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 REPLY BRIEF FOR PETITIONER PUBLIC CITIZEN, INC.

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GLOSSARY

FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
Midcontinent	Midcontinent Independent System Operator, Inc., regional transmission organization operating in 15 midwestern states

SUMMARY OF ARGUMENT

It is axiomatic that a court may not sustain an administrative agency's order if the reasons the agency articulated when it took the action are arbitrary and capricious. Alternative rationales devised in briefing before a reviewing court cannot salvage the agency's action.

Here, the Federal Energy Regulatory Commission (FERC or the Commission) rejected claims that rates established for wholesale electric capacity in an auction conducted by the Midcontinent Independent System Operator (Midcontinent) in 2015 were unjust and unreasonable in violation of sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. §§ 824d, 824e. The stated reason for the Commission's orders was that the auction was conducted in compliance with provisions of a previously approved tariff. The Commission did not address whether those provisions remained just and reasonable at the time of the auction, or whether the auction results reflected the exercise of market power by one of the bidders, Dynegy.

Apparently dissatisfied with the Commission's reasoning, counsel for FERC and intervenor Vistra argue that the Commission really decided something else. They claim the Commission in fact held: (1) that

the complainants had not carried their burden of proving that Dynegy had exercised market power or that the auction procedures were unjust and unreasonable as of 2015; (2) that Dynegy's bids reflected Dynegy's costs; and (3) that the challenged rates were just and reasonable because they were comparable to rates in similar locations elsewhere in the country. These arguments share a fatal flaw: They have no relationship to what the Commission's orders said.

Judged on their own terms, as they must be, the Commission's orders cannot withstand review. FERC and Vistra acknowledge that the justness and reasonableness of Midcontinent's auction results—including whether the tariff provisions governing the auction remained adequate in 2015 and whether the auction results reflected the exercise of market power—are subject to challenge under FPA section 206. But the Commission's orders failed to address those key issues, let alone articulate a reasoned basis for answering them adversely to the complainants. Although the absence of an adequate explanation for rejecting the complaints under section 206 alone requires that the Commission's orders be set aside, the Commission's orders also

contravene section 205's command that the proponent of a challenged rate increase prove it is just and reasonable.

The Commission also acted arbitrarily and capriciously in dismissing complaints of market manipulation based on its unexplained finding that no manipulation occurred. Again, FERC and Vistra defend the Commission's action on other grounds, claiming that the complainants were improperly asserting a private right of action and that the Commission's order was an exercise of enforcement discretion. The Commission itself rejected the former claim, however, and the latter cannot be squared with the Commission's express finding that there was no violation. The Commission's action, for which it articulated no basis whatsoever, is indefensible.

ARGUMENT

I. The Commission offered no defensible basis for finding the 2015/16 auction results just and reasonable.

A. Post hoc rationalizations do not support the challenged orders.

Under *SEC v. Chenery Corp.*, courts "must judge the propriety of [an agency's] action solely by the grounds invoked by the agency." 332 U.S. 194, 196 (1947); *see, e.g.*, *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1024 (D.C. Cir. 2018); *Conn. Dep't of Pub. Util. Control v. FERC*, 484 F.3d

558, 560 (D.C. Cir. 2007); *Mo. Pub. Serv. Comm'n v. FERC*, 234 F.3d 36, 41 (D.C. Cir. 2000). In assessing the Commission's action, therefore, the Court must "focus on the reasons stated in the orders under review," *ANR*, 904 F.3d at 1025, and may not "give [the] agency the benefit of a *post hoc* rationale of counsel" set forth in the appellate brief of the agency or an intervenor, *Mo. Pub. Serv. Comm'n*, 234 F.3d at 41 (citation omitted). Here, both FERC's brief and intervenor Vistra's offer an account of the Commission's rationale that cannot be squared with the terms of its orders and thus provides no basis for sustaining them.

1. Before the Commission, Public Citizen and the other complainants contended that the challenged rates were unjust and unreasonable because they reflected Dynegy's exercise of market power, and that the terms under which Midcontinent's 2015/16 planning resource auction were conducted were not sufficient to prevent such unjust and unreasonable rates at the time the auction was held. In this Court, FERC and Vistra contend that the Commission fully considered those arguments and rejected them on the ground that the complainants had not met their burden of proof under FPA section 206, 16 U.S.C. § 824e. In fact, however, in the Commission proceedings, the

Commission's only rationale was that the challenges to the rates failed because there was "no evidence in the record to support a finding that Dynegy's offers *violated [Midcontinent]'s Tariff*." 2019 Order ¶ 84, JA __ (emphasis added).

