

No. __-____

IN THE
Supreme Court of the United States

CORAL POWER, L.L.C., ET AL.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA
EX REL. BILL LOCKYER, ATTORNEY GENERAL, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission has the power to order retroactive refunds under § 205 of the Federal Power Act, 16 U.S.C. § 824d, for sales made under a tariff that the Commission accepted for filing without suspension or hearing.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Coral Power, L.L.C., AES Placerita, Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC (f/k/a Sempra Energy Solutions), Sempra Energy Trading Corp., and Sempra Generation (f/k/a Sempra Energy Resources) were intervenors in the court of appeals proceedings and participated in the agency proceedings.

Respondent People of the State of California ex rel. Bill Lockyer, Attorney General, was the petitioner in the court of appeals proceedings and participated in the agency proceedings.

Respondent Federal Energy Regulatory Commission was the respondent in the court of appeals proceedings.

The following respondents were intervenors in the court of appeals proceedings and participated in the agency proceedings:

AES Delano, Inc. (f/k/a Delano Energy Company Inc.)
Arizona Public Service Co.
Avista Corporation
Avista Energy, Inc.
BP Energy Co.
Cabrillo Power I LLC
Cabrillo Power II LLC
California Public Utilities Commission
City of Tacoma, Washington
Duke Energy North America, LLC
Duke Energy Trading and Marketing, LLC
Dynegy Power Marketing, Inc.
El Paso Merchant Energy LP
El Segundo Power LLC
Enron Energy Services, Inc.

Enron Power Marketing, Inc.
Long Beach Generation LLC
Mirant Americas Energy Marketing LP
Mirant California, LLC
Mirant Delta, LLC
Mirant Potrero, LLC
Morgan Stanley Capital Group Inc.
Mountainview Power Company
PacifiCorp
PacifiCorp Power Marketing, Inc.
Pinnacle West Capital Corporation
Public Service Company of Colorado
Reliant Energy Services, Inc.
Riverside Canal Power Company
Strategic Energy LLC
TransCanada Energy Ltd.
Williams Energy Marketing & Trading Company

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Coral Power, L.L.C., AES Placerita, Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC, Sempra Energy Trading Corp., and Sempra Generation state the following:

Coral Power, L.L.C. is owned by Coral Energy Holding, L.P., which is owned by Shell Oil Company. Shell Oil Company is owned indirectly by Royal Dutch Petroleum Company, which in turn is owned by Royal Dutch Shell plc, a publicly traded corporation. Royal Dutch Shell plc has no parent company, and no publicly held company owns 10% or more of its stock.

AES Placerita, Inc. is a wholly owned subsidiary of The AES Corporation. AES Placerita, Inc. has its principal offices in Newhall, California. The AES Corporation is a publicly traded Delaware corporation with its principal executive offices located in Arlington, Virginia. The AES Corporation has no parent company, but approximately 16% of its stock is owned by Legg Mason Capital Management, Inc. (“LMCM”). LMCM is not a publicly traded company, but it is wholly owned by Legg Mason Inc. (“LMI”), which is a publicly traded company. LMI has no parent company, and no publicly held company owns 10% or more of its stock.

Portland General Electric Company is a publicly traded company. Pursuant to a federal bankruptcy court plan of distribution, a Reserve for Disputed Claims owns a large percentage of Portland General’s common stock. The Reserve for Disputed Claims is not a publicly traded entity.

Powerex Corp. is a Canadian corporation incorporated under British Columbia’s Company Act. Powerex is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of

the Province of British Columbia. No publicly held company owns any Powerex stock.

PPL EnergyPlus, LLC and **PPL Montana, LLC** are wholly owned, indirect subsidiaries of PPL Corporation, whose shares are publicly traded. PPL Corporation has no parent company, and no other publicly held company has a 10% or greater ownership interest in PPL EnergyPlus, LLC, PPL Montana, LLC, or PPL Corporation.

Public Service Company of New Mexico (“PNM”) is a corporation organized and existing under the laws of the State of New Mexico, and is engaged primarily in the generation, transmission, distribution, and sale of electricity and in the transmission, distribution, and sale of natural gas within the State of New Mexico. PNM is a wholly owned subsidiary of PNM Resources, Inc. (“PNM Resources”), which is a corporation organized and existing under the laws of the State of New Mexico. PNM Resources is a publicly traded company and has issued securities to the public. Other than PNM Resources, PNM has one affiliate, Texas-New Mexico Power Company, that has issued shares or debt securities to the public.

Puget Sound Energy, Inc. is a Washington corporation having its principal place of business at PSE-12N, 10885 NE 4th St., Bellevue, Washington 98004-5591. Puget’s mailing address is PSE-12N, P.O. Box 97034, Bellevue, Washington 98009-9734. Puget is an investor-owned public utility primarily engaged in the business of purchasing, generating, transmitting, distributing, and selling electric energy at wholesale and retail. Puget is a wholly owned subsidiary of Puget Energy, Inc., a holding company. Puget Energy, Inc. has issued equity or debt securities to the public.

Sempra Energy Solutions LLC and **Sempra Generation**: Both Sempra Energy Solutions LLC (“SES”) and Sempra Generation are indirect wholly owned subsidiaries of Sempra Energy, a publicly held corporation. No other publicly held company has a 10% or greater ownership interest in each of Sempra Generation, SES, or

Sempra Energy. Sempra Generation acquires, develops, and operates power plants and energy infrastructure, and markets at wholesale the output from power plants, for the competitive market. SES is a retail provider of natural gas and electricity to commercial and industrial customers throughout the United States in markets that offer retail choice.

Sempra Energy Trading Corp. (“SET”) is a corporation organized and existing under the laws of the State of Delaware. Its principal office is located at 58 Commerce Road, Stamford, Connecticut 06902. SET is a full-service energy trading company that markets and trades physical and financial energy and metals products, including electric energy and power, natural gas, crude oil, base metals, and associated commodities. SET is a wholly owned indirect subsidiary of Sempra Energy, whose shares are publicly traded. No other publicly held company has a 10% or greater ownership interest in SET or Sempra Energy.

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Coral Power, L.L.C., AES Placerita, Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Public Service Company of New Mexico, Puget Sound Energy, Inc., Sempra Energy Solutions LLC, Sempra Energy Trading Corp., and Sempra Generation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

This petition raises an issue of surpassing importance to a core sector of our nation's economy: whether the Federal Energy Regulatory Commission ("FERC" or "Commission") has the power to order retroactive refunds for sales of wholesale electricity in a circumstance not expressly authorized by Congress in the Federal Power Act ("FPA" or "Act"). In a sweeping and unprecedented opinion that departs from a line of decisions by the D.C. Circuit and makes no effort to engage the statutory text, the Ninth Circuit took FERC to task for adhering to its seven-decade-old view that Congress in the FPA afforded the agency only very limited authority to impose retroactive refunds. The underlying premise of the Ninth Circuit's decision is that the FPA provides a retrospective remedy in every case. That erroneous conclusion disregards the FPA's text, its legislative history, this Court's decisions, and the decisions of other circuits. It is also bad policy.

The Ninth Circuit's decision in this case violates the plain language of the FPA. Only two provisions of the Act explicitly grant FERC any retroactive refund authority, and both provisions are by their plain terms inapplicable here. Moreover, the FPA's legislative history confirms that Congress did not intend to empower FERC with the kind of retroactive refund remedy created by the Ninth Circuit. In several cases, this Court has recognized FERC's lack of authority to order retroactive refunds and has applied the filed rate doctrine to bar litigants' attempts to unsettle past wholesale electricity transactions.

Under the FPA's plain text and this Court's cases articulating and applying the filed rate doctrine, the D.C. Circuit and other federal courts of appeals have held that FERC cannot order refunds for past sales of wholesale electricity, except in the narrow circumstances permitted by the FPA. The Ninth Circuit's decision in this case cannot be reconciled with those decisions, which the court below completely ignored.

