

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 07-73550

**NORTH STAR STEEL COMPANY, LLC,
PETITIONER,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**ON PETITION FOR REVIEW OF ORDERS OF THE
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**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably concluded that ordering refunds to be paid to a retail customer was beyond the Commission’s wholesale ratesetting jurisdiction under the Federal Power Act.

COUNTERSTATEMENT OF JURISDICTION

As set forth more fully in the Argument (*see infra* pp. 23, 25), the Court lacks jurisdiction to consider certain arguments raised by Petitioner North Star

Steel Company, LLC (“North Star”), concerning consistency with agency precedent, because it failed to meet the statutory prerequisites for judicial review under Section 313(b) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251(b), by failing to raise those issues with specificity on rehearing to the agency. *See, e.g., Cal. Dep’t of Water Res. v. FERC*, 341 F.3d 906, 910-11 (9th Cir. 2003) (citing cases).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case concerns the Commission’s determination that North Star sought retail refunds that are beyond the scope of the Commission’s wholesale ratemaking authority under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d, 824e.

North Star, an end user of electricity, filed a complaint against eight wholesale energy suppliers that had sold power to North Star’s retail supplier for resale to North Star. North Star sought refunds directly from the wholesale sellers, on the ground that the wholesale prices had been used to calculate the retail rates charged to North Star. The Commission dismissed the complaint because North Star requested relief that would constitute retail refunds, which are outside the

Commission’s statutory jurisdiction. *North Star Steel Company, LLC v. Arizona Public Service Company, et al.*, 116 FERC ¶ 61,022 (2006) (“Complaint Order”), ER 113, *reh’g denied*, 120 FERC ¶ 61,146 (2007) (“Rehearing Order”), ER 133.¹

This appeal followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

Section 201 of the Federal Power Act (“FPA”), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. §§ 824(a)-(b). This grant of jurisdiction, though broad and comprehensive, excludes retail sales. *See id.* § 824(b)(1) (“The provisions of this subchapter shall apply to the . . . sale of electric energy at wholesale in interstate commerce, but . . . shall not apply to any other sale of electric energy”); *id.* § 824(d) (“The term ‘sale of electric energy at wholesale’ when used in this subchapter[] means a sale of electric energy to any person for resale.”). *See generally* *New York v. FERC*, 535 U.S. 1, 17, 28 (2002); *see also, e.g., Pub. Util. Dist. No. 1 of Grays Harbor County v. IDACORP Inc.*, 379 F.3d 641, 646-47 (9th

¹ “ER” refers to the Excerpts of Record filed by North Star. “P” refers to the internal paragraph number within a FERC order. “Br.” refers to North Star’s initial Brief.

Cir. 2004) (discussing exclusive FERC jurisdiction over wholesale power sales).

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). Complaints asserting that existing rates are unlawful are governed by FPA § 206, 16 U.S.C. § 824e. *See Cal. Power Exch. Corp. v. FERC*, 245 F.3d 1110, 1120-21 (9th Cir. 2001) (describing statutory framework).

B. The Commission Proceedings and Orders

1. California Energy Crisis and Refund Proceeding

This case is peripherally related to the California energy crisis, with which this Court is abundantly familiar. *See Bonneville Power Admin. v. FERC*, 422 F.3d 908, 910-11 (9th Cir. 2005) (“The California energy crisis of 2000 and 2001 is a subject that is well-known to this court and to the public. . . . The history and legacy of the California energy crisis are long, detailed, and tortured.”), *cert. denied*, 2007 U.S. LEXIS 12950 (U.S. Dec. 10, 2007); *id.* at 911-13 (describing crisis and resulting FERC proceedings); *see generally Pub. Utils. Comm’n of Cal. v. FERC*, 462 F.3d 1027, 1036-45 (9th Cir. 2006) (same, in more detail), *reh’g pending*, Nos. 01-71051, *et al.*; *Port of Seattle v. FERC*, 499 F.3d 1016, 1022-26 (9th Cir. 2007), *reh’g pending*, Nos. 03-74139, *et al.*; *Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 471 F.3d 1053, 1067-69 (9th Cir. 2006), *cert. granted*

sub nom. Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, 2007 U.S. LEXIS 9070 (U.S. Sept. 25, 2007) (Nos. 06-1457, *et al.*) (argument held Feb. 19, 2008); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1009-10 (9th Cir. 2004), *cert. denied*, 2007 U.S. LEXIS 7865 (U.S. June 18, 2007).

