UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-15285

CALIFORNIA DEPARTMENT OF WATER RESOURCES,

Plaintiff-Appellee,

v.

POWEREX CORP., a Canadian Corporation, dba POWEREX ENERGY CORP.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR THE PROVINCE OF BRITISH COLUMBIA AS AMICUS CURIAE SUPPORTING APPELLANT

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INTEREST OF THE *AMICUS CURIAE*

The nature of the Province of British Columbia's interest in this case is in some sense the legal question at issue. The Province intends to elaborate, in particular, its relationship with Appellant Powerex, which contends (correctly, in the Province's view) that it is an "agency or instrumentality" of British Columbia under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 ("FSIA"). Powerex and Appellee California Department of Water Resources have consented to the filing of this brief.

In 1964 the Province of British Columbia created a new Crown corporation, BC Hydro and Power Authority ("BC Hydro"). BC Hydro is one of Canada's largest electric utilities; it is responsible for the generation and distribution of energy to an area containing more than 94% of the Province's population. BC Hydro, *Our System*, *at* http://www.bchydro.com. Powerex was created in the 1980s as a wholly owned subsidiary of BC Hydro, the purpose of which is to sell the Province's wholesale electricity products outside the Province, for the benefit of British Columbians. To that end, Powerex actively markets electric power in the western United States. Powerex's cross-border trading relationships make it vulnerable to lawsuits in the United States, the financial burden of which will ultimately be borne by BC Hydro and the Province, Powerex's only owners.

The FSIA was intended to protect foreign governments from the indignity of litigation in the United States, and to that end provides that a "foreign state shall be immune from the jurisdiction of the Courts of the United States and of the States" except in certain circumstances. 28 U.S.C. § 1604. A "foreign state" includes any "agency or instrumentality of a foreign state." *Id.* § 1603(a). In cases where an exception to immunity applies, the FSIA recognizes the principle of mutual respect between sovereign nations by extending certain procedural privileges to the "agency or instrumentality" of a foreign government, including the rights to litigate in federal rather than state court, and to a trial without a jury.

This case arises from the erroneous denial of the FSIA's protections to Powerex. Relying on this Court's decision in *California* v. *NRG Energy Inc.*, 391 F.3d 1011 (9th Cir. 2004), petition for cert. filed, 74 U.S.L.W. 3050 (July 15, 2005) (No. 05-85), another case involving Powerex, the district court concluded that Powerex is not an "agency or instrumentality" of the Province. See ER 153-63. But the district court misread *NRG Energy* in some respects, and in other respects applied portions of that case that were wrongly decided. Indeed, *NRG Energy* refused Powerex organ status under the FSIA based on a mere handful of factual circumstances (many of which it appraised inaccurately, as the Province can attest) divorced from their context. *NRG Energy*'s approach represents a marked departure

from the flexible, contextual approach previously followed by this Court and currently followed by the Second, Third, and Fifth Circuits.

NRG Energy vastly expands the ability of plaintiffs to seek compensation in U.S. state courts in relation to business transactions with foreign governments. And because *NRG Energy* created intra- and sister-circuit conflicts, it also injected a highly undesirable level of uncertainty into FSIA doctrine. The *amicus* Province has a substantial interest in seeing the restoration of this Court's contextual test as well as a correct application of the FSIA to the Province's organ, Powerex.

INTRODUCTION AND SUMMARY OF ARGUMENT

Decisions like the one under review threaten to strip foreign sovereigns of the immunities and procedural protections supplied by the FSIA and leave them to the mercies of state courts. The FSIA is intended to ensure that foreign sovereign immunity decisions are based on legal, rather than foreign policy, grounds, allowing foreign governments to arrange their affairs according to a uniform set of legal guidelines. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). To achieve that goal, the FSIA grants foreign states immunity from suit in American courts, subject to specified exceptions. If an exception applies, as the "commercial activities" exception undisputedly does here, the FSIA provides that federal district courts shall have original jurisdiction and that any trials in federal court will be without a jury. If

any suit is filed against a foreign sovereign in a state court, the government has the right to remove the case to federal court. 28 U.S.C. § 1441(d). This provision is designed "to remove any local bias that might be present at a jury trial in a state court." *Davis* v. *McCourt*, 226 F.3d 506, 511 (6th Cir. 2000).

A "foreign state" includes any "agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The FSIA defines an "agency or instrumentality of a foreign state" as:

> any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

28 U.S.C. § 1603(b). Among these criteria, the parties dispute only Section 1603(b)(2), which confers FSIA protection if a company is "an organ of a foreign state" *or* if "a majority of [the company's] shares" are owned by a foreign state.[1]

Powerex satisfies both prongs of Section 1603(b)(2). First, a majority of its shares are held by the Province through BC Hydro, the Province's statutory agent.

[1] The parties also dispute whether the amended complaint arises under federal law, a question *amicus* Province does not address.

