ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1156

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of an Order of the
Federal Energy Regulatory Commission

INITIAL BRIEF FOR PETITIONER PUBLIC CITIZEN, INC.

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner
Public Citizen, Inc.

Dec. 4, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As required by Circuit Rules 28(a)(1) and 29(d), counsel for petitioner, Public Citizen, Inc., hereby certifies as follows:

A. Parties and Amici

1. Before This Court

a. Petitioner

The petitioner in this Court is Public Citizen, Inc., a nonprofit, nonstock corporation. Public Citizen has no parent companies, and no publicly held company holds any ownership interest in it. Public Citizen is a membership organization that advocates the interests of consumers and the public in a variety of areas. Among the concerns of Public Citizen and its members are the unjust and unreasonable rates for electricity that have resulted from the Federal Energy Regulatory Commission's adoption of market rate-setting mechanisms. Public Citizen brings this action on behalf of its members in Illinois who are injured by FERC's challenged actions here, which have subjected consumers to increased electricity rates.

b. Respondent

The respondent in this court is the Federal Energy Regulatory Commission (FERC).

c. Intervenors

This Court has granted the following entities leave to intervene in this proceeding:

Vistra Energy Corp., Illinois Power Marketing Co., and Dynegy Market and Trade, LLC ("Vistra Entities"). The Vistra Entities moved for leave to intervene in support of respondent FERC.

Southern Illinois Power Cooperative, Inc., and Hoosier Energy Rural Electric Cooperative, Inc. The motion of these two intervenors did not specify which party they wished to support.

Mississippi Public Service Commission and Mississippi Public Utilities Staff. The motion of these two intervenors did not specify which party they wished to support.

Midcontinent Independent System Operator, Inc. (MISO). MISO's motion did not specify which party it wished to support.

c. Amicus curiae

The Electric Power Supply Association has filed a notice of its intent to participate in this case as amicus curiae in support of respondent FERC, with the consent of the parties.

2. Parties Before the Agency

The complainants in the proceedings before FERC were Public Citizen, Inc.; the People of the State of Illinois by Illinois Attorney General Lisa Madigan; and Southwestern Electric Cooperative, Inc.

Respondents and intervenors before FERC were:

Ameren Illinois Company and Union Electric Company d/b/a Ameren Missouri

American Electric Power Service Corporation

American Municipal Power, Inc.

American Public Power Association

Arkansas Public Service Commission

Coalition of MISO Transmission Customers

Council of the City of New Orleans, Louisiana

DTE Electric Company

Duke Energy Corporation

Dynegy Inc., Dynegy Marketing and Trade, LLC; and Illinois Power Marketing Company

Electric Power Supply Association

Exelon Corporation

Gibson City Energy Center, LLC and Grand Tower Energy Center, LLC

Great River Energy

Hoosier Energy Rural Electric Cooperative, Inc., and Southern Illinois Power Cooperative

Illinois Citizens Utility Board

Illinois Commerce Commission

Illinois Industrial Energy Consumers

Illinois Municipal Electric Agency

Indiana Municipal Power Agency

Indianapolis Power & Light Company

Kentucky Municipal Power Agency

Louisiana Public Service Commission

Madison Gas & Electric Company

Michigan Public Service Commission

Midcontinent Independent System Operator, Inc.

Midcontinent MCN, LLC

Minnesota Department of Commerce

Minnesota Large Industrial Group

Mississippi Public Service Commission

Missouri Joint Municipal Electric Utility Commission

Missouri Public Service Commission

Monitoring Analytics, LLC

Natural Resources Defense Council

NRG Companies

Organization of MISO States

Potomac Economics, Ltd.

Prairie Power, Inc.

PSEG Energy Resources & Trade LLC; PSEG Power LLC; Public Service Electric and Gas Company

Sierra Club

Southern Minnesota Municipal Power Agency

The Sustainable FERC Project

Wabash Valley Power Association, Inc.

Wisconsin Public Service Corporation

WPPI Energy

Xcel Energy Services Inc.

B. Rulings Under Review

This action seeks review of a final order of FERC denying complaints filed under section 206 of the Federal Power Act, 16 U.S.C. § 824e, and of FERC's denial of Public Citizen's timely petition for rehearing of that order. The citations of the orders are as follows:

1. Order Denying Complaints in Part, *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.; People of the State of Illinois by Illinois Attorney General Lisa Madigan v. Midcontinent Independent System Operator, Inc.; Southwestern Electric Cooperative, Inc. v. Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction*, Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, 168 FERC ¶ 61,042, JA __ (July 19, 2019).

2. Order Denying Rehearing, *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.; People of the State of Illinois by Illinois Attorney General Lisa Madigan v. Midcontinent*

Independent System Operator, Inc.; Southwestern Electric Cooperative, Inc. v. Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction, Docket Nos. EL15-70-002, EL15-71-002, EL15-72-002, 170 FERC ¶ 61,227, JA __ (March 19, 2020).

C. Related Cases

The case on review has never previously been before this Court or any other. There are no other related cases currently pending in this court or in any other court of which counsel is aware.

Respectfully submitted,

/s/ Scott L. Nelson
Scott L. Nelson
Public Citizen Litigation Group
1600 20th St. NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorney for Petitioner

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GLOSSARY

APA	Administrative Procedure Act
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
MISO	Midcontinent Independent System Operator, Inc., regional transmission organization operating in 15 midwestern states
MW-day	Megawatt-day, a unit of energy equal to one million watts of power produced by a power plant over a period of one day
PJM	PJM Interconnection, regional transmission organization operating mostly in the Middle Atlantic region

INTRODUCTION

This case involves the lawfulness of wholesale electric capacity rates established in an auction held by the Midcontinent Independent System Operator, Inc. (MISO) in April 2015. The auction was held under conditions that effectively allowed one power supplier, Dynegy, Inc., (now known as Vistra Energy Corp.) to control the clearing price for MISO's Zone 4, which covers most of Illinois outside the Chicago metropolitan area. The result of the auction was an approximately 800% increase in rates for Zone 4 compared to the results of the prior year's auction, while all other MISO zones saw rates either decrease or remain roughly the same. The Zone 4 rates were more than 40 times higher than the rates in every other MISO zone. Electricity consumers in Zone 4 faced increased rates estimated to exceed $100 million in total.

Later in 2015, the Federal Energy Regulatory Commission (FERC) held that two features of MISO's auction design that allowed bidding strategies like Dynegy's were unjust and unreasonable and had to be changed for future auctions. As a result, Zone 4 rates fell substantially in subsequent auctions. Then, after nearly four years of delay, FERC held that the Zone 4 rates for 2015/16 were just and reasonable within the

meaning of the sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. §§ 824d & 824e, solely because the rates were established by an auction conducted according to the procedures set forth in a MISO tariff that FERC had previously approved. At the same time, FERC dismissed without any explanation complaints that Dynegy had engaged in market manipulation in violation of section 222 of the FPA, 16 U.S.C. § 824v.

FERC's refusal to consider the lawfulness of the outcome of the 2015/16 auction—that is, the prices it produced—is an unlawful abdication of its responsibility under FPA sections 205 and 206 to ensure that all wholesale electric rates are just and reasonable and, if they are not, to set a just and reasonable rate. 16 U.S.C. §§ 824d(a) & 824e(a). And FERC's refusal to explain its reasons for rejecting claims of market manipulation violates fundamental norms of reasoned, record-based agency decisionmaking under the Administrative Procedure Act (APA).

JURISDICTION

This petition seeks review of FERC's final action denying complaints that challenged the MISO Zone 4 wholesale electric rates for 2015/16 as unjust and unreasonable under sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d & 824e, and alleged that Dynegy engaged in

market manipulation in violation of section 222 of the FPA, 16 U.S.C. § 824v. This Court has jurisdiction under section 313(b) of the FPA, 16 U.S.C. § 825*l*(b).

