No. 17-57

IN THE

Supreme Court of the United States

PACIFIC GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND SAN DIEGO GAS & ELECTRIC COMPANY,

Petitioners,

v.

UNITED STATES, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONERS' REPLY BRIEF

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REPLY BRIEF

The Court should grant certiorari because the decision below directly conflicts with Eighth Circuit precedent, with numerous cases from this and other Courts finding privity among participants in similar exchanges, and with the Federal Energy Regulatory Commission's (FERC's) decisions and tariffs. The government's attempts to distinguish these authorities rely on either factual misunderstandings or immaterial differences. And the government is wrong that the Ninth Circuit and FERC have adopted the Federal Circuit's view; in fact, both have rejected it.

The government is likewise mistaken that this case presents a poor vehicle because the trial court (improperly) reached the merits. As the government concedes, the dispositive merits question is whether the Ninth Circuit affirmed FERC's price-correction orders, which found that the Agencies overcharged Petitioners. As even the panel below recognized, the Ninth Circuit did affirm those FERC orders.

Finally, the government cannot diminish this case's importance. The theoretical possibility of seeking relief from the judgment-proof, non-profit Exchanges is not sufficient assurance for sophisticated companies making energy trades worth hundreds of millions of dollars. Nor does the 2005 amendment of the Federal Power Act resolve this issue, as it fails to address myriad circumstances where governmental sellers might overcharge buyers. This Court should grant review.

I. REVIEW IS WARRANTED TO RESOLVE THE SPLIT OF AUTHORITY CREATED BY THE HOLDING BELOW.

a. Certiorari is warranted here because the Federal Circuit's decision conflicts directly with the Eighth Circuit's decision in *Alliant Energy* v. *Nebraska Public*

Power District, 347 F.3d 1046 (8th Cir. 2003). Pet. 17–19. The government's responses are unavailing.

The government first argues that *Alliant Energy* does not show market participants are in privity "merely due to their participation in the exchange." Opp. 13–14. But Petitioners do not contend that privity arises from mere participation. The parties are in privity because their individual agreements with the Exchanges explicitly "incorporated by reference, in their entirety," the FERC tariffs, Pet. App. 146a; Pet. 8, and those tariffs set forth the participants' obligations to each other, thereby creating a multi-party contract—just as the *Alliant Energy* seller was "liable as a result of the incorporation of a [FERC] tariff into a separate contract," Pet. App 25a.

The government next contends that *Alliant Energy* "never addressed standing or privity" and, therefore, is not "binding precedent on the jurisdictional question of standing." Opp. 14. This misunderstands the issues. Although contractual privity is jurisdictional in the Court of Federal Claims, *id.* at 10, privity is also—and in other courts, is only—an "essential," substantive element of a breach-of-contract claim. 13 *Williston on Contracts* § 37:1 (4th ed. 2017). The Eighth Circuit did not discuss the parties' contractual relationship in terms of "standing" because it was not a question of standing; rather, it was an element of the buyers' claims. And the court's holding that the sellers breached contractual obligations to the buyers rested on the explicit premise that the parties were in privity via a contract that (as here) "provide[d] that its terms [were] subject to" FERC's tariffs and rules. 347 F.3d at 1050.

Finally, the government says *Alliant Energy* "involved a distinct source of privity" because the participants there "all signed a common contract." Opp. 14.

Not so. As here, each *Alliant Energy* participant signed a *separate* application to the entity that administered the overarching contract; that contract, in turn, provided that each member was "deemed" to be a signatory thereto. MAPP Agreement §§ 4.2.1, 4.2.2, 4.2.4, FERC Docket No. ER96-1447-000 (Jan. 12, 1996), https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=8282356. The contracts here mirror that structure, as confirmed by testimony below. Trial Tr. 2199, 2204–2206. While the government tries to walk back its concession that the two are "directly analogous" (Opp. 15 n.4), the court to which that concession was directed clearly agreed that they are. *BPA* v. *FERC*, 422 F.3d 908, 925–26 (9th Cir. 2005). And the government ignores that it was a *plaintiff urging liability* in *Alliant Energy*. Pet. 17. The Eighth and Federal Circuits are in clear conflict.

b. The decision below also conflicts with numerous decisions finding privity among participants in similar exchanges. Pet. 19–20.

