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AN ELECTRIFYING EXPANSION OF JUDICIAL REVIEW OF AGENCY ACTIONS IN *PSEG ENERGY RESOURCES & TRADE LLC*

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Abstract: The Federal Energy Regulatory Commission (“FERC”) issues orders on electricity market auction results to ensure that electricity rates are just and reasonable. FERC issued an order accepting the results of the 2008 ISO New England forward capacity auction. PSEG Energy Resources (“PSEG”), a participant in the auction, challenged the order on the grounds that it resulted in undue discrimination for the most necessary resources for reliability and violated the basic market policy goals. When FERC rejected this challenge, PSEG petitioned for review of the FERC order. The United States Court of Appeals for the D.C. Circuit reviewed the FERC order under a two-step *Chevron U.S.A. v. Natural Resources Defense Council*-like analysis and the agency’s failure to respond to public comments under the Administrative Procedure Act’s arbitrary and capricious standard. This Comment argues that in *PSEG Energy Resources & Trade LLC v. Federal Energy Regulatory Commission*, the D.C. Circuit’s review of the FERC order represents an expansion of judicial review of administrative action.

INTRODUCTION

Electric power market systems, which are responsible for the sale of energy resources from generators, vary state by state.¹ In some states and regions, Independent System Operators (“ISOs”) or Regional Transmission Organizations (“RTOs”) manage the market in which these electricity transactions take place.² The market in New England is administered by ISO New England, which covers six states, 72,000 square miles, and has a generating capacity of 31,000 megawatts.³ ISO New England holds forward capacity

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

¹ See *Electric Power Markets: National Overview*, FED. ENERGY REGULATORY COMM’N (Feb. 29, 2016), <http://www.ferc.gov/market-oversight/mkt-electric/overview.asp> [<https://perma.cc/9XAF-Q8N7>]. Electric power markets operate through transactions between electricity generators and anyone who resells the electricity to customers. *What Is a Wholesale Electricity Market?*, ELEC. POWER SUPPLY ASS’N (Mar. 17, 2017), <https://www.epsa.org/industry/primer/?fa=whole-saleMarket> [<https://perma.cc/2SXXV-G97U>].

² *What Is a Wholesale Electricity Market?*, *supra* note 1.

³ *About the FCM and Its Auctions*, ISO NEW ENG., <https://www.iso-ne.com/markets-operations/markets/forward-capacity-market/fcm-participation-guide/about-the-fcm-and-its-auctions> [<https://perma.cc/38A6-EWTM>].

auctions each year, during which suppliers compete to receive capacity payments in exchange for a commitment to supply capacity.⁴

Similar to other commodity trading markets, these electric power markets are subject to regulatory oversight.⁵ The Federal Energy Regulatory Commission (“FERC”) is a federal agency that ensures that energy markets provide electricity and other energy sources at just and reasonable rates.⁶ FERC has the authority to issue orders that implement and approve tariffs.⁷ FERC derives its authority from the Federal Power Act (“FPA”).⁸

PSEG Energy Resources and Trade, LLC and PSEG Power Connecticut (“PSEG”) participate in the New England electric power market.⁹ PSEG challenged FERC in the United States Court of Appeals for the D.C. Circuit regarding FERC’s order accepting auction results in the market administered by ISO New England.¹⁰ ISO New England filed an intervenor brief in support of FERC and its interpretation of ISO New England’s tariff (“Tariff”), which was at the center of the dispute.¹¹

The D.C. Circuit is considered a semi-specialized court because it hears a majority of administrative law cases regarding federal agency actions.¹² Since the 1960s, the D.C. Circuit has been the primary court for judicial review over agency actions and interpretations.¹³ The seminal case in administrative law is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,

⁴ *Forward Capacity Market*, ISO NEW ENG., <https://www.iso-ne.com/markets-operations/markets/forward-capacity-market> [<https://perma.cc/46SS-UTAJ>].

