No. 09-288

In The
Supreme Court of the United States

PUGET SOUND ENERGY, INC., AVISTA CORPORATION, AVISTA ENERGY, INC., CONSTELLATION ENERGY COMMODITIES GROUP, INC., IDACORP ENERGY L.P., MORGAN STANLEY CAPITAL GROUP INC., PORTLAND GENERAL ELECTRIC COMPANY, POWEREX CORP., SEMPRA ENERGY TRADING LLC, SHELL ENERGY NORTH AMERICAN (US), L.P., AND TRANSCANADA ENERGY LTD.,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA EX REL. EDMUND G. BROWN JR., ATTORNEY GENERAL, THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, THE CITY OF SEATTLE, WASHINGTON, THE PORT OF SEATTLE, WASHINGTON, AND THE CITY OF TACOMA, WASHINGTON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

REX S. HEINKE*
JERRY E. ROTHROCK
L. RACHEL HELYAR
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East, 24th Floor
Los Angeles, CA 90067
(310) 229-1000

Attorneys for the City of Seattle, Washington

**Counsel of Record*

EDMUND G. BROWN JR.
Attorney General of the State of California
MATT RODRIQUEZ
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DAVID M. GUSTAFSON
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
1515 Clay Street, 20th Floor
Oakland, CA 94612

Attorneys for the People of the State of California ex rel. Edmund G. Brown Jr., Attorney General

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

FRANK R. LINDH
MARY F. MCKENZIE
ELIZABETH M. MCQUILLAN
KAREN P. PAULL
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
505 Van Ness Avenue
San Francisco, CA 94102

Attorneys for the Public Utilities Commission of the State of California

PHILIP L. CHABOT, JR.
MCCARTHY, SWEENEY &
HARKAWAY, P.C.
2175 K Street, NW, Suite 600
Washington, DC 20037

Attorneys for the Port of Seattle, Washington

November 30, 2009

KEVIN J. MCKEON
KATHERINE E. LOVETTE
HAWKE, MCKEON &
SNISCAK LLP
100 North Tenth Street
Harrisburg, PA 17101

Attorneys for the People of the State of California ex rel. Edmund G. Brown Jr., Attorney General

MICHAEL J. KURMAN
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Attorneys for the City of Tacoma, Washington

QUESTIONS PRESENTED

1. This Court ruled in *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) that courts lack jurisdiction to review an agency's refusal to institute enforcement proceedings. When an agency "*does* act to enforce," however, its decision is reviewable. *Id.* at 832. The first question for review is:

Did the court of appeals lack jurisdiction under *Heckler* to review the decision of the Federal Energy Regulatory Commission ("FERC") to deny refunds to purchasers of electricity in the Pacific Northwest, where that decision was based on an administrative law judge's findings and recommendations after a contested evidentiary hearing?

2. Did the court of appeals err by ordering FERC to address evidence of market manipulation that FERC admitted into the record but failed to address in its decision?

3. After FERC interpreted an administrative complaint to exclude refunds for certain types of energy purchases, did the court of appeals err when, applying the same standard as the D.C. Circuit, the court rejected FERC's interpretation on the grounds that the face of the complaint demonstrated no intention to exclude such purchases and FERC's interpretation of the complaint was inconsistent with its prior interpretation of a closely-related complaint?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

FERC CASES

TABLE OF AUTHORITIES – Continued

Blank Page

BRIEF IN OPPOSITION

Respondents the City of Seattle, Washington ("Seattle"), the Port of Seattle, Washington ("Port"), the City of Tacoma, Washington ("Tacoma"), the People of the State of California ex rel. Edmund G. Brown Jr., Attorney General of the State of California (the "California Attorney General"), and the Public Utilities Commission of the State of California (the "CPUC") oppose the petition for a writ of certiorari to review the opinion of the Ninth Circuit Court of Appeals in this case.

INTRODUCTION

The Ninth Circuit Court of Appeals reviewed a FERC decision denying refunds for overcharges on wholesale electricity sales in the Pacific Northwest during the energy crisis of 2000-2001. The court reversed the decision on narrow fact-bound grounds and remanded it to FERC for further proceedings. The decision was correct and does not warrant review.

In *Heckler v. Chaney*, this Court held that an agency's refusal to institute enforcement proceedings is presumptively not subject to judicial review. The Ninth Circuit's decision does not conflict with *Heckler*, nor does it conflict with decisions of other circuit courts of appeals interpreting *Heckler*. FERC could have avoided judicial review by conducting whatever investigation it wished and making

whatever enforcement decision it wished, so long as it did not conduct an adjudicative proceeding. But FERC elected the latter course. After Puget Sound Energy, Inc. ("Puget") filed a complaint seeking relief from unreasonable electricity prices during the energy crisis, FERC allowed other Pacific Northwest purchasers to intervene and become parties, and then directed an administrative law judge ("ALJ") to conduct a public adjudicative proceeding to determine whether there were grounds to provide refunds for transactions in the Pacific Northwest (the "PNW Refund Proceeding"). The PNW Refund Proceeding involved discovery, the submission of extensive evidence, cross-examination, briefing, findings by an ALJ, oral arguments by the parties, and a decision by FERC to deny refunds. The court of appeals' review of this adjudicative decision did not in any way impair FERC's exercise of its separate discretionary enforcement authority.

