No. 23-773

In the Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA, DELAWARE DIVISION OF THE PUBLIC ADVOCATE, MARYLAND OFFICE OF PEOPLE'S COUNSEL, PJM INDUSTRIAL CUSTOMER COALITION & MONITORING ANALYTICS, LLC

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As we have explained, the decision below turns the fundamental premise of the Federal Power Act (FPA) "right on its head." Pet. App. 141a (dissenting statement of Commissioner Danly).

That is, "the ability of the utility owner to 'set the rates it will charge prospective customers, and change them at will,' subject to review by the Commission" is "the very thing that the statute was designed to protect." *Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (quoting *City of Cleveland* v. *FPC,* 525 F.2d 845, 855 (D.C. Cir. 1976)). Yet by holding that a public utility's auction-based offers to sell electricity and related products at or above a specified price are not "rates * * * demanded" within the meaning of the FPA (16 U.S.C. § 824d(a)), the court of appeals blessed an arrangement in which non-governmental third parties, *not* the public utility, are allowed to set the price of a utility's offer—and that third-party mandated rate, *not* the utility's own, is subject to deferential FERC review.

FERC has little substantive response. It hardly disputes that we have the better textual reading, and its structural arguments ring hollow when tested. Nor does it meaningfully detract from the importance of the issues presented. In all, certiorari is warranted to correct the court of appeals' upending of a critically important federal statute.

A. The question presented is important.

The question whether a public utility's bid into a competitive auction structure constitutes a "rate[] * * * demanded" under Section 205 of the FPA—and therefore can only be preempted or set aside if the

Commission finds it to be unjust and unreasonable—has profound importance for the proper regulation of the modern power grid. See Pet. 12-15.

A huge amount of the Nation's power (and related products like the electric capacity at issue here) is now priced and delivered via competitive market mechanisms overseen by non-governmental entities (RTOs and ISOs). Pet. 11. Indeed, PJM's auctions alone deliver power and related services to a "very large region" comprising "all or parts of 13 mid-Atlantic and Midwestern States and the District of Columbia." *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 155-156 & n.2 (2016). Yet the governing statutory structure dates from over sixty years before the market innovations that led to the adoption of the now-dominant RTO/ISO auction processes, making it critical to ensure that the interactions between the statute and the modern markets are properly construed. And, that is to say nothing about the significant grid reliability impacts of the specific capacity market at issue here. Pet. 14-15; see, *e.g.*, *Advanced Energy Mgmt. All.* v. *FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017) (capacity auctions used to ensure sufficient power in times of "high demand for electricity").

Against all this, FERC simply suggests that the specific question here may have "limited practical significance" because "the Commission already may review offers for compliance with the tariff." Opp. 17-18. But as discussed below, the FERC "review" to which the government refers involves burdens inverted from what they would be if—as petitioner contends—offers do constitute Section 205 "rates." See pages 7-9, *infra*. And this burden-shift is precisely the point, because it destroys "the very thing that the statute was designed to protect": "the ability of the utility owner to 'set the

rates it will charge prospective customers, and change them at will,' subject to review by the Commission" under the deferential just-and-reasonable standard. *Atlantic City*, 295 F.3d at 10; see *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958) ("[L]ike the seller of an unregulated commodity," a public utility "has the right in the first instance to change its rates as it will," subject only to just-and-reasonable review by FERC); Pet. 16-18.[1]

The government also has no answer to our demonstration that this Court routinely reviews FERC cases despite the absence of a circuit conflict, likely due to both the overriding national importance of the electric grid and the routing of such cases by default to a single court of appeals. See Pet. 15-16. The government simply observes that a petitioner also has the option of filing suit in its home circuit. Opp. 17. We of course agree (see Pet. 15), but the fact is that three quarters of FERC cases are decided by the D.C. Circuit alone (*id.* at 15 n.7), meaning that court frequently has the last word. FERC has no response.

FERC also does not address the substantial real-world implications of the decision below. See Pet. 15-

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[1] Additionally, we have already explained that a large part of the problem with PJM's arrangement is that many of the factors considered by the Market Monitor are not set out in PJM's FERC-approved tariff at all (see Pet. 21-22 & n.10)—so the government's suggestion of "review * * * for compliance with the tariff" (Opp. 18) is non-responsive in material part. Rather, there are a host of issues unaddressed by the tariff, and FERC's position here (adopted by the court of appeals) allows the Market Monitor—a private third party—to essentially play the role of FERC, determining what utilities may or may not incorporate into the bids they submit to the auction. That strips utilities of their essential Section 205 rights.

16. Now that the court of appeals has empowered the Market Monitor (a private third party) to act with regulatory authority, it may override a supplier's desired bid into the auction. Each year, suppliers interact with the Market Monitor thousands of times—and the decision below vastly skews the balance of authority, shifting Section 205 rights from the supplier (as Congress intended) to the Market Monitor and PJM.[2] In the aggregate, these interactions have enormous financial and practical consequences. Yet for any one of these individual actions, it is difficult to envision circumstances in which an individual supplier will pursue the many steps required to bring this question before the Court again, should this petition be denied. See Pet. 15.

