Maria C. Severson, Esq., SBN 173967
AGUIRRE & SEVERSON, LLP
501 West Broadway, Suite 1050
San Diego, CA 92101
Telephone: (619) 876-5364
Facsimile: (619) 876-5368

Attorneys for Petitioner

Per Gov. Code § 6103, Petitioner is a public entity and is exempt from filing fees

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By M. Lille R
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

IMPERIAL IRRIGATION DISTRICT, Petitioner, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant.	Case No. RG16842589 **PETITION FOR WRIT OF MANDATE TO ENFORCE PUBLIC RECORDS ACT AND COMPLAINT FOR DECLARATORY RELIEF**

1. Petitioner Imperial Irrigation (IID) ("Petitioner"), pursuant to Code of Civil Procedure § 1085, Government Code § 6258 (the California Public Records Act ("CPRA")), and Article I Section 3 of the California Constitution alleges, as follows:

I.

PARTIES

2. Petitioner Imperial Irrigation District (IID) entered the power industry in 1936. Today, the IID serves electricity to more than 145,000 customers in Imperial County, and parts of Riverside and San Diego counties in the state of California. Located in Imperial County, the IID is the largest irrigation district in the nation. The IID does business with the California Independent System Operator (CAISO) from IID's operating headquarters located at 333 East Barioni Boulevard, Imperial, CA 92251.

3. Michael J. Aguirre, a resident of the State of California and legal counsel for IID, requested documents pursuant to the California Public Records Act and Art. 3 § 1 of the California State Constitution from the University of California, Berkeley, one of the educational institutions operated as part of the Regents of the University of California,

4. Respondent Regents of the University of California (University) is the governing body of the University of California, including UC Berkeley and UC Los Angeles (UCLA), amongst others. Its headquarters is located in the County of Alameda.

II.

JURISDICTION AND VENUE

5. Jurisdiction is proper in the Superior Court for the County of Alameda pursuant to Government Code § 6268, California Code of Civil Procedure § 1085, and Article VI § 10 of the Constitution of the State of California.

6. Venue is proper in the County of Alameda pursuant to California Code of Civil Procedure Section 393 because the acts and omissions complained of herein occurred in part in the County of Alameda, and all or some of the public records are located there in the University's possession, custody or control.

III.

GENERAL ALLEGATIONS

7. This action is brought under the California Public Records Act and Article I § 3 of the California State Constitution to obtain public records from the University. The records show how three University lawyers -- Ethan Elkind, Dan Farber and Ann Carlson -- shaped their legal opinions issued to the California Legislature and the public in such a way as to understate the risk to climate change laws if the California Independent System Operator (CAISO) is expanded to include 14 western states. They so acted to help CAISO executives push through the CAISO expansion plan, whose plan organizers are under the control of corporations with carbon-based assets.

8. The California Legislature directed CAISO to be organized as a nonprofit corporation to independently manage California's largest electricity grid. Under California law,

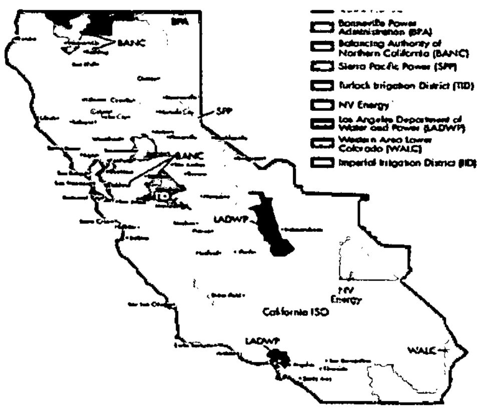
the governor appoints CAISO's five-member board, and the electric utilities surrender to CAISO control over their electric transmission lines. CAISO is supposed to provide for open access to CAISO's transmission service. CAISO is also supposed to operate a day-ahead and hour-ahead wholesale electricity market. In doing so, CAISO is to have no stake in the electricity transactions.

9. California has a number of important clean energy and environmental policies that affect its electricity sector and impact CAISO operations. The most relevant policies for purposes of our analysis include:

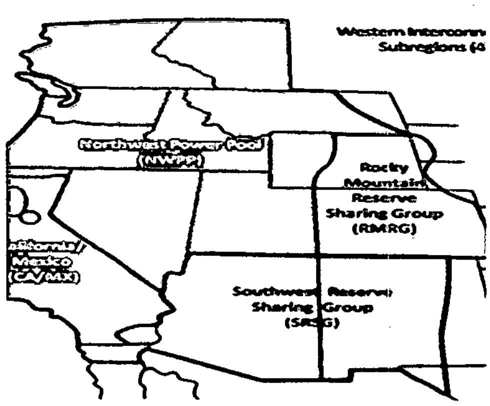
- The cap-and-trade program that the state's Air Resources Board has adopted as part of its implementation of AB 32, the Global Warming Solutions Act. All electricity generators located in California and all importers of electricity to California who emit 25,000 metric tons of CO_2 equivalent or more annually are included as covered entities under the cap and trade program.
- The Renewable Portfolio Standard (RPS), which requires California's Investor Owned Utilities (IOU) and locally owned utilities to procure 33 percent of their electricity from eligible renewable sources by 2020 and 50 percent by 2030.
- A greenhouse gas "performance standard" that prohibits California utilities from entering into long-term contracts for baseload electricity generation that exceeds a performance standard equivalent to that which can be met by an efficient combined cycle natural gas plant ("the performance standard").

10. The California Independent System Operator (CAISO) now proposes to expand into the a Regional Independent System Operator (ISO) that includes all or some part of the 14 states in the U.S. portion of the Western Electricity Coordinating Council (WECC):

CAISO Boundary Today



CAISO Proposed Boundary



11. Expanding CAISO operations would apply the above-mentioned California climate change laws to energy transactions in all 14 states in WECC, subjecting those laws to judicial challenge because California law cannot govern transactions taking place wholly in other states.

12. Additionally, CAISO expansion could result in California's climate change laws conflicting with the Federal Energy Regulatory Commission (FERC) because of the potential impact that enforcement of climate change laws in CAISO's proposed regional market could have upon wholesale energy rates. FERC has exclusive jurisdiction over wholesale energy rates, so any state regulation whose implementation directly affects those rates would be subject to federal preemption.

13. Nonetheless, CAISO sought to convince the California Legislature to adopt the CAISO expansion plan by assuaging concerns over its constitutionality. In March 2016, CAISO executives chose three University professors to author a legal opinion downplaying the risks. CAISO chose lawyers from the University in order to bolster CAISO's position there was a clear path past the expansion's risks to California climate laws.

14. These University lawyers recognized that CAISO's regional expansion plan could endanger California's climate change laws. The lawyers were warned about the danger regional expansion posed to California's climate laws in a legal memorandum written by The Utility Reform Network (Attached as Exhibit 1), which includes the following:

> The risks of federal court challenges to California policy are likely to increase if the ISO expands to become a regional transmission operator… claims could be raised in federal court or at FERC by private parties (as was the case in Hughes) claiming that the innovative policies favored by California are distorting wholesale markets and disadvantaging fossil fuel generation.
>
> **
>
> Policymakers concerned about this possibility should carefully consider whether the expansion of FERC-regulated wholesale markets will ultimately serve California's goal of being an international leader on clean energy and climate policy.

15. One of the University lawyers then expressed deep concern about CAISO's legal positions in a 3 May 2016 memo (Attached as Exhibit 2):

In addition, I found the conclusion here persuasive that geographic expansion is not the issue with FERC jurisdiction, but rather the nature of the potential interference in wholesale markets. But couldn't someone argue that the nature of this particular geographic expansion, with its attendant and largely unprecedented conditions related to clean energy, will end up creating an impermissible effect on the wholesale market? One thing that seemed clear to me from the Hughes decision, even though it was limited in scope to get the 8-0 vote, was that the Court is very protective of the wholesale market from state action that could affect prices. I know there was a specific mechanism involved that is not present here (the contract for differences), but could geographic expansion lead to enough of an impact on wholesale prices with these clean energy policies that the Court might feel that CAISO (and California) is overstepping?

**

For example, it seems that some of the areas of law we're looking at are not exactly settled. The Minnesota case (correct me if I'm wrong) is on appeal and could wind up in the Supreme Court, which could resolve any conflict in reasoning with the 9th Circuit in an adverse way for CAISO. While I agree with the conclusion that California's policies are distinguishable from the Minnesota law, the policies are not exactly apples and oranges either -- particularly to a potentially hostile Supreme Court with a Trump appointee as the deciding vote.

16. The legal troika consisted of Ethan Elkind, Daniel Farber and Ann Carlson.[1] Elkind and Farber, both of the University of California, Berkeley (UC Berkeley), were tapped by CAISO to serve as primary consultants to Boyd of the University of Colorado and Carlson of the University of California, Los Angeles.

17. CAISO selected Elkind to bolster its case by trading on Elkind's title as Director of the Climate Change Program at the Center for Law, Energy, and the Environment on behalf of UC Berkeley and UCLA. CAISO selected Farber to use his title as the Co-Director of the Center for Law, Energy, and the Environment. CAISO selected Carlson to use her title as the UCLA Law School's Co-Director, Emmett Institute on Climate Change and the Environment.

18. Elkind, Farber and Carlson signed CAISO Service Agreements in March 2016. The three had a group meeting with CAISO executives on 28 March 2016. On 31 March 2016, CAISO provided Elkind, Farber and Carlson with a "Working Outline on Regionalization Impact on State Law" (Attached as Exhibit 3). This document explained CAISO's prospective position on the legal risks inherent in regionalization; the arguments and language therein reappeared in substantial part in the final legal opinion. CAISO in-house counsel Andrew Ulmer asked if the three could provide an initial draft of the opinion the week of 6 April 2016.

[1] William Boyd of the University of Colorado is another author unrelated to University.

19. CAISO issued the final legal opinion to the California Legislature on 1 August 2016 entitled "Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets" (Attached as Exhibit 4).

20. Farber and Elkind, in their public capacity as UC Berkeley law school attorneys, worked on the legal opinion from before March 2016, until in and after August 2016. On 4 March 2016, Elkind informed CAISO via email that law school resources would be used to complete the project: "We think we can tackle this effort given our existing capacity at the law school."

21. Elkind, Farber and Carlson made, sent and received the public records at issue in connection with their work on the legal opinion.

22. Farber and Elkind used UC Berkeley facilities and the UC Berkeley email system to facilitate their work on the legal opinion. Farber regularly issued communications to the team through the email address dfarber@berkeley.edu; Elkind did the same through elkind@berkeley.edu. In all of their e-mail communications to CAISO and to the other attorneys retained by CAISO, both Farber and Elkind identified themselves with their official UC Berkeley titles and capacities.

23. UC Berkeley's Elkind wrote to CAISO's Ulmer on 21 March 2016: "We'd likely want to highlight the finished work product (once it's publicly available) through our environmental law center's promotional material (blog, newsletter, website, etc.), which I assume would be helpful to CAISO, too. Do you anticipate any objection to us doing so? Is it possible to get approval in advance to promote the finished product through Berkeley Law?" Elkind thus entered into the services contract with the intent to publicize his work on the legal opinion in order to further the public profile of UC Berkeley's Center for Law, Energy, and the Environment. (Attached as Exhibit 5)

24. Furthermore, the completed CAISO legal opinion credited both Elkind and Farber as authors, with specific reference to their official UC Berkeley titles and capacities:

> **"Ethan Elkind, Director, Climate Change and Business Program, UC Berkeley and UCLA Schools of Law and Daniel Farber, Sho Sato Professor of Law, UC Berkeley School of Law*"**

25. The published legal opinion stated in a footnote "the contents of this report contain the views of the individual authors and do not reflect the views of the University of California." Yet, the disclaimer did not state that the opinion reflected only Elkind and Farber's private views. As such, Farber and Elkind both knew and intended the use of their official titles to enhance the weight of their opinion.

26. As early as 23 September 2016, Petitioner contacted the Dean of UC Berkeley's School of Law in an informal attempt to determine the scope of Farber and Elkind's involvement in the published legal opinion.

27. On 15 November 2016, Petitioner asked Farber, under the Public Records Act and Art I, Sec. 3 of the California State Constitution, to provide: "any and all records and communications "regarding the project that resulted in the issuance of your opinion published by CAISO on 1 August, 2016 entitled Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets." (Attached as Exhibit 6)

28. On 15 November 2016, under the Public Records Act and Art I, Sec. 3 of the California State Constitution, Petitioner asked Elkind to provide: "any and all records and communications regarding the project that resulted in the issuance of your opinion published by CAISO on 1 August, 2016 entitled Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets." (Attached as Exhibit 5)

29. In its first response to the requests for public records, the University "determined that there were no public records responsive to your request because Professors Farber and Elkind performed the work you referenced pursuant to private consulting engagements with CAISO and not as part of their University of California employment." However, CAISO is a nonprofit corporation created pursuant to statute; it is supervised by a Board of Governors whose members are appointed by the Governor of California and confirmed by the California Senate. As such, the agreements at issue were services agreements with an agency of the State of California, rather than an agreement with a wholly private party. (Responses attached as Exhibit 7)

30. The University further claimed the records sought are private because Farber filed a Report of Outside Professional Activities pursuant to UC Berkeley's General University Policy

025-10(b)(2). However, Farber filed the report late, *after* he knew Petitioner was investigating the matter. Records show Farber worked on the opinion from at least April to September 2016, but Farber limited his work in the Report of Outside Professional Activities to only "3 days." Additionally, Elkind never filed his own Report of Outside Professional Activities.

31. The agreements under which Farber and Elkind worked for CAISO provided: "Any work product produced by Consultant in performing Services under this Agreement ("Work Product") is considered work made for hire and is the property of ISO." CAISO is required to provide public records under Cal. Pub. Util. Code § 345.5; it has already produced what records were in its possession regarding the legal opinion. Petitioner believes there to be further records regarding the same that are stored on UC Berkeley's email servers.

32. The public has a strong interest in ensuring that California's climate change and renewable energy policies are not undermined by CAISO's regional expansion efforts. CAISO regional expansion will have a dramatic impact on the future of California energy policy and law. The manner in which regional expansion occurs will likely determine the path by which California controls its greenhouse gas emissions and meets its renewable energy procurement targets. California's renewable energy policies should not be subjected to an unnecessary and significant risk of having its implementation by CAISO be declared unconstitutional.

33. The public has a right to be aware of the full extent of the risks posed by regional expansion, such that members of the public can participate in the democratic process to voice their concerns. Therefore, if the records sought by Petitioner reveal or reinforce Petitioner's initial conclusion that the CAISO legal opinion is untruthful or contains substantial omissions, then the public interest in production of these documents would outweigh any countervailing privacy concerns.

FIRST CAUSE OF ACTION

VIOLATION OF CALIFORNIA CONSTITUTION ARTICLE I, SECTION 3(b)

(Failure to Respond Properly and Provide Documents for Inspection)

34. Petitioner incorporates the allegations of the preceding paragraphs as though fully set forth herein.

35. Article 1 § 3(b)(1) of the Constitution of the State of California declares, "The people have the right of access to information concerning the conduct of the people's business and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Additionally, Article 1 §3(b)(2) states in relevant part that, "A statute, court rule, or other authority... shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."

36. Respondent's failure to provide a proper response to Petitioner's Public Records Act Request and make public documents available for inspection thus violates Article I, Section 3(b) of the Constitution of the State of California, providing to the people, inter alia, the right of access to information concerning the conduct of the States' business; allowing the writings of public officials and agencies to be open to public scrutiny.

SECOND CAUSE OF ACTION

VIOLATION OF GOV. CODE § 6250, *et seq.*

(California Public Records Act)

37. Petitioner incorporates the allegations of the preceding paragraphs as though fully set forth herein.

38. Petitioner Imperial Irrigation District is interested in the outcome of these proceedings with a clear, present and substantial right to the relief sought herein. Petitioner has no plain, speedy and adequate remedy at law other than that sought herein.

39. A member of the public who believes that public records are being improperly withheld may bring suit for mandate to enforce the PRA. (*See* Govt. Code §§ 6258, 6259(a).) If the Court finds that the public official's decision to refuse disclosure is not justified, the court shall order the public official to make the records public under Government Code § 6259(b.)

40. Respondent's failure to provide a proper response to Petitioner's Public Records Act Request violates the California Public Records Act, which provides: "...public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record." (Gov. Code § 6253(a).)

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41. A public record is "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local government agency." Gov. Code § 6252(d). "Only purely personal information unrelated to the conduct of the public's business could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend that is totally void of reference to governmental activities." *San Gabriel Tribune v. Sup. Ct.* (1983) 143 Cal. App. 3d 762, 774.

42. Thus, the possession of a document relating to an issue of public concern by a state agency requires that agency to produce those documents "to the extent they contain information relating to the conduct of the public's business." *Bertoli v. City of Sebastopol* (2015) 233 Cal. App. 4th 353, 373 (requiring city to produce emails and other electronic documents located on their servers relating to appellant's traffic accident on a public highway).

43. The University of California, Berkeley has a legal obligation to make all public records available for inspection by any member of the public upon request. Respondent has made no valid claim that any of the documents sought are exempted from disclosure under any of the statutory grounds for withholding documents. Indeed, Petitioner has reiterated to Respondent prior to the filing of this action the reasons stated herein, only to be rebuffed.

