No. 09-288 SEP 4 - 2009

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 AMERICA (US), L.P., AND TRANSCANADA ENERGY LTD.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA, ET AL.,
Respondents.

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

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit – in conflict with the decisions of at least four other circuits – erred in holding that the Federal Energy Regulatory Commission's ("FERC") use of a pre-enforcement evidentiary proceeding to inform its decision whether to enforce § 206 of the Federal Power Act, 16 U.S.C. § 824e, subjected to judicial review that agency's otherwise unreviewable choice not to initiate a § 206 enforcement proceeding.

2. Whether the Ninth Circuit deviated from the settled administrative law of other circuits by interfering with FERC's discretion to structure its own proceedings in ordering FERC to consider in one proceeding matters that FERC had determined were more properly addressed in a separate and ongoing proceeding.

3. Whether the Ninth Circuit, in conflict with the deferential approach in other circuits to reviewing agency interpretations of administrative complaints, exceeded its authority by rejecting FERC's interpretation of an administrative complaint that accorded with the complainant's own interpretation and was based on the entire context of the complaint.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Puget Sound Energy, Inc., Avista Corporation, Avista Energy, Inc., Constellation Energy Commodities Group, Inc. (f/k/a Constellation Power Source, Inc.), IDACORP Energy L.P., Morgan Stanley Capital Group Inc., Portland General Electric Company, Powerex Corp., Sempra Energy Trading LLC (f/k/a Sempra Energy Trading Corp.), Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.), and TransCanada Energy Ltd. participated in the proceedings before the Federal Energy Regulatory Commission ("FERC") and were intervenors in the court of appeals proceedings.

Respondent FERC was the respondent in the court of appeals proceedings.

Respondents other than FERC participated in the proceedings before FERC and were, as designated below, petitioners and/or intervenors in the court of appeals proceedings:

Petitioners:

California Public Utilities Commission

City of Seattle, Washington

City of Tacoma, Washington

People of the State of California *ex rel.* Edmund G. Brown, Jr. (replacing Bill Lockyer), Attorney General

Port of Seattle, Washington

Intervenors:

Alcoa Inc.

Arizona Public Service Company

Bonneville Power Administration

BP Energy Company

California Electricity Oversight Board

California Independent System Operator Corporation

California Public Utilities Commission

City of Los Angeles Department of Water and Power

City of Redding, California

City of Santa Clara, California

City of Seattle, Washington

City of Tacoma, Washington

Columbia Falls Aluminum Company, LLC

Duke Energy North America, LLC

Duke Energy Trading and Marketing, LLC

El Paso Marketing, LP (f/k/a El Paso Merchant Energy, LP)

M-S-R Public Power Agency

Modesto Irrigation District

Northern California Power Agency

PacifiCorp

People of the State of California *ex rel.* Edmund G. Brown, Jr. (replacing Bill Lockyer), Attorney General

Pinnacle West Capital Corporation

Port of Seattle, Washington

PPL EnergyPlus, LLC

PPL Montana, LLC

Public Service Company of Colorado

Public Service Company of New Mexico

Public Utility District No. 1 of Benton County, Washington

Public Utility District No. 1 of Franklin County, Washington

Public Utility District No. 2 of Grant County, Washington

Public Utility District No. 1 of Grays Harbor County, Washington

Southern California Edison Company

Tractebel Energy Marketing Inc.

Williams Power Company, Inc.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners Puget Sound Energy, Inc., Avista Corporation, Avista Energy, Inc., Constellation Energy Commodities Group, Inc. (f/k/a Constellation Power Source, Inc.), IDACORP Energy L.P., Morgan Stanley Capital Group Inc., Portland General Electric Company, Powerex Corp., PPL EnergyPlus, LLC, PPL Montana, LLC, Sempra Energy Trading LLC (f/k/a Sempra Energy Trading Corp.), Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.), and TransCanada Energy Ltd. state the following:

Puget Sound Energy, Inc. ("Puget") is organized under the laws of the State of Washington and is headquartered in Bellevue, Washington. Puget's principal office is located at 10885 NE 4th Street, Bellevue, Washington 98004. Puget provides electric and natural gas service to retail customers in a 6,000-square-mile area principally in the Puget Sound region within the State of Washington. Since February 6, 2009, Puget is an indirect, wholly owned subsidiary of Puget Holdings LLC, a consortium of investors led by Macquarie Infrastructure Partners I, Macquarie Capital Group Limited, the Canada Pension Plan Investment Board, and British Columbia Investment Management Corporation, and also includes Alberta Investment Management, Macquarie-FSS Infrastructure Trust, and Macquarie Infrastructure Partners II. None of these entities is publicly traded or has issued shares to the public, and no publicly held corporation owns 10% or more of the stock of Puget.

Avista Corporation is a corporation organized under the laws of the State of Washington with its principal office in Spokane, Washington. Avista Cor-

poration is an investor-owned, publicly traded natural gas and electric utility engaged in, among other things, the businesses of: (1) distributing natural gas for residential, commercial, and industrial use; and (2) generating, transmitting, and distributing electric power to wholesale and retail customers and transmitting electric power on behalf of third parties. Avista Corporation operates its regulated utility business under the trade name "Avista Utilities." Avista Corporation has no parent companies. No publicly held company owns 10% or more of Avista Corporation stock.

Avista Energy, Inc. is a wholly owned subsidiary of Avista Capital, Inc., which in turn is a wholly owned subsidiary of Avista Corporation. Avista Corporation is a diversified energy company that is publicly held. No publicly held corporation other than Avista Corporation owns 10% or more of the stock of Avista Energy, Inc.

Constellation Energy Commodities Group, Inc. (f/k/a Constellation Power Source, Inc.), through the undersigned counsel, hereby certifies upon information and belief that Constellation Energy Commodities Group, Inc. is an indirect, wholly owned subsidiary of Constellation Energy Group, Inc., a publicly traded company, and that no publicly held company holds 10% or more of Constellation Energy Group, Inc.'s stock. Constellation Energy Commodities Group, Inc. is an energy marketing company that operates throughout North America under a market-based rate schedule originally approved by the Federal Energy Regulatory Commission on May 15, 1997, in Docket No. ER97-2261-000. (On November 1, 2004, Constellation Power Source, Inc. changed its name to Constellation Energy

Commodities Group, Inc. ("CCG"). On November 23, 2004, CCG filed a Notice of Succession in Docket No. ER05-261-000 informing the Commission of the name change. On January 6, 2005, the Commission accepted CCG's Notice of Succession. (*See* Unpublished Letter Order, Docket No. ER05-261-000, Issued January 6, 2005).)

IDACORP Energy L.P. ("IE") is a limited partnership organized under the laws of the State of Delaware. During a portion of the period subject to the orders on review, it was engaged in the business of purchasing and reselling power and providing scheduling services. IE also is successor-in-interest to the power marketing contracts of Idaho Power Company d/b/a IDACORP Energy. Idaho Power Company ("IPC") is a corporation organized under the laws of the State of Idaho. Until IE succeeded to IPC's power marketing business, IPC was engaged in the business of purchasing and reselling power and providing scheduling services, in addition to its utility business. IPC remains engaged in the latter. IDACORP Energy Services Company, a Nevada corporation, holds 99% of the partnership interests in IE, and IDACORP, Inc. holds 1% of the partnership interests in IE. IPC and IDACORP Energy Services Company are wholly owned subsidiaries of IDACORP, Inc., a publicly traded Idaho corporation.