The Ninth Circuit conferred on FERC an atextual refund authority in a lead case arising out of the California energy crisis of 2000-2001, in which shortages of electricity coupled with extraordinarily hot weather combined to produce severe market conditions and high prices. Its decision threatens to unsettle completely the market for power both looking backward and in the future. Retrospectively, many sellers of electricity in the California markets during the 2000-2001 period also purchased power at market prices, so the court's atextual remedy has a deleterious effect on those market participants by forcing a recalculation of thousands of closed and settled transactions – destroying significant contractual reliance interests. Looking forward, the court's judgment creates massive disincentives to capital investment in the Western power markets because the possibility that FERC will impose retroactive refunds not contemplated by Congress presents an enormous, unanticipated, and uncertain risk for power sellers. That decision destroys the longstanding balance – enacted by Congress in the 1930s and repeatedly ratified by Congress, this Court, and the D.C. Circuit – between correcting unjust-and-unreasonable prices on a prospective basis (thereby preserving incentives to invest) and ordering refunds on sales that took place before FERC determined the rate to be unjust and unreasonable.

The outcome of this case unquestionably would have been different had it been decided by the D.C. Circuit under precedents properly construing the FPA and applying this Court's precedents. Hundreds of cases arising out of the California energy crisis will be decided under the erroneous standard articulated by the Ninth Circuit in this

case, and the court's decision creates extraordinarily counterproductive market incentives. The petition should be granted and the decision below reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 383 F.3d 1006. The order of FERC denying California's complaint (Pet. App. 20a-60a) is reported at 99 FERC ¶ 61,247. FERC's order denying rehearing (Pet. App. 61a-79a) is reported at 100 FERC ¶ 61,295.

JURISDICTION

The court of appeals entered its judgment on September 9, 2004, and rehearing was denied on July 31, 2006 (Pet. App. 80a-81a). On October 23, 2006, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including December 28, 2006. *Id.* at 96a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Power Act, 16 U.S.C. §§ 791a *et seq.*, and the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*, are set forth at Pet. App. 82a-95a.

STATEMENT OF THE CASE

Statutory Framework

In 1935, Congress enacted the FPA,¹ which delegated to FERC "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982); *see* 16 U.S.C. § 824. This petition involves the proper interpretation of § 205 and § 206 of that Act.

Section 205 defines FERC's authority over wholesale electricity and transmission rates. Section 205(a) of the FPA requires that "[a]ll rates . . . made, demanded, or received" by sellers of wholesale electricity be "just and

¹ Title II of the Public Utility Act of 1935, ch. 687, 49 Stat. 803, 838-63 (codified as amended at 16 U.S.C. §§ 791a-825r).

reasonable,” and it declares “any . . . rate . . . that is not just and reasonable” to be “unlawful.” 16 U.S.C. § 824d(a). Section 205(b) prohibits discriminatory pricing. *See id.* § 824d(b). Section 205(c) requires sellers to file, “[u]nder such rules and regulations as [FERC] may prescribe” and “within such time and in such form as [FERC] may designate,” “schedules” (also known as “tariffs”²) that contain “all rates” for any sale of wholesale electricity in interstate commerce. *Id.* § 824d(c). Section 205(d) requires utilities to provide FERC with notice of any proposed change in rates. *See id.* § 824d(d). Section 205(e) grants FERC authority to investigate the lawfulness of any proposed rate change; permits FERC to suspend the effectiveness of proposed rates pending administrative review; and, when the proposed rate takes effect after a period of suspension but before the conclusion of FERC’s investigation, authorizes FERC to order refunds for sales occurring during its review. *See id.* § 824d(e). *See generally City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.) (under § 205, FERC plays a “reactive role”).

Under § 206(a), FERC has the power to investigate, on complaint or its own motion, the lawfulness of any existing approved rate. *See* 16 U.S.C. § 824e(a). Section 206(b) permits FERC to order refunds when it determines that an existing rate is unjust, unreasonable, or unduly discriminatory. Refunds, however, cannot be ordered for transactions occurring before “the date of the filing of [a]

² FERC’s regulations define the term “rate schedule” as “a statement of (1) electric service . . . , (2) rates and charges for or in connection with that service, and (3) all classifications, practices, rules, regulations or contracts which in any manner affect or relate to the aforementioned service, rates, and charges.” 18 C.F.R. § 35.2(b). That statement must “be in writing and may take the physical form of a contractual document, purchase or sale agreement, lease of facilities, *tariff* or other writing.” *Id.* (emphasis added; footnote omitted). “Tariff” means “a compilation, in book form, of rate schedules of a particular public utility, effective under the Federal Power Act, and a copy of each form of service agreement.” *Id.* n.1. The remainder of this petition uses the more common term “tariff” instead of “schedule.”

complaint” or “the date of the publication by [FERC] of notice of its intention to initiate” an investigation under § 206. *Id.* § 824e(b).

Market-Based Rate Tariffs

Historically, electric utilities charged fixed wholesale rates, which were based on the cost of providing service plus a reasonable rate of return.³ In the early 1970s, FERC started allowing sellers to file tariffs containing formula rates, which specified the cost components of the rate; under those tariffs, rates changed as costs fluctuated. *See Public Utils. Comm’n v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001). Later, FERC began approving tariffs under which rates would be set in the market. *See, e.g., Citizens Power & Light Corp.*, 48 FERC ¶ 61,210 (1989). As FERC has explained, “[m]arket-based rates helped to develop competitive bulk power markets.” *Promoting Wholesale Competition*, 61 Fed. Reg. at 21,545.

When reviewing a utility’s application for authority to sell at market-based rates, FERC requires the applicant to “establish that it, and its affiliates, either do not have, or have adequately mitigated, market power” in both the generation and the transmission of electric energy. *Grand Council of Crees v. FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000). FERC’s aim is to assess “whether the seller or its affiliates [can] limit competition and thereby drive up prices,” and a “key inquiry [is] whether the seller or its affiliates own[] or control[] transmission facilities in the relevant service area and therefore, by denying access or imposing discriminatory terms or conditions on transmission service, [can] foreclose other generators from competing.” *Promoting Wholesale Competition*, 61 Fed. Reg. at

³ *See Public Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 758 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 2957 (2005). *See generally* Final Rule, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,543-46 (1996) (“*Promoting Wholesale Competition*”) (recounting the historical development of the electric energy industry).

21,546.⁴ The seller “must also establish that it cannot erect barriers to entry, and that there is no evidence of other behavior perceived as anticompetitive.” *Grand Council of Crees*, 198 F.3d at 953.

FERC provides public notice of the seller’s application and an opportunity for interested parties to file comments. When FERC approves a seller’s application, it issues an order, of which aggrieved parties can obtain judicial review. *See, e.g., Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 366-69 (D.C. Cir. 1998). FERC’s determination that a seller lacks market power – a determination that must be made before the seller can conduct *any* transactions at market-based rates – establishes that market discipline will assure that the seller’s rates are just and reasonable.⁵

During the period at issue in this petition, FERC’s orders granting authority to sell at market-based rates generally required the applicants to submit periodic reports containing information on their market power and their

⁴ *See also AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018 (2004) (setting forth FERC’s current market-power tests), *clarified on denial of reh’g*, 108 FERC ¶ 61,026 (2004); *Citizens Power & Light*, 48 FERC ¶ 61,210, at 61,777 (defining market power as a seller’s ability to “significantly influence price in the market by withholding service and excluding competitors for a significant period of time”).

⁵ *See Louisiana Energy*, 141 F.3d at 365 (“Where there is a competitive market, [FERC] may rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy [§ 205(a)’s just-and-reasonable-rate] requirement.”); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (same); Pet. App. 43a (“[B]efore a utility can charge market-based rates, [FERC] must find the utility (and its affiliates) lacks or has mitigated market power. That determination supports a conclusion that resulting market-based rates, through market discipline, will be just and reasonable.”); *see also Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (“In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.”).

transactions in the market. *See* Pet. App. 10a-11a.⁶ Quarterly transaction reports included, among other things, information on participants in the transactions, the type of power sold, and the price at which that power was sold. *See id.* at 48a-49a. FERC used that information to reassess its conclusion that the seller lacked, or had mitigated, market power.⁷ FERC also could investigate, under FPA § 206, whether a seller’s market-based rates had become unjust and unreasonable. If so, then FERC could order modifications to the seller’s tariff (including revoking the seller’s market-based rate authority) and require a seller to pay refunds, subject to the limitations of § 206. *See id.* at 44a-45a.

