

ORAL ARGUMENT NOT YET SCHEDULED

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

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

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PUBLIC CITIZEN, INC.,

*Petitioner,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent.*

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

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**INITIAL REPLY BRIEF FOR PETITIONER  
PUBLIC CITIZEN, INC.**

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## **GLOSSARY**

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”)

## SUMMARY OF ARGUMENT

FERC took a final, reviewable action when it terminated petitioners' challenges under section 205 of the Federal Power Act (FPA), 16 U.S.C. § 824d, to the lawfulness of the wholesale electric capacity rates resulting from the eighth "forward capacity auction" conducted by ISO-New England (ISO-NE). FERC's action resulted from a deadlock on whether to hold a hearing on the section 205 challenge and rested critically on the view of then-Commission Chair LaFleur that FERC had no authority to review the auction rates.

Before this Court, FERC and its supporting intervenors do not defend the position that the Commission lacks authority to review whether rates established by auction are just and reasonable, even though FERC's termination of the section 205 proceedings hinged on that view of its authority. Instead, FERC stakes its case on the argument that its action was unreviewable because (1) it was not incorporated in an order concurred in by a majority of the Commission, (2) it merely allowed rates to go into effect "by operation of law," and (3) it was an exercise of unreviewable discretion not to investigate the rates' lawfulness.

Each of FERC's arguments rests on a fundamental mischaracterization of the action petitioners challenge. At issue is not merely FERC's failure to suspend the rates, but its definitive termination of petitioners' section 205 claim that the rates are unjust and unreasonable. Indeed, contrary to the litigation position taken by FERC's lawyers and by the intervenors, FERC itself has treated the challenged action as preclusive of further challenges to the justness and reasonableness of the rates.

Such a definitive resolution by FERC of a proceeding under section 205 satisfies the practical approach this Court has taken to identifying final, reviewable orders under FPA section 313(b), 16 U.S.C. § 8251(b). That the action was not taken by majority vote is not determinative: FERC's reliance on a statute providing that the agency operates by majority vote is misplaced because the statute does not govern the scope of review under section 313(b) or specify the consequences when an agency deadlock results in a definitive rejection of a challenge to the lawfulness of rates under section 205.

Nor does the assertion that the rates went into effect "by operation of law" when FERC did not suspend them mean that FERC's action is

unreviewable. Petitioners seek review not merely of FERC's failure to suspend the rates, but of its definitive rejection of their section 205 challenge to the rates' lawfulness. That action did not occur by operation of law, but was the consequence of FERC's two-two deadlock and the legal positions taken by the Commissioners who opposed setting the rates for hearing under section 205. Moreover, the precedents FERC cites for its "operation of law" theory are inapplicable, because they involved circumstances where the consequence that occurred by operation of law was not subject to any governing legal standard. This Court subsequently held that where, as here, the immediate consequences of an agency's inaction are specified by statute but remain subject to a substantive legal standard, the agency's action is reviewable. *Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011). *Amador County* governs here because, as FERC concedes, rates that go into effect "by operation of law" remain subject to the FPA's command that all rates be just and reasonable.

Finally, FERC's assertion that it has unreviewable discretion not to consider the lawfulness of a rate under section 205 is unfounded. Although FERC might have discretion not to investigate the lawfulness



of an unchallenged rate filing, this Court has held that FERC is required to hold a hearing when challengers to a filing raise a material issue of fact as to its lawfulness, *see Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994), and that FERC may not relegate such challengers to proceedings under section 206 based on a legally erroneous view that it lacks authority to consider their challenge under section 205—exactly what happened here. *See City of Batavia v. FERC*, 672 F.2d 64, 75-77 (D.C. Cir. 1982).

