No. 07-1007

In the Supreme Court of the United States

PORTLAND GENERAL ELECTRIC COMPANY, ET AL., PETITIONERS

v.

PUBLIC POWER COUNCIL, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
GREGORY G. KATSAS
Acting Assistant Attorney General
BARBARA C. BIDDLE
JONATHAN H. LEVY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Bonneville Power Administration (BPA) acted within its statutory authority in entering into agreements with some of its customers to settle potential disputes regarding a statutory program.

2. Whether BPA properly allocated the costs of those settlement agreements.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-58a, 59a-98a) are reported at 501 F.3d 1009 and 501 F.3d 137.

JURISDICTION

The judgments of the court of appeals (Pet. App. 1440a-1442a) were entered on May 3, 2007. Petitions for rehearing were denied on October 5, 2007 (Pet. App. 1435a-1438a, 1439a). On December 27, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 3, 2008, and the petition was filed on February 1, 2008.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Bonneville Power Administration (BPA) is a federal agency within the Department of Energy. See 16 U.S.C. 832a(a). It was created by Congress in 1937 to market hydroelectric power generated by dams on the Columbia River and its tributaries. See Bonneville Project Act of 1937, 16 U.S.C. 832 *et seq.* BPA is a self-financing agency that funds its programs through its own revenues. See 16 U.S.C. 838i. BPA is required by statute to set the rates at which it sells power at a level that will allow it to "recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power." 16 U.S.C. 839e(a)(1). Because BPA's rates are set to cover its costs, lower rates for some customers generally result in higher rates for other customers.

BPA is authorized to sell electric energy at wholesale to "public bodies and cooperatives and to private agencies and persons." 16 U.S.C. 832d(a); see 16 U.S.C. 839c(b)(1). The "private agencies and persons" served by BPA are primarily investor-owned utilities (IOUs) and direct-service industrial customers (mostly aluminum plants). The "public bodies and cooperatives" are primarily public utilities and are called "preference customers," because, by statute, they receive "preference and priority" in the disposition of the power that BPA sells from the federal hydroelectric facilities in the Pacific Northwest. 16 U.S.C. 832c(a); see 16 U.S.C. 839c(a).

b. In the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Northwest Power Act), 16

U.S.C. 839 *et seq.*, Congress established the Residential Exchange Program (REP) to provide that residential and small-farm consumers whose power is furnished by an IOU may also share in the benefits of federal hydropower production. See 16 U.S.C. 839c(c). The REP allows BPA customers to sell electricity to BPA at the customer's average system cost (ASC); the customer then buys back the same amount of electricity at the priority firm exchange rate (PF Exchange Rate), which is a lower rate set by BPA based on a statutory formula. See 16 U.S.C. 839e; 49 Fed. Reg. 45,219 (1984). The amount of electricity exchanged is equal to the customer's electrical load attributable to residential and small-farm consumers. The exchange occurs only on paper—no electricity is actually transferred—and the result is essentially a subsidy from BPA to the utility, which is required to pass the subsidy on to its residential and small-farm consumers. See 16 U.S.C. 839c(c)(3); 49 Fed. Reg. at 45,220 & n.1.

Because BPA buys power under the REP at a higher rate than the rate at which it sells back the same amount of power, the REP results in added costs to BPA that it must recover from its power revenue. But REP costs are not always or entirely passed on to preference customers. By statute, BPA must perform a complex calculation to determine preference customer rates. See 16 U.S.C. 839e(b). First, it calculates preference customer rates based on all of its applicable costs. Second, it calculates what the rates for the preference customers would be in a hypothetical world where five conditions were satisfied, one of which is that "no purchases or sales" are made under the REP. 16 U.S.C. 839e(b)(2)(C). Preference customers are entitled to the lower of the two rates produced by those calculations,

and excess costs are recovered through rates charged to non-preference customers. See 16 U.S.C. 839e(b)(2) and (3). Because of the zero-sum nature of BPA rate-setting, the application of the statutory rules governing the REP has often resulted in conflict and litigation. Pet. App. 16a-17a.

