

Case No. 15-5082

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

PACIFIC GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, PEOPLE OF THE STATE OF CALIFORNIA EX REL. EDMUND G. BROWN JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, AND CALIFORNIA DEPARTMENT OF WATER RESOURCES, by and through its California Energy Resources Scheduling Division,

Plaintiffs - Appellants

v.

UNITED STATES,

Defendant - Appellee.

Appeal from the United States Court of Federal Claims
(Hon. Susan G. Braden,
Case Nos. 07-00157, 07-00167, and 07-00184)

**Brief of *Amici Curiae* the
Public Utilities Commission of the State of California and the
National Association of Regulatory Utility Commissioners
Supporting Plaintiffs-Appellants and Reversal**

September 15, 2015

(Caption continued on next page.)

Arocles Aguilar
General Counsel
Candace J. Morey
Principal Counsel
CALIFORNIA PUBLIC UTILITIES
COMMISSION
505 Van Ness Avenue
San Francisco, C.A. 94102
415.703.3211
candace.morey@cpuc.ca.gov

*Counsel for the Public Utilities
Commission of the State of
California*

James Bradford Ramsay
General Counsel
NATIONAL ASSOCIATION OF
REGULATORY UTILITIES
COMMISSIONERS
1101 Vermont Avenue,
N.W. Suite 200
Washington, D.C. 20005
202.898.2207
jramsay@naruc.org

*Counsel for the National
Association of Regulatory
Utility Commissioners*

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pacific Gas & Electric Co. v. United States

Case No. 15-5082

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) Amicus certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

The Public Utilities Commission for the State of California

2. The name of the real party in interest (Please only include any real party in interest NOT identified in Question 3. below) represented by me is:

The Public Utilities Commission for the State of California

3. All parent corporations and any publicly held companies that own 10 percent of the stock of the party or amicus curiae represented by me are listed below. (Please list each party or amicus curiae represented with the parent or publicly held company that owns 10 percent or more so they are distinguished separately.)

None

4. [] The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

September 15, 2015 Date

/s/ Candace J. Morey Signature of counsel

Please Note: All questions must be answered

cc:

Candace J. Morey Printed name of counsel

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Pacific Gas and Electric Co. v. US

Case No. 15-5082

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party) James Bradford Ramsay certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

The National Association of Regulatory Utility Commissioners (NARUC)

2. The name of the real party in interest (Please only include any real party in interest NOT identified in Question 3. below) represented by me is:

The National Association of Regulatory Utility Commissioners (NARUC)

3. All parent corporations and any publicly held companies that own 10 percent of the stock of the party or amicus curiae represented by me are listed below. (Please list each party or amicus curiae represented with the parent or publicly held company that owns 10 percent or more so they are distinguished separately.)

NARUC has no parent company. No publicly held company has ownership.

4. [] The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None.

9-15-15 Date

Signature of counsel

Please Note: All questions must be answered

James Bradford Ramsay Printed name of counsel

cc:

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INTEREST OF *AMICI CURIAE*¹

The *Amici Curiae* are as follows:

The Public Utilities Commission of the State of California (CPUC) is a constitutionally-established State agency that regulates Investor-Owned Utilities (IOUs) to ensure the provision of safe, reliable utility service at reasonable rates while fulfilling California’s renewable energy goals. The CPUC has a statutory mandate to represent the interests of the ratepayers of California before the federal courts and the Federal Energy Regulatory Commission (FERC).²

The National Association of Regulatory Utility Commissioners (“NARUC”), founded in 1889, is composed of those State commissions from all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands responsible for regulating, among other things, retail electric and natural gas service. Both Congress and federal courts have consistently recognized NARUC as a proper entity to represent the

¹ Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No party or party’s counsel, nor any person other than *Amici Curiae* the Public Utilities Commission of the State of California made any monetary contribution intended to fund its preparation or submission.

² Cal. Pub. Util. Code § 307.

collective interests of State commissions.³

At issue in this case is whether federal agencies that voluntarily sold electricity through California's FERC-regulated auction markets during the Western Energy Crisis of 2000-2001 (Energy Crisis) may evade contractual obligations to repay windfall profits they pocketed due to widespread market manipulation and market dysfunction. Bonneville Power Administration (BPA) and Western Area Power Administration (WAPA) (collectively, the Agencies) are the *only* governmental power agencies that have refused to pay any refunds whatsoever for electricity sales they made through the California Power Exchange (CalPX) and California Independent System Operator (ISO) at prices above what FERC determined were the just and reasonable market clearing prices, even as they *collected* refunds for transactions in which they were purchasers of electricity.

