No. 07-155

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY, ET AL.,
PETITIONERS

v.

BONNEVILLE POWER ADMINISTRATION, 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

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QUESTION PRESENTED

Whether the Federal Power Act, 16 U.S.C. 791a *et seq.*, which generally regulates only non-governmental "public utilities," and which generally exempts federal and state governmental entities from Federal Energy Regulatory Commission refund authority, authorized the Commission to order federal and state governmental entities to pay refunds on sales of electric energy in the California market during the 2000-2001 energy crisis.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 422 F.3d 908. The orders of the Federal Energy Regulatory Commission (Pet. App. 44a-74a, 75a-148a, 149a-154a) are reported at 96 F.E.R.C. ¶ 61,120, 97 F.E.R.C. ¶ 61,275, and 99 F.E.R.C. ¶ 61,160.

JURISDICTION

The judgment of the court of appeals was entered September 6, 2005. A petition for rehearing was denied on March 7, 2007 (Pet. App. 42a-43a). On May 21, 2007, Justice Kennedy extended the time within which to file

a petition for a writ of certiorari to and including July 20, 2007. On July 24, 2007, Justice Kennedy further extended the time to August 4, 2007, and the petition was filed on August 6, 2007 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (Commission or FERC) exclusive jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Proposed rates for the sale or transmission of power within FERC's jurisdiction are subject to FERC review to ensure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a) and (b). To that end, the FPA provides that every "public utility" must file, "[u]nder such rules and regulations as the Commission may prescribe, * * * schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission." 16 U.S.C. 824d(c). FERC has the statutory authority to investigate rates for sales by public utilities to determine whether they are just and reasonable. 16 U.S.C. 824e(a). After such an investigation, FERC may order a public utility to pay "refunds of any amounts paid * * * in excess of those which would have been paid under the just and reasonable rate." 16 U.S.C. 824e(b).

The FPA defines a "public utility" as a "person who owns or operates facilities subject to the jurisdiction of the Commission." 16 U.S.C. 824(e). The term "person," in turn, is defined as an "individual or a corporation," 16 U.S.C. 796(4), and the statutory definition of "corporation" specifically excludes "municipalities," see *ibid.*,

which include any "city, county, * * * or other political subdivision or agency of a State," 16 U.S.C. 796(7). Thus, utilities operated by states and localities, although "public" in the sense of governmental, are not "public utilities" under the FPA.

The scope of FERC's regulatory authority is further limited by 16 U.S.C. 824(f). That provision states that "[n]o provision in this subchapter 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, * * * unless such provision makes specific reference thereto."

b. 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. BPA is a self-financing agency that funds its programs through its own revenues, with congressional oversight. See 16 U.S.C. 838i. The rates at which BPA sells power are governed by the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), Pub. L. No. 96-501, 94 Stat. 2697 (16 U.S.C. 839 *et seq.*). Under that statute, rates are established through trial-type hearings conducted by BPA. See 16 U.S.C. 839e(e). BPA's primary obligation in setting rates is to meet its revenue requirements, consistent with sound business principles. See 16 U.S.C. 839e(a)(1).

The Northwest Power Act grants FERC a specific and limited role in reviewing BPA's rates. FERC is required to approve rates set by BPA under 16 U.S.C. 839e if they (A) are sufficient to assure repayment of the federal investment in the Columbia River power system,

(B) are based on total system costs, and (C) as to transmission rates, equitably allocate the costs of the transmission system between federal and non-federal power utilizing such system. See 16 U.S.C. 839e(a)(2). Nothing in the Act authorizes FERC to conduct any inquiry into BPA's rates under a standard of "reasonableness."[1]

c. After the events giving rise to this case, Congress enacted the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594. Section 1286 of that statute amends 16 U.S.C. 824e (2000 & Supp. V 2005) to provide that "[i]f an entity described in [16 U.S.C. 824(f) (Supp. V 2005)] voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission." Energy Policy Act of 2005 § 1286, 119 Stat. 981 (16 U.S.C. 824e(e)(2) (Supp. V 2005)).[2]

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[1] BPA is, however, subject to FERC orders under a provision of the FPA allowing FERC to issue orders requiring a "transmitting utility" to provide transmission services. 16 U.S.C. 824j; see 16 U.S.C. 796(23) (defining a "transmitting utility" as any "electric utility * * * or Federal power marketing agency which owns or operates electric power transmission facilities which are used for the sale of electric energy at wholesale"). Governmental entities like BPA are also subject to FERC's authority to order transmission interconnections. See 16 U.S.C. 824i.