Morgan Stanley Capital Group Inc. states that its parent company is Morgan Stanley. Morgan Stanley is a publicly held corporation that has no parent corporation. Based on Securities and Exchange Commission Rules regarding beneficial ownership, State Street Bank & Trust Company ("State Street"), 225 Franklin Street, Boston, Massachusetts 02110, beneficially owned 13.4% of Morgan Stanley's

stock (based on the Schedule 13G filed February 17, 2009, by State Street, acting in various fiduciary capacities). As of May 22, 2009, Mitsubishi UFJ Financial Group, Inc. ("MUFG"), 7-1 Marunouchi 2-chome, Chiyoda-ku, Tokyo 100-8330, beneficially owned 339,839,033 shares of Common Stock, representing approximately 21.47% of the outstanding shares of Common Stock of the Company (assuming full conversion of all of the shares of Series B Preferred Stock held by MUFG at the Initial Conversion Price and further assuming no conversion of any other securities not beneficially owned by MUFG that are convertible or exchangeable into shares of Common Stock) (based on the Schedule 13D filed on October 23, 2008, as amended by the first amendment thereto, filed on October 30, 2008, and as further amended by the second amendment thereto, filed on May 22, 2009 (together, the "MUFG Schedule 13D")). Capitalized terms used and not defined in this description shall have the meanings set forth in the MUFG Schedule 13D.

Portland General Electric Company is an Oregon corporation with its principal place of business at One World Trade Center, 121 SW Salmon Street, 17th Floor, Portland, Oregon 97204. No publicly held corporation owns 10% or more of PGE's issued and outstanding common stock.

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.

Sempra Energy Trading LLC ("SET") (f/k/a Sempra Energy Trading Corp.) is a limited liability company 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 wholly owned subsidiary of RBS Sempra Commodities LLP ("RBS Sempra Commodities"), a UK limited liability partnership. RBS Sempra Commodities is owned by The Royal Bank of Scotland plc ("RBS"), which directly owns 51% of the voting interests, and Sempra Energy, which indirectly owns 49% of the voting interests. RBS is a wholly owned subsidiary of The Royal Bank of Scotland Group plc, a public limited company registered in Scotland. Sempra Energy is a publicly traded company. No other publicly held company has a 10% or greater ownership interest in SET.

Shell Energy North America (US), L.P. (f/k/a Coral Power, L.L.C.) is an indirect subsidiary of Shell Oil Company. Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc. Shell Petroleum Inc. is a wholly owned subsidiary of Shell Petroleum N.V. Royal Dutch Shell plc, whose shares are publicly traded, owns 100% of Shell Petroleum N.V. The other parent companies of Shell Energy listed above are not publicly traded. No publicly held company has a 10% or greater ownership interest in Royal Dutch Shell plc.

TransCanada Energy Ltd. ("TCE") is a Canadian corporation, with its principal place of business in the City of Calgary, Alberta, Canada. TCE owns generating facilities that are located in Alberta, Canada, and sells capacity and energy from those facilities exclusively within Canada. TCE is an indirect, wholly owned subsidiary of TransCanada PipeLines

Limited, which in turn is a direct, wholly owned subsidiary of TransCanada Corporation, a holding company that was created under a plan of arrangement approved by the common shareholders of TransCanada PipeLines Limited on April 25, 2003, and subsequently by the Court of Queen's Bench of Alberta, Canada. Common shares in TransCanada Corporation are traded on the Toronto and New York stock exchanges. There is no publicly held company directly owning 10% or more of TCE.

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Puget Sound Energy, Inc. ("Puget") et al. respectfully petition for a writ of certiorari to review the U.S. Court of Appeals for the Ninth Circuit's judgment in this case.

INTRODUCTION

In a judgment of enormous practical significance for administrative law generally and as applied to multi-billion dollar litigation arising out of the 2000-2001 California energy crisis, the Ninth Circuit created multi-circuit conflicts on three questions of administrative law that routinely affect agency practice.

The first concerns when an agency's exercise of discretion to terminate pre-enforcement activities without taking enforcement action may be subject to judicial review. Reconstruing *Heckler v. Chaney*, 470 U.S. 821 (1985), the Ninth Circuit established a presumption *in favor of* judicial review whenever the agency "take[s] steps towards enforcing a violation of the law" that inform its decision whether to initiate an enforcement action. Pet. App. 18a. That innovation departs from the generally accepted presumption in other circuits *against* reviewability in those circumstances.

The *Heckler* principle serves important interests: affording federal agencies flexibility over their decisions whether to enforce; and assuring targets of preliminary agency investigations that termination offers an end to their legal jeopardy. Left uncorrected, the Ninth Circuit's approach threatens to expand significantly the domain of judicial review of discretionary agency decisions not to enforce. Moreover, the Ninth Circuit's novel assertion of judicial review of preliminary agency action here directly negates Congress's command that the Federal Energy Regulatory Commission ("FERC") promptly resolve cases

arising out of the California energy crisis and reopens a closed administrative proceeding in which FERC had decided that the equities weighed against initiating an enforcement proceeding for Pacific Northwest ("PNW") transactions.

The Ninth Circuit then compounded its *Heckler* error in two ways: by failing to give appropriate deference to FERC's management of its own dockets and by rejecting FERC's interpretation of petitioner Puget's administrative complaint. The court ordered FERC to consider allegations of tariff violations on remand, notwithstanding that FERC had already investigated those allegations in separate, FERC-initiated proceedings. The court's decision to override FERC's discretionary judgment to address distinct issues in different proceedings conflicts with other circuits' approach.

The court similarly disregarded FERC's construction of Puget's complaint, which had sought only price caps for wholesale electricity sales to serve PNW customers. Whereas FERC had construed the complaint to *exclude* transactions to serve California customers, the Ninth Circuit (in conflict with other circuits' approach) read the complaint to include electricity sales to the California Department of Water Resources ("CDWR") to serve Californians that occurred months after Puget filed its complaint.

The Ninth Circuit's novel interpretations of established administrative law principles transform a decade-old proceeding about price caps for PNW electricity purchases into a new case seeking billions in refunds for California transactions without any contemporaneous notice to sellers.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-37a) is reported at 499 F.3d 1016. FERC's orders (Pet. App. 38a-110a, 111a-377a, 378a-408a, 409a-447a, 448a-453a) are reported at 96 FERC ¶ 61,120, 96 FERC ¶ 63,044, 103 FERC ¶ 61,348, 105 FERC ¶ 61,183, and 106 FERC ¶ 61,109.

JURISDICTION

The court of appeals entered its judgment on August 24, 2007. Petitions for rehearing were denied on April 9, 2009. *See* Pet. App. 454a. On June 29, 2009, Justice Kennedy extended the time for filing a certiorari petition to and including September 4, 2009. *See id.* at 465a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Power Act ("FPA"), 16 U.S.C. §§ 791a *et seq.*, are set forth at Pet. App. 455a-464a.

STATEMENT OF THE CASE

1. Statutory Background

The FPA charges FERC with ensuring that interstate electricity rates are "just and reasonable." 16 U.S.C. § 824d(a). FPA § 206 authorizes FERC to conduct a hearing "upon its own motion or upon complaint" to determine whether an effective rate is unlawful. *Id.* § 824e(a). If FERC chooses to hold a hearing under § 206, it "shall specify the issues to be adjudicated" and, if "after [such] hearing" it "find[s] that any rate" is "unjust [or] unreasonable," FERC "shall determine" and "fix" "the just and reasonable rate." *Id.*

Section 206 also authorizes FERC to exercise discretion in providing refunds for unlawful rates. *See*

id. § 824e(b). FERC can only order refunds for a period after the "refund effective date," which the applicable FPA provision required to be at least 60 days after the filing of a complaint or publication of FERC's decision to initiate a proceeding. *See id.* § 824e(b) (2000).