California’s Wholesale Electricity Market

In the mid-1990s, retail electricity rates in California were nearly twice the national average and rising.⁸ In response, California comprehensively reformed its electric energy industry, moving from a cost-based rate system to a more market-based rate system.⁹ To effect that reform, the California Public Utilities Commission (“CPUC”) issued an order¹⁰ and the California Legislature

⁶ For an example of FERC’s reporting requirements, see *Citizens Power & Light*, 48 FERC ¶ 61,210, at 61,778; *see also British Columbia Power Exchange Corp.*, 80 FERC ¶ 61,343, at 62,141 (1997) (requiring Powerex to file quarterly reports on its transactions and an analysis of its market power triennially). After the events at issue in this petition, FERC expanded and clarified its reporting requirements. *See* Final Rule, *Revised Public Utility Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107 (2002).

⁷ *See* Pet. App. 44a (“The filings give notice of the actual prices that were charged and allow monitoring to assure that conditions have not changed so as to permit the exercise of market power, and therefore that market rates will no longer be in the zone of reasonableness.”).

⁸ *See* W. Lynn Garner, *California Rides the Tiger*, Public Utilities Fortnightly, Jan. 1, 1995, at 20.

⁹ *See Snohomish*, 384 F.3d at 758-59; *Pacific Gas & Elec. Co. v. Lynch*, 216 F. Supp. 2d 1016, 1035 (N.D. Cal. 2002).

¹⁰ *Proposed Policies Governing Restructuring California’s Electric Services Industry and Reforming Regulation*, D. 95-12-063, 1995 Cal.

unanimously passed a bill¹¹ that, together, restructured the California electricity market. Among other changes, the State created several auction markets for trading wholesale electricity.¹²

Initially, those markets performed well. *See* Pet. App. 45a n.40. Then, in 2000 and 2001, prices in those markets increased significantly. FERC has identified three “principal causes” of the price increases experienced in California: “First, a lack of electricity supply in California. As a result, California imported more power from other Western states tha[n] would otherwise be the case. Second, poor market rules, particularly rules that governed the behavior of state regulated utilities in California. Third, market manipulation.”¹³

The events that took place in California’s wholesale electricity markets during 2000 and 2001 have spawned numerous regulatory and judicial proceedings, many of which are ongoing.¹⁴ For example, FERC has mandated

PUC LEXIS 1034 (CPUC Dec. 20, 1995), *modified* by D. 96-01-009, 1996 Cal. PUC LEXIS 22 (CPUC Jan. 10, 1996).

¹¹ Act of Sept. 23, 1996, 1996 Cal. Legis. Serv. 854 (A.B. 1890) (West) (codified at Cal. Pub. Util. Code §§ 330-397 (West 1998)).

¹² *See, e.g., Snohomish*, 384 F.3d at 759 (describing those markets); *see also* Pet. App. 2a-3a & n.2 (recounting significant aspects of the restructuring plan).

¹³ Federal Energy Regulatory Commission, Open Commission Meeting Statement of Chairman Joseph T. Kelliher (Sept. 21, 2006); *see San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 93 FERC ¶ 61,121, at 61,353-55 (2000) (identifying the same three factors); *see also* Paul L. Joskow, *California’s Electricity Crisis*, 17 Oxford Rev. Econ. Pol’y 365, 377 (2001) (identifying “five primary *interdependent* factors: (i) rising natural gas prices, (ii) a large increase in electricity demand in California, (iii) reduced imports from other states, (iv) rising prices for nitrogen oxide (NOx) emissions credits, and (v) market-power problems”).

¹⁴ *See, e.g., Public Utils. Comm’n v. FERC*, 462 F.3d 1027, 1036-45 (9th Cir. 2006) (“*PUC v. FERC*”) (recounting California’s transition to competitive electricity markets and describing many of the administrative proceedings and litigation arising out of that transition); FERC, Report to the United States Congress, *The Commission’s Response to*

structural reforms of California's energy markets and has issued rules proscribing manipulative market behavior.¹⁵ FERC is also in the process of adjudicating a complex investigation to determine the extent to which sellers of energy will be ordered to pay refunds for sales at prices exceeding just-and-reasonable rates.¹⁶ Petitions for review of many FERC orders arising from the events of 2000 and 2001 have been or are being considered by the same panel of the Ninth Circuit that decided this appeal.

FERC also has investigated allegations of market manipulation by sellers.¹⁷ Many of those investigations have been resolved without any finding of wrongdoing.¹⁸

the California Electricity Crisis and Timeline for Distribution of Refunds 20-26 (Dec. 27, 2005) ("FERC 2005 Report").

¹⁵ See Final Rule, *Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 114 FERC ¶ 61,163 (2006); Final Rule, *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (2006); FERC 2005 Report at 4 & n.5, 8.

¹⁶ See *PUC v. FERC*, 462 F.3d 1027 (9th Cir. 2006) (addressing issues arising from that proceeding).

¹⁷ See Order Directing Staff Investigation, *Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (2002); Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003); Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior Through the Use of Partnerships, Alliances or Other Arrangements and Directing Submission of Information, *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003); see also Order on Motion for Discovery Order, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 101 FERC ¶ 61,186, at 61,733 (2002) (responding to an order of the Ninth Circuit by permitting private parties "to conduct discovery into market manipulation by various sellers during the western power crisis of 2000 and 2001").

¹⁸ See, e.g., Order on Motion to Dismiss Show Cause Proceeding, *Public Serv. Co. of New Mexico*, 112 FERC ¶ 61,033 (2005); Order Approving Contested Settlement, *Coral Power, L.L.C.*, 108 FERC ¶ 61,115 (2004); Order Approving Contested Settlement Agreement, *Powerex Corp.*, 106 FERC ¶ 61,304 (2004); Order Approving Contested Settlement Agreement, *Puget Sound Energy, Inc.*, 106 FERC ¶ 61,026 (2004); Order on Motions to Dismiss Show Cause Proceedings, *Arizona Pub. Serv. Co.*, 106 FERC ¶ 61,021, at 61,077, 61,080 (2004) (Public Service Company of New Mexico). FERC has extended the statutory

Indeed, a FERC economist testified that “Powerex was genuinely attempting to assist [with] congestion management” and that the “evidence demonstrate[d] Powerex’s reliability as a supplier and its contribution toward keeping the lights on in California during the crisis.”¹⁹ In addition, FERC ordered some sellers to demonstrate that they did not violate the federal tariffs that governed California’s markets when they submitted bids to sell energy into those markets for prices exceeding a certain threshold.²⁰ After reviewing evidence, FERC terminated its investigations of several sellers, and many other sellers were never targets of a FERC investigation.²¹

period for consideration of requests for rehearing of those orders. See Order Granting Rehearing for Further Consideration, *Coral Power, L.L.C.*, Docket Nos. EL03-151-004 & EL03-186-005 (FERC Oct. 1, 2004); Order Granting Rehearing for Further Consideration, *Aquila Merchant Servs., Inc.*, Docket Nos. EL03-166-004 & EL03-199-004 (FERC May 4, 2004) (Powerex); Order Granting Rehearing for Further Consideration, *Arizona Pub. Serv. Co.*, Docket Nos. EL03-168-003 & EL03-169-003 (FERC Mar. 24, 2004) (Puget Sound Energy, Inc.; Public Service Company of New Mexico); Order Granting Rehearing for Further Consideration, *Public Serv. Co. of New Mexico*, Docket No. EL03-200-005 (FERC Sept. 6, 2005).