The Commission elaborated that the tariff included provisions "*designed* to mitigate the exercise of market power," and that Dynegy's offers "were permissible under the Tariff." *Id.*, JA __–__ (emphasis added). The Commission also stated that "an Auction Clearing Price is not unjust and unreasonable because it is higher than expected," *id.*, JA __—a point that no one disputed. But the sole answer the Commission offered to the complainants' contention that Dynegy had exercised market power was that the Midcontinent tariff included provisions *designed* to mitigate market power and that under those provisions Dynegy's bids "were *considered* to be competitive." *Id.* at ¶ 85, JA __–__ (emphasis added).

The Commission made *no* findings with respect to the complainants' arguments that the auction results in fact reflected Dynegy's exercise of market power and that the tariff provisions were not adequate to ensure competitive rates under the conditions in which the

2015/16 auction was held. And it ultimately found "that the 2015/16 Auction Clearing Price in Zone 4 was just and reasonable *because it resulted from the application of [Midcontinent]'s Tariff*, which had *previously* been accepted as a just and reasonable approach to mitigating the effects of anticompetitive behavior in the capacity market." *Id.* at ¶ 86, JA __ (emphasis added). The Commission's 2019 Order thus rested exclusively on the point that the auction had been conducted in accordance with the existing tariff—not on any findings with respect to whether the rates were in fact just and reasonable, whether they reflected exercise of market power, and whether the tariff provisions remained adequate to ensure just and reasonable rates at the time of the auction.

The Commission's Rehearing Order rested on the same basis: It reaffirmed "that the results of the 2015/16 Auction were just and reasonable because Dynegy's bids were authorized under a valid market-based rate tariff and because, as noted in the July 2019 Order, the bids complied with the terms of the [Midcontinent] Tariff, which had been approved by the Commission and were in effect at the time of the 2015/16 Auction." Rehearing Order ¶ 23, JA __. The Commission rejected Public

Citizen's legal argument that it was required to approve the auction rates before they went into effect under FPA section 205, 16 U.S.C. § 824d, asserting that section 205's requirement of just and reasonable rates is satisfied by an ex ante approval of a market-based rate-setting mechanism and compliance with post-approval transaction reporting, without regard to the amounts of the resulting rates themselves. Rehearing Order ¶¶ 16–18, JA __–__. But the Commission gave short shrift to Public Citizen's contentions that the Commission had defaulted in its obligations under FPA section 206, 16 U.S.C. § 824e, by failing to determine whether the rate-setting mechanisms and the resulting rates remained just and reasonable at the time of the 2015/16 auction. The Commission's Rehearing Order, like its initial order, failed to explain its rejection of the complainants' contentions that the 2015/16 rates in fact reflected exercise of market power and were unjust and unreasonable. The Commission did not even make a conclusory assertion that the complainants had failed to carry their burden under section 206. Although the Commission insisted that it was not disclaiming authority to look beyond compliance with tariff procedures to determine the

lawfulness of rates resulting from an auction, Rehearing Order ¶ 20, JA __, it failed to *exercise* that authority.

The closest the Commission came to addressing whether the results of the 2015/16 auction were just and reasonable came in a brief paragraph discussing its December 2015 Order determining that the tariff provisions governing Midcontinent's capacity auction were no longer just and reasonable "prospectively." Rehearing Order ¶ 22, JA __–__. The Commission pointed out that the December 2015 Order did not find that the provisions were unjust and unreasonable at the time of the 2015/16 auction, and it noted that *one* of the several bases for the December 2015 ruling was not applicable at that time. *See id.*, JA __–__. The December 2015 Order, however, neither determined that the auction provisions *had been* just and reasonable at the time of the 2015/16 auction, nor found that the rates resulting from that auction were not the product of Dynegy's exercise of market power: It left those issues for later determination. *See* December 2015 Order ¶ 4, JA __. And like its 2019 Order dismissing the complaints, the Commission's Rehearing Order did not address or decide those questions. The Commission merely reverted to the same observations it had made in its 2019 Order: that "the market

mitigation measures in place for the 2015/16 Auction *had been* approved by the Commission as a just and reasonable approach to mitigating anticompetitive behavior," that those measures were "*designed* to mitigate market power," and that Dynegy's bids were "permissible under the tariff." Rehearing Order ¶ 22, JA __ (emphasis added).

