No. 11-1009

In the Supreme Court of the United States

PUBLIC CITIZEN, INC., ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

MICHAEL A. BARDEE
General Counsel

ROBERT H. SOLOMON
Solicitor

CAROL J. BANTA
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's rules allowing wholesale sales of electricity at market-based rates, based on rigorous monitoring for potential market-power abuses, are consistent with the Federal Power Act's mandate that rates be "just and reasonable" (16 U.S.C. 824d(a)) and consistent with the Act's rate-filing requirements (16 U.S.C. 824d(c) and (d)).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 659 F.3d 910. The orders of the Federal Energy Regulatory Commission (excerpted at Pet. App. 23a-88a and 89a-190a) are reported at 72 Fed. Reg. 39,904 and 73 Fed. Reg. 25,832.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2011. On December 22, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 10, 2012, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Power Act (FPA or Act), 16 U.S.C. 824 *et seq.*, grants the Federal Energy Regulatory Commission (FERC or Commission) jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. See 16 U.S.C. 824(a)-(b). That grant of jurisdiction is comprehensive and exclusive. See generally *New York* v. *FERC*, 535 U.S. 1 (2002). All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are "just and reasonable," and not unduly discriminatory or preferential. 16 U.S.C. 824d(a), (b) and (e).

To facilitate such FERC review, the FPA requires every public utility to file with the Commission, pursuant to rules developed by the Commission, "schedules showing all [jurisdictional] rates and charges * * * together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." 16 U.S.C. 824d(c); see 18 C.F.R. Pt. 35 (filing obligations). Any change in a jurisdictional rate, charge, or contract requires 60 days' notice to the Commission and the public, "[u]nless the Commission otherwise orders." 16 U.S.C. 824d(d); see *ibid.* (Commission may allow rate change to go into effect without 60 days' notice "for good cause shown.").

2. a. The Commission has responded to "the dramatic changes in the power industry that have occurred in recent decades." *New York*, 535 U.S. at 5. Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among wholesale power suppliers. The expansion of vast regional grids and the possibility of long-distance transmission have enabled electric utilities to make large

transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. See *id*. at 7-8. In 1996, exercising its authority under the FPA, the Commission issued Order No. 888[1] (affirmed by this Court in *New York*) to remedy undue discrimination in transmission services by requiring vertically integrated utilities to unbundle wholesale generation and transmission services and to file open access transmission tariffs. See *id.* at 11-13; cf. *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 536 (2008) ("the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity").

To broaden the geographic reach of wholesale competition and to promote efficiencies, the Commission has also encouraged the creation of "regional transmission organizations"—independent regional entities that operate the transmission grid on behalf of grid-owning member utilities and run auction markets for electricity sales. See *Morgan Stanley*, 554 U.S. at 536-537 (noting the Commission's intent "[t]o further pry open the wholesale-electricity market"). Those regional markets are subject to FERC rules that help mitigate the exercise of market power, place price caps where appropri-

[1] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Servs. by Pub. Utils. and Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, 61 Fed. Reg. 21,540 (1996), clarified, 76 F.E.R.C. ¶ 61,009 and 76 F.E.R.C. ¶ 61,347 (1997), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), order on reh'g, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), order on reh'g, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), aff'd in relevant part, *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff 'd *sub nom. New York*, *supra*.

ate, and provide for oversight of market behavior and conditions by the regional entities' own market monitors. See, *e.g.*, Pet. App. 50a (para. 955), 97a (para. 395).

b. "Against this backdrop of technological change and market-based reforms, the Commission over the past two decades has begun to permit sellers of wholesale electricity to file 'market-based' tariffs." *Morgan Stanley*, 554 U.S. at 537. In 2004, the Commission announced a policy updating its standards and procedures for obtaining market-based rate approval and initiated a formal rulemaking to amend its regulations. That process culminated in the 2007 final market-based rate rule (MBR Rule) and associated orders at issue here. See Pet. App. 23a-88a (Order 697), 89a-190a (Order 697-A).

i. As developed over the years and now formalized in the MBR Rule, the Commission's market-based rate program combines pre-approval analysis of a seller's market position and periodic reviews with post-approval reporting requirements and market-behavior rules. Pet. App. 23a-24a (para. 2). A utility must obtain prior FERC approval by, *inter alia*, showing that it lacks (or has adequately mitigated) market power. See 18 C.F.R. 35.12. Market power is defined as a seller's ability to "significantly influence price in the market by withholding service and excluding competitors for a significant period of time." *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006, 1012 n.4 (9th Cir. 2004) (quoting *Citizens Power & Light Corp.*, 48 F.E.R.C. ¶ 61,210, at 61,177 (1989)), cert. denied, 551 U.S. 1140 (2007). Using specified methods of analysis of market concentration during various seasons and load levels, the utility must show that it lacks both horizontal (generation) and vertical (transmission or inputs to generation) market power. Pet. App. 30a (para. 13), 32a (para. 21). When a seller

passes the screening process, FERC adopts a presumption that the seller does not have market power, though intervenors may present evidence to rebut that presumption. *Id.* at 5a.

Once a seller obtains authorization to file a market-based rate, it must submit an updated market-power analysis every three years (or sooner at the Commission's request),[2] so the Commission can determine whether the seller has gained market power since the initial approval (or the previous review).[3] See 18 C.F.R. 35.37(a)(1); App., *infra*, 4a-6a (Order No. 697 paras. 882-885).[4]

ii. Beyond the initial authorization (and periodic reconsideration) of a market-based tariff, the Commission imposes an array of ongoing reporting obligations and other limitations on sellers. Each power seller with a market-based tariff must file quarterly reports with the Commission summarizing all wholesale transactions during the most recent three-month period. App., *infra*, 3a-4a (Order No. 697 paras. 854-855). The reports must

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[2] Sellers who control less than 500 MW of power generation and meet other criteria are exempt from the periodic-review process. Pet. App. 5a n.1.