The district court's rejection of this ground for conferring FSIA protection on Powerex relied on a misinterpretation of *NRG Energy* and *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), neither of which addressed the question whether direct, majority ownership can be established through principles of agency law. Indeed, the district court's reading of those cases directly conflicts with Congress's intent to confer instrumentality status on entities, such as Powerex, owned in no portion by private interests.

Second, Powerex is an "organ" of British Columbia because it serves a public purpose, is actively supervised by the Province, and holds special status in Canada. *NRG Energy* constrained the district court to reject this basis for conferring instrumentality status on Powerex, but for reasons that an en banc panel of this Court should reject. *NRG Energy* interpreted the FSIA in a mechanical manner, refusing Powerex status as an "organ of a foreign state," even though Powerex's sole purpose is to perform international treaty and trade obligations for the Province's benefit, Powerex is completely owned by the Province (through BC Hydro), and Powerex is subject to special treatment under Canadian law. *NRG Energy* conflicts with prior decisions of this Court and decisions of the Second, Third, and Fifth Circuits. Those decisions have adopted a broad, fact-sensitive approach to determining organ status,

under which Powerex would constitute an organ of the Province and would be entitled to remove to federal court.

ARGUMENT

I. Powerex Is An Instrumentality Of A Foreign State Because It Is Wholly Owned By A Statutory Agent Of British Columbia.

BC Hydro is a statutory agent of the Province (Hydro and Power Authority Act, R.S.B.C., ch. 212 (1996), § 3(1)), and its property is owned by the Province. *Westbank First Nation* v. *British Columbia Hydro & Power Auth.*, 154 D.L.R. (4th) 93, ¶¶ 12-13 (C.A. 1997) (property of BC Hydro is held as "the interest of the Crown in right of British Columbia and immune from taxation"), aff'd, 3 S.C.R. 134 (1999).[2] Consequently, the Province wholly owns Powerex through its statutory agent, BC Hydro, and the Province owns all of Powerex's shares. Thus, agency law principles operate to make Powerex an instrumentality of the Province. See 28 U.S.C. § 1603(b)(2).

The district court concluded, incorrectly, that *NRG Energy* foreclosed Powerex's agency-law argument. But *NRG Energy* merely interpreted *Dole Food* to hold that *indirect* ownership by a foreign state does not, on that fact alone, make the indirectly owned subsidiary an entity "a majority of whose shares or other ownership

[2] As further proof that Powerex's property is property of the Province, Powerex is not subject to taxation. Constitution Act, 1867, R.S.C. 1985, § 125.

interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2). Neither *NRG Energy* nor *Dole Food* considered whether *direct* ownership can be established through principles of agency law. Because the Province agrees with the elaboration of those principles in Powerex's brief, it will not discuss them further here. Instead, the Province will explain why applying agency-law principles here would support Congress's clear intent to provide the FSIA's protections to companies whose ownership contains no private component.

Congress anticipated that courts applying the FSIA's majority-ownership test would encounter only two categories of companies: (1) those "entirely owned by a foreign state" and (2) those owned at least in part by "private interests." H.R. Rep. No. 94-1487 at 15, 94th Cong. 2nd Sess. (1976), *reprinted at* 1976 U.S.C.C.A.N. 6604, 6614. Any entity falling into the first category is necessarily an instrumentality under Section 1603(b)(2), but an entity falling into the latter category is an instrumentality only if private interests account for less than 50% of the entity's ownership:

> [Section 1603(b)(2)] requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is *divided between a foreign state and private interests*, the entity will be deemed to be an

> agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

Id. (emphasis added).

The distinction drawn by Congress—between companies owned entirely by foreign states, on the one hand, and those partially owned by private interests, on the other—recognizes that a foreign state's immunity interests are highest when no private interests are present. By contrast, private ownership interests can water down a state's immunity interests, and this watering down occurs exponentially over multiple tiers of ownership. This issue is what separates this case from *Dole Food*.

Dole Food involved a severe watering-down problem. A foreign state wholly owned one company, which owned a majority of shares in another company, which owned a majority of shares in a third company, which owned a majority of shares in a fourth company. 538 U.S. at 473-74. Private ownership interests thus diluted foreign-state interests at each tier, which threatened to complicate any effort to describe precisely the foreign state's ownership interest in the subsidiaries. On these facts, *Dole Food* held that a corporate subsidiary could not claim instrumentality status "where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary." *Id.* at 471. Otherwise the Court would have had to adopt "a control test that mandates

inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares." *Id.* at 477.

No watering-down problem exists here. "Private interests" own *no portion* of Powerex. Rather, *all* of Powerex's shares are held by a *single* statutory agent of the Province, namely BC Hydro. Given Congress's intent that Section 1603(b)(2)'s instrumentality test could be flunked only by companies whose ownership included private interests, *Dole Food* should not be read to foreclose Powerex's reliance on agency-law principles to validate its ownership by the Province. See *Filler* v. *Hanvit Bank*, 378 F.3d 213, 219 (2d Cir. 2004) ("[T]he purpose of the FSIA . . . is to grant governmental, not private corporate immunity . . . ."), cert. denied, 125 S. Ct. 677 (2004). Indeed, *Dole Food* stressed that the FSIA must be interpreted consistently with "*elementary principles of corporate law*." 538 U.S. at 477 (emphasis added); see *id.* at 476 (rejecting veil-piercing argument that relied on "depart[ing] from the general rules regarding corporate formalities"). Here, those principles regard the Province as Powerex's direct owner.

