ORAL ARGUMENT NOT YET SCHEDULED

No. 14-1244
Consolidated with No. 14-1246

IN THE UNITED STATES COURT OF APPEALS
FOR THE D.C. 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.

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September 4, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rules 28 and 26.1 and FRAP 26.1, petitioner Public Citizen, Inc., certifies as follows:

A. Parties:

(1) The parties to the proceeding before the agency were ISO New England, Inc., which made the rate filing that initiated the agency proceedings, as well as the following intervenors:

Belmont Municipal Light Department

Brayton Point Energy, LLC

Brookfield I Energy Marketing LP

Calpine Corporation

Connecticut Attorney General

Connecticut Municipal Electric Energy Cooperative

Connecticut Office of Consumer Counsel

Connecticut Public Utilities Regulatory Authority

Conservation Law Foundation

Dominion Resources Services, Inc.

Eastern Massachusetts Consumer-Owned Systems

Electric Power Supply Association

Emera Energy Services Inc.

Entergy Nuclear Power Marketing, LLC

Exelon Corporation

GDF SUEZ

GenOn Energy Management, LLC

H.Q. Energy Services (U.S.) Inc.

Massachusetts Attorney General

Massachusetts Department of Public Utilities

National Grid

New England Power Generators Association Inc.

New England Power Pool Participants Committee

New England States Committee on Electricity

New Hampshire Electric Cooperative, Inc.

New Hampshire Office of Consumer Advocate

NextEra Energy Resources, LLC

Northeast Utilities

NRG Companies

PSEG Energy Resource & Trade LLC

Public Citizen, Inc.

United Illuminating Co.

Utility Workers Union of America Local 464

(2) The parties in this Court are petitioner Public Citizen, Inc., and respondent Federal Energy Regulatory Commission. The parties in the consolidated case, No. 12-1246, are petitioners George Jepsen, Attorney General for the State of Connecticut, the Connecticut Public Utilities Regulatory Authority and the Connecticut Office of Consumer Counsel, and respondent Federal Energy Regulatory Commission.

In addition, the following entities have been granted leave to intervene in this Court:

Calpine Corporation

Electric Power Supply Association

GenOn Energy Management, LLC

H.Q. Energy Services (U.S.), Inc.

New England Power Generators Association, Inc.

New England Power Pool Participants Committee

NRG Power Marketing, LLC

(3) Petitioner Public Citizen, Inc., is 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 New England who are injured by FERC's challenged actions here, which allow higher electricity rates that will be passed on to consumers to go into effect.

B. Rulings Under Review. The rulings under review are the following orders of the Federal Energy Regulatory Commission (FERC):

(1) Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Docket No. ER14-1409 (September 16, 2014); and

(2) Notice of Dismissal of Pleadings, *ISO New England Inc.*, Docket No. ER14-1409 (October 24, 2014).

C. Related Cases. The case on review has never previously been before this Court or any other. There is one related case pending before this Court, No. 14-1246, a petition filed by George Jepsen, Attorney General for the State of Connecticut, the Connecticut Public

Utilities Regulatory Authority and the Connecticut Office of Consumer Counsel, seeking review of the same orders at issue in this case. That case was likewise never previously before this Court or any other. This Court, by order dated November 20, 2014, consolidated the two cases.

Two pending proceedings before FERC, dockets EL14-99-000 & ER15-117-000, involve issues concerning whether ISO New England is required by section 206 of the Federal Power Act to amend the tariff establishing its auction procedures, but those proceedings do not affect the finality or reviewability of the FERC actions challenged here.

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GLOSSARY

APA	Administrative Procedure Act
FCA	Forward Capacity Auction (used only in quoted material)
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO-NE	ISO New England (ISO is part of the actual name of this entity, but "ISO" itself also stands for "Independent System Operator")

JURISDICTION

This is a petition for review of a final order of the Federal Energy Regulatory Commission (FERC) in a proceeding to review wholesale electric rates under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d. This Court has jurisdiction over orders issued by FERC in such proceedings under FPA section 313(b), 16 U.S.C. § 825*l*(b).

FERC's issued its order on September 16, 2014, when it released a "notice" stating that the challenged rates had become effective, together with statements of the four commissioners then sitting revealing that they had split two-to-two on whether to allow the rates to go into effect or hold a hearing on their lawfulness. JA __-__.

As required by FPA section 313(a), 16 U.S.C. § 825*l*(a), petitioner Public Citizen, Inc., which had intervened in the section 205 proceeding to contest the lawfulness of the rates, filed a request for rehearing within 30 days of FERC's action, on October 15, 2014. JA __. On October 24, 2014, FERC issued a "notice" dismissing the rehearing request. JA __. Public Citizen filed its timely petition for review on November 14, 2014, within 60 days of the ruling on rehearing. *See* 16 U.S.C. § 825*l*(b).