IV.

A WRIT OF MANDATE FOR DECLARATORY AND INJUNCTIVE RELIEF IS APPROPRIATE

44. Petitioner incorporates the allegations of the preceding paragraphs as though fully set forth herein.

45. Respondent has a clear, present and sacrosanct duty to comply with the Constitution of the State of California. (Gov. Code § 6250 *et seq.*)

46. Petitioner has performed all conditions precedent to filing this petition. There are no administrative exhaustion requirements under Gov. Code § 6250 *et seq.*

47. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other than the relief sought in this petition.

///

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for judgment by this Court as follows:

1. For the issuance of a peremptory Writ of Mandate directing Respondent to comply with the CPRA by making all requested documents available to Petitioner for inspection within ten days of this Court's order for production;

2. In the alternative, for the issuance of an order to Respondent to show cause why the Court should not issue such a writ;

3. For a declaration pursuant to Gov. Code § 6259 signifying Respondent has violated Petitioner's rights under the California Constitution Art. 1 § 3, and Government Code § 6250 et seq; and

4. For all other relief the Court deems proper.

AGUIRRE & SEVERSON, LLP

Dated: 14 December 2016

Maria C. Severson, Esq.
Counsel for Petitioner

VERIFICATION

I, Kevin E. Kelley, declare:

1. I am the General Manager of the Petitioner in the above-entitled action.

2. I have read the foregoing PETITION FOR WRIT OF MANDATE TO ENFORCE PUBLIC RECORDS ACT AND COMPLAINT FOR DECLARATORY RELIEF and know the contents thereof. The facts stated in the Petition and Complaint are either true and correct of my own personal knowledge, or I am informed and believe that such facts are true and correct, and on that basis I allege them to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 13, 2016, in El Centro, California.

Kevin E. Kelley

Kevin E. Kelley

EXHIBIT 1

From: Ulmer, Andrew
Sent: Friday, April 22, 2016 11:35 AM
To: 'William C. Boyd'; Carlson, Ann; 'Daniel Farber'; Ethan Elkind
Cc: Ivancovich, Anthony
Subject: CAISO project
Attachments: TURNAnalysis_Hughes_v_Talen_April20.docx

Dear all:

In light of the Hughes v. Talen opinion issued earlier this week, I thought I should some information with you.

The first is a summary Anthony prepared:

> In 2015, the Supreme Court agreed to hear arguments in two linked cases involving a Maryland program providing incentives to new power generation – *Hughes v. PPL EnergyPlus* (14-614) and *CPV Maryland v. PPLEnergyPlus* (14-623). In *PPL EnergyPlus et al. v. Nazarian, et al.*, 753 F. 3d 467 (4th Cir.2014), the Fourth Circuit Court of Appeals found that the state program infringed on FERC's jurisdiction. Under the Maryland program, the state solicited offers to construct new natural gas-fired power plants and compelled utilities to sign long-term contracts with the winning generation developers that guaranteed the developers a fixed price for their capacity for the term of their contract, provided the capacity cleared PJM's capacity market. Under the Maryland program, unlike bi-lateral contracts in California, the utilities did not purchase the capacity of the power plants but, instead, the contracts required the capacity to clear through PJM's capacity market and, if it did, the supplier would be eligible for payments amounting to the difference between the revenue requirement set forth in the winning bid and the price received in the capacity market. The costs would then be passed through to the utilities' customers. While not addressed by the court, it is noteworthy that neither Maryland nor the respective utilities, elected to opt out of PJM's capacity market, which would have allowed them to procure capacity bilaterally and not have to clear capacity through PJM's capacity market.
>
> The Fourth Circuit Courts of Appeal found that the Maryland program was field preempted by the Federal Power Act because, based on the rules established by FERC, generators that clear PJM's capacity market receive the price set by that market; however, generators winning the state-sponsored solicitations and clearing the capacity market would be paid the price resulting from the solicitation, not the clearing price of the capacity market. In other words, the contracts for differences guaranteed by the states had the effect of setting the ultimate price that the generator would receive for its sale of capacity in the PJM capacity market, thereby intruding on FERC's exclusive authority to set wholesale rates. Accordingly, the Fourth Circuit concluded that the State program sought to regulate a field that the Federal Power Act already occupies essentially setting a wholesale rate.
>
> Today, the Supreme Court upheld the Fourth Circuit decision. The Court stated that FERC approved the PJM capacity market as the sole rate-setting mechanism for the sales of capacity to PJM, and deemed the clearing price to be per se just and reasonable. The Court found that, by adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf. The Court stated that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed to be just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation.

The Supreme Court acknowledged that States may regulate within the domain Congress assigned to them even when their laws incidentally affect areas subject to FERC's domain, However, States may not seek to achieve ends however legitimate through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland did.

Importantly, the Supreme Court stressed that its decision was "limited." The Court noted that it was rejecting Maryland's program only because it disregards an interstate wholesale rate required by FERC. The Court stated that "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered' to a generator's wholesale market participation." The Court further stated that "[s]o long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." The full paragraph from the Court's decision (which was 8-0) follows:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation." Brief for Respondents 40. So long as a State does not condition payment of funds on capacity clearing the [PJM] auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

The second is a blog written by NRDC: https://www.nrdc.org/experts/allison-clements/supreme-court-decision-striking-down-maryland-program-contains-good-news

The third is an overview of concerns prepared by an attorney at The Utility Reform Network (TURN). I've attached that document. TURN's overview should provide some additional context for this project.

I would like to propose that we schedule a call for next Thursday, if possible, to discuss the current draft, the process for Dan and Ethan to provide input and steps to complete the project.

Best,

Andrew

Andrew Ulmer
Director, Federal Regulatory Affairs
California Independent System Operator Corp.

US SUPREME COURT UPHOLDS PREEMPTION OF MARYLAND RESOURCE PLANNING EFFORTS

Understanding the potential consequences for California

On April 19th, the US Supreme Court issued a decision *Hughes v. Talen Energy Marketing*. The Court affirmed the 4th Circuit and held that Maryland's effort to promote the development of new local generation is preempted under the Federal Power Act. The implications for California are potentially significant.

In 2006, the PJM Regional Transmission Organization developed a centralized capacity market through a settlement joined by all participating states (including Maryland). The settlement specified that states within PJM retained the right to direct, via regulation or legislation, the development of new generating capacity as needed to satisfy local resource needs and bid the capacity into the PJM market as a "price taker" (willing to accept any price set by the market). This settlement provision was critical to gaining state support for the new market and was designed to ensure that states could act if the capacity market failed to produce new local generation at reasonable prices. When Maryland subsequently determined that the PJM capacity market was not successfully encouraging needed new local generation, the state first petitioned FERC to change the capacity market rules to provide 10-year payments to new generation (rather than the 3-year payments for new generation authorized under the rules). When FERC rejected this petition, Maryland initiated processes pursuant to the settlement to provide long-term revenue guarantees as incentives for new local generation.

Under the approach originally adopted by Maryland, the state held an auction for new local generation and picked winning bids on a least-cost basis. The winning generator was required to participate in (and clear) the capacity market, meaning they would effectively bid their capacity as "price takers". The states' load-serving entities would execute 20-year "contracts for differences" allowing the generator to receive a long-term fixed price with Maryland ratepayers responsible for any differences (positive or negative) between the guaranteed contract price and the market clearing price received from the PJM capacity market. In short, the states would get needed local generation built by having the retail customers of the Maryland load-serving entities taking on all of the capacity market risk.

In response to these state initiatives, private generating companies successfully lobbied PJM in 2011 to propose a change to its own tariff to remove the relevant settlement provision that allowed PJM states to direct the development of new local resources that are bid into the capacity market as a "price taker". Over the objections of the states that had originally insisted upon this right in exchange for their support for the settlement, FERC approved the modification and eliminated this right. Private generators subsequently sued Maryland arguing that their actions were preempted under the Federal Power Act.

The Supreme Court's decision in *Hughes* concludes that Maryland's actions were preempted by the Federal Power Act. The decision explains that interstate wholesale rates can be set through auctions run by a grid operator that set prices for day ahead energy, real-time energy, and future capacity. Any effort by states to "intrude on FERC's authority over interstate wholesale rates" (page 13) is subject to preemption under the Federal Power Act. The decision primarily focuses on the specific mechanism used by Maryland to promote in-state generation through the "contract for differences" approach. The

Court distinguishes this arrangement from a traditional bilateral contract between a utility and a generator by noting that the contract for differences specified that the capacity would be sold from the generator into the PJM auction rather than transferred to the utilities outside the auction (as would be the case in a traditional bilateral contract). As a result, the Court found that the Maryland policy was an effort to circumvent the interstate wholesale rate set in the PJM capacity auction. The Court notes that Maryland's goal of encouraging the development of new in-state generation "does not save its program" because "states may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates" (pages 12-13).

The decision claims that "our holding is limited" and asserts that the decision does not "address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." (page 15) The Court also states "nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.' So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable" (page 15).

While some instant analysis has characterized the decision as having a limited impact on states' rights, a leading commenter on Supreme Court decisions (SCOTUSblog) observes that the decision "reinforced the authority of the federal government's energy regulators in the ongoing national-state competition to manage the markets for electricity."[1] Any analysis of the potential impacts on California and other states must consider the following relevant issues:

(1) States have a poor record defending against preemption challenges brought under the Federal Power Act (FPA) in federal courts. The Court's holding continues a near-perfect string of losses by states seeking to preserve their authority. There is no specific reason to hope that future challenges brought against state resource planning efforts will fail simply because the facts are somewhat different than those presented in the Maryland case.

(2) Maryland and New Jersey originally agreed to the PJM capacity market through a settlement that guaranteed these states a right to direct the development of local resources that could bid into the capacity market as a "price taker". Several years later, this provision was eliminated by FERC in response to a PJM proposal. The lesson is that conditions originally obtained by states in exchange for their support for a regional market can be eliminated after the market is operating even if the states protest these changes. Any deal to retain specific states' rights is neither durable nor enforceable once jurisdiction is transferred to FERC.

(3) The Court did not hold that other types of state resource planning initiatives are protected against preemption in a regional market. The decision ONLY addresses the limited issue of the mechanism adopted by Maryland. There is no basis to conclude that any other state program to promote local

[1] http://www.scotusblog.com/2016/04/opinion-analysis-u-s-energy-regulators-authority-grows/

resources would necessarily survive a similar challenge.

(4) The decision references measures available to states that are extraordinarily limited (tax incentives, land grants, direct subsidies, state-owned generation). None of these are comparable to the kind of resource planning and direct contracting requirements used in California. The decision also references "re-regulation" but that would seem to suggest the highly improbable situation where FERC-regulated wholesale markets are eliminated and utilities are fully vertically integrated. Missing from this list are renewable portfolio standards, preferred resource carve-outs, utility procurement requirements, and distribution-level incentives to generation selling into wholesale markets. None of California's policy tools to move towards a low carbon grid appear on the Court's safe harbor list.

(5) The Decision points to a variety of "competitive wholesale auctions" that could justify preemption. These include "a 'same-day auction' for immediate delivery of electricity to LSEs facing a sudden spike in demand; a 'next-day auction' to satisfy LSEs' anticipated near-term demand; and a 'capacity auction' to ensure the availability of an adequate supply of power at some point far in the future" (page 3). The CAISO already runs two of these three types of "wholesale auctions" in the form of day ahead and real-time energy markets. Any state policies that direct load-serving entities to procure resources and have a direct effect on prices in these markets could be subject to challenge.

(6) Although no centralized capacity market currently exists for California, the California Independent System Operator (CAISO) has historically favored this type of centralized auction to both promote new generation and compensate existing units. Prior efforts by CAISO have failed due to stiff opposition from the CPUC and other California stakeholders. If CAISO regional expansion occurs, there is a serious risk that the new ISO will propose (and FERC will approve) a region-wide capacity market in the coming years. Even if California obtains an assurance from CAISO that no capacity market will be created in the future, the experience with PJM demonstrates that any conditions obtained by a state (even in a settlement) can be eliminated at a later date.

(7) If a regional capacity market is established in the future, it is not clear that new preferred and renewable resources located in California could bid into such a market as "price takers" due to FERC's preference for Minimum Offer Price Rules (MOPRs) designed to prevent this type of bidding behavior. Under a MOPR, new clean generation under contract to California utilities could fail to clear a regional capacity market. This outcome could lead to additional and unnecessary expenditures on dirty fossil plants that do clear the capacity auction, resulting in an oversupply of resources and higher costs to California customers.

(8) The Court's suggestion that states may encourage new or clean generation through measures "untethered to a generator's wholesale market participation" may be difficult to accomplish in practice. All generation built in California (except for resources located in the service territories of non-CAISO member utilities, such as SMUD, IID and LADWP) participates in wholesale energy markets and receives compensation based on the day ahead and/or real-time prices. California's preferred resource policies guarantee fixed prices (paid by retail customers) to resources that sell their output into FERC-regulated markets and act as "price takers". As a result, there may be few meaningful differences between the mechanisms prohibited in <u>*Hughes*</u> and those favored by California to promote

clean, local generation.

(9) The risks of federal court challenges to California policy are likely to increase if the CAISO expands to become a regional transmission operator (like PJM). Once freed from obligations to act consistent with California law, CAISO would be emboldened to develop new regional energy and capacity markets regardless of objections raised by California political leaders and state regulators. This evolution would increase the likelihood of conflicts between FERC-regulated wholesale markets and California policy measures. Claims could be raised in federal court or at FERC by private parties (as was the case in *Hughes*) claiming that the innovative policies favored by California are distorting wholesale markets and disadvantaging fossil fuel generation.

Although it is impossible to predict the outcome of future litigation, the trend towards greater reliance on FERC-authorized regional markets significantly increases the risk that California will find itself in the crosshairs and potentially on the losing end of a preemption challenge. Policymakers concerned about this possibility should carefully consider whether the expansion of FERC-regulated wholesale markets will ultimately serve California's goal of being an international leader on clean energy and climate policy.

EXHIBIT 2

From: Carlson, Ann <carlson@law.ucla.edu>
Sent: Thursday, May 05, 2016 12:42 PM
To: Ulmer, Andrew
Cc: William C. Boyd; Ethan Elkind; 'Daniel Farber'
Subject: Fw: CAISO project

Follow Up Flag: Follow up
Flag Status: Flagged

< EXTERNAL email. Evaluate before clicking. >

HI Andrew,

I'm forwarding you comments from Dan and Ethan. We will wait to get your comments and perhaps to talk them all over before revising the memo.

Best,

Ann

Ann Carlson
Shirley Shapiro Professor of Environmental Law
Faculty Co-Director, Emmett Institute on Climate Change and the Environment
UCLA School of Law

From: Ethan Elkind
Sent: Tuesday, May 3, 2016 11:51 AM
To: William C. Boyd; Carlson, Ann
Cc: 'Daniel Farber'
Subject: Re: CAISO project
Hi William and Ann,
Thanks for sharing this draft. Both Dan and I had a chance to review and overall think it looks strong and reads very well and clearly.

One question I have is whether or not we need to be more on guard for opposition arguments against these conclusions. Even a small chance that CAISO expansion could call into question California's renewable policies would be hugely detrimental, and so I wonder if we should more explicitly address potential counter-arguments.

For example, it seems that some of the areas of law we're looking at are not exactly settled. The Minnesota case (correct me if I'm wrong) is on appeal and could wind up in the Supreme Court, which could resolve any conflict in reasoning with the 9th Circuit in an adverse way for CAISO. While I agree with the conclusion that California's policies are distinguishable from the Minnesota law, the policies are not exactly apples and oranges either -- particularly to a potentially hostile Supreme Court with a Trump appointee as the deciding vote. Similarly, the CPUC decision on California's RPS has not been challenged -- is it too late to challenge it? What if it is challenged and the CPUC receives an adverse decision?

I'm not suggesting that we try to game out the politics in this memo, but perhaps we could acknowledge more of the legal uncertainty in our conclusions and try to address the counter-arguments more explicitly.

In addition, I found the conclusion here persuasive that geographic expansion is not the issue with FERC jurisdiction, but rather the nature of the potential interference in wholesale markets. But couldn't someone argue that the nature of this particular geographic expansion, with its attendant and largely unprecedented conditions related to clean energy, will end up creating an impermissible effect on the wholesale market? One thing that seemed clear to me from the Hughes decision, even though it was limited in scope to get the 8-0 vote, was that the Court is very protective of the wholesale market from state action that could affect prices. I know there was a specific mechanism involved that is not present here (the contract for differences), but could geographic expansion lead to enough of an impact on wholesale prices with these clean energy policies that the Court might feel that CAISO (and California) is overstepping?

To be clear, I wouldn't agree with those conclusions and don't find them necessarily persuasive, but I could certainly imagine a court might. So perhaps we could acknowledge and forcibly refute the best arguments to the contrary.

I hope these comments are helpful and not too far outside of the scope of what CAISO would like from us. I'm also happy to discuss by phone if that would be of use. Overall, I think the document is very well done and look forward to hearing what our friends at CAISO think.