Amici have an interest in fairness in this case to ensure that the Plaintiffs recover, on behalf of California ratepayers, the tens of

³ See 47 U.S.C. § 410(c) (1971); 47 U.S.C. § 254 (1996); *United States v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), *aff'd* 672 F.2d 469 (5th Cir. 1982), *aff'd en banc on reh'g*, 702 F.2d 532 (5th Cir. 1983), *rev'd on other grounds*, 471 U.S. 48 (1985); *cf. NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994).

millions of dollars in refunds they are owed for BPA and WAPA's electricity sales. But the ramifications of the decision below extend well beyond remedies for BPA and WAPA's electricity sales in 2000-2001, and *Amici* have a further interest in this case to ensure reciprocity and accountability of all market participants to abide by their contractual commitments to follow FERC's pricing determinations.

Governmental agencies are free to sell power through central clearinghouse markets like the ISO, which operate in many regions in the country. But to do so they must agree, as did BPA and WAPA as a condition of their participation in the CalPX and ISO, to be held to the rules and price setting mechanisms incorporated into the FERC-regulated tariffs. While *FERC* may not order payment of refunds on such electricity sales, *the courts may*. This leverage is crucial to fairness and healthy market functioning, especially in single-price auctions where buyers have no ability to reject purchases from particular sellers.

This leverage is also necessary to protect ratepayers from unjust and unreasonable electricity prices charged by governmental agencies, which is particularly important in light of governmental agencies'

ongoing and extensive participation today in FERC-regulated electricity markets nationwide. It is also an issue of growing importance to California and the West, because the ISO is already expanding the geographic scope of its real-time Energy Imbalance Market into other western states. It is also actively promoting a single western FERC-regulated regional energy market. These developments will undoubtedly increase the volume of electricity sales into the ISO by governmental agencies, including BPA and WAPA.

SUMMARY OF ARGUMENT

This Court should reverse Judge Braden's dismissal, reinstate all of Judge Smith's orders finding BPA and WAPA liable for breach of contract, and allow the case to proceed to the damages phase. Plaintiffs' claims stand as a matter of contract law, separate and apart from FERC's statutory jurisdiction to revise market clearing prices and to order refunds from public utilities. Enforcing the Agencies' agreements to accept FERC-regulated prices for sales through the CalPX and ISO is critical in FERC-regulated electricity markets that allow voluntary participation by non-FERC jurisdictional governmental power sellers.

Amici endorse the arguments and legal positions set forth by

Plaintiffs. *Amici* agree with Plaintiffs that the law-of-the-case doctrine precludes Judge Braden's actions and that she erred in finding that Plaintiffs lack standing to pursue their breach of contract claims. In the interest of avoiding repetition *Amici's* brief supplements just one aspect of Plaintiffs' argument: that Judge Braden erred in finding that Plaintiffs contract claims fail on the merits.

ARGUMENT

I. THE FEDERAL AGENCIES VOLUNTARILY PARTICIPATED IN FERC-REGULATED ENERGY MARKETS AND ARE CONTRACTUALLY OBLIGATED TO ABIDE BY FERC'S PRICING DETERMINATIONS.

Judge Braden's ruling improperly construes limitations on FERC's statutory authority to *directly* compel refunds from governmental power sellers like BPA and WAPA as further limiting Plaintiffs' ability to seek refunds from the Agencies through this breach of contract action. This error appears to stem primarily from her conclusion that "Section 206 of the Federal Power Act does not authorize FERC retroactively to correct the market clearing price for participants in the CalPX and ISO markets." *Pac. Gas & Elec. Co. v. United States*, 122 Fed. Cl. 315, *76 (2015). But limits on retroactive ratemaking by FERC are not implicated by Plaintiffs' contract-based claims for refunds on BPA and

WAPA's sales during the Refund Period.

