No. 23-773

In the Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a supplier's input into an auction process used to determine rates for electric capacity is itself a "rate" subject to just-and-reasonable review under Section 205 of the Federal Power Act, 16 U.S.C. 824d.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 80 F.4th 302. The orders of the Federal Energy Regulatory Commission (Pet. App. 32a-144a, 145a-201a) are reported at 176 F.E.R.C. ¶ 61,137 and 178 F.E.R.C. ¶ 61,121.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2023. On November 3, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 12, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (Act), 16 U.S.C. 791a *et seq.*, entrusts the Federal Energy Regulatory Commission

(FERC or Commission) with regulating the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Under Section 205 of the Act, "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable." 16 U.S.C. 824d(a); see *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 264-265 (2016) (*EPSA*). To facilitate the Commission's enforcement of that requirement, each regulated utility must "file with the Commission" its rates in a publicly available document called a tariff. 16 U.S.C. 824d(c).

Historically, because utilities were "vertically integrated monopolies," the Commission employed "cost-based rate-setting" to ensure just and reasonable rates. *EPSA*, 577 U.S. at 267; see *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). Those rates took the form of "dollar prices [a seller] wanted to charge for units of electricity." *Public Citizen, Inc.* v. *FERC*, 7 F.4th 1177, 1184 (D.C. Cir. 2021). But a variety of regulatory changes in the late 20th century—including Congress's enactment of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, and FERC's subsequent reforms—sought to increase competition by unbundling existing monopolies and encouraging competition from new generators. Pet. App. 5a.

As part of those reforms, the Commission encouraged "the creation of nonprofit entities to manage wholesale markets on a regional basis." *EPSA*, 577 U.S. at 267. PJM Interconnection, LLC (PJM) is one such

market operator, spanning thirteen States and the District of Columbia. Pet. App. 6a.

PJM and other market operators conduct auctions to supply the grid with electricity. See *EPSA*, 577 U.S. at 268. The specific type of auction in this case is a "capacity" auction. Pet. App. 2a. Capacity is not electricity itself but the ability to produce it when needed in the future. See *Advanced Energy Mgmt. Alliance* v. *FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017) (per curiam). PJM hosts its capacity auctions three years in advance. *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016). In the auction, utilities that own, or intend to build, power plants offer to sell their future capacity. See *Advanced Energy*, 860 F.3d at 659 (observing that acceptance of a capacity offer "creates a kind of options contract").

After all offers are submitted, PJM begins accepting offers—from lowest price to highest—until it has purchased enough capacity to satisfy projected demand. *Hughes*, 578 U.S. at 155-156. No matter what price is listed in their original offers, all capacity sellers receive the highest accepted price, termed the "market-clearing price." Pet. App. 9a (citation omitted); see *Blumenthal* v. *FERC*, 552 F.3d 875, 878 (D.C. Cir. 2009).

Under this competitive regime, sellers may seek Commission approval for "'market-based' tariffs" in lieu of traditional cost-based tariffs. *Public Citizen*, 7 F.4th at 1184 (citation omitted). Like a menu that advertises lobster at "market price," a market-based tariff does not list any specific price for electricity, but simply states that the seller will charge the price set by the relevant market. See *ibid.* In this context, "the 'rate' filed by authorized [sellers] 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), cert. denied, 567 U.S. 934 (2012).

Unlike cost-of-service rates, the Commission does not assess market rates directly to determine whether they are just and reasonable under Section 205. *Public Citizen*, 7 F.4th at 1193. Instead, "[t]he whole premise of the Commission's market-based system is that a properly competitive market will necessarily produce just and reasonable prices." *Id.* at 1194; see *EPSA*, 577 U.S. at 267 ("In this new world, FERC often forgoes the cost-based rate-setting traditionally used" and "instead undertakes to ensure 'just and reasonable' wholesale rates by enhancing competition."). Market-based ratemaking relies on the principle that "[i]n a competitive market, where neither buyer nor seller has significant market power," the prices will be "reasonable" and "close to marginal cost, such that the seller makes only a normal return on its investment." *Montana*, 659 F.3d at 916 (citation omitted; brackets in original). While the Commission examines auction results *ex post* as part of its ongoing monitoring duty, that review is to confirm that the results are "consistent with the data expected of a competitive, unmanipulated market." *Public Citizen*, 7 F.4th at 1193 (citation omitted).