Given that *NRG Energy*'s holding was directly adverse to Powerex, the district court here understandably—but incorrectly—felt constrained by *NRG Energy* to ignore Powerex's agency-law arguments. But the district court exercised an over-abundance of caution. In fact, affirming the district court's ruling would require this

Court to discard *Dole Food*'s instruction to follow clear principles of corporate law; over-read *Dole Food*'s refusal to adopt a multi-tiered "control" test for determining majority ownership; and negate Congress's intent to confer instrumentality status on companies, such as Powerex, whose ownership is unalloyed by private interests.

II. *NRG Energy* Short-Circuited The Required Contextual Test For Determining Whether A Foreign Entity Is An "Organ" Under The FSIA, And Created Intra- And Sister-Circuit Conflicts.

Although *NRG Energy* did not dictate the district court's ruling under Section 1603(b)(2)'s majority ownership prong, it did, regrettably, require the district court to hold that Powerex is not an organ within the meaning of the FSIA. This panel should recommend en banc review of *NRG Energy*'s holding, however, because it departed from the contextual analysis that this Court previously applied for determining organ status under the FSIA, an approach also adopted by three federal circuits. See *Gates* v. *Victor Fine Foods*, 54 F.3d 1457, 1460-61 (9th Cir. 1995) (in determining that company was an agent of Canada, examining day-to-day control, purposes served by the entity, and Provincial laws and regulations). Consequently, the Province of British Columbia and other foreign states now lack predictable and consistent jurisdictional guidelines.

The term "organ" in the FSIA is to be interpreted broadly and flexibly. *Gates*, 54 F.3d at 1460. Accordingly, courts do not "mechanically" apply a closed universe

of factors "or require that all [factors] support an organ-determination." *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000). They instead conduct searching, fact-intensive inquiries designed to discern whether an entity "engages in a public activity on behalf of the foreign government." *EOTT Energy Operating Ltd. P'ship* v. *Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) (internal quotation marks omitted). Those inquiries address, at a minimum, the reasons for the entity's creation, the entity's treatment under foreign law, the level of supervision and control exercised by the foreign government, and whether the entity holds exclusive rights to something in the foreign country. See *Filler*, 378 F.3d at 217; *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 206-214 (3d Cir. 2003); *Kelly*, 213 F.3d at 846-848.

Before *NRG Energy*, this Court followed the fact-sensitive approach endorsed by the Second, Third, and Fifth Circuits. Under that approach, an entity's "involvement in commercial affairs" or enjoyment of "some autonomy from the foreign government" were not dispositive facts, so long as other facts showed that the entity was engaged in a public activity on behalf of a foreign government. See *EIE Guam Corp.* v. *Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 641 (9th Cir. 2003) (organ status is appropriate in light of "district court's key assertion" that the entity served a public purpose); *EOTT Energy*, 257 F.3d at 997 (organ status is

appropriate even where the government is "not involved in the day-to-day activities" of the entity).

In contrast to this fact-sensitive approach, *NRG Energy* gave an abbreviated, counterfactual picture of the relationship among Powerex, BC Hydro, and the Province. *NRG Energy* relied on a handful of facts stripped of their context, namely that Powerex was not run or staffed by civil servants, was not immune from suit in Canada, and "was not wholly owned by the government" —an apparent reference to the ownership of Powerex's shares by BC Hydro. 391 F.3d at 1026. The Court also incorrectly concluded that Powerex exhibited a "high" degree of independence from BC Hydro, was not supported financially by the Province, and did not hold any special privileges or duties under Canadian law. *Id.*

There is virtually no overlap between the kinds of facts held to be dispositive in *NRG Energy* and those held to be dispositive in previous Ninth Circuit decisions. Whereas *EIE Guam* held that facts pertaining to an entity's purpose were "key," 322 F.3d at 641, *NRG Energy* took the unprecedented step of denying organ status despite "evidence that [Powerex] serves a public purpose." 391 F.3d at 1026. Similarly, whereas *Gates* held that the Province of Alberta's lack of "involve[ment] in the day-to-day activities of Alberta Pork does not mean that it is not exercising control over the entity," 54 F.3d at 1461, *NRG Energy* inferred a lack of control from the fact that

Powerex "was not run by government appointees . . . [or] staffed with civil servants." 391 F.3d 1026.

But *NRG Energy*'s most glaring departure from the contextual approach followed elsewhere was its conclusion that Powerex's ownership structure cut *against* conferring organ status on Powerex. Specifically, *NRG Energy* counted against Powerex the observation that Powerex "was not wholly owned by the government." 391 F.3d at 1026.[3] That analysis, which apparently looked only as far as one tier of ownership—given that the Province does wholly own Powerex through BC Hydro—transposed *Dole Food*'s majority-ownership analysis to the organ prong of Section 1603(b)(2).

