THE LIMITS OF INTRA-AGENCY PRECEDENT IN ARBITRARY-AND-CAPRICIOUS REVIEW

I. INTRODUCTION

In 2016, Baltimore Gas and Electric Company (BGE) applied to the Federal Energy Regulatory Commission (FERC) for a rate change to recover $38 million in accumulated losses due to a deficiency in BGE's tax deferred account from 2005 to 2016.[1] FERC rejected the application, finding that BGE's proposed change would violate FERC's "matching principle" by charging later ratepayers

1. Balt. Gas & Elec. Co. v. FERC, 954 F.3d 279, 281 (D.C. Cir. 2020).

for earlier-incurred losses by the utility.[2] FERC explained that, under FERC Order No. 144, BGE missed its opportunity to recover the deficiency by failing to raise the issue in its 2005 rate change application.[3] After FERC ruled against BGE on rehearing, BGE petitioned the U.S. Court of Appeals for the D.C. Circuit for review, alleging that FERC's order was "arbitrary and capricious" under the Administrative Procedure Act (APA).[4]

In its petition, BGE argued, first, that a settlement agreement it reached with FERC in 2006 reserved its right to recover tax deferred losses at a later time.[5] FERC, however, denied that the settlement's language supported BGE's claim.[6] The D.C. Circuit held for FERC, finding that, while the language from the settlement was vague, denying BGE's application appropriately enforced FERC's matching principle.[7]

In its second argument, BGE claimed that, by rejecting its proposed rate increase, FERC broke with its own precedent, having allowed late recoveries for at least four earlier, "similarly situated" utilities.[8] The court held that FERC adequately distinguished BGE's case from the others, so it ultimately decided in FERC's favor.[9] However, the judges' opinions divided on the issue of whether, under the APA, FERC bore an obligation to distinguish the cases at all.[10] The two-judge majority applied a rule from *ANR Storage Co. v. FERC*, 904 F.3d 1020 (D.C. Cir. 2018), requiring FERC "to provide some reasonable justification for any adverse treatment relative to similarly situated competitors," and determined that FERC owed BGE an explanation for the denial.[11] The late Judge Williams,[12] dissenting, applied a rule from *San Diego Gas & Electric Co. v. FERC*, 913 F.3d 127 (D.C. Cir 2019), stating that, without protests from interested third parties, "the Commission's decision to approve rate increases" in the earlier, seemingly-precedential cases "does not amount to 'policy or precedent.'"[13] Because the cases cited by BGE were not protested while under FERC's jurisdiction, the dissenting judge concluded that they did not qualify as precedential, so FERC owed BGE no explanation for its differential treatment.[14]

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2. *Id.*
3. *Id.* at 281–82.
4. *Id.*
5. *Balt. Gas & Elec. Co.*, 954 F.3d at 282.
6. *Id.* at 282–83.
7. *Id.*
8. *Id.* at 283.
9. *Id.* at 286–87.
10. *Balt. Gas & Elec. Co.*, 954 F.3d at 285–90.
11. *Balt. Gas & Elec. Co.*, 954 F.3d at 285 (citing ANR Storage Co. v. FERC, 904 F.3d 1020, 1025 (D.C. Cir. 2018)).
12. Judge Williams passed away a few months after the decision. The fall 2020 issue of *ELJ* was dedicated to his memory. *See* Matthew Christiansen, *Dedication: Judge Stephen F. Williams*, 41 ENERGY L. J. xxxii (2020).
13. *Balt. Gas & Elec. Co.*, 954 F.3d at 290 (citing San Diego Gas & Elec. Co. v. FERC, 913 F.3d 127, 142 (D.C. Cir. 2019).
14. *Id.*

Curiously, although Judge Williams and the *Baltimore Gas* majority applied different rules from different cases—*ANR Storage* and *San Diego Gas*—neither the majority opinion nor the dissenting judge considered the rules from those cases to be in conflict.[15] Judge Williams interpreted the language from *ANR Storage* as describing a special case and, therefore, not analogous to *Baltimore Gas*, so he only applied *San Diego Gas*.[16] The majority, on the other hand, stated that the facts and holding from *San Diego Gas* satisfied the rule from *ANR Storage* and, therefore, did not think that *San Diego Gas* could contain an exception to *ANR Storage*.[17] That is, in *Baltimore Gas*, the majority and the dissenting judge agreed that *ANR Storage* was consistent with *San Diego Gas* but only because they twice disagreed about the proper interpretations of those cases.[18] Even more curiously, in the earlier *San Diego Gas* case, the dissenting Judge Randolph interpreted the rule from *ANR Storage* broadly, like the *Baltimore Gas* majority, but he also interpreted the then-new rule from *San Diego Gas* broadly, like Judge Williams.[19] Judge Randolph regarded the limiting of FERC precedent only to protested cases as incompatible with the requirement for FERC to explain all its apparent inconsistencies.[20] Thus, he found the cases at issue in *Baltimore Gas* to be in conflict by agreeing with the *Baltimore Gas* majority about the interpretation of one case and with the *Baltimore Gas* dissent about the interpretation of the other.[21]

Section II of this Note begins with a historical introduction to the Administrative Procedure Act (APA) and its requirement for courts to correct the "arbitrary and capricious" actions of federal agencies, particularly when those actions fail to conform to the agency's own precedent.[22] It then homes in on recent D.C. Circuit cases, like *ANR Storage* and *San Diego Gas*, which address FERC's obligation under the APA to explain its actions in light of alleged inconsistencies with its own precedent.[23] Next, the same section explains the FERC regulation that features in the *Baltimore Gas* case, namely, FERC's requirement that utilities use the "normalization" method to handle their tax depreciation accounts.[24] The section ends with a synopsis of the *Baltimore Gas* case's progression under FERC's jurisdiction that led BGE to petition the D.C. Circuit court.[25]

Section III analyzes the court's opinion on the scope of FERC's obligation to explain its seemingly inconsistent actions. First, it discusses *Baltimore Gas*, wherein the court held that FERC cannot escape its obligation by delegating its

15. *Id.* at 285–86, 288–89.

16. *Id.* at 288.

17. *Id.* at 285–86.

18. *Balt. Gas & Elec. Co.*, 954 F.3d at 285–86, 288.

19. 913 F.3d at 147–48.

20. *Id.* at 147–48.

21. *Id.* ("Our court has rejected this very argument. In *ANR Storage*, FERC attempted to distinguish its prior orders from the one under review on the basis that the former had been unopposed and lacked a reasoned discussion.").

22. 5 U.S.C. § 706(2)(A) (2021); 2 Am. Jur. 2d *Administrative Law* § 477 (2020).

23. *San Diego Gas*, 913 F.3d; *ANR Storage*, 904 F.3d.

24. 18 C.F.R. § 35.24(b)(1) (2020); 954 F.3d at 281–82.

25. *Balt. Gas & Elec. Co.*, 954 F.3d at 281.

authority to staff or others; the court may set aside even delegated actions if it determines that an agency action was "arbitrary and capricious."[26] Second, the discussion contemplates the court's holding that, under *ANR Storage*, FERC owes utilities an explanation for adverse treatment whenever other, "similarly situated" utilities have received more favorable treatment under the same FERC policies.[27] Next, by considering Judge Williams's dissent in *Baltimore Gas*, claiming that the majority failed to correctly apply the rule from *San Diego Gas*, section III raises the question of whether the court rightly decided *Baltimore Gas*.[28] Finally, section III examines Judge Randolph's earlier dissent from *San Diego Gas*, which argued that the rule from *San Diego Gas* stands at odds with the rule from *ANR Storage*.[29] The section assesses these three approaches toward FERC's duty to explain its inconsistencies, ultimately favoring Judge Randolph's perspective.[30] This Note concludes by pointing out that, although the *Baltimore Gas* court did not reverse *San Diego Gas*, its holding likely had the same effect and advanced the same policy aims that concerned the dissenting judge in that case, namely, predictable, intelligible, consistent agency actions.[31]

II. BACKGROUND

A. "Arbitrary and Capricious" in the Administrative Procedure Act

In 1946, Congress enacted the APA with the aim of "improv[ing] the administration of justice by prescribing fair administrative procedure."[32] Politically, the APA represented New Deal Democrats' efforts to reify Roosevelt-era institutions, as they anticipated losing the presidency to the Republicans in the early 1950s.[33] Some scholars see the 1984 court-adopted rule of "*Chevron* deference," which gives federal agencies broad authority to interpret statutes pertaining to their administrative specialties, as the anticipated Republican de-regulative push back against the APA.[34] Despite this seeming policy collision, the APA has weathered

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26. *Id.* at 284.