In practice, markets may be uncompetitive when sellers with a "'large market share'" are able to exert "market power" to "'control or affect the price' of energy." Pet. App. 4a (brackets and citation omitted); see *Public Citizen*, 7 F.4th at 1184.[1] The Commission

[1] To take a simplified example, consider a seller that controls 80 megawatts of capacity out of a total of 100 megawatts offered at auction. If PJM projects that it needs to purchase 30 megawatts to meet future demand, then at least ten megawatts of that seller's

therefore requires a seller filing a market-based tariff to demonstrate that it "lacks or has adequately mitigated market power." *Morgan Stanley*, 554 U.S. at 537; see *Public Citizen*, 7 F.4th at 1184. Among other things, a seller must comply with the tariff of the market operator, which includes rules "designed to help ensure that market power cannot be exercised in th[at] organized market[ ]," along with "additional protections * * * appropriate to ensure that prices in th[at] market[ ] are just and reasonable." *Public Citizen*, 7 F.4th at 1185 (citation omitted). Market operators like PJM also retain independent entities called market monitors to ensure compliance with their rules and guard against anticompetitive behavior. Pet. App. 9a n.8; see, *e.g.*, *Electric Power Supply Ass'n* v. *FERC*, 391 F.3d 1255, 1260 (D.C. Cir. 2004).

2. The PJM capacity market has existed since 2006. Pet. App. 2a. From the beginning, PJM's tariff has imposed "default" caps on offers made into its capacity auction. See, *e.g.*, *PJM Interconnection, L.L.C.*, 117 F.E.R.C. ¶ 61,331, 2006 WL 3762158, at *62,672-*62,673 & n.82 (Dec. 22, 2006). Those caps, which apply only to sellers with market power, "represent[ ] a threshold for determining whether an offer require[s] additional review to mitigate a potential exertion of market power." Pet. App. 8a. The default cap functions "like a signal level" to flag potentially anticompetitive offers. *Ibid.*

While PJM's default caps have been adjusted over time in response to market feedback, the basic process for mitigating potentially anticompetitive offers—

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capacity will necessarily clear the auction regardless of how high it offers. This market power allows the seller to drive up the market-clearing price.

namely, "unit-specific review"—has remained effectively the same. See, *e.g.*, *Advanced Energy*, 860 F.3d at 666-667; see also Pet. 9; Pet. App. 37a. Offers falling at or below the default cap are deemed competitive without further review. Pet. App. 8a. Offers above the cap are subject to "unit-specific review" by the independent market monitor (Market Monitor) and PJM. *Ibid.*; see *id.* at 8a-9a. On unit-specific review, sellers can substantiate their offers with data reflecting their particular costs. *Id.* at 9a. If PJM and the Market Monitor find these costs unsupported and incompatible with PJM's tariff, they will propose a mitigated offer that complies with the tariff. The seller may either accept the mitigated offer or petition the Commission for a determination that the seller's above-cap offer complies with the tariff. *Id.* at 26a-28a.

In 2021, the Commission determined that the assumptions underlying the extant default cap were inaccurate, causing it to be set "higher than or equal to ninety-nine percent of offers subject to an offer cap." Pet. App. 12a (brackets and citations omitted). That "'excessively high' cap frustrated the Commission's market mitigation efforts" by failing to distinguish potentially problematic offers from acceptable ones. *Id.* at 13a (citation omitted).

Having determined that the default cap was inadequate, the Commission considered various alternatives. Pet. App. 36a. In the orders challenged here, the Commission replaced the existing cap with lower default caps specific to particular methods of generating power, with the expectation that most sellers would choose to pursue unit-specific review instead. See *id.* at 36a-37a. The Commission concluded that expansion of the existing unit-specific review process would more rigorously

protect against anticompetitive offers by sellers with market power. *Id.* at 37a.

