Filed 5/26/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ELECTRIC REFUND CASES.	B206881, B207189 & B208946 (JCCP No. 4521) (Los Angeles County Super. Ct. No. BC369141)

APPEAL from a judgment of the Superior Court of Los Angeles County, Wendell R. Mortimer, Jr., Judge. Reversed.

Brune & Richard, Laurie Edelstein, Randall T. Kim; Sidley Austin, Marie L. Fiala; Stephen L. Schirle and Mark Patrizio for Plaintiff and Appellant Pacific Gas and Electric Company.

Steptoe & Johnson, Lawrence P. Riff, Jay E. Smith; Russell C. Swartz and Leon Bass, Jr. for Plaintiff and Appellant Southern California Edison Company.

Hennigan Bennett & Dorman, J. Michael Hennigan, Laura Lindgren and Robert W. Mockler for Plaintiff and Appellant San Diego Gas & Electric Company.

Meyers, Nave, Riback, Silver & Wilson, Benjamin T. Reyes, II, Geoffrey Spellberg, Joseph M. Quinn; Slover & Loftus and Robert D. Rosenberg for Defendant and Appellant Arizona Electric Power Cooperative, Inc.

---

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of part III of the Discussion.

INTRODUCTION

The facts underlying this appeal concern the intricate realm of California's energy crisis of May 2000 to June 2001. The precise legal issue, however, is relatively straightforward: the exhaustion of administrative remedies doctrine. Plaintiffs and appellants are Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company (collectively referred to as the IOUs),[1] entities that bought electricity during the crisis. Defendant and respondent is Arizona Electric Power Cooperative, Inc. (Arizona), which sold electricity during the crisis.

In 2000, the IOUs initiated a proceeding before the Federal Energy Regulatory Commission (FERC), the federal agency charged with regulating transmission and sale of electric energy for resale in interstate commerce. FERC found that unjust and unreasonable rates had been charged during the crisis and ordered refunds from energy sellers, including Arizona. The problem with the order was that FERC's jurisdiction extended to "public utilities," which essentially were private sellers of energy. "Nonpublic entities," including governmental entities, were not subject to FERC's jurisdiction. Rural cooperatives like Arizona had historically been treated as "nonpublic entities" that were also not subject to FERC's jurisdiction. FERC nonetheless concluded that Arizona was subject to its order, not because Arizona was no longer a "nonpublic entity," but because FERC had jurisdiction over the subject matter of the dispute. Arizona appealed to the Ninth Circuit Court of Appeals, which agreed that FERC exceeded its jurisdiction when it held that Arizona was subject to its refund order. (*Bonneville Power Admin. v. F.E.R.C.* (9th Cir. 2005) 422 F.3d 908 (*Bonneville*).)

Unable to obtain a remedy against Arizona before FERC, and following *Bonneville*'s suggestion that a remedy might be found in a contract action, the IOUs filed this state court action. Arizona demurred to the complaint on the ground, among others, that by failing to argue in the FERC proceedings that Arizona's "nonpublic" status should be changed, the IOUs failed to exhaust their administrative remedies. The trial court

---

[1] Investor-owned utilities.

agreed and sustained the demurrer without leave to amend. The IOUs appealed. In the published portion of this opinion, we find that any failure of the IOUs to challenge Arizona's jurisdictional status did not implicate the exhaustion of administrative remedies doctrine. It was therefore error to sustain the demurrer on this ground. In the unpublished portion of this opinion, we find that there were no valid alternative grounds for dismissal of the IOU's action on demurrer. The judgment is therefore reversed.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.[2]

In 1996, our Legislature enacted Assembly Bill No. 1890 (Pub. Util. Code, § 330 et seq.), which deregulated California's electrical power markets.[3] The new scheme created the California Power Exchange Corporation (CalPX) and the California Independent System Operator Corporation (CalISO). (Pub. Util. Code, § 330, subd. (*l*)(1).)[4] CalPX operated a "clearinghouse" for daily and hourly auctions, or trades, of electricity. CalISO managed California's transmission grid and ensured an adequate and stable supply of energy. The IOUs supplied electrical power to California residents and businesses, and the IOUs were required to buy most of their power supply through CalPX and CalISO.[5]

---

[2] We state the facts in accord with the usual standard of review.

[3] Before deregulation, IOUs were vertically integrated, meaning they were responsible for generation, transmission, and distribution of electricity. (*Public Utilities Com'n of State, Cal. v. F.E.R.C.* (2006) 462 F.3d 1027 [providing helpful background about California's electricity market].) After deregulation, the IOUs were required to divest generation plants.

[4] CalPX and CalISO were subject to regulation by FERC. (16 U.S.C. § 824(e); *Pacific Gas and Elec. Co. et al*. (1996) 77 Fed. Energy Reg. Com. Rep. ¶ 61,204, 61,803-61,805.)

[5] If an energy shortfall occurred, CalISO could buy energy outside of the CalPX market.

The CalPX auctions resulted in a single market clearing price that applied to all sellers and buyers, even if some sellers would have sold power for less and some buyers would have bought it for more. In other words, all sellers received the market clearing price. *Bonneville* described the single-price auctions like this: "In a single-price auction, all of the bidders are paid the same price as was bid by the highest-priced seller whose electric energy was needed to 'clear the market' or balance the supply of electric energy against the demand for electric energy. As a result, all of the bidders in a particular hour in the spot market received the same price for their sales." (*Bonneville*, *supra*, 422 F.3d at p. 912.)