[3] As the court of appeals noted (Pet. App. 12a n.3), the Commission has the power to investigate a seller's market position at any time—upon outside complaint or the Commission's own detection of changed market conditions—and may revoke market-based rate authority from any seller found to have market power. *Id.* at 57a-58a (para. 964). The Commission, in fact, has revoked the market-based rate authority of sellers who failed to submit updated market-power analyses or otherwise demonstrate continuing eligibility. See, *e.g.*, *3E Techs., Inc.*, 113 F.E.R.C. ¶ 61,124 (2005); cf. *Pinnacle W. Capital Corp.*, 122 F.E.R.C. ¶ 61,035, paras. 3-6 (2006).

[4] The appendix to this brief contains relevant excerpts of FERC Order No. 697 and 697-A that were omitted from the Pet. App.

contain "a summary of the contractual terms and conditions in every effective service agreement for all jurisdictional services, including market-based and cost-based power sales and transmission services; and transaction information for effective short-term (less than one year) and long-term (one year or greater) power sales during the most recent calendar quarter." App., *infra*, 2a-3a (Order No. 697 para. 717) (citing *Revised Pub. Util. Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31044 (2002)); accord *id.*at 3a-4a (para. 855). See 18 C.F.R. 35.10b (electric quarterly reports); see also *Morgan Stanley*, 554 U.S. at 537 (describing reporting requirements); *Lockyer*, 383 F.3d at 1013 (same).[5]

"[A]fter-the-fact reporting allows the market to operate initially without regulatory intrusion" and to avoid the costs and practical difficulties associated with prereview of a large number of transactions, many of which are of short duration. *California ex rel. Lockyer* v. *British Columbia Power Exch. Corp.*, 99 F.E.R.C. ¶ 61,247, at 62,065 (2002). At the same time, the reporting requirements provide the Commission with information that it uses to monitor and oversee the rates being charged, and place sellers on notice that their authorization to sell at market-based rates is subject to continuing review and remedial action. *Ibid.*

The Commission also has implemented a series of "Market Behavior Rules" that prohibit certain practices that it has found to be anticompetitive and manipulative. All existing and future market-based tariffs are subject

[5] The Commission has in some cases revoked the market-based rate authority of sellers who failed to submit the mandated reports. App., *infra*, 3a-4a (Order No. 697 para. 855 & n.1003) (citing cases); see, *e.g.*, *Electric Quarterly Reports*, 138 F.E.R.C. ¶ 61,071 (2012) (notice that eight sellers' authority would be revoked for failure to submit reports).

to those rules. 18 C.F.R. 35.36, 35.37; see *Conditions for Pub. Util. Market-Based Rate Authorization Holders*, Order No. 674, 114 F.E.R.C. ¶ 61,163 at para. 4 (2006) (market-based rate tariffs and authorizations "would be unjust and unreasonable unless they included clearly-delineated rules governing market participant conduct"); see also *CAlifornians for Renewable Energy, Inc.* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, para. 35 (2007) (describing additional rules and policies).

In addition, in 2001, the Commission created its own Office of Enforcement to strengthen oversight by identifying market problems, assuring compliance with rules and regulations, and crafting remedies for market failures and penalties for manipulation. See App., *infra*, 8a-9a (Order No. 697-A para. 58) (Commission relies on Office to "monitor[] activity in the electric markets and conduct[] investigations to determine whether market participants are violating" market rules.); *CAlifornians for Renewable Energy*, 119 F.E.R.C. ¶ 61,058, para. 37; see also 18 C.F.R. Pt. 1c (Office's enforcement of rules prohibiting manipulation of wholesale electricity and natural gas markets). The Office also enforces the quarterly reporting requirements. 119 F.E.R.C. ¶ 61,058, para. 37.

In 2005, Congress provided for greater transparency in wholesale electricity markets and expanded the Commission's authority to detect and to punish market manipulation and violations of its market-behavior rules. See Energy Policy Act of 2005 (2005 Act), §§ 1281-1286, Pub. L. No. 109-58, 119 Stat. 594, 978-981 (collectively entitled "Market Transparency, Enforcement, and Consumer Protection"). Various amendments in the 2005 Act are premised on the Commission's ability to autho-

rize market rates and are designed to enhance its ability to monitor the operation of wholesale markets. See 16 U.S.C. 824t (directing greater market transparency), 824u (prohibiting false filing of market information), 824v (prohibiting market manipulation), 825o-1 (increasing civil penalties), 824e(b) and (e) (increasing refund protections). Congress also premised a provision authorizing "relief for extraordinary violations" in manipulating wholesale electricity markets on the existence of the Commission's market-based rate program, allowing the Commission to invalidate certain contract terms in cases where it has already "revoked the seller's authority to sell any electricity at market-based rates." 2005 Act § 1290(a)(2), 119 Stat. 984.

3. After the Commission issued its final rule revising and codifying its oversight of market-based ratemaking (Pet. App. 23a-88a), and reaffirmed its conclusions after further explanation on rehearing (*id.* at 89a-190a), numerous parties filed a total of seven petitions for review in the courts of appeals. All but the instant petitioners later withdrew their petitions, leaving only petitioners' facial challenge in this case. The court of appeals denied the remaining consolidated petitions. *Id.* at 1a-22a.

a. The court of appeals rejected petitioners' argument that the Commission, allegedly by relying on the market to regulate rates, violated its obligation under the FPA to ensure that rates are "just and reasonable." Pet. App. 8a-17a. Invoking decisions of the D.C. Circuit and Ninth Circuit, the court explained that the Commission need not, in addition to screening individual sellers for market power, make a specific finding that a market is competitive. *Id.* at 9a (citing *Lockyer*, *supra*; *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)). The court of appeals distinguished this Court's

decision in *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397-398 (1974), on the ground that monopolistic forces had distorted the market in that case, such that the agency could not rely on the market to drive prices to just and reasonable levels. Pet. App. 10a-11a.

