No. 07-835

In the Supreme Court of the United States

COLORADO OFFICE OF CONSUMER COUNSEL, 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 DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission was required, in a Commission-initiated investigation into the tariffs of wholesale sellers of electricity with market-based rate authorization, to address petitioners' broader challenges to the Commission's market-based rate program.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulation:

Statutes and regulation—Continued: Page

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 490 F.3d 954. The orders of the Federal Energy Regulatory Commission (Pet. App. 17a-128a, 129a-215a) are reported at 105 F.E.R.C. ¶ 61,218 and 107 F.E.R.C. ¶ 61,175.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. Petitions for rehearing were denied on August 20, 2007 (Pet. App. 6a, 7a). The petition for a writ of certiorari was filed on November 19, 2007 (Mon-

day). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Power Act (FPA), 16 U.S.C. 791a *et seq.*, grants the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Proposed rates for the sale or transmission of power within the Commission's jurisdiction are subject to FERC review to ensure that they are "just and reasonable" and not unduly discriminatory or preferential. 16 U.S.C. 824d(a).

In addition to reviewing proposed rates, the Commission may also initiate proceedings to investigate the justness and reasonableness of any existing rate. If the Commission determines that any "rate, charge, or classification," or "any rule, regulation, practice, or contract affect[ing] such rate, charge, or classification," is "unjust, unreasonable, unduly discriminatory or preferential," then the Commission must determine and "fix" the "just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force." 16 U.S.C. 824e(a) (Supp. V 2005).

b. Until the 1980s, the Commission established rates primarily on a cost-of-service basis. As barriers to entry in the generation sector declined, however, a competitive market for wholesale sales of electricity began to develop. In response to those developments, the Commission began considering and approving market-based rates for wholesale electricity sales in the late 1980s.

Under the Commission's market-based rate program, the Commission approves a seller's request to sell

electricity at market-based rates only if it first finds that the seller and its affiliates either do not have market power or have adequately mitigated their market power. See *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006, 1009 (9th Cir. 2004), cert. denied, 127 S. Ct. 2972 (2007) (*Lockyer*). Market-based rates are permissible in those circumstances because "when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown Gas Co.* v. *FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (*Elizabethtown*). See *Lockyer*, 383 F.3d at 1013 (noting that "[i]n 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") (quoting *Tejas Power Corp.* v. *FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) (*Tejas*)).

2. a. From 2000 until mid-2001, the California electric energy markets were subject to considerable upheaval, and the Commission responded by conducting an investigation under Section 824e into the justness and reasonableness of rates in those markets. See *Lockyer*, 383 F.3d at 1009. The Commission determined that the "'California market structure provide[d] the opportunity for sellers to exercise market power' in times of tight supply and that such market power could result in 'unjust and unreasonable rates.'" *Id.* at 1010 (quoting *San Diego Gas & Elec. Co.* v. *Sellers of Energy & Ancillary Servs.*, 93 F.E.R.C. ¶ 61,121 (2000) (*San Diego*)). The Commission further concluded that the "electric market structure and market rules for wholesale sales of electric energy in California [were] seriously flawed" and had helped to cause, "and continue[d] to have the potential to cause, unjust and unreasonable rates for short-

term energy * * * under certain conditions." *Id.* at 61,349-61,350.

b. As a result of its experience with the California markets, the Commission became concerned that public utilities with market-based rate authorization elsewhere might be able, under certain circumstances, to exercise market power or engage in anticompetitive behavior that could result in unjust and unreasonable rates. See *Investigation of Terms & Conditions of Pub. Util. Market-Based Rate Authorizations*, 97 F.E.R.C. ¶ 61,220, at 61,976 (2001) (*Investigation I*). Accordingly, in an order issued in November 2001, the Commission instituted a proceeding under Section 824e to investigate the justness and reasonableness of the market-based rate tariffs and authorizations of public utilities that sell electric energy and ancillary services at wholesale in interstate commerce. *Id.* at 61,977. Although the Commission did not find that particular sellers had exercised market power, it proposed to protect against the possibility of unjust and unreasonable rates by taking steps to minimize the potential for market-power abuse or anticompetitive behavior. *Id.* at 61,976.