FERC-approved Tariffs governed the sale and purchase of electricity through the CalPX and CalISO markets. Rates for such sales had to be "just and reasonable" under the Federal Power Act. (16 U.S.C. § 824d(a).) Each participant in the CalPX and CalISO markets had to execute a CalPX Participation Agreement and a CalISO Scheduling Coordinator Agreement agreeing to abide by the Tariffs. The CalPX Participation Agreement, prescribed by the CalPX Tariff, provided, for example, that the market participant " 'will abide by and will perform all of the obligations under the [Cal]PX Tariff in respect of all matters set forth therein including, without limitation, all matters relating to the trading of Energy by it through the [Cal]PX markets . . . [and] billing payments.' "

From May 2000 to June 2001, California experienced an energy crisis caused by sustained high prices for electricity.[6] Rolling blackouts occurred in Northern California. Prices for electricity far exceeded prices in prior periods. Sellers, including Arizona, received these inflated market clearing prices. The unjust and unreasonable rates were

[6] Market manipulation caused the high prices: "Sellers quickly learned that the California spot markets [trades occurring a day ahead or same day] could be manipulated by withholding power from the market to create scarcity and then demanding extremely high prices when scarcity was probable." (*Public Utilities Com'n of State, Cal. v. F.E.R.C., supra,* 462 F.3d at p. 1039.) Manipulative tactics included shutting down power plants to create the illusion of scarcity. (*Ibid.*)

passed through to the IOUs' retail electric customers in California. Statutorily forced to buy power through CalPX and CalISO, some IOUs amassed crippling debt. CalPX collapsed in January 2001.

The crisis ended in June 2001, when FERC established a mitigated market clearing price, which essentially was a recalculated just and reasonable rate. (*San Diego Gas & Elec. Co. v. Sellers of Energy et al.* (2001) 95 Fed. Energy Reg. Com. Rep. ¶ 61,418, 62558 [2001 WL 1910052 (F.E.R.C.)] (hereafter *San Diego Gas & Elec. Co.*).)

II. Procedural background.

A. *Proceedings before FERC.*

1. Background concerning FERC.

The Federal Power Act (FPA), codified at title 16 United States Code section 824 et seq., governs FERC.[7] FERC has exclusive jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. (16 U.S.C. § 824(b).) All rates and charges made, demanded, or received by any "public utility" for or in connection with such transmissions and sales shall be "just and reasonable." (16 U.S.C. § 824d(a).) Any unjust and unreasonable sale is unlawful. (*Ibid.*) If FERC determines that an unjust and unreasonable rate has been charged or paid, it can determine the just and reasonable rate and order the public utility to make refunds. (16 U.S.C. § 824e.)

FERC's jurisdiction is limited to "public utilities." (16 U.S.C. § 824(b) & (e).) Confusingly, "public utilities" are essentially *private* sellers of energy. Expressly exempted from FERC's authority and jurisdiction are "nonpublic utilities," such as governmental entities. (16 U.S.C § 824(f); see also *Bonneville, supra,* 422 F.3d at pp. 915-916.) Although not expressly exempted from FERC's authority, cooperatives such as Arizona that receive financing under the Rural Electrification Act of 1936

[7] The FPA was amended in 2005. Unless otherwise noted, we cite the version of the FPA in effect at the time of underlying proceedings.

(REA)[8] are also outside of FERC's jurisdiction.[9] (*Dairyland Power Cooperative et al.* (1967) 37 Fed. Power Com. 12 [1967 WL 113475 (F.P.C.)] (*Dairyland*).) This rule is referred to as the *Dairyland* exemption.

2. The IOUs file a complaint.

During California's energy crisis, on August 2, 2000, the IOUs[10] filed a complaint with FERC against sellers of electricity in the CalISO and CalPX markets. Notice of the complaint was filed in the Federal Register. (65 Fed.Reg. 48693 (Aug. 9, 2000).) Arizona formally intervened in the FERC proceeding in June 2001. FERC opened an investigation into the "justness and reasonableness of the rates and charges of public utilities that sell energy and ancillary services to or through the California ISO and PX" and into "whether the tariffs and institutional structures and bylaws of the California ISO and PX are adversely affecting the efficient operation of competitive wholesale electric power markets in California and need to be modified." (*San Diego Gas & Elec. Co.* (2000) 92 Fed. Energy Reg. Com. Rep. ¶ 61,172, 61603 [2000 WL 1204898 (F.E.R.C.)].) After finding that California's electrical market structure and rates were flawed (*San Diego Gas & Elec. Co.* (2000) 93 Fed. Energy Reg. Com. Rep. ¶ 61,121, 61370 [2000 WL 1637060 (F.E.R.C.)]), FERC proposed price mitigation measures and refund liability and established a methodology for calculating refunds (*San Diego Gas & Elec. Co.* (2001) 94 Fed. Energy Reg. Com. Rep. ¶ 61,245 [2001 WL 406581 (F.E.R.C.)]).

---

8 The REA was established to provide electrical services to rural parts of the United States. The Rural Utilities Service (RUS) administered loans given under the REA. (7 U.S.C.A. § 6942.)

9 The FPA was amended in 2005 to expressly exempt such entities: "No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 . . . ." (16 U.S.C. 824(f).)

10 San Diego Gas & Electric Company filed the complaint and Pacific Gas & Electric and Southern California Edison Company intervened.

FERC then issued an order on July 25, 2001 establishing "the scope of and methodology for calculating refunds related to transactions in the spot markets operated by" the CalISO and CalPX during October 2, 2000 through June 20, 2001.[11] (*San Diego Gas & Elec. Co.* (2001) 96 Fed. Energy Reg. Com. Rep. ¶ 61,120, 61499 [2001 WL 1704964 (F.E.R.C.)].) The order established a mitigated market clearing price, i.e., just and reasonable rates an unmanipulated market would have produced during the refund period. The order, however, did something more: transactions subject to refunds included sales by nonpublic entities. (*Ibid*.) The order thus encompassed all sellers of electricity, including sellers that were normally *outside* of FERC's jurisdiction, namely, governmental entities and rural cooperatives (Arizona) that received REA financing.