Beyond its jurisdictional arguments, FERC offers essentially no defense of what it did. FERC contends that the only issue is whether the Commission abused its broad discretion in not suspending rates, but that view fails to come to grips with what FERC actually did: It rejected a challenge to the lawfulness of rates based on the legally erroneous position—which it does not defend—that it has no authority to consider their lawfulness. FERC turns *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), upside down by *not* defending the actual basis for the Commission’s action and instead defending a purely hypothetical exercise of “discretion” not to consider the lawfulness of the rates and to relegate the petitioners to section 206 proceedings. Moreover, even if the

Commission had discretion not to adjudicate a rate challenge properly before it under section 205 and instead to tell the challengers to avail themselves of section 206, with its very different burden of proof, the Commission's actions belie its attorneys' argument that that is all FERC did here: The Commission's own decisions treat its action in this case as precluding a challenge to the rates under section 206 as well. FERC's attorneys do not even try to defend that result.

## **ARGUMENT**

### **I. This Court has jurisdiction to review FERC's action.<sup>1</sup>**

Underlying FERC's arguments is a fundamental mischaracterization of the Commission's action. FERC's premise, and the intervenors', is that all that happened here is that the agency failed to suspend rates pending an adjudication of their lawfulness under section 205, and thus the rates were allowed to become "effective" (although they will not be collected until 2017) "by operation of law."

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<sup>1</sup> Our opening brief mistakenly stated that the motions panel "denied" FERC's motion to dismiss for lack of jurisdiction. We did not intend to suggest that the motions panel actually decided the jurisdictional issue: The brief correctly stated that the motions panel directed the parties to address the issue in their briefs, and it complied with that direction. Nonetheless, we apologize for the inaccuracy.

Beyond that, FERC suggests, the agency's two-two deadlock and the resulting "notice" had no effect.

The agency plainly did more than that, however. FERC's notice marked the end of proceedings concerning the rates' lawfulness under section 205. FERC concedes as much by arguing that any further challenge must proceed under section 206, with its different allocation of the burden of proof and the additional requirement that rates be shown unlawful under the *Mobile-Sierra* standard. FERC makes light of these differences but cannot deny that, as this Court has held, relegating a rate challenge to section 206 proceedings materially alters the challenger's rights, and an order that erroneously does so is subject to judicial review. *See Batavia*, 672 F.2d at 75-77.

Moreover, FERC's brief never acknowledges that the Commission itself has ruled that the termination of the section 205 proceeding precludes further inquiry into the lawfulness of the auction results. When Public Citizen attempted to raise the rates' lawfulness in the pending section 206 complaint proceeding concerning the auction, FERC refused to consider that issue. The Commission stated that in light of its notice that the rates had gone into effect and its dismissal of petitioners'

rehearing requests, “[w]e are unable to reopen the question of the justness and reasonableness of the eighth FCA rates”—even in the section 206 proceedings. *ISO New England Inc.*, 149 FERC ¶ 61,227, at P 67 (2014). FERC adhered to that view on rehearing. *ISO New England Inc.*, 153 FERC ¶ 61,096, at P 15 (2015).<sup>2</sup> The insistence in FERC’s brief that the lawfulness of the rates may still be challenged under section 206 directly contradicts the Commission’s ruling to the contrary.

In short, FERC’s action not only finally rejected petitioners’ challenge to the rates under section 205, but FERC itself has treated its action as a determination that prevents it from considering the rates’ lawfulness in another proceeding. Such action meets the requirements of “definitive impact” defining a reviewable order under FPA section 313(b). *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238 (D.C. Cir. 1980); *see also City of Carlisle v. FERC*, 741 F.2d 429, 431 (D.C. Cir.

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<sup>2</sup> FERC’s rehearing order quoted its first order’s statement that it was “unable” to reopen consideration of the rates. In reaffirming that holding, it stated that the rates had been filed in the proceeding at issue here, had become “effective by operation of law,” and were now on appeal in this Court. *Id.* PP 9, 15. Both the initial order in the section 206 proceedings and the rehearing order contradict FERC’s assertion in its brief that “all the Commission stated” was that it would not expand the proceedings to encompass the rates’ lawfulness. FERC Br. 46.