This transposition is unquestionably flawed; looking to whether an entity seeking organ status is "wholly [and directly] owned by the government" creates *a presumption against organ status* because the "organ" test is applied only to entities that do not satisfy *Dole Food*'s test for direct, majority ownership. It is no surprise, therefore, that *NRG Energy*'s approach directly conflicts with previous decisions of this Court and the Third Circuit. See *EOTT Energy*, 257 F.3d at 997 ("In *Corporacion Mexicana de Servicios Maritimos v. M/T Respect*, 89 F.3d 650[, 655] (9th Cir. 1996),

[3] Oddly, *NRG Energy* likened the ownership structure here to the watered-down public ownership structure presented in *Dole Food*. 391 F.3d at 1026.

we held that a Mexican oil refinery was an organ where it was entirely owned by the government [through a direct subsidiary of the government]."); *USX Corp.*, 345 F.3d at 213 ("Because Ireland has complete control over all shares of ICAROM, albeit through a tiered arrangement . . . , this factor weighs in favor of a finding of organ status.").[4] This intra- and sister-circuit conflict operated here and in *NRG Energy* to turn a factor that should have favored Powerex into one that worked heavily against it.

Thus, instead of applying a fact-sensitive test broadly construing organ status, *NRG Energy* applied a fact-selective test with one hand placed on the scale against Powerex. By ignoring the circumstances of Powerex's creation, the responsibilities Powerex exclusively carries out on behalf of and in coordination with BC Hydro and the Province, the special privileges Powerex enjoys under Canadian law, and the Provincial employment policies imposed on Powerex (see pp. 19-30, *infra*), *NRG Energy* carried out only a partial analysis under the FSIA. And *NRG Energy* ignored the Province's ownership and control of Powerex in applying the organ test, based on

[4] *USX Corp.* carefully explained that an entity's failure to satisfy the majority ownership prong of Section 1603(b)(2) should not count against that entity under the organ prong. 345 F.3d at 213 n.22 (view that tiered ownership structure weighed in favor of a finding of organ status "is not inconsistent with *Dole*, a case in which the Supreme Court was confronted with a discrete question of statutory interpretation that does not arise under the organ prong of section 1603(b)(2)").

reasoning that will counsel against conferring organ status in every case. *NRG Energy*'s limited analysis has rudely disturbed the standing expectations of the Province, which believed that Powerex would be entitled to the FSIA's protections because it performs public activities on the Province's behalf.

III. *NRG Energy* Created An Imbalance With Canadian Law And Threatens U.S.-Canada Trade Relations.

Because Powerex has asked that the panel recommend reconsideration of *NRG Energy* en banc, and because en banc review is discretionary, the Province offers its perspective on the broad public importance of the erroneous *NRG Energy* decision. Specifically, the Province addresses the legal imbalance the decision creates, and the harm that decision and this litigation threaten in U.S.-Canadian relations.

A. Like The Second, Third, And Fifth Circuits, Canada Applies A Broad, Contextual Approach To Sovereign Immunity.

NRG Energy also stands in stark contrast to the contextual approach that Canada has adopted to the doctrine of foreign sovereign immunity. Canada's State Immunity Act, R.S.C., ch. S-18 (1985) ("SIA"), was largely patterned after the American model. *Re Canada Labour Code*, 2 S.C.R. 50, ¶ 13 (Can. 1992). Like the FSIA, the SIA grants a "foreign state" immunity from the jurisdiction of Canadian courts, defining a "foreign state" to include "any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state." R.S.C.,

ch. S-18, § 2. An "agency of a foreign state" is "any legal entity that is an organ of the foreign state but that is separate from the foreign state." *Id.*

In defining the outer limits of SIA application, Canadian courts have been recognized the delicate compromises and balances inherent to the doctrine of international sovereign immunity. As the Ontario Court of Appeals concluded, "the use of the broad word 'organ' in the [State Immunity] Act, which was promulgated to codify the application of the doctrine [of sovereign immunity] in Canada, indicates the intention of [P]arliament to protect individuals and institutions who act at the request of a foreign state in situations where that state would enjoy sovereign immunity." *Walker (Litig. Guardian of)* v. *Bank of New York, Inc.*, 16 O.R. (3d) 504, ¶ 10 (C.A. 1994) (holding that the Bank and its employees were "organs" of the United States); see also *Jaffe* v. *Miller*, 13 O.R. (3d) 745, ¶¶ 31-32 (C.A. 1993) (holding that functionaries of an agency of a foreign government were entitled to immunity); *P.(R.)* v. *Westwood*, 2003 B.C.S.C. 1279, ¶ 19 (B.C. 2003) (same).

