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

SUPPLEMENTAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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AUGUST 5, 2009

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STATEMENT OF THE ISSUE

As directed by the Court's June 24, 2009 Order, the issue for supplemental briefing is whether the decision of the Federal Energy Regulatory Commission to dismiss the complaint of Petitioner North Star was "an 'agency refusal[] to institute investigative or enforcement proceedings' under *Heckler v. Chaney*, 470 U.S. 821, 838 (1985)." In particular, the Court directed the parties to address whether it has jurisdiction to review the challenged FERC orders in light of the Court's previous applications of *Heckler* in *Friends of Cowlitz v. FERC*, 253 F.3d 1161 (9th Cir.

2001), *amended by* 282 F.3d 609 (9th Cir. 2002), and *Port of Seattle v. FERC*, 499 F.3d 1016 (9th Cir. 2007), *reh'g denied*, Nos. 03-74139, *et al.* (9th Cir. Apr. 9, 2009).

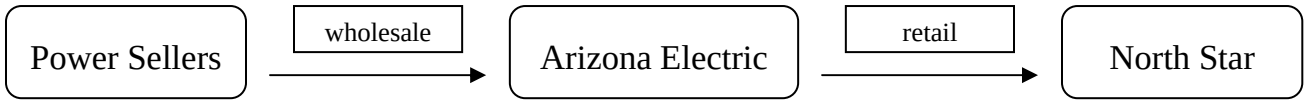
As explained below, this Court lacks jurisdiction to the limited extent that the Commission declined to expand the scope of the complaint before it, which sought retail refunds, to consider an additional wholesale remedy.

BACKGROUND

As set forth in the Commission's principal brief ("FERC Br."), this case concerns the Commission's dismissal of North Star's complaint for refunds arising from the California energy crisis. 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, Arizona Electric, for resale to North Star. North Star obtained electric energy pursuant to a contract with Arizona Electric, which provided for Arizona Electric to make such purchases from third party suppliers to serve North Star's requirements, and to charge North Star the cost of those purchases plus a markup and various other charges. *See* FERC Br. 7-8 (describing terms of contract).[1] Nevertheless, North Star sought refunds to be paid to itself directly from the wholesale sellers. *See* FERC Br. 9-10.

[1] For simplicity, this supplemental brief does not discuss the intermediary role of another party to the contract, Mohave Electric. *See* FERC Br. 7-8, 17-18 & n.3. This omission does not affect the analysis.

In the challenged FERC orders, the Commission held that refunds to North Star would constitute retail refunds, which are beyond the scope of the Commission's wholesale ratemaking authority under Sections 201, 205, and 206 of the Federal Power Act, 16 U.S.C. §§ 824, 824d, 824e. Complaint Order at PP 11, 13, ER 117-18; Rehearing Order at P 6, ER 135-36. The Commission's decision followed from the fact that power suppliers made jurisdictional sales of electric energy at wholesale in interstate commerce to Arizona Electric, which in turn resold the power to North Star under the retail, non-FERC-jurisdictional contract. These purchase-and-resale transactions are illustrated as follows:



Indeed, as the Commission stated in its principal brief, the wholesale nature of the transactions between the power sellers and Arizona Electric was *defined* by Arizona Electric's resale to North Star. FERC Br. 19 (citing FPA § 201(d), 16 U.S.C. § 824(d), which defines a wholesale transaction as "a sale of electric energy to any person for resale"). Accordingly, the Commission reasonably determined that a refund to North Star "would be a retail refund that is beyond the scope of the Commission's jurisdiction." Rehearing Order at P 6, ER 135-36.

