Nos. 08-74443, 08-74439

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

RICHARD BLUMENTHAL, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT, LISA MADIGAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS, and PATRICK LYNCH, ATTORNEY GENERAL OF THE STATE OF RHODE ISLAND,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of a Final Order of the Federal Energy Regulatory Commission

BRIEF FOR PETITIONERS

Lynn N. Hargis
Public Citizen, Inc.
215 Pennsylvania Avenue SE
Washington, DC 20003
(202) 454-5183

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

Attorneys for Petitioners in No. 08-74443 (Public Citizen, Inc., Colorado Office of Consumer Counsel, and Public Utility Law Project of New York, Inc.)

Additional Counsel Listed on Inside Front Cover

September 23, 2010

INSIDE FRONT COVER

John S. Wright
Michael C. Wertheimer
Assistant Attorneys General
Connecticut Office of the Attorney General
10 Franklin Square
New Britain, CT 06051
(860) 827-2620

Lisa Madigan, Attorney General for the State of Illinois
By: Michael Scodro, Solicitor General
Janice A. Dale, Assistant Attorney General
Office of the Illinois Attorney General
100 West Randolph Street, 11th Floor
Chicago, IL 60601
(312) 814-3736

Patrick C. Lynch, Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

Counsel for Petitioners in No. 08-74439
(Richard Blumenthal, Attorney General for the State of Connecticut,
Lisa Madigan, Attorney General of the State of Illinois, and
Patrick C. Lynch, Attorney General of the State of Rhode Island)

CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., a petitioner in No. 08-74443, is a non-profit advocacy organization representing the interests of its members, who are consumers and members of the general public, with respect to a range of issues including utility regulation. Public Citizen is a non-stock corporation. It has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

Public Utility Law Project of New York, Inc., a petitioner in No. 08-74443, is a non-profit corporation representing the interests of utility consumers on issues affecting affordability of service, consumer protection and universal utility service. Public Utility Law Project of New York has no parent company and no subsidiaries or affiliates that have issued shares to the public. No publicly held company has an ownership interest in it.

TABLE OF CONTENTS

Cases:

Statutes and Regulations:

Other:

JURISDICTION

These petitions seek review of orders of the Federal Energy Regulatory Commission (FERC) promulgating a final rule entitled "Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities," codified at 18 C.F.R. Part 35, Subpart H ("the MBR Rule"). The original order promulgating the MBR Rule, designated Order 697 by FERC, was issued on June 21, 2007, and published at 72 FR 39904 (July 20, 2007) (ER 2). Petitioners submitted timely requests for rehearing of Order 697. FERC denied the requests for rehearing in an order designated Order 697-A on April 21, 2008. 73 FR 25832 (May 7, 2008) (ER 146).

Petitioners filed timely petitions for review of Orders 697 and 697-A in the United States Court of Appeals for the D.C. Circuit on June 19, 2008. The petitions were transferred to this Court under 28 U.S.C. § 2112(a) because of an earlier-filed petition in this Court, and consolidated with five other petitions, which have now been dismissed or are the subject of pending motions to dismiss. This Court has jurisdiction under 16 U.S.C. § 825l(b).

STATEMENT OF ISSUES

Whether FERC's MBR Rule must be set aside as "not in accordance with law" and "in excess of statutory authority" under 5 U.S.C. § 706(2)(A) & (C) because it conflicts with provisions of the Federal Power Act (FPA), 16 U.S.C.

§§ 824 *et seq.*, commanding that all changes in rates and charges be publicly filed with FERC before they go into effect and that all rates be "just and reasonable." 16 U.S.C. § 824d.

STATEMENT OF THE CASE AND FACTS

The FPA was enacted in 1935 to provide comprehensive federal regulation of electric power transmission and wholesale electric power transactions, which, because of their interstate dimensions, had escaped effective state regulation. *See New York v. FERC*, 535 U.S. 1, 5-6 (2002). The Act, which in its general outlines has remained largely unchanged, gives FERC (and formerly its predecessor, the Federal Power Commission (FPC)) regulatory authority over "public utilities," a term the FPA defines to refer to entities that maintain facilities for *wholesale sale* (or transmission) of power in interstate commerce. 16 U.S.C. §§ 824(b)(1), (e).[1]

Although the FPA regulates wholesale rates and transactions and the sellers who engage in them, it does so because such sales are "for ultimate distribution to the public" and thus are "affected with a public interest." *Id*. § 824(a). As courts have repeatedly recognized, "[a] major purpose of the whole Act is to protect consumers against excessive prices." *Pa. Water & Power Co. v. FPC*, 343 U.S. 414, 418 (1952).

[1] Because in common parlance the term "utility" is also often used to describe entities that distribute and sell power to retail customers, this brief generally refers to FPA-regulated utilities as wholesale power sellers.

