No. 99-1429

In the Supreme Court of the United States

ANADARKO PETROLEUM CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that gas producers who must make refunds retroactive to 1983 of prices charged in excess of the maximum lawful prices formerly in effect for natural gas under the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, were not entitled, on a generic basis, to retain the interest due customers on the amounts to be refunded.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-14a) is reported at 196 F.3d 1264. Rehearing of that opinion by the panel (Pet. App. 68a-70a) is reported at 200 F.3d 867. The initial order of the Federal Energy Regulatory Commission (Pet. App. 40a-67a) is reported at 80 F.E.R.C. ¶ 61,264, and its order on rehearing (Pet. App. 15a-39a) is reported at 82 F.E.R.C. ¶ 61,058. The prior decision of the court of appeals (Pet. App. 71a-102a) is reported at 91 F.3d 1478.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1999. A petition for rehearing was granted and the court of appeals opinion modified on January 21, 2000. The petition for a writ of certiorari was filed on February 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, which was substantially repealed in 1989, imposed certain statutory ceilings on natural gas rates.[1] Section 110 of the NGPA allowed producers to recover charges in excess of the applicable NGPA maximum lawful prices "to the extent necessary to recover * * * State severance taxes attributable to the production" of natural gas. 15 U.S.C. 3320(a) (1988) (repealed 1989). The Commission's NGPA regulations governing price increases for the recovery of any collected severance taxes provided that any such increases were "subject to a general obligation to refund any portion of the price, together with interest." 18 C.F.R. 270.101(e)(1) (1993) (removed).

Section 502(c) of the NGPA authorizes the Commission to permit "adjustments" to congressionally-mandated maximum lawful prices "as may be necessary to prevent special hardship, inequity, or an unfair distribution of burdens." 15 U.S.C. 3412(c). The Commission's regulations implementing Section 502(c) provide that parties seeking an adjustment bear the burden of demonstrating "why the relief should be

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[1] Congress repealed the pricing provisions of Title I of the NGPA effective January 1, 1993. Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157.

granted and the business consequences that will result if the relief is denied; and * * * how the denial of relief will cause the applicant to suffer special hardship, inequity, or unfair distribution of burdens." 18 C.F.R. 385.1104(a)(1)(ii) and (iii).

2. In 1983, several parties filed petitions with the Commission arguing that the Commission's prior determinations permitting the recovery of the Kansas *ad valorem* tax by producers under Section 110 of the NGPA should be abandoned.[2] The Commission denied those petitions in *Sun Exploration & Production Co.*, 36 F.E.R.C. ¶ 61,093 (1986). The court of appeals reversed and remanded, concluding that the Commission had not adequately explained its decision to authorize producers to charge prices in excess of the NGPA statutory price ceilings to recover the costs of the Kansas *ad valorem* tax. *Colorado Interstate Gas Co.* v. *FERC*, 850 F.2d 769 (D.C. Cir. 1988).

On remand, the Commission concluded that the Kansas *ad valorem* tax should be viewed as a property tax and therefore not a severance tax recoverable under Section 110. *Colorado Interstate Gas Co.*, 65 F.E.R.C. ¶ 61,292, at 62,371 (1993), order on reh'g, 67 F.E.R.C. ¶ 61,209 (1994). As a remedy, FERC ordered refunds of those taxes that had been included in rates charged after June 28, 1988—the date of the court of

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[2] The Commission's earlier determination to permit recovery of the Kansas *ad valorem* tax was based on the findings of its predecessor, the Federal Power Commission, that the tax could be recovered under the Natural Gas Act of 1938, 15 U.S.C. 717 *et seq.* See *Just and Reasonable National Rates for Sales of Natural Gas*, 51 F.P.C. 2212, 2301-2302, clarified, 52 F.P.C. 915, reh'g denied in relevant part, 52 F.P.C. 1604 (1974), aff'd *sub nom. Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976).

appeals' decision in *Colorado Interstate*. In FERC's view, refunds were not appropriate for periods preceding that decision, because producers had reasonably relied on Commission orders holding that the Kansas tax could lawfully be recovered. See 67 F.E.R.C. at 61,660.