As a secondary matter, but more significant for the question posed on supplemental briefing, the Commission chose not to reach beyond North Star's complaint to create a remedy for Arizona Electric's wholesale power purchases. In a passing footnote in its request for rehearing, North Star acknowledged that its complaint had sought only refunds to North Star itself, and suggested (for the first time) that the Commission had broad discretion to fashion an alternative remedy, ordering refunds to Arizona Electric. *See* FERC Br. 25-26. Addressing this new argument in its Rehearing Order, the Commission declined to exercise such discretion in this proceeding. The Commission determined instead that any refunds to Arizona Electric should be pursued in the wholesale California Refund Proceeding, to which Arizona Electric, North Star, and the Wholesale Sellers are all parties. Rehearing Order at P 12 n.15, ER 137-38.

SUMMARY OF ARGUMENT

To the extent that the Commission adjudicated North Star's complaint seeking refunds to North Star, which the Commission reasonably determined would constitute retail refunds that are beyond its jurisdiction under the Federal Power Act, the Commission's decision is subject to ordinary judicial review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Its finding was based on its interpretation of the Federal Power Act (*see* FERC Br. 14-15) and substantial record evidence (*see* FERC Br. 17-20), and accordingly should be upheld.

To the extent, however, that the Commission declined to go beyond North Star's complaint to craft an alternative remedy, such as refunds to Arizona Electric for wholesale transactions, the Commission exercised its broad discretion under the Federal Power Act; under the principles of *Heckler* and this Court's precedents, that decision is not appropriate for judicial review.

ARGUMENT

A. Overview Of Relevant Precedents

1. Presumption Of Unreviewability: *Heckler v. Chaney* And *Friends Of Cowlitz v. FERC*

Despite a general presumption of reviewability under the Administrative Procedure Act, judicial review does not extend to cases where "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). In *Heckler*, the Supreme Court explained that the exception in § 701(a)(2) applies where Congress has not affirmatively precluded review, but "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830. Rejecting the appeals court's narrow construction of the § 701(a)(2) exception to APA review, the Court held that agencies' "refusals to take enforcement steps" generally are presumptively unreviewable. *Id.* at 831. The Court explained that agency decisions to refuse enforcement are generally unsuitable for judicial review for "many" reasons:

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its

> expertise. Thus, 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. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

Id. at 831-32. In addition, an agency's refusal to act generally involves no exercise of coercive power over liberty or property rights, which often may call for judicial intervention. *Id.* at 832. Nevertheless, the general presumption of unreviewability of enforcement decisions "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33.

This Court applied the principles of *Heckler* to FERC's enforcement decisions under the Federal Power Act in *Friends of Cowlitz*, holding that the Commission "has virtually unreviewable discretion whether to enforce" alleged violations of a hydropower license. 253 F.3d at 1173.[2] In that case, the petitioners

[2] *Friends of Cowlitz* arose under Part I of the Federal Power Act, governing hydroelectric projects on jurisdictional waters, whereas the present case arises under Part II of the FPA, concerning wholesale sales of electric energy in interstate commerce. The case's relevance, however, is not limited to that subchapter of the (continued…)

accused the operator of a hydroelectric project of violating the terms of its FERC-approved license, and appealed the Commission's dismissal of their complaint requesting enforcement. *See* 253 F.3d at 1163-65. The Court found that the Commission had erred in summarily dismissing the complaint, because the Commission's own procedural rule provided for summary disposition only where there was no genuine issue of fact. *Id.* at 1168-69.

The Court went on, however, to conclude that the Commission had lawfully exercised its discretion in choosing not to investigate the complaint or take enforcement action. *Id.* at 1170-73. Mindful that *Heckler* allowed for the presumption of unreviewability to be rebutted if Congress had set forth clear standards, the Court determined that "an examination of the relevant provisions of the FPA reveals no such establishment of priorities or meaningful guidelines." 253 F.3d at 1171. Accordingly, even if the Commission found license violations, "it could lawfully decline to prosecute any such violations, and . . . such a decision would be immune from judicial review." *Id.*

Similarly, the Court concluded that "FERC did not abuse its discretion in declining to investigate the petitioners' allegations or hold an evidentiary hearing."