Petitioner and others moved for rehearing, which the Commission denied. Pet. App. 32a-144a. Movants contended that the unit-specific review process violates the rights of sellers to set their own rates under Section 205 of the Act, subject to just-and-reasonable review by the Commission, by "allowing a mitigated version of a resource's offer to take effect without the Commission first reviewing the resource's proposed offer." *Id.* at 93a. The Commission rejected that argument. *Id.* at 92a-122a.

The Commission explained that the offers submitted into capacity auctions are not "rates * * * demanded" under Section 205, 16 U.S.C. 824d(a), but rather "mere inputs to the ultimate rate produced by operation of PJM's market rules," Pet. App. 100a. "[T]he rate for the sale of capacity in an organized capacity market is the set of market rules contained in the Commission-accepted tariff and the market clearing price that emerges from the market conducted pursuant to those rules." *Id.* at 99a. Because Section 205 applies only to "rates," the unit-specific review process "cannot—and does not—deprive sellers of their FPA section 205 filing rights." *Id.* at 101a.

The Commission independently held that, "even if capacity offers into an organized market" qualify as rates, sellers nevertheless exercise their rights to file a rate under Section 205 "by seeking and obtaining market-based rate authority from the Commission." Pet. App. 101a. "[B]y extension, abiding by the applicable market rules, which is a necessary prerequisite to receiving market-based rate authority, does not infringe on those rights." *Ibid.* The Commission noted

that sellers are free to leave PJM's auction and sell their capacity elsewhere, such as by bilateral contract. *Id.* at 113a-116a. And it observed that a seller is not without recourse if PJM rejects its offer: in that situation, a seller may obtain further review from the Commission. *Id.* at 120a-121a.

Commissioner Danly dissented from the Commission's order and reconsideration decision. See Pet. App. 132a-144a, 198a-201a. He acknowledged "that sellers' offers are 'inputs' to the capacity auction," but contended that they nevertheless "independently enjoy section 205 rights." *Id.* at 139a.

3. Petitioner and several utilities petitioned the D.C. Circuit for review of the Commission's orders on various grounds, including the alleged violation of their Section 205 rights. In a unanimous opinion, the court of appeals denied the petitions. Pet. App. 1a-31a.

The court of appeals first observed that petitioner had "misconstrue[d] the regulatory program at issue." Pet. App. 26a. It explained that, contrary to petitioner's contentions, the "Market Monitor's proposal does not automatically displace an [above-cap] offer submitted by a [seller]." *Ibid.* Rather, sellers "can submit their offers to PJM regardless of the Independent Market Monitor's views, then ask the Commission to referee if a dispute persists." *Id.* at 28a. In short, the tariff rules "make quite clear that [sellers] do not play second fiddle when their proposed offers deviate from that of the Independent Market Monitor." *Ibid.*

The court of appeals also concluded that petitioner had misinterpreted the phrase "rates * * * demanded" under Section 205, 16 U.S.C. 824d(a), to include capacity offers into PJM's auction. Pet. App. 28a. Using "traditional tools of statutory interpretation" to examine the

statute's "'plain text,'" the court agreed with the Commission that "capacity market offers are not 'rates' within the statutory meaning of Section 205." *Id.* at 29a-30a (citation omitted). Instead, those offers are merely "inputs into determining the market-clearing price." *Id.* at 30a.

ARGUMENT

Petitioner renews (Pet. 16-24) its contention that the decision below violates its statutory right to set a rate subject to review by the Commission as just and reasonable under Section 205. The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Section 205 of the Act states that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable." 16 U.S.C. 824d(a). This Court has interpreted a similar scheme under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, as providing that "all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful." *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956). The mitigation framework that the Commission established in the orders below fully protects a seller's right to propose initial rates, subject to review by the Commission as just and reasonable.

At the outset, a seller may choose to file a "cost-based rate[ ]" or a "market-based rate" with the Commission. *Montana Consumer Counsel* v. *FERC*, 659

F.3d 910, 914 (9th Cir. 2011), cert. denied, 567 U.S. 934 (2012); see Pet. App. 97a; *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (*EPSA*). A cost-based rate takes the form of "dollar prices" the seller seeks "to charge for units of electricity"; those prices are subject to direct, substantive review by the Commission to determine whether they are just and reasonable. *Public Citizen, Inc.* v. *FERC*, 7 F.4th 1177, 1184 (D.C. Cir. 2021). Petitioner raises no objection to cost-based rates.

