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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PACIFIC GAS AND ELECTRIC
COMPANY, SOUTHERN CALIFORNIA
EDISON COMPANY, CALIFORNIA
ELECTRICITY OVERSIGHT BOARD

Plaintiffs,

v.

2:06-CV-0559-MCE-KJM

MEMORANDUM AND ORDER

ARIZONA ELECTRIC POWER
COOPERATIVE, INC., CITY OF
ANAHEIM, CITY OF AZUSA, CITY
OF BANNING, CITY OF BURBANK,
CITY OF GLENDALE, CITY OF LOS
ANGELES, CITY OF PASADENA,
CITY OF RIVERSIDE, CITY OF
SANTA CLARA, CITY OF SEATTLE,
CITY OF VERNON, EUGENE WATER
AND ELECTRIC BOARD, LOS
ANGELES DEPARTMENT OF WATER
AND POWER, MODESTO IRRIGATION
DISTRICT, NORTHERN CALIFORNIA
POWER AGENCY, PUBLIC UTILITY
DISTRICT NO. 2 OF GRANT
COUNTY, SACRAMENTO MUNICIPAL
UTILITY DISTRICT, SALT RIVER
PROJECT AGRICULTURAL
IMPROVEMENT AND POWER
DISTRICT, TURLOCK IRRIGATION
DISTRICT,

Defendants.

1 SAN DIEGO GAS & ELECTRIC
2 COMPANY,

3 Plaintiff,

2:06-CV-0592-MCE-KJM
RELATED CASE

4
5 v.

6 ARIZONA ELECTRIC POWER
7 COOPERATIVE, INC., CITY OF
8 ANAHEIM, CITY OF AZUSA, CITY
9 OF BANNING, CITY OF BURBANK,
10 CITY OF GLENDALE, CITY OF LOS
11 ANGELES, LOS ANGELES
12 DEPARTMENT OF WATER AND POWER,
13 CITY OF PASADENA, CITY OF
14 RIVERSIDE, CITY OF SANTA
15 CLARA, CITY OF SEATTLE, CITY
16 OF VERNON, EUGENE WATER AND
ELECTRIC BOARD, MODESTO
IRRIGATION DISTRICT, NORTHERN
CALIFORNIA POWER AGENCY,
PUBLIC UTILITY NO. 2 OF GRANT
COUNTY, SACRAMENTO MUNICIPAL
UTILITY DISTRICT, SALT RIVER
PROJECT AGRICULTURAL
IMPROVEMENT AND POWER
DISTRICT, and TURLOCK
IRRIGATION DISTRICT,

17 Defendants.
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22 Before the Court are numerous motions seeking dismissal of
23 the two above captioned cases. The lead case, civil case no.
24 2:06-cv-0559, was filed on March 16, 2006, and its companion
25 case, civil case no. 2:06-cv-0592, was filed five (5) days later
26 on March 21, 2006. These actions involve identical Defendants
27 and are based on same or similar allegations, same or similar
28 events and pose same or similar questions of fact and law.

1 Due to this marked similarity, the Court ordered the cases
2 related. See Civ. Case No. 2:06-cv-0559, Docket 15, March 28,
3 2006. The Motions to Dismiss filed in these actions seek
4 dismissal through virtually identical mechanisms. Given the
5 likeness of the Parties, the underlying factual predicate, and
6 the bases of the motions filed in both actions, the Court shall
7 herein dispose of all pending motions in both the lead case as
8 well as the member case (collectively, the "Action") as set forth
9 below.

10
11 **BACKGROUND**
12

13 The present Action was brought by Pacific Gas & Electric
14 ("PG&E"), Southern California Edison Company ("SCEC"), the
15 California Electricity Oversight Board ("CEOB") and San Diego Gas
16 & Electric ("SDGE") (collectively, "Plaintiffs") against twenty
17 separate non-public government entities including Arizona
18 Electric Power Cooperative, Inc. ("Arizona"), City of Anaheim
19 ("Anaheim"); City of Azusa ("Azusa"); City of Banning
20 ("Banning"); City of Burbank ("Burbank"); City of Glendale
21 ("Glendale"); City of Los Angeles ("Los Angeles"); City of
22 Pasadena ("Pasadena"); City of Riverside ("Riverside"); City of
23 Santa Clara ("Santa Clara"); City of Seattle ("Seattle"); City of
24 Vernon ("Vernon"); Eugene Water and Electric Board ("Eugene");
25 Los Angeles Department of Water and Power ("LA Water"); Modesto
26 Irrigation District ("Modesto"); Northern California Power Agency
27 ("NCPA"); Public Utility District No. 2 of Grant County
28 ("Grant"); Sacramento Municipal Utility District ("SMUD"); Salt

1 River Project Agricultural Improvement and Power District ("Salt
2 River"); and Turlock Irrigation District ("Turlock")
3 (collectively, "Defendants").¹ Plaintiffs are seeking damages and
4 declaratory relief for sums allegedly owed as a result of
5 overpayment to Defendants for wholesale electricity and ancillary
6 services ("Energy") between May 1, 2000 and June 20, 2001.