27. *Id.* at 285.

28. *Id.* at 287, 290 (J. Williams, dissenting).

29. *San Diego* Gas, 913 F.3d at 142–48 (J. Randolph, dissenting).

30. *Balt. Gas & Elec. Co.*, 954 F.3d at 284–85 (majority opinion), 287, 290 (J. Williams, dissenting); *San Diego Gas*, 913 F.3d at 142–48.

31. *Balt. Gas & Elec. Co.*, 954 F.3d at 286 (majority opinion); *San Diego Gas*, 913 F.3d at 148 n.8 (J. Randolph, dissenting).

32. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

33. McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG.180 (1999). Cf. Alan Schwartz, *Comment on "The Political Origins of the Administrative Procedure Act," by McNollgast*, 15 J.L. ECON. & ORG. 218 (1999) (arguing that the greatest beneficiaries of the APA were not New Deal Democrats but, rather, lawyers who expected to litigate APA-related cases).

34. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). *See also* McNollgast, *supra* note 33, at 215; *but see* Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253 (2014).

the decades well, having been amended only sixteen times in over seventy years.[35] Among this statute's most enduring features is the court's authority to review "arbitrary" and "capricious" agency actions.[36]

Where an agency departs from established precedent without acknowledging the departure and offering a reasoned explanation, its decision may be overturned as arbitrary and capricious.[37] But what agency actions are precedential and therefore trigger these obligations? Following precedent means that later actions track earlier actions that involved similar circumstances.[38] Accordingly, the Supreme Court has held that a federal agency's disparate treatment of "identically situated" individuals—that is, its failure to follow its own precedent—may violate the arbitrary-and-capricious standard of the APA.[39] As with the constitutional guarantee of equal protection, "similarly situated" entities are to be handled similarly.[40] The sole exception, as previously noted, is if the agency adopts a new policy basis for its decisions, in which case the agency must acknowledge its change in course and offer "good reasons for it."[41] Otherwise, courts refuse to uphold agency actions that "appl[y] different standards" to "similarly situated" entities.[42] As the U.S. Court of Appeals for the D.C. Circuit put it, "It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently.'"[43]

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35. Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629, 629 (2017). For a pessimistic take on the relationship between the APA and *Chevron*, *see* Patrick J. Smith, *Chevron's Conflict with the Administrative Procedure Act*, 32 VIRGINIA TAX REV. 813 (2013) (referencing *Chevron,* 467 U.S. at 843–44).

36. 5 U.S.C. § 706(2)(A). Although *Chevron* gave agencies impressive powers to interpret statutes, the opinion expressly reserved the court's right to review agency actions; *see* 467 U.S. at 44 ("Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."). *See also* Merrill, *supra* note 34, at 256.

37. *E.g., FCC v. Fox Television Stations, Inc*., 556 U.S. 502 (2009) ("The requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. . . . And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.").

38. *Doctrine of precedent*, BLACK'S LAW DICTIONARY (11th ed. 2019).

39. Judulang v. Holder, 565 U.S. 42, 59 (2011) (noting that "this [injustice] is what the APA's 'arbitrary and capricious' clause is designed to thwart.").

40. *See e.g.,* General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997) (asking whether public utilities and local distributors of natural gas are "similarly situated for constitutional purposes" when one receives a tax exemption that the other does not). *See also* United States v. Armstrong, 517 U.S. 456 (1996) (applying the constitutional requirement for equal treatment of "similarly situated" individual persons). Courts also use a "similarly situated" test to determine membership to class action lawsuits. *See e.g.,* Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 32 (1976).

41. *Fox Television Stations*, 556 U.S. at 515.

42. Burlington N. and Sante Fe Ry. Co. v. Surface Transp. Bd., 403 F.3d 771, 777 (2005) (citing Willis Shaw Frozen Express, Inc. v. Interstate Commerce Comm'n, 587 F.2d 1333, 1336 (1978); Ace Motor Freight, Inc. v. Interstate Commerce Comm'n, 557 F.2d 859, 862 (1977)). *See also* Colorado Interstate Gas Co. v. FERC, 146 F.3d 889, 893 (D.C. Cir. 1998).

43. West Deptford Energy, v. FERC, 766 F.3d 10, 20 (D.C. Cir. 2014) (citing *ANR Pipeline Co.*, 71 F.3d at 897, 901 (D.C. Cir. 1995)).

B. How the D.C. Circuit Tests FERC for "Arbitrary and Capricious" Action

The number of D.C. Circuit Court cases and opinions that bear on the topic of *stare decisis* in administrative law far exceed those of any other court.[44] Moreover, the D.C. Circuit often handles judicial reviews of Federal Energy Regulatory Commission (FERC) actions.[45] Thus, the D.C. Circuit's treatment of "similarly situated" entities has a special influence on how the arbitrary-and-capricious standard affects FERC and the public utilities it regulates.

1. FERC Bears a Duty to Treat Similarly Situated Entities Similarly

In *ANR Storage v. FERC*, the D.C. Circuit set aside a FERC action as arbitrary and capricious because FERC failed to explain its disparate treatment of a petitioner's similarly situated competitor.[46] Typically, FERC prefers that natural gas companies charge cost-based, rather than market-based, rates to their customers.[47] To use market-based rates, a company must show that it "lacks power in the relevant markets."[48] Market power, in turn, depends on a geographically bounded assessment of the company's market share, among other factors.[49] The petitioner in this case, ANR Storage, requested a market-based rate, arguing that its 16% market share for working gas and 15% for daily deliverability met the condition for lack of marker power.[50] FERC denied the request based on other market factors, like "lack of current competitors" and ANR Storage's status as a "strong incumbent" in the market.[51] The court found no fault with FERC's factor analysis and corresponding conclusion.[52] However, ANR Storage argued that FERC's ruling was inconsistent with several earlier actions, and the court found one of these comparisons persuasive.[53] Seven years prior to the ANR Storage request, ANR's competitor, DTE Energy Company, requested a market-based rate because of its 18% market share for working gas and 17% for daily deliverability in the same market.[54] The court reasoned that, under the APA, FERC had a "statutory duty . . .

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44. The D.C. Circuit Court has over 130 relevant cases listed, about triple the number of *stare decisis* case as the U.S. Court of Appeals for the Ninth Circuit. *See* E.H. Schopler, *Comment Note,* Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies, 29 A.L.R.2d 1126 (1961).

45. David M. Cooper, *The Role of the D.C. Circuit in Administrative Law*, 32 APP. PRAC. J., no. 2, 2013, at 2. Several statutes give the D.C. Circuit Court the authority to review FERC actions regardless of the petitioner's citizenship. *See* 15 U.S.C. § 717r(b) (2021); 16 U.S.C. § 825l(b) (2021); 28 U.S.C. § 2349 (2021).

46. ANR Storage Co. v. FERC, 904 F.3d 1020 (D.C. Cir. 2018).

47. *Id.* at 1022. Companies determine "cost-based" rates by adding a predetermined markup to their costs in acquiring and delivering the product to customers. "Market-based" rates are set at the highest price that customers are willing and able to pay. When a market-based rate would be higher than its corresponding cost-based rate, the company would have higher profits by charging the former rather than the later.

48. *Id*. (citing N. Nat. Gas Co. v. FERC, 700 F.3d 11, 13 (D.C. Cir. 2012)).

49. *Id.* at 1023.

