No. 11-1009

IN THE

Supreme Court of the United States

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

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

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,

Respondents.

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

PETITIONERS' REPLY

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June 4, 2012

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RULE 29.6 STATEMENT

The statement in the Petition for Certiorari remains accurate.

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INTRODUCTION

FERC's opposition brief highlights two critical points about the market-based rates rule (MBR Rule). First, FERC's abandonment of the Federal Power Act (FPA) requirement that rate changes be filed in advance depends on the transparent fiction that market-based rates *never change*. FERC's position is irreconcilable both with the FPA's prohibition of changes in "any rate" without advance filing unless FERC exercises its limited waiver authority (which it *concededly* has not done), and with the principle that statutory rate-filing requirements trump agencies' shifting policy preferences. *See MCI Telecommun. Corp. v. AT&T Co.*, 512 U.S. 218 (1994); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990).

Second, FERC's brief demonstrates that the MBR Rule substitutes rudimentary antitrust enforcement, aimed at sellers who single-handedly exercise market power, for a statutory scheme premised on advance review of the justness and reasonableness of *rates* and providing remedies to customers for *any* unjust or unreasonable rate, regardless of the seller's market power. FERC and the intervenors assert that replacing rate regulation with market forces is a sound response to changes in the electricity industry. That controversial view is irrelevant. Congress, not regulators, must determine whether changing circumstances and policy preferences justify reshaping statutory rate-regulation paradigms. *See FPC v. Texaco, Inc.*, 417 U.S. 380, 400 (1974); *MCI*, 512 U.S. at 232; *Maislin*, 497 U.S. at 135-36.

FERC acknowledges it has fundamentally recast the way it regulates a critical industry, but claims its authority to do so does not merit review because there

is no direct circuit conflict over the MBR Rule's validity. Given the inconsistent and ever-changing statements by the lower courts about the circumstances under which market rates may be lawful (*see* Pet. 28-30), the absence of directly conflicting holdings does not obviate the need for review. This Court has not hesitated to decide critical issues of agency regulatory authority with similarly far-reaching effects absent square circuit conflict, particularly when, as here, the petitioners include representatives of States. *See*, *e.g.*, *New York v. FERC*, 535 U.S. 1 (2002); *Massachusetts v. EPA*, 549 U.S. 497 (2007). The Court decided *MCI* and *Texaco* without mentioning circuit conflict, and both *NRG Power Marketing, LLC v. Maine PUC*, 130 S. Ct. 693 (2010), and *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1*, 554 U.S. 527 (2008), resolved important issues regarding FERC's authority although there was no circuit split.

Morgan Stanley emphasized that this Court "has not … approved" the MBR regime's lawfulness, a question "properly addressed in a challenge to the scheme itself"—like this one. 554 U.S. at 538, 548. If FERC's MBR Rule disregards fundamental FPA requirements, that is surely an important matter demanding correction by this Court. Alternatively, if the FPA *permits* FERC's broad-ranging revision of the statutory scheme, it is this Court that should say so.

I. The MBR Rule Eliminates the FPA's "File-All-New-Rates" Requirement.

The FPA requires electricity wholesalers to file *all* changes in rates 60 days *before* they go into effect, unless FERC, for good cause, issues a waiver 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." 16 U.S.C. § 824d(d). Contrary to the Ninth Circuit's suggestion that FERC's waiver authority authorizes eliminating advance filing of changes in market-based rates (Pet. App. 17a-18a), FERC admits the MBR Rule is *not* an exercise of its waiver authority—as is obvious because the Rule is not an order complying with § 824d(d). *See* FERC Opp. 21, n.20.

FERC nonetheless insists that its unexercised waiver authority demonstrates the advance-filing requirement's "flexibility." *Id.* The statute's conditions on FERC's authority to waive advance filing provide not "flexibility," but firm *limits* on FERC's power. *Cf. MCI*, 512 U.S. 228-29 (power to "modify" tariff-filing requirements did not authorize elimination of filing). The FPA gives FERC only one way to excuse advance filing: an order, based on good cause, specifying the particular rate change and when it will go into effect. FERC's admission that the MBR Rule is not such a waiver means it *cannot* allow changes without advance filing.

FERC therefore must rely on the fiction that an MBR seller's rates *never change* because it always charges a "market rate." FERC Opp. 21. By FERC's reasoning, a crab house whose blackboard says it will sell a bushel of crabs at "market price" can straightfacedly say its price never changes—even if the customer pays $50 one day and $60 the next.