Specifically, the Commission proposed to revise all existing market-based rate tariffs and authorizations to include the following provision: "As a condition of obtaining and retaining market-based rate authority, the seller is prohibited from engaging in anticompetitive behavior or the exercise of market power. The seller's market-based rate authority is subject to refunds or other remedies as may be appropriate to address any anticompetitive behavior or exercise of market power." *Investigation I*, 97 F.E.R.C. at 61,976. The Commission also proposed to include that provision in all new market-based rate tariffs and authorizations. *Ibid.*

After receiving comments on its proposal, and after taking into account additional information regarding behavior that occurred in western markets in 2000 and 2001, as well as additional experience in other competitive markets (especially organized spot markets in the east), the Commission issued a modified proposal. *Investigation of Terms & Conditions of Pub. Util. Market-Based Rate Authorizations*, 103 F.E.R.C. ¶ 61,349, at 62,372 (2003) (*Investigation II*). That proposal was aimed at identifying more precisely and comprehensively the transactions and practices that would be prohibited under sellers' market-based rate tariffs and authorizations. Specifically, the Commission proposed six Market Behavior Rules relating to (1) unit operation (requiring generators and other sellers to comply with market rules); (2) market manipulation (prohibiting actions without a legitimate business purpose that manipulate or attempt to manipulate the market); (3) communications (prohibiting false or misleading communications); (4) reporting (requiring accurate reporting of transactions); (5) record retention (retaining information necessary to reconstruct energy prices charged for a period of three years); and (6) related tariffs (requiring compliance with seller's code of conduct and the standards of conduct under *Open Access Same-Time Information System and Standards of Conduct*, Order No. 889, FERC Stats. & Regs. ¶ 31,037, 61 Fed. Reg. 21,737 (1996)). *Investigation II*, 103 F.E.RC. at 62,375-62,377. In November 2003, after considering comments submitted in response to the modified proposal, the Commission issued an order amending market-based rate tariffs and authorizations to include the Market Behavior Rules. Pet. App. 17a-128a.

Several parties, including petitioners, sought rehearing. They challenged the scope of the agency-initiated proceeding, arguing that the Commission's Market Behavior Rules rested on the assumption that market-based rates can be just and reasonable, an assumption they contended was inconsistent with the FPA. Pet. App. 183a. The Commission denied rehearing. *Id.* at 129a-215a. The Commission explained that its orders were focused narrowly on "seller conduct." *Id.* at 184a. The broader issues raised by petitioners, the Commission had previously observed, were best addressed "in other concurrent proceedings," *id.* at 82a, not "in the context of this proceeding," *id.* at 184a.

c. Petitioners sought review in the court of appeals. After the petitions were filed but before the case was decided, the Commission rescinded certain Market Behavior Rules, including Rule 2 (prohibiting anticompetitive behavior), on the ground that they were unnecessary in light of the Commission's new authority to prohibit manipulative devices or contrivances under the Energy Policy Act of 2005 (2005 Act), Pub. L. No. 109-58, § 1283, 119 Stat. 979 (16 U.S.C. 824v). See *Investigation of Terms & Conditions of Pub. Util. Market-Based Rate Authorizations*, 114 F.E.R.C. ¶ 61,165 at 61,528-61,529 (2006) (*Investigation III*). The remaining Market Behavior Rules were removed from seller tariffs and codified in regulations applicable to market-based rate sellers. *Ibid.*

3. The court of appeals denied the petitions for review. Pet. App. 1a-5a. The court held that the petitions were not moot, because the rescission of the market-based rules did not change the Commission's determination that market-based rates under the old tariffs had become unjust and unreasonable. *Id.* at 3a.

On the merits, petitioners argued that the Commission had found market-based rates unjust and unreasonable, and that it was therefore required not simply to enact new rules to govern sellers' behavior, but to "fix" a new just and reasonable rate. Pet. App. 2a-3a. According to petitioners, fixing a new just and reasonable rate would require rejection of all market-based rates. *Ibid.* The court of appeals disagreed. It held that 16 U.S.C. 824e (2000 & Supp. V 2005) did not require the Commission, having found only one aspect of the market-based rate tariffs to be unjust or unreasonable, to revisit all elements of market-based rate tariffs. Pet. App. 4a.