50. *Id.*

51. *ANR Storage*, 904 F.3d at 1023 (quoting *ANR Storage*, 153 FERC ¶ 61,052 (2015)).

52. *Id.* at 1024.

53. *Id.* at 1024–25.

54. *Id*. at 1024.

to provide some reasonable justification for any adverse treatment relative to similarly situated competitors."[55] Because ANR Storage and DTE Energy "hardly seem dispositively different," FERC had to "provide some reasonable justification" in order to reject ANR Storage's rate request.[56] Concluding that FERC failed in its statutory duty, then, the court held that FERC's treatment of ANR Storage was arbitrary and capricious.[57]

The D.C. Circuit also found a FERC action to be "arbitrary and capricious" under the APA in *West Deptford Energy v. FERC*, 766 F.3d 10 (D.C. Cir. 2014).[58] In that case, the petitioner, an electricity generator, applied to FERC to connect to a regional electric transmission organization.[59] Typically, after applying, generators must wait several months for a review before receiving admission into the "interconnection queue" and access to the grid.[60] Tariffs, the FERC-approved governing documents for regional transmission organizations, specify transmission rates for electricity and other related services and, therefore, greatly affect the financial transactions between the generators and transmission organizations.[61] Thus, changes to those tariffs can raise questions about which transmission and services rates and charges apply to a new customer: the rates associated with the application date, the joining date, or some other time.[62] In several earlier cases, FERC insisted that a tariff rate correspond to the date on which the relevant agreement was filed with FERC, even if the customer originally applied to the transmission organization before that rate went into effect.[63] In *West Deptford*, however, FERC allowed a transmission organization to apply an earlier rate associated with the petitioner's application rather than the later filing rate, as in the previous cases.[64] Noting the "sharp contrast" with the earlier cases, the court scorned FERC's treatment of the petitioner as "the very essence of unreasoned and arbitrary decision-making."[65]

2. When is an Agency's Prior Order Considered to be Agency Precedent?

The D.C. Circuit Court's concern for similar treatment raises a question about the scope of "similarly situated" entities available for comparison—namely, when are cases seemingly involving similar facts considered precedential? In *San Diego*

55. *Id*. at 1025.

56. *ANR Storage*, 904 F.3d at 1025.

57. *Id*. at 1028.

58. 766 F.3d at 17, 22.

59. *Id.* at 15.

60. *Id.* at 13–14.

61. *Id.* at 13.

62. *See e.g., id.* at 12, 18.

63. *West Deptford Energy*, 766 F.3d at 19–20 (referencing *MidAmerican Energy Co*., 116 FERC ¶ 61,018 P 13 (2006); *Midwest Indep. Transmission Sys., Inc. (MISO I)*, 114 FERC ¶ 61,106 P 70 (2008); *Midwest Indep. Transmission Sys. Operator, Inc. (MISO IV)*, 129 FERC ¶ 61,060 P 62 n.120 (2009); *Midwest Indep. Transmission Sys. Operator, Inc. (MISO V)*, 131 FERC ¶ 61,165 P 32 (2010); *Midwest Indep. Transmission Sys. Operator, Inc. (MISO VI)*, 138 FERC ¶ 61,199 P 42 (2012)).

64. *West Deptford Energy*, 766 F.3d at 18–19; *PJM Interconnection*, 139 FERC ¶ 61,184 (2012).

65. *West Deptford* Energy, 766 F.3d at 19, 22.

Gas, a petitioner challenged a rejection of its application for FERC's Abandonment Incentive program, which permits utilities to recover their full costs for certain abandoned or canceled infrastructure projects.[66] FERC rejected the application, saying that granting it would have reimbursed the petitioner for past investments rather than encouraging new investments, as the Abandonment Incentive program aimed to do.[67] As in *ANR Storage* and *West Deptford*, the petitioner noted at least two earlier cases in which FERC treated others in like circumstances favorably.[68] In those cases, contrary to its self-proclaimed policy aims, FERC funded "pre-order costs" and effectively reimbursed capital investments.[69] The contrast, the petitioner argued, rendered FERC's rejection of the petitioner's Abandonment Incentive application "arbitrary and capricious."[70] Surprisingly, the court did not agree and instead stressed that earlier FERC actions do not necessarily qualify as precedents, particularly when "no party filed a protest."[71]

The Court explained that "'[i]n the absence of protests,' the Commission's decision to approve rate increases does not amount to 'policy or precedent.'"[72] Moreover, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."[73] In other words, under *San Diego Gas*, a petitioner attempting to prove a FERC action arbitrary-and-capricious may only invoke the earlier cases of "similarly situated" entities that have faced protests while under FERC's jurisdiction.[74] This limitation saves FERC from paying homage to unrecorded history—uncontested cases with no "clearly asserted propositions of fact, law[,] or policy"—and ensures that challenges to FERC actions find their grounding in earlier resolutions of "pertinent issues."[75]

The D.C. Circuit's decision in *San Diego Gas* to restrict "similarly situated" cases to those involving protests drew a sharp dissent from Judge Randolph, which is discussed below.[76] However, arguably, the holding finds support in FERC's earlier reasoning as well as the theoretical correspondence between the arbitrary-and-capricious test and the court's doctrine of *stare decisis*.[77] For example, in

66. *San Diego Gas*, 913 F.3d at 130. *See also* 18 C.F.R. § 35.35(d)(1)(vi).

67. *San Diego* Gas, 913 F.3d at 135 (citing 18 C.F.R. § 35.35(d)(1)(vi)).

68. *Id.* at 141–42; 904 F.3d at 1024–25; *West Deptford*, 766 F.3d at 19–20.

69. *San Diego Gas*, 913 F.3d at 141–42; *Pacific Gas & Elec. Co.*, 137 FERC ¶ 61,193 (2011); *Southern Cal. Edison Co.*, 137 FERC ¶ 61,252 (2011).

70. *San Diego Gas*, 913 F.3d at 141.

71. *Id.* at 142.

72. *Id.* (quoting Gas Transmission Nw. Corp. v. FERC, 504 F.3d 1318, 1320 (D.C. Cir. 2007)).

73. *Id.* (quoting Webster v. Fall, 266 U.S. 507, 510 (1925)).

74. *Id. Cf.* Judge Randolph's dissent, *id.* at 148 (applying the APA language of "similarly situated" to challenge the consistency of this case and *ANR Storage*).

75. *Balt. Gas & Elec. Co.*, 954 F.3d at 287–88 (J. Williams, dissenting).

76. *San Diego Gas*, 913 F.3d at 142–48.

77. *Gas Transmission Nw. Corp.*, 504 F.3d at 1320 (describing FERC's refusal to regard unprotested cases as precedential as "eminently reasonable" (citing 117 FERC ¶ 61,146 at 61,786 (2006))); *San Diego Gas*, 913 F.3d at 142 (saying that, without the court's attention to the relevant issue, a decision does not qualify as precedent (quoting *Webster*, 266 U.S. at 511)).

Nevada Power Company, 113 F.E.R.C. ¶ 61,007 (2005), a utility argued that a peer had received more favorable treatment from FERC under similar circumstances, but FERC considered its action in the earlier case to have been an "inadvertent[] allow[ance]," saying that the earlier case neither raised, contested, nor discussed the germane issue.[78] Accordingly, FERC refused to acknowledge the earlier case as precedent.[79] Likewise, in *Webster v. Fall*, 266 U.S. 507, (1925), the Supreme Court held that, in the federal judicial system, it is the courts' treatment of considered issues, and not merely a correspondence of circumstances, that are "so decided as to constitute precedents."[80] Thus, the standard for intra-agency *stare decisis* imposed on FERC in *San Diego Gas* arguably resembles the agency's self-imposed standard as well as the standard for *stare decisis* used by federal courts.[81] Furthermore, the majority opinion in *San Diego Gas* held that this practice—treating as precedential only protested cases containing on-point reasoning—concurred with the holding in *ANR Storage* because, in *ANR Storage*, "[t]he sole underlying issue was squarely presented and necessarily resolved by the agency."[82] In sum, the D.C. Circuit's rule under *San Diego Gas* seems to require FERC to follow the precedent set by its own reasoning and holdings but only when that reasoning has featured expressly in protested adjudications.