FERC explained its rationale for extending its jurisdiction: "The Commission has determined that all sellers of energy in the California ISO and PX spot markets should be subject to refund liability for the period beginning October 2, 2000. We have decided to extend refund liability to public and non-public utility sellers based on our review of the controlling law, the involvement of both types of sellers in the California centralized ISO and PX spot markets, and the equities of the situation. Non-public utility sellers as well as public utility sellers of electric energy in those California markets contributed to and benefitted from the dysfunctions that offered the possibilities for the market abuse under certain conditions, on which the call for refunds are based. In these circumstances, as discussed below, we conclude that although we do not have direct regulatory rate authority over power sales by non-public utilities, we do have authority to order them to abide by the market rules we have established and to make refunds of unjust and unreasonable rates for sales pursuant to those market rules." (*San Diego Gas & Elec. Co.*, *supra*, 96 Fed. Energy Reg. Com. Rep. ¶ 61,120 at p. 61511.)

---

[11] FERC concluded that its refund authority did not extend to the summer period from May 1 to October 1, 2000. The Ninth Circuit later disagreed with that conclusion.

FERC characterized itself as having jurisdiction over the "subject matter of the affected [sales]," namely, "wholesale sales of electric energy in interstate commerce through a Commission-authorized and Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants, including non-public utilities. Exempting transactions involving non-public utility sellers from refund scrutiny here would allow them to make such sales without regard to the just and reasonable standard that applies to the market clearing price administered . . . ." (*San Diego Gas & Elec. Co.*, *supra*, 96 Fed. Energy Reg. Com. Rep. ¶ 61,120 at p. 61512.) "Our action thus revises the market clearing prices that all market participants previously agreed to accept for their sales. In this context, we see no reason to treat nonpublic utility sellers differently, as they are receiving the same price, the just and reasonable market clearing price established pursuant to market rules approved by this Commission, that they expected to obtain for their wholesale sales into the centralized ISO and PX spot markets." (*Ibid.*)

B. *Arizona appeals FERC's July 25, 2001 order to the Ninth Circuit Court of Appeals—Bonneville.*

Arizona and governmental entities appealed to the Ninth Circuit, which reversed FERC's July 25, 2001 order insofar as it found it had refund authority over wholesale electric energy sales made by governmental entities and nonpublic utilities, including Arizona. (*Bonneville, supra,* 422 F.3d at p. 911.) After the court found that the FPA expressly limited FERC's authority to investigate rates and order refunds from a " 'public utility,' " the court considered the unique position of Arizona. *Bonneville* first noted that FERC had initially respected Arizona's historical status as a nonpublic entity: "FERC has, until its appellate brief in this proceeding, treated [Arizona] as a non-public utility. FERC has offered nothing in the record to support its change of position nor did its refund orders single out [Arizona] for treatment as a public utility. We cannot accept FERC's post-hoc rationalization for ordering refunds from [Arizona]. Consequently, in this proceeding we treat [Arizona] as a non-public utility but without prejudice to reclassification by FERC in a different proceeding." (*Id.* at pp. 917-918, fn. omitted.)

Bonneville therefore held that the "retroactive imposition of a market price that effects a refund responsibility is a regulatory action that falls outside of FERC's jurisdiction with respect to non-public utilities and governmental utilities." (*Id.* at p. 920.)

C. *This state court action*.

Before filing the state court action, Pacific Gas & Electric Company, Southern California Edison, and the California Electricity Oversight Board filed, on March 16 and 21, 2006, complaints in federal court, which were dismissed in March 2007 for lack of federal subject matter jurisdiction. (*Pacific Gas and Elec. v. Arizona Elec. Power Coop.* (E.D.Cal. 2007) 479 F.Supp.2d 1113.)

The IOUs then filed, in April 2007, this state court complaint containing causes of action for (1) breach of contract, (2) anticipatory breach of contract, (3) unjust enrichment, (4) money had and received, and (5) through (9) declaratory relief. The named defendants included Arizona.[12] The IOUs sought "to recover . . . the amounts that each Governmental Entity [including Arizona] received in excess of the lawful rates for its wholesale sales of electric power to the California IOUs in the [Cal]ISO and [Cal]PX markets."

Arizona demurred to the complaint. In its demurrer, Arizona pointed out that its exemption from FERC jurisdiction rested on agency doctrine rather than statute. Arizona therefore argued that the IOUs could have asked FERC to revisit Arizona's exempt status, but it did not. By failing to ask for revocation of the *Dairyland* exemption, the IOUs failed to exhaust their administrative remedies, Arizona argued. The other defendants also filed a joint demurrer in which Arizona joined. They raised arguments

---

[12] The other defendants, who are not a party to this appeal, are governmental entities: 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, 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, and Turlock Irrigation District. They and Arizona are collectively referred to in the complaint as the "Governmental Entities."

that the action was barred by the statute of limitations, failed to state a claim, and the parties lacked privity.

The trial court largely overruled the governmental entities' joint demurrer,[13] finding, as to the statute of limitations, that the IOUs had properly pled equitable tolling and that factual issues had been raised which could not be resolved on demurrer.[14] The trial court, however, sustained Arizona's demurrer without leave to amend for failure to exhaust administrative remedies.[15] The amended judgment of dismissal was entered on April 22, 2008. This appeal followed.[16]

DISCUSSION

I. Standard of review.

A demurrer tests the sufficiency of the allegations in a complaint as a matter of law. (*Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1151.) We review the sufficiency of the challenged complaint de novo. (*Coopers & Lybrand v. Superior Court* (1989) 212 Cal.App.3d 524, 529.) We accept as true the properly pleaded allegations of fact in the complaint, but not the contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We also accept as true facts which may be inferred from those expressly

---

13 The court sustained only the demurrer to the third cause of action for unjust enrichment without leave to amend, except as to Pacific Gas & Electric.

14 The court also found that "[t]he breach of contract cause of action is proper under *Bonneville* . . . , and under the contracts themselves which state that they are subject of FERC's authority."

15 The trial court added that "[t]his ruling is without prejudice." Arizona appealed the court's order insofar as it was "without prejudice." We dismissed the appeal on April 13, 2009, finding that an appealable issue was not presented.