7 Plaintiffs purchase Energy from a number of sources and
8 resell that Energy to consumers at retail prices. The California
9 wholesale markets are operated by the California Independent
10 System Operator Corporation ("ISO") and California Power Exchange
11 Corporation ("PX") under tariffs filed with and approved by the
12 Federal Energy Regulatory Commission ("FERC"). The ISO and PX
13 are public utilities under the Federal Power Act ("FPA") and are,
14 therefore, subject to FERC's jurisdiction.

15 The ISO is generally the entity responsible for operating
16 and maintaining California's electric transmission grid,
17 including resolving transmission congestion and purchasing
18 electric power to maintain system reliability. The PX acts as a
19 clearinghouse for daily and hourly markets and submitted
20 schedules of electric power to the ISO in which scheduled
21 generation for the following day equaled scheduled demand.
22 Pursuant to the PX Tariff, sellers in the PX market submitted
23 offers to sell electric power, and purchasers submitted demand
24 bids for the quantity of electric power that they wanted to buy.

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27 ¹Eugene and Salt River were voluntarily dismissed from this
28 Action with prejudice on July 12, 2006 and May 12, 2006,
respectively.

1 The PX conducted day-ahead and same-day auctions that allowed
2 parties to adjust their hourly commitments based on changing
3 needs and availability. Under its tariff, the PX was charged
4 with responsibility for, among other things, settling energy
5 trades between PX market participants and preparing and
6 distributing to PX market participants invoices reflecting the
7 amounts payable and receivable by them in connection with their
8 trading through the PX.

9 In general, the PX determined, for each hour in each of the
10 markets that it operated, a single market-clearing price that all
11 electric power suppliers were paid under the auction provisions
12 of the PX tariff. The PX matched offers to buy and sell
13 beginning with the lowest-priced bids and continuing up to the
14 highest-priced bids until the amount of power accepted matched
15 the amount sought by purchasers at that price. The price of the
16 last, and therefore the highest-priced, accepted bid set the
17 price for the entire market. All sellers of electric power in a
18 given auction received the same market-clearing price, even if
19 the seller had offered to sell at a lower price.

20 In order to obtain sufficient electric power to maintain
21 reliability of California's electric grid, the ISO at times was
22 required to procure electric power through procedures other than
23 its regular auction. During the period at issue, the ISO was
24 often forced to solicit such electric power, known as
25 "out-of-market" or "OOM" electric power, to meet California's
26 demand for electric power.

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1 The ISO Tariff permitted the ISO to solicit this electric power
2 through extraordinary means, such as seeking Energy from OOM
3 electric power marketers and generators, including the
4 Defendants. These purchases were subject to certain price caps
5 applicable in the ISO markets, which price caps varied during the
6 relevant period and were intended to prevent price gouging.
7 Despite these price caps, suppliers of OOM electric power
8 regularly demanded more than the FERC-approved price cap for such
9 sales to the ISO. In order to maintain the reliability of
10 California's electric grid, the ISO procured the electric power
11 at whatever price it was offered, even if that price exceeded its
12 price caps, and then charged market participants, including the
13 Plaintiffs, herein, for the Energy purchased.

14 Plaintiffs allege that the ISO and PX Tariffs filed with
15 FERC contained the only terms and conditions, including the
16 pricing formulas, upon which transactions in the ISO and the PX
17 could lawfully be conducted. Further, the Plaintiffs aver that
18 Defendants voluntary sale of Energy into the ISO and PX markets
19 render them charged with knowledge and acceptance of those terms
20 and conditions giving rise to contract remedies. This assertion
21 is heavily disputed by Defendants. As additional support for the
22 foregoing, Plaintiffs contend that the PX tariff required all PX
23 market participants to execute a PX Participation Agreement.
24 That Agreement provided, *inter alia*, that the PX market
25 participant "will abide by and will perform all of the
26 obligations under the PX tariff in respect of all matters set
27 forth therein including, without limitation, all matters relating
28 to the trading of Energy by it through the PX market."

1 PX Tariff Appendix A, Participation Agreement, § II(B). The PX
2 Participation Agreement further provided that “[t]he PX Tariff is
3 incorporated herein and made a part hereof.” PX Tariff Appendix
4 A, Participation Agreement, § 8.

5 Similarly, the ISO Tariff contemplated that each market
6 participant, including the Defendants, would execute an ISO
7 Scheduling Coordinator Agreement. That Agreement was prescribed
8 by the ISO tariff and provided, *inter alia*, that the ISO
9 Scheduling Coordinator “will abide by, and will perform all of
10 the obligations under the ISO Tariff placed on Scheduling
11 Coordinators in respect of all matters set forth therein
12 including, without limitation, all matters relating to the
13 scheduling of Energy and Ancillary Services on the ISO controlled
14 grid, ... [and] billing and payments” ISO Tariff Appendix
15 B, Scheduling Coordinator Agreement, § 2(B). The Scheduling
16 Coordinator Agreement further provided that “[t]he ISO Tariff is
17 incorporated herein and made a part hereof.” ISO Tariff Appendix
18 B, Scheduling Coordinator Agreement, § 8.

