

**ORAL ARGUMENT NOT YET SCHEDULED**

**No. 20-1156**

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

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PUBLIC CITIZEN, INC.,

*Petitioner,*

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent.*

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On petition for review of an order of the  
Federal Energy Regulatory Commission

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**BRIEF OF THE ELECTRIC POWER SUPPLY ASSOCIATION AS  
AMICUS CURIAE SUPPORTING RESPONDENT**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties and Amici**

All parties and intervenors appearing before the Federal Energy Regulatory Commission (FERC) and in this Court are listed in Petitioner's opening brief.

The Electric Power Supply Association (EPSA), which appeared before FERC, appears as *amicus curiae* in this Court. Pursuant to Circuit Rule 26.1, EPSA states that it is not a public company, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock. EPSA is a trade association within the meaning of Circuit Rule 26.1(b).

### **B. Rulings Under Review**

References to the rulings at issue appear in Petitioner's opening brief.

### **C. Related Cases**

This case has not previously been before this Court or any other appellate court. *Amicus* is unaware of any related cases currently pending in this Court or in any other court within the meaning of Circuit Rule 28(a)(1)(C).

*/s/ Paul W. Hughes*

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## **GLOSSARY**

EPSA	Electric Power Supply Association
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
MISO	Midcontinent Independent System Operator

## **INTEREST OF *AMICUS CURIAE***

*Amicus curiae* the Electric Power Supply Association (EPSA) is a national trade association representing competitive power suppliers.<sup>1</sup> EPSA advocates on behalf of its members in support of well-functioning competitive wholesale electricity markets, which benefit consumers and power suppliers.

EPSA's members are active participants in the wholesale energy and capacity markets, including the market managed by the Midcontinent Independent System Operator (MISO). Because those markets depend on participants' ability to rely on rates approved by the Federal Energy Regulatory Commission (FERC), EPSA and its members have a significant interest in this case.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

For decades, this Court has authorized FERC to approve market-based rates as “just and reasonable” “rates” under Sections 205 and 206 of the Federal Power Act (FPA). Market-based rates allow parties to set prices that more accurately and efficiently reflect costs and demand, which in turn better signal the need for investments in new resources or maintenance of

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel contributed money to fund preparing or submitting the brief. All parties consented to the filing of this brief.

current resources to meet consumers' energy needs. FERC will authorize a utility to sell electricity at market prices—by granting market-based rate authorization—if FERC determines that the utility does not possess market power or that its market power is adequately mitigated.

Petitioner would take a sledgehammer to this entire regime. It argues that the FPA compels FERC to separately determine *ex post* whether individual *prices* set pursuant to an authorized market-based rate are just and reasonable. This would render meaningless FERC's authorization of market-based rates altogether. As Petitioner sees it, notwithstanding FERC's approval of the market-based rates, FERC may nonetheless later disapprove a transaction that complied with the authorized rate. This would undermine the essential purpose of market-based rates, injecting considerable uncertainty into the marketplace. That would chill investments by sellers and threaten the long-term reliability of the electricity grid.

Properly construed, the FPA does not support Petitioner's extraordinary argument. Governing judicial precedent recognizes that, when a seller acts under previously granted market-based rate authorization, there is a distinction between the "*rate*" and the resulting *price*. It is the *rate*—which encompasses FERC's determination that the applicable rules and procedures adequately monitor and mitigate a seller's market power—to which the FPA's review requirements apply, not the *price*.

To be sure, prices bear on FERC's regulation of rates. FERC requires reporting of actual prices to facilitate market monitoring. This information allows FERC to ensure that sellers are complying with the rate and that the rate itself remains just and reasonable.

Finally, Petitioner draws the wrong lesson from the clearing price resulting from the 2015/2016 Zone 4 auction. The higher price was a natural—and entirely predictable—result of MISO's adoption of a vertical demand curve in its market design. A vertical demand curve yields highly volatile prices: Often, the prices are near zero, but sometimes they reach near the maximum allowable offer price.

The Court should deny the petition for review.

## **ARGUMENT**

### **I. FERC SATISFIES THE FEDERAL POWER ACT BY DETERMINING THAT A MARKET-BASED RATE TARIFF IS JUST AND REASONABLE AND THAT A SELLER COMPLIED WITH THAT TARIFF.**

In the proceedings below, FERC properly determined that Petitioner failed to prove that the rate applied—which encompassed Dynegy's market-based rate authorization and the MISO auction rules<sup>2</sup>—in the 2015/2016

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<sup>2</sup> The former can be understood as encompassing the latter, because market-based rate authorization is conditioned on compliance “with the Commission-approved rules and regulations of the applicable market.” 18 C.F.R. § 35.41(a).