16 While this matter was pending on appeal, FERC issued an order finding that Arizona is entitled to the *Dairyland* exemption and granted Arizona's request to be designated a nonpublic utility. (*San Diego Gas & Elec. Co*. (2008) 125 Fed. Energy Reg. Com. Rep. ¶ 61,297 [2008 WL 5272822 (F.E.R.C.)].)

alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We consider matters which may be judicially noticed, and we "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank,* at p. 318.) The interpretation of a written contract is a judicial function subject to an independent determination, unless interpretation turns on the credibility of extrinsic evidence. (*Coopers & Lybrand,* at p. 529.) The complaint's "allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) The judgment or order of dismissal entered after the demurrer is sustained must be affirmed if any of the grounds for demurrer raised by the defendant is well taken and disposes of the complaint. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) But it is error to sustain a general demurrer if the complaint states a cause of action under any possible legal theory. (*Ibid.*)

II. Exhaustion of administrative remedies.

Arizona's argument that the IOUs failed to exhaust their administrative remedies is premised on this: the IOUs should have tried to revoke or to limit the *Dairyland* exemption in the FERC proceedings. As we explain, we do not agree that any failure to challenge the *Dairyland* exemption in the FERC proceedings constituted a failure to exhaust administrative remedies.

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts. (*Id.* at p. 293; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70.) Several rationales underlie the doctrine. Its primary purpose " 'is to afford administrative tribunals the opportunity to decide in a final way matters within their area of expertise prior to judicial review.' [Citation.]" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874.) Exhaustion of administrative remedies also facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. (*Ibid.*)

"The principal purposes of exhaustion requirements include avoidance of premature interruption of administrative processes, allowing an agency to develop the necessary factual background of the case, letting the agency apply its expertise and exercise its statutory discretion, and administrative efficiency and judicial economy. [Citation.] The exhaustion doctrine is grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary). [Citation.]" (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1489-1490.)

We do not see how the way in which the IOUs pursued Arizona before FERC undermined the exhaustion of administrative remedies doctrine. Arizona does not dispute that FERC's " 'power includes the exclusive authority to determine the reasonableness of wholesale rates.' " (*Wholesale Electricity Antitrust Cases I & II* (2007) 147 Cal.App.4th 1293, 1312.) Arizona thus agrees that the IOUs had to first file a proceeding before FERC, which is exactly what the IOUs did.[17] The IOUs were initially *successful* in obtaining refunds from Arizona in that proceeding, although they suffered a reversal in *Bonneville*. After *Bonneville*, it then was clear that the IOUs could not seek a remedy against Arizona from FERC. The IOUs therefore pursued a judicial remedy by filing this state court action. On these facts, the IOUs exhausted any administrative process they

[17] The IOUs argue that had they filed suit in court rather than FERC, any such action would have been dismissed under the filed rate doctrine. " ' "At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g., antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question." [Citations.] "[T]he filed rate doctrine has prohibited not just a state court (or a federal court applying state law) from setting a rate different from that chosen by FERC, but also from assuming a hypothetical rate different from that actually set by FERC." ' ([*Public Util., Grays Harbor, WA v. IDACORP* (9th Cir. 2004) 379 F.3d 641, 650-651].)" (*Wholesale Electricity Antitrust Cases I & II, supra,* 147 Cal.App.4th at p. 1316.) We express no opinion on what would have happened had the IOUs sued Arizona in state court before *Bonneville*.

might have been required to pursue: they sought a remedy from the agency having jurisdiction over rates and only sought judicial review after the Ninth Circuit ruled that the remedy was not available from the agency.

Arizona, however, contends that the doctrine of exhaustion of administrative remedies required something more of the IOUs: the IOUs should have asked FERC to revoke or to limit the *Dairyland* exemption. This contention, it seems to us, relies on a corollary principle to the doctrine that administrative remedies must be exhausted. That principle is: a litigant must fully present its arguments and evidence at the administrative hearing. " 'Before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings.' " (*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 520.) "The requirement that a litigant present his or her arguments and evidence fully at the administrative hearing level is analogous to the doctrine of exhaustion of administrative remedies, though it is based on different policies." (1 Cal. Administrative Mandamus: Laying the Foundation at the Administrative Hearing (Cont.Ed.Bar 3d ed. 2003) § 3.49, p. 82 (Administrative Mandamus).)

The IOUs did not fail to satisfy any presentation requirement concerning Arizona's jurisdictional status in the FERC proceedings. To recap, a "public entity" was, in simplified terms, a private seller of energy. "Public entities" were subject to FERC's jurisdiction. A "nonpublic entity" (e.g., a government entity) was not subject to FERC's jurisdiction. Arizona, a rural cooperative subject to a RUS-financed mortgage, was traditionally afforded "nonpublic entity" status, and thus was outside of FERC's jurisdiction. That exempt status was first recognized in *Dairyland, supra,* 37 Fed. Power Com. 12 at page 26, where the commission noted that "the record over [the past 30 years] discloses not a single instance where Commission jurisdiction over cooperatives was asserted. All the indications are to the contrary. We therefore conclude that such jurisdiction does not presently exist." A year after *Dairyland*, a federal district court suggested that the status afforded cooperatives by *Dairyland* might one day change: "If the Commission had found that conditions in the power industry had so changed that generating cooperatives now did fall within its jurisdiction, this court would be faced with a different issue. For just as the Commission's determination here that it is without jurisdiction is entitled to judicial deference, . . . so would be its determination that it had the requisite authority." (*Salt River Project Agr. Dist. v. Federal Power Comm.* (D.C. Cir. 1968) 391 F.2d 470, 474, fn. 8 (*Salt River*).) *Salt River* thus suggested that perhaps FERC could one day exercise jurisdiction over a cooperative if changes in the industry occurred such that rural cooperatives should be considered "public entities." There was, however, no need for the IOUs to challenge the continuing viability of *Dairyland*. FERC found that it could order refunds from Arizona under a theory having nothing to do with Arizona's traditional nonpublic entity status. The IOUs thus won in front of FERC without having to raise the jurisdictional issue.[18]