19 Beginning in May 2000, the prices demanded by sellers in the
20 ISO and PX markets rose dramatically and sellers continued to
21 demand those unprecedented prices for over a year. As a result
22 of the auction provisions of the ISO and PX Tariffs, these
23 extremely high prices were charged by all Energy sellers in the
24 markets, even if individual sellers had offered to sell their
25 power in the auctions at lower prices.

26 As a result of these unprecedented prices, SDG&E filed a
27 complaint with FERC under the FPA against Energy sellers subject
28 to FERC’s jurisdiction. August 2, 2000, FERC Docket No. EL00-95.

1 PG&E, SCE, and the EOB intervened on August 14, 2000. In that
2 proceeding, the complaining parties requested that FERC
3 investigate the justness, reasonableness, and lawfulness of rates
4 being charged in the California ISO and PX markets and that FERC
5 order refunds to the extent that FERC determined that sellers had
6 charged unjust, unreasonable, or otherwise unlawful rates.

7 Following the foregoing proceeding, FERC immediately
8 initiated an investigation into the pricing charged in the
9 wholesale Energy markets. In a November 1, 2000, Order, FERC
10 found that the California market structure and rates were
11 seriously "flawed" and proposed fundamental modifications to the
12 wholesale market. 93 FERC ¶ 61,121, at 61,370 (2000).

13 On December 15, 2000, FERC issued an order eliminating the
14 requirement that the Plaintiffs purchase all of their needed
15 electric power through the PX. The Order included proposed price
16 mitigation measures and refund liability of public utility
17 sellers. 93 FERC ¶ 61,294, at 61,997 (2000). As a result of its
18 findings, FERC also terminated the PX wholesale rate schedule and
19 outlined a complex web of mitigation measures. *Id.* at 61,997.
20 Specifically, the Commission proposed to limit the single-price
21 auction by refunding prices in excess of a "break-point" price.
22 *Id.* at 61,983.

23 The power crisis ultimately ended on June 19, 2001, when
24 FERC imposed "must offer" requirements on electric power
25 generators prohibiting them from withholding generation, and
26 imposed price caps on wholesale sellers of electric power across
27 all western states effective June 21, 2001 ("June 19, 2001,
28 Order").

1 *San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,418 at 62,558,
2 62,569 (2001).

3 On July 25, 2001, FERC ordered both public and non-public
4 utilities to refund those sums charged in excess of the price it
5 had deemed to be just and reasonable for the period beginning
6 October 2, 2000, and ending June 20, 2001 ("Refund Period"). 96
7 FERC P 61,120, at 61,499 (2001) ("July Order"). This Order
8 caused much upheaval as it directed non-public utilities that had
9 universally been deemed outside FERC's jurisdiction to pay
10 refunds for the Refund Period. Not surprisingly, the non-public
11 utilities sought review of FERC's July Order from the Ninth
12 Circuit Court of Appeal. See *Bonneville Power Admin. v. FERC*,
13 422 F.3d 908, 913 (9th Cir. 2005).

14 The *Bonneville* Court unanimously concluded that FERC
15 exceeded its jurisdiction when it ordered non-public utilities
16 that sold Energy into the California market during the relevant
17 period to pay refunds. The Ninth Circuit explained that FERC
18 derives its refund authority from the FPA and specifically from
19 Section 201(f) thereof. *Id.* at 915. The court further clarified
20 that governmental entities (non-public utilities), like
21 Defendants herein, are not subject to the provisions of
22 subchapter II of the FPA unless otherwise specifically provided.
23 *Id.* Accordingly, the court remanded the action for further
24 proceedings.

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STANDARD

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3 Federal Courts are presumptively without jurisdiction over
4 civil actions, and the burden of establishing the contrary rests
5 upon the party asserting jurisdiction. *Kokkonen v. Guardian Life*
6 *Ins. Co. of America*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 2d
7 391 (1994). Lack of subject matter jurisdiction is never waived
8 and may be raised by either party or the court at any time.
9 *Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d.
10 593, 594-95 (9th Cir. 1996). Lack of subject matter jurisdiction
11 may be raised by the district court *sua sponte*: "Nothing is to be
12 more jealously guarded by a court than its jurisdiction." *In re*
13 *Mooney*, 841 F.2d. 1003, 1006 (9th Cir. 1988).

14 In moving to dismiss for lack of subject matter jurisdiction
15 pursuant to Rule 12 (b)(1), the challenging party may either make
16 a facial attack on the allegations of jurisdiction contained in
17 the complaint or can instead take issue with subject matter
18 jurisdiction on a factual basis. *Thornhill Publ'g Co. v. Gen.*
19 *Tel. & Elect. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

20 If the motion constitutes a facial attack, the Court must
21 consider the factual allegations of the complaint to be true.
22 *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981);
23 *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd
24 Cir. 1977). If the motion constitutes a factual attack, however,
25 "no presumptive truthfulness attaches to plaintiff's allegations,
26 and the existence of disputed material facts will not preclude
27 the trial court from evaluating for itself the merits of
28 jurisdictional claims." *Thornhill*, 594 F.2d at 733.

