

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

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**Nos. 03-74139, *et al.***

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**PORT OF SEATTLE, WASHINGTON, *ET AL.*,  
Petitioners,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
Respondent.**

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**FOR RESPONDENT  
FEDERAL ENERGY REGULATORY  
COMMISSION**

**MARCH 30, 2005**

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**GLOSSARY**

ALJ	administrative law judge
<i>ALJ Order</i>	<i>Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.</i> , 96 FERC ¶ 63,044 (2001), JER 253
Cal. Br.	California Parties' opening brief
California Parties	Petitioners State of California, California Electricity Oversight Board, and the California Public Utilities Commission
CERS	California Energy Resources Scheduling Division of the California Department of Water Resources
Commission or FERC	Federal Energy Regulatory Commission
CPER	Additional Excerpts of Record filed by California Parties
FPA	Federal Power Act
<i>Hearing Order</i>	<i>San Diego Gas &amp; Electric Co. v. Sellers of Energy and Ancillary Service, et al.</i> , 96 FERC ¶ 61,120 (2001), JER 110
ISO	California Independent System Operator
JER	Joint Excerpts of Record
P	paragraph number
Port	Petitioner Port of Seattle, Washington
Port Br.	Port's opening brief
Puget	Petitioner Puget Sound Energy, Inc.

**GLOSSARY**

Puget Br.	Puget’s opening brief
<i>Puget I</i>	<i>Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.</i> , 103 FERC ¶ 61,348 (2003), JER 741
<i>Puget II</i>	<i>Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.</i> , 105 FERC ¶ 61,183 (2003), JER 807
<i>Puget III</i>	<i>Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.</i> , 106 FERC ¶ 61,109 (2004), CPER 25
PX	California Power Exchange
Seattle	Petitioner City of Seattle, Washington
Seattle Br.	Seattle’s opening brief
Tacoma	Petitioner City of Tacoma, Washington
Tacoma Br.	Tacoma’s opening brief
WSPP	Western Systems Power Pool

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

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**STATEMENT OF THE ISSUES**

1. Does this Court have jurisdiction to review determinations of the Federal Energy Regulatory Commission (“Commission” or “FERC”): (a) declining to exercise its discretion to order retroactive relief for alleged violations of the Federal Power Act (“FPA”), 16 U.S.C. § 824, *et seq.*, based on its balance of all relevant factors; and (b) granting all the prospective relief sought by the complainant initiating the instant proceeding?

2. Assuming jurisdiction, did the Commission reasonably agree with the findings of the administrative law judge (“ALJ”), after an evidentiary hearing and on the basis of record evidence, that refunds for past charges in the Pacific Northwest would not be equitable under the circumstances?

3. In reaching its decision not to award refunds, did the Commission afford the parties sufficient opportunity to present their cases?

### **COUNTERSTATEMENT OF JURISDICTION**

This Court lacks jurisdiction to consider any of the petitions for review. As explained further below, *see infra* page 66, Petitioner Puget Sound Energy, Inc. (“Puget”) is not “aggrieved,” within the meaning of FPA § 313(b), 16 U.S.C. § 825l(b), because the Commission granted all the relief it sought in this proceeding. *See The Steamboaters v. FERC*, 759 F.2d 1382, 1387 (9<sup>th</sup> Cir. 1985).

As for the remaining Petitioners, their claim that the Commission improperly denied refunds for an alleged violation of the FPA is not justiciable. As explained further below, *see infra* pages 35-38, the Commission has unreviewable prosecutorial discretion to decide whether and how to enforce such a claim. *See* 5 U.S.C. § 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821 (1985); *Friends of the Cowlitz v. FERC*, 253 F.3d 1161 (9<sup>th</sup> Cir. 2001).

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Addendum to this brief.

## STATEMENT OF THE CASE

### I. INTRODUCTION

With the second half of 2000 came an energy crisis that brought a sharp rise in wholesale electricity prices throughout the West, frequent system emergencies and occasional blackouts in California, and severe financial distress to utilities, energy consumers and other market participants. In response, the Commission initiated a series of adjudicatory and investigative proceedings, intended both to settle and reform markets going forward and, where appropriate, to provide ratepayer relief going backward. *See, e.g., In re California Power Exchange Corp.*, 245 F.3d 1110, 1125 (9<sup>th</sup> Cir. 2001) (approving of FERC's decision to focus first on prospective remedies before turning to possible retroactive relief).

In relevant respect, the Commission initiated three broad categories of proceedings, resulting in the issuance of dozens of orders. In one, commonly referred to as the "**California Proceeding**," the Commission reformed California market institutions and rules and restrained prices for electricity purchased in California through centralized spot markets. The Commission also provided a process for determining refunds for prices that were found to be unjust and



unreasonable in violation of FPA §§ 205 and 206, 16 U.S.C. §§ 824d and 824e. The Commission's directives in the California Proceeding are not the subject of the instant petitions, but rather are the subject of over one hundred other petitions for review now pending in this Court.

In the second category of proceedings, which is presented here, commonly referred to as the "**Pacific Northwest Proceeding**," the Commission restrained prices for electricity purchased through short-term bilateral contracts, between specific buyers and sellers, outside California. Recognizing that wholesale electricity markets in California and the Pacific Northwest, while integrated, differ significantly in their structure and operation, the Commission decided after hearing that further retroactive relief for Pacific Northwest markets would do more harm than good, and thus provided prospective relief only. That determination is the subject of the instant seven consolidated appeals.

The California and Pacific Northwest Proceedings are generic proceedings addressing broadly whether rates charged were just and reasonable and, if not, whether they should be corrected. In the third category of proceedings, commonly referred to as the "**Enforcement Proceedings**," the Commission initiated docket-specific investigations of individual utilities to determine whether any of them had violated, at any time, the terms and conditions of filed tariffs and, if so, how to

enforce the tariffs. The Commission's decisions to initiate investigative proceedings, and to resolve many through settlements resulting in over one billion dollars of ratepayer refunds and benefits, are the subject of dozens of other petitions for review in this Court and in the D.C. Circuit.

As a result of the Commission's initiatives, in conjunction with various other initiatives at all levels to promote supply, to reduce demand and to reform markets, prices in Western electricity markets returned to preexisting competitive levels by early June 2001. The Commission remains committed to effective ongoing monitoring of energy markets. It will take prompt action to remedy any conduct, occurring at any time, that undermines the competitive operation of those markets or is otherwise inconsistent with tariff obligations and commitments.

## **II. STATUTORY AND REGULATORY FRAMEWORK**

Section 201 of the FPA, 16 U.S.C. § 824, affords 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 statutory grant of jurisdiction is comprehensive and exclusive. *See New York v. FERC*, 535 U.S. 1, 18-20 (2002) (discussing statutory framework, and division between federal and state regulatory authority under the FPA); *see also, e.g., Public Utility District No. 1 of Grays Harbor County, Washington v.*

*Idacorp Inc.*, 379 F.3d 641, 646-47 (9<sup>th</sup> Cir. 2004) (discussing exclusive FERC jurisdiction over wholesale power sales); *California v. Dynegy, Inc.*, 375 F.3d 831, 849-52 (9<sup>th</sup> Cir. 2004) (same).

All rates for or related to jurisdictional sales and transmission services proposed or provided by any public utility must be just and reasonable and not unduly discriminatory or preferential. FPA §§ 205(a), 205(b), and 205(e), 16 U.S.C. §§ 824d(a), 824d(b), and 824d(e). Pending an FPA § 205 investigation, the Commission may suspend the proposed rate for a period of up to five months, at which point the proposed rate becomes effective, subject to refund. *Id.* § 824d(e). If the Commission ultimately determines that the initially-suspended rate was not just and reasonable, FERC may order refunds with interest of any amounts collected in excess of a just and reasonable rate. *Id.*

In contrast, complaints asserting that existing rates are unlawful are governed by FPA § 206, under which only prospective relief is available. *See California Power Exchange*, 245 F.3d at 1120-21 (describing statutory framework). If, after hearing on its own motion or upon complaint, the Commission determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." FPA § 206(a), 16 U.S.C. § 824e(a). Prospective

rate corrections require the setting of a “refund effective date.” The Commission "may order the [seller] to make refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate. . . ." FPA § 206(b), 16 U.S.C. § 824e(b). The refund effective date "shall not be earlier than the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period." *Id.*

Commission regulations detail the procedures governing, for example, the filing of a complaint under FPA § 206, *see* 18 C.F.R. § 385.206, and the withdrawal of pleadings, *see* 18 C.F.R. § 385.216.

### **III. WESTERN WHOLESALE ELECTRICITY MARKETS**

California and the Pacific Northwest are part of the integrated Western Interconnection, a large and complex bulk electric power market serving customers throughout the Western United States, Canada, and a part of Mexico. The Western Interconnection is one of the three major interconnections in the United States and operates largely independently from the other two. Market conditions in California influence market conditions in the Pacific Northwest, and vice versa.

The operation of the California and Pacific Northwest regional markets, while related in some respects, is also different in significant respects.

## A. California

By mid-1995, retail electricity rates in California were well above the national average and rising. In response, California comprehensively restructured its electric energy industry, changing from a cost-based system of setting wholesale electricity rates to a market-based system, where the rate would be determined in a structured market. *E.g., Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 758-59 (9<sup>th</sup> Cir. 2004).

Specifically, the California Public Utilities Commission's final restructuring order in December 1995 led to the unanimous enactment by the California legislature and approval by the Governor of Assembly Bill ("AB") 1890 in September 1996. *California Power Exchange*, 245 F.3d at 1114. That legislation "was designed to dismantle the investor-owned, government-regulated utility model and create a deregulated market in which price would be established by competition." *California v. FERC*, 383 F.3d 1006, 1008 (9<sup>th</sup> Cir. 2004).

To accomplish the desired competitive restructuring of the industry, AB 1890 required California's major investor-owned, vertically-integrated utilities to divest a substantial portion of their power generation plants. These utilities also were required to sell their generation output to, and purchase all their generation needs from, a newly-created wholesale clearinghouse, known as the California

Power Exchange (“PX”). The PX would operate an auction market for the purchase and sale of electricity in the “day-ahead” and “day-of” markets, under which the PX would set market-clearing prices applicable to all accepted bids.

The legislation also created the California Independent System Operator (“ISO”) to manage the transmission network. To assure the reliability of the network, the ISO was directed to operate a real-time, or “spot,” market to balance supply and demand at any given time. If, for example, “customer demand for a particular hour was not met, then the ISO was required to procure power on the spot market to maintain the stability of the grid.” *Public Utility District No. 1 of Snohomish County*, 384 F.3d at 759. *See also, e.g., California v. Dynege*, 375 F.3d at 835-36 (explaining development and restructuring of California wholesale electricity markets and roles of the ISO and PX).