¹⁹ Affidavit of Patrick R. Crowley at 25:24-26:1, 26:23-26:25, *Powerex Corp.*, Docket Nos. EL03-166-000 & EL03-199-000 (FERC filed Oct. 31, 2003). As part of the settlement between FERC Staff and Powerex, they submitted a Joint Explanatory Statement, which stated that the Staff had found “no probative evidence that Powerex engaged in or facilitated any” prohibited trading practices. Joint Explanatory Statement at 3, *Powerex Corp.*, Docket Nos. EL03-166-000 & EL03-199-000 (FERC filed Oct. 31, 2003). Instead, the evidence “show[ed] that Powerex was a valuable and reliable supplier of energy and ancillary services to the California organized markets throughout the period.” *Id.* (emphasis added).

²⁰ See Order Requiring Demonstration That Certain Bids Did Not Constitute Anomalous Market Behavior, *Investigation of Anomalous Bidding Behavior and Practices in the Western Markets*, 103 FERC ¶ 61,347, at 62,359 (2003).

²¹ See, e.g., Letter From William F. Hederman, Director, Office of Market Oversight and Investigations, FERC, to Paul W. Fox, Bracewell & Patterson, LLP (May 12, 2004) (Powerex); Letter From William F. Hederman, Director, Office of Market Oversight and Investigations, FERC, to Robert H. Loeffler, Morrison & Foerster LLP (May 12, 2004)

Proceedings Below

Proceedings at FERC

In March 2002, California filed a complaint with FERC against sellers of wholesale electricity in California during 2000 and 2001. *See* Complaint, *California ex rel. Lockyer v. British Columbia Power Exchange Corp.*, Docket No. EL02-71-000 (FERC filed Mar. 20, 2002) (“California FERC Compl.”). California asserted that those sellers had failed to file their rates, as required by § 205(c), and that the failure rendered unlawful every transaction at issue. *See id.* at 2. Among other remedies, California sought an order requiring sellers to refund the difference between prices for those sales and just-and-reasonable rates. *See id.* at 24-25.

California presented two theories to support its claim. First, California contended that market-based rate tariffs are unlawful under the FPA because they do not permit FERC to determine in advance whether actual rates charged in particular market transactions are just and reasonable. *See id.* at 3-16. Second, California argued that, even if market-based rate tariffs comport with the FPA, a seller’s rates can be considered properly filed only if the seller complies with FERC’s reporting requirement by submitting information on the prices at which actual sales occurred. California alleged that sellers had failed to comply with those reporting requirements because they had reported aggregated sales data rather than data on specific transactions. *See id.* at 4, 16-23.

In response to California’s complaint, sellers explained that California’s general challenge to FERC’s approval of market-based rate tariffs had been rejected in previous FERC orders. *See, e.g.*, Motion to Intervene, Motion to

(AES Placerita, Inc.); Letter from William F. Hederman, Director, Office of Market Oversight and Investigations, FERC, to John T. Stough, Jr., Hogan & Hartson LLP (May 12, 2004) (Public Service Company of New Mexico). Petitioners PPL EnergyPlus, LLC and PPL Montana, LLC were never targets, and AES Placerita, Inc. was not involved in either of the orders to show cause referenced in footnote 17.

Dismiss and Answer of Powerex Corp. to Complaint at 6-10, 17-18, *California ex rel. Lockyer v. British Columbia Power Exchange Corp.*, Docket No. EL02-71-000 (FERC filed Apr. 9, 2002). Sellers acknowledged that some quarterly transaction reports contained aggregated, rather than transaction-specific, information. But sellers contended that nothing in FERC's orders approving their market-based rate tariffs (or in any other FERC rule or order) required otherwise. *See id.* at 15, 18-21.

In May 2002, FERC issued an order dismissing in part, denying in part, and granting in part California's complaint. *See* Pet. App. 21a. First, FERC dismissed the complaint as an impermissible collateral attack on prior FERC orders approving market-based rate tariffs. *See id.* at 38a.

Second, FERC rejected California's challenge to the legality of market-based rate tariffs on the merits (to the extent that it was not a collateral attack). FERC explained that its *ex ante* determination that a seller lacks market power satisfies § 205's requirement that the seller's rates be just and reasonable. *See id.* at 40a-41a.²² FERC further noted that the quarterly transaction reports provided "an efficient and adequate means for [FERC] and the public to examine on a continuing basis whether a seller and its affiliates lack market power" and to identify "pricing trends, discriminatory patterns, or other indicia of the exercise of market power." *Id.* at 42a. FERC explained that its market-based rate regime satisfied § 205(c)'s filing requirement because "the on-file market-based umbrella tariff (which was the subject of Commission approval) preauthorizes the seller to engage

²² *See* Pet. App. 41a ("In the case of market-based rates, the just and reasonable standard of FPA § 205(e) is satisfied by the Commission's determination, prior to the effectiveness of those rates, that the utility (and its affiliates) lacks market power or has taken sufficient steps to mitigate market power.").

in market-based sales and puts the public on notice that the seller may do so.” *Id.* at 43a.²³

Third, FERC granted the complaint in part, holding that FERC’s orders approving sellers’ market-based rate tariffs required those sellers to provide transaction-specific information in their quarterly reports and that some sellers had not complied with that requirement. *See id.* at 48a-51a.²⁴ FERC, however, rejected California’s contention that deficiencies in the reports meant that “no rates were lawfully on file in the first instance.” *Id.* at 53a. It explained that it was sellers’ market-based rate tariffs, “not the quarterly reports,” that “constitute[d] the authorization to sell at market-based rates” and that “reporting deficiencies . . . d[id] not invalidate market-based pricing tariffs as lawful filed rates.” *Id.*²⁵ Exercising its broad remedial discretion, FERC concluded that the appropriate remedy for the reporting deficiencies was to

²³ *See* Pet. App. 45a (explaining that market-based rate tariffs fulfill the notice function of § 205(c) because “purchasers know in advance that . . . the rates could ‘fluctuate widely and rapidly (every hour or less in the [Cal-]ISO and [Cal-]PX) according to supply and demand and any other consideration taken into account by buyers and sellers in the course of business’”; purchasers therefore “can predict in advance the consequences of relying, for example, on last minute spot purchases in a sellers’ market”) (quoting California FERC Compl. at 9). FERC also observed that, “[i]n a buyers’ market, as existed in California in the first years after restructuring, the consequences of heavy reliance on spot markets were favorable to purchasers. Presumably, this is why the Attorney General did not challenge market-based tariffs and our notice and filing requirements during that period, even though, for all practical purposes, the tariffs and requirements operated then as they did in 2000-01.” *Id.* at 45a-46a n.40.

²⁴ *See also* Pet. App. 48a (“That is not to say that the after-the-fact reports establish the market rate but, rather, they are an important tool in assuring that a seller’s use of market-based rates remains reasonable.”).

²⁵ *See* Pet. App. 53a (“Power sales made pursuant to a previously accepted market-based rate tariff are, in effect, pre-authorized pursuant to the acceptance for filing of the market-based rate tariff. The quarterly reports allow for monitoring and oversight of that tariff.”) (footnote omitted).

direct sellers to submit non-aggregated sales information that had not been provided in previous quarterly reports. *See id.* at 51a-54a.