In August 2000, San Diego Gas & Electric Co. filed the complaint that launched FERC's investigation into prices charged during the Energy Crisis and ultimately led FERC to conclude that the CalPX and ISO rates were in fact unjust and unreasonable. *City of Redding v. FERC*, 693 F.3d 828, 832 (9th Cir. 2012). The CalPX and ISO operated single-price auction spot markets in which BPA and WAPA received the same prices as *all* sellers for electricity sales that cleared the market. *Redding*, 693 F.3d at 832. Thus by August 2000, BPA and WAPA were both on notice that FERC might revise its method for calculating the market clearing prices for energy sales in the CalPX and ISO markets for any date following a Refund Effective Date (which at the time was no sooner than sixty days after filing of the complaint). FERC properly established the Refund Effective Date as October 2, 2000. *CPUC v. FERC*, 462 F.3d 1027, 1046 (9th Cir. 2006).

BPA and WAPA were further on notice—and in fact agreed—that prices they received for their energy sales in the CalPX and ISO markets could be modified through FERC regulatory determinations. The CalPX and ISO Tariffs each include a “*Memphis* clause,” found at

Tariff Sections 13 and 19, respectively. This provision is common in the industry and, as Judge Smith found based on his assessment of evidence presented at trial, represented a contractual agreement that market participants could petition FERC to investigate and correct market prices to just and reasonable levels. *Pac. Gas & Elec. Co. v. United States*, 105 Fed. Cl. 420, 435 (2013).

The CalPX and ISO tariffs were also fully incorporated into the contracts BPA and WAPA signed in order to participate in the CalPX (the participation agreements) and ISO (the scheduling coordinator agreements). Just as in the *Alliant* case decided by the Eighth Circuit, this structure bound BPA and WAPA to abide by FERC's actions that modified the prices charged in the markets. *Alliant Energy v. Nebraska Public Power District*, 347 F.3d 1046, 1050 (8th Cir. 2003) ("When a contract provides that its terms are subject to a regulatory body, all parties to that contract are bound by the actions of the regulatory body.").

FERC undoubtedly has the authority to determine the "just and reasonable" rate on and after the Refund Effective Date pursuant to its statutory authority. *See Redding*, 693 F.3d at 841. And as the Ninth

Circuit affirmed, FERC did not exceed its regulatory authority when it revised the method for calculating the just and reasonable market clearing prices:

[FERC's] July 2001 Order "reset" the market clearing prices in the CalPX and ISO spot markets during the refund period to just and reasonable levels for the purpose of calculating the amount of refund due [from FERC-regulated entities]. This calculation necessarily involved reevaluating the price previously charged by all market participants because the market clearing price was the same for all of them.

Id. at 842 (internal citation omitted). That is all that matters to *this* proceeding. No further *FERC* authority is necessary because here, as in *Alliant*, the Court is not enforcing the *FERC order* that reset market rates through the exercise of its authority under Section 206(b)—it is enforcing an *agreement freely entered into by the parties*. *Id.* at 840.

In short, once FERC reset prices by adopting the mitigated market clearing prices for electricity sales made during the Refund Period, the Agencies became contractually obligated to pay the difference between the prices they initially received and the FERC-corrected market clearing prices. Limitations on FERC's authority to order refunds directly from BPA and WAPA or to "retroactively" order refunds are irrelevant to this Court's analysis.

II. REINSTATING PLAINTIFFS' CONTRACT CLAIMS IS CRUCIAL TO HEALTHY FUNCTIONING IN FERC-REGULATED ENERGY MARKETS.

Reversing Judge Braden's dismissal and reinstating all of Judge Smith's orders is required as a matter of law and fairness to rectify past harms to Plaintiffs, and ultimately California ratepayers. But it is also essential to protect buyers and ratepayers and to promote healthy and robust markets going forward—nationwide and especially in the West as the geographic reach of the California ISO's markets expand.

A. Enforcing Contractual Remedies Is Critical to Protect Buyers, Who Cannot Opt Out of Procuring Electricity from Governmental Agencies Participating in the ISO.

Buyers in the ISO's single-price auctions cannot avoid electricity sales that originate from governmental agencies. Indeed, buyers have no idea whether power they purchased in a particular time frame originated partially, entirely, or not at all from governmental agencies. They simply receive a single bill for the share of electricity that cleared in the ISO's market to meet their load. If BPA or WAPA's bids clear the ISO's auction for any period then all buyers, collectively, are liable to pay them the same market clearing prices that all sellers receive. This

is also true in other FERC-regulated markets operated by other ISOs and Regional Transmission Operators (RTOs) throughout the country, which generally use the same type of single-price auction as the California ISO.

