1996 WL 34483442 (C.A.D.C.) (Appellate Petition, Motion and Filing)
United States Court of Appeals, District of Columbia Circuit.

NIAGARA MOHAWK POWER CORPORATION, et al., Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 95-1222.
October 23, 1996.

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

Brief for Respondent Federal Energy Regulatory Commission

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

ORAL ARGUMENT IS SCHEDULED FOR DECEMBER 2, 1996

I *CERTIFICATE AS TO PARTIES, RULINGS. AND RELATED CASES (Corrected)

A. *Parties*

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

B. *Rulings Under Review*

References to the rulings below appear in Petitioners' briefs.

C. *Related Cases* [1]

These cases have not been previously before this Court, nor are there any other related cases pending in this Court. Case No. 95-1222 is related to a case currently pending in the United States District Court for the Northern District of New York, *Niagara Mohawk Power Corp. v. FERC*, Cir. No. 95-CV-634 (RP-GID), in which Niagara Mohawk is challenging the same Commission orders that are the subject of the instant petitions for review. As of this writing, the Commission motion to hold the district court action in abeyance is still pending.

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IX *GLOSSARY

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

Municipal Rate Statute	Conn. Gen. Stat. § 16.243e, providing that an electric utility must contract to purchase the power of resources recovery facilities that are owned or operated by or for the benefit of a municipality or municipalities at "the same rate that the electric company charges the municipality or municipalities for electricity."
NARUC	National Association of Regulatory Utility Commissioners Preamble Preamble to FERC's 1980 Rules, *Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*. Order No. 69, 45 Fed. Reg. 12,214 (February 25, 1980), 1977-81 FERC Stats. & Regs., Regulations Preambles ¶ 30,128 (1980)
PURPA	The Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2601
QF	Qualifying Facility or QF, *i.e.*, a cogeneration facility or a small power production facilities which produces electricity by the use of renewable resources such as biomass, water power and solar energy. 18 C.F.R. § 292.101(b)(1) (1993)
Resources Authority	Southeastern Connecticut Regional Resources Authority, a co-owner of the Preston Facility
SPPF	Small Power Production Facility, eligible for QF status under Section 201 of PURPA. See 16 U.S.C. 796(17) (A) and § 824a-3(j)

*1 *STATEMENT OF THE ISSUES*

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

2. Whether, assuming that the Commission orders are properly subject to review by this Court, the Commission reasonably concluded, both prospectively and in cases in which the utility had preserved the issue by a timely challenge, that Section 210 of PURPA, 16 U.S.C. § 824a-3, preempts state regulation requiring utilities to purchase electric energy from entities that are qualifying facilities ("QFs") at rates that exceed the affected utility's avoided cost.

*2 *STATUTES AND REGULATIONS*

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

STATEMENT OF JURISDICTION

This Court lacks jurisdiction in this case because the orders here sought to be reviewed were issued under the Commission's enforcement authority of Section 210(h) of PURPA, 16 U.S.C. § 824a-3(h), and not under the Federal Power Act (FPA).

STATEMENT OF THE CASE

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

These consolidated appeals involve the reviewability *velnon* of orders issued by the Commission under PURPA § 210, in two factually unrelated cases and, if reviewable, whether the Commission's rulings on preemption were correct: see *Connecticut Light & Power Co.*,, 70 FERC ¶ 61,012 (1995), *reconsideration denied*, 71 FERC ¶ 61,035 (1995) (“*CL&P*”), and *Orange & Rockland Utilities, et al.*, 70 FERC ¶ 61,014 (1995), *reconsideration denied*, 71 FERC ¶ 61,034 (1995) (“*O&R*).

In *CL&P* (Case Nos. 95-1222 and 95-1302), Niagara Mohawk Power Corporation (“NiMo”) and the Long Island Lighting Company (“LILCO”), electric utilities located in the State of New York (collectively, the “utility petitioners”), filed petitions for review of the *CL&P* orders in which they challenge only that aspect of the *CL&P* orders that would deny the application of PURPA retroactively to preexisting QF contracts, where the rate in such contracts had been imposed by a state commission order ***3** that had already become final and nonappealable through the utilities' failure to appeal on a timely basis.

Also, in the *CL&P* case (Nos. 95-1298, 95-1299, and 95-1309, respectively), the Southeastern Connecticut Regional Resources Authority (“Resources Authority”), the American Ref-Fuel Company of South-eastern Connecticut (“Ref-Fuel”), and the National Association of Regulatory Utility Commissioners (“NARUC”), collectively the “QF petitioners,” filed petitions challenging the Commission's interpretation that PURPA preempts state regulation requiring utilities to buy QF power at rates that exceed their avoided cost.

In the *O&R* case (Nos. 95-1223 and 95-1303, respectively), NiMo and LILCO challenge the Commission's determination not to apply its *CL&P* preemption analysis to contracts executed prior to repeal of a New York minimum six-cent rate law that were allowed to become final and nonappealable.

II. STATEMENT OF PACTS

A. ***Statutory And Regulatory Background***

1. ***The Jurisdictional Framework:*** PURPA § 210 establishes a scheme whereunder the Commission establishes the ratesetting rules under which the state commissions operate. State commissions, in turn, implement those rules by making the case-specific rate determinations for the entities within their jurisdiction.

Specifically, § 210(a) of PURPA requires FERC, after consultation with representatives of federal and state regulatory ***4** agencies having ratemaking authority for electrical utilities, to prescribe (and from time to time thereafter revise) rules that require utilities to offer to purchase power from, and sell power to, qualifying cogeneration and small power production facilities. Within one year after FERC's prescription of rules (or revised rules) under § 210(a), state regulatory commissions must implement such rules for each electric utility for which it has ratemaking authority. PURPA § 210(f) (1). PURPA § 210(g) provides for judicial review of state commission proceedings conducted for the purpose of implementing “any requirement of a rule under subsection (a) in the same manner, and under the same requirements, as judicial review may be obtained under [PURPA § 123].” [2]

PURPA § 210(h) provides for enforcement of any rules prescribed by the Commission pursuant to subsection (a) and of the state commissions' obligation to implement such rules under subsection (f)(1). The Commission may enforce the requirements of subsections (a) and (f)(1) of § 210 against QFs, electric utilities and state commissions only in a federal district court. For purposes of such enforcement actions, FERC rules prescribed under § 210(a) -- and the requirement of § 210(f)(1) that state commissions implement such rules -- shall be treated as rules “enforceable” under the Federal Power Act. PURPA § 210(h) ***5** further provides that an electric utility or a QF may petition the FERC to enforce the implementation of § 210(f) against state commissions, and that if the Commission does not initiate such an enforcement action within 60 days, the utility or QF may commence its own enforcement action in district court.

2. ***The Requirements of Full "Avoided Cost":*** PURPA rates for QF sales to utilities must satisfy two statutory criteria: 1) they must be high enough to encourage cogeneration and small power production (16 U.S.C. § 824a-3(a)); and 2) they must not cost the utility's customers more than they would otherwise pay for the same quantity of power from an alternative source (16 U.S.C. § 824a-3(b). Thus, Section 210(b) of PURPA requires that the "rules prescribed under subsection (a)" shall ensure that the rates for PURPA-mandated utility purchases from QFs are "just and reasonable and in the public interest," and shall not discriminate against QFs, nor "provide for a rate that exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b).

In Order No. 69,[3] the Commission adopted regulations necessary to encourage cogeneration and small power production, as PURPA § 210(a) requires. As relevant here, Section 292.304 of the Commission's regulations, 18 C.F.R. § 292.304 (1995), provides that a rate for utility purchases will be deemed "just and ***6** reasonable" and "not discriminat[ory] against [QFs]" "if the rate equals avoided costs . . .," 18 C.F.R. § 292.304(b)(2). The rules also provide that "nothing in this subpart requires any electric utility to pay more than avoided costs for purchases." 18 C.F.R. § 292.304(a)(2).[4]

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

1. ***Connecticut Light & Power - (FERC Docket No. EL93-55)***

a. In June 1987, the Resources Authority[5] filed a petition for a declaratory order with the Connecticut Department of Utility Control ("Connecticut Department") asking that state agency to declare that CL&P, a Connecticut utility, was required to purchase all of the electrical output of the Resources Authority's Preston, Connecticut "resources recovery facility" (the "Preston facility") at a rate specified by § 16-243e of the Connecticut General Statutes ("§ 16-243e," or the "municipal rate statute"). Under § 16-243e, Connecticut utilities are required to enter into contracts to purchase the electrical output of resource recovery facilities owned or operated by Connecticut ***7** municipalities, for a minimum twenty-year term and "at the same rate that the electric company charges the . . . municipalities for electricity". In October 1987, the Connecticut Department, ruling in favor of the Resources Authority, declared that CL&P was required to purchase all of the Preston facility's output at the rate specified by § 16-243e.