⁵ 16 U.S.C. § 824e (2012); *What FERC Does*, FED. ENERGY REGULATORY COMM’N (May 24, 2016), <http://www.ferc.gov/about/ferc-does.asp> [<https://perma.cc/4FG7-EGZ4>].

⁶ See 16 U.S.C. § 824e; *What FERC Does*, *supra* note 5.

⁷ 16 U.S.C. § 824d.

⁸ *Id.* § 824d–e; Joseph T. Kelliher, *Market Manipulation, Market Power, and the Authority of the Federal Energy Regulatory Commission*, 26 ENERGY L.J. 1, 1 (2005).

⁹ *Bridgeport Harbor Station Combined Cycle Project*, PSEG POWER LLC <https://www.pseg.com/family/power/fossil/stations/connecticut/bridgeport-harbor-cc-project.jsp> [<https://perma.cc/QW7V-GPC7>]; *PSEG Energy Resources & Trade LLC*, PSEG POWER LLC, https://www.pseg.com/family/power/resources_trade/index.jsp [<https://perma.cc/B3G2-MDK7>]. PSEG Energy Resources is a company underneath the umbrella of PSEG, which engages in the trading of wholesale energy. *PSEG Energy Resources & Trade LLC*, *supra*. PSEG Power Connecticut is a subsidiary of PSEG Fossil LLC and it owns and operates fossil fuel and natural gas power plants in Bridgeport and New Haven. *Bridgeport Harbor Station Combined Cycle Project*, *supra*.

¹⁰ *PSEG Energy Res. & Trade LLC v. Fed. Energy Regulatory Comm’n*, 665 F.3d 203, 205 (D.C. Cir. 2011).

¹¹ See Brief of Intervenor ISO New England at 1, *PSEG Energy Resources & Trade LLC*, 665 F.3d 203 (No. 10-1103). The ISO New England Tariff (“Tariff”) is a document that outlines the rates, terms, and conditions for ISO New England and market participants. *Transmission, Markets, and Services Tariff*, ISO NEW ENG., <https://www.iso-ne.com/participate/rules-procedures/tariff> [<https://perma.cc/5UTR-CB4V>].

¹² John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 554 (2010) (noting that the D.C. Circuit hears a disproportionate share of administrative law cases in the United States).

¹³ *Id.* at 554–55.

Inc., in which the United States Supreme Court established a two-step analysis to determine if an agency should be granted deference in its interpretation of a statute.¹⁴ A court can also determine if the agency's failure to respond meaningfully to objections is arbitrary and capricious under the Administrative Procedure Act.¹⁵ The D.C. Circuit's exercise of its authority in reviewing FERC's actions in *PSEG Energy Resources & Trade LLC v. Federal Energy Resources Commission* is no exception.¹⁶

In *PSEG Energy Resources & Trade LLC*, the D.C. Circuit considered PSEG's challenge of FERC's order based on Tariff provisions the FERC had previously interpreted.¹⁷ In its review of the order, the court considered whether FERC erroneously contended that the Tariff provisions were clear, and if it failed to meaningfully respond to objections raised by a party.¹⁸ This Comment argues that the holding in *PSEG Energy Resources & Trade LLC* represents a continuing expansion of judicial review over agency actions.¹⁹

I. FACTS AND PROCEDURAL HISTORY

ISO New England holds forward capacity auctions, an annual auction typically conducted three years before the resources will be utilized to provide the energy service.²⁰ In this auction, ISO New England sets a starting price and then suppliers must respond with bids for the amount of capacity they are willing to provide at that price.²¹ As the auctioneer reduces the price, the suppliers reduce their capacity bids.²² An electricity supplier is successful in the auction when the supplier's bid equals the amount of capacity that ISO New England determined is necessary to maintain reliability of the regional system.²³ An auction's results include multiple suppliers that successfully bid to commit to supply the necessary amount of energy to maintain reliability in the region.²⁴ The amount of energy a supplier has agreed to provide for the set price at the end of the auction is called the "installed capacity requirement" ("ICR"), and the supplier must commit to provide the capacity stated

¹⁴ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹⁵ 5 U.S.C. § 706(2)(A) (2012).