For several years, the restructured, newly-competitive California electricity markets operated largely as intended. Starting in the summer of 2000, however, California wholesale electricity prices increased significantly, load-serving utilities incurred billions of dollars in debt, and the ISO declared dozens of system emergencies and occasional rolling blackouts. *See California Power Exchange*, 245 F.3d at 1115 (describing events).

## **B. Pacific Northwest**

Wholesale sales of electricity in the Pacific Northwest, in contrast to California, do not operate through a centralized electric power exchange that sets a market clearing price. Rather, in the absence of centralized markets or an ISO, power in the Pacific Northwest is bought and sold continuously on a bilateral basis between individual buyers and sellers. This means that each utility is free to choose how to meet its firm load requirements and how to minimize exposure to volatile spot market prices.

Specifically, market participants in the Pacific Northwest buy and sell electricity pursuant to the rules and guidance of the Western Systems Power Pool (“WSPP”) Agreement. The WSPP Agreement is a standardized power sales contract, employing standardized contractual terms and conditions, under which members subject to FERC jurisdiction can sell electricity at market-based prices after they receive market-based rate authority from the FERC. There are approximately 220 parties to the WSPP Agreement. Most are power marketers and investor-owned utilities that are regulated by FERC; the remainder are governmental entities that are not.<sup>1</sup> See Puget Complaint at 3-4, JER 5-6; 96

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<sup>1</sup> Pursuant to FPA § 201(f), the statute’s requirements do not extend to governmental entities: “No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing . . . .” 16 U.S.C. § 824(f).

FERC at 65,355, 65,377-78, JER 312, 334-35.<sup>2</sup>

As the ALJ in the Pacific Northwest Proceeding found, based upon the record, the Pacific Northwest is uniquely dependent on hydroelectric power. 96 FERC at 65,385-86, JER 341-42; *see also infra* page 22. The prevalence of hydroelectric generation provides an inexpensive source of power. However, it also subjects load serving entities in the Pacific Northwest to the vagaries of weather conditions (i.e., drought and low flow conditions). Faced with seasonal and year-to-year variations in water and storage availability, Pacific Northwest utilities have long been accustomed, under bilateral contracts of varying length, to buying and selling with each other and with parties outside the region to match supply with load and to hedge market risk.<sup>3</sup>

During the 2000-2001 period, precipitation levels in the Pacific Northwest fell to record lows and the region suffered its worst drought in 50 years. *Id.* at 65,386, JER 342. This translated to little surplus hydropower above Pacific Northwest loads which, in turn, disrupted traditional trading patterns among

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<sup>2</sup> References throughout this brief to “JER” are to pages in the Joint Excerpts of Record. References to “CPER” are to pages in the Additional Excerpts of Record submitted by Petitioners People of the State of California, *et al.*

<sup>3</sup> The ALJ explained that Pacific Northwest utilities typically export large volumes of “economy” hydropower to California and the Desert Southwest during wet spring and summer months, and typically import large volumes of thermal generation from the South to supplement local supplies during cold winter months. 96 FERC at 65,365, JER 322.



regions. Combined with other factors (such as a sharp rise in the price and unavailability of natural gas), the price of electricity in the Pacific Northwest (and throughout the West) rose “dramatically.” *Id.* at 65,367, JER 324.

#### **IV. RELATED PROCEEDINGS**

##### **A. California Proceeding**

On August 2, 2000, San Diego Gas & Electric Co. filed a complaint, docketed in FERC Docket No. EL00-95-000, against all sellers of energy and ancillary services into the California ISO and PX markets subject to FERC jurisdiction. The complaint requested that the Commission impose a \$250/megawatt-hour price cap for sales into those markets.

The Commission responded with a series of orders implementing a number of structural and pricing reforms designed to make California electricity markets more stable and less susceptible to price spikes. *See, e.g., San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 93 FERC ¶ 61,294 (Dec. 15, 2000), JER 22 (comprehensive array of reforms); *see also California Power Exchange Corp.*, 245 F.3d at 1116-18 (describing early initiatives). In relevant respect, the Commission, after earlier efforts did not prove sufficiently effective, established a forward price mitigation plan, ultimately effective June 21, 2001, applicable to all sellers into, and all electricity sold at wholesale through,

centralized, single price auction spot markets in California.

Looking backward, at the period from October 2, 2000 (the refund effective date) to June 20, 2001, the Commission established a process for determining which prices in the PX and ISO markets were unjust and unreasonable under FPA § 206. Specifically, a mitigated market clearing price (“MMCP”) methodology was set as a benchmark against which to judge prices during that period. An evidentiary hearing was ordered to develop a record from which to make findings of fact concerning: (1) the mitigated price in each hour of the refund period; (2) the amount of refunds owed by each supplier according to the FERC-prescribed methodology; and (3) the amount currently owed to each supplier by the ISO, utilities, and the State of California.

This Court currently is considering more than 100 petitions to review the Commission’s California Proceeding orders. By Order dated November 24, 2004, the Court grouped the petitions under three captions: (1) *Public Utilities Commission of the State of California, et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 01-71051, *et al.* (immediate Phase One briefing on refund effective date and scope issues); (2) *Bonneville Power Administration, et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 02-70262, *et al.* (Phase One briefing on authority over governmental entities); <sup>4</sup> and (3) *Public*

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<sup>4</sup> Phase One oral argument in the California Proceeding appeals is scheduled

*Utilities Commission of the State of California, et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 01-71934, *et al.* (later Phase Two briefing, if necessary, on all other issues).

## **B. Enforcement Proceedings**

In early 2002, in response to reports that Enron had abused its market-based pricing tariff authority, the Commission directed its staff to initiate a fact-finding investigation into whether any entity manipulated short-term prices in Western electricity or natural gas markets at any time after January 1, 2000. *See Fact-Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, 98 FERC ¶ 61,165 (Feb. 13, 2002). Commission staff, afforded broad investigative authority, obtained over 2 terabytes of electronic data and hundreds of boxes of written materials, including responses to data requests sent to hundreds of respondents representing all segments of the industry. In addition, Commission staff met with representatives of numerous parties to review their expert testimony and analyses on many issues. Staff shared information, as appropriate, with the U.S. Department of Justice and other investigatory agencies,

Commission staff's Final Report (issued March 26, 2003) identified instances or allegations of possible market power abuses or tariff violations, in the form of: (1) anomalous bidding behavior; and (2) physical withholding of

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for April 12 and 13, 2005.

generation resources from markets. In response, the Commission initiated a number of investigative and enforcement proceedings, taking different forms, to examine instances of potential wrongdoing by individual entities and to take remedial action as appropriate, regardless of when or where the wrongdoing occurred.<sup>5</sup>

Some of the Commission's investigations have uncovered specific misconduct during specific time periods.<sup>6</sup> Other investigations have concluded with settlements with individual suppliers providing customers with over a billion dollars in refunds and additional non-monetary relief.<sup>7</sup> Settlement activity

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<sup>5</sup> For example, on June 25, 2003, the Commission directed dozens of entities to show cause, in evidentiary hearings, why their conduct after January 1, 2000 did not constitute gaming and/or anomalous market behavior in violation of applicable tariffs. *See American Electric Power Service Corp., et al.*, 103 FERC ¶ 61,345 (2003), *reh'g denied*, 106 FERC ¶ 61,020 (2004), *appeals pending sub nom. Dynegy Power Marketing, Inc., et al. v. FERC*, D.C. Cir. Nos. 04-1034, *et al.* (transferred to 9<sup>th</sup> Cir. Feb. 9, 2004). The Commission directed the ALJs to hear evidence, render findings and conclusions quantifying the extent to which the identified entities may have been unjustly enriched as a result of their conduct, and recommend appropriate monetary and non-monetary remedies.

<sup>6</sup> *See, e.g., Fact-Finding Investigation Into Possible Manipulation of Electric and Natural Gas Prices*, 102 FERC ¶ 61,108 (2003), *reh'g dismissed*, 104 FERC ¶ 61,146 (2003) (agreement to pay \$13.8 million in refunds for withholding of generating capacity on two days in June, 2000), *appeals pending sub nom. Pacific Gas and Electric Co., et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 03-72874, *et al.*

<sup>7</sup> *See, e.g., San Diego Gas & Electric Co. v. Sellers of Energy, et al.*, 109 FERC ¶ 61,257 (2004) (approximately \$200 million in refunds to resolve all claims against Duke Energy); *San Diego Gas & Electric Co. v. Sellers of Energy, et al.*, 109 FERC ¶ 61,071 (2004) (almost \$300 million in refunds to resolve all claims

continues to this date.<sup>8</sup>

As for Enron, which to date has refused to settle any claims in California or the Pacific Northwest, the Commission stripped its affiliates of authority to trade electricity and natural gas at negotiated, market-based rates. *See Enron Power Marketing, Inc., et al.*, 103 FERC ¶ 61,343 (2003), *reh'g denied*, 106 FERC ¶ 61,024 (2004), *appeals pending sub nom. City of Palo Alto, California, et al. v. FERC*, D.C. Cir. Nos. 04-1036, *et al.* The Commission also ordered Enron to forfeit \$32.5 million in unjust profits and directed an ALJ to compile a record to determine whether further disgorgement of profits is appropriate. *See El Paso Electric Co., et al.*, 108 FERC ¶ 61,071 (2004); *see also El Paso Electric Co., et al.*, 110 FERC ¶ 61,280 (2005) (clarifying that terminated contracts between Enron and purchasers are within scope of hearing).

## **V. PACIFIC NORTHWEST PROCEEDING**

### **A. Filing of, and Initial Action on, Puget's Complaint**

On October 26, 2000, Puget Sound Energy Inc. (Puget) filed a complaint in FERC Docket No. EL01-10-000, JER 3, seeking an order limiting the prices at

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against Dynegy, Inc. and NRG Energy); *San Diego Gas & Electric Co. v. Sellers of Energy, et al.*, 108 FERC ¶ 61,002 (2004) (approximately \$140 million in refunds in resolution of FERC claims).

<sup>8</sup> For example, merchant generator Mirant Corp. announced, on January 14, 2005, a settlement valued at approximately \$360 million in refunds and other cash equivalents.

which FERC-jurisdictional sellers could sell electricity under the WSPP Agreement into the Pacific Northwest's wholesale power markets.<sup>9</sup> Puget sought prospective relief in the form of a price cap (to be set no higher than any price cap set in the California Proceeding). It also requested that “[i]f and to the extent any refund is called for in response to [Puget’s] petition, [Puget] respectfully requests that the refund effective date be set, in accordance with Section 206 of the Federal Power Act (16 U.S.C. § 824e(b)), sixty (60) days after the date of filing of this Complaint.” JER 13.