Taking a cue from their American counterparts, Canadian courts have carefully applied sovereign immunity with an eye to the circumstances of an entity's creation, as well as its responsibilities and obligations, recognizing that foreign governments often use complex structural or organizational models with which Canadian courts may not be familiar. See, *e.g.*, *Re Canada Labour Code*, 2 S.C.R. at ¶ 36 (the

"lesson" to be drawn from the American FSIA in applying sovereign immunity is that "the proper approach to characterizing state activity is to view it in its *entire context*") (emphasis added); see also *Sarafi* v. *The "Iran Afzal,"* 2 F.C. 954, ¶¶ 6, 9 (Tr. Div. 1996) (holding that a shipping line created by the Iranian government to hold the assets of a nationalized line was an "agency" of Iran).

As the Supreme Court of Canada has held, "a contextual approach is the only reasonable basis of applying the doctrine of . . . immunity." *Re Canada Labour Code*, 2 S.C.R. at ¶ 30. By emphasizing the importance of a context-specific approach, Canada has rejected mechanical analyses as inappropriate to the doctrine of foreign sovereign immunity. *Id.* at ¶¶ 26, 30 (rejecting "rigid dichotomies" as "not helpful" in sovereign immunity analysis). *NRG Energy* therefore put this Court out of step not only with the Second, Third, and Fifth Circuits, but with the international trend toward a fair and contextual analysis of foreign sovereign immunity.

B. *NRG Energy* Threatens To Disrupt Canada's Relations With The United States.

Exposing Powerex to state-court litigation exacerbates an ongoing trade dispute, thus aggravating the tensions the FSIA seeks to mitigate. Some background on this litigation is helpful to explain the stakes here. For helping to keep the lights on in California during the State's 2000-01 energy crisis, the Province and BC Hydro have

been rewarded with a string of lawsuits alleging that Powerex engaged in Enron-style market manipulation tactics. The U.S. Federal Energy Regulatory Commission has rejected those charges, *Powerex Corp.*, 106 F.E.R.C. P 63,019, 2004 WL 346501, at *65157 (Feb. 24, 2004), so it is small wonder that plaintiffs are eager to get those accusations in front of state court rather than federal court.

These lawsuits essentially seek to punish Canadian Crown corporations for assisting California during the 2000-01 blackouts. BC Hydro's manager of communications, Elisha Moreno, has stated that the California lawsuits against Powerex have made the State a "much less desirable place to do business." Derrick Penner, *BC Hydro branch sued for $1 billion*, VANCOUVER SUN, at 1-2, May 19, 2005 (internal quotation marks omitted), *available at* Westlaw, PapersCan. Consequently, Powerex has declined several invitations to bid on providing peaking electrical power supply to California this summer and next. Don Whiteley, *Relationship rift between Powerex and U.S. customers is bad news for California*, VANCOUVER SUN, at 1, 3, May 25, 2005. BC Hydro and Powerex also declined to participate in a recent emergency power supply simulation exercise run by California. *Id.* at 1. Worse, in addition to the perception in Canada that California is ungrateful for its assistance in the blackout, the State still owes the Province about $280 million for that power. *Id.* at 2.

Allowing this lawsuit to proceed before a state court, when Powerex is so clearly a sovereign entity entitled to remove the case to federal court, could have far-reaching negative ramifications for trade between Canada and the United States, not just for Powerex. Province-owned utilities dominate the U.S.-Canada electricity trade, the three largest of which are Ontario Power Generation, Hydro-Québec and BC Hydro.[5] The volume of this trade is astounding. In 2004, Canada's energy exports to the United States totaled $50 billion, including 96% of America's electricity imports.[6]

The test adopted below substantially broadens the range of state court lawsuits that can now be brought against foreign states. Consequently, Canadian Crown corporations, including electricity authorities, are now vulnerable to state court litigation. The chilling effect that this Court's decision will have on Canada-United States trade relations counsels strongly in favor of en banc consideration here.

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[5] Dep't of Energy, Energy Information Administration, *Country Analysis Briefs: Canada* (Feb. 2005), *available at* http://www.eia.doe.gov.

[6] North America Bureau, Department of Foreign Affairs & International Trade, Embassy of Canada, *Canada: The largest energy supplier to the United States, at* http://www.dfait-maeci.gc.ca.

IV. The District Court Was Constrained To Ignore Facts Clearly Demonstrating Powerex's Entitlement To FSIA Protection.

NRG Energy itself never addressed the full panoply of facts relevant to Powerex's organ status under the FSIA, and its precedential authority constrained the district court likewise to ignore them. Thus, the district court was required to conclude, based on no underlying factual findings, that "'[Powerex's] high degree of independence from the government of [the Province], combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law[,] dictate . . . that Power[e]x is not an organ of [the Province]." 1/13/06 Order at 9-10 (quoting *NRG Energy*, 391 F.3d at 1026) (ER 161-62). Below are facts that the court below would have been required to consider under a fact-sensitive organ test. With respect, these are facts that *NRG Energy* itself either ignored or misapprehended.