FERC issued a final order denying the complaints on July 19, 2019.[1] Petitioner Public Citizen, Inc., one of the complainants in the proceeding, filed an application for rehearing of the 2019 Order on Monday, August 19, 2019. JA __. The application for rehearing was timely under FPA section 313(a), 16 U.S.C. § 825*l*(a), which requires that an application for rehearing be filed within 30 days of a final order of FERC, because the 30th day following the 2019 Order fell on Sunday, August 18, 2019, and the application for rehearing was filed on the next business day. *See* 18 C.F.R. § 385.2007(a)(2); Fed. R. App. P. 26(a)(1).

[1] Order Denying Complaints in Part, *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.; People of the State of Illinois by Illinois Attorney General Lisa Madigan v. Midcontinent Independent System Operator, Inc.; Southwestern Electric Cooperative, Inc. v. Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction*, Docket Nos. EL15-70-000, EL15-71-000, EL15-72-000, 168 FERC ¶ 61,042, JA __. FERC's Order Denying Complaints in Part is referred to herein as the "2019 Order."

FERC denied the application for rehearing in an order issued on March 19, 2020.[2] Public Citizen filed its timely petition for review in this Court (JA __) on May 15, 2020, within 60 days of the Rehearing Order. *See* 16 U.S.C. § 825*l*(b).

STATEMENT OF ISSUES

1. Whether FERC's determination that the Zone 4 rates resulting from the 2015/16 auction were just and reasonable was arbitrary and capricious, an abuse of discretion, or contrary to law because it was based entirely on the Commission's finding that the auction had been conducted in compliance with the procedures set forth in the then-applicable tariff and reflected no consideration of whether the resulting rates themselves were just and reasonable, as the FPA requires, or even whether the tariff terms were just and reasonable at the time the rates were to be collected.

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[2] Order Denying Rehearing, *Public Citizen, Inc. v. Midcontinent Independent System Operator, Inc.; People of the State of Illinois by Illinois Attorney General Lisa Madigan v. Midcontinent Independent System Operator, Inc.; Southwestern Electric Cooperative, Inc. v. Midcontinent Independent System Operator, Inc., Dynegy, Inc., and Sellers of Capacity into Zone 4 of the 2015-2016 MISO Planning Resource Auction*, Docket Nos. EL15-70-002, EL15-71-002, EL15-72-002, 170 FERC ¶ 61,227, JA __. The Order Denying Rehearing is referred to herein as the "Rehearing Order."

2. Whether FERC's determination that Dynegy did not engage in manipulation, and its resulting dismissal of the complaints' allegations of manipulation, was arbitrary and capricious, an abuse of discretion, or contrary to law because the Commission completely failed to explain the basis of its conclusion that Dynegy's conduct was not manipulative and explicitly stated that it was basing its determination entirely on secret information that is not part of the record of this proceeding.

STATUTES

Sections 205, 206 and 222 of the FPA, 16 U.S.C. §§ 824d, 824e, and 824v, are reprinted in pertinent part in the statutory addendum.

STATEMENT OF THE CASE

1. MISO's 2015/16 Planning Resource Auction

MISO conducts annual planning resource "auctions" to establish rates for the capacity required by load-serving entities (that is, retail electric suppliers) within each of nine zones. MISO establishes the amount of capacity required for each zone, and wholesale power suppliers submit bids indicating the amount of capacity they will offer and the price at which they will offer it. The lowest-priced bids are accepted until the needed capacity is satisfied, and the price of the last increment of power

needed establishes the "auction clearing price," which all suppliers whose bids are accepted will receive. 2019 Order ¶¶ 3–4, JA __–__.

Because MISO limits the amount of capacity that can be imported into a zone to meet its capacity requirements, owners of generation capacity that lack market power from the standpoint of MISO as a whole may have the ability to exercise market power within a particular zone if they control enough of its capacity. That is, a seller that knows its capacity is needed to satisfy a zone's capacity requirements will also know that the clearing price will be no lower than its bid, *see id.* at ¶ 39, JA __, as long as the bid does not exceed the "conduct threshold" or "market impact threshold" established by MISO's Market Monitor to identify bids that require "market power mitigation," *id.* at ¶ 33, JA __. As a result, auction rates may differ widely from zone to zone. Before the 2015/16 auction, however, there was little or no price separation between the zones. *See id.* at ¶ 5, JA __.

In 2013, Dynegy acquired a number of coal-fired plants in Zone 4 that made it a pivotal supplier of capacity for that zone. Because Zone 4 could not meet its local clearing requirements without the capacity of Dynegy's plants, the rates set by the planning resource auction could be

no lower than the rate at which Dynegy bid capacity needed to meet the local clearing requirements into the auction. *See id.* ¶¶ 37–39, JA __–__. The Commission approved the acquisition of the plants by Dynegy because it would not give Dynegy market power within MISO's authority area as a whole, but it did so without analyzing whether the acquisition would provide Dynegy market power in Zone 4. *See id.* ¶¶ 6–7, JA __–__. Dynegy opposed changes to MISO's planning resource auction procedures that would have limited its ability to determine rates established for Zone 4. *See id.* ¶¶ 23–24, JA __–__.

In the 2015/16 auction, Dynegy bid resources necessary to meet Zone 4's local clearing requirements into the auction at $150.00/MW-day (megawatt-day). *See id.* ¶ 40, JA __. Because the capacity Dynegy bid at that rate represented the marginal capacity necessary to meet Zone 4's local clearing requirement, Dynegy's bid established the auction clearing price for Zone 4. *See id.* The $150.00/MW-day rate was nearly nine times higher than the Zone 4 rate resulting from the 2014/15 auction, and more than 43 times higher than the rates for all other MISO zones established by the 2015/16 auction, none of which exceeded $3.48/MW-day. *See id.* ¶ 5, JA __. Nearly all other bidders in Zone 4 submitted bids substantially

lower than Dynegy's. *See id.* at ¶ 41, JA __–__. However, Dynegy's bid did not trigger measures to mitigate excessive rates because it was lower than the conduct threshold established as a screen to identify anticompetitive bids. That threshold had been set at $180.33/MW-day based principally on an "initial reference level" reflecting estimates of the "opportunity cost" of bidding capacity into Zone 4 rather than exporting bidding capacity to areas served by another regional transmission organization, PJM. *See id.* at ¶¶ 33–35, 85, JA __–__, __–__.[3]

2. The Complaint Proceedings

Public Citizen, as well as the Illinois Attorney General and Southwestern Electric Cooperative, filed complaints alleging that Dynegy had engaged in manipulative practices and that the 2015/16 Zone 4 auction rate was unjust and unreasonable. In December 2015, the Commission issued an Order granting the complaints in part and denying them in part. *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61385 (Dec. 31, 2015), JA __ (2015 Order).

[3] More specifically, the conduct threshold equaled the sum of the initial reference level of $155.79/MW-day, reflecting the estimated opportunity cost of not exporting capacity to PJM, plus 10% of the estimated cost of new entry into the market, or $24.75/MW-day. *See id.* at ¶ 35, JA __.

The Commission determined that the MISO tariff establishing the auction procedures was "no longer just and reasonable," *id.* at ¶ 1, in two respects: the way it determined the initial reference level used to screen out excessive bids and the local clearing requirements applicable to the auctions. *See id.* at ¶ 3, JA __.

Specifically, FERC concluded that MISO's calculation of the initial reference level "does not represent an appropriate default opportunity cost for all MISO capacity resources" because of constraints on the ability of power suppliers within MISO to sell capacity into PJM, including limits on the availability of transmission service to make such sales possible. *Id.* at ¶¶ 86, 89, JA __. Thus, the conduct threshold significantly inflated the level at which a bid could be said to reflect a well-functioning market, as opposed to the exercise of market power. FERC accordingly determined that MISO must adjust the initial reference level to $0/MW-day for future auctions, so that market mitigation requirements would be triggered by bids that exceeded 10% of the cost of new entry (unless the bidder had received a higher facility-specific initial reference level). *Id.* at ¶ 93, JA __.