2. The California Energy Crisis and FERC's Proceedings

a. This Court and others have documented the events leading up to the energy crisis in California and other western U.S. markets in 2000-2001. *See, e.g.*, *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733, 2742-43 (2008); *Public Utils. Comm'n v. FERC*, 462 F.3d 1027, 1037-42 (9th Cir. 2006) ("*PUC*").

In mid-2000, the price of electricity in the California electricity market "jumped dramatically" because of "a combination of natural, economic, and regulatory factors." *Morgan Stanley*, 128 S. Ct. at 2742 (internal quotations omitted). California experienced disruptive "blackouts, brownouts, and system emergencies." *PUC*, 462 F.3d at 1040 (footnote omitted).

b. This case concerns the distinct but related market for electricity in the Pacific Northwest – Oregon, Washington, Idaho, and parts of Montana, Nevada, Utah, and Wyoming. *See* 16 U.S.C. § 839a(14). Unlike California's centralized exchanges, the PNW market operates primarily through bilateral contracts. *See* Pet. App. 9a, 394a. The PNW wholesale power market is one of the nation's most liquid – "electricity in the region is traded an average of six times between the point of generation to the last wholesale purchaser in the chain." *Id.* at 398a-399a.

PNW utilities generally sell power south, into California, during the summer months, when demand

there is high and PNW hydroelectric generation conditions are favorable. *See id.* at 311a. In the winter months, PNW utilities generally import power, particularly from California, "to supplement local supplies during winter cold spells" when generation conditions are unfavorable and local heating demand is high. *Id.*

In 2000, PNW energy prices "rose dramatically." *Id.* at 391a (internal quotations omitted). The increases were driven in part by "supply and demand fundamentals," *id.*, such as unusually unfavorable winter weather, *see id.* at 314a-315a, and by ongoing California market dysfunctions, *see id.* at 8a-9a, 391a.

c. On October 26, 2000, petitioner Puget – the sole complainant before FERC – filed a § 206 complaint. *See* C.A. J.E.R. 2-16. Puget sought "a price cap for wholesale sales of energy and capacity" into the PNW "equal to the lowest cap on prices," if any, FERC established in response to a prior request by San Diego Gas & Electric Co. ("SDG&E") for price caps in California. *Id.* at 13; *see also id.* at 3-4, 14-15. Puget – an investor-owned utility serving retail customers in Washington State – feared being subjected to "uncapped prices when [it] need[ed] [to buy] power" from California in the winter, but receiving only capped California prices when selling power south in the summer. *Id.* at 12. Puget sought to avoid having to sell low and buy high, whipsawed by price caps applicable to California but not the PNW. *See id.* Puget expressly disclaimed interest in refunds and sought "prospective only" relief. *Id.* at 13.

On December 15, 2000, FERC dismissed Puget's complaint, "declin[ing] to implement a region-wide price cap" or to initiate a § 206 hearing. *See San*

Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs., 93 FERC ¶ 61,294, at 62,019 (2000). Puget sought rehearing of FERC's dismissal of its complaint "to the extent the order declines to impose a price cap" in the PNW. C.A. J.E.R. 86.

On April 26, 2001, however, FERC imposed a price cap in California markets. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,115, at 61,353-65 (2001). And, on June 19, 2001, FERC extended that price cap to the PNW. *See San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Servs.*, 95 FERC ¶ 61,418, at 62,567-70 (2001).

On June 22, 2001, Puget moved to withdraw its rehearing request and to dismiss its complaint. *See* C.A. J.E.R. 97-102. Puget explained that FERC's "June 19 Order satisfie[d] Puget Sound's Complaint because it implement[ed] price" caps in the PNW that matched those in California – the very remedy Puget had requested. *Id.* at 100. Several parties – including parties that had not previously (or timely) sought to intervene – opposed Puget's motion. *See* Pet. App. 12a-13a; C.A. J.E.R. 103-04. Those parties for the first time "sought to expand the complaint proceeding and the requested remedy" to include "retroactive refunds for spot market bilateral sales in the Pacific Northwest." Pet. App. 378a-379a; *see* C.A. J.E.R. 104.

In July 2001, FERC decided on its own motion to "establish[] another proceeding . . . to explore whether there may have been unjust and unreasonable charges . . . in the Pacific Northwest . . . and the calculation of any refunds associated with such charges." Pet. App. 39a. FERC "establish[ed] a separate preliminary evidentiary proceeding" before

an administrative law judge ("ALJ") to "help the Commission to determine the extent to which the dysfunctions in the California markets may have affected decisions in the Pacific Northwest," to "assist[] the Commission in understanding the Pacific Northwest spot market and the proper action to be taken," and to "encourage the parties to try to settle past accounts." *Id.* at 102a-103a, 390a.

In short, FERC "desired additional information before making a decision" whether to initiate § 206 hearings that could lead to refunds. *Id.* at 425a. FERC expressly declined to set a refund effective date under § 206, explaining it had not yet revised its "previous determination not to set [Puget's] complaint for hearing." *Id.* at 102a n.75; *see* 16 U.S.C. § 824e(b); Pet. App. 382a (FERC "did not set the complaint for hearing under FPA Section 206 or establish a refund effective date in the July 25 Order").

In recommendations and findings (*see* Pet. App. 111a), the ALJ first determined that purchases by the California Energy Resources Scheduling division ("CERS") of CDWR fell outside the scope of Puget's complaint, which initiated – and therefore defined – the proceeding's scope.[1] *See id.* at 209a-210a. The ALJ reasoned that CDWR's transactions were "not to a PNW load server," but instead served California end-user customers, while "Puget's complaint specifically referred" to sales serving PNW load. *Id.* at 209a, 371-372a.

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[1] In January 2001, the California legislature created CERS because the state's retail utilities were "fast becoming insolvent." *PUC*, 462 F.3d at 1042. CDWR, through CERS, made bulk power purchases worth more than $5 billion for California consumers. *See id.*

The ALJ next recommended that the Commission not initiate a § 206 proceeding. *First*, the evidence failed to establish that prices were unjust or unreasonable. *See id.* at 326a. *Second*, a refund proceeding would prove unworkable because it would entail recalculating hundreds of thousands of transactions. *See id.* at 369a-370a.

On December 19, 2002, following the public disclosure of evidence suggesting that Enron had manipulated energy prices in California, FERC allowed the parties "to 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 and propose[] new and/or modified findings of fact.'" *Id.* at 14a (quoting C.A. J.E.R. 526).

On June 25, 2003, FERC terminated this proceeding. Citing *Heckler v. Chaney*, FERC decided in its discretion not to pursue a § 206 enforcement action for PNW transactions. *See id.* at 402a & n.64. "Based on the totality of the circumstances," FERC concluded that, "even if" a § 206 hearing were to conclude that "prices were unjust and unreasonable," FERC would not order sellers to pay refunds, because such refunds "would not result in an equitable resolution of the matter." *Id.* at 401a-402a.[2]

FERC's conclusion rested on several equitable factors. *See id.* at 392a-402a. FERC relied on the ALJ's factual findings that "electricity in the region is traded an average of six times" before being consumed, and that "approximately 500,000 transactions

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[2] The same day it terminated the PNW proceeding, FERC issued separate orders opening new proceedings to investigate and redress alleged market manipulation and tariff violations in both California and the PNW. *See infra* p. 24.

would have to be recalculated if refunds are required." *Id.* at 398a-399a. FERC concluded that "an immense number of transactions [would be] subject to refund in th[e] case," requiring "prolonged time and effort to unravel" and making it, "in many instances," "nearly impossible to match a particular sale with its source or to calculate the alleged refund due with precision." *Id.* (internal quotations omitted).

