CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(j) OF THE COURT'S RULES

In the United States Court of Appeals for the District of Columbia Circuit

No. 17-5208

GREGORY R. SWECKER & BEVERLY F. SWECKER,
Plaintiffs-Appellants,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Defendant-Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF DEFENDANT-APPELLEE FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: OCTOBER 9, 2018

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiffs-Appellants' Circuit Rule 28(a)(1) certificate identifies Midland Power Cooperative and Central Iowa Power Cooperative as Defendants-Appellees, but these entities are no longer part of this appeal because this Court granted their motion for summary affirmance. No. 17-5208 (D.C. Cir. May 9, 2018). With that clarification, the parties before this Court are identified in Appellants' certificate.

B. Ruling Under Review

Swecker v. Midland Power Coop., 253 F. Supp. 3d 274 (D.D.C. 2017), JA 43-51.

C. Related Cases

This Court previously granted a FERC motion to dismiss a petition for review filed by the Sweckers for lack of jurisdiction. *Swecker v. FERC*, No. 06-1170 (D.C. Cir. Oct. 3, 2006).

In 2015, the Eighth Circuit affirmed dismissal (for failure to state a claim) of a complaint filed in U.S. District Court (S.D. Iowa) by the Sweckers against Midland Power Cooperative and Central Iowa Power Cooperative that alleged violations of the Public Utility Regulatory Policies Act of 1978. *Swecker v. Midland Power Coop.*, 807 F.3d 883, 883-84 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 990 (2016).

Two appeals are currently pending in the Eighth Circuit as to actions between the Sweckers and the United States related to foreclosure proceedings and loans provided by the U.S. Department of Agriculture's Farm Services Agency. *See Swecker v. United States*, No. 4:17-cv-00195 (S.D. Iowa Nov. 28, 2017) (action dismissed for failure to state a claim), *appeal pending*, 8th Cir. No. 18-1243; *United States v. Swecker*, No. 4:09-cv-00013 (S.D. Iowa Nov. 10, 2016) (granting United States motion for summary judgment), *appeal pending*, 8th Cir. No. 18-1007.

Counsel for Respondent Federal Energy Regulatory Commission is not aware of any other pending related cases.

/s/ Anand R. Viswanathan
Anand R. Viswanathan
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October 9, 2018

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GLOSSARY

APA	Administrative Procedure Act
Br.	Opening brief of Plaintiffs-Appellants Gregory R. Swecker and Beverly F. Swecker
Commission or FERC	Federal Energy Regulatory Commission
Op.	*Swecker v. Midland Power Coop.*, 253 F. Supp. 3d 274 (D.D.C. 2017), JA 43-51
PURPA	Public Utility Regulatory Policies Act of 1978

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STATEMENT OF THE ISSUES

This case concerns a presumptively unreviewable agency decision not to act—under a substantive statute that provides no guidelines for the agency to follow on when it should or should not act. That statute, the Public Utility Regulatory Policies Act of 1978 ("PURPA"), gives the Federal Energy Regulatory Commission ("the Commission" or "FERC") the option of bringing an enforcement action if asked to do so.

Its decision here not to bring such an action is presumed immune from judicial review under 5 U.S.C. § 701(a)(2), as the Supreme Court has long held. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985). The district court found that the Sweckers had not rebutted that presumption and dismissed their complaint. *Swecker v. Midland Power Coop.*, 253 F. Supp. 3d 274, 280 (D.D.C. 2017) ("Op."), JA 50-51.