Even if we agreed that the IOUs had a duty to argue in the FERC proceedings that the *Dairyland* exemption should be found inapplicable to Arizona, that duty was satisfied. Arizona's jurisdictional or nonjurisdictional status was before FERC. On June 19, 2001, FERC issued an order prescribing mitigation directives against all sellers of electricity. (*San Diego Gas & Elec. Co*., *supra,* 95 Fed. Energy Reg. Com. Rep. ¶ 61,418.) On July 19, 2001, Arizona sought clarification and/or rehearing: "AEPCO seeks clarification that the Commission did not intend in its June 19 Decision *to subject non-jurisdictional sellers located outside of California such as AEPCO to any possible*

---

[18] If the IOUs did have a duty to challenge *Dairyland* expressly in the FERC proceedings, then their failure to do so would have merely constituted a waiver of the argument. (See generally, Administrative Mandamus, *supra,* §§ 3.50-3.73, at pp. 82-96 [the failure to raise some defenses, objections, or challenges at the time of the administrative hearing may constitute a waiver].) If, for example, the IOUs tried to argue in these state court proceedings that the *Dairyland* exemption no longer applied to Arizona, then they might have waived or forfeited any such argument. But the IOUs do *not* challenge Arizona's status as a nonpublic entity. They concede that Arizona is a nonpublic entity and, taking *Bonneville*'s hint, are pursuing contractual theories of liability against it.

refund proceedings or refunds for any sales prior to June 19." (Underlining in original, italics added.) In apparent reference to *Dairyland*, Arizona noted that it was, "under established precedent, not subject to the Commission's public utility jurisdiction."

FERC responded with its controversial July 25, 2001 order to Arizona to pay refunds. That order can only be viewed as FERC's attempt to get around *Dairyland* by characterizing its "jurisdiction" over nonpublic utilities like Arizona as deriving from its broad authority over rates. Arizona then filed a request for rehearing of the July 25 order. Citing *Dairyland*, Arizona argued that it was not subject to FERC's public utility jurisdiction; accordingly, the commission was "without authority to determine if [Arizona's] rates [were] not 'just and reasonable' or to order a refund based on such a determination."[19] Thereafter, Arizona again asked FERC to clarify whether its treatment of " 'governmental entities' " extended to Arizona for the purposes of an order FERC had issued on December 19, 2001. These events show that Arizona's jurisdictional status was at issue in the FERC proceedings. But rather than address *Dairyland* head on, FERC tried to get around it by deriving its jurisdiction over Arizona from its general authority over rates and from Arizona's participation in the regulated markets.

In any event, a failure on the part of the IOUs to challenge *Dairyland* head on in the FERC proceedings might have been excusable. " '[T]he doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma. [Citation.] It contains its own exceptions, . . .' " (*In re Hudson* (2006) 143 Cal.App.4th 1, 7.) Those exceptions include: (1) when the administrative agency cannot provide an adequate remedy; (2) when the subject of controversy lies outside the agency's jurisdiction; and (3) where it would be futile to pursue a remedy. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 322; *Unnamed Physician v. Board of Trustees* (2001) 93

---

19 Arizona also argued that even assuming that "the Commission could reverse or limit its holding in *Dairyland* so as to exercise some authority over the rates that [Arizona] can charge for its WSCC wholesale power sales prospectively, it does not follow that the Commission may retroactively order [Arizona] to make refunds for earlier periods."

Cal.App.4th 607, 620.) The IOUs could have reasonably concluded that attacking *Dairyland* would be futile. At the time the IOUs initiated the FERC proceeding in 2000, a rural cooperative had never been treated as an entity subject to FERC's jurisdiction—or at least such an instance has not been brought to our attention by the parties. In fact, just two months before FERC issued its July 25, 2001 order, FERC affirmed, in an unrelated proceeding, that Arizona was "not subject to the Commission's jurisdiction." (*Sierra Southwest Cooperative Services, Inc.* (2001) 95 Fed. Energy Reg. Com. Rep. ¶ 61,310, 62,057.) After *Bonneville*, FERC found that Arizona's traditional nonpublic entity status should be maintained. (*San Diego Gas & Elec. Co*., *supra*, 125 Fed. Energy Reg. Com. Rep. ¶ 61,297.) And the FPA has now codified *Dairyland*: "No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 . . . ." (16 U.S.C. § 824(f).) It therefore was unlikely that attacking *Dairyland* would have been successful, notwithstanding *Bonneville*'s suggestion that FERC perhaps could have revisited the status traditionally afforded Arizona, had it done so not in a "post-hoc" fashion.

Instead, the manner in which the IOUs proceeded—filing a proceeding before FERC in the first instance—arguably furthered the purposes of the doctrine of administrative remedies. It allowed FERC, which was uniquely situated and had expertise over the subject matter, to develop the record. It allowed FERC to promptly address problems in the market and to establish a methodology by which to reconfigure the rates. It also led to congressional confirmation that rural cooperatives, like Arizona, were not subject to FERC's jurisdiction. Rather than inhibiting the purposes of the exhaustion doctrine, they were promoted. The demurrer therefore should not have been sustained on the ground that the IOUs failed to exhaust their administrative remedies.

III. Alternative grounds for sustaining demurrer.

Arizona argues that there are alternative grounds on which the trial court's order sustaining its demurrer could nonetheless be upheld: (A) statute of limitations, (B) failure to state a claim, and (C) lack of privity.[20]

A. *Statute of limitations and equitable tolling.*

Arizona contends that any limitations period expired before the IOUs filed this state court action.[21] The IOUs allege, however, that "the limitations period was tolled, at a minimum, from the time the California [p]arties initiated refund proceedings at FERC on August 2, 2000, through the time the Ninth Circuit issued its decision in *Bonneville* on September 6, 2005, and from March 16, 2006 through March 16, 2007 . . . or from March 21, 2006 through March 16, 2007 . . . , while the claims alleged in the Eastern District were pending." We begin by deciding whether equitable tolling applies; because if it does, then we need not decide what limitations periods apply to the various causes of action and when they accrued.