1984) (reviewing FERC's rejection of a rate challenge where FERC did not suspend rates). In effect, FERC's action was equivalent to "the quintessential reviewable order under the Act": "a final determination by the Commission concerning the justness and reasonableness of a rate filing." *Papago*, 628 F.2d at 239.

FERC's insistence that such a definitive action is unreviewable because it was not incorporated in an order issued by majority vote of the Commission is groundless. Although FERC is correct that the precedents adopting a pragmatic construction of section 313(b) did not involve matters decided by Commission deadlocks, FERC cites no authority holding that such actions are unreviewable. Instead, FERC relies on a statute providing that the Commission operates by majority vote, *see* 42 U.S.C. § 7171(e), and on a decision holding, unsurprisingly, that a pair of orders issued by majority vote of the Commission could not be negated by adding up the votes of separate blocs of dissenting Commissioners. *See Pub. Serv. Comm'n v. FPC*, 543 F.2d 757 (D.C. Cir. 1974). Neither the statute nor the decision, however, defines the nature of a reviewable order under section 313(b), nor does either suggest that when the Commission deadlocks, the resulting action (or inaction) is unreviewable.

Indeed, FERC itself concedes that an “order” under section 313(b), as under similar review statutes, 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*, 799 F.3d 1126, 1131 (D.C. Cir. 2015). FERC offers no coherent explanation of why the action here does not meet that definition, regardless of the absence of a majority vote.

FERC’s reliance on this Court’s decisions in *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007), and *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004), is likewise misplaced. There, this Court held that agency action was not reviewable where a statute specified certain consequences unless an agency took action to alter them, and the agency did not take such action. FERC argues that because the statute here provides that rates go into effect unless suspended within a specified time after they are filed under section 205, the same principle applies. FERC’s argument fails for two reasons. First, the petitioners here do not challenge only the failure to suspend the rates, but also FERC’s effective rejection of their challenges to the rates under section 205, which FERC has held bars further review of the rates’ lawfulness. The statute provides that otherwise permissible rate changes become effective if not

suspended, but it does not require FERC to terminate its review of a rate's lawfulness under section 205 by a particular time. That consequence is attributable not to the statute, but to FERC's decision, resulting from a deadlock among the Commissioners, not to proceed with a hearing on the lawfulness of the rates under section 205.

Second, this Court's decision in *Amador County* makes clear that *Sprint Nextel* and *AT&T Corp.* do not apply here. *Amador County*, like those decisions, involved consequences that occurred by operation of law if the agency failed to act: A compact was deemed approved. But, unlike the statutes in *Sprint Nextel* and *AT&T Corp.*, the statute did not make that result *lawful*: it provided that the compact was approved only to the extent otherwise lawful under the statute. *See Amador*, 640 F.3d at 375. *Amador* held that *Sprint Nextel* and *AT&T* did not apply under such circumstances, but only in cases where a statute provided for consequences "by operation of law without limitation." *Id.* at 382. By contrast, a statute that provides a substantive legal standard that must be met even by an action occurring by "operation of law" imposes a legal obligation on the agency, and the failure to fulfill that obligation provides "discrete agency inaction to review." *Id.*

FERC and the intervenors concede that the FPA, like the statute in *Amador County*, provides a legal standard that remains applicable even when rates go into effect by “operation of law”: “All rates” must meet section 205(a)’s “just and reasonable” standard. 16 U.S.C. § 824d(a). As in *Amador County*, the statute provides “no exemption” for rates that go into effect by operation of law. 640 F.3d at 381. The statute gives FERC no authority to approve rates that are unjust and unreasonable, or to disclaim its power to review their lawfulness, merely by allowing them to take effect by “operation of law.”