The court upheld the Commission's policy of screening individual sellers for market power and presuming reasonableness of the terms of transactions between market participants in the absence of market power, especially in light of the program's extensive after-the-fact reporting obligations and monitoring of individual market-based transactions. Pet. App. 14a-16a. "By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power," the court reasoned, "FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable." *Id.* at 15a. The court further explained that the Commission has the enforcement tools necessary to police sellers and "to act when markets fail" in order to protect customers. *Id.* at 16a n.5.

b. The court of appeals also rejected petitioners' argument that the Commission's program, which allows sellers to file a market-based rate and does not require advance notice of changes in market prices, violates Section 824d(d)'s 60-day notice requirement for "rate changes." Pet. App. 17a-21a. After noting the Commission's "broad discretion to construe the FPA's notice and filing requirements," the court held that the agency can reasonably conclude under *Chevron* 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." *Id.* at 19a-20a.

Although the court of appeals denied petitioners' facial challenges to the market-based rate program for the reasons explained above, it preserved the future possibility of an "as-applied challenge to FERC's implementation" of its orders. Pet. App. 22a n.6.

ARGUMENT

Petitioners renew their contentions that the Commission's market-based rate program (i) violates Section 824d(a)'s mandate that the Commission ensure "just and reasonable" rates for wholesale sales of electricity (Pet. 24-31), and (ii) violates Section 824d(d)'s requirement that sellers provide 60 days' notice of any rate changes (Pet. 13-24). The court of appeals' decision, however, correctly rejected those facial challenges. The only other court of appeals to have considered the first issue reached the same conclusion as the court did here, and no other court has decided the second issue. The decision below thus does not conflict with any decision of another court of appeals, nor does it conflict with any decision of this Court. The Commission, after years of consideration, experience, and refinement, has taken account of the substantial technological and market developments in the electric power industry in a manner consistent with its statutory responsibilities. Further review is not warranted.

1. Petitioners contend (Pet. 24) that the MBR Rule "substitutes reliance on market forces" for the FPA's "just and reasonable" rate standard, in conflict with this Court's decision in *FPC* v. *Texaco*, 417 U.S. 380 (1974). The Commission's emphasis on the role of market power, however, is in accord with this Court's longstanding interpretation of the FPA and does not conflict with *Texaco*. And petitioners ignore the reporting, oversight,

and enforcement measures that the court of appeals found "crucial" (Pet. App. 16a) to its approval of the Commission's approach. This Court's review of the decision below, which is consistent with the other court of appeals decisions on this issue, is unwarranted.

a. As the court of appeals acknowledged (Pet. App. 8a), *Texaco* disapproved of an agency's reliance on market price alone as "the final measure of 'just and reasonable' rates." 417 U.S. at 397; see Pet. App. 13a ("FERC may not determine in advance that the prevailing market rate is by definition just and reasonable"). At issue in *Texaco* was the Federal Power Commission's (FPC's) rule exempting small natural gas producers from direct rate regulation. 417 U.S. at 382-386. As relevant here, the Court observed that concentration in the industry and monopolistic forces had distorted the natural gas sales market. Because the market was distorted, the Court explained, the agency could not rely simply on the market to drive prices to just and reasonable levels. *Id.* at 397-398. The Court suggested, however, that the "true" market price would be the "just and reasonable rate." *Id.* at 398 (quoting *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 25 (1968)).

The MBR Rule avoids the FPC's mistake in *Texaco* by looking not primarily at prevailing market prices, but rather at the market position of the seller. As the court of appeals recognized (Pet. App. 11a), the MBR Rule employs "a rigorous screening process to detect market power." "Where sellers do not have market power or the ability to manipulate the market (alone or in conjunction with others), it is not unreasonable for FERC to presume that rates will be just and reasonable." *Id.* at 14a (citing *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Elizabeth-*

town Gas Co. v. *FERC*, 10 F.3d 866, 870-871 (D.C. Cir. 1993)).

The Commission's focus on a seller's market power is consistent with the "commonsense notion," underlying this Court's half-century-old standard from *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), that wholesale market participants with "presumptively equal bargaining power" can be expected to negotiate just and reasonable rates. *Morgan Stanley Capital Group Inc.* v. *Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 545 (2008) (quoting *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 479 (2002)); accord *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 n.4 (2010) ("well-informed wholesale-market participants of approximately equal bargaining power generally can be expected to negotiate just-and-reasonable rates"); *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable."); *Elizabethtown Gas*, 10 F.3d at 871 (upholding market-based pricing under the Natural Gas Act where FERC found that the pipeline would be unable to exercise market power, so that "market discipline" would hold prices to just and reasonable levels); see also Pet. App. 110a (para. 408). Conversely, the exercise of market power would remove the presumption that rates are just and reasonable. See *Morgan Stanley*, 554 U.S. at 554 ("[I]f it is clear that one party to a contract engaged in such extensive unlawful market manipulation as to alter the playing field for contract negotiations, the Commission should not presume that the contract is just and reasonable.").

