No. 99-1556

In the Supreme Court of the United States

ALCOA INC. AND VANALCO INC., PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed for lack of jurisdiction petitioners' claim that the Bonneville Power Administration violated their First Amendment rights.

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a-2a, 3a-4a) are unreported. The order of the district court (Pet. App. 5a) is unreported.

JURISDICTION

The orders of the court of appeals were entered on February 9, 2000. The petition for a writ of certiorari was filed on March 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Bonneville Power Administration (BPA) is a federal agency within the United States Department of Energy that markets and transmits

federally-generated electricity in several States in the western United States. See 16 U.S.C. 832a(a). The power is primarily generated by a series of dams along the Columbia River. See *Aluminum Co. of America* v. *Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 382 (1984). BPA sells low-cost hydroelectric power to public utilities and entities, private investor-owned utilities (IOUs), and direct-service industrial customers (DSIs). *Id.* at 382, 384. DSIs are primarily aluminum smelters, such as petitioners, that purchase electric power directly from BPA. See Power Subscription Strategy, 64 Fed. Reg. 149, 151 (1999).

Several statutes govern BPA's operations. These include the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839 *et seq.* (Northwest Power Act), the Federal Columbia River Transmission System Act, 16 U.S.C. 838 *et seq.*, the Act of Aug. 31, 1964, 16 U.S.C. 837 *et seq.*, and the Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.* Pursuant to these statutes, BPA, *inter alia*, must set rates for its electric power at a level that will meet costs and repay any federal debt incurred in building the projects included in the Federal Columbia River Power System, 16 U.S.C. 838g; market power "with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles," 16 U.S.C. 838g; support energy conservation, 16 U.S.C. 839; and act to protect the fish and wildlife of the Columbia River basin, 16 U.S.C. 839b (1994 & Supp. IV 1998). See *Association of Pub. Agency Customers, Inc.* v. *BPA*, 126 F.3d 1158, 1164 (9th Cir. 1997).

2. In 1981, Congress required the BPA to offer long-term sales contracts to its customers, not to exceed a twenty-year term. 16 U.S.C. 839c(g)(1), 832d(a). In

anticipation of the expiration of those contracts in 2001, and to facilitate the offering of replacement contracts, BPA sought input from a wide range of interested and affected groups and individuals beginning in 1996. See 64 Fed. Reg. at 149, 151. The result of this public process was the "Power Subscription Strategy," a comprehensive plan issued in December 1998, to guide BPA in developing new power sales contracts while fulfilling all of its statutory mandates. See 64 Fed. Reg. at 149.

The Subscription Strategy did not address the specific price or quantities of power to be sold to the DSIs upon the expiration of their current power sales contracts. Subsequently, the BPA, with the help of the DSIs, developed a proposal called the "Compromise Approach." See Pet. App. 91a-95a. The Compromise Approach proposed a price and allocation of power that BPA would offer to the DSIs post-2001, based on each DSI's "Industrial Firm Power" purchases from BPA under their current agreements, between fiscal years 1997 and 2001.[1] *Id.* at 91a. The BPA offered to include this price and allocation proposal for service to the DSIs as part of BPA's Initial Proposal in an upcoming Rate Case "if the DSIs are willing to support it." *Ibid.*; 64 Fed. Reg. at 44,318 (announcing BPA's upcoming Rate Case).

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[1] Although BPA may elect to serve the DSIs, it is not required to do so after 2001. See 16 U.S.C. 839c(d)(1); H.R. Rep. No. 976, 96th Cong., 2d Sess. Pt. I, at 61 (1980) ("[S]ection 5(d) authorizes the Administrator to sell power to existing direct service industrial customers that have a BPA contract at the date this bill is enacted. Initial long-term 20-year contracts are to be offered by BPA to these customers in accordance with section 5(g). In return for these new contracts, the DSI's would have to agree to terminate their current contracts. Subsequent contracts for these DSI's are *authorized but not mandated.*") (emphasis added).

In exchange for its agreement to include the Compromise Approach proposal in the upcoming Rate Case, the BPA asked the DSIs to refrain from challenging or otherwise undermining the Compromise Approach proposal. In particular, BPA asked the DSIs to agree to: (1) support the proposals in the Compromise Approach throughout the Rate Case, as long as BPA did so; (2) indicate that they do so outside the Rate Case venue; (3) not oppose the elements of the proposal relating to rates for service to Investor-Owned Utilities; (4) not legally challenge the Compromise Approach at the end of the Rate Case if it is sustained in BPA's Rate Case Final Record of Decision (although the DSIs could challenge BPA's decisions regarding adjustments of rates); (5) not file a lawsuit challenging the sale of power to Investor-Owned Utilities if the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision; and (6) withdraw a lawsuit challenging the Subscription Strategy currently filed in the Court of Appeals for the Ninth Circuit, if the Compromise Approach is substantially sustained in the Rate Case Final Record of Decision. Pet. App. 88a-90a.