The government cannot distinguish *Clews* v. *Jamieson*, which found "sufficient privity of contract … to sustain [a] suit" between stock-exchange participants because the "sales and purchases of stock were … made subject to the rules of the exchange," 182 U.S. 461, 482, 488 (1901)—just as the parties' sales here were subject to the FERC tariffs. That the *Clews* parties acted through agents (Opp. 17) was relevant to whether the sellers were bound by their broker's actions, not whether the exchange's rules created privity between buyers (or their agents) and sellers (or theirs). 182 U.S. at 482–83. Likewise, whether "sales of shares could be traced between" parties (Opp. 17) was not even mentioned, and is immaterial to privity in any event, *infra* p. 7.

Nor can the government distinguish the other cases finding privity among stock- or commodities-exchange participants based on those exchanges' rules. Pet. 19. The government contends stock exchanges are "a poor analogue" for "electricity markets" because the securities industry is self-regulated. Opp. 15. But none of these cases say—and the government does not attempt to explain why—self-regulation somehow underlies the rule finding privity among exchange participants, which, as *Clews* shows, predates the modern securities regulatory regime. Nor does the government confront the trial evidence that the Exchanges are in fact closely analogous to stock or commodities exchanges. Pet. 6–7.

The government's remaining contentions are equally irrelevant. It says these cases "often" involved "distinct bilateral contracts" that were "the source of privity." Opp. 15–16. But that is not the rule applied in these cases, which uniformly hold that "[t]he constitution and rules of a stock exchange constitute a contract between all members of the exchange with each other." *Muh* v. *Newburger, Loeb & Co.*, 540 F.2d 970, 973 (9th Cir. 1976). In *Muh*, for example, the issue was whether any "binding agreement" required arbitration. There was a separate consulting agreement (Opp. 16), but it "contained no express arbitration provision"; rather, *the exchange's rules* "constitute[d] [the] agreement to arbitrate" that drove the court's holding. 540 F.2d at 972–73. And other cases involved no separate contract whatsoever. *E.g.*, *A.G. Edwards & Sons, Inc.* v. *Clark*, 558 So. 2d 358, 359 (Ala. 1990).

The government also says none of these cases "involved a claim … that another market participant breached the exchange agreement" as opposed to some other obligation. Opp. 16. That, too, is irrelevant; privity turns on whether the parties have "enter[ed] into a contract," not on the specific duty breached. 13 *Williston on Contracts* § 37:1.

c. The government claims the Ninth Circuit and FERC have also found no privity among Exchange participants. Opp. 11–12. If true, that would simply illustrate a deeper circuit split. But the government is mistaken.

Although *Southern California Edison Co.* v. *Lynch* used the word "privity" in passing when rejecting other market participants' attempt to intervene to challenge a settlement between Petitioner Southern California Edison and the California Public Utilities Commission regarding retail rates (Opp. 11), the court did not consider whether participants were parties to a multi-party contract that permitted them to bring claims against each other. 307 F.3d 794, 803 (9th Cir. 2002). And the Ninth Circuit has subsequently reiterated its view that such claims may well be permissible. See *City of Redding* v. *FERC*, 693 F.3d 828, 835–36, 842 (9th Cir. 2012); *BPA*, 422 F.3d at 925–26.

The government similarly errs in contending that FERC agrees with the decision below. Opp. 12. The issue in *Southern California Edison Co.* was whether sales through one Exchange "would qualify as wholesale sales." 80 FERC ¶ 61,262, 61,944 (1997). FERC did not discuss, much less determine, whether the PX tariff and related agreements created a multi-party contract or whether market participants may sue each other. And the language on which the government relies relates to "retail purchaser[s']" contractual relationships. Opp. 12. Buyers like Petitioners are not retail purchasers, but wholesale purchasers. 80 FERC at 61,946; Pet. App. 4a–6a. The government's reliance is therefore doubly misplaced.