When a seller chooses to file a market-based tariff, however, the Commission employs a *structural* approach to ensuring that the resulting rates are just and reasonable. See Pet. App. 97a. Specifically, the Commission takes steps to ensure that the seller cannot exercise market power and that the relevant market operates fairly; in those circumstances, "it is rational to assume" that market prices will be just and reasonable. *Public Citizen*, 7 F.4th at 1184. Among other things, the Commission requires sellers who file market-based rates to comply with the tariffs of market operators, which include rules designed "to ensure that prices in those markets are just and reasonable." *Id.* at 1185 (citation omitted).

If a seller does not believe that a tariff's rules produce "just and reasonable rate[s]," it is free to challenge those rules before the Commission under Section 206 of the Act. 16 U.S.C. 824e(a). Indeed, that type of challenge is what gave rise to the Commission orders at issue here, revising the mitigation approach contained in PJM's tariff. See Pet. App. 146a.

If a seller disagrees with PJM's application of its tariff, it may likewise contest that before the Commission. As the Commission explained below, all sellers retain

"the ability to file a petition with the Commission * * * as a means to protect its rights provided under the Tariff." Pet. App. 120a. Because the tariff itself establishes the framework for producing just and reasonable rates, however, a challenge to the tariff's application is only that: a challenge to the tariff's application, not an independent review to determine whether market prices are just and reasonable. See *id.* at 121a.

In sum, the framework established by the Commission fully protects sellers' Section 205 rights, while effectuating the Commission's obligation to ensure that rates are just and reasonable.

2. Petitioner contends (Pet. 16-24) that sellers' offers into the PJM auction are themselves rates under Section 205 and therefore must be admitted into the auction unless the Commission determines that they are not just and reasonable. In petitioner's view, the orders below improperly permit PJM and the Market Monitor to displace a seller's offers without Commission review. That argument rests on a mistaken premise and is, in any event, incorrect on its own terms.

a. At the outset, petitioner appears to misapprehend the Commission's role in the review of seller offers. Petitioner contends (Pet. 4, 23) that unit-specific review "provide[s] to a non-governmental third party" (the Market Monitor and PJM) "the ability unilaterally to force a rate upon unwilling suppliers" and the right to "step into FERC's shoes as the regulator." Those contentions reflect a misunderstanding of how the auction process works.

As explained, a seller that participates in PJM's capacity auction must comply with the rules contained in PJM's tariff, in order to ensure that "the markets function as intended and produce competitive outcomes."

Pet. App. 180a. A seller that chooses to submit an above-cap offer must calculate its unit-specific costs according to a detailed, Commission-approved method contained in PJM's tariff. See C.A. App. 611. The seller then submits its cost calculations for the offer to the Market Monitor, along with supporting data and documentation, triggering unit-specific review. Pet. App. 8a-9a. The Market Monitor reviews the submission to verify compliance with the tariff. See *id.* at 26a-27a. If the seller and Market Monitor disagree over how to calculate the seller's costs, then PJM independently referees the dispute. *Id.* at 27a.

"[E]ven if PJM rejects a supplier's offer as incompatible with the Tariff and chooses to set the offer at the price proposed by the Independent Market Monitor," a seller may still petition the Commission for a determination that its "offer[ ] compl[ies] with the Tariff and therefore should be permitted into the auction." Pet. App. 27a; see C.A. App. 595. The Commission 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 and that the seller's offer complies with the Tariff provisions." Pet. App. 121a. "In other words, the relevant rate on file is the Tariff; therefore, the offer, so long as it complies with the Tariff, may be used in the auction." *Ibid.*

Sellers are thus free to advance their own offers and cost calculations through each level of the unit-specific review process, including to the Commission itself. Neither PJM nor the Market Monitor may simply "substitute[ ] an offer of [their] own choosing." Pet. 13. Instead, the process "make[s] quite clear that suppliers do

not play second fiddle when their proposed offers deviate from that of the Independent Market Monitor." Pet. App. 28a. And as even petitioner concedes (Pet. 13 n.6), there is nothing exceptional about the fact that "offers may be subject to certain mitigation rules contained within a tariff" and that "FERC—with the advice of third parties, such as PJM or the Market Monitor—maintains the power to reject offers where appropriate under the statute."