The statute leaves no room for FERC's strained construction. FERC neither argues that § 824d(d)'s references to a "change" in a "rate," "charge," or "contract relating thereto" are ambiguous, nor acknowledges that this Court and others have recognized that "rate" has a plain meaning: "the '[p]rice or

amount stated or fixed on any thing.'" *Smiley v. Citibank*, 517 U.S. 735, 746 (1996) (citation omitted); *see also* Pet. 15-16.

FERC's insistence that MBR tariffs fix an unchanging "rate"—although the amounts customers pay for power change constantly and without notice—makes a mockery of the FPA's language. The contention that MBR tariffs establish a "rate" also contradicts *Morgan Stanley*'s statement that "when a seller files a market-based tariff, purchasers no longer have the option of buying electricity at a rate set by tariff." 554 U.S. at 538. The very words of MBR tariffs—"[a]ll sales shall be made at *rates established by agreement* between the purchaser and Seller"[1]—belie FERC's position by recognizing that MBR tariffs themselves do *not* establish rates, let alone invariant ones. As then-Judge Scalia recognized in *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 380 (D.C. Cir. 1986), such tariffs do not "set[] forth a rate"; they "simply announce[] a pricing policy."[2]

FERC not only distorts the FPA's language, but also trivializes *MCI* and *Maislin*. FERC contends that *MCI* and *Maislin* condemned only administrative schemes that "complete[ly]" detariffed part of an industry, and that the MBR Rule does not do that be-

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[1] www.ferc.gov/industries/electric/gen-info/mbr/tariff.asp (emphasis added).

[2] The intervenors assert that several Ninth Circuit cases hold that MBR tariffs are properly filed rates. Those cases, however, merely hold that MBR tariffs cannot be challenged collaterally, but only in proceedings directly challenging FERC's actions. *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1039 & n.11 (9th Cir. 2007).

cause it contemplates *after-the-fact* filing of prices and *some* of the other information that § 824d(d) demands be filed in advance.[3] FERC Opp. 22-23. *MCI* and *Maislin* did not attach talismanic significance to whether the detariffing of industry participants who lacked market power was "complete." What both decisions invalidated were agency decisions to *disregard statutory rate-filing requirements*. *MCI*, 512 U.S. at 234; *Maislin*, 497 U.S. at 95. Substituting *after-the-fact* informational filings for statutory *advance-filing* requirements is as unlawful as the detariffing in *MCI* and *Maislin*.

The advance-filing requirement, like the requirements enforced in *MCI* and *Maislin*, is "utterly central" to the statute. *MCI*, 512 U.S. at 230; *Maislin*, 497 U.S. at 132. Without advance filing, members of the public cannot challenge rates before they go into effect and invoke the FPA's hearing, suspension, and refund provisions. *See* 16 U.S.C. § 824d(e); *cf. MCI*, 512 U.S. at 230-31. It was no accident that *NRG* and *Morgan Stanley* described the "file-all-new-rates requirement" as central to the FPA. *NRG*, 130 S. Ct. at 698; *see Morgan Stanley*, 554 U.S. at 531-33. Indeed, this Court long ago identified the filing requirements as utilities' "basic duties" under the Act. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.,* 350 U.S. 332, 342 (1956). The MBR Rule dispenses with the FPA's most fundamental procedural requirement.

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[3] FERC *prohibits* even *after-the-fact* filing of MBR contracts, although §§ 824d(c) and 824d(d) require sellers to file contracts. *See* 18 C.F.R. § 35.1(g); Pet. App. 62a. Similarly, in *MCI*, the FCC "prohibited non-dominant carriers from filing tariffs." 512 U.S. at 221.

FERC insists that MBR tariffs are no different from lawful formula rates and "umbrella" tariffs. Formula rates, however, *precisely determine* actual charges. MBR tariffs, by contrast, provide *no* "discernable rate," *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1526 (D.C. Cir. 1995) (invalidating tariff that merely set forth a "range of rates"), and are only an "offer to negotiate" rates. *Regular Common Carrier*, 793 F.2d at 380.