On appeal to the Supreme Court of Connecticut, CL&P argued, *inter alia*, that § 16-243e was preempted by PURPA because it allegedly would require CL&P to pay the Resources Authority at least $ 105 million more than its avoided cost for energy generated by the Preston facility over the 20-year term of the contract. Without reaching the preemption claim, the Connecticut Supreme Court ruled that the Connecticut Department had partially misapplied § 16-243e, and remanded the case to the Connecticut Department for a recalculation of the applicable rate. *See Connecticut Light & Power v. Department of Utility Control*, 554 A.2d 1089 (Conn. 1989). On remand, the Connecticut Department recalculated the rate, which, according to CL&P, still exceeded CL&P's avoided cost by $14.8 million.

b. Thereafter, CL&P filed a petition for a declaratory judgment in federal district court seeking to invalidate § 16-243e on the ground that it was preempted by PURPA in that it required CL&P to purchase any of the Preston facility's output at a price that exceeds CL&P's avoided cost. Invoking the doctrine of primary jurisdiction, the district court stayed its proceeding and ordered CL&P "to file a petition for a declaratory ruling ***8** with FERC" on the preemption issue. *Connecticut Light & Power Co. v. South Eastern Connecticut Regional Resources Recovery Authority*, 822 F. Supp. 888, 892 (D.Conn. 1993). On July 12, 1993, CL&P filed such a petition with FERC.

On January 11, 1995, the Commission granted CL&P's petition, stating that § 16-243e was preempted by PURPA § 210 insofar as it imposed a rate that exceeded CL&P's avoided cost. *Connecticut Light & Power Co.*, 70 FERC ¶ 61,012 (1995), JA 689-708.

In support, the Commission invoked the express language of § 210(b) of PURPA and its legislative history, as Well as Section 292.304(a)(2) of the Commission's regulations. *Id.* at p. 61,028, JA 700-701. The Commission also reasoned that states have no authority to set rates for QFs outside the PURPA context because a state is barred by the negative commerce clause from regulating the rates for sales-for-resale of electric energy in interstate commerce -- including a QF sale to an electric utility. *Id.* at 61,030, JA 705-707, *citing*, *PUC, Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

The Commission's January 11 order also stated that a finding of preemption was "appropriately applied to CL&P, because CL&P has been challenging this rate since at least 1987." 70 FERC at p. 61,029, JA 704. The Commission went on to declare, however,

[w]e will not entertain requests as a consequence of this order asking us to invalidate on this basis other, pre-existing contracts where the avoided cost issue could have been raised. The appropriate time to challenge a state-imposed rate is up to or at the time the contract is signed, not several years into a contract which heretofore has ***9** been satisfactory to both parties. Henceforth, however, if parties are required by-state law or policy to sign contracts that reflect rates for QF sales at wholesale that are in excess of avoided cost, those contracts will be considered to be void *ab initio*.

Id. at pp. 61,029-30, JA 704-705.

d. Two electric utilities, Niagara Mohawk and LILCO, filed requests for rehearing urging that the Commission erred in not applying its preemption analysis to other, preexisting QF contracts that had already become final. On the other hand, the Resources Authority, NARUC and others in the QF industry, objected to that part of the January 11 order (JA 700-707) declaring that state programs are preempted by PURPA § 210 to the extent that they require utilities to buy power from QFs at rates that exceed avoided cost.

On April 12, 1995, the Commission issued an order denying reconsideration of its January 11 order. *Connecticut Light & Power*, 71 FERC ¶ 61,035 (1995), JA 1047-1054. The Commission initially found that this proceeding was not subject to the rehearing procedure established by Section 313 of the Federal Power Act, 16 U.S.C. § 8251, because it "solely involve [s] [PURPA] § 210 issues." JA 1047 n.2. Accordingly, it vacated a previous order tolling the FPA § 31330-day rehearing period and treated the parties' FPA § 313-based rehearing requests as though they were nonstatutory "requests for reconsideration." *Id*.

On the merits, the Commission adhered to its view that state-imposed QF rates that exceed the purchasing utility's ***10** avoided cost are preempted by PURPA. 71 FERC at 61,153 JA 1041-1044, but that it would not apply its preemption reasoning to contracts at state-imposed rates exceeding avoided cost "where the avoided cost issue could have been raised but was not raised." 71 FERC at p. 61,153-54, JA 1044.

2. *Orange & Rockland (FERC Docket No. 87-53)*.

a. On July 31, 1987, Orange and Rockland Utilities, Inc. ("O&R"), a New York utility, as well as its two out-of-state affiliates, the Rockland Electric Company and the Pike County Light & Power Company, filed a joint petition challenging the legality of New York Public Service Law Section 66-c (the "six cent" law). This statute established a minimum rate of six cents-per-kilowatthour applicable to the sale of electricity by QFs to electric utilities in the State of New York. O&R's petition sought a Commission declaration that the law was preempted to the extent that it imposed a rate in excess of O&R's avoided cost because that rate would ultimately be passed through to its out-of-state affiliates, which, under a FERC-approved agreement, were jointly responsible for O&R's power purchases.

Niagara Mohawk intervened in the *O&R* proceeding, requesting the Commission to declare the six-cent law preempted insofar as it exceeds any purchasing utility's avoided cost, regardless of whether the QF power was resold by the purchasing utility out-of-state. On April 14, 1988, the Commission issued an order declaring that, prospectively, states may not impose rates for ***11** sales by QFs to electric utilities that exceed the utilities' avoided cost. *Orange and Rockland Utilities, Inc.*, 43 FERC ¶ 61,067 (JA 186-227), *reh'gdenied*, 43 FERC ¶ 61,546 (1988).

b. On June 16, 1988, the Commission stayed its April 14 order pending judicial review. JA 304. [6] On appeal, the Second Circuit held that judicial review was not appropriate on ripeness grounds, citing the stay of the April 14 order and the pendency of a FERC rulemaking. *Occidental Chemical Corporation v. FERC*, 869 F.2d 127, 129 (2d Cir. 1989).

While the Commission's stay remained in effect, the State of New York in 1992 repealed the six-cent minimum-rate statute prospectively; the statute remained in effect, however, as to QF contracts executed and filed with the New York Public Service Commission ("PSC") on or before June 26, 1992, and as to QFs that were entitled to the statutory minimum rate by a final and unappealable New York court order rendered before January 1, 1987. N.Y. Pub. Serv. Law § 66-C.2 (McKinney Supp. 1993).

c. On January 11, 1995, the Commission issued an order (JA 2276-2279) dismissing the O&R proceeding as moot, on the ground that the declaratory order had been overtaken by events because: 1) by its own terms, the declaratory order, upon taking effect, ***12** would have operated prospectively only; 2) the declaratory order was stayed almost immediately in June 1988; 3) the June 1988 stay of that order had never been lifted; 4) the New York statute had been repealed prospectively; and 5) the Commission had determined to adhere to its policy announced in the *CL&P* declaratory order -- that it would not apply its preemption ruling to invalidate preexisting contracts that had not been challenged on a timely basis, and thus had already become final and unappealable. *Orange & Rockland Utilities, Inc.*, 70 FERC ¶ 61,014 at 61,034 (1995), JA 2278. On April 12, 1995, the Commission denied reconsideration of its January 11 order. *Orange & Rockland Utilities. Inc., et al.*, 71 FERC ¶ 61,034 (1995); JA 1047-1054. [7]

These petitions followed.

13 *SUMMARY OF ARGUMENT

I.

This Court does not possess statutory authorization to review the orders pursuant to Section 313(b) of the Federal Power Act.