C. FERC's Normalization Requirement and Rectifications of Resulting Problems

When a utility makes a capital investment, the method it uses to depreciate its new asset has a material impact on its tax liability, reducing its taxes in the early years of the asset and increasing its taxes later.[83] Tax codes allow for a few different depreciation methods, including "straight line," "flow through," and "normalization."[84] In the flow through method, once common with utilities, tax savings due to accelerated depreciation pass on to customers immediately.[85] With the normalization depreciation method, utility companies bank some of their early tax savings in dedicated "deferred tax" accounts instead of passing that savings directly to customers, and use it to cover later tax expenses.[86] While customers face a slightly higher initial rate than with the flow through method, they eventually

78. *Nevada Power Company*, 113 FERC ¶ 61,007, at 61,014 (2005).

79. *Id*.

80. 266 U.S. at 511.

81. 913 F.3d at 142.

82. *Id. See also ANR Storage Co*., 153 FERC ¶ 61,052, at P 97 (2015).

83. Eugene F. Bringham & Timothy J. Nantell, *Normalization Versus Flow Through for Utility Companies Using Liberalized Tax Depreciation*, 49 ACCT. REV. 436, 436 (1974).

84. *Id. See also Summary of Statement No. 109*, FINANCIAL ACCOUNTING STANDARDS BOARD, https://www.fasb.org/summary/stsum109.shtml (last visited Oct. 4, 2020).

85. Bringham & Nantell, *supra* note 83, at 439; JOINT COMMITTEE ON TAXATION, APPLICABILITY OF THE NORMALIZATION REQUIREMENTS OF THE INTERNAL REVENUE CODE TO CONSOLIDATED TAX SAVINGS ADJUSTMENTS 4–5 (Sept. 6, 1991) [hereinafter COMMITTEE ON TAXATION].

86. Bringham & Nantell, *supra* note 83, at 436; COMMITTEE ON TAXATION, *supra* note 85, at 4–5.

benefit from the normalization method, because the company's ongoing tax savings stabilizes at a better rate.[87] Consequently, FERC generally requires utilities to use the normalization method.[88]

1. Reasonable Accommodations for Tax Deferred Anomalies

By statute, FERC limits public utilities' rates to "just and reasonable" levels.[89] Rates predict and partially determine returns, so they often require correction in case of policy changes or unexpected events.[90] Under the tax normalization method, corrections include remedying excesses and deficiencies in tax deferred accounts.[91] When such irregularities arise, FERC requires the affected utility, "within a reasonable period of time," to "mak[e] up deficiencies in or eliminate[e] excesses in their deferred tax reserves."[92]

In the case of new FERC rules or changes in the tax code, the utility must make appropriate changes "in the applicant's next rate case following applicability of the rule."[93] FERC's insistence that utilities give up the flow through method in favor of normalization in the early 1970s created systematic deficiencies among utilities' tax deferred accounts.[94] To correct this problem, in 1978, FERC introduced the "*South Georgia* method," which allows a utility to recover accumulated losses in a tax deferred account by distributing a compensatory rate increase for that loss over the remaining lifetime of the corresponding depreciating asset.[95] By 1983, the D.C. Circuit regarded the *South Georgia* method as the conventional "reasonable accommodation" for rectifying anomalies in tax deferred accounts.[96]

87. Bringham & Nantell, *supra* note 83, at 440–43 (discussing some of the advantages of the normalization method using computer simulations). *See also* COMMITTEE ON TAXATION, *supra* note 85, at 7.

88. 18 C.F.R. § 35.24(b)(1) (2020); *Accounting for Income* Taxes, FERC Docket No. AI93-5-000 (Apr. 23, 1993) (making the normalization method required practice for fiscal years after Dec. 15, 1992). *See also* Public Sys. v. FERC, 709 F.2d 73, 75 (D.C. Cir. 1983) (mentioning that FERC spent the twenty years indecisive about the benefits of the normalization method before permitting it as a general policy in 1976).

89. 16 U.S.C. § 824d(a).

90. Bringham & Nantell, *supra* note 83, at 440.

91. *Balt. Gas & Elec. Co*, 954 F.3d at 281; Order No. 144, *Regulations Implementing Tax Normalization for Certain Items Reflecting Timing Differences in the Recognition of Expenses or Revenues for Ratemaking and Income Tax Purposes*, FERC STATS. & REGS. ¶ 30,254, 31,519 (1981), 46 Fed. Reg. 26,613, 26,635 (1981) (to be codified at 18 C.F.R. pt. 2) [hereinafter Order No. 144].

92. Order No. 144, *supra* note 91, at 26,635.

93. *Id.* at 26,614.

94. Memphis Light, Gas and Water Div. v. FERC, 707 F.2d 565, 569 (D.C. Cir. 1983).

95. *PJM Interconnection*, 161 FERC ¶ 61,163, at P 6 n.10 (2017) ("Under the South Georgia method, a calculation is taken of the difference between the amount actually in the deferred account and the amount that would have been in the account had normalization continuously been followed. This difference is collected from ratepayers over the remaining depreciable life of the plant that caused the difference. When the deferred account is fully funded at the end of this transition period, the annual increment ceases.").

96. *Memphis Light*, 707 F.2d at 572.

2. Later Accommodations for Earlier Anomalies

Despite the urgency conveyed in FERC's rules, some companies have recovered accumulated losses in tax deferred accounts years after the originating anomaly. For example, after PPL Electric Utilities Corporation (PPL) waited four years, FERC permitted it "to recover a deferred income tax liability that is currently unfunded due to a Pennsylvania Public Utility Commission decision to flow-through to customers certain income taxes benefits."[97] Similarly, Duquesne Light Co., which also postponed its switch from flow through to normalization tax deferment methods due to Pennsylvania Public Utility Commission policies, excluded its tax deferred amounts from a 2006 rate application, so it applied to recuperate those losses with its next application seven years later in 2013.[98] FERC responded favorably to the proposal, which followed the *South Georgia* method, by amortizing over the remaining life of all its transmission assets.[99] Thus, while utilities have incurred some losses due to changes from flow-through to normalization methods, as well as from other tax-related anomalies, FERC and its utility companies have a forty-year history of ameliorating those losses.

D. Procedural History for Baltimore Gas and Electric

Baltimore Gas and Electric (BGE) incurred an income tax deferred account deficiency over an eleven-year period from 2005 to 2016.[100] In part, the loss arose because of a FERC settlement in 2006 that prevented BGE from including tax deferred amounts in its rate calculations and from increasing its rates before 2009.[101] By the time BGE approached FERC about recovering those losses, they had accumulated to about $38 million.[102] BGE applied for a rate increase to recover that amount via the *South Georgia* method; however, FERC rejected the BGE proposal, saying that BGE should have proposed the increase in an earlier, 2005 rate filing.[103] BGE requested a rehearing, which FERC denied with a lengthy explanation.[104] From there, in the case of interest for this Note, BGE petitioned the D.C. Circuit Court under the APA for a review of the FERC order only to be denied its requested relief a second time.[105] Since then, BGE has requested a rehearing from the D.C. Circuit, but the Court declined.[106]

97. *PPL Electric Utilities Corp.*, Letter Order, FERC Docket No. ER12-1397 (May 23, 2012).

98. *PJM Interconnection*, FERC Docket Nos., ER17-528-000, ER17-528-001, at 21 (Dec. 18, 2017) (citing *Duquesne Light Co.*, FERC Docket No. ER13-1220 (Apr. 26, 2013)).

99. *Duquesne Light Co.*, FERC Docket No. ER13-1220 (Apr. 26, 2013).

100. *Balt. Gas & Elec. Co.*, 954 F.3d at 281.

101. *PJM Interconnection*, 161 FERC ¶ 61,163, at P 12.

