No.

IN THE

Supreme Court of the United States

PUBLIC CITIZEN, INC., COLORADO OFFICE OF CONSUMER COUNSEL, AND PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC.,

GEORGE JEPSEN, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT, LISA MADIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, AND PETER F. KILMARTIN, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the 9th Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a question noted and reserved by this Court in *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527, 538, 548 (2008):

Whether rules of the Federal Energy Regulatory Commission (FERC) establishing a system of "market-based rates" for wholesale electric power conflict with provisions of the Federal Power Act, 16 U.S.C. §§ 824 *et seq.*, commanding that all changes in rates and charges must be publicly filed with FERC before they go into effect and that all rates must be "just and reasonable," nonpreferential, and nondiscriminatory. 16 U.S.C. § 824d.

PARTIES TO THE PROCEEDING

All of the petitioners in this Court, and the principal respondent, are listed on the cover. During the pendency of the proceedings in the court below, petitioner George Jepsen, Attorney General for the State of Connecticut, and petitioner Peter F. Kilmartin, Attorney General of the State of Rhode Island, were substituted for their respective predecessors in office, Richard Blumenthal and Patrick Lynch, who were originally parties to the petitions for review that led to the decision below.

Aside from the parties listed on the cover, one other party actively participated in the proceedings in the court below: the Electric Power Supply Association, which appeared as an intervenor in support of respondent FERC and is a respondent here.

The petitions for review brought in the court below by the petitioners here were consolidated for review with a petition filed by the Montana Consumer Counsel. Montana Consumer Counsel did not file a brief, but moved to dismiss its petition and intervene in the review proceedings initiated by the petitioners here. Because that motion was never granted, Montana Consumer Counsel remained a petitioner in the consolidated proceedings in the court of appeals at the time of the decision, and is a nominal respondent here.

The following parties intervened in one or more of the consolidated petitions for review but did not actively participate in the proceedings in the court below:

American Public Power Association
California Public Utilities Commission
Coalition of Midwest Transmission Customers

Deseret Generation & Transmission Co-Operative, Inc.
Duke Energy Corporation
Industrial Energy Consumers-Ohio
Industrial Energy Consumers-Pennsylvania
Integrys Energy Group, Inc.
Integrys Energy Services, Inc.
Lower Mount Bethel Energy, LLC
National Rural Electric Cooperative Association
NEPOOL Industrial Customer Coalition
Pacificorp
PJM Industrial Customer Coalition
PPL Brunner Island, LLC
PPL Colstrip I, LLC
PPL Colstrip II, LLC
PPL Edgewood Energy, LLC
PPL Electric Utilities Corporation
PPL EnergyPlus, LLC
PPL Great Works, LLC
PPL Holtwood, LLC
PPL Maine, LLC
PPL Martins Creek, LLC
PPL Montana, LLC
PPL Montour, LLC
PPL Shoreham Energy, LLC
PPL Susquehanna, LLC
PPL University Park, LLC
PPL Wallingford Energy, LLC
Public Service Company of New Mexico
Shell Energy North America (U.S. L.P.)
Southeast Electricity Consumers Association
Southwest Industrial Customer Coalition
Transmission Access Policy Study Group
Transmission Dependent Utility Systems
Tucson Electric Power Co.

Upper Peninsula Power Company
West Virginia Energy Users Group
Wisconsin Public Service Corporation

Because these intervenors remained parties to the proceedings below at the time of the court's decision, they are at least nominal respondents here.

RULE 29.6 STATEMENT

Petitioners Public Citizen, Inc., and Public Utility Law Project of New York, Inc., are non-profit, non-stock corporations. They have no parent corporations, and because they issue no stock, no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

APPENDIX:

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Regulations:

Other:

INTRODUCTION

This case presents a question of national importance that this Court has expressly acknowledged and reserved: Whether the "market-based rates" for wholesale electric power allowed by the Federal Energy Regulatory Commission (FERC) conflict with the basic procedural and substantive requirements of the Federal Power Act (FPA) that new rates be filed before going into effect and that all rates be just, reasonable, and nondiscriminatory. In upholding FERC's market-based-rate regulations in this case, the Ninth Circuit resolved that question in a manner contrary to the dictates of the governing statute and principles long established by this Court and followed by other appellate decisions.

This Court has described market-based rates as "[r]ecent FERC [i]nnovations." *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535 (2008). The FPA commands that all wholesale rates for electric power be "just and reasonable" and forbids "discriminatory or preferential" rates. 16 U.S.C. §§ 824d(a), 824e(a). To enforce these commands, the FPA requires that any changes in rates or charges be filed with FERC *before* they go into effect, *id.* § 824d(d)—a provision this Court has aptly termed the "file-all-new-rates requirement." *NRG Power Mktg., LLC v. Maine PUC*, 130 S. Ct. 693, 698 (2010); *see also Morgan Stanley*, 554 U.S. at 531-32. FERC's market-based-rate system turns these requirements upside down by (1) permitting wholesalers to change rates at will without publicly filing them in advance if FERC determines that the sellers lack market power, and (2) abandoning any effective effort by FERC to review actual rates and charges to determine whether they are in fact just, reasonable, nonpreferential and nondiscriminatory, as long as the sellers lack market power and abide by FERC's standards of conduct. *See id.* at 537-38.

This Court and other lower federal courts have repeatedly disapproved similar efforts by agencies to negate statutory rate-filing requirements because the agencies prefer a deregulated market. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *MCI Telecommun. Corp. v. AT&T Co.*, 512 U.S. 218 (1994); *Sw. Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *Regular Common Carrier Conf. v. United States*, 793 F.2d 376 (1986) (Scalia, J.); *MCI Telecommun. Corp. v. FCC*, 765 F.2d 1186 (1985) (R.B. Ginsburg, J.). And the Court has strongly emphasized that "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act." *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 398 (1974). The Ninth Circuit's decision is irreconcilable with these precedents.