Petitioner criticizes the involvement of PJM and the Market Monitor in this review process. See, *e.g.*, Pet. 13 (asserting that seller's offer may "be overridden by a non-governmental, sub-regulatory entity"). But nothing prevents the Commission from enlisting such entities to "perform a market monitoring function to ensure that markets within the region * * * do not result in wholesale transactions or operations that are unduly discriminatory or preferential or provide opportunity for the exercise of market power." *Electric Power Supply Ass'n* v. *FERC*, 391 F.3d 1255, 1260 (D.C. Cir. 2004) (brackets, citation, and internal quotation marks omitted); see 18 C.F.R. 35.34(j)(3)(i) (permitting delegation to sub-entities). PJM and the Market Monitor do not "supplant Commission authority," but rather "provide the Commission with an additional means of detecting market power abuses." *Regional Transmission Orgs.*, 89 F.E.R.C. ¶ 61,285, 1999 WL 33505505, at *190 (Dec. 20, 1999).

Petitioner also complains (Pet. 19) that "the supplier has no right to take its own offer to FERC under Section 205 for a determination of its legality." But as explained below, see pp. 15-16, *infra*, petitioner's demand that FERC individually review each market input to determine whether it is just and reasonable is fundamentally

inconsistent with the nature of a market-based rate, whose validity depends on the *structural* fairness of the market. If a seller believes that a market operator's tariff will not produce just and reasonable rates, it is free to challenge that tariff under Section 206. Otherwise, the Commission's review properly focuses on whether a seller's offer complies with the tariff, not whether it is just and reasonable standing alone.

b. Petitioner's contention (Pet. 16-24) that a seller's offers into the PJM capacity auction are themselves "rates" under Section 205, 16 U.S.C. 824d(a), also fails on its own terms.

Petitioner's rate on file with the Commission is a market-based rate, which reflects that the seller will charge the price set by the relevant market, rather than specifying a particular price. *Public Citizen*, 7 F.4th at 1184. And "the rate for the sale of capacity in an organized capacity market is the set of market rules contained in the Commission-accepted tariff and the market clearing price that emerges from the market conducted pursuant to those rules." Pet. App. 99a.

By contrast, sellers' offers into the auction are merely "inputs that inform the ultimate rate that emerges from that process." Pet. App. 99a. PJM accepts offers beginning with the lowest price until it has acquired sufficient capacity to satisfy projected demand. Regardless of offer price, each seller receives the highest accepted offer price, known as the market-clearing price. *Id.* at 100a. Because "[a]ll capacity sellers that clear the auction receive the market clearing price, not their individual offer prices," an offer to sell into the capacity market "is a request to receive the market clearing price." *Id.* at 99a. The market-clearing price—not the seller's offer—represents "the amount of

money a [buyer] will hand over in exchange for" capacity. *EPSA*, 577 U.S. at 284. Put simply, "'the rate is what it is,'" namely, "the price paid." *Ibid.* (citation omitted).

Petitioner does not dispute (Pet. 21) that the auction structure and resultant market-clearing prices constitute rates under Section 205. Instead, it contends (*ibid.*) that seller offers are *also* rates. In support of that contention, petitioner relies principally on dictionary definitions, but the definitions it cites support the government. Petitioner observes that a "'rate' is '[a]n amount paid or charged for a good or service.'" Pet. 17 (citation omitted). But the amount charged and paid in the capacity auction is the market-clearing price, which may not match a seller's offer price. Petitioner further notes that "a 'demand' is a 'request for payment of a debt or an amount due.'" *Ibid.* (citation omitted). But again, as the Commission explained, "a capacity market sell offer, regardless of the price specified in the seller's offer, is a request to receive the market clearing price." Pet. App. 99a.