FERC contested this Court's jurisdiction by filing a motion to dismiss arguing that FERC's action was not a reviewable "order" under FPA section 313(b). A motions panel denied the motion but directed that the parties argue jurisdiction in their merits briefs. This Court's jurisdiction is addressed in Part I of the Argument.

STATEMENT OF ISSUES

(1) Whether FERC took a judicially reviewable action under section 313(b) of the FPA, 16 U.S.C. § 825*l*(b), when it determined by a two-to-two deadlock of its commissioners to terminate its review of the lawfulness, under FPA section 205, 16 U.S.C. § 824d, of wholesale electric power rates established in a non-competitive auction, and as a result issued a notice stating that the rates would go into effect.

(2) Whether FERC's action in ending its consideration of the lawfulness of the rates was arbitrary and capricious or contrary to law because it rested on a disclaimer of authority to review whether a rate resulting from an auction is just and reasonable, contrary to the requirements of FPA section 205 and judicial precedents construing it.

STATUTES

The pertinent statutory provisions, FPA sections 205 and 313 (16 U.S.C. §§ 824e & 825*l*), are reprinted in the statutory addendum.

STATEMENT OF THE CASE AND FACTS

ISO New England (ISO-NE), the "independent system operator" authorized by FERC to administer New England's electrical transmission grid and wholesale electricity markets, conducts annual "forward capacity auctions" to establish rates for wholesale electric capacity to be provided three years later in the New England region. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010). The eighth such auction, conducted in 2014, was held in concededly noncompetitive conditions resulting from the withdrawal of capacity from the market in advance of the auction, *see* JA __ (Moeller Statement), and yielded rates that will increase electricity prices for New England consumers by well over a billion dollars. See JA __ (Jepsen Intervention, at 5).

As required by the settlement agreement and tariff establishing the auctions, ISO-NE filed the auction results with FERC under FPA section 205. As permitted by section 205 and the settlement agreement and

tariff, Public Citizen, the Connecticut petitioners, and others intervened, challenging the rates under section 205(a)'s "just and reasonable" standard and seeking a hearing. JA __, __.

Because of a two-to-two division among the four commissioners then sitting, FERC refused to set the rates' lawfulness for hearing. Absent a majority vote, FERC issued a "notice" on September 16, 2014, stating that the rates filed by ISO-NE had become effective "by operation of law." JA __. FERC simultaneously released statements by the commissioners explaining the views that led to the rejection of the challenges to the rates' lawfulness under section 205.

Then-Commission Chair LaFleur's statement asserted that FERC had no authority to consider the justness and reasonableness of the rates because they were the result of an auction carried out in accordance with a FERC-approved tariff. LaFleur Statement, at 3, JA __. Commissioner LaFleur specifically rejected the proposition that FERC had the power "to independently assess whether the resulting auction rates themselves are just and reasonable." *Id.* at 2, JA __. According to Commissioner LaFleur, FERC's approval of the tariff setting forth the auction rules, which she considered the "pertinent filed 'rate,'" *id.* at 2, JA __,

precluded any review under section 205 of the lawfulness of the "resulting *rates*" established in the auction, *id*. at 3, JA __ (emphasis in original), even if those rates reflected the exercise of market power by participants in the auction. *Id.* Commissioner LaFleur characterized the filing of the auction results as a mere "informational filing," *id.*, that could not trigger review of the actual rates under section 205's just-and-reasonable standard.

Commissioner Moeller agreed with Commissioner LaFleur that the challenge to the justness and reasonableness of the rates must be rejected because they were established "in accordance with [ISO-NE's] Tariff," albeit in "a non-competititve auction." Moeller Statement, JA __. Commissioner Moeller, unlike Commissioner LaFleur, stated that it was theoretically possible that an auction process approved by FERC could "produce results that are not just and reasonable," *id.*, but asserted that the results in this case were not unjust and unreasonable.

Commissioners Clark and Bay, by contrast, would have set the rates for hearing because ISO-NE had not carried its burden of establishing that the auction results are just and reasonable. Clark-Bay Statement at 1, JA __. They pointed out that, in approving the

settlement agreement establishing the capacity auctions, FERC had expressly stated that auction results would be reviewed in section 205 proceedings to ensure that they were just and reasonable, and that Chairman LaFleur's view that such review was unavailable contradicted those assurances and the requirements of section 205. *Id*. at 1-2, JA __.