---

[20] The IOUs contend that Arizona may not raise these alternative grounds because the trial court rejected them in connection with the joint defendants' demurrer. The alternative grounds are properly considered in this appeal because a reviewing court may affirm a trial court's judgment on any basis presented by the record, whether or not relied on by the trial court. (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324 [a judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any ground stated in the demurrer, whether or not considered by the trial court]; see *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.)

[21] The limitations period for the IOUs' contract claims, Arizona argues, is, at most, four years. (Code Civ. Proc., § 337 [an action upon any contract, obligation or liability founded upon an instrument shall be brought within four years].) The limitations period may be less for the IOUs' fourth cause of action for money had and received (three-year-limitation period under Com. Code, § 3118, subd. (g)).

Arizona also argues that the claims accrued on August 2, 2000, when the IOUs filed the complaint before FERC. It posits August 24, 2001—the date Arizona sought rehearing of FERC's July 25, 2001 order—as the latest possible accrual date.

The doctrine of equitable tolling is " 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' [Citation.]" (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99; see also *Elkins v. Derby* (1974) 12 Cal.3d 410.) In broad terms, the doctrine applies when an injured person has several legal remedies and reasonably and in good faith pursues one. (*McDonald*, at p. 100.) It may apply where, for example, administrative remedies must be exhausted before a second action can proceed and where a first action, embarked upon in good faith, is found to be defective. (*Ibid.*)

To invoke equitable tolling, a plaintiff must allege three elements: (1) timely notice to the defendant in filing the first claim; (2) lack of prejudice to defendant in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by the plaintiff in filing the second claim. (*Addison v. State of California* (1978) 21 Cal.3d 313, 319; *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 924 (*Collier*).)

1. Timely notice to Arizona.

This first prong of the doctrine requires the plaintiff to have filed his first claim within the statutory period. (*Collier*, *supra*, 142 Cal.App.3d at p. 924.) This filing must have alerted the defendant in the second claim of the need to begin investigating the facts which form the basis of the second claim—this generally means that the defendants in the first and second claims are the same. (*Ibid.*)

The complaint here alleges that the IOUs filed the first claim—the FERC action—on August 2, 2000, while California's energy crisis was ongoing. There is no dispute that this filing was timely. The dispute instead centers on whether Arizona received notice of the FERC proceeding. Arizona argues it lacked notice because the complaint filed before FERC was directed against only public entities, not nonpublic entities like Arizona.

It may be true that there was some confusion in the FERC proceedings as to how rural cooperatives would be treated. That does not necessarily negate notice. Rather, notice of the proceeding was published in the Federal Register. (65 Fed.Reg. 48693

(Aug. 9, 2000).) And, as alleged in the complaint, the FERC proceeding was "against all sellers of energy and ancillary services into markets operated by the ISO and PX," and "[g]overnmental [e]ntities," including Arizona, were parties to the proceeding. Arizona actively participated in the FERC proceeding by, for example, filing motions for clarification or rehearing in which it specifically raised the issue of its nonjurisdictional status. Also, FERC's July 25, 2001 order stated: "From the time the Commission acted on [the] complaint, all sellers into those markets were on notice that those clearing prices, and the market rules that set the clearing prices, were subject to change if they were found to be unjust and unreasonable." (*San Diego Gas & Elec. Co., supra,* 96 Fed. Energy Reg. Com. Rep. ¶ 61,120 at p. 61512.)

These events suggest that Arizona was alerted to the need to begin investigating facts forming the basis of the claims in this state court action, which, as we discuss below, are similar to the issues involved in the FERC proceeding. These allegations raise a dispute about notice that is not proper to resolve on a demurrer. (See *Thompson v. California Fair Plan Assn.* (1990) 221 Cal.App.3d 760, 765 [where facts concerning notice were undisputed, applicability of equitable tolling could be determined].)

2. Lack of prejudice to Arizona.

This element essentially requires the facts underlying the two claims to be identical or "at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second. . . . The critical question is whether notice of the first claim affords the defendant an opportunity to identify the sources of evidence which might be needed to defend against the second claim." (*Collier, supra,* 142 Cal.App.3d at p. 925, fn. omitted.) "So long as the two claims are based on essentially the same set of facts[,] timely investigation of the first claim should put the defendant in position to appropriately defend the second. Once he is in that position the defendant is adequately protected from stale claims and deteriorated evidence. In terms of the underlying policies of the statutes of limitation, it is irrelevant whether those two claims are alternative or parallel, consistent or inconsistent, compatible or incompatible." (*Id.* at pp. 925-926.)

Arizona argues that the IOUs' claim before FERC and their contractual claim here are so dissimilar as to cause prejudice to Arizona to have to defend against this second action. Arizona characterizes the issue before FERC as whether rates were " 'just and reasonable' "; in contrast, the claims here rest on alleged breach of contract. These claimed differences, however, do not render the claims in the FERC proceeding so dissimilar to the ones in this proceeding as to make the existence or lack of prejudice indisputable. Rather, both proceedings arose out of the same energy markets in California, the same energy crisis of May 2000 to June 2001, and the same rates that were imposed during that time. Both proceedings address the same wrong: whether sellers of energy received unjust and unreasonable rates. (Cf. *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071, 1085, 1086 [statute of limitations is not tolled while a plaintiff who has suffered several different wrongs pursues only one remedy as to one of those wrongs].) Both proceedings also seek the same remedy: a return of any unjust and unreasonable rates. Certainly, a contract claim may lead to defenses and relief inapplicable in the FERC proceedings, but this is not sufficient to definitively establish prejudice as a result of the delay in filing the second claim.