In sum, FERC's and Vistra's arguments that the Commission based its ruling on the asserted failure of Public Citizen and the other complainants to carry their burden under section 206 of showing that the auction procedures and/or the resulting rates were unjust and unreasonable at the time of the 2015/16 auction have no basis in the Commission's orders. The Commission did not make such a ruling, let alone articulate a reasoned basis for it. Instead, the Commission began and ended with the proposition that the auction was conducted under an existing tariff that had previously been approved.

2. FERC and Vistra also seek to substitute a rationale devised by counsel for that of the Commission in arguing that the Commission relied in whole or in part on "evidence cited by the Commission showing the Dynegy's auction bids approximate its marginal costs." FERC Br. 37–38; *see also id.* at 39–41; Vistra Br. 10, 28–29. The Commission's 2019

Order states that Dynegy *argued* that its bids reflected costs, but nowhere in the Commission's explanation of the basis of its decision does it refer to or rely on that claim. *See* 2019 Order ¶¶ 84–89, JA __–__.

The Commission mentioned Dynegy's claim that its bids approximated its costs only in paragraphs of its 2019 Order that are part of the Commission's lengthy description of contentions made by the parties. *See id.* ¶¶ 56, 83, JA __, __; *see generally id.* ¶¶ 37–83, JA __–__ (describing contentions in complaints, answers, comments, answers to answers, and other pleadings concerning the claim that the rates were unjust and unreasonable). And contrary to the suggestion in FERC's brief that Public Citizen did not contest Dynegy's argument about its costs, the order explains that the Illinois Attorney General and Public Citizen argued that Dynegy's arguments presented a factual issue requiring discovery and a hearing. *See id.* at ¶ 79, JA __. Elsewhere, moreover, the order's description of the parties' contentions makes clear that whether the bids exceeded marginal cost, and whether such a bid was unjust and unreasonable, was disputed by the parties. *See id.* at ¶¶ 40, 44, 65, JA __, __, __–__.

The paragraphs of the order that reflect the Commission's *determination*, *id.* at ¶¶ 84–89, JA __ –__, nowhere purport to resolve whether Dynegy's bids reflected its costs or to tie the Commission's determination to that question. Indeed, the only references to the word "cost" in that section of the order appear in statements that Dynegy's bids were *permissible under the Midcontinent tariff* because they did not exceed the cost of new entry for Zone 4, and that the bids did not require mitigation under the tariff because they did not exceed the sum of the reference level and 10 percent of the costs of new entry. *Id.* at ¶¶ 84–85, JA __. The 2019 Order contains no suggestion that the auction results were just and reasonable *because* Dynegy's bids were cost-justified. Nor does the Rehearing Order discuss Dynegy's assertions that the rates were cost-justified. *See* Rehearing Order ¶¶ 16–23, JA __–__.

The contrary assertions by FERC and Vistra in this Court rest on the slenderest of reeds. Their briefs point to a footnote in paragraph 84 of the Commission's 2019 Order citing pages 33 to 35 of Dynegy's answer to the complaints—pages that are *also* referred to in footnotes to paragraphs 56 and 83 of the order, which describe Dynegy's argument about its costs. *See* FERC Br. 39–40 (citing 2019 Order ¶¶ 56 n.157, 84

n.243, JA __, __); Vistra Br. 28–29 (citing 2019 Order ¶¶ 83 n.239, 84 n.243, JA __, __). Paragraph 84 of the 2019 Order is, of course, part of the Commission's determination, but the footnote in question does not cite the referenced pages from Dynegy's answer as evidence that the challenged rates were cost-justified: It cites them *only* to express the Commission's agreement with Dynegy on the anodyne proposition that rates are not unjust and unreasonable just because they are "higher than expected." 2019 Order ¶ 84 & n.243, JA __. Neither the text of paragraph 84 nor the footnote indicates that the citation has anything to do with Dynegy's costs. The briefs' assertion that the footnote reflects the Commission's sub silentio adoption of Dynegy's contention that its bids were cost-based (and the unstated conclusion that the complainants failed to carry the burden of refuting that claim) amounts to a request that "this court read 'between the lines' " of FERC's order to ascertain its rationale. *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 272 F.3d 607, 615 (D.C. Cir. 2001). This Court does not uphold agency decisions on rationales it is "compelled to guess at." *Conn. Dep't of Pub.*

Util. Control, 484 F.3d at 560 (quoting *Chenery*, 332 U.S. at 196–97).[1] And contrary to the Commission's argument here (FERC Br. 43), a party's rehearing request is not required to contest rulings the Commission never made.