The umbrella tariffs FERC has previously approved are also unlike MBR tariffs because they do *not* excuse a seller from complying with 824d(d)'s requirement of advance notice when it makes a change in rates or services within the general ambit of the tariff. The umbrella tariff's existence is merely a factor FERC considers in deciding whether to grant a § 824d(d) waiver. *See Xcel Energy Servs. Inc. v. FERC*, 510 F.3d 314, 317 (D.C. Cir. 2007). Such umbrella tariffs, unlike MBR tariffs, do not rest on the fiction that no change subject to § 824d(d) can occur once the tariff is issued. The validity of umbrella tariffs under which FERC *exercises* its authority to require advance filing unless it grants a waiver cannot support MBR tariffs under which FERC *dispenses* with advance filing without a § 824d(d) waiver.

The intervenors, revealingly, contend that §824d(d)'s advance-filing requirement must be disregarded because otherwise FERC's MBR regime would be impractical. EPSA Opp. 14.[4] But the MBR tail can-

[4] The advance-filing requirement, with its waiver provision, was long applied even to very short-term sales, and would not handcuff FERC and the industry as much as intervenors suggest.

not wag the FPA dog. FERC's practices must conform to the statute, not the other way around.

II. FERC May Not Substitute MBR Tariffs for Just and Reasonable Rates.

FERC defends at length the reasonableness of replacing a determination of whether *rates and charges* are just and reasonable with an inquiry into whether individual sellers have market power. But FERC cannot mask that the MBR Rule provides no yardstick to judge the lawfulness of rates other than whether individual sellers possess market power or violate market-conduct rules. The enforcement mechanisms FERC touts are, essentially, antitrust and market-design tools rather than measures of the justness and reasonableness of rates. And the truncated remedies FERC's enforcement regime offers are very different from those the statute provides: Instead of a general *entitlement* to a refund under § 824d(e) if a seller cannot prove a rate change is just and reasonable, FERC substitutes "disgorgement," available when FERC exercises its discretion to take enforcement action and proves a particular seller has market power.[5]

FERC fails to demonstrate that the MBR Rule's reliance on market forces is any more lawful than that which the Court struck down in *Texaco*. There, as here, the Commission allowed only sellers without market power to charge market rates. There, too, the

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[5] *See* Mohler, *Has the "Complete and Permanent Bond of Protection" Provided by FERC Refunds Eroded in the Transition to Market-Based Rates?*, 33 Energy L.J. 41, 44 (2012) ("[F]ull refunds may not be provided under the FERC's market-based rate regulation and … it is consumers who will now shoulder the burden of lost refunds.").

Commission *claimed* it was not relying solely on the market to determine justness and reasonableness of rates. But the Court found the agency had offered no other *meaningful* criterion for determining the lawfulness of rates charged by sellers who lacked market power. *See* 417 U.S. at 396-400.

Nor can *Texaco* be distinguished on the ground that the Court there "found" the market non-competitive. FERC Opp. 11. What *Texaco* said was that *Congress* found the industry non-competitive decades earlier and that the agency had no power to contradict Congress. 417 U.S. at 397-98. Both points are equally true here. The Court also observed that the agency had not found that actual rates would be just and reasonable. *Id*. at 396. Here, too, FERC expressly declined to find that the wholesale electricity market is competitive or that market-based rates are in *fact* just and reasonable.

FERC falls back on this Court's statements in *Morgan Stanley* and *NRG* that "well-informed wholesale-market participants of approximately equal bargaining power generally can be expected to negotiate just-and-reasonable rates," *NRG*, 130 S. Ct. at 700 n.4., but that observation—explaining the *application* of *Mobile-Sierra*'s "public interest" just-and-reasonable standard to bilateral contracts—cannot justify *abandonment* of just-and-reasonable review of rates where sellers lack demonstrable market power. Moreover, FERC has not established that most MBR transactions are negotiated between participants of approximately equal bargaining power whose interests protect the consumers the FPA was intended to

protect. *See Atlantic Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378, 388 (1959).[6]

III. The Issue Merits Review.

FERC contends that Congress approved market-based rates in various provisions of the Energy Policy Act of 2005 ("EPAct") that refer to "markets" and provide FERC with increased enforcement authority. FERC Opp. 7-8. But the EPAct did not repeal the FPA's basic advance-filing and just-and-reasonable-rates requirements. Nor do any of the EPAct's references to "markets" or FERC's enforcement authority presuppose the MBR Rule's challenged features: elimination of advance-filing requirements and substitution of market power for justness and reasonableness as the measure of lawful rates.