A. Powerex Was Created For A Public Purpose.

NRG Energy essentially ignored the circumstances surrounding Powerex's birth. In 1964 the Province passed what is now called the Hydro and Power Authority Act, R.S.B.C., ch. 212 (1996) ("Hydro Act"), creating a new Crown corporation that came to be known as BC Hydro. See Powerex Corp.'s Request for Judicial Notice in Opposition to Motion to Remand (May 15, 2005) Ex. 2, Declaration of Kenneth G.

Peterson ¶¶ 12, 24 ("Peterson Decl.") (ER 48, 50-51). In the 1980s, the Province undertook a massive restructuring of BC Hydro. As part of this project, Powerex was established in 1988. Powerex, *Quick Facts*, *at* http://www.powerex.com.

Powerex was created for one purpose: to act as the exclusive marketer of surplus power outside of British Columbia, for the benefit of British Columbia's citizens. Peterson Decl. ¶¶ 17-18 (ER 49). As a wholly owned subsidiary of BC Hydro, Powerex is a Crown corporation and satisfies the requirements for a government corporation under the Province's Financial Administration Act ("FAA"), R.S.B.C., ch. 138, § 1 (1996). As such, Powerex is ultimately accountable to the Provincial government, and is subject to certain obligations and responsibilities and entitled to certain rights and benefits under Provincial law that are not applicable to private businesses. See *id.* This structure gave Powerex the flexibility necessary to participate actively in the energy market, while ensuring that the Province would retain control through the series of checks and balances imposed by Provincial law on government corporations.

The Province has also used Powerex for public purposes beyond its primary mandate. In the early 1990s the Province approved Powerex as the vehicle through which to create a domestic power exchange operation, which was intended to promote an efficient domestic market for private power. Peterson Decl. ¶¶ 20-21 (ER 49-50).

And in 1997 the Province passed legislation giving the Provincial government authority to define the terms under which Powerex would supply power to Provincial businesses, to "help ensure that British Columbia's electric power resources contribute to the creation and retention of jobs in British Columbia and to regional economic development." Power for Jobs Development Act, S.B.C., ch. 51, § 2 (1997).

B. British Columbia Has Granted Powerex Exclusive Rights.

Powerex is the sole entity in the Province with the right to market BC Hydro's surplus energy outside of British Columbia, to western Canada and the western United States. BC Hydro is directed, by its sole shareholder, the Province, "through Powerex, [to] continue to be an active participant in extra-provincial energy trading markets."[7] Thus, Powerex works closely with BC Hydro to deliver electricity to the United States. BC Hydro's system of dams and reservoirs allows Powerex to purchase electricity on the open market during non-peak hours when prices are low and sell its own electricity supplies during peak hours.[8]

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[7] Shareholder's Letter of Expectations between The Minister of Energy and Mines (as Representative of the Shareholder, the Government of British Columbia) and the Chair of the British Columbia Hydro and Power Authority, Feb. 2004, *available at* http://www.gov.bc.ca/cas/down.

[8] Wendy Stueck, *U.S. gives Powerex 'exoneration,'* THE GLOBE AND MAIL, at 2, Nov. 1, 2003, *available at* Westlaw, CanadaNP.

Other duties carried out by Powerex underline its essentially public nature and undermine *NRG Energy*'s conclusion that Powerex is just another for-profit company. Specifically, the Province and BC Hydro assigned to Powerex their rights and interests under the Columbia River Treaty in the "Canadian Entitlement," Canada's half-share of surplus power produced on the Columbia River. Peterson Decl. ¶¶ 6-12 (ER 47-48). The Province and BC Hydro also assigned to Powerex the Province's responsibilities under the Skagit River Treaty concerning the transmission of power from the Province to Seattle. *Id.* ¶¶ 28-29 (ER 51-52).

C. Powerex Holds Special Status Under Canadian Law.

Unlike private companies, Powerex does not have to pay federal and Provincial taxes. Constitution Act, 1867, 30 & 31 Vict., ch. 3, *reprinted in* R.S.C. 1985, App. II, No. 5, § 125 ("No Lands or Property belonging to Canada or any Province shall be liable to Taxation"). In addition, Powerex's commercial arrangements are frequently supported by BC Hydro guarantees, which permit Powerex to benefit from BC Hydro's credit rating. Peterson Decl. ¶ 40 (ER 54).[9] As a government corporation, Powerex can receive loans from the Province's Ministry of Finance, and is also

[9] See also British Columbia Utilities Commission, *BC Hydro Revenue Requirement Hearing*, at 1426 (May 26, 2004) ("B.C. Hydro still guarantees the obligations of Powerex.") (statement of Gary Sherlock, BC Hydro's comptroller and vice president of business development), *available at* http://www.bchydro.com.

eligible to have its debt obligations assumed by the Provincial government. FAA, R.S.B.C., ch. 138, §§ 53, 56.3. Powerex also qualifies under Provincial law to receive insurance and risk management services from the Ministry of Finance. *Id.* § 30. The advantages Powerex enjoys by virtue of its relationship to the Province establish that *NRG Energy* was wholly mistaken in concluding that Powerex did not benefit from any "financial support" from the Province or "special privileges or obligations under Canadian law." 391 F.3d at 1026.