That "commonsense" presumption is particularly appropriate in the context of modern power markets. This Court has noted the transformative, pro-competitive developments in wholesale electricity markets since the 1970s and 1980s. See, *e.g.*, *New York*, 535 U.S. at 5, 7-8; see also pp. 2-4, *supra*. Indeed, this Court in *Morgan Stanley* recognized power generation as one of "those areas of the industry amenable to competition." 554 U.S. at 536. Accordingly, the Commission's approach to modern electricity markets is easily distinguishable from early efforts to introduce market-based ratemaking for the natural gas sales examined in *Texaco*.

b. Contrary to petitioners' assertion (Pet. 27), the Commission does not "rel[y] solely on its economic theory that market forces will make rates * * * just and reasonable." In issuing the MBR Rule, the Commission emphasized that it "is not relying solely on the market, without adequate regulatory oversight, to set rates." Pet. App. 47a (para. 952). As described above (pp. 5-8, *supra*), the market-based rate program requires detailed reporting of all transactions conducted pursuant to the market-based rate tariff, and the Commission provides ongoing monitoring and enforcement of approved market-rate sellers. The court of appeals properly relied on those reporting requirements and oversight efforts, in tandem with the pre-screening for market power, in affirming the MBR Rule. Pet. App. 12a-15a. As the court of appeals explained, "'the crucial difference' between previous market-based regulatory policies rejected by the courts" and the MBR Rule is "'the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements.'" *Id.* at 16a (quoting *California ex rel.*

Lockyer v. *FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004), cert. denied, 551 U.S. 1140 (2007)); cf. *Elizabethtown Gas*, 10 F.3d at 870 (noting with approval FERC's commitment to use its complaint and investigation authority to assure that market rates are indeed reasonable); *Blumenthal* v. *FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009) ("FERC reasonably relied on its continuing oversight of the market to guard against potential abuses of market power").

In that regard, the court of appeals relied in part on its own earlier decision in *Lockyer*, which had rejected a similar facial challenge to an earlier version of the market-based rate program. Pet. App. 15a-17a. In *Lockyer*, the court explained that the Commission does not rely on market forces alone in approving market-based rate tariffs, but rather relies on a combination of the Commission's pre-approval analysis of a seller's market power, ongoing oversight of mandatorily reported market-based transactions, and continued reconsideration of market-based rate authorization. The court concluded (correctly) that those measures, taken together, enable the Commission to ensure that rates are—and remain—just and reasonable, as required by the FPA. 383 F.3d at 1013-1014, 1017.[6]

[6] Although petitioners emphasize (Pet. 12, 30) the court of appeals' erroneous assumption in *Lockyer* that FERC's "triennial" review of updated market power analyses would take place three times per year, rather than every three years (see 383 F.3d at 1013), *Lockyer* also relied on the quarterly reports of all transactions. *Id.* at 1013, 1017. In the proceeding below, the court of appeals acknowledged its earlier misunderstanding but found it immaterial because "[t]he precise nature and timing of FERC's reporting requirements are within the agency's discretion," and the difference was "not so substantial" as to invalidate *Lockyer*'s approval of the market-based rate program. Pet. App. 12a.

Following the events leading to *Lockyer*,[7] the Commission overhauled its reporting requirements to include, *inter alia*, transaction-specific data (*i.e.*, the "minimum needed for market monitoring purposes"). *Revised Pub. Util. Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,044, at para. 54 (2002); App., *infra*, 2a-3a (Order No. 697 para. 717), 3a-4a (Order No. 697 para. 855) (updated FERC reporting requirements mandate specific, not aggregate, data in standardized format allowing for customer complaints and effective agency monitoring); see also *id.* at 2a (Order No. 697 para. 117) ("as part of our ongoing monitoring activities, we examine the [electric quarterly report] data in an effort to identify whether market prices may indicate an exercise of market power"). The Commission also revamped its market-behavior rules and market-power analysis, and created the Office of Enforcement to monitor market activity (see p. 7, *supra*). And in the 2005 Act, as described above (see pp. 7-8, *supra*), Congress further enhanced the Commission's remedial and enforcement authority over participants in the market-based rate program, thereby "effectively ratif[ying]" that program. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000). Accordingly, the Commission's standards, procedures, and oversight under the MBR Rule, as supplemented by Congress, are now "more rigorous

[7] Although the *Lockyer* court rejected the facial challenge to market-based rates, it found merit in an as-applied challenge on the ground that the Commission had not rigorously followed its post-approval reporting requirements during the Western energy crisis in 2000-2001. See 383 F.3d at 1014. But the court determined that the Commission's approach, *if followed*, avoided the failures in *Texaco* and similar cases and satisfied the FPA's requirement of "just and reasonable" rates. *Ibid.*

than those reviewed by the *Lockyer* court." Pet. App. 156a (para. 459).

As the court of appeals noted (Pet. App. 16a n.5), all that monitoring would be ineffectual if the Commission lacked "the tools to act when markets fail." But, as it determined "for purposes of this facial challenge," "FERC has those tools." *Ibid.* Those tools include a variety of enforcement measures—both monetary, including disgorgement of unjust profits, retroactive refunds to customers, and stiff civil penalties, as well as nonmonetary, including revocation of market-based rate authority. *Id.* at 25a-26a (para. 5), 57a-58a (para. 964), 136a-137a (para. 436), 152a (para. 454 & n.725). Nor is the Commission reluctant to employ those tools as appropriate. See, *e.g.*, *Constellation Energy Commodities Group, Inc.*, 138 F.E.R.C. ¶ 61,168, paras. 1, 22 (2012) (approving settlement between Office of Enforcement and power marketer over allegations of market manipulation and violations of other market-behavior rules; marketer required to pay $135 million civil penalty and $110 million as disgorgement and interest for unjust profits, and to be subject to enhanced compliance monitoring); see also nn. 3 and 5, *supra*.