¹⁶ See 665 F.3d at 207; Golden, *supra* note 12, at 554.

¹⁷ 665 F.3d at 205.

¹⁸ See *id.* at 208–09.

¹⁹ See *id.*; *infra* notes 81–112 and accompanying text.

²⁰ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 205; *Forward Capacity Market*, *supra* note 4.

²¹ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 206.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

in its bid.²⁵ The forward capacity market auction and mechanism is based on a settlement and tariff approved by FERC.²⁶

The problem with the forward capacity market is that the auction ends when the price floor is reached.²⁷ Because the price floor can be reached at a point when the supplier's capacity bid exceeds the ICR, the suppliers could end up buying more power than the ISO New England market needed.²⁸ To avoid this problem, ISO New England's tariff ("Tariff") includes a proration rule.²⁹ Under this rule, the total payment cap is calculated by multiplying the floor price by the ICR and the price is prorated by reducing the amount each supplier receives so that the total does not exceed the cap.³⁰ The quantity is prorated as the suppliers are given the option to reduce their capacity obligations by an equivalent amount.³¹

FERC approved ISO New England's addition of a sentence in the proration rule that stated that a decision to prorate a price must undergo reliability review.³² FERC approved this inclusion without allowing the public to provide comments.³³

In *PSEG Energy Resources & Trade LLC v. Federal Energy Regulatory Commission*, PSEG Energy Resources and Trade LLC and PSEG Power Connecticut ("PSEG") challenged the FERC order that accepted the results of the 2008 forward capacity market auction administered by ISO New England, based on Tariff provisions that FERC determined to be unambiguous.³⁴ In this auction, PSEG attempted to prorate the capacity of its Connecticut resources.³⁵ PSEG was barred from doing so because of reliability review, which ensures sufficient resources from the provider's capacity supply to

²⁵ *Id.* An installed capacity requirement ("ICR") is "a measure of the installed resources that are projected to be necessary to meet both ISO New England's and the Northeast Power Coordination Council's reliability standards, with respect to satisfying the peak demand forecast for New England while maintaining the required reserve capacity." *Installed Capacity Requirements*, ISO NEW ENG., <https://www.iso-ne.com/system-planning/resource-planning/installed-capacity-requirements> [<https://perma.cc/D2UK-RKGF>].

²⁶ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 206; see *Blumenthal v. Fed. Energy Regulatory Comm'n*, 552 F.3d 875, 885 (D.C. Cir. 2009) (holding that that the market auction mechanism is reasonable market structure).

²⁷ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 206.

²⁸ *Id.*

²⁹ *Id.* Federal Energy Regulatory Commission ("FERC") regulations mandate the Tariff as a requirement for Regional Transmission Organizations. *Id.*

³⁰ *PSEG Energy Resources & Trade LLC*, 665 F.3d at 206.

³¹ *Id.*

³² *Id.*

³³ *Id.* The Administrative Procedure Act requires that agencies conducting certain actions, such as rulemaking and adjudication, must have a comment period open to the public. 5 U.S.C. § 553(c) (2012).

³⁴ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 205.

³⁵ *Id.* at 206.

power the system.³⁶ As a result, PSEG could not reduce its capacity supply obligation in Connecticut because it would endanger the system's reliability.³⁷

ISO New England and PSEG had two varying interpretations of the reliability review language.³⁸ ISO New England argued that the rule meant that, when the supplier's resources are necessary for local reliability, quantity proration can be barred, but the supplier may still be forced to accept price proration.³⁹ PSEG agreed with respect to the inability to prorate resources, but argued that it should receive the non-prorated floor price for the resources it provided.⁴⁰