On judicial review of the Commission's order, the court of appeals held that, although the Commission reasonably determined that the Kansas *ad valorem* tax was not a severance tax within the meaning of Section 110, the Commission should have awarded refunds retroactively to October 4, 1983—"the date when all interested parties were given notice in the Federal Register that the recoverability of the Kansas tax under § 110 of the NGPA was at issue." *Public Serv. Co.* v. *FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996), cert. denied, 520 U.S. 1224 (1997).[3]

3. Following this Court's denial of certiorari to review *Public Service*, producers petitioned the Commission for equitable relief under Section 502(c) of the NGPA, seeking, among other things, a generic waiver of the requirement to pay interest on the refunds owed with respect to production between October 4, 1983, and June 28, 1988.[4] The Commission denied the request

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[3] The court of appeals explained that "anything short of full retroactivity (*i.e.*, to 1978) allows the producers to keep some unlawful overcharges without any justification at all." *Public Serv. Co.*, 91 F.3d at 1490. The court limited the producers' liability to October 1983, however, because that was "the earliest date advocated by any party before the court. *Ibid.*

[4] Producers also sought a reduction in the principal amount of the refunds owed to the extent Kansas taxing authorities overvalued (and therefore overtaxed) gas properties under the assumption that the *ad valorem* tax was recoverable as an add-on to the price of the gas – the so-called "tax-on-tax" effect. Producers also

for generic adjustment relief. Pet. App. 40a-67a. The Commission observed that "[i]nterest, which merely represents use of the money, is ordinarily part of the refund of any overcharge, absent compelling reasons for not requiring its payment to the injured party." *Id.* at 48a. The Commission further observed that the argument that the producers made in support of a generic waiver of interest on the refunds—that producers reasonably relied on the Commission's prior orders permitting recovery of the tax—was the same equitable argument that had been presented to, and rejected by, the court of appeals in *Public Service* in the context of holding that the effective date for refunds should be October 4, 1983. *Id.* at 48a, 52a. The Commission thus explained that "*Public Service* leaves the Commission little choice but to deny the Producers' request for an across-the-board waiver of interest on all the refunds required by the court." *Id.* at 52a.

The Commission concluded, however, that, because the refund and interest obligations "could present a serious financial problem to specific producers, particularly small producers or producers who no longer have producing wells," the Commission would "entertain individual requests for adjustment relief." Pet. App. 52a. The Commission also explained that it would

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argued that their liability should be limited to refunding amounts with respect to production after October 4, 1983, in essence seeking a proration of their tax bills for the year 1983. The court of appeals upheld the Commission's determination that the producers are responsible for refunding the tax-on-tax. Pet. App. 10a. The court also held that producers must refund any tax reimbursements after October 4, 1983, as long as the tax reimbursements caused the producers' sales to exceed the maximum lawful price. *Id.* at 13a, 69a. Petitioners do not challenge those rulings before this Court.

permit producers to file requests to satisfy their payment obligations over a period of up to five years. *Id.* at 58a.

The Commission denied the producers' request for rehearing. Pet. App. 15a-39a. The Commission reiterated its view, however, that the fact "[t]hat [the Commission is] denying the generic request for waiver of interest or principal is no indication how we would rule on individual petitions for relief based upon the circumstances of that particular petitioner." *Id.* at 33a-34a.

4. The court of appeals upheld the Commission's rejection of the producers' requests for generic adjustment relief. Pet. App. 1a-14a. The court observed that the Commission's general policy "requires interest to be paid on various kinds of overcharges," *id.* at 6a, and that "the regulation governing price increases for the recovery of severance taxes gave notice that any such increases were 'subject to a general obligation to refund any portion of the price, together with interest,'" *id.* at 7a (quoting 18 C.F.R. 270.101(e)(1) (1993)).

The court of appeals then rejected the equitable reasons the producers advanced for obtaining generic relief from their interest obligation: namely, that "the litigation has gone on forever; the Commission is responsible for much of the delay; the producers relied on the Commission's settled view that the Kansas *ad valorem* tax was a severance tax." Pet. App. 7a. The court explained that "[t]he Commission's legal errors and the snail-like pace of its administrative proceedings are cause for complaint, but are not in themselves grounds for altering the producers' interest obligation." *Ibid.* The court reasoned that "[i]t is the balance of equities between the producers and their customers,

not between the producers and the Commission, that matters." *Ibid.*

The court of appeals further found that "the Commission properly concluded that it should not grant a generic waiver of interest because, to do so, it would have to assess the equities in a manner contrary to *Public Service*." Pet. App. 9a. The court of appeals explained that,