As to the calculation of local clearing requirements, FERC found that MISO's tariff provisions for determining a zone's capacity import limits were unjust and unreasonable because they had the effect of unduly limiting the amount of capacity that could be imported into a zone for purposes of the planning resource auction. *See id.* at ¶¶ 145–48, JA __. FERC directed MISO to implement changes that would more correctly reflect a zone's ability to import capacity to meet its requirements. *See id.* at ¶ 148, JA __.

The Commission held, prospectively, that the provisions it found to be unjust and unreasonable could not be applied in future auctions and that MISO was required to revise them before the 2016/17 auction. *See id.* at ¶ 3, JA __. In the 2016/17 auction, the clearing price in Zone 4 fell by more than 50%, to $72/MW-day; in the 2017/18 auction it plummeted to $1.50/MW-day.[4]

The Commission's 2015 Order, however, did not resolve whether Dynegy had engaged in manipulation or whether the rates resulting from the 2015/16 auction in Zone 4 were just and reasonable. Rather, it stated

[4] MISO, 2017/2018 Planning Resource Auction Results (April 14, 2017), https://cdn.misoenergy.org/2017-2018%20Planning%20Resource%20Adequacy%20Results87196.pdf.

that those issues remained under consideration and would be addressed in a future order. *See id.* at ¶ 4, JA __. The 2015 Order further established a refund effective date of May 15, 2015, for the complaints under section 206 of the FPA. *See* 16 U.S.C. § 824e(b); 2015 Order ¶ 177, JA __.

3. The 2019 Order

More than three-and-a-half years later, on July 19, 2019, the Commission, by a three-to-one vote, issued an order finally resolving the remaining issues in the complaint proceedings by denying the complaints to the extent they sought relief beyond that provided in the 2015 Order. 2019 Order, JA __. Then-Chair Chatterjee and Commissioners LaFleur and McNamee concurred in the Commission's action, and Commissioner Glick dissented.

a. The Commission's Ruling on Market Manipulation

With respect to the claims that Dynegy had engaged in market manipulation, the Commission summarized the arguments and submissions of the parties, but then denied the complaints without addressing those arguments. Instead, the Commission stated that FERC's Office of Enforcement had "initiated a formal, non-public investigation into whether market manipulation occurred before or

during the 2015/16 Auction," and that "[t]hat investigation has been closed." 2019 Order, ¶ 30, JA __. The Commission further stated that the investigation had lasted three years and had involved review of "over 500,000 pages of documents" and "17 days of testimony, from 11 witnesses." *Id.* at ¶ 31, JA __. The Commission neither made that information part of the record of the complaint proceedings, nor explained what the information had revealed or how it affected the complainants' claims that Dynegy had engaged in manipulation. Instead, the Commission's explanation of its denial of the complaints of manipulation consisted, in its entirety, of the following two sentences:

> Based on a review of the investigation, we find that the conduct investigated did not violate the Commission's regulations regarding market manipulation. We conclude, therefore, that no further action is appropriate to address the allegations of market manipulation raised in the complaints.

Id. at ¶ 32, JA __.

Commissioner Glick dissented from the determination that Dynegy had not engaged in market manipulation. Commissioner Glick pointed out that the Commission's Order provided "no basis" for the belief "that the 2015 auction results were not the product of market manipulation." 2019 Order, Dissent, ¶ 4, JA __. He observed that the decision to close

the non-public investigation into manipulation "was made by the Chairman without consulting the other commissioners" and that, if consulted, he "would have argued against terminating the enforcement process." *Id.*, JA __. "Because the details of the investigation were, and remain non-public at the choice of the Commission," Commissioner Glick stated that he could "not explain why I disagree with the Chairman's decision to close the investigation," but that he believed "that the evidence uncovered to date was more-than-sufficient to justify continuing the enforcement process." *Id.*, JA __. Commissioner Glick further pointed out that the Commission had chosen not to publicly disclose any aspects of the non-public investigation and thus had "not provide[d] even the scantest reasoning to support its finding that the nearly 1,000 percent year-over-year increase in the MISO Zone 4 capacity price had nothing to do with market manipulation." *Id.* at ¶ 5, JA __. Instead, the Commission had provided only an "unsubstantiated assurance that no one violated the Commission's regulations regarding market manipulation." *Id.*, JA __.

b. The Commission's Determination That the 2015/16 Zone 4 Auction Rates Were Just and Reasonable

As for the complaints' contention that the rate of $150.00/MW-day established by the 2015/16 auction for Zone 4 was unjust and unreasonable, the 2019 Order devoted 51 paragraphs to summarizing the evidence and the arguments of the parties before disposing of the complaints on a ground that entirely avoided the question whether the auction clearing prices reflected Dynegy's exercise of market power and were therefore unjust and unreasonable. Instead, the Commission determined that the Zone 4 auction clearing price was just and reasonable solely "because it resulted from the application of MISO's Tariff, which had previously been accepted as a just and reasonable approach to mitigating the effects of anticompetitive behavior in the capacity market." 2019 Order, ¶ 86., JA __. The Order noted that the tariff included provisions that were "designed to mitigate the exercise of market power and result in a just and reasonable rate," *id.* at ¶ 84, JA __, and that Dynegy's bids were "permissible under the Tariff," *id.*, JA __.

The Commission did not, however, find that the tariff provisions, under the conditions of the 2015/16 auction, were in fact sufficient to mitigate exercise of market power and produce just and reasonable rates,

nor did it determine that features of the tariff that were intended "to mitigate economic withholding," *id.* at ¶ 85, were in fact effective to do so. Rather, the Commission determined only that prices were just and reasonable because Dynegy's bids "were *considered* to be competitive under the Tariff." *Id.*, JA __ (emphasis added). The 2019 Order specifically rejected the argument that the Commission had any obligation to ensure that rates resulting from an auction pursuant to the terms of a tariff are in fact just and reasonable. *Id.* at ¶ 89, JA __. And nowhere did the Commission consider whether the flaws in the MISO tariff—which had led it to conclude in its 2015 Order that the tariff was no longer just and reasonable—had contributed to results in the 2015/16 auction that reflected exercise of market power.

Commissioner Glick dissented from the Commission's determination that the rates were just and reasonable, just as he had from its ruling on market manipulation. He pointed out that "the fact that MISO and the individual market participants appear to have followed the relevant tariff language does not respond to allegations that the resulting rates are unjust and unreasonable as a result of market manipulation." 2019 Order, Dissent, ¶ 2, JA __. Creation of a "safe harbor" for anticompetitive

rates for "simply following the relevant tariff," he noted, "would be an unreasoned departure from settled policy" and "directly contravene case law." *Id.* at ¶ 3, JA __. Accordingly, he concluded, the Commission's statement that "the relevant tariff language was followed" "fails to adequately address the key question posed by the complaints: Whether the results of the [MISO] 2015/2016 capacity auction … were just and reasonable." *Id.* at ¶ 1, JA __.

4. The Rehearing Order

Public Citizen filed a request for rehearing (JA __) under 16 U.S.C. § 825*l*(a), as required to preserve its ability to seek judicial review of the 2019 Order under 16 U.S.C. § 825*l*(b). Public Citizen's request for rehearing challenged both (1) FERC's denial of the complaints that Dynegy had engaged in market manipulation, and (2) the Commission's determination that the auction results were just and reasonable merely because the auction had been conducted in accordance with the terms of a tariff that the Commission had previously approved. As to manipulation, Public Citizen argued that FERC's unexplained conclusion that Dynegy had not engaged in manipulation, based on facts outside the record of the complaint proceedings, was arbitrary and capricious

because it violated the fundamental APA requirement that an agency provide a reasoned basis for its actions. *See* JA __–__. With respect to the justness and reasonableness of the Zone 4 capacity rates resulting from the 2015/16 auction, Public Citizen argued that under precedents of this Court and the Ninth Circuit, FERC may not rely exclusively on its approval of market-based rate-setting methodologies in determining the lawfulness of the actual rates resulting from the use of those methods. Rather, the Commission must, when the resulting rates are challenged, determine whether they are in fact just and reasonable as required by sections 205 and 206 and the FPA, 16 U.S.C. §§ 824d & 824e. *See* JA __–__. In addition, Public Citizen pointed out that, even if the Commission were limited to reviewing the justness and reasonableness of the auction procedures, the 2019 Order had not considered whether those procedures remained just and reasonable at the time of the 2015/16 auction, such that it was lawful under section 206 for sellers to charge rates resulting from that auction during the time those rates were in effect. *See* JA __–__.