Petitioner's contention that the Commission must individually review every offer is also fundamentally inconsistent with the nature of a market-based rate. To ensure that market rates are just and reasonable, the Commission regulates *market structure*—rather than reviewing each and every input into the market or each and every price produced by the market. See, *e.g.*, *Public Citizen*, 7 F.4th at 1193 (holding that "the Commission can rationally allow markets to set 'just and reasonable' prices as long as the Commission takes the necessary steps to ensure that market participants cannot wield anticompetitive market power"); *Montana*, 659 F.3d at 919; see also *Elizabethtown Gas Co.* v. *FERC*,

10 F.3d 866, 870-871 (D.C. Cir. 1993) (similar for the Natural Gas Act).

Because the entire premise of this scheme is that a properly regulated market will produce just and reasonable rates, the Commission need not review each output "to reconfirm that the price is 'just and reasonable' in its own right." *Public Citizen*, 7 F.4th at 1194. Similarly, reviewing each market input to determine whether it is just and reasonable, as petitioner urges, would "unravel the entire PJM capacity market mitigation structure." Pet. App. 109a. On petitioner's view, "any capacity seller dissatisfied with PJM's application of the Commission-accepted market rules contained in the Tariff would be able to bypass those rules by requesting that the Commission perform what amounts to a *de novo* review." *Id.* at 110a. "The result would be a confusing, bifurcated system of market power mitigation that would make market power mitigation unworkable." *Ibid.*

Petitioner does not contest the "longstanding" market-based rate framework. *Public Citizen*, 7 F.4th at 1194; see Pet. 23; Resp. Constellation Energy Generation, LLC Br. in support of Petitioner 15; see also *EPSA*, 577 U.S. at 267. And rightly so, as "[n]othing in the statute dictates the precise methodology the Commission must use to ensure the justness and reasonableness of rates, whether through individualized review or through reviewing and monitoring the process by which rates are computed." *Public Citizen*, 7 F.4th at 1194. The court of appeals correctly rejected petitioner's effort to eviscerate that framework while leaving it intact in name only.

3. Even setting aside the merits, petitioner offers no compelling basis for this Court's review. As petitioner

concedes (Pet. 15), there is no circuit conflict on the question presented. Petitioner asserts (*ibid.*) that the D.C. Circuit is the "default" venue for challenges to FERC actions, but in fact the statute authorizes suit in the circuit where the utility "is located or has its principal place of business, or in the" D.C. Circuit, 16 U.S.C. 825*l*(b). A version of the unit-specific review process has been in place for nearly 20 years, and the market-based rate system for even longer. See, *e.g.*, *PJM Interconnection, L.L.C.*, 117 F.E.R.C. ¶ 61,331, 2006 WL 3762158, at *62,672-*62,673 & n.82 (Dec. 22, 2006); *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998). The absence of *any* disagreement in the circuits is a good sign that this Court's intervention is not necessary.

Petitioner contends (Pet. 14) that review is warranted even in the absence of a circuit conflict because electrical grids are important and the decision below "empowers PJM to run roughshod over a utility's chosen offer." Petitioner's characterization of the decision below is incorrect: a seller may challenge before the Commission both the rules for a particular market and the application of those rules to the seller. And if a seller still finds the rates that it is able to obtain in PJM's market unfavorable, it may sell its capacity in a variety of other outlets, including via bilateral contract. See Pet. App. 113a-116a. Moreover, in selling to those other outlets, a seller may choose to make a cost-based rate filing under Section 205, rather than a market-based rate filing. *Id.* at 114a.

Petitioner acknowledges the limited practical significance of the decision below. Petitioner suggests (Pet. 21-22) that "a supplier whose offer affirmatively conflicts with specific directives of the * * * tariff will have

an uphill battle to demonstrate why the reasoning underlying FERC's prior approval of those directives does not apply in the same way to the supplier's proposal," and that it "may be the case that issues explicitly addressed in the * * * tariff can effectively occupy the field." But on that view, there would be little difference between petitioner's preferred approach and the current system, where the Commission already may review offers for compliance with the tariff. See Pet. App. 121a.

In short, petitioner offers no basis for concluding that the decision below has caused or will cause practical problems for the "proper[ ] functioning" of the "electric grid." Pet. 16. Further review is unwarranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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