Similarly, the Ninth Circuit's instruction that FERC address evidence of intentional market manipulation on remand did not improperly interfere with FERC's discretion to structure its own proceedings. Petitioners' argument rests on their incorrect factual assertion that FERC decided to address evidence of market manipulation and tariff violations occurring in the Pacific Northwest in separate seller-specific proceedings (the "Gaming & Partnership Proceedings"). But FERC specifically limited the Gaming & Partnership Proceedings to unlawful behavior in the

organized California markets and *excluded* the Pacific Northwest.

Nor does the court of appeals' decision conflict with the D.C. Circuit's deferential standard for reviewing agency decisions. The court of appeals rejected FERC's interpretation of the Puget complaint as excluding sales to the California Energy Resources Scheduling division of the California Department of Water Resources ("CERS") in the Pacific Northwest. The court cited with approval the D.C. Circuit's standard, and gave due deference to FERC. The court nevertheless was compelled to reject FERC's interpretation of the Puget complaint because that interpretation was inconsistent with the complaint's own words and directly contradicted FERC's interpretation of a closely-related energy crisis complaint involving sales in California markets.

Finally, the decision is interlocutory because the court of appeals remanded the case back to FERC, which may or may not ultimately award refunds.

In sum, the court of appeals applied settled law in a limited, fact-bound decision that was fully consistent with *Heckler* and in conformity with standard judicial practice in all circuit courts of appeals. The petition for certiorari should be denied.

STATEMENT

The Federal Power Act ("FPA") provides that the business of selling electricity in interstate commerce "is affected with a public interest," and that federal regulation of such sales is "necessary in the public interest." FPA Section 201(a), 16 U.S.C. § 824(a). Rates charged for wholesale electricity by a public utility must be "just and reasonable." FPA Section 205(a), 16 U.S.C. § 824d(a). Whenever FERC, after a hearing on its own motion or in response to a complaint, finds that a rate is unjust and unreasonable, it is required to determine the just and reasonable rate and has discretion to order that refunds be paid. FPA Section 206(a) and (b), 16 U.S.C. § 824e(a) and (b). Complaints may be filed by any person, State, municipality or state commission. FPA Section 306, 16 U.S.C. § 825e. If FERC determines that a complaint has any reasonable basis, it must conduct either an internal investigation or a public hearing. FPA Sections 306, 307 and 308, 16 U.S.C. §§ 825e, 825f and 825g. Any aggrieved party may seek judicial review of an order issued by FERC. FPA Section 313, 16 U.S.C. § 825*l*.

1. In August 2000, San Diego Gas & Electric Company filed a complaint with FERC that initiated a proceeding (the "California Refund Proceeding") requesting that FERC order a cap on "prices at which sellers subject to its jurisdiction may bid energy or ancillary services into California's two large bulk-power markets – those operated by the PX and the ISO." Resp. App. 2.

In October 2000, Petitioner Puget filed a closely-related complaint with FERC, contending that "California and the Pacific Northwest are part of the substantially integrated wholesale power market of the Western Interconnection."[1] Resp. App. 37. Puget also contended that FERC would seriously disrupt and distort that integrated wholesale market if it established price caps in only one part of that market as requested by the San Diego complaint. *Id.* at 40. Accordingly, Puget requested that, if FERC decided to impose a price cap in response to the San Diego complaint, it should also impose the same or a lower price cap on wholesale energy prices in the Pacific Northwest. *Id.* at 39-41.

Contrary to Petitioners' representation that Puget "expressly disclaimed interest in refunds," Pet. 5, the Puget complaint specifically asked FERC to set a refund effective date "in accordance with Section 206 of the [FPA] . . . sixty . . . days after the date of filing of this Complaint" (the earliest possible date for obtaining refunds under the then-applicable version of FPA Section 206) if FERC decided to order refunds

---

[1] "Western Interconnection," "West-wide," and "West" refer to the geographical area encompassed within the Western Electricity Coordinating Council. It extends from Canada to Mexico and includes all or portions of fourteen western United States, the Canadian provinces of Alberta and British Columbia, and the northern portion of Baja California.

"in response to this Complaint." Pet. App. 11a, Resp. App. 42, 44.[2]

Less than two months later, shortly after finding in the California Refund Proceeding that prices in the California spot markets operated by the PX and ISO were unjust and unreasonable, FERC dismissed the Puget complaint, asserting that a West-wide price cap was "impracticable." 93 FERC 61,294 at 62,019. Puget filed a request for rehearing.

2. On June 19, 2001, FERC issued an order setting price caps on spot market sales throughout the West, including the Pacific Northwest, based on its finding that "'the California market is integrated with those of other states in the [West].'" Pet. App. 12a, Resp. App 127. Contrary to its finding several months earlier when it dismissed the Puget complaint, FERC concluded that a West-wide price cap was not only practical but also necessary "to modify the existing market structure throughout the West to minimize the potential for market power abuse, and thus to protect against possible unjust and unreasonable rates." Resp. App. 61.