1 If the Court grants a motion to dismiss a complaint, it must
2 then decide whether to grant leave to amend. Generally, leave to
3 amend should be denied only if it is clear that the deficiencies
4 of the complaint cannot be cured by amendment. *Broughton v.*
5 *Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980).

6
7 **ANALYSIS**

8
9 **I. Subject Matter Jurisdiction**

10
11 Plaintiffs seek to invoke federal question jurisdiction
12 based on 28 U.S.C. § 1331. Specifically, paragraph 1 of PG&E's
13 Complaint provides as follows:

14 Plaintiffs' claims require resolution of a disputed and
15 substantial issue of federal law in that plaintiffs'
16 claims arise out of defendants' sales of electric power
17 in wholesale electricity markets that are within the
18 Federal Energy Regulatory Commission's ("FERC")
exclusive regulatory jurisdiction, and plaintiffs are
suing to recover for defendants' breaches of their
contractual obligations contained in tariffs filed with
and regulated by FERC.

19 See PG&E Complaint, ¶ 1; see also SDG&E Complaint, ¶ 1.

20 Plaintiffs, in their papers, go on to argue that while this case
21 seeks to interpret what is essentially a state law matter rather
22 than a federal matter, the Supreme Court has "recognized ... that
23 in certain cases federal question jurisdiction will [also] lie
24 over state-law claims" that require the resolution of a disputed
25 and substantial issue of federal law. See Plf.s' Opp'n., p. 47
26 (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*,
27 125 S. Ct 2363, 2366-67 (2005)).
28

1 More precisely, Plaintiffs salient contention is that subject
2 matter jurisdiction exists in the present action as the federal
3 ISO and PX Tariffs filed with FERC contained the only terms and
4 conditions, including the pricing formulas, upon which
5 transactions in the ISO and the PX could lawfully be conducted.
6 Accordingly, the interpretation of those federal tariffs will be
7 necessary to assess the merits of Plaintiffs' claims. Further,
8 Plaintiffs aver that Defendants voluntary sale of Energy into the
9 ISO and PX markets render them charged with knowledge and
10 acceptance of those terms and conditions giving rise to contract
11 remedies under federal law. Defendants controvert Plaintiffs'
12 allegations by clarifying that Plaintiffs' claims do not truly
13 arise under a federal statute nor is there exclusive federal
14 jurisdiction over the subject matter.

15 As noted above, district courts are courts of limited
16 jurisdiction. They possess only that power authorized by the
17 United States Constitution and statute. *Exxon Mobil Corp. v.*
18 *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2616 (2005) (internal
19 quotation marks and citation omitted). As a general matter,
20 federal courts have subject matter jurisdiction over civil
21 actions "arising under the Constitution, laws, or treaties of the
22 United States." 28 U.S.C. § 1331.² In order to be heard in this
23 forum, Plaintiffs must satisfy the Court that jurisdiction
24 exists.

25 ///

27 ²To the extent jurisdiction could be based on 28 U.S.C. §
28 1332, the Court shall address that issue in Section II.C. of this
Order.

1 **A. Arising Under Federal Jurisdiction**

2
3 As an initial matter, the Parties and the Court agree that
4 this case does not present a federal question of the first kind;
5 namely one created under federal law. Rather, this is a purely
6 state based contract action implicating certain language
7 contained in a federal tariff. Plaintiffs seek to persuade the
8 Court that this chiefly federal issue is merely played out
9 against the backdrop of a state law contract claim. Defendants,
10 predictably, claim the federal tariffs, while admittedly crafted
11 pursuant to federal law, play but a bit role in an entirely state
12 law contract action. In fact, this case poses the "litigation-
13 provoking problem" of a federal issue embedded in a state-created
14 cause of action. See *Merrell Dow Pharm. Inc. v. Thompson*, 478
15 U.S. 804, 809-10 (1986). More precisely, the question before
16 this Court is whether the incorporation by reference of federal
17 regulations into a purely state law contract is sufficient to
18 confer federal subject matter jurisdiction. See 28 U.S.C. §
19 1331.

20 As a general matter, the Supreme Court has explained that
21 the "vast majority" of cases brought under the federal-question
22 jurisdiction of the federal courts are those in which federal law
23 creates the cause of action. *Merrell Dow*, 478 U.S. at 808. That
24 said, the Court has nonetheless recognized a case may arise under
25 federal law "where the vindication of a right under state law
26 necessarily turned on some construction of federal law." *Id.*
27 (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463
28 U.S. 1, 9 (1983).

1 The cases that instruct the resolution of this
2 jurisdictional quandary begin with the seminal case *Merrell Dow*
3 adjudged in 1986. There, the complainants alleged that the
4 misbranding of Benedictin resulted in pregnant women ingesting
5 the drug which caused birth defects to their children.
6 Plaintiffs sought redress on grounds of negligence, breach of
7 warranty, strict liability, fraud, and gross negligence. As part
8 of their cause of action, however, plaintiffs alleged the
9 misbranding, in violation of the Federal Food, Drug, and Cosmetic
10 Act ("FDCA"), was negligence per se. Defendants sought to have
11 the case heard in a federal forum based on the existence of a
12 federal issue embedded in the state law claims. The Supreme
13 Court concluded that federal jurisdiction was lacking. In
14 explaining its' finding, the Supreme Court stated that

15 "a complaint alleging a violation of a federal statute
16 as an element of a state cause of action, when Congress
17 has determined that there should be no private, federal
18 cause of action for the violation, does not state a
19 claim 'arising under the Constitution, laws, or
20 treaties of the United States.'" "

21 *Merrell Dow*, 478 U.S. at 817.