Nor does the government respond to our showing that the quick auction timeframe, combined with the yearslong judicial review process, means that all such claims are virtually certain to be moot long before reaching this Court's review. See Pet. 15-16. Because of the posture in which this case has arisen—FERC's improper stripping of suppliers' Section 205 rights was baked into the FERC order below—this is a

[2] To be clear: The Market Monitor has an important role in investigating market power, monitoring bids, and reporting its findings to PJM and FERC for action as appropriate. The error of the decision below was in stripping the Section 205 rights that should be held by suppliers and placing them with the Market Monitor and PJM. Cf. *Atlantic City*, 295 F.3d at 11 ("FERC lacks the authority to require [public utilities] to cede their right under Section 205 of the Act to file changes in rate design with the Commission").

uniquely attractive vehicle for review.[3] By contrast, if the Court does not intervene now, it is practically unlikely that the D.C. Circuit's erroneous statutory construction will ever be reconsidered, and certainly not with the speed the issue's importance warrants. See Pet. 15-16.

In sum, the question presented here goes to the heart of a statutory scheme that is critically important to the power grid and therefore to the modern economy. The Court should grant review now.

B. The court of appeals turned a critical federal statute on its head.

On the merits, the petition demonstrated both that the text of Federal Power Act Section 205 plainly encompasses public utilities' offers into competitive auctions (Pet. 16-17), and that the court of appeals' contrary construction reverses the fundamental premise of utility-directed ratemaking under the FPA (*id.* at 18-19).

1. As to the text, FERC has little response to our demonstration that auction offers definitionally are "rates * * * demanded" (16 U.S.C. § 824d(a)): An offer represents the rate at or above which a supplier demands to be paid; if that price is not met, the supplier will not provide capacity. Pet. 16-17.

FERC seeks to pick apart and attack the definition of each statutory word in isolation, arguing that an auction offer cannot be a "rate"—that is, "[a]n amount paid or charged for a good or service" (Rate, *Black's Law Dictionary* (11th ed. 2019))—because "the

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[3] FERC does not contest that its conclusion that suppliers lack Section 205 rights in these circumstances is essential to its order. See Pet. 9-11.

amount charged and paid in the capacity auction is the market-clearing price, which may not match a seller's offer price." Opp. 15. But Section 205 applies to "[a]ll rates and charges made, demanded, *or* received" (16 U.S.C. § 824d(a) (emphasis added)); that is, it covers not just the rates ultimately "received," but also those "demanded" but *not* received, which describes an auction offer that does not match the clearing price. Indeed, under its misreading, FERC would have no authority over a rate demanded by a regulated utility unless a customer agrees to pay that rate. FERC's myopic focus on the definition of "rate" alone thus disregards that "two words together may assume a more particular meaning than those words in isolation." *FCC* v. *AT&T Inc.*, 562 U.S. 397, 405-406 (2011); accord, *e.g.*, *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

The same is true of the agency's observation that "a capacity market sell offer, regardless of the price specified in the seller's offer, is a request to receive the market clearing price," and its accompanying suggestion that an offer therefore cannot be a "demand." Opp. 15 (quoting Pet. App. 99a); see Demand, *Black's Law Dictionary* (11th ed. 2019) ("request for payment of a debt or an amount due"). FERC is only half right: As the agency elsewhere recognizes, an auction offer is "a request to receive the market clearing price" *if and only if* the market clearing price meets or exceeds the amount of the offer. See Opp. 3. If the clearing price is lower than a particular supplier's offer, that supplier does not sell any capacity at all. See *Hughes*, 578 U.S. at 155-156. A supplier's offer is thus a

request to be paid *at least* as much as the amount specified in the offer.[4]

Under the plain meaning of the statutory text, therefore, auction offers are "rates * * * demanded," and are subject to Section 205.

2. As to our structural arguments, FERC repeatedly obscures the way PJM's process functions, asserting that—contrary to our explanation that the process removes suppliers' Section 205 right to set their own offers subject only to Commission review—"a seller may obtain further review from the Commission" "if PJM rejects its offer." Opp. 8; see *id.* at 10-11 ("[A]ll sellers retain 'the ability to file a petition with the Commission * * * as a means to protect its rights provided under the Tariff.'").

But as FERC elsewhere admits, this "further review" is not a Section 205 determination of whether the supplier's offer is just and reasonable, with the result that the offer may go forward if so. Instead, FERC has explained that it "would *not* substitute a seller's offer for the PJM/Market Monitor mitigated offer *absent* a finding that PJM and/or the Market Monitor violated the Tariff in rejecting or modifying the seller's offer." Pet. App. 121 (emphases added); see Opp. 12 (quoting this language). "In other words, the [Market Monitor]'s rate gets the [Section] 205 rights,

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[4] As Constellation Energy explains (Br. of Resp. Constellation Energy in Support of Cert., at 11-14), our construction also avoids an improper sub-delegation of authority to the Market Monitor (which is a private, for-profit firm, Marketing Analytics). In briefly addressing the sub-delegation issue (Opp. 13), FERC does not even attempt a rebuttal of the legitimate concerns raised by Constellation Energy regarding a transfer of regulatory authority to the Market Monitor.

not the seller's rate." Pet. App. 140-141a (dissenting statement of Commissioner Danly).