MISO Zone 4 Auction was unjust and unreasonable. Petitioner's complaint (Pet'r Br. at 27) that FERC did not also separately determine whether the specific price that resulted was just and reasonable rests on a profoundly flawed interpretation of the FPA.

**A. Courts have consistently interpreted the “rates” regulated in the FPA as encompassing market-based rates.**

The Federal Power Act vests FERC with the responsibility to ensure that wholesale power “rates” are “just and reasonable.” 16 U.S.C. § 824d(a). Sections 205 and 206 of the Act set forth complementary processes through which FERC exercises that power.

Under Section 205, public utilities file “schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission.” *Id.* § 824d(c). Regulated parties must also provide FERC and the public notice of a rate change. *Id.* § 824d(d). So long as the rate or rate change is just and reasonable, it may go into effect.

Once a rate is on file, FERC retains authority under Section 206 to review whether the rate remains just and reasonable. *Id.* § 824e(a). In a Section 206 proceeding (like this one), the burden of proof rests with FERC or a complainant to demonstrate that the rate is unjust or unreasonable. *Id.* § 824e(b).

This Court and many others have long held that the “rates” that are subject to—and may satisfy—the FPA's requirements and restrictions are

not confined to specific numeric prices. Instead, they may take the form of rates that set forth a method of determining prices, such as market-based rates, formula rates, or umbrella tariffs.<sup>3</sup> A market-based rate tariff “simply state[s] that the seller will enter into freely negotiated contracts with purchasers.” *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008). A formula rate “specifies the cost components that form the basis of the rates a utility charges its customers” and thus “allows a utility to recover costs that may fluctuate over time.” *Pub. Utils. Comm’n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001).

When these types of rates are employed, courts have properly distinguished the “rates” themselves (*i.e.*, the method or measure for setting prices) from the resulting prices and have found that the FPA’s requirements apply to the *rates*, not the prices. For example, courts have recognized

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<sup>3</sup> See, e.g., *La. Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998) (approving use of market-based rates); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) (same); *Pub. Utils. Comm’n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (approving use of formula rates); *ChevronTexaco Expl. & Prod. Co. v. FERC*, 387 F.3d 892, 894 (D.C. Cir. 2004) (same). *ChevronTexaco* and various other decisions cited herein were decided under substantively identical provisions of the Natural Gas Act and, in accordance with judicial guidance, are cited “interchangeably” with cases under the FPA. *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

that the “rate” that Section 205 requires to be filed with FERC is the market-based rate tariff or formula rate, and not any specific price that results from application of those rates. As this Court put it, a “method or formula for calculating a rate ... when enshrined in an approved tariff, is itself a ‘filed rate.’” *ChevronTexaco*, 387 F.3d at 894.<sup>4</sup>

In a case relied upon by Petitioner, the Ninth Circuit expressly rejected an attempt to equate the “rate” in Section 205 with “price” in a market-based rate regime. That court held that “the ‘rate’ filed by authorized power wholesalers is the ‘market rate,’ and that rate does not ‘change’ even though the prices charged by the wholesalers may rise and fall with the market.” *Montana Consumer Counsel v. FERC*, 659 F.3d 910, 921 (9th Cir. 2011).

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<sup>4</sup> See also *Wah Chang v. Duke Energy Trading & Mktg, LLC*, 507 F.3d 1222, 1225 (9th Cir. 2007) (market-based rate tariffs qualify as valid filed rates); *Pub. Util. Dist. No. 1 of Grays Harbor v. IDACORP Inc.*, 379 F.3d 641, 649 (9th Cir. 2004) (same); *E&J Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1041 (9th Cir. 2007) (same); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 432-33 (2d Cir. 2013) (holding that filed-rate doctrine applies to market-based rates); *Pub. Utils. Comm’n of Cal.*, 254 F.3d at 254 (“the formula itself is the rate,” so “periodic adjustments made in accordance with the Commission-approved formula do not constitute changes in the rate itself and accordingly do not require § 205 filings”) (internal quotation marks and brackets omitted).

In short, approval of a market-based rate as “just and reasonable” is squarely within FERC’s Section 205 authority.<sup>5</sup> Similarly, FERC may approve of formula rates as “just and reasonable.”<sup>6</sup> Neither determination requires FERC to address, either before or after the fact, whether any particular *price* is just and reasonable.

**B. There is no basis for interpreting “rates” in Section 206 differently to mean “prices.”**

Petitioner cannot quarrel with the established understanding of “rates” as used in Section 205 of the FPA. Doing so would run headlong into the decades of case law approving market-based rates as permissibly within the scope of Section 205—and it would foreclose the ubiquitous use of market-based rates.