A.1. FPA § 313(b), in express terms, limits this Court's power of review to those Commission orders that have been issued in "a proceeding under this Act," *i.e.*,, the FPA. However, the Commission's *CL&P* and Q&R orders were not issued in a proceeding "under the FPA," but involved only "PURPA § 210" issues. Congress did not enact PURPA § 210 as an amendment to the Federal Power Act. Rather, by expressly conferring only the enforcement powers of the FPA on the Commission under PURPA § 210, and no more, Congress clearly indicated that it considered PURPA § 210 and the FPA to be distinct statutory frameworks, and meant for the FPA to apply only when and how Congress specified. The legislative background of PURPA § 210(h) confirms that Congress never envisioned that Commission orders issued under § 210 would be directly reviewable in the courts of appeals under FPA § 313(b). But, even if the statutory provisions are ambiguous, as a jurisdictional determination by the federal agency solely charged with administration of PURPA § 210 -- the Commission's findings that the *CL&P* and the *O&R* petitions for a declaratory order arose solely under PURPA § 210 -- and not under the Federal Power Act -- are entitled to *Chevron* step 2 deference.

***14** 2. No argument raised by petitioners warrants a different conclusion as to the legislative purpose of PURPA § 210.

The Commission's statements in its 1980 preamble statements that its rules issued under PURPA § 210 should be reviewed at the same time and by the same court of appeals that would review its PURPA § 201 rules is compatible with our present approach because PURPA § 201 expressly amended the FPA, and because the Commission's PURPA § 201 rules and PURPA § 210 rules were issued simultaneously as a separate, but coordinated, rulemaking package. Thus, this Court's review of the Commission's

initial PURPA § 210 rules was consistent with the well-settled doctrine that when an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the courts of appeals, the entire decision is reviewable exclusively in the appellate court.

There is no basis for the QF petitioners' assertion that court of appeals' review of PURPA § 210 orders is necessary because such orders cannot be divorced from FPA issues, given that the Commission must certify QFs pursuant to Section 3 of the FPA, as amended by Section 201 of PURPA, and given that PURPA § 210(e) authorizes the Commission to exempt QFs from regulation under the FPA. The Commission's experience has shown that it is highly unusual for a Commission proceeding to involve QF certification issues alongside PURPA § 210 rate or service implementation, because certification occurs early in the process, while avoided cost issues arise separately in the later ***15** state implementation process to determine the case-specific rate for the QF.

The Commission's authority to exempt QFs from regulation under the FPA pursuant to PURPA § 210(e) likewise poses no potential for intertwining with the FPA. The Commission has already, by rule, categorically exempted QFs from regulation under the FPA, and would regard any challenge to its authority to exempt a QF from the FPA as arising under PURPA § 210(e), not the FPA.

B. In any event, the Commission orders under challenge here are not immediately reviewable in this Court under the rationale of *Industrial Cogenerators v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995). In that case, this Court explained that PURPA § 210(h) creates an enforcement scheme over which federal district courts have exclusive jurisdiction and which, accordingly, precludes direct appellate review of PURPA § 210(h) declaratory orders.

1. The Commission's orders in *CL&P* -- like the Commission's orders in *Industrial Cogenerators* -- are of no legal moment "[e]xcept that a private party bringing an enforcement action might seek to introduce the Declaratory Order in order to show that the FERC supported its position." *Industrial Cogenerators*, 47 F.3d at 1234-35. Indeed, the Commission's *CL&P* orders in this case simply set forth a *legal* interpretation of PURPA and the Commission's implementing regulations. And, just as in *Industrial Cogenerators*, the *CL&P* declaratory order ***16** involved here did not direct the state commission to do anything; rather, it deferred all factual issues for resolution by the appropriate state or judicial forum.

Moreover, as in *Industrial Cogenerators*, immediate review of the Commission's declaratory order would usurp the role of a federal district court. The *CL&P* controversy is already pending in a federal district court where it was stayed pending the Commission's issuance of the orders challenged here. Now that the Commission has concluded its legal interpretation of *CL&P's* preemption claim, CL&P may, *inter alia*, amend its complaint before that same district court to seek enforcement relief against the Connecticut Department under PURPA § 210(h)(2)(B).

Nor is there any basis for the claim that the *CL&P* declaratory order embodies "a rule of general application, not tied to a particular set of fact potentially subject to the statutory enforcement scheme" for which immediate court of appeals review "would not necessarily be inconsistent with § 210." *See**Industrial Cogenerators*, 47 F.3d at 1236. On the contrary, the *CL&P* orders are tied closely to a "particular set of facts potentially subject to the statutory enforcement scheme," *id*., *i.e.*, the Connecticut Department's application of the Municipal Rate Statute to CL&P's purchase of Preston facility power. Moreover, the *CL&P* order is not an order that has been codified in a rule prescribed under PURPA § 210(a); therefore, the *CL&P* order (and any subsequent Commission cases adopting *CL&P's* reasoning) cannot itself be enforced as a binding rule ***17** that must be implemented by state regulatory authorities pursuant to PURPA § 210 (f) (1).

Equally insubstantial is the utility petitioners' argument that the Commission's advisory opinion in *CL&P* amounts to the type of broad declaration of enforcement policy recognized as reviewable according to *dictum* in *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994). The Commission's pronouncements here were made in the context of a fact-specific controversy, *i.e.*. the type of enforcement order that is immune from judicial review under *Heckler v. Chancy*, 470 U.S. 821 (1985). But even if the Commission's orders were reviewable under the *dictum* of *Crowley*, *see* 37 P.3d at 677, original

jurisdiction over the Commission's asserted PURPA enforcement policy statement would lie exclusively in federal district court, not in the court of appeals.

2. Similar considerations preclude review of the *O&R* order. Like the *CL&P* declaratory order, it had no legal effect apart from a § 210 enforcement proceeding, and thus would not be reviewable in this Court even if the Commission had sustained it on reconsideration.

C. Assuming *arguendo* that FPA § 313(b) applies here, this case must be dismissed because none of the petitioners can show "aggrievement" within the meaning of that statute. As the QF petitioners concede, the Commission's orders in *CL&P* did not purport to address the factual issue whether the Municipal Rate Statute imposes a rate that actually exceeds CL&P's avoided cost. ***18** And neither NiMo nor LILCO are subject to the Connecticut Rate Statute; their concerns about the precedential effect of *CL&P* -- that its preemption analysis will not be applied to disturb preexisting QF contracts that have become final and unappealable -- do not establish standing. And, in any event, none of the petitioners seeking review of the Commission's orders in *CL&P* and *O&R* could conceivably suffer harm unless and until an opponent can persuade a federal district court (or a state commission) to adopt the non-binding legal reasoning of the Commission's orders.

II.

Assuming *arguendo* that the merits of the Commission's rulings in *CL&P* and *O&R* are presently reviewable by this Court, the Commission's preemption rulings are correct on the merits.

A. The Commission correctly held that PURPA § 210 preempted state authority on the issue of avoided cost.

Preemption results when a state law stands as an obstacle to the accomplishment of congressional purposes. The Commission's finding that state programs that impose rates for QF sales to utilities higher than avoided cost are preempted was correct because PURPA § 210(b) limits such rates to an avoided cost rate cap.

The Commission also properly relied on the dormant Commerce Clause, as well as its exclusive jurisdiction over electricity sales-for-resale in interstate commerce, as generally ***19** prohibiting state regulation of QF rates outside the bounds of PURPA.

Moreover, the Commission's preemption ruling is supported by the legislative history of PURPA § 210. In the Conference Report accompanying passage of PURPA, the only authority which Congress expressed any concern about reserving to the states was the states' preexisting authority to regulate retail sales.

The Commission correctly disavowed any binding effect of the pronouncements in the 1980 preamble to its PURPA regulations. Those pronouncements --to the extent they suggested that states have authority to set QF rates higher than avoided cost -- were ambiguous, inconsistent, and unaccompanied by any legal analysis.

Nor was the Commission bound by a state court decision upholding New York's six-cent law against claims that it was preempted by PURPA. The Supreme Court's dismissal of this case for want of a substantial federal question amounted only to a decision on the merits of the particular case and did not require the Commission to follow its reasoning for all time and in all cases.

B. The Commission's view that its preemption analysis should be applied prospectively only was consistent with applicables legal principles involving retroactivity of Commission orders. See *Williams Natural Gas Company v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1995).

20** ***ARGUMENT

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

The petitions for review of the Commission's orders in both cases are not properly before this Court for any one of three independent reasons: (1) this Court does not possess statutory authorization to review the orders pursuant to Section 313(b) of the Federal Power Act; (2) appellate review of the orders would in any event unduly "disrupt the enforcement scheme carefully elaborated in § 210" as interpreted by this Court in *Industrial Cogenerators v. FERC*, 47F.3d 1231 (D.C. Cir. 1995); and (3) no petitioner has standing... We support each of these positions in the argument that follows.