D. Powerex Is Subject To Provincial Supervision.

Other facts further demonstrate the degree to which the Province, BC Hydro, and Powerex are intertwined. First, Powerex is subject to numerous statutory restraints, including any regulations and directives passed by the Provincial Treasury Board applicable to government corporations. See, *e.g.*, FAA, R.S.B.C., ch. 138, § 4.1 (in relation to capital expenditures). The Province can also restrict the circumstances in which Powerex can enter banking arrangements, lend or borrow money, or give guarantees and indemnities. *Id.* § 75(1)(a); see also *id.* § 79.3 (prohibition on entering into commodity derivative transactions unless permitted by a Treasury Board regulation and subject to any conditions imposed by such a regulation).

Powerex is also subject to financial disclosure obligations inapplicable to private companies. As a wholly owned subsidiary of BC Hydro, Powerex's financial

information must be included in BC Hydro's statutorily mandated financial disclosures. Financial Information Regulation, B.C. Reg. 371/93, § 1 (1993); see also Budget Transparency and Accountability Act, R.S.B.C., ch. 23, §§ 13, 16 (2000) ("BTAA") (Powerex's activities are included in BC Hydro's service plans and service plan reports required to be made public by the responsible Provincial government minister each fiscal year). Powerex's books can be examined and reported on by the Province. [10] And the Auditor General, an officer of the Provincial Legislature, may, in certain circumstances, be required to report to the Provincial Legislative Assembly on aspects of Powerex's financial operations, including whether Powerex is "operating economically, efficiently and effectively."[11]

Powerex must also comply with Provincial guidelines for public employee compensation, which, according to former BC Hydro chair Brian Smith, have caused Powerex traders to be "hired away by American utilities, which are not subject to the provincially mandated wage guidelines."[12]

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[10] FAA, R.S.B.C., ch. 138, § 8(2)(c)(ii); Financial Information Act, R.S.B.C., ch. 140, § 4 (1996); BTAA, R.S.B.C., ch. 23, § 20.

[11] Auditor General Act, R.S.B.C., ch. 2, § 11(8).

[12] Michael McCullough, *Hydro chief expects $100-million profit,* VANCOUVER SUN, at A4, Mar. 21, 2001, *available at* Westlaw, PapersCan.

The Province also exerts significant control over Powerex's management. The Province's Lieutenant Governor in Council directly appoints BC Hydro's board of directors, which in turn appoints Powerex's board. Peterson Decl. ¶ 35 (ER 53). The Province also has established a BC Hydro risk management committee to outline the criteria for all Powerex transactions and recommend approval of trades falling outside those criteria. *Id.* ¶ 38 (ER 54).

As a practical matter, these controls mean that Powerex's corporate governance is directly accountable to the Province. BC Hydro's most recent annual report, for example, lists eight then-current members of Powerex's board: one was BC Hydro's President and CEO, and six others (including Powerex's chair) were members of BC Hydro's board. BC Hydro, *2005 Annual Report*, at 64, 66 (June 29, 2005). BC Hydro board members also accounted for five of the six positions on Powerex's audit and risk management committee. *Id.* It strains credulity to suppose that BC Hydro board members remove their government appointee caps when making decisions for Powerex.

E. Powerex's Relationship With The Province Directly Implicates The FSIA's Goal Of Respecting Foreign States.

These facts overwhelmingly demonstrate that Powerex acts in the public interest and under the Province's "active supervis[ion]." *Corporacion Mexicana*, 89

F.3d at 654. Powerex's public purpose and interdependence with the Province mean that issues involving Powerex, such as the California lawsuits, necessarily implicate the "sensitivit[ies] of actions against foreign states" that the FSIA's protections are designed to address. H.R. Rep. No. 94-1487, at 32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6631.

Powerex's bottom line, which is of course at stake in this litigation, is inextricably intertwined with politics. Powerex's profits are not "private" profits *per se*; rather, they are consolidated with the profits of BC Hydro.[13] See, *e.g.*, BC Hydro, *2005 Annual Report*, at 89 (June 29, 2005). The Province directs BC Hydro regarding the method for the payment of surplus revenue to the Province, including the consolidation of net income from Powerex.[14] Of course, just as the Province's citizens benefit from Powerex's profits, they also suffer Powerex's business losses. The Province recorded a potential $820 million liability on its books in 2003 to account

[13] Powerex's contributions to Provincial coffers are not trivial. In 2000-01, Powerex helped BC Hydro achieve almost $4.5 billion in revenue, which made up 69% of BC Hydro's total revenue for the 2001 fiscal year. Scott Simpson, *Market fired Powerex bonanza*, VANCOUVER SUN, at 1, May 18, 2002, *available at* Westlaw, PapersCan.