On December 15, 2000, the Commission dismissed Puget’s complaint. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, et al.*, 93 FERC ¶ 61,294 (2000), JER 22. The Commission – after denying requests to impose a price cap in California -- explained that implementation of the “region-wide price cap” sought by Puget is “impracticable given the market structure in the Northwest.” 93 FERC at 62,019, JER 61. Moreover, Puget and the few parties that supported the complaint, *see* 93 FERC at 61,989, 62,023, JER 31, 65,<sup>10</sup> had

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<sup>9</sup> Puget stated that, for purposes of its complaint, “Pacific Northwest” has the meaning set forth in the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839a(14).

<sup>10</sup> None of the other Petitioners to the instant appeals intervened before the Commission at that time to address Puget’s claim for relief. Indeed, among those entities that actually did intervene, only one (Southern California Edison Company) supported Puget’s complaint. *See* 93 FERC at 61,989, JER 31.

failed to satisfy their burden of proof under FPA § 206 to justify a price cap. 93 FERC at 62,019, JER 61.

On January 12, 2001, Puget sought rehearing of the dismissal of its complaint.

### **B. Institution of Prospective West-Price Price Mitigation**

While Puget's rehearing request was pending, the Commission initiated an investigation of wholesale electricity prices outside California in an order issued April 26, 2001. *See San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,115 at 61,365 (2001) (establishing an inquiry into whether a price mitigation plan should be implemented outside California). The Commission invited comment on how such a West-wide plan could be implemented.

On June 19, 2001, the Commission expanded the scope of its price mitigation and monitoring plan, for California and throughout the West, by imposing price curbs on all sales during all hours in all Western spot markets. *See San Diego Gas & Electric Co., et al.*, 95 FERC ¶ 61,418 (2001). Under the plan, the California ISO market clearing price capped prices in all other spot market sales throughout the West (*i.e.*, bilateral transactions in the WSCC) during reserve deficiencies in California. During non-reserve deficiency hours, prices in Western spot markets were not allowed to exceed 85 percent of the highest hourly clearing

price that was in effect during the most recent reserve deficiency period called by the ISO. *See* 95 FERC at 62,567-70.

Satisfied with the Commission's imposition of prospective price mitigation on wholesale power sales throughout the West, Puget almost immediately moved, on June 22, 2001, to withdraw both its complaint and request for rehearing of the December 15, 2000 order dismissing its complaint. Various entities – including Petitioners City of Tacoma (“Tacoma”), City of Seattle, Washington (“Seattle”), and Port of Seattle, Washington (“Port”) – filed answers in opposition to Puget's withdrawal motion.

### **C. Institution of Proceeding to Consider Retroactive West-Wide Relief**

Also on June 22, 2001, the Commission clarified that parties to a settlement conference, established in the California Proceeding, to resolve potential refund issues for past spot market sales, could also discuss past sales in the Pacific Northwest. Despite a FERC-sponsored two-week settlement conference, the parties proved incapable of forging a comprehensive settlement of refund issues for past periods. The Commission's Chief ALJ, on July 12, 2001, issued a report and recommendation regarding a refund methodology governing past sales in California. *See San Diego Gas & Electric Co., et al.*, 96 FERC ¶ 63,007 (2001). As for sales outside California, the Chief ALJ reported that there was little time in



the settlement proceeding to address the issues raised in Puget's complaint, specifically noting that the parties did not have data on unpaid balances or on potential refunds.

In a July 25, 2001 order, the Commission instituted a process to consider past spot market sales in the Pacific Northwest. *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Service, et al.*, 96 FERC ¶ 61,120 (2001), JER 110 ("Hearing Order"). The Commission recognized that "[s]pot market sales outside of California were not based on bids into an auction, and instead were made through bilateral contracts." *Id.* at 61,520, JER 131. Further recognizing the "complexities associated with these retroactive bilateral calculations and the absence of any further development of this issue in the settlement proceeding, and in recognition that the prior settlement proceeding focused primarily on California," the Commission established a "separate preliminary evidentiary proceeding pertaining to the Northwest." *Id.*

The Commission established the parameters for the evidentiary proceeding as follows:

The proceeding is intended to facilitate development of a factual record on whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for the period beginning December 25, 2000 through June 20, 2001. The record should establish the volume of the transactions, the identification of the net sellers and net buyers, the price and terms and

conditions of the sales contracts, and the extent of potential refunds. This will help the Commission to determine the extent to which the dysfunctions in the California markets may have affected decisions in the Pacific Northwest.

*Id.*<sup>11</sup> The Commission “strongly encourage[d] the parties to try to settle past accounts;” if they could not, then the ALJ, within a defined time period following the completion of “discussions,” was directed to submit recommendations and findings of fact. *Id.* at 61,520-21, JER 131-132.

#### **D. The ALJ’s Recommendations and Findings of Fact**

The parties engaged in extensive discovery, filed prepared testimony by over 40 witnesses, conducted a three-day evidentiary hearing with cross-examination, and filed post-hearing briefs. On September 24, 2001, the ALJ issued her recommendations and proposed findings of fact. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.*, 96 FERC ¶ 63,044 (2001), JER 253 (“*ALJ Order*”).

The ALJ recommended that no refunds are warranted for wholesale power sales made in the Pacific Northwest. *Id.* at 65,370, JER 327. The evidence

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<sup>11</sup> The Commission did not set a FPA § 206(b) refund effective date. Rather, it noted that December 25, 2000 – 60 days after the filing of Puget’s complaint – “is the earliest refund effective date the Commission could establish” if it later were to: (1) deny Puget’s motion to withdraw its complaint; and (2) grant rehearing of its earlier decision not to set the complaint for hearing. 96 FERC at 61,520 n.75, JER 131.

demonstrated that the Pacific Northwest market for spot sales of electricity was competitive and functional during the relevant time period (December 25, 2000 to June 20, 2001) and that prices were not unreasonable. *Id.* at 65,369-70, JER 326-27. The ALJ found that, while California electric energy prices affected electric energy prices in the Pacific Northwest, other factors contributed to higher prices in the Pacific Northwest, including reduced available power due to drought, increased demand, and high natural gas prices. *Id.* at 65,365-67, JER 322-24.

The ALJ's findings rested, in part, on the differences between the California and Pacific Northwest power markets. While "inextricably interrelated," the two markets operated quite differently. *Id.* at 65,330-31, JER 287-88. During the relevant period, California had a centralized spot market with a single auction price, while the Pacific Northwest operated entirely through individually-negotiated, bilateral contracts. Pacific Northwest markets rely much more heavily on hydroelectric resources and are more sensitive to price because of the large presence of aluminum and other energy-intensive industries with alternative fuel capability in the region. *Id.* at 65,365-66, JER 322-24.

The two regional markets also differed greatly in terms of supply options and hedging strategies. *Id.* at 65,368-69, JER 325-26. Unlike California utilities during the relevant period, compelled to sell into and buy from centralized spot

markets, Pacific Northwest utilities could assemble a portfolio of long-, medium-, and short-term contracts to limit exposure to volatile spot market prices. The prices paid under those contracts, the ALJ found, were the result of arm's-length negotiations and reflected the value that willing buyers and sellers placed on those transactions in the face of supply constraints. The ALJ blamed "market fundamentals, exacerbated by financial uncertainty and confusion" as the cause of Pacific Northwest's high power prices, and stated that "the evidence shows that the Pacific Northwest performed just as workably competitive markets would under adversity." *Id.* at 65,367, JER 324.

Finding that rates were not unjust and unreasonable or otherwise violative of the FPA, the ALJ made no findings regarding potential refunds.<sup>12</sup> Instead, she recommended that the Commission affirm its December 15, 2000 dismissal of Puget's complaint and allow Puget to withdraw its rehearing request. *Id.* at 65,383-85, JER 340-42.

Various parties filed briefs on and opposing exceptions to the ALJ's decision.

#### **E. Additional Submissions to the Commission**

On December 19, 2002, the Commission reopened the record to allow

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<sup>12</sup> The ALJ did identify the total extent of potential refunds at \$1.93 billion, based on the parties' claims. *Id.* at 65,336, JER 293.

additional discovery related to sales during the period January 1, 2000 to June 20, 2001. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.*, 101 FERC ¶ 61,304 (2002), JER 523.<sup>13</sup> The parties could submit directly to the Commission “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 proposed new and/or modified findings of fact.” *Id.* at 62,221, JER 526. As established by later clarifying orders, the parties were directed to file their evidence and proposed findings by March 3, 2003, and to file reply comments by March 20, 2003. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.*, 102 FERC ¶¶ 61,113 and 61,163 (2003), JER 547, 550.

On June 2, 2003, the Commission heard oral argument on the legal and policy issues raised in the proceeding.

## **F. FERC Orders Resolving Proceeding and Denying Refunds**

**1. *Puget I.*** In an order issued June 25, 2003, the Commission responded to:

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<sup>13</sup> This action also responded to an August 21, 2002 Order of this Court in Nos. 01-71051, *et al.*, directing the Commission to allow the parties an opportunity to adduce additional evidence of market manipulation in Western energy markets. This Court’s Order (at 7-8) explicitly left to the Commission’s discretion how best to adduce and consider new evidence, and did not require the Commission to consider any new evidence in any particular proceeding.

(1) Puget's pending withdrawal motions; (2) the ALJ's recommendations and proposed findings of fact; and (3) the parties' comments and evidence. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.*, 103 FERC ¶ 61,348 (2003), JER 741 (“*Puget I*”).

The Commission first denied Puget's motion to withdraw its complaint and granted its request for rehearing of the December 2000 dismissal of its complaint. The Commission explained that it had provided all the relief sought by Puget in its complaint when the Commission, in June 2001, implemented price mitigation measures on wholesale sales throughout the West. 103 FERC at PP 23-30, JER 744-45.

Turning to the issue of refunds, the Commission concluded that, based on the record compiled before the ALJ and supplemented by the parties, “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 P 35, JER 746. In particular, the circumstances unique to this proceeding, recognized by the ALJ, prevent an even and fair allocation of refunds (even if determined to be warranted):

1. **Large presence of non-jurisdictional sellers** – The burden of paying refunds would fall on a limited class of jurisdictional sellers in the region since a large portion of transactions at issue were conducted by non-jurisdictional entities not subject to the

Commission's refund authority. *Id.* at PP 36-39, JER 746-47.<sup>14</sup>

2. **Reliance on spot markets** – Refunds would unfairly reward entities that relied on the spot market, at the expense of other market participants that paid for hedging instruments or adopted procurement strategies with a greater emphasis on long-term instruments. *Id.* at PP 40-43, JER 747.