As we have explained, this is a critical distinction. Under Section 205, a rate will be upheld so long as it is just and reasonable, a standard that permits a range of acceptable rates. Pet. 4-5; see, *e.g.*, *Maine Pub. Utils. Comm'n* v. *FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008) ("[T]here is not a single 'just and reasonable rate' but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone."), *rev'd in part on other grounds*, 558 U.S. 165 (2010); *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint."). And "FERC has no power to force public utilities to file *particular* rates" so long as the utility's chosen rate is within that zone of reasonableness. *Atlantic City*, 295 F.3d at 9-10 (emphasis added).

The issue presented here—ultimately, whether to flip the normal burdens under the Federal Power Act—is therefore hugely consequential. If, as petitioner contends, auction offers are Section 205 rates, then suppliers can set them at will, only the Commission may disturb them, and even the Commission may do so only if it determines that they are outside the wide zone of reasonableness. But under the "review from the Commission" proposed by FERC as a substitute here (Opp. 8, 10-11), the *supplier* must prove "that PJM and/or the Market Monitor violated the Tariff in rejecting or modifying the seller's offer" in order to obtain relief. Pet. App. 121.

Far from being a meaningful substitute, therefore, this inversion of the normal burdens is precisely what,

in the words of dissenting Commissioner Danly, "flips [S]ection 205 right on its head." Pet. App. 141. Instead of utilities making offers based on their own cost-benefit analysis, subject only to deferential FERC review under Section 205, non-governmental third parties now are empowered to "dictate[] what every single seller can offer" (*id.* at 134-135a), apparently with recourse for the supplier only if those third parties violated the tariff in doing so. That is a massive upheaval in a statute that "was designed to protect * * * the ability of the utility owner to 'set the rates it will charge prospective customers, and change them at will,' subject to review by the Commission," and under which "FERC has no power to force public utilities to file particular rates unless it first finds the existing filed rates unlawful." *Atlantic City*, 295 F.3d at 10; see also, *e.g.*, *United Gas Pipe Line Co.*, 358 U.S. at 113 (a public utility has the "right * * * to change its rates * * * [at] will, unless it has undertaken by contract not to do so.").[5]

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[5] FERC is wrong to speculate that our construction of Section 205 would "unravel the entire PJM capacity-market mitigation structure." Opp. 16. We agree that FERC properly "regulates *market structure*." Opp. 15. Nothing from our argument, accordingly, suggests that "each market input" would need to be reviewed by FERC. Opp. 16. Often, no disputes worthy of FERC review will emerge among a supplier, the Market Monitor, and PJM—meaning that the market structure suffices. But when disagreement emerges, FERC acknowledges that suppliers may present a dispute for resolution. Opp. 10-11, 17. The question here is who holds the Section 205 right in that proceeding—and the statutory text provides a plain answer. Nothing about our argument poses an obstacle to FERC regulating the market structure; FERC's alarmist assertions to the contrary lack justification.

3. Finally, it is cold comfort to suggest, as FERC does, that suppliers harmed by this regulatory upending of the statute "are free to leave PJM's auction and sell their capacity elsewhere, such as by bilateral contract." Opp. 8; see also *id.* at 17. First, this blithe proposal does not tell the whole story: As we have described, PJM's "must offer" requirement *mandates* that many "[r]esource owners must offer their capacity in PJM's capacity market in order to participate in PJM's energy market." *Advanced Energy Mgmt.*, 860 F.3d at 667.

Thus, FERC is proposing that suppliers forgo participation in *all* PJM markets (again, the largest and likely most important energy markets in the Nation, see Pet. 13 n.5) in order to avoid the unlawful structures of the capacity market it seeks to defend here. Not only is that alternative likely impracticable for many suppliers, it is also no defense to a claim of unlawful action to say that the victim may simply cease its own lawful conduct to avoid exposure to the illegality. Cf., *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 463 n.12 (1974) (suggesting that "a showing of irreparable injury might be made" where "an individual demonstrates that he will be required to forgo constitutionally protected activity in order to avoid [unlawful] arrest").

* * *

In sum, FERC has done little to rebut dissenting Commissioner Danly's observation that the agency—and the D.C. Circuit in affirming it—has "flip[ped] [S]ection 205 right on its head." Pet. App. 141a. Rather than a statute that "protect[s] * * * the ability of the utility owner to 'set the rates it will charge prospective customers, and change them at will,' subject

to review by the Commission" (*Atlantic City*, 295 F.3d at 10), we now have a structure under which non-governmental third parties are empowered to "dictate[] what every single seller can offer" into an auction, and "the [third party]'s rate gets the [Section] 205 rights, not the seller's rate" (Pet. App. 134-135a, 141a (dissenting statement of Commissioner Danly)).

Because that fundamental upending of a critically important federal statute is unwarranted, the Court should grant review.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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