In *Morgan Stanley*, this Court observed that "we have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system." 554 U.S. at 538. Later, the Court "reiterate[d] that we do not address the lawfulness of FERC's market-based-rates scheme, which assuredly has its critics. But any needed revision in that scheme is properly addressed in a challenge to the scheme itself …." *Id*. at 548. This case presents exactly such a challenge. The Court should grant certiorari to resolve the issues of national importance it poses.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, captioned *Montana Consumer*

Counsel v. FERC, is reported at 659 F.3d 910 (2011), and is reproduced in the Appendix at 1a. FERC's Order 697 is reported at 119 FERC ¶ 61295 (2007), and 72 Fed. Reg. 39904 (2007), and is reproduced in relevant part in the Appendix at 23a. FERC's rehearing order, Order 697-A, is reported at 123 FERC ¶ 61055 (2008), and 73 Fed. Reg. 25832 (2008), and is reproduced in the Appendix in relevant part at 89a.

JURISDICTION

The Ninth Circuit entered its judgment on October 13, 2011. On December 22, 2011, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including February 10, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Section 205 of the FPA, 16 U.S.C. § 824d, provides in pertinent part:

> **§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses**
>
> **(a) Just and reasonable rates**
>
> All 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, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

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, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, 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 public 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 go 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.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classifica-

> tion, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FERC's regulations concerning market-based rates, 18 C.F.R. Part 35, Subpart H, are set forth in the Appendix at 191a.

STATEMENT

The FPA was enacted in 1935 to provide comprehensive federal regulation of electric power transmission and wholesale electric power transactions, which, because of their interstate dimensions, had escaped effective state regulation. *See New York v. FERC*, 535 U.S. 1, 5-6 (2002). The Act, which in its general outlines has remained largely unchanged, gives FERC (and formerly its predecessor, the Federal Power Commission (FPC)) regulatory authority over "public utilities," a term meaning entities that own or operate facilities for *wholesale sale* (or transmission) of power in interstate commerce. 16 U.S.C. §§ 824(b)(1), (e).[1]

The FPA regulates wholesale rates and transactions and the sellers who engage in them because such sales are "for ultimate distribution to the public" and thus are "affected with a public interest." *Id.* § 824(a). As courts have repeatedly recognized, "[a] major purpose of the whole Act is to protect consumers against excessive prices." *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952).

The FPA achieves this end by requiring "[a]ll rates and charges made, demanded, or received" by power wholesalers to be "just and reasonable," nondiscriminatory and nonpreferential. 16 U.S.C. §§ 824d(a), (b). It establishes a regulatory structure designed to allow enforcement of this fundamental command by requiring wholesalers to file their rates publicly with FERC so that FERC may determine the lawfulness of the rates through procedures specified by the Act. Specifically, the FPA requires wholesale power sellers to file schedules setting forth their rates and charges, as well as all contracts establishing or affecting such rates and charges. 16 U.S.C. § 824d(c). When a public utility *changes* a rate, charge, or contract, it must provide advance public notice in a filing specifically describing the change and stating when it will go into effect, and FERC may investigate and set for hearing the question whether the changed rate is lawful. *Id.*

[1] Because in common parlance "utility" is often used to describe an entity that distributes power to retail customers, this Petition generally refers to FPA-regulated utilities as wholesale power sellers.

§§ 824d(d), (e). FERC may also suspend the effect of the change for a limited time pending hearing and/or, if the new rate goes into effect and is then held unlawful, order refunds. *Id.* § 824d(e). FERC also has authority, upon its own initiative or a complaint filed by anyone, to initiate a hearing and find that any existing rate or contract is "unjust, unreasonable, unduly discriminatory or preferential." *Id.* § 824e(a). If FERC so finds, it must "determine the just and reasonable rate … or contract to be thereafter observed and in force, and shall fix the same by order." *Id.*[2] *See generally Morgan Stanley*, 554 U.S. at 531-32 (describing the statutory scheme).

In the 1990s, after decades of administering the statute according to its terms by requiring filing of all rate changes and reviewing the justness and reasonableness of rates (usually on the basis of whether they allowed the seller a fair opportunity to recover its costs and earn an adequate, but not excessive, rate of return on capital), FERC began to allow power wholesalers to sell at "market-based-rates" if FERC found that the wholesalers individually lacked market power or had taken steps to mitigate it. FERC permitted sellers granted market-based-rate authority to file "tariffs" that do not include prices but state that power will be sold at rates later established by agreement. FERC also excused such sellers from filing advance notice of changes in the actual rates charged. Instead, FERC substituted after-the-fact reporting require-

[2] The FPA's key provisions, 16 U.S.C. §§ 824d and 824e, are sections 205 and 206 of the original Act and are often so cited in the case law. Following this Court's practice in recent FPA decisions, this Petition uses the U.S. Code section numbers.

ments under which sellers provide information on a quarterly basis about the rates they charged in transactions during the previous three months. FERC also required each large seller to provide updated market analyses every three years addressing whether the seller has market power. *See generally Morgan Stanley*, 554 U.S. at 535-38.