3. **Adverse consequences to spot markets** – Refunds would undermine confidence in Pacific Northwest spot markets, jeopardize needed investment, and discourage trading. *Id.* at PP 44-46, JER 747-48.

4. **Complexity/Impossibility** – Given the immense number of transactions (over 500,000) and the complexity of determining the chain of transactions down to the last customer, calculating refunds would be exceedingly difficult, if not impossible. *Id.* at PP 47-50, JER 748.

5. **Preferences of parties** – The vast majority of market participants, as well as state commissions in Washington and Oregon, did not pursue refunds and believe that retroactive relief would only unsettle markets to their long-term detriment. *Id.* at PP 51-53, JER 748.

Based on the “totality of the circumstances,” the Commission determined that even if it were to conclude that prices during the potential refund period were unjust and unreasonable (which it did not), “the directing of refunds in this proceeding would not result in an equitable resolution of the matter.” *Id.* at P 53,

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<sup>14</sup> Unlike the situation involving the California ISO and PX single price auction and centralized spot markets in which governmental entities participated as sellers of power and thus were made subject to the Commission's refund authority, here the governmental entities were not participating in a centralized spot market administered by entities exclusively within FERC jurisdiction. *See infra* page 51.

JER 749. Accordingly, the Commission terminated the proceeding.

**2. *Puget II*.** In an order issued November 10, 2003, the Commission denied all requests for rehearing of its decision to terminate the proceeding without refunds. *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.*, 105 FERC ¶ 61,183 (2003), JER 807 (“*Puget II*”).

The Commission again concluded, based on the various equitable considerations discussed in its earlier order, that it is impossible to craft a retroactive remedy that would be equitable to market participants in the Pacific Northwest, even if it had determined that rates were not just and reasonable. *Id.* at PP 37-64, JER 813-818. The Commission rejected the argument that it is required to make a determination whether rates were just and reasonable. *Id.* at PP 29-36, JER 812-813. Rather, the Commission enjoys considerable discretion under FPA § 206, 16 U.S.C. § 824e, in deciding how to proceed in response to Puget’s complaint and whether its approach in the California Proceeding is suited to the Pacific Northwest Proceeding, given “major differences” in the regional markets. *Id.* at P 35, JER 813.

The Commission also rejected various procedural objections. As for Puget, the Commission determined that it was appropriate to deny withdrawal of its complaint effective June 2001, in order to permit its consideration of the claims



and arguments raised by other parties during the interim. *Id.* at P 14, JER 809-10. As for the few parties favoring refunds, the Commission determined that they were afforded ample opportunity to make their case. *Id.* at PP 17-23, JER 810-11.

**3. *Puget III.*** In an order issued February 9, 2004, the Commission denied a request for rehearing concerning the scope of the proceeding, filed by the State of California, California Electricity Oversight Board, and the California Public Utilities Commission (collectively, “California Parties”). *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.*, 106 FERC ¶ 61,109 (2004), CPER 25 (“*Puget III*”).

The Commission clarified that bilateral transactions involving the California Energy Resources Scheduling Division (“CERS”) of the California Department of Water Resources are outside the scope of the Pacific Northwest Proceeding. The Commission agreed with the ALJ that Puget’s complaint concerned only wholesale power sales into the Pacific Northwest and that the evidence showed that CERS transactions at the California border served only California load, not Pacific Northwest load. *Id.* at PP 10-13, CPER 26-27.

### **SUMMARY OF ARGUMENT**

The Commission reasonably exercised its discretion in affording participants in Pacific Northwest markets prospective relief from high prices during 2000-2001. The FPA does not require the Commission to order refunds, especially where (as here) the Commission provided all the relief requested by the party (Puget) that filed the complaint that initiated the proceeding. As the FPA does not impose meaningful limitations on the exercise of the Commission's discretion, that exercise here is unreviewable.

Assuming jurisdiction, the Commission reasonably determined that, in the circumstances presented, refunds would be inequitable. It based this judgment on a number of factors, recognized by the ALJ, including: (1) large presence of non-jurisdictional sellers in Pacific Northwest markets; (2) concern that refunds would promote undue reliance on volatile spot markets; (3) concern that refunds would hinder long-term effectiveness of markets; (4) difficulty, if not impossibility, of calculating refunds; and (5) preference of the vast majority of market participants. This balance is well-supported by the record compiled at hearing before the ALJ and supplemented to the Commission.

The Commission respected the procedural rights of all parties, by affording them numerous opportunities to make their case for refunds. As for Puget, the

Commission followed its procedures in considering arguments in opposition to withdrawal of its complaint. Finally, the ALJ and the Commission reasonably concluded that bilateral sales for delivery inside California were outside the scope of the complaint proceeding.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Judicial review of FERC orders is limited. *E.g., City of Centralia, Washington v. FERC*, 799 F.2d 475, 481 (9th Cir. 1986). A Commission ruling may be overturned only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A); *see, e.g., California Department of Water Resources v. FERC*, 341 F.3d 906, 910 (9<sup>th</sup> Cir. 2003); *The Steamboaters v. FERC*, 759 F.2d 1382, 1388 (9th Cir. 1985). That narrow standard requires a court to satisfy itself that the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). As long as the record shows that the agency's decision was "based on a consideration of relevant factors and there is no clear error of judgment," the decision was not arbitrary or capricious. *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9<sup>th</sup> Cir. 2001). The Commission's findings of fact are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825l(b).

The Commission's interpretation of the FPA is reviewed under the standard announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under that standard, a court must "decide (1) whether the statute unambiguously forbids the Agency interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). While a court reviews legal questions *de novo*, it must still give deference to an agency's interpretation. *E.g., American Rivers v. FERC*, 201 F.3d 1186, 1194 (9<sup>th</sup> Cir. 2000).

## **II. THE COMMISSION HAS BROAD DISCRETION WHETHER AND HOW TO INVESTIGATE AND ENFORCE ALLEGED VIOLATIONS OF THE FPA**

### **A. The Commission Reasonably Exercised Its Discretion in Choosing, Under the Circumstances, To Deny Refunds and Terminate the Pacific Northwest Proceeding**

The ALJ in this proceeding, based upon the record, found explicitly that the Pacific Northwest market for spot sales of electricity was competitive and functional during the relevant time period (December 25, 2000 to June 20, 2001), and that prices were neither unreasonable nor otherwise violative of the FPA. *ALJ Order* at 65,369-70, 63,386-87, JER 326-27, 342-43. While the Commission agreed with the premises on which those findings rested, *see Puget I* at PP 32-33,

JER 745-46, it did not make formal findings as to whether markets were competitive or whether rates were just and reasonable. This was because “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 P 35, JER 746; *see also Puget II* at P 36 n.36, JER 813 (“granting the requested refund remedy would simply serve to redistribute the inequities”).

The inability to fashion an equitable retroactive remedy was based on the Commission’s evaluation of the “totality of the circumstances.” *Puget I* at P 53, JER 749. No single factor alone mandated its decision. Rather, the Commission looked at a host of factors, *see infra* pages 48-59, developed in the record as compiled by the ALJ and supplemented by the parties. In this “unusual” case, *Puget II* at P 18, JER 810, after deciding no equitable retroactive remedy could be devised, the Commission exercised its discretion to terminate the Pacific Northwest Proceeding without finding whether high electricity prices were unjust and unreasonable or what caused those prices.

This is not to say, however, that the Commission did nothing. The Commission found “it is beyond question” that prices “rose dramatically” during the relevant period. *Puget I* at P 32, JER 745. Prior to the ALJ hearing at issue in this proceeding, the Commission already had taken aggressive steps to mitigate

prices beginning in the Spring of 2001, effectively lowering them to normal levels.

*See Puget I* at PP 33-34 & nn.32-34, JER 746.

In response to arguments that the Commission is compelled by law to provide a retroactive remedy, as well as a prospective remedy, the Commission explained that its “mitigation plan provided the relief requested by Puget, and on a forward basis the relief sought by other participants in the complaint proceeding.” *Id.* at P 34, JER 746. No other party filed for relief under FPA section 206. The parties seeking retroactive relief were not complainants like Puget, but merely intervenors in Puget’s complaint proceeding. Consequently, “as intervenors, these parties are not in the position to argue that the Commission must determine a just and reasonable rate under FPA Section 206(a) or that the Commission’s remedy offends a core purpose of the statute. Rather, the Commission, in a reasonable exercise of its discretion, provided a remedy of a prospective price cap – the precise remedy requested by the complainant.” *Puget II* at P 33, JER 813. Refunds under FPA § 206 “are discretionary, as the statute provides that ‘at the conclusion of any proceeding under this section, the Commission *may* order the public utility to make refunds.’” *Id.* at P 32, JER 813 (quoting 16 U.S.C. § 824e(b)) (emphasis in original). *See also Towns of Concord, Norwood and Wellesley, Massachusetts v. FERC*, 955 F.2d 67, 72-74 (D.C. Cir. 1992) (similarly

explaining that the ratemaking sections of the FPA afford the Commission broad remedial discretion, including the discretion not to order refunds when confronted with a statutory violation).

Moreover, the Commission questioned whether the just and reasonable standard is even applicable here. As a “substantial majority of the bilateral contracts at issue” were transacted under the WSPP Agreement, which is subject to the much more stringent “public interest” standard under the *Mobile-Sierra* doctrine,<sup>15</sup> “it is quite possible that the public interest standard would have applied in the current proceeding as well, if we had found it necessary to reach the issue.” *Puget II* at P 29, JER 812.

**B. The Commission’s Exercise of Its Prosecutorial Discretion is Non-Reviewable**

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). As explained in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), construing APA § 701(a)(2), an agency’s decision whether and how to proceed in addressing a possible violation

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<sup>15</sup> See *United Gas Pipe Line Co. v. Mobile Gas Serv.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); see also, e.g., *Potomac Electric Power Co. v. FERC*, 210 F.3d 403, 406 (D.C. Cir. 2000) (describing public interest standard).



“often involves a complicated balancing of a number of factors which are peculiarly within its expertise,” including the identification of agency priorities and the allocation of agency resources. *See Senate of the State of California v. Mosbacher*, 968 F.2d 974, 976 (9<sup>th</sup> Cir. 1992) (noting 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”) (quoting *Heckler*, 470 U.S. at 831); *Sierra Club v. Whitman*, 268 F.3d 898, 903 (9<sup>th</sup> Cir. 2001) (recognizing that an agency is best equipped to balance “factors which are peculiarly within its expertise,” such as determining overall priorities and how agency enforcement resources are best allocated) (quoting *Heckler*, 470 U.S. at 831-32).