22 The foregoing holding had been interpreted by some courts as
23 standing for the proposition that absent a private right of
24 action, federal jurisdiction cannot exist. In fact, that reading
25 was later disapproved by the Court in a case entitled *Grable &*
26 *Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S 308, 125 S. Ct.
27 2363, 162 L. Ed. 2d 257 (2005). There, petitioner Grable brought
28 a state quiet title action, claiming the respondent's title to a
piece of land was invalid because the Internal Revenue Service
had improperly noticed a tax seizure under 26 U.S.C. § 6335.

1 In upholding the lower court's determination that federal
2 question jurisdiction did, in fact, exist, the Supreme Court
3 wrote:

4 [W]hether Grable was given notice within the meaning of
5 the federal statute is thus an essential element of its
6 quiet title claim, and the meaning of the federal
7 statute is actually in dispute; it appears to be the
8 only legal or factual issue contested in the case. The
9 meaning of the federal tax provision is an important
10 issue of federal law that sensibly belongs in a federal
11 court.

12 *Grable*, 545 U.S. at 314. Significantly, the fact that the
13 federal statute in *Grable* did not create a private cause of
14 action was not controlling. In discussing the issue, the Court
15 explained that *Merrell Dow* should be read in its entirety as
16 treating the absence of a federal private right of action as
17 "evidence relevant to, but not dispositive of, the sensitive
18 judgments about congressional intent that § 1331 requires." *Id.*
19 at 308. The Court went on to explain that the absence of a
20 private right of action should be considered an indicator of
21 substantiality of the federal issue at stake and, more
22 importantly, as an indicator of congressional intent regarding
23 the scope of jurisdiction to be exercised under § 1331. *Id.* The
24 *Grable* Court further found the missing cause of a private right
25 of action not as "a missing federal door key, always required,
26 but as a missing welcome mat." *Id.*

27 Most recently, the Court considered a case rather on point
28 with the case presently before this Court; *Empire HealthChoice*
Assur., Inc. v. McVeigh, 126 S. Ct. 2121 (2006).

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1 *Empire* involved a dispute about the meaning of terms in a federal
2 health insurance contract between a federal agency and a private
3 insurance carrier that set forth the details of a federal health
4 insurance program created by federal statute and covering eight
5 million federal employees. See *Id.* at 2138 (dissent by Justice
6 Breyer). In *Empire*, it was undisputed that the statute at issue
7 was federal in character, the program that created the statute
8 was federal, the beneficiaries of the program were federal
9 employees, and the premiums paid under the relevant policies were
10 federal. *Id.* Yet, the Court concluded that subject matter
11 jurisdiction did not exist. The *Empire* Court characterized the
12 *Grable* decision as belonging to a "slim" category of cases as it
13 presented a nearly pure issue of law that could be settled once
14 and for all and thereafter would govern numerous tax sale cases.
15 *Id.* at 2137. The Court was persuaded that the contract
16 interpretation at issue in *Empire* was sufficiently fact-bound and
17 situation-specific that it did not fall within the very narrow
18 category of cases *Grable* exemplifies. *Id.*

19 In sum, an embedded federal issue in a state law claim
20 will qualify for a federal forum only if federal jurisdiction is
21 consistent with congressional judgment about the sound division
22 of labor between state and federal courts governing the
23 application of § 1331. Indeed, the Supreme Court has been
24 careful not to articulate a "single, precise, all-embracing" test
25 for jurisdiction over federal issues embedded in state-law claims
26 between non-diverse parties. Rather, the Court has instructed
27 that when addressing this issue, a number of factors are to be
28 considered.

1 Ultimately, however, it is clear that unless a state law claim
2 necessarily raises a stated federal issue, actually disputed and
3 substantial, which does not disturb any congressionally approved
4 balance of federal and state judicial responsibilities, federal
5 jurisdiction cannot lie. The Court believes that such is the
6 case here.

7 First, the lack of a private right of action, as explained
8 above, speaks in part to whether Congress envisioned that claims
9 arising under a particular piece of federal legislation would
10 properly be heard in a federal forum. *Merrell Dow*, 478 U.S. at
11 812. The federal laws at issue here are the Federal Power Act
12 and the federal tariffs promulgated thereunder. As Defendants
13 repeatedly explain, they are expressly exempt from the reaches of
14 the refund authority granted to FERC under the FPA. See
15 *Bonneville*, 422 F.3d at 926. This express exemption evinces, at
16 least at some level, congressional intent that these non-public
17 utilities not be subject to federal jurisdiction. This is true
18 at least with respect to the reach of the federal agency charged
19 with the administration of refunds pursuant to the FPA. It bears
20 mention that the federal judiciary is not to "engraft a remedy on
21 a statute, no matter how salutary, that Congress did not intend
22 to provide." *California v. Sierra Club*, 451 U.S. 287, 297
23 (1981). The Plaintiffs sought refunds from the Defendants
24 through a FERC proceeding. That proceeding resulted in an order
25 for the payment of refunds to Plaintiffs by the non-public
26 utility Defendants. Later, the *Bonneville* court found that FERC
27 had no jurisdiction to order such refunds based on federal law.

