG filed its petition, the Commission properly concluded that "[i]t is now *far* too late in the Commission's implementation of PURPA for NYSEG to argue, for the first time, that these particular regulations have legal and policy flaws requiring that we abrogate contracts entered into under these regulations." 71 FERC at p. 61,116; JA 552 (emphasis in original). Indeed, if the Commission "were to grant the relief requested by NYSEG and allow the reopening of QF contracts that had not been challenged at the time of their execution, financeability of such projects would be severely hampered" -- a result at odds with the legislative directive to encourage QF development. *Id.* at p. 61,118; JA 556.

Next, NYSEG (*see* Br. 42-44) challenges the Commission's determination (71 FERC at 61,117; JA 555) that the appropriate time to challenge the state commission's orders was when the contracts were signed, "not years into the contract." According to NYSEG (*see* Br. 11), it could not have challenged the rates any earlier because, it "had no evidence that the rates provided under the agreements would in fact exceed NYSEG's avoided cost over the terms of those agreements." JA 26.

This was insufficient cause to excuse NYSEG from challenging the rates back in 1990 because NYSEG was well aware that it had been exposed to the risk of over-estimated avoided cost as early as 1988. In its petition to the Commission, NYSEG admitted (JA 19-20) that, during the proceedings before the New York ***44** commission, it had opposed the terms of the Lockport and Saranac agreements, "primarily on the basis that the proposed terms of the Lockport [and Saranac] agreement[s] did not sufficiently protect NYSEG's ratepayers in the event that the 1988 LRAC [long-run avoided cost] estimates . . . proved to be inaccurate." NYSEG further conceded (JA 21) that, during the state proceeding, it had vigorously advocated certain cost-tracking, rate reconciliation, and other security measures to minimize the risk of overpayments in the event that the NYPSC's long-range avoided-cost estimates turned out to be too high. Despite these efforts, the state commission rejected its cost-tracking and periodic rate reconciliation proposal, opting instead a 7.4% discount from its long-range cost estimates to compensate NYSEG for the risk that its estimate might prove to be too high. *See* JA 21-22, 553 and n. 42.

In these circumstances, NYSEG's failure to seek judicial review at that time because it could not then have demonstrated that the state commission's estimates were erroneous is a claim (JA 47) that rings hollow. Regardless of whether NYSEG could have demonstrated that the state commission's estimates were faulty when made, it nevertheless would have been able to challenge those aspects of the NYPSC's order specifically rejecting NYSEG's cost-tracking proposal because allegedly unlawful administrative orders satisfy the "aggrievement" or "injury in fact" elements of standing for purposes of judicial review when they cause an immediate exposure to future financial ***45** risk. *See Great Lakes Transmission Co. v. FERC,* 984 F.2d 426, 430-431 (D.C. Cir. 1993); *ANR Pipeline Co. v. FERC,* 771 F.2d 507, 515-16 (D.C. Cir. 1985). Accordingly, this ground alone is sufficient to reject NYSEG's merits challenge here.

3. NYSEG nonetheless asserts (Br. 29) that it is entitled to relief from the Saranac and Lockport contracts because its outside experts stand ready to demonstrate that the rates specified in those contracts "are now and will be for the life of the contracts vastly in excess of NYSEG's avoided cost." But, under the Commission's regulations, the relevant inquiry is not what will happen to NYSEG's avoided-cost during the terms of the QF contracts at issue here; rather, the dispositive issue is whether the New York commission accurately forecasted NYSEG's long-run avoided cost at the time the estimate was made, and NYSEG (JA 26, 54) has conceded that it had no evidence that the New York commission's 1988 estimates for NYSEG were inaccurate at that time.

4. NYSEG next contends (Br. 33-34) that the Commission's regulations are invalid because they were predicated on an assumption that overestimations and underestimations of NYSEG's long-range avoided-cost "would balance out over the life of the Agreements," and that is now unlikely to occur in light of the availability of open access transmission effectuated by Commission Order No. 888. But the Commission's PURPA rules were not predicated on the assumption that overestimations and underestimations would balance out over the life of an *individual* ***46** contract. Rather, the Commission's 1980 preamble explained that even if in one case avoided-cost turns out to be less than the rate specified in a QF contract, "*in other cases* the required rate will turn out to be lower than the avoided cost at the time of purchase." 1980 Preamble at 30,880.