The Commission exercised this discretion when it chose not to decide definitively whether past Pacific Northwest rates were just and reasonable, because “the totality of the circumstances” showed that the “directing of refunds in this proceeding would not result in an equitable resolution of this matter.” *Puget I* at P 53 & n.64, JER 749 (noting agency’s “absolute discretion” under *Heckler*).

In *Friends of the Cowlitz v. FERC*, 253 F.3d 1161 (9<sup>th</sup> Cir. 2001), this Court explained that the relevant inquiry in determining reviewability is whether the agency’s governing statutes contain meaningful restrictions on its exercise of

prosecutorial discretion. *See id.* at 1167 (test is whether “Congress has provided clear legislative direction limiting an agency’s enforcement discretion”). The FPA and implementing regulations impose no “meaningful guidelines” limiting the Commission’s discretion as to how to undertake or conclude an enforcement proceeding. Because “FERC decisions to investigate (or not investigate)” are “clearly committed to the agency’s discretion,” they are “therefore unreviewable by this court.” 253 F.3d at 1171-72. The court in *Baltimore Gas & Electric Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001), similarly found that the statutes and regulations governing FERC action employ broad permissive language that offers no “discretion-restricting guideline.”<sup>16</sup>

Significantly, the *Baltimore Gas & Electric Co.* court held that the Commission’s non-reviewable discretion extends not just to decisions whether to initiate an enforcement action, but also to decisions how to conduct and resolve such actions. *See* 252 F.3d at 459 (*Heckler* “sets forth the general rule that an agency’s decision not to exercise its enforcement authority, or to exercise it in a

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<sup>16</sup> *Baltimore Gas & Electric* involved provisions of the Natural Gas Act (“NGA”), whereas the instant case involves the analogous provisions of the FPA. The relevant provisions of the two statutes “are in all material respects substantially identical,” and precedents under either statute may be used interchangeably. *See, e.g., Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Sierra Ass’n for Environment v. FERC*, 791 F.2d 1403, 1406 n.2 (9<sup>th</sup> Cir. 1986).

particular way, is committed to its absolute discretion”); *see also Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 354 (D.C. Cir. 2000) (agency’s decision to settle represents non-reviewable exercise of its prosecutorial discretion); *New York State Dep’t of Law v. FCC*, 984 F.2d 1209, 1214 (D.C. Cir. 1993) (same).

As to the argument that the ratemaking sections of the Commission’s governing statutes restrict its discretion, those provisions, while they “deny FERC the discretion to . . . permit [utilities] to charge unreasonable rates,” also “are utterly silent on the manner in which the Commission is to proceed against a particular transgressor.” *Baltimore Gas & Electric*, 252 F.2d at 461. The statute “expressly confirms the breadth of the Commission’s enforcement discretion” by repeatedly emphasizing in other sections the various types of actions the Commission “may” take to enforce the statute. *Id.*; *see also* FPA § 206(b), 16 U.S.C. § 824e(b) (“At the conclusion of any proceeding under this section, the Commission *may* order the public utility to make refunds. . . .”) (emphasis added); *Public Citizen v. EPA*, 343 F.3d 449, 464 (5<sup>th</sup> Cir. 2003) (statutory provision – similar to FPA § 206(a) -- that agency “shall” take particular action “whenever” it determines that the statute has not been followed affords the agency *Heckler* non-reviewable discretion); *New York Public Interest Research Group v. EPA*, 321 F.3d 316, 330-31 (2d Cir. 2003) (same).

**C. The Commission Did Not Limit Its Own Discretion**

Petitioners argue that the Commission has no discretion. *See* Port Br. 34-36; Seattle Br. 24-32; Tacoma Br. 31-37; Cal. Br. 23-26, 46-51. Rather, they contend that the Commission must find (or, in their view, already has found) that rates in the Pacific Northwest were not just and reasonable, and that it must provide for refunds, because of its own actions in: (1) instituting and conducting the Pacific Northwest Proceeding and providing for prospective relief; and (2) providing for retroactive relief in the California Proceeding.

**1. Conduct of Pacific Northwest Proceeding**

Petitioners argue that the Commission's actions in instituting this proceeding compel both a finding of unjust and unreasonable rates and a directive to make refunds. *E.g.*, Tacoma Br. 34 and Cal. Br. 47 (noting "implicit" findings). This argument fails to recognize the tentative nature and limited scope of the proceeding. The Commission never established an FPA § 206(b) refund effective date for this matter because Puget sought prospective relief (a price cap) only, and requested a refund effective date only "[i]f and to the extent" one was necessary, JER 13. *See also Puget II* at P 33, JER 813. One was not necessary in light of the December 2000 dismissal of Puget's complaint and the June 2001 imposition of the prospective price mitigation Puget sought. *See Puget I* at P 24, JER 744-45

(intervenors, which had not filed a complaint, were seeking to “dramatically alter and expand” the scope of the proceeding by seeking refunds); *see also Puget II* at P 33 n.33, JER 813.

When the Commission imposed the forward West-wide price cap in June 2001, *see Puget I* at P 33, JER 746, giving Puget the prospective relief it sought, it did not open the possibility of retroactive relief as well. The Commission offered no commentary on prices for the prior six months or otherwise indicate that it would go back in time to consider whether refunds might be appropriate. Petitioners’ argument that the Commission in June 2001 implicitly or explicitly found that past rates were not just and reasonable, even if adopted, would not automatically warrant past refunds. FPA § 206(b) allows refunds only starting from the refund effective date. *See Puget I* at P 30 & n.25, JER 745; *Puget II* at P 29 n.26, JER 812; *see supra* pages 6-7. Refunds for the period prior to June 2001 in these circumstances would require reconsideration of Puget’s complaint – which the Commission did later in the July 2001 Hearing Order.

Even then, the Commission retained all its discretion to choose how to proceed in the future. Recognizing the “unique circumstances,” *Puget II* at P 34, JER 813, the Commission established a “preliminary” evidentiary hearing. *Hearing Order* at 61,520, JER 131. Its explicit purpose was to “facilitate

development of a factual record” that would “help the Commission to determine the extent to which the dysfunctions in the California markets may have affected decisions in the Pacific Northwest.” *Id.* The ALJ was instructed to engage in “discussions” with the parties. *Id.* at 61,521, JER 132. As for the possibility of refunds, the Commission made no “determination on the matter” but simply “desired additional information before making a decision.” *Puget II* at P 30, JER 812.

To be sure, the Commission asked for the compilation of a record, including identification of sales volumes, prices, buyers, and sellers, focused on “whether there may have been unjust and unreasonable charges for spot market bilateral sales in the Pacific Northwest for the period beginning December 25, 2000 through June 20, 2001.” *Hearing Order* at 61,520, JER 131. But this request for information cannot be construed to tie the Commission’s hands on how it would consider the information or decide the matter. *See id.* (information sought only as to “potential” refunds). Nor did the Commission establish December 25, 2000 as a formal FPA § 206(b) refund effective date. *See Puget II* at P 29 n.26, JER 812. Rather, without deciding the matter, December 25, 2000 was picked as the earliest date from which the Commission “technically may have authority to require refunds for at least a short period.” *Puget I* at P 30, JER 745.

Moreover, the directive in July 2001 to explore unjust and unreasonable charges for spot market sales “cannot be understood as a Commission determination regarding the applicable standard” for judging the reasonableness of the contracts at issue. *Puget II* at P 29 n.27, JER 812. When the parties raised before the ALJ whether the just and reasonable or *Mobile-Sierra* standard applied, *see supra* page 35, she left the issue for the Commission to decide, if it were inclined to order refunds. *Id.* As the Commission declined to order refunds, it never had any reason to determine the applicable standard, much less determine whether any Pacific Northwest contract rates failed to meet the applicable standard.

Nor can the Commission be presumed to have limited its flexibility, as Petitioners charge (*e.g.*, Tacoma Br. 20-30), in allowing for the post-hearing submission of evidence and comments directly to the Commission. In allowing the parties to submit, in March 2003, “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,” JER 524, the Commission again did not make any determination as to the relevant standard for assessing sales. *See also* JER 547, 550 (clarifying orders). Rather, as it had done in ordering an ALJ hearing, the Commission simply was requesting the submission of additional

evidence to assist in its fact-finding mission. *See Puget II* at P 22, JER 811 (explaining that Commission “considered the complete record,” including additional materials submitted directly to the Commission in March 2003, in deciding to terminate the proceeding). The additional information covered a much broader period of time, reflecting more recent discovery, thereby expanding the scope of possible enforcement options, not limiting them.

## **2. Conduct of California Proceeding**

Petitioners also argue (*e.g.*, Cal. Br. 4-5, 48-49) that the decision to provide for refunds in the California Proceeding compels a decision to provide for refunds in the Pacific Northwest Proceeding. Petitioners argue that they are similarly situated with customers in California receiving refunds, and that it was unfair and unduly discriminatory, in violation of FPA sections 205 and 206, to provide for disparate treatment among customers in neighboring regions.

The Commission found that markets and market conditions differed in the two regions, thereby justifying different approaches. To be sure, as the Commission found in the June 2001 order adopting West-wide price mitigation, the two markets are “integrated.” *Puget I* at P 33, JER 746 (quoting from earlier order). That is why the Commission adopted price mitigation in both California and the Pacific Northwest, “in order to prevent arbitrage where power is diverted



from the lower priced market to the higher priced.” *Id.* In other words, the Commission recognized the integration of the two markets by imposing West-wide price caps to prevent suppliers from taking advantage of price differentials between mitigated and un-mitigated markets, to the possible detriment of the mitigation plan’s effectiveness.

This does not mean, however, that the Commission’s findings in the California Proceeding – including its finding that rates were not just and reasonable and thus deserving of retroactive correction – are automatically applicable to the Pacific Northwest Proceeding. To the contrary, the Commission found “major differences” in the two regional markets and that participants in the Pacific Northwest market “are not similarly situated to market participants in the California spot markets.” *Puget II* at P 35, JER 813. Those differences include: (1) the fact that California ISO and PX spot markets were centralized markets with a single market clearing price, while Pacific Northwest spot markets are based on bilateral contracts between individual market participants; (2) California utilities were prevented by state law and regulatory policy from entering into long-term contracts, while Pacific Northwest utilities were free to enter into forward hedging contracts; and (3) the Commission had jurisdiction over the transactions of governmental entities in centralized California spot markets but not over the

transactions of governmental entities in the Pacific Northwest. *Id.* See also *Puget I* at PP 13-15, JER 743 (noting the ALJ's similar conclusions as to significant differences in regional spot power markets).