PSEG raised two objections in filing a rehearing request: (1) that FERC's interpretation resulted in undue discrimination against the resources most necessary for reliability, and (2) that the interpretation violated the policy goals of the forward capacity market.⁴¹ PSEG based its interpretation on these policy goals.⁴² FERC rejected PSEG's interpretation and held that according to the Tariff, ISO New England was required to impose price proration when reliability review precludes quantity proration in order to not violate the total payment cap.⁴³ In its order, FERC allowed ISO New England to reduce the per unit price paid to PSEG for that capacity.⁴⁴ Finally, PSEG petitioned FERC for review of the order, which denied PSEG's request for relief.⁴⁵

II. LEGAL BACKGROUND

The Federal Power Act ("FPA") is the statute that lists the Federal Energy Regulatory Commission's ("FERC") legal duties and grants FERC the authority to issue and review orders regarding electric utilities.⁴⁶ The FPA was initially enacted as the Federal Water Power Act in response to the need to regulate water resources.⁴⁷ In 1935, Congress amended the Federal Water Power Act and renamed it the FPA.⁴⁸ The United States Court of Appeals for

³⁶ *Id.*

³⁷ *Id.* at 205.

³⁸ *Id.* at 206.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 205.

⁴⁵ *Id.* at 207.

⁴⁶ 16 U.S.C. § 824e (2012). The Federal Power Act ("FPA") lists issuing and reviewing orders to ensure that public utility rates are just and reasonable as one of FERC's duties. *Id.*

⁴⁷ See James C. Duda, *The "Comprehensive Plan" Requirement of the Federal Power Act: A Senator's Dream, a Congressional Mandate, and a Parameter for Agency Discretion*, 28 B.C. L. REV. 523, 531 (1987).

⁴⁸ 16 U.S.C. § 791a; Duda, *supra* note 47 at 535 n.88.

the D.C. Circuit's authority to review orders issued by FERC is codified in § 313(b) of the FPA.⁴⁹

In 1984, the United States Supreme Court decided *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*—the seminal case when it comes to agency deference.⁵⁰ In *Chevron*, the Court considered whether the Environmental Protection Agency should be granted deference for its interpretation of the term “stationary source” found in the Clean Air Act.⁵¹ In the holding, the Court established a two-step analysis to determine if the agency should receive deference for its interpretation of the statute.⁵² At the first step, courts must determine if Congress has spoken clearly to the precise question at issue in the statute.⁵³ Then, if a court determines that Congress has not spoken clearly on the issue, that court must proceed to the second step and determine if the agency's interpretation of the statute is reasonable.⁵⁴ If the interpretation is reasonable, the agency will receive deference in its interpretation.⁵⁵ The policy underlying the *Chevron* doctrine is that, unlike judges, agencies have specific expertise in the area of law from dealing frequently with the subject matter.⁵⁶

In *Colorado Interstate Gas v. Federal Energy Regulatory Commission*, the D.C. Circuit applied a *Chevron*-like analysis to evaluate a FERC order.⁵⁷ Unlike the ordinary *Chevron* doctrine, which considers an agency's interpretation of the statute it administers, the court's *Chevron*-like analysis was applied to the agency's interpretation of a tariff.⁵⁸ The court held that FERC's interpretation was reasonable.⁵⁹ In reaching this determination, the court's *Chevron*-like analysis involved two steps.⁶⁰ The court first considered de novo whether the tariff unambiguously addresses the matter at issue.⁶¹ If the language is unambiguous, the D.C. Circuit held that a court must defer to the unambiguously expressed intent of the parties.⁶² If the language is ambigu-

⁴⁹ 16 U.S.C. § 8251(b).

⁵⁰ See 467 U.S. 837, 866 (1984).

⁵¹ *Id.* at 840.

⁵² *Id.* at 842.

⁵³ *Id.*

⁵⁴ See *id.* at 843.

⁵⁵ *Id.* at 844.

⁵⁶ *Chevron*, 467 U.S. at 865.

⁵⁷ 599 F.3d 698, 701 (D.C. Cir. 2010).