102. *Balt. Gas & Elec. Co.*, 954 F.3d at 281. In 2019, Baltimore Gas and Electric reported $360 million in net income and a total cash flow of $748 million. Exelon Corp., Annual Report (Form 10-K) 56, 199 (Dec. 31, 2019).

103. *PJM Interconnection*, 161 FERC ¶ 61,163, at P 18; *PJM Interconnection*, FERC Docket Nos., ER17-528-000, ER17-528-001, at 8, 15.

104. *PJM Interconnection*, 164 FERC ¶ 61,173 (2018).

105. *Balt. Gas & Elec. Co.*, 954 F.3d at 287.

106. Balt. Gas & Elec. Co. v. FERC, 2020 U.S. App. LEXIS 13480 (D.C. Cir. 2020).

In its FERC application and in its FERC rehearing request, BGE argued that earlier rate increases for four utilities constitute precedent for FERC to grant delayed recoveries of losses related to tax deferred accounts.[107] These four are PPL and Duquesne, mentioned above, plus Virginia Electric & Power Company (VEPCO) and Midcontinent Independent System Operator (ITC).[108] BGE claimed that VEPCO and ITC both corrected ongoing deficits and recovered earlier losses.[109] In response, FERC denied the precedential relevance of all four cases.[110] First, pointing out that three of BGE's references were "delegated letter orders"—that is, orders issued by authority delegated to FERC staff rather than by any of the five FERC Commissioners—FERC asserted that such orders do not amount to Commission precedent.[111] Second, regarding VEPCO and ITC, FERC interpreted its records differently from BGE, saying that FERC neither considered nor approved plans from these two companies to recuperate past losses related to their tax deferred accounts.[112] PPL and Duquesne, on the other hand, did recover tax deferred losses, but FERC distinguished these cases from BGE by saying that PPL and Duquesne incurred their losses by transitioning to the normalization tax depreciation method, whereas BGE's loss arose due to a moratorium and settlement.[113]

III. ANALYSIS

BGE filed a petition for review with the D.C. Circuit on the grounds that FERC's rejection of the BGE application to recover its tax-deferred losses was arbitrary-and-capricious.[114] The court held for FERC, but its analysis of FERC's obligations to follow its own precedent raises a question about the precise nature of that precedent, as well as a question about whether the Court consistently decided two earlier cases, *ANR Storage* and *San Diego Gas*.[115]

In *Baltimore Gas and Electric v. FERC*, BGE first argued that its attempt to recover its tax deferred losses accorded with its 2006 settlement agreement with FERC and FERC Order No. 144.[116] The Court responded that, under the doctrine of *Chevron* deference, FERC had broad authority to interpret the language of the settlement agreement as well as its own regulations.[117] Accordingly, it accepted

107. *PJM Interconnection*, FERC Docket Nos., ER17-528-000, ER17-528-001, at 21–23.

108. *Id*.

109. *Id*.

110. *PJM Interconnection*, 164 FERC ¶ 61,173 at P 28.

111. *Id.* ("[D]elegated letter orders do not establish binding Commission precedent.") (citing 161 FERC ¶ 61,163, at P 22; *South Carolina Elec. & Gas Co.*, 162 FERC ¶ 61,024, at P 19 and n.45 (2018); *Millennium Pipeline Co.,* 145 FERC ¶ 61,088, at P 10 n.11 (2013); *Westar Energy, Inc.*, 124 FERC ¶ 61,057, at P 26 (2008); *Norwalk Power,* 122 FERC ¶ 61,273, at P 25 (2008)).

112. *Balt. Gas & Elec. Co.*, 954 F.3d at 281; 161 FERC ¶ 61,163 at P 22.

113. *PJM Interconnection*, 164 FERC ¶ 61,173 at P 28–29.

114. *Balt. Gas & Elec. Go.*, 954 F.3d 279 (D.C. Cir. 2020).

115. *Compare id.* at 290 (J. Williams, dissenting) and *San Diego Gas,* 913 F.3d 127, 142–48 (J. Randolph, dissenting).

116. *Balt. Gas & Elec. Co.*, 954 F.3d at 281–82; *see also* Order No. 144, *supra* note 3.

117. *Balt. Gas & Elec. Co.*, 954 F.3d at 282.

FERC's argument that Order No. 144, instead of providing for BGE's recovery of its tax deferred amounts, prohibited postponed recovery under the order's "matching principle," which requires that the tax advantages of an expense benefit the same utility customers who pay for that expense.[118] Thus, the Court found no arbitrary or capricious FERC actions when considering its treatment of BGE in light of FERC's own regulations on tax deferment practices.[119]

Having pronounced BGE's first argument a resounding failure, the Court turned to the petitioner's second argument, which compared FERC's earlier determinations to its adverse treatment of BGE, much like the approach from *ANR Storage* and *West Deptford*.[120] As in BGE's FERC hearings, the utility pointed to four cases—*PPL*, *Duquesne*, *VEPCO*, and *ITC*—and asserted that, in each, FERC allowed a utility to recover losses associated with efforts to correct anomalies in its tax deferred accounts and, thereby, failed to follow its own precedent when it stopped BGE from doing the same.[121] FERC gave a three-fold response.[122] First, as it stated in the orders on review, FERC maintained that three of the four cases cited by BGE were issued via delegated letter and therefore were not precedential.[123] Second, FERC maintained that none of the four cases were precedential because none "squarely presented" or "necessarily resolved" the relevant issue in a protest, as required under *San Diego Gas*.[124] Finally and alternatively, FERC argued that it adequately distinguished the cases cited by BGE by showing that BGE was not "similarly situated" when FERC rejected its application.[125]

The Court rejected FERC's first two arguments but held in favor of FERC on the basis of its third argument. The Court agreed that the four cases cited by BGE could be distinguished from BGE's circumstances so as to disqualify them as precedent for purposes of BGE's case.[126] Two of the BGE-cited cases, *ITC* and *VEPCO*, did not involve the recuperation of accumulated losses, as supposed by BGE in its protest.[127] The other two, *PPL* and *VEPCO*, featured anomalies that arose in changes from flow-through to normalization methods, whereas BGE's tax deferred losses originated from its earlier FERC settlement.[128]

Because the court affirmed FERC's orders based on the agency's third rationale, its rejection of FERC's first two arguments will likely be considered dicta,

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118. Order No. 144, *supra* note 3, at 26,618 ("the tax reducing effect of an expense is allocated to the same customers who pay the expense during the same period").

119. *Balt. Gas & Elec. Co.*, 954 F.3d at 282.

120. *Id*. at 283.

121. *Id.* at 285.

122. *Id*. at 284–87.

123. *Id*. at 284.

124. *Balt. Gas*, 954 F.3d at 285; 913 F.3d at 142.

125. *Balt. Gas & Elec. Co.*, 954 F.3d at 286.

126. *Id*. at 286–87 ("FERC fares far better on its final argument").

127. *Id*. at 286.

128. *Id*. at 286–87 (citing *PJM Interconnection*, FERC Docket Nos., ER17-528-000, ER17-528-001, at P 28 n.86 ("Specifically, PPL's and Duquesne's Formula Rates represented the utilities' change from the Pennsylvania Public Utility Commission's flow-through requirements. BGE began its full normalization in 1976.")).

i.e, unnecessary to disposition of the case.[129] Nevertheless, the Court's treatment of FERC's second argument raises questions about—or an inconsistency in—the D.C. Circuit's holdings in *ANR Storage*, requiring FERC to treat as precedent all its prior orders, contested or not, and in *San Diego Gas*, restricting that requirement to those cases involving protests.[130]

A. Delegated Letter Orders are Precedential

In response to FERC's first argument, denying that delegated actions amount to precedent, the D.C. Circuit discussed that FERC should not disown its decisions by delegating its authority to its staff.[131] It reasoned that agency actions taken via authority delegated to staff simply are actions of the agency.[132] If the delegated action fails to reflect the purposes of the agency, the agency may take corrective action, say, by overriding it.[133] However, so long as the agency allows the action to stand, the agency takes responsibility.[134] FERC's approach of removing delegated staff actions from the sphere of precedent, and so from arbitrary-and-capricious review, violates the United States Code and the D.C. Circuit's case law.[135] While this result is commonsensical—inducing FERC to either internally review or else prepare to defend the actions of its staff—it is worth noting that FERC has several otherwise-unrelated decisions riding on the contrary assumption, that is, that actions taken via "delegated letter" are protected from judicial review, even if they depart from the agency's precedent.[136] Given the D.C. Circuit's dictum that FERC may not use delegation as an excuse for inconsistency, moving forward, the Court may maintain that even delegated agency actions can be set aside for arbitrariness and capriciousness.[137]

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129. *See also Judicial dictum*, Black's Law Dictionary (11th ed. 2019) ("An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision and therefore not binding even if it may later be accorded some weight.").