The FPA achieves this end by requiring "[a]ll rates and charges made, demanded, or received" by power wholesalers to be "just and reasonable" as well as nondiscriminatory and nonpreferential. 16 U.S.C. §§ 824d(a), (b). It establishes a regulatory structure designed to allow enforcement of this fundamental command by requiring the public filing of rates with FERC so FERC may determine their lawfulness through procedures specified by the Act. Specifically, the FPA requires wholesale power sellers to file schedules setting forth their rates and charges, as well as all contracts establishing or affecting such rates and charges. 16 U.S.C. § 824d(c). When a public utility *changes* a rate, charge, or contract, it must provide advance public notice in a filing specifically describing the change and stating when it will go into effect, and FERC may investigate and set for hearing the question whether the change is lawful. *See* 16 U.S.C. §§ 824d(d), (e). FERC may also suspend the effect of the change for a limited time pending hearing and/or, if the new rate goes into effect and is then held unlawful, order refunds. *Id.* § 824d(e). Even after a rate or contract goes into effect, 16 U.S.C. § 824e(a) provides that FERC always retains authority, upon its own initiative or upon a complaint filed by anyone, to find that the rate or contract is "unjust, unreasonable, unduly discriminatory or preferential." If FERC so finds it must "determine the just and reasonable rate … or contract to be thereafter observed and in force, and shall

fix the same by order." *Id.*[2] *See generally Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2737-38 (2008) (describing the statutory scheme).

In the 1990s, after decades of administering the statute according to its terms by requiring filing of all rate changes and reviewing the justness and reasonableness of rates (usually on the basis of whether they allowed the seller to recover its costs and an adequate rate of return), FERC began to allow power wholesalers to sell at "market-based-rates" if it found that they lacked or had taken steps to mitigate market power. FERC permitted sellers granted market-based-rate authority to file "tariffs" stating that they would sell power at rates agreed to by purchasers, and excused sellers from filing advance notice of changes in the actual rates charged. Instead, FERC substituted after-the-fact reporting requirements under which sellers provided information on a quarterly basis about the rates charged in transactions they had entered into over the previous three months, as well as triennial (once every three years) updates of market analyses addressing whether the sellers had market power. *See generally Morgan Stanley*, 128 S. Ct. at 2740-42 (describing FERC's market-based-rate scheme).

---

[2] The key provisions of the FPA as set forth in 16 U.S.C. §§ 824d and 824e were sections 205 and 206, respectively, of the original Act and are often so cited in the case law, particularly older decisions. Following the Supreme Court's practice in its most recent FPA decisions, this brief uses the U.S. Code section numbers.

On May 19, 2006, FERC issued a notice of proposed rulemaking announcing its intention to promulgate the MBR Rule "to codify and, in certain respects, revise its current standards for market-based rates for sales of electric energy, capacity, and ancillary services." 71 FR 33102 (June 7, 2006). FERC's proposed MBR Rule set forth, among other things, the criteria FERC would use to determine whether sellers possess market power, the mitigation steps it would require of sellers with market power, the quarterly reporting requirements and triennial market-power updates required of sellers granted market-based-rate authority (except for certain small sellers whom FERC proposed to exempt from the update requirement), and standard terms of market-based-rate tariffs.

Petitioners Public Citizen, Public Utility Law Project of New York, and Colorado Office of Consumer Counsel, and Richard Blumenthal, Amy Madigan, and Patrick Lynch, the Attorneys General of Connecticut, Illinois, and Rhode Island (respectively), filed comments opposing the proposed MBR Rule on the ground that FERC lacked legal authority to promulgate it. Petitioners contended that the FPA did not permit FERC to exempt sellers from the Act's filing requirements, in particular the requirement that all changes in rates and charges be filed in advance. Petitioners also contended that by allowing power wholesalers to sell electricity at rates determined solely by market forces, FERC's MBR Rule

would violate the FPA's core requirement that all rates and charges be "just and reasonable" and nondiscriminatory.

On June 21, 2007, FERC issued Order 697, promulgating the MBR Rule largely as proposed. FERC rejected petitioners' challenge to its legal authority to issue the MBR Rule, asserting that existing judicial precedents—foremost among them *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004)—had already determined that "rates that are established in a competitive market can be just, reasonable and not unduly discriminatory." Order 697, at ¶ 963.[3] FERC also asserted that the MBR Rule met the statutory requirement of advance notice of changes in rates or charges because, under FERC's market-based-rate scheme, the only "change" requiring advance filing under § 824d(d) was the change to market-based rates, not changes in actual prices charged once a market-based-rate tariff was in place. *Id.* at ¶ 962. In addition, Order 697 contained a footnote suggesting that petitioners were "precluded from attacking" FERC's legal authority to issue the MBR Rule by having failed to raise their argument in an earlier FERC proceeding involving similar issues. *Id.* at ¶ 967, n.1112.