That the EPAct refers to "markets" in no way endorses *market-based rates*. Wholesale electricity markets existed before FERC's MBR regime, and will still exist if it is set aside. The EPAct's few references to "markets" thus hardly ratify FERC's fundamental alteration of the FPA. "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

FERC misleadingly asserts that EPAct § 1290 is "premised … on the existence of the Commission's market-based rates program." FERC Opp. 8. Section 1290 provided additional remedies in then-pending

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[6] Because of FPA preemption, buyers in MBR transactions have little incentive to protect retail customers, to whom they are entitled to pass on wholesale charges. *See* Pet. 31-32.

proceedings arising from the 2000-01 western energy crisis involving one wholesaler—Enron—whose "authority to sell any electricity at market-based rates" had been "revoked" by FERC. EPAct § 1290(a)(2). Section 1290's reference to revocation of MBR authority merely identified Enron as the seller to which the provision applied. *See City of Vernon, Cal.*, 115 FERC ¶ 61,374 at P 11 n.20, P 33-35 (June 28, 2006). Section 1290 reflected awareness that FERC had revoked Enron's MBR authority, but mere congressonal awareness of agency activity "is not enough to change anything." *MCI*, 512 U.S. at 233. At *most*, the provision may express approval of *revoking* MBR authority, but it neither suggests that *granting* MBR authority is lawful nor presupposes the *ongoing* existence of FERC's MBR regime or the MBR Rule.

Absent congressional authorization for what *Morgan Stanley* called FERC's "innovations," 554 U.S. at 535, the suggestion that FERC's authority to transform the FPA's system of rate regulation does not merit review by this Court rings hollow.[7] In *Morgan Stanley* and *NRG*, this Court granted review without a direct circuit conflict because of the practical significance of the issues and an apparent clash of lower

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[7] The intervenors point to the denial of certiorari in *Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1310 (2008). But there the D.C. Circuit did not decide the issues posed here: It held FERC was not required to reconsider the lawfulness of MBR tariffs in the order on review. The Court's denial of California's *conditional* cross-petition in *Lockyer*, *see California ex rel. Brown v. Coral Power, L.L.C.*, 551 U.S. 1140 (2007), is also irrelevant. Because the Court denied the *industry* petition in *Lockyer*, it *could not* grant California's cross-petition.

courts' decisions with basic principles established by this Court. Both factors are present here. In *New York v. FERC*, the Court granted review of part of FERC's "Order 888" (requiring open-access tariffs for electricity transmission) because of the issue's "importance." 535 U.S. at 16.[8] In *MCI* and *Texaco*, the Court addressed the lawfulness of agencies' attempts to restructure regulatory regimes absent a direct circuit split. Indeed, the Court often reviews important questions of agency authority without requiring direct circuit conflict. *E.g.*, *Mass. v. EPA*, *supra*; *Nat'l Cable & Telecommun. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

The industry intervenors' predictions of dire consequences if this Court sets aside the MBR Rule underscore that the issues presented are, to say the least, of national importance. That the Court's decision might significantly affect the industry and its customers should not deter the Court from addressing the issues. An industry does not acquire prescriptive rights to freedom from statutory requirements because an agency abdicates regulatory duties imposed by Congress. And it is highly debatable whether any possible negative consequences of returning to the FPA's regulatory system—under which a stable (and profitable) national power industry existed for decades—would outweigh the negative consequences of FERC's administrative removal of the FPA's consumer protections. *See* Pet. 31-32.

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[8] Notably, Order 888 did not relieve utilities of the FPA's core rate-filing and just-and-reasonable requirements.

Ultimately, it is for neither FERC nor this Court to determine whether the FPA is good or bad policy: Congress did that long ago. "[O]ur estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of" a federal statute. *MCI*, 512 U.S. at 234. "It is not the Court's role … to overturn congressional assumptions embedded into the framework of regulation established by the Act." *Texaco*, 417 U.S. at 400. If the FPA—including its finding that rate regulation is "necessary in the public interest," 16 U.S.C. §824(a), and its advance-filing and just-and-reasonable requirements—"has become an anachronism … it is the responsibility of Congress to modify or eliminate these sections." *Maislin*, 497 U.S. at 136. Unless that happens, enforcing the statute's requirements merits this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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