Act; indeed, as discussed below, this Court's analysis relied in part on the Commission's enforcement authority under FPA § 307, 16 U.S.C. § 825f, which applies to the Commission's jurisdiction under both Parts I and II.

Id. The relevant statutory provision, FPA § 307, 16 U.S.C. § 825f, couched the Commission's enforcement authority in discretionary terms (FERC "may" investigate as "it may find necessary or proper"), such that "investigative decisions are firmly committed to the agency's discretion." 253 F.3d at 1172. The Commission's implementing regulations likewise committed decisions as to whether to investigate to the agency's discretion. *See id.* The Court also upheld the Commission's exercise of its broad discretion not to hold an evidentiary hearing. *Id.* at 1172-73 (citing *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978)).

2. Application In Cases Arising From FERC Energy Crisis Orders

The standards set forth in *Heckler* and *Friends of Cowlitz* have recently been tested in this Court in three cases arising from the California energy crisis.

First, without discussing *Heckler* itself, the Court drew upon *Heckler*'s principles in distinguishing between enforcement decisions and adjudicative responsibilities in a case concerning the scope of the California Refund Proceeding. *See Pub. Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027 (9th Cir. 2006), *reh'g denied*, Nos. 01-71051, *et al.* (9th Cir. Apr. 6, 2009). The Commission had declined to award relief under an FPA provision concerning remedies for tariff violations; on appeal, the Commission explained that it was pursuing tariff violations related to the California energy crisis in a separate

enforcement proceeding. *See* 462 F.3d at 1049. The Court, however, found that an enforcement proceeding and a complaint proceeding are "quite distinct": "One is investigative and prosecutorial; the other is a contested proceeding. . . . In contrast to an adjudicated, contested proceeding, in [an enforcement] proceeding, FERC may settle claims without review, and need not justify its decision to order refunds, or to decline to order refunds." *Id.* at 1050. By contrast, "[w]hen parties seek adjudicative relief from an agency, they are entitled to a reasoned response from the agency." *Id.* at 1051. In the California Refund Proceeding, the complaining parties had "filed a cognizable request for relief and tendered credible evidence in support" and therefore were "entitled to have FERC adjudicate whether the tariff has been violated and what relief is appropriate[,]" notwithstanding that FERC's own enforcement action might provide some of the same relief. *Id.* ("FERC cannot . . . categorically refuse to entertain the application; it must address the merits.").

Less than a month later, the Court again considered a dispute related to the California Refund Proceeding, this time upholding the Commission's decision not to extend the reach of its exercise of enforcement authority. *See Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861 (9th Cir. 2006). That case arose from FERC orders concerning the methodologies that the California Independent System Operator ("California ISO") would use in re-running past invoices to calculate various

parties' obligations in the California Refund Proceeding. The Commission had rejected the California ISO's proposal to adjust certain payments in the re-run, because the Commission determined that the adjustment would expand the scope of the transactions covered in a separate FERC investigative proceeding. *Id.* at 865-66. This Court held that it lacked jurisdiction under *Heckler* to review the orders "[b]ecause FERC retains almost unfettered discretion to initiate investigations and prosecute violations of the FPA . . . ." *Id.* at 867. The Court found that the Commission had reasonably interpreted its own order, denying the California ISO's request to expand the scope of the transactions included in the re-run, as a decision not to exercise its enforcement authority under the Federal Power Act. *Id.* at 868. The Court also rejected a separate petition, challenging the Commission's approval of the California ISO's proposed accounting method for the re-run, as a collateral attack on an earlier order in the agency's California Refund Proceeding. *Id.* at 869-70.

More recently, the Court again considered *Heckler*, and the limits of its application, in *Port of Seattle*. In that case, the Commission had denied refunds for energy transactions in the Pacific Northwest. Following on the heels of the complaint that initiated the California Refund Proceeding, a party had filed a complaint seeking refunds for transactions in Pacific Northwest wholesale power markets. 499 F.3d at 1023. Following an evidentiary proceeding before an

administrative law judge, the Commission denied refunds for those transactions, citing the balance of various equitable factors (and affirming the ALJ). *Id.* at 1024-26.