In short, the integrated nature of Western markets, in and of itself, does not mandate refunds across all markets. As the Commission explained, “[t]he significant differences between the California and Pacific Northwest spot markets, as well as the differing procedural postures of the California refund and Pacific Northwest proceedings, refute the notion that the different outcomes in the two proceedings results in unlawful discrimination to market participants in the Pacific Northwest.” *Puget II* at P 35, JER 813.

**D. This Court Has Not Limited the Commission's Discretion**

Petitioners also argue that this Court itself has limited the Commission's discretion in choosing whether to grant refunds. See Port. Br. 55-56; Seattle Br. 18-24; Tacoma Br. 27-29. In particular, they cite to this Court's recent opinion in *State of California v. FERC*, 383 F.3d 1006 (9<sup>th</sup> Cir. 2004), *reh'g pending* (which issued after the Commission had issued all orders in the instant proceeding). In that case, the Court: (1) upheld the Commission's authorization of market-based rates as consistent with the prior notice and filing requirement of FPA section 205, 16 U.S.C. § 824d; but (2) remanded in part for further proceedings to determine

whether, and to what extent, violations of after-the-fact reporting requirements (considered to be tariff requirements) require additional refunds.

Those rulings have little relevance here. The instant Pacific Northwest Proceeding is a complaint proceeding, limited by the matters raised in Puget's complaint and the strictures of FPA § 206, addressing generally the condition of Pacific Northwest markets during a defined time period (no earlier than December, 2000). Puget's complaint did not raise potential tariff violations, nor did the Commission or the ALJ expand the scope of this proceeding to consider such violations. Instead, as explained above, *see supra* pages 14-16, the Commission established separate Enforcement Proceedings (including one devoted to Enron) to determine whether any of the terms of filed tariffs have been violated at any time by any entity. Should the Commission determine in those proceedings that, in fact, tariffs have been violated, then it is able to consider refunds or other appropriate relief back to the date of the violation. The Commission, in finding and remedying tariff violations, whenever and wherever they may have occurred, is not constrained by the precise timing or substance of the Puget complaint instituting the Pacific Northwest Proceeding, nor is it limited by the presence or absence of any refund effective date under FPA § 206.

In these circumstances, it is entirely reasonable for the Commission to employ different paths for the different California, Pacific Northwest and Enforcement Proceedings, given their different focus. The Commission has discretion to order its priorities and to choose what means will best allow it to consider issues and evidence. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991) (upholding FERCs decision to address and resolve separate, but related, issues in separate proceedings). That discretion can be upset only in extraordinary circumstances:

Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. Indeed, our cases could hardly be more explicit in this regard.

*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543-44 (1978) (citations and internal quotation marks omitted). *See also, e.g., California Power Exchange*, 245 F.3d at 1125 (explaining that petitioners “[d]o not appear to appreciate the flexibility FERC has under the FPA to address conditions leading to unjust and unreasonable rates in a market-based system by reforming market structures”).

Indeed, this Court has recognized the Commission’s freedom to structure its proceedings to best investigate and consider evidence. In its August 21, 2002

Order in Nos. 01-71051, *et al.*, granting a motion for leave to adduce additional evidence of market manipulation by sellers in Western energy markets, the Court explicitly “defer[ed] to the discretion of FERC to determine how this new evidence shall be adduced.” Order at 7-8. *See also California*, 383 F.3d at 1015-16 (noting that while the Commission has “broad remedial authority” under the FPA to address tariff violations and anticompetitive behavior, it “may elect not to exercise its remedial discretion by requiring refunds”). The Court thus recognizes the broad discretion delegated to the Commission to investigate and consider facts, both those developed before the ALJ and those presented directly to the Commission, and to make remedial judgments. *See State of California v. FERC*, 329 F.3d 700, 715 (9<sup>th</sup> Cir. 2003) (explaining that “[b]alancing potentially conflicting factors relevant to the public’s energy needs is a task for the Commission’s discretion that we hesitate to second-guess”).

### **III. THE COMMISSION REASONABLY BALANCED ALL EQUITABLE CONSIDERATIONS IN DETERMINING THAT REFUNDS ARE NOT APPROPRIATE IN THE CIRCUMSTANCES**

The Commission determined, based upon the record compiled with the ALJ and later supplemented to the Commission, that refunds are not appropriate in light of “overriding equitable considerations.” *Puget II* at P 36, JER 813. Notwithstanding the impact of high prices on Pacific Northwest market

participants, both the ALJ and the Commission concluded, on balance, that there was no equitable retroactive remedy. Rather, the requested refunds “would simply serve to redistribute the inequities,” rather than serve “to make the market whole.” *Id.* at P 36 n.36, JER 813.

In reaching its conclusion, the ALJ and the Commission did not rest on any one factor. Rather, the Commission considered and balanced a number of factors which, in the aggregate, favored terminating the proceeding without refunds. That analysis was reasonable, amply supported by record evidence, and therefore should be upheld. *See Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005) (noting that the “crucial question” for the Commission in considering a price mitigation plan is whether plan “will do more good than harm”) (quoting *Maryland People’s Counsel v. FERC*, 761 F.2d 780, 788-89 (D.C. Cir. 1985)).

**A. Large Proportion of Non-Jurisdictional Sales in the Northwest**

The Commission, citing record evidence submitted to the ALJ, noted that a large portion of the electricity bought and sold in the Pacific Northwest involves governmental entities, including Bonneville Power Administration, the largest seller in the region. *Puget I* at P 39, JER 747. Many, but not all, governmental entities are both buyers and sellers. Because governmental entities are not public

utilities subject to FERC jurisdiction, *see* FPA § 201(f), 16 U.S.C. § 824(f),<sup>17</sup> the Commission agreed with the ALJ that “the burden of paying refunds will fall on a limited class of jurisdictional sellers in the region; and the benefit of receiving refunds will be available only to buyers who bought from those same sellers.” *Puget I* at P 39, JER 747 (quoting *ALJ Order* at 65,370, JER 327). The Commission characterized such a result as “inequitable and unbalanced.” *Puget I* at P 39, JER 747.

The Commission found the problem compounded by the fact that the parties seeking refunds are all governmental entities. “It would not do justice,” the Commission explained, “to allow these parties to receive refunds for their high-priced purchases while they are exempt from providing refunds for any high priced sales they may have made.” *Id.*<sup>18</sup>

Petitioners argue that the Commission’s actions here are inconsistent with its actions in the California Proceeding. *See* Port Br. 40-41; Seattle Br. 32-34;

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<sup>17</sup> While governmental entities may meet the definition of “public utility” under the FPA, section 201(f) nevertheless exempts the applicability of the FPA to such entities except as specifically provided.

<sup>18</sup> The Commission was not overlooking the peculiar facts of individual governmental entities. It merely was making a general observation about governmental entities as a class. The fact that some individual entities may be only buyers, as noted by some Petitioners (*e.g.*, Port Br. 41), does not eliminate the inequity of one-sided refunds when governmental entities are also sellers or necessitate a buyer-only carve-out.

Tacoma Br. 39-42; Cal. Br. 34-41. They note that the Commission did extend refund liability to governmental entities in California selling into ISO and PX centralized spot markets. But, as the ALJ and the Commission explained, the California determination was not intended to reflect anything other than the “special circumstances presented” in the California Proceeding. *Puget I* at P 37, JER 746 (citing *Hearing Order* at 61,511-13, JER 122-24). The application of the refund remedy to governmental entities in California recognized the peculiar fact that the Commission had authority over sales into the centralized markets operated by the ISO and PX, both entities subject to Commission authority and Commission-approved market rules. *Puget I* at P 37, JER 746. In contrast, the Pacific Northwest market operates through bilateral agreements, not through centralized markets and central clearing prices. *Id.* at P 38, JER 746. Moreover, in California governmental entity sellers entered into arrangements that acknowledged the Commission’s authority over the centralized transaction. In contrast, the WSPP Agreement governing bilateral transactions in the Northwest, *see supra* page 10, specifically states that the Commission is without authority over transacting parties that are not otherwise subject to Commission jurisdiction. *Puget II* at P 40, JER 814.

Given these differences, the Commission was justified in not extending



California's "special circumstances" to the Pacific Northwest. Petitioners assert, sometimes using colorful metaphors (*e.g.*, Port Br. 40), that this decision amounts to the Commission declining to provide partial justice when it could not provide complete justice. As recognized by the ALJ, the Commission, and certain state commissions, however, refunds in the circumstances presented would provide no justice at all and merely offer "an arbitrary redistribution of inequities." *Puget II* at PP 42-43, JER 814-15. "Whether or not a purchaser would receive a refund for a particular transaction," the Commission explained, "would arbitrarily depend on whether the counter-party happened to be a jurisdictional entity." *Id.* at P 42, JER 814. While Petitioners themselves would benefit from such an arbitrary reallocation, other market participants – and the market as a whole – would not.

### **B. Reliance on Spot Markets**

The Commission adopted the findings of the ALJ that Pacific Northwest purchasers had numerous power supply options. Unlike California purchasers compelled to rely on spot purchases during the relevant time period, Pacific Northwest purchasers could develop a power supply portfolio of short-, medium-, and long-term contracts to achieve a hedged and balanced portfolio. *Puget I* at PP 40-43, JER 747. Purchasers, like Seattle and Tacoma, were "generally forewarned" of potential shortages, and assumed the risk of high spot market prices

when they chose to sell their ownership interests in generating facilities and chose to rely on the potentially volatile spot market. *Id.* at P 41, JER 747.

In these circumstances, the ALJ and the Commission, as well as state commissions in Washington and Oregon, agreed that “it would be unfair and inequitable to allow those market participants that relied heavily on the spot market to receive refunds, while those who perhaps more prudently engaged in a procurement strategy that included a higher balance of long-term instruments would not receive refunds.” *Id.* at P 42, JER 747. Petitioners challenge this finding as emblematic of an uncaring “blame the victim” attitude that serves only to reward those market participants that abused their market power. *See* Port Br. 42-43; Seattle Br. 34-37; Tacoma Br. 42-47; Cal. Br. 26-29. But the Commission’s approach was far from callous. It balanced the interests of all purchasers, those, like Petitioners, that relied on spot markets and others who chose to avoid the risk of market volatility by “pay[ing] for hedge instruments and long-term contracts in order to protect their interests” against spot market price volatility. *Puget II* at P 50, JER 816. As the Commission found, refunds would offer only an “arbitrar[y] remedy” that would flow only to the portion of the regional market that failed “to avail themselves of the instruments available in the marketplace of protect their interests.” *Id.* at PP 50-51, JER 816.