⁵⁸ Compare *Chevron*, 467 U.S. at 842 (applying a two-step analysis to an agency's interpretation of a statute), with *Colo. Interstate Gas v. Fed. Energy Regulatory Comm'n*, 599 F.3d 698, 701 (D.C. Cir. 2010) (applying a two-step analysis to an agency's interpretation of a tariff).

⁵⁹ *Colo. Interstate Gas*, 599 F.3d at 700.

⁶⁰ *Id.* at 701.

⁶¹ *Id.* (quoting *Ameren Servs. Co. v. Fed. Energy Regulatory Comm'n*, 330 F.3d 494, 498 (D.C. Cir. 2003)).

⁶² *Colo. Interstate Gas*, 599 F.3d at 701 (quoting *Ameren Servs.*, 330 F.3d at 498).

ous, a court must defer to FERC's construction of the provision, as long as that interpretation is reasonable.⁶³

In *Cajun Electric Power Cooperative, Inc. v. Federal Energy Regulatory Commission*, the D.C. Circuit further expanded on the *Chevron* analysis at the first step.⁶⁴ The court considered Cajun Electric Power Cooperative, Inc.'s ("Cajun") challenge to a FERC interpretation of a contract between Cajun and Gulf States Utility Company.⁶⁵ The court remanded the case to FERC because it determined that the contract was ambiguous.⁶⁶ The court noted that the agency is not granted deference in the determination of whether the statute is ambiguous.⁶⁷ Therefore, the court can remand the question to the agency if the agency is incorrect in its determination that Congress' intent was clearly expressed.⁶⁸

The Administrative Procedure Act ("APA") was enacted in 1946 to codify judicial review of agency decision-making and actions.⁶⁹ Prior to the twentieth century, there was no comprehensive body of administrative law in the United States.⁷⁰ Rather, any rules regarding an agency's administrative procedures were included in that agency's enabling legislation.⁷¹ The turning point for administrative law was the New Deal.⁷² Because the New Deal legislation did not create procedures to govern the actions of these agencies, Congress passed the APA in 1946 to categorize and regulate agency actions.⁷³

The enactment of the APA paved the way for courts to assume broad authority to review agency actions.⁷⁴ The D.C. Circuit can review agency actions under § 706(2)(A) of the APA, which allows a court to determine if an agency action is arbitrary and capricious.⁷⁵

In *PPL Wallingford Energy LLC v. Federal Energy Regulatory Commission*, the D.C. Circuit considered whether FERC's failure to respond to the

⁶³ *Colo. Interstate Gas*, 599 F.3d at 701 (quoting *Koch Gateway Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 136 F.3d 810, 814–15 (D.C. Cir. 1998)).

⁶⁴ 924 F.2d 1132, 1136 (D.C. Cir. 1991).

⁶⁵ *Id.* at 1133. FERC's interpretation of the contract was based on authority granted by the FPA. *Id.*

⁶⁶ *Id.* at 1137.

⁶⁷ *Id.* at 1136.

⁶⁸ *Id.*

⁶⁹ Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 *FORDHAM ENVTL. L. REV.* 207, 208 (2016)

⁷⁰ *Id.*

⁷¹ *Id.* at 209.

⁷² *Id.*

⁷³ *See id.* at 214.

⁷⁴ 5 U.S.C. § 702 (2012); Elias, *supra* note 69, at 222.