The issues on appeal are:

1. Whether the district court correctly found that the Sweckers had not rebutted the presumption that the agency decision not to act is unreviewable, when they have not challenged that finding in this Court; and
2. Whether the Sweckers have a cause of action against FERC in district court under a provision of PURPA that allows actions against two potential defendants, neither of which is FERC.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Congress enacted the Public Utility Regulatory Policies Act of 1978 as part of a package of legislation called the National Energy Act to combat a nationwide energy crisis and promote the development of alternative energy resources. *FERC v. Mississippi*, 456 U.S. 742, 745 (1982). To "counter traditional electric utilities' reluctance to deal with" renewable sources of energy, PURPA charges the Commission "with implementing mandatory purchase and sell obligations, requiring electric utilities to purchase electric power from, and sell power to, qualifying cogeneration and small power production facilities (collectively, 'qualifying facilities')." *S. Cal. Edison Co. v. FERC*, 443 F.3d 94, 95 (D.C. Cir. 2006) (citing 16 U.S.C. § 824a-3(a)(1)-(2)); *see also* 16 U.S.C. § 796(17)(A)(i)-(ii) (facility that generates no more than 80 megawatts of power from renewable resources is a PURPA qualifying facility). In addition to the mandatory purchase requirement, the statute also imposes requirements on the price at which such purchases must be made. *Id.* §§ 824a-3(b), 824a-3(d); *see also S. Cal. Edison*, 443 F.3d at 96 (explaining PURPA's "avoided cost" rate).

Section 210(h) of PURPA, 16 U.S.C. § 824a-3(h), sets forth the means for enforcement of these rules. Under that subsection, a private party seeking to enforce a nonregulated electric utility's compliance with PURPA must first

petition FERC to do so. *See, e.g., Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir. 1995). If FERC does not initiate an enforcement action within the statutory 60-day time period, the petitioning party may itself initiate an action in federal district court against a state regulatory authority or a nonregulated utility. 16 U.S.C. § 824a-3(h)(2)(B); *see also Indus. Cogenerators*, 47 F.3d at 1234. The only role prescribed in the statute for the Commission in such a district court action is a voluntary intervenor "as a matter of right." *See* 16 U.S.C. § 824a-3(h)(2)(B).

The judicial review provisions of the Administrative Procedure Act ("APA") establish a cause of action for parties adversely affected either by agency action or by an agency's failure to act. *Heckler v. Chaney*, 470 U.S. 821, 828 (1985); *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011). But the APA expressly removes from judicial review those agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Such actions are unreviewable because "the courts have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion." *Sierra Club*, 648 F.3d at 855 (internal quotation marks omitted). In cases that involve agency decisions not to take action, this Court "begin[s] with the presumption that the agency's action is unreviewable." *Id*. (citing *Chaney*, 470 U.S. at 831-32); *see also Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 458-59 (D.C. Cir. 2001).

II. THE SWECKERS' HISTORY OF LITIGATION

Appellants Gregory and Beverly Swecker own and operate a small wind facility in Iowa that generates electricity. Op. 1, JA 43. This facility has been classified since 1999 as a "qualifying facility" under section 210 of PURPA, 16 U.S.C. § 824a-3. Op. 3, JA 45 (citing Compl. ¶ 10, JA 3); *Midland Power Coop. v. FERC*, 774 F.3d 1, 2 (D.C. Cir. 2014). Under PURPA, the Sweckers sell excess power from their wind turbine to Midland Power Cooperative, an electric utility in Greene County, Iowa. 16 U.S.C. § 824a-3(a); Op. 3, JA 45 (citing Compl. ¶ 12, JA 3). Midland buys the rest of its electricity from Central Iowa Power Cooperative ("Central Iowa"). Op. 3, JA 45 (citing Compl. ¶¶ 13-15, JA 3-4).

This appeal is but the latest in a series of lawsuits the Sweckers have initiated over many years against Midland and others in state and federal courts over the proper calculation of rates (avoided cost price for electricity sales) and their rights under PURPA, among other issues. *See, e.g.*, Op. 3, JA 45; *Swecker v. Midland Power Coop.*, 807 F.3d 883, 883-84 (8th Cir. 2015) (affirming dismissal for failure to state a claim), *cert. denied*, 136 S. Ct. 990 (2016); *Swecker v. United States*, No. 4:17-cv-00195, ECF No. 34, slip op. 2-3 (S.D. Iowa Nov. 28, 2017) (dismissing for failure to state a claim and citing over 20 cases involving the Sweckers since 1997 in state and federal courts); *see also Swecker v. FERC*, No. 06-1170 (D.C. Cir. Oct. 3, 2006) (granting FERC motion to dismiss because