Instead, Petitioner suggests that “rates” means something *different* in Section 206 of the same Act—namely, that it means the *prices* that are

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<sup>5</sup> See, e.g., *La. Energy & Power Auth.*, 141 F.3d at 365 (FERC “may rely on market-based rates ... to ensure that rates satisfy [FPA’s ‘just and reasonable’] requirement.”); *PNE Energy Supply LLC v. Eversource Energy*, 974 F.3d 77, 86 (1st Cir. 2020) (“[A] market-based rate or tariff term allowed by FERC under its rate-setting authority is still a rate approved by FERC.”).

<sup>6</sup> See, e.g., *La. Pub. Serv. Comm’n v. FERC*, 761 F.3d 540, 552 (5th Cir. 2014) (FERC “exercised its role when it initially reviewed and accepted the bandwidth formula”); *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990) (FERC “need not confine rates to specific, absolute numbers but may approve a tariff containing a rate ‘formula’ or a rate ‘rule’”; such formula may “qualify as a ‘rate’”).

produced by the approved rates. Under this theory, FERC must review the *prices* resulting from an approved rate independently of the rate. But there is no basis for such an inconstant reading. Courts typically presume that “identical words used in different parts of the same act are intended to have the same meaning.” *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). And Sections 205 and 206 are more than simply isolated provisions of the same statute—they are companions, two sides of the same coin. *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956) (“These sections are simply parts of a single statutory scheme under which all rates are established initially by the [regulated] companies, ... and all rates are subject to being modified by the Commission upon a finding that they are unlawful.”). Together, they authorize FERC to evaluate, determine, and ensure the justness and fairness of a “rate,” just at different points in time. Thus, there is no basis for suggesting that the “rates” subject to review under Section 206 are different from the “rates” subject to review under Section 205.

**1. *The text and context of the FPA support FERC’s reading.***

Petitioner relies on a single cherry-picked dictionary definition to argue that the “rate” subject to review under Section 206 is the specific *price*

that resulted from an auction, as opposed to the market-based rate authorizing sales pursuant to the auction rules and procedures for setting the price. That reliance is misplaced.

Petitioner's argument hinges on the (alternative) definition of "rate" in a recent edition of the Webster's dictionary as a "charge, payment, or price fixed according to a ratio, scale, or standard." Pet'r Br. at 30. But the relevant question is what the term meant at the time the statute was enacted. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). Dictionaries contemporaneous with the 1935 passage of the FPA defined "rate" both in broader terms of a general standard—like a market-based rate or a formula rate—as well as in narrower terms that equate "rate" with price. For example, the 1934 Funk and Wagnalls Dictionary defines "rate" as "[t]he measure of a thing, by its relation to a standard," and, in the alternative, "[d]egree of value; price." Funk & Wagnalls, *The Comprehensive Standard Dictionary of the English Language* 486 (1934). The 1907 Supplement to the Webster's International Dictionary defined "rate" as "[t]hat which is established as a measure or criterion," and, alternatively, a "price fixed with relation to a standard." Webster's *International Dictionary of the English Language: A Supplement* 1191 (1907). And the 1920 Webster's New Standard Dictionary defined "rate" as a "[s]tandard," "value," or "price." Laird & Lee's *Webster's New Standard Dictionary of the English Language* 464 (1920).

Even taking into account modern dictionaries, no consensus emerges that “rate” necessarily means “price.” The Oxford Dictionaries define “rate” as “a measure, quantity, or frequency, typically one measured against some other quantity or measure”—which would encompass a market-based rate tariff. *New Oxford American Dictionary* 1447 (3d ed. 2010). Given the myriad competing definitions, other courts have recognized that “[t]here are clearly multiple common usages for ‘rate.’” *Kings Dodge, Inc. v. Chrysler Group, LLC*, 595 F. App’x 530, 536 (6th Cir. 2014).

Because there is no single, fixed definition of “rate,” this Court “cannot rely on any all-purpose definition but must consider the particular context in which the term appears.” *FAA v. Cooper*, 566 U.S. 284, 294 (2012); *United States v. Briggs*, 141 S. Ct. 467, 470 (2020) (“The meaning of a statement often turns on the context in which it is made, and that is no less true of statutory language.”). Here, the context of the term “rate” makes clear that it refers to the rate filed with and approved by FERC—whether it be a market-based rate, formula rate, or a fixed price.

The relevant context is FERC’s ratemaking authority and oversight over wholesale electricity rates, which courts have repeatedly recognized are “broad.” *Mobil Oil Exploration & Producing S.E. Inc. v. United Dist. Co.*, 498 U.S. 211, 224 (1991); *see also In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) (“[T]he breadth and complexity of the Commission’s

responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.”). And “[i]t has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates.” *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963). Petitioner’s restrictive reading of the term “rates” cannot be reconciled with this context.