The court of appeals explained that "[w]hile the statute requires the Commission to act upon a finding that rates * * * are unjust or unreasonable, it nowhere mandates that having made such a finding with respect to a discrete issue, the Commission must reopen and reevaluate all other aspects of the filed rate." Pet. App. 4a. "To the contrary," the court observed, the statute requires "that '[a]ny complaint or motion of the Commission to initiate a proceeding under this section *shall state the change or changes to be made* in the rate,'" and it requires "that the Commission '*specify the issues to be adjudicated*'" in a hearing under Section 824e. *Ibid.* (quoting 16 U.S.C. 824e(a) (Supp. V 2005)) (alterations in original). The court concluded that "the FPA makes clear that" proceedings under Section 824e "are designed to identify and address * * * discrete issues." *Ibid.* Having initiated a discrete investigation into the specific issues of anticompetitive behavior and market manipulation, and having adopted the Market Behavior Rules, the Commission had "fixed" the rate with respect

to the only issues it had set forth in its order initiating the proceeding. *Id.* at 5a.

ARGUMENT

Petitioners renew their argument (Pet. 7-13) that the Commission, having initiated a proceeding under 16 U.S.C. 824e (2000 & Supp. V 2005) to consider certain aspects of market-based rates, was required to expand its inquiry to address other issues raised by petitioners. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. The decision below does not limit the Commission's authority; instead, it recognizes that when the Commission initiates an investigation, it is not obligated to resolve issues that are outside the scope of that investigation. Nothing in the decision limits the right of interested persons to file a complaint under Section 824e or to raise relevant issues in the context of a rulemaking. Further review is not warranted.

1. Petitioners assert (Pet. 9-10) that the decision below "would restrict FERC's authority" in a proceeding under Section 824e "to *considering* only those rate elements that it proposes to remedy at the outset of a hearing, regardless of any evidence or legal arguments produced by others during the hearing." Petitioners are incorrect. The decision of the court of appeals reflects nothing more than the long-recognized authority of the Commission to determine the scope of its own investigation, and to address the justness and reasonableness of individual rate elements without the obligation of conducting a full-blown rate examination. The Commission certainly has authority under Section 824e(a) "to address all unlawful elements of initial and 'long-estab-

lished' rates" (Pet. 11), but that does not mean that the Commission is *required* to expand the scope of its investigation to address every element of a rate before it may find one element unjust and unreasonable.

As the court of appeals explained, "[w]hile the statute requires the Commission to act upon a finding that rates (or regulations, practices, or contracts affecting those rates) are unjust or unreasonable, it nowhere mandates that having made such a finding with respect to a discrete issue, the Commission must reopen and reevaluate all other aspects of the filed rate." Pet. App. 4a. Instead, the statute provides that a "complaint or motion of the Commission to initiate a proceeding * * * shall state the change or changes to be made in the rate," and it also requires that the Commission's order setting a hearing shall "specify the issues to be adjudicated." 16 U.S.C. 824e(a) (Supp. V 2005). Based on that language, the court correctly concluded that proceedings under Section 824e "are designed to identify and address * * * discrete issues." Pet. App. 4a.

2. The decision of the court of appeals is consistent with this Court's decisions interpreting the FPA. For example, in *New York* v. *FERC*, 535 U.S. 1 (2002), the Court upheld Commission orders issued under Section 824e that required every transmission-owning utility under Commission jurisdiction to file a tariff providing for open access in order to remedy undue discrimination. The Court rejected contentions that the Commission should have extended its open-access remedy to bundled retail transactions, and it emphasized that the problem FERC sought to remedy in the first place was discrimination in the wholesale power market. *Id*. at 26. "Because FERC determined that the remedy it ordered constituted a sufficient response to the problems FERC

had identified in the wholesale market, FERC had no [Section 824e] obligation to regulate bundled retail transmissions or to order universal unbundling." *Id.* at 27. The Court acknowledged that findings of discrimination in the wholesale market might suggest the existence of such discrimination in the retail market, but it concluded that "because the scope of the order presently under review did not concern discrimination in the retail market," the Commission was not obligated "to provide a full array of retail-market remedies." *Ibid.*