On May 19, 2006, FERC issued a notice of proposed rulemaking announcing its intention to promulgate regulations "to codify and, in certain respects, revise its current standards for market-based rates for sales of electric energy, capacity, and ancillary services." 71 Fed. Reg. 33102 (June 7, 2006). FERC's proposed market-based-rate rule ("MBR Rule") set forth, among other things, the criteria FERC would use to determine whether sellers individually possess market power, the mitigation steps it would require of sellers with market power, the quarterly reporting requirements and triennial market-power updates required of sellers granted market-based-rate authority (except for sellers with less than 500 megawatts of capacity, whom FERC proposed to exempt from the update requirement), and standard terms of market-based-rate tariffs.

Petitioners Public Citizen, Public Utility Law Project of New York, Colorado Office of Consumer Counsel, and the Attorneys General of Connecticut, Illinois, and Rhode Island, filed comments opposing the proposed MBR Rule on the ground that FERC lacked legal authority to promulgate it. Petitioners contended that the FPA did not permit FERC to exempt sellers from the Act's filing requirements, in particular the requirement that all changes in rates and charges be filed in advance. Petitioners also contended that by allowing power wholesalers to sell electricity at rates determined solely by market forces, FERC's MBR Rule would violate the FPA's core requirement that all rates and charges be "just and reasonable" and nondiscriminatory.

On June 21, 2007, FERC issued Order 697, promulgating the MBR Rule largely as proposed. FERC rejected petitioners' challenge to its legal authority to issue the MBR Rule, asserting that existing judicial precedents—foremost among them *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004)—had already determined that "rates that are established in a competitive market can be just, reasonable and not unduly discriminatory." Pet. App. 56a. FERC also asserted that the MBR Rule meets the statutory requirement of advance notice of changes in rates or charges because, under the MBR Rule, the only "change" in rates requiring advance filing under § 824d(d) is the change to market-based rates, not changes in rates actually collected once a market-based-rate tariff is in place. Pet. App. 55a-56a. In addition, Order 697 contained a footnote suggesting that petitioners were "precluded from attacking" FERC's legal authority to issue the MBR Rule by having failed to raise their argument in an earlier FERC proceeding involving similar issues. Pet. App. 60a, n.1112.

Petitioners, as required by statute to preserve their arguments for judicial review, *see* 16 U.S.C. § 825l(a), filed requests for rehearing reasserting their fundamental challenges to FERC's authority to issue the MBR Rule. Petitioners' rehearing requests also contested FERC's assertion that they were precluded from challenging FERC's legal authority to issue the MBR Rule because they had not challenged earlier actions by FERC. Petitioners relied on a line of appellate precedents holding that a challenge to an agency's authority to issue a rule cannot be precluded on the ground that it is an improper challenge to prior agency actions to which the challenger did not object. *See* Pet. App. 172a-73a & nn. 779-82 (citing cases).

On April 21, 2008, FERC denied petitioners' requests for rehearing in Order 697-A. With respect to the merits of petitioners' arguments that FERC's MBR Rule is contrary to the FPA's filing requirements and its substantive command that rates be just and reasonable, FERC reiterated the positions it had articulated in Order 697. However, as to Order 697's intimation that petitioners were "precluded" from raising their challenges, Order 697-A disavowed any suggestion that petitioners' arguments were an improper collateral challenge to prior FERC actions. Acknowledging that precedent supported petitioners' right to challenge FERC's legal authority for its rulemaking (*see* Pet. App. 171a-73a), FERC stated that it had *not* intended to assert the "broad proposition" that petitioners could not challenge FERC's power to issue the MBR Rule. Pet. App. 174a. FERC acknowledged that petitioners' arguments were properly before it and emphasized that it had "thoroughly addressed" them both in Order 697 and in Order 697-A. Pet. App. 175a.

Petitioners sought judicial review, and their petitions were consolidated in the Ninth Circuit with others challenging FERC's regulations on different grounds. The court of appeals had jurisdiction under 16 U.S.C. § 825l(b). After lengthy delays while FERC resolved various rehearing requests, the other petitions were withdrawn or not pursued, leaving petitioners' challenge to FERC's market-based rates as the only issue for decision.

In rejecting petitioners' challenge, the Ninth Circuit acknowledged both that this Court's decision in *Morgan Stanley* is an "invitation" to seek review of the lawfulness of FERC's market-based rate regime, Pet. App. 16a, and that petitioners raise issues of "exceptional importance." Pet. App. 21a. But the court held that it was bound to uphold FERC's market-based rate regulations by its prior holding in *Lockyer*, 383 F.3d 1006. At the same time, the court recognized that *Lockyer* did not expressly address whether market-based rates complied with § 824d(d)'s file-all-new-rates requirement, Pet. App. 20a, and that *Lockyer*'s acceptance of market-based rates was premised in part on the misunderstanding that FERC reviewed sellers' market power every four months rather than just once every three *years*. Pet. App. 11a. In approving the regulations, the court explicitly held that it was "reasonable" for FERC to excuse market-based rate sellers from the statutory requirement of advance filing of new rates on the theory that the only "change" in rates that ever occurs under market-based rates is FERC's initial grant of market-based rate authority to a seller, no matter how many times the seller thereafter changes the prices it charges for power. *See* Pet. App. 20a. And the court held that FERC's system of relying primarily on reviewing sellers' market power and market conduct satisfied the statutory mandate that rates and charges be just, reasonable and nondiscriminatory. *See* Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

I. In Permitting FERC to Negate Clear Statutory Rate-Filing Requirements, The Ninth Circuit's Decision Conflicts in Principle with Decisions of this Court and Other Circuits.