Indeed, Petitioner’s reading of “rates” as “prices” would effectively render meaningless FERC’s accepted authority to approve market-based rates and formula rates. The value in such rates is the ability to rely on them when entering into transactions. Petitioner’s proposed interpretation would make it impossible for EPSA’s members and other market participants to rely on approved market-based rates—or on any formula rate. Even if FERC approved a market-based rate tariff or formula as just and reasonable under established standards, and parties complied with that tariff or formula, anyone unhappy with a resulting price could still challenge the price based under some other, amorphous standard. Without an alignment between the ex ante and ex post reviews, parties have no assurance that the transactions into which they enter will not be later invalidated.

Such a result is particularly untenable in the context of the electricity industry. In recognition of the need for parties in the industry to “rely on

the finality of approved rates,” Congress allows FERC to change rates only prospectively, with limited exceptions. *Pub. Utils. Comm’n of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990); *see* 16 U.S.C. § 824e(a) (permitting FERC to determine the “just and reasonable rate . . . to be *thereafter* observed”) (emphasis added). Uncertainty over the finality of rates—which Petitioner’s system would introduce—would threaten the viability of market-based rate and formula rate regimes, as well as the reliability of the electricity grid: “[U]ncertainties regarding rate stability and contract sanctity can have a chilling effect on investments and a seller’s willingness to enter into long-term contracts.” FERC Order No. 697, 119 FERC ¶ 61,295 at P 6 (2007). “[T]his, in turn, can harm customers in the long run.” *Id.*

The need for market certainty is particularly true in capacity markets like the MISO Zone 4 auction. “Capacity” is “not actual electricity” but rather “a commitment to produce electricity or forgo the consumption of electricity when required.” *Advanced Energy Mgmt. Alliance v. FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017). Procuring capacity, through an organized market like MISO’s or bilaterally, enables load-serving utilities—which serve retail customers—to ensure that they will be able to provide electricity to their customers reliably. *Id.* at 659. And it enables power generators, like EPSA’s members, “to plan and build facilities to meet future demand.” *Del. Dep’t of Natural Resources & Env’l Control v. E.P.A.*, 785 F.3d 1, 12 (D.C. Cir. 2015).

Revenues from capacity sales are “needed to provide the proper incentives for new efficient entry ... and to retain existing efficient generators over the long term.” *PJM Interconnection, LLC*, 128 FERC ¶ 61,157 at P 24 (2009). In this way, capacity markets are critical to “ensur[ing] resource adequacy.” *Del. Dep’t of Natural Resources*, 785 F.3d at 12.

Accordingly, price signals must be sufficiently certain to “encourage the maintenance and development of generation, transmission and demand-side resources.” *Del. Dep’t of Natural Resources*, 785 F.3d at 12. Without that certainty, power generators will either build risk premiums into their rates—raising prices for consumers—or they will invest less in facilities that are needed to produce electricity. The attendant reduction in supply “undermines the reliability of the power grid,” and increases the number of power emergencies. *Id.* at 13.<sup>7</sup>

Finally, there is no practical basis to read the FPA as requiring FERC

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<sup>7</sup> Reliance interests are so strong that FERC generally declines to re-run capacity auctions, even if the rules were not followed. See *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 at P 141 (2012) (“Re-running past auctions would create market uncertainty for market participants and require resolving complex questions”); *PJM Interconnection, LLC*, 128 FERC ¶ 61,157 at P 63 (2009) (rejecting intervenor’s proposal that “would require re-running the capacity market” because the rules are “intended to provide significant forward certainty on capacity procurement and capacity pricing”); *Astoria Generating Co. v. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 at P 132 (2012) (declining to rerun an action to avoid “market uncertainty”).

to determine whether individual prices are just and reasonable. Individual transaction prices are the result of applying the rate rule approved by FERC. Even leaving aside issues of reliance and fairness, there is no logical reason for, or logical way in which to conduct, a separate inquiry into a price resulting from the faithful application of a just and reasonable rate rule. FERC is right to focus its review on the integrity of the governing rules, and not engage in separate inquiries as to the specific prices.