2. In 1998, BPA issued a Power Subscription Strategy, outlining in general terms how it anticipated selling power from 2001 to 2011. Pet. App. 213a-264a. That document did not set specific rates or include specific contractual terms, but it did describe the products BPA would offer and the frameworks it would use for pricing and contracts. One element of the strategy was to offer potential customers a choice with respect to the REP. *Id.* at 228a-232a. Customers eligible to receive REP payments could either continue participating in the REP as determined by BPA based on its interpretation and implementation of the Northwest Power Act and reserve their right to challenge aspects of BPA's determination in court, or they could enter into a REP settlement that embodied a compromise of BPA's and the customers' conflicting positions regarding the proper implementation of the statutory REP and that would preclude further litigation. See *ibid.*

BPA estimated that the statutory REP would provide about $48 million per year in benefits—and thus cost BPA $48 million in payments—if all of BPA's interpretations were upheld against possible challenges. Pet. App. 841a. But BPA also understood that if REP recipients successfully advocated any of a number of different theories, the statutory REP payments could be much higher. For example, if the REP recipients successfully challenged BPA's calculation of the PF Exchange rate, the statutory REP would cost about $280 million per

year, *id.* at 761a; and if the REP recipients successfully challenged BPA's method for calculating the ASC, then the statutory REP could cost about $323 million per year. *Id.* at 782a. The REP settlements, by contrast, were valued at about $140 million per year. *Id.* at 841a. The REP settlement was a "global" settlement, so it would come into force only if all REP-eligible IOUs chose it. *Id.* at 742a-743a. In fact, all REP-eligible IOUs did choose the REP settlement. *Id.* at 28a.

In setting its rates, BPA did not classify the costs of the REP settlement as if they were program costs of the REP for purposes of Section 839e(b). Pet. App. 24a-25a. Instead, it classified them as "settlement costs," and it "equitably" allocated them to both preference and non-preference rates. *Ibid.* (quoting 16 U.S.C. 839e(g)). In so doing, it relied on Section 839e(g), which provides that "the Administrator shall equitably allocate to power rates * * * all costs and benefits not otherwise allocated under this section." *Id.* at 25a.

3. Several parties filed petitions for review to challenge the REP settlement and BPA's rate-setting, and the petitions were consolidated into two cases. One case involved petitions for review challenging BPA's decision to offer and enter into the REP settlement agreements. The second case included petitions for review of the rates that resulted, in part, from BPA's decision to allocate the costs associated with the REP settlements to the rates of both preference and non-preference customers. A single panel of the court of appeals heard both cases and granted the petitions in relevant part. Pet. App. 1a-58a, 59a-98a.

a. The court of appeals held that the REP settlements were inconsistent with the governing statute. The court first stressed that BPA's statutory settlement

authority, while "expansive" and "broad," Pet. App. 43a, 45a, 58a, is "subject to" other provisions of the Act, and its exercise must be "grounded in" those provisions, *id.* at 40a-41a, 45a—in this case, the provisions of the Act governing the REP and limiting rates charged to preference customers, 16 U.S.C. 839c(c) and 839e(b). The court then concluded that the REP settlements exceeded those limitations because they did not "reflect the current REP program, as defined by BPA's own regulations." Pet. App. 57a. In particular, the court faulted BPA because the anticipated cost of the REP was about $48 million per year, while the anticipated cost of the settlements was about $147 million per year. *Id.* at 49a-52a. The court noted that BPA justified the cost of the settlements on several bases, the "most significant" of which was "the effect of a possible legal challenge" to the ASC methodology. *Id.* at 52a. If successful, such a challenge would increase the annual cost of the REP from $48 million to about $323 million. *Id.* at 53a-54a. The court rejected BPA's analysis, however, because "there was no existing legal challenge nor had BPA proposed changing its methodology." *Id.* at 54a.

In addition, the court of appeals noted that BPA had established the ASC methodology by regulation; that the regulation had been approved by the Federal Energy Regulatory Commission (FERC); and that petitions for review challenging the methodology had been rejected by the court of appeals 20 years earlier. Pet. App. 55a. In the court's view, BPA had "not identified any problem" with the regulatory methodology "that it fears might be exploited by those seeking to challenge it." *Ibid.* Accordingly, the court concluded that BPA was "bound by its regulations" until it adopted new reg-

ulations or until FERC or the court of appeals disapproved of the existing regulations. *Id.* at 55a-56a.