California petitioned for rehearing, which FERC denied. The Commission reaffirmed that its market-based rate regime satisfies § 205(c)'s filing requirement. It explained that its finding that a seller cannot exercise market power establishes that the seller “will charge competitive rates that are just and reasonable” and that “[q]uarterly reports provide a means for examining whether the utility continues to lack market power and, thus, that its rates remain just and reasonable, as well as for determining whether the utility’s rates are unduly discriminatory.” *Id.* at 69a.²⁶

FERC also expanded on its rationale for denying the refunds California requested. While it had “found that some sellers were in non-compliance with one requirement, *i.e.*, [FERC]’s requirements for reporting market-based transactions,” FERC explained that California sought “relief for different, unproven claims, namely that sellers charged unjust and unreasonable rates and engaged in ‘prohibited schemes.’” *Id.* at 75a. FERC also held that California had failed to show any connection between deficiencies in reporting and any unjust-and-unreasonable rates or “prohibited schemes.” *Id.* at 75a-76a, 78a-79a. Given those failures of proof, FERC held that it could not order sellers to refund the difference between rates charged – which had not been shown to be unjust and unreasonable – and an unproven just-and-reasonable rate. FERC further explained that disgorgement of profits would be a disproportionate remedy for the reporting deficiencies because, among other reasons, “there appears to have been some legitimate confusion as to [FERC]’s expectations,” and that confusion was “due at

²⁶ FERC also rejected California’s claim that quarterly reports must be treated as new § 205 filings, explaining that they “simply report the actual transactions that were previously authorized by [FERC], and thus do not constitute new § 205 rate filings.” Pet. App. 68a n.12.

least in part to the fact that many sellers filed aggregated data in their quarterly reports for years without having been challenged by any market-participant.” *Id.* at 78a; *see id.* at 77a-79a.

Proceedings in the Ninth Circuit

California petitioned for review under 16 U.S.C. § 825l(b). The Ninth Circuit upheld FERC’s authorization of market-based tariffs, concluding that market-based rate tariffs comport with the FPA because FERC determines that the seller lacks market power and requires the seller to report on its transactions. *See* Pet. App. 9a-11a.²⁷

Turning to FERC’s decision not to order refunds, the court held that FERC misunderstood its authority under § 205 to order refunds for violations of its reporting requirements. *See id.* at 2a, 14a-15a, 17a-18a. The court acknowledged FERC’s understanding that § 205(e) did not permit FERC to order the refunds sought by California in this case because sellers’ market-based rate tariffs were made effective only after FERC approval. But the Ninth Circuit concluded that FERC’s interpretation of § 205 “comport[ed] neither with the statutory text nor with the [FPA]’s ‘primary purpose’ of protecting consumers.” *Id.* at 18a; *see id.* (“[T]he § 205(e) refund remedy is, practically speaking, eliminated under the scheme as FERC would have us interpret it.”). Elaborating on the latter assertion, the Ninth Circuit explained that “[t]he FPA cannot be construed to immunize those who overcharge and manipulate markets in violation of the FPA.” *Id.* The Ninth Circuit held that FERC had the power under § 205 to order refunds for all of the transactions at issue in this case because “[t]o cabin FERC’s section 205 refund authority under the circumstances of this case would be manifestly contrary to the fundamental purpose and structure of the FPA.” *Id.* at 17a. The court of appeals remanded the case

²⁷ The court disagreed, however, with FERC’s conclusion that California’s complaint was a collateral attack on FERC’s prior orders approving market-based rate tariffs. *See* Pet. App. 11a n.5.

to FERC “to reconsider its remedial options in the first instance.” *Id.* at 18a.

In October 2004, sellers filed a timely petition for rehearing, which the court denied 21 months later without comment. *See* Pet. App. 80a-81a.

REASONS FOR GRANTING THE PETITION

WHETHER FERC HAS AUTHORITY TO ORDER RETROACTIVE REFUNDS UNDER § 205 OF THE FEDERAL POWER ACT IS A QUESTION OF EXCEPTIONAL IMPORTANCE ON WHICH THE COURTS OF APPEALS DIRECTLY CONFLICT

A. The Ninth Circuit’s Holding That FERC Has Authority To Order Refunds Under § 205 Violates The FPA’s Plain Text And Conflicts With Decisions Of This Court

The Ninth Circuit held in this case that § 205 of the FPA authorizes FERC to order retroactive refunds for sales, beyond the narrow limits of § 205(e). *See* Pet. App. 14a-18a; *see also PUC v. FERC*, 462 F.3d at 1045 (same panel as this case) (describing the Ninth Circuit’s opinion in this case as holding “that FERC erred as a matter of law in concluding retroactive refunds were not available under § 205”). The Ninth Circuit’s holding violates the plain language and structure of the FPA, and disregards this Court’s precedents.

1. Only one subsection of § 205 provides FERC with any refund authority, and that limited grant of refund power is inapplicable here. Under § 205(e), FERC has discretion to initiate a hearing to review the lawfulness of any rate change. *See* 16 U.S.C. § 824d(e).²⁸ If FERC

²⁸ Section 205(e) provides in pertinent part as follows:

Whenever any . . . new [rate] schedule is filed[,] the Commission shall have authority, either upon complaint or upon its own initiative without complaint, . . . to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission . . . may suspend the operation of such schedule and defer the use of such rate, charge, classifi-

commences a hearing, it can suspend the effectiveness of the changed rate for up to five months beyond the date on which it would otherwise have gone into effect. *See id.* After five months (or sooner if FERC chooses), the seller may begin selling under the new rate, even if FERC's investigation has not concluded. *See id.* But, if a tariff has been suspended and then permitted to take effect pending administrative review, and FERC ultimately determines that the rate change is unlawful, FERC has discretion to order the seller to refund to its customers the difference between the proposed rate and the rate that FERC ultimately determines is just and reasonable. *See id.*

Section 205(e)'s limited grant of refund authority does not apply here. It applies only when a proposed rate increase takes effect "at the end of such period" of suspension and only while FERC's § 205 investigation is ongoing. *Id.*; see FERC C.A. Br. at 4-5 (filed Feb. 13, 2003) (explaining that FERC's § 205(e) refund authority exists only when "FERC ultimately determines that [an] *initially-suspended rate* was not just and reasonable") (emphasis added).²⁹ Here, FERC never suspended petitioners'

cation, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified.

16 U.S.C. § 824d(e).

²⁹ See generally *East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 942 (D.C. Cir. 1988) ("[a]llowing these retroactive reductions in filed rates is a necessary compromise to accommodate delays in the approval process").

market-based rate tariffs; nor did it permit sellers to transact under market-based rate tariffs until after it had found their proposed market-based rate to be just and reasonable and had accepted their tariffs for filing.³⁰ Section 205(e) therefore provides no basis for FERC to order refunds in this case.³¹

FERC’s lack of authority to order retroactive refunds in this case is confirmed by FPA § 206 – the only other provision of the FPA that contains a textual grant of refund authority to FERC. FERC has authority under § 206(a) to initiate a hearing, on complaint or on its own motion, to investigate whether an existing rate complies with § 205(a) and (b). *See* 16 U.S.C. § 824e(a). If FERC finds that the existing rate is “unjust, unreasonable, unduly discriminatory or preferential,” it may take corrective action, such as determining a “just and reasonable rate . . . to be thereafter observed and in force.” *Id.* In addition to setting a rate “to be thereafter observed,” § 206(b) permits FERC to order a seller to refund the difference between the existing rate and the rate that FERC determines is just and reasonable. *See id.* § 824e(b). But FERC cannot order refunds for all sales at that unjust-and-unreasonable rate. Instead, FERC’s refund authority is confined to those sales that occurred *after* the statutory “refund effective date,” which at the time at issue in this proceeding could be no earlier than 60 days after either the filing of the complaint or the publication of FERC’s decision to initiate an investigation. *See* 16 U.S.C. § 824e(b) (2000); *see also* Pet. App. 53a (“section 206 bars retroactive refund liability”); FERC C.A. Br. at 4-5 (explaining that complaints asserting that existing rates are

³⁰ *See, e.g., British Columbia Power Exchange*, 80 FERC ¶ 61,343, at 62,136 (“accept[ing] for filing, without suspension or hearing, an application of [Powerex] to transact as a power marketer in the United States at market-based rates”).