For all these reasons, Petitioner's attempt to equate "rates" under the FPA with "prices" must be rejected as inconsistent with language, context, and purpose of the FPA. At a minimum, the Court should defer to FERC's reasonable interpretation that the "rates" subject to review in a market-based rate scheme are the market-based rate tariffs. *See AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003) ("[T]he fact that the provision can support two plausible interpretations renders it ambiguous for purposes of *Chevron* analysis.") (citation omitted).<sup>8</sup>

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<sup>8</sup> Petitioner's reliance (at 31) on the concept of a "charge" in Section 206 is misplaced. To start with, Public Citizen waived this argument when it failed to present it to FERC in its request for rehearing below. *See* 16 U.S.C. § 825l(b); *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1247 (D.C. Cir. 2004). In any event, when Section 206 was enacted in 1935, "rate" and "charge" were well-understood terms of art used, at times, to refer to separate cost components. In that setting, "rate" generally referred to a cost component based on volume or distance while "charge" referred to some distinct component. *See, e.g., Columbus Gas & Fuel Co. v. Pub. Utils. Comm'n of Ohio*, 292 U.S. 398, 401 (1934) (describing a "rate of 55 cents" per thousand cubic

## 2. *Petitioner misreads prior court decisions.*

Absent textual support for its reading, Petitioner argues that prior court decisions require FERC to determine whether individual transaction prices that result from the approved market-based rate tariff are just and reasonable. Petitioner misreads those decisions.

This Court has held that FERC may accept market-based rates as just and reasonable if FERC finds that the seller lacks market power and engages in ongoing monitoring, such as that provided by requiring sellers to periodically report transaction data. *See Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009); *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18, 34 (D.C. Cir. 2002). But it has never held—as Petitioner suggests (at 32-34)—that FERC is required to evaluate the justness and reasonableness of reported transaction prices produced by the approved rate under some undefined standard different from the one used to evaluate whether the underlying rate was just and reasonable.

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feet, “with an additional charge of 5 cents per thousand cubic feet if monthly bills were not paid within a fixed time, and a monthly minimum charge of 75 cents”); *Adams v. Mills*, 286 U.S. 397, 405 (1932) (describing “an extra charge of 25 cents a car for unloading live stock”); *Interstate Commerce Comm’n v. Chicago, B. & Q.R. Co.*, 186 U.S. 320, 322 (1902) (describing “a terminal charge of \$2 per car will be made in addition to the Chicago rates”).

Rather, the purpose of requiring a seller to report transaction data is “to ensure the continued competitiveness of the ... electricity market.” *Blumenthal*, 552 F.3d at 883. The purpose of filing transaction data is to “increase the information available to buyers and ... reduce any ill effects of market power, while at the same time making it easier for FERC to identify situations in which [sellers] were abusing their market power.” *Interstate Natural Gas Ass’n*, 285 F.3d at 34. This data enables FERC to determine whether the conditions underlying its approval of the *rate* hold true—not an invitation to independently evaluate the reasonableness of each individual price. This process, this Court explained, satisfies the requirement articulated in *Farmers Union* that FERC retain “some general oversight over the system” to confirm that the market worked as expected.<sup>9</sup> *Id.* at 31.

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<sup>9</sup> *Farmers Union Cent. Exchange v. FERC*, did not involve a market-based rate where FERC had determined that the sellers lacked or had mitigated market power. 734 F.2d 1486, 1495-98 (D.C. Cir. 1984). Instead, FERC’s only involvement was to set concededly unreasonably high price ceilings that “expose[d] a range of permissible prices that would exceed the ‘zone of reasonableness.’” *Id.* at 1509. The *only* guard against unreasonable prices was if “competition in the oil pipeline market [drove] the actual prices back down.” *Id.* That is not the case now. Since *Farmers Union*, FERC has been required to determine that sellers lack market power, or that any market power they have is mitigated, prior to approving market-based rates. So unlike in *Farmers Union*, the prices resulting from market-based rates *are* expected to fall within the “zone of reasonableness.” For similar reasons, Petitioner’s reliance (at 34) on dicta in *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015) is unavailing. *TransCanada* did not involve a market-rate based tariff where the Commission had determined that

Petitioner relies (at 38) heavily on a trilogy of Ninth Circuit cases<sup>10</sup> as standing for the proposition that FERC must “review the justness and reasonableness of *prices* resulting from market-based transactions.” Those cases, while not binding on this Court, say nothing of the sort.

As noted above, the Ninth Circuit in *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), recognized the distinction between rates and prices—rejecting petitioners’ “theory that ‘rate’ means price.” *Id.* at 921; *see also id.* (deferring to FERC’s interpretation that “the ‘rate’ filed by authorized power wholesalers is the ‘market rate,’ and that rate does not ‘change’ even though the prices charged by the wholesalers may rise and fall with the market.”).