Under this single-price auction market construct, contract remedies are the only means buyers have to protect against excessive charges by government agencies if FERC were to determine that market clearing prices are unjust and unreasonable for any reason. Legislation passed in 2005 (which is inapplicable to this case) granted FERC limited refund authority over federal power marketing and certain other governmental agencies for sales that (1) are at rates established by a FERC-approved tariff and (2) *violate* the terms of the tariff or applicable Commission rules in effect at the time of the sale. 16 U.S.C. § 824e(e)(2). But while this authority provides a FERC-based avenue for relief going forward if a governmental agency *breaks the rules*, contract claims remain the only means to obtain refunds for overcharges on electricity sales by governmental agencies that could occur for numerous other reasons.

The 2005 expansion of FERC's refund authority simply does not

reduce the necessity of contract remedies to enforce FERC-determined market clearing prices against governmental agencies. As energy markets expand and evolve, FERC could well act to reset the ISO's market clearing prices in the future, in response to a complaint filed pursuant to Section 206 of the Federal Power Act that is aimed at price rules rather than alleged tariff violations by the governmental agencies. For example, price volatility or other unanticipated problems may surface as the ISO gains experience administering pricing formulations in markets that cover a wider geographic area compared to its historical California-centric scope. FERC's regulatory authority extends not only to particular prices, but also to the rate formulas, practices, and other terms and conditions of service. *See Pub. Utils. Comm'n of the State of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001).

Further, even though the Energy Crisis was unprecedented in the scope and scale of market manipulation and dysfunction that prevailed (to disastrous effect for California's ratepayers and economy), FERC did not make *seller-specific* findings of tariff violations for the transactions at issue during the Refund Period. It simply reset all market clearing prices to a just and reasonable level. By reinstating Judge Smith's

orders, this Court will demonstrate that as the markets expand and mature, FERC's review and revision of prices, if needed, will apply to all market participants who have agreed to abide by the tariffs.

B. Healthy Market Function Requires Certainty That All Market Participants Will Honor Their Contractual Commitments to Abide by FERC Determinations Regarding Market Prices and Formulations.

Affirming contract remedies is the only way to assure buyers that governmental agencies will be held accountable to honor their contractual commitments to abide by FERC's determinations regarding just and reasonable prices. This is necessary to protect ratepayers from exposure to potential net market revenue shortfalls and ensure that the total market revenues "pencil out" (such that total payments equal receipts). If governmental power agencies are not contractually obligated to *pay* refunds for sales above FERC-determined just and reasonable market clearing prices, yet they are entitled to *collect* refunds on their purchases at unjust and unreasonable prices, it results in a net payment shortage. Ratepayers ultimately bear the brunt of the shortfall, to the extent that they are customers of buyers who are charged with the shortfall and who in turn seek to recoup it in rates.

See San Diego Gas & Elec. Co., 125 FERC ¶ 61,214 at P 10 (2008)

(noting that as a result of the Ninth Circuit’s *Bonneville* decision, the “shortfall in refunds must be allocated somehow among buyers”).

If buyers cannot rely on contractual commitments that clearly make single-clearing prices binding on all sellers in FERC-regulated markets, then they may increase their reliance on hedging or pursue other arrangements to reduce their exposure to prices charged in transactions with governmental agencies. Such actions could reduce liquidity in the markets, which would undermine FERC’s broader goal to promote competitive markets in regional transmission systems. Thus, assurances of contractual remedies are critical to promote healthy and robust market function in FERC-regulated electricity markets nationwide, and in particular in California as the ISO looks to expand market operations in the West.

C. Ensuring Reciprocity of Market Prices Is Important in All Markets, and Particularly in California and the West as the ISO Expands Its Real-Time Markets.

The potential ratepayer exposure to shortfalls for sales by governmental power sellers is not insignificant, because governmental power sellers play a major role in electricity markets today. In 2013, federal power agencies alone accounted for over six percent of the

electricity generated in the United States, and other publicly owned utilities generated nearly ten percent of the nation's electricity.⁴ Further, ratepayers' exposure to prices (and potential shortfalls) for electricity sales by governmental agencies will increase in California and other western states as the ISO's real-time markets expand throughout the region.