130. *Balt. Gas & Elec. Co.*, 954 F.3d at 290 (J. Williams, dissenting).

131. *Id.* at 284 ("[T]he Commission cannot lend its authority to staff and then disclaim responsibility for the actions they take.").

132. *Id.* at 285 (quoting 18 C.F.R. § 385.1902(a) ("Any staff action . . . taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing.")).

133. *Id.*

134. *Id.*

135. *Id.* at 284–85 (citing 5 U.S.C. §§ 551(6), (13); Sprint Nextel Corp. v. F.C.C., 508 F.3d 1129, 1131 n.3 (D.C. Cir. 2007)).

136. *See PJM Interconnection*, 164 FERC ¶ 61,173 at P 28 n.83 (citing November 16 Order, 161 FERC ¶ 61,163 at P 22; *South Carolina Elec. & Gas Co.*, 162 FERC ¶ 61,024 at P 19 and n.45 (2018); *Millennium Pipeline Co.,* 145 FERC ¶ 61,088 at P 10 n.11 (2013); *Westar Energy, Inc.*, 124 FERC ¶ 61,057 at P 26 (2008); *Norwalk Power,* 122 FERC ¶ 61,273 at P 25 (2008)).

137. *Balt. Gas & Elec. Co.*, 954 F.3d at 284.

B. FERC Must Explain Inconsistencies

Surprising the dissenting Judge Williams, the Court also rejected the second FERC argument, which claimed that the cases cited by BGE failed to provide adequate reasoning to be invoked as the agency's precedent.[138] FERC explained that the earlier cases were uncontested and, therefore, under *San Diego Gas*, fell short of binding precedent.[139] Looking to *ANR Storage*, however, the dicta of the *Baltimore Gas* majority contended that "the duty to explain inconsistent treatment is incumbent on the agency and cannot be waived by the decisions of third parties."[140] This duty, the Court continued, quoting the earlier case, is "imposed by the APA and owed to all *other* regulated parties."[141] In other words, following *ANR Storage*, the Court construed the APA as grounding a positive duty for regulatory agencies to justify "any adverse treatment relative to similarly situated competitors."[142] Similarly, the majority invoked the rule from *West Deptford*, referring to the agency's duty to explain any lack of parity in its actions as "textbook administrative law."[143] Thus, according to the Court, FERC owed BGE a decision that was consistent with its treatment of "similarly situated" entities or else a reasonable and thorough explanation for its change in policy.[144]

In response to FERC's invocation of *San Diego Gas*, the majority opinion acknowledged that, in that case, the Court allowed FERC to reject San Diego Gas & Electric's application for an investment incentive even though it gave other utilities more favorable treatment.[145] The majority also acknowledged that, in *San Diego Gas*, it permitted the disparity because the more favorably treated cases failed to qualify as precedents.[146] However, contrary to FERC's reading of the *San Diego Gas* decision—a section that the majority referred to as "dicta"—the Court insisted that, in *San Diego Gas*, it maintained the rule requiring "FERC to explain inconsistencies" in its treatment of the utilities that it regulates.[147] Rather, the Court continued, in that case, FERC succeeded in accounting for the differences between its treatment of San Diego Gas & Electric and the more favorably treated applicants.[148] Thus, the *Baltimore Gas and Electric* court saw the *San Diego Gas* decision as irrelevant to its reasoning and chose, instead, to apply the

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138. *Balt. Gas & Elec. Co.*, 954 F.3d at 285. *Cf. id.* at 287, 290 (J. Williams, dissenting).

139. *Id*. at 285.

140. *Id*.

141. *Id*. (quoting *ANR Storage*, 904 F.3d at 1025).

142. *Id.* (quoting *ANR Storage*, 904 F.3d at 1025).

143. *Balt. Gas & Elec. Co.*, 954 F.3d at 283, 286 (quoting West Deptford Energy, v. FERC, 766 F.3d 10, 20 (D.C. Cir. 2014)). Apart from FERC-related cases, the majority cites to Point Park Univ. v. N.L.R.B., 457 F.3d 42, 50 (D.C. Cir 2006), which indicates that federal agencies owe the courts detailed reasons for their actions in anticipation of the courts' review.

144. *West Deptford*, 766 F.3d at 20 (quoting Colorado Interstate Gas Co. v. FERC, 146 F.3d 889, 893 (D.C. Cir. 1998)).

145. *Balt. Gas & Elec. Co.*, 954 F.3d at 285.

146. *Id*.

147. *Id.* (citing *San Diego Gas & Elec. Co.*, 913 F.3d at 142). *Cf. id.* at 290 (J. Williams, dissenting).

148. *Id.* at 286.

"longstanding principle[]" of requiring agencies to "reasonably explain disparate treatment of similarly situated parties."[149]

C. Was the Baltimore Gas Opinion Wrong about San Diego Gas?

The Court's analysis on the narrow issue of whether FERC bore a duty to explain its different treatment of BGE received a sharp dissent from Judge Williams (dissenting as to the majority's analysis on that issue), who opined that FERC's reading of the *San Diego Gas* case was correct and the majority's reading—which it "mysteriously dismissed as dicta" —was wrong.[150] Rather, as Judge Williams read *San Diego Gas*, the rule restricting precedent to contested cases explained why the court held with FERC in that case, namely, because, while San Diego Gas was treated differently from the utilities in the cases San Diego Gas cited, those cases involved no protests so "we required no explanation for the difference."[151] Similarly, in the *Baltimore Gas* case, Williams explained, "FERC's duty to distinguish the orders cited by BGE . . . turns on whether the pertinent issues were 'squarely presented and necessarily resolved by the agency.'"[152] Because the cases cited by BGE did not face protests that caused FERC to deal with the "pertinent issues," Williams said that FERC bore no duty to distinguish them from BGE's case.[153] The proper scope of for arbitrary-and-capricious review, Williams said, only includes protested cases; otherwise, FERC would have to accept as precedent cases that fail to address outright the issues in question.[154]

Furthermore, Judge Williams insisted that the *ANR Storage* rule does not conflict with the rule from *San Diego Gas*, because *ANR Storage* involved a hotly contested matter between competitors.[155] That is, whereas the majority took the reasoning from *ANR Storage* to require FERC to explain any disparate treatment whatsoever, Williams understood it to apply only in the special circumstance that the differing treatments involve "indistinguishable competitors."[156] Since the cases cited by BGE did not involve BGE's direct competitors, Williams concluded that the rule from *ANR Storage* did not apply.[157] Similarly, the dissenting judge regarded the Court's earlier holding in *West Deptford Energy* as addressing an especially egregious FERC behavior of refusing to explain its actions.[158] In other

149. *Id.* at 285–86.

150. *Balt. Gas & Elec. Co.*, 954 F.3d at 287, 290 (J. Williams, dissenting as to Part III) ("in *San Diego Gas & Electric Company v. FERC* (mysteriously dismissed as 'dicta' by the majority, *see* Maj. Op. 285), the court acknowledged that FERC had treated like parties differently; FERC denied San Diego Gas recovery of costs incurred before the agency issued an order granting recovery of those costs, whereas FERC had granted similar pre-order costs for other utilities.").