3. Vistra's assertion that the Commission relied on evidence that the Zone 4 auction rates were "akin to or lower than those of similar markets," Vistra Br. 29, strays equally far afield from the Commission's actual rationale. Vistra is correct that the Commission "noted" that Dynegy had *made* that argument, *id.* at 29 (citing 2019 Order ¶ 57, JA __–__)—just as it "noted" the arguments made on all sides by all parties, including the argument that, absent Dynegy's status as a pivotal supplier for Zone 4, prices in Zone 4 would have been comparable to the much lower prices in adjacent Midcontinent zones, see 2019 Order ¶ 39, JA __. But in the critical paragraphs that set forth the reasons for the Commission's determinations, neither the 2019 Order nor the Rehearing Order reasoned that the 2015/16 Zone 4 auction results were just and

[1] FERC's claim that the 2019 Order somehow rested on the view that Dynegy could have justified its bid based on a facility-specific reference level reflecting its going-forward costs, FERC Br. 42–43, lacks grounding in anything said by FERC to explain its determinations in the 2019 Order.

reasonable because they were similar to prices in other markets. *See* 2019 Order ¶¶ 84–89, JA __–__; Rehearing Order §§ 16–23, JA __–__.

4. Vistra claims that Dynegy "could not and did not know" whether its offers "would have any impact on the market at all" and that, "[b]ased on publicly available data," its offers and bilateral transactions "should have precluded Dynegy from being a pivotal supplier." Vistra Br. 9. Those assertions likewise have nothing to do with the Commission's rationale for its rulings. Again, Vistra made these arguments before the Commission, and its contentions are duly recited in the Commission's order. *See* 2019 Order ¶ 51, JA __. The complainants pointed to contrary evidence that auction participants would have known that any entity controlling as much generation as Dynegy did could control the auction results because its generation capacity was necessary for the auction to clear. *See id.* ¶ 39, JA __; *see also id.* ¶ 78, JA __–__. The Commission, however, neither rested its determination on acceptance of Dynegy's position nor faulted the complainants for failing to prove that Dynegy was able to exercise market power because of its status as a pivotal supplier. *See* 2019 Order ¶¶ 84–86, JA __–__. For the Commission

majority, that dispute was irrelevant because all that mattered was that Dynegy's bids were permissible under the tariff.

B. The orders cannot be sustained in light of FERC's and Vistra's concession that auction results can be challenged as unjust and unreasonable under FPA section 206.

FERC argues at length that rates resulting from auctions and other market-based rate-setting mechanisms can go into effect without review for reasonableness under FPA section 205, 16 U.S.C. § 824d. Critically, however, both FERC and Vistra concede that the justness and reasonableness of such rates (and the mechanisms used to set them) are always subject to challenge under section 206, 16 U.S.C. § 824e. *See* FERC Br. 34–35; Vistra Br. 18. FERC and Vistra further concede that FERC's prior approval of a tariff establishing auction procedures or other market-based rate-setting mechanisms is not enough to answer such a section 206 challenge. *See* FERC Br. 44–45; Vistra Br. 34. They acknowledge that, if prices established by auction in fact reflect the exercise of market power as a result of the failure of safeguards designed to prevent sellers from acquiring market power or to mitigate its exercise, section 206 requires FERC to provide a remedy. *See* FERC Br. 15; Vistra Br. 14. Those concessions require that the Commission's orders be set

aside because—absent the post hoc rationalizations FERC and Vistra attempt to substitute for the Commission's actual decisions—the Commission's orders do not square with the concededly applicable requirements of section 206.