FERC's "refusal to initiate an enforcement action is not reviewable"). Along with dismissing one of the Sweckers' recent complaints, the U.S. District Court for the Southern District of Iowa also issued an order admonishing them for "a pattern of blatant disregard for the time and resources of the courts and of their opposing parties" through their "abusive and vexatious filings." *Swecker*, No. 4:17-cv-00195, ECF No. 35 (S.D. Iowa Nov. 28, 2017) (imposing "protective measures"). The order requires the Sweckers to seek leave from the court prior to filing any new action there.

The Sweckers have also "repeatedly, and unsuccessfully, petitioned FERC" to initiate enforcement actions against Midland and Central Iowa. Op. 3, JA 45 (citing FERC orders declining to act). In these petitions, the Sweckers alleged that Midland owes them a higher rate under PURPA, among other claims. *See, e.g.*, Pet. For Enforcement, FERC No. EL14-9, *et al.*, at 6-7 (Apr. 8, 2016) ("April 2016 Pet."), JA 115-16. They have demanded both damages and declaratory relief that Midland owes them the same rate that it pays its supplier, Central Iowa. *See, e.g.*, Pet. For Enforcement, FERC No. EL14-9, *et al.* (Mar. 24, 2016), JA 122-26; April 2016 Pet. at 7, JA 116; *see also Swecker v. Midland Power Coop.*, 142 FERC ¶ 61,207, at P 11 (2013), JA 62; *Swecker v. Midland Power Coop.*, 147 FERC ¶ 61,114, at P 1 (2014), JA 54; *Swecker v. Midland Power Coop.*, 136 FERC

¶ 61,085, at P 1 (2011), JA 78. They also have asked the Commission to order Midland and Central Iowa to provide them with certain cost data.

In response, the Commission repeatedly has declined to initiate enforcement actions on their behalf. *See Swecker v. Midland Power Coop.*, 162 FERC ¶ 61,072 (2018), JA 52; *Swecker v. Midland Power Coop.*, 155 FERC ¶ 61,237 (2016), JA 53; *Swecker v. Midland Power Coop.*, 149 FERC ¶ 61,236, at P 4 (2014), JA 57; *Swecker v. Midland Power Coop.*, 147 FERC ¶ 61,114, at P 2, JA 55; *Swecker v. Midland Power Coop.*, 142 FERC ¶ 61,207, at P 2, JA 59; *Swecker v. Midland Power Coop.*, 136 FERC ¶ 61,085, at P 2, JA 78. In so declining to act, the Commission has confirmed that, under section 210(h)(2) of PURPA, the Sweckers "may themselves bring an enforcement action against Midland and [Central Iowa] in the appropriate court." *See, e.g.*, *Swecker*, 162 FERC ¶ 61,072, at P 2, JA 52.

After FERC declined to take enforcement action on the Sweckers' 2016 petitions, they filed the complaint in the U.S. District Court for the District of Columbia that commenced the proceeding now before this Court. Swecker Compl., Case No. 1:16-cv-01434 (D.D.C. July 11, 2016), JA 1-14. This complaint named not just Midland and Central Iowa as defendants, but also FERC. *Id*. ¶¶ 6-8, JA 3. And as with the Sweckers' prior FERC petitions, the complaint demanded both damages and injunctive relief against Midland and Central Iowa to recover a

higher rate for Midland's purchases of energy from the Sweckers' facility. *See id*. ¶¶ 61, 71-74, JA 10, 12. The complaint again demanded data from Midland and Central Iowa to verify their costs. As to the Commission, the Sweckers alleged that the agency "knowingly and willingly" failed to enforce its regulations. *Id*. ¶ 60, JA 10.