A few days later, claiming to be satisfied with the remedy provided by the June 19 order, Puget filed a motion to withdraw its complaint. *Id.* In response, Port, Tacoma, Seattle, and the Washington Attorney

---

[2] The court of appeals specifically rejected the contention by Puget and other sellers that "Puget's complaint never requested refunds or the setting of a refund effective date." Pet. App. 25a.

General filed answers opposing the motion, explaining that a dismissal would prejudice other entities that relied on the Puget complaint. Pet. App. 12a-13a. Consistent with FERC procedure in adjudicative proceedings, FERC allowed these entities to intervene. *Id.*

3. On July 25, 2001, FERC issued an order in both the California Refund Proceeding and the PNW Refund Proceeding. With respect to the former, FERC "establish[ed] the scope of and methodology for calculating refunds related to transactions in [the California Refund Proceeding]" and "establish[ed] an evidentiary hearing proceeding in order to further develop the factual record in [the California Refund Proceeding] so that refunds may be calculated." Pet. App. 38a-39a. With respect to the latter, FERC established a separate evidentiary "proceeding before an [ALJ] to explore whether there may have been unjust and unreasonable charges for spot market sales in the Pacific Northwest from December 25, 2000 through June 20, 2001, and the calculation of any refunds associated with such charges." *Id.* at 39a. FERC invited parties to the California Refund Proceeding to participate in the PNW Refund Proceeding. *Id.* at 13a, 102a-103a.

An ALJ conducted pre-hearing conferences in the PNW Refund Proceeding and issued an order on August 23, 2001 listing the issues to be tried, including whether refunds for spot market sales in the Pacific Northwest are "lawful or appropriate" and the "extent of any potential refunds." Pet. App. 114a.

After allowing the parties to engage in discovery, the ALJ conducted a three-day adjudicative hearing during which the pre-filed initial and/or rebuttal testimony of over 40 witnesses was taken and subjected to cross-examination. *Id.* at 417a-419a.

On September 24, 2001, the ALJ issued her "Recommendations and Proposed Findings." Pet. App. 111a-377a. Contrary to the Commission's prior determinations that the Pacific Northwest is a component part of a larger, single, inextricably integrated market that includes California, *id.* at 12a, the ALJ did not find the Pacific Northwest market to be connected to the California market in any significant way. The ALJ found that the Pacific Northwest market was functional and competitive and that prices were just and reasonable. *Id.* at 13a-14a. Accordingly, the ALJ recommended that refunds be denied. *Id.* at 14a. The ALJ also recommended that the Puget complaint be dismissed and that Puget be allowed to withdraw its rehearing request. *Id.* at 371a.

On December 19, 2002, while FERC was considering the findings and recommendations of the ALJ, new evidence came to light regarding Enron's manipulation of the electricity markets. Pet. App. 14a. FERC reopened the evidentiary record in the PNW Refund Proceeding to allow the parties to conduct additional discovery and submit "additional evidence concerning potential refunds for spot market bilateral sales transactions in the Pacific Northwest for the period January 1, 2000 through June 20,

2001" – a more extensive refund period than the one requested in the Puget complaint. *Id.*; Resp. App. 154. FERC also indicated that it would review the new evidence itself rather than remand for findings by the ALJ. Resp. App. 161-62. On March 3, 2003, Seattle, Port, and Tacoma submitted voluminous evidence supporting refund claims in response to this order.

On June 25, 2003, FERC adopted the ALJ's recommendation to deny refunds without addressing the new evidence submitted at FERC's own invitation. FERC rejected the ALJ's recommendation to allow Puget to withdraw its complaint because to do so would be unfair to parties seeking refunds who had "reasonably relied on the Puget complaint, which raised similar issues, as an appropriate forum for addressing their overlapping claims." Pet. App. 388a. FERC declined to make any finding as to whether wholesale market prices in the Pacific Northwest were unjust and unreasonable, instead concluding that, even if prices were unjust and unreasonable, the balance of equities weighed against ordering refunds. *Id.* at 392a-401a. Finally, FERC followed the ALJ's recommendation to exclude from the PNW Refund Proceeding transactions involving electricity purchased in the Pacific Northwest for consumption in California. *Id.* at 432a.

Respondents timely filed requests for rehearing of the June 2003 order, which FERC denied.

4. Respondents subsequently petitioned the Ninth Circuit Court of Appeals for review.[3] On August 24, 2007, the court of appeals granted the petitions in part and denied them in part. As a preliminary matter, the court rejected FERC's argument that, under *Heckler v. Chaney*, it lacked jurisdiction to review FERC's decision to deny refunds. The court of appeals recognized that, under *Heckler*, courts lack jurisdiction to review "'an agency's decision not to prosecute or enforce[,]'" but observed that, "when 'an agency *does* act to enforce, that action itself provides a focus for judicial review.'" Pet. App. 17a-18a (quoting *Heckler*, 470 U.S. at 831-32). Following *Heckler*, the court of appeals concluded that, "where FERC has made a determination to adjudicate a dispute or take[s] steps toward enforcing a violation of the law, the outcome it chooses is subject to judicial review[.]" *Id.* at 18a. The court found that FERC had taken those steps in this case by allowing interested persons to intervene, holding hearings, and taking evidence to adjudicate the refund dispute between the parties, and that FERC's ensuing decision to deny refunds was therefore reviewable. *Id.* at 18a-19a.