Moreover, the Ninth Circuit *confirmed* that FERC was not required to determine that the reported transaction prices are individually just and reasonable. Rather, the court explained that FERC must review prices to ensure that the *market-based rate* remains just and reasonable—that is, that the seller does not have, or has mitigated, market power. The court

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the sellers lacked or had mitigated market power—or even a tariff that the Commission had unconditionally approved.

<sup>10</sup> *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011); and *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015).

held that “the law permits” FERC to determine that rates are just and reasonable by monitoring average actual prices to ensure that they are comparable with “average prices that would be charged in a competitive market where no sellers were able to exercise market power.” *Montana Consumer Counsel*, 659 F.3d at 919. “By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power, FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable.” *Id.*

Nothing in the other cases cited by Petitioner is to the contrary. Indeed, *Montana Consumer Council* rested on and applied *Lockyer*. 659 F.3d at 919-20. *Harris*, meanwhile, simply reaffirmed that FERC cannot completely abandon the reporting requirements. Where a seller does violate the reporting requirements, FERC must ensure that the deficiencies did not “mask[] manipulation or accumulation of market power.” *Harris*, 784 F.3d at 1277.

In sum, nothing in the FPA’s text, structure, or context, or judicial decisions construing the FPA, support rewriting the FPA to require FERC to determine whether individual prices are just and reasonable.

## **II. FERC REASONABLY DETERMINED THAT PETITIONER FAILED TO SHOW THAT THE CLEARING PRICE WAS UNJUST OR UNREASONABLE.**

Even assuming *arguendo* that the FPA did require FERC to review prices, the Court should still deny the petition. FERC did in fact review Petitioner's complaint that the clearing price was unjust and unreasonable, and reasonably found that Petitioner had failed to sustain its burden of proof.

As FERC explains in its brief (at 39-44), the un rebutted evidence was that Dynegy's bid (on which the clearing price was based) was appropriately based on Dynegy's costs. Moreover, FERC reviewed the Conduct Threshold in MISO's tariff, which operated as a cap on auction prices, and which FERC recognized produced a price of \$180.43/MW-day in the 2015/2016 Auction. *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 at PP 33-86 (2019), JA\_\_; *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,385 at PP 35, 24-40 (2015), JA\_\_. Although FERC found that the Conduct Threshold used in the 2015/2016 Auction would no longer be just and reasonable in future auctions due to anticipated changes in the neighboring capacity market, it determined that Petitioner did not sufficiently "support [its] claim that the 2015/16 Auction," including the Conduct Threshold that was applied, "produced unjust and

unreasonable results.” *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,227 at P 22 (2020), JA\_\_\_. Having determined that Petitioner had not shown that the Conduct Threshold was unjust and unreasonable for the 2015/2016 auction, FERC necessarily determined that the clearing price, which was *below* the threshold, was neither unjust nor unreasonable.

### **III. THE PRICE RESULTING FROM THE MISO ZONE 4 2015/2016 AUCTION WAS A NATURAL RESULT OF THE MARKET DESIGN.**

The elevated clearing price in MISO’s Zone 4 2015/2016 Auction—the central fact on which Petitioner hangs its argument—was *predicted* as the natural consequence of MISO’s use of a vertical demand curve in its market design. Indeed, it is well known that use of a vertical demand curve in a capacity market results in substantial price volatility. These price fluctuations are not, as Petitioner would have it, evidence that sellers violated the approved rate or engaged in market manipulation.

As relevant here, MISO administers a capacity market in which load-serving utilities purchase generators’ future ability to produce electricity. MISO holds annual auctions that set prices for this electricity capacity, and the load-serving utilities pay the auction clearing prices for capacity purchased through those auctions. *Cf. Del. Dep’t of Natural Resources*, 785 F.3d at 11-12 (describing typical aspects of capacity markets). The prices are set

at the point at which the supply curve meets the demand curve, subject to a cap set by MISO (the “deficiency price”).

System operators administering capacity markets like MISO “typically require [load-serving utilities] to purchase a certain amount of capacity to ensure reliability during periods of high demand.” *Del. Dep’t of Natural Resources*, 785 F.3d at 11. MISO did this by setting a “vertical” demand curve, which “specif[ies] a fixed demand that define[s] the capacity sought by the auction.”<sup>11</sup> *NextEra Energy Resources, LLC v. FERC*, 898 F.3d 14, 18 (D.C. Cir. 2018). In other words, load-serving utilities must purchase a minimum amount of capacity, and any unit of capacity over that threshold is valued at zero dollars.

Commentators, courts, and FERC itself have all consistently recognized that the use of a vertical demand curve produces substantial price volatility.<sup>12</sup> Indeed, in advocating *against* the adoption of a vertical demand

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<sup>11</sup> In a traditional supply and demand curve—where price is plotted on the vertical axis, and quantity is plotted on the horizontal axis—the demand curve slopes downward, reflecting the general principle that consumers are willing to purchase more of something as the price decreases. The supply curve traditionally slopes upwards, reflecting the general principle that suppliers are willing to sell more of something as the price increases.