Even if the "practical difficulty of determining the chain[] of transactions" could be overcome, FERC further observed that "[a] large portion of the power bought and sold in the Pacific Northwest is by governmental entities" over which FERC "lack[ed] authority to impose refund obligations," *id.* at 394a-395a, 400a, and that "there will be few chains of transactions that will not contain a non-jurisdictional transaction," *id.* at 400a. Consequently, "the burden of paying refunds will fall on a limited class of jurisdictional sellers," while the government entities involved in numerous transaction chains could "receive refunds for their high-priced purchases while they are exempt from providing refunds for any high priced sales they may have made." *Id.* at 395a (internal quotations omitted). "Such an outcome," FERC determined, "is not equitable." *Id.* at 400a.

Finally, FERC reasoned that awarding refunds would "unfairly punish[]" utilities that "prudently engaged in a procurement strategy" that relied on long-term rather than spot market transactions and would "undermine the credibility of the regulatory process and could jeopardize investment in energy infrastructure." *Id.* at 397a-398a (internal quotations omitted).

On rehearing, FERC reaffirmed that "[t]he time and resources that must be devoted to refund cal-

culations is a legitimate consideration within the Commission's discretion," *id.* at 442a, and that "refunds are not appropriate because such relief would arbitrarily remedy only a portion of the regional market," *id.* at 436a. FERC noted that, "[i]n reaching its decision," it "considered the complete record, including the material submitted in the [additional] filings" alleging market manipulation. *Id.* at 419a.

FERC also adopted ALJ findings that CDWR's transactions were outside Puget's complaint. *See id.* at 432a n.43. On further rehearing, FERC reaffirmed its understanding that sales to CDWR were outside the complaint's scope because they were not transacted to "serv[e] load in the Pacific Northwest but [instead to] serv[e] California load." *Id.* at 452a-453a.

3. The Decision Below

The court of appeals granted the petitions for review in part and remanded for further Commission proceedings.

The court first held that FERC's decision not to initiate a § 206 enforcement proceeding for the PNW was reviewable under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 701(a)(2). The court rejected FERC's argument that the agency's decision not to enforce § 206 was committed by law to its discretion. *See* Pet. App. 17a-19a. The court reasoned that "*Heckler* limited the presumption of unreviewability to 'agency *refusals to institute* investigative or enforcement proceedings.'" *Id.* at 18a (quoting *Heckler*, 470 U.S. at 838). Under the court's test, once an agency has "take[n] steps towards enforcing a violation of the law, the outcome it chooses is subject to judicial review." *Id.* Because FERC "made a decision to commit resources to an examination of whether

refunds are warranted," "held hearings," and "t[ook] evidence," the court deemed that decision reviewable. *Id.* at 18a-19a.

Although the court "decline[d] to reach the merits of FERC's ultimate decision to deny refunds," *id.* at 36a, it remanded for further proceedings in light of two other rulings. *First*, the court reversed FERC's interpretation of Puget's complaint, holding that "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." *Id.* at 31a.

Second, the court held that FERC failed adequately to consider evidence of market manipulation. *See id.* at 33a-36a. The court remanded for FERC to consider that evidence "in detail" and to "account for it in any future orders regarding the award or denial of refunds in the Pacific Northwest proceeding." *Id.* at 36a.[3]

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[3] Several petitioners, such as Puget, IDACORP, Morgan Stanley Capital Group, and Portland General, have reached settlements with CDWR and respondent California, which release, among other things, claims from CDWR relating to transactions at issue here. Some respondents, such as Port of Seattle and City of Seattle, which were petitioners below, are not parties to those settlements. Despite those settlements, the Ninth Circuit's decision exposes these petitioners to potential refund claims for sales to utilities that resold the power (directly or indirectly) to CDWR.

REASONS FOR GRANTING THE PETITION

I. THE NINTH CIRCUIT ERRONEOUSLY HELD – IN CONFLICT WITH FOUR OTHER CIRCUITS – THAT PRELIMINARY FACT-FINDING TO INFORM A DECISION COMMITTED TO AGENCY DISCRETION RENDERS THAT DECISION REVIEWABLE

APA § 701(a)(2) bars judicial review of "agency action[s] . . . committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In *Heckler*, this Court held that § 701(a)(2) creates a "presumption" that an "agency's decision not to undertake certain enforcement actions" is unreviewable. 470 U.S. at 831. The Ninth Circuit held that *Heckler*'s presumption of unreviewability does not apply whenever an agency "take[s] steps towards enforcing a violation of the law" even if the agency, after gathering information to inform its discretion, chooses not to pursue enforcement. Pet. App. 18a. That judgment cannot be squared with other circuits' holdings that agencies may utilize investigative proceedings to inform their exercises of discretion without rendering those decisions reviewable. The Ninth Circuit's misunderstanding of *Heckler* led to error in a case with tremendous practical consequences for resolving the multi-billion dollar California energy crisis litigation.

A. The Decision Below Conflicts With Other Circuits' Interpretation Of *Heckler*'s "Presumptively Unreviewable" Standard

1. *Heckler* held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." 470 U.S. at 831; *see* 5 U.S.C. § 701(a)(2). Such decisions are "general[ly] unsuitab[le] for judicial review" because they "often

involve[] a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831. More particularly, "review is not to be had if [a] statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at 830.

2. Four 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. *See Schering Corp. v. Heckler*, 779 F.2d 683, 685-87 (D.C. Cir. 1985); *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); *Greer v. Chao*, 492 F.3d 962, 966-67 (8th Cir. 2007) (O'Connor, J., sitting by designation); *Sierra Club v. Larson*, 882 F.2d 128, 131-33 (4th Cir. 1989); *Sherman v. Black*, 315 F. App'x 347, 349 (2d Cir. 2009). By contrast, the Ninth Circuit's conflicting standard posits that such "steps towards enforcing a violation of the law" render "the outcome [the agency] chooses . . . subject to judicial review." Pet. App. 18a. This Court should resolve the circuits' disagreement over *Heckler*'s proper scope.

D.C. Circuit. The D.C. Circuit has consistently held that agency decisions to settle rather than to pursue enforcement actions – *i.e.*, opting not to proceed with enforcement after some investigation or pre-enforcement analysis has already occurred – fall within the scope of *Heckler*'s presumptive unreviewability.[4]

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[4] For both settlements and decisions not to enforce, the agency chooses not to exercise its statutory enforcement authority

In *New York State Department of Law v. FCC*, for example, the D.C. Circuit held that *Heckler*'s presumption of unreviewability applied to "an agency's decision to settle or dismiss an enforcement action." 984 F.2d at 1214. The Federal Communications Commission ("FCC") had issued a "show cause" order after learning of possible Communications Act violations through a routine audit. *See id.* at 1211-12. After several months of investigation and negotiation, the FCC and the carriers entered into a consent decree under which the FCC agreed not to bring a formal enforcement action. *See id.* at 1212. Several intervenors contested the FCC's decision to terminate the proceeding.

In rejecting the intervenors' challenge, the D.C. Circuit observed that "the FCC is best positioned to weigh the benefits of pursuing an adjudication against the costs to the agency (including financial and opportunity costs) and the likelihood of success." *Id.* at 1213. The court concluded that those same discretionary considerations informed both "the discretionary decision to initiate an action" and "the . . . decision to settle the enforcement action." *Id.* at 1214. The governing statute in neither situation restricted the agency's discretion. *See id.* at 1215 ("Certainly the statute does not lay out any circumstances in which the agency is required to undertake *or to continue* an enforcement action.") (emphasis added).