In sum, the Commission's potent combination of preapproval market power analysis and vigilant post-approval monitoring and enforcement sets the MBR Rule apart from the few cases that have invalidated other forms of market-based ratemaking. See, *e.g.*, *Texaco*, *supra*; *Farmers Union Cent. Exch., Inc.* v. *FERC*, 734 F.2d 1486, 1509 (D.C. Cir. 1984) (rejecting Commission's decision to allow oil pipeline rates to be driven by competition because the agency had no mechanism in place to ensure that competition would actually keep prices within the zone of reasonableness: "[N]othing in the

regulatory scheme itself acts as a monitor to see if this occurs or to check rates if it does not. That is the fundamental flaw in the Commission's scheme."), cert. denied, 469 U.S. 1034 (1984). The protective, multi-faceted approach to market-based ratemaking put in place by the Commission "enables the Commission to meet its statutory duty to ensure that all rates are just and reasonable." Pet. App. 47a-48a (paras. 952-953).

c. As this Court has recognized, the only two courts of appeals that have decided this issue are in accord: "Both the Ninth Circuit and the D.C. Circuit have generally approved FERC's scheme of market-based tariffs." *Morgan Stanley*, 554 U.S. at 538 (citing *Lockyer*, 383 F.3d at 1011-1013; *Louisiana Energy*, 141 F.3d at 365); see Pet. App. 15a-17a, 22a; *Public Util. Dist. No. 1 of Snohomish County* v. *FERC*, 471 F.3d 1053, 1081 (9th Cir. 2006), vacated on other grounds, 547 F.3d 1081 (9th Cir. 2008); see also *Blumenthal*, 552 F.3d at 882 (citing earlier market-based rate approvals under the FPA and the substantially identical Natural Gas Act). The lack of any conflict among the courts of appeals makes further review of petitioners' facial challenge to the Commission's sound exercise of authority over wholesale electricity rates particularly unwarranted.

2. Petitioners also contend that the MBR Rule is inconsistent with the notice-and-filing requirements of the FPA (Pet. 13-16) and that the decision below conflicts with this Court's precedents concerning "detariffing" of rate-regulated industries (Pet. 17-24). The court of appeals, in the decision below and in its earlier *Lockyer* decision, correctly rejected that facial challenge. After thorough consideration of the Commission's reporting requirements and oversight measures, the court of appeals concluded that the Commission's

market-based rate program, in contrast to the complete deregulation in the detariffing cases, adheres to the FPA's mandates. No other court of appeals has concluded otherwise. Accordingly, further review is unwarranted.

a. As discussed above, Section 824d(a) of the FPA states that "[a]ll rates and charges * * * shall be just and reasonable," but does not prescribe any particular ratemaking methodology. The other provisions of Section 824d, which *inter alia* grant the Commission wide latitude to determine the timing, form, and treatment of rate filings, are designed to give effect to that substantive mandate.

Section 824d(c) requires that every public utility file with the Commission schedules showing rates and charges for jurisdictional transmission or sales, but leaves the timing and form of those filings to the Commission's discretion:

> Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, * * * schedules[8] showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission.

16 U.S.C. 824d(c); see Pet. App. 53a-54a (para. 959), 134a-135a (para. 434).

[8] The FPA does not define "schedules" and thus leaves the responsibility of defining that term to the Commission as well. The Commission defines "rate schedule" in its regulations at 18 C.F.R. 35.2(b).

Section 824d(d) further provides:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate * * * , except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for pubic inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will to into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

16 U.S.C. 824d(d).

Petitioners suggest (Pet. 14-15) that those provisions require the exact numerical sale price to be on file with the Commission before any transmission or sale is executed. Those provisions, however, do not compel such a narrow construction. The Commission, within the "broad discretion" that the FPA affords it (Pet. App. 19a), has determined that the FPA's rate-filing requirements are satisfied when a seller—having demonstrated to the Commission that it lacks market power—files a generally-applicable market-based tariff ("umbrella tariff") and subsequently provides details of all transactions (including prices) in its mandatory quarterly reports. *Id.* at 55a (para. 961). Interpreting both the FPA and its own market-based rate rules, the Commission reasonably concluded that "[t]he market-based rate tariff, with its appurtenant conditions and requirement for

filing transaction-specific data in [electric quarterly reports], *is* the filed rate." *Ibid.* (emphasis added). As in *Lockyer*, the court of appeals here correctly deemed that conclusion a permissible one. *Id.* at 20a-21a; 383 F.3d at 1013.[9]

The key purpose of Section 824d(d), as petitioners point out (Pet. 13, 23), is to afford notice and an opportu-

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[9] The Commission permits the filing of umbrella tariffs for a broad range of transactions, not limited to market-based sales. See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 F.E.R.C. ¶ 61,139, at 61,982-61,983 (1993) (explaining that umbrella tariffs of general applicability set forth the general rates, terms, and conditions of service, leaving details such as the amount and duration of service and the precise price to vary with each transaction); *see also id.* at 61,983 (Umbrella tariffs "give the selling utility the flexibility to respond to market opportunities while satisfying its obligation to have its rate on file. * * * [They are intended to] retain[] maximum flexibility in transacting business in an evolving, increasingly competitive generation market.").