A. *The Commission Orders Challenged Here Are Not Reviewable In This Court Since They Were Issued In A Proceeding Arising Solely Under § 210 Of PURPA, Not Under Any Provision Of The FPA.*

1. *Congress Did Not Intend That PURPA § 210 Orders Be Reviewable In The Courts On Appeals Under § 313 (b) Of The FPA.*

a. It is settled doctrine that "Congress 'may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had.' " *Rochester v. Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979), *quoting*, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). *Seealso*5 U.S.C. § 703; *FCC v. ITT World Communications Inc.*, 466 U.S. 463, 468 (1984); *Internat'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). "If Congress makes no specific choice of this type in the statute pursuant to which the ***21** agency action is taken, or in another statute applicable to it then an aggrieved person may get 'nonstatutory review' ... in federal district court pursuant to the general 'federal question' jurisdiction of that court." *Five Flags Pipe Line Co. v. Department of Transportation*, 854 F.2d 1438, 1439 (D.C. Cir. 1988); *seealsoRobbins v. Reagan*, 780 F.2d 37, 42-43 (D.C. Cir. 1985); *Internat'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). These principles apply here.

b. FPA § 313(b), in express terms, limits this Court's power of review to those Commission orders that have been issued in "a proceeding under this Act," *i.e.*, the FPA. However, as the Commission correctly observed, *see* 71 FERC at p. 61,144-45 n.2. (JA 1047 n.2); *id*. at p. 61,148 n.2 (JA 1038 n.2), its *CL&P* and *O&R* orders were not issued in a proceeding under the FPA, but involved only "PURPA § 210 issues." *Id.*

This conclusion cannot be challenged on the ground that the orders were nevertheless issued in a "proceeding under the Federal Power Act," because of PURPA § 210's appearance in Title 16 of the U.S. Code. Even though Section 210 of PURPA has been codified along with the FPA in the same chapter of Title 16 of the United States Code, *see*16 U.S.C. § 824a-3, the "Historical Note" to 16 U.S.C. § 824a-3 makes clear that PURPA § 210 "was enacted as part of the Public Utility Regulatory Policies Act of 1978, and *not* as part of the Federal Power Act which generally ***22** comprises this chapter." (Emphasis added.)[8] Indeed, while many-provisions of Title II of PURPA expressly amend the FPA, see PURPA §§ 201-05, 206-08, 211-13, Section 210 of PURPA does not.[9]

There is likewise no merit to the claim (Util. Br. 13) that because § 210(h) requires that the Commission's § 210(a) rules, and the state commission implementation requirement of § 210(f)(1), be treated as rules *enforceable* under the FPA, the Commission's PURPA § 210 declaratory orders must arise from proceedings under the FPA. *See*16 U.S.C. §§ 824a-3(h)(1), (h)(2)(A). For if, from the outset, Congress had intended the Commission's PURPA § 210 rules and orders to be reviewable under § 313(b), it would have been entirely redundant for it to specify, as it did in PURPA § 210(h), that "rules prescribed ***23** under subsection (a)" "shall be treated as an [enforceable] rule under the Federal Power Act." Indeed, that Congress expressly-established this enforcement authority, and no more, in PURPA § 210(h) is clear evidence that it considered PURPA § 210 and the Federal Power Act to be distinct statutory frameworks, and meant for the FPA to apply only when and how Congress specified.

The legislative background of PURPA § 210(h) confirms the textual directive. PURPA § 210(h) originated in a bill that proposed to vest authority to enforce § 210 of PURPA solely in the "Administrator" of the "Federal Energy Administration." Section 552 of that bill provided, as relevant here:

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

House Document No. 95-138 (April 29, 1977). [10] Significantly, this bill did not include a proviso deeming any reference to the Commission in *section 313(b)* of the Federal Power Act to be a reference to the Administrator, and thus any orders, whether rules or declaratory orders or otherwise, issued by the Adminis- ***24** trator pursuant to its Section 552 enforcement authority would not have been reviewable in the court of appeals. [11]

This determination by the federal agency solely charged with administration of PURPA § 210 as to the nature of its jurisdiction over the *CL&P* and the *O&R* petitions for a declaratory order -- as arising under PURPA, and not the Federal Power Act (*see* JA 1038 n.2, 1047 n.2) -- is entitled to *Chevron* step 2 deference. See *Village of Bergen v. FERC*, 33 F.3d 1385, 1388-89 (D.C. Cir. 1994); *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994).

25 2.** ***No Argument Raised By Petitioners Warrants A Different Conclusion As To The Legislative Purpose.

a. Petitioners point out (Util. Br. 13, QF Br. 35) that the Commission's present reading of the statutory scheme, as not affording judicial review of § 210 orders under § 313(b) of the FPA, conflicts with the Commission's reading in 1980, when it initially adopted its PURPA § 210(a) rules. At that time, the Commission expressed the view that those rules were subject to the FPA rehearing procedure and should be reviewable directly by the courts of appeals pursuant to § 313(b) of the FPA. *See Small Power Production; Order Granting in Part and Denying in Part Rehearing of Orders Nos. 69 and 70, and Amending Regulations*, FERC Stats. &. Regs. ¶ 30,160 [1977-1981 Regulations Preambles] at p. 31,107 n.2 (1980); *seealsoIndustrial Cogenerators*, 47 F.3d at 1263.

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

***26** While petitioners correctly observe (Util. Br. 14-15; QF Br. 35) that the jurisdictional issue was never raised when this Court in *American Electric Power* [13] reviewed all legal challenges to both the PURPA § 210 and PURPA § 201 rules, this is of no legal consequence since judicial review of the combined rulemaking package directly in the court of appeals was appropriate under the settled doctrine that "[w]hen an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the courts of appeals, the entire decision is reviewable exclusively in the appellate court." *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986); *see Shell Oil. Inc. v. FERC*, 47 F.3d 1186, 1194-95 (D.C. Cir. 1995); *International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1482 (D.C. Cir. 1994); *Media Access Project v. FCC*, 883 F.2d 1063, 1066-69 (D.C. Cir. 1989). As the Commission recently noted, the only reason this Court possessed jurisdiction in *American Electric Power* to review the Commission's original PURPA § 210 rules was the coexistence of challenges to its PURPA § 201 rules in the same case. *See* Order No. 550-A, FERC Stats. & Regs. [Regulations Preambles] ¶ 30,969 at p. 30,837 (1993). [14] In ***27** contrast, the declaratory order in *CL&P* did not involve a joint resolution of issues arising under both the FPA and PURPA § 210 (see QF Br. 9), but an avoided cost preemption issue arising only under § 210. [15]

b. The QF petitioners assert, however (QF Br. 33-34), that PURPA § 210 issues cannot be divorced from issues arising under the FPA, given that PURPA § 210 (e) confers authority upon the Commission to exempt QFs from regulation under the FPA, and given the fact that a cogenerator or SPPF may not even avail itself of the rights of a QF under PURPA § 210 unless and until it obtains from the Commission certification of its QF status under section 3 of the Federal Power Act, as amended by PDRPA 201. Here, too, their claims are flawed.

To be sure, as the Commission recognized, this Court possesses jurisdiction under Section 313(b) to review Commission orders disposing of QF certification issues arising under §§ 3(17) and 3(18) of the FPA. *See* Order No. 550-A, FERC Stats. ***28** & Regs. [Regulations Preambles] ¶ 30,969 at p. 30,837, [16] *citing Puerto Rico Electric Power Authority v. FERC*, 848 F.2d 243 (D.C. Cir. 1988). And if the two arise in the same proceeding, both will be reviewable by this Court as in the *American Electric Power* context. But the Commission's experience has shown that it is highly unusual for a Commission proceeding to involve QF certification issues alongside PURPA § 210 rate or service implementation issues because the Commission has exclusive authority to administer the QF certification program, and demonstrating eligibility for QF status is normally an early step in the PURPA process. On the other hand, avoided cost issues arise separately in the later state implementation process to determine the case-specific rate for the QF.