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after gathering information to inform that discretionary choice. The agency may determine that *some* remedy short of what it could obtain through enforcement utilizes agency resources most effectively. FERC below reasoned in part that imposition of the region-wide price cap provided "appropriate relief." Pet. App. 379a.

The D.C. Circuit reiterated that holding in *Baltimore Gas & Electric*, concluding that FERC's decision to settle rather than to bring an enforcement action following an investigation was "committed to the agency's nonreviewable discretion." 252 F.3d at 457. FERC had reason to believe that a natural gas vendor had violated the Natural Gas Act ("NGA"), 15 U.S.C. § 717f(c), by abandoning capacity in its natural gas lines. FERC initiated an "investigation into whether [the vendor] had unlawfully abandoned service without first obtaining FERC approval." 252 F.3d at 457. That investigation proceeded for four years before FERC decided to settle without determining whether a violation had occurred. *See id.*

A customer of the vendor then challenged the settlement. The D.C. Circuit observed that *Heckler* "sets forth the general rule that an agency's decision not to exercise its enforcement authority, *or to exercise it in a particular way*, is committed to its absolute discretion." *Id.* at 459 (emphasis added). The court reasoned that "FERC's decision to settle . . . , and its consequent decision not to see its enforcement action through to fruition, is a paradigmatic instance of an agency exercising its presumptively nonreviewable enforcement discretion." *Id.* at 460.

The D.C. Circuit adheres to that approach. *See Association of Irritated Residents v. EPA*, 494 F.3d 1027, 1035 (D.C. Cir. 2007).

Eighth Circuit. In *Greer v. Chao*, the Eighth Circuit held that "the manner in which an agency opts to investigate a complaint is largely a matter left to the agency's discretion." 492 F.3d at 965. The agency there decided – after an 18-month investigation – not to pursue enforcement of an individual's administrative complaint. *See id.* at 963. Although the indi-

vidual challenged "the Secretary's failure to investigate certain aspects of his larger complaint," the court reasoned that "at bottom [the complainant] objects to the Secretary's decision not to initiate enforcement proceedings." *Id.* at 966. Accordingly, the fact and content of the agency's investigation did not remove its discretionary enforcement decision from *Heckler*'s presumption of unreviewability: "[d]eciding which claims are facially without merit, which claims merit investigation, and the level of investigation desirable, all are enforcement-related decisions," and are not subject to review. *Id.* at 965 (internal quotations omitted).

Fourth Circuit. In *Sierra Club v. Larson*, the Fourth Circuit similarly held that an agency's decision not to initiate an enforcement proceeding – after conducting "a fact-finding investigation" and producing a "report" recommending "corrective steps" short of enforcement – remained unreviewable. 882 F.2d at 130. The court concluded that the investigation and report were not themselves reviewable, *see id.* at 132, and that those steps did not open to review the agency's decision not to prosecute. The court concluded that "the agency exercised its discretion, after an investigation, by declining to proceed any further." *Id.*

Second Circuit. Finally, the Second Circuit concluded in *Sherman v. Black* that an agency decision not to enforce after an investigation was unreviewable. *See* 315 F. App'x at 349 ("[The agency] reviewed the evidence, discussed the circumstances alleged in [the] complaint, and determined that [the] allegations did not warrant further action.").

3. The Ninth Circuit below articulated a conflicting legal standard to justify judicial review of FERC's

decision not to enforce § 206, following a pre-enforcement, preliminary fact-finding proceeding. The court's standard authorizes judicial review of agency pre-enforcement actions where the agency has taken "steps towards enforcing a violation of the law" and has "made a decision to commit resources to an examination of whether" enforcement proceedings should be initiated. Pet. App. 18a.

Yet those very same steps had been taken in the other circuits' cases described above. The FCC issued a "show cause" order and conducted discovery in *New York State Department of Law*, 984 F.2d at 1211-12; FERC conducted a four-year investigation into potential wrongdoing in *Baltimore Gas & Electric*, 252 F.3d at 457; and the agencies in *Greer*, *Sierra Club*, and *Sherman* each launched "investigation[s]" in which complaining parties participated and were given opportunities to respond. 492 F.3d at 963; 882 F.2d at 130; 315 F. App'x at 349. This case, therefore, would have been decided differently if considered by one of those circuits.

B. Preliminary Fact-finding Does Not Render Decisions Committed By Law To Agency Discretion Reviewable Under The APA

The Ninth Circuit's rule finds no support in APA § 701(a)(2) or this Court's interpretation of that statute in *Heckler* and its progeny. The touchstone of reviewability is congressional intent: "If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2)"; "if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law.'" *Heckler*, 470 U.S. at 834-35. Generally, whether

Congress has provided meaningful standards for judicial review of an agency decision not to prosecute is a question of statutory interpretation independent of the agency's procedures in making that decision.

Similarly, the three reasons why this Court found "judicial review of agency decisions to refuse enforcement" to be "general[ly] unsuitab[le]" apply regardless of whether the agency has taken steps toward exercising its enforcement discretion. *First*, "an agency decision not to enforce often involves a complicated balancing" of factors relating to the proper use of the agency's resources: "the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831. An agency's preliminary inquiry to inform its enforcement discretion does not change the nature of that calculus.

Second, "when an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights." *Id.* That observation holds regardless of whether the agency first conducts investigatory proceedings.

Third, the Court's analogy to prosecutorial discretion, *see id.*, extends to agencies' pre-enforcement investigative activities. Just as a prosecutor may consider evidence before declining to indict, so too may an agency investigate facts before declining to enforce a statute.

C. The Ninth Circuit Erroneously Found FERC's Decision Not To Pursue Enforcement Under § 206 To Be Reviewable

After granting all the relief Puget sought in its complaint, FERC acted "upon its own motion," 16 U.S.C. § 824e(a), to explore whether to award refunds for PNW electricity sales during the energy crisis. FERC held a "separate preliminary evidentiary proceeding," Pet. App. 102a, to gather "additional information before making a decision" whether to initiate a hearing under § 206, *id.* at 425a. From that information, FERC decided not to set the matter for hearing under § 206 and to cease enforcement activities. That decision is not reviewable.

In holding otherwise, the Ninth Circuit did not analyze § 206's terms as *Heckler* requires. Instead, the court erroneously held that, because the Commission "ha[d] already made a decision to commit resources to an examination of whether refunds [were] warranted," any decision resulting from that examination was reviewable. *Id.* at 18a.

The FPA grants FERC unfettered discretion to decide whether to take enforcement action on its own motion under § 206. That section does not address *when* or *why* the Commission should hold a "hearing"; rather, it provides that, "*[w]henever* the Commission, after a hearing held upon its own motion . . . , shall find that any rate . . . is unjust [or] unreasonable, . . . the Commission shall determine the just and reasonable rate." 16 U.S.C. § 824e(a) (emphasis added). The statute specifies what a "motion of the Commission to initiate a proceeding" must contain, *id.*; requires FERC, "*[i]f* . . . [it] shall decide to hold a hearing," to "fix by order the time and place of such hearing and [to] specify the issues to be adjudicated,"

id. (emphasis added); and requires FERC, "*[w]henever* [it] institutes a proceeding," to "establish a refund effective date," *id.* § 824e(b) (emphasis added). Those provisions constrain FERC's discretion *after* it initiates a hearing on its own motion under § 206, without restricting its discretion to conduct preliminary fact-finding investigations to inform its decision.