The Commission denied the request for rehearing on March 19, 2020, by a two-to-one vote, with then-Chair Chatterjee and Commis-

sioner McNamee forming the majority and Commissioner Glick again dissenting. Rehearing Order, JA __. In the Rehearing Order, FERC doubled down on the reasoning of the 2019 Order, insisting both that it need provide no explanation for dismissing a complaint alleging market manipulation and that the justness and reasonableness of the Zone 4 auction results depended entirely on whether the auction had been conducted in accordance with the terms of MISO's previously approved tariff.

As to manipulation, the Rehearing Order stated that FERC had "discretion" about "whether and how" to investigate complaints of manipulation. *Id*. at ¶ 13, JA __. Although the Commission acknowledged that complainants "may raise an allegation of market manipulation in the context of a complaint," the Commission stated that it retained complete "discretion on how to explore that issue." Id. at ¶ 13, JA __. The Commission further asserted without elaboration that Public Citizen had "not met its burden as a complainant to demonstrate that activity meeting [the] definition [of manipulation had occurred and resulted in rates that are unjust and [un]reasonable." *Id*. at ¶ 14, JA __. Rather than explaining the basis for that conclusion, the Commission asserted that

Public Citizen's argument that the Commission was required to engage in reasoned decisionmaking was an effort to "shift its burden to the Commission." *Id.* Finding the argument that it is obligated to explain its decisions "unavailing," the Commission insisted that it need say no more than that in the "reasonable application of [its] discretion," it had determined that "no further action is appropriate." *Id.*

The Commission acknowledged that its determination that there was no market manipulation did "not resolve the distinct question of whether an exercise of market power in the auction resulted in rates that are unjust and unreasonable." *Id.* at ¶ 15, JA __. As to that issue, the Commission again rejected the argument that it had any obligation to determine whether the prices resulting from the 2015/16 auction were themselves just and reasonable. It insisted that it need not "engage in a review under section 205 of individual transactions, including auction offers, entered into pursuant to a seller's market-based rate tariff." *Id.* at ¶ 16, JA __. Rather, it stated that a "market-based rate tariff" is itself the "rate" that is subject to the FPA's just-and-reasonable requirement, and that such a rate is just and reasonable as long as it is subject to an "ex ante finding of the absence of market power and enforceable post-

approval transaction reporting." *Id.* at ¶¶ 16–17, JA __. Although the Commission acknowledged that the "case law cited in Public Citizen's request for rehearing provides that the legality of a seller's market-based rate sales also depends on the Commission's ability to monitor rates through post-approval reporting requirements," the Commission interpreted that requirement to mean only that a seller must "follow[ ] the Commission's post-approval reporting requirements," not that the Commission must actively review the reported rates to evaluate whether they are just and reasonable or reflect the seller's exercise of market power. *Id.* at ¶ 18, JA __. The Commission acknowledged only an obligation to review "individual sellers' market-based rate authority and the market monitoring and mitigation rules governing transactions in RTO/ISO markets" on a "going-forward basis." *Id.* at ¶ 20, JA __.

As to Public Citizen's argument that the Commission had failed to determine whether the 2015/16 auction procedures were infected by the same features that had led the Commission to determine in its 2015 Order that the procedures were no longer just and reasonable and had to be revised for future auctions, the Commission denied that its findings in the 2015 Order "support[ed] a claim that the 2015/16 Auction results

reflected the exercise of market power and produced unjust and unreasonable results." *Id.* at ¶ 22, JA __. The Commission stated that its 2015 findings determined only the justness and reasonableness of the auction procedures "going forward." *Id.* However, it did not find that the procedures in fact remained just and reasonable at the time of the 2015/16 auction. Rather, it stated only that those procedures "had been approved" years earlier as a "just and reasonable approach" that was "designed to mitigate market power." *Id.* Because the auction "complied with the terms of the MISO Tariff, which had been approved by the Commission and were in effect at the time of the 2015/16 Auction," the Commission concluded that the "results of the 2015/16 Auction were just and reasonable" without regard to whether those results in fact reflected Dynegy's exercise of market power or whether the auction procedures remained just and reasonable at the time. *Id.* at ¶ 23, JA __.

Commissioner Glick again dissented, explaining that "the Commission has at no point provided Public Citizen with an adequate response to the concerns raised in its complaint or explained why, in light of those concerns, the auction results were just and reasonable." Rehearing Order, Dissent, ¶ 1, JA __. In Commissioner Glick's view, "the

fact that MISO and the individual market participants appear to have followed the relevant tariff language does not insulate them against the argument that market manipulation rendered the resulting rates unjust and unreasonable." *Id.* at ¶ 2, JA __. Commissioner Glick pointed out that the Rehearing Order "does not provide even the scantest reasoning to support its finding that the nearly 1,000 percent year-over-year increase in the MISO Zone 4 capacity price had nothing to do with market manipulation." *Id.* at ¶ 5, JA __. As a result, Commissioner Glick stated that he did "not believe that we can say with any confidence that the 2015 auction was not subject to market manipulation" and, accordingly, that he "c[ould] not join the Commission's conclusion that those auction results are just and reasonable." *Id.* at ¶ 6, JA __–__.

SUMMARY OF ARGUMENT

FERC's ruling that the results of the 2015/16 Zone 4 auction were just and reasonable solely because the auction was conducted in accordance with the terms of a previously approved tariff setting forth the auction procedures cannot be squared with the command of sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d, 824e, that all wholesale electricity rates and charges must be just and reasonable. The plain

terms of the statute require that FERC determine whether the prices resulting from market-based rate-setting mechanisms are just and reasonable, not just that FERC approve tariffs establishing auction procedures that it considers just and reasonable. A long line of precedents of this Court and the Ninth Circuit affirm that FERC may rely on market mechanisms to set rates in the first instance only if it retains and exercises the authority to determine whether the resulting rates are reasonable. FERC never exercised that authority here. Indeed, it denied any obligation to do so.

FERC's refusal to consider whether the auction results themselves were just and reasonable contradicts not only the statute and past decisions of the courts, but also flies in the face of FERC's own repeated statements in litigation that it recognized its obligation to determine the reasonableness of rates resulting from market-based rate-setting mechanisms. In the Orders challenged in this case, FERC did not acknowledge that its failure to consider the justness and reasonableness of the charges resulting from the auctions contradicted those assurances. Nor did it offer a reason for reversing the position it had taken in litigation before both this Court and the Ninth Circuit. Even if FERC's

resolution of the challenge to the justness and reasonableness of the auction results could otherwise be squared with the statute, FERC's failure to recognize and explain its change in position would render its action arbitrary and capricious.

Moreover, FERC did not even act consistently with its own position that the justness and reasonableness of the MISO tariff's auction procedures, rather than of the rates they produced, is determinative. FERC never determined whether the auction procedures remained just and reasonable at the time of the auction that resulted in the challenged rates. The FPA, however, requires that in complaint proceedings brought under section 206, 16 U.S.C. § 824e, FERC must consider whether previously approved rates are still just and reasonable. FERC's failure to address whether the MISO tariff's auction provisions were just and reasonable when the challenged charges were established is irreconcilable with section 206's command.