In short, the California energy crisis, which spilled over to other western states, followed California's restructuring of electric energy markets in the 1990s, which established spot markets for the wholesale sale of electric energy using a single-price auction mechanism to set market prices. In 2000-2001, that pricing mechanism contributed to high wholesale electricity prices and provided opportunities for market manipulation, resulting in frequent system emergencies along with occasional blackouts, and severe financial distress to California utilities, energy customers, and other market participants. *See generally Bonneville*, 422 F.3d at 911-12; *Pub. Utils. Comm'n*, 462 F.3d at 1038-40.

In response, the Commission initiated a series of adjudicatory and investigative proceedings, intended both to correct structural defects in California electricity markets (and western markets outside California) and to determine appropriate refunds for excessive wholesale prices. *See Bonneville*, 422 F.3d at 912-13; Complaint Order at PP 2-5, ER 113-15. In particular, in August 2000, the Commission initiated an investigation into the justness and reasonableness of the rates for all sales in California spot markets (the "California Refund Proceeding").

See San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs., 92 FERC ¶ 61,172 (2000). That proceeding, addressing numerous issues and involving numerous parties, has been the subject of scores of petitions for review in this Court and complex case management (including court-mediated settlement). *See Pub. Utils. Comm'n*, 462 F.3d at 1034 & n.1; *see also, e.g., Pub. Utils. Comm'n of Cal. v. FERC*, 9th Cir. Nos. 01-71934, *et al.* (“Phase II” issues concerning specific refund calculation issues; currently in abeyance pending final judicial resolution of “Phase I” scope and transaction issues).

Of relevance to this case, North Star, Arizona Electric Power Cooperative, Inc. (“Arizona Electric”), and all of the Wholesale Sellers (defined below) are parties to the California Refund Proceeding. *See* Complaint Order at P 5, ER 115; Rehearing Order at P 12 n.15, ER 138. In addition, the power sales at issue in this case occurred in short-term western markets during 2000 and 2001, and North Star’s Complaint relied upon the Commission’s findings in the California Refund Proceeding. *See* Complaint ¶¶ 8-33, ER 13-17. Nevertheless, that Complaint, and the Commission’s dismissal thereof, present discrete issues that are appropriately addressed in this separate appeal.

2. North Star Complaint Proceeding

a. The Electric Service Agreement

North Star obtained electric energy to operate its steel recycling facility in Arizona pursuant to a Non-Firm Electric Service Agreement (the “Contract”) among North Star, Arizona Electric, and Mohave Electric Cooperative (“Mohave Electric”), executed in August 1994. Complaint Ex. 1, ER 25. That Contract, which designated Arizona Electric and Mohave Electric collectively as “SELLERS” and North Star as “PURCHASER,” provided that “SELLERS agree to supply and sell to PURCHASER and PURCHASER agrees to accept and pay for Non-Firm Energy” *Id.* § 6, ER 43.

The Contract further specified that North Star would purchase the electricity from Mohave Electric, which would in turn purchase it from Arizona Electric. *See* Contract § 2.11 (though the Contract might, for convenience, “refer to the sale of electricity by SELLERS to PURCHASER[,] . . . such references shall not affect the fact that the electricity purchased by PURCHASER pursuant to this Agreement shall be purchased solely from [Mohave Electric]”), ER 31. Mohave Electric would bill and be paid by North Star; Arizona Electric would bill and collect from Mohave Electric. *See id.* §§ 14.2, 14.6, 14.7, 14.11, ER 53, 55, 56.

Because North Star’s non-firm energy requirements would exceed Arizona Electric’s available generation resources on a continual basis, it would be

“necessary for the SELLERS to purchase Non-Firm Energy from entities not Parties to this Agreement to serve PURCHASER’s requirement.” Contract § 2.8, ER 30. The “Monthly Non-Firm Energy Charge” paid by North Star under the Contract would include “[t]he actual total cost incurred by [Arizona Electric], as charged by entities other than [Arizona Electric and the transmission provider], for purchasing, transmitting and scheduling for delivery . . . Non-Firm Energy on behalf of [Mohave Electric] and [North Star], multiplied by the Margin Multiplier . . .” *Id.* § 14.1.1, ER 51-52. That “Margin Multiplier” was defined as the integer 1 plus designated “markups” for both Arizona Electric and Mohave Electric: 0.14 for Arizona Electric and 0.01 for Mohave Electric. *Id.* § 14.3, ER 54; *see also* Complaint ¶ 7, ER 10. Therefore, the formula for calculating the Monthly Non-Firm Energy Charge paid by North Star was 1.15 times the actual total cost to Arizona Electric of purchasing power from other entities. The Contract also included various other charges to be paid by North Star, including costs of generating electricity from Arizona Electric’s own generation resources, costs related to transmission, Mohave Electric’s out-of-pocket costs, a Mohave Electric franchise charge, and taxes and regulatory assessments. *See* Contract §§ 14.1.2-.4, 14.2, 14.5, ER 52-55.