Best,
Ethan

On 4/29/2016 5:26 AM, William C. Boyd wrote:

> Dear Dan and Ethan,
>
> I am attaching a draft of the CAISO memo per Ann's conversation with Ethan yesterday. We just sent this draft to Andrew as well. As you will see, we still need to add some general descriptive material to the introduction and I don't think Ann has had a chance to incorporate some of the comments she received earlier from CAISO folks on the commerce clause section. Looking forward to your feedback.
>
> Thanks and all best from a snowy Boulder!
>
> William

--
Ethan N. Elkind
UC Berkeley / UCLA Schools of Law

EXHIBIT 3

Sedgley, Martha

From:	Ulmer, Andrew
Sent:	Thursday, March 31, 2016 4:27 PM
To:	Daniel Farber; Ethan Elkind
Cc:	Carlson, Ann; 'William C. Boyd'; Ivancovich, Anthony
Subject:	CAISO project
Attachments:	Working Outline on Regionalization Impact on State Law.docx

Dan and Ethan:

Attached is the background document we prepared and previously sent to Ann and William.. The document frames the issues, provides background, and relevant administrative and case law citations. I will look for a time next week for all us to touch base.

Andrew Ulmer
Director, Federal Regulatory Affairs
California Independent System Operator Corp.

Legal Impact of Adding PacifiCorp as a California ISO Participating Transmission Owner on California's Environmental Policies

I. INTRODUCTION

- The California ISO (ISO) is a public utility as that term is defined in the Federal Power Act. Accordingly, the ISO is subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). FERC has recognized that the ISO is a regional organization, operates organized regional electricity markets, and constitutes a transmission planning region. *See Pacific Gas & Electric Co.*, 81 FERC ¶ 61.122 at 61 451(1996)(The ISO tariff affects the rates, terms and conditions under which suppliers and consumers outside of California will be able to participate in the markets and transmit energy from or through California); *California Independent System Operator Corp*, 143 FERC ¶ 61,057 at PP 25-28 (2013) (The ISO has a footprint reflecting a regional scope that complies with Order No. 890 and the ISO meets the requirements of Order No. 1000 for a transmission planning region that undertakes regional transmission planning and develops a single regional transmission plan); *California Independent System Operator Corp.*, 147 FERC ¶ 61,231 (2014) (FERC approved energy imbalance market tariff provisions that enables the ISO to offer participation in the imbalance energy portion of it real-time market to other balancing authorities in the western states, including PacifiCorp, which operates in five states other than California).

- California Public Utilities code section 393.5 states in part:

  (a) It is the intent of the Legislature to provide for the transformation of the Independent System Operator into a regional organization to promote the development of regional electricity transmission markets in the western states and to improve the access of consumers served by the Independent System Operator to those markets, and that the transformation should only occur where it is in the best interests of California and its ratepayers.

- A vertically integrated utility (PacifiCorp) whose facilities and customers are mostly outside the State of California is considering "joining" the CAISO by becoming a Participating Transmission Owner (PTO).

- The ISO assumes operational control over the transmission facilities of PTOs, schedules transmission over those facilities, performs certain transmission planning functions pursuant to a FERC-jurisdictional Open Access Transmission Tariff, and operates real-time and day-ahead wholesale energy and ancillary services market whose rules are also embodied in its FERC-approved a tariff. Under the ISO's wholesale market structure, a PTO like PacifiCorp who serves end users, *i.e.*, a load serving entity – uses the ISO's real time and day-ahead markets to procure the power needed to serve its end user customers.

- The ISO operates transmission lines located both inside and outside of California in interstate commerce. Although most of the PTO transmission facilities under the ISO's operational control are located within California, some PTO facilities are located outside of the State. (*e.g.*, the Valley Electric system, and other PTO transmission lines and entitlements on transmission lines).

- The same is true for the location of the end user customers served by PTOs that are also load serving entities (*e.g.*, Valley Electric load).

- The ISO's wholesale market also currently includes "imports" from generators located outside the State of California, as well "exports" from generators located within California.

- The ISO also operates a regional real-time energy imbalance market (EIM). The participants in the Energy Imbalance Market (EIM) are located in six states other than California. PacifiCorp participates in the EIM and operates in five of those states.

- Some stakeholders have raised concerns that existing State policies promoting clean energy and the limitation of greenhouse gases will become preempted by federal law if the ISO were to become more regional by having PacifiCorp (or another predominantly non-California utility) become a PTO.

- This paper evaluates that concern and concludes that having an entity like PacifiCorp join the ISO would not increase federal, *i.e.*, FERC, regulation over the ISO and would not impact the extent to which California may continue to regulate in these areas.

II. PREEMPTION

Issue A: Does the ISO adding PacifiCorp as a PTO and changing its governance expand FERC's jurisdiction over the ISO, grant FERC authority to displace state authority over environmental matters, or allow FERC to overturn state policies regarding what generation facilities should be built and what types of resources load serving entities should procure?

- FERC already regulates the ISO, the ISO's markets, the ISO's transmission services, and the ISO's resource adequacy framework. Merely adding PacifiCorp as a participating transmission owner and changing the ISO's governance cannot expand FERC's jurisdiction under the Federal Power Act, will not expand FERC's jurisdiction over the ISO, and will not enable FERC to overturn state decisions directing the types of resources that should be built or procured by load serving entities to meet state environmental policies.

- Under the Federal Power Act, FERC has jurisdiction over the transmission of electricity in interstate commerce, the sale of electricity at wholesale in interstate commerce, and all facilities for such transmission and sale of electric energy, but, subject to a few specified exceptions, does not have jurisdiction over facilities used for the generation of electric energy, facilities used in local distribution, facilities used only for the transmission of electricity in intrastate commerce, and facilities for the transmission of electric energy consumed wholly by the transmitter. 16 U.S.C. §824 (b)(1). These matters are subject to the jurisdiction of the States. *New York v. FERC*, 551 U.S. 1 (2002).
    - Where FERC's jurisdiction over an issue is exclusive, states cannot have jurisdiction over the same subject. *Miss, Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354. 377 (1988).
    - Where Congress has not expressly preempted state law, preemption can occur where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *California v. ARC Am. Corp.*, 490 U.S. 93. 100-01 (1989).
    - Federal law also prevails where the scope of the federal statue indicates that Congress intended federal law to occupy a field exclusively. *Kurns v. Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1266 (2102), quoting *Freightliner Corp. v. Myerick*, 514 U>S> 280. 287 (1995).
    - Whether a state regulation operates within a preempted field may depend on the target at which the state law aims. State law will be preempted if it is aimed directly at wholesales for resale. *Oneoak Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1599 (2015); *see also FERC . Electric Power Supply Ass'n*, No. 14-840 (S. Ct. Jan. 25 2016) (limiting FERC's "affecting" jurisdiction to rules or practices that directly affect the wholesale rate). The Federal Power Act leaves no

room for either direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result. *FERC v. Electric Power Supply Association*, No. 14-840 (Jan. 25. 2015), quoting *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S.884, 91 (1963).

- o A basic assumption is that Congress did not intend to preempt state law unless that was the clear and manifest intent of Congress. *Meditronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The law of supply and demand is not the law of preemption. When a state regulates within its sphere of influence, the regulation's incidental effect on interstate commerce does not render the regulation invalid. *PPLEnergyPlus, et al. v. Solomon*, 766 F.3d 241 (3d Cir. 2014),, petitions for cert. pending, No. 14-634 (filed Nov. 26, 2014) and No. 14-694 (filed Dec. 10, 2014),. citing *Nw. Cent. Pipeline v, State Corporation Commission of Kansas*, 489 U.S. 493 (1989). The Federal Power Act expressly excludes FERC from matters traditionally regulated by the states and expressly preserves state authority over new generation by including a specific grant of authority to regulate production. *PPLEnergyPlus, et al. v, Nazarian, et al.*, 753 F.3d 467, 480 (4th Cir. 2014), *cert. granted*, Nos. 14-614 and 14-623).

- A state's procurement policies may impinge on FERC's jurisdiction when they set the rates generators receive for their wholesale capacity contrary to the federal scheme established for the pricing of such interstate capacity sales (*i.e.*, a centralized capacity market) and, when they do, they are preempted. *PPLEnergyPlus, et al. v. Solomon*, 766 F.3d 241 (3d Cir. 2014), petitions for cert. pending, No. 14-634 (filed Nov. 26, 2014) and No. 14-694 (filed Dec. 10, 2014); *PPLEnergyPlus, et al. v, Nazarian, et al.*, 753 F.3d 467 (4th Cir. 2014), cert. granted, Nos. 14-614 and 14-623). See also *New England Power Generators Assoc. v. FERC*, 757 F3d 283 (D.C. Cir. 2014). This type of pricing conflict does not exist in regions, such as the ISO, where load serving entities, overseen by state and local regulatory authorities, meet their capacity obligations by procuring capacity through bilateral contracts or self-supply, and there is no mandatory, FERC-approved, capacity clearing market. States can develop whatever capacity resources they wish and use such resources to any extent they wish as longs as the states' choices do not adversely affect wholesale capacity rates in a capacity market. *New Jersey Board of Public Utilities et al. v. FERC*, 744 F.3d 74 (3d Cir. 2013).

- FERC and the courts have recognized that states have significant authority to promote development and procurement of energy resources, including clean energy, within their reserved jurisdiction over facilities used for generation of electric energy. States have broad powers to direct the planning and resource decisions of utilities under their jurisdiction. Unless state measures are "aimed directly" at regulating wholesales for resale interstate electric transmission service (*e.g.*, rates for transactions subject to FERC's jurisdiction under the Federal Power Act), they fall within the subjects left to the states to regulate. The types of activities enumerated below are subject to state authority, are not preempted by the Federal Power Act, and would not become subject to FERC jurisdiction if PacifiCorp were to become an ISO participating transmission owner, particularly because these legitimate state roles have been recognized in the context of multi-state independent system operators like the ISO.

- States and municipal authorities retain the right to forbid new entrants from providing capacity, to require retirement of existing generators, to limit construction to more expensive, environmentally friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from FERC. *Connecticut Department of Public Utility Control v. FERC,* 569 F3d 477, 481 (D.C. Cir. 2009).

- States can incentivize the construction of new generation facilities, limit new construction to certain types of generation resources, and require the retirement of generation facilities in a manner that may have an indirect effect on the wholesale energy market. . *Brief for the United States as Amicus Curiae,* p. 32, Supreme Court of the United States, Nos. 14-614 and 14-623 (Jan. 2016), citing *Connecticut Department of Public Utility Control v. FERC,* 569 F3d 477, 481 (D.C. Cir. 2009); *PPLEnergyPlus, et al. v. Solomon,* 766 F.3d 241, 255 (3d Cir. 2014);

- States may select the type of generation to be built (*e.g.*, wind or solar) and where to build the facility, or may elect to build no generation at all. *PPLEnergyPlus, et al. v. Solomon,* 766 F.3d 241 (3d Cir. 2014);

- State are free to require procurement of new generation resources and can take actions that affect the supply and demand in the wholesale market. *PPLEnergyPlus, et al. v. Solomon*, 766 F.3d 241 (3d Cir. 2014);

- States have authority over local energy matters, including the construction of power plants. States can subsidize generators so long as the subsidies dot set wholesale prices. *PPLEnergyPlus, et al. v. Solomon,* 766 F.3d 241 (3d Cir. 2014).

- States have the authority to dictate the generation resources from which utilities may procure electric energy. *California Public Utilities Commission,* 134 FERC ¶ 61,044 at P 30 (2011).

- States retain significant authority to promote new generation a within their reserved jurisdiction over facilities used for generation of electric energy. *Brief for the United States as Amicus Curiae,* Supreme Court of the United States, p. 32, Nos. 14-614 and 14-623 (Jan. 2016).

- Permissible state programs may include a requirement that local utilities purchase a percentage of electricity from a particular generator or from renewable resources, or the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements. *Id.*, at 34, quoting *Midwest Power Sys., Inc.* 78 FERC 61,067 at 61, 246 (1997) (Iowa statue not preempted to the extent it requires state utilities to purchase from certain types of generating facilities.)

- States are able to use any resource they wish to secure the capacity they need. *New Jersey Board of Public Utilities et al. v. FERC,* 744 F.3d 74, 97 (3d Cir. 2013).

- A state may act within its borders to ensure resource adequacy or to favor particular types of new generation. *PJM Interconnection, LLC,* 135 FERC ¶ 61,022 at P142 (2011).

- FERC has recognized that states retain "authority in traditional areas as the authority over local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges." *New York v. FERC,* 535 US 1 (2002), citing Order No. 888, FERC Stats & Regs., ¶ 31,036 at 31,782, n. 453 (1996).

- States can determine how to provide required resources and can place controls on the amount or type of generation capacity built within the state or at particular locations. *Connecticut Department of Public Utility Control v. FERC,* 569 F3d 477, 482 (D.C. Cir.

2009), citing *ISO New England*, 120 FERC ¶ 61,234 at 61,978 (20007).

- The courts have determined that states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or order utilities to purchase renewable generation. *Entergy Nuclear Vermont Yankee v. Shumlin*, 733 F3d 393, 417 (2d Cir. 2013); *S. Cal. Edison. Co. and San Diego Gas & Elec. Co., 71 FERC* ¶ 61,269 (June 2, 1995).

- States are free to subsidize the construction of new generators, and direct load serving entities to build or contract for any self-supply they believe is necessary. *New England Power Generators Assoc. v. FERC*, 757 F3d 283, 291 (D.C. Cir. 2014).

- States are free to require procurement of new generation resources even if the price signals in the regional wholesale capacity market indicate that no new resources are needed. *ISO New England, Inc.*, 135 FERC ¶ 61,029 at P 171 (2011), *order clarified on reh'g*, 138 FERC 61,029 (2012).

- States have general authority concerning resource planning and resource decisions. *So. Cal. Edison Co.*, 71 FERC ¶ 61,269 (1995).

- States retain authority over the need for new electrical generating facilities. *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190 (1983).

- State or public service commission action related to the siting or building of a physical generation facility, the direct financing of the construction of a power plant, or the encouragement of or limitations on certain types of power plants within its borders (such as environmental-related regulation) would not be field pre-empted by the Federal Power Act. *PPL Energyplus, LLC v. Nazarian*, 2013 WL 5432346 (D. Md. 2013), aff'd, *PPLEnergyPlus, et al. v, Nazarian, et al.*, 753 F.3d 467 (4th Cir. 2014), *cert. granted*, Nos. 14-614 and 14-623).

- As a general matter, in situations where one party's resource adequacy decisions can cause adverse reliability and cost impacts on other participants in regionally operated systems, FERC considers resource adequacy in determining whether rates remain just and reasonable and whether the system operator can maintain reliability. FERC has indicated that its role is to ensure there is a workable approach to resource adequacy. *California Independent System Operator Corp.*, 116 FERC ¶61,274 at PP 1112-19 (2006). FERC has already acted in accordance with these principles in assessing the ISO's existing resource adequacy program and has recognized the states' historical role in ensuring resource adequacy.

- The ISO's FERC-approved resource adequacy program is based on bilateral procurement by load serving entities (LSEs). The California Public Utilities Commission (CPUC) and local regulatory authorities are responsible for directing the procurement of their jurisdictional LSEs, including the procurement of preferred resources (*e.g.*, renewable resources, storage, demand response). Capacity that LSE's procure through bilateral contracts to meet their resource adequacy obligations does not clear through a centralized market mechanism. The ISO only engages in backstop procurement in a limited number of defined circumstances to maintain reliability.

- The ISO resource adequacy framework, that allows the CPUC and local regulatory authorities in the first instance to determine the types of resources their jurisdictional load serving entities will procure is permitted by the Federal Power Act. *California Independent System Operator Corp.*, 116 FERC ¶61,274 at PP 1112-19 (2006). Adding PacifiCorp as a participating transmission owner will not change that fact.

- The courts have upheld a state program that compelled electric distribution companies to enter into bilateral contracts to purchase up to four percent of a State's electrical needs for a term of up to 20 years from in-state, state-selected renewable projects. The program was not preempted and did not directly distort the wholesale market because the electric distribution companies purchased renewable energy directly from the renewable energy generators, rather than requiring the generators to sell their capacity through a wholesale auction mechanism. *ALLCO Finance Limited v. Klee,* No. 13-cv-1874, 2014 WL 7004 (D. Conn. 2016 Dec. 10, 2014), *aff'd on other grounds,* 805 F.3d 89 (2d Cir. 2015).

- FERC has declined to require centralized capacity procurement mechanisms in regions that rely on state resource planning, bilateral contracting, and that do not have a history of operating as a power pool. *Midwest Independent Transmission System Operator, Inc.*, 153 FERC ¶61,229 at PP 43-52 (2015). These conditions exist in the ISO footprint. Adding PacifiCorp, which is a vertically integrated utility that relies on state resource planning efforts, supports continuation of a bilateral contract/self-scheduling approach to resource adequacy. *See, id.*

Issue B: Would adding PacifiCorp as a participating transmission owner or changing the ISO's governance cede California's authority to continue to enforce its clean energy and climate policies to the FERC. These policies include among others reducing air and GHG pollution in California, establishing renewable portfolio (RPS) standards, integrating electric vehicle charging, and promoting energy storage, demand response, and energy efficiency.