Finally, FERC's failure to offer *any* explanation for its finding that Dynegy did not engage in market manipulation violates the fundamental principle that agencies must offer reasoned, record-based explanations for their actions. FERC's attempt to suggest that its finding regarding

manipulation reflected an exercise of unreviewable enforcement discretion is flatly wrong: FERC purported to *determine* the lawfulness of Dynegy's conduct, not to exercise discretion not to do so. An agency may not make such a determination without explaining its basis.

STANDING

A membership organization has standing to challenge agency action "if at least one of its members would have standing and if the issue is germane to the organization's purpose." *Int'l B'hood of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 342-43 (1977)). FERC's action rejected a challenge to wholesale electric rates, allowing a substantial rate increase. Wholesale electric rates are (indeed, must be, as a matter of law) passed on to retail customers. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). As illustrated in the declaration reproduced in the standing addendum, Public Citizen has members in MISO Zone 4 who pay electric rates that increased because of the wholesale capacity rate increase at issue. A rate increase inflicts economic injury sufficient to confer Article III standing. *See Ne. Energy Assocs. v. FERC*, 158 F.3d 150, 154 (D.C. Cir. 1998).

Protection of consumers against such injuries is germane to Public Citizen's purposes, as the organization's history of participation as a petitioner in cases seeking review of FERC orders involving market-based electric rates demonstrates. *See, e.g., Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016); *Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011); *Colo. Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007).

ARGUMENT

I. Standard of Review

The Court's review of actions by FERC is governed by the familiar standards of the APA, under which agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see, e.g., La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1302 (D.C. Cir. 2014). Under that standard, an agency action premised on the legally erroneous view that the agency lacks authority conferred on it by statute must be set aside as "not in accordance with law." *See, e.g.*, *Mass. v. EPA*, 549 U.S. 497, 528 (2007). In addition, an agency acts arbitrarily and capriciously when it does not acknowledge and explain a departure from its past positions, *Encino*

Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125–26 (2016), or when it otherwise fails to "articulate[ ] a reasoned explanation for its action" in light of the record before it, *Farmers Union Cent. Exchange, Inc. v. FERC*, 734 F.2d 1486, 1500 (D.C. Cir. 1984); *see Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43–44, 48, 52, 57 (1983).

II. FERC unlawfully refused to review the justness and reasonableness of the actual rates resulting from MISO's 2015/16 planning resource auction.

A. The FPA's clear language and consistent judicial precedent require FERC to determine whether auction results are just and reasonable.

The Commission's determination that the Zone 4 capacity rates set by the 2015/16 auction were just and reasonable rested solely on the auction's compliance with the then-applicable provisions of the MISO tariff setting forth the auction procedures. The Commission concluded that, because Dynegy's bids were permissible under the terms of that approved tariff, the resulting rates were just and reasonable. 2019 Order, ¶¶ 84–86, JA __–__; Rehearing Order ¶ 17, JA __. FERC's Orders thus rest on the proposition that the Commission lacks authority to review rates set by auction for anything other than compliance with auction procedures, regardless of whether the rates reflect the exercise of market

power rather than competitive forces, provide utilities with excess profits, or unjustifiably burden consumers. Moreover, the Orders did not even address whether the auction procedures themselves remained just and reasonable at the time of the 2015/16 auction, even though the Commission had already determined that key provisions essential to preventing exercise of market power (specifically, provisions determining the local clearing requirements of MISO's zones and establishing the initial reference level used to screen for potentially anticompetitive bids) were no longer adequate to ensure just and reasonable rates as of December 2015, only a few months after the auction at issue.

The Orders' conclusion that the Commission must find a rate just and reasonable if it has been set by an auction whose procedures the Commission previously approved is contrary to the plain language of FPA sections 205 and 206, which preclude the Commission from allowing rates and charges that are not just and reasonable. That conclusion is also contrary to a long string of decisions of this Court and the Ninth Circuit addressing FERC's authority to approve rates set using market mechanisms. Those decisions hold that the Commission's power to review the lawfulness of rates established by market mechanisms—the

authority the Order effectively disclaims—is critical to the legality of Commission's reliance on such mechanisms to set rates in the first instance.

1. The Statutory Language

Section 205(a) of the FPA specifically provides that "[a]ll rates and charges" for wholesale electric energy "shall be just and reasonable," and that "any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a). Section 205 further requires power wholesalers to file schedules of "rates and charges" and notices of changes in rates with the Commission, and it provides the Commission with authority to determine the lawfulness of any rate change. *Id.* §§ 824d(c), (d) & (e). Section 206 provides the Commission with authority to police whether existing rates and charges—even rates and charges established pursuant to previously filed and approved rate schedules—are just and reasonable. *Id.* § 824e(a). If they are not just and reasonable, section 206 requires the Commission to replace them with rates and charges that are just and reasonable—that is, to ""determine the just and reasonable rate [or] charge … to be thereafter observed and in force, and … fix the same by order." *Id.* In addition, section 206

authorizes FERC to "order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate [or] charge." *Id.* § 824e(b).

Despite this clear statutory language, the two FERC Orders at issue here posit that once the Commission has approved a "tariff" setting forth auction procedures, it need not look beyond compliance with those procedures to determine the lawfulness of the resulting rates or charges, even rates or charges that are collected subsequent to a refund effective date established under Section 206. That view cannot be squared with the plain statutory language, which requires the Commission to determine whether "rates" and "charges" are just and reasonable. The relevant meaning of "rate" is a "charge, payment, or price fixed according to a ratio, scale, or standard." Webster's Third New International Dictionary (Kindle ed. 2017). And a "charge" is an "expenditure or incurred expense" or "the price demanded for a thing or service." *Id.* The wholesale electric capacity prices established by the MISO Zone 4 auction are unquestionably "rates" and "charges." And under the statute, "[i]t is

the Commission's job … to find a just and reasonable rate." *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011).

FERC insists that, under a "market-based rate tariff," the filed rate is the "market rate," and that the Commission need only determine that the market-base rate-setting mechanism is just and reasonable, not the actual rates themselves. Rehearing Order ¶¶ 16–17, JA __–__. Even if that view could be squared with the plain meaning of the term "rates," it does not account for the requirement that FERC determine the justness and reasonableness of all "charges." The auction prices, not the auction procedures, are the "charges" borne by power purchasers. Thus, while courts have held that the filing of a market-based rate tariff (together with after-the-fact reporting of rates and charges established pursuant to that tariff) comports with the statutory requirement that schedules of "rates" be filed and that notice be given of changes in "rates," *see*, *e.g.*, *Mont. Consumer Counsel v. FERC*, 659 F.3d at 921–22, they have at the same time insisted that FERC may not evade its responsibility to determine whether the resulting charges are just and reasonable, *see id.* at 919. "FERC may not determine in advance that the prevailing market rate is by definition just and reasonable," nor may it "substitute

prevailing market prices for its own judgment." *Id.* "Such a policy would be regulation in name only." *Id.*

2. Judicial Decisions

FERC's assertion in the Orders under review—that having approved a market mechanism to establish rates, it is no longer required to consider the justness and reasonableness of the resulting rates—contradicts the entire body of precedent of this Court and the Ninth Circuit concerning the circumstances in which FERC may rely on market mechanisms to set rates. Those decisions consistently hold that the use of market-based rate-setting mechanisms is permissible *only* if the Commission reviews the actual resulting rates to ensure that they conform to the fundamental statutory requirement that rates be just and reasonable.

a. This Court's Decisions

In *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (1993), this Court stated that the Commission may accept market-based rates as just and reasonable, but the Court emphasized that such acceptance required both a finding that sellers lacked market power, *see id.* at 870–81, and continued review by the Commission of rates actually charged to "assure

that a market … rate is just and reasonable." *Id.* at 870. The holding in *Elizabethtown Gas* is flatly inconsistent with the Orders' view that such review is unavailable as long as the market rate has been determined in accordance with procedures set forth in a tariff—even where there is evidence that the market was *not* in fact competitive and that rates may be attributable to the exercise of market power.