Nor does the FPA constrain FERC's exercise of its fact-finding powers. FPA § 307 provides that "[t]he Commission *may* investigate any facts . . . *which it may find necessary or proper* in order to determine whether" a FPA violation has occurred. 16 U.S.C. § 825f(a) (emphases added). And § 309 authorizes FERC "to perform any and all acts . . . necessary or appropriate to carry out the provisions of this chapter." *Id.* § 825h. "[A]n administrative agency's decision to conduct or not to conduct an investigation is committed to the agency's discretion." *General Motors Corp. v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979) (per curiam).

As in *Heckler*, "[t]he Act's enforcement provisions . . . commit complete discretion to the [agency] to decide how and when they should be exercised." 470 U.S. at 835. Absent any statutory guidance suggesting how, when, or why FERC should act to enforce § 206 on its own motion, there is "no law to apply." *Id.* at 830-31 (internal quotations omitted).

FERC made an unreviewable decision not to "initiate a proceeding" under § 206 that could lead to refunds for PNW sales. 16 U.S.C. § 824e(b). It repeatedly reaffirmed that it did not set Puget's complaint for a hearing, *see* Pet. App. 382a, 417a,[5] and did not

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[5] FERC initially dismissed Puget's complaint without setting it for a hearing, and Puget's complaint remained dismissed dur-

issue an order "fix[ing] . . . the time and place of such hearing and . . . specify[ing] the issues to be adjudicated," *see id.* at 102a-103a. FERC did not set a "refund effective date" as § 206 requires "[w]henever the Commission institutes a proceeding under this section." 16 U.S.C. § 824e(b); *see* Pet. App. 102a n.75, 382a, 417a, 424a n.26.

The Ninth Circuit below erroneously relied on *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990), as authority for judicial review of an agency's decision to terminate an enforcement action once begun. There, the FCC "set the [challenged] tariffs for a hearing" under 47 U.S.C. § 204, a statute similar to FPA § 206. *MCI*, 917 F.2d at 33. The FCC had designated certain questions for inquiry – just as FERC would have been required to do had it initiated a § 206 hearing in this case – and later abandoned those questions after having taken evidence and arguments. *See id.* at 41-42. The D.C. Circuit there held that the FCC had initiated an enforcement action and needed to provide a reasoned explanation for its subsequent decision not to reach certain issues. *See id.* at 42. Here, by contrast, FERC never initiated an enforcement action under FPA § 206.[6]

Finally, FERC's decision not to initiate a § 206 proceeding for the PNW is plainly "unsuitab[le]" for review under *Heckler*. 470 U.S. at 831. FERC's assessment that the equities weighed against refunds,

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ing the Commission's separate preliminary evidentiary proceeding. *See* Pet. App. 417a.

[6] The Ninth Circuit opined that it "regularly exercise[s] judicial review over FERC's decision to grant or deny refunds." Pet. App. 19a. But none of the decisions cited reviewed a determination not to hold a hearing under FPA § 206.

even assuming that rates were unjust or unreasonable, turned on the impracticability of determining who should get such refunds, the arbitrariness of refunds given FERC's lack of jurisdiction over many sellers, and the agency's conclusion that refunds would reward uneconomic behavior. *See* Pet. App. 390a-402a. Those considerations are "peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831.

D. The Proper Understanding Of *Heckler*'s "Presumptive Unreviewability" Standard Raises A Question Of Great Practical And Recurring Importance

Agencies routinely take steps to inform themselves before deciding whether to bring enforcement actions. By injecting the specter of judicial review into those steps, the Ninth Circuit's rule will have significant adverse consequences for both agency decision-making and those entities (like petitioners here) that cannot order their affairs in reliance on the agency's decision not to take any enforcement action against them. When an agency crosses the line etched by the Ninth Circuit in ways that traditionally have been unreviewable, companies accused erroneously of wrongdoing will face the lingering threat that judicial second-guessing will reopen the agency's decision not to take enforcement action. Subjecting non-enforcement decisions to full judicial review risks significant misallocations of resources as agencies attempt to ensure that their previously informal procedural mechanisms are now sufficiently detailed to survive judicial review. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978).

The court's holding that preliminary agency fact-finding can render decisions not to prosecute subject to judicial review creates significant new "uncertainty and disagreement" in an area in which clarity is essential. 3 Richard J. Pierce, *Administrative Law Treatise* § 17.7, at 1273 (4th ed. 2002). As one commentator notes, it is particularly "important" that judicial review of agency inaction be placed on a "solid basis" to provide agencies and their regulated entities with certainty. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 Admin. L. Rev. 1, 4-5 (2008). The Ninth Circuit dramatically expanded the scope of agency actions potentially subject to review and authorized courts to parse even more finely the fact-intensive question whether an agency has acted or declined to act within the meaning of *Heckler*, thereby adding to the scope of disagreement over the Court's seminal decision.

II. THE NINTH CIRCUIT IMPROPERLY INTERFERED WITH FERC'S ABILITY TO STRUCTURE ITS PROCEEDINGS IN CONFLICT WITH OTHER CIRCUITS' APPROACH

The Ninth Circuit further erred by remanding for FERC to consider allegations of tariff violations in the PNW proceeding, despite FERC's many "separate proceedings focusing on [the same allegations of] misconduct." Pet. App. 35a. That judgment impermissibly injected the court into FERC's management of its administrative dockets.

A. The Ninth Circuit Ordered FERC To Address Further In This Proceeding Factually Distinct Tariff Violation Allegations FERC Had Fully Considered In Separate Enforcement Proceedings

1. In deciding not to initiate a § 206 hearing concerning PNW transaction prices, FERC "considered the complete record" amassed through its preliminary evidentiary proceeding, "including the material" concerning alleged market manipulation. Pet. App. 419a. That decision rested on FERC's equitable determination that, *even if* prices in the PNW were unjust or unreasonable, awarding refunds would be impracticable, would necessarily result in arbitrariness due to FERC's lack of jurisdiction over many sellers, and would unfairly reward economically irrational behavior. *See supra* pp. 21-22. Allegations of market manipulation, even if proven true, were irrelevant to that conclusion.

The same day FERC declined to initiate a § 206 refund proceeding on its own motion in the PNW, it opened new proceedings specifically to investigate and redress alleged market manipulation and tariff violations in both California and the PNW. FERC ordered dozens of sellers "to show cause why their behavior . . . does not constitute gaming and/or anomalous market behavior" that violated relevant tariffs. *American Elec. Power Serv. Corp.*, 103 FERC ¶ 61,345, at 62,328 (2003); *see also Enron Power Mktg., Inc.*, 103 FERC ¶ 61,346, at 62,349 (2003) (same). FERC further ordered an ALJ to make findings from evidence "quantifying the full extent" of "unjust[] enrich[ment]" from such conduct and authorized the ALJ to recommend "disgorgement of unjust profits." *American Elec. Power*, 103 FERC at

62,328; *see also Enron Power Mktg.*, 103 FERC at 62,349 (same).

2. The Ninth Circuit recognized that "FERC already [was] addressing market manipulation in separate proceedings focusing on misconduct" – indeed, FERC earlier had completed those investigations – but it nonetheless held that FERC must consider such allegations in the PNW proceeding on remand. Pet. App. 35a-36a. In so doing, the court did not review the reasons FERC gave for not initiating a § 206 proceeding: "even if prices were unjust and unreasonable, it is not possible to fashion a remedy that would be equitable to all the participants in the Pacific Northwest market." *Id.* at 392a-393a. The court made no effort to explain how allegations of market manipulation, if proved, could alter FERC's balancing of equitable factors.[7] Instead, the court simply reapplied an earlier holding that also intruded on FERC's discretion to manage its dockets. *Id.* at 36a (citing *PUC*, 462 F.3d at 1048-51).