Most of the DSIs accepted the Compromise Approach proposal and agreed to BPA's requests. Petitioners did not. Pet. 5. Petitioners have been full participants in BPA's Rate Case and have used the Rate Case to challenge the validity of the Compromise Approach proposal, and to raise other issues of concern to them. The rate-making proceedings began on August 24, 1999, and concluded on May 10, 2000, with the issuance of BPA's Record of Decision. The Compromise Approach proposal was a relatively small part of BPA's rate proceeding. 64 Fed. Reg. at 44,318. The Federal Energy Regulatory Commission (FERC) will

review BPA's decision, 16 U.S.C. 839e(i)(5) and (6), and the decision will be deemed final for purposes of judicial review when it is confirmed and approved by FERC, 16 U.S.C. 839f(e)(4)(D).

3. During the Rate Case, in which they were participants, petitioners brought suit in both federal district court and the court of appeals, seeking to enjoin BPA's rate-making proceeding, to enjoin BPA from entering into subscription contracts with its customers, to enjoin "implementation" of the Compromise Approach, and to require BPA to commence a new Rate Case. See Petitioner Vanalco Inc.'s Motion for Preliminary Injunction to Enjoin Power Rate Case 1. Petitioners asserted, *inter alia*, that the Compromise Approach had infringed their First Amendment rights to petition the government for redress of grievances. *Id.* at 15.

The district court issued an order dismissing petitioners' claims for lack of jurisdiction. Pet. App. 5a. The court of appeals affirmed the district court's dismissal, noting that the questions raised were "so insubstantial as not to need further argument." *Id.* at 3a-4a. The court of appeals also issued an order dismissing petitioners' direct appeal for lack of jurisdiction. *Id.* at 1a-2a.[2]

ARGUMENT

The rulings of the court of appeals are correct and do not conflict with the decisions of this Court, or of any other court of appeals. Accordingly, further review is not warranted.

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[2] On March 31, 2000, after the petition for a writ of certiorari was filed, petitioners filed an application to Justice O'Connor for a stay of the rate-making proceedings, pending disposition of the petition. The stay was denied by order of April 6, 2000.

A. The court of appeals correctly affirmed the district court's dismissal of petitioners' claims for lack of jurisdiction, and correctly determined that it lacked jurisdiction over petitioners' direct appeal.

The district court lacked jurisdiction over petitioners' claims of unconstitutional action on the part of BPA. Section 9(e)(5) of the Northwest Power Act, 16 U.S.C. 839f(e)(5), vests jurisdiction in the courts of appeals to review "[s]uits to challenge the constitutionality of this chapter, or any action thereunder."[3] The Court of Appeals for the Ninth Circuit has consistently held that its jurisdiction over such suits is exclusive and that the district court lacks jurisdiction to consider such challenges. See *Public Util. Comm'r* v. *BPA*, 767 F.2d 622, 627 (9th Cir. 1985) (Kennedy, J.); see also *Central Mont. Elec. Power Coop., Inc.* v. *Administrator of the BPA*, 840 F.2d 1472, 1475 (9th Cir. 1988) (district court has jurisdiction over nonconstitutional suits challenging

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[3] The statute provides:

> Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C. 832 *et seq.*], the Act of August 31, 1964 (16 U.S.C. 837-837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. * * * Such court shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this chapter or any other law. Suits challenging any other actions under this chapter shall be filed in the appropriate court.

16 U.S.C. 839f(e)(5).

actions taken by agencies other than BPA pursuant to the Act); *Pacific Power & Light Co.* v. *BPA*, 795 F.2d 810, 815-816 (9th Cir. 1986) (same). Furthermore, the court of appeals has held that the Northwest Power Act "does not permit district court jurisdiction where the effect of an action is to challenge a BPA proceeding, the substance of which eventually will be subject to direct review" by the court of appeals.[4] See *id.* at 815. Because petitioners brought a constitutional challenge to BPA's rate-making proceeding, and because that proceeding will eventually be subject to direct review by the court of appeals, the district court correctly determined that it lacked jurisdiction to consider petitioners' challenge. See, *e.g.*, *Public Util. Comm'r*, 767 F.2d at 627. The court of appeals correctly