After rejecting the procedural challenges raised by the sellers, the court of appeals determined that

---

[3] Seattle, Port, Tacoma, the California Attorney General, and the CPUC each petitioned for review of FERC's decision to deny refunds. The California Attorney General and the CPUC also petitioned for review of FERC's decision to exclude transactions involving energy consumed in California.

FERC's decision to exclude sales to CERS from the PNW Refund Proceeding based on its interpretation of the Puget complaint and FERC's failure to consider or examine the evidence submitted pursuant to its December 2002 order were arbitrary, capricious, and an abuse of discretion.

The court of appeals ruled that FERC's interpretation of the Puget complaint to exclude purchases made by CERS was inconsistent with any rational reading of the complaint and directly contradicted FERC's prior interpretation of the closely-related complaint that initiated the California Refund Proceeding.[4] Pet. App. 31a-32a.

The court of appeals also ruled that, "despite a great deal of new evidence submitted to FERC in the spring of 2003," "FERC failed to take any of it into account, relying instead on the ALJ's factual findings from September 2001, which were made prior to the Enron revelations [of market manipulation]." Pet. App. 33a-34a. In light of evidence submitted in response to FERC's December 2002 order, the court observed that "FERC must at least consider the possibility that the [PNW] spot market was not . . . functional and competitive." *Id.* at 35a.

---

[4] The court of appeals also found that FERC's decision that sales to CERS did not occur in the Pacific Northwest was not supported by substantial evidence. Pet. App. 31a. Petitioners have not sought review on that basis.

The court of appeals "decline[d] to reach the merits of FERC's ultimate decision to deny refunds," and remanded to FERC to further consider its refund decision in light of the newly submitted evidence and the court's related decisions, issued subsequent to FERC's final order in this case. Pet. App. 36a.

ARGUMENT

1. There is no circuit conflict regarding the court of appeals' application of *Heckler v. Chaney*.

a. In *Heckler*, this Court granted certiorari to decide whether an agency's decision "*not to exercise* its enforcement authority . . . may be judicially reviewed." 470 U.S. at 828. Petitioners were inmates sentenced to death by lethal injection who asked the Food and Drug Administration ("FDA") to take investigative and enforcement actions under the Food, Drug & Cosmetic Act to prevent the use of certain drugs for human execution. *Id.* at 824. The FDA declined to do so, stating it would not exercise its jurisdiction to interfere with the state criminal justice system. *Id.* at 824-25. This Court determined that the FDA's decision was nonreviewable. It stressed that the exception to reviewability "remains a narrow one," *id.* at 838 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)), but ruled that an agency's decision not to prosecute or enforce "should be presumed immune from judicial review[,]" *id.* at 832.

This Court explained that decisions not to enforce are generally unsuitable for review because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," such as where to allocate agency resources and whether an agency is likely to succeed in its enforcement action. *Heckler*, 470 U.S. at 831. This Court further noted that an agency's refusal to act does not implicate its coercive powers. *Id.* at 832. By the same token, it observed, "when an agency *does* act to enforce, the action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner." *Id.* Finally, this Court analogized an agency's refusal to institute proceedings to a prosecutor's decision not to indict. *Id.*

In the absence of any adjudication or statutory guidelines for the agency to follow in exercising its enforcement powers, this Court concluded that the FDA's refusal to act on the inmates' request provided no basis for judicial review. *Heckler*, 470 U.S. at 837-38.

b. The court of appeals cited *Heckler* and faithfully applied it to the facts of this case. Pet. App. 17a-19a. There is, as discussed below, no circuit conflict. Petitioners simply dispute whether the court properly applied *Heckler* to the facts, an issue that does not warrant review.

Here, far from refusing to institute proceedings, or engaging only in pre-enforcement activities, FERC

adjudicated the claims before it. *See Heckler*, 470 U.S. at 832. While FERC may – and sometimes does – limit an inquiry to an investigation short of prosecution, that is not what it did here. As discussed above, FERC responded to the filing of the Puget complaint by holding a public hearing and taking evidence "to adjudicate a dispute between the parties as to whether refunds should be awarded." Pet. App. 18a-19a. FERC allowed interested parties (other Pacific Northwest purchasers and public agencies representing consumer interests) to intervene and directed the parties to participate in a public evidentiary proceeding to determine "whether there may have been unjust and unreasonable charges for" spot market sales in the Pacific Northwest.[5]

In the course of this adjudicative proceeding, the ALJ authorized discovery, received direct and/or rebuttal testimony from 40 witnesses and gave the parties the opportunity to cross-examine those witnesses. Pet. App. 417a. After the conclusion of the hearing and submission of post-hearing briefs, the ALJ issued proposed findings of fact and recommendations, and the parties were given the opportunity to file comments with FERC in response. Pet.

---

[5] Indeed, under FERC's investigative regulations, "[t]here are no parties, as that term is used in adjudicative proceedings, in an investigation under this part and no person may intervene or participate as a matter of right in any investigation under this part." 18 C.F.R. § 1b.11; *see also Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 458 (D.C. Cir. 2001) (according to FERC, "third parties have no right to participate in investigations").