B. The Ninth Circuit Exceeded Its Authority In Holding That FERC Must Consider Evidence Of Tariff Violations In The PNW Docket

1. "An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities," and "need not solve every problem before it in the same proceeding." *Mobil Oil Exploration & Producing Southeast Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991); *see also FPC v. Sunray DX Oil Co.*, 391 U.S.

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[7] The Ninth Circuit directed FERC to "reevaluate[]" three ALJ findings "in light of" the market manipulation evidence. Pet. App. 35a. None of those findings, however, underlay FERC's determination that the equities disfavored refunds.

9, 49-50 (1968). *Mobil Oil* held that FERC acted within its discretion in declining to consider the effect of certain contractual "take or pay" provisions in a rulemaking on gas delivery rates: "the agency could compile relevant data more effectively in a separate proceeding" and it had "taken steps to alleviate take-or-pay problems." 498 U.S. at 230 (internal quotations omitted). This Court concluded that it will not interfere in an agency's choice to pursue related "issue[s] separately" at least "where a different proceeding would generate more appropriate information and where the agency was addressing the question." *Id.*; *see also Sunray*, 391 U.S. at 49-50.

The D.C. Circuit has held consistently that an agency has "inherent power[] . . . to control its own docket." *GTE Serv. Corp. v. FCC*, 782 F.2d 263, 274 n.12 (D.C. Cir. 1986) (citing cases); *see City of Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989) (stating that "we would not strike down the [agency's decision] if it were a first step toward a complete solution, even if we thought [the agency] 'should' have covered both" issues in the same order) (footnote omitted); *see also, e.g., American Bird Conservancy, Inc. v. FCC*, 516 F.3d 1027, 1032 (D.C. Cir. 2008) (per curiam). Other circuits are in accord. *See, e.g., Aviators for Safe & Fairer Regulation, Inc. v. FAA*, 221 F.3d 222, 231 (1st Cir. 2000); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995); *New Orleans Pub. Serv., Inc. v. FERC*, 659 F.2d 509, 516 (Former 5th Cir. Oct. 1981).

2. The Ninth Circuit's judgment conflicts with those cases by holding that FERC lacks discretion to determine that it can address an issue "more effectively in a separate proceeding." *Mobil Oil*, 498 U.S. at 230; *see* Pet. App. 35a-36a; *PUC*, 462 F.3d at 1049-

51. FERC's authority to regulate interstate power markets derives from at least two different FPA sections. Section 206 authorizes FERC review of rates to ensure they are "just and reasonable," and to order "only prospective[]" refunds. *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992). By contrast, FERC's authority to order remedies for tariff violations derives from FPA § 309, which authorizes FERC "to perform any and all acts . . . necessary or appropriate to carry out" the FPA. 16 U.S.C. § 825h. Remedies for tariff violations redress specific misconduct and necessarily are retrospective. *See Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

FERC reasonably decided to investigate and remedy allegations of tariff violations in seller-specific proceedings under § 309, rather than in a PNW-focused market-wide § 206 proceeding. Proceedings to investigate alleged tariff violations raise legal and factual questions different from proceedings concerning just-and-reasonable rates. The latter turn on market-wide conditions and remedies; the former focus on specific seller conduct. Because those inquiries involve different issues and evidence, implicate different parties, and impose different obligations on their participants, FERC reasonably concluded that separate proceedings would be more efficient because each would be tailored to the specific problems being addressed.

Thus, as in *Mobil Oil*, FERC "could compile" and analyze "relevant data more effectively in a separate proceeding." 498 U.S. at 230; *see also Sunray*, 391 U.S. at 49-50. By launching separate show-cause proceedings contemporaneously with its decision not to initiate a § 206 hearing for PNW transactions,

"the Commission itself has taken steps to alleviate" the related problem. *See id.* at 50. Accordingly, in ordering FERC on remand to examine allegations of tariff violations, the Ninth Circuit impermissibly interfered with FERC's ability to structure its own dockets.

III. THE DECISION BELOW IMPERMISSIBLY EXPANDS REFUND LIABILITY UNDER § 206 BEYOND THE SCOPE OF THE COMPLAINT AND CONFLICTS WITH THE D.C. CIRCUIT'S APPROACH

The Ninth Circuit erred in reversing FERC's conclusion that CDWR's transactions are outside the scope of Puget's complaint. That holding rejected FERC's contextual reading of Puget's complaint – a reading that Puget shared. The decision below conflicts with numerous D.C. Circuit precedents that defer to administrative agencies' construction of the pleadings before them, and undermines the well-established rule against retroactive ratemaking.

A. The Ninth Circuit's Approach To Interpreting Administrative Complaints Conflicts With D.C. Circuit Cases And Is Insufficiently Deferential To The Agency

1. The D.C. Circuit's standard for interpreting administrative complaints requires agencies and reviewing courts to examine an administrative complaint in its entire context. In *Burlington Northern Railroad Co. v. ICC*, 985 F.2d 589 (D.C. Cir. 1993), for example, a dispute arose over whether several complaints concerning rates for interstate rail shipments of grains were limited to grains destined for export. "[T]he complaint[s] did not clearly state whether only export traffic was being challenged." *Id.* at 594. Nevertheless, the shippers' legal theory

depended on that limiting condition. *See id.* The Interstate Commerce Commission ("ICC") therefore limited the complaints' scope to grains shipped for export as consistent with the "key element of the complainants' theory." *Id.* The D.C. Circuit upheld the ICC's interpretation of the complaints, concluding that "the shippers' [legal] analysis . . . matched the finding that they challenged only rates on export grain." *Id.* at 595.

Similarly, in *American Federation of Government Employees v. FLRA*, 796 F.2d 530 (D.C. Cir. 1986) ("*AFGE*"), the D.C. Circuit affirmed the Federal Labor Relations Authority's ("FLRA") narrowing construction of a complaint because "[t]he entire thrust of the unfair labor practice complaint" was "directed to" one legal theory and not another. *Id.* at 533. Although finding that the complainant's "broad construction of the complaint" to include another legal theory "may be colorable," the court deferred to the FLRA's narrower construction. *Id.* (complaint "precisely track[ed] the [FLRA's] standard" for one legal theory but not the other).

Those decisions establish that reviewing courts should defer to agency constructions of an administrative complaint based on the "key element[s]," *Burlington Northern*, 985 F.2d at 594, or the "entire thrust," *AFGE*, 796 F.2d at 533, of the complaint's theory of relief. The D.C. Circuit consistently defers to agencies' constructions of parties' pleadings, particularly when the pleading falls in an area in which "the Commission has greater technical expertise . . . than does the [c]ourt." *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 604 (D.C. Cir. 1997); *see Burlington Northern*, 985 F.2d at 595; *AFGE*, 796 F.2d at 533; *see also City of San Antonio v. CAB*, 374 F.2d

326, 329 n.5 (D.C. Cir. 1967) (noting that "'subordinate questions of procedure'" including "'the scope of the inquiry'" initiated by a complaint generally are "'left to the [agency's] own devising'") (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)).

2. By contrast, the Ninth Circuit below declined to read Puget's complaint in its proper context, as FERC did. Instead, the court focused on two sentences of the complaint, divorced from the legal theory motivating the complainant. *See* Pet. App. 31a-32a.