Similarly, the Commission, with judicial approval, has long interpreted the FPA's notice-and-filing provisions to allow the filing of formula rates, without requiring separate notice of changes in resulting rates that are set under the formula. See, *e.g.*, *Public Utils. Comm'n of Cal.* v. *FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) (affirming FERC's approval of formula rate); see also *id.* at 254 n.3 ("the formula itself is the filed rate that provides sufficient notice to ratepayers for purposes of the [filed rate] doctrine"); *Alabama Power Co.* v. *FERC*, 993 F.2d 1557, 1567-1568 (D.C. Cir. 1993) (endorsing FERC's position that, when it accepts a formula rate, FERC "grants waiver of the filing and notice requirements of [Section 824d];" explaining that the utility's "rates, then, can change repeatedly, without notice to the Commission, *provided* those changes are consistent with the formula") (internal quotation marks and citation omitted). Cf. *Maine Pub. Utils. Comm'n* v. *FERC*, 520 F.3d 464, 469, 479 (D.C. Cir. 2008) (upholding Commission's approval of auction-based pricing model, akin to a formula rate, in an organized regional market), rev'd on other grounds, *NRG Power*, *supra*.

nity to challenge the changed rate. Cf. 16 U.S.C. 824d(e) (providing for suspension of rates pending hearing on lawfulness). Petitioners contend (Pet. 16) that FERC's market-based rate program has eliminated the requisite advance notice and replaced it with after-the-fact reporting. Consistent with its determination that a market-based rate tariff is the pertinent rate schedule (and the filed rate), however, the Commission considers a "rate change" to be initiated when a seller applies for market-based rate authority and proposes a market-based tariff—with 60 days' public notice and subject to challenge—not each time the seller subsequently negotiates a new price pursuant to the same market-based tariff. Pet. App. 153a-155a (para. 456), 158a (para. 461). In other words, "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 fill with the market." *Id.* at 19a-20a. As the court of appeals held, in the absence of a definition in the FPA of "rate change," and in light of "the flexibility afforded FERC by the statute's express terms," the FPA permits the Commission's construction. *Id.* at 20a.[10]

b. Petitioners argue (Pet. 19-24, 33-34) that FERC's construction of the notice-and-filing requirements is inconsistent with the Court's decisions in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp.* v. *AT&T*,

[10] Contrary to petitioners' contention (Pet. 14), the court of appeals did not mistakenly believe that the Commission had invoked its waiver authority under Section 824d(d) to support the MBR Rule. The court merely cited the waiver authority—as had the Commission (Pet. App. 153a-155a (para. 456))—as consistent with the "overall flexibility evident in the FPA's other provisions." *Id.* at 19a.

512 U.S. 218 (1994). Petitioners are incorrect, because the Commission's use of *ex ante* findings of no market power coupled with post-approval reporting and monitoring requirements distinguishes FERC's market-based rate program from those invalidated by this Court in *Maislin* and *MCI*.

Maislin involved an Interstate Commerce Commission (ICC) policy that allowed carriers to charge privately negotiated contract rates that differed from the filed tariff rate, but that were *never* disclosed to nor reviewed by the ICC and that were not subject to any challenge for discrimination. *Maislin*, 497 U.S. at 130-133. This Court held that the policy violated the filed-rate doctrine. *Id.* at 126-127; see also *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379-380 (D.C. Cir. 1986) (rejecting ICC rule allowing parties to agree upon rates that would never be published or filed with the agency). Similarly, *MCI* rejected a Federal Communications Commission (FCC) policy that relieved *all* nondominant carriers of *any* requirement to file any of their rates with the agency. This Court found that such complete detariffing for nondominant carriers effectively removed all rate regulation where the FCC found competition to exist, in violation of specific language in the Communications Act of 1934, 47 U.S.C. 151 *et seq.* *MCI*, 512 U.S. at 224-225, 231-232; see also *MCI Telecomms. Corp.* v. *FCC*, 765 F.2d 1186, 1992 (D.C. Cir. 1985) (detariffing amounted to "wholesale abandonment or elimination" of filing requirements).

In each of those cases, the agency in question sought to deregulate an industry entirely by exempting participants from all filing requirements and thus forgoing any public notice or agency review of rates. "[A] market-

based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily required oversight." *Lockyer*, 383 F.3d at 1014. With the MBR Rule, however, FERC has developed a multi-layered regulatory structure that combines rigorous advance screening of market power with frequent public reporting, continuing agency monitoring, and significant enforcement activity. The Commission's approach, unlike those in *Maislin* and *MCI*, places a high priority on public notice, opportunities for challenges, and ongoing agency oversight.

As discussed above (pp. 4-8, *supra*), market-based rate transactions under FERC's program are made in accordance with the published terms of a filed umbrella tariff, approved only after FERC determines, in a noticed public proceeding with opportunity for interested parties to protest, that the seller lacks market power as measured by the Commission's prescribed standards. See Pet. App. 160a-161a (paras. 464-465). Moreover, the Commission requires the quarterly filing of the actual prices charged for individual transactions, allowing both the Commission and the public to review rates for reasonableness and undue discrimination. Parties can institute complaint proceedings, or the Commission can institute its own proceedings, to challenge rates as unreasonable or unduly discriminatory, or to question whether the seller has obtained market power. The Office of Enforcement also monitors program participants for market manipulation and other violations. *Id.* at 159a-161a (paras. 463-465). "No detariffing occurs in these circumstances." *Ibid*.[11]

[11] In the "detariffing" cases, the statutes at issue—the Interstate Commerce Act (*Maislin*) and the Communications Act (*MCI*)—pro-

Accordingly, as the court of appeals previously concluded, "the crucial difference between *MCI*/*Maislin* and the present circumstances is the dual requirement of an ex ante finding of the absence of market power *and* sufficient post-approval reporting requirements. Given this, FERC argues that its market-based tariff does not run afoul of *MCI* or *Maislin*, and we agree." *Lockyer*, 383 F.3d at 1013; accord Pet. App. 16a.

c. Petitioners do not contend that any other court of appeals has concluded, in conflict with the decision below, that the MBR Rule or FERC's market-based rate program violates Section 824d's notice-and-filing requirements. Indeed, the Ninth Circuit is the only court of appeals to have decided that issue thus far, and this Court recently acknowledged the absence of lower court disagreement on the lawfulness of the market-based program more generally. See *Morgan Stanley*, 554 U.S. at 538. Accordingly, review by this Court would be premature at best.