⁷⁵ 5 U.S.C. § 706(2)(A). Section 706(2)(A) states in part: "The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." *Id.*

petitioner's objections constituted an arbitrary and capricious decision.⁷⁶ The petitioners, power companies ("PPL"), challenged orders made by FERC that rejected their agreement to provide electric power with ISO New England on a cost-of-service basis.⁷⁷ In making this determination, the court relied on the arbitrary and capricious standard under § 706(2)(A) of the APA, which states that an agency must have a satisfactory explanation for its choice after examining all of the relevant data.⁷⁸ The court noted that under the APA, the agency's decision could not be reasoned if the agency does not answer seemingly legitimate objections.⁷⁹ Applying this standard, the D.C. Circuit determined that the agency's decision was arbitrary and capricious because it failed to address PPL's objections.⁸⁰

III. ANALYSIS

In *PSEG Energy Resources & Trade LLC v. Federal Energy Regulatory Commission*, the United States Court of Appeals for the D.C. Circuit granted PSEG Energy Resources and Trade LLC and PSEG Power Connecticut's ("PSEG") petition for review, and remanded the order by the Federal Energy Regulatory Commission ("FERC") for both issues brought by PSEG.⁸¹ The court remanded on the first issue to allow FERC to re-interpret ISO New England's tariff ("Tariff") in light of its analysis drawing from *Chevron U.S.A v. Natural Resources Defense Council*.⁸² In addition, the D.C. Circuit remanded the second issue because FERC failed to address PSEG's objections regarding the interpretation of the Tariff.⁸³

The first issue considered in *PSEG Energy Resources & Trade LLC* involved the interpretation of the meaning of the last sentence of the proration rule.⁸⁴ The D.C. Circuit considered two questions about the meaning of that sentence.⁸⁵ First, the court considered whether FERC incorrectly read the text of the Tariff as compelling the conclusion that it reached regarding the auction results.⁸⁶ Second, the court considered whether FERC was incorrect in

⁷⁶ 419 F.3d 1194, 1198 (D.C. Cir. 2005).

⁷⁷ *Id.* at 1195. Cost-of-service is the revenue a power company must collect from rates that it charges consumers to recover business costs. FED. ENERGY REGULATORY COMM'N, COST-OF-SERVICE RATES MANUAL 7 (1999).

⁷⁸ PPL Wallingford Energy LLC v. Fed. Energy Regulatory Comm'n, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1200.

⁸¹ 665 F.3d 203, 210–11 (D.C. Cir. 2011).

⁸² *See id.* at 209.

⁸³ *Id.* at 210.

⁸⁴ *Id.* at 206. The last sentence of the proration rule requires that any proration conducted by the capacity market must undergo reliability review. *Id.*

⁸⁵ *Id.* at 208.

⁸⁶ *Id.*

failing to respond to the objections raised by PSEG about the undue discrimination of FERC's interpretation and its contradiction of the basic policy goals of the forward capacity market.⁸⁷

The D.C. Circuit applied the same *Chevron*-like analysis used in *Colorado Interstate Gas v. Federal Energy Regulatory Commission* to decide if FERC properly interpreted the Tariff.⁸⁸ At the first step, the court considered if the text of the Tariff interpreted by FERC was ambiguous.⁸⁹ The court noted that the agency has the discretion to interpret the Tariff, rather than relying on the assumption that Congress required such an interpretation.⁹⁰ The court remanded this issue to FERC, ultimately granting the agency the discretion to review the Tariff once again in order to determine if PSEG's position was the more appropriate interpretation of the Tariff.⁹¹

The next issue the D.C. Circuit considered was whether FERC's failure to respond to the objections raised by PSEG rendered its decision arbitrary and capricious.⁹² The court relied on § 706 of the Administrative Procedure Act (APA) in its consideration of whether FERC's failure to respond was arbitrary and capricious.⁹³ The court considered whether FERC's counsel's statements constituted a sufficient response to PSEG and concluded that it did not.⁹⁴ As a result, the court held that remand was appropriate on the issue in order to allow FERC to respond to the objections raised by PSEG.⁹⁵

As a semi-specialized court, the D.C. Circuit has historically had judicial review over agency actions, as demonstrated in *PSEG Energy Resources & Trade*.⁹⁶ The D.C. Circuit relied on *Chevron* and the cases that built upon that doctrine, specifically *Cajun Elec. Power Coop., Inc. v. Federal Energy Regulatory Commission*, to determine whether FERC's interpretation was proper.⁹⁷ Although the D.C. Circuit remanded the order to allow FERC to properly interpret the language of the Tariff, the court's application of the *Chevron*-like analysis further extends its judicial review over agency actions under the

⁸⁷ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 208.