The district court, on May 17, 2017, granted motions to dismiss filed by Midland, Central Iowa, and the Commission. The court concluded that the Sweckers failed to meet their burden to show that it had personal jurisdiction over Midland and Central Iowa. Op. 6, JA 48. The Sweckers also failed to overcome the presumption that FERC's decision not to initiate an enforcement action was unreviewable. *Id*. 8-9, JA 50-51. That decision was committed to agency discretion by law, and the court found that it lacked subject matter jurisdiction to review it. *Id*. 9, JA 51. The court subsequently denied the Sweckers' Rule 59(e) motion for reconsideration of the dismissal order, as they identified neither any change in controlling law nor new evidence justifying relief. Minute Order, Case No. 16-cv-01434 (D.D.C. July 10, 2017).

This appeal followed. While this Court initially dismissed the appeal as untimely, it later vacated that dismissal order and granted the Sweckers' request for rehearing "in light of appellants' evidence that they tendered their notice of appeal to the district court within the applicable deadline." *Swecker v. Midland Power*

Coop., No. 17-5208 (D.C. Cir. Feb. 6, 2018). This Court later granted Midland's and Central Iowa's motion for summary affirmance, leaving FERC as the sole remaining appellee, because the Court agreed that the Sweckers failed to make a prima facie showing of personal jurisdiction over the utilities. No. 17-5208 (D.C. Cir. May 9, 2018).

SUMMARY OF ARGUMENT

Can a court review an agency decision not to act under a statutory provision that places no limits and provides no guidelines on the agency's exercise of discretion? The answer to that question here is no, according to both the Supreme Court and this Court.

When it comes to agency decisions not to enforce, this Court "begin[s] with the presumption that the agency's action is unreviewable." *Sierra Club*, 648 F.3d at 855 (citing *Chaney*, 470 U.S. at 831-32). To be sure, that presumption (like any presumption) can be overcome.

The Sweckers did not overcome it here, as the district court concluded. And rightly so: The Commission's choice not to initiate an enforcement action was permitted under the substantive statute (PURPA). PURPA says nothing at all about whether the agency should (let alone must) commence enforcement action. Because of how Congress chose to draft this statute, courts have neither any "meaningful standard against which to judge the agency's exercise of discretion,"

Chaney, 470 U.S. at 830, nor any "concrete limitations to impose" on that exercise of discretion, *Sierra Club*, 648 F.3d at 855 (internal quotation marks omitted).

And the Sweckers never alleged that the Commission declined action out of mistaken belief as to its own jurisdiction; nor did they allege that FERC did so based on a policy amounting to an abdication of its statutory responsibilities. With that record, and under this statute, the district court correctly found the Commission's decision not to take action was nonjusticiable.

But the Sweckers do not challenge that finding. This defect alone, even with the traditional solicitude for pro se litigants, warrants affirmance.

Even if this appeal is subject to judicial review, this Court still should affirm because PURPA section 210(h) does not permit a cause of action against FERC.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal of an action for want of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or for failure to state a claim under Rule 12(b)(6). *See, e.g.*, *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 980 (D.C. Cir. 2017); *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 874 (D.C. Cir. 2014). Pro se complaints "must be 'liberally construed' and 'held to less stringent standards than formal pleadings drafted by lawyers.'" *Croley v. Joint Comm. on Judicial Admin.*, 895 F.3d 22, 25

(D.C. Cir. 2018) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). While review of a motion to dismiss a complaint requires the Court to take as true all well-pled factual allegations, it also obligates the Court "to disregard any legal conclusions, legal contentions couched as factual allegations, and unsupported factual allegations within the complaint." *Gulf Coast Mar. Supply, Inc. v. United States*, 867 F.3d 123, 128 (D.C. Cir. 2017); *see also Kaemmerling v. Lappin*, 553 F.3d 669, 677 (D.C. Cir. 2008) ("Even given the special liberality with which we consider pro se complaints, we need not accept inferences unsupported by the facts alleged in the complaint or legal conclusions cast in the form of factual allegations.") (internal quotation marks omitted); *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1106 (D.C. Cir. 2005) (noting that "the rule of liberal construction of [pro se] complaints applies to factual allegations").