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[4] District courts have uniformly dismissed suits challenging BPA actions for lack of jurisdiction, holding that such suits are subject to exclusive review by the appropriate court of appeals. The court of appeals has uniformly affirmed these dismissals. See *National Wildlife Fed'n* v. *Johnson*, 548 F. Supp. 708 (D. Or. 1982), aff'd, 709 F.2d 1310 (9th Cir. 1983); *Public Util. Comm'r* v. *BPA*, 583 F. Supp. 752 (D. Or. 1984), aff'd, 767 F.2d 622 (9th Cir. 1985); *Public Power Council* v. *Johnson*, 589 F. Supp. 198 (D. Or. 1984); *Pacific Power & Light Co.* v. *BPA*, 589 F. Supp. 539 (D. Or. 1984), aff'd, 795 F.2d 810 (9th Cir. 1986); *City of Seattle* v. *Johnson*, 600 F. Supp. 306 (D. Or. 1984); *Central Mont. Elec. Power Coop., Inc.* v. *Administrator of the BPA*, 656 F. Supp. 781 (D. Mont. 1987), aff'd in part and appeal dismissed in part, 840 F.2d 1472 (9th Cir. 1988); *Bowers* v. *Jura*, 749 F. Supp. 1049 (W.D. Wash. 1990). Congress made clear in enacting this legislation that "suits to challenge the constitutionality of the act or any action thereunder and final actions and decisions taken pursuant to the act by either the BPA or the council shall be filed in the U.S. court of appeals for the region. This would include rate matters." 126 Cong. Rec. 29,813 (1980) (statement of Rep. Dingell).

affirmed, and that decision does not warrant this Court's review.

The court of appeals also correctly determined that it lacked jurisdiction to hear petitioners' direct appeal. The jurisdiction of the court of appeals extends only to final actions of the BPA, 16 U.S.C. 839f(e)(1), and there is no "final action" for the court of appeals to review at this time. See, *e.g.*, *Northwest Resource Info. Ctr., Inc.* v. *National Marine Fisheries Serv.*, 25 F.3d 872, 875 (9th Cir. 1994). BPA's rate determinations are deemed final only upon confirmation and approval by FERC. 16 U.S.C. 839f(e)(4)(D). Although BPA's portion of the rate-making proceeding at issue in this case has concluded, FERC has not reviewed and approved BPA's rate determination, so the "final action" requirement has not been met. See *Public Utils. Comm'n* v. *FERC*, 814 F.2d 560, 561 (9th Cir. 1987) (BPA's alleged unconstitutional failure to hold required hearing held not reviewable in court of appeals until FERC ruled on new BPA rate schedule); *Public Util. Comm'r*, 767 F.2d at 629 (constitutional challenge to BPA proceeding not reviewable until BPA's final rate methodology reviewed and approved by FERC). Therefore, the court of appeals correctly determined that it lacked jurisdiction to consider petitioners' challenge and that determination does not warrant review.

B. Petitioners contend that because their constitutional rights have been violated and those violations will cause "irreparable injury," an exception to the finality requirement should apply. Pet. 17, 22. This claim lacks merit and does not warrant this Court's review.

1. First, petitioners' claim that BPA's action violates their First Amendment rights does not entitle them to review when that action is not final. As the Ninth

Circuit has correctly recognized, the general rule is that challenges to agency proceedings, whether based on constitutional claims or otherwise, must await final agency action for review, when, as here, the governing statute so requires. See *Public Util. Comm'r*, 767 F.2d at 630. Until FERC passes final judgment on BPA's rate determination, that determination is not yet final for purposes of review by the court of appeals. See *Public Utils. Comm'n*, 814 F.2d at 561; *California Energy Comm'n* v. *Johnson*, 767 F.2d 631, 633-634 (9th Cir. 1985) (challenge to a BPA rate order on ground that BPA failed to follow its ratemaking procedures must await final FERC approval). Petitioner does not contend that there is a conflict among the Circuits on this point, and there is none. Furthermore, this approach is consistent with this Court's general presumption that judicial review ordinarily must await the conclusion of agency proceedings. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980); *Abbott Lab.* v. *Gardner*, 387 U.S. 136, 148-149 (1967).