⁸⁸ *Id.* (citing *Colo. Interstate Gas*, 599 F.3d at 701).

⁸⁹ *Id.* at 209.

⁹⁰ *Id.* (citing *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000)).

⁹¹ *Id.*

⁹² *See id.*

⁹³ *Id.* at 208.

⁹⁴ *Id.* at 210.

⁹⁵ *Id.* (noting FERC counsel's rationalization formulated after the FERC decision was issued and quoted statement in footnote of rehearing order not a response to PSEG's objections).

⁹⁶ *See id.*; Golden, *supra* note 12, at 554.

⁹⁷ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 209; *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Cajun Elec. Power Coop., Inc. v. Fed. Energy Regulatory Comm'n*, 924 F.2d 1132, 1136 (D.C. Cir. 1991).

Chevron doctrine.⁹⁸ In its original form, the doctrine is used to determine whether agencies properly interpret the statute administered by the respective agencies.⁹⁹ For other agency actions, such as agency interpretations of regulation, courts have employed alternative forms of deference.¹⁰⁰

The D.C. Circuit's application of a *Chevron*-like analysis to FERC's order signals a continued departure from the traditional use of the doctrine.¹⁰¹ Judicial review of agency action has increased as agencies have gained more authority.¹⁰² The court correctly applied the *Chevron*-like analysis because FERC did not reasonably exercise its discretion when it failed to consider all possible interpretations of the Tariff.¹⁰³ The court expanded its scope of review under *Chevron* while still allowing FERC to retain its discretion in regulating energy markets.¹⁰⁴

Alternatively, the D.C. Circuit's use of the arbitrary and capricious standard does not signal a widening of judicial review, but rather makes certain that agencies face accountability for their actions and decisions.¹⁰⁵ Therefore, the D.C. Circuit acted within the scope of its statutory authority under the APA when it reviewed FERC's order, as the APA's chief purpose is to ensure that agencies are held accountable to the public.¹⁰⁶

Similar to the decision in *PPL Wallingford Energy LLC v. Federal Energy Regulatory Commission*, the D.C. Circuit viewed FERC's failure to re-

⁹⁸ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 209; see *Chevron*, 467 U.S. at 842.

⁹⁹ See *Chevron*, 467 U.S. at 842.

¹⁰⁰ See *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (applying criterion of administrative interpretation to regulation); *Skidmore v. Swift & Co.*, 323 U.S. 134, 139 (1944) (providing that agency interpretation of its own regulations must be based on persuasiveness of interpretation). The different analyses for agency actions stem from common law decisions examining different agency actions. See *Chevron*, 467 U.S. at 842; *Seminole Rock*, 325 U.S. at 414; *Skidmore*, 323 U.S. at 139. Although *Bowles v. Seminole Rock* and *Skidmore v. Swift & Co.* predate the decision in *Chevron U.S.A. v. Natural Resources Defense Council*, *Bowles* and *Skidmore* still provide relevant analysis with regard to agency deference. See *Chevron*, 467 U.S. at 842; *Seminole Rock*, 325 U.S. at 414; *Skidmore*, 323 U.S. at 139.

¹⁰¹ See *Chevron*, 467 U.S. at 842, *Seminole Rock*, 325 U.S. at 414; *PSEG Energy Res. & Trade LLC*, 665 F.3d at 209.

¹⁰² See Ronald A. Cass, *Vive La Deference?: Rethinking the Balance Between Administrative and Judicial Discretion*, 83 GEO. WASH. L. REV. 1294, 1300 (2015). The growth in agency authority can be seen in the expansion of the number of people employed by the federal government. Jonathon Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html?utm_term=.8c17eed0353 [<https://perma.cc/T6EH-LVEG>]. The number of non-military workers in the federal government has grown from 1000 in 1790 to 2,515,000 in 1962, and 2,840,000 in 2013. *Id.*

¹⁰³ See *PSEG Energy Res. & Trade LLC*, 665 F.3d at 209.