As the dissenting Commissioners explained, "[t]hat the Commission would have an opportunity to ensure that the results of the auctions were just and reasonable—and not merely the process leading to them—was an important underpinning of New England's forward capacity market." *Id.* at 2, JA __. They emphasized that filing of auction results was not merely an "informational" requirement; rather, "[i]n order to guard against unexpected outcomes …, ISO-NE was required to file the auction results with the Commission under section 205 of the FPA, and to carry the burden of establishing that those results were just and reasonable and not unduly discriminatory or preferential." *Id.* Thus, "[t]he Commission would abdicate its responsibility under section 205 of the FPA if it treated the FCA 8 Results Filing as a mere informational filing and determined without further review that the prices resulting from the auction must necessarily be just and reasonable." *Id.* at 3, JA

__. Commissioners Clark and Bay also pointed out that there was reason to believe ISO-NE had not complied with tariff provisions requiring mitigation of market power, *id.* at 2, JA __, and they noted the irony that the very auction rules whose approval by FERC formed the basis of Commissioner LaFleur's conclusion that the auction results were unassailable were themselves "the subject of a unanimous Commission order under section 206 of the FPA that finds those rules may be unduly preferential or discriminatory." *Id.* at 3, JA __.

FERC later dismissed timely rehearing requests from Public Citizen and the Connecticut petitioners. JA __.

SUMMARY OF ARGUMENT

Public Citizen, and the Connecticut petitioners in No. 14-1246, seek review of FERC's abdication of its responsibility to determine the lawfulness of wholesale electric rates established in the ISO-NE capacity auction. FERC engaged in reviewable agency action, or inaction, when it decided not to set the lawfulness of the rates for hearing and effectively rejected claims that they are not just and reasonable as required by section 205 of the Federal Power Act (FPA), 15 U.S.C. § 824d. *See City of Batavia v. FERC*, 672 F.2d 64, 75 (D.C. Cir. 1982).

FERC has argued that this Court lacks jurisdiction because FERC's decision to terminate consideration of the rates' lawfulness and allow them to go into effect resulted from a two-to-two deadlock among the four Commissioners then sitting. Because of the deadlock, FERC did not issue a document it called an "order," but evidenced its rejection of the challenges to the rates under section 205 by issuing a "notice" that the rates were effective because it had not suspended them. FERC's position ignores the long-settled law of this Circuit that a statute granting this Court jurisdiction over agency "orders" includes "any agency action that is otherwise susceptible of review on the basis of the administrative record alone." *N.Y. Repub. State Comm. v. SEC*, __ F.3d __, __, 2015 WL 5010051, at *3 (D.C. Cir. Aug. 25, 2015). Final agency action (including agency inaction) is reviewable under the Administrative Procedure Act (APA) regardless of whether it is set forth in a document labeled an "order," and is thus within this Court's jurisdiction over FERC orders under FPA section 313(b), 28 U.S.C. § 825*l*(b).

FERC's action definitively rejected challenges to the lawfulness of the rates under FPA section 205. The absence of a document called an "order" or a majority vote does not make FERC's failure to carry out its

statutory obligation to disapprove unjust and unreasonable rates non-final or unreviewable. Under the pragmatic approach this Court has taken to identifying judicially reviewable actions under the FPA, FERC's action falls within this Court's jurisdiction. *See Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1982).

That the decision reflected a deadlock does not mean there is nothing to review. Under such circumstances, the agency's action must be judged on the basis of the rationale set forth by the commissioners who blocked action. *FEC v. Nat'l Repub. Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Commissioner LaFleur's position that FERC lacked authority to review the rates was a critical determinant of FERC's action, and the action can only be sustained if that position is correct.

That the rates assertedly took effect by "operation of law" in light of FERC's action does not change the analysis. This Court's decision in *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011), holds that even when a statute specifies a consequence of an agency's inaction, the agency's failure to act is reviewable if the statute sets a substantive standard governing the agency's exercise of authority. Section 205 of the FPA sets such a standard by requiring that rates be "just and

reasonable." 16 U.S.C. § 824d(a). FERC therefore cannot disclaim responsibility for the results of its action (or inaction) by contending that the rates are effective merely because of a statute.

Once the reviewability of FERC's action is established, there can be no question that that action must be set aside. Commissioner LaFleur's determinative view that FERC lacked authority to review the actual *rates* resulting from the ISO-NE auction is contrary to the plain language of FPA section 205, which provides that all rate changes must be just and reasonable, must be filed with FERC, and are subject to review for lawfulness once filed, as well as to the ISO-NE tariff, which specifically contemplates such review.

A string of leading decisions of this Court and the Ninth Circuit establish that the statute means what it says: FERC cannot disclaim responsibility to review the justness and reasonableness of rates established through market mechanisms. *See Cal. ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015); *Mont. Consumer Counsel v. FERC,* 659 F.3d 910 (9th Cir. 2011); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Interstate Natural Gas Ass'n v. FERC*, 285 F.3d 18 (D.C. Cir. 2002); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993);

Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984). This Court cannot sustain agency action whose premise is that FERC lacks authority to carry out its responsibilities under FPA section 205. *See Batavia*, 672 F.2d at 77.