App. 417a-418a. FERC then allowed the parties to supplement the record with additional evidence supporting refunds, including refunds for time periods not covered by the Puget complaint, and to submit evidence regarding manipulation of the energy markets by Enron and other sellers. Pet. App. 14a, 418a; Resp. App. 161-62. Finally, FERC reviewed the record, along with the ALJ's findings and recommendations, and, following oral argument before the full Commission, issued a written decision declining to order refunds. Pet. App. 379a.

Ignoring the adjudicative nature of the proceeding, Petitioners argue that FERC's decision to deny refunds is not reviewable because FERC did not "initiate a proceeding." Pet. 19-21 & n.5. This curious assertion is based on Petitioners' claim that FERC never set Puget's complaint for a hearing. *Id.* at 20 n.5. This is simply incorrect. A hearing was held, and the Commission itself recognized that the proceeding was adjudicative. *See* Pet. App. 418a n.15 (citing adjudicative statute). Indeed, in its decision following the hearing, FERC identified the PNW Refund Proceeding as the *only* proceeding in which Respondents' claims for relief could be adjudicated. FERC explicitly rejected the ALJ's recommendation that the Commission allow Puget to withdraw its complaint and dismiss the entire proceeding, stating that: "After allowing intervenors to pursue a preliminary hearing through the Puget complaint until now, it would be unfair to deny relief based on procedural issues and

leave them with no other forum to pursue their complaints." *Id.* at 388a.

FERC's November 2003 order denying Respondents' requests for rehearing further reflects its recognition that the proceeding was adjudicative under *Heckler*. The order responds at length to objections that the ALJ's accelerated procedural schedule prevented parties from fully presenting their refund case. It defends the procedures used, finding that they comported with due process on grounds that parties had the opportunity to engage in discovery, examine and cross-examine witnesses, and supplement the record following the hearing. Pet. App. 416a-419a. As this Court has repeatedly held, due process considerations arise only in adjudications, not investigative proceedings. *S.E.C. v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (the Due Process Clause is not implicated in an administrative investigation) (citing *Hannah v. Larche*, 363 U.S. 420, 440-43 (1960)); *see Hannah*, 363 U.S. at 442-43 (no right to cross-examination in investigative proceedings). FERC's recognition of its due process obligations (whether or not it met them) confirms that it viewed the proceeding as adjudicative.

In sum, FERC did not merely investigate and decide not to pursue enforcement. Instead, FERC adjudicated claims for relief and rendered a decision on the merits. Section 313 of the FPA provides that such decisions are reviewable by courts of appeals. 16 U.S.C. § 825*l*. The court of appeals in this case did nothing more than engage in the normal judicial

review of an agency's adjudicative decision, as all courts of appeals regularly do. Pet. App. 19a, citing cases.[6]

c. The circuit court cases cited by Petitioners are not in conflict with the court of appeals' decision. Petitioners' observation that "[f]our circuits interpret *Heckler* to hold that agency non-enforcement decisions do not become reviewable simply because the agency has taken investigative or pre-enforcement steps to inform its decision," Pet. 13, is irrelevant because FERC did not limit itself to such steps here.

Petitioners cite cases holding that agency decisions to settle are presumptively unreviewable. Pet. 13-15 (citing *New York State Dep't of Law v. FCC*, 984 F.2d 1209, 1213-15 (D.C. Cir. 1993); *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459-60 (D.C. Cir. 2001); *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007)). These cases have no bearing here. This case does not involve a settlement or anything analogous to one.

---

[6] In addition to the cases reviewing FERC decisions to grant or deny refunds that were cited by the court of appeals (*i.e.*, *Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); and *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003)), *see Westar Energy, Inc. v. FERC*, 568 F.3d 985 (D.C. Cir. 2009); *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008); *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804 (D.C. Cir. 2007); *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14 (D.C. Cir. 2006).

Petitioners also cite cases in which an agency conducted an investigation but decided not to pursue enforcement. Pet. 15-17 (citing *Greer v. Chao*, 492 F.3d 962 (8th Cir. 2007), *Sierra Club v. Larson*, 882 F.2d 128 (4th Cir. 1989), and *Sherman v. Black,* 315 F. App'x 347 (2d Cir. 2009)). These cases too are irrelevant. Petitioners misstate the unremarkable holding in each case that agency decisions to terminate investigations without further enforcement are unreviewable by asserting that the agencies in question "launched 'investigation[s]' in which complaining parties participated and were given opportunities to respond." Pet. 17. However, apart from *Greer*, in which the complaining party sought reconsideration, 492 F.3d at 963, there is no indication in any of these cases that any party participated or was given an "opportunit[y] to respond" to the investigation. Certainly none of the cases entailed an adversary proceeding of the kind FERC conducted here. To the contrary, these cases involved standard internal agency investigations that led to nonreviewable decisions declining to enforce violations alleged by the complaining parties. The agencies in those cases did not, as FERC did here, allow numerous parties to intervene, allow extensive discovery, hold formal public hearings before an ALJ, take testimony from numerous witnesses, or issue a substantive decision after the submission of post-hearing briefs.

d. Amici Law Professors ("Amici") assert that the court of appeals' opinion will cause "hopeless confusion," Amici Br. 8, tending to (1) "discourage

agencies from devoting resources to careful decisions about enforcement" for fear of exposing their decisions to judicial review; and (2) inconvenience private parties, who will lack certainty whether a given agency decision is subject to judicial review. Amici Br. 10-12, 17-18.