Petitioners, as required by statute to preserve their arguments for judicial review, *see* 16 U.S.C. § 825l(a), filed timely requests for rehearing reasserting their

[3] As conventional with FERC orders, we cite specific passages in Orders 697 and 697-A by the Orders' internal paragraph numbers.

fundamental challenges to FERC's authority to issue the MBR Rule. Petitioners' rehearing requests also contested FERC's assertion that they were precluded from challenging FERC's legal authority to issue the MBR Rule because of their failure to challenge earlier actions by FERC. Petitioners cited a line of precedents from the D.C. Circuit holding that a challenge to an agency's authority to issue a rule cannot be precluded on the ground that it is an improper challenge to prior agency actions to which the challenger did not object.[4]

On April 21, 2008, FERC denied petitioners' requests for rehearing in Order 697-A. With respect to the merits of petitioners' arguments that FERC's MBR Rule is contrary to the FPA's filing requirements and its substantive command that rates be just and reasonable, FERC reiterated the positions it had articulated in Order 697. However, as to Order 697's intimation that petitioners were "precluded" from raising their challenges, Order 697-A retracted any suggestion that petitioners' arguments were an improper collateral challenge to prior FERC actions. Acknowledging the precedents submitted by petitioners in support of their right to challenge FERC's legal authority for its actions (*see* Order 697-A at

[4] *See Montana* v. *Clark*, 749 F.2d 740, 744 & n.8 (D.C. Cir. 1984); *see also Indep. Community Bankers of Am.* v. *Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999); *Public Citizen* v. *NRC*, 901 F.2d 147, 150 (D.C. Cir. 1990); *Ass'n of Am. R.Rs.* v. *ICC*, 846 F.2d 1465, 1473 (D.C. Cir. 1988); *Ohio* v. *EPA*, 838 F.2d 1325, 1328 (D.C. Cir. 1988); *NRDC* v. *NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981).

¶¶ 480-82), FERC asserted that petitioners had "ma[de] more of this footnote [in Order 697] than it was intended to convey." *Id.* at ¶ 483. FERC stated that it had *not* intended to assert the "broad proposition" that petitioners could not challenge its legal authority to issue the MBR Rule. *Id.* FERC acknowledged that petitioners' arguments were properly before it and emphasized that it had "thoroughly addressed" them both in Order 697 and in Order 697-A. *Id.*

SUMMARY OF ARGUMENT

In *Morgan Stanley*, the Supreme Court went out of its way to observe—twice—that the lawfulness of FERC's market-based-rate scheme, an issue not before the Court in that case, was an open question. *See* 128 S. Ct. at 2741, 2747. Recognizing that "FERC's market-based rate scheme ... assuredly has its critics," the Court virtually invited a challenge to it by stating that "any needed revision in that scheme is properly addressed in a challenge to the scheme itself ...." *Id.* at 2747. This case, in which FERC has issued a final rule explicitly premised on its purported authority to allow market-based-rates and to bend the FPA's filing requirements to make its scheme work, presents just such a challenge. And because FERC's MBR Rule cannot be reconciled with clear commands of the FPA, the proper resolution of that challenge is for this Court to set aside the rule.

The FPA unambiguously commands that when a wholesale power seller changes any rate or charge, it must publicly file notice of the change with FERC 60

days *before* it goes into effect. 16 U.S.C. § 824d(d). This requirement, which the Supreme Court has described as the statute's "file-all-new-rates requirement," *NRG Power Marketing, LLC v. Maine PUC*, 130 S. Ct. 693 (2010), is critical to the FPA's regulatory structure because it provides the essential predicate to FERC's authority to investigate rate increases, set them for hearing, suspend them pending a determination of their lawfulness, and order refunds if they are determined to be unlawful. See 16 U.S.C. § 824d(e). FERC, however, permits sellers with market-based-rate tariffs to change prices at will in individual private transactions without advance notice, subject only to after-the-fact reporting.

Contrary to FERC's assertion, nothing in this Court's opinion in *Lockyer* holds that FERC's MBR Rule satisfies § 824d(d)'s advance-filing requirement. Indeed, *Lockyer* does not mention § 824d(d). FERC's theoretical justification for not requiring advance filing of rate changes—that the only change in rates occurs when FERC grants a seller market-based-rate authority—cannot be squared with the ordinary meanings of the statute's words. "Rates" and "charges" refer to amounts actually charged by sellers, and those amounts obviously "change" when prices in market transactions go up and down. FERC's contrary assertion, described as "metaphysical" by the Supreme Court in *Morgan Stanley*, 128 S. Ct. at 2744, makes a mockery of the statute's words and distorts beyond recognition

the fundamental regulatory mechanism chosen by Congress: the requirement that all new rates must be filed.