In short, even if NYSEG is correct that the New York commission overestimated the avoided-cost for the remaining duration of the Lockport and Saranac agreements, this does not undermine the Commission's assumption that "in the long run, overestimations and under-estimations of avoided costs will balance out," As NYSEG points out (Br. 9), "by 1992, the [New York commission] . . . revised its estimates of avoided costs downward by 40 percent vis-a-vis the 1988 estimates employed in the Agreements." This decline, and any further drop in avoided cost after 1992, will only serve to lower the rates for new QF contracts. It is these latter QF contracts which will serve to "under-estimate" avoided cost when electricity production costs turn upwards, and tend to balance out overestimations made in other, higher-priced QF contracts.

5. NYSEG (Br. 40-42) also takes issue with the Commission's statement that it is too late for NYSEG to challenge its regulations at issue in this case, asserting that it may challenge the application of an allegedly invalid rule against it at any time. This claim is likewise unfounded.

The Commission's avoided cost regulations, of which 18 C.F.R. §.292.304(d)(2)(ii) is a part, were the subject of a major ***47** legal challenge, not only in this Court, *see AEP*, 675 F.2d 1126 (D.C. Cir. 1982), but also by the Supreme Court, which sustained them in *API*, 461 U.S. 402 (1983). The Commission's rationale for allowing avoided cost to be established at the time of contracting, as an alternative to the time of delivery, was clearly articulated in its 1980 preambles to the avoided cost regulations. *See* Order No. 69, [1977-1981 Regulations Preambles] FERC Stats. & Regs. ¶ 30,128 at pp. 30,880-81. NYSEG could have, and should have, raised its objection to this particular regulation during the *AEP/API* cases. Where, as here, NYSEG has advanced no "valid excuse for failing to mount a timely challenge to the initial regulation, considerations of finality and exhaustion dictate that the litigant should be bound by the regulation." *Edison Electric Institute v. ICC*, 969 F.2d 1221, 1230 (D.C. Cir. 1992). *See also Raton Gas Transmission Corp. v. FERC*, 852 F.2d 612, 615 (D.C. Cir. 1988) ("[strict enforcement of the [statutory] time limit is necessary to preserve finality in agency decisionmaking and to protect justifiable reliance on agency rules"). [26]

***48** NYSEG (Br. 41) seeks to avoid the timeliness problem, however, by pointing to that part of its petition for a declaratory order (JA 58), which requested FERC to "take any action to revise or waive rules necessary in order to grant the relief requested," and claiming that "an agency decision refusing to modify its rules in the face of changing circumstances is reviewable." (Br. 41, *citing Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979).) NYSEG lacks standing to challenge the Commission's failure to revise 18 C.F.R. § 292.304(d)(2) because even if the Commission had commenced the procedures specified in PURPA § 210(a) to revise that regulation, any such revision could operate *prospectively* only, *see, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208-09 (1988) "[C] ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"); *see also Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1500 and n.25 (1994). Thus, a Commission revision of its PURPA regulations cannot provide the retroactive relief from preexisting QF contracts sought here. *See Luian v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). [27]

***49** 6. NYSEG finally complains that the alleged above-avoided cost contracts at issue here will add directly to costs potentially stranded by Commission Order No. 888, [28] which requires all utilities that own or control transmission facilities to file tariffs that offer to provide nondiscriminatory open access transmission service. Assuming that FPA § 313(b) applies to this case, this claim is jurisdictionally barred, *see Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1525-26 (D.C. Cir. 1994), because NYSEG failed to raise it on rehearing to the Commission. Moreover, as of this writing, Order No. 888 is pending rehearing by the Commission, and thus NYSEG's concerns about the potential effects of Order No. 888 are unripe for judicial review. In any event, as the Commission pointed out in *this* proceeding, 72 FERC at p. 61,341; JA 594, utilities are encouraged to buy out or buy down "existing power purchase agreements, whether or not with QFs," and the Commission "will permit the recovery in wholesale rates of a pro rata share of the buy-out or buy-down costs." *Id.*

50** ***CONCLUSION

For the foregoing reasons, the petitions for review should be dismissed for lack of jurisdiction or, in the alternative, denied on the merits.

Appendix not available.

Footnotes

* Authorities upon which we chiefly rely are marked with an asterisk.

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1 Docket No. RM79-55, *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, FERC Stats. & Regs. [1977-1981 Regulations Preambles] ¶ 30,128 (1980).

2 The Commission's avoided cost rules were initially vacated by this Court in *American Electric Power Service Corp. v. FERC*, 675 F.2d 1126 (D.C. Cir. 1982) ("*AEP*"), but that decision was reversed by the Supreme Court in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983) ("API").