> [i]n holding [in *Public Service*] that the producers [must] "refund the full amount that they unlawfully collected," 91 F.3d at 1490, [the court] determined that the producers had not established "detrimental reliance," *ibid*; that even if they had relied on the Commission's treatment of the Kansas tax, passage of the NGPA and the 1983 petition challenging this treatment rendered their reliance unreasonable, *ibid*; and that "[the court is] hard pressed to see how the producers would be harmed in any cognizable way even if they were required to disgorge every dollar they received in recovery of the tax," *ibid.*

Pet. App. 8a-9a (footnote omitted). The court of appeals also stated that "[its] decision today does not affect the Commission's established standards for granting hardship waivers and does not prohibit individual parties from seeking hardship waivers in a proceeding under NGPA § 502(c), 15 U.S.C. § 3412(c)." Pet. App. 9a n.5.

ARGUMENT

The court of appeals correctly upheld the Commission's decision to deny a generic waiver of all interest on all refunds required to be paid under *Public Service*. The broad legal propositions that petitioners purport to frame for review by this Court are not presented in this case. Moreover, the court's holding

arises in the context of a repealed statute and is limited to the unique facts of this case. Further review is therefore not warranted.

1. Petitioners contend (Pet. 13-20) that this Court's review is warranted to determine when courts must defer to an agency's decision to limit relief when applying a new rule of law retroactively. That contention lacks merit. Petitioners essentially challenge (see, *e.g.*, Pet. 16) the court of appeals' 1996 decision in *Public Service* that the producers' refund liability extends back to 1983, instead of 1988, as the Commission determined on remand from the D.C. Circuit's decision in *Colorado Interstate*. As we explained in our brief in opposition to the petition for a writ of certiorari seeking review of the *Public Service* decision (Nos. 96-954 & 96-1230, FERC Br. at 7-8), however, the court of appeals in *Public Service* did not purport to depart from its settled precedent recognizing the broad remedial discretion of administrative agencies and affording deference to exercises of that discretion; at most, *Public Service* misapplied settled principles in the particular context of that case. Moreover, as we also explained (*id.* at 8-9), there is some basis for the proposition that FERC's remedial discretion was uniquely constrained in that case given the *statutory* prescriptions of the ceiling prices and provisions for refunds of overcharges. This Court denied certiorari in *Public Service*, and there is no basis for seeking a different course now under the guise of reviewing the D.C. Circuit's affirmance of the Commission's orders denying generic remedial relief with respect to petitioners' interest obligation. That conclusion is particularly warranted given that the court of appeals' decision arose in the context of a repealed statute and price ceilings that were eliminated more than seven years ago.

2. Petitioners and respondents Kansas and Kansas Corporation Commission further argue (Pet. 20-21, 25; Kansas *et al.* Br. 2-3) that the court of appeals' decision bars all equitable discretion by the Commission under Section 502(c) of the NGPA. That contention, however, misapprehends the nature of both the Commission's order denying petitioners' request for generic interest relief and the court of appeals' decision. The Commission repeatedly has stated that it *will* exercise its discretion to consider individual requests to be relieved from any interest obligation. Pet. App. 21a-22a ("[T]he Commission again emphasizes, as it did in the September 10 Order, that it will entertain individual requests for adjustment relief under NGPA section 502(c). * * * A producer is entitled to relief * * * if it can establish * * * 'special hardship, inequity, or unfair distribution of burdens.'") (quoting 15 U.S.C. 3412(c) and 18 C.F.R. 385.1104(a)(1)(iii)). The court of appeals likewise stated that its decision "does not affect the Commission's established standards for granting hardship waivers and does not prohibit individual parties from seeking hardship waivers" under Section 502(c). *Id.* at 9a n.5.

The Commission's order and the court of appeals' decision simply hold that producers are not entitled to across-the-board relief from their interest obligations for the 1983 to 1988 period based on an asserted reliance on the Commission's pre-1988 orders permitting recovery of the Kansas tax. As the court of appeals concluded (Pet. App. 8a-9a), the Commission properly interpreted the court's own prior decision in *Public Service* to hold that the producers had not demonstrated detrimental and reasonable reliance on the Commission's earlier orders, and therefore that the producers were liable for overcharges beginning in 1983, when they were on notice that the status of the

Kansas tax was being challenged before the Commission.