28 ///

1 Congress has spoken that it does not intend these Defendants to
2 be subject to governance by the federal agency charged with
3 administration of the federal law at issue. This Court is not
4 free to supplement the foregoing congressional answer. The Court
5 finds Congress intended to limit the scope of jurisdiction vis-a-
6 vis these Defendants in precisely this type of claim.

7 With respect to the substantial nature of the federal
8 interests at stake, they do not rise to the level of warranting
9 federal question jurisdiction. The federal tariffs that have
10 been incorporated by reference into the contracts at issue are to
11 be interpreted and governed solely by California law rather than
12 by federal law. Specifically, the ISO tariff provides as
13 follows: "This ISO Tariff shall be governed by and construed in
14 accordance with the laws of the State of California." ISO
15 Tariff, § 20.7. The PX Tariff provides substantially the same.
16 Given that the very language at issue, the contract terms
17 provided by the federal tariffs, is to be expressly construed in
18 accord with California law rather than federal law, the Court
19 finds the federal interests to be considerably muted. Any
20 interpretation by a federal court of the language of the tariffs
21 will only speak to how those tariffs should be construed in this
22 state. Accordingly, the reach of any such adjudication will not
23 have federal reverberation. In addition, to the extent federal
24 interests are implicated, the state court is quite competent to
25 apply the language of the tariffs and is certainly well
26 positioned to do so where, as here, the tariff language is to be
27 construed in accord with state law.

28 ///

1 In sum, the Court concludes both that the lack of a private
2 right of action evinces congressional intent to foreclose a
3 federal forum and that the federal interests at stake are muted
4 given that the federally imported language is to be accorded
5 meaning consistent with this state's laws. However, even had the
6 Court found the presence of a substantial disputed federal issue
7 and the ostensible importance of a federal forum, those finding
8 are not necessarily dispositive. *Grable*, 545 U.S. at 314. In
9 fact, there must always be an assessment of any disruptive
10 portent in exercising federal jurisdiction. *Id.*

11 In assessing the potential disruption of the sound division
12 of labor between state and federal courts envisioned by Congress,
13 it is instructive to once again consider the seminal Supreme
14 Court cases of *Grable* and *Merrell Dow*. In *Grable*, the Court saw
15 little danger in accepting jurisdiction of the state title
16 dispute because it would "portend only a microscopic effect on
17 the federal-state division of labor." *Id.* at 315. In contrast,
18 recognizing a substantial federal question when a violation of
19 federal law furnished the basis for a negligence claim, as in
20 *Merrell Dow*, would severely impact the "the concern for
21 'practicality and necessity' that *Franchise Tax Board* advised for
22 the construction of § 1331 when jurisdiction is asserted because
23 of the presence of a federal issue in a state cause of action."
24 *Merrell Dow*, 478 U.S. at 811-12. Accepting jurisdiction in that
25 case "would have attracted a horde of original filings and
26 removal cases raising other state claims with embedded federal
27 issues" and likely would "have heralded a potentially enormous
28 shift of traditionally state cases into federal courts."

1 *Grable*, 545 U.S. at 319.

2 The Court views the circumstance presented by this case as
3 more parallel to the paradigm expressed in *Merrell Dow* than the
4 paradigm articulated in *Grable*. Specifically, excepting
5 diversity cases from the equation, the bulk of contract disputes
6 in the United States are conducted by the state courts. This
7 balance would be upset drastically if state contract claims could
8 become a matter of substantial federal interest by the simple
9 expedient of incorporating by reference the terms of a federal
10 law or regulation. The Court believes such a dramatic shift
11 would distort the division of judicial labor assumed by Congress
12 under section 1331.

13 Given the foregoing concerns, and following the analytical
14 methodology laid down by recent Supreme Court precedent, the
15 Court finds that this state-law contract action incorporating by
16 reference federal tariffs does not present a sufficient federal
17 question over which this Court may exercise "arising under"
18 jurisdiction pursuant to 28 U.S.C. § 1331.

19

20 **B. Sparta/Dynegy Exclusive Jurisdiction Exception**

21

22 The Parties vigorously argue over the applicability of an
23 exception to the general rule that state law claims cannot be
24 alchemized into federal causes of action by incidental reference.
25 *See Sparta Surgical Corp. v. NASD*, 159 F.3d 1209 (9th Cir. 1998)
26 (citing *Easton v. Crossland Mortg. Corp.*, 114 F.3d 979, 982
27 (1997)).