A. The MBR Rule Abrogates the FPA's File-All-New-Rates Requirement.

The FPA enforces its fundamental substantive command that all rates be just, reasonable, and nondiscriminatory with an unequivocal procedural requirement: Changes in rates must be filed with FERC 60 days before they go into effect. This requirement ensures that if a rate is challenged, it may be suspended or allowed to go into effect subject to refund pending the Commission's determination of its lawfulness. 16 U.S.C. § 824d(d), (e). The "file-all-new-rates requirement," as this Court described it in *NRG Power Marketing*, 130 S. Ct. at 698, has only one statutory exception: "for good cause shown," FERC may issue an order excusing compliance with the 60-day notice requirement, but only if the order "*specif[ies] the changes so to be made and the time when they shall take effect*." 16 U.S.C. § 824d(d) (emphasis added). Absent such an order, "no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public." *Id*.

Under FERC's MBR Rule, by contrast, sellers constantly change the rates at which they sell power in market transactions, without any advance filing, and only report their rates in after-the-fact quarterly reports. And FERC does *not* excuse compliance with the advance filing requirement in orders that specify the changes in rates and the time when they shall take effect. Indeed, without clairvoyance, it could not possibly do so, as there is no way of knowing what changes will occur in rates charged under MBR tariffs, or when the changes will go into effect. FERC's elimination of advance filing also makes it impossible to suspend changed rates or permit them to go into effect subject to refund under 16 U.S.C. § 824d(e). Nonetheless, according to FERC, the MBR Rule complies with the statutory file-all-new-rates requirement based on the fiction that the only "change" in rates that occurs under the MBR Rule is the initial grant of MBR authority to the seller. Pet. App. 55a, 153a-54a. After that, in FERC's view, the constant, sometimes daily or even hourly changes in the rates actually charged are not changes at all.

The Ninth Circuit upheld FERC's failure to comply with the statute's advance filing requirement, on the ground that the FPA's "flexibility," including the carefully limited authority § 824d(d) grants FERC to waive the 60-day advance filing requirement, either renders § 824d(d)'s command that all changes in rates be filed in advance ambiguous enough to allow FERC's construction or clearly authorizes FERC to excuse advance filing of changes in wholesale prices charged by MBR sellers. Pet. App. 17a-18a.

The Ninth Circuit's reliance on FERC's waiver authority under § 824d(d) was clear error for two reasons. First, in Orders 697 and 697-A, FERC did not invoke that authority; indeed, FERC claimed *not* to be waiving the advance-filing requirement, but to be *complying* with it on the theory that no changes in rates or charges occur after MBR authority is granted.

Thus, under *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), the MBR Rule cannot be sustained on that basis. Second, and more importantly, FERC's waiver authority under § 824d(d) is subject to unambiguous limits that render it entirely inapplicable to changes in rates under MBR tariffs. FERC can only exercise its waiver authority through an order that *specifies the change and its effective date*. FERC does not purport to issue such orders with respect to each change in rates actually imposed under an MBR tariff.

The Ninth Circuit's holding—that FERC's notion that rates or charges never change under MBR tariffs is a permissible reading of the statute—reflects a similar disregard of statutory language. As this Court has stated, the ordinary meaning of "rate" is "the '[p]rice or amount stated or fixed on any thing.'" *Smiley v. Citibank*, 517 U.S. 735, 746 (1996) (quoting N. Webster, American Dictionary of the English Language 910 (1849)). Similarly, the Eleventh Circuit has recognized that a statutory reference to "rates" unambiguously refers to the amount charged for something:

> A "rate," as defined by the Oxford English Dictionary, is "[t]he amount of a charge or payment … having relation to some other amount or basis of calculation." Oxford English Dictionary (2d ed. 1989). Other dictionaries define a "rate" as "[a]n amount paid or charged for a good or service," Black's Law Dictionary 1268 (7th ed. 1999), or "a charge per unit of a public-service commodity," Merriam-Webster Online Dictionary, available at www.m-w.com/cgi-bin/dictionary.

Nat'l Ass'n of State Util. Consumer Advocates v. FCC, 457 F.3d 1238, 1254 (2006).

Consistent with the plain meaning of the statutory term, this Court in both *Morgan Stanley* and *NRG Power Marketing* repeatedly used the term "rate" to refer to the actual contract prices charged for power by sellers with MBR tariffs. *See*, *e.g.*, *Morgan Stanley*, 554 U.S. at 530-31, 541-42, 545, 551; *NRG*, 130 S. Ct. at 696. Indeed, *Morgan Stanley* explicitly recognized that MBR tariffs do not set a rate. 554 U.S. at 538 ("when a seller files a market-based tariff, purchasers no longer have the option of buying electricity at a rate set by tariff"). And the Court characterized FERC's view that the filing and approval of an MBR tariff is equivalent to filing and approval of the actual rates subsequently charged under that tariff as "metaphysical." *Id*. at 542.

When a statute's "language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998). That is the case here. The statute provides for advance public filing of changes in rates except when FERC enters an order excusing the advance filing based on good cause and specifying the exact change in rates and its effective date. Under the MBR Rule, sellers with MBR tariffs constantly change rates—i.e., the amount they charge for power—without advance filing or a waiver order that satisfies the statutory criteria. FERC has replaced the FPC's clear procedural requirements with a new system entirely of its own invention.

B. The Ninth Circuit's Abrogation of the FPA's Rate-Filing Requirements Cannot Be Squared with Precedents of This Court and Other Federal Appellate Decisions.

This Court has repeatedly emphasized the critical role that the FPA's "file-all-new-rates" requirement plays in the regulatory system created by Congress. In *Morgan Stanley*, the Court made clear that "[t]he filing requirement" is "a *precondition* to changing a rate." 554 U.S. at 533 (emphasis in original). The Court carefully explained the essential role the filing requirement plays in ensuring compliance with the statute's substantive requirements:

> The FPA requires all wholesale-electricity rates to be "just and reasonable." § 824d(a). When a utility files a new rate with the Commission, through a change to its tariff or a new contract, the Commission may suspend the rate for up to five months while it investigates whether the rate is just and reasonable. § 824d(e).