This Court may affirm the district court's Rule 12(b)(1) dismissal if dismissal would otherwise have been proper under Rule 12(b)(6). *Sierra Club*, 648 F.3d at 857; *see also In re: Swine Flu Immunization Prod. Liab. Litig.*, 880 F.2d 1439, 1444 (D.C. Cir. 1989) (appellate court may affirm district court's dismissal of complaint on any ground that supports the judgment).

II. THE SWECKERS DO NOT CHALLENGE THE DISTRICT COURT'S FINDING THAT THE COMMISSION'S DECISION NOT TO ACT IS NONJUSTICIABLE

The district court found that the Sweckers did not overcome the *Chaney* presumption of unreviewability that attaches to the Commission's decision not to commence enforcement action. That decision, accordingly, was committed to agency discretion by law and is not subject to judicial review. Op. 9, JA 51; *see also Citizens For Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 441 (D.C. Cir. 2018); *Swecker v. FERC*, No. 06-1170 (D.C. Cir. Oct. 3, 2006) (granting FERC motion to dismiss; "The commission's refusal to initiate an enforcement action is not reviewable"). Nowhere in their opening brief do the Sweckers discuss (let alone attempt to rebut) that district court finding. Instead, they merely advance their view of what the agency should have done but did not do.

The Administrative Procedure Act, 5 U.S.C. § 701(a)(2), expressly prohibits judicial review of an "agency action [that] is committed to agency discretion by law." Under *Chaney*, an agency's decision not to exercise its enforcement authority is committed to its absolute discretion and thus is presumptively unreviewable. 470 U.S. at 831; *Sierra Club*, 648 F.3d at 855; *Balt. Gas*, 252 F.3d at 459.

That presumption of unreviewability may be overcome in three circumstances: (1) where "the substantive statute has provided guidelines for the

agency to follow in exercising its enforcement powers"; (2) where the agency refuses "to institute proceedings based solely on the belief that it lacks jurisdiction"; and (3) where the agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 & n.4 (internal quotation marks omitted); Op. 8, JA 50. The district court correctly found none of those three circumstances present here. Op. 8-9, JA 50-51.

As to the first *Chaney* exception, the substantive statute (PURPA) provides no guidelines or mandatory directives for the agency to follow in determining whether to commence an enforcement action. *Id*. 8, JA 50. Section 210(h)(2) is "'utterly silent on the manner in which the [agency] is to proceed against a particular transgressor.'" *See Sec'y of Labor v. Twentymile Coal Co*., 456 F.3d 151, 158 (D.C. Cir. 2006) (quoting *Balt. Gas*, 252 F.3d at 461). This sort of blank canvas gives a court "no meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830.

Indeed, Congress's choice of words in this statute demonstrates its intent. The relevant provision speaks in permissive, not mandatory, terms: Section 210(h)(2)(A) states that the Commission "*may* enforce the requirements of subsection (f) . . . against any State regulatory authority or nonregulated electric utility." 16 U.S.C. § 824a-3(h)(2)(A) (emphasis added); *see also Indus.*

Cogenerators, 47 F.3d at 1232 ("[T]he Commission may, upon its own motion or upon petition, bring an enforcement action in district court to ensure compliance with the Act"). If the Commission does not act under subparagraph (A) despite being petitioned to do so, then the petitioning party "*may* bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements . . . ." 16 U.S.C. § 824a-3(h)(2)(B) (emphasis added); *Citizens For Responsibility*, 892 F.3d at 439 ("To state the obvious, the word 'may' imposes no constraints on the [agency's] judgment about whether, in a particular matter, it should bring an enforcement action."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 112 (2012) ("The traditional, commonly repeated rule is that *shall* is mandatory and *may* is permissive.").