Likewise, this Court reiterated in *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18 (2002), that use of market rates was acceptable only where the Commission had shown detailed empirical evidence that they would fall within a "zone of reasonableness" and, critically, where the Commission retained the ability to "check rates" to ensure that they are "in fact" in the "zone of reasonableness." *Id.* at 31; *see id.* at 34. And in *Farmers Union Central Exchange v. FERC*, this Court rejected reliance on market-established rates under circumstances where the Commission did not maintain its ability to "ac[t] as a monitor" to ensure that competition drove "actual prices" into the "zone of reasonableness" or "to check rates if it [did] not." 734 F.2d at 1509. Both *Interstate Natural Gas* and *Farmers Union* directly contradict the Orders by expressly holding that, when market mechanisms set rates, the Commission must exercise

review to ensure both that it approves of the market procedures and that the "resulting rates" are reasonable. *Id.* at 1501.

More recently, in *TransCanada Power Marketing Ltd. v. FERC*, 811 F.3d 1 (2015), this Court again held that the Commission may not rely solely on the use of ostensibly competitive bidding mechanisms to determine that rates are just and reasonable. Rather, it must determine that the rates themselves are just and reasonable, and explain why it believes that they resulted from competitive economic forces that restrained power suppliers from making bids that resulted in supracompetitive profits. *See id.* at 11–13.

Finally, in *Public Citizen, Inc. v. FERC*, the Court, while holding that it lacked jurisdiction to review a Commission deadlock that precluded the issuance of a final order, pointedly noted that the assertion by the then-Commission Chair that the Commission lacks "authority to engage in any review whatsoever [of the lawfulness of auction results], so long as [the system operator] conducted the auction in accordance with its tariff" was "questionable at best." 839 F.3d at 1174. That same false assertion underlies the Orders at issue here.

In its Rehearing Order, FERC made no attempt to square its position with this Court's decisions in *Farmers Union*, *Interstate Natural Gas*, and *Elizabethtown Gas*, other than to cite them in a footnote suggesting that all they require is that market-based-rate sales be reported so the Commission can "monitor rates." Rehearing Order ¶ 18 & n. 46, JA __. But each of those decisions expressly stated that the Commission must retain the authority not just to monitor rates, but to ensure that the rates resulting from its reliance on market mechanisms to set rates in the first instance are in fact just and reasonable—the very power it expressly declined to exercise in this case. *See Farmers Union*, 734 F.3d at 1501; *Interstate Natural Gas*, 285 F.3d at 31; *Elizabethtown Gas*, 10 F.3d at 871.

As to the Court's decisions in *TransCanada Power Marketing* and *Public Citizen*, FERC tried to sidestep them on rehearing as factually distinguishable. Rehearing Order ¶ 19, JA __. That *TransCanada* involved a market-based rate-setting mechanism that was different in its details, however, does not affect the applicability of the legal principles this Court applied in setting aside FERC's order: that FERC is required to find that contested rates resulting from a bidding process are "just and

reasonable" and do not involve "excessive profits," and that FERC must "explain its reasoning" in making that determination. 811 F.3d at 12. Merely relying on "market forces" is not enough. *Id.* at 13. Likewise, the Court's statement in *Public Citizen* that the position of two commissioners that FERC lacked authority to review the justness and reasonableness of rates established in accordance with market-based tariff provisions was "questionable at best," 839 F.3d at 1174, cannot be confined to circumstances where a tariff's own terms authorize such review, as FERC suggests, Rehearing Order ¶ 19, JA __. The FPA's express terms make unjust and unreasonable charges illegal regardless of whether a tariff purports to allow or foreclose FERC's review of charges under it. 16 U.S.C. § 824d(a).

b. Ninth Circuit Decisions

A trilogy of Ninth Circuit decisions—*California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (2004), *Montana Consumer Counsel*, 659 F.3d 910, and *California ex rel. Harris v. FERC*, 784 F.3d 1267 (2015)—have similarly emphasized that review of actual rates established by market mechanisms, as opposed to mere review of the mechanisms themselves,

is essential to the lawfulness of the Commission's exercise of regulatory authority.

Lockyer held that a market-based rate tariff complied with the FPA only "so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were 'just and reasonable' and whether market forces were truly determining the price." 383 F.3d at 1014. *Montana Consumer Counsel* similarly upheld the Commission's rules permitting market-based rates, but emphasized that "FERC may not determine in advance that the prevailing market rate is by definition just and reasonable," 659 F.3d at 918, but must analyze rates actually charged, *id.* at 919. If those rates are not in fact just and reasonable, "FERC must have the tools to act when markets fail, and it must use those tools to ensure that customers pay only just and reasonable rates." *Id.* at 920 n.5.

Most recently, in *Harris*, the Ninth Circuit rejected the Commission's argument that review of rates charged by market-based rate sellers is limited to consideration of whether particular sellers possessed market power based on market share. Rather, the court held, the Commission must engage in "active ongoing review" of rates resulting

from market mechanisms to "determine whether sellers' rates complied with § 205." 784 F.3d at 1273. Quoting *Lockyer*, the court reiterated that if the Commission's "ability to … gauge the 'just and reasonable' nature of the rates is eliminated, then effective regulation is removed altogether." *Id.* at 1274 (quoting 383 F.3d at 1015-16). And the court emphasized that the Commission must "fully consider whether a reported rate [is] just and reasonable." *Id.* at 1275.

Again, FERC's Rehearing Order suggests that these decisions only require it to enforce post-sale reporting requirements. *See* Rehearing Order ¶ 18 & n.46, JA __. According to FERC, the Ninth Circuit precedents validate its view that it cannot review whether rates and charges resulting from market-based-rate tariffs are just and reasonable because the tariff itself establishes the rate, and FERC's acceptance of the justness and reasonableness of a market-based-rate tariff necessarily establishes the justness and reasonableness of the rates and charges determined in accordance with the market mechanisms it sets forth. *See id.* at ¶¶ 16–17, JA __–__. *Lockyer*, however, expressly required the Commission to review the justness and reasonableness of *prices* resulting from market-based transactions, 383 F.3d at 1014. And, as explained

above, *Montana Consumer Counsel* held that the tariff stood in for the rate only for purposes of filing and notice requirements. *See supra* p. 31. The decision reiterated *Lockyer*'s insistence that FERC must retain its authority to determine the justness and reasonableness of amounts actually charged customers under market-based-rate tariffs. *See* 659 F.3d at 918–20.

Harris, moreover, resoundingly rejects the Commission's contention that because it characterizes the tariff establishing auction procedures as setting forth the "filed rate," it is not required by Section 205 to review whether the *actual* rates resulting from the auction are just and reasonable. As *Harris* holds, post-sale filing with the Commission of actual rates charged under a market-based-rate tariff is not merely an informational requirement: It is essential to compliance with the statutory requirement that the Commission determine the justness and reasonableness of all rates. 784 F.3d at 1273. Absent the reporting of the rates themselves—which is necessary to allow the Commission to do its job of reviewing the rates under section 205—"there is no filed tariff in place at all," and FERC cannot perform its responsibility to "gauge the 'just and reasonable' nature of the rates." *Id.* at 1274 (quoting *Lockyer*,

383 F.3d at 1015-16). Indeed, the 2019 Order acknowledges that the Ninth Circuit precedents require the reporting of auction results to "enable the Commission to evaluate whether rates are just and reasonable." 2019 Order ¶ 89, JA __. But the Commission's Orders deny it that ability by limiting its role to considering whether the auction procedures have been followed.

B. FERC's disavowal of responsibility to review the justness and reasonableness of the auction results is an unexplained departure from its previously stated interpretation of the FPA.