The Contract was subject to approval by the Arizona Corporation Commission. *See id.* § 5.2, ER 41.

b. North Star Complaint

On May 2, 2006, North Star filed with the Commission a complaint against eight entities (the “Wholesale Sellers” or “Respondents”),² seeking refunds of amounts that Arizona Electric had paid to purchase wholesale electric energy to serve North Star’s non-firm energy requirements in 2000-2001. Complaint, ER 6.

North Star acknowledged that Arizona Electric had made the relevant wholesale power purchases: “[Arizona Electric] had the obligation, on behalf of North Star, to obtain electric energy, at wholesale in interstate commerce, from wholesale electricity providers . . . and to . . . deliver such energy to North Star” Complaint ¶ 6, ER 9; *see also id.* ¶ 7 (explaining the “the price charged North Star by [Arizona Electric], and paid by North Star to [Arizona Electric],” for the electricity), ER 10.

Nevertheless, North Star sought refunds directly from the Wholesale Sellers: “North Star respectfully requests that each Respondent be ordered and directed *to refund to North Star* the total amount shown for each on Exhibit 2D.” Complaint

² The named Respondents were: Arizona Public Service Company; California Independent System Operator Corporation; Enron Power Marketing, Inc.; Nevada Power Company; PacifiCorp; Powerex Corp.; Public Service Company of New Mexico; and Tucson Electric Power Company. Complaint ¶ 3, ER 8-9. All but PacifiCorp (which settled with North Star, *see infra* p. 22) and Enron have intervened in this appeal in support of the Commission.

at p. 14 (emphasis added), ER 19; *accord id.* at p. 1 (requesting “an order directing the above-named Respondents *to return to North Star* amounts paid them for electric energy”) (emphasis added), ER 6; Notice of Complaint at 1 (same), ER 22. *See also* Complaint Ex. 2D (listing amounts of refunds sought from each Wholesale Seller), ER 105.

Neither Arizona Electric nor Mohave Electric was named as a respondent to North Star’s Complaint or otherwise participated in the complaint proceeding.

c. Complaint Order

On July 7, 2006, the Commission issued an Order Dismissing Complaint, *North Star Steel Company, LLC v. Arizona Public Service Company, et al.*, FERC Docket No. EL06-68, 116 FERC ¶ 61,022 (2006) (“Complaint Order”), ER 113. The Commission noted that North Star was an end user — that is, a retail customer — and that it purchased electricity from Arizona Electric that Arizona Electric purchased at wholesale from the Wholesale Sellers. *Id.* at P 11, ER 117. North Star had not identified any wholesale transaction between the Wholesale Sellers and North Star. *Id.* Therefore, because FPA § 201, 16 U.S.C. § 824 (*see supra* p. 3), limits the Commission’s rate and refund authority for sales of power to wholesale transactions, the Commission found that refunds to North Star were beyond that authority: “North Star requests that the Commission order Respondents to refund certain amounts to North Star. In other words, North Star

requests that the Commission order retail refunds. Such retail refunds are beyond the scope” of the Commission’s wholesale ratemaking authority under the FPA. Complaint Order at P 13, ER 117-18.

d. Rehearing Order

North Star filed a timely request for rehearing (“Rehearing Request”). ER 119. On August 10, 2007, the Commission issued an Order Denying Rehearing, *North Star Steel Company, LLC v. Arizona Public Service Company, et al.*, 120 FERC ¶ 61,146 (2007) (“Rehearing Order”), ER 133. The Commission clarified that a retail customer such as North Star may bring a complaint under FPA § 206, but “that does not also mean that it is within the Commission’s jurisdiction to order the remedy sought by North Star.” *Id.* at P 6, ER 135. North Star participated in a retail transaction; “[t]herefore, any refund given directly to North Star would be a retail refund that is beyond the scope of the Commission’s jurisdiction.” *Id.*, ER 136. Whether a wholesale buyer (here, Arizona Electric) must pass through to a retail customer any refunds that the wholesale buyer might collect is an issue for the appropriate state authority. *Id.* at P 7, ER 136.