³¹ Moreover, FERC has no inherent authority to order refunds under § 205 because “an agency literally has no power to act . . . unless and until Congress confers power upon it.” *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986).

unlawful “are governed by FPA § 206, under which *only prospective relief is available*”) (emphasis added).³² In sum, the decision below violates the FPA’s plain language, which does not grant FERC authority to order retroactive refunds, except under the limited exceptions in § 205(e)’s suspension clause and § 206(b)’s refund-effective-date provision.³³

2. The FPA’s legislative history confirms the error of the Ninth Circuit’s conclusion that FERC has general

³² The Ninth Circuit did not suggest that § 206 authorizes the refunds requested by California. Nor could it have, because California’s complaint was filed in March 2002, *after* the transactions of which it complains. See Pet. App. 5a.

³³ FERC may have authority in limited circumstances to order retrospective monetary relief under FPA § 309, which authorizes FERC to “issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of” the FPA. 16 U.S.C. § 825h; see *Boston Edison Co. v. FERC*, 856 F.2d 361, 369-70 (1st Cir. 1988) (§ 309 is “far from an unbounded grant of remedial authority”). In this case, however, neither FERC nor the court below invoked § 309. Moreover, no party relied on that provision as support for the result reached by the court below. FERC has ordered retrospective monetary relief when a seller has charged a rate without prior approval from FERC, see *Delmarva Power & Light Co.*, 24 FERC ¶ 61,199, at 61,461 (1983), *modified on other grounds*, 24 FERC ¶ 61,380 (1983), *petition for review denied*, *City of Newark v. FERC*, 763 F.2d 533 (3d Cir. 1985), or has violated a condition in FERC’s order approving the seller’s market-based rate tariff, see *Washington Water Power Co.*, 83 FERC ¶ 61,282 (1998). Neither case supports the decision below. Unlike in *Delmarva Power*, the sales at issue here occurred under FERC-approved tariffs. See Pet. App. 44a-45a, 68a n.12, 69a-70a. In *Washington Water Power*, the seller engaged in an unauthorized preferential transaction with an affiliate. As a punishment, FERC ordered the seller to disgorge profits resulting from the prohibited transaction. Here, by contrast, petitioners did not engage in any self-dealing or otherwise prohibited transactions. Moreover, FERC found no evidence that reporting violations at issue here led to any tangible harm. FERC found that California had failed to show any connection between deficiencies in reporting and any unjust-and-unreasonable rates or prohibited schemes. See *id.* at 75a-76a, 78a-79a. FERC also may have authority to punish a seller’s violation of its own tariff by ordering retrospective monetary remedies, see *Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003), but no such violations have been proved here, see Pet. App. 75a-76a.

authority under § 205 to order refunds. When Congress was considering legislation that became the FPA in 1935, it rejected a proposed provision that would have authorized FERC to issue “reparation orders.” S. Rep. No. 74-621, at 20 (1935). Congress rejected that provision because it concluded that “wholesale customers of electric utilities should not be permitted to accept service . . . without complaint and thereafter be permitted reparations.” *San Diego Gas & Elec.*, 93 FERC ¶ 61,121, at 61,379 (citing *Public Utility Holding Companies: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 1684-85 (1935)); see *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 258 (1951) (Frankfurter, J., dissenting) (“Wholesale consumers of electric energy were apparently considered, as a rule, adequately protected by the provisions of the Act authorizing the Commission to grant prospective relief and, in certain circumstances, to order refunding of sums accumulated during the pendency of rate proceedings.”) (citing 16 U.S.C. §§ 824d(e), 824e(a)).

As originally enacted, the FPA did not permit even the limited retroactive relief now available under § 206(b)’s “refund effective date” clause. See 49 Stat. 852. Instead, the FPA “permitted the Commission to order refunds in Section 206 proceedings prospectively only, *i.e.*, prospectively from the date of the Commission’s decision” that the existing rate had become unlawful. *San Diego Gas & Elec.*, 93 FERC ¶ 61,121, at 61,377.

The provision for a “refund effective date” was added to the FPA in 1988. See Regulatory Fairness Act, Pub. L. No. 100-473, § 2, 102 Stat. 2299, 2299-2300 (1988). Under that amendment, the refund effective date could be no earlier than 60 days *after* either the filing of the complaint or the publication of FERC’s decision to initiate an investigation. See *id.* The reason for that limited grant of refund authority was to prevent utilities from delaying the effectiveness of FERC-imposed rate changes by engaging in dilatory behavior during § 206 investigations. S. Rep. No. 100-491, at 3-4 (1988).

Finally, in 2005, Congress amended § 206(b) to provide, as it now does, that the refund effective date can be as early as (but not earlier than) the date of the complaint or the date of publication of FERC’s notice of intention to institute an investigation. *See* Electricity Modernization Act of 2005, Pub. L. No. 109-58, Tit. XII, § 1285, 119 Stat. 594, 941, 980-81.³⁴ Significantly, the House of Representatives rejected an amendment that, in the words of its sponsor, addressed FERC’s authority “to issue orders requiring refunds for all electricity overcharges.” 151 Cong. Rec. H2332 (daily ed. Apr. 20, 2005) (statement of Rep. Dingell). The amendment provided that, “with regard to market-based rates, [FERC] may establish an earlier refund effective date.” *Id.* (Dingell amendment § 1291). Representative Dingell contended that the amendment was necessary because H.R. 6 – the bill that eventually was enacted into law – did not “authorize FERC to grant *full* refunds to consumers” who were adversely affected by wholesale market-based electricity prices, “but rather allows refunds only from the date when the complaint is filed.” *Id.* at H2333 (emphasis added). As Representative Barton put it, “[t]he Dingell substitute would require retroactive refunds for market-based rates. It would go back into contracts that have already been executed and electricity [that has been] consumed and money for that electricity has been paid, and for the first time create a retroactive refund. I think that is unwise and unnecessary.” *Id.* The House of Representatives agreed with Representative Barton, rejecting the Dingell amendment by a 243-188 vote. *See id.* at H2380.

Thus, Congress has thrice addressed FERC’s power to order refunds for past sales. Each time, it declined to grant FERC authority to order retroactive refunds, outside of the limited circumstances in which § 205(e) and

³⁴ Because California’s complaint was filed after the transactions of which it complains, the retroactive relief sanctioned by the Ninth Circuit in this case would be unavailable even under the current version of § 206(b).

§ 206(b) apply. Indeed, *after* the Ninth Circuit issued the opinion in this case, Congress declined to amend the FPA to create the very refund authority that the court below concocted. The Ninth Circuit’s holding therefore circumvents Congress’s plain, longstanding intent.

3. In addition to ignoring the plain text, structure, and legislative history of the FPA, the Ninth Circuit disregarded this Court’s decisions on the filed rate doctrine when it held that FERC has general authority to order refunds under § 205. Sections 205 and 206 of the FPA provide the statutory basis in the energy context for the “filed rate” or “filed tariff” doctrine. That doctrine prohibits a seller of power from collecting a rate other than the one filed with FERC and prevents FERC from imposing a rate increase or decrease for power already sold (except in the limited circumstances permitted by § 205(e) and § 206(b)). *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577-78 (1981) (explaining the doctrine).³⁵

The filed rate doctrine’s prohibition on retroactive ratemaking derives from § 206, under which FERC’s power “is limited to prescribing the rate ‘to be thereafter observed’ and thus can effect no change prior to the date of the order.” *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956). In an early decision applying the filed rate doctrine under the FPA, this Court relied on the fact that “Congress withheld from [FERC] power to grant reparations.” *Montana-Dakota Utils.*, 341 U.S. at 254.³⁶ This

³⁵ Although *Arkansas Louisiana Gas* involved the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (“NGA”), the Court there noted that § 4 and § 5 of the NGA, 15 U.S.C. §§ 717c-717d, “are in all material respects substantially identical” to § 205 and § 206, respectively, of the FPA. 453 U.S. at 577 n.7 (internal quotation marks omitted). The principal difference between the relevant provisions of the two Acts – namely, that NGA § 5 (the analogue to FPA § 206) contains no provision for a “refund effective date” and is thus purely prospective, *compare* 16 U.S.C. § 824e(a)-(b) *with* 15 U.S.C. § 717d(a) – does not implicate the analysis in this petition. Accordingly, this petition follows the established practice of citing precedents under the NGA and the FPA interchangeably.