All customers, of course, rightly share in the expectation that the Commission will protect them from the exercise of market power or unlawful behavior. In the instant case, the ALJ found no evidence of such behavior in the Pacific Northwest, *see Puget II* at P 55, JER 817, and the post-hearing information submitted directly to the Commission did not refute the ALJ's finding, *see Puget II* at P 22, JER 811. As evidenced by the Enron and other Enforcement Proceedings, however, *see supra* pages 14-16, the Commission is acting vigorously to ensure that all evidence of improper behavior is ferreted out and that conduct in violation of tariff commitments is remedied whenever or wherever it may have occurred.

### **C. Adverse Consequences to Spot Markets**

The Commission balanced the immediate request for refunds against the long-term impact on markets. It agreed with the ALJ and state commissions in Washington and Oregon that refunds would adversely affect Pacific Northwest bilateral markets by undermining the credibility and finality of the regulatory process, jeopardizing investment in energy infrastructure, chilling confidence in markets, and perhaps resulting in trader insistence on risk premiums and additional security. *Puget I* at PP 44-46, JER 747-48. The Commission concluded that, on balance, refunds “would create an unacceptable amount of risk and uncertainty for future market participants in the region, since it would set a precedent that the

contract price for power may always be subject to change without any advanced warning.” *Puget II* at P 54, JER 816.

Petitioners castigate the Commission’s approach as one-sided. *See* Port Br. 45-46; Seattle Br. 37-40; Tacoma Br. 47-48; Cal. Br. 29-31. They assert that refunds would improve future market conditions as market participants gain additional reason to trust the Commission, and offer the California Proceeding as the model to follow in addressing allegations of market lawlessness. Their views are contravened by those of FERC, the ALJ, and the two state commissions, all of whom regularly must forecast the efficacy of regulatory initiatives and make predictions as to which of various approaches is most likely to work best and which will create overall harm. *See Puget II* at P 54, JER 816 (prediction that refunds would produce more overall harm than good is based on both record evidence and general familiarity with regulated markets). *See also Process Gas Consumers Group v. FERC*, 292 F.3d 831, 838 (D.C. Cir. 2002) (courts will defer to the Commission’s judgment as to the expected future operation of regulated markets and entities); *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (noting “it is within the scope of the agency’s expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view”).

Moreover, as explained above, the Commission is following different approaches to achieving the same goal of improving competition, due to the different facts and different procedural postures, in its California, Pacific Northwest and Enforcement proceedings. The balance it has struck in one proceeding, and its prediction as to which approach is best there, does not foreclose another result for another proceeding.

**D. Complexity/Impossibility**

The ALJ found, and the Commission agreed, that the task of calculating refunds would be exceedingly complex, if not impossible. Specifically, the ALJ identified approximately 500,000 transactions that would have to be recalculated, in light of the fact the Pacific Northwest wholesale electricity market is “highly active.” *Puget I* at P 47, JER 748 (citing parts of *ALJ Order*). She explained that electricity is traded an average of six times between the point of generation and the point of consumption, that there are few chains of transactions that do not include non-jurisdictional governmental entities, and that a resource portfolio often reflects a wide variety of supply rights. In light of these facts, “it would be nearly impossible to match a particular sale with its source or to calculate the alleged refund due with precision.” *Id.* at P 49, JER 748 (quoting *ALJ Order* at 65,385, JER 341).

Petitioners believe that the ALJ's claim of refund difficulty or impossibility is vastly overstated, offering some transaction data or record evidence of their own. *See* Port Br. 42-43; Seattle Br. 40-44; Tacoma Br. 49-51; Cal. Br. 31-33. But for purposes of review, "[t]he question [the court] must answer . . . is not whether record evidence supports [petitioners'] version of events, but whether it supports FERC's." *Florida Municipal Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003). Here, while some parties might be able to reconstruct their own transactions during the relevant time period, there is ample record evidence to support the ALJ's and the Commission's conclusion that transaction reconstruction and rate recalculation throughout the region would likely be a "massive undertaking" that likely "would require prolonged time and effort" that, even if undertaken, would unlikely produce "in the end a fair result." *Puget II* at P 59, JER 817.

Petitioners observe (*e.g.*, Seattle Br. 44) that the Commission did not shy away from an equally or more difficult task in the California Proceeding. This comparison fails to recognize the significant differences in the California and Pacific Northwest Proceedings and the regional markets involved. As explained above, the Commission cannot transfer its California mitigated market clearing price approach to the Pacific Northwest, which lacks centralized markets and a

market clearing price. *Id.* at P 60, JER 818. In any event, the California benchmark approach, which “has proved to be extraordinarily time and resource consuming . . . can hardly be held out as the model to be applied to other proceedings.” *Id.* In short, the Commission has not, as Petitioners suggest, simply abdicated a difficult core function, but rather has exercised its discretion to decline to undertake an exceedingly difficult, perhaps impossible, recalculation task on a grand scale that, even if successful, would serve only to “exacerbate” market inequities. *Id.* at P 61, JER 818.

#### **E. Preference of Most Parties**

In addition, the Commission noted that the vast majority of market participants in the Pacific Northwest – including some net purchasers -- have not pursued refunds.<sup>19</sup> *Puget I* at PP 51-52, JER 748. It offered the example of one net purchaser, Pinnacle West, which told the Commission at oral argument in June 2003 that it does not want refunds and, like most market participants, “wants this case to end and want[s] to move on.” *Id.* at P 52, JER 748. The Commission also

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<sup>19</sup> The Commission, using the ALJ’s calculations, noted that during the relevant time period there were 226 members of the WSPP, of which only 56 provided transaction data to the ALJ, of which only 8 chose to pursue refund claims. *Puget I* at P 52 n.61, JER 748. These numbers -- which are not, as Petitioners submit (*e.g.*, Tacoma Br. 51), subjective or lacking in record support -- led the Commission to conclude that “the others’ unwillingness to participate or respond reflects an unwillingness to change their contracts.” *Id.*

gave “due respect” to the opinions of state agencies in Washington and Oregon, noting that they believe that refunds would not cure injuries caused by high Pacific Northwest prices and “would only serve inequitably to redistribute that damage.” *Id.* at P 51, JER 748.

Petitioners are, of course, correct when they argue that the Commission’s task is not merely to engage in a simple “head count.” *See* Port Br. 43-44; Seattle Br. 44; Tacoma Br. 51-53; Cal. Br. 44-46. The Commission recognized that the numbers, in and of themselves, are not determinative. *Puget II* at P 64, JER 818. They are, however, relevant to the Commission’s assessment of the equities and its decision whether to exercise its remedial discretion: “[I]n a bilateral market with over 200 participants, our decision that requiring refunds in these circumstances would be inequitable is consistent with the decision of the overwhelming share of market participants foregoing refunds.” *Id.*

#### **IV. THE COMMISSION AFFORDED ALL PARTIES DUE PROCESS IN PRESENTING THEIR CASES FOR AND AGAINST REFUNDS**

After Puget filed its complaint in October 2000, Pacific Northwest market participants had the opportunity to file answers and comments. After the Commission revived the Puget complaint in July 2001 and initiated a fact-finding proceeding, market participants had the opportunity to engage in discovery, prepare direct and rebuttal testimony of witnesses, participate in a three-day



hearing, and file post-hearing briefs to the ALJ. After the ALJ issued her decision, parties were able to file comments with the Commission. After the Commission reopened the record, the parties were able to conduct further discovery as to market manipulation and to file, in March 2003, additional evidence and comments directly to the Commission, which heard oral argument in the matter in June 2003. After the Commission later that month issued its decision to terminate the proceeding and to deny refunds, the parties were able to file requests for rehearing, which the Commission denied in two later orders.

Despite all this process, two Petitioners continue to raise objections to the Commission's conduct of this proceeding. Port complains that the Commission, in initiating the proceeding in 2001 and later engaging in fact-finding, did not afford the parties sufficient opportunity to make their case for refunds. Puget, on the other hand, complains that the Commission afforded other parties too much of an opportunity to make their case for refunds, by failing to terminate the proceeding in 2001 when it afforded Puget the prospective relief it sought. Neither complaint has any validity.

**A. The Commission Did Not Afford the Parties Favoring Refunds Too Little Opportunity to Make Their Case**

Port argues (Br. 46-52) that it was unduly hindered in its efforts to make its case for refunds by the Commission's "botched" and "confusing" procedures. The

Commission recognized that its choice of procedures was “unusual,” *Puget II* at P 18, JER 810, but adopted those procedures precisely to offer participants like Port the opportunity to pursue refunds. The Commission could have greatly simplified matters, and avoided all the procedural concerns raised by Port, simply by granting Puget’s motion to withdraw its complaint, in recognition of the fact that, by June 2001, the Commission had afforded Puget all the relief it had sought. *Puget I* at P 24, JER 744-45 (noting that Port and other intervenors seeking refunds were attempting to expand the scope of the complaint proceeding, in violation of the Commission’s procedures) (citing portions of *ALJ Order*).

Instead, the Commission initiated the “preliminary” proceeding, and directed the ALJ to commence both an evidentiary hearing and “discussions” with the parties, in order to pursue settlement possibilities and, if settlement was not forthcoming, to compile facts and present recommendations to the Commission. *Hearing Order* at 61,520-21, JER 131-32. The Commission undertook these measures to “determine whether the proceeding should continue or be terminated.” *Puget II* at P 18, JER 810. Despite Port’s claim to the contrary, the July 2001 Hearing Order “was sufficiently clear as demonstrated by the fact that the Presiding ALJ commenced an inquiry that comported with our instructions, and participants in the proceeding litigated the issues that would provide the

Commission with relevant information to make a decision whether to continue or terminate the proceedings.” *Id.*

Port complains (Br. 51-52) that the procedures adopted by the ALJ and the Commission were unduly expedited. To be sure, the Commission sought “to bring closure and certainty to this proceeding (to sellers and customers alike) fairly and quickly.” *Puget Sound Energy, Inc. v. All Jurisdictional Sellers of Energy, et al.*, 101 FERC ¶ 61,304 at P 1 (2002), JER 524 (reopening record). This is a worthy goal that reflects the Commission’s balance of competing concerns.

In any event, the Commission’s desire for expedition and finality was not implemented at the expense of the parties’ procedural rights. To the contrary, as the Commission explained, Port and the other Petitioners seeking refunds – none of whom responded to Puget’s original complaint – were afforded “adequate due process” when the ALJ and the Commission, “in the interest of fairness,” later allowed them to engage in discovery, prepare testimony, participate in cross-examination, supplement the record after hearing,<sup>20</sup> and file briefs and comments.