FERC and its intervenors nonetheless contend that the statute imposes no affirmative obligation on FERC to disapprove unlawful rates under section 205. Rather, they argue, FERC has unfettered and unreviewable enforcement discretion not to consider the lawfulness of rates under section 205 and to allow them to go into effect without review. FERC’s invocation of enforcement discretion, however, is misplaced. Although FERC undoubtedly has broad discretion as to the extent to which it investigates uncontested rate filings, the matter is different when parties intervene in section 205 proceedings to challenge the lawfulness of a rate filing. FERC cites no authority holding that



FERC can decline to adjudicate such a challenge as a matter of enforcement discretion. Rather, FERC is obligated to hold a hearing if the challenger raises an issue of material fact as to the lawfulness of the rates, and to disapprove the rates if the utility fails to carry its burden of proving they are just and reasonable. *See Cajun*, 28 F.3d at 177; *cf. Carlisle*, 741 F.2d at 431 (noting that challengers in a section 205 proceeding “were entitled to have their objections considered by the Commission”). And—critically important to this case—this Court has held that FERC may not relegate a challenger to proceedings under section 206 if it has authority to review the challenged rates under section 205 and wrongly concludes that it lacks such authority. *See Batavia*, 672 F.2d at 75-77.<sup>3</sup>

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<sup>3</sup> The intervenors’ repeated citation of *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984), for the proposition that FERC’s role under section 205 is “essentially passive and reactive” greatly overstates the meaning of that phrase. The Court’s observation meant that FERC’s powers under section 205 are triggered only by a rate filing, not that FERC may decline to address challenges to rates in section 205 proceedings based on a legally erroneous view of its authority. Likewise, *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527, 546 (2008), recognizes that FERC sometimes “passively permi[ts]” a rate to go into effect under section 205, but does not suggest that is always the case.

In sum, FERC's obligation to adjudicate challenges to rates under section 205, and to disapprove rates not shown to be just and reasonable, is not an option that FERC can dispense with in its unfettered discretion. Still less can FERC claim in litigation to have done nothing except exercise "enforcement discretion" even while the Commission itself treats its action as precluding further review of the rates' lawfulness.

## **II. FERC's action was contrary to law.**

FERC contends that if its action is reviewable, the only issues before the Court are whether the agency may in its discretion decline to determine whether rates are just and reasonable before allowing them to go into effect and whether the agency abused that discretion here. FERC's position rests on an unduly narrow view of what the Commission did and on a hypothetical exercise of "discretion" that never occurred.

FERC's deadlock did not just allow the rates to become "effective," but ended the agency's consideration of their lawfulness under section 205. At a minimum, as all parties agree, that decision shifted the burden of proof and, additionally, made any subsequent challenge subject to the daunting *Mobile-Sierra* "public interest" standard. The Commission has now gone further and ruled that its deadlock-based disposition of the

section 205 challenge renders it *unable* to reopen the issue of the lawfulness of the rates in another proceeding. The Commission's rejection of the section 205 challenge, moreover, was not an exercise of "discretion" to allow rates to go into effect without determining their lawfulness, but reflected the view of then-Chair LaFleur that the Commission has no authority to review whether the actual rates resulting from the auction are just and reasonable.

FERC argues that the views expressed by the Commissioners whose votes resulted in the deadlock are irrelevant because they do not reflect the official position of the Commission and because, under the *Chenery* doctrine, an agency order may be upheld only "on the same basis articulated in the order by the agency itself." *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (citing *Chenery*, 332 U.S. at 196). But it is FERC that disregards *Chenery*. FERC and the interveners completely ignore this Court's holdings that, when an agency's course of action results from a deadlock, the views of the agency members whose positions dictated the outcome *must* be consulted to determine the agency's rationale. *See, e.g., FEC v. Nat'l Repub. Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) (citing cases). Because the agency action

rests on the rationale supplied by the Commissioners who blocked the agency from proceeding further, *Chenery* directs that the action be reviewed exclusively on that basis—the actual reason for what the agency did—not on hypothetical rationales conjured up by agency counsel. See *Dem. Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1135 n.6 (D.C. Cir. 1987). Then-Chair LaFleur’s view that the Commission lacks authority to review the rates was decisive in dictating the agency’s result. *Chenery* demands that the agency’s action stand or fall on that rationale.<sup>4</sup>