FERC's assertion of authority to define "market-based-rates" as "just and reasonable" is equally indefensible. Both the Supreme Court in *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), and this Court in *Lockyer* insisted that market prices cannot be the measure of what is just and reasonable, nor may an agency substitute reliance on market forces for its own obligation to determine whether rates produced by the market are actually just and reasonable. FERC, however, relies only on assessments of sellers' market power and prohibitions on manipulative conduct to support its view that the resulting rates "can" be reasonable. It has made no effort to determine whether competitive markets in fact exist, let alone made an empirical determination that the rates produced by those markets are just and reasonable. It has wholly abandoned review of the reasonableness of rates themselves, as opposed to review of what it considers to be the indicia of a fair market.

Each of these flaws in FERC's MBR Rule, standing alone, is enough to condemn it. Together, they completely upend the regulatory system Congress enacted in the FPA. FERC has replaced the statutory scheme of rate-regulation accomplished through rate-filing with an agency-adopted scheme of rate-deregulation in which rate-filing is dispensable and dispensed-with. The resulting

system, which would be unrecognizable to the FPA's drafters, cannot be sustained by this Court.

ARGUMENT

I. Standard of Review

This Court reviews an agency's promulgation of a regulation under the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 706, and must set aside the agency's action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." *Id*. § 706(2)(A), (C). Where, as here, the claim is that the agency's action is contrary to the statutes that define its authority, the Court "review[s] de novo the question whether FERC complied with its statutory mandate." *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003). Similarly, where "the petitioners call into question the Commission's understanding of its statutory mandate, [the Court's] review is *de novo*." *Am. Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 1999). In conducting its de novo review of statutory questions, the Court applies the principles of *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). Thus, where legislation leaves scope for administrative construction, the Court "defer[s] to the Commission's interpretations of the statutory provisions it administers," but the Court "remain[s] 'the final authority on issues of statutory construction and must reject

administrative constructions which are contrary to clear congressional intent.'" *Am. Rivers*, 201 F.3d at 1194 (9th Cir. 1999) (quoting *NRDC v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1999)).

II. FERC Lacks Authority to Relieve Regulated Wholesale Utilities of Their Statutory Obligation to File All Changes in Rates *Before* They Go Into Effect.

FERC's MBR Rule is not in accordance with law and in excess of FERC's statutory jurisdiction because it excuses regulated wholesale power sellers from the FPA's express rate-filing requirements—most blatantly, from the requirement of 16 U.S.C. § 824d(d) that changes in rates be publicly filed at least 60 days before the new rates go into effect. The MBR Rule rests on the premise that, for wholesale sellers that the agency concludes lack market power under the MBR Rule's criteria, the agency has authority to alter the filing requirements of the FPA so that the only advance "rate-change" filing is the filing of the utility's request for market-based-rate authority. Under the MBR Rule, neither the actual rates paid by buyers nor contracts between sellers and purchasers are filed with FERC before they go into effect. Instead, the utility must comply with after-the-fact, quarterly reporting requirements under which it provides FERC with lists of prices paid by its customers over the prior three months. The statute does not permit such a fundamental alteration of the filing requirements it imposes on utilities.

A. Section 824d Expressly Commands That Changes in Rates Be Filed Before They Go Into Effect.

The fundamental substantive command of the FPA is that "[a]ll 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 ... shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C. § 824d(a); *see also id*. § 824e(a). The FPA also outlaws rates that are "unduly discriminatory or preferential." *Id*. at 824d(b).

To make enforcement of these commands possible, the FPA requires utilities to file their rates (as well as contracts setting forth rates) with FERC. Thus, section 824d(c) provides:

> **(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.

The general requirement that all rates and charges (and contracts affecting them) be filed is buttressed by a more specific provision that is critical to ensuring that FERC and the public have the opportunity to scrutinize *changes* in rates to

make certain that they comply with the Act's substantive mandates. That provision, section 824d(d), expressly provides that *changes* in rates must be filed with FERC well *before* they go into effect. Section 824d(d) provides:

> **(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.

The plain terms of the statute permit "no change" by a utility to any "rate" or "charge" without 60 days' notice, which the utility must provide by "filing with the Commission new schedules" that "stat[e] plainly" the change in rates or charges to be made. Although the provision grants FERC some authority to relieve a utility from the 60-day notice requirement by "order[ing] otherwise," it expressly limits the circumstances and manner in which FERC may do so: For "good cause shown," FERC may waive the 60-day notice requirement, but only if it simultaneously issues an "order specifying the changes" in rates, and stating "when they shall take affect and the manner in which they shall be filed."