2. Second, an exception to the finality requirement for review of agency proceedings has been recognized only in rare circumstances where agency action has clearly violated important statutory or constitutional rights. See, *e.g.*, *Leedom* v. *Kyne*, 358 U.S. 184, 187-188 (1958); *Peter Kiewit Sons' Co.* v. *United States Army Corps of Engineers*, 714 F.2d 163, 168-169 & n.33 (D.C. Cir. 1983); see also *Public Util. Comm'r*, 767 F.2d at 630 (in an "extreme case", an action may be challengeable by suit on constitutional grounds before it is final). Those circumstances are not present here. Petitioners' First Amendment claims are without foundation, as is their claim of irreparable injury. As the court of appeals correctly observed, petitioners' claims are "insubstantial." Pet. App. 4a. Accordingly, the

court correctly held that ordinary finality requirements apply.

Contrary to petitioners' contention, the Compromise Approach does not violate petitioners' First Amendment right to petition the government for redress. Pet. 6-7. Petitioners did not agree to the Compromise Approach and therefore are not bound by any of its restrictions (which are of limited scope and duration). Petitioners were free to challenge the Compromise Approach during BPA's rate-making proceeding, to petition Congress, to speak publicly about their views of the rates proposed therein, and are free to bring a legal challenge to the Compromise Approach when the appropriate court has jurisdiction to consider it.

Petitioners further argue that by "silencing" those DSIs who agreed to the proposal, BPA's Compromise Approach has prevented petitioners from assembling with "their natural allies" in pursuing redress before the agency or Congress or otherwise. Pet. 14. This argument is similarly without merit. As we have explained, the Compromise Approach does not bind petitioners in any way. It was not BPA's proposal of the Compromise Approach which prevented petitioners from associating with their fellow DSIs, but the DSIs' voluntary decision to accept the proposal and petitioners' voluntary decision to reject it. Moreover, in this context, the other DSIs are not in fact allied with petitioners, because they support a proposed price and allocation of power that petitioners do not.[5] Also, as a participant in the rate-making proceedings, petitioners

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[5] While petitioners claim that they and the other DSIs represent a "political bloc," Pet. 7, these corporations have discrete economic interests and frequently disagree with one another, as this case demonstrates.

have continued to associate each day with their fellow DSIs, and indeed to raise the very issues that are the subject of this litigation. See 64 Fed. Reg. at 44,322 ("parties to the rate case may raise and discuss any issues regarding BPA's proposal to serve the DSIs, including any issues regarding the potential effects of this proposal on BPA's rates").

Petitioners also suggest that the Compromise Approach violates the rights of the DSIs that agreed to its terms, because those entities are required to forgo expressing concerns or objections in the rate-making proceedings and elsewhere, and to "abandon their First Amendment right to petition any branch of the government, including specifically the Congress." Pet. i. This claim is without merit. Petitioners fail to establish standing to assert the First Amendment rights of the other DSIs, particularly in an attempt to seek judicial repudiation of an agreement those persons have voluntarily chosen to make. See *NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958) (generally, parties may rely only on constitutional rights personal to themselves). In any event, the Compromise Approach proposal does not abridge the First Amendment rights of the DSIs who agreed to it. The Compromise Approach was entered into voluntarily, and was simply an agreement to support an Initial Proposal in BPA's rate case, and to refrain from challenging it if it was sustained in that case. The DSIs, sophisticated corporations, knowingly and voluntarily agreed to support that proposal, and the Compromise Approach did not violate their First Amendment rights.

C. Finally, petitioners contend that the Compromise Approach will irreparably harm their economic interests without interlocutory review. Pet. 20. Petitioners claim that because they did not accept the

Compromise Approach, they will be allocated less power and required to pay higher prices for it. *Ibid.* However, until FERC confirms and approves BPA's rates, questions of price and allocation of power remain administratively unresolved. Petitioners' alleged harm is therefore speculative, and their claims do not warrant review by this Court.

Petitioners thus failed to establish a clear violation of their constitutional rights or a threat of irreparable injury to their interests. Accordingly, the court of appeals correctly affirmed the district court's dismissal of petitioners' claims and correctly dismissed their claims on direct appeal.[6]

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[6] Petitioners have filed a supplement to their petition urging that, in the alternative to granting certiorari, this case should be held pending the outcome of *United States* v. *Velazquez*, cert. granted, 120 S. Ct. 1553 (2000) (No. 99-960). At issue in *Velazquez*, however, is whether certain statutory provisions, which preclude recipients of Legal Services Corporation funds from participating in "litigation, lobbying or rulemaking, involving an effort to reform a Federal or State welfare system," violate the First Amendment. Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321-55. The instant case does not involve such a statutory restriction, but rather a proposal which two corporations declined to accept, leaving them free to litigate, lobby or otherwise publicly discuss the matters at issue. It also presents jurisdictional issues not present in *Velazquez*. *Velazquez* thus presents no reason to postpone action on the petition for certiorari at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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