- Although FERC would continue to regulate the ISO's operation of wholesale electricity markets and interstate electric transmission services under the Federal Power Act, FERC's regulation of wholesale interstate electricity transactions does not preempt state environmental and clean energy laws and state jurisdiction over retail sales. Only to the extent state regulation is aimed directly at rates for wholesale service, will state policies be potentially subject to possible preemption by FERC. Policies that are purely environmental, merely increase supply, change the supply mix, or increase costs (as the result of complying with legitimate environmental policies) are not preempted or subject to FERC jurisdiction.

- As a creature of statute, FERC has no constitutional or common law authority, but only those authorities conferred upon it by Congress. Where there is no statute conferring authority, FERC has none. *Atlantic City Electric Company v. FERC,* 295 F 3d 1 (D.C. Cir. 2002). The Federal Power Act does not confer FERC with authority over environmental regulation (except possibly in connection with hydroelectric licensing, which is not applicable here). Accordingly, FERC as a general rule should not be able to preempt state environmental policies laws and policies. *Oneoak Inc. v. Learjet, Inc.,* 135 S. Ct. 1591, 1599 (2015) (suggesting that FERC's denial of cost recovery for a pipeline's failure to recycle would not deny states the power to enact and apply recycling laws). *See also California ISO v. FERC,* 372 F 3D 395 (D.C. Cir. 2004) (FERC has no authority over the ISO's governance because it is not a practice affecting a rate and corporate regulation is the subject of state and federal statutes); *NAACP*, 48 F.P.C. 40 (1972) (FERC has no authority to regulate employment procedures or numerous other areas that Congress created specialized agencies to regulate).

- In the Federal Power Act, Congress expressed its intention to preserve state authority over environmental, renewables portfolios, and energy efficiency policy, rather than to displace the states' authority. *See, e.g.*, 16 U.S.C. §§ 824a-1(a)(2), 824o(i)(3).

- Preemption of state laws and regulations occurs only when Congress has shown a clear intention to override state requirements. The Federal Power Act ("FPA"), and in particular those sections added in EPAct 2005, manifest a clear Congressional purpose to preserve state jurisdiction and authority over environmental, renewables, and energy efficiency policy, rather than to supplant them. Moreover, the federal courts recognize and protect state authority over these state policies, and FERC has followed the courts' lead. Participation by a state's utilities in a multi-state ISO does not create a situation in which the state's policies in these areas will be supplanted by federal regulation. Consequently, decisions by non-California utilities to join the California ISO as participating transmission owners will not lead to the preemption of California environmental, renewables, or energy efficiency requirements by federal law.

- FERC does not regulate climate policy under the Federal Power Act and thus lacks the authority to direct California's clean air, GHG, and RPS polices.

- Changing ISO governance or adding a non-California participating transmission owner does not give FERC jurisdiction over matters where it has none. FERC and courts have recognized states' continued authority in these areas, even in the context of multi-state independent system operators and regional transmission organizations.

III. <u>COMMERCE CLAUSE ISSUES</u>

Issue: Does adding PacifiCorp as a participating transmission owner or modifying ISO governance change how California environmental laws would be evaluated under the Commerce Clause?

- The body of law addressing the dormant commerce clause generally permits states to impose restrictions on the use of goods or services within the state, so long as the restriction:
    - does not discriminate (either facially, in purpose or in fact) against interstate commerce (*i.e.*, it treats both internal production and imports consistently), City of Philadelphia v. New Jersey, 437 U.S.

617 (1978), *Cotto Waxo Co. v. Williams,* 790, 46 F 3d. at 793 (8th Cir. 1995), citing *Healy v. Beer Inst, Inc.*, 491 U.A. 324, 3236 (1989); *New Energy Co. of Ind. V. Limbach*, 486 U.S. 269, 274 (1988);

- o does not control conduct occurring entirely outside the state (*i.e.*, does not impact a transaction solely between two entities located outside of the state), *Id.; Baldwin v G.A.F. Seelig, Inc., 294 U.S. 511 (1935);* and

- o does not unduly burden interstate commerce (*i.e.*, does not impose a burden on interstate commerce that is "clearly excessive" in relationship to the putative local benefits). *Pike v. Bruce Church, Inc.,*397 U.S. 137, 142 (1970).

- Any dormant commerce clause concerns regarding the extraterritorial effect of California environmental laws would not be increased as a result of PacifiCorp joining the ISO as a participating transmission owner or the ISO's governance structure changing. A change in ISO governance is wholly irrelevant in any commerce clause analysis.

- The ISO already operates interstate transmission facilities, provides interstate transmission service, and operates interstate wholesale electricity markets. The participants in the Energy Imbalance Market (EIM) are located in six states other than California. The ISO imports power into and exports power out of California. Transmission facilities located outside of California are already under the ISO's operational control.

- PacifiCorp is already an EIM participant and operates in five-of-the-six states other than California that are participating in the EIM.

- The California Air Resources Board (CARB) and the ISO have worked together to develop a set of complementary rules and regulations that allow the ISO to minimize the impact of CARB's greenhouse gas (GHG) regulations on interstate commerce outside of California by: (1) establishing methods to distinguish between out-of-state resources that are deemed to be delivering energy into California and out-of-state resources whose energy is deemed to be serving load outside of California; and (2) applying the requirement to meet CARB's GHG obligations only to the out-of-state resources deemed to be delivering to California. These rules include both the e-tagging tracking rules for standard imports into the ISO Balancing Authority Area and a methodology for EIM market transfers that uses the optimization process, together with resource bidding rules, to allow resources to incorporate the potential cost of California carbon compliance into their bidding decisions and effectively prevent their resource from being deemed to have been dispatched deemed to serve load in California if they do not want to incur that cost.

- The approach used for EIM transfers addresses potential concerns about extraterritorial impacts or undue burdens on interstate commerce because it provides an effective means to account for resources and energy that are deemed to be delivered into California and resources and energy that are available for use only outside of California.

- If PacifiCorp joins the ISO as a participating transmission owner and resources in its footprint become participants in the day-ahead market, the ISO will need to extend and enhance this accounting and tracking methodology to apply to this new context, including in particular to day-ahead unit commitments. This will allow the ISO, through the optimization process, to continue to identify and distinguish between resources that are being used to serve load in California and those that are not.

- With such a mechanism in place, CARB's protections against a dormant commerce clause challenge based on purported extraterritorial effects of its regulation will be at least as strong as they are under the current paradigm because the effect of the rules will be limited to resources and energy deemed to have delivered into California.

- The *North Dakota v. Heydinger* case, Case No. 11-cv-3232 (D. Minn. April 18, 2014) is distinguishable because, in that case, there was no process in place to enable parties who were participating in Midwest ISO (MISO) markets to distinguish between resources and energy that are available to be used in Minnesota versus in other states within the MISO. This is a fundamental difference in the cases and it was pivotal to the Minnesota Court's analysis, which focused on the inability to distinguish between out-of-state resources that are serving load in Minnesota (and thus properly regulated by Minnesota) and out-of-state resources that were serving entirely out-of-state load. Absent any such ability to distinguish, the Court concluded that the Minnesota statute has an impermissible extraterritorial impact on wholly out-of-state transactions. This situation does not exist here because the ISO currently has – and will continue to have – mechanisms in place to make such distinctions.

- PacifiCorp's mere transformation from an EIM participant to a participating transmission owner, by itself, does not change how California environmental laws would be evaluated under the Commerce Clause and would not cause otherwise constitutional laws to become unconstitutional.

EXHIBIT 4

Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets

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Ann E. Carlson, Shapiro Professor of Environmental Law, UCLA School of Law and **William Boyd**, Professor of Law and John H. Schultz Energy Law Fellow, University of Colorado Law School*

In consultation with **Ethan Elkind**, Director, Climate Change and Business Program, UC Berkeley and UCLA Schools of Law and **Daniel Farber**, Sho Sato Professor of Law, UC Berkeley School of Law*

Introduction

The California Independent System Operator (CAISO) has asked us to provide our independent legal assessment of issues that could arise as a result of the potential addition of PacifiCorp as a participating transmission owner in CAISO. More specifically, we have evaluated whether the expansion of CAISO to include the PacifiCorp transmission assets:

1) would alter the Federal Energy Regulatory Commission's (FERC's) jurisdiction over CAISO, including FERC's authority to displace California's authority over environmental matters or its ability to affect state policies regarding both the building of generation facilities and the types of resources load serving entities should procure; or

2) would raise any concerns about the constitutionality of California environmental and clean energy laws under the Commerce Clause of the United States Constitution.

The straightforward answers to each of these questions are that the inclusion of PacifiCorp assets in CAISO:

1) would not alter FERC's jurisdiction and would not displace any existing state authority over environmental matters. CAISO is already subject to FERC jurisdiction and the inclusion of PacifiCorp in CAISO does not change this. FERC does not have jurisdiction over California's energy and environmental policies and this would not change because of the inclusion of PacifiCorp in CAISO;

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*The contents of this report contain the views of the individual authors and do not reflect the views of the University of California or the University of Colorado.

2) would not alter the constitutionality of California's environmental and clean energy laws under the Commerce Clause of the United States Constitution because the policies are already subject to Commerce Clause scrutiny.

We analyze each of the issues below. Before doing so, we briefly describe CAISO and the proposed expansion to include PacifiCorp's transmission assets. We then describe the interstate nature of California's sources of electricity and the relationship between CAISO and the western regional interconnect, which covers the western United States. We also set forth those California clean energy and climate policies that apply to California's electricity sector.

CAISO currently operates the bulk transmission grid for 80 percent of California and a small part of western Nevada.[1] CAISO is a non-profit public benefit corporation that was established pursuant to AB 1890 in 1996 as part of California's electricity restructuring effort.[2] It is regulated by FERC as a "public utility" under the Federal Power Act.

In November 2014, CAISO established a real-time energy imbalance market (EIM) that PacifiCorp joined.[3] Since that time several other utilities have joined or announced their intention to join the EIM, which now operates across six states in the western United States.

In April 2015, CAISO and PacifiCorp also executed a memorandum of understanding to explore adding PacifiCorp as a full participating transmission owner or PTO in CAISO.[4] Under such an arrangement, CAISO would assume operational control over the transmission facilities of PacifiCorp, just as it does for its existing PTOs, and would administer these facilities in accordance with its FERC-approved Open Access Transmission Tariff. CAISO also operates day-ahead and real-time wholesale electricity markets as well as an ancillary services market, all according to rules embodied in its FERC-approved tariff.[5] PTOs that serve end-use customers, a category that would

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[1] *See* California ISO, *The ISO Grid*, https://www.caiso.com/about/Pages/OurBusiness/UnderstandingtheISO/The-ISO-grid.aspx.

[2] AB 1890, Chapter 854 (approved by Governor, September 23, 1996).

[3] The EIM automatically balances supply and demand for electricity every fifteen minutes, dispatching the least-cost resources every 5 minutes. In November 2014, this voluntary energy imbalance market service became available to other grids operating in the West in part as a way to integrate renewable resources across a larger geographic region reliably and efficiently. *See* CAISO, Energy Imbalance Market (EIM) Overview available at: https://www.caiso.com/informed/Pages/EIMOverview/Default.aspx

[4] *See* New Participating Transmission Owner Memorandum of Understanding, (April 13, 2015), https://www.caiso.com/Documents/NewParticipatingTransmissionOwnerMemorandum_Understanding.pdf.

[5] Ancillary services are those services necessary to support the transmission of electric power from seller to purchaser, given the obligations of control areas and transmitting utilities within those control areas, to maintain reliable operations of the interconnected transmission system. Ancillary services supplied with generation include load following, reactive power-voltage

include PacifiCorp if it joined CAISO, use these markets to procure the power they need to serve their end-use customers.

Expanding CAISO to include PacifiCorp would mean that PacifiCorp's transmission facilities would be added to the CAISO-controlled grid. This would expand CAISO's footprint into another five western states.[6] The current CAISO system, as noted, already includes facilities that are outside of California. From a jurisdictional perspective, CAISO's operational control over PacifiCorp's transmission assets would be similar to CAISO's operational control over existing out-of-state facilities. Moreover, the CAISO system itself is connected to the larger regional grid in the western United States (the Western Interconnect). As a result, electric power that flows across the CAISO system already crosses state lines and therefore has and will continue to be traveling in interstate commerce. This is true regardless of whether CAISO operates wholly within the state of California or expands to include transmission facilities in other states.

California has a number of important clean energy and environmental policies that affect its electricity sector. The most relevant policies for purposes of our analysis include:

- The cap-and-trade program that the state's Air Resources Board has adopted as part of its implementation of AB 32, the Global Warming Solutions Act. All electricity generators located in California and all importers of electricity to California who emit 25,000 metric tons of CO_2 equivalent or more annually are included as covered entities under the cap and trade program.[7]
- The Renewable Portfolio Standard (RPS), which requires California's Investor Owned Utilities (IOU) and locally owned utilities to procure 33 percent of their electricity from eligible renewable sources by 2020 and 50 percent by 2030.[8]
- A greenhouse gas "performance standard" that prohibits California utilities from entering into long-term contracts for baseload electricity generation that exceeds a performance standard equivalent to that which can be met by an efficient, combined cycle natural gas plant ("the performance standard").[9]

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regulation, system protective services, loss compensation service, system control, load dispatch services, and energy imbalance services. *See* FERC, Market Oversight Glossary available at: http://www.ferc.gov/market-oversight/guide/glossary.asp.

[6] The five states are Oregon, Washington, Idaho, Utah, and Wyoming. For a map of the assets CAISO would manage with the PacifiCorp expansion, *see* RTO Insider, *Revised Western RTO Governance Plan Highlights State Authority, http://www.rtoinsider.com/wp-content/uploads/CAISO-plus-Pacificorp-Map-CAISO-content-web.jpg* (July 21, 2016).

[7] *See* 17 CCR § 95811, 95812(c)(1)(2).

[8] *See* Cal Pub. Util. Code Sections 399.11-399.32.

[9] *See* 11 CCR § 2900 *et. seq.*

- A Feed-in Tariff that requires California's Investor Owned Utilities (IOUs) to purchase the electricity generated by small (below 20MW) combined heat and power facilities.[10]

We describe below how the Federal Power Act divides jurisdiction between FERC and the states and the relationship between California's environmental and clean energy policies and federal authority. We then turn to an analysis of the constitutionality of those state policies that affect both in- and out-of-state electricity producers. We conclude that the inclusion of PacifiCorp's transmission assets in CAISO does not change the legal analysis of either FERC's jurisdiction and any associated risk of preemption or the constitutionality of the state's environmental and clean energy policies.

1. Expansion of CAISO to include PacifiCorp does not affect FERC's jurisdiction over CAISO and neither displaces state authority over environmental matters nor affects state policies regarding generation facilities or the procurement of particular types of resources by load serving entities

a. Expansion of CAISO to include PacifiCorp does not affect FERC's jurisdiction over CAISO

FERC regulates CAISO as a "public utility" under the Federal Power Act (FPA).[11] Any future expansion of CAISO to include PacifiCorp assets would not affect FERC's jurisdiction over CAISO. As long as CAISO continues to operate the bulk transmission grid on behalf of its member utilities and administer regional wholesale power markets, CAISO will be subject to FERC jurisdiction. It makes no difference whether CAISO operates wholly within a single state or across multiple states. It is the function that CAISO performs rather than its territorial footprint that determines FERC jurisdiction.

Under the Federal Power Act, FERC has jurisdiction over (a) transmission of electricity in interstate commerce; and (b) wholesale sales (sales for resale) of electricity in interstate commerce.[12] Because the California bulk transmission grid is connected to the larger Western Interconnect, all transmission and all wholesale sales of electricity in California that make use of that bulk transmission grid are interstate and thus subject to FERC jurisdiction.[13] Adding PacifiCorp (or any other entity) to CAISO does not change this fact. By the same token, a decision by CAISO to shrink its footprint so that it operated wholly within California would not change this fact.

[10] AB 1613, *Waste Heat and Carbon Emissions Reduction Act*, codified as amended at Cal. Pub. Util. Code §§ 2840 to 2845 (2016).
[11] 16 U.S.C. §824(e).
[12] 16 U.S.C. §824(b)(1); *FERC v. EPSA*, 577 U.S. __ *slip op*. at 3 (2016).
[13] *New York v. FERC*, 535 U.S. 1, 7 (2002); *FPC v. Florida Power & Light Co.*, 404 U.S. 453, 460-63 (1972).

FERC's jurisdiction over CAISO's operation of the bulk transmission system and the wholesale power markets is exclusive.[14] The FPA established a system of dual regulation of the electricity sector, with federal and state jurisdiction confined to particular spheres of activity.[15] While the line between state and federal jurisdiction under the FPA has been the subject of two high-profile Supreme Court cases this term,[16] neither of these cases affects FERC's ongoing jurisdiction over CAISO (with or without the addition of PacifiCorp). Moreover, as discussed below, neither case appears to create any new risk of federal preemption for California's existing authority over environmental matters or policies affecting generation facilities, nor does either case interfere with the procurement of particular types of resources by California's Load Serving Entities (LSEs).