Id. at 531-32. And in *NRG Power Marketing*, the Court reiterated that the "file-all-new-rates requirement" is "a *precondition* to changing a rate." 130 S. Ct. at 698 (emphasis in original).

The Court's emphasis on the advance filing requirement in *Morgan Stanley* and *NRG* followed directly from the Court's seminal ruling in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.,* 350 U.S. 332 (1956). There, interpreting provisions of the Natural Gas Act that were indistinguishable from the FPA's pertinent terms, the Court explained that the statute is a "prohibition" on changes in rates without advance filing with the Commission. *Id.* at 339.[3] The statute, the Court stated, says "that a change cannot be made without the proper notice to the Commission." *Mobile*, 350 U.S. at 339. The Court further explained that "the filing requirements are obviously necessary to permit the Commission to exercise its review functions, and the requirement of ... advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers." *Id.* at 344. As the Court stated again in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), "the clear purpose of the congressional scheme [is] granting the Commission an opportunity in every case to judge the reasonableness of the rate."

An agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri,* 484 U.S. 495, 517 (1988)). An agency "does not have the power to adopt a policy that directly conflicts with its governing statute," *Maislin*, 497 U.S. at 134-35 (1990), and the "agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI v. AT&T*, 512 U.S. at 229. In light of these principles, it is not surprising that this Court, as well as other federal

[3] In the companion case *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), the Court recognized that the relevant Natural Gas Act provisions were "in all material respects substantially identical" to §§ 824d(c), (d) and (e).

courts, has repeatedly rejected similar efforts by federal regulatory agencies to dispense with critical rate-filing requirements because the agencies—like FERC in this case—preferred to pursue policies different from those dictated by Congress.

For example, *Maislin* addressed the Interstate Commerce Act (ICA), which expressly provided that motor common carriers could provide transportation services only if their rates were set forth in tariffs filed with the Interstate Commerce Commission (ICC), and forbade carriers from receiving compensation different from the rates in the filed tariffs. *Id.* at 120. The ICC, pursuing a deregulatory, market-based agenda at odds with the congressional policy reflected in the ICA, adopted a policy of permitting carriers and shippers to negotiate rates different from the filed rate and holding the parties to the negotiated rates even though, "[i]n many instances, ... the negotiated rate is never filed with the ICC." *Id.* at 121.

Maislin held that the ICC acted unlawfully in deviating from the express statutory requirement that only filed rates be charged. Critical to the Court's holding was its reading of the plain terms of the statute, which, like the FPA provisions at issue here, required filing of rates: "The Act requires a motor common carrier to publish its rates in a tariff filed with the Commission." *Id.* at 126.[4] The Court flatly

[4] The FPA allows more room for establishment of rates by negotiated contracts than did the ICA. *See Morgan Stanley*, 554 U.S. at 531. But its filing requirements unequivocally apply to rate changes and other changes effected through contracts: "Like tariffs, contracts must be filed with the Commission before they go into effect." *Id.* (citing 16 U.S.C. § 824d(c), (d)).

rejected the agency's argument that "in light of the more competitive environment, strict adherence to the [statutory] filed rate doctrine 'is inappropriate and unnecessary ....'" *Id*. at 134. Rather, the Court stated, "[i]f strict adherence to [the statute's sections requiring that rates be filed] ... has become an anachronism ..., it is the responsibility of Congress to modify or eliminate these sections." *Id.* at 135-36.

Maislin stressed that excusing carriers from the requirement of filing rates before they could be collected was inimical to the overall structure of the ICA. As the Court explained, the ICA imposed the basic requirement that rates be "both reasonable and nondiscriminatory." *Id*. at 119. The statute gave the ICC "primary responsibility for determining whether a rate or practice is reasonable," *id.*, and therefore gave the ICC the power to investigate and determine the reasonableness of a rate, and the responsibility to prescribe a reasonable rate when it found a filed rate unreasonable. *Id*. at 119-20. The Court recognized that the statutory filing requirement was "utterly central" to permitting the ICC to carry out its assigned functions. *Id*. at 132. Absent the filing requirement, neither the agency nor the public could determine whether to challenge a rate and, most importantly, "[t]he ICC cannot review in advance the reasonableness of *unfiled* rates." *Id.* Thus, *Maislin* held, the ICC's policy was unlawful not only because it violated the specific sections of the ICA that required filing of rates, but also because it was "flatly inconsistent with the statutory scheme as a whole." *Id.* at 131.

Maislin was presaged by the D.C. Circuit's ruling in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (1986), in which then-Judge Scalia (joined by then-Judge Ginsburg) held that an ICC decision permitting the filing of a tariff that did not set forth the rate to be charged was unlawful because it "nullifie[d]" the statutory requirement that carriers charge only rates set forth in their tariffs. *Id*. at 379. "That requirement," the court explained, "is utterly central to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates." *Id*. (statutory citations omitted).