¹⁰⁴ See *id.*

¹⁰⁵ See 5 U.S.C. § 706 (2012); *PSEG Energy Res. & Trade LLC*, 665 F.3d at 208.

¹⁰⁶ 5 U.S.C. § 706; see *PSEG Energy Res. & Trade LLC*, 665 F.3d at 208; *PPL Wallingford Energy LLC*, 419 F.3d at 1198.

spond directly to PSEG's objections as necessitating remand.¹⁰⁷ FERC's failure to respond to PSEG's two legitimate objections prevented its order from being fully reasoned and rationalized.¹⁰⁸ In both of these cases, the D.C. Circuit exercised its authority to hold these agencies accountable.¹⁰⁹ While *Chevron* requires more deference for agency actions, the APA also allows courts to step in when an agency exercises its discretion without responding to any objections or concerns from the public.¹¹⁰

The D.C. Circuit continues to pave a path for the growth of judicial review through its applications of the APA and the *Chevron* doctrine.¹¹¹ As *PSEG Energy Resources & Trade LLC* demonstrates, courts will continue to use these tools to expand its review of agency actions.¹¹²

CONCLUSION

As the regulating agency for electricity markets, the Federal Energy Resources Commission ("FERC") employs its agency expertise and discretion to issue orders that ensure just and reasonable rates in the electric market. The FERC order at issue in *PSEG Energy Resources & Trade LLC v. Federal Energy Resources Commission* was subject to judicial review by the D.C. Circuit, the court with the requisite expertise in administrative law. The D.C. Circuit considered the order by applying the basic doctrines of administrative law. The court's application of the analysis drawing from *Chevron U.S.A. v. Natural Resources Defense Council* demonstrates the expansion of *Chevron* to agency actions that were not originally covered by the doctrine. Further, the court applied its authority under § 706 of the Administrative Procedures Act to ensure that FERC's actions were held accountable. Therefore, *PSEG*

¹⁰⁷ *PSEG Energy Res. & Trade LLC*, 665 F.3d at 210; *PPL Wallingford*, 419 F.3d at 1200.

¹⁰⁸ See *PSEG Energy Res. & Trade LLC*, 665 F.3d at 210.

¹⁰⁹ 5 U.S.C. § 706; see *PSEG Energy Res. & Trade LLC*, 665 F.3d at 208; *PPL Wallingford* 419 F.3d at 1198.

¹¹⁰ See 5 U.S.C. § 706; *Chevron*, 467 U.S. at 842; *PSEG Energy Res. & Trade LLC*, 665 F.3d at 208.

¹¹¹ See *Chevron*, 467 U.S. at 842; *Seminole Rock*, 325 U.S. at 414; *PSEG Energy Res. & Trade LLC*, 665 F.3d at 208; Golden, *supra* note 12, at 554.

¹¹² See *Chevron*, 467 U.S. at 842; *PSEG Energy Res. & Trade LLC*, 665 F.3d at 208. The future of the *Chevron* doctrine is currently uncertain because the most recent addition to the United States Supreme Court, Neil Gorsuch, has criticized the expanding power of administrative agencies under *Chevron*. Peter J. Henning, *Gorsuch Nomination Puts Spotlight on Agency Powers*, N.Y. TIMES: DEALBOOK (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/business/dealbook/gorsuch-nomination-puts-spotlight-on-agency-powers.html> [https://perma.cc/846L-6BVB]; Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [https://perma.cc/4PCF-U68M]; see *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149, 1154 (10th Cir. 2016) (Gorsuch, J. concurring) (referring to the *Chevron* doctrine as the "elephant in the room" and questioned the constitutionality of the doctrine).

Energy Resources represents the continuing expansion of judicial review of agency actions by the D.C. Circuit.