FERC has regulated CAISO since its inception in 1996, just as it regulates other Regional Transmission Organizations and Independent System Operators around the country. FERC's primary responsibilities in this respect are to ensure that the rates, terms, and conditions that CAISO adopts for transmission and for wholesale sales of electricity are "just and reasonable" and "nondiscriminatory."[17] This includes "the authority—indeed, the duty—to ensure that rules or practices 'affecting' wholesale rates are just and reasonable."[18] The Supreme Court has recently confirmed that FERC's "affecting" jurisdiction is limited to rules or practices that "*directly* affect the wholesale rate."[19]

Expansion of CAISO to include PacifiCorp will not change or enhance FERC's "affecting" jurisdiction. Just as before the expansion, FERC will continue to have jurisdiction only over rules or practices that "directly affect" wholesale rates in the CAISO region.[20] Among other things, the courts have expressly held that this authority

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[14] *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). (confirming "the exclusive jurisdiction vested by Congress in FERC over the regulation of interstate wholesale utility rates"); *Miss Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.").

[15] 16 U.S.C. §824(b)(1); *FERC v. EPSA*, 577 U.S. __ slip op at 26-27 ("The Act makes federal and state powers complementary and comprehensive so that there will be no gaps for private interests to subvert the public welfare") (internal quotation marks and citations omitted); *FPC v. Southern California Edison*, 376 U.S. 205, 215-16 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction. . .").

[16] *FERC v. EPSA*, 577 U.S. __ (2016); *Hughes v. Talen Energy Marketing LLC*, 578 U.S. __ (2016).

[17] 16 U.S.C. §824d(a).

[18] *FERC v. EPSA*, 577 U.S. __ *slip op.* at 15; 16 U.S.C. §824e(a).

[19] *FERC v. EPSA*, 577 U.S. __ *slip op.* at 15 (emphasis in original; citation omitted).

[20] *Id.* (citing *California Independent System Operator v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (limiting practices "affecting" rates "to those methods or ways of doing things that directly affect the rate or are closely related to the rate, not all those remote things beyond the rate structure that might in some sense indirectly or ultimately do so").

does not permit FERC to dictate the specifics of an ISO's internal governance such as the selection and composition of the ISO's governing board.[21]

In sum adding PacifiCorp to CAISO as a participating transmission owner and changing CAISO's governance to accommodate this expansion cannot increase FERC's jurisdiction under the Federal Power Act, because that authority is already complete and exclusive with respect to CAISO's operation of the bulk transmission grid and the wholesale power markets.

b. Expansion of CAISO to include PacifiCorp does not displace state authority over environmental matters

Adding PacifiCorp to CAISO will not affect California's authority over environmental matters. Because FERC's jurisdiction over CAISO does not change as a result of the expansion of CAISO, California's authority over environmental matters will not be at increased risk of federal preemption as a result of the CAISO expansion. Put simply, the geographic expansion of CAISO to include PacifiCorp assets does not result in any concomitant expansion of FERC authority over state environmental matters; California will be able do anything it could do previously with respect to such environmental matters.

Because FERC is a creature of federal law, it has no authority beyond that granted to it by Congress.[22] Other than some specific environmental requirements regarding hydroelectric licensing under Part I of the Federal Power Act, which are unrelated to the issues discussed in this memo, the FPA does not reach state environmental matters. Accordingly, FERC and the federal courts have long recognized that FERC cannot displace or preempt state environmental policies unless those policies directly intrude upon jurisdictional rates set by FERC.

To the extent that state environmental laws or policies directly intrude upon or seek to establish FERC jurisdictional rates, they would be vulnerable to a preemption challenge on those grounds. But this would be true irrespective of whether CAISO remains as it is or expands to include PacifiCorp assets and/or other entities in the future. Expanding the CAISO grid to include PacifiCorp assets does not change or expand FERC's authority over state environmental matters.

The Supreme Court's recent decision in *FERC v. EPSA,* 577 U.S. __ (2016) does not change this conclusion. In that case, the Court upheld FERC regulations that allowed demand response to be aggregated and bid into the wholesale power markets on the grounds that the regulations were within the scope of FERC's authority to regulate

[21] *California Independent System Operator v. FERC*, 372 F.3d 395, 398, 403 (D.C. Cir. 2004) (holding that FERC had no authority under its "affecting" jurisdiction to remove and replace the members of the CAISO board).

[22] *California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004).

practices affecting FERC jurisdictional rates. To the extent that a particular party or FERC seeks to argue in the future that certain state environmental laws or policies trigger or are somehow implicated by FERC's "affecting" jurisdiction, as clarified in the *EPSA* case, any such argument would be independent of the territorial footprint of CAISO and would turn on the question whether the practice in question "directly affects" a FERC jurisdictional rate.

Similarly, the Supreme Court's recent decision in *Hughes v. Talen Energy Marketing LLC*, 578 U.S. __ (2016) does not create any new legal avenue for FERC to challenge state environmental laws as a result of an expanded CAISO. In that case, the Court held that the FPA preempted Maryland's efforts to encourage new generation by setting rates for capacity that was cleared through the FERC-regulated PJM capacity market. As the Court stressed in *Hughes,* its holding was "limited" and "[n]othing in [its] opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation."[23] The Court went out of its way, in other words, to stress that its decision was limited to the facts of the Maryland program and could not be interpreted as a basis for displacing or preempting state authority over environmental matters.

To conclude, expanding CAISO to include PacifiCorp as a participating transmission owner would not result in any new or expanded authority by FERC to displace state authority over environmental matters. With the addition of PacifiCorp, FERC would simply be regulating CAISO's operation of the bulk transmission grid and regional wholesale power markets over a larger area. FERC's authority under the Federal Power Act would remain unchanged.

c. Expansion of CAISO to include PacifiCorp does not affect state policies regarding generation facilities or the procurement of particular types of resources by load serving entities

The FPA expressly reserves to the states authority over generation facilities.[24] This includes the authority to determine what kind of generation will be built and what types of resources will be procured by load serving entities in the state. Adding PacifiCorp to CAISO does not affect this authority and does not create any new risk of federal

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[23] *Hughes v. Talen Energy Marketing LLC*, 578 U.S. __ *slip op.* at 15.

[24] 16 U.S.C. §824(b)(1); *Hughes v. Talen Energy Marketing LLC*, 578 U.S. __ slip op at 2 (2016) ("The States' reserved authority includes control over in-state facilities used for the generation of electric energy.") (internal quotation marks and citations omitted); *FERC v. EPSA*, 577 U.S. __ slip op. at 3 (2016) (noting that the FPA "also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction"); *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 525 (1945) (describing purpose of the FPA "to protect rather than to supervise authority of the states"); *cf. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. __, slip op. at 10 (2014) (stressing that "the Natural Gas Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.").

preemption of California policies regarding generation facilities or the procurement of particular types of resources.

Congress, FERC, and the federal courts have long recognized the broad powers that states enjoy in directing the planning and resource decisions of utilities operating within their jurisdictions.[25] These powers are not diminished by the expansion of an ISO to encompass a broader, multi-state region, and both FERC and the courts have consistently reaffirmed these powers in various multi-state RTOs and ISOs. Such powers include, among other things, policies to promote procurement of particular types of resources, such as state Renewable Portfolio Standards; policies to incentivize construction of particular types of generation; bilateral contracting for future capacity; policies to require the retirement of existing facilities; administration of resource planning exercises; and policies to promote distributed energy resources and to allow demand response resources to be bid into wholesale power markets.[26]

In fact, state policies to promote specific types of generation or encourage procurement of certain types of resources would only run afoul of FERC's jurisdiction under the Federal Power Act if they sought to establish or directly intruded upon a FERC jurisdictional rate. This issue arose in the context of California's feed-in tariff for combined heat and power facilities. As part of the state's efforts to reduce greenhouse gas emissions from the power sector, AB 1613 directed the California PUC (CPUC) to require California's Investor Owned Utilities (IOUs) to purchase, at a price set by the CPUC, the electricity generated by small (below 20 megawatts) combined heat and power facilities.[27] The three major California IOUs and the California PUC filed cross petitions at FERC seeking a declaratory order on whether the AB 1613 feed-in tariff constituted an effort to establish wholesale rates and thus intruded upon FERC's jurisdiction.[28] FERC found that the feed-

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[25] *See, e.g., Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) ("States have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction." (quoting *S. Cal Edison San Diego Gas & Elec. Co.*, 71 FERC ¶ 61,269 (1995)).

[26] *See, e.g., FERC v. EPSA*, 577 U.S. __ *slip op.* at 25 (2016) (noting the FERC's demand response rules allowed states to determine whether their retail customers would be able to "make demand response bids in the wholesale market"); *Conn. Dept. Pub Util. v. FERC*, 569 F. 3d 477, 481 (D.C. Cir. 2009) ("State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission."); *Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) ("States may, for example, order utilities to build renewable generators themselves, or order utilities to purchase renewable generation.") (internal quotation marks, alterations, and citation omitted); *PPL EnergyPlus LLX v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014) ("The states may select the type of generation to be built—wind or solar, gas or coal—and where to build the facility. Or states may elect to build no electric generation facilities at all.").

[27] AB 1613, *Waste Heat and Carbon Emissions Reduction Act,* codified as amended at Cal. Pub. Util. Code §§ 2840 to 2845 (2016).

[28] *California Public Utilities Commission*, 132 FERC ¶ 61,047 (2010) (Initial Order)

in tariff would not be preempted by the Federal Power Act if the program could be tailored to fit within PURPA's provisions for qualifying facilities (QFs).[29] That is, as long as the combined heat and power facilities were QFs as defined under PURPA and as long as the feed-in tariff rates were consistent with California's avoided cost provisions for QFs, the feed-in tariff would not interfere with FERC's jurisdiction.[30] In a subsequent order, FERC clarified that PURPA did not prohibit the CPUC from setting the feed-in tariff rate based on a multi-tiered avoided cost rate structure that reflected specific resource procurement requirements for California IOUs (e.g., the state Renewable Portfolio Standard).[31] FERC stressed here that while it has exclusive jurisdiction over wholesale *rates,* "it is the *states* that have the authority to dictate a utility's actual purchase decisions."[32] Thus, the states are free to employ a whole range of policy instruments and supports to dictate or encourage utilities' decisions regarding generation and procurement as long as they refrain from setting wholesale rates. In the context of California and the proposed expansion of CAISO, moreover, such powers would not be affected in any way by the addition of PacifiCorp's transmission assets (or those of any other entity).

Consistent with this, FERC has also long recognized the states' historical role in ensuring resource adequacy, requiring that such efforts be "workable" in the context of FERC's duty to ensure overall reliability of the bulk power grid.[33] Adding PacifiCorp's transmission assets to CAISO would not change this dynamic. CAISO's resource adequacy program, as approved by FERC, is based on bilateral procurement by California LSEs.[34] The CPUC and local regulatory authorities direct the procurement decisions and practices of the LSEs, including the procurement of preferred resources pursuant to state clean energy policies (e.g., RPS, loading order, etc.).[35] CAISO does not operate a centralized capacity market and engages only in backstop procurement in a

[29] *Id.* at P. 64-65. *see also* Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 210, 92 Stat. 3117, 3144-47.

[30] *California Public Utilities Commission*, 132 FERC ¶ 61,047 at P 67 (2010) (finding that "the AB 1613 program will *not* be preempted by the FPA or PURPA as long as: (1) the [combined heat and power] generators from which the CPUC is requiring the Joint Utilities to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility").

[31] *California Public Utilities Commission*, 133 FERC ¶ 61,059 at P 20 (2010) (clarifying order) (finding that "the concept of a multi-tiered avoided cost rate structure is consistent with the avoided cost requirements set forth in section 210 or PURPA and in the Commission's regulations"). *See also California Public Utilities Commission,* 134 FERC ¶ 61,044 at P 32 (2011) (order denying rehearing) ("[I]n determining the avoided cost rate, just as a state may take into account the cost of the next marginal unit of generation, so as well the state may take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy or for a long duration. Therefore, the CPUC may take into account actual procurement requirements, and resulting costs, imposed on utilities in California.")

[32] *California Public Utilities Commission*, 134 FERC ¶ 61,044 at P. 28 (emphasis in original).

[33] *Calif. Ind. System Operator Corp.*, 116 FERC ¶ 61,274 at P 1117 (2006).

[34] *Id.* at PP 1117-18.

[35] *Id.*

limited number of defined circumstances in order to ensure reliability. Thus, the capacity that California LSEs procure through bilateral contracts in order to meet resource adequacy requirements does not clear through a centralized capacity market.

Adding PacifiCorp's transmission assets to CAISO would not increase the probability that FERC would require a centralized capacity market for CAISO in the future. FERC has declined to require centralized capacity markets in regions where vertically-integrated LSEs, state resource planning, and bilateral contracting predominate.[36] These conditions already exist in the CAISO footprint.[37] Adding PacifiCorp would not change this given that PacifiCorp is a vertically-integrated utility that relies on state resource planning.[38] If anything, therefore, adding PacifiCorp to CAISO would strengthen rather than diminish the existing CAISO approach to resource adequacy and, accordingly, make it less likely that FERC would mandate a centralized capacity market in the future. For its part, CAISO has also made clear in public documents that it has no intention of seeking to create a capacity market. Its July 2016 revised proposed principles for governance of a regional ISO, for example, include a provision prohibiting CAISO "from proposing or endorsing a centralized market for the forward procurement of electric capacity that would (1) require capacity to clear at a market clearing price in order to count for resource adequacy purposes absent the unanimous authorization of the Western States Committee or (2) allow the participation of load-serving utilities from a state without the authorization of the applicable state regulator or local regulatory authority."[39]

Moreover, even if FERC decided in the future to require a centralized capacity market for CAISO, this would not preclude the state of California, or any other state in the CAISO

[36] *Midwest Independent Transmission System Operator, Inc.*, 153 FERC ¶61,229 at PP 46-52 (2015). *See also Midwest Independent Transmission System Operator, Inc.*, 139 FERC ¶61,199 at 40 (2012) (rejecting MISO's request to convert MISO's voluntary capacity market to a mandatory centralized capacity market); *Midwest Independent Transmission System Operator, Inc.*, 125 FERC ¶61,060 at P 39 (2008) ("We reject arguments that a mandatory auction or a mandatory centralized capacity market is necessary to ensure resource adequacy."), *order on reh'g and compliance,* 127 FERC ¶61,054 at PP 24-30 (2009) (confirming that a mandatory centralized capacity market is not necessary to ensure resource adequacy in the MISO region).

[37] As is the case with respect to Investor Owned Utilities in a number of the MISO states, California's Investor Owned Utilities operate under a hybrid regulatory model that combines competitive wholesale power markets with regulated retail monopoly franchises. In addition to procuring power from third-party wholesale power suppliers, the California Investor Owned Utilities also own or control generation, transmission, and distribution assets.

[38] *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 153 FERC ¶61,229 at PP 52 (2015) (noting "the predominance of vertically-integrated LSEs and long-term bilateral arrangements for obtaining capacity" as "key MISO region characteristics"). All of the five non-California western states in which PacifiCorp and its affiliates operate (Oregon, Washington, Idaho, Utah, and Wyoming) are traditional cost-of-service states that engage in state resource planning exercises.

[39] See CAISO, *Revised Proposal Principles for Governance of a Regional ISO* 3 (July 15, 2016), available at http://www.caiso.com/Documents/RevisedProposedPrinciples-RegionalISOGovernance.pdf.

footprint, from continuing with various policies to ensure resource adequacy and/or to promote construction and procurement of certain types of generation facilities. Nothing in the Supreme Court's recent decision in *Hughes* suggests otherwise. In that case, Maryland's mandatory contracts-for-differences approach to promoting new generation was struck down because it expressly disregarded the interstate wholesale rate approved by FERC and established through the PJM capacity market.[40] As the Supreme Court made clear in *Hughes*, "[s]o long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable."[41] The longstanding practice of using bilateral contracts to secure capacity was explicitly identified by the Court as well within the bounds of state authority.[42] As noted above, the Court also stressed that its holding was "limited," concluding that "[n]othing in this opinion should be read to foreclose Maryland or other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation."[43]

FERC has also repeatedly and consistently exempted renewable resources from the minimum offer price rule (MOPR) requirements in several existing capacity markets, allowing these resources to bid into the capacity markets as price-takers. These requirements were established to guard against the exercise of "buyer-side" market power to artificially depress prices in the capacity markets. In PJM, for example, FERC exempted wind and solar resources from the MOPR, a decision that was subsequently upheld by the Third Circuit.[44] Likewise, FERC also granted MOPR exemptions for

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[40] *Hughes v. Talen Energy Marketing*, LLC, 578 U.S. __ *slip op.* at 14-15 (2016); *see also PPL EnergyPlus, LLC v. Solomon*, 766 F. 3d 241, 250-52 (3rd Cir. 2014) (finding that New Jersey's Long-Term Capacity Pilot Program Act, which, like the Maryland program, sought to guarantee long-term fixed price contracts for new generation in the State, intruded upon FERC's jurisdiction over the PJM capacity market and was preempted), *cert. denied, Fiordaliso v. Talen Energy Marketing*; __ S.Ct. __, 2016 WL 1618368 (Mem).

[41] *Hughes v. Talen Energy Marketing*, LLC, 578 U.S. __ *slip op.* at 15.

[42] *Id.*, at 14.