Thus, the Commission certified the Resources Authority's facility at issue in *CL&P* as a QF, much earlier in a completely separate proceeding from the § 210 proceeding challenged here. *SeeAmerican REF-FUEL Company of Southeastern Connecticut*, 40 FERC ¶ 61,061 (1987). Likewise, the Commission certified the facility whose rates were at issue in *O&R* as a QF six years before the § 210 proceeding commenced. *Hookers Chemical and Plastics Corp.*, 43 FERC ¶ 62,194 (1982), *recertified sub nom. Occidental Chemical Corp.*, 43 FERC ¶ 62,194 (1988).

c. There is likewise no merit to petitioner's argument (*see* QF Br. 34) that PURPA § 210 issues are inextricably interrelated ***29** with FPA issues because § 210 (e) authorizes the Commission to exempt QFs from certain regulatory responsibilities under the FPA. The Commission, by rule, has already determined to grant all eligible QFs an exemption from these FPA requirements, *see*18 C.F.R. § 292.601(c)(1995), and thus does not administer exemptions on an individual QF basis. In any event, it is the Commission's position that any challenge to the Commission's authority to exempt a QF from the FPA would arise under PURPA § 210(e), not the FPA. [17]

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

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

In *Industrial Cogenerators v. FERC*, 47 F.3d at 1234-35, this Court explained that PURPA § 210 creates an enforcement scheme over which federal district courts have exclusive jurisdiction, and which, accordingly, precludes direct appellate review of PURPA § 210(h) declaratory orders. This ruling governs the orders at issue here as well. Accordingly, even apart from the jurisdictional bar of FPA § 313(b), the petitions in this case must be dismissed.

1.a. Although the orders in *CL&P* did express the Commission's view that the Connecticut Municipal Rate Statute was preempted by PURPA § 210 to the extent it imposed a rate above a purchasing utility's avoided cost, the orders did not in any way purport to determine the fact-bound question "whether the rates imposed by the Municipal Rate Statute . . . do or do not exceed avoided cost." 70 FERC at 61,029, JA 704. Rather, as the Commission explained, this is "a matter best left to the appropriate state or judicial forum." *Id.*

Hence, like the Commission's initial declaratory order in *Industrial Cogenerators*, the Commission's *CL&P* orders in this case simply set forth a *legal* interpretation of PURPA and the Commission's implementing regulations. [18] And, just as in

***31** *Industrial Cogenerators*, the *CL&P* declaratory order did not direct the state commission to do anything; rather it deferred all factual issues for resolution by the appropriate state or judicial forum. In short, the orders in *CL&P*. like the Commission's orders in *Industrial Cogenerator*, are of no legal moment "[e]xcept that a private party bringing an enforcement action might seek to introduce the Declaratory Order in order to show that the FERC supported its position." *Industrial Cogenerators*, 47 F.3d at 1234-35.

Underscoring their "nonbinding effect" (see *id.* at 1235), the Commission issued its *CL&P* orders on a petition filed by the utility at the direction of a federal district court. *See Connecticut Light & Power Co. v. Southeastern Connecticut Regional Resources Recovery Authority*, 822 F. Supp. 888, 890-92 (D.Conn. 1993). The district court proceeding was merely stayed pending the Commission's consideration of CL&P's petition. Now that the Commission has concluded its legal interpretation of CL&P's preemption claim, CL&P may, *inter alia*, amend its complaint before that same district court to seek enforcement relief against the Connecticut Department under PURPA § 210(h) (2)(B). [19] Indeed, were this Court now to assert jurisdiction over the declaratory order -- before the district court has had ***32** an opportunity to review the substance of the Commission's "pre-litigation statement of position" (as *Industrial Cogenerators*, 47 F.3d at 1235, described it) --it "would as a practical matter usurp the role of the district court as the court of first instance, contrary to the enforcement scheme adopted by the Congress in § 210(h) of the PURPA." *Id.* Simply put, where CL&P has a potential enforcement claim against the Connecticut state commission that is "tied to a particular set of facts" that has also served as the predicate for a Commission declaratory order, immediate review of the declaratory order by the court of appeals would create the very "fragmented and arbitrary review process" that this Court rejected in *Industrial Cogenexators*. *Id.*

b. Nor is there any basis for the claim (Util. Br. 18-19, QF Br. 35-36) that the *CL'&P* declaratory order embodies "a rule of general application, not tied to a particular set of fact potentially subject to the statutory enforcement scheme" for which immediate court of appeals review "would not necessarily be inconsistent with § 210." *See Industrial Cogenerators*, 47 F.3d at 1236. On the contrary, the *CL&P* orders are tied closely to a "particular set of facts potentially subject to the statutory enforcement scheme," id-, *i.e.*, the Connecticut Department's application of the Municipal Rate Statute to CL&P's purchase of Preston facility power.

Moreover, as the QF petitioners concede (QF Br. 26), these are not orders that have been codified in a rule prescribed under PURPA § 210(a); therefore, the *CL&P* order (or any subsequent ***33** Commission cases adopting *CL&P's* PURPA-interpretive statements) cannot itself be enforced as a binding rule that must be implemented by state regulatory authorities under PURPA § 210(f). [20] Rather, these orders reflect only the view expressed by FERC in a pre-enforcement context in advance of potential litigation. See *Industrial Cogenerators*, 47 F.3d at 1235 (FERC's statement "was much like a memorandum of law").

c. Equally insubstantial is the assertion (Util. Br. 17) that the Commission's statement of position in *CL&P* amounts to a statement of "broad enforcement policy abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings" which, petitioners assert, is judicially reviewable, *quoting dictum* from *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (1994). To prevail on such a claim petitioner would first have to overcome the presumptions of unreviewability of agency non-enforcement decisions established in *Heckler v. Chaney*, 470 U.S. 821 (1985) ("*Chaney*"), as well as agency legal interpretations issued in the course of a decision not to take enforcement action or commence an investigation. *See Safe Energy Coalition v. USNRC*, 866 F.2d 1473, 1476 (D.C. Cir. 1989); *cf. ICC v. Brotherhood of Locomotive* ***34** *Engineers*, 482 U.S. 270, 283 (1987). [21] But even if the Commission's orders were reviewable under the *dictum* of *Crowley*. *see* 37 F.3d at 677, original jurisdiction over the Commission's asserted PURPA enforcement policy statement would lie exclusively in federal district court, not in the court of appeals. *See Five Flags*, 854 F.2d at 1439.

d. In sum, the Commission's declarations in *CL&P* are not binding upon a federal district court under PURPA § 210(h), or upon the state commissions under PURPA § 210 (f), or upon state courts in any future judicial review of a state commission proceeding under PURPA § 210(g). Rather, these declarations will be accorded such weight and deference as these other adjudicatory bodies may choose to accord them. *See Industrial Cogenerators*, 47 F.3d at 1235. [22] Any other approach, we

submit, will allow a ***35** "fragmented and arbitrary review process," 47 F.2d at 1235, *quoting*Texaco, Inc. v. Chandler, 354 F.2d 655, 657 (10th Cir. 1957), and also defeat the "complete and independent scheme by which the purposes of PURPA are to be realized," 47 F.3d at 1235-1236.

2. Similar considerations preclude review of the *O&R* orders. The April 1988 *O&R* declaratory order (JA 186-227), merely expressed the Commission's views that New York's six-cent law was preempted by PURPA § 210 to the extent that it authorized the NYPSC to impose a rate for QF sales to New York utilities that exceed the latter's avoided cost, and that such preemption should operate prospectively only. The *O&R* declaratory order was stayed in June 1988 (JA 304), and remained ineffective until it was vacated by the Commission in January 1995. Like the *CL&P* declaratory order, it had no legal effect apart from a § 210 enforcement proceeding, and thus would not be reviewable in this Court even if the Commission had sustained it on reconsideration. *See*Industrial Cogenerators, 47 F.3d at 1235. Consequently, the two *O&R* orders under challenge here -- which vacated the 1988 declaratory order as having been mooted by supervening events (*see* JA 1038, 1047) simply represent an exercise of the Commission's discretionary judgment not to render an advisory interpretation of the legal issues that were involved in the *O&R* controversy because those ***36** issues were, in the Commission's view, moot. See *Industrial Cogenerators*, 47 F.3d at 1235.