[2] That new regulatory authority applies only to governmental entities that sell more than "8,000,000 megawatt hours of electricity per year" and does not extend to sales by "an electric cooperative." 16 U.S.C. 824e(e)(3)(A) and (B) (Supp. V 2005).

Several other provisions added to the FPA by the Energy Policy Act of 2005 are also applicable to governmental entities. See, *e.g.*, Energy Policy Act of 2005 § 1283, 119 Stat. 979 (16 U.S.C. 824v (Supp. V 2005))

The Energy Policy Act of 2005 separately addressed sales by BPA by restricting the Commission's new refund authority over governmental entities. Specifically, Section 1286 amended 16 U.S.C. 824e (2000 & Supp. V 2005) to provide that "[t]he Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate." 16 U.S.C. 824e(e)(4)(A) (Supp. V 2005). The refund authority over BPA is further constrained by new 16 U.S.C. 824e(e)(4)(B) (Supp. V 2005), which allows the Commission to order refunds for short-term sales by BPA only if the rates "are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period." Finally, the Energy Policy Act of 2005 added a new 16 U.S.C. 824e(e)(4)(C) to clarify the scope of the Commission's authority over federal power marketing agencies, of which BPA is one. That provision states that "[i]n the case of any Federal power marketing agency * * * the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate." Energy Policy Act

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(allowing FERC to prohibit "any entity (including an entity described in [16 U.S.C. 824(f)])" from engaging in market manipulation in connection with jurisdictional transactions); Energy Policy Act of 2005 § 1231, 119 Stat. 955 (16 U.S.C. 824j-1 (Supp. V 2005)) (concerning open access by "unregulated transmitting utilit[ies]"); Energy Policy Act of 2005 § 1211, 119 Stat. 942 (16 U.S.C. 824*o*(b) (Supp. V 2005)) (concerning reliability standards for any user, owner or operator of the bulk power system, "including but not limited to the entities described in" 16 U.S.C. 824(f) (Supp. V 2005)).

of 2005 § 1286, 119 Stat. 981 (16 U.S.C. 824e(e)(4)(C) (Supp. V 2005)).

2. In the 1990s, California extensively deregulated portions of its energy market. At that time, the major utilities were vertically integrated; that is, they owned generating resources, transmission lines, and distribution facilities. Under the restructuring, those utilities were required to divest most of their generating assets and to purchase power at market-based rates through an independent power exchange, which organized the wholesale market, and an independent system operator, which managed the transmission network. Pet. App. 7a. The restructuring contemplated sales of power into a centralized "spot" market in which sellers, including public utilities and governmental utilities alike, would bid in a "single-price auction." *Id.* at 8a. In that auction, all buyers paid the same price as was bid by the highest-priced seller that was needed to allow the market to clear, that is, to ensure that supply was sufficient to meet the demand. *Ibid.*

For several years, the restructured California electricity markets operated largely as intended. Starting in the summer of 2000, however, wholesale electricity prices in California increased significantly; utilities incurred billions of dollars in debt; and the independent system operator declared dozens of system emergencies and occasional rolling blackouts. See generally *In re California Power Exch. Corp.*, 245 F.3d 1110, 1115 (9th Cir. 2001).

On August 2, 2000, San Diego Gas and Electric Co., a public utility in California, filed a complaint with FERC in which it sought a price cap on sales by public utility sellers. *San Diego Gas & Elec.*, 92 F.E.R.C. ¶ 61,172, at 61,603 (2000). In response, FERC instituted an inves-

tigation and, in December 2000, terminated the power exchange wholesale price schedule. Thereafter, FERC established for public utilities a "breakpoint" price above which refunds would be either required or investigated. Pet. App. 10a. In that order, FERC stated that it had "no authority" to order non-public utilities, that is, governmental entities, to make refunds. *Id.* at 11a (quoting *San Diego Gas & Elec.*, 94 F.E.R.C. ¶ 61,245, at 61,864 (2001)).

In an order issued on July 25, 2001, the Commission took a different position. Pet. App. 44a-74a. In that order, FERC held for the first time that it had jurisdiction to order refunds on sales in the California spot markets during the relevant time period, whether by public utilities or by non-public utilities, including governmental entities. *Id.* at 59a. The Commission stated that "although we do not have direct regulatory rate authority over power sales by non-public utilities, we do have authority to order them to abide by the market rules we have established and to make refunds of unjust and unreasonable rates for sales pursuant to those market rules." *Id.* at 60a. In the Commission's view, it had jurisdiction because of "the subject matter of the affected transactions: wholesale sales of electric energy in interstate commerce through a Commission-authorized and Commission-regulated centralized clearinghouse that set a market clearing price for all wholesale seller participants." *Id.* at 63a.