b. In a separate opinion issued the same day, the court of appeals also concluded that BPA's rate-setting contravened Section 839e(b)(2), which, the court concluded, "requires that the IOUs' [REP] benefits not come at the expense of BPA's preference customers." Pet. App. 85a-87a. According to the court, although the statute "normally ensures that the costs of the REP are not passed along to BPA's preference customers," BPA in fact imposed the costs of the REP settlement on its preference customers by treating the costs as ordinary costs of business under Section 839e(g). *Id.* at 85a-86a. The court determined that such treatment violated the statute. "By burdening its preference customers with part of the cost of the REP settlement, BPA 'ignored its obligations' under [Section 839e(b)(2) and (3)]." *Id.* at 86a (quoting *id.* at 57a). In sum, "BPA plainly violated the rule that the rates it charges preference customers must be calculated as if no purchases or sales were made [under the REP]." *Id.* at 86a-87a (internal quotation marks and citation omitted).

4. A number of non-preference customers (but not BPA) filed petitions for rehearing en banc, which were denied without opinion. Pet. App. 1435a-1439a. Three non-preference customers have now filed a petition for a writ of certiorari that covers both decisions of the court of appeals.

ARGUMENT

Petitioners contend (Pet. 21-22) that the court of appeals disregarded *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984), by failing to defer to BPA's reasonable interpretation of a statute it administers. That claim lacks

merit. The opinions below extensively discuss *Chevron*, and they properly state the rule of deference established in that decision. The court's application of settled legal principles in the circumstances of this case does not warrant this Court's review. Nor are petitioners correct when they suggest (Pet. 22, 34) that the decisions below are of "extraordinary importance" to BPA and to utilities and consumers in the Pacific Northwest because the decisions will unduly constrain the ability of BPA and its customers to settle disputes. The court of appeals correctly recognized that BPA possesses broad discretion to conduct itself in a business-like fashion and to settle disputes. The fact-bound decisions below will not significantly impair BPA's ability to settle disputes in the future. Further review is not warranted.

1. As petitioners acknowledge (Pet. 23), the court of appeals recognized that BPA's interpretation of the statute it administers is entitled to deference. Indeed, the court of appeals repeatedly cited this Court's decision in *Chevron*, and it provided a detailed and accurate statement of the law as embodied in *Chevron* and other decisions of this Court. Pet. App. 34a-35a; see *id.* at 48a, 80a. The court of appeals thus correctly understood and stated the basic principles of deference at issue in *Chevron* and similar cases. The decision below neither conflicts with those cases nor creates a circuit conflict on the broad question of whether "courts must defer to administrative agencies' interpretations of the statutes that they administer, especially in cases involving complex issues requiring technical expertise." Pet. 25 n.5.

Petitioners contend (Pet. 24) that the analysis of the court of appeals was flawed because it "improperly focused on a question that no one disputed." In their view, (Pet. 25), the only issue before the court of appeals was

whether "BPA had acted contrary to law," since "the challengers below did *not* suggest that BPA had acted arbitrarily and capriciously." But "[w]hether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable." *General Instrument Corp.* v. *FCC*, 213 F.3d 724, 732 (D.C. Cir. 2000). And the court of appeals essentially determined that BPA had acted unreasonably in paying over $140 million per year to settle REP claims that—under its own ASC methodology—were worth only $48 million per year.

In addition, the court of appeals identified a highly unusual combination of factors relating to the ASC regulations that, in its judgment, made BPA's action improper. After noting that BPA based its decision to enter into the settlement agreements in part on its concern that those regulations might be successfully challenged, the court noted that (1) the regulations had already been unsuccessfully challenged in the court of appeals (the same court that would hear any future challenge) some 20 years earlier; (2) the regulations had been approved by FERC, as required by statute; and (3) BPA failed to identify "any problem in the 1984 methodology that it fear[ed] may be exploited by those seeking to challenge it." Pet. App. 55a. The court of appeals also noted that increased settlement costs would be passed on to preference customers, many of whom were not parties to the REP settlements. *Id.* at 25a.