C. *Failure To Meet "The Aggrievement" Requirement Is Also An Independent Basis For Dismissal Here.*

1a. "To show aggrievement, a plaintiff must allege facts sufficient to prove the existence of a 'concrete, perceptible harm of a real, non-speculative nature.' " *North Carolina Utilities Comm'n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981). This showing is essentially the same as the "injury in fact" required by standing doctrine... *See*Moreau v. FERC, 982 F.2d 556, 564 (D.C. Cir. 1993); *Northwestern Public Service Co. v. FPC*, 520 F.2d 454, 458 (D.C. Cir. 1975). *See also*Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2136 (1992). Since no petitioner seeking review here has established aggrievement, the petitions in these cases are also properly dismissible for lack of standing.

b. Neither the NARUC nor the Resources Authority can show aggrievement in *CP&L*, for these petitioners have not been exposed to the imminent danger of injury as a result of the Commission's pronouncement that it considers the Connecticut Rate Statute to be preempted by PURPA. As the QF petitioners concede (QF Br. 10), the Commission's order did not purport to address the factual issue whether the Municipal Rate Statute imposes a rate that actually exceeds CL&P's avoided cost. Indeed, neither NARUC nor Resources Authority can show any harm unless and until CL&P can persuade the Connecticut Department (under § 210(f)(1)) or a state court (under § 210(g)) or the federal district court (under ***37** § 210(h)(2)(B)) to adopt the legal reasoning in the *CL&P* declaratory order, and find that the Municipal Rate Statute imposes a rate that actually exceeds CL&P's avoided cost. *See* Industrial Cogenerators, 47 F.3d at 1234-1235.

Likewise, neither NiMo nor LILCO are subject to the Connecticut Municipal Rate statute; their only concern is the precedential effect of the Commission's statement that it will not apply the *CL&P* pre-emption analysis to invalidate pre-existing QF contracts where the pre-emption issue could have been timely raised but was not. This, however, is not enough to establish aggrievement. *Shipbuilders Council of America v. United States*, 868 F.2d 452, 456 (D.C. Cir. 1989); *Accord*Radio-fone. Inc. v. FCC, 759 F.2d 936, 939 (D.C. Cir. 1985); *Aeronau-tical Radio. Inc. v. FCC*, 983 F.2d 275, 284 (D.C. Cir. 1993).

2. Nor are NiMo and LILCO aggrieved by the Commission's declaration in *O&R* that it will not apply its preemption reasoning to QF contracts that have already become final and nonappealable. As the Court stated in *Industrial Cogenerators*, 47 F.3d at 1235 (FERC's § 210(h), the Commission's "[d]eclaratory [o]rder is legally ineffectual apart from its ability to persuade (or to command the deference of) a court ***38** ... in a private enforcement action". For these reasons as well, the petitions for review should be dismissed. [23]

II. THE COMMISSION'S PREEMPTION RULINGS ARE CORRECT ON THE MERITS

Assuming, *arguendo*, that the merits of the Commission's orders are reviewable by this Court at the present juncture, it is our submission that they were correctly resolved. *First*, we show that the Commission applied established doctrine in finding that § 210 of PURPA preempts state regulation requiring utilities to buy QF power at more than avoided cost; *second*, we demonstrate that the Commission acted lawfully in limiting its preemption analysis only to prospective application and to those cases involving challenges to contracts that had not become final and nonappealable due to the failure to challenge them on a timely basis.

39 A.** ***The Commission Correctly Held That PURPA § 210 Pre-empts State Authority On The Issue Of Avoided Cost.

1. It is settled that a congressional intent to preempt will be inferred where a "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *United Distribution Companies v. FERC*, No. 92-1485, decided July 16, 1996 slip op. at 76-77. And preemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congres-sionally delegated authority may preempt state regulation. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986), *citing*. *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, 458 U.S. 141 (1982); and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *UPC*, *supra*.

Given these bedrock principles, FERC correctly determined that state programs that establish rates for QF sales to utilities exceeding the latter's avoided cost are preempted because they stand as an obstacle to the fulfillment of the congressional purposes behind the avoided cost rate cap established for QF sales by PURPA § 210(b).

a. As the Commission explained (JA 700), PURPA expressly directs FERC, and not the states, to prescribe rules governing QF rates, and leaves the states only with the responsibility for "implement[ing]" the Commission's rules. The Commission also correctly reasoned that its exclusive rulemaking authority over ***40** rate-setting (PURPA §§ 210 (a), (b)), coupled with the states' obligation to implement the Commission's rate-setting rules (PURPA § 210(f) (1)), requires the states to honor the ratemaking limitations established in PURPA § 210(b). (JA 700-704.)

Under PURPA § 210(a), the Commission must establish rates high enough to encourage cogeneration and small power production, and the Commission complied with § 210(a)'s requirement by-establishing the rates for QF sales at the statutory limit -- full avoided cost. *See* PURPA § 210(b); 18 C.F.R. § 292.304(a). [24] Because "a rate cannot simultaneously be both equal to full avoided cost and yet exceed full avoided cost," the Commission reasoned (JA 701 n.39) that states would be in violation of the PURPA § 210 (f)(1) implementation requirement by imposing any rate that exceeds avoided cost.

b. The Commission, moreover, not only invoked preemption principles, but also relied on the dormant Commerce Clause as generally prohibiting state regulation of interstate wholesale electric power transactions, *see Public Utilities Commission, Rhode Island v. Attleboro Steam & Electric Co.*, 273 U.S. 83, 86-90 (1927), as well as its exclusive jurisdiction over such transactions conferred by Section 201 of the Federal Power Act, 16 U.S.C. § 824 (JA 705-707).

***41** c. Finally, the Commission's view that states have no authority to establish QF rates that exceed avoided cost is also supported by the legislative history of PURPA § 210. Indeed, the only concern Congress expressed with regard to preservation of state law or programs involving QF involved state jurisdiction over *retail* sales by QFs. In the Conference Report accompanying passage of PURPA § 210, Congress described § 210(a) as

> limit [ing] the authority of the Commission to authorize in these rules cogeneration facilities or small power production facilities to make any sale for purposes *other than for resale*. The conferees do not intend that this limitation on the Commission's authority will limit the States from allowing such sales to take place. The cogenerator or small power producer may be permitted to make *retail* sales pursuant to State law.

1978 U.S. Code, Cong. & Admin. News 7831 (emphasis added). Significantly, while Congress went to great lengths to recognize and preserve preexisting state regulatory authority over the rates for QF sales *atretail*, it conspicuously failed to acknowledge that the states possessed any authority -- other than through the strictures of PURPA § 210 --to regulate QF rates at *wholesale*.

2. The QF petitioners seek to deflect the clear import of these principles by mounting a two-part attack. At the outset, they assert that the Commission's present views on preemption are contrary to views expressed by the Commission in the preamble to the 1980 PURPA § 210(a) rules, where the Commission stated:

> While the rules prescribed under section 210 of PURPA are subject to the statutory ***42** parameters, the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies. ... If a State program were to provide that electric utilities must purchase power from . . . [QFs] at a rate higher than that provided by these rules, a [QF] might seek to obtain the benefits of that State program. In such a case, however, the higher rates would be based on State authority to establish such rates, and not on the Commission's rules.

Order No. 69, FERC Stats. & Regs. ¶ 30,128 at p. 30,875 (1980). From this, the QF petitioners argue (QF Br. 24) that the Commission's 1980 legal interpretation, not its current interpretation in the orders challenged here, was the correct one because the Commission has the authority under PURPA § 210(e) to exempt, and in fact did exempt, QFs from the Federal Power Act's grant of exclusive jurisdiction (FPA § 201) to the Commission over QF sales-for-resale).

Building on this theme, the QF petitioners go on to maintain (QF Br. 12-16) that the Commission's earlier view as to the legality of state programs that regulate QF sales rates has already been upheld in state court in *Consolidated Edison of New York v. Public Service Commission of New York*, 472 N.E. 2d 981 (1984), ("*ConEd*"), which must also be regarded as a Supreme Court "decision on the merits" because that Court subsequently dismissed an appeal (410 U.S. 1075) of the *ConEd* decision for want of a substantial federal question. Neither line of argument ***43** should prevail because Petitioners have only constructed a "house of straw."

a. The Commission properly concluded that it should not adhere to the 1980 preamble statement because it was "ambiguous," "inconsisten[t]," and "did not provide any rationale to support this statement or any legal analysis." JA 703 and n.45. Moreover, as the Commission explained, "we cannot ascertain at this date any legal basis under which states have independent authority to prescribe rates for sales by QFs at wholesale that exceed the avoided cost cap contained in PURPA." *Id.* And, contrary to the QF petitioners' assertions (*see* QF Br. 6, 7, 11, 25n.9, 28, 31n.10), the Commission did not, in its 1980 preamble, purport to rely on its authority under PURPA § 210(e) to exempt QFs from FPA regulation as authority for allowing states to regulate the rates for QF sales to utilities pursuant to their own independent programs.