Finally, responding to a footnote in the Rehearing Request (at 6 n.16, ER 124), the Commission rejected North Star’s suggestion that it exercise its remedial discretion to grant (wholesale) refunds to Arizona Electric instead of (retail) refunds to North Star. The Commission determined that the California

Refund Proceeding, to which both Arizona Electric and North Star are parties, “is the appropriate forum” to consider such refunds; accordingly, North Star’s newly-raised request for refunds to Arizona Electric already “[is] being, and should be, litigated in other proceedings.” Rehearing Order at P 12 n.15, ER 137-38.

SUMMARY OF ARGUMENT

The Commission reasonably concluded that the refunds that North Star requested were retail refunds beyond the Commission’s jurisdiction under the Federal Power Act.

The FPA limits the Commission’s authority over rates and refunds to wholesale energy sales, defined as sales for the purpose of resale. This and other courts have strictly upheld such limits on FPA jurisdiction, even where the Commission has sought to remedy extraordinary market flaws. Therefore, the statutory exclusion of retail sales prevents the Commission from ordering retail refunds.

Here, the Commission reasonably concluded that refunds to North Star would be retail refunds. North Star was a party only to retail transactions; Arizona Electric purchased energy at wholesale to resell (through Mohave Electric) to North Star. The Commission did not treat North Star differently from other retail customers, as the cases North Star cites did not involve similar circumstances.

Finally, the Commission appropriately determined that any wholesale refunds to Arizona Electric, first proposed by North Star on rehearing, should be pursued in the wholesale California Refund Proceeding, to which Arizona Electric, North Star, and the Wholesale Sellers are all parties.

ARGUMENT

I. STANDARD OF REVIEW

Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), the Court reviews FERC orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See, e.g., City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). The Commission’s factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003).

The two-step Chevron analysis applies to the Commission’s interpretation of the Federal Power Act. *Bonneville*, 422 F.3d at 914. If Congress has “directly spoken to the precise question at issue” and its intent is clear, “that is the end of the matter.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). If the statute is silent or ambiguous as to the question, the Court gives deference to the Commission’s interpretation if it is a “permissible construction of the statute.” *Id.* at 843. *See Bonneville*, 422 F.3d at 914; *Bear Lake Watch*, 324 F.3d at 1073.

II. THE COMMISSION REASONABLY FOUND THAT NORTH STAR REQUESTED RETAIL REFUNDS THAT ARE BEYOND THE SCOPE OF THE COMMISSION’S AUTHORITY

A. Retail Refunds Are Outside The Commission’s Wholesale Ratesetting Jurisdiction

The Commission’s rates and refund authority under FPA §§ 205 and 206 (16 U.S.C. §§ 824d, 824e) is limited by FPA § 201, which grants the Commission jurisdiction over “the sale of electric energy at wholesale in interstate commerce” and unequivocally excludes “any other sale of electric energy.” 16 U.S.C. § 824(b)(1); *see* Rehearing Order at P 6, ER 135; Complaint Order at P 13, ER 117-18. The statute defines “sale of electric energy at wholesale” to mean “a sale of electric energy to any person for resale.” FPA § 201(d), 16 U.S.C. § 824(d); *see also supra* at p. 3 (discussing FPA jurisdiction).

This jurisdictional limitation is backed by decades of precedent. *See, e.g., New York*, 535 U.S. at 17 (noting that Commission’s jurisdiction over sales (as opposed to transmission) is limited to wholesale); *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 824 (D.C. Cir. 2006) (“Jurisdiction over th[e] sale . . . of electricity is split between the federal government and the states on the basis of the . . . nature of the energy sale. . . . FERC has jurisdiction over . . . the sale of electricity at wholesale in interstate commerce. States retain jurisdiction over retail sales of electricity”); *see also Consumers Energy Co.*, 118 FERC ¶ 61,143 at P 36 (2007) (“[T]he Commission does not have jurisdiction over retail rates.”); *cf.*

Duke Power Co. v. FPC, 401 F.2d 930, 936 (D.C. Cir. 1968) (in keeping with “basic legislative plan for a federal-state division of regulatory power,” jurisdictional limitations in FPA § 201 were intended “to prevent the expansion of Federal authority over State matters”).