The court in *Public Service* explained that the "enactment of a substantially new regulatory regime [upon passage of the NGPA] in 1978 undermined any assurance that the [Federal Power Commission's] treatment of the Kansas tax under the NGA would withstand scrutiny under the NGPA; reliance would have been foolhardly." 91 F.3d at 1490; see also *ibid.* ("[N]o seller of natural gas could justifiably be confident that it was entitled to recover the tax until the legal question was settled anew under the new statute."). The court of appeals also explained that the producers in any event had not shown "[w]hat [they could] have done differently if they had known in 1983 that they were not entitled to recover the Kansas tax[.] They could not have raised their prices above the maximum lawful level regardless [of] whether the traffic would have borne such an increase." *Ibid.* Based on those legal findings, the Commission in this case properly ruled that it could not "see how the same reliance, that in the context of waiving all refunds for the 1983-1988 period the Court concluded was foolhardy, can somehow be transformed into reliance that would justify granting generic adjustment relief of interest only pursuant to NGPA section 502(c)." Pet. App. 28a.

3. Petitioners also err in contending (Pet. 21-24) that the court of appeals' decision conflicts with decisions of this Court and other courts of appeals concerning the factors that are relevant to awards of pre-judgment interest. In particular, petitioners point to *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169 (1989), and *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), as well as two decisions of the Fifth Circuit, *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d

1053 (1985), cert. denied, 476 U.S. 1114 (1986), and *Estate of French* v. *FERC*, 603 F.2d 1158 (1979). There is, however, no conflict.

To be sure, the degree of personal wrongdoing on the part of the defendant and other fundamental considerations of fairness have properly been considered in some circumstances in declining to award prejudgment interest. *Osterneck*, 489 U.S. at 176 (identifying factors that have been considered by lower courts in securities litigation, but disclaiming an intent to specify what factors must be considered); *Board of County Comm'rs*, 308 U.S. at 353 (discussing issue of fault in unique context of request for prejudgment interest from political subdivision of a State). The court of appeals concluded, however, that the Commission properly considered those factors and concluded that the balance of the equities in this particular case favored awarding the overcharged customers a full refund with interest beginning in 1983. Pet. App. 8a-9a. Significantly, moreover, *Osterneck* and *Board of County Commissioners* involved judicially fashioned standards for the award of interest by the district courts themselves in cases brought directly in court. This case, by contrast, involves the award of interest by an administrative agency under a statutory and regulatory regime that specifically provides for refunds of overcharges with interest – and that still leaves individual producers free to challenge an award of interest based on a more particularized weighing of the equities concerning that particular producer and its customers. That approach is fully consistent with *Osterneck* and *Board of County Commissioners*.

The court of appeals also properly distinguished (Pet. App. 9a-10a) this case from the Fifth Circuit's decision in *Estate of French*, which held that "equitable con-

siderations" required the Commission to suspend interest payments during the seven-year period in which the Commission considered a petition for an economic hardship waiver. 603 F.2d at 1167. The decision below explained that, "[h]ere, by contrast, the Commission acted quite promptly on the producers' petition for a waiver of interest," Pet. App. 9a, and that "[t]here is an ocean of difference between being required to pay interest on a lawful obligation (as the producers are being required to do here) and being required to pay interest while waiting for the Commission to decide whether one deserves a hardship waiver (which is what the court refused to allow in *French*)," *id.* at 9a-10a.[5]

There is, in sum, no conflict of decisions, and the court of appeals' fact-bound decision therefore does not warrant further review.

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[5] The Fifth Circuit's decision in *Texas Eastern Transmission Corp.* is also distinguishable on its facts. There, the court of appeals upheld the Commission's exercise of its discretion not to require customers to pay interest on cost allowances because, while the customers were on notice that allowances would eventually be awarded, they were not on notice as to the amount, and if the sellers had wanted to assure collection of the later-awarded allowances they could have done so contractually. 769 F.2d at 1066. The court of appeals concluded that, "[u]nder the specific circumstances of this case," the Commission's "exclusion of interest results from a reasonable balancing of the equities." *Ibid.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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