Advance filing of all changes in rates is integral to the statute's provisions for the review of new rates. Thus, section 824d(e), which immediately follows the 60-day notice provision for rate changes, provides that "[w]henever any such new schedule is filed"—i.e., whenever a utility files a schedule showing a change in rates as provided in the previous subsection—FERC may set the issue of the lawfulness of the change for hearing. Pending the hearing, FERC may "suspend the operation of such schedule and defer the use of such rate" for up to five months. *Id*. If the change involves an *increase* in rates, and the increase goes into effect before the hearing is completed, FERC may require the utility to account for and refund, with interest, "such portion of such increased rates or charges as by [FERC's] decision shall be found not justified." *Id*. And when an increase in rates is set for hearing, "the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility." *Id*.

The Supreme Court summarized the plain meaning of these provisions in *Morgan Stanley*:

> [T]he FPA requires regulated utilities to file compilations of their rate schedules, or "tariffs," with the Commission, and to provide service to electricity purchasers on the terms and prices there set forth. § 824d(c). *Utilities wishing to change their tariffs must notify the Commission 60 days before the change is to go into effect*. § 824d(d). ... *Like tariffs, contracts must be filed with the Commission before they go into effect*. 16 U.S.C. § 824d(c), (d).
>
> The FPA requires all wholesale-electricity rates to be "just and reasonable." § 824d(a). When a utility files a new rate with the

> Commission, through a change to its tariff or a new contract, the Commission may suspend the rate for up to five months while it investigates whether the rate is just and reasonable. § 824d(e).

128 S. Ct. at 2737-38 (emphasis added). "The filing requirement," the Court emphasized, is "a *precondition* to changing a rate ...." *Id*. at 2738 (emphasis in original). In its latest opinion on the FPA, *NRG Power Marketing*, the Supreme Court reiterated that what it called the "file-all-new-rates requirement" is "a *precondition* to changing a rate ...." 130 S. Ct. at 698 (emphasis in original).

The Supreme Court's reading of the FPA in *Morgan Stanley* and *NRG* as imposing a "file-all-new-rates requirement" was hardly novel, but followed directly from the Court's venerable ruling in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956). There, interpreting provisions of the Natural Gas Act that were indistinguishable from the FPA's pertinent terms, the Court explained that the statute is a "prohibition" on changes in rates without advance filing with the Commission. *Id.* at 339.[5] The statute, the Court stated, says "that a change cannot be made without the proper notice to the Commission." *Mobile*, 350 U.S. at 339. The Court further explained that "the filing requirements are obviously necessary to permit the Commission to exercise its review functions,

[5] In the companion case *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), the Court recognized that Natural Gas Act provisions concerning filing of rate changes and the Commission's power to set changes for hearing and suspend their effect were "in all material respects substantially identical" to the FPA's provisions in §§ 824d(c), (d) and (e).

and the requirement of ... advance notice of changes is essential to afford the Commission a reasonable period in which to determine whether to exercise its suspension powers." *Id.* at 344. As the Supreme Court stated in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), "the clear purpose of the congressional scheme [is] granting the Commission an opportunity in every case to judge the reasonableness of the rate."

B. FERC's MBR Rule Is Unlawful Because It Is Inconsistent with the Statutory Requirement of Advance Filing of Rate Changes.

Under the MBR Rule, FERC asserts authority to grant electricity wholesalers authority to collect market-based rates if they meet the Rule's criteria concerning lack (or mitigation) of market power. The market-based-rate tariffs filed by sellers granted such authority, "instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan Stanley*, 128 S. Ct. at 2741. "FERC does not subject the contracts entered into under these tariffs (as it subjected traditional wholesale-power contracts) to § 824d's requirement of immediate filing ...." *Id.* Even though the actual rates collected by sellers change from contract to contract or auction to auction, FERC permits these changes to go into effect without the requirement of 60 days' notice imposed by § 824d(d), subject only to after-the-fact quarterly reports by utilities listing rates *that have already gone into effect*.

FERC's grants of market-based-rate authority do not comply with the conditions imposed by § 824d(d) on FERC's authority to permit a rate change to go into effect without the required advance notice by filing. Section 824d(d) provides that any order granting such permission must "specify[] the changes so to be made and the time when they shall take effect." FERC's orders granting market-based-rate authority obviously do not, and cannot, comply with that requirement, because FERC cannot forecast the many future changes that will take place in rates charged by the utilities to whom it grants market-based-rate authority, let alone when each change will take effect.

In short, the MBR Rule is an assertion by FERC of authority to excuse regulated utilities from the requirement that they file all changes in rates 60 days in advance of their effective date, without compliance with the express limitations the statute places on FERC's authority to provide for rate changes without the required 60-days' advance filing. Because an agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law,'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)), the MBR Rule must be set aside as not in accordance with law and in excess of statutory authority under 5 U.S.C. §§ 706(2)(A) and (C). By purporting to excuse power wholesalers from filing requirements expressly imposed by statute, the MBR Rule

violates the fundamental principle that an agency "does not have the power to adopt a policy that directly conflicts with its governing statute." *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990). "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommun. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994).