The court of appeals' decision will not result in either outcome. Courts have been reviewing FERC's adjudicative decisions to deny refunds for years. Fn. 6, *supra*. Amici point to no evidence that this well-established practice has discouraged agencies from making careful decisions about enforcement, or that it has harmed private parties in any way. To the contrary, judicial review serves to improve the quality of agency decisions and to prevent abuses of agency discretion.

Amici also claim that the court of appeals' decision subjects agencies to judicial review whenever they take "*any steps*" toward enforcement of the law, including "accept[ing] delivery of a petition seeking a § 206 petition," "issu[ing] a press release expressing concern about conditions in the market," or "obtain[ing] information from regulated entities." Amici Br. 8-9. The court's decision suggests no such thing; Amici take the word "steps" out of context to argue that anything an agency does is potentially subject to review.

Contrary to Amici's misreading, the court of appeals made clear in its decision that: "When an agency *has instituted* proceedings, meaningful standards exist to review what the agency has done:

'when an agency *does* act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner.'" Pet. App. 18a (quoting *Heckler*, 470 U.S. at 832). "Accordingly," the court of appeals stated, "where FERC has made a determination *to adjudicate a dispute or take steps toward enforcing a violation* of the law, the outcome it chooses is subject to judicial review[.]" *Id.* (emphasis added). *See also id.* at 18a-19a ("[H]ere . . . FERC has held hearings and taken evidence to adjudicate a dispute between the parties as to whether refunds should be awarded. Although the steps FERC has taken do not require FERC to find that refunds are appropriate, FERC's decision regarding the propriety of awarding refunds is reviewable by this court.").[7]

When the word "steps" is read in context, there is no doubt about the opinion's meaning or its congruity with *Heckler*. Far from "undermining" *Heckler*, Amici Br. 3, the court of appeals' opinion follows it to hold that when, as here, FERC has instituted an adjudicative proceeding rather than conduct an internal investigation, both FERC and the affected parties

---

[7] Moreover, unlike *Heckler*, which applies in situations where "there is no meaningful standard against which to judge an agency's decision," *Heckler*, 470 U.S. at 830, FERC's action here was taken in the context of a Section 206 complaint, and the FPA specifically establishes the standard for FERC's review – whether rates are unjust, unreasonable, unduly discriminatory or preferential. 16 U.S.C. § 824e(a).

should expect FERC's decision in that proceeding to be subject to judicial review.[8]

Finally, Amici suggest that FERC's decision to deny refunds is nonreviewable because it is based on equitable factors. Amici Br. 8-9. But FERC's refund decisions always involve equitable and policy factors. *See, e.g., Keyspan-Ravenswood*, 474 F.3d at 812-13; *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998). That does not render them any less reviewable, or any less subject to reversal if lacking a rational basis. *Id.*

2. The court of appeals did not improperly interfere with FERC's discretion to structure its own administrative proceedings when it ordered FERC to consider evidence of market manipulation in the PNW Refund Proceeding.

Petitioners argue that the court of appeals' mandate to FERC to consider evidence of market manipulation on remand in the PNW Refund Proceeding, rather than in the Gaming & Partnership

---

[8] FERC knows how to structure its proceedings to draw the line between an internal investigation and an adjudication. *See, e.g., PJM Interconnection, L.L.C., et al.*, 97 FERC ¶ 61,319 (2001) (FERC denied motions to intervene in investigation initiated by show cause order regarding allegations of affiliate abuse, noting that intervention not permitted as a matter of right in investigations). FERC obviously could have conducted an investigation here, but instead chose to invite interested persons to participate in an adjudicative proceeding.

Proceedings,[9] "interfered with FERC's ability to structure its own dockets." Pet. 28. This argument rests entirely on fundamental factual misstatements regarding the nature and scope of these proceedings, FERC's reasoning, and the court of appeals' determinations.

Petitioners assert that "FERC reasonably decided to investigate and remedy allegations of tariff violations in seller-specific proceedings . . . rather than in" the PNW Refund Proceeding. Pet. 27. Petitioners identify those separate proceedings as "new proceedings specifically to investigate and redress alleged market manipulation and tariff violations in both California *and the PNW*." *Id.* at 24 (emphasis added); *see also* Amici Br. 14 (referring to the "new proceedings specifically targeted at market manipulation in California and the Pacific Northwest").

Petitioners and Amici are incorrect. FERC specifically limited the scope of the Gaming & Partnership Proceedings to examination of "gaming and/or anomalous market behavior in violation of the California Independent System Operator Corporation's (ISO) and California Power Exchange's (PX) tariffs."[10]

---

[9] The Gaming & Partnership Proceedings were initiated by two FERC orders issued on the same day that FERC terminated the PNW Refund Proceeding: *Am. Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345 (2003) and *Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346 (2003). *See* Pet. 24.