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<sup>20</sup> In this regard, Tacoma argues (Br. 20-27) that the Commission disregarded its March 2003 submissions. This is not true. *See Puget II* at P 22, JER 811 (“In reaching its decision to terminate the proceeding, the Commission considered the complete record, including the material submitted in the March 2003 filings.”). In any event, the parties’ procedural rights would have been upheld even if the Commission had decided to make its final determination on the basis of either: (1) the record as it existed in late 2000 when it initially dismissed

*Puget II* at PP 20-22, JER 810-11. Intervenor arguments were adequately made and understood; neither due process nor the Administrative Procedure Act requires more. *See State of California*, 329 F.3d at 711-13 (concluding that FERC, “based on the total circumstances,” did not deny petitioners their due process rights when it approved expeditiously a corporate reorganization of Pacific Gas and Electric affiliates prior to hearing from intervenors); *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 807-08 (9<sup>th</sup> Cir. 2002) (concluding that party was not denied due process when it was allowed only one day to comment on settlement).

**B. The Commission Did Not Afford the Parties Favoring Refunds Too Much Opportunity to Make Their Case**

Approaching this case from the opposite direction, Puget argues that the Commission afforded parties seeking refunds too much of an opportunity to make their case. Puget makes the highly technical argument (Br. 20-30) that its June 22, 2001 motion to withdraw its complaint became effective by operation of law when no “party” filed in opposition. According to Puget, it was improper for the Commission in July 2001 to initiate a fact-finding proceeding – even though the

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Puget’s complaint; or (2) the record as compiled before the ALJ. *Id.* (“[T]he Commission provided additional opportunities to revive the complaint proceeding beyond that required by minimum due process requirements.”). *See also Puget Sound Energy, Inc., et al.*, 102 FERC at P 9, JER 548 (2003) (granting Tacoma’s request for clarification, allowing parties to submit evidence from other proceedings).

Commission ultimately reached the correct result (termination of the proceeding without refunds) on the merits.

This procedural argument is without merit. The Commission's regulations provide that "[t]he withdrawal of any pleading is effective at the end of 15 days from the date of filing of a notice of withdrawal, if no motion in opposition to the notice of withdrawal is filed within that period. . . ." 18 C.F.R. § 385.216(b)(1). If a "motion in opposition" is filed within 15 days, then "the withdrawal is not effective until the [Commission] issues an order accepting the withdrawal." *Id.* § 385.216(b)(2).

Here, it is beyond dispute that several pleadings "in opposition" were timely filed within 15 days of Puget's June 22, 2001 motion for withdrawal. *See Puget II* at P 14, JER 809-10. Therefore, according to the plain meaning of the operative regulation, its motion did not become effective by operation of law and could later be denied by the Commission after considering the pleadings in opposition. *See, e.g., Entergy Services, Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (noting that courts will defer to the Commission's interpretation of its own regulation "so long as it is not 'plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Puget responds (Br. 25-28) that other regulations compel that only "parties"

may file in opposition to a motion to withdraw a pleading. Even assuming such a requirement, however, it was fulfilled when the entities filing the oppositions also filed motions for intervention, which were subsequently granted by the Commission, “thereby giving the intervenors party status in the proceeding.” *Puget II* at P 14, JER 810. “[I]t does not make sense,” the Commission explained, “that the oppositions cannot be considered simply because the Commission followed its procedures and did not grant late intervention immediately.” *Id.*

Puget contends (Br. 18) that the Commission must follow its rules “to avoid the possibility of prejudice against parties, such as Puget, that rely upon those rules.” What Puget fails to understand, however, is that the Commission denied its motion to withdraw its complaint precisely to avoid prejudice to the parties to this proceeding. If the Commission had allowed withdrawal, by operation of law or through its affirmative action, “intervenors would not [have been] able to pursue their refund requests based on a dismissed complaint.” *Puget I* at P 23, JER 744. The Commission kept the complaint proceeding alive in order to be fair to other parties seeking refunds that “could have filed separate complaints with the Commission but instead reasonably relied on the Puget complaint, which raised similar issues, as an appropriate forum for addressing their overlapping claims.” *Id.* at P 25, JER 745.

In other words, it would have been “unfair” to intervenors seeking refunds “to deny relief based on procedural issues and leave them with no other forum to pursue their complaints.” *Id.* The Commission’s disposition of the procedural issues raised, like its disposition of the merits, reflects a balance of concerns that is reasonable under the circumstances and therefore must be upheld.

In any event, Puget fails to make any claim of injury over which the Court can assert jurisdiction. Puget admits (*e.g.*, Br. 15) that the Commission “reached the correct judgment on the merits.” The Commission’s alleged procedural error in terminating the proceeding in 2003, instead of in 2001, without ordering refunds, harmed Puget only to the extent that it was obliged to continue litigation. Br. 30-31.<sup>21</sup>

Under FPA § 313(b), 16 U.S.C. § 8251(b), only a party that is “aggrieved” by a Commission order may obtain judicial review. *See, e.g., State of California v. FERC*, 966 F.2d 1541, 1561 (9<sup>th</sup> Cir. 1992). *See also The Steamboaters v. FERC*, 759 F.2d 1382, 1387 (9<sup>th</sup> Cir. 1985) (noting that “review under section 313(b) [of the FPA] is limited to orders of definitive substantive impact, where judicial abstention would result in irreparable injury to a party”). Here, as the Commission

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<sup>21</sup> Puget recognizes (Br. 31) that, since the Commission did not adopt a formal refund effective date under FPA § 206(b) when it instituted the fact-finding proceeding in July 2001, “no effective remedy could lawfully result from the proceeding.”

already has afforded Puget all the relief it sought in its complaint, *see Puget I* at P 30, JER 745, there is no “definitive substantive” injury left for the Court to redress.

**V. THE COMMISSION REASONABLY DETERMINED THAT CALIFORNIA SALES WERE OUTSIDE THE SCOPE OF THE PACIFIC NORTHWEST COMPLAINT PROCEEDING**

Finally, one petitioner, the California Parties, raises an issue concerning the scope of the Pacific Northwest proceeding. They argue (Br. 18) that the Commission here “arbitrarily” excluded sales to the California Energy Resources Scheduling Division (“CERS”) of the California Department of Water Resources. They claim (Br. 19-22) that there was no evidence to treat CERS sales any differently than sales to other Pacific Northwest buyers.

In fact, there was ample reason to differentiate between CERS sales and other sales. Both the ALJ and the Commission determined that Puget’s complaint – which specifically asked for a price cap on sales “into” Pacific Northwest wholesale power markets, JER 4 – did not cover sales to CERS, which did not exist at the time of the complaint, or, more generally, bilateral sales into California. Southbound wholesale sales at the California-Oregon Border (“COB”) and Nevada-Oregon Border (“NOB”) interconnections, according to the ALJ, were not sales into the Pacific Northwest because: (1) the delivery point is not to a Pacific Northwest load server; and (2) deliveries actually take place in California. *Puget II*



at P 42 n.43, JER 815 (citing *ALJ Order* at 65,331-32, JER 288-89). Indeed, a witness for the California Parties testified that deliveries of CERS purchases occur in California. *Puget III* at P 12, CPER 27 (citing *ALJ Order* at 65,307, 65,312, JER 264, 269). The Commission explained that “the ALJ’s conclusion that the CERS transactions did not involve sales into the Pacific Northwest was reasonable and supported by the evidence in the record.” *Id.*

The California Parties respond (Br. 22-23) that the Commission’s focus on delivery points in California is inconsistent with its definition of the scope of the California Proceeding. But there is nothing inconsistent in the Commission’s different handling of two separate proceedings that are defined by two different complaints and two different markets. Based on the record and the ALJ’s findings, the Commission reasonably found that “[t]he CERS’ purchases must be treated differently from the purchases by the Pacific Northwest municipal utilities since only the latter are within the scope of the complaint.” *Puget III* at P 13, CPER 27. This finding is well within the “technical expertise” of the Commission in interpreting the pleadings it receives, *e.g.*, *Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 604 (D.C. Cir. 1997), and within its discretion how to organize and conduct its proceedings, *see, e.g.*, *Pacific Gas and Electric Co. v. FERC*, 746 F.2d 1383, 1386 (9<sup>th</sup> Cir. 1984).

**CONCLUSION**

For the foregoing reasons, the petitions for review of the Pacific Northwest orders should be dismissed for lack of jurisdiction or, alternatively, denied on the merits.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

This Court currently is considering more than 100 petitions for review of FERC orders, arising out of the Western energy crisis of 2000-2001, reforming California market institutions and mitigating prices for electricity purchased in California through centralized spot markets. By Order dated November 24, 2004, the Court grouped the petitions under three captions: (1) *Public Utilities Commission of the State of California, et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 01-71051, *et al.* (Phase One “Scope/Transactions Cases”); (2) *Bonneville Power Administration, et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 02-70262, *et al.* (Phase One “Jurisdictional Cases”); and (3) *Public Utilities Commission of the State of California, et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 01-71934, *et al.* (later Phase Two briefing, if necessary, on remaining issues). Oral argument on Phase One issues is scheduled for April 12 and 13, 2005.

Numerous other appeals of other FERC orders, addressing the Commission’s related investigation of actions by energy suppliers into Western energy markets during the 2000-2001 time period, resulting in substantial refunds to energy customers, are pending in this Court and the D.C. Circuit. They include: *Pacific Gas and Electric Co., et al. v. FERC*, 9<sup>th</sup> Cir. Nos. 03-72874, *et al.* (investigation and settlement of claims against Reliant Energy); *Dynegy Power Marketing, Inc., et al. v. FERC*, D.C. Cir. Nos. 04-1034, *et al.* (transferred to 9<sup>th</sup>

Circuit Feb. 9, 2005) (initiation of show cause proceedings concerning gaming and anomalous behavior in violation of applicable tariffs); *City of Los Angeles Department of Water and Power v. FERC*, D.C. Cir. No. 04-1081 (initiation of investigation into anomalous bidding behavior); and *City of Palo Alto, California, et al. v. FERC*, D.C. Cir. Nos. 04-1036, *et al.* (revocation of Enron's authority to trade energy at market-based rates).

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***Port of Seattle, Washington, et al. v. FERC***  
**FERC Docket No. EL01-10**  
**9<sup>th</sup> Cir. Nos. 03-74139, et al.**

**CERTIFICATE OF COMPLIANCE**

I hereby certify that, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points, and contains 13,940 words.

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