The Supreme Court's decision in *Maislin* is closely on point. There, the Interstate Commerce Act (ICA) expressly provided that motor common carriers could provide transportation services only if their rates were set forth in tariffs filed with the Interstate Commerce Commission (ICC), and forbade carriers from receiving compensation different from the rates in the filed tariffs. *Id.* at 120. The ICC, pursuing a deregulatory, market-based agenda, adopted a policy of permitting carriers and shippers to negotiate rates different from the filed rate and holding the parties to the negotiated rates even though, "[i]n many instances, ... the negotiated rate is never filed with the ICC." *Id*. at 121.

Maislin held that the ICC had acted unlawfully in deviating from the express statutory requirement that only filed rates be charged. Critical to the Court's holding was its reading of the plain terms of the statute, which, like the FPA provisions at issue here, required filing of rates: "The Act requires a motor common carrier to publish its rates in a tariff filed with the Commission." *Id*. at

126. The Court flatly rejected the agency's argument that "in light of the more competitive environment, strict adherence to the [statutory] filed rate doctrine "is inappropriate and unnecessary ....'" *Id*. at 134. Rather, the Court stated, "[i]f strict adherence to [the statute's sections requiring that rates be filed] ... has become an anachronism ..., it is the responsibility of Congress to modify or eliminate these sections." *Id.* at 135-36.

The Court in *Maislin* stressed that excusing carriers from the requirement of filing rates before they could be collected was inimical to the overall structure of the ICA. As the Court explained, the ICA imposed the basic requirement that rates be "both reasonable and nondiscriminatory." *Id*. at 119. The statute gave the ICC "primary responsibility for determining whether a rate or practice is reasonable," *id.*, and therefore gave the ICC the power to investigate and determine the reasonableness of a rate, and the responsibility to prescribe a reasonable rate when it found a filed rate unreasonable. *Id*. at 119-20. The Court recognized that the statutory filing requirement was "utterly central" to permitting the ICC to carry out its assigned functions. *Id*. at 132. Absent the filing requirement, neither the agency nor the public could determine whether to challenge a rate and, most importantly, "[t]he ICC cannot review in advance the reasonableness of *unfiled* rates." *Id.* Thus, *Maislin* held, the ICC's policy was unlawful not only because it violated the

specific sections of the ICA that required filing of rates, but also because it was "flatly inconsistent with the statutory scheme as a whole." *Id.* at 131.

Maislin's holding was presaged by the D.C. Circuit's ruling in *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (1986), in which then-Judge Scalia (joined by then-Judge Ruth Bader Ginsburg) held that an ICC decision permitting the filing of a tariff that did not set forth the rate to be charged was unlawful because it "nullifie[d]" the statutory requirement that carriers charge only rates set forth in their tariffs. *Id*. at 379. "That requirement," the court explained, "is utterly central to the Act. Without it, for example, it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory, and virtually impossible for the public to assert its right to challenge the lawfulness of existing or proposed rates." *Id*. (statutory citations omitted).

The Supreme Court in *MCI v. AT&T* similarly rejected an agency's attempt at "detariffing" an industry based on policy preferences for market rate-setting that conflicted with clear statutory language. 512 U.S. at 229. *MCI* involved an FCC policy that permitted "nondominant" telecommunications carriers (those without monopoly power) to charge rates that were not on file with the Commission. The Communications Act, by contrast, required the filing of "schedules showing all charges," as well as advance filing of all changes in charges, and it prohibited any

carrier from collecting any compensation for services different from the charges set forth in its schedule. *See id.* at 224-25 (quoting statute). Although the Act gave the Commission some power to "modify" these requirements, the Supreme Court held that such authority did not empower the FCC to make "basic and fundamental changes in the [statutory] scheme." *Id.* at 225. The Court concluded that reading the limited modification authority to permit the agency to exempt 40 percent of the industry from the requirement of filing rates would go "beyond the meaning that the statute could bear" and entail a "radical or fundamental change in the Act's tariff-filing requirement." *Id*. at 229.

In so holding, the Court stressed that, as in *Maislin*, the filing requirement was "utterly central" to the statutory scheme because it was essential to the efficacy of provisions permitting challenges to unreasonable rates. *Id*. at 230-31. "Rate filings," the Court stated, "are the essential characteristic of a rate-regulated industry." *Id*. at 231. The agency's attempt to eliminate that essential characteristic from the regulatory scheme exceeded the outer bounds of the statutory authority conferred by Congress:

> What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.

Id. at 231-32.