3. The IOUs' good faith and reasonable conduct.

Nor do we think there can be a finding at this stage in the proceedings that the IOUs lacked good faith and acted unreasonably in first pursuing a remedy from FERC. Arizona suggests that the IOUs acted unreasonably by failing to raise the *Dairyland* issue before FERC. While it might have been reasonable for the IOUs to have expressly raised it in the FERC proceedings, we cannot say it was unreasonable for them *not* to do so. Arizona does not dispute that FERC had jurisdiction over the market rates. And, as we have said, rural cooperatives have never been treated as public entities. FERC reaffirmed Arizona's status as a nonpublic entity just months before it issued the July 25, 2001 order; and Congress has recently amended the FPA to expressly exclude rural cooperatives from FERC's jurisdiction. If the IOUs made an assessment not to challenge *Dairyland* head on, the status of the law at the time the underlying events, as well as events since that time, demonstrate it was not a facially unreasonable one. "A plaintiff's seeming misanalysis of the facts or the law, particularly in a relatively esoteric area . . . does not amount to the sort of bad faith found to thwart equitable tolling. That type of bad faith typically involves trifling with the courts or the other party." (*Mojica v. 4311 Wilshire, LLC* (2005) 131 Cal.App.4th 1069, 1074.) In fact, it might be hard to find the IOUs' tactics before FERC unreasonable, given that they won in front of that entity, despite their later loss in the Ninth Circuit.

The timing of events similarly does not indicate bad faith. The IOUs filed the FERC proceeding in August 2000, *during* the energy crisis. The IOUs then filed their federal court action approximately six months after their defeat in *Bonneville.* When the federal district court dismissed their action in March 2007, the IOUs filed this state court action one month later, in April 2007.

We therefore conclude that the complaint sufficiently alleges equitable tolling.

B. *Failure to state a claim.*

Although *Bonneville* found that FERC had improperly asserted jurisdiction over Arizona, it nonetheless observed that the parties had entered into agreements with CalPX and CalISO obligating them to abide by the Tariffs. (*Bonneville, supra,* 422 F.3d at p. 925.) The court noted that the focus on these agreements demonstrated that any remedy might lie in a contract claim. (*Ibid.*) Arizona, however, disagrees that the contract approach is viable. It distinguishes *Alliant Energy v. Nebraska Public Power Dist.* (8th Cir. 2003) 347 F.3d 1046 (*Alliant*), which *Bonneville* cited to support its suggestion that a contract action might be feasible against governmental and nonpublic entities.

Alliant involved Mid-Continent Area Power Pool (MAPP), an association of energy companies that included public utilities and cooperatives. (*Alliant, supra,* 347 F.3d at p. 1049.) Each party in *Alliant* was a MAPP member and a signatory to the enabling agreement, which set forth members' contractual rights and obligations. The agreement obligated parties to accept FERC-ordered modifications. FERC found that certain fees collected by MAPP were discriminatory and ordered MAPP to refund charges. (*Ibid.*) Some MAPP members refused to refund the charges, causing some parties to the MAPP agreement to sue each other for breach of contract. *Alliant* found that this was permissible. The court said that when "a contract provides that its terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body. . . . As a result, we are not enforcing the FERC order; instead, we are enforcing an agreement," which the parties freely entered. (*Id.* at p. 1050.)

Arizona points out that there are many factual differences between the MAPP agreement and the Tariffs here. For example, *Alliant* involved a pool agreement and express agreement to be bound by certain FERC orders. But the differences, while relevant, do not minimize *Alliant*'s broader holding that where parties sign an agreement containing terms subject to a regulatory body, the parties may be subject to regulatory actions by that body—even if the body cannot directly, for example, order refunds from the parties.

The complaint here alleges facts showing that the parties entered into agreements subject to a regulatory body, FERC. For example, the complaint alleges that CalPX and CalISO were subject to FERC's exclusive regulatory jurisdiction. All sales and purchases in the CalPX and CalISO markets were made under Tariffs filed with and approved by FERC and that prescribe the terms and conditions of all transactions in the markets. Arizona voluntarily bought or sold electric power in the CalPX and CalISO markets. Each market participant, including Arizona, was required to execute a "Participation Agreement" or "Scheduling Coordinator Agreement" under which it agreed to abide by the Tariff. For the purposes of withstanding a demurrer, these allegations are sufficient to show that the broad principle enunciated in *Alliant* might apply.[22]

Arizona makes a related claim that the IOUs' own breaches of the alleged contracts bars any recovery. Specifically, Arizona argues that the IOUs did not perform

[22] Arizona further attempts to distinguish *Alliant* by arguing that FERC had no authority "to retroactively alter tariff rates under" section 206 of the FPA; rather, it could only determine rates prospectively. The scope of FERC's authority, however, is a different issue than the scope of the agreements Arizona entered into.

their obligations under the contracts because they failed to maintain their creditworthiness,[23] became ineligible to purchase power through CalPX and CalISO, became insolvent, and "underscheduled load."[24] These alleged performance issues are clearly fraught with factual issues rendering them unresolvable on demurrer.

C. *Lack of privity*

Arizona's final argument why the causes of action should be dismissed is that there was no contractual privity between it and the IOUs. The IOUs respond that privity existed either under a third-party beneficiary theory or a "multi-party contract" theory.

The notion that a contract can be made to benefit a third party who is not a signatory to the contract is well-settled in California law. (Civ. Code, § 1559.) The third-party beneficiary need not be named or identified in the contract. (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1023 (*Spinks*).) Rather, whether a third party has rights under a contract depends on the contracting parties' intent to benefit that third party. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436.) Whether a third party was an intended beneficiary is to be determined from the contract as a whole in light of the circumstances under which it was entered. (*Bancomer, S. A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1458; *Garcia*, at pp. 436-437; *Spinks*, at p. 1024 ["In determining intent to benefit a third party, the contracting 'parties' practical construction of a contract, as shown by their actions, is important evidence of their intent' "].)

---

[23] FERC addressed the creditworthiness issue in its July 25, 2001 order by including a "creditworthiness adder in the methodology to determine refund liability." (*San Diego Gas & Elec. Co.*, *supra*, 96 Fed. Energy Reg. Com. Rep. ¶ 61,120 at p. 61519.)