Lacking any such conflict, petitioners assert (Pet. 1) that this case "presents a question of national importance." The court of appeals agreed that this dispute involves "policy issues of exceptional importance." Pet.

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hibited the charging of any rate other than the tariff rate. See, *e.g.*, *Maislin*, 497 U.S. at 120 (citing 49 U.S.C. 10761(a) (1988)); *MCI*, 512 U.S. at 224-225 (citing 47 U.S.C. 203 (1988 & Supp. IV 1992)). "Unlike the Interstate Commerce Act, however, * * * the FPA 'departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used in ratesetting.'" *Morgan Stanley*, 554 U.S. at 531 (quoting *Verizon Commc'ns*, 535 U.S. at 479); see 16 U.S.C. 824d(c) (requiring utilities to file "all contracts which in any manner affect or relate to [wholesale sales or transmission] rates, charges, classifications, and services"); see also Pet. App. 159a-160a (para. 464) (distinguishing ICC cases on that basis).

App. 21a. But, as the court of appeals correctly determined (*id.* at 22a), the Commission decided those policy issues in a manner that is consistent with its statutory responsibilities, including those under the amendments enacted by Congress in 2005 to enhance the Commission's enforcement authority with respect to market-based rates. This case thus does not present legal issues warranting further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

MICHAEL A. BARDEE
General Counsel

ROBERT H. SOLOMON
Solicitor

CAROL J. BANTA
Attorney
Federal Energy Regulatory Commission

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APPENDIX A

119 FERC ¶ 61,295
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 35

(Docket No. RM04-7-000; Order No. 697)

Market-Based Rates For Wholesale Sales Of Electric Energy, Capacity And Ancillary Services By Public Utilities

(Issued: June 21, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule

SUMMARY: The Federal Energy Regulatory Commission (Commission) is amending its regulations to revise Subpart H to Part 35 of Title 18 of the Code of Federal Regulations governing market-based rates for public utilities pursuant to the Federal Power Act (FPA). The Commission is codifying and, in certain respects, revising its current standards for market-based rates for sales of electric energy, capacity, and ancillary services. The Commission is retaining several of the core elements of its current standards for granting market-based rates and revising them in certain respects. The Commission also adopts a number of reforms to streamline the administration of the market-based rate program.

* * * * *

117. AARP and State AGs and Advocates argue that the Commission should consider evidence from actual market data in determining whether market power exists rather than rely on the results of the DPT to determine whether a seller has market power. We agree that actual market data is an important part of a determination of whether a seller may have market power. In this regard, we look at actual market data, both in the initial analysis and in ongoing monitoring of the EQR data. As the Commission stated in the April 14 Order, "[a]s with our initial screens, applicants and intervenors may present evidence such as historical wholesale sales. Those data could be used to calculate market shares and market concentration and could be used to refute or support the results of the Delivered Price Test."[98] In addition, as part of our ongoing monitoring activities, we examine the EQR data in an effort to identify whether market prices may indicate an exercise of market power.

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717. With regard to comments that the Commission establish a reporting mechanism, under the Commission's existing reporting requirements entities making power sales must submit EQRs containing: a summary of the contractual terms and conditions in every effective service agreement for all jurisdictional services, including market-based and cost-based power sales and transmission services; and, transaction information for effective short-term (less than one year) and long-term (one year or greater) power sales during the most recent

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[98] April 14 Order, 107 FERC ¶ 61,018 at P 112.

calendar quarter.[789] Through this reporting requirement, the Commission monitors the rates charged by mitigated sellers.

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854. In this regard, we agree with PPM that the Commission retains the tools necessary to ensure that all rates are just and reasonable, including initial market power evaluations, and ongoing monitoring by the Commission. For example, as noted above, all sellers with market-based rates must file electronically with the Commission an EQR of transactions no later than 30 days after the end of the reporting quarter and must comply with the change in status reporting requirement. We note that the reporting requirement relied upon by the court in *Lockyer* is the transaction-specific data found in EQRs, which we continue to require of all sellers, and not updated market power analyses. Thus, exempting Category 1 sellers from routinely filing updated market power analyses does not run counter to *Lockyer*.

855. With respect to EQR filings, the Commission enhanced and updated the post-transaction filing requirements from what they were during the period at issue in the *Lockyer* case, now requiring electronic reporting of, among other things:[1002] (1) a summary of the contractual

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[789] *Revised Public Utility Filing Requirements*, Order No. 2001, 67 FR 31043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001.

[1002] *Revised Public Utility Filing Requirements*, Order No. 2001, 67 FR 31043 (May 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002). Required data sets for contractual and transaction information are described in Attachments B and C of Order No. 2001. The EQR must be submitted to the Commission using the EQR Submission System Software,

terms and conditions in every effective service agreement for market-based power sales; and (2) transaction information for effective short-term (less than one year) and long-term (one year or greater) market-based power sales during the most recent calendar quarter. We also note that the Commission has revoked the market-based rate authority of sellers that have failed to comply with the EQR filing requirements.[1003] Further, the Commission has utilized EQR data in determinations relating to market power. For example, the Commission relied in part on EQR data in reaching its determination that an "alternative" market power analysis submitted by Duke Power was unpersuasive.[1004]

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882. The Commission adopts the NOPR proposal to conduct a regional review of updated market power analyses, with certain modifications. We agree with commenters such as APPA/TAPS that the regional approach will lead to data consistency and availability. In this regard, both the Commission and market partici-

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which may be downloaded from the Commission's website at http://www.ferc.gov/docs-filing/eqr.asp. The exact dates for these reports are prescribed in 18 CFR 35.10b. Failure to file an EQR (without an appropriate request for extension), or failure to report an agreement in an EQR, may result in forfeiture of market-based rate authority, requiring filing of a new application for market-based rate authority if the seller wishes to resume making sales at market-based rates.