[10] 103 FERC at 62,328 (P1); *see also* 62,328 (P2), 62,341 (P70, P71), 62,342 (ordering paragraph (A)), 62,348 (P2, P3),

(Continued on following page)

In fact, when Port requested on rehearing that FERC examine evidence of manipulation in the Pacific Northwest in the Gaming & Partnership Proceedings, FERC *refused*.[11]

Accordingly, FERC's decision to exclude "gaming practices that manipulated . . . the Pacific Northwest region," *see* fn. 11, *supra*, directly contradicts Petitioners' assertion that FERC "reasonably decided" to investigate tariff violations and market manipulation evidence in the Pacific Northwest in the separate Gaming & Partnership Proceedings.

In addition, FERC's orders initiating the Gaming & Partnership Proceedings never indicated that these proceedings were created for the purpose of addressing the new manipulation evidence submitted in the PNW Refund Proceeding. Likewise, there is no basis in the record of the PNW Refund Proceeding for

---

62,351 (P12), 62,357 (P45, P46), and 62,358 (ordering paragraph (B)).

[11] *Am. Elec. Power Serv. Corp., "Order Denying Rehearing,"* 106 FERC ¶ 61,020 at 61,061 (2004) ("Port of Seattle argues that the Partnership Gaming proceeding should have included a review of potential gaming practices that manipulated all of the Western Electricity Coordinating Council (WECC) electricity market, including the Pacific Northwest region. . . . We will deny rehearing; we will not broaden the scope of these proceedings."). FERC later permitted evidence involving Pacific Northwest manipulation in certain proceedings involving Enron, but otherwise maintained its approach to excluding from all other Gaming & Partnership Proceedings review of potential gaming practices in the Pacific Northwest, including those involving the Petitioners here.

Petitioners' assertion that FERC's rationale for declining to address market manipulation therein was that these issues would be addressed in the Gaming & Partnership Proceedings. FERC itself did not articulate any such rationale at the time.[12]

Petitioners also state incorrectly that the court of appeals "recognized that 'FERC already [was] addressing market manipulation in separate proceedings focusing on misconduct[.]'" Pet. 25 (citing Pet. App. 35a-36a). To the contrary, the court of appeals held that FERC "fail[ed] to rely on this reasoning below, *see Laclede Gas Co. [v. FERC]*, 997 F.2d [936,] 945 [D.C. Cir. 1993] (FERC order 'must stand or fall on the grounds articulated by the agency in that order')[.]" Pet. App. 35a.

Finally, Petitioners mischaracterize the court of appeals' decision by claiming that "the court did not review the reasons FERC gave" for denying refunds and "made no effort to explain how allegations of market manipulation, if proved, could alter FERC's balancing of equitable factors." Pet. 25. In fact, the court of appeals carefully explained that FERC's failure to consider and address relevant evidence of

---

[12] Indeed, FERC had opportunities in both its November 10, 2003 and February 9, 2004 orders denying rehearing (*see* Pet. App. 409a-447a and 448a-453a), to make the alleged connection between the June 25, 2003 Gaming & Partnership Proceedings orders and the order terminating the PNW Refund Proceeding, but it did not do so. Rather, FERC first asserted this connection in its 2005 brief to the Ninth Circuit.

market manipulation (which conflicted with the ALJ's findings of a lawful, competitive and functional market in the Pacific Northwest) was arbitrary and capricious. Pet. App. 33a-36a.[13]

3. The court of appeals gave due deference to FERC's interpretation of the Puget complaint; its rejection of that interpretation is consistent with D.C. Circuit precedent and no circuit conflict exists.

a. The court of appeals found that nothing in the Puget complaint supported FERC's interpretation that CERS' purchases in the Pacific Northwest for ultimate consumption in California were outside the scope of the complaint, that FERC's interpretation directly contradicted its interpretation of a closely-related complaint, and that FERC's interpretation was therefore "arbitrary, capricious, and an abuse of discretion." Pet. App. 31a.

Petitioners argue that the decision creates a conflict with the D.C. Circuit's standard for deference to agency rulings in *Burlington Northern R.R. Co. v. ICC*, 985 F.2d 589, 594-95 (D.C. Cir. 1993), *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 604 (D.C. Cir. 1997) and related cases. Citing these cases, Petitioners argue that the D.C. Circuit "consistently defers to agencies' constructions of parties' pleadings, particularly when the pleading falls in an area in

---

[13] In light of these facts, the cases cited by Petitioners for the proposition that an agency may address issues in separate proceedings are irrelevant.

which 'the Commission has greater technical expertise . . . than does the [c]ourt,'" but the court of appeals failed to do so here because it "declined to read Puget's complaint in its proper context," and rejected FERC's interpretation based "solely on two sentences from the complaint." Pet. 29-31.

Petitioners are incorrect. There is no circuit conflict. Relying on the very same D.C. Circuit precedents cited by Petitioners, the court of appeals expressly acknowledged that "we owe deference to FERC's interpretation of the scope of Puget's complaint." Pet. App. 31a.