Notwithstanding the Commission’s broad remedial discretion (*see, e.g., Town of Concord v. FERC*, 955 F.2d 67, 73-74 (D.C. Cir. 1992)), this and other Courts have not hesitated to reverse the Commission for exceeding the bounds of its statutory authority, even with the best of intentions. *See, e.g., Bonneville*, 422 F.3d at 911 (reversing orders in California Refund Proceeding to the extent they required non-jurisdictional governmental entities to make refunds for power sales at excessive prices); *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 673-76 (D.C. Cir. 2007) (reversing orders that required non-jurisdictional municipal utility to refund overcollection from California grid customers); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 461-62 (D.C. Cir. 2005) (reversing orders, under Natural Gas Act, that imposed metering requirements on non-jurisdictional natural gas gathering facilities that were addressed in jurisdictional tariff), *discussed in Bonneville*, 422 F.3d at 924.

In *Bonneville*, this Court overturned the Commission’s decision in the California Refund Proceeding to order refunds from governmental entities that profited from unjust and unreasonable prices. Numerous governmental entities had

voluntarily sold power in FERC-jurisdictional wholesale markets during the California energy crisis; by the Commission’s estimate, the governmental entities accounted for nearly 30 percent of the electric energy and ancillary services sales in the California spot markets during the 2000-2001 period. 422 F.3d at 912. Nevertheless, because the FPA excludes governmental entities from the Commission’s refund authority (*see* FPA § 201(f), 16 U.S.C. § 824(f)), this Court held that the Commission exceeded its statutory authority by requiring those entities to pay refunds. 422 F.3d at 914-21. It did not matter that the Commission was trying to remedy the excessive rates produced by a “dysfunctional” and “seriously flawed” market (*id.* at 910): “Although we recognize that the California energy crisis was extraordinary, the fact remains that it does not alter FERC’s statutory authority.” *Id.* at 921.

Nevertheless, North Star contends that the Commission should have construed the FPA more broadly, to effectuate congressional policy. Br. 18-19. (North Star does not explain exactly what legislative purpose would be served by construing its non-jurisdictional retail transactions to be jurisdictional wholesale transactions.) As the *Bonneville* and *Transmission Agency* cases demonstrated, however, courts do not give the Commission deference to expand its jurisdiction where the statute clearly limits it. *See Bonneville*, 422 F.3d at 920 (“[T]he text and structure of the FPA are unambiguous FERC tries to escape the clear dictates

of the statute by referring to the FPA’s legislative history. This effort is unavailing. Legislative history cannot trump the statute.”); *Transmission Agency*, 495 F.3d at 673 (“[W]e need go no further than step one of *Chevron* to hold that FERC acted contrary to law”); *see also Columbia Gas*, 404 F.3d at 461 (“Because Congress’ intent is clear here, we have no occasion to proceed to *Chevron*’s deferential second step.”).

Thus, even if the Commission wished to grant North Star retail refunds in this case, neither a general concern for protecting consumers nor a specific desire to remedy the effects of the California energy crisis would allow it to extend its wholesale refund authority to retail sales.

B. The Relief Sought By North Star Would Constitute Retail Refunds

The Commission reasonably determined that the relief North Star requested would constitute refunds for retail transactions: “North Star admits it is a retail customer participating in a retail transaction. Therefore, any refund given directly to North Star would be a retail refund that is beyond the scope of the Commission’s jurisdiction.” Rehearing Order at P 6 & n.11 (citing North Star’s explanation that it received retail service from Mohave Electric, which obtained scheduling and transmission service for North Star’s load from Arizona Electric), ER 135-36; *see also* Complaint Order at P 13, ER 118. Any jurisdictional refunds would go to the wholesale buyer (Arizona Electric), and any pass-through to North

Star (whether directly from Arizona Electric or through Mohave Electric) would be “an issue for the appropriate state authority, rather than the Commission.”

Rehearing Order at P 7, ER 136 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 111 FERC ¶ 61,186 at P 30 (2005) (declining to decide whether scheduling coordinators must pass through refunds on wholesale transactions to retail customers)).

The Commission’s decision followed from the facts in the record. The Wholesale Sellers made jurisdictional sales of electric energy at wholesale in interstate commerce to Arizona Electric. *See* Complaint Order at PP 6, 11, ER 115, 117; Rehearing Order at P 2, ER 134; Complaint ¶¶ 7, 18, 26, ER 10, 13, 15; *see also* FPA § 201(b)(1), 16 U.S.C. § 824(b)(1). Arizona Electric in turn resold the power to North Star under the retail, non-FERC-jurisdictional Contract.³ *See* Complaint Order at P 11, ER 117; Rehearing Order at P 2, ER 134; Complaint

³ Actually, as noted above, the Contract provided that Arizona Electric resold the electricity to Mohave Electric, which then resold it again to North Star. *See supra* p. 7; Contract §§ 2.11, 14.2, 14.11, ER 31, 53, 56. *Compare* Complaint ¶¶ 7, 26 (blurring those resale transactions into a single step), ER 10, 15.