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. Dept. 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 New England who pay electric rates that will increase because of the wholesale capacity rate increase at issue. A rate increase inflicts economic injury sufficient to confer Article III

standing. *See Northeast 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 involvement in cases addressing issues arising from market-based electric rates demonstrates. *See, e.g., Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (Public Citizen was petitioner in challenge to market-based rates, and Public Citizen's attorneys briefed and argued the case); *Colo. Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007) (same).

ARGUMENT

I. Standard of Review.

This Court determines its own jurisdiction de novo. *Indep. Producers Group v. Library of Cong.*, 759 F.3d 100, 105 (D.C. Cir. 2014).

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 (or failure to act) 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).

II. This Court has jurisdiction to review FERC's action.

A. FERC's action is reviewable under this Court's practical construction of the FPA's review provision.

This Court would unquestionably have jurisdiction if FERC, by a vote of three commissioners, had issued an order summarily rejecting the challenges to the rates at issue on the ground that it could not consider the justness and reasonableness of the auction results under FPA section 205. *See*, *e.g.*, *Batavia*, 672 F.2d at 75-77; *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994). FERC contends that actions with exactly the same consequences, based on exactly the same legal misconceptions as to the scope of FERC's authority, are unreviewable if the agency takes them because of a deadlock of the commissioners. The result is that the more commissioners support an objection to a rate's legality, the less likely it is that a challenger may obtain review of FERC's failure to enforce section 205.

That counterintuitive result is not supported by the FPA, the APA, or this Court's decisions. Section 313(b) of the FPA, 16 U.S.C. § 825*l*(b), grants the courts of appeals jurisdiction to review an "order" entered by FERC in a proceeding under the FPA. FERC's position that its action was not an "order" because it was announced in a "notice" and was not the result of a majority vote is directly foreclosed by precedent.

This Court has held repeatedly that, unless distinctive statutory language indicates otherwise, "a statutory review provision creating a right of direct judicial review in the court of appeals of an administration 'order' authorizes such review of *any agency action* that is otherwise susceptible of review on the basis of the administrative record alone." *N.Y. Repub. State Comm. v. SEC*, __ F.3d at __, 2015 WL 5010051, at *3 (emphasis added). That principle, originating in *Investment Co. Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1278 (D.C. Cir. 1977), is fully applicable to FPA section 313(b). *See Kan. Power & Light Co. v. FPC*, 554 F.2d 1178, 1181 n.4 (D.C. Cir. 1977). This Court has held that *Investment Co.*'s definition of orders is controlling under section 313(b), and that "agency action 'unlawfully withheld'" by FERC,

as well as determinations by FERC that it lacks authority over particular matters, are "orders" reviewable under section 313(b). *Id.*

FERC's action here falls well within the broad scope of reviewable agency action under the APA, which expressly includes failure to act and unlawful withholding of action. *See* 5 U.S.C. §§ 551(3), 701(b)(2), 702 & 706(1). Because preclusion of review of agency action is the exception, not the rule, this Court must consider its jurisdiction "in light of 'the strong presumption that Congress intends judicial review of administrative action.'" *Amador*, 640 F.3d at 379 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).

Consideration of the reviewability of FERC's action must also reflect the Court's repeated holdings that the availability of review under FPA section 313(b) is "determined by reference to its practical function and consequences in the relevant statutory scheme" and reflects "pragmatic" considerations rather than "overrefined" analysis. *Papago Tribal Util. Auth. v. FERC*, 628 F.2d at 239 (citations omitted); *accord, e.g., United Mun. Distrib. Group v. FERC*, 732 F.2d 202, 206-07 (1984).

This Court emphasized in *Papago* that while "the quintessential reviewable order under the Act is a final determination by the

Commission concerning the justness and reasonableness of a rate filing," 628 F.2d at 239, actions not conforming precisely to that model are reviewable if considerations of finality, irreparable injury absent review, and suitability of the issues for judicial resolution favor review. *Id.* Those considerations strongly support review here.

First, unlike actions the Court has declined to review in *Papago* and like cases, FERC's action here is not "interlocutory." *Id.* at 240. At issue in *Papago* was FERC's acceptance of a rate filing subject to further proceedings to determine whether rates were just and reasonable. This Court held that it lacked jurisdiction to review such an "undeniably interlocutory" decision, which "decides nothing concerning the merits of the case" but "merely reserves the issues pending a hearing." *Id.*

Here, by contrast, FERC acted with the "definitive impact" and finality that characterize reviewable action. *Id.* at 238. Petitioners do not seek review of a mere "informational" notice analogous to a "press release[]." FERC Mot. to Dism. 9, 11. FERC's notice that the rates were becoming effective reflected the agency's underlying decision (resulting from a deadlock) not to set their justness and reasonableness for hearing under section 205 of the FPA. The agency's notice marked the

termination of any substantive review of the rates under section 205. The substance of the agency's action was identical to what *Papago* describes as the "quintessential reviewable" FERC action: a "final determination" of a challenge to "the justness and reasonableness of a rate filing." 628 F.2d at 239.