MCI, like *Maislin*, had been foreshadowed by an earlier D.C. Circuit decision, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (1985). Then-Judge Ginsburg, writing for the court, had rejected an earlier version of the FCC's detariffing policy that prohibited non-dominant carriers from filing rate schedules. As the Supreme Court later did in *MCI*, the D.C. Circuit found that the agency's action conflicted with the clear statutory requirement that schedules showing rates be filed. The court emphasized that despite the agency's assertion that competitive market forces could ensure just and reasonable rates without compliance with the statutory filing requirements, the court was "not at liberty to release the agency from the tie that binds it to the text Congress enacted," no matter how "reasonable the Commission's assessment" of market forces might be. *Id*. at 1194. "In sum, if the Commission is to have authority to command that common carriers not file tariffs, the authorization must come from Congress, not from this court or from the Commission's own conception of how the statute should be rewritten in light of changed circumstances." *Id*. at 1195; *accord*, *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1526 (D.C. Cir. 1995).

The teaching of *Maislin*, *Regular Common Carrier*, and the two *MCI* cases is straightforward: When a statute creating a rate-regulation scheme imposes a clear rate-filing command, the agency enforcing the statutory scheme has no authority to excuse compliance because it thinks it has come up with a better way

of regulating the industry. Here, as in those cases, the MBR Rule is inconsistent with both specific provisions of the FPA governing filing of rate changes, and with the statutory scheme as a whole. Because it permits changes in rates to go into effect without advance filings specifying the changes, the MBR Rule is at odds with the FPA's unambiguous requirement in § 824d(d) that changes in rates be filed 60 days before they go into effect (except when FERC excuses that requirement in an order that itself specifies the change in rates and the date it will go into effect, which FERC's market-based-rate authorizations can never do). Like the policies at issue in *Maislin*, *Regular Common Carrier*, and the *MCI* cases, the MBR Rule is also "flatly inconsistent with the statutory scheme as a whole," *Maislin*, 497 U.S. at 131, because it eliminates the possibility of suspension and review of increases in rates *before* they go into effect as provided in § 824d(e)—a provision that is itself critical to achieving the FPA's fundamental objective of ensuring that all rates are "just and reasonable." 16 U.S.C. § 824d(a). FERC is no more capable than the ICC, or anyone not possessing omniscience, of "review[ing] *in advance* the reasonableness of *unfiled* rates." *Maislin*, 497 U.S. at 132 (first emphasis added).

C. This Court's Decisions Do Not Support FERC's Deviation from the Statute.

In taking the position that the MBR Rule is consistent with the FPA's filing requirements, FERC relies principally on this Court's decision in *Lockyer*, and

secondarily on the Court's decision in *Public Utility District No. 1 v. FERC* (*Snohomish*),[6] which it asserts held that FERC has complied with all of the FPA's filing requirements by requiring the filing of a market-based-rate tariff, coupled with after-the-fact reporting of rates actually charged by wholesale power sellers. Order 697-A, at ¶¶ 459-60.

Lockyer, however, cannot bear the weight FERC places on it. *Lockyer* stated generally that "market-based tariffs do not, *per se*, violate the FPA" as long as they are coupled with vigorous actions to "ensure that the rate is just and reasonable." 383 F.3d at 1014, 1013. Beyond that, *Lockyer* considered whether the filing of a market-based-rate tariff, coupled with quarterly reports summarizing actual transactions, complied with the general rate-filing requirement of § 824d(c), which is subject to the proviso that "filings be 'within such time and within such form' and under 'such rules and regulations as the Commission may prescribe.'" *Id*. at 1013 (quoting 16 U.S.C. § 824d(c)). The Court stated that FERC's acceptance of after-the-fact reporting to complete the filing requirement (which the filing of the market-based-rate tariff by itself would *not* satisfy because it would not set forth actual rates, *see id*. at 1014) would not violate § 824d(c). *Id*. at 1013. Even that statement was dicta, because the Court ultimately found that the § 824d(c) filing

[6] *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006), *aff'd on other grounds sub nom. Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733 (2008), *and vacated*, 547 F.3d 1081 (9th Cir. 2008).

requirement had been violated by the failure of sellers even to comply with the after-the-fact reporting requirements imposed by FERC. *See id*. at 1014-15.

Wholly absent in *Lockyer*, however, was *any* discussion of whether after-the-fact reporting of *changes* in rates satisfies the separate and very specific requirement of § 824d(d) that sellers give 60 days' advance notice of *any* change in a rate or charge by filing a schedule stating plainly what the change in the rate will be. The *Lockyer* opinion *never once* mentions § 824d(d), nor does it discuss *changes* in rates. Indeed, the word "change" appears only once in the opinion, in a wholly different context. *See id*. at 1010. In light of its utter silence on the question, *Lockyer* cannot be read to express any holding on the compliance of FERC's market-based-rate regime with the FPA's specific filing requirements for changes in rates and charges.