3 Lockport owns and operated a 199.4 MW cogeneration facility in Lockport, New York. Lockport's agreement with NYSEG obligates NYSEG to purchase the net electric output of the facility for a term of fifteen years that commenced upon the facility's commercial operation in October 1992. Saranac owns and operates a 240 MW cogeneration facility in Plattsburgh, New York. Saranac's agreement with NYSEG requires it to purchase the net electric output of Saranac's facility for a term of fifteen years that commenced upon the facility's commercial operation in June 1994. The Commission previously certified both facilities as QFs. *See Empire Energy-Niagara Cogeneration, Inc.*, 45 FERC ¶ 61,241 (1988); *Saranac Energy Company, Inc.*, 57 FERC ¶ 62,211 (1991).

4 16 U.S.C. § 824a-3(b) (1988). PURPA § 210(b) sets limits on the rates which the Commission may, by rule, prescribe for QF sales pursuant to PURPA § 210(a). It does not authorize the Commission to exercise oversight powers over state commission implementation of FERC's PURPA § 210(a) rules.

5 16 U.S.C. § 824a-3(h) (1988).

6 To the contrary, as the Commission explained (71 FERC at p. 61,116; JA 552), NYSEG specifically acknowledged that "[i]n ordering NYSEG to accept the terms of the Lockport and Saranac agreements, the State Commission was carrying out its statutory mandate under Section 210(f) of PURPA to implement the Commission's rules . . . ." The Commission went on to find that, at the time the Saranac and Lockport agreements were approved, the contract rates were actually *below* NYSEG's long run avoided costs because the state commission had granted NYSEG a discount in its QF purchase rates to compensate for the risk that the long term costs might eventually exceed NYSEG's actual avoided cost during the life of the contracts. *Id.* at p. 61,117 and n.42; JA 553 and n.42.

7 *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 (1995); *reconsideration denied, Connecticut Light & Power Co.*, 71 FERC ¶ 61,034 (1995), *appeal pending sub nom., Niagara Mohawk Power Corp. v. FERC*, D.C. Cir. No. 95-1222. *Niagara Mohawk* is a companion case scheduled for oral argument on the same day as this case, before the same panel assigned to this case.

8 *Niagara Mohawk Power Corp. v. FERC*, D.C. Cir. No. 95-1222, *et al.* (Respondent's Brief filed Sept. 9, 1996).

9 *See also* 5 U.S.C. § 703 ("[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute . . ."); *FCC v. ITT World Communications Inc.*, 466 U.S. 463, 468 (1984); *Internat'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994).

10 This language was inserted verbatim into Section 522(c) of H.R. 6831, 95th Cong., 1st Sess., introduced in the House on May 2, 1977, as well as into Section 522(c) of S. 1469, 95th Cong, 1st Sess., introduced in the Senate on May 5, 1977. It survived in the House bill until it was superseded by Section 546(c) of H.R. 8444, passed by the House on August 5, 1977, which substituted the Commission for the Administrator, and which simply provided that "*[f]or the purposes of enforcement*, a rule under this section shall be treated as a rule under the Federal Power Act." (Emphasis added.)

11 Thus, by enacting PURPA § 210(h), 16 U.S.C. § 824a-3(h), Congress specifically authorized the Commission to institute actions to enforce the § 210 (a) and § 210 (f) (1) requirements in federal district court where jurisdiction is exclusive under FPA § 317 -- under authority borrowed from FPA § 314. Antecedent to or simultaneous with such actions, the Commission may also subpoena witnesses and documents for investigation under authority borrowed from FPA § 315 (incorporating the subpoena and investigative authority of FPA § 307); and the Commission may subject willful violators of PURPA's §§ 210(a) and (f)(1) requirements to criminal fines and penalties, under authority derived from FpA § 316. But all of these enforcement tools were established by Congress to enhance the Commission's enforcement authority under Section 210 of PURPA, not to convert PURPA § 210 proceedings into FPA proceedings for the purposes of authorizing direct court-of-appeals review.

12 The Commission's initial PURPA § 201 rules, adopted in Order No. 70 became effective on March 13, 1980, while the PURPA § 210 rules (Order No. 69) became effective a week later, on March 20, 1980. The Commission addressed requests for rehearing of *both* rulemaking orders in a single rehearing order. *See Small Power Production; Order Granting in Part and Denying in Part Rehearing of Orders Nos. 69 and 70, and Amending Regulations*, FERC Stats. & Regs, ¶ 30,160 [1977-1981 Regulations Preambles] at p. 31,107 n.2 (1980).