<sup>12</sup> See, e.g., *Electricity Consumers Resource Council v. FERC*, 407 F.3d 1232, 1240-41 (D.C. Cir. 2005) (recognizing “the price volatility under the vertical demand curve”); *PJM Interconnection LLC*, 119 FERC ¶ 61,318 at P 99 (2007) (“[T]he vertical demand curve results in extremely volatile pricing.”); *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 at P 75 (2006) (“A

curve, *amicus* EPSA (along with others) specifically warned MISO that such a curve would yield “boom or bust cycles” in prices.<sup>13</sup> These cycles follow shifts in supply: In times where there is sufficient supply, the clearing price will be close to zero. When, however, supply is diminished or there is a shortage, the price will clear at or near the deficiency price.

**A. A vertical demand curve ensures that clearing prices will be near zero when supply is above the minimum capacity requirement.**

For several reasons, when a market is designed with a vertical demand curve, prices will be exceptionally low—indeed, near zero—when supply exceeds the minimum capacity requirement.

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downward-sloping demand curve [in place of a vertical demand curve] would reduce capacity price volatility and increase the stability of the capacity revenue stream over time.”); Filing Letter at 5, *PJM Interconnection, LLC*, Docket No. ER14-504-000 (filed Nov. 29, 2013) (under “vertical demand curve approach, capacity prices can change dramatically with small supply changes around the fixed reserve requirement”); *ISO New England Inc.*, 155 FERC ¶ 61,319 at P 21 (2016) (“[T]he vertical demand curves previously used ... permit significant price volatility ...”); Todd S Aagaard & Andrew N. Kleit, *The Complexity Dilemma in Policy Market Design*, 30 *Duke Env'tl. L. & Pol'y F.* 1, 28 & n.98 (2019) (“Scholars have identified several problems with these price-insensitive quotas, including price volatility and increased investment risks.”).

<sup>13</sup> Capacity Suppliers’ Motion to Intervene and Protest, Attachment A, Affidavit of Roy J. Shanker, PhD. on behalf of Capacity Suppliers at 4, Docket No. ER11-4081-000 (filed Sept. 15, 2011) (“Shanker ER11-4081 Affidavit”), JA\_\_.

*First*, the marginal cost of selling capacity from most existing generators is close to zero.<sup>14</sup> Accordingly, unless the generator would incur opportunity costs from being unable to export the capacity to a neighboring market, it will likely be willing to accept any non-zero price for a large number of units of capacity. *See* IMM Comments at 6 & n.3. This results in a supply curve that is more or less flat until new generators or generators with significant opportunity costs would be needed to meet demand.

*Second*, the vertical demand curve causes any amount of supply over the fixed demand threshold to be valued at zero. *See* Shanker ER11-4081 Affidavit, at 21-22, JA\_\_. These units of capacity are artificially assigned a zero-price, even though they have value from increasing reliability. IMM Comments at 6-7; *see also* *NextEra Energy Resources LLC*, 898 F.3d at 22 (observing that a “vertical demand curve ... results in more significant price suppression than a sloped demand curve”). Additionally, suppliers are incentivized to offer their capacity at very low prices, lest there is excess supply and they receive nothing for their offered capacity. *PJM Interconnection*

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<sup>14</sup> *See* Potomac Economics, 2013 State of the Market Report for the MISO Electricity Markets 18 (2014), *available at* <https://www.potomaceconomics.com/wp-content/uploads/2017/02/2013-State-of-the-Market-Report.pdf>; Motion to Intervene Out of Time and Comments of Midwest ISO’s Independent Market Monitor at 6, Docket No. ER11-4081-000 (Sept. 19, 2011) (“IMM Comments”).

*LLC*, 119 FERC ¶ 61,318 at P 99 (2007) (“[A]s long as supply exceeds the required amount, the price falls precipitously.”).

*Third*, the supply curve includes zero-priced bids that do not actually reflect the price at which generators are willing to sell capacity to others. For example, load-serving utilities may submit zero-priced offers for capacity they purchase outside the auction (*i.e.*, that they are “self-supplying”). See Answer of Dynegy Inc., Dynegy Marketing and Trade, LLC, and Illinois Power Marketing Co., Exhibit B, Affidavit of Susan L. Pope ¶¶ 9-10, Docket No. EL15-70-000 (filed July 6, 2015) (“Pope Affidavit”), JA\_\_\_. Additionally, generators may also submit zero-price offers to self-supply the obligations of affiliated competitive retail suppliers. *Id.* ¶ 10, JA\_\_\_. This added supply at zero-prices shifts the supply curve to the right, with a long tail near zero to the left. See *ISO New England Inc. & New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138 at P 4 (2017).