Second, withholding review would threaten irreparable injury to the petitioners. By terminating review of the auction rates under section 205, FERC has deprived the challengers of the opportunity to require the rates' proponents to carry the burden of proving justness and reasonableness, as section 205 requires. *See* 16 U.S.C. § 824d(e) ("the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility"); *Papago*, 628 F.2d at 239. If any further challenge to the rates' lawfulness were available, it could proceed only under section 206 of the FPA, 16 U.S.C. § 824e, under which the burden of proof shifts to the challenger to prove a rate is unjust and unreasonable. 28 U.S.C. § 824e(b); *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014).

Third, under the settlement agreement and tariff establishing the ISO-NE capacity auction, a party challenging an auction rate under

section 206 must show that it is unlawful under the *Mobile-Sierra* "public interest" standard. *See NRG Power Mktg.*, 558 U.S. 165. This Court has repeatedly characterized that standard as "practically insurmountable" for private parties challenging rates. *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407-09 (D.C. Cir. 2000). But the *Mobile-Sierra* standard does *not* apply to challenges to the capacity auction results in section 205 proceedings initiated by ISO-NE's filing of the rates. *See Devon Power LLC*, 115 FERC ¶ 61,340 at PP 179, 185 (2006); *Devon Power LLC*, 117 FERC ¶ 61,133 at P 93 (2006). Thus, by pretermitting review under section 205, FERC has subjected any further challenges to the auction rates to a much more stringent, "practically insurmountable" standard.

It is therefore no answer to say that Public Citizen is unaffected by FERC's action because it is "free to file a complaint challenging the justness and reasonableness of the rates under section 206 of the Federal Power Act." Mot. to Dism. 10-11. This Court has held that, even absent the extra hurdle of *Mobile-Sierra*, FERC engages in reviewable action if it erroneously concludes that it lacks authority to review a rate under section 205 and relegates the challenger to section 206 proceedings, with

their different burdens of proof and remedies. *See Batavia*, 672 F.2d at 75-77. When the termination of section 205 proceedings alters not only the burden of proof but also the applicable legal standard to the detriment of the challenger, the impact is even greater and is irreparable absent immediate review. FERC's failure to hold ISO-NE to the burden and standard of proof required by section 205 cannot be rectified in hypothetical future section 206 proceedings subject to different standards.

Moreover, FERC has *already held* that its actions in the 205 proceeding *bar* it from entertaining further challenges to the rates under section 206. When it ended the section 205 proceedings without a hearing, FERC issued an order initiating a section 206 proceeding to consider whether prospective changes in ISO-NE's auction procedures are necessary to ensure the justness and reasonableness of future auction results. Public Citizen intervened in that section 206 proceeding and asked FERC to consider the lawfulness of the rates challenged here. On December 15, 2014, FERC rejected that request:

> We will not expand the scope of this proceeding as requested by Public Citizen. With regard to the rates resulting from the eighth FCA, those rates went into effect by operation of law, and the requests for rehearing in that case were dismissed. *We are*

> *unable to reopen the question of the justness and reasonableness of the eighth FCA rates.*

ISO New England Inc., 149 FERC ¶ 61,227, at P 67 (2014) (emphasis added; footnote omitted). FERC's litigation position—that it took no action that "affect[ed] legal rights and obligations," Mot. to Dism. 8—is directly contrary to FERC's own order stating that the actions challenged here *preclude* it from further consideration of the justness and reasonableness of these rates. FERC itself considers its action in this case to be a final resolution of the issue of the rates' justness and reasonableness.

Both in the finality with which it terminated review of the rates under section 205 and in its otherwise irremediable consequences, FERC's action satisfies this Court's practical approach to identifying reviewable final orders of the Commission. It "brings the ratemaking proceeding to a close" and is "analogous to a 'final determination of the justness and reasonableness of the rate filing,' which the *Papago* court characterized as '[t]he quintessential reviewable order.'" *United Mun. Distrib. Group*, 732 F.2d at 206 (quoting *Papago*, 628 F.2d at 239).