This Court reached a similar conclusion in *Mobil Oil Exploration & Producing Southeast, Inc.* v. *FERC*, 498 U.S. 211 (1991) (*Mobile Oil*), with regard to a Commission-initiated rulemaking under the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*, concerning the vintage pricing of "old" natural gas. The Commission rejected suggestions that its rulemaking should also resolve the issue of take-or-pay provisions in certain natural gas contracts. *Mobile Oil*, 498 U.S. at 220. This Court affirmed that determination, holding that "[a]n agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures," *id.* at 230, and that "an agency need not solve every problem before it in the same proceeding." *Id.* at 231. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (quotation marks omitted); *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 142-143 (1940) ("Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the

range of investigation in ascertaining what is to satisfy the requirements of the public interest."). Cf. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-155 (1962) (under Natural Gas Act (NGA) § 5, 52 Stat. 823, 15 U.S.C. 717d, the Commission may impose relief with regard to a particular rate element after finding that element unjust and unreasonable, even though other rate issues are still being litigated); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (under NGA § 5, the Commission may enter an order decreasing revenues in advance of establishing a specific schedule of rates).

The decision below is also consistent with the decisions of other courts of appeals, which have consistently held that agencies are not obligated to expand rate investigations beyond their intended scope. See, *e.g.*, *Georgia Power Co.* v. *FPC*, 373 F.2d 485, 487 (5th Cir. 1967) ("There is nothing in Section [824e(a)] which prohibits the Commission from eliminating an unlawful practice without simultaneously holding a full rate hearing to prescribe a proper rate."); *Alliant Energy Corp.* v. *FERC*, 253 F.3d 748, 754 (D.C. Cir. 2001) (where proceeding concerned third-party compensation charges under power pool tariff, Commission had no obligation to consider allegation that border utility charges were unjust and unreasonable); cf. *AT&T Corp.* v. *FCC*, 448 F.3d 426, 435 (D.C. Cir. 2006) ("The Commission has the authority to determine the scope of its investigations, and AT&T has no authority to force a separate inquiry by the Commission without filing a complaint.") (citations omitted). In short, nothing in the FPA requires the Commission "to solve all problems that may be related to a particular decision at the same time." *Wiscon-*

sin Gas Co. v. *FERC*, 770 F.2d 1144, 1160 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986).

3. Petitioners err when they assert (Pet. 7) that the decision of the court of appeals is "of critical importance to the proper administration of FERC's responsibilities to protect consumers." Nothing in the decision below limits the ability of interested parties to challenge rates that they believe to be unjust and unreasonable by filing a complaint under Section 824e. Indeed, that is precisely the means by which the petitioner in *Lockyer* challenged the Commission's market-based rates. Parties may also present their views on relevant issues within the scope of Commission rulemaking proceedings, see, *e.g.*, *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 50 (1968), as several of the petitioners are currently doing in an ongoing Commission rulemaking regarding market-based rates. *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, 119 F.E.R.C. ¶ 61,295 paras. 938-942, 956-958 (2007) (Order No. 697), petitions for rehearing pending. In that rulemaking, petitioners are raising the same challenges to market-based rates that they attempted to raise in this case, see *id.* paras. 938-942, 956-958, and the Commission has answered those arguments, see *id.* paras. 943-955, 959-971.

Thus, the decision below in no way limits "the ability of consumers and their advocates to participate meaningfully" (Pet. 8) in proceedings before the Commission. Indeed, the importance of the decision is further diminished by the fact that the Market Behavior Rules that were the subject of the challenged orders have been rescinded or removed from seller tariffs and recodified, in

final orders that were not appealed. Pet. App. 3a; *Investigation III*, 114 F.E.R.C. ¶ 61,165, at 61,528-61,529.