151. *Balt. Gas & Elec. Co*., 954 F.3d at 290.

152. *Id*. at 287 (citing *San Diego Gas*, 913 F.3d at 142).

153. *Id*. at 287.

154. *Id.* at 287–88.

155. *Id*. at 288.

156. *Balt. Gas & Elec. Co*., 954 F.3d at 285, 290.

157. *Id.* at 287.

158. *Id.* at 289.

words, according to Judge Williams, neither *ANR Storage* nor *West Deptford Energy* should have had much bearing on *Baltimore Gas and Electric*, since the earlier cases involved extraordinary injustices of FERC's playing favorites and stonewalling, whereas the latter case featured a utility attempting to create a loophole for itself.[159]

D. Was San Diego Gas Wrongly Decided?

Suppose for a moment that Judge Williams' dissent is correct in its reading of *San Diego Gas*.[160] That is, suppose that *San Diego Gas*, rightly interpreted, restricts the scope of precedential agency cases to those in which the agency answered an on-point protest.[161] In that case, one might, with Judge Williams, consider *Baltimore Gas and Electric* to have been wrongly decided, or one might regard the earlier *San Diego Gas* case to have been in the wrong.[162]

In *San Diego Gas*, Judge Randolph's dissent argued that the case was decided wrongly on three distinct lines of reasoning.[163] The last of these three addressed the same rule that Judge Williams later applied in his dissent in *Baltimore Gas*.[164] There, Judge Randolph accused FERC of failing to follow its own internal precedent.[165] In the administrative hearings leading up to the case before the D.C. Circuit, FERC had dismissed earlier cases cited by San Diego Gas & Electric as not-precedential because those cases were decided without extensive reasoning regarding the issues at stake in the petitioner's case.[166] However, Judge Randolph considered FERC's failure to generate records with the relevant reasoning to be all the worse for FERC, treating it as a violation of the APA and FERC's obligations denoted in *ANR Storage*.[167] He concluded in strong language that the Court's holding was "contrary to the law of this circuit."[168] The two dissenting judges, then, shared an interpretation of the *San Diego Gas* case while disagreeing about the merits of that case.

E. Policy Implications of Baltimore Gas

The majority opinion in *Baltimore Gas and Electric*, Judge Williams's dissent in that case, and Judge Randolph's dissent from *San Diego Gas* suggest at least three ways to understand FERC's APA-imposed obligation to follow its own precedent—that is, its duty to treat similar entities similarly. First, the majority

159. *Id.* at 288 ("[T]he majority's approach invites a litigant to dive deep into the records of past agency cases, find one with facts loosely comparable to its own case, and then require the agency to adjudicate, *ex post* and likely on a limited record, whether and to what extent each past case is like the present one.").

160. 913 F.3d at 142.

161. *Id.*

162. *See id.* at 142–48 (J. Randolph, dissenting).

163. *Id.*

164. *Id.* at 147.

165. *Id.*

166. *San Diego Gas*, 913 F.3d at 142 (majority opinion).

167. *Id.* at 147–48.

168. *Id.* at 147.

opinion from *Baltimore Gas* considered the rule from *ANR Storage* to be consistent with the reasoning from *San Diego Gas*.[169] The *Baltimore Gas* majority decided in favor of FERC because FERC fulfilled its duty under *ANR Storage* by "adequately explain[ing]" the "inconsistencies" cited by BGE.[170] Those BGE-cited cases did not qualify as "policy or precedent" because FERC distinguished them from the case at bar, not because those cases were altogether exempt from precedential status.[171] Furthermore, the majority denied that *San Diego Gas* restricted FERC's intra-agency case law to protested cases only, so it simply applied the rules from *ANR Storage* and *West Deptford Energy* requiring FERC to "provide a reasoned explanation for contrary treatment of 'similarly situated' parties" in the name of predictability and coherency.[172] Thus, according to the *Baltimore Gas* majority, FERC must explain every plausible allegation of inconsistent treatment, even when the alleged inconsistency involves a FERC case that did not face protests.[173]

Second, in his dissent, Judge Williams understood the majority's reasoning in *Baltimore Gas* to be in conflict with the rule from *San Diego Gas*.[174] The *San Diego Gas* rule, he thought, would only require FERC to explain itself if the cases cited by BGE were "clearly opposed" and, therefore, decidable in light of "clearly asserted propositions of fact, law or policy" in FERC's records.[175] Judge Williams explained that, under the rule from *San Diego Gas*, not all FERC actions qualify as precedent but only those with detailed reasoning on the issue at hand, typically in response to a third party protest.[176] Furthermore, he saw the rule from *ANR Storage*, requiring FERC to explain alleged inconsistencies, as inapplicable in *Baltimore Gas*, since, unlike *Baltimore Gas*, *ANR Storage* involved a tight comparison between "indistinguishable competitors."[177] In other words, as Judge Williams would have it, FERC need not give "reasonable and coherent explanation[s] for the seemingly inconsistent results" in every plausible case, but only when the FERC action cited as precedent has survived a protest and, hence, contains on-point reasoning.[178]

Third and finally, extending Judge Randolph's approach from his dissent in *San Diego Gas*, one might agree with the *Baltimore Gas* majority's application of

169. *Balt. Gas & Elec. Co.*, 954 F.3d at 285.

170. *Id*.

171. *Id.* (quoting *San Diego Gas*, 913 F.3d at 142).

172. *Id*. at 285–86.

173. *Id.* at 286.

174. *Balt. Gas & Elec. Co.*, 954 F.3d at 287 (J. Williams, dissenting) ("I believe that under the circumstances the Commission was under no obligation to distinguish the orders, and therefore don't reach the question of whether its efforts to do so were good enough.").

175. *Id.*

176. *Id.*

177. *Id.* at 288–89 (J. Williams, dissenting) ("Unlike in *ANR Storage*, there is no suggestion here that any of the firms said to have been treated more favorably than BGE was in any way its competitor.").

178. *Id.* at 287 (J. Williams, dissenting). *Cf. id*. at 286 (majority opinion) ("If a party plausibly alleges that it has received inconsistent treatment under this same rule or standard, we must consider whether the agency has offered a reasonable and coherent explanation for the seemingly inconsistent results.").

the rule from *ANR Storage* while regarding the rule from *San Diego Gas* as bad law.[179] In his dissent, Judge Randolph, considered the majority's holding in *San Diego Gas* to be in direct conflict with the rule from *ANR Storage*, which required FERC to "provide some reasonable justification for treating [similarly situated entities] differently."[180] The *San Diego Gas* majority, he thought, wrongly excused FERC from its duty to explain why it treated San Diego Gas & Electric differently from another utility.[181] To make such exceptions to the rule from *ANR Storage* simply because an earlier case was not protested or because FERC failed to commit its reasoning to paper, Judge Randolph thought, would undermine the APA-mandated practice of judicial review.[182] Thus, on this approach, one might view the holding in *Baltimore Gas* as a non-binding assessment that a judicial misstep had occurred in *San Diego Gas*, even if the majority opinion in *Baltimore Gas* misinterpreted the holding in *San Diego Gas*.[183]

1. *San Diego Gas* Attempted to Narrow the Rule from *ANR Storage*

The majority opinion in *Baltimore Gas* insists that the rule from *San Diego Gas* requires FERC to explain inconsistencies.[184] However, both FERC and Judge Williams thought that the rule from *San Diego Gas* should have excused FERC from needing to explain supposed inconsistencies between its treatment of BGE and arguably-similar entities.[185] Moreover, Judge Randolph, in his *San Diego Gas* dissent, expressed a worry that, in that case the majority had excused FERC from needing to explain a supposed inconsistency between its treatment of San Diego Gas and Electric and an arguably-similar entity.[186] Thus, the *Baltimore Gas* majority's understanding of the rule from *San Diego Gas* runs contrary to the interpretations of two senior circuit judges and a federal agency. Furthermore, the *Baltimore Gas* majority made no attempt to explain the language from *San Diego Gas* that gave rise to the interpretive disagreement—that is, the language requiring FERC cases cited as precedent to "squarely present" and "necessarily resolve" the pertinent issues in response to third party protests.[187] In sum, there is good reason to think that the *Baltimore Gas* majority erred in construing the rule from *San Diego Gas* as in harmony with the broad requirement from *ANR Storage* for FERC to explain its alleged inconsistencies.