B. The absence of a majority vote does not prevent review of an agency's failure to act lawfully.

That FERC did not act by majority vote does not make its action unreviewable. FERC acknowledges that inaction may constitute reviewable final agency action under the APA, Mot. to Dism. 12, and inaction is generally not incorporated in formal orders adopted by majority vote. Thus, this Court held in *American Rivers & Idaho Rivers United v. FERC* that it had jurisdiction over a claim that the agency's prolonged inaction was unlawful, even though it did not result from a majority vote or formal order. *See* 372 F.3d 413, 417 (D.C. Cir. 2004).[1]

Moreover, when an agency's action (or inaction) is contrary to law or arbitrary and capricious, review is not foreclosed merely because the agency's action resulted from a deadlock, as opposed to concurrence of a majority. Deadlocks cannot excuse an agency from judicial scrutiny for noncompliance with the law. To be sure, as this Court stated in *Public*

[1] The Ninth Circuit's earlier decision, *American Rivers v. FERC*, 170 F.3d 896 (9th Cir. 1999), does not foreclose review of FERC inaction that is not enshrined in a formal "order." *American Rivers* sensibly holds that a petitioner cannot *contrive* reviewable failure to act by unilaterally setting a deadline by which it insists that the agency act or be "deemed" to have failed to act. Here, the finality of the agency's action is not an artifact of an extralegal deadline imposed by the challengers, but reflects the agency's own determination (via deadlock) to terminate review of the rates' lawfulness under section 205.

Service Commission v. FPC, 543 F.2d 757, 776 (D.C. Cir. 1974), FERC ordinarily makes "a decision by majority vote duly taken." But nothing in *Public Service Commission* suggests that an agency's arbitrary or unlawful action or failure to act is not "institutional action," *id*. at 777, if it does not result from a majority vote.[2]

Rather, when a deadlock prevents an agency from mustering a majority vote to act non-arbitrarily and in accordance with law, the failure to act is attributable to the agency as an institution and is subject to review if it otherwise meets the criteria defining final, reviewable agency action under the APA and/or a more specific review statute. *See*, *e.g.*, *FEC v. Nat'l Repub. Senatorial Comm.*, 966 F.2d at 1476. And when reviewable inaction results from a deadlock, the explanation provided by agency members whose votes blocked the action necessarily determines

[2] In *Public Service Commission*, the Federal Power Commission had issued an order by a majority vote and then denied rehearing by a different majority vote—with two commissioners changing sides. *See id*. at 774-75. This Court rejected the argument that the two commissioners' withdrawal of support for the initial order on rehearing vitiated the order's efficacy. Both the order and rehearing denial were affirmative actions of the Commission supported by majority votes and thus constituted the Commission's "institutional action," and "the efficacy of action taken by majority vote is in no wise affected by the fact that there is also a minority." *Id*. at 777.

whether the agency acted arbitrarily and capriciously or contrary to law. *See id*. ("Since those Commissioners [who prevented the agency from acting] constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did.").

C. The challenged rates took effect because of a discrete action attributable to FERC.

As explained above, FERC's action, which terminated review of the rates' lawfulness under section 205 and prevented meaningful review in any subsequent proceeding, is the type of action that is in the heartland of reviewability under FPA section 313(b). The agency's action is also reviewable under the APA because it satisfies two key criteria identified in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004): The "agency failed to take a *discrete* agency action that it is *required to take*." *Id.* at 64.

The challenge here is not to a broad, unfocused, programmatic agency failure to comply with the law, as in *Norton*, but to a specific, identifiable default at a particular point in time: the agency's termination of review of the lawfulness of the auction rates. The agency, moreover, is not permitted by FPA section 205(a) to approve rates that are unjust or unreasonable, 15 U.S.C. § 824d(a), and it must set the issue

of a rate's lawfulness for hearing under section 205(e) when necessary to make that determination. *See* 15 U.S.C. § 824d(e); *Cajun Elec. Power Coop.*, 28 F.3d at 177.

These statutory requirements are reinforced by the settlement agreement and tariff establishing the ISO-NE capacity auction, which obligate ISO-NE to make "a section 205 filing following the auction containing the results," which "the Commission *will review … under the just and reasonable standard*." *Devon Power LLC*, 115 FERC ¶ 61,340, at P 185 (2006) (emphasis added); *see also Devon Power LLC*, 117 FERC ¶ 61,133, at P. 93 (2006) ("[T]he Settlement Agreement provides for thorough review of the final auction clearing prices by the Commission and any interested parties," and in the required section 205 filing "parties may challenge [the auction results] under the 'just and reasonable standard' and the Commission will address such challenges under that standard.").

This case is thus completely unlike one where an agency's inaction is unreviewable because it merely allows consequences attributable solely to a statute to occur. *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007). FERC argued in its motion to dismiss that, like the FCC in

Sprint Nextel, it took no reviewable action because it merely informed the public of an inevitable statutory consequence of its failure to suspend the rates when it issued its "notice" that they were effective "by operation of law." But FERC's litigation position that its action was purely informational is contrary to its own subsequent reliance on that action as a *determination* precluding further consideration of the justness and reasonableness of the rates, even under FPA section 206. *See supra*, at 19-20.