FERC's and Vistra's concessions are required by the text of section 206, which requires the Commission to fix a just and reasonable rate "[w]henever" it determines that an existing rate is unjust or unreasonable. 16 U.S.C. § 824e(a). Even under the view that approval of a market-based-rate tariff allows changes in prices determined under the terms of the tariff to go into effect without filing and Commission approval under section 205, *see* 16 U.S.C. § 824d(d) & (e), a market-based rate, like any other rate, cannot remain in effect if it is no longer just and reasonable, regardless of the Commission's prior approval of the terms of a market-based-rate tariff. *See Emera Me. v. FERC*, 854 F.3d 9, 21 (D.C. Cir. 2017). Moreover, this Court and the Ninth Circuit have insisted that FERC must continue to oversee markets to ensure that rates established by market mechanisms remain 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." *Mont. Consumer*

Counsel v. FERC, 659 F.3d 910, 920 n.5 (9th Cir. 2011); *see also*, *e.g.*, *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (1993) (allowing market-based rates where "FERC has made it clear that it will exercise its … authority (upon its own motion or upon that of a complainant) to assure that a market (i.e., negotiated) rate is just and reasonable").[2] In the absence of review under section 205 before auction rates go into effect, section 206 provides the mechanism for such review—a point FERC and Vistra embrace in their briefs.

In exercising its authority under section 206, as in other matters, "FERC must have 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Blumenthal v. FERC*, 552 F.3d 875, 881 (D.C. Cir. 2009). In addressing section 206 complaints, FERC "must engage in reasoned decisionmaking" and "respond meaningfully to the arguments raised before it." *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018). "[C]onclusory statements that dismissed Petitioners' concerns without

[2] *Elizabethtown* refers to FERC's authority under Section 5 of the Natural Gas Act, 15 U.S.C. § 717c, the counterpart to FPA section 206. 10 F.3d at 870.

providing reasoned analysis" do not suffice. *Id.*; *see also TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015)

Here, the Commission never engaged in any analysis of the justness and reasonableness of the 2015/16 auction procedures *at the time the auction was held* or of whether the resulting rates reflected exercise of market power—the very analysis FERC and Vistra now concede is required. The Commission's analysis began and ended with the proposition that the auction was conducted in accordance with tariff provisions that it had *previously* approved—a point that failed altogether to address the critical issue of the reasonableness of the rates as of the spring of 2015. FERC's and Vistra's attempts to supply in their briefs the analysis the Commission never provided in its orders is no substitute for a reasoned disposition of the complaints under section 206. *See New England Power Generators*, 881 F.3d at 212 (holding that "persuasive" and even "compelling" arguments offered by FERC and intervenors must be rejected when the Commission itself has failed to provide a reasoned analysis).

The Commission's failure to grapple with whether the Midcontinent tariff's provisions regarding import limits and

establishment of the reference level rendered the tariff unjust and unreasonable for the 2015/16 auction is illustrative. The point is not that the Commission's December 2015 Order holding the tariff provisions unjust and unreasonable prospectively required a similar result with respect to the 2015/16 auction; as FERC and Vistra point out, one of the several reasons for the December 2015 Order was not applicable at the time of the 2015/16 auction. The problem is that the Commission went no further than to say that the December 2015 Order did not decide the issue—a point that was apparent given that that Order left the issue for later decision. The Commission never went on to address and resolve whether those tariff provisions were just and reasonable at the time the 2015/16 auction was held.[3]

[3] Vistra's assertion that Public Citizen waived these arguments by not including them in its rehearing request is unfounded. The rehearing request invoked section 206 and argued that the Commission had failed to consider whether the tariff's provisions concerning the auction, specifically including those that were the subject of the December 2015 Order, were just and reasonable at the time of the auction. Rehearing Request 15–16, 21–22, JA __–__, __–__. Vistra's further claim that the December 2015 Order specifically *rejected* claims about the local clearing requirement's application to the 2015/16 auction (Vistra Br. 26–27) is not supported by the paragraphs of the Order that Vistra cites, which contain no such determination. That Order specifically left open allegations concerning the 2015/16 auction. December 2015 Order ¶ 4, JA __.

These failings require that the Commission's orders be vacated. Such a ruling would not, as Vistra asserts, suggest that "the Commission was obliged, upon the mere filing of a complaint, to reassess from scratch the adequacy of [Midcontinent's] rules and procedures." Vistra Br. 34. The challenges to the 2015/16 auction did not involve "the mere filing of a complaint." FERC received three separate complaints, dozens of comments, answers, and other submissions, and held a technical conference addressing issues concerning Midcontinent's tariffs. The Commission's 2019 Order summarized the contentions and evidence submitted by the parties concerning the justness and reasonableness of the 2015/16 auction and its results in 51 paragraphs and 37 single-spaced pages. JA __–__. Requiring the Commission to articulate a reasoned basis for the rejection of such complaints, beyond that the auction was conducted in accordance with the then-approved terms of the tariff, will not "wreak havoc in the energy markets." Vistra Br. 34. Rather, it will hold FERC to the minimum standards of reasoned decisionmaking required of all administrative agencies.