13 NYSEG also asserts (Br. 18 n.17) that PURPA § 210 declaratory orders are reviewable pursuant to Section 313(b) of the FPA merely because the FERC cited the FPA, in addition to PURPA, as statutory authority for its 1980 rulemaking promulgating its § 210(a) rules. *See also* 18 C.F.R. Subpart C. The short answer to this assertion is that, in a rulemaking, "[i]f an agency invokes a statutory provision that actually does not confer authority on the agency, it would follow that the agency does not have that authority." *Media Access Project v. FCC*, 883 F.2d at 1067. Although the Commission has never explained why it cited the FPA as authority for 18 C.F.R. Subpart C, it may have reflected the Commission's simultaneous adoption of rules implementing both sections 3(17) and 3(18) of the FPA and section 210 of PURPA in a single rulemaking order. *See* Order On Rehearing Of Order Nos. 69 and 70, FERC Stats. & Regs. [1977-1980 Regulations Preambles] ¶ 30,160 at p. 31,116 (1980).

14 NYSEG claims that in three other cases, *Gulf Stages Utilities v. FERC*, 872 F.2d 487 (D.C. Cir. 1989) ("*Gulf States*"); *Florida Power, & Light Co. v. FERC*, 711 F.2d 219 (D.C. Cir. 1983) ("*FP&L*"), and *Occidental Chemical Corp. v. FERC*, 869 F.2d 127 (2d Cir. 1989) ("*Occidental*"). the courts of appeals have directly reviewed Commission orders issued under PURPA § 210. But those cases reviewed only FERC QF certification determinations under FPA § 3 (as amended by PURPA § 201); and *Occidental* was dismissed for lack of jurisdiction without any review of the Commission's § 210 order on the merits.

NYSEG (Br. 21) also cites this Court's decision in *Greensboro Lumber Co. v. FERC*, 825 F.2d 518 (D.C. Cir. 1987) as an instance in which this Court addressed a challenge to a FERC order issued under PURPA § 210. But no party in *Greensboro* challenged the court's jurisdictional basis. In these circumstances, *Greensboro* cannot be considered precedent for establishing this Court's jurisdiction under FPA § 313(b) over FERC orders issued pursuant to PURPA § 210. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279-80 (1936) *quoting Webster v. Fall*, 266 U.S. 507, 511 (1926); *see also Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1993).

15 NYSEG did not seek this relief in its petition for a declaratory order. It only supported the New York commission on this relief in a reply pleading (JA 437-38), after the New York commission, in its intervention before FERC (*see* JA 376-377 and n.1), encouraged FERC to take that approach.

16 Under PURPA § 210(e), 16 U.S.C. § 824a-3(e), exemptions from FPA regulation and revisions or revocations of such exemptions, are administered through the Commission's rulemaking authority.

17 *See Industrial Cogenerators*, 47 F.3d at 1236 (PURPA § 210's "scheme involves the promulgation of regulations by the FERC, and their subsequent enforcement exclusively in federal district court").

18 *See also West Penn Power Co.*, 71 FERC ¶ 61,153 at p. 61,495 (1995) ("*West Penn*") ("whether the particular facts applicable to an individual QF necessitate [contract] modifications is a matter for the states to determine. The Commission does not intend to adjudicate the specific provisions of individual QF contracts").

19 A copy of the Commission's declaratory order in *Industrial Cogenerators* is contained in Addendum B to this brief,

20 As the Court noted in *Industrial Cogenerators*, a federal district court is "the superior forum" for deciding such factual issues. 47 F.3d at 1235.

21 Accordingly, there is no basis to the claim (Br. 25) that since the Commission has adhered to the view espoused here in later Commission cases, it is a "rule of general application" having binding effect. This claim is flawed because parties in these later cases remain free to test the substance of the Commission's views in a private enforcement action commenced under PDRPA § 210(h)(2)(B), where the policy views would amount simply to FERC's "pre-litigation statement of position." *See Industrial Cogenerators*, 47 F.3d at 1235.