In any event, this more precise description of the Contract simply adds a *second* step between the wholesale transactions at issue (between Wholesale Sellers and Arizona Electric) and the ultimate end user, North Star. It does not affect the Commission’s analysis; if anything, the additional degree of separation confirms the Commission’s understanding of the distinction between the wholesale sales to Arizona Electric and the retail sales to North Star.

¶ 7, ER 10; Affidavit of Philip J. Movish (“Movish Affidavit”) ¶ 6, ER 96; *see also* Br. 16 (“[t]he electricity at issue was sold, by Respondents, to [Arizona Electric/Mohave Electric] *for resale to North Star*”) (emphasis added). Under the FPA, the wholesale nature of the transactions between the Wholesale Sellers and Arizona Electric was in fact *defined by* Arizona Electric’s resale to North Star. FPA § 201(d), 16 U.S.C. § 824(d); *see generally Cal. Elec. Power Co. v. FPC*, 199 F.2d 206, 209-10 (9th Cir. 1952) (discussing FPA jurisdiction based on sales of energy for resale). If North Star itself had purchased the energy to operate its facility directly from the Wholesale Sellers, the transaction would not have been a jurisdictional wholesale transaction.

North Star’s Complaint, however, specifically requested that refunds be paid by the Wholesale Sellers directly to North Star itself. Complaint at pp. 1, 14, ER 6, 19; *see also supra* pp. 9-10. North Star argued it was entitled to collect from the Wholesale Sellers because the retail price it paid under the Contract was derived from the prices that Arizona Electric paid at wholesale to purchase energy. *See* Complaint ¶ 7, ER 10; Br. 16. The Commission reasonably concluded, however, that North Star paid retail charges for retail transactions, so any refunds made to North Star would be retail refunds. *See* Complaint Order at PP 11, 13, ER 117-18; Rehearing Order at P 6, ER 11.

In addition, North Star's claim that its Complaint did not involve the additional 15% retail markups paid to Arizona Electric and Mohave Electric (*see* Br. 17) is belied by its clear request for refunds, from the Wholesale Sellers, of those retail charges. *See* Complaint ¶ 26 (seeking to recover "the additional price[s] incurred as a result of the mark-up"), ER 10; Ex. 2D (separately listing "Mark-Up" and including amount in "Total" requested for each Respondent), ER 105; Movish Affidavit ¶ 5 (stating that North Star requested refunds of "additional costs incurred by North Star that directly correspond to" excessive wholesale prices), ER 95-96; *id.* ¶ 7, ER 97.

North Star now suggests, incorrectly, that the Commission "restrict[ed] the identity of persons who can bring Complaints," precluding retail customers from doing so. Br. 19. To the contrary, the Commission emphasized that its analysis turned on the nature of the relief sought, not on the identity of the complainant: "While North Star is correct that the FPA and the Commission's regulations permit North Star to bring a complaint under [FPA §] 206 . . . challenging the justness and reasonableness of the Respondents' rates, that does not also mean that it is within the Commission's jurisdiction to order the remedy sought by North Star." Rehearing Order at P 6, ER 135; *see also id.* at P 10 (abandoning on rehearing earlier agency reliance on lack of contractual privity between North Star and the Wholesale Sellers), ER 136-37. Nor did the Commission misperceive, as North

Star claims (Br. 14), that the Complaint challenged the retail rate under North Star's Contract with Arizona Electric and Mohave Electric; the Commission's reference to "the justness and reasonableness of the Respondents' rates" makes clear that it understood that the Complaint challenged Wholesale Sellers' spot market rates.

C. The Commission Has Not Granted Retail Refunds In Other Cases

North Star contends (Br. 19-22) that the challenged orders are inconsistent with the Commission's treatment of retail customers in two prior cases. North Star's argument, however, mischaracterizes both the circumstances and the Commission's actions in those cases.

For instance, North Star contends that retail customers intervened and directly obtained refunds in another FPA § 206 proceeding. *See Portland General Elec. Co.*, 105 FERC ¶ 61,302 (2003), *discussed in* Br. 20-22. In *Portland General*, however, the customers that North Star cites were among numerous parties to a settlement that was not contested. *Id.* at P 1. The Commission did not purport to make merits determinations concerning the retail customers' involvement in the settlement, or their entitlement to refunds. Rather, in approving an uncontested settlement, the Commission's role "is limited to ensuring that the settlement is fair, reasonable and in the public interest." Rehearing Order at P 12, ER 137; *see generally* 18 C.F.R. § 385.602(g)(3).