Moreover, a later FERC order squarely rejected the Federal Circuit's view, finding that Exchange participants could sue each other. Pet. 20–21. The government says this decision dealt only with remedies against defaulting third-parties (Opp. 13 n.3), but that is incorrect. The issue was not who should collect on third-party debts, but who "should be responsible for the collection of Scheduling Coordinator's debts"—*i.e.*, participants' debts. *Pac. Gas & Elec. Co.*, 81 FERC ¶ 61,122, 61,506–07 (1997); Pet. 7 & n.1. The Exchanges argued that "traders," not "the administrator of a market," "should … take the payment and bad debt risks." 81 FERC at 61,507. FERC agreed. *Id.* at 61,509. The decision below conflicts with this ruling.

d. The opposition's remaining arguments are similarly unavailing. The government ignores the tariff provisions explicitly contemplating liability between participants. Pet. 9. FERC adopted those provisions—as part of the parties' contracts—"so that non-defaulting Participants are able to seek recovery from the defaulting party," *Cal. Power Exch. Corp.*, 92 FERC ¶ 61,096, 61,379 (2000), which necessarily requires privity.

The government likewise fails to defend the majority's incorrect assumption that participants could be in privity with the exchanges or each other, but not both. Instead, it declares the majority "did not so hold." Opp. 17. But the majority framed the alternative to exchange-only privity as "individual contracts between consumers and producers." *Id.* at 11. That was error. The parties are all in privity via *one* overarching multilateral contract. Pet. 22.

The government next repeats three of the majority's errors.

First, the government claims "the only contracts here were between the exchanges … and individual market participants." Opp. 11 (quoting Pet. App. 4a). That is incorrect. Where parties sign an agreement that explicitly incorporates another document, "the two form a single instrument." 11 *Williston on Contracts* § 30:25 (4th ed. 2017). Thus, when each participant signed an agreement that "incorporated herein and made a part hereof" the entire FERC tariff, Pet. 8, they adopted the tariff as well—including the obligations running to each other. Pet. 21. "[T]he contractual relationships of offer, acceptance, and mutual intent ran between" participants. Pet. App. 163a.

Second, the government says privity among participants was impossible because "electricity is fungible, and purchases and sales of electricity could not be traced to particular consumers and producers." Opp. 11. But the government offers no reason why traceability in each *individual* sale is necessary for parties to be in privity through an overarching contract governing *all* sales. And as Judge Newman explained, it is not only possible to determine the extent of each participant's obligations to the others, but the Exchanges have done so: "The charges, overages, refund allocations, and the like have already been litigated, settled, or otherwise disposed of via FERC's California Refund Proceeding." Pet. App. 41a; *id.* at 153a–155a.

Third, the government contends that privity among participants was unnecessary because injured buyers could sue the Exchanges, which could in turn sue the Agencies. Opp. 12, 17. That is no answer. The government does not dispute that the non-profit Exchanges are essentially judgment-proof. Pet. 9. Nor does it dispute that the Exchanges have no stake in whether Petitioners are repaid.[1] The government nevertheless contends that the stability of these markets rests on the willingness of these disinterested third-parties to litigate against the United States. This proposed work-around is not merely burdensome (Opp. 17)—it is something sophisticated companies executing trades worth hundreds of millions of dollars would never adopt. Pet. 23.

e. The government's defense of the majority's privity-via-agency holding is equally unsuccessful. The government ignores its concession below that at least one of the Exchanges *was an agent for the parties*, creating privity. Pet. 14, 25. Instead, it says the majority correctly required a showing that the parties controlled the Exchanges' conduct, and that Petitioners at most assert "misapplication of a properly stated rule of law." Opp. 19. This is unavailing.

The majority declined to find agency despite the tariffs' explicit designation of the Exchanges as agents, Pet. 25, and despite the fact that the participants *did* control the Exchanges' conduct. They did so at the outset, by contractually adopting the tariffs that set forth the Exchanges' duties, and they did so in precisely the ongoing manner the government says was required (Opp. 19)—by directing the Exchanges when to trade energy and at what price. The Exchanges had no title to any energy and no stake in any trade, Pet. 8, and they traded only when told by, and under the conditions set by, participants. *Id.* at 25; cf. *Kern-Limerick*

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[1] Although the government suggests the Exchanges have not sued the Agencies because "the agencies breached no contract" (Opp. 12), the Exchanges have made clear that collecting overcharges is the participants' responsibility because the participants benefit from trading and are in privity. *Supra* p. 5; Pet. 16.

v. *Scurlock*, 347 U.S. 110, 120–21 (1954) (each purchase "require[ed] specific Government approval"). That is "interim" control, and the majority's contrary holding dramatically restricts the ability of parties doing business with the United States to structure their dealings through intermediaries. That holding warrants review.