[14] See Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order of the Lieutenant Governor in Council No. 1125, § 3 (Nov. 27, 2003).

for the string of lawsuits in California against Powerex.[15] Powerex's legal costs are likewise absorbed by BC Hydro and, ultimately, the Province. As of 2005, BC Hydro and Powerex had incurred at least $30 million in legal and consulting costs for defending Powerex against the lawsuits.[16]

Because Powerex's profits ultimately belong to British Columbians, how to pursue those profits and what to do with them are questions of public policy. For instance, as befits a company accountable to the public, Powerex follows a "conservative risk profile . . . defined through limits that are regularly reviewed by both the Powerex and BC Hydro Boards of Directors." BC Hydro, *2005 Annual Report*, at 81. Likewise, BC Hydro sets aside revenue (which includes profits from Powerex) in a "rate stabilization account," from which BC Hydro draws in low-profit years to maintain low consumer prices. See BC Hydro, *2001 Annual Report*, at 11 (June 2001). Thus, due in part to "trade activity from Powerex," BC Hydro's consumer rates did not rise from 1993 until 2004, when the British Columbia Utilities

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[15] Michael McCullough, *Olympics brings cheer to otherwise troubled year*, VANCOUVER SUN, at 3, Dec. 31, 2003, *available at* Westlaw, PapersCan.

[16] Paul Harris, *Powerex skirmish with California has cost $30 mil.*, BUSINESS IN VANCOUVER, Issue 828 (Sept. 6-12, 2005), available at http://www.ippbc.com; BC Hydro, *2005 Annual Report*, at 74 ("Operating costs were also higher ($15 million) than forecast mainly due to an increase in Powerex's provision for legal costs to defend the California litigation.").

Commission authorized a modest 4.85% increase.[17] Similarly, in February 2001 the Province ordered BC Hydro to pay $200 rebates to its residential customers. See BC Hydro, *2001 Annual Report*, at 1. These decisions reflect policy concerns, not commercial ones.

Indeed, *NRG Energy*'s holding that Powerex is merely "an independent commercial enterprise" surprised members of the Provincial government, whom the political process holds accountable for Powerex's actions. 391 F.3d at 1026. The Minister of Energy, Mines and Petroleum Resources, in particular, has faced tough questioning from members of the Province's Legislative Assembly about Powerex's conduct, such as a demand that "the minister . . . set the record straight" about outstanding amounts owed Powerex from its California sales,[18] and a request to know "what actions the minister has taken to ensure that B.C. Hydro's domestic customers are not put at risk through the activities of Powerex."[19] Ministers responded by urging

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[17] British Columbia Utilities Commission, *In the Matter of British Columbia Hydro and Power Authority 2004/05 to 2005/06 Revenue Requirements Application and British Columbia Transmission Corporation Application for Deferral Accounts*, at 67 (Oct. 29, 2004), *available at* http://www.bcuc.com; see BC Hydro, *2005 Annual Report*, at 95.

[18] Official Report of the Debates of the Legislative Assembly (Hansard), 36th Parliament, 5th Session, at 17718 (Apr. 9, 2001).

[19] Official Report of the Debates of the Legislative Assembly (Hansard), 34th Parliament, 4th Session, at 11368 (July 24, 1990).

that Powerex's sales to California "should continue" even though Powerex is owed nearly $300 million for sales there;[20] and that "the government, through this ministry, has to establish with finality the broad policy guidelines which cover" Powerex activities that can expose BC Hydro to risk.[21] And the Province's Minister recently assured the Legislative Assembly that "[t]he management of Powerex will make decisions in the best interests of British Columbians, in the best interests of B.C. Hydro and in the best interests of keeping rates low across the province on where to buy electricity."[22]

In refusing to grant organ status to Powerex, *NRG Energy* rejected the premise of these debates, which is that the Province has quite a lot to say about Powerex's conduct. *NRG Energy*'s holding was based on a mischaracterization of the entity and a misunderstanding of its treatment under Canadian laws, as well as the adoption of a flawed legal test in conflict with prior decisions of this and other circuits. It was not based on applying a fact-sensitive doctrine broadly construing organ status under the FSIA.

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[20] Official Report of the Debates of the Legislative Assembly (Hansard), 36th Parliament, 5th Session, at 17718 (Apr. 9, 2001).

[21] Official Report of the Debates of the Legislative Assembly (Hansard), 34th Parliament, 4th Session, at 11368 (July 24, 1990).

[22] Official Report of the Debates of the Legislative Assembly (Hansard), 38th Parliament, 2nd Session, at 3934 (Apr. 24, 2006).

CONCLUSION

For the foregoing reasons, the district court's ruling should be reversed or, in the alternative, *NRG Energy* should be overruled by an en banc panel of this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULES 29(d) and 32(a)(7)(B)

Pursuant to Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the attached Brief for the Province of British Columbia as Amicus Curiae Supporting Appellant is proportionally spaced, has a typeface of 14 points or more, and contains 6,963 words.

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2006, an original and fifteen copies of the Brief for the Province of British Columbia as Amicus Curiae Supporting Appellant were sent via Federal Express to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94103-1526, and two copies were sent for overnight delivery to:

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