Thus, in *Portland General* “the Commission was not asserting jurisdiction to order refunds for a retail sale of power.” Rehearing Order at P 12, ER 137. Moreover, the Commission stated that its approval of the settlement did “not constitute approval of, or precedent regarding, any principle or issue in this proceeding.” *Portland General*, 105 FERC ¶ 61,302 at P 2. Accordingly, that order has no bearing on the Commission’s dismissal of North Star’s Complaint for seeking extra-jurisdictional relief.

Indeed, the Commission afforded precisely the same treatment to North Star when the circumstances *were* similar to *Portland General*. PacifiCorp, one of the eight Respondents named in North Star’s Complaint, entered into a settlement with North Star. No party contested the settlement, and the Commission approved it in an August 2007 order that echoed *Portland General*: “The Commission approves the Settlement, finding it to be fair and reasonable and in the public interest. The Commission’s approval of the Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.” *North Star Steel Co. v. Ariz. Pub. Serv. Co.*, 120 FERC ¶ 61,125 at P 4 (2007).

North Star also contends, for the first time on appeal, that the Commission departed from the precedent set in *City of Burbank v. Calpine Energy Services, L.P.*, 102 FERC ¶ 61,268 (2003) (“*Kroger*”), discussed in Br. 19-20. (North Star cites the order as *Kroger Co. v. Dynegy Power Mktg., Inc.*, which was the caption

of one of several cases addressed in the same order. *See* Br. 20 n.56.) North Star never raised the *Kroger* case, or any purported similarity of Kroger’s circumstances to those of North Star, before the Commission. Therefore, the Commission never had an opportunity to address North Star’s argument. *See* FPA § 313(b), 16 U.S.C. § 825l(b)) (“No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.”); *Cal. Dep’t of Water Res.*, 341 F.3d at 910 (“Where an argument is not adequately presented to FERC for FERC to decide it, review in our court is not appropriate.”) (citing cases); *Canadian Ass’n of Petroleum Producers v. FERC*, 308 F.3d 11, 15 (D.C. Cir. 2002) (“Simply put, the court cannot review what the Commission has not viewed in the first instance.”).

Nevertheless, the *Kroger* case is not, in fact, analogous to North Star’s circumstances. First, the Commission focused principally on Kroger’s request for modification of wholesale forward bilateral contracts — an issue that is absent from North Star’s Complaint. *Kroger*, 102 FERC ¶ 61,268 at PP 1, 11; *id.* at P 13 (“Kroger seeks abrogation of the contracts”); *see* Kroger Complaint at 1-2, 4-8, 23 (attached to North Star’s Brief). The Commission set the complaint for hearing to consider that exceptional form of relief:

. . . Kroger seek[s] the *extraordinary remedy* of contract modification. The Commission’s long-standing policy . . . has been to recognize the

sanctity of contracts. Rarely has the Commission deviated from that policy, and then only in *extreme circumstances* The Commission has determined that, based on the *unusual circumstances* presented, it is appropriate to set the contracts at issue for hearing.

102 FERC ¶ 61,268 at P 22 (emphases added).

In addition, the Kroger Complaint did not obviously seek retail refunds, as did North Star's Complaint. Neither the Kroger Complaint nor the Commission's order, in setting the matter for hearing and establishing a refund effective date for past transactions, specified to whom any refunds would be paid. *See id.* at P 24; Kroger Complaint at 27, 29-30. *Contrast* North Star Complaint at pp. 1, 14, ER 6, 19; *see supra* pp. 9-10. Moreover, Kroger itself (unlike North Star) had entered into an agreement with both parties to the wholesale transaction, acting as a guarantor for the wholesale buyer (including by direct payments to the seller). Kroger Complaint at 11-12; *see also* 102 FERC ¶ 61,268 at P 14 (wholesale seller argued, for purposes of determining the standard of review, that Kroger had "stepped into the shoes" of the wholesale buyer because of the credit assurance arrangement). Accordingly, its claims were not based simply on the "pass-through" of wholesale costs as an input in a retail price formula.