The Puget complaint focused on electricity purchases for PNW consumers. *See supra* pp. 5-6. Puget feared being whipsawed by the seasonal difference in retail energy demand between California and the PNW if FERC ordered price caps in California but not the PNW. As Puget's complaint explained, "absent equivalent price caps" in both regional markets, "wholesale purchasers such as [Puget] in the Pacific Northwest" would face "uncapped prices when they need power (e.g., to meet winter demand) and yet [be] hobble[d] [in] their ability to offset the costs of such purchases with uncapped prices when they have surplus power . . . for sale to California." C.A. J.E.R. 11-12 (emphasis omitted). Puget therefore requested a price cap on sales "into" the PNW equivalent to any cap the Commission might impose on California markets. *Id.* at 13.

Accordingly, FERC reasonably determined that the complaint was limited to transactions "serving load" – retail consumer demand – "in the Pacific Northwest." Pet. App. 452a. FERC adopted the ALJ's finding that CDWR's transactions were not encompassed within Puget's complaint because CDWR "is not . . . a Pacific Northwest load server." *Id.* at

432a n.43. FERC's conclusion is consistent with a straightforward reading of the "entire thrust" of Puget's complaint. *AFGE*, 796 F.2d at 533.

Instead of deferring to FERC's contextual reading of the complaint, the Ninth Circuit focused solely on two sentences from the complaint that: (a) stated that Puget sought a price cap at which sellers "'may sell capacity or energy into the Pacific Northwest's wholesale power markets'"; and (b) specified that Puget "'seeks an order that prospectively caps the prices for wholesale sales of energy or capacity into the Pacific Northwest.'" Pet. App. 31a (quoting C.A. J.E.R. 4). Based on those sentences, the court concluded that "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.*" *Id.* (emphases added).

The complaint, however, was far from silent on those issues. *See supra* p. 5. Puget feared having to pay uncapped prices in the winter as a net importer of energy *to serve its retail customers in the PNW*, but being unable to charge equivalent prices for its summer exports of energy to serve Californians. *See* C.A. J.E.R. 11-13. The phrase "into the Pacific Northwest" therefore clearly referenced energy sales for use in the PNW.[8]

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[8] The Ninth Circuit's other two rationales are unpersuasive. First, the court reasoned that "FERC's interpretation of Puget's complaint is also inconsistent with its prior interpretation of the complaint filed by SDG&E in the California proceeding." Pet. App. 32a. But the different aims, geographical regions, and market contexts of the two complaints accounted for FERC's differing treatments. *See* Powerex Corp. *et al.* C.A. Reh'g Pet. 15-17 (Dec. 17, 2007).

Second, the court claimed that, in *PUC*, it had upheld FERC's decision "to exclude [CDWR's] transactions from the California

The Ninth Circuit's failure to defer to FERC's contextual reading of the complaint creates a circuit conflict this Court should resolve.

B. The Ninth Circuit's Legal Standard Undercuts Long-standing Principles Of Administrative Law

The Ninth Circuit's legal standard fails to give proper deference to agency decisionmaking in areas where the agency's expertise and discretion are paramount, and undercuts the long-standing rule against retroactive ratemaking.

1. The Ninth Circuit's standard compromises the filed-rate doctrine and its implementation in § 206. *See Concord*, 955 F.2d at 71-72. That long-standing principle of rate regulation "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *see* 16 U.S.C. § 824d(c). The filed-rate doctrine's closely related "corollary" "prohibit[s] the regulatory agency from altering a rate retroactively." *Concord*, 955 F.2d at 71; *see Arkansas Louisiana Gas*, 453 U.S. at 578. "The duty to file rates with the Commission, and the obligation to charge only those rates, have always been considered essential to preventing price discrimination[,] . . . stabilizing rates[,] . . . [and] render[ing] rates definite and certain." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) (internal quotations and citations omitted). *See also Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985)

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proceeding based in substantial part on the existence of this proceeding involving the Pacific Northwest." Pet. App. 32a-33a. That consideration, however, is irrelevant to Puget's intent regarding its complaint and finds no support in *PUC*.

(Scalia, J.) ("[p]roviding . . . necessary predictability" in rates "is the whole purpose of the well established 'filed rate' doctrine").

Section 206 authorizes FERC to grant refunds of rates subject to constraints consistent with the filed-rate doctrine's purposes. A complaint seeking refunds must first "state the change or changes" sought by the complainant. 16 U.S.C. § 824e(a). If FERC holds a hearing on the complaint, it must "specify the issues to be adjudicated." *Id.* If, after hearing, FERC finds the complained-of rate to be unjust or unreasonable, it may order refunds only for a period after the "refund effective date." *Id.* § 824e(b). Together, these provisions ensure that, "once a complaint is filed, sellers are on notice that their sales may be subject to refund." *PUC*, 462 F.3d at 1063.

This notice is critical to the statutory structure. It allows FERC to grant refunds without interfering with the certainty and predictability of rates. Indeed, the filed-rate doctrine "does not extend to cases in which buyers are on adequate notice that resolution of [a complaint] may cause a later adjustment to the rate being collected at the time of service." *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1490-91 (10th Cir. 1995) (internal quotations omitted). Such notice enables parties to know that refunds are possible *when they enter into the transaction. See Louisiana Pub. Serv. Comm'n v. FERC*, 482 F.3d 510, 520 (D.C. Cir. 2007). FERC must read the complaint in light of its entire context, therefore, to judge accurately whether market participants received notice that "a rate is tentative and may be later adjusted with retroactive effect." *Consolidated Edison*, 347 F.3d at 969.

2. This case presents a particularly egregious example of the problem. Puget filed its complaint in October 2000. *See* Pet. App. 10a-11a. CDWR did not begin purchasing energy for California consumption until January 2001. *See PUC*, 462 F.3d at 1042. The California parties did not claim that the PNW proceeding encompassed CDWR's transactions until August 2001 – *after* FERC had ruled that those transactions were outside the complaint that initiated the California refund proceeding. *See* C.A. J.E.R. 170-75; Pet. App. 85a-86a. Importantly, Puget – the complainant – *agreed* with FERC's interpretation that CDWR's transactions were outside the scope of Puget's complaint. Puget received *all* of the relief its complaint sought when FERC ordered region-wide rate caps in June 2001.

The Ninth Circuit's erroneous approach to administrative complaint interpretation takes a fully satisfied complaint seeking price caps for PNW electricity transactions and transforms it into a multi-billion dollar proceeding focused on California transactions for which CDWR declined to file its own timely complaint for refunds. Sellers had no notice when Puget filed its PNW-focused complaint that transactions they made months later to a public entity in California might be subject to refunds. The Ninth Circuit's dramatic expansion of the refund proceedings, therefore, significantly prejudices those sellers. They face enormous legal uncertainty over voluminous transactions completed nearly a decade ago.

IV. THIS CASE PRESENTS QUESTIONS OF NATIONAL IMPORTANCE

The California energy crisis occurred almost a decade ago, yet the participants in that crisis – buyers, sellers, public utilities, marketers, government bodies, and foreign entities – remain mired in litigation. The Ninth Circuit's approach to managing these cases has stymied FERC's ability to comply with Congress's directive "to conclude its investigation" into the California energy crisis "as soon as possible," Energy Policy Act of 2005, Pub. L. No. 109-58, § 1824(1), 119 Stat. 594, 1134, and denied procedural fairness to companies that in any other circumstance or circuit would have prevailed under long-standing principles.

The Ninth Circuit's decision here reopens a closed administrative proceeding and restarts litigation over stale events. By achieving that result through novel departures from bedrock administrative law principles, the Ninth Circuit's approach either augurs ill for defendants in future administrative complaint proceedings or, if the decision below is confined, portends "California-energy-crisis-only" administrative principles that tip the scales against non-California entities caught up in that litigation. Neither result should be tolerated by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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