At bottom, the decisions below stand for the uncontroversial propositions that the outer limits of BPA's settlement authority must be tied to the substantive provisions of the Northwest Power Act and that BPA must provide a reasonable explanation when it enters into a settlement that has a significant impact on non-

parties and that is based on alleged vulnerabilities in regulations that have already received administrative approval and withstood judicial challenge. The court of appeals did make factual mistakes and conduct an incorrect analysis of unique —or at least unusual—features of the administrative record. For example, the court of appeals relied on the "fact" that "there was no existing legal challenge" to the ASC methodology at the time the settlement agreements were entered into. Pet. App. 54a. As petitioners note (Pet. 29-30), however, the court of appeals was mistaken as to that fact—IOUs had raised several challenges to BPA's methodology. Moreover, BPA believes that it did provide a reasonable explanation of why the ASC methodology regulations were vulnerable to legal challenge despite having been approved by FERC and having withstood previous petitions for review. See Gov't C.A. Br. 39-48. In particular, BPA noted that the earlier decision of the court of appeals approving the ASC methodology had specifically declined to approve "permanent implementation" of certain aspects of that methodology, leaving open the possibility of future challenges. *Pacificorp* v. *FERC*, 795 F.2d 816, 823 (9th Cir. 1986).

The case-specific errors of the court of appeals do not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). That is especially so given that BPA has already initiated proceedings to revise the ASC methodology, with the consequence that the validity of the old methodology is of little ongoing significance. See *Proposed Methodology for Determining the Average System Cost of Resources for Electric Utilities Participating in the Resi-*

dential Exchange Program Established by Section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act, 73 Fed. Reg. 7270, 7271 (2008) (initiating proceeding aimed at developing a new "ASC Methodology that will be legally sustainable, efficient, and durable over time").

2. Petitioners also contend (Pet. 31-34) that the court of appeals erred in its interpretation of Section 839e(b)(2), which limits the rates that BPA can charge preference customers. That issue does not independently warrant review, since it affects only the allocation of the cost of the REP settlements. If this Court does not review the decision of the court of appeals setting aside the settlements, then the question of how to allocate the cost of the settlements would be of little or no importance.

In any event, although the court of appeals misinterpreted BPA's legal position, petitioners are incorrect when they suggest (Pet. 33) that the court simply refused to defer to BPA's construction of the ambiguous terms of Section 839e(b)(2). In fact, the court examined the statute and determined that, at least with respect to the allocation of costs in this case, it was unambiguous. Pet. App. 40a (describing BPA's position as "contrary to a plain reading of the Bonneville Project Act" and the Northwest Power Act). This case therefore does not present an occasion to decide the general question whether courts of appeals should "consider[] and defer[] to the statutory constructions of expert agencies." Pet. 34. At most, it presents an occasion to determine the proper construction of Section 839e(b)(2), and petitioners do not explain why that issue warrants review in the context of this case.

3. Finally, petitioners assert (Pet. 34) that the decisions of the court of appeals will prevent BPA from considering "risks of changes in market conditions or legal challenges to BPA's procedures" when entering into settlements, and that as a result, the decisions below will "significantly constrain BPA's ability to settle contract and rate disputes with utilities." Petitioners also characterize (Pet. 28) the decisions as holding that "BPA's settlements could not account for potential regulatory changes because BPA had not already adopted such changes." Petitioners misread the court of appeals' decisions.

Far from "constrain[ing]" BPA's general settlement authority, the court of appeals reaffirmed both the existence of that authority and its breadth. The court acknowledged that "[t]he ability to settle claims without resort to litigation or full-throated regulatory proceedings is certainly an important aspect for making BPA an efficient agency and fulfilling the Administrator's charge to conduct BPA as a well-run business," and it recognized that settling claims "requires flexibility and discretion." Pet. App. 43a. Indeed, the court deemed it "implicit in the grant of settlement power that BPA have the flexibility to take into account a variety of considerations, including its litigation costs, differing damage assessments, and the risk of loss on the merits." *Id.* at 43a-44a.

Thus, the court of appeals did not limit BPA's broad legitimate settlement authority. It held only that "BPA cannot bypass the requirements of [applicable statutory provisions] *altogether* when it settles out of purchase and exchange sale obligations." Pet. App. 48a n.20 (emphasis added). In other words, the court held that BPA's settlement of claims (or potential claims) under

the statutory REP must be grounded in the terms of that program as enacted by Congress. That legal holding is correct and will have no impact on future BPA settlements, which have always been, and will continue to be, grounded in applicable statutory provisions. Although the court of appeals misapplied that principle in this particular case, such an isolated misapplication of settled law does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. KATSAS
Acting Assistant Attorney General
BARBARA C. BIDDLE
JONATHAN H. LEVY
Attorneys

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