This Court in *MCI v. AT&T* similarly rejected an agency's attempt at "detariffing" an industry based on policy preferences for market rate-setting that conflicted with clear statutory language. 512 U.S. at 229. *MCI* involved an FCC policy that permitted "nondominant" telecommunications carriers (those without monopoly power) to charge rates that were not on file with the Commission. The Communications Act, by contrast, required the filing of "schedules showing all charges," as well as advance filing of all changes in charges, and it prohibited any carrier from collecting any compensation for services different from the charges set forth in its schedule. *See id.* at 224-25 (quoting statute). Although the Act gave the Commission some power to "modify" these requirements, the Court held that such authority did not empower the FCC to make "basic and fundamental changes in the [statutory] scheme." *Id.* at 225. The Court concluded that reading the limited modification authority to permit the agency to exempt 40 percent of the industry from the requirement of filing rates would go "beyond the meaning that the statute could bear" and entail a "radical or fundamental change in the Act's tariff-filing requirement." *Id*. at 229.

In so holding, the Court stressed that, as in *Maislin*, the filing requirement was "utterly central" to the statutory scheme because it was essential to the efficacy of provisions permitting challenges to unreasonable rates. *Id*. at 230-31. "Rate filings," the Court stated, "are the essential characteristic of a rate-regulated industry." *Id*. at 231. The agency's attempt to eliminate that essential characteristic from the regulatory scheme exceeded the outer bounds of the statutory authority conferred by Congress:

> What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.

Id. at 231-32.

MCI, like *Maislin*, was foreshadowed by an earlier D.C. Circuit decision, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (1985). Then-Judge Ginsburg, writing for the court, rejected an earlier version of the FCC's detariffing policy that prohibited non-dominant carriers from filing rate schedules. As this Court later concluded in *MCI*, the D.C. Circuit found that the agency's action conflicted with the clear statutory requirement that schedules showing rates be filed. The court emphasized that despite the agency's assertion that competitive market forces could ensure just and reasonable rates without compliance with the statutory filing requirements, the court was "not at liberty to release the agency from the tie that binds it to the text Congress enacted," no matter how "reasonable the Commission's assessment" of market forces might be. *Id*. at 1194. "In sum, if the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress, not from this court or from the Commission's own conception of how the statute should be rewritten in light of changed circumstances." *Id*. at 1195; *accord*, *Sw. Bell Corp. v. FCC*, 43 F.3d 1515, 1526 (D.C. Cir. 1995).

The teaching of *Maislin*, *Regular Common Carrier*, and the two *MCI* cases is straightforward: When a statute creating a rate-regulation scheme imposes a clear rate-filing command, the agency enforcing the statutory scheme has no authority to excuse compliance because it thinks it has come up with a better way of regulating the industry. Here, as explained above, the MBR Rule is inconsistent with specific provisions of the FPA requiring advance public filing of rate changes. And like the policies at issue in *Maislin*, *Regular Common Carrier*, and the *MCI* cases, the MBR Rule is also "flatly inconsistent with the statutory scheme as a whole," *Maislin*, 497 U.S. at 131, because it eliminates the possibility of suspension and review of increases in rates *before* they go into effect as provided in § 824d(e)—a provision critical to the FPA's fundamental objective of ensuring that all rates are "just and reasonable." 16 U.S.C. § 824d(a). FERC is no more capable than the ICC, or anyone not possessing omniscience, of "review[ing] *in advance* the reasonableness of *unfiled* rates." *Maislin*, 497 U.S. at 132 (first emphasis added).

The Ninth Circuit's approval of FERC's disregard of the FPA's clear filing requirements cannot be squared with this Court's approach in *Maislin* and *MCI*. As in those cases, this Court should grant certiorari to determine whether the agency has acted lawfully in fundamentally altering the regulatory framework Congress created.

II. FERC's Reliance on Market Forces as the Measure of Lawful Rates Under the FPA Conflicts with this Court's Decision in *FPC v. Texaco*

That FERC's disregard of statutory filing requirements is incompatible with this Court's decisions in *Maislin* and *MCI* is reason by itself for this Court to grant review and set aside the MBR Rule. But the fundamental flaws in the MBR Rule are not only procedural, but also substantive: FERC's MBR system is at odds with the statutory requirement that rates be just, reasonable, nonpreferential and nondiscriminatory because it substitutes reliance on market forces for adherence to that statutory standard.

As this Court emphasized in *Morgan Stanley*, "There is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard." 554 U.S. at 545. Although the standard does not leave FERC "bound to any one ratemaking formula," "FERC must choose a method that entails an appropriate 'balancing of the investor and the consumer interests.'" *Id.* at 532 (quoting *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 603 (1944)). Such a balance, moreover, must give due regard to what then-Judge Scalia, writing for the D.C. Circuit, described as "the Federal Power Act's primary purpose of protecting the utility's customers." *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 492-93 (D.C. Cir. 1985). The FPA was intended to "afford[] consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378, 388 (1959).

In *FPC v. Texaco, Inc.*, this Court construed the requirement of just and reasonable rates under the parallel provisions of the Natural Gas Act to foreclose the Commission from relying on market forces to determine the reasonableness of rates charged by sellers—even sellers the Commission had determined to lack market power. *See* 417 U.S. at 394-400. The Commission had purported to issue a "blanket" certificate (similar to the market-based-rate tariffs at issue here) authorizing small producers of natural gas to sell gas "at the price the market would bear" and relieving them from statutory rate filing requirements. *Id.* at 384. Although the Commission "asserted" that it would continue "to review new contract prices charged by small producers 'to assure … the reasonableness of the rates charged by such producers pursuant to the action we are taking herein,'" *id.* at 397, the Court concluded that the "implication" of its action was that "reasonableness would be judged by the standard of the marketplace." *Id.* at 396.