b. The Commission also properly rejected the claims (QF Br. 12-16) that the Commission was somehow bound by the *ConEd* decision to recognize the validity of state programs or statutes imposing rates in excess of avoided cost. The Commission acknowledged that *ConEd* had been appealed to the Supreme Court, and that the Supreme Court had dismissed the appeal for want of a substantial federal question. The Commission properly recognized (JA 1043) that this amounted to a decision on the merits of the particular case only insofar as it left the underlying judgment undisturbed, and did not require the Commission (and all other ***44** courts, federal and state, and all other commissions nationwide) to follow the New York Court of Appeals' interpretation of the meaning and reach of PURPA "for all time and in all cases." Id. This reasoning was clearly correct. *See Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (JA 1043). [25]

B. ***The Commission Acted Within Its Lawful Authority In Applying Its Preemption Analysis Only To Future Contracts And Those Existing Contacts In Which The Avoided Cost, Issue Has Been Preserved.***

Although the utility petitioners (NiMo in Case No. 95-1223, and LILCO in Case No. 95-1303) do not dispute that the Commission's April 1988 declaratory order in *O&R* never became fully effective due to a stay that was in effect since June 1988, and that New York repealed the six-cent law prospectively in 1992, they nonetheless assert that the Commission is legally obligated, under *Harper v. Va. Dept. of Taxation*, 113 S.Ct. 2510, 2517 (1993), to apply its *CL&P* preemption analysis to all pending cases. They go on to argue that because *O&R* was still "pending" ***45** when the Commission issued *CL&P*, the preemption analysis announced in *CL&P* must be applied in *O&R* as well. These claims are baseless.

1. The Commission did apply its *CL&P* rulings in *O&R*, and complied with all applicable retroactivity principles. In *CL&P*, the Commission expressly declared that it would restrict its preemption analysis to pending and future QF contract challenges, and simply adhered to these principles in *O&R*. These rulings were correct.

As the Commission recognized in *CL&P*, *see* JA 1045, it has broad' policy discretion to apply its newly announced "rules" prospectively, as well as broad remedial discretion not to enforce its PURPA preemption analysis in past cases where QFs had reasonably relied on the Commission's prior, different interpre-tation of the states' independent authority to exceed avoided cost under "state QF" programs. *See* JA 1045 and n.42, *citing Williams Natural Gas Company v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (Commission can deny retroactive effective date to a rule announced in agency adjudication in order to protect settled expectations of those who had relied on pre-existing rule). [26]

***46** As the Commission observed (JA 1045), by refusing to apply its preemption analysis to QF contracts that had not been the subject of a timely and continuous challenge, it avoided the "substantial injustice" that such an analysis might otherwise have caused. In particular, the' Commission cited the potential injury to existing QFs from lending institutions' refusal to extend them financing "when the life of the underlying project is threatened." (JA 1045 n.43.) In addition, the Commission cited the "strong interest in repose generally . . . particularly in the context of expensive generating plants, [where] applicants and investors must be able confidently to rely on the predictability of rules" as supporting its determination to apply the analysis only to CL&P and to future QF contracts. *Id.* [27]

The Commission also correctly reasoned that prospective-only application of the *CL&P* preemption analysis was proper given the Commission's own past statements and the effect they might have had in inducing detrimental "reliance." *SeePub. Serv. Co. of* ***47** *Colorado*, D.C. Cir. No. 94-1418, slip op. at 22. As the Commission stated:

> [t]his approach is especially appropriate here given the apparent confusion created by the language contained in the preamble to our regulations . . . . As a consequence, some states in reliance on this preamble language have required rates that were above avoided cost for QF sales at wholesale. ... In light of the confusion that the preamble language created, we believe it inappropriate to entertain requests to invalidate other, pre-existing contracts where the avoided cost issue could have been raised but was not raised.

JA 1045. [28]

2. The utility petitioners nonetheless argue (Util Br. 37) that even if the Commission lawfully declared that it would apply the *CL&P* preemption analysis only prospectively and to pending challenges, it erroneously failed to apply that analysis to NiMo in *O&R*, since NiMo had been challenging the six-cent law before the Commission since 1987.

But, as the Commission recognized, unlike CL&P, which actually sought relief from a specific QF contract in *CL&P*, NiMo was only an intervenor in *O&R*. NiMo had "never filed a separate ***48** petition seeking relief as to its own QF contracts" as did CL&P. Indeed, since 1988, when the Commission limited the declaratory order in *O&R* to future contracts and then stayed its effectiveness indefinitely, NiMo "made no filing at the Commission or, to our knowledge, initiated state or federal court litigation seeking to challenge the rates in its own QF contracts as violating the avoided cost requirement of PURPA." JA 1053 n.20. The Commission also observed that "LILCO likewise did not file a separate petition, and did not seek to participate

in this proceeding until the Commission issued its January 11, 1995 order." JA 1053 n.20. "This contrasts starkly with the continuing effort by [CL&P] to challenge its contract in state court, in federal court and then at this Commission." JA 1053 n.20, *citingCL&P*, 70 FERC at 61,024-26; JA 704. [29]

3. Finally, if, as we have argued, the Commission lawfully determined to limit its *CL&P* preemption analysis to pending and future QF contract cases, then its April 1988 declaratory order in *O&R* is clearly moot. The original *O&R* declaratory order, by ***49** its own terms, was to operate prospectively only, and for all practical purposes, it never became effective. Thereafter, New York repealed the six-cent law prospectively in 1992. *See* N.Y. Pub. Serv. Law § S6-c(2) (McKinney 1994). Thus, the 1988 declaratory order in effect addressed only the "prospective" legality of a statute that no longer applied. In short, as of the repeal of the six-cent law, there could no longer be any "case or controversy" arising prospectively from the six-cent law's application, to which the 1988 declaratory order could apply any preemptive force. In these circumstances, the Commission reasonably vacated the 1988 declaratory order as moot.

***50** *CONCLUSION*

For the foregoing reasons, the petitions for review should be dismissed on jurisdictional grounds or denied on the merits.

Appendix not available.

Footnotes

1 The typewritten version of the Respondent's Brief inadvertently omitted the related case identified above.

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2 PURPA § 123, 16 U.S.C. § 2633, generally provides a right to judicial review of state regulatory authority determinations in state court (unless a utility affected by the determination happens to be a federal agency, in which event judicial review resides in federal district court.)

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

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

5 The Resources Authority is a municipal resource recovery authority established by 11 Connecticut townships that serve as it members. JA 693. The Commission certified its Preston facility, which the Resources Authority jointly owns and operates with Ref-Fuel and the Connecticut Resources Recovery Authority, as a QF in *American REF-FUEL Company of Southeastern Connecticut*, 40 FERC ¶ 62,061 (1987).

6 On that same date, the Commission issued a notice in a rulemaking proceeding seeking comments on whether it should codify, in a final rule, the prohibition on QF rates exceeding avoided cost adopted in the April 14 order. Administrative Determination of Full Avoided Costs, 53 Fed. Reg. 24,099 (June 27, 1988), IV FERC Stats. & Regs. ¶ 32,462 (1988). This rulemaking proceeding is still pending.

7 The Commission, on reconsideration, as it did in *CL&P*, observed that this case arose solely under PURPA § 210, and thus was not subject to the rehearing procedure of FPA § 313. 71 FERC at 61,144-45 n.2, JA 1047, n.2.

8 For this reason, 16 U.S.C § 8251(b), which purports to represent the codified language of FPA § 313(b), cannot be applied literally. *See Industrial Cogenerators*, 47 F.3d at 1234. While FPA § 313(b), as it appears in the Statutes At Large (*see* 49 Stat. 860), vests jurisdiction in this Court over Commission orders issued in a proceeding "*under this Act*." there is a conflict between the scope of FPA § 313(b) in the Statutes At Large, and the scope of 16 U.S.C. § 8251(b), the codified version of FPA § 313, which extends this Court' review authority to orders issued in a "proceeding *under this chapter*." (Emphasis added.) Where such conflict in language arises, the Statutes At Large provisions of the statute are considered to be "legal evidence of laws," *i.e.*. the official enactment, *see*1

U.S.C. § 112, and must prevail over inconsistent language in the United States Code. *See also Five Flags Pipe Line Co. v. Department of Transportation*, 854 F.2d at 1440-41.

9 The Supreme Court has recognized the separateness of PURPA § 210 from Section 313(b) of the FPA by pointing out that the "substantial evidence" standard of review of FPA § 313(b) was not applicable to its review of the PURPA § 210 regulations. See API, 461 U.S. at 412 n.7.