In any event, this Court's decision in *Amador*, 640 F.3d 373, not *Sprint Nextel*, controls this case. *Amador* holds that when a statute imposes on an agency a substantive duty to enforce a legal standard—as FPA section 205 requires FERC to disapprove rates that are unjust and unreasonable—a failure to carry out that duty is reviewable agency action even if a statute specifies the consequence of the agency's inaction.

The contrast between *Sprint Nextel* and *Amador* is instructive. In *Sprint Nextel*, a party petitioned the FCC for "forbearance" from enforcing regulatory requirements. The FCC did not act (because of a deadlock), and the relevant statute provided that the petition would be

deemed granted if not denied within a specified period. This Court held that there was no reviewable agency action when the FCC issued a press release stating that, by operation of the statute, the petition was deemed granted because the agency had not acted. 508 F.3d at 1131-32. Because Congress, by statute, had unqualifiedly provided for forbearance under such circumstances, the Court held that the action at issue was not that of the agency, but of Congress. *Id.*

FERC's action cannot be analogized to that of the FCC in *Sprint Nextel* merely because section 205 provides that rates eventually go into effect if not suspended. *Amador* specifically rejects that view. In *Amador*, as in *Sprint Nextel*, an agency failed to act, resulting in a consequence specified by statute: An Indian gambling compact was deemed approved. *See* 640 F.3d at 375. But unlike in *Sprint Nextel*, the statute did not unqualifiedly approve compacts on which the agency took no action; they were deemed approved only to the extent otherwise lawful under the statute. *See id*. This feature, the Court held, reflected an underlying "obligation to disapprove illegal compacts"—an obligation that included "no exemption" for compacts deemed approved by inaction. *Id*. at 381. This "essential difference" distinguished *Sprint Nextel*, where the statute

provided for a grant of forbearance "by operation of law without limitation." *Id.* at 382. By providing a governing legal standard, the statute in *Amador* "limited the extent to which a compact could be approved by operation of law, thus imposing an obligation on the [agency] to affirmatively disapprove any compact exceeding that limit." *Id.* A claim that the agency failed to fulfill that obligation provided the Court with "a discrete agency inaction to review." *Id.*

Section 205 of the FPA is directly analogous to the statutory scheme in *Amador*. Although it provides for rates to go into effect if not suspended, it never excuses them from section 205(a)'s fundamental requirement that "[a]ll rates" be "just and reasonable." 15 U.S.C. § 824d(a). Nor does it implicitly authorize FERC to allow unjust or unreasonable rates to go into effect. FERC remains obligated to disapprove rates that are not just and reasonable, and to set them for hearing if necessary to make that determination. *Batavia*, 672 F.2d at 75-77; *Cajun*, 28 F.3d at 177. The settlement agreement's terms likewise require review under section 205. FERC's failure to perform those obligations, like the agency's failure to act in *Amador*, is thus a reviewable, discrete inaction. That one consequence of that inaction may

occur by operation of law does not render FERC's noncompliance with its obligations unreviewable.

Finally, FERC's contention that its defaults are unreviewable because there is nothing for the Court to "hold unlawful or set aside" is unfounded. Mot. to Dism. at 12. The Court may hold unlawful and set aside FERC's failure to set the rates for hearing and to determine whether they are just and reasonable under section 205, and it may compel the agency to take the actions unlawfully withheld—all forms of relief available under the APA, 5 U.S.C. § 706, as well as the FPA, *see Batavia*, 672 F.2d at 75-77.[3]

III. FERC's refusal to review the justness and reasonableness of the actual rates resulting from the capacity auction is contrary to law.

The recognition that FERC's actions in this case are subject to review virtually resolves the case. Commissioner LaFleur's view that the agency lacked authority to review the rates established by the capacity auction—a view that was the critical determinant of the agency's

[3] If necessary to allow the rates to be set for hearing under section 205 to be provided, the Court may order FERC to consider suspension of the rates pending hearing notwithstanding the expiration of the statutory period for suspension. *Batavia*, 72 F.2d at 77. On remand, there will be no deadlock because FERC now has five confirmed commissioners.

action—is contrary not only to the plain language of FPA section 205, but also to a long string of decisions of this Court and the Ninth Circuit. Those decisions hold that FERC's power to review the lawfulness of rates established by market mechanisms—the authority Commissioner LaFleur disclaimed—is critical to the legality of FERC's reliance on such mechanisms to set rates in the first instance.

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 FERC, and provides FERC with authority to determine the lawfulness of any rate change. *Id*. §§ 824d(c), (d) & (e). Despite this clear statutory language, Commissioner LaFleur's statement of reasons asserted that once FERC approved a "tariff" setting forth auction procedures, it had no power to review the lawfulness of "resulting *rates*." LaFleur Statement, at 3, JA __ (emphasis in original). The claim that FERC cannot review what Commissioner LaFleur acknowledged to be *rates* cannot be squared with the plain statutory

language. 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).