North Star's equal protection argument (Br. 22) is no more than an ordinary claim of arbitrary and capricious departure from agency precedent, dressed up in constitutional clothing. Nevertheless, the Commission answered North Star's contention, explaining that, because of the different circumstances in *Portland*

General, as discussed above, approval of that uncontested settlement “does not constitute different treatment under the law.” Rehearing Order at P 12, ER 137. *See generally, e.g., Thornton v. City of St. Helens*, 425 F.3d 1158, 1167-68 (9th Cir. 2005) (equal protection claim requires showing of different treatment from others similarly situated without rational basis). Though North Star failed to raise *Kroger* before the Commission, its equal protection argument on appeal fails for the same reason.

III. THE COMMISSION PROPERLY DETERMINED THAT POTENTIAL REFUNDS TO ARIZONA ELECTRIC SHOULD BE ADDRESSED IN THE CALIFORNIA REFUND PROCEEDING

On rehearing, North Star raised for the first time, and only cursorily, the alternative prospect of wholesale refunds directed to the wholesale buyer, Arizona Electric:

Although North Star’s Complaint requested that refunds be paid to it, there is nothing to preclude FERC from arriving at the maximum effectuation of Congressional objectives by directing, instead, that the refunds be paid to [Arizona Electric], which could then be expected to honor the terms of its contract with North Star.

Rehearing Request at 6 n.16, ER 124; *see also* Br. 18 n.48 (same). *Cf.* Rehearing Order at P 12 n.15 (“In passing, North Star notes . . . that the Commission could exercise its remedial discretion to fashion a remedy that would provide North Star with the relief it requests.”), ER 137. This differed from the Complaint, which

only (and unambiguously) requested refunds paid directly to North Star itself. *See supra* pp. 9-10.

The Commission concluded that “here North Star has failed to persuade us to exercise our discretion to fashion a remedy in this proceeding.” Rehearing Order at P 12 n.15, ER 138. Rather, the Commission determined that the wholesale California Refund Proceeding — to which both Arizona Electric (which has never been a party to the instant case) and North Star are parties — was the appropriate forum to determine whether to order wholesale refunds to Arizona Electric. Accordingly, the Commission found that “North Star’s request that we exercise our discretion and order refunds to [Arizona Electric] is . . . being, and should be, litigated in other proceedings.” *Id.*

It is within the Commission’s purview to determine how best to allocate its resources for the most efficient resolution of matters before it. *See, e.g., Mobil Oil Exploration & Producing Se., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) (“[an] agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities”; lower court “clearly overshot the mark” if it required the agency to resolve a particular issue in a particular proceeding) (internal citations omitted); *Tenn. Valley Mun. Gas Ass’n v. FERC*, 140 F.3d 1085, 1088 (D.C. Cir. 1998) (“An agency has broad discretion to determine when and how to hear and decide the matters that come before it.”)

(citing cases); *Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992) (agencies accorded substantial deference in ordering their proceedings). It is well within the Commission’s discretion and reasoned judgment to direct North Star — to the extent it pursues wholesale refunds to Arizona Electric (the wholesale buyer) — to continue to pursue that claim in the wholesale California Refund Proceeding.

To the extent North Star may belatedly take issue with the Commission’s decision that refunds to Arizona Electric should be addressed in another proceeding, or otherwise question the adequacy of the California Refund Proceeding for pursuing any of its claims, any such objection has been “twice waived,” as North Star never challenged the Commission’s finding in a request for rehearing or in its opening brief to this Court. *Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007). *See generally Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003) (“The very purpose of rehearing is to give the Commission the opportunity to review its decision before facing judicial scrutiny.”).

Nevertheless, the Commission anticipated North Star’s possible objection to this determination, recognizing that North Star’s Complaint (filed nearly five years after the Commission initiated the California Refund Proceeding and North Star intervened in that proceeding) requested refunds commencing nine months earlier

than the beginning of the refund period established in the California Refund Proceeding. Rehearing Order at P 12 n.15, ER 138. The Commission, however, further observed that the refund period in that case remains subject to change: “The issues related to the temporal scope of the California refund proceeding have been remanded to [the Commission] and await further process.” *Id.* (citing *Pub. Utils. Comm’n*, 462 F.3d 1027).

CONCLUSION

For the reasons stated, North Star's petition should be denied, and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Although this case involves some of the same events (*i.e.*, the California energy crisis) that are involved in other cases previously and currently before this Court (*see supra* pp. 4-6), it does not arise out of the same FERC orders and does not raise the same or closely related issues. Accordingly, the Commission does not believe there are any related cases as defined in 9th Cir. R. 28-2.6.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and 9th Cir. R. 32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 6,393 words, not including the tables of contents and authorities, the certificates of counsel, and the addendum.

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March 14, 2008