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

11 Thus, as this legislative history confirms, the textual directive that § 210(a) rules and the § 210(f)(1) implementation duty be "treated" as "enforceable under the FPA" was simply intended to authorize the Commission to issue declaratory orders and rules (without the procedural formalities required for rules prescribed under subsection (a)) under the general administrative powers borrowed from FPA § 309, 16 U.S.C. §825h, *so long as they are issued for the purpose of enforcing* PURPA § 210(a)'s rules and § 210(f)'s implementation requirement.

Congress specifically authorized the Commission to institute actions to enforce the § 210(a) and § 210(f)(1) requirements in federal district court, where jurisdiction is exclusive under FPA § 317, 16 U.S.C. § 825p, under authority borrowed from FPA § 314, 16 U.S.C. § 825m; the Commission may also subpoena witnesses and documents for investigation under authority borrowed from FPA § 315, 16 U.S.C. § 825n (incorporating the subpoena and investigative authority of FPA § 307, 16 U.S.C. § 825f); and the Commission may subject willful violators of PURPA's §§ 210(a) and (f)(1) requirements to criminal fines and penalties, under authority derived from FPA § 316, 16 U.S.C. § 825***o***. But all of these enforcement tools were established by Congress to enhance the Commission's enforcement authority under Section 210 of PURPA, not to convert PURPA § 210 proceedings into FPA proceedings for the purposes of authorizing direct court-of-appeals review.

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

13 *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd on other grounds sub nom.American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983).

14 Petitioners (Util. Br. 15; QF Br. 35) point out that in one case, *Greensboro Lumber Co. v. FERC*, 825 F.2d 518 (D.C. Cir. 1987), this Court addressed a challenge to a FERC order issued solely under PURPA § 210. But, as the QF petitioners concede (QF Br. 35), no party in *Greensboro* challenged the court's jurisdiction. In these circumstances, *Greensboro* cannot be considered precedent for establishing this Court's jurisdiction under FPA § 313(b) over FERC orders issued pursuant to PURPA § 210. *See**KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279-80 (1936) (jurisdictional "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents") (*quoting Webster v. Fall*, 266 U.S. 507, 511 (1926). *See also Brecht v. Abrahamson*, 113 S. Ct. 1710, 1717 (1993).

15 Indeed, as the QF petitioners concede (QF Br. 9), the Commission "did not rely on its authority to set rates under the FPA as the basis for its assertion of rate jurisdiction over QFs."

16 A copy of Order No. 550-A appears in Addendum B appended to this brief.

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

18 The Commission's initial declaratory order in *Industrial Cogenerators* ruled that various aspects of the Florida state commission's regulations implementing PURPA may be inconsistent with the Commission's PURPA regulations. *See Industrial Cogenerators v. Florida Public Serv. Comm'n*, 43 FERC ¶ 61,545 (1988).

19 In any such action, the QFs would be free to raise their claims that CL&P is procedurally barred from seeking in federal district court to preempt the Municipal Rate Statute because it withdrew a state court appeal of the state commission's decision on remand (*see* QF Br. 30).

20 Thus, there is no basis for the different variations of the utility petitioners' claims (*see* Util. Br. 9, 10, 11, 17, 18, 19, 24, 26, and 28) that as the alleged errors in the Commission's declaratory orders must be "corrected" now -- by this Court -- because they are presently binding on state commissions as a "rule prescribed under § 210(a)" which the states "must implement under § 210 (f)(1)."

21 In *Safe Energy*, 866 F.2d at 1477, this Court observed that *Chaney* expressly reserved the question whether an agency's "conscious" and "express" adoption of a "general policy [of non-enforcement] that is so extreme as to amount to an abdication of its statutory responsibilities" might overcome the presumption of unreviewability. For the reasons discussed at pp. 38-50, *infra*, the utility petitioners have failed to show that the Commission's exercise of discretion to apply its preemption analysis prospectively is "extreme" or otherwise amounts to an "abdication of statutory responsibilities," since it is consistent with sound remedial principles, *see Williams Natural Gas Company V. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993).

22 Petitioners (Util. Br. 17; QF Br. 25) cite other PURPA § 210(h) declaratory orders in which the Commission has adhered to various aspects of *CL&P* in an effort to persuade this Court the *CL&P* is somehow "binding" on other courts and state commissions. This effort must fail because the Commission's adherence to its policy views expressed in *CL&P* in subsequent PURPA § 210(h) enforcement cases does not make those views any more binding on the parties here, nor does it impair the rights of parties in those subsequent cases to challenge the Commission's legal interpretation in any future case where that interpretation is relied upon by an adversary.

23 The utility petitioners also maintain (Util. Br. 20-25) that they are not barred by claim preclusion principles, or by any statute of limitations, in seeking to challenge these contracts anew. (Br. 25-28). However, since neither the Commission's *CL&P* orders nor its *Orange & Rockland* orders have addressed preclusion issues or statute of limitations issues, and since the utilities are not challenging the Commission's failure to address them (but instead are responding only to issues raised in motions to dismiss filed by other parties), the utilities cannot satisfy the "aggrievement" requirement of FPA § 313(b) on these issues. Moreover, these issues were not raised in a request for rehearing filed with the Commission, and thus, on this separate basis, this Court lacks jurisdiction to consider them. *See Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1525-26 (D.C. Cir. 1994).

24 In *API*, the Supreme Court explained that PURPA § 210(b) "sets full avoided cost as the maximum rate that the Commission may prescribe." 461 U.S. at 413.

25 Nor is there merit to the argument (QF Br. 12, 15) that the *ConEd* decision has continued vitality because it relied on the "legislative history of PURPA." The *ConEd* court, 472 N.E. 2d at 985 n.7, apparently misread the above-quoted Conference Report language, see *supra* p. 41, as constituting an express congressional determination not to impose limits on state authority to regulate *sales-for-resale*, when, in fact, Congress was only declining to limit state authority to regulate QF sales *at retail*. This apparent misinterpretation of legislative history further weakens the *ConEd* decision as support for state authority to conduct QF rate programs concerning sales-for-resale.

26 The Commission does not believe that the retroactivity principles enunciated for Article III courts in *Harper* extend to agency adjudications. But even if *Harper* were applicable, the Commission's rulings were consistent with *Harper* since *Harper* does not apply its retroactivity principles to cases that have already become final and unappealable.

27 The utility petitioners (Util. Br. 37-40) fault the Commission for failing to apply its preemption analysis retroactively at least to those QFs that were afforded the option by the NYPSC to convert certain "tariff-based contracts" (which by their own terms were subject to future price modifications) to "avoided-cost contracts" as early as 1988, but declined to do so. But there was no reason for the Commission to reopen these contracts, since (a) the utilities did not seek judicial review of them in a timely manner; (b) the New York legislature's repeal of the six-cent law did not purport to affect these tariff-based contracts; and the Commission's orders under challenge here did not purport to declare that the "grandfathering" provisions of New York's repeal statute (described at Utils. Br. 6-7) were preempted by PURPA.

28 Indeed, as the Commission recognized (JA 1045), even the federal district court involved here found it necessary to invoke the primary jurisdiction doctrine because the law was "unsettled and conflicting." *Connecticut Light & Power Co. v. South Eastern Connecticut Regional Resources Recovery Authority*, 822 F. Supp. 888, 892 (D.Conn. 1993). As the Commission further observed, at least two other courts have remarked on the unsettled nature of the issue. JA 1045 n.46, *citing Massachusetts Electric Company v. Department of Public Utilities*. No. S-6483, 1994 Mass. Lexis 682 at *18 - *20 (Mass. Dec. 22, 1994); *North Carolina ex rel. Utilities Commission v. North Carolina Power*, 1994 N.C. Lexis 705 at *6 & n.2, *8 (N.C. Dec. 9, 1994).

29 By asserting that the 1988 *O&R* declaratory order is not moot because the Commission is under an obligation to apply the *CL&P* preemption analysis retroactively to all QF contracts that were governed by the six-cent law before its repeal, the petitioner utilities are in effect challenging that aspect of the declaratory order that determined that preemption of the six-cent law should operate prospectively. *See* 43 FERC at 61,196, J.A. 208. Since neither NiMo nor LILCO sought rehearing of the 1988 declaratory order on this basis (assuming *arguendo* this case is governed by Section 313 of the Federal Power Act), this Court lacks jurisdiction to consider these claims. *See Mine Reclamation Corp.*, 30 F.3d 1519, 1525-26 (D.C. Cir. 1994); *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993).

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