[43] *Id.* (international quotation marks and citation omitted); *see also PPL EnergyPlus, LLC v. Solomon*, 766 F. 3d at 255 ("When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid. . . . The states may select the type of generation to be built—wind or solar, gas or coal—and where to build the facility. Or states may elect to build no electric generation facilities at all. The state's regulatory choices accumulate into the available supply transacted through the interstate market. The Federal Power Act grants FERC exclusive control over whether interstate rates are 'just and reasonable,' but FERC's authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates.").

[44] *See PJM Interconnection, LLC*, 135 FERC ¶61,022 at P 152 (2011) (accepting PJM's proposal to exempt wind and solar generation from the MOPR), *order on reh'g*, 137 FERC ¶61,145 at PP 109-10 (2011) (finding that PJM's decision to exempt wind and solar resources from the MOPR was a "pragmatic and reasonable approach"). *See also New Jersey Board of Public Utilities v. FERC*, 744 F. 3d 74, 90, 106-07 (2014) (upholding FERC's approval of PJM's decision to exempt wind and solar resources from the PJM MOPR).

renewable resources in both the New York ISO and ISO New England.[45] Taken together, these recent decisions further support the conclusion that even if FERC decided to require CAISO to institute a mandatory capacity market, which seems unlikely, the Commission would be expected to grant some form of MOPR exemption for renewable resources.

In addition to these exemptions for renewable resources, FERC has also approved two additional MOPR exemptions in PJM that further support the efforts of states and LSEs to ensure resource adequacy without having their procurement decisions subject to a MOPR. Specifically, FERC has approved MOPR exemptions for (a) self-supply by LSEs that rely largely on self-supply arrangements and that are neither significantly net-short or net-long in terms of the capacity they clear through self-supply relative to what they buy in the capacity market, and (b) new resources that are procured through a state-sponsored procurement process that is competitive and non-discriminatory and whose costs are not being recovered through a bypassable surcharge linked to clearance in the capacity market or are not being subsidized by a government agency.[46] FERC has recently authorized similar MOPR exemptions for the New York ISO.[47]

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[45] *See NY Public Service Comm'n et al. v. New York Independent System Operator, Inc.*, 153 FERC ¶61,022 at PP 47-51 (2015) (finding that a properly constructed renewable resources exemption from the NY ISO capacity market, which exempts only those resources with limited or no incentive and ability to exercise buyer-side market power, is just and reasonable), *order on reh'g*, 154 FERC ¶61,088 at P 14 (2016) (affirming previous finding on renewable resource exemption); *ISO New England, Inc.*, 147 FERC ¶61,173 at P 81 (2014) (accepting ISO New England's proposal "to allow an exemption from the MOPR for resources that qualify as Renewable Technology Resources as just, reasonable, and not unduly discriminatory or preferential"), *order on reh'g*, 150 FERC ¶61,065 at P 16 (2015) (denying request for rehearing on renewable exemption), *order on remand*, 155 FERC ¶61,023 at P 2 (2016) (affirming "its finding that the renewables exemption from the minimum offer price rule is just and reasonable, and not unduly discriminatory or preferential"). In the ISO New England context, "Renewable Technology Resources" are defined as "those resources that qualify under state renewable or alternative energy portfolio standards (or, in states without a portfolio standard, qualify under the states' renewable energy goals as a renewable energy resource) and that are geographically located in a state in which they qualify." 147 FERC ¶61,173 at P 62, n. 65. It bears emphasizing here that in the NY ISO and ISO New England cases (in contrast to the PJM case), FERC approved a cap on the amount of renewables that would be eligible for the MOPR exemption, reasoning that because these markets are smaller than PJM's, the renewables exemption would have a greater impact on prices. Smaller markets, in other words, might need a cap on the exemption in order to avoid price distortions. Accordingly, based on this precedent, even if FERC did mandate a centralized capacity market in the CAISO region, a development that (again) seems very unlikely, a decision to expand CAISO by adding PacifiCorp would actually support more favorable treatment of renewables than might be accorded in a smaller ISO market.

[46] *See PJM Interconnection, LLC*, 143 FERC ¶61,090 at PP 24-25, 52, 107 (2013) (accepting PJM's proposed MOPR exemption for competitive entry and conditionally accepting PJM's proposed MOPR exemption for self-supply), *order on reh'g and compliance, PJM Interconnection, LLC*, 153 FERC ¶61,066 at PP 32, 52 (2015) (denying request for rehearing on competitive entry and self-supply exemptions).

[47] *See Consolidated Edison Company of New York, Inc., v. New York Independent System Operator, Inc.*, 150 FERC ¶61,139 PP 45-51 (2015) (directing NY ISO to create a competitive

In sum, these various FERC orders and judicial opinions make clear that FERC is regulating the existing capacity markets in a manner that minimizes market disruption but also respects state authority over resource adequacy and procurement decisions and, specifically, state policies to support renewable energy resources. In *Hughes*, and similarly in the Third Circuit's *Solomon* decision striking down a New Jersey program that also interfered with PJM's capacity market, the fatal flaw that led to preemption was the effort by these states to encourage the construction of new power generation facilities by *directly regulating* the rates that these facilities would receive for their capacity in the PJM capacity market. Going forward, these states and others remain free to seek to encourage new generation through other means, including traditional bilateral contracts such as those used by California LSEs under the state's existing resource adequacy framework.

Finally, nothing in the Eight Circuit's recent decision in *North Dakota v. Heydinger* changes any of this analysis.[48] In that case, the court struck down a Minnesota statute that prohibited electricity imports if the imports would result in an increase in the state's greenhouse gas emissions. The three-judge panel agreed that the statute was invalid, but the judges could not agree on the legal basis for their ruling. Instead, each issued a separate opinion based on separate legal grounds, and each of them disagreed with the others regarding the basis for invalidating the statute.

The relevant portions of the Minnesota statute prohibited "any person" from "import[ing] or commit[ing] to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions; or enter[ing] into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions."[49] One judge found that the statute violated the dormant commerce clause. Another found that it was preempted by the Clean Air Act. And yet another found that it was preempted by the Federal Power Act (FPA). The dormant commerce clause and Clean Air Act preemption opinions are discussed in the next section.

With respect to FPA preemption, the concurring opinion by Judge Murphy found that, because the Minnesota statute operated as a complete ban on certain types of wholesale

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entry exemption), order on clarification, reh'g, and compliance, 152 FERC ¶61,110 at P 39-45 (2015) (denying requests for rehearing on competitive entry exemption); *NY Public Service Comm'n et al. v. New York Independent System Operator, Inc.*, 153 FERC ¶61,022 at PP 10, 61-62 (2015) (directing New York ISO to design a self-supply exemption that included net-short and net-long thresholds similar to those used in PJM), *order on reh'g*, 154 FERC ¶61,088 at P 17-18 (2016) (denying requests for rehearing on New York ISO's design of a self-supply exemption).

[48] *North Dakota v. Heydinger*, No. 14-2156 (8th Cir., 2016).

[49] Next Generation Energy Act, Minn. Stat. §216H, subd. 3. New facilities are defined as those built after 2007. If such a facility were to contribute to statewide carbon dioxide emissions, the facility could nevertheless export the electricity into Minnesota if it purchased carbon dioxide allowances from another state's cap and trade system (such as California's).

power contracts, it impermissibly intruded upon FERC's jurisdiction over wholesale sales of electricity in interstate commerce.[50] But as Judge Colloton pointed out in his concurring opinion, the statute did not impose a "complete ban" on certain wholesale contracts. Rather, it allowed such contracts to proceed as long as they were accompanied by certain offset requirements. Thus, Judge Colloton argued (correctly in our view), the FPA does not preempt such contracts. We discuss Judge Colloton's reasoning that the statute is problematic under the Clean Air Act in the Commerce Clause section below.[51]

Moreover, both FERC and the Supreme Court have long recognized that the states have authority to direct the procurement decisions of their regulated utilities (see discussion above). It therefore seems inconsistent, at best, to say that states are allowed to promote certain types of generation on the one hand (based on their emissions profile or other attributes) but cannot prohibit other types of generation (based on their emissions profile or other attributes), given that a decision to promote a particular type of generation could be viewed as tantamount to a decision to ban other types. In the Supreme Court's *Hughes* decision, of course, the problem was that the means selected to promote new generation capacity *directly regulated* the rates that the facilities would receive in the PJM capacity market. That is far different from a state policy that seeks to ensure that the electricity its residents use has a particular emissions profile.

To be sure, by simply prohibiting any person from importing out-of-state power that would contribute to an increase in the state's GHG profile, the Minnesota statute suffered from some imprecise drafting that may have made it more vulnerable to attack. In this respect, California's greenhouse gas emissions performance standard (SB 1368) would appear to be on stronger ground if it were ever subject to an FPA preemption challenge along the lines of Judge Murphy's opinion in *Heydinger*. Unlike the Minnesota statute, for example, California's performance standard simply requires that any "baseload generation" supplied to a load serving entity or to a local publicly owned electric utility under any "long-term financial commitment" must comply with the greenhouse gas emissions performance standard as established in regulation.[52] These regulations subsequently established a performance standard of 1100 pounds of carbon dioxide per megawatt hour (MWh) of electricity.[53] The California standard is thus more specific than the Minnesota statute in applying directly to load-serving entities and municipal utilities,

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[50] *Heydinger* at 25-27.

[51] *Heydinger* at 28-29. Judge Colloton found instead that the Minnesota statute was preempted by the Clean Air Act (discussed below).

[52] *See* Cal Public Utilities Code §8341(a) (2016): "No load-serving entity or local publicly owned electric utility may enter into a long-term financial commitment unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard established by the commission, pursuant to subdivision (d), for a load serving entity, or by the Energy Commission, pursuant to subdivision (e), for a local publicly owned electric utility."

[53] Cal Code of Regs. Ch 11, Art 1, §§ 2901 *et seq.*; California Public Utilities Commission, Greenhouse Gas Performance Standard, http://www.cpuc.ca.gov/General.aspx?id=5927.

and it is not phrased as a flat prohibition on particular fuels but rather as a requirement that power procured under long-term contracts have certain environmental attributes.

Most importantly for the analysis here, however, is the fact that none of these policies are affected in any way by the proposed expansion of CAISO. That is, the proposal to include PacifiCorp's transmission assets in CAISO has no relevance to the legal analysis regarding FPA preemption in the *Heydinger* case. If applied to the California performance standard, the reasoning of the case would apply whether or not CAISO's footprint expands. Put another way, either the California performance standard is a legitimate exercise of state power or not under the *Heydinger* case, irrespective of the size of the CAISO footprint.

To conclude, a decision to expand CAISO to include PacifiCorp's transmission assets does not increase the preemption risk facing California's policies regarding generation facilities or the procurement of particular types of resources by load-serving entities. Those risks exist independently of any decision to expand CAISO and, as such, they are not relevant to the legal analysis provided here. Based on the Supreme Court's recent decision in *Hughes*, moreover, as long as California refrains from attempting to directly regulate or interfere with a FERC jurisdictional rate, it will continue to enjoy broad authority to direct the planning and resource decisions of utilities operating within its jurisdiction.

2. Expansion of CAISO to include PacifiCorp does not change any potential Commerce Clause claims under the U.S. Constitution

State regulation of goods and services that cross interstate boundaries, including the environmental regulation of energy markets, is subject to the Commerce Clause of the U.S. Constitution. The expansion of CAISO to include PacifiCorp does not alter the constitutional standards that apply to California clean energy and environmental policies. Electricity that flows across the CAISO system has and will continue to be traveling in interstate commerce over the Western Interconnect, regardless of whether CAISO operates wholly within the state of California or expands to include transmission facilities in other states.

The expansion of CAISO to include PacifiCorp as a participating transmission owner does not change the constitutionality of California policies that regulate the electricity sector, including the renewable portfolio standard, the state's performance standard, and the cap-and-trade program's inclusion of electricity imports, since those policies were already subject to the Commerce Clause. Expansion of CAISO to include PacifiCorp does not affect whether the state's electricity sector policies are valid under the Commerce Clause. We nevertheless explain the current status of Commerce Clause doctrine and evaluate the possibility of legal challenges to California policies on constitutional grounds.

States that regulate goods and products sold in interstate commerce are subject to what is known as the dormant Commerce Clause. The dormant Commerce Clause—so-called because it is a principle derived from the text of the Commerce Clause but is not explicitly set forth in it[54]—is designed to prevent states from engaging in economic protectionism that favors their own economic interests at the expense of out-of-state interests. The most constitutionally suspect state policies are those that discriminate explicitly in favor of in-state economic interests or have a discriminatory purpose. These "facially discriminatory" policies, and those motivated by "economic protectionism," are essentially *per se* unconstitutional unless a state can show that it has no other means to achieve a legitimate state purpose.[55]

The constitutional analysis does not end, however, with policies that are facially discriminatory or have a discriminatory purpose. Even those policies that are not facially or purposely discriminatory but have effects on interstate commerce are subject to the Commerce Clause. The "Pike" balancing test applies to such policies and is far more deferential to states in analyzing non-discriminatory laws that are "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[56] A court will uphold a nondiscriminatory state statute that has an effect on interstate commerce "unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits."[57] Because this inquiry is so dependent on the particular evidence about the costs and benefits of a particular regulation in future regulation, we do not analyze its potential application in this memorandum. It is worth stressing, however, that the test is very deferential to state regulation.

Some courts have imposed a third test on state laws under the dormant Commerce Clause. Known as the "extraterritoriality test," these courts have held that "[t]he Commerce Clause precludes application of a state statute to commerce that takes place wholly outside of the state's borders."[58] Importantly, however, the Ninth Circuit Court of Appeals, which has jurisdiction over California, has limited the extraterritoriality test to laws that either "dictate the price of a product," or "tie[] the price of its in-state products to out-of-state prices."[59]

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[54] Section 8, clause 3 of Article 1 of the United States Constitution grants Congress the power to regulate commerce "among the several states."

[55] *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338-39 (2007) ("An ordinance may be valid even if it affects interstate commerce if it passes a two pronged inquiry: "first, whether the ordinance discriminates against interstate commerce, and second, whether the ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.")

[56] *United Haulers*, 550 U.S. at 346.

[57] *United Haulers*, 550 U.S. at 346 (citations omitted).

[58] *Cotto Waxo Co.*, 46 F.3d at 793 (citing *Healy*, 491 U.S. at 336).

[59] *Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 951 (9th Cir. 2013).

To date, with one exception involving a Minnesota policy that we discuss below, challenges to state climate and energy policies on Commerce Clause grounds have met with failure. And importantly, in a Commerce Clause decision involving California's Low Carbon Fuel Standard (LCFS), the Ninth Circuit rejected a Dormant Commerce Clause claim. Although the LCFS involves fuels, not electricity, the court's reasoning in upholding the LCFS against constitutional challenge serves as an important precedent in evaluating the constitutionality of California climate policies involving the electricity sector.

Two categories of state climate policies regulating the electricity sector have faced dormant Commerce Clause challenges, one involving attempts to limit the carbon content of electricity imported into a state and another involving renewable portfolio standards. California has policies that do both and therefore both categories of cases are relevant to an analysis of their constitutionality.

a. The Expansion of CAISO to Include PacifiCorp Assets Does Not Change the Constitutionality of California's Regulation of Electricity Imports

California regulates imports of electricity to limit their carbon content in two ways. The performance standard, as described above, prohibits utilities from entering into long-term contracts for baseload electricity generation where the carbon content of the electricity generated exceeds 1100 pounds of carbon dioxide per megawatt hour of electricity. This policy applies to contracts with both in- and out-of-state generators.[60] The effect of the performance standard is to ban California LSEs from entering long-term contracts to import electricity generated from coal for baseline purposes since, at least to date, coal-fired power plants cannot meet the standard. California has no in-state coal-fired power plants.

The second California policy that regulates imports of electricity into the state is part of the state's cap-and-trade program. This policy is designed to ensure that the state's greenhouse gas emissions from the generation of electricity both in and out of state are captured in California's regulatory policies. In-state generation is regulated by measuring emissions from power plants within the state's borders. The regulation of greenhouse gas emissions from out-of-state generation that is imported into the state is more complex. It is not possible to track specific electricity flows into and out of a state. Electric power does not travel directly from a particular generation facility into a state; instead, the grid operates on a regional basis, with supply and demand constantly balanced and energy moving to those areas of high demand in the region that need it.[61]

[60] 20 CCR § 2902 (West 2016).

[61] For an explanation of the interconnected nature of our electric grid, *see* BRIEF FOR *AMICI CURIAE* BENJAMIN F. HOBBS, et al. in EME Homer Generation v. E.P.A., https://www.edf.org/sites/default/files/sites/default/files/content/12-1182_and_12-1183%20_Benjamin_F_Hobbs_etc.pdf.