The ISO launched the first western Energy Imbalance Market (EIM) on November 1, 2014, with the addition of PacifiCorp as a full participant in the ISO's 15-minute and five-minute real-time markets. NV Energy, Puget Sound Energy, and Arizona Public Service are also committed to join the EIM by the fall of 2016. While generation resources located inside of EIM entities previously sold power as imports into the ISO, as a participant in the Energy Imbalance Market the ISO now has real-time visibility into and can manage a wider array of generation resources within the EIM entities' grids. The ISO market systems actively optimize resources from across the expanded ISO-EIM region to balance supply and demand and meet immediate power needs

⁴ See The American Public Power Association Directory and Statistical Report, available at <http://www.publicpower.org/files/PDFs/USElectricUtilityIndustryStatistics.pdf>

at less cost.⁵ By the fall of 2016, the EIM will provide customers access to power generation sources across *seven* states in addition to California.

The ISO's expanding EIM footprint will undoubtedly increase California ratepayers' exposure to power sales originating from BPA, WAPA, and other publicly-owned, governmental power agencies. BPA itself has noted that its transmission system interconnects with all of the current EIM entities and most of the proposed EIM entities, and therefore coordination with BPA's transmission operations is critical to the EIM's operations. BPA delivers power to a number of publicly-owned utilities located in the PacifiCorp, NV Energy, and Puget Sound Energy balancing authority areas,⁶ and there are numerous other governmental power utilities throughout the West.

Further, in addition to expanding its real-time markets, the ISO is exploring the feasibility and benefits of incorporating PacifiCorp *fully*

⁵ Information on the Energy Imbalance Market is available at <http://www.caiso.com/Documents/EIMFAQ.pdf>/.

⁶ See *Bonneville Power Administration Comments on EIM Year 1 Enhancements Phase 2 Straw Proposal*, August 6, 2015, available at <http://www.caiso.com/Pages/documentsbygroup.aspx?GroupID=B1AD516F-FB18-45A9-ACA0-10FAAFBCE8BE>.

into the ISO's day-ahead and real-time markets.⁷ The ISO is also actively working to launch a regional energy market to coordinate electricity systems across the West, using the ISO's infrastructure to develop a single western grid and a western regional energy market.⁸

It is especially critical at this juncture for the Court to reassure electricity buyers that *all* sellers who contractually agree to abide by the ISO's tariff as a condition of their participation will be held to the same FERC-regulated prices and pricing rules in a FERC-regulated western regional energy market. The Court should therefore reverse Judge Braden's dismissal and reinstate all of Judge Smith's orders.

September 15, 2015

Respectfully submitted,

/s/ James Bradford Ramsey

/s/ Candace J. Morey

James Bradford Ramsay
General Counsel
NATIONAL ASSOCIATION OF
REGULATORY UTILITY
COMMISSIONERS

Arocles Aguilar
General Counsel
Candace J. Morey
Principal Counsel
CALIFORNIA PUBLIC
UTILITIES COMMISSION

⁷ See <http://www.aiso.com/Documents/PacifiCorpAgreesToExploreFullParticipationInCaliforniaISO.pdf>.

⁸ See <http://www.aiso.com/informed/Pages/BenefitsofaRegionalEnergyMarket.aspx#PacifiCorp>.

1101 Vermont Avenue, N.W.
Suite 200
Washington, D.C. 20005
202.898.2207

*Counsel for Amicus Curiae the
National Association of Regulatory
Utility Commissioners*

505 Van Ness Avenue
San Francisco, C.A. 94102
415.703.3211

*Counsel for Amicus Curiae the
Public Utilities Commission of the
State of California*

CERTIFICATES OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) I certify the following:

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 3,177 words, including footnotes but excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B) (iii) and Federal Circuit Rule 32(e)(1), which I determined based on the word-counting function of my word processing system (Microsoft Word 2010).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) in that the brief was prepared in Century 14 point font, a proportional typeface.

Dated: September 15, 2015

/s/ Candace J. Morey
Candace J. Morey
Principal Counsel
California Public Utilities
Commission
505 Van Ness Avenue
San Francisco, C.A. 94102
415.703.3211

*Counsel for Amicus Curiae the
Public Utilities Commission of
the State of California*

CERTIFICATE OF SERVICE

I hereby certify that today, September 15, 2015, I filed the foregoing Appellants' Opening Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: September 15, 2015

/s/ Candace J. Morey

Candace J. Morey
Principal Counsel
California Public Utilities
Commission
505 Van Ness Avenue
San Francisco, C.A. 94102
415.703.3211

*Counsel for Amicus Curiae the
Public Utilities Commission of
the State of California*