On appeal, the Court concluded that *Heckler*'s presumption of unreviewability did not apply in light of the Commission's decision to adjudicate, and because the agency's substantive ruling could be measured against meaningful standards:

> When an agency has instituted proceedings, meaningful standards exist to review what the agency has done: "when an agency does act to enforce, that action itself provides a focus for judicial review, inasmuch as the agency must have exercised its power in some manner. The action at least can be reviewed to determine whether the agency exceeded its statutory powers." . . . Accordingly, where FERC has made a determination to adjudicate a dispute or take steps towards enforcing a violation of the law, the outcome it chooses is subject to judicial review under the standards of review set forth in the Administrative Procedure Act . . . .

Id. at 1027 (internal citations omitted). In *Port of Seattle*, the Commission had "already made a determination to commit resources" to examining whether refunds were warranted for certain energy transactions in the Pacific Northwest, even holding hearings and taking evidence. *Id.* Although those steps did not require the Commission to find that refunds should be paid, its decision on the merits was reviewable on appeal. *Id.* ("Indeed, we regularly exercise review over FERC's decision to grant or deny refunds . . . .") (citing, *inter alia*, *Pub. Utils. Comm'n*).

B. Application To The Present Case

The instant appeal provides a fourth opportunity for the Court to consider the application of *Heckler*'s presumption of unreviewability of enforcement decisions to the Commission's handling of disputes arising from the California energy crisis. The Commission did not initially raise a *Heckler*-based jurisdictional argument (though it did challenge jurisdiction as to several issues based on the statutory bar in FPA § 313(b), 16 U.S.C. § 825*l*(b), to judicial review of issues not presented with specificity to the agency on rehearing, *see* FERC Br. 1-2, 23, 25, 27). But the relevance of *Heckler* and its progeny has come to the fore as a result of the increased focus, in North Star's reply brief and at oral argument, on the Commission's alternative ruling on a secondary issue that North Star raised late in the FERC proceeding.

As to the core holding of the challenged FERC orders — that North Star sought retail refunds that were beyond the Commission's statutory jurisdiction — the Commission does not question this Court's jurisdiction. But as to the Commission's secondary ruling, declining to go beyond North Star's complaint to craft alternative relief, the Commission submits that its decision was an exercise of its discretionary enforcement authority that is not subject to judicial review pursuant to *Heckler* and this Court's case law.

To the extent that the Commission adjudicated North Star's complaint seeking refunds to North Star, its decision is subject to ordinary APA review. First, the Commission's decision in that respect was a straightforward adjudication of North Star's request for relief, rather than an enforcement decision. *See Pub. Utils. Comm'n*, 462 F.3d at 1051 ("When parties seek adjudicative relief from an agency, they are entitled to a reasoned response from the agency."); *Pac. Gas & Elec.*, 464 F.3d at 867 n.4 ("Of course, our lack of jurisdiction over FERC's purely discretionary prosecutorial decisions does not relieve FERC of its duty to adjudicate.") (citing *Pub. Utils. Comm'n*). Moreover, the Commission based its ruling on legal issues: its interpretation of the Federal Power Act as excluding jurisdiction over retail sales (FERC Br. 14-17), and its reasonable conclusion that refunds to North Star would, in fact, be retail refunds (FERC Br. 17-21). As such, the Court does have "meaningful standard[s]" by which to review the agency's ruling on North Star's complaint requesting retail refunds. *Heckler*, 470 U.S. at 830; *cf. id.* at 833 n.4 (noting that case did not involve "a refusal by the agency to institute proceedings based . . . on the belief that it lacks jurisdiction").