Other PURPA provisions not relevant here, by contrast, use mandatory "shall" language, indicating that Congress intended the ordinary distinction between "may" and "shall" to govern. *See, e.g.*, 16 U.S.C. § 824a-3(m)(3) (Commission "shall make a final determination within 90 days" of an application by a utility for relief from mandatory purchase obligation); *id*. § 824a-3(m)(7) (Commission "shall issue and enforce such regulations as are necessary" to ensure that a utility purchasing from a qualifying facility recovers costs); *see also Sierra Club*, 648 F.3d at 856 ("[W]hen a statute uses both 'may' and 'shall,' the normal

inference is that each is used in its usual sense—the one act being permissive, the other mandatory.") (internal quotation marks omitted); *accord Anglers Conservation Network v. Pritzker*, 809 F.3d 664, 671 (D.C. Cir. 2016).

This Court also has confirmed the permissive text of PURPA. That is, it has recognized that PURPA grants the Commission discretion to decide whether to bring an enforcement action against a nonregulated electric utility like Midland. *See Indus. Cogenerators*, 47 F.3d at 1234 ("FERC *can* initiate an enforcement action either upon its own motion or upon the petition of a private party.") (emphasis added); *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000) ("The Commission's only obligations under [PURPA] § 210 are the promulgation and periodic revision of these regulations and of the exemption regulations required by [PURPA] § 210(e); therefore, the Commission's decision not to take any [enforcement] action . . . cannot be a violation of § 210 by the Commission."); *N.Y. State Elec. & Gas Corp. v. FERC*, 117 F.3d 1473, 1476 (D.C. Cir. 1997).

The second and third *Chaney* exceptions offer the Sweckers no recourse either. On the second exception, the district court noted that the Sweckers never alleged that FERC had declined to initiate proceedings "because it believes it lacks jurisdiction to do so." Op. 9, JA 51. The same goes for the third exception—the Sweckers failed to allege that the Commission had adopted a policy "so extreme as

to constitute an abdication of its responsibilities under PURPA." *Id*. Nor could they: the Commission's policy statement on its PURPA enforcement responsibilities simply embraces the letter of the statute, noting that it is not required to pursue any particular enforcement action. *See Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,644-61,645 (1983) ("The Commission may undertake an enforcement action either on its own motion or upon petition . . . . The Commission is not required to undertake an enforcement action described above.") (cited at Op. 9, JA 51).

The district court thus concluded correctly that the Sweckers failed to overcome the presumption that FERC's decision not to initiate an enforcement action is unreviewable. And because they do not dispute any of those findings in their opening brief, they have forfeited (and cannot on reply raise) any argument on whether the Commission's decision is subject to judicial review here. *See, e.g*., *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1121 (D.C. Cir. 2018); *Newspaper Ass'n of Am. v. Postal Regulatory Comm'n*, 734 F.3d 1208, 1212 (D.C. Cir. 2013).

Whether the agency decision is nonjusticiable or outside federal court jurisdiction makes no difference here. While the district court dismissed the complaint under Rule 12(b)(1), this Court has acknowledged "it has not always been consistent" in its rulings on whether agency decisions excluded from judicial

review by 5 U.S.C. § 701(a)(2) are outside the Court's jurisdiction (under Rule 12(b)(1)) or are nonjusticiable (under Rule 12(b)(6)). *Sierra Club*, 648 F.3d at 853 (internal quotation marks omitted). In *Sierra Club*, this Court "hasten[ed] to state that [it did] not fault the district court" for dismissing under Rule 12(b)(1), and simply affirmed under Rule 12(b)(6). *Id*. at 853, 857. It can do the same here.

III. THE SWECKERS HAVE NO CAUSE OF ACTION AGAINST FERC UNDER PURPA

Although the district court did not address the Commission's alternative argument—that FERC cannot be a defendant in a lawsuit filed under PURPA section 210(h)(2) (FERC Motion at 9-10)—the Sweckers raise it in their brief, Br. 14, so the Commission responds here.