Contrary to Petitioners' argument, the court of appeals' decision makes clear that the court did in fact search for a basis to defer to FERC's interpretation of the complaint read in its overall context but was forced to conclude that, "[o]n its face, Puget's complaint provides no indication of an intent to exclude refunds for energy purchased in the Pacific Northwest spot market for consumption outside the geographical area." Pet. App. 31a. Petitioners cannot plausibly claim that the court of appeals' reliance on the actual words of the complaint somehow ignored the complaint's overall context. As the decision clearly shows, the court of appeals took into consideration the context of the complaint in some detail, going so far as to include FERC's contradictory interpretation of the closely-related price-cap complaint filed in the California Refund Proceeding. There, FERC construed the scope of the complaint to include transactions in the California markets regardless of where

the energy was consumed. Pet. App. 32a. Unhappily for Petitioners, the court of appeals, again expressing its agreement with the D.C. Circuit, relied on *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 815-16 (D.C. Cir. 1998) in concluding that "[w]here an agency treats similar situations differently without reasoned explanation, its decision will be vacated as arbitrary and capricious." Pet. App. 32a. *See also Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987) ("[i]f the agency's interpretation of a contract has vacillated, deference might give the agency license to act arbitrarily by making inconsistent decisions without justification," making deference in that instance "inappropriate").

Deference does not mean complete abdication of judicial review. The D.C. Circuit standard applied by the court of appeals recognizes that courts cannot blindly defer to agency decisions that lack a rational basis. As the D.C. Circuit stated in *Amerada Hess*, cited by both Petitioners and the court of appeals, "deference . . . does not mean abdication of careful and thorough judicial review. . . . We will not accept FERC's interpretation . . . unless it is 'amply supported, both factually and legally.'" *Amerada Hess*, 117 F.3d at 604 (citations omitted). Here, after conducting the "careful and thorough" review endorsed by the D.C. Circuit in *Amerada Hess*, the court of appeals was compelled to reverse FERC's decision, just as the D.C. Circuit has done in similar circumstances. *See, e.g., Idaho Power Co. v. FERC*, 312 F.3d 454, 461 (D.C. Cir. 2002) (recognizing deference due to FERC's

interpretation of ambiguous tariff language but vacating FERC's decision because FERC's interpretation of the tariff was contrary to prior interpretations and "nonsensical"); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1289-95 (D.C. Cir. 2000) (recognizing that deference due to FERC decision dismissing complaints on summary disposition "does not [ ] mean passive acceptance of irrational or unexplained decision making" and reversing, finding FERC's decision "unconvincing" and lacking a reasoned explanation).

The court of appeals has done nothing more here than follow long-established principles of appropriate judicial review. The claimed circuit conflict is illusory.

b. Petitioners also claim that the court of appeals' failure to give due deference to FERC's interpretation of the Puget complaint undercuts the rule against retroactive ratemaking. Pet. 32. The rule against retroactive ratemaking flows from Section 206 of the FPA and requires that rates may be revised by FERC only after application by the seller, or after a complaint has been filed against the seller, thus providing the seller notice that a transaction may be subject to refund. *Id.* at 33. The court of appeals did not disturb this concept. The court merely held, correctly, that the Puget complaint provided clear notice to sellers "that they may be liable for refunds for sales of energy in those markets, regardless of where the energy would be consumed." Pet. App. 32a.

4. Finally, the limited holding of the decision below and the interlocutory posture of the case provide additional reasons for denying further review.

The court of appeals declined to reach the merits of the refund dispute and remanded to the Commission to conduct further proceedings, including evidentiary hearings as needed, in light of intervening case law. This Court grants review of an interlocutory decision only in extraordinary circumstances, *American Construction Co. v. Jacksonville, Topeka & K.W.R. Co.*, 148 U.S. 372, 384 (1893), and avoids doing so when it will induce inconvenience, litigation costs, and delay in determining ultimate justice, *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152-53 (1964). Petitioners cite no extraordinary circumstances justifying review at this juncture, because none exist. Further review at this stage will only cause delay and harm Respondents, who have been waiting for final resolution of the refund dispute for close to a decade.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

REX S. HEINKE*
JERRY E. ROTHROCK
L. RACHEL HELYAR
AKIN GUMP STRAUSS HAUER & FELD LLP
2029 Century Park East, 24th Floor
Los Angeles, CA 90067

Attorneys for the City of Seattle, Washington

**Counsel of Record*

FRANK R. LINDH
MARY F. MCKENZIE
ELIZABETH M. MCQUILLAN
KAREN P. PAULL
PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
505 Van Ness Avenue
San Francisco, CA 94102

Attorneys for the Public Utilities Commission of the State of California

PHILIP L. CHABOT, JR.
MCCARTHY, SWEENEY & HARKAWAY, P.C.
2175 K Street, NW, Suite 600
Washington, DC 20037

Attorneys for the Port of Seattle, Washington

EDMUND G. BROWN JR.
Attorney General of the State of California
MATT RODRIQUEZ
Chief Assistant Attorney General
GORDON BURNS
Deputy Solicitor General
DAVID M. GUSTAFSON
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
1515 Clay Street, 20th Floor
Oakland, CA 94612

KEVIN J. MCKEON
KATHERINE E. LOVETTE
HAWKE, MCKEON & SNISCAK LLP
100 North Tenth Street
Harrisburg, PA 17101

Attorneys for the People of the State of California ex rel. Edmund G. Brown Jr., Attorney General

MICHAEL J. KURMAN
ARENT FOX LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Attorneys for the City of Tacoma, Washington