**B. A vertical demand curve ensures that clearing prices will spike to or near the deficiency price when supply is reduced.**

In times of market shortages, or when there are fewer offers at very low prices,<sup>15</sup> the vertical demand curve causes prices to increase dramatically to something near, if not equal to, the deficiency price. The decrease in

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<sup>15</sup> This might occur, for example, if fewer LSEs self-supply or if there is an opportunity to export capacity elsewhere at a higher price.

supply causes the supply curve to shift to the left, which results in one of two scenarios. The first is that the supply curve does not meet the demand curve because there simply is not enough supply to meet the minimum capacity requirement. In that case, the offer cap becomes the clearing price. See IMM Comments at 6-7. The other outcome is that the supply curve does still intersect the demand curve, but does so at a much higher price. In a market with a typical downward-sloping demand curve, a shift left in the supply curve will cause a rise in the equilibrium price, but it will be a gradual rise because of the gradual downward slope of the demand curve. The impact of the supply shift is split between an increase in price and a decrease in quantity purchased. In the case of a vertical demand curve, however, demand remains constant, and so changes in supply result *only* in a price change. Thus, even small changes in supply may result in large price increases. Pope Aff. ¶¶ 53, 56, JA\_\_.

The price volatility inherent to this market design has led FERC to approve proposals by other system operators to replace vertical demand curves with downward-sloping demand curves.<sup>16</sup> FERC has found this to be “an important improvement” that addresses “challenges presented by the

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<sup>16</sup> See, e.g., *PJM Interconnection, LLC*, 117 FERC ¶ 61,331 at P 76; *New York Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201 at P 35, *on reh’g*, 105 FERC ¶ 61,108 (2003), *aff’d sub nom. Electricity Consumers*, 407 F.3d 1232; *ISO New England Inc.*, 158 FERC ¶ 61,138 at P 29.

use of a vertical demand curve in previous auctions, including, among other things, the Commission's concerns regarding price volatility."<sup>17</sup>

MISO, however, has not replaced the vertical demand curve for a downward-sloping one. MISO and FERC concluded (wrongly, in EPSA's view) that the vertical demand curve had advantages that outweighed its drawbacks.<sup>18</sup> See *Midcontinent Independent System Operator, Inc.*, 170 FERC ¶ 61,215 at P 117 (2020). One arguable advantage of a vertical demand curve is that consumers will often enjoy exceedingly low prices. Indeed, as MISO's Independent Market Monitor explained below, the price increase observed in the 2015/2016 Zone 4 auction was not indicative of that price being "unreasonably high" but "of the fact that historic prices and prices in other zones are unreasonably low." Motion to Intervene and Comments of the Midcontinent ISO's Independent Market Monitor at 7, Docket No. EL15-70-000 (filed July 6, 2015), JA\_\_; see also *id.* at 8, JA\_\_ (noting that the "Zone 4 price of \$155 per MW-day is still relatively low when compared to the cost of building a new unit at \$247/MW-day").

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<sup>17</sup> *ISO New England, Inc.*, 147 FERC ¶ 61,173 at P 29 (2014), *on reh'g*, 150 FERC ¶ 61,065 (2015); see also *PJM Interconnection, LLC*, 146 FERC ¶ 61,052 at P 30 (2014) ("[A] downward-sloping demand curve ... [would] reduce price volatility and increase the stability of the capacity revenue stream over time.").

<sup>18</sup> Petitioner did not argue before the Commission that MISO's use of the vertical demand curve was inappropriate. See 16 U.S.C. § 825*l*.

In all, consumers enjoy the skewed benefits of a vertical demand curve, including long periods of very low prices. But that same curve inherently results in occasional price increases. After the fact intervention targeting only the rare spikes would not only be fundamentally unfair to generators, but would also, in the long run, harm consumers and generators alike. Deprived of appropriate compensation for the value of their capacity, generators will not invest in the development of new resources or maintenance of current generation resources, leading to future shortages and power emergencies.

### CONCLUSION

This Court should deny the petition for review.

Dated: February 11, 2021

Respectfully submitted,

*/s/ Paul W. Hughes*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amicus curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(a)(5) because it contains 6,450 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: February 11, 2021

/s/ Paul W. Hughes

**CERTIFICATE OF SERVICE**

I hereby certify that that on February 11, 2021, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: February 11, 2021

/s/ Paul W. Hughes