28 ///

1 This exception was first set out in the seminal case of *Sparta*
2 *Surgical Corp. v. NASD* ("*Sparta*") and later examined in *Lockyer*
3 *et al. v. Dynegy, et al.* In *Sparta*, the Ninth Circuit confronted
4 the question of subject matter jurisdiction over a variety of
5 state common-law claims that alleged, in part, a violation of the
6 rules contained in the Securities and Exchange Act ("Exchange
7 Act"). 159 F.3d 1209. The plaintiffs in *Sparta* brought their
8 claims in a state court. Thereafter, the defendants removed the
9 case alleging "arising under" federal jurisdiction based on a
10 claimed violation of the Exchange Act. The Ninth Circuit found
11 federal jurisdiction proper based on the exclusive jurisdiction
12 provision contained in the Exchange Act itself. The court
13 explained its ruling as follows: "the rule that state law claims
14 cannot be alchemized into federal causes of action by incidental
15 reference ... has no application when relief is partially
16 predicated on a subject matter committed exclusively to federal
17 jurisdiction." *Id.* at 1212-13. The court ultimately found that
18 the state law claims arose under the exclusive jurisdiction
19 provision of the Exchange Act rather than under 28 U.S.C. § 1331.
20 *Id.* at 1212.

21 Later, in *Lockyer v. Dynegy*, the Ninth Circuit confronted a
22 similar case where the plaintiffs sought federal jurisdiction
23 over a state law unfair competition claim, Cal. Bus. & Prof. Code
24 § 17200, *et seq.*, alleging an underlying violation of the precise
25 tariffs at issue here. 375 F.3d 831 (9th Cir. 2004). Like in
26 *Sparta* itself, the plaintiffs in *Dynegy* brought their claim in
27 the state Superior Court. The defendants promptly removed the
28 action to a federal forum.

1 Plaintiffs thereafter sought remand and the Ninth Circuit, citing
2 *Sparta*, concluded the federal court properly retained
3 jurisdiction given the existence of an exclusive jurisdiction
4 provision contained in the FPA. *Id.*

5 Plaintiffs in the present action rely heavily on the *Dynegy*
6 case. That is, Plaintiffs rely on the Ninth Circuit's conclusion
7 that the tariffs promulgated by FERC pursuant to its authority
8 under the FPA are the equivalent of a federal regulation and,
9 therefore, an examination of those tariffs to assess the merits
10 of the present claim raises a federal question. *See Id.* at 840.
11 Plaintiffs further contend that this case is analogous to *Dynegy*
12 where the Ninth Circuit plainly found federal jurisdiction
13 because, as in *Dynegy* itself, here the merits of the claim turn,
14 in part, on an examination of the tariffs. Defendants contend,
15 rather convincingly, that the *Dynegy* case is distinguishable from
16 the case at bar. The Court agrees.

17 As an initial matter, the *Dynegy* plaintiffs were seeking
18 relief on the ground that the defendants violated California's
19 unfair competition law. *See Cal. Bus. & Prof. Code* § 17200 *et*
20 *seq.* Generally, that law proscribes unlawful business practices
21 by borrowing violations of other laws and treating them as
22 independently actionable under Section 17200. *Cel-Tec Commc'ns,*
23 *Inc. V. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999).
24 Accordingly, an essential element of the *Dynegy* plaintiffs' claim
25 was, necessarily, a violation of the federal tariffs themselves.
26 Absent such a violation, no state law liability could have
27 survived.

28 ///

1 Given that fact, it is no surprise the court concluded the relief
2 sought was predicated on a matter committed exclusively to
3 federal jurisdiction because the state lawsuit turned "entirely[]
4 upon the defendant's compliance with a federal regulation."
5 *Dynegy*, 375 F.3d at 841.

6 Here, in contrast, the Plaintiffs are seeking to enforce a
7 private contract between private parties which will afford relief
8 only if the contract terms, from wherever drawn, are found to
9 have been breached. Unlike in *Dynegy*, it is not the federal
10 tariff itself, standing as the law, that will give life to the
11 merits of Plaintiffs' claim. It is the contract language,
12 standing only as a representation of the agreement between the
13 Parties, that will inform the resolution of this matter.

14 While the Court believes the foregoing to be the correct
15 analysis of the jurisdictional issue at bar, an argument may be
16 advanced that the subject matter of the contract, i.e. the sale
17 of Energy from the Defendants to the Plaintiffs, is the exclusive
18 domain of federal jurisdiction irrespective of the sweeping
19 exception for these Defendants. At first blush, this averment
20 appears meritorious. Indeed, a broad reading of the *Dynegy* case
21 arguably supports this argument to the extent that *Dynegy* finds
22 an interpretation of the federal tariffs at issue a matter
23 committed exclusively to federal jurisdiction. See 375 F.3d at
24 843. However, the Court finds the later decided *Bonneville* case
25 dispels the notion that the broad grant of authority under the
26 FPA's exclusive jurisdiction provision ensnares all matters,
27 however arising, respecting the sale of Energy. See 422 F.3d at
28 916.

1 To be sure, the FPA applies to "the transmission of electric
2 energy in interstate commerce and to the sale of electric energy
3 at wholesale." 15 U.S.C. § 824(b). More importantly, however,
4 the FPA provides:

5 The District Courts of the United States ... shall have
6 exclusive jurisdiction of violations of this chapter or
7 the rules, regulations, and orders thereunder, and of
8 all suits in equity and actions at law brought to
enforce any liability or duty created by, or to enjoin
any violation of, this chapter or any rule regulation
or order thereunder.