[24] "Underscheduling Load" refers to understating "load consistently in schedules submitted to the [Cal]PX in an effort to reduce the amount of generation purchased in the day-ahead market, thereby lowering the price." (*American Elec. Power Service Corp.* (2004) 106 Fed. Energy Reg. Com. Rep. ¶ 61,020, 61057 [2004 WL 103470 (F.E.R.C.)].)

In contrast to a contract made to benefit a third party, a "multi-party contract" is a more amorphous concept. The IOUs cite *Gear v. Webster* (1968) 258 Cal.App.2d 57, as one example of a multi-party contract under which members were allowed to bring an action against each other. In *Gear*, a real estate salesperson and broker were members of a board of realtors, a voluntary association governed by bylaws requiring members to arbitrate any disputes. (*Id.* at p. 59.) When a dispute arose over a commission, the court held that, by agreeing to abide by the bylaws, the members were bound by the arbitration provision.

Arizona counters with *Stoops v. Abbassi* (2002) 100 Cal.App.4th 644, as an example of a multi-party contract under which members could not sue each other. Stoops was a member of an inter-indemnity cooperative that created a trust fund, funded by member contributions, to cover malpractice lawsuits. (*Id.* at pp. 646-647.) When members failed to pay assessments into the fund, Stoops was unable to receive defense or indemnification costs from the trust for a malpractice suit he faced. He tried to sue other members directly to recover funds he spent in connection with the lawsuit. We held that Stoops, as a member of the cooperative, could not sue other members directly to collect unpaid assessments. (*Id.* at p. 655.) That holding, however, was based on the statutes governing the type of arrangement at issue, and, in particular, the power vested in the cooperative's board—and not in its members—to pursue assessments. (*Id.* at p. 656 ["Stoops is bound by the contract he signed [and] by the statutory authority from which [the cooperative] was formed, . . ."].)[25]

---

[25] Arizona also cites *Pruyn v. Agricultural Ins. Co.* (1995) 36 Cal.App.4th 500 and *Pacific Estates, Inc. v. Superior Court* (1993) 13 Cal.App.4th 1561 for the proposition that a "multi-party contract" in California is limited to one in which multiple parties to a contract become co-obligors under the agreement. Those cases, however, involved specific provisions of the Insurance Code regarding good faith determinations of settlements among co-obligors on a contract debt.

The unique facts of this case do not fit neatly into either *Gear* or *Stoops,* neither of which describe the universe of "multi-party contracts" that might exist. The structure of the energy markets created unique relationships and the energy crisis created a unique situation. A liberal view of the complaint's allegations, however, shows that privity might be shown to exist between the parties under either a third party or a multi-party contract theory. Those allegations are that the IOUs and Arizona entered into direct agreements with CalPX and CalISO, as neutral clearinghouses acting essentially as nonprofit auction houses pairing buyers and sellers of energy. Each participant in the CalPX market agreed to " 'abide by and . . . perform all of the obligations under the [Cal]PX Tariff in respect of all matters set forth therein including, without limitation, all matters relating to the trading of Energy by it through the [Cal]PX markets . . . [and] billing and payments.' " The complaint also alleges terms in the agreements which can be interpreted to support actions by one participant against another:

- " 'the [Cal]ISO will not act as a principal but as agent' for Scheduling Coordinators"
- " '[t]he [Cal]PX will not be, and shall not be deemed to be, a counterparty to any trade transacted through the [Cal]PX markets' "
- a market participant who "fails or refuses to pay its bill becomes responsible for a market shortfall, and is deemed [a] '[Cal]ISO Debtor' or a '[Cal]PX Creditor.' An entity that is owed money because of the market shortfalls is deemed [a] '[Cal]ISO Creditor' or '[Cal]PX Creditor,' with the right to enforce its contractual right to payment against [a] [Cal]ISO or [Cal]PX Debtor"
- "[t]o ensure that market participants are financially capable of satisfying obligations running to each other from these transactions, the [Cal]ISO and [Cal]PX Tariffs require market participants to meet certain creditworthiness and collateral requirements, and require the [Cal]ISO and [Cal]PX to maintain financial reserve accounts funded by participants and held in trust for their benefit"

- "ISO Tariff § 11.19 [provides,] . . . '[e]ach [Cal]ISO Creditor shall give notice to the [Cal]ISO before instituting any action or proceedings in any court against [a] [Cal]ISO Debtor to enforce payments due it'[]; *see also* ISO Tariff § 11.20.1 ('Without prejudice to the right of any Scheduling Coordinator to bring such proceedings as it sees fit i[n] connection with matters related to the recovery of amounts owed to it,' [Cal]ISO may bring proceedings on behalf of those Scheduling Coordinators that have indicated to [Cal]ISO their willingness for [Cal]ISO to act first); ISO Tariff § 11.20.2 (ISO [Creditors] shall, on request, certify in writing the amounts owed by ISO Debtor that remain unpaid and ISO Creditors to whom such amounts are owed; ISO certificate given under this section may be used as prima facie evidence of the amount due by ISO Debtor to ISO Creditors in any legal proceedings)."

Where, as here, these allegations show that the IOUs and Arizona participated in the auction markets governed by FERC-approved Tariffs, we do not think it proper on a demurrer, before the relationships or participants in those markets are properly understood through discovery and evidence, to dismiss the contract claims. (See *Spinks, supra*, 171 Cal.App.4th at p. 1025 [whether a particular third person is an intended beneficiary of a contract is generally a question of fact].)

DISPOSITION

Pacific Gas & Electric Company's, Southern California Edison Company's, and San Diego Gas & Electric Company's Supplemental Request for Judicial Notice in support of Reply Brief, filed April 23, 2009, is granted.

Arizona Electric Power Cooperative, Inc.'s Request for Judicial Notice, filed January 16, 2009, is granted.

The judgment is reversed. Plaintiffs and appellants Pacific Gas & Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company are to recover any costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.