179. *Balt. Gas & Elec. Co.*, 954 F.3d at 285 (J. Williams, dissenting).

180. *San Diego Gas*, 913 F.3d at 147–48 (J. Randolph, dissenting).

181. *Id.* at 147 (J. Randolph, dissenting).

182. *Id.* at 148 (J. Randolph, dissenting).

183. *See Balt. Gas & Elec. Co.*, 954 F.3d at 286 (majority opinion) (recognizing the FERC obligation to "reasonably explain disparate treatment of similarly situated parties" as "settled law").

184. *Id.* at 285.

185. *Id.* at 285, 287.

186. *San Diego Gas*, 913 F.3d at 147.

187. *Balt. Gas & Elec. Co.*, 954 F.3d at 285 (majority opinion); *see San Diego Gas*, 913 F.3d at 142 ("in the absence of protests, the Commission's decision to approve rate increases does not amount to policy or precedent"); *see also Balt. Gas & Elec. Co.*, 954 F.3d at 287 (J. Williams, dissenting).

2. Challenging the Policy Concerns of *San Diego Gas*

Most likely, Judge Williams was correct in his opinion that the majority's understanding of *San Diego Gas*, or an overturning of *San Diego Gas*, invites, or would invite, prospective petitioners to "dive deep into the records of past agency cases," although he also feared that petitioners would "find one [past case] with facts loosely comparable to its own case, and then require the agency to adjudicate, *ex post* and likely on a limited record, whether and to what extent each past case is like the present one."[188] No doubt, such an approach places a heavy administrative burden on FERC to develop and maintain detailed (perhaps painstakingly detailed) records of its decisions and on the courts (and the D.C. Circuit in particular) to review FERC's actions.[189] Moreover, the ever-growing case history of FERC and other agencies means that, without major policy changes, the body of records into which an adversely treated party might "dive deep" grows quickly and indefinitely, locking courts and involved parties into a judicial puzzle of ever-increasing complexity.[190]

However, someone thinking along the lines of Judge Randolph, might see this administrative burden in a positive light.[191] After all, the APA means to ensure justice and consistency, not to conserve agency or court resources.[192] The administrative burden to which Judge Williams objects falls on courts and agencies because the APA makes the courts responsible for correcting inconsistent federal agency actions.[193] And courts happen to identify agency actions in need of correction, in part, by comparing them to earlier, analogous cases—thereby revealing the boundaries of agency policies and regulations.[194] Restricting earlier cases so as to prohibit certain comparisons effectively licenses FERC to act inconsistently "so long as it avoids explaining its actions."[195] Thus, regardless of the apparent administrative advantages afforded by the rule in *San Diego Gas*, by limiting the scope of intra-agency precedent only to protested cases, the rule could stifle arbitrary-and-capricious judicial reviews, contrary to the substance and aims of the

188. *Id.* at 288 (J. Williams, dissenting) (continuing, "[A] requirement that an agency address its past vermicelli, either by reconciling its current decision with the earlier record or by applying *Fox Television*, would tie courts and agencies in linguistic knots for little or no benefit.").

189. Some understand the burden of generating, maintaining, and applying such records to be an aim imposed on federal agencies by the APA. *See* Gillian E. Metzger, *Embracing Administrative Common Law, GEO. WASH. L. REV.* 1294 (2012); E. H. Schopler, *supra* note 44.

190. *Balt. Gas & Elec. Co.*, 954 F.3d at 288 (J. Williams, dissenting).

191. *San Diego Gas*, 913 F.3d at 147–48 (Randolph, J., dissenting) ("FERC has a 'statutory duty—imposed by the APA and owed to all other regulated parties—to provide some reasonable justification for any adverse treatment relative to similarly situated competitors.'") (quoting ANR Storage v. FERC, 904 F.3d 1020, 1025 (D.C. Cir. 2018)).

192. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as 5 U.S.C.A. §§ 551-559).

193. *West Deptford*, 766 F.3d at 24.

194. 2 Am. Jur. 2d *Administrative Law* § 477 (2020).

195. *San Diego Gas*, 913 F.3d at 290 n.8 (J. Randolph, dissenting).

APA.[196] By this way of thinking, the relief granted to agencies and courts by restricting the body of intra-agency case law eligible for the courts' consideration comes at the cost of shirking the statutory duty to ensure justice and consistency.[197]

Additionally, Judge Williams likely overstated his worry that, by allowing petitioners to "deep dive" into the entire body of earlier agency cases, the majority opinion in *Baltimore Gas & Electric* threatens to "tie courts and agencies in linguistic knots for little or no benefit to the rule of law."[198] Even if Judge Randolph rightly concluded that the *San Diego Gas* majority erred, the other case from which Judge Williams quoted, *Cooper Industries v. Aviall Services*, 543 U.S. 157 (2004), remains good law and prohibits pseudo-precedential "[q]uestions which merely lurk in the record."[199] In *Cooper Industries*, the U.S. Supreme Court disregarded an earlier case as not-precedential because the opinion in that case treated only one of two relevant statutes, not the combination of statutes at issue.[200] That is, even without the rule from *San Diego Gas*, the rule from *Cooper Industries* ensures that cases used by courts to detect arbitrary and capricious agency actions remain on point, not merely "loosely comparable," as Judge Williams supposed.[201] Thus, the only safeguard lost by ignoring, overturning, or otherwise interpreting *San Diego Gas* is the wooden rule that limits FERC precedent to cases that have been protested.[202]

IV. CONCLUSION

The majority's reasoning in *Baltimore Gas* offers little reason to think that it rightly applied the rule from *ANR Storage* while ignoring the limitations that might have been imposed by the rule from *San Diego Gas*.[203] Rather, perhaps ironically, the dissenting Judge Williams's persuasive interpretation of the rule from *San Diego Gas* suggests that the *Baltimore Gas* Court would have been more consistent if it had overturned the decision in *San Diego Gas* for the reasons addressed by Judge Randolph.[204] If the D.C. Circuit and other courts rely on the *Baltimore Gas* decision, then, going forward, FERC cannot excuse its inconsistencies by citing to *San Diego Gas*.[205] On the contrary, the majority opinion in *Baltimore Gas* supports the expectation that the D.C. Circuit will continue to enforce and to construe

196. *Id.* at 147 (J. Randolph, dissenting) ("The majority's attempt to write off FERC's prior orders is contrary to the law of this circuit.").

197. *Id.*

198. *Balt. Gas & Elec. Co.*, 954 F.3d at 287–88 (J. Williams, dissenting).

199. *Id.* at 287 (J. Williams, dissenting) (quoting Cooper Indus. v. Aviall Servs., 543 U.S. 157, 170 (2004)).

200. *Cooper Indus.*, 543 U.S. at 170 ("But we did not address the relevance, if any, of Key Tronic's status as a PRP or confront the relationship between §§ 107 and 113.").

201. *Id. Cf. Balt. Gas & Elec. Co.*, 954 F.3d at 288 (J. Williams, dissenting).

202. *San Diego Gas*, 913 F.3d at 142.

203. *Balt Gas & Elec. Co.,* 954 F.3d at 285–86.

204. *San Diego Gas*, 913 F.3d at 147–48 (J. Randolph, dissenting).

205. *Balt. Gas & Elec. Co.*, 954 F.3d at 286 ("*San Diego Gas* did not, and could not have, altered settled law.").

broadly the longstanding requirement expressed in *ANR Storage*.[206] For now, federal agencies bear a positive duty to justify "any adverse treatment relative to similarly situated competitors."[207]

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206. *Id.* at 285.

207. *Id.* (quoting *ANR Storage*, 904 F.3d at 1025).

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