FERC's determination in this case that it was not required to review the justness and reasonableness of the Zone 4 auction results as long as the auction was conducted in accordance with the terms of MISO's tariff is irreconcilable not only with the text of the FPA and the precedents governing FERC's authority to rely on market-based rate-setting mechanisms, but also with the Commission's own previously expressed views. The Commission has repeatedly assured the courts that, in relying on auctions and other market mechanisms to establish rates, it will not shirk its "responsibility to ensure that the System Operator's auction process *and resulting rates* are just and reasonable."

Brief of Respondent FERC 43, *Public Citizen, Inc. v. FERC*, No. 14-1244 (D.C. Cir. filed Dec. 23, 2015) (emphasis added).

Likewise, in the *Montana Consumer Counsel* case, FERC expressly acknowledged that the Ninth Circuit's precedents required mechanisms "that would enable FERC to determine whether rates were 'just and reasonable' and whether market forces were truly determining the price." Brief of Respondent FERC 28, *Blumenthal v. FERC*, Nos. 08-74439 & 08-74443 (9th Cir. filed Jan. 7, 2011). Thus, FERC told the court that "[t]he *actual rates* and other details of transactions conducted under the [market-based-rate] tariff are publicly disclosed in quarterly reports and subject to complaints on any grounds available under the FPA, including discrimination or market manipulation." *Id.* at 43–44 (emphasis added). Similarly, as the Ninth Circuit's opinion in *Harris* makes clear, FERC represented to the court in *Lockyer* that it was "not contending that approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine." 784 F.3d at 1274.

FERC's exclusive reliance in this case on compliance with auction procedures set forth in MISO's tariff to determine the justness and reasonableness of the challenged rates disclaims the responsibility FERC

previously recognized in proceedings in this Court and the Ninth Circuit. FERC's Orders neither acknowledge nor explain this about-face in the agency's position. Even putting aside that FERC's new position is not defensible under the terms of the FPA and the judicial precedents construing it, FERC's failure to recognize and give reasons for its change of heart would condemn its actions here as arbitrary and capricious. "It is textbook administrative law that an agency must provide[ ] a reasoned explanation for departing from precedent or treating similar situations differently." *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018) (quoting *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014)).

As the Supreme Court has emphasized, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position" and "show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Here, FERC has done neither: It has given no hint that it recognizes the inconsistency of its action here with its prior assurances to the courts that it will review the justness and reasonableness of actual rates charged under market-based-rate tariffs,

let alone explained its changed view. "FERC must provide a … robust rationale for its seeming inconsistency with past precedent and practice." *New England Power Generators*, 881 F.3d at 210. Its failure to do so requires that its Orders be vacated.

C. FERC failed even to consider whether MISO's auction procedures remained just and reasonable at the time of 2015/16 auction.

Finally, even if the Commission might, under other circumstances, lawfully conclude that an auction conducted in accordance with procedures that are themselves just and reasonable has resulted in just and reasonable rates, it could not do so here because it failed to consider whether the tariff provisions governing the auction remained just and reasonable at the time the auction was held. Although the Commission noted that the tariff contained provisions that were "designed" to prevent exercise of market power, 2019 Order ¶ 84, JA __, and "had been approved … as a just and reasonable approach to mitigating anticompetitive behavior in the MISO capacity market" in 2013, Rehearing Order ¶ 22, JA __, it never determined whether they remained just and reasonable, or effective to mitigate anticompetitive behavior, when the auction was held in the spring of 2015.

Even under its own theory that the FPA requires it to consider only the justness and reasonableness of a market-based-rate tariff, as opposed to the resulting rates, FERC's statement that the MISO tariff had been approved as just and reasonable in 2013 is not a sufficient answer to the question whether collection of rates under that tariff remained lawful in 2015/16. The FPA requires FERC to consider both whether a rate is just and reasonable at the time of its initial filing under section 205, 16 U.S.C. § 824d, and also, on a complaint or on its own motion under FPA § 206 16 U.S.C. § 824e, whether it *remains* just and reasonable. That is, section 206 requires FERC to determine whether existing, previously approved rates are still just and reasonable: "Section 206 permits, indeed requires, FERC to determine whether an existing rate is 'unjust, unreasonable, unduly discriminatory or preferential[.]'" *Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017). Under Section 206, "whenever FERC finds a rate to be unjust and unreasonable, FERC 'shall determine the just and reasonable rate … to be thereafter observed and in force.'" *City of Redding, Cal. v. FERC*, 693 F.3d 828, 838 (D.C. Cir. 2012) (quoting 16 U.S.C. § 824e(a)). FERC's determination that an existing rate is unjust and unreasonable not only bars collection of that rate prospectively, but

also authorizes FERC to provide refunds of amounts paid in excess of the just and reasonable rate during a 15-month period starting with the "refund effective date" established under section 206(b), 16 U.S.C. § 824e(b). *See City of Redding*, 693 F.3d at 838–39.

Here, FERC established May 15, 2015, as the refund effective date, so the refund period encompassed the entire 12-month period in which the 2015/16 auction results were in effect from June 1, 2015, through May 31, 2016. On FERC's own theory that the justness and reasonableness of the auction procedures under the tariff determines the justness and reasonableness of the charges imposed, FERC would have had to consider whether the auction procedures used to determine the charges during the refund period were just and reasonable *at that time*. But FERC never made such a determination: It found the procedures found just and reasonable in 2013, and it found in December 2015 that their use in future auctions would be unjust and unreasonable. It never ruled on whether the procedures remained just and reasonable when the charges for 2015/16, which were entirely within the refund period, were established.

That omission is particularly striking given the reasoning underlying FERC's December 2015 finding that the tariff's provisions were no longer just and reasonable for use in future auctions. Although that determination rested in part on changes to PJM's capacity-market construct that would not take place until 2020/21, *see* 2015 Order ¶ 88, JA __, those changes by themselves could not have justified FERC's determination that MISO was required to change its auction procedures for the 2016/17 planning resource auction. That determination was necessarily based on FERC's findings that the ability of power suppliers in MISO to export capacity to PJM was limited by the availability of transmission services (a finding based in part on evidence from 2014/15), *see id*. at ¶ 89, JA __, and that the MISO tariff's provisions for calculating local clearing requirements for each zone were unreasonable (a finding based on existing conditions in 2015, not future ones), *see id*. at ¶¶ 145–48, JA __–__. Yet FERC never considered whether those same features rendered the MISO auction procedures unjust and unreasonable at the time of the 2015/16 auction, and thus rendered the collection of charges based on the tariff during the refund period unjust and unreasonable under section 206.

FERC's Rehearing Order sought to brush aside this omission by observing that the 2015 Order determined only that the auction procedures were not just and reasonable "prospectively." Rehearing Order ¶¶ 21–22, JA __–__. That statement is true as far as it goes, but it does not justify FERC's failure to consider whether they were a just and reasonable basis for determining the charges collected during the section 206 refund period. FERC's further suggestion that the findings made in December 2015 "do not support a claim that the 2015/16 Auction results reflected the exercise of market power and produced unjust and unreasonable results," *id.* at ¶ 22, JA __, rests on a wholly incomplete statement of the basis of the 2015 Order. In any event, that statement does not justify FERC's failure to consider, still less make any determination regarding, the justness and reasonableness of the auction procedures leading to the challenged charges.

By failing to consider whether the tariff provisions remained just and reasonable at the time the auction was held, the Commission provided no reasoned explanation for its view that the resulting rates were just and reasonable. As in *TransCanada*, where the Commission "provided no explanation for why it believed that the Program [for

establishing the challenged rates] was competitive," 811 F.3d at 13, the Commission's determination that the rates were just and reasonable "is not reasoned decision making," *id*.

III. FERC's wholly unexplained determination that Dynegy did not engage in market manipulation was arbitrary and capricious.