3. Governmental entities, including BPA, sought review, and the cases were consolidated in the Ninth Circuit. Pet. App. 9a n.3. The court of appeals granted the petitions for review. *Id.* at 1a-41a.

The court of appeals held that "FERC does not have refund authority over wholesale electric energy sales

made by governmental entities and non-public utilities." Pet. App. 5a. It based that conclusion on its reading of the "unambiguous" statutory text. *Ibid.* In particular, the court emphasized that Section 824(f) "provides that governmental entities are not subject to the provisions of subchapter II of the FPA." *Id.* at 15a. While acknowledging that FERC has "broad powers over wholesale sales of electric energy" under Section 824(b)(1), the court explained that "the specific prevails over the general." *Id.* at 18a. The court also looked to Sections 824d and 824e, noting that FERC's jurisdiction under those provisions was confined to sales by "public utilities," a term that was expressly defined to exclude municipalities. *Id.* at 19a-23a. Focusing on those provisions, the court thus rejected the argument that FERC's general jurisdiction over the wholesale sale of power into California justified the exercise of refund authority over governmental entities, holding that the "more *specific* provisions of the FPA * * * limit FERC's authority over governmental entities and limit FERC's authority to ensure just and reasonable rates and to order refunds to 'public utilities.'" *Id.* at 26a (citation omitted).

The court of appeals determined that its conclusion was supported by the legislative history of the FPA, Pet. App. 26a-28a, as well as by FERC's longstanding practice of excluding governmental entities from its FPA jurisdiction, *id.* at 29a-32a. The court also rejected the argument that the governmental entities had waived the restrictions on FERC's jurisdiction by selling power in a market regulated by FERC. As the court explained, "FERC cannot exercise jurisdiction or authority unless authorized by statute, regardless of whether the juris-

diction is exercised without objection or even with the consent of the relevant parties." *Id.* at 35a.[3]

ARGUMENT

The court of appeals correctly determined that FERC, at the time of the issuance of its refund orders, lacked refund jurisdiction over non-public utility, governmental entities. The court's judgment follows from the plain language of 16 U.S.C. 824 and 824e, and it does not conflict with any decision of this Court or of any other court of appeals. Moreover, in light of the amendments made by the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, the interpretation of the Federal Power Act as it existed in 2001 is an issue of minimal ongoing importance. Further review is not warranted.

1. The decision below comports with the plain language of the Federal Power Act, 16 U.S.C. 791a *et seq.* Petitioner does not claim that the court of appeals miscontrued the statutory language, and petitioner asserts no conflict among the circuits with respect to the interpretation of that language. Indeed, the D.C. Circuit recently adopted a construction of the FPA identical to that applied below. In *Transmission Agency of Northern California* v. *FERC*, 495 F.3d 663 (2007) (*TANC*), the court followed the Ninth Circuit's decision in holding that FERC had no authority under 16 U.S.C. 824(f) and 824e to order a municipality to pay refunds under the Federal Power Act. See 495 F.3d at 673-675. Like the

[3] On remand, FERC implemented the decision of the court of appeals by vacating its "refund orders to the extent that they subject non-public utility entities to the Commissions's [Section 824e] refund authority." *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exch.*, 121 F.E.R.C. ¶ 61,067, ¶ 2 (2007).

court below, the D.C. Circuit held that it did not matter whether the municipality had contractually agreed to pay such refunds since, "as a statutory entity, [FERC] cannot acquire jurisdiction merely by agreement of the parties before it." *Id.* at 676 (brackets in original) (quoting *Columbia Gas Transmission Corp.* v. *FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005)); accord Pet. App. 35a ("FERC's regulatory authority is bound by statute, and utilities can neither waive that authority to opt in or out of FERC's jurisdiction.").

The conclusion reached by the courts in this case and *TANC* is confirmed by Congress's enactment of the Energy Policy Act of 2005. That legislation amended 16 U.S.C. 824e (Supp. V 2005) to specify limited circumstances in which FERC may order BPA and other governmental entities to pay refunds on sales of electric energy.[4] As the court of appeals recognized, the amendments were necessary precisely because Congress recognized that the "existing law"—at issue here—"did not permit FERC to order refunds from governmental entities." Pet. App. 29a n.10.