³⁶ *Accord FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968) (“[T]his Court has repeatedly held that [FERC] has no reparation power.”);

Court has consistently applied the filed rate doctrine in a variety of regulatory contexts³⁷ and has stated that abrogation of that doctrine “must come from Congress, rather than from this Court.” *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).³⁸

The filed rate doctrine, as articulated in this Court’s cases, reinforces the conclusion that is apparent from the text of the FPA: FERC lacks power to order retroactive refunds, unless it acts under the narrow grants of authority in § 205(e) and § 206(b). The Ninth Circuit here made no attempt to square its holding that FERC can order retroactive refunds under § 205 with this Court’s precedents construing the FPA to prohibit the Commission from ordering retroactive refunds or otherwise altering retroactively the rates paid for energy sold except in the very limited circumstances specifically provided in the Act.³⁹

FPC v. Hope Natural Gas Co., 320 U.S. 591, 618 (1944) (FERC “has no power to make reparation orders”).

³⁷ In *Arkansas Louisiana Gas*, the Court explained that the filed rate doctrine “has its origins in this Court’s cases interpreting the Interstate Commerce Act, and has been extended across the spectrum of regulated utilities.” 453 U.S. at 577 (citations omitted).

³⁸ In addition to the restrictions that the filed rate doctrine places on both sellers and FERC, the doctrine bars “civil lawsuits that have the effect of contradicting or undercutting a tariffed rate.” *Town of Norwood v. FERC*, 202 F.3d 392, 400 n.4 (1st Cir. 2000) (citing *Arkansas Louisiana Gas*); see *Montana-Dakota Utils.*, 341 U.S. at 251-54 (applying the doctrine to bar a civil action).

³⁹ Although the Ninth Circuit opined that, when transaction-specific reporting requirements are not followed, “[p]ragmatically, . . . there is no filed tariff in place at all,” Pet. App. 15a, it did not hold that sellers did not have rates on file during the relevant period. Instead, in asserting that FERC had misunderstood the importance of its reporting requirements, the court below stated that, “[i]f the tariff is interpreted as FERC urges here, then the tariff runs afoul of [Supreme Court precedent], the filed rate doctrine, and the FPA. If, *on the other hand*, we view the reporting requirements as integral to the tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates, then a market-based tariff is permitted.” *Id.* at 15a-16a (emphasis added). Thus, the court *rejected* an interpretation that would have had the effect of holding that sellers did not

B. The Ninth Circuit’s Decision Conflicts With The Holdings Of Other Circuits

1. The Ninth Circuit’s decision directly conflicts with decisions of the D.C. Circuit, which has repeatedly recognized that FERC lacks authority to order refunds, except under the plain terms of § 205(e) and § 206(b). In *Consolidated Edison*, for example, the D.C. Circuit rejected an attempt to obtain retroactive relief under § 205. There, buyers cited § 205(d)’s language permitting FERC to waive the usual 60-day notice period for tariff changes on a finding of good cause as authorizing FERC to order “retroactive relief upon a finding of good cause.” 347 F.3d at 969. The D.C. Circuit disagreed, relying on one of its prior decisions interpreting similar language in the NGA as not permitting retroactive relief. *See id.* (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990)). In *Columbia Gas*, the court had held that, although FERC can waive the notice requirement for a tariff filing, it cannot “waive” the filed rate doctrine by ordering retroactive relief. *See* 895 F.2d at 794-97.

Similarly, in *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336 (D.C. Cir. 1974), the court explained that the Commission’s power “to order refunds arises from section 205(e) of the [FPA] and is directly tied to the exercise of the Commission’s suspension power.” *Id.* at 344-45 (footnote omitted); *see East Tennessee Natural Gas*, 863 F.2d at 942 (referring to the cognate provision of the NGA as the “only statutory exception to the rule prohibiting retroactive rate changes”). The D.C. Circuit has further recognized that § 206, which “affords the exclusive avenue to rate relief,” *Papago Tribal Util. Auth. v. FERC*, 610 F.2d 914, 928 (D.C. Cir. 1979), “preclud[es] [FERC] from ordering refunds, even when it determines that the rates in effect are unjust and unreasonable.” *Indiana & Michigan*

have rates on file. Instead, it concluded that the filed rate doctrine applies, but that, under § 205 and its “implied enforcement mechanisms,” FERC has power to order retroactive refunds in response to violations of its reporting requirements.

Elec., 502 F.2d at 345; accord *Public Serv. Co. of New Hampshire v. FERC*, 600 F.2d 944, 958 (D.C. Cir. 1979); see *Consolidated Edison Co. of New York, Inc. v. FERC*, 958 F.2d 429, 431 n.4 (D.C. Cir. 1992) (R.B. Ginsburg, J.) (“[FERC] may not order refunds under [NGA] § 5(a); it may determine only the just-and-reasonable rate ‘to be thereafter observed.’”).

Those limitations on FERC’s ability to order retroactive relief allow utilities “to rely on a filed rate, once [FERC] has permitted it to become effective, until such time as the rate is proved to be unlawful.” See *Robin Pipeline Co. v. FERC*, 795 F.2d 182, 184 (D.C. Cir. 1986) (R.B. Ginsburg, J.). Thus, the D.C. Circuit repeatedly has recognized that “FERC may not order a retroactive refund based on a post hoc determination of the illegality of a filed rate’s prescription.” *Id.* at 189 n.7; accord *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (the FPA “bars utility refunds for past excessive rates”); see *East Tennessee Natural Gas*, 863 F.2d at 941 (“[r]etroactive changes in rates violate the filed rate doctrine”).

In view of the D.C. Circuit’s traditional prominence in adjudicating petitions for review of FERC orders, the Ninth Circuit’s divergence from the prevailing rule in the D.C. Circuit is especially troubling. Even without any other conflicting circuits, the existence of the Ninth Circuit’s conflict with the D.C. Circuit on this important question would by itself warrant a grant of certiorari.

2. But, like the D.C. Circuit, other circuits have recognized that FERC lacks a generalized retroactive refund power. In *Distrigas of Massachusetts Corp. v. FERC*, 737 F.2d 1208 (1st Cir. 1984) (Breyer, J.), the First Circuit affirmed FERC’s decision that DOMAC, a liquefied natural gas (“LNG”) seller, must share with Boston Gas Company “revenues it obtained from selling ‘cool-down’ services to LNG tankers” because such services were provided “in part” with DOMAC’s natural gas facilities. *Id.* at 1221. To that end, FERC had “decided that the cool-down service revenues should be split, 50-50, between DOMAC and

its customers.” *Id.* But the court *rejected* FERC’s authority to order DOMAC to *refund* customers’ shares: “Neither section 4 nor section 5 [of the NGA] authorizes [FERC] to make adjustments or to order refunds to compensate customers for *past* excessive charges by the utility – *i.e.*, charges made prior to the time a proposed rate increase took effect; both are directed only at the reasonableness of prospective or increased rates.” *Id.*⁴⁰

Likewise, the Tenth Circuit has noted that “any relief from an unjust rate ordered by [FERC] is *prospective* only; it may not have retroactive effect.” *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1488 (10th Cir. 1995) (emphasis added). More generally, the Eighth Circuit has acknowledged that “Congress anticipated cases in which rates would be found unreasonable, and subject to future adjustment, but would *not be subject to refund*” under the FPA. *Cooperative Power Ass’n v. FERC*, 733 F.2d 577, 580 (8th Cir. 1984) (emphasis added).