The Commission's determination that Dynegy did not engage in market manipulation rested solely on an *ipse dixit*: The Commission stated that it had reviewed the record of a non-public investigation that had been unilaterally terminated by the Chairman and had concluded, for reasons not stated, that Dynegy's conduct "did not violate the Commission's regulations regarding market manipulation." 2019 Order, ¶ 32, JA __. The Commission did not include the evidence from the non-public investigation in the record, did not allow the parties to address that evidence, and did not say in even the most general terms what, in its view, that evidence showed. Nor did the Commission address the arguments advanced by the parties as to whether manipulation had occurred, or the evidence the complaining parties relied on to demonstrate that further proceedings should be conducted to determine whether manipulation had occurred. The Commission's determination

that there was no violation was, as Commissioner Glick's dissent stated, no more than a "conclusory assertion." 2019 Order, Dissent, ¶ 6, JA __. The Commission offered no account of what, in its view, Dynegy had in fact done or why that conduct did not amount to manipulation.

Such decisionmaking cannot be squared with the APA's prohibition of "arbitrary and capricious" agency action. 5 U.S.C. § 706(2)(A). As the Supreme Court emphasized in its seminal decision in *State Farm*, that standard provides ample scope for the exercise of agency discretion and expertise, but that scope is not unlimited: "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" 463 U.S. at 43 (citation omitted). An agency action cannot be sustained on "a reasoned basis … that the agency itself has not given." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Thus, the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *Id.* at 48. An agency's action must be set aside as arbitrary and capricious when "[t]here are no findings and no analysis … to justify the choice made, no

indication of the basis on which the [agency] exercised its expert discretion." *Id.* (citation omitted).

This Court has repeatedly made clear that FERC is not exempt from these principles. Review of the Commission's actions under the "arbitrary and capricious" standard requires a " 'searching and careful' inquiry into the record" to "ensure that the [agency] engaged in reasoned decisionmaking." *Farmers Union*, 734 F.2d at 1499 (citations omitted); *accord*, *e.g.*, *Sw. Airlines Co. v. FERC*, 926 F.3d 851, 855–56 (D.C. Cir. 2019); *New England Power Generators*, 881 F.3d at 210; *Emera*, 854 F.3d at 30. The Commission's decisionmaking must be "reasoned, principled, and based upon the record." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). The Commission "must 'respond meaningfully to the arguments raised before it.' " *TransCanada*, 811 F.3d at 12 (citation omitted). And FERC must "fully articulate the basis for its decision." *Mo. Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000) (citation omitted). "Unless FERC offers … a valid reason" for its decisions, they must be set aside as "arbitrary and capricious." *Orangeburg, S.C. v. FERC*, 862 F.3d 1071, 1084 (D.C. Cir. 2017).

These basic requirements are far from onerous, but the 2019 Order's conclusion that Dynegy did not engage in manipulation falls well short of satisfying them. The Commission did not just fail to explain itself "cogently," articulate the basis of its decision "fully," or respond "meaningfully" to the arguments raised: It did not explain itself, articulate the basis of its decision, or respond to arguments *at all*. It drew no "rational connection" between any facts and its ultimate conclusion. And its decision did not even purport to be based upon the record: The Commission invoked the secret record of another proceeding, not the public record of this one. As in *State Farm*, "[t]here are no findings and no analysis here to justify the choice made," and "no indication of the basis on which the [agency] exercised its expert discretion." 463 U.S. at 48 (citation omitted).

FERC's Rehearing Order asserts that the requirement of reasoned explanation does not apply here because the Commission has discretion with respect to *how* it pursues investigations of market manipulation. Rehearing Order ¶ 13, JA __. FERC even suggests in a footnote that its decision reflected the exercise of unreviewable enforcement discretion under the principles of *Heckler v. Chaney*, 470 U.S. 821 (1985). Rehearing

Order ¶ 13 n. 31, JA __. This petition for review, however, neither attempts to dictate the agency's investigative procedures nor seeks review of an exercise of enforcement discretion. The decision challenged here is FERC's substantive ruling, in response to complaints that it acknowledges were properly before it (*see id.* at ¶ 13, JA __), that "the conduct investigated *did not violate the Commission's regulations regarding market manipulation*." 2019 Order, ¶ 32, JA __ (emphasis added). The Commission's conclusion that "no further action is appropriate to address the allegations of market manipulation raised in the complaints," *id.*, rested entirely on this resolution of the *merits* of the claim—not on the exercise of prosecutorial discretion. And the substantive determination that Dynegy did not engage in manipulation was nowhere explained in either the 2019 Order or the Rehearing Order, as Commission Glick pointed out in dissent. *See* Rehearing Order, Dissent, ¶ 1. *Heckler*'s protection of agency enforcement discretion provides no shield for unreasoned agency adjudications of the merits of issues properly presented to them for decision.

FERC's Rehearing Order also attempts to justify the Commission's failure to explain its ruling on manipulation by turning the tables,

asserting that Public Citizen "seeks to shift its burden [of demonstrating that manipulation occurred] to the Commission." Rehearing Order ¶ 14, JA __. FERC's argument confuses a complainant's burden of proof with the agency's burden of explanation. That complainants bear the burden of proof with respect to claims that a violation occurred does not alter FERC's obligation to provide a reasoned explanation if it concludes that no violation occurred. This Court has explicitly held that FERC has the obligation to offer an "adequate rationale and explanation" for its determinations on matters as to which complainants bear the burden of proof, such as complaints that rates are unjust and unreasonable under FPA § 206. *New England Power Generators*, 881 F.3d at 210. Here, FERC offered *no* explanation, let alone an adequate one, for its finding that Dynegy did not engage in manipulation. It merely offered "conclusory statements that dismissed Petitioners' concerns without providing reasoned analysis." *Id.* at 211.

As in *New England Power Generators*, FERC's gambit of "shifting the burden back" to the complainant, *id.*, is no substitute for reasoned explanation. Indeed, FERC's ruling here was even more conclusory and less explanatory than in *New England Power Generators*, where FERC

at least stated some reasons for its decision and "attempted to grapple with Petitioners' arguments" in its rehearing order. *Id.* at 212. Here, FERC did not even do that: It just announced its conclusion that no violation occurred based on an undisclosed record. 2019 Order, ¶¶ 31–32, JA __. And its Rehearing Order was no more informative. Rehearing Order ¶ 14, JA __–__.

"FERC's complex mandate doesn't relieve it of the requirements of reasoned decisionmaking." *New England Power Generators*, 811 F.3d at 212. FERC's failure to provide even a rudimentary explanation of its decision that Dynegy did not engage in manipulation requires a remand for a coherent, record-based explanation of FERC's determination. *See id.* at 213.

CONCLUSION

For the foregoing reasons, this Court should vacate FERC's Orders and remand for a determination whether MISO's 2015/16 Zone 4 auction results were just and reasonable and for a reasoned explanation of FERC's determination with respect to market manipulation by Dynegy.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Petitioner Public Citizen

December 4, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 10,916 words. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on December 4, 2020.

/s/ Scott L. Nelson
Scott L. Nelson

ADDENDA

STATUTORY ADDENDUM

CONTENTS

§ 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, classification, 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.

§824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any 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, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the

time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best

estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons

who have paid those rates or charges which are the subject of the proceeding.

§824v. Prohibition of energy market manipulation

(a) In general

It shall be unlawful for any entity (including an entity described in section 824(f) of this title), directly or indirectly, to use or employ, in connection with the purchase or sale of electric energy or the purchase or sale of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance (as those terms are used in section 78j(b) of title 15), in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.

(b) No private right of action

Nothing in this section shall be construed to create a private right of action.

STANDING ADDENDUM

CONTENTS

No. 20-1156

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

DECLARATION OF TERRI WEISSMAN

1. My name is Terri Weissman. I am a member of Public Citizen, Inc.

2. I am an Associate Professor of Art History and Chair of the Art History program at the School of Art + Design of the University of Illinois at Urbana-Champaign.

3. I have an apartment in Champaign, Illinois. I have paid electricity bills there since 2008, including from June 2015 to May 2016.

4. As a retail electricity consumer, I am directly affected, and injured, by increases in electricity rates.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Dec. 1, 2020

Terri Weissman