II. THIS CASE IS A PROPER VEHICLE FOR REVIEW.

The government argues this is a "poor vehicle" because the trial court "properly" "ruled against petitioners" on the merits. Opp. 19–20. But a federal court may not "properly" reach the merits after finding it lacks jurisdiction. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Regardless, that ruling on the merits and the government's embrace of its reasoning (Opp. 6, 9 n.2, 12, 20) are erroneous.

After FERC corrected the prices charged in the Exchanges (Pet. 10–11; Pet. App. 7a–8a, 122a–123a), the Agencies challenged FERC's orders in the Ninth Circuit, seeking to insulate themselves from contractual liability "by preventing FERC from recalculating the market rates." *City of Redding*, 693 F.3d at 842; see Opp. 20 (FERC's price correction is the "predicate for petitioners' breach of contract claims"). That effort failed.

The government says the Ninth Circuit held that "FERC could not and did not reset the prices that the agencies charged during the relevant period," and thus "the agencies did not overcharge petitioners." Opp. 20. But as both the majority and the dissent below recognized, "the Ninth Circuit *upheld* FERC's ability to find the rates charged by all sellers, *including the government agencies*, to be unjust and unreasonable." Pet.

App. 8a (emphases added); *id.* at 41a. That is true regardless of whether FERC could directly compel each seller to pay a refund. Where, as here, all sellers in a given market must charge the same price (Pet. 6; Opp. 3–4), FERC's correction of that single price necessarily applies to every seller "because the market clearing price was the same for all of them." *City of Redding*, 693 F.3d at 841; Pet. App. 8a, 40a.

In so holding, the Ninth Circuit rejected FERC's arguments for even broader authority. Opp. 6, 12, 20. But the court affirmed the challenged FERC orders, which "revised the market clearing prices that *all market participants* previously agreed to accept for their sales." 693 F.3d at 841–42 (emphasis added). The government cannot collaterally attack those orders now. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958).

In short, FERC properly determined the just-and-reasonable rate for the disputed transactions, Pet. App. 8a, and the Exchanges have determined the Agencies' refund obligations under that rate, *id.* at 41a. All that remains is for the government to comply with its contractual obligation to refund the overcharges. *Id.*; *Alliant Energy*, 347 F.3d at 1051. The Federal Circuit's unanimous and correct account of *City of Redding* leaves little doubt that it will reverse the merits ruling on remand. Pet. App. 8a, 40a–41a.

III. REVIEW IS NEEDED TO ENSURE THE STABILITY OF THE NATION'S ENERGY MARKETS.

The government does not dispute the obvious importance of the Nation's energy markets; does not dispute the vital role of governmental sellers in those markets; and does not dispute that such markets are frequently structured similarly or identically to the

Exchanges. Pet. 27–30. Nor does it contest that, if such sellers are able to escape liability for defaults or overcharges, the stability of these markets will be threatened and ratepayers will suffer. *Id.* at 29–30. It nevertheless attempts to downplay the consequences of the decision below. Those efforts fail.

First, the government says "FERC did not reset the rates the agencies charged," and thus there were no "overcharge[s]." Opp. 20. As explained, however, FERC determined the just-and-reasonable rate for *all* sellers, including the Agencies. *Supra* Part II. But even if the government were right about this case (which it is not), that would not address the problems created by the decision below, which bars relief for all buyers in all cases.

Second, the government says markets will not be destabilized because buyers can seek relief from the Exchanges, which could then seek relief from the Agencies. Opp. 20. The government is incorrect. As already explained, market participants can find no security in the prospect of suing effectively judgment-proof intermediaries in the hope that those parties will eventually pursue relief from their true counterparties. *Supra* p. 7–8; Pet. 28–30.

Third, the government says Congress has addressed the issues raised by this case by amending the Federal Power Act. Opp. 21. However, this provision deals only with sales that "violate[] a tariff or … [FERC] rules." *Id.* (quoting 16 U.S.C. § 824e(e)). It does not address the myriad other situations (for example, meter errors) where charges are properly corrected but the seller broke no rules. Outside the limited circumstances contemplated by the statute, only contractual remedies would make damaged parties whole and avoid harms to ratepayers. See Pet. 29.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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