In its Rehearing Order, however, the Commission also issued an alternative ruling on a new request by North Star. As the Commission noted in its principal brief (at 25), North Star's rehearing request included a footnote alluding to the possibility of refunds to Arizona Electric, instead of North Star. In that footnote

North Star both acknowledged that such a remedy was beyond the scope of its complaint and recognized that the decision whether to create a new remedy was committed to FERC's discretion: "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] . . . ." Rehearing Request at 6 n.16, ER 124; *see also* North Star Br. 18 n.48; North Star Reply Br. 14. *See* FERC Br. 25-26 ("This differed from the Complaint, which only (and unambiguously) requested refunds paid directly to North Star itself.") (citing FERC Br. 9-10).

After answering North Star's various challenges on rehearing to the Complaint Order, the Commission responded to North Star's new argument, which the Commission properly understood as seeking discretionary relief:

> In passing, North Star notes in footnote 16 of its request for rehearing that the Commission could exercise its remedial discretion to fashion a remedy that would provide North Star with the relief it requests. . . .
>
> [W]e note that North Star recognizes that the Commission's fashioning of remedies is discretionary and 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 137-38. The Commission went on to conclude that the California Refund Proceeding, in which both Arizona Electric and North Star are parties, is the appropriate forum to determine whether to order wholesale

refunds to Arizona Electric. *Id.*; *see also* FERC Br. 26. Therefore, the Commission chose not to provide alternative, discretionary relief to Arizona Electric in North Star's complaint proceeding: "North Star's request that we exercise our discretion and order refunds to [Arizona Electric] is . . . being, and should be, litigated in other proceedings." Rehearing Order at P 12 n.15, ER 138.

The Commission's decision not to go beyond adjudication of the North Star complaint before it to order newly-conceived refunds to a third party is exactly the kind of determination that is committed to agency discretion. (Even North Star conceded that its late-raised suggestion was entirely within the Commission's discretion — indeed, North Star merely contended that "there is nothing to preclude FERC" from devising a remedy for Arizona Electric, should it elect to do so. Rehearing Request at 6 n.16, ER 124; North Star Br. 18 n.48.) Likewise, the Commission's determination that any refunds to Arizona Electric should be litigated in the California Refund Proceeding is manifestly within its broad discretion to allocate its resources and structure its proceedings. *See* FERC Br. 26-27, and cases cited therein; *see also Friends of Cowlitz*, 253 F.3d at 1171 (noting agency discretion to allocate resources, citing *Heckler*, 470 U.S. at 831-32); *Port of Seattle*, 499 F.3d at 1027 (in cases where agency decides not to enforce, "the concern is that courts should not intrude upon an agency's prerogative to pick and choose its priorities, and allocate its resources accordingly . . . .").

Of course, the Commission never had any opportunity to consider North Star's arguments — first raised in its reply brief (at 14-17) before this Court — that the Commission's alternative holding was in error. Oral Argument (Audio Recording) at 18:54-19:03, 20:00-20:15, 21:00-21:36; *see also* FERC Br. 27 (any such belated objection was "twice waived"). As such, even assuming jurisdiction in the face of FPA § 313(b), 16 U.S.C. § 825*l*(b), as well as *Heckler*, there could be no responsive reasoning by the Commission for the Court to evaluate on review. Moreover, to the extent that North Star belatedly challenged the scope of the California Refund Proceeding in *this* appeal, its argument constitutes a collateral attack on the Commission's decisions in that proceeding. *Cf.* Oral Argument at 25:25-25:50; *see also Pac. Gas & Elec.*, 464 F.3d at 870.

CONCLUSION

For the reasons stated above and in the Commission's principal brief, to the extent that North Star challenges the Commission's refusal to exercise its discretion to expand the scope of North Star's complaint to encompass wholesale refunds to Arizona Electric, the petition should be dismissed for lack of jurisdiction; the challenged FERC Orders should be affirmed in all other respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 5th day of August 2009, electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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