[1003] *See Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006); *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006); *Electric Quarterly Reports*, 69 FR 57679 (Sept. 27, 2004); *Electric Quarterly Reports*, 105 FERC ¶ 61,219 (2003).

[1004] *Duke Power, a Division of Duke Energy Corporation*, 111 FERC ¶ 61,506 at P 48, 55 (2005).

pants will benefit from greater data consistency that will result from regional examination of updated market power analyses and a methodical study of all sellers in the same region. This will give the Commission a more complete view of market forces in each region and the opportunity to reconcile conflicting submissions, enhancing our ability to ensure that sellers' rates remain just and reasonable.

883. Although some commenters express concern that a regional review approach will increase administrative burdens, particularly for sellers operating in multiple regions, we believe that the Commission's proposal properly and fairly balances the need to effectively monitor and mitigate market power in wholesale markets with the desire to minimize any administrative burden associated with the filing and review of updated market power analyses. While we recognize that some sellers may have to file updates more frequently than they do currently, we have carefully balanced the interests of all involved, and we believe that regional reviews of updated market analyses is both needed and desirable and will enhance the Commission's ability to continue to ensure that sellers either lack market power or have adequately mitigated such market power.

884. We note that sellers currently must prepare a market power analysis for all of their generation assets nationwide. Some sellers with assets in multiple regions have chosen to submit their individual updated market power analyses when each is due (every three years) rather than combining them into a single updated market power analysis. Others file one updated market power analysis for the entire corporate family, with individual analyses of the different markets in which their

assets are located. Either way, the same analyses must be filed under the status quo and the approach adopted in this Final Rule. The timing may differ, but the increased burden is minimal.[1026]

885. Nevertheless, considering the comments received and upon further review of the Commission's proposal, we believe that some of the proposed regions should be consolidated. Therefore, we will reduce the number of regions from the proposed nine to six. In Appendix D we identify the six regions (Northeast, Southeast, Central, Southwest Power Pool, Southwest, and Northwest), and will require Category 2 sellers that own or control generation assets in each region to file an updated market power analysis for that region every three years based on a rotating schedule shown in the Appendix.[1027] We believe that, with fewer and larger regions, some sellers will likely be present in fewer regions and administrative burdens for those sellers accordingly will be reduced. In addition, the decrease in the number of regions will also extend the time period between filings. In the NOPR, the Commission stated that three regions would be reviewed per year, with four months between each set of filings. Here we adopt review of two regions per year, with the filing periods six months apart.

[1026] In this regard, we note that preparation of multiple market power analyses is likely less burdensome and less expensive than what would otherwise be required under cost-based regulation which can result in extended administrative litigation to determine the just and reasonable rate.

[1027] Concerning power marketers that may not own or control generation assets in any region, we will require the submission of a filing explaining why the seller meets the Category 1 criteria, as discussed above. Power marketers must submit such a filing with the first scheduled geographic region in which they make any sales.

APPENDIX B

123 FERC ¶ 61,055

UNITED STATES OF AMERICA

FEDERAL ENERGY
REGULATORY COMMISSION

18 CFR Part 35

[Docket No. RM04-7-001; Order No. 697-A]

Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities

(Issued April 21, 2008)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Rehearing and Clarification.

SUMMARY: In this order on rehearing, the Commission affirms its basic determinations in Order No. 697, and grants rehearing and clarification regarding certain revisions to its regulations and to the standards for obtaining and retaining market-based rate authority for sales of energy, capacity and ancillary services to ensure that such sales are just and reasonable. The Commission also clarifies several aspects of the implementation process adopted in Order No. 697.

* * * * *

Commission Determination

58. We have considered the strategic bidding literature and various theoretical models which demonstrate that market participants who pass market power screens nonetheless may be able to elevate prices in Commission-approved auction markets through "non-collusive strategic bidding, withholding, and gaming tactics." However, the Commission does not think it is necessary to investigate the possibility of whether sellers or market participants are able to engage in strategic bidding, withholding and gaming tactics to elevate prices in auction markets in order to determine whether to grant market-based rate authority. First, these theoretical or gaming models require consideration of numerous assumptions and hypothetical future behavior that may quickly become invalid because of the changing behavior of market participants, changes in the market or changes in other factors, e.g., supply or demand. Accordingly, the Commission is concerned that they would not be reliable tools in helping assess whether a seller has market power. Second, the type of behavior described by NASUCA may be prohibited by the Commission's Anti-Manipulation Rule at section 1c.2 of the Commission's regulations.[85] Violations of the Anti-Manipulation Rule include behavior constituting a fraud that had the purpose of impairing, obstructing, or defeating a well-functioning market.[86] The Commission's Office of Enforcement monitors activity in the electric markets and conducts investigations to determine whether market par-

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[85] *Prohibition of Energy Market Manipulation*, Order No. 670, 71 FR 4244 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,202 (2006), *reh'g denied*, 114 FERC ¶ 61,300 (2006).

[86] Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 50-53.

ticipants are violating the Anti-Manipulation Rule. To the extent that NASUCA or any other entity has specific allegations of market manipulation, that entity should contact the Commission's Enforcement Hotline or the Division of Investigations of the Office of Enforcement. Finally, as the Commission stated in Order No. 697, for practical considerations the data gathering and analysis burden imposed on sellers and the Commission to consider all the hypothetical types of behavior would be overly burdensome and impractical.[87]

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[87] Order No. 697 at P 124.