9 16 U.S.C. § 825p. In contrariety, the FPA provides the following
10 exemption:

11 No provision in this subchapter shall apply to, or be
12 deemed to include, the United States, a State or any
13 political subdivision of a State, or any agency,
14 authority, or instrumentality of any one or more of the
foregoing, ...unless such provision makes specific
reference thereto.

15 16 U.S.C. § 824(f).

16 The *Dynegy* plaintiffs sought to directly enforce the federal
17 tariffs as they applied to public utilities. Based on the
18 exclusive jurisdiction provision, the court found relief was
19 "predicated on a subject matter committed exclusively to federal
20 jurisdiction." 375 F.3d at 841 (citing *Sparta*, 159 F.3d at
21 1213). Later, in *Bonneville*, the court was tasked with
22 interpreting both the foregoing jurisdictional provisions to
23 determine if the federal commission tasked with implementing the
24 FPA could, as a matter of jurisdiction, order non-public
25 utilities to refund sums allegedly overcharged.

26 ///

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1 The *Bonneville* court made clear that while the subject matter of
2 wholesale sales of Energy under the FPA is committed to FERC's
3 exclusive federal governance, the more narrow exclusionary
4 provision carves an exception to that general authority to govern
5 the sale of Energy at least with respect to these Defendants.
6 See 422 F.3d at 916. That holding indicates to this Court that
7 the subject matter, as it applies to these defendants, is not a
8 matter committed exclusively to federal jurisdiction pursuant to
9 15 U.S.C. § 824(b). Instead, federal jurisdiction in this case,
10 if any, would necessarily have to exist under 28 U.S.C. § 1331.
11 As explained in Section I.A. supra, the Court has already
12 determined this matter does not satisfy the factors giving rise
13 to jurisdiction thereunder nor does it meet the exception set
14 forth in the *Sparta/Dynegy* line of cases.

15 Finally, the exclusive jurisdiction provision of the FPA
16 provides that the District Courts shall have jurisdiction over
17 violations of the FPA, and of all suits in equity and actions at
18 law brought to enforce the FPA or the rules promulgated
19 thereunder. These Defendants are simply not subject to the
20 relevant provisions of the FPA as a federal regulation. Rather,
21 these Defendants may only be bound to comply with the language of
22 the tariffs purely as a matter of contract law. On that same
23 note, this is not a suit alleging violations of the FPA itself or
24 of any rule or regulation thereunder. Instead, this is a suit to
25 enforce a contract between private parties that has merely
26 incorporated by reference terms that are contained in a federal
27 regulation.

28 ///

1 In sum, to the extent FERC has no federal authority to order
2 refunds of these Defendants, Plaintiffs seek to substantively
3 characterize the contract terms as federal in character so as to
4 trigger federal question jurisdiction. Simultaneously, however,
5 to the extent garden variety contract terms do not give rise to a
6 federal question, Plaintiffs seek to jurisdictionally
7 characterize the tariffs as "federal regulations." The Court
8 finds these positions to be inapposite. Either, the tariffs
9 incorporated by reference into the contracts at issue are drawn
10 from and have their force under the FPA, in which case Congress
11 and relevant case law have indicated there is no federal
12 authority to enforce these tariffs against these Defendants (See
13 *Bonneville*, 422 F.3d 908); or, the tariffs are merely garden
14 variety contract terms incorporated into a private state law
15 contract, in which case there is no federal question (See *Empire*,
16 126 S. Ct. 2121). In either event, federal jurisdiction is
17 wanting. Accordingly, the Court hereby grants the Defendants'
18 Motion to Dismiss based on a lack of federal jurisdiction.

19
20 **C. Diversity Jurisdiction**

21
22 There are three Parties to the present action that are
23 arguably non-diverse. Accordingly, as to those three Defendants,
24 the lack of federal question jurisdiction would not be fatal in
25 and of itself as jurisdiction could arguably be based on
26 diversity.

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28 ///

1 The principal federal statute governing diversity jurisdiction,
2 28 U.S.C. § 1332, gives federal district courts original
3 jurisdiction of all civil actions "between ... citizens of
4 different States" where the amount in controversy exceeds
5 \$75,000. 28 U.S.C. § 1332(a)(1). The statutory formulation
6 "between ... citizens of different States" has been construed to
7 require complete diversity between all plaintiffs and all
8 defendants. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005)
9 (citing *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996)).


10 In the present action, fifteen (15) of the seventeen (17)
11 Defendants in this action are citizens of the State of California
12 while the remaining three (3) are not. Accordingly, complete
13 diversity does not exist and jurisdiction cannot, therefore, be
14 conferred as to any of the remaining Defendants.

15
16 **CONCLUSION**
17

18 For the reasons set forth above, the Defendants' Motion to
19 Dismiss based on a lack of subject matter jurisdiction is
20 GRANTED.

21 IT IS SO ORDERED.

22
23 Dated: March 16, 2007

24
25 
26 MORRISON C. ENGLAND, JR.
27 UNITED STATES DISTRICT JUDGE
28