C. The Commission's orders also do not square with FPA section 205.

In light of FERC's and Vistra's concession that the justness and reasonableness of the 2015/16 auction must satisfy FPA section 206, and the patent inadequacy of the Commission's determination under section 206, this Court need not reach any questions about the application of FPA section 205. Nonetheless, the Commission's action is also impossible to square with section 205's requirements that changes in rates be submitted to the Commission for review, with the burden of establishing their justness and reasonableness on the proponent of a rate increase. See 16 U.S.C. §§ 824d(a), (d), (e).

The Commission's contrary view rests on the proposition that the "rate" is the tariff setting forth procedures for establishing rates, not the actual electricity prices established through those procedures. FERC and Vistra make no effort to square that view with the plain meaning of the statute. Amicus curiae Electric Power Supply Association, however, posits that the relevant definition of "rate" is "[t]he measure of a thing, by its relation to a standard"—a generic definition applicable to usages such as rate of speed—rather than the more pertinent definition supported by its own dictionary citations, "price fixed with relation to a

standard." Amicus Br. 10. The latter definition, however, is the one clearly evoked by the language of section 205 referring to "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." 16 U.S.C. § 824d(a).

Section 205's pairing of "rates and charges" underscores that the statute refers to the actual amounts demanded by utilities. Indeed, the amicus brief confirms that at the time of the statute's enactment, both terms referred to "cost components." Amicus Br. 15 n.8. FERC's and the amicus's assertion that Public Citizen waived reliance on the statutory language by not seeking rehearing on the concept of "charges" overlooks that Public Citizen's request for rehearing specifically invoked section 205's reference to "rates and charges." Rehearing Request 16, JA __. In any event, given Public Citizen's undisputed preservation of its claim that section 205 requires affirmative Commission approval of the increase in prices resulting from the 2015/16 auction, the Court is not barred from "consider[ing] a party's interpretation of other statutory

provisions to bolster the interpretation of the statutory language at issue." *Verso Corp. v. FERC*, 898 F.3d 1, 12 (D.C. Cir. 2018).[4]

To be sure, as our opening brief acknowledged, courts have accepted, in part, the fiction that a market-based-rate tariff stands in for actual rates and charges for purposes of section 205's advance filing requirements, and that the filed rate does not change even when, as here, it increases by 800%. Opening Br. 31–40. But those decisions do not altogether excuse FERC from its responsibilities under Section 205 with respect to the actual rates and charges resulting from market-based-rate tariffs. The discussion of the case law in FERC's brief cannot obscure that the decisions consistently require that FERC retain its authority to ensure that actual rates remain reasonable. And although some of them may leave unclear whether that policing of rates must occur through section 205 or section 206, the most recent authority, *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015), leaves no doubt on the

[4] *Verso* held that the *Chenery* principle did not bar FERC from relying in its brief on a statutory provision not cited in its order to support the grounds explicitly relied on in its order. 898 F.3d at 12. The same principle logically applies here, where Public Citizen is invoking statutory language to support the argument it made in its rehearing request.

point: FERC has not carried out its responsibilities under section 205 until it determines, based on reporting of the prices charged in market-based transactions, "whether sellers' rates complied with § 205." *Id.* at 1273.[5]

The Court need not, however, resolve in this case whether FERC's obligation to review the actual prices charged under a market-based tariff comes from section 205 or, as FERC contends, only from section 206. The Commission's determination that the auction results here were just and reasonable merely because they complied with the terms of an existing tariff is inadequate under either provision.

II. The Commission's finding that there was no market manipulation was arbitrary and capricious.

FERC's and Vistra's defense of the Commission's order disposing of the complaints of manipulation, like their arguments about the justness and reasonableness of the rates, rests in large part on their failure to come to grips with the real basis of the Commission's order. The Commission did not rest its dismissal of the complaints on the view that they were improper attempts to assert a "private right of action" under

[5] As *Harris* explains, 784 F.3d at 1275–75, its decision in this regard is fully consistent with this Court's decision in *Blumenthal*, 552 F.3d 875.