C. The Proper Interpretation Of FERC’s Statutory Refund Authority Is Of Enormous Practical Importance

1. FERC has removed any doubt that the Ninth Circuit’s decision dramatically expanded its refund power. Responding to a letter from Senator Feinstein regarding the court of appeals’ decision in this case, FERC’s then-Chairman observed that “the Ninth Circuit held that [FERC] has authority under the [FPA] to order retroactive refunds in the circumstances of this case for sellers that failed to comply with certain [FERC] reporting requirements.” Letter from Pat Wood, III, Chairman, FERC, to the Hon. Dianne Feinstein, Docket No. EL00-95 (FERC filed Oct. 14, 2004). The Chairman explained that “the Ninth Circuit interpreted the [FPA] to provide [FERC] with *broader refund authority than [FERC] believed the Act provided.*” *Id.* (emphasis added). But he

⁴⁰ *Accord Boston Edison*, 856 F.2d at 369 (“[I]t is settled that [FERC] lacks power to order ‘reparations’ in compensation even for unjust or unreasonable past rates.”) (internal quotation marks omitted).

expressed no reluctance to use that new-found power, stating that he “appreciate[d] the court’s clarification of our authority under the [FPA] as it enhances our authority to protect customers from misconduct by public utilities.” *Id.* Similarly, in a report to Congress on its resolution of the proceedings arising out of 2000-2001 California wholesale-electricity sales, FERC stated that the “Ninth Circuit [in this case] interpreted the FPA to provide [FERC] with broader authority than [FERC] believed the Act provided.” FERC 2005 Report at 7 n.12.

The Ninth Circuit’s aggrandizement of FERC’s power may be welcome to the Commission, but it expands FERC’s authority beyond congressional limits that judicial review must enforce, not flout. With this new tool in its regulatory arsenal, FERC can extend the destabilizing effects of the Ninth Circuit’s pernicious reading of the FPA to other parts of the country, with even broader consequences to the national power supply.

2. Adverse commercial consequences will undoubtedly flow from the Ninth Circuit’s decision. The court’s creation of a new refund authority under § 205 undermines the regulatory stability of the filed rate doctrine and threatens the growth and competitiveness of the nation’s power markets. By “authorizing only prospective rate changes,” *Consolidated Edison*, 347 F.3d at 969, the filed rate doctrine guarantees to sellers “a right to rely on the legality of the filed rate,” *Sea Robin Pipeline*, 795 F.2d at 189 n.7, until FERC finds the filed rate unlawful and determines a rate “to be thereafter observed and in force” under § 206, 16 U.S.C. § 824e(a).⁴¹ The Ninth Circuit’s

⁴¹ *Accord East Tennessee Natural Gas*, 863 F.2d at 942 (recognizing the “basic principle” that utilities regulated by FERC “are entitled to rely on filed rates”).

Indeed, FERC has recognized that ordering refunds can “create an unacceptable amount of risk and uncertainty for future market participants in the [West], since it would set a precedent that the contract price for power may always be subject to change – without any advanced warning.” *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy and/or Capacity at Wholesale into Electric Energy*

new rule destroys that predictability by subjecting sellers to refunds for sales conducted under approved tariffs, without regard to whether those sellers had any notice that their sales might be subject to refund.

Left uncorrected, the Ninth Circuit's erroneous expansion of FERC's power to order refunds for past sales will likely have a chilling effect on future investment in Western wholesale electricity markets. Instead of investing earnings in generation and transmission facilities to increase the supply of power, prudent sellers will carry reserves to insure against retrospective rate-setting and refunds. Yet new investment is precisely what California and other Western States desperately need to avoid supply shortages and further price shocks. Indeed, FERC recognized in a report to Congress that "restoring confidence in California markets is critical to motivating future investment in transmission and generation facilities necessary to the long-term health and competitiveness of the wholesale electricity market." FERC 2005 Report at 14. Only the certainty provided by fealty to congressional text and purposes can restore that confidence.

3. The chilling effect on investment-backed expectations created by the decision below will also dramatically affect the natural gas industry, which is regulated by the NGA. Sections 4 and 5 of the NGA parallel FPA § 205 and § 206. *See supra* note 35. Those parallels have led this Court and numerous lower courts to apply precedents under the FPA to the NGA, and vice versa. *See Arkansas Louisiana Gas*, 453 U.S. at 577 n.7 (Court has followed an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes"). Thus, the Ninth Circuit's erroneous expansion of FERC's remedial authority raises the specter of infecting the natural gas industry with an errant and disruptive set of refund rules as well.

and/or Capacity Markets in the Pacific Northwest, 105 FERC ¶ 61,183, at 61,965 (2003), *petitions for review pending*, *Port of Seattle v. FERC*, Nos. 03-74139 *et al.* (9th Cir., to be argued Jan. 8, 2007).

4. Even if none of the foregoing national harms were to occur, the destabilizing effect on the Western States' recovering wholesale electricity markets alone would justify a grant of certiorari. FERC's exercise of its judicially created § 205 refund authority on remand has the potential to wreak havoc in ongoing regulatory and judicial proceedings stemming from events in California's electricity markets during 2000 and 2001.⁴² For six years, parties have based strategic litigation and settlement decisions on an understanding of FERC's statutory refund authority (an understanding shared by FERC) that has now been upset. That disruption threatens tremendous economic consequences. At the end of 2005, FERC boasted settlements with sellers arising from the events of 2000 and 2001 worth more than \$6.3 billion. *See* FERC 2005 Report at 3. Billions of additional dollars are at stake in the remaining proceedings. *See id.* at 9. In 2005, Congress directed FERC to "seek to conclude its investigation into the unjust or unreasonable charges incurred by California during the 2000-2001 electricity crisis as soon as possible." Energy Policy Act of 2005, Pub. L. No. 109-58, § 1824(1), 119 Stat. 594, 1134. The ability to achieve that resolution, however, is clouded by the regulatory uncertainty created by the Ninth Circuit's decision below. Moreover, another panel of the Ninth Circuit (Browning, Pregerson, and Berzon, JJ.) recently extended the destabilizing effects of the holding in this case. That panel relied on the decision below as a "critically important" basis for its holding that the *Mobile-Sierra*⁴³ doctrine – which limits FERC's authority under § 206 to modify contracts and to order refunds – does not apply to contracts entered into under FERC's market-based rate regime. *Public Util. Dist. No. 1 of Snohomish County v. FERC*, Nos. 03-72511 *et al.*, 2006 WL 3717533, at *24 (9th Cir. Dec. 19, 2006);

⁴² *See PUC v. FERC*, 462 F.3d at 1036-45 (describing many ongoing administrative and judicial proceedings).

⁴³ *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

see also *Public Utils. Comm'n v. FERC*, Nos. 03-74207 & 03-74246, 2006 WL 3717673, at *4 (9th Cir. Dec. 19, 2006).

Furthermore, the Ninth Circuit's radical understanding of the FPA is especially troublesome, considering that that court hears appeals in a large number of cases arising from the events in California's electricity markets during 2000 and 2001. Indeed, the D.C. Circuit has issued orders transferring to the Ninth Circuit petitions for review of FERC orders arising from the California energy crisis that have been filed in that court.⁴⁴ And the Ninth Circuit has made an administrative determination to cede control over this critical area to three judges by assigning more than a hundred cases involving both the California *and* the Pacific Northwest markets to the very same panel that rendered the erroneous decision below.⁴⁵ There is therefore no reasonable prospect that the temporizing or correcting influence of other members of the Ninth Circuit will be brought to bear on these colossally important cases.⁴⁶

CONCLUSION

The petition for a writ of certiorari should be granted.

⁴⁴ See, e.g., Order, *Dynegy Power Mktg., Inc. v. FERC*, Nos. 04-1034 *et al.* (D.C. Cir. Feb. 9, 2005) (per curiam); Order, *Calpine Corp. v. FERC*, No. 04-1230 (D.C. Cir. Sept. 8, 2004); Order, *Turlock Irrigation Dist. v. FERC*, Nos. 01-1289 *et al.* (D.C. Cir. May 15, 2002) (per curiam).

⁴⁵ See Order, *Public Utils. Comm'n v. FERC*, Nos. 01-71051 *et al.* (9th Cir. Oct. 22, 2004).

⁴⁶ That reality is underscored by the denial of rehearing en banc in this case. See Pet. App. 80a-81a.

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