The assertion that, having approved a market mechanism to establish rates, FERC is divested of authority to consider the "resulting *rates*" also contradicts repeated decisions of this Circuit and the Ninth Circuit that the use of market-based rate-setting mechanisms is permissible *only* if FERC reviews the actual resulting rates to ensure that they conform to the fundamental statutory requirement that rates be just and reasonable. Thus, while this Court stated in *Elizabethtown Gas Co. v. FERC* that FERC may accept market-based rates as just and reasonable, the court emphasized that such acceptance required both a finding that the relevant market was competitive, *see* 10 F.3d at 870-81, and continued review by FERC of rates actually charged to "assure that a market … rate is just and reasonable." *Id*. at 870. The Court's holding in *Elizabethtown Gas* is flatly inconsistent with Commissioner LaFleur's view that such review is *impermissible* even where a market has been found *not* to be competitive and rates may be attributable to the exercise of market power.

Likewise, the Court reiterated in *Interstate Natural Gas Ass'n v. FERC* that use of market rates was acceptable only where FERC had shown detailed empirical evidence that they would fall within a "zone of reasonableness" and, critically, where FERC retained the ability to "check rates" to ensure that they are "in fact" in the "zone of reasonableness." 285 F.3d at 31; *see also id*. at 34. And in *Farmers Union Central Exchange v. FERC*, the Court rejected reliance on market-established rates where FERC 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. *Farmers Union* directly contradicts Commissioner LaFleur by expressly holding that when markets set rates, FERC must exercise review to ensure that the "resulting rates" are reasonable. *Id*. at 218.

A trilogy of Ninth Circuit decisions—*California ex rel. Lockyer v. FERC*, 383 F.3d 1006, *Montana Consumer Counsel v. FERC,* 659 F.3d 910, and *California ex rel. Harris v. FERC*, 784 F.3d 1267—has 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 FERC'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 FERC 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 court rejected FERC's argument that review of rates charged by market-based rate sellers is limited to consideration of whether particular sellers possessed market power. Rather, the court held, FERC 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 FERC'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). FERC, the court emphasized, must "fully consider whether a reported rate [is] just and reasonable." *Id*. at 1275.

Harris also resoundingly rejects Commissioner LaFleur's contention that the tariff establishing market procedures is itself the "filed rate" and that any review of the actual rates charged would constitute impermissible retroactive ratemaking. As *Harris* holds, the filing with FERC of actual rates to be charged is not merely an informational requirement, but is essential to compliance with the statutory requirement that all rates be filed with FERC: Absent the filing of the rates themselves—which is necessary to allow FERC to do its job of reviewing the rates under section 205—"there is no filed tariff in place at all." *Id*. at 1274 (quoting *Lockyer*, 383 F.3d at 1015-16). If, as *Harris* holds, the statutory rate-filing requirement is not met until the rates resulting from market mechanisms are filed, FERC could not possibly be accused of retroactive ratemaking if it exercised its power to review the completed rate filing at its first opportunity to do so.

In any event, it is nonsensical to suggest that reviewing rates resulting from a tariff under section 205 would be retroactive ratemaking when, as here, *the tariff specifically contemplates such review*. Even if the tariff were the "filed rate," FERC would be *fulfilling* the terms of the tariff by conducting the review the tariff calls for, not retroactively altering the "rate." But *Harris* makes consideration of the particular terms of the tariff unnecessary by holding that filing and review of the resulting rates under section 205 is a requirement of the statute.

FERC's action in this case was the result of Commissioner LaFleur's legally erroneous conclusion that FERC lacked the authority to review the rates under section 205, when in fact section 205 requires that FERC retain authority to engage in such review. This Court cannot sustain action premised on the erroneous view that FERC lacks authority granted by section 205. *Batavia*, 672 F.3d at 77.

CONCLUSION

This Court should set aside FERC's action and remand for further proceedings consistent with the requirements of FPA section 205.

Respectfully submitted,

/s/ Scott L. Nelson

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Dated: September 4, 2015

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-face and volume limitations set forth in FRAP 32(a) and this Court's briefing order. The type face is fourteen-point Century Schoolbook BT. As calculated by my word-processing software, Microsoft Word 2010, the brief contains 6,934 words, excluding those parts not counted under FRAP 32 and this Court's rules.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I certify that on September 4, 2015, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in this case.

/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.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part,

any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court

unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the

United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

STANDING ADDENDUM

CONTENTS

No. 14-1244

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

DECLARATION OF KAREN KRAUT

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1. My name is Karen Kraut. I am a member and supporter of Public Citizen, Inc.

2. I reside in the state of Massachusetts.

3. My home is powered by electricity, and I receive monthly bills for electricity, which I pay.

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 December 15, 2014.

Karen Kraut