The bounds of the private right of action conferred by section 210(h) are delineated strictly by the plain text of the statute: the private party (here, the Sweckers) may sue two (and only two) types of defendants—and the Commission is not one of them. *See Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997) (noting that section 210 sets out "a self-contained scheme by which the purposes of the PURPA are to be realized"). Those two options, under section 210(h)(2)(B), 16 U.S.C. § 824a-3(h)(2)(B), are the state regulatory authority or a "nonregulated electric utility." While that provision permits FERC to intervene "as a matter of right" in that federal action, it leaves no room for FERC to be a defendant.

The Sweckers seem to read the plain text of section 210(h) to imply a cause of action against FERC. In their view, FERC may be a defendant in federal court because "[a] clear reading of this statute does not expressly prohibit" that result. *See* Br. 14.

But this is not how courts read statutes. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). In *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A.*, the Supreme Court rejected the very theory the Sweckers offer now. 530 U.S. 1, 8 (2000). The Court there considered the question of who was entitled to use a provision of the Bankruptcy Code, 11 U.S.C. § 506(c), to seek payment for a claim from property encumbered by a secured creditor's lien. While section 506(c) specified who may invoke that section ("[t]he trustee"), the petitioner argued that it did not expressly prohibit anyone else from doing so. 530 U.S. at 7-8.

The Court, however, found that theory—"that the expression of one thing indicates the inclusion of others unless exclusion is made explicit"—"contrary to common sense and common usage." *Id*. at 8. And when it comes to determining whether a statute confers a private cause of action, the Court has shown particular unwillingness to drift beyond its traditional fidelity to the statutory text. *See, e.g.*, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) ("[I]mplying a private

right of action on the basis of congressional silence is a hazardous enterprise, at best."); *Alexander*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

At least one court of appeals already has considered—and rejected—the claim that the Commission may be a defendant in a lawsuit filed under PURPA. In *Niagara Mohawk Power Corp. v. FERC*, the Second Circuit confronted a case just like this one: a district court's dismissal, on jurisdictional grounds, of a complaint alleging that FERC, among others, violated PURPA. 306 F.3d 1264, 1268 (2d Cir. 2002). The court affirmed the district court and held that a private party "cannot maintain a claim against FERC under PURPA for the simple reason that no such claim exists." *Id*.

A straightforward reading of the statutory text, in the court's view, permitted private rights of action against only "a State regulatory authority or nonregulated electric utility"—FERC was neither of those, so therefore the plaintiff "may not sue FERC under PURPA." *See id*.; 16 U.S.C. § 824a-3(h)(2)(B); *see also Indus. Cogenerators*, 47 F.3d at 1234 ("Section 210 creates an enforcement scheme by which either the FERC or a private party may see to it that *a state regulatory commission or an unregulated utility* complies with the PURPA.") (emphasis added). Not only is that plain-text reading correct, it also accords with the negative-implication canon. *See, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384,

2390 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *accord Stovic v. R.R. Retirement Bd.*, 826 F.3d 500, 503 (D.C. Cir. 2016); Scalia & Garner, *supra* p.14, at 107-08.

Once the Commission announced its decision not to initiate an enforcement action, the Sweckers' only remaining avenue to pursue their PURPA claims was an action in federal district court against the appropriate "State regulatory authority or nonregulated electric utility"—but not against FERC. *See* 16 U.S.C. § 824a-3(h)(2)(B); *see also Indus. Cogenerators*, 47 F.3d at 1232; *Xcel Energy Servs. Inc. v. FERC*, 407 F.3d 1242, 1243-44 (D.C. Cir. 2005); *Niagara Mohawk*, 117 F.3d at 1488.

The only role contemplated in the statute for the Commission in the district court proceeding was an intervenor "as a matter of right." *See* 16 U.S.C. § 824a-3(h)(2)(B). And FERC opted not to intervene.

CONCLUSION

The district court's order dismissing the complaint against the Commission should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,479 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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