The Court held that such a yardstick for determining the lawfulness of rates could not be squared with the requirement that *all* rates be just and reasonable, or with the Act's erection of an administrative structure requiring the Commission rather than the marketplace to apply that standard:

> [I]n our view the prevailing price in the marketplace cannot be the final measure of "just and reasonable" rates mandated by the Act. It is abundantly clear from the history of the Act and

> from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas. Hence, the necessity for regulation and hence the statement in [*FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 25 (1968)], that if contract prices for gas were set at the market price, this "would necessarily be based on a belief that the current contract prices in an area approximate closely the 'true' market price—the just and reasonable rate. Although there is doubtless some relationship, and some economists have urged that it is intimate, such a belief would contradict the basic assumption that has caused natural gas production to be subjected to regulation. ..." …
>
> In subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price. ... This does not mean that the market price of gas would never, in an individual case, coincide with just and reasonable rates or not be a relevant consideration in the setting of area rates, ... it may certainly be taken into account along with other factors .... It does require, however, the conclusion that Congress rejected the identity between the "true" and the "actual" market price.

Id. at 398-99 (footnote and citations omitted).

In rejecting the Commission's reliance on its belief that market prices charged by small producers would be reasonable, this Court pointed out that "there is no finding in the Commission's order as to the actual impact the projected market price increases would have on consumer expenditures for gas." *id*. at 399, and that, even if the Commission had found only a small impact, the Act "does not say a little unlawfulness is permitted." *Id*. The Court acknowledged that "[i]t may be, as some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today." *Id*. at 400. Whatever its own view of that matter—or the Commission's view—might be, the Court declined "to overturn congressional assumptions embedded into the framework of regulation established by the Act." *Id*. Such sweeping changes are, instead, "a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process." *Id.*

Here, as in *FPC v. Texaco*, FERC has expressly refused to make findings as to either the existence of a competitive market or the actual impact of the MBR Rule on rates: It relies solely on its economic theory that market forces will make rates charged by individual sellers that lack market power just and reasonable—precisely what this Court held in *Texaco* that the agency could not do. The Ninth Circuit sought to distinguish *Texaco* by stating that the decision was based on this Court's view that the market was non-competitive, and that FERC's determination that individual sellers lack market power puts any such concern to rest. Pet. App. 10a. But what *Texaco* actually said was that *Congress* had found the industry to be non-competitive when it enacted the statute decades earlier and that the agency lacked the power to substitute reliance on market forces simply because it found that certain sellers did not have market power.

See 417 U.S. at 397-98. Exactly the same is true here. Moreover, given that FERC has expressly refused to make any finding about whether wholesale electric power markets within which it grants sellers authority to charge market rates are competitive, *Texaco* cannot be distinguished on the basis that the market there was less competitive than the wholesale electric power market.

In addition to directly conflicting with *Texaco*, the decision below also conflicts in principle with earlier appellate decisions—even some that have been read to permit use of market prices as a measure of justness and reasonableness in certain circumstances. For example, in *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984), the D.C. Circuit rejected FERC's reliance on market rates for pipelines to satisfy the just-and-reasonable standard because there was "nothing in the regulatory scheme" to determine whether "competition ... drives actual prices back down into the zone [of reasonableness]" or "to check rates if it does not." *Id*. at 226.[5]

Similarly, in *Tejas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990)—a case often cited for its dictum that it is "rational to assume" that the terms of voluntary agreements "in a competitive market" be-

[5] Subsequently, in *Interstate Natural Gas Association v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), the court upheld market rates for gas pipelines only after a rigorous analysis of the *Farmers Union* analysis, requiring FERC to show detailed empirical evidence that market rates could be expected to be within a zone of reasonableness (that is, neither excessive nor insufficiently compensatory), and to demonstrate that it had the ability to "check" excessive rates if it found that competition had not in fact resulted in just and reasonable rates. *See id.* at 31-35.

tween buyers and sellers who lack market power are reasonable, *id*. at 1004—the court's actual *holding* was that FERC could *not* find a market rate lawful absent "substantial evidence upon the basis of which the Commission could conclude that market forces will keep ... prices in reasonable check." 908 F.2d at 1005.

Likewise, in *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993), where the D.C. Circuit stated that market-based gas rates were consistent with the Natural Gas Act's requirement of just and reasonable rates, the court did not countenance FERC's reliance on the theory that markets would produce just and reasonable rates. The court stressed both that FERC had made a specific finding that the relevant market was a competitive one, *see id*. at 870-71, *and* that FERC would continue to review rates actually charged to "assure that a market (*i.e.*, negotiated) rate is just and reasonable." *Id.* at 870.[6] And in *Louisiana Energy & Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), the court stated in dicta that market-based rates were permissible under the FPA, but, as in *Elizabethtown Gas*, only "[w]here there is a competitive market." *Id*. at 365.

Even the Ninth Circuit's own prior decision in *Lockyer*, while holding that market-based rates were not necessarily unlawful, demanded far more from FERC than the agency produced in support of its MBR Rule. *Lockyer* stressed, for example, that "ap-

[6] *Elizabethtown Gas* also pointedly refused to rule on whether market-based-rates complied with statutory filing requirements, an issue the parties had not preserved before the agency. *Id.* at 871.

proval of [market-based] tariffs was conditioned on the existence of a competitive market." *Id*. at 1012. Moreover, *Lockyer* was premised on the court's mistaken understanding that "FERC required the wholesale seller to file a market analysis every four months," 383 F.3d at 1013, allowing FERC to "determine ... whether market forces were truly determining the price." *Id*. at 1014. Such reviews are actually conducted—for large sellers only—once every three *years*. 18 C.F.R. § 35.37(a)(1). Moreover, *Lockyer* assumed that FERC would review the after-the-fact quarterly reports of actual prices charged by sellers over the past three months "to determine whether the rates were 'just and reasonable.'" 383 F.3d at 1014. As *Lockyer* put it, "[i]f the ability to ... gauge the 'just and reasonable' nature of the rates is eliminated, then effective federal regulation is removed altogether." *Id.* at 1015.