FERC and the intervenors do not defend then-Chair LaFleur’s rationale. FERC concedes that, under the precedents cited in our opening brief (at 31-34), the Commission has a “responsibility to ensure that the

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<sup>4</sup> FERC repeatedly suggests that the Commission’s action was justified by the conclusion that the Brayton Point plant’s owners did not engage in manipulative conduct in retiring their plants. But that was not Commissioners LaFleur’s and Moeller’s rationale. And as Commissioners Clark and Bay explained, there was ample reason to question the justness and reasonableness of the rates because of the non-competitive conditions under which the auction was conducted and the possible exercise of market power regardless of whether Brayton Point’s owners engaged in misconduct. Clark-Bay Statement, at 2-3, JA \_\_\_. Contrary to FERC’s assertions, Public Citizen did not focus exclusively on allegations of manipulation at Brayton Point before FERC; its rehearing request did not even discuss Brayton Point. JA \_\_\_-\_\_\_.

System Operator’s auction process *and resulting rates* are just and reasonable.” FERC Br. 43 (emphasis added). FERC contends that the Commission satisfied that responsibility by “diligently review[ing] the eighth Auction Rates,” *id.* at 43, but ignores that the reason it ultimately terminated its review of the rates under section 205 was then-Chair LaFleur’s view that the agency had *no* “responsibility ... to independently assess whether the resulting auction rates are just and reasonable.” LaFleur Statement, at 2, JA \_\_. That view of the agency’s “responsibility” is exactly the opposite of the one advanced in FERC’s brief. FERC effectively concedes that the premise of the agency’s action was contrary to law.

The intervenors likewise acknowledge that courts have conditioned approval of the “Commission’s use of market-based rate-setting mechanisms” on “ongoing Commission oversight to ensure that markets are competitive *and that auction processes produce just and reasonable rates.*” Intervenor Br. 19 (emphasis added). That is precisely the authority Commissioner LaFleur disclaimed. Of course, FERC may not be required to “pre-approve” every individual, unchallenged rate before

it takes effect, *see id.*, but it may not disclaim the authority to review a rate if its lawfulness is contested.

Moreover, the intervenors' suggestion that courts have insisted only that FERC retain authority to act "prospectively under section 206," *id.*, is incorrect. The Ninth Circuit's recent ruling in *California ex rel. Harris v. FERC*, 784 F.3d 1267 (9th Cir. 2015), holds the opposite, requiring that the Commission retain authority to review rates resulting from market mechanisms *under section 205* and set aside those rates if they are not just and reasonable. *See id.* at 1273-75.

Contrary to the intervenors' assertion, such review is not impermissibly "retroactive." Although the rates at issue have become "effective" in theory, they will not be collected for months. There is nothing retroactive about reviewing the lawfulness of rates that have not yet been imposed by a utility, particularly where, as here, the settlement agreement establishing the rate-setting procedure specifically contemplates such review.<sup>5</sup> The settlement thus reinforces the statute, contradicts Commissioner LaFleur's view that the Commission lacks

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<sup>5</sup> The intervenors and FERC concede that the agreement *permits* review of auction results under section 205, and argue only that it does not *require* such review.

authority to review the auction results, and negates any suggestion that such review would be impermissibly retroactive.

## CONCLUSION

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

Respectfully submitted,

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December 2, 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 3,625 words, excluding those parts not counted under FRAP 32 and this Court's rules. The word count of this brief, added to that of the Connecticut petitioners' brief (3,339), does not exceed 7,000.

/s/ Scott L. Nelson

Scott L. Nelson



## **CERTIFICATE OF SERVICE**

I certify that on December 2, 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, including counsel for all parties.

/s/ Scott L. Nelson

Scott L. Nelson