Petitioner contends (Pet. 29-30) that the 2005 legislation "did not resolve the uncertainty engendered by the Ninth Circuit's ruling." In fact, the import of the 2005 amendments is clear. Section 824(f) bars FERC from exercising jurisdiction over sales of electric energy by governmental entities under any provision of subchapter II of the FPA "unless such provision makes specific reference thereto." The Energy Policy Act of 2005 satisfies the "unless" clause by adding 16 U.S.C. 824e(e) (Supp.

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[4] Petitioner does not contend that the 2005 legislation applies retroactively. Since the statute does not otherwise specify, the amendments apply prospectively only. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994).

V 2005), thus making clear that FERC's refund jurisdiction over sales of electric energy by governmental entities is limited to the circumstances set forth in that new provision. And the provisions of the Energy Policy Act of 2005 relating to BPA—which petitioner does not address—are even more explicit. See 16 U.S.C. 824e(e)(4) (Supp. V 2005). There is nothing "uncertain" about the effect of the 2005 amendments. In any event, the interpretation of those amendments would most appropriately be addressed in a case that arose after they became effective and that actually presented the issue.[5]

2. Petitioner contends (Pet. 15) that the jurisdictional limitations of Sections 824 and 824e may be disregarded because an agency may address matters outside its jurisdiction "where necessary to fulfill its overarching obligation to ensure that rates within its jurisdiction are just and reasonable." In support of that proposition, petitioner cites *Houston East & West Texas Railway* v. *United States*, 234 U.S. 342 (1914) (*Houston*), in which this Court upheld the regulatory jurisdiction of the Interstate Commerce Commission (ICC) over allegedly discriminatory interstate transportation rates, even though the remedy ultimately affected intrastate rates that were beyond the ICC's jurisdiction. Pet. 17.

Petitioner's reliance on *Houston* is misplaced. In that case, the Court sustained an ICC order that exercised the agency's jurisdiction over *interstate* rates, which were indisputably within the agency's statutory jurisdiction. See 234 U.S. at 349-350. The ICC did not purport to regulate any *intrastate* rates directly, and this Court noted that the intrastate rate was not af-

[5] In view of the enactment of the Energy Policy Act of 2005, FERC accepts the constructions of Sections 824(f) and 824e adopted by the court of appeals below and by the D.C. Circuit in *TANC*.

fected by the ICC's order. See *id.* at 347. *Houston* stands for the unexceptional proposition that a regulatory agency may consider matters outside its jurisdiction in determining how to exercise its authority over matters within its jurisdiction, as long as the agency does not directly regulate the matters outside its jurisdiction.

The other decisions cited by petitioner (Pet. 19-21) merely apply that principle to sustain agency action regulating a matter falling within the agency's jurisdiction. None of the decisions cited by petitioner holds that a regulatory agency may disregard a jurisdictional restriction in order to regulate directly a matter over which Congress has expressly denied the agency regulatory power.[6] To the contrary, this Court has expressly rejected any such rule. In *FPC* v. *Conway Corp.*, 426 U.S. 271, 276-282 (1976), for example, the Court held that the Federal Power Commission had authority to eliminate discrimination barred by Section 824e by establishing a rate within a broad range of possible reasonable rates. In so holding, however, the Court was careful to note that this remedy did "not invade a nonjurisdictional area" because "[t]he remedy, if any,

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[6] Petitioner suggests (Pet. 19) that 16 U.S.C. 825h, which confers a general power on FERC to take such actions and issue orders necessary to carry out the FPA, might allow FERC to exercise jurisdiction otherwise barred by Section 824e. That contention is foreclosed by *FPC* v. *Texaco, Inc.*, 417 U. S. 380, 394 (1974), in which this Court held that the Federal Power Commission could not use its analogous authority under Section 16 of the Natural Gas Act (NGA), 15 U.S.C. 717*o*, to "set at naught an explicit provision of the Act." The same principle governs the Commission's authority under Section 825h. See *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 578 n.7 (1981) (noting that the NGA and the FPA are "in all material respects substantially identical") (quoting *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

would operate only against the rate for jurisdictional sales." *Id.* at 279. The question in this case, in contrast, is whether FERC may impose a refund remedy directly on governmental entities, in conflict with Section 824(f).