In any event, even if this Court were to regard the Commission's order as judicially reviewable because it amounted to a "rule of general application," jurisdiction to review the Commission's order would still lie, as an original matter, only in federal district courts under 28 U.S.C. § 1331, and not in the court of appeals pursuant to section 313(b) of the FPA, because the "rule" was issued in a "proceeding" conducted solely under PURPA § 210, and no statute authorizes the court of appeals to review rules issued solely under PURPA § 210. *See* pages 17-18, *supra*.

22 NYSEG cites *Freehold Cogeneration Assocs., L.P. v. N.J. Bd. of Regul. Commissioners*, 44 F.3d 1178 (3rd Cir. 1995) and *Smith Cogeneration Mgmt. v. Corp. Comm'n. Of Okla.*, 863 P.2d 1227 (Okla. 1993) for the proposition that relief against a state commission under PURPA § 210(h)(2)(B) is no longer available after a QF contract has become final. (*See* Br. 10) At most, however, these cases stand for the proposition that states, *on their own*, may not reopen QF contracts for the purpose of implementing *state utility regulation* from which QFs are exempt under PURPA § 210(e). Indeed, the Third Circuit carefully pointed out that *Freehold* did not involve a "challenge to the validity of state action implementing the rules adopted by FERC pursuant to section 210(a)." 44 F.3d at 1184-85. Likewise, *Smith Cogen* did not purport to address a state commission's duty to comply with a federal district court's order

issued pursuant to PURPA § 210(h)(2)(B) directing a state commission to comply with PURPA § 210's requirements. Rather, the *Smith Cogen* court simply applied the regulations challenged here (which went unchallenged in *Smith Cogen*) to declare that a QF contract "reopener" clause of the type advocated by NYSEG here was preempted by PURPA. 863 P.2d at 1241. Therefore, contrary to NYSEG's suggestion (Br. 10), these cases do not suggest that a federal district court loses PURPA § 210(h)(2)(b) jurisdiction over the state commission implementation requirements of PURPA § 210(f)(1) after a QF contract becomes final.

23 As the Commission explained in the *West Penn*

whether the particular facts applicable to an individual QF necessitate modifications of other terms and conditions of the QF's contract with the purchasing utility is a matter for the States to determine. This Commission does not intend to adjudicate the specific provisions of individual QF contracts.

71 FERC ¶ 61,153 at p. 61,495.

24 Wholly apart from the statutory jurisdictional defects affecting NYSEG's petition for review discussed *supra*, the petition should be dismissed because it invites the Court to second-guess the Commission's determination not to grant NYSEG's request (*see* JA 6, 41, 51) that FERC institute an enforcement action pursuant to PURPA § 210(h) (2) (A). Such non-enforcement matters are presumed to be committed to an agency's unreviewable discretion. *See Heckler v. Chaney*, 470 U.S. 821, 832-36 (1985); *Safe Energy Coalition v. USNRC*, 866 F.2d 1473, 1476 (D.C. Cir. 1989). But even if NYSEG were to overcome this presumption of unreviewability, original jurisdiction would exclusively in federal district court, not the court of appeals. *Five Flags*, 854 F.2d at 1439.

25 *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843-45 (1984).

26 Even if this Court, in reliance upon *Functional Music, Inc. v. FCC*, 274 F.2d 543 (D.C. Cir. 1958) and its progeny, were to find that NYSEG should be permitted to challenge the regulation outside the statutory limitations period, NYSEG should not be allowed to challenge the regulation after the appeal period for challenging its *application* to NYSEG has already expired. In this case, the regulation was applied to NYSEG back in 1990 when the New York commission required NYSEG to enter into these contracts. Thus, the very *latest* NYSEG could have challenged 18 C.F.R. § 292.304(d)(2)(ii) would have been before the appeal period for challenging the Saranac and Lockport agreements expired.

27 The same reasoning would apply to reject NYSEG's claim (Br. 38) that it has somehow been harmed by the Commission's failure to revoke Saranac's and Lockport's exemption from FPA rate regulation and to modify their rates pursuant to FPA § 206, 16 U.S.C. § 824e. Any Commission determination to revoke its rules granting QFs an exemption from FPA § 206 would itself be subject to the rulemaking procedures set forth in PURPA § 210(e), 16 U.S.C. § 824a-3, and thus any new rule revoking QF exemptions could apply only prospectively. *Bowen*, 488 U.S. at 208-09.

28 "Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities and Transmitting Utilities," Order No. 888, [1991-1996 Regulations Preambles] FERC Stats. ¶ Regs. ¶ 31,036 (Apr.24, 1996), 61 Fed. Reg. 21540 (May 10, 1996).

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