4. Because the general validity of the Commission's market-based rate program was not at issue in the administrative proceedings below—and was not passed upon by the court of appeals—this case presents no occasion to consider petitioners' arguments (Pet. 14-24) challenging the program. In any event, the market-based rate program fully complies with the FPA, which grants FERC broad discretion as to how to satisfy the statute's ratemaking mandate.

a. While 16 U.S.C. 824d(a) requires that "[a]ll rates and charges made * * * shall be just and reasonable," the FPA does not dictate, or even mention, any particular ratemaking methodology. See *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 315 (1989). And although the FPA also requires that every public utility file "schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. 824d(c), it explicitly leaves the timing and form of those filings to FERC's discretion. In particular, public utilities must file "schedules showing all rates and charges" under "such rules and regulations as the Commission may prescribe," and "within such time and in such form as the Commission may designate." *Ibid.* The FPA does not define "schedules," leaving that to FERC's discretion as well. See 18 C.F.R. 35.2(b) (defining "rate schedule"). Accordingly, "so long as FERC has approved a tariff within the scope of its FPA authority, it has broad discretion to establish effective reporting requirements for administration of the tariff." *Lockyer*, 383 F.3d at 1013.

Contrary to petitioners' contention, the market-based rate program does not result in the "detariffing"

(Pet. 14) of rates. The Commission's market-based rate program consists of an initial determination by the Commission that the applicant lacks market power or has taken sufficient steps to mitigate market power, coupled with "strict reporting requirements to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." *Lockyer*, 383 F.3d at 1013. Sellers with market-based rate authorization are required to file quarterly reports detailing for each individual purchase and sale the names of the parties, a description of the service, the delivery point of the service, the price charged and quantity provided, the contract duration, and any other attribute of the product being purchased or sold that contributed to its market value. *Ibid.* The reporting requirement thus encompasses the core of sellers' contracts in a form that is useful and understandable, and it provides a means for the Commission and the public to spot pricing trends, discriminatory patterns, or other indicia of the exercise of market power. *California ex rel. Lockyer* v. *British Columbia Power Exch. Corp.*, 99 F.E.R.C. ¶ 61,247, at 62,063 (2002).

b. Petitioners argue (Pet. 14-18) that FERC's market-based rate program is inconsistent with this Court's decisions in *Maislin Indus. U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) (*Maislin*), and *MCI Telecoms. Corp.* v. *AT&T*, 512 U.S. 218 (1994) (*MCI*). Petitioners are incorrect, because the Commission's interconnected program of ex ante findings of no market power coupled with post-approval reporting requirements distinguishes FERC's market-based rate program from those invalidated by this Court in *Maislin* and *MCI*.

Maislin involved an ICC policy that allowed carriers to charge privately negotiated contract rates that dif-

fered from the filed tariff rate, 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 132-133. This Court held that the policy violated the filed-rate doctrine. *Id.* at 126-127. Here, in contrast, market-based rate sales are made in accordance with a market-based rate umbrella tariff, approved only after FERC determines, in a publicly-noticed proceeding with opportunity for interested parties to protest, that a seller lacks market power. *Lockyer*, 383 F.3d at 1013. Moreover, FERC's system requires the quarterly filing of the actual rates charged for individual transactions, allowing both FERC and the public to review rates for reasonableness and lack of undue discrimination. *Ibid.* And after market-based rate authority is granted, parties can file complaint proceedings, or FERC can institute its own proceeding, to challenge market-based rates as unduly discriminatory or unjust or unreasonable or to question whether the seller has market power.

Petitioners' reliance on *MCI*, 512 U.S. at 229-231, is similarly misplaced. *MCI* rejected an FCC policy that relieved *all* nondominant carriers of *any* requirement to file any of their rates with the agency. This Court found that such wholesale 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. FERC's market-based rate system, by contrast, requires every seller with market-based rate authority to have on file an umbrella market-rate tariff and to file quarterly reports detailing the specific rates charged for each sale. No detariffing occurs in these circumstances. As the *MCI* Court held, it would not violate the filed-rate doctrine

for the FCC to "modify the form, contents, and location of required filings, and [to] defer filing or perhaps even waive it altogether in limited circumstances." *Id.* at 234. That is what FERC has done here.

c. Petitioners do not suggest that the decision below is inconsistent with any decision of any other court of appeals. Instead, they contend (Pet. 19) that the court below has never actually considered the validity of market-based rates. If that were true, it would hardly provide a justification for this Court to consider the issue in the first instance, particularly in a case where the question is not directly presented. In any event, petitioners misread the relevant decisions of the court of appeals.