Petitioner's reliance (Pet. 18) on *United States* v. *Public Utilities Commission*, 345 U.S. 295 (1953), is also misplaced. The FPA gives FERC jurisdiction over sales of electricity at wholesale in interstate commerce, and it defines the "sale of electric energy at wholesale" as the "sale of electric energy to any person for resale." 16 U.S.C. 824(d). The public utility in *Public Utilities Commission* argued that sales to the United States Navy were exempt from FERC regulation under the FPA because the Navy was not a "person" within the meaning of Section 824(d) and thus was not entitled to seek relief from the Commission. The Court rejected that contention, holding that Congress placed no significance on the use of "person" in that context and therefore that the Navy could claim the protections of the FPA. *Public Utils. Comm'n*, 345 U.S. at 313. That holding has no bearing on the issues presented here. Section 824(f) prohibits FERC from exercising refund authority over governmental entities; it does not bar the Commission from affording such governmental entities the protections of the Act. Cf. *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 316 n.15 (1978) ("[T]he sovereign [is] entitled to have the benefit of a statute extending a right to 'persons.'")

3. Petitioner asserts (Pet. 23) that the decision below "conflicts with Supreme Court precedent requiring deference to the regulatory agency when interpreting the scope of its authority under its governing statutes." But the appropriate framework for reviewing an agency's interpretation of a statute is that established

by *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984), and that is precisely the framework applied by the court of appeals in this case, Pet App. 13a, and by the D.C. Circuit in *TANC*, 495 F.3d at 673-674. Both courts held that the *Chevron* analysis stopped at step one because the statute was unambiguous. Pet. App. 5a ("The text is clear and unambiguous."); *TANC*, 495 F.3d at 673 ("In this case, we need go no further than step one of *Chevron* to hold that FERC acted contrary to law when it ordered [the City of Vernon, California] to pay refunds.").

The decision below is entirely consistent with the cases cited by petitioner on the question of deference. See Pet. 23-24. In two of those cases, as in this case, the Court found the statutory language to be unambiguous, making it unnecessary to defer to FERC's interpretation. See *Mobil Oil Exploration & Producing Se., Inc.* v. *FERC*, 498 U.S. 211, 225 n.5 (1991); *New York* v. *FERC*, 535 U.S. 1, 16-22 (2002). And the D.C. Circuit's decision in *Automated Power Exch., Inc.* v. *FERC*, 204 F.3d 1144 (2000) (*APX*), cited by petitioner as a "particularly relevant example" (Pet. 23), actually supports the approach followed by the court of appeals in this case. The issue in *APX* was whether FERC had jurisdiction over an entity that facilitated trades of power but neither took title to the power nor transmitted it in interstate commerce. The court held that FERC had such jurisdiction because the entity was a public utility, reasoning that FERC precedent "does not limit public utilities to those entities that take title to power." *APX*, 204 F.3d at 1151. As the court explained, APX "can set the final price at which the sale is actually transacted," which is "precisely" the "feature" that made APX a

"public utility" subject to FERC jurisdiction. *Id.* at 1150.

The issue in *APX* was thus not the broad legal question whether FERC could assert jurisdiction over a non-public utility, but rather the case-specific question whether APX *was* a public utility. Petitioner in this case does not contend that governmental entities are public utilities. Certainly, the approach followed in *APX* is in accord with the approach followed by the court of appeals in this case and by the D.C. Circuit in *TANC*. Both courts ruled that there was no ambiguity on the question presented here because there were abundant indicia in the express language of Section 824(f) and in Section 824e that Congress did address the precise question at hand and had decided not to accord FERC refund jurisdiction over governmental entities. Nothing in the holding or reasoning of *APX* is inconsistent with those rulings.

4. Finally, petitioner argues (Pet. 25-26) that the case presents "an issue of national importance" because it involves "the single biggest energy market crisis in the nation's history" and will "have ramifications well into the future for this country's energy policy and for the goals that Congress sought to achieve with the FPA." But with the enactment of the Energy Policy Act of 2005, Congress has already responded to the California energy crisis, established policy "goals," and addressed the regulatory "ramifications" associated with centralized markets. Congress elected to expand FERC's refund jurisdiction over governmental entities with respect to energy sales in centralized markets only to the extent set forth in Section 1286 of the Energy Policy Act of 2005, and not otherwise. 16 U.S.C. 824e (Supp. V 2005).

It is up to Congress to specify the scope of FERC's power under the Federal Power Act. The text of Sections 824(f) and 824e, as well as the text of the Energy Policy Act of 2005 and the policy determinations embodied in that legislation, foreclose petitioner's contentions in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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