As a result of the way the grid operates, California's Air Resources Board has developed regulations to attribute greenhouse gas emissions to approximate the greenhouse gas emissions Californians are responsible for in purchasing and using electricity generated out-of-state by imposing compliance obligations on the first deliverer of electricity into the state.[62] Emissions are measured in one of two ways. Either the importer can use a facility-specific factor that requires the importer to demonstrate that the importer had the right to electricity from a specific plant that was actually being utilized at the time of the import.[63] If it cannot do so, the importer must use an "unspecified" default factor that measures the emissions of imported electricity at the rate that represents the most likely emissions factor associated with out-of-state electricity generation that will meet California electricity demand.[64] We refer to this set of regulations as the "first importer rules."[65]

These two policies—the performance standard and the first importer rules—have the potential to raise concerns under dormant Commerce Clause jurisdiction, though they have to date not been the object of lawsuits against them. Our analysis suggests that the California policies are likely to withstand any constitutional challenge. Importantly, however, the legal issues surrounding the constitutionality of the two policies do not change by virtue of the inclusion of PacifiCorp assets in the CAISO footprint. Any constitutional issues, in other words, exist independent of the CAISO expansion because they involve electricity moving in interstate commerce and are therefore already subject to the Commerce Clause.

The *Heydinger* case, as we explained earlier, involves a policy that is somewhat similar to, but distinguishable from, California's performance standard. Indeed, the part of the Minnesota statute that caused one judge on the Eighth Circuit to strike the statute down

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[62] Cal. Code Regs. Title 17 § 95111(a)(2) ("*Delivered Electricity*. The electric power entity must report imported, exported, and wheeled electricity in MWh disaggregated by first point of receipt or final point of delivery, as applicable, and must also separately report imported and exported electricity from unspecified sources and from each specified source.."); *see also* Cal. Code Regs. Title 17 § 95852 (b) (describing compliance obligations of first deliverers of electricity).

[63] Cal Code Regs, Title 17§ 9511(a)(4) (defining imported electricity from specified facilities); §95852(B)(3) (setting forth criteria for specified sources); 9511(b)(2) (formula for specified emissions).

[64] Cal. Code Regs Title 17 § 95111 (b)(1) (formula for determining unspecified emissions). For an explanation of how the importer rules work, *see* J. Bushnell et al. / Energy Policy 64 (2014) 313–323.

[65] CARB is currently working with CAISO and considering changing the process by which electricity is tracked in order to measure GHGs associated with the California electricity market. *See* State of California, Air Resources Board, *Public Hearing to Consider the Proposed Amendments to the California Cap On Greenhouse Gas Emissions and Market Based Compliance Mechanisms, Draft Staff Report: Initial Statement of Reasons*, (July 12, 2016) at 50-51 (describing potential changes), http://www.arb.ca.gov/cc/capandtrade/draft-ct-reg_071216.pdf. This memo does not address any rule changes CARB might adopt to track out of state GHGs.

on Commerce Clause grounds *is not part of the California statute.* Thus the Commerce Clause analysis in the *Heydinger* case is not applicable to California's provision. We explain why below.

As a reminder, the relevant provisions of Minnesota's Next Generation Act prohibit any person from ". . . import[ing] or commit[ing] to import from outside the state power from a new large energy facility that would contribute to statewide power sector carbon dioxide emissions; or . . . enter[ing] into a new long-term power purchase agreement that would increase statewide power sector carbon dioxide emissions."[66] Minnesota and North Dakota are both part of the Midcontinent Independent System Operator (MISO), which coordinates transmission for the Midwestern part of the country and parts of Canada and also operates an organized generation and capacity market.[67] In striking down the import and long-term power purchase agreement provisions, the Eighth Circuit panel issued three separate concurring opinions using three separate and distinct bases for the decision and disagreeing with one another's legal reasoning. We have already described the concurring opinion that reasoned that the Minnesota provision is preempted by the Federal Power Act. Another judge struck the Minnesota provision down on the grounds that it violates the dormant Commerce Clause. The third judge struck the statute down on the ground that the Minnesota policy is preempted by the federal Clean Air Act. We address the latter two arguments below.

One judge, Judge Loken, reasoned that because electricity transmitted on the MISO system cannot be directed to a particular state or a particular end-user in a particular state, the Minnesota statute could apply to an electricity generator operating wholly outside the borders of Minnesota and not intending to export electricity to Minnesota.[68] The statute's language applies to "any person" importing electricity into Minnesota (unlike the California statute, which applies specifically to California's load-serving entities and publicly owned utilities). In Judge Loken's view, electricity that is injected onto the MISO transmission lines might, in fact, wind up being imported into Minnesota even if the generator of the electricity does not intend for it to be. As a result, the court reasoned, such a generator—under the explicit terms of the statute—would need to seek regulatory approval from the state of Minnesota to demonstrate that it was complying with the statute. The Minnesota regulation therefore violated the Commerce Clause of the United States constitution because it regulated wholly out-of-state economic activity in violation of the extraterritoriality test.[69]

We believe that Judge Loken's opinion is based on an erroneous understanding of the way the electric grid works. We are joined in this belief by Judge Loken's colleague on the case, Judge Murphy, who concurred in the result of the case on the grounds that the policy is preempted by the FPA (addressed above) but who disagreed that the policy

[66] *Heydinger* at 2.
[67] *Heydinger* at 4.
[68] *Heydinger* at 15.
[69] *Heydinger* at 17-18. Judge Leyder did not separately explain why he struck down subsection (3) of the Minnesota statute.

violates the Commerce Clause. Judge Murphy objected to Judge Loken's characterization of how electrons "flow" over the MISO system. Judge Loken explained his belief that "when a non-Minnesota generating utility injects electricity into the MISO grid to meet its commitments to non-Minnesota customers, it cannot ensure that those electrons will not flow into and be consumed in Minnesota."[70] Judge Murphy disputed this description. His description of the transmission of electricity is, in our view, the accurate one: "In the electricity transmission system, individual electrons do not actually 'flow' in the same sense as water in a pipe. Rather, the electrons oscillate in place, and it is electric energy which is transmitted through the propagation of an electromagnetic wave. Electricity on the grid behaves according to the laws of physics, and it cannot be dispatched from one particular place to another. Energy flowing onto a power grid energizes the entire grid, and consumers then draw undifferentiated energy from that grid."[71]

This factual disagreement between Judge Loken and Judge Murphy is important from a legal perspective in the Minnesota case because of a dispute over how the Minnesota statute should be construed. Judge Loken construed the statute to apply to any generator injecting power onto the MISO grid regardless of whether it has a bilateral contract with a Minnesota utility or is participating in MISO short term energy markets. That is because, under Loken's understanding of the way electricity works on the grid, electrons injected by a generator could accidentally flow into Minnesota and "any person" importing electricity into Minnesota could then be subject to the statute. Judge Murphy's explanation, however, demonstrates that electrons don't flow across state borders but instead "oscillate in place" and energize the grid. Thus Minnesota could not regulate the out-of-state generator with no connection to Minnesota who injects electrons into the MISO grid, because there is simply no way to track the flow of electrons into Minnesota. Judge Murphy's opinion concludes that because of the way electricity energizes the grid, the only reasonable construction of the Minnesota statute is that it does not apply to such a generator, nor does it apply to MISO short-term energy markets. Instead, the statute should be construed to apply only to parties to bilateral contracts under which a Minnesota utility contracts with an out-of-state generator for long-term power.[72] Those parties do not operate wholly outside Minnesota's borders, and therefore the statute is sound under the Commerce Clause.[73]

California's performance standard regulation is on its face limited to bilateral contracts between in-state utilities and generators. Thus the concern that Judge Loken had about the Minnesota statute—and the basis for his opinion striking the statute down on Commerce Clause grounds—does not even apply to the California statute.

In addition to this important factual distinction, Judge Loken also relied on a test under the Commerce Clause, the "extraterritoriality test" that, as the Ninth and Tenth Circuits

[70] *Heydinger* at 15.
[71] *Heydinger* at 22 (citations omitted).
[72] *Heydinger* at 22-23.
[73] *Id.*

have explained, has never been used by the U.S. Supreme Court to invalidate polices that do not involve differential prices for in- and out-of-state products. The Ninth Circuit made that precedent clear in evaluating the constitutionality under the Commerce Clause of California's ban on foie gras produced as the result of force-feeding a bird. As the Ninth Circuit explained:

> The [Supreme Court has held that the extraterritoriality doctrine is] not applicable to a statute that does not dictate the price of a product and does not "t[ie] the price of its in-state products to out-of-state prices." Here, [the foie gras ban does not impose any prices for duck liver products and does not tie prices for California liver products to out-of-state prices. [The extraterritoriality doctrine is] thus inapplicable in this case.[74]

California's first importer rules and its performance standard do not impose any prices for electricity and do not tie in-state prices for California electricity to out-of-state prices. The extraterritoriality test would not under the Ninth and Tenth Circuit reasoning, therefore, apply to determining their constitutionality.

Moreover, California's policies regulate the purchasing decisions by entities doing business within the state and treat in-state and out-state purchases the same. They do not regulate wholly out-of-state behavior. The performance standard prohibits load-serving entities serving California end-use customers from entering into long-term contracts for generation that exceeds the performance standard, whether or not the generators are located in- or out-of-state. Minnesota's statute—in Judge Loken's view—does not limit its provisions to entities that are tied to the state but instead apply to "any person." California's first importer rules are also designed to apply only to electricity that can be attributed to California. The implementation of the rules is aided by extensive cooperation between CARB and CAISO that allows CAISO to distinguish between electricity generated out-of-state but deemed to be imported into California and electricity that is not, and a methodology that allows for the cost of California carbon compliance to be incorporated into wholesale bidding decisions.[75] Minnesota made no such efforts. As long as California continues to employ a methodology that reasonably

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[74] *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F 3d 937, (9th Cir. 2013). *See also, Energy and Environmental Legal Institute v. EPEL* 793 F.3d 1169, 1170-71 (10th Cir. 2015).

[75] CARB and CAISO have been working to clarify the tracking of these resources with the expansion of CAISO's Energy Imbalance Market (EIM) and will need to continue to do so if CAISO expands to include the PacifiCorp assets. For guidance on the reporting requirements for electricity importers and exporters in light of the expansion of CAISO's EIM, *see* State of California Air Resources Board, *ARB Energy Imbalance Market Reporting Transactions, Frequently Asked Questions (FAQs)*, http://www.arb.ca.gov/cc/reporting/ghg-rep/ghg-rep-power/eim-faqs.pdf; *see also* State of California Air Resources Board, *Public Hearing to Consider the Proposed Amendments to the California Cap On Greenhouse Gas Emissions and Market Based Compliance Mechanisms, Draft Staff Report: Initial Statement of Reasons*, (July 12, 2016) at 50-51 (describing potential CAISO changes to calculating emissions), http://www.arb.ca.gov/cc/capandtrade/draft-ct-reg_071216.pdf.

attempts to attribute California's share of greenhouse gases to its electricity imports, and to measure the greenhouse gases of generators who are parties to long-term contracts with California's utilities, our view is that the state's policies should be able to withstand scrutiny under the Commerce Clause. The expansion of CAISO to include the PacifiCorp assets does not change this analysis.

The *Heydinger* case also included a concurring opinion from a third judge, Judge Colloton, who disagreed with his two colleague's opinions and offered a third rationale for striking down the Minnesota statute. He argued that the Minnesota provisions are preempted by the Clean Air Act. Because the Minnesota statute gives out-of-state generators the option of offsetting greenhouse gas emissions from power imported to Minnesota by purchasing allowances in another state's cap-and-trade program, Judge Colloton held that this was preempted by the Clean Air Act, which regulates greenhouse gases and grants states "primary responsibility for assuring air quality within [their] entire geographic region. § 7407(a); see also § 7401(a)(3)."[76] In his view, generators in one state should not have to answer both to the state in which they are located and a state to which they import electricity by potentially reducing emissions for each one. A coal-fired power plant in North Dakota, for example, could be required to reduce greenhouse gases in order to meet Minnesota's Next Generation Act requirements and could also be required to reduce emissions under North Dakota's implementation of the Clean Air Act. This, reasoned Colloton, is impermissible because "allowing 'a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states.'"[77] The logic of this argument seems peculiar, since the facility always has the option of declining to sell power to Minnesota entities. In any event, Colloton's analysis does not apply to California's performance standard. California's performance standard does not allow out-of-state generators that exceed the standard to offset their emissions either through the purchase of cap-and-trade allowances or through reducing their emissions. Instead, California's utilities cannot enter long-term contracts with such generators. Therefore, its performance standard appears not to raise Clean Air Act preemption issues of the sort with which Judge Colloton is concerned.

Not only are California's first importer and performance standard rules a) not subject to the extraterritoriality doctrine and b) distinguishable from the Minnesota Next Generation Act, but the Ninth Circuit Court of Appeals has issued a decision that provides a helpful precedent for any Commerce Clause challenge to California's climate policies. We next review the case, which upheld California's Low Carbon Fuel Standard, to demonstrate why the state's electricity import rules are likely to be upheld as constitutional if challenged.

In *Rocky Mountain Farmers Union v. Corey*,[78] the Ninth Circuit found that the state's Low Carbon Fuel Standard (LCFS) did not discriminate against interstate commerce

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[76] *Heydinger* at 29.
[77] *Heydinger* at 29-30.
[78] 730 F.3d 1070 (9th Cir. 2013), *cert. denied,* 134 S. Ct. 2875 (2014).

under the "facially discriminatory" prong of the Commerce Clause doctrine. An explanation of the LCFS is necessary to describe the court's ruling. The LCFS caps the average carbon intensity of transportation fuels in California's market. Fuel blenders must either meet a specified annual carbon intensity in their fuels or use credits to comply with the standard if their intensity is too high. If their fuel is less carbon intensive than required, blenders can generate credits to sell to companies that need them to comply with the standard.

In order to capture the full measure of carbon intensity, the state uses a "life cycle analysis," taking into account all of the carbon emissions that are generated in not only the production and refining of the fuel but also in transporting it to market. The state does so for obvious reasons: if it took into account only the emissions generated from, for example, production, overall emissions could increase if the emissions from transporting the fuel into the state were higher than fuel produced elsewhere, including within the state. The result is that a chemically identical gallon of gasoline blended to reduce the carbon intensity of the fuel with, say, ethanol, could have a higher carbon intensity depending on where and how the gasoline was produced, refined and shipped. North Dakota ethanol-blended gasoline, in other words, could have a different carbon intensity than Oregon ethanol-blended gasoline or California ethanol-blended gasoline. And one gallon of North Dakota ethanol could have a different carbon intensity than another North Dakota gallon if the production and refining of the gallon was done with different sources of energy (natural gas as opposed to coal, for example).[79] Opponents of the LCFS sued, arguing that this life cycle treatment—in treating what could be identical gallons of gasoline differently depending on where and how they were produced and transported—unconstitutionally discriminated against out-of-state producers.

A lower court had held that the LCFS "discriminates on the basis of origin." The Ninth Circuit disagreed. Instead, the court found that the California methodology, in measuring a complex series of factors to determine carbon intensity, "is an average based on scientific data, not an ungrounded presumption that unfairly prejudices out-of-state ethanol."[80] The court distinguished between unconstitutional discrimination intended to favor in-state businesses and treatment that may result in the unequal treatment of states but that is not facially discriminatory. As the court reasoned:

> When it is relevant to that measurement [of overall carbon intensity], the Fuel Standard considers location, but only to the extent that location affects the actual GHG emissions attributable to a default pathway. Under dormant Commerce Clause precedent, if an out-of-state ethanol pathway does impose higher costs on California by virtue of its greater GHG emissions, *there is a nondiscriminatory reason for its higher carbon intensity value.* Stated another way, if producers of out-of-state ethanol actually cause more GHG emissions for each unit produced, because they use dirtier electricity or less efficient plants, CARB can base its regulatory treatment on these emissions. If California is to successfully promote

[79] *Rocky Mountain Farmers*, 730 F.3d at 1080-84 (describing program).
[80] 730 F.3d at 1089.

> low carbon-intensity fuels, countering a trend towards increased GHG output and rising world temperatures, it cannot ignore the real factors behind GHG emissions.[81]

This language—rejecting the application of the "facially discriminatory" test for a policy that considers location as long as the reason for the consideration of location is non-discriminatory—is powerful for any analysis of the constitutionality of the first importer rules. The performance standard does not take location into account and thus is far less likely to face constitutional challenge. But the first importer rules apply to the place at which scheduled electricity first, in theory, crosses the California border and thus has a locational element. The reason that California has developed the electricity import rules is to ensure that California is accounting for and regulating all of the emissions associated with its in-state electricity use in order reduce the state's overall greenhouse gas emissions.[82] Without such rules, the state's electricity providers could simply import all of their electricity from out-of-state, avoid complying with the cap-and-trade program and actually *increase* the state's overall greenhouse gas emissions from the electricity sector. Thus, as with the LCFS, California has a non-discriminatory reason for taking the location of electricity imports into account and thus is unlikely to have a facial Commerce Clause challenge against it succeed. The expansion of CAISO does not change this analysis.

Finally, the *Rocky Mountain* court also rejected arguments that the LCFS impermissibly regulated extraterritorial behavior. Although, as referenced above, the *Association des Eleveurs de Canards et d'Oies du Quebec* case (the foie gras case) rejects application of the extraterritorial doctrine altogether if a statute does not discriminate on the basis of price, the *Rocky Mountain* court also made clear that it is valid for California to "regulate commerce and contracts within their boundaries with the goal of influencing the out-of-state choices of market participants."[83] The performance standard regulates contracts within the state of California—between its utilities and baseload generators. Such regulation is constitutionally permissible.

