

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 08 2005

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

PACIFICORP,	)	No. 03-72522
	)	
Petitioner,	)	EL02-80
	)	
	)	<b>MEMORANDUM*</b>
PUBLIC UTILITY DISTRICT NO. 1	)	
OF SNOHOMISH COUNTY,	)	
WASHINGTON,	)	
	)	
Intervenor,	)	
	)	
v.	)	
	)	
FEDERAL ENERGY	)	
REGULATORY COMMISSION;	)	
	)	
Respondent,	)	
	)	
MORGAN STANLEY CAPITAL	)	
GROUP, INC.; RELIANT ENERGY	)	
SERVICES INC.; WILLIAM	)	
ENERGY MARKETING &	)	
TRADING COMPANY; EL PASO	)	
MERCHANT ENERGY L.P.,	)	
	)	
Intervenors.	)	
_____	)	
	)	
PACIFICORP; PUBLIC UTILITY	)	No. 04-72781
_____	)	

\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

DISTRICT NO. 1 OF SNOHOMISH )  
 COUNTY, WASHINGTON, )  
 )  
 Petitioners, )  
 )  
 RELIANT ENERGY SERVICES )  
 INC.; EL PASO MERCHANT )  
 ENERGY L.P.; MORGAN )  
 STANLEY CAPITAL GROUP, INC.;) )  
 WILLIAMS POWER COMPANY, )  
 INC.; PUBLIC UTILITY DISTRICT )  
 NO. 1 OF SNOHOMISH COUNTY, )  
 WASHINGTON, )  
 )  
 Intervenors, )  
 )  
 v. )  
 )  
 FEDERAL ENERGY )  
 REGULATORY COMMISSION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

Petition for Judicial Review of  
 Federal Energy Regulatory Commission

Argued and Submitted July 12, 2005  
 Portland, Oregon

Before: FERNANDEZ, RYMER, and KLEINFELD, Circuit Judges.

PacifiCorp, a public utility,<sup>1</sup> petitions for review of a decision of the Federal Energy Regulatory Commission (FERC) regarding rates in forward market contracts for the wholesale purchase of electricity.<sup>2</sup> We dismiss the petition.

Among other things, FERC determined that even if PacifiCorp had met its other burdens, FERC would not, in the exercise of its enforcement discretion, take the requested remedial action. See PacifiCorp, 105 F.E.R.C. ¶ 61,184, at 61,968, 61,978–79 (2003). Both PacifiCorp’s failure to seek a rehearing of that determination,<sup>3</sup> and its failure to raise the issue in its opening brief<sup>4</sup> are fatal to the

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<sup>1</sup> Public Utility District No. 1 of Snohomish County, Washington, intervened to support PacifiCorp’s position. Because the District does not raise relevant points which are significantly different from those made by PacifiCorp, what we say as to the latter applies to the former also.

<sup>2</sup> As relevant here, PacifiCorp’s action before FERC was directed at PacifiCorp’s contracts with three wholesale sellers of electricity – Reliant Energy Services, Inc., El Paso Merchant Energy, L.P., and Williams Energy Marketing & Trading Company (collectively the Marketers). They have intervened to support FERC’s decision.

<sup>3</sup> A petition for rehearing is required. See 16 U.S.C. § 825l(a), (b); see also High Country Res. v. FERC, 255 F.3d 741, 744–45 (9th Cir. 2001); Tenn. Gas Pipeline Co. v. FERC, 871 F.2d 1099, 1107, 1110 (D.C. Cir. 1989).

<sup>4</sup> Arguments not raised in the opening brief are waived. See Blanford v. Sacramento County, 406 F.3d 1110, 1114 n.8 (9th Cir. 2005); Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999). Unsupported arguments are also waived. See Acosta-Huerta v. Estelle, 7 F.3d 139, 144 (9th Cir. 1992).

petition, regardless of any merit that the petition may otherwise have.<sup>5</sup> We, therefore, can give no effective relief. In short, we lack jurisdiction to decide the petition.

Petition DISMISSED.

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<sup>5</sup> That the petition does have merit is a questionable proposition, but we do not decide the issue.