The courts of appeals have agreed that the Commission's market-based rate program is consistent with the requirements of the FPA, because "when there is a competitive market the FERC may rely upon market-based prices in lieu of cost-of-service regulation to assure a 'just and reasonable' result." *Elizabethtown,* 10 F.3d at 870. "[I]n 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, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Lockyer*, 383 F.3d at 1013 (quoting *Tejas*, 908 F.2d at 1004). See *Louisiana Energy & Power Auth.* v. *FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *Cajun Elec. Power Coop., Inc.* v. *FERC*, 28 F.3d 173, 176, 179, 180 (D.C. Cir. 1994).

Contrary to petitioners' suggestion (Pet. 19-20), *Elizabethtown* specifically addressed arguments, like those made here, that market-based pricing constituted virtual deregulation of rates, in contravention of the Natural Gas Act, 15 U.S.C. 717 *et seq.*, which parallels the

FPA. *Elizabethtown,* 10 F.3d at 870. The court of appeals rejected that contention, determining that the just and reasonable standard does not compel the use of any single pricing formula, and that where there is a competitive market FERC may rely on market-based prices in lieu of cost-of-service regulation to assure a just and reasonable result. *Ibid.* And no court of appeals has held that FERC's approval of a market-based system is inconsistent with the FPA's mandates.

d. The 2005 Act, which petitioners do not address, further undermines their position. Several provisions of that statute are premised on the existence of the market-based rate system and, like the Market Behavior Rules in this case, are aimed at enhancing that system and ensuring its smooth functioning. For example, Congress adopted a prohibition on "market manipulation" that is modeled on the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* See 2005 Act § 1283, 119 Stat. 979 (16 U.S.C. 824v (Supp. V 2005)). The prohibition on market manipulation presupposes the existence of market transactions.

In another provision of the 2005 Act, Congress directed FERC to adopt rules "to facilitate price transparency in markets for the sale and transmission of electric energy" and "to ensure that consumers and competitive markets are protected from the adverse effects of potential collusion or other anticompetitive behaviors." 2005 Act § 1281(a)(1) and (b)(2), 119 Stat. 978 (16 U.S.C. 824t(a)(1) and (b)(2) (Supp. V 2005)); see § 1286, 119 Stat. 981 (16 U.S.C. 824e(e)(2) (Supp. V 2005)) (giving FERC new "refund authority" over entities otherwise not subject to FERC's jurisdiction that make "short-term sale[s] of electric energy through an organized market in which the rates for the sale are established by

Commission-approved tariff"); § 1290(a), 119 Stat. 984 (enhancing the Commission's remedial authority in cases where it has "revoked the seller's authority to sell any electricity at market-based rates"). In all of these provisions, Congress has "effectively ratified the [Commission's] previous position" regarding its authority to approve a framework of market-based rates under the FPA. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000).

The Commission also has new authority to remedy manipulative behavior by participants in wholesale electricity markets, 2005 Act § 1283, 119 Stat. 979 (16 U.S.C. 824v (Supp. V 2005)), including the authority to impose increased civil penalties for violations of the FPA, 2005 Act § 1284(e), 119 Stat. 980 (16 U.S.C. 825*o*-1) (Supp. V 2005)). And it has taken a series of steps "to ensure that there are appropriate market safeguards in place to prevent a repeat of the California 2000-2001 energy crisis." *CAlifornians for Renewable Energy, Inc.* v. *California Pub. Utils. Comm'n*, 119 F.E.R.C. ¶ 61,058, at 61,247-61,249 (2007) (*CARE*) (citing numerous agency initiatives). For example, the Commission has created an expanded office to oversee competitive markets and has revised its program for evaluating requests for market-based rates. See, *e.g.*, Order No. 697, 119 F.E.R.C. ¶ 61,295, at 62,653, petitions for reh'g pending.

As the Commission has explained, the "improved market-based rate program provides the foundation to ensure that sellers and buyers can continue to rely on market-based rate contracts to provide price certainty, flexibility in contract terms, and the contract stability necessary to support new investment." *CARE*, 119 F.E.R.C. ¶ 61,058, at 61,249. It would be premature for this Court to consider the validity of the market-based

rate system before any court of appeals has examined the system in light of the 2005 Act and the Commission's recent initiatives.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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