Although we believe that current Commerce Clause doctrine makes it highly unlikely that California's electricity import rules would be struck down as unconstitutional, a court could, of course, disagree. The U.S. Supreme Court has not in recent years evaluated the constitutionality of clean energy policies and therefore could change the doctrinal landscape we have evaluated to be either more favorable to state policies or less. Nevertheless, the expansion of CAISO does not change our constitutional analysis. California is already subject to the Commerce Clause because it participates in a regional system of transmission; the CAISO expansion does not increase the likelihood that a constitutional challenge would succeed on Commerce Clause grounds.

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[81] 730 F.3d at 1090.

[82] *See* ARB staff report, note 64 at 50-51 for support of the state's reasoning in developing its rules.

[83] 793 F.3d 1103.

b. The Expansion of CAISO Does Not Affect the Constitutionality of California's Renewable Portfolio Standard Requiring the Procurement of a Set Percentage of Renewable Resources

California's RPS requires its Investor Owned Utilities (IOU) and publicly owned utilities to procure 33 percent of their electricity from renewable sources by 2020 and 50 percent by 2030. Although some state RPSs have faced constitutional challenge under the Commerce Clause, the only reported federal court decision to consider a broad-based challenge to an RPS—the State of Colorado's—rejected the constitutional claim. Other Commerce Clause challenges have involved RPS policies that explicitly favor in-state renewable resources, but to date no court has issued a decision evaluating such a challenge.[84] Our view is that California's general RPS is, similarly, likely to withstand constitutional challenge under the same reasoning as the 10th Circuit Court of Appeals decision upholding Colorado's RPS. And, importantly, the expansion of CAISO to include the PacifiCorp assets would not change this constitutional analysis. California's RPS is already subject to the Commerce Clause because electricity that serves California customers crosses state borders.

In *Energy and Environmental Legal Institute v. EPEL*,[85] out-of-state coal producers challenged Colorado's RPS. Like California, Colorado is connected to the Western Interconnect and receives some of its power from out of state.[86] The coal producers argued that, because Colorado is a net importer of electricity, its RPS would mean that less coal would be sold overall on the grid of which Colorado is a part.[87] They contended that the RPS discriminated against out-of-state producers under the extraterritorial analysis applied in the *Heydiger* case described above involving Minnesota's Next

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[84] *See* State Power Project, *State Cases*, http://statepowerproject.org/states/ for a summary of Commerce Clause cases. The 7th Circuit, in a case involving a FERC order about cost allocation and transmission lines, suggested in dicta that Michigan's RPS, in favoring in-state renewable resources, might be constitutionally problematic. The court did not, however, actually rule on the constitutionality, nor did the parties brief the issue. *See Illinois Commerce Comm v. FERC*, No. 11-3421 (7th Cir., June 7, 2013). The California Public Utilities Commission heard and rejected a Commerce Clause challenge to California's policies that establish which renewable resources qualify for the state's RPS requirements. *See* Public Utilities Commission of the State of California, Decision 13-10-074, *Order Denying Applications for Rehearing of Decision (D.) 11-12*-052 (Oct. 31, 2013). We do not evaluate these qualification standards here, but emphasize the more general point that general RPSs appear to be constitutional under the Commerce Clause.

[85] 793 F.3d 1169, 1170-71 (10th Cir. 2015).

[86] 793 F.3d 1171 ("Colorado consumers receive their electricity from an interconnected grid serving eleven states and portions of Canada and Mexico.)

[87] 793 F.3d at 1171 ("Because electricity can go anywhere on the grid and come from anywhere on the grid, and because Colorado is a net importer of electricity, Colorado's renewable energy mandate effectively means some out-of-state coal producers, like an EELI member, will lose business with out-of-state utilities who feed their power onto the grid. And this harm to out-of-state coal producers, EELI says, amounts to a violation of one of the three branches of dormant commerce clause jurisprudence.")

Generation Act.[88] The Court of Appeals rejected the arguments, holding that the Colorado RPS did not discriminate against out-of-state producers and did not regulate extraterritorial prices.[89] California's RPS policy would likely similarly survive a general constitutional challenge.

To sum up, thus far, courts that have considered Commerce Clause challenges to state climate policies have generally upheld them, with the exception of the Eighth Circuit decision in *North Dakota v. Heydinger*. We do not believe that the *Heydinger* court's reasoning would extend to California's policies, as described above. California's policies appear to be well-insulated from constitutional challenge. Most important for this memo, the expansion of CAISO to include Pacific Corp does not change this analysis.

Conclusion

Although the questions involving state and federal jurisdiction over electricity markets and the constitutional validity under the Commerce Clause of state environmental regulation of electricity are complex, our bottom-line conclusion is straightforward: The expansion of CAISO to include PacifiCorp as a participating transmission owner does not change either California's authority over energy and environmental matters or the constitutionality of its energy and environmental policies. CAISO is already regulated by FERC as a public utility, and California's environmental and clean energy policies affecting the electricity sector are already subject to the Commerce Clause because the state's electricity crosses interstate borders. Adding PacifiCorp assets to CAISO will not create any new or additional risk of preemption for California's energy and environmental policies. Nor will it alter the constitutionality of those policies.

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[88] 793 F.3d at 1172.

[89] 793 F.3d at 1174 ("But whatever doctrinal pigeonhole you choose to place them in, we don't see how *Baldwin, Healy,* and *Brown-Forman* require us to strike down Colorado's mandate. For that mandate just doesn't share any of the three essential characteristics that mark those cases: it isn't a price control statute, it doesn't link prices paid in Colorado with those paid out of state, and it does not discriminate against out-of-staters.")

EXHIBIT 5

From: Ethan Elkind <elkind@berkeley.edu>
Sent: Friday, March 25, 2016 10:54 AM
To: Ulmer, Andrew
Cc: Daniel Farber; Ivancovich, Anthony
Subject: Re: CAISO project

Hi Andrew,
Dan and I discussed and we are okay moving forward without this advance approval. Let's revisit once the work product takes shape.

Best,
Ethan

Sent from my iPhone

On Mar 24, 2016, at 2:30 PM, Ulmer, Andrew <aulmer@caiso.com> wrote:

> Ethan and Dan:
> Although we anticipate that the work product will become public, we are not comfortable with prior approval to publicize the results without knowing what they are. If this is a problem for going forward let's discuss.
> I am in your time zone tomorrow if you want to talk.
> Best,
> Andrew
>
> ---
>
> **From:** Ethan Elkind [mailto:elkind@berkeley.edu]
> **Sent:** Wednesday, March 23, 2016 2:42 PM
> **To:** Ulmer, Andrew <aulmer@caiso.com>
> **Cc:** 'Daniel Farber' <dfarber@berkeley.edu>
> **Subject:** Re: CAISO project
> Great -- thank you Andrew. That would solve it.
>
> Look forward to hearing about the advance approval on publicizing, if that's possible to secure.
>
> Ethan
>
> On 3/23/16 2:03 PM, Ulmer, Andrew wrote:
>
>> Ethan:
>> We would propose to add a specific exception to the work order that specify Sections 3, 4 and 13.c of the agreement are not applicable because consultant will not be located on ISO premises or have access to ISO systems while performing the services.
>> I am checking on the question about advance approval related to publicizing the final work product under Section 19.
>> Andrew
>>
>> ---
>>
>> **From:** Ethan Elkind [mailto:elkind@berkeley.edu]
>> **Sent:** Monday, March 21, 2016 11:14 AM

To: Ulmer, Andrew
Cc: 'Daniel Farber'
Subject: Re: CAISO project

< EXTERNAL email. Evaluate before clicking. >

Hi Andrew,
Dan and I had an opportunity to review the template contract and are basically fine with it. However, we noted two provisions that sparked some questions:

Section 13c requires liability insurance up to $1M. Dan and I have not purchased such a policy and are wondering how critical it is to keep this requirement, given the nature of the work we would be doing. If it's non-negotiable, do you have any sense as to how much these policies cost and what the process is to purchase? Could we build the expense into our contract price?

Section 19: this provision doesn't allow us to publicize our work on this effort without CAISO approval. We'd likely want to highlight the finished work product (once it's publicly available) through our environmental law center's promotional material (blog, newsletter, website, etc.), which I assume would be helpful to CAISO, too. Do you anticipate any objection to us doing so? Is it possible to get approval in advance to promote the finished product through Berkeley Law?

Otherwise, we would be comfortable moving forward and would look forward to discussing further on another call.

Best,
Ethan

On 3/17/16 1:00 PM, Ulmer, Andrew wrote:

> Dan and Ethan:
> I am attaching a template for a personal services contract for your review. Dan, as I mentioned, we would like to explore having you and Ethan serve in a primary consultant role to Ann Carlson and William Boyd in helping to develop the written work product we discussed. As a next step, can you review this form of contract and let me know if you have concerns. If you are willing to go forward in this role and we proceed to execute the contract, we can then schedule a call to orchestrate this effort. Obviously, if you want to discuss with Ann/William offline please do so.
> Best,
> Andrew
> Andrew Ulmer
> Director, Federal Regulatory Affairs
> California Independent System Operator Corp.
>
> ***
>
> The foregoing electronic message, together with any attachments thereto, is confidential and may be legally privileged against disclosure other than to the intended recipient. It is intended solely for the

EXHIBIT 6

Michael Aguirre

From: Michael Aguirre <maguirre@amslawyers.com>
Sent: Tuesday, November 15, 2016 3:22 PM
To: 'dfarber@law.berkeley.edu'
Cc: 'Mia Severson'
Subject: Public Records Request

Dear Professor Farber:

Under the California Public Records Act and Article 1, Section 3 of the California Constitution, please provide to me any and all records and communications regarding the project that resulted in the issuance of your opinion published by CAISO on 1 August, 2016 entitled Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets.

Please include mseverson@amslawyers.com in your response. Thank you.

Michael J. Aguirre, Esq.
Aguirre & Severson, LLP
501 W. Broadway
Suite 1050
San Diego, Ca 92101
(619)876-5364

Michael Aguirre

From:	Michael Aguirre <maguirre@amslawyers.com>
Sent:	Tuesday, November 15, 2016 3:17 PM
To:	'eelkind@law.berkeley.edu'
Cc:	'Mia Severson'
Subject:	Public Records Request

Dear Professor Elkind:

Under the California Public Records Act and Article 1, Section 3 of the California Constitution, please provide to me any and all records and communications regarding the project that resulted in the issuance of your opinion published by CAISO on 1 August, 2016 entitled Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets.

Please include mseverson@amslawyers.com in your response. Thank you.

Michael J. Aguirre, Esq.
Aguirre & Severson, LLP
501 W. Broadway
Suite 1050
San Diego, Ca 92101
(619)876-5364

Michael Aguirre

From:	Michael Aguirre <maguirre@amslawyers.com>
Sent:	Tuesday, November 15, 2016 3:21 PM
To:	'carlson@law.ucla.edu'
Cc:	'Mia Severson'
Subject:	Public Records Request

Dear Professor Carlson:

Under the California Public Records Act and Article 1, Section 3 of the California Constitution, please provide to me any and all records and communications regarding the project that resulted in the issuance of your opinion published by CAISO on 1 August, 2016 entitled Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets.

Please include mseverson@amslawyers.com in your response. Thank you.

Michael J. Aguirre, Esq.
Aguirre & Severson, LLP
501 W. Broadway
Suite 1050
San Diego, Ca 92101
(619)876-5364

EXHIBIT 7

Michael Aguirre

From:	Christopher M Patti <cpatti@berkeley.edu>
Sent:	Friday, December 2, 2016 3:57 PM
To:	Michael Aguirre
Cc:	Liane Ko; Maria Severson; Melanie Mason; Daniel Kim; Robert Bryson II
Subject:	Re: RESPONSE: PRA Requests: Records related to CAISO Publication

Dear Mr. Aguirre,

The University of California's Electronic Communications Policy permits incidental personal use of University-provided email, including by faculty for private professional activities permitted under section 025 of the University's Academic Personnel Manual. Such personal communications that do not involve University business are not deemed "public records" subject to disclosure under the Public Records Act merely by virtue of the fact that they are in possession of a University employee or official. See, e.g., *Board of Pilot Commissioners v. Superior Court* (2013) 218 Cal.App.4th 577; *Coronado Police Officers Assn v. Carroll* (2003) 106 Cal.App.4th 1001; see also *Howell Educational Assn v. Howell Bd. of Ed.* (Mich App. 2010) 789 N.W.2d 495 ("personal e-mails were not rendered public records solely because they were captured in a public body's e-mail system's digital memory").

Regards,

Christopher M. Patti/Chief Campus Counsel/University of California, Berkeley/200 California Hall #1500/Berkeley, California 94720-1500/T: 510-642-7122/F: 510-643-5980

On Fri, Dec 2, 2016 at 3:54 AM, Michael Aguirre <maguirre@amslawyers.com> wrote:

Greetings: We are investigating whether two law school employees (Faber, Elkind) used UC Berkeley email accounts to communicate with and issue false legal opinions supporting a private corporate takeover of the California Independent System Operator, which is now headed by a board appointed by the governor. The emails on UC Berkeley email system went back and forth from feb to aug 2016 See attached examples. Use of the UC Email system makes these emails in this context public records. Thank You, Mike Aguirre

From: Christopher M Patti [mailto:cpatti@berkeley.edu]
Sent: Monday, November 28, 2016 9:03 PM
To: Michael Aguirre <maguirre@amslawyers.com>
Cc: Liane Ko <lianeko@berkeley.edu>; Maria Severson <mseverson@amslawyers.com>
Subject: PRA Requests: Records related to CAISO Publication

Michael Aguirre

From: Christopher M Patti <cpatti@berkeley.edu>
Sent: Monday, November 28, 2016 9:03 PM
To: Michael Aguirre
Cc: Liane Ko; Maria Severson
Subject: PRA Requests: Records related to CAISO Publication
Attachments: SIGNED-APM025_Farber_Daniel.pdf

Dear Mr. Aguirre,

This responds to your November 23 email to Liane Ko (below).

The University determined that there were no public records responsive to your request because Professors Farber and Elkind performed the work you referenced pursuant to private consulting engagements with CAISO and not as part of their University of California employment. For your reference, I attach a copy of Professor Farber's annual Report of Outside Professional Activities in which he disclosed the CAISO engagement as a non-University activity.

If you have information that you believe suggests there may be public records responsive to your request that we have not located, we would be glad to consider it.

Regards,

Christopher M. Patti/Chief Campus Counsel/University of California, Berkeley/200 California Hall #1500/Berkeley, California 94720-1500/T: 510-642-7122/F: 510-643-5980

From:

Michael Aguirre <maguirre@amslawyers.com>
Date: Wed, Nov 23, 2016 at 12:32 AM
Subject: RE: PRA Requests: Records related to CAISO Publication
To: UC Berkeley Public Records Office <pra@berkeley.edu>
Cc: mseverson@amslawyers.com

Greetings: We have records clearly showing the professor has public records in his possession custody and control regarding this matter and he knows it. If you are taking the position that these records are not public records please so indicate. Otherwise a lawsuit will be filed to enforce the Public Records Act. Please let us know your decision by next Monday. Thank You, Mike Aguirre

From: UC Berkeley Public Records Office [mailto:pra@berkeley.edu]
Sent: Tuesday, November 22, 2016 7:38 PM
To: Michael Aguirre <maguirre@amslawyers.com>
Subject: PRA Requests: Records related to CAISO Publication

Dear Mr. Aguirre:

This is to acknowledge and respond to your California Public Records Act (CPRA) requests below, which have now been referred to our office for response. The University has determined that it has no public records that are responsive to your request.

With this message, your requests are now considered closed.

Regards,

Liane Ko
Public Records Coordinator

****
Public Records Office
University of California, Berkeley

-------- Forwarded Message --------

Subject: Public Records Request
Date: Tue, 15 Nov 2016 15:21:44 -0800
From: Michael Aguirre <maguirre@amslawyers.com>
To:dfarber@law.berkeley.edu
CC:'Mia Severson' <mseverson@amslawyers.com>

Dear Professor Farber:

Under the California Public Records Act and Article 1, Section 3 of the California Constitution, please provide to me any and all records and communications regarding the project that resulted in the issuance of your opinion published by CAISO on 1 August, 2016 entitled Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets.

Please include mseverson@amslawyers.com in your response. Thank you.

Michael J. Aguirre, Esq.

Aguirre & Severson, LLP

501 W. Broadway

Suite 1050

San Diego, Ca 92101

(619)876-5364

-------- Forwarded Message --------

Subject: Public Records Request
Date: Tue, 15 Nov 2016 15:16:38 -0800
From: Michael Aguirre <maguirre@amslawyers.com>
To: eelkind@law.berkeley.edu
CC: 'Mia Severson' <mseverson@amslawyers.com>

Dear Professor Elkind:

Under the California Public Records Act and Article 1, Section 3 of the California Constitution, please provide to me any and all records and communications regarding the project that resulted in the issuance of your

opinion published by CAISO on 1 August, 2016 entitled Evaluation of Jurisdictional and Constitutional Issues Arising from CAISO Expansion to include PacifiCorp Assets.

Please include mseverson@amslawyers.com in your response. Thank you.

Michael J. Aguirre, Esq.

Aguirre & Severson, LLP

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Suite 1050

San Diego, Ca 92101

(619)876-5364

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Public Records Office
University of California, Berkeley