FPA section 222, 16 U.S.C. § 824v, the provision outlawing market manipulation. Nor was the Commission's action in any sense an exercise of prosecutorial discretion. Rather, it was, unambiguously, a decision on the merits of the complaints resting on an express, but entirely unexplained, finding that Dynegy's conduct "did not violate the Commission's regulations regarding market manipulation." 2019 Order, ¶ 32, JA __. The Commission's Rehearing Order reiterated that it had determined that no further action was appropriate to address the market manipulation allegations *because* it had "found that the conduct investigated did not violate the Commission's regulations regarding market manipulation." Rehearing Order ¶ 4, JA __–__. The Commission adhered to that determination on rehearing. *Id.* § 14, JA __.

It could hardly be clearer that the Commission did not rely on section 222's statement that "[n]othing in this section shall be construed to create a private right of action." 16 U.S.C. § 824v(b). Dynegy argued before the Commission that the complaints were attempts to assert such a right of action. 2019 Order ¶ 26, JA __. But the Commission's determination regarding the manipulation claims made no mention of that argument, *id.* ¶¶ 30–32, JA __, and its explicit ruling that Dynegy's

conduct did not violate the manipulation prohibition, *id.* ¶ 32, JA __, was inconsistent with any assertion that the issue was not properly before it. On rehearing, the Commission expressly acknowledged that manipulation claims may be raised by complaint, and it explained that the absence of a private right of action does not foreclose bringing manipulation allegations in complaint proceedings before FERC. Rehearing Order ¶ 13 & n.36, JA __–__. That acknowledgment, moreover, is consistent with the plain meaning of the statute's disclaimer of a "private right of action," which, as the Commission previously acknowledged, means "that there is no private right to bring a claim of manipulation directly to a court as a prosecuting litigant seeking a remedy." *Blumenthal v. ISO-New England, Inc.*, 129 FERC ¶ 61,057, at ¶ 18 (2009). The suggestions in FERC's and Vistra's briefs that Public Citizen is asserting a private right of action square with neither the rationale of the orders nor the statutory language, and they are unsupported by any authority construing such a phrase to prohibit the filing of a complaint before an administrative agency.

FERC's insistence in its brief that the Commission's action was a proper exercise of prosecutorial discretion also fails to square with what

the Commission really did. The Commission's 2019 Order dismissing the complaints said nothing about discretion, but flatly *found* that there had been no manipulation—albeit with no explanation of the reasoning underlying that finding. 2019 Order, ¶ 30, JA __. On rehearing, the Commission stated that it had discretion with respect to "how to explore the possibility that market manipulation has occurred." Rehearing Order ¶ 13, JA __. But the Commission acknowledged that it has exercised that discretion by permitting claims of manipulation to be raised in complaint proceedings. *Id.*, JA __. It further acknowledged that its resolution of the complaint proceedings rested on its express finding "that the conduct investigated did not violate the Commission's regulations regarding market manipulation," *id.* at ¶ 4, JA __–__, not on a discretionary decision about the allocation of agency investigatory resources.

Similarly, FERC's brief, while stressing the Commission's conclusion that further action would not be "appropriate," acknowledges the Commission reached that conclusion "because the conduct investigated did not violate the Commission's market manipulation regulations." FERC Br. 52–53. Vistra's contrary assertion that it is "clear" in context "that the Commission did not make a freestanding

determination that no market manipulation occurred," Vistra Br. 37, is inconsistent not only with the Commission's unambiguous orders but also with FERC's position before this Court.

Under *Heckler v. Chaney*, 470 U.S. 821 (1985), an agency's exercise of enforcement discretion is generally unreviewable where there are no "meaningful standards" for courts to apply in undertaking that review. *Id.* at 834. The same considerations do not apply when an agency acts in a manner that can be "reviewed to determine whether the agency exceeded its statutory powers." *Id.* at 832. An agency's exercise of enforcement discretion is unreviewable only when "a court can satisfy itself that the agency has actually exercised its discretion," *Gen. Motors Corp. v. FERC*, 613 F.2d 939, 944 (D.C. Cir. 1979), not when the agency has in fact issued "a summary disposition on the merits," *So. Union Gas Co. v. FERC*, 840 F2d 964, 968 (D.C. Cir. 1988). Where, as here, an agency acts based on its interpretation of "the substantive requirements of the law," its action falls outside *Heckler* because there is law to apply to review its action. *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 333 (D.C. Cir. 1993). *Heckler* thus does not control when agency "adjudication" results in an "affirmative act of approval," which is "the very opposite of a