In this case, the lower court abandoned the careful conditions prior courts put on the acceptability of market-based rates. The court required FERC neither to show the existence of a competitive market nor to make a finding based on empirical evidence that market forces will produce just and reasonable rates—indeed, the court expressly repudiated any such requirements. And the decision allows FERC, instead of reviewing *rates and charges* for reasonableness, to substitute a review of individual sellers' market power and compliance with market-behavior rules.[7] That re-

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[7] The Ninth Circuit stated that it understood FERC would review not only sellers' market power and behavior, but also their actual rates to determine whether they exceeded those that would be expected in a competitive market—for example, whether they resulted in prices that are not close to marginal cost. Pet.

(*Footnote continued*)

sult is inconsistent with *FPC v. Texaco* and with the weight of appellate precedents preceding the decision below.

III. The Issue Is of National Importance.

Over the past twenty years, FERC has embarked on a mission to turn the regulation of wholesale electric rates under the FPA upside down, rapidly supplanting the statutorily mandated system of filed, regulated rates with its orders allowing unfiled, deregulated rates. The impact on the industry has been substantial. By comparison to *MCI*, where the elimination of filing requirements affected about 40 percent of the market, here there are over 1,735 sellers who have MBR tariffs, as compared with only 296 who remain subject to traditional cost-of-service regulation for at least some of their sales.[8]

It is consumers who ultimately feel the effects of these changes: Under this Court's FPA preemption jurisprudence state regulators generally have little or

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App. 14a-15a. That wishful understanding is not supported by any citation to FERC's orders or any other indication that FERC actually conducts such reviews. Indeed, in *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009), the agency made clear that it would not find market rates unreasonable even where evidence showed that they produced prices far above sellers' marginal costs. *See id*. at 883. The court in *Blumenthal*, like the court below, abandoned any insistence that FERC must find markets to be "structurally competitive," *id*. at 882, before allowing market-based rates.

[8] The data on numbers of sellers with MBR tariffs and those subject to traditional rate regulation are found at http://www.ferc.gov/industries/electric/gen-info/reg-ent.asp and http://www.ferc.gov/industries/electric/gen-info/mbr/list.asp, respectively.

no choice but to allow retail power sellers to pass on to customers the unfiled and unreviewed market-based rates charged by power wholesalers under FERC-approved MBR tariffs. *See Entergy La., Inc. v. La. Pub. Serv. Comm'n,* 539 U.S. 39, 47 (2003); *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953 (1986).

The circumstances that led to the Court's decision in *Morgan Stanley*—the western energy crisis of 2000—are one dramatic manifestation of the effects of deregulation. But the change has had broader and more lasting effects:

> Over the past 15 years, federal and state policymakers have fundamentally restructured wholesale electricity markets and retail electric service in many parts of the country. These changes were predicated on the promise that increased "competition" would spur efficiencies, promote innovation, ensure an adequate infrastructure and, most importantly, result in lower rates for consumers. But the opposite has occurred—restructured markets are producing higher prices (and higher profits) than one would expect in a competitive market. Nor is new infrastructure being constructed. And the only "innovation" many consumers have seen is in the new and complex market mechanisms developed to extract more dollars from them for the same basic product—retail electric service.

American Public Power Ass'n, *Consumers in Peril: Why RTO-Run Electricity Markets Fail to Produce Just and Reasonable Electric Rates* (2008), https://appanet.cms-plus.com/files/PDFs/ConsumersinPeril.pdf.

These considerations led the Ninth Circuit itself to acknowledge that this case poses issues of "exceptional importance." Pet. App. 21a. The issue for this Court, however, is not whether the policy underlying FERC's MBR Rule is good or bad. The issue for this Court is whether it is lawful for such fundamental change to be wrought by an agency, in derogation of clear statutory requirements and without prompting by definitive congressional action to alter those requirements.

The Court's past decisions, including *Maislin*, *MCI*, and *Texaco*, underscore the importance of this Court's addressing agency actions that broadly dispense with statutory rate-filing and rate-regulation requirements and restructure by administrative fiat the regulatory regime applicable to important industries. And the Court's long history of resolving significant questions arising under the FPA—most recently in *NRG Power Marketing* and *Morgan Stanley*—reflects the great importance that such issues have for our economy and for the proper functioning of the agency assigned the task of implementing the statute.

This Court has already taken note of, and reserved decision on, the critical question of the lawfulness of FERC's MBR tariffs. In *Morgan Stanley*, the Court acknowledged that FERC's "market-based-rates scheme … assuredly has its critics." 554 U.S. at 548. The Court twice pointedly noted that "[w]e have not hitherto approved … the lawfulness of the market-based-tariff system," *id*. at 538, and that "we do not address the lawfulness of FERC's market-based-rates scheme." *Id.* at 548. The Court left "any needed revision in that scheme" to be "properly addressed in a challenge to the scheme itself." *Id*.

This case is that challenge. If FERC's attempt to shrug off procedural and substantive requirements of the FPA is to be rejected—as this Court's decisions indicate it must be—it is now apparent that it is up to this Court to take that step. If, on the other hand, FERC's rewriting of the FPA is to be upheld in the face of such precedents as *Maislin*, *MCI*, and *Texaco*, it should be this Court that does so and explains why. The lingering and substantial issues about the lawfulness of FERC's MBR Rule deserve final resolution by this Court. The time for that resolution has come.

CONCLUSION

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

Respectfully submitted,

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