'refus[al] to act'" that falls within *Heckler*'s preclusion of review of enforcement discretion. *Dep't of Homeland Sec. v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1906 (2020).[6]

Here, the Commission decided the merits of the claim of manipulation and expressly approved Dynegy's conduct. The agency's action was not an exercise of enforcement discretion. FERC's attempt to analogize such a determination to an exercise of *settlement* discretion, FERC Br. 54, 57, likewise fails because a settlement, unlike the Commission's action in this case, does not adjudicate the merits of a claimed statutory violation. *See Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d. 456, 458 (D.C. Cir. 2001) (noting that the challenged settlement "expressly declined to resolve" whether a violation had occurred).

FERC and Vistra point to no authority that would uphold an entirely unexplained substantive determination of the merits of a party's

[6] To the extent the Ninth Circuit's decision in *Friends of the Cowlitz v. FERC*, 253 F.3d 1161, 1171 (9th Cir. 2001), *amended*, 282 F.3d 609 (9th Cir. 2002), suggests that a legally erroneous substantive decision to dismiss a complaint can be sustained as an exercise of enforcement discretion, that decision is inconsistent with the Supreme Court's clarification of *Heckler*'s scope in *Department of Homeland Security v. Regents*, as well as the decisions of this Court holding *Heckler* inapplicable to such substantive actions.

complaint. Indeed, a leading decision cited in FERC's brief emphasizes that when parties initiate complaint proceedings before FERC, the Commission may not terminate the proceedings based on an unexplained assertion that there has been no violation and attempt to shelter that action from review by characterizing it as an exercise of enforcement discretion. *See Pub. Utils. Comm'n of Calif. v. FERC*, 462 F.3d 1027, 1048–51 (9th Cir. 2006). In such circumstances, the agency must demonstrate that it made a "reasoned decision based upon substantial evidence in the record" and "articulate a satisfactory explanation for its action." *Id.* at 1048 (citations omitted). The Commission did not do so here.

The Commission's action cannot be sustained on the ground that it rested on a claimed failure by Public Citizen to carry a burden of proof. The Commission's 2019 Order did not purport to rest on allocation of the burden of proof or deficiencies in the complainants' claims of manipulation. Rather, the Commission affirmatively found, based on undisclosed reasoning and evidence outside the record, that Dynegy had not engaged in manipulation. Only when Public Citizen requested rehearing on the ground that the Commission's action was entirely

unexplained and unreasoned did the Commission attempt to turn the tables by asserting that the complainants had somehow failed to carry their burden of proof. Rehearing Order ¶ 14, JA __–__. But even then, the Commission completely failed to explain *how* the complaints of manipulation fell short. As this Court held in *New England Power Generators*, FERC cannot avoid its obligation to provide a reasoned explanation for its decisions by "shifting the burden back" to complainants through entirely "conclusory statements that dismiss[] … concerns without providing reasoned analysis." 881 F.3d at 202.

Finally, Vistra's assertion that it is "unclear precisely what relief Public Citizen seeks" with respect to manipulation is unfounded. Public Citizen seeks, and is entitled to, a *reasoned* resolution of its complaints properly before the Commission, with respect to manipulation as well as the justness and reasonableness of the auction results. Although the Commission observed that, under its precedents, the issues of manipulation and unjust and unreasonable rates are conceptually distinct, *see* Rehearing Order ¶ 14 n.39, in this case the allegations that Dynegy improperly manipulated the auction to take advantage of the market power its pivotal position gave it have an obvious relationship to

whether the auction results were just and reasonable, as Commissioner Glick observed in dissent. *See* Rehearing Order Dissent ¶ 6, JA __; *cf.* *Harris*, 784 F.3d at 1275 (noting that manipulation claims were "integral" to claims that sellers' "accumulation of market power … resulted in an excessive rate"). The need for coherent explanations of the Commission's conclusions regarding manipulation and the justness and reasonableness of the auction results go hand in hand.

CONCLUSION

This Court should vacate FERC's Orders and remand for reasoned determinations of whether Midcontinent's 2015/16 Zone 4 auction results were just and reasonable and whether Dynegy engaged in market manipulation.

Respectfully submitted,

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March 5, 2021

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 6,498 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 March 5, 2021.

/s/ Scott L. Nelson
Scott L. Nelson