This Court has long adhered to the rule that matters not actually addressed in an opinion are not holdings entitled to precedential weight in later cases, even when they are arguably implicit in or "lurk in the record" of the prior opinion. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Thus, in *E. & J. Gallo Winery v. EnCana Corp*., 503 F.3d 1027, 1046 n.14 (9th Cir. 2007), the Court refused to give an opinion precedential weight on an issue it did not "expressly address." And in *United States v. Dunbar*, 154 F.2d 889, 891 (9th Cir. 1945), the Court called it "a

matter of indifference that ... questions, which were not considered in th[e] court's [prior] opinion, may be said to 'lurk' in its decision." *See also Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985); *Alameda v. Paraffine Cos.*, 169 F.2d 408, 409 (9th Cir. 1948). As the Supreme Court has put it, stare decisis does not apply when a court has "never squarely addressed the issue." *Brecht v. Abrahamson*, 507 U.S. 619, 531 (1993). *Lockyer* did not address the requirements of § 824d(d), squarely or otherwise, and therefore issued no binding holding as to whether FERC's market-based-rate scheme conflicts with that provision.

As for this Court's decision in *Snohomish*, it provides no support for FERC's view that its MBR Rule can be squared with the file-all-new-rates requirement of § 824d(d). In *Snohomish*, as the Supreme Court itself recognized in its own decision in the case, *Morgan Stanley*, the validity of FERC's market-based-rate regime was not directly at issue, *see* 128 S. Ct. at 2741, 2747, and this Court merely described its opinion in *Lockyer* without ruling again on the lawfulness of FERC's scheme. *See* 471 F.3d at 1080.[7] In particular, *Snohomish* did

[7] If anything, this Court's discussion of the general issue of the lawfulness of market-based-rates in *Snohomish* undercuts the suggestion that FERC has acted lawfully in allowing them, for the Court emphasized that FERC has not, in practice, provided the meaningful review of rates to ensure that they are just and reasonable that *Lockyer* demanded as a necessary component of any system that allowed rates to be set as an initial matter by market forces. *See* 471 F.3d at 1080-85.

not address the issue whether FERC's authorization of utilities to change rates without the advance filing required by § 824d(d) could be squared with the terms of the FPA, and thus it was never a precedent supporting FERC's compliance with § 824d(d)'s specific requirements. In any event, following the Supreme Court's remand in *Morgan Stanley*, this Court vacated its own opinion in *Snohomish*. *Pub. Util. Dist. No. 1 v. FERC*, 547 F.3d 1081, 1082 (9th Cir. 2008). *Snohomish* is thus not binding precedent in this Court for any proposition.

D. FERC's Position That a Wholesale Power Seller Satisfies the Requirement of Advance Filing of Changes in Rates and Charges Merely by Seeking Market-Based-Rate Authority Is Directly Contrary to the Statute's Plain Meaning.

Beyond invoking *Lockyer* and *Snohomish*, FERC asserts that its MBR Rule complies with § 824d(d)'s requirement that wholesale power sellers file notice of changes in rates or charges 60 days before they go into effect because, "[u]nder the market-based rate program, a rate change is initiated when a seller applies for authorization of market-based rate pricing, not when it subsequently enters into negotiated rates ...." Order 697-A, at ¶ 456.[8] Thus, according to FERC, the MBR Rule complies with § 824d(d) because it requires advance notice (and Commission

[8] *See also id.* at ¶ 436 ("Under the market-based rate program, the rate change is initiated when a seller applies for authorization of market-based rate pricing."); *id.* at ¶ 434 ("[T]he market-based rate tariff, with its appurtenant conditions and requirement for filing transaction-specific data in EQRs, is the filed rate.").

approval) of the filing of any market-based-rate tariff, which FERC considers to be a change in rates within the meaning of the statute. Subsequent increases and decreases in actual prices charged by a seller under a market-based-rate tariff, by contrast, are in FERC's view not "changes" in "rates" or "charges," and thus do not require advance notice.

FERC's attempt to square the MBR Rule with the statute's file-all-new-rates requirement is untenable for two related reasons. First, under the plain language of § 824d(d), the myriad increases and decreases in prices actually charged by power wholesalers under market-based-rate tariffs are "changes" in "rates" or "charges." That the seller may originally have given 60 days' notice of its intent to seek market-based-rate authority and file a market-based-rate tariff does not, under § 824d(d), excuse compliance with the advance filing requirement for changes that later take place. Second, even without regard to the changes that subsequently occur, a power wholesaler's filing of notice that it seeks market-based-rate authority cannot, by itself, satisfy § 824d(d)'s requirements even for a moment, because a market-based-rate tariff does not specify a rate at all, and thus does not meet the requirement that a § 824d(d) filing "stat[e] plainly" what changes will be made in rates or charges.

1. Plain Statutory Language Contradicts FERC's View That Rates and Charges Under Market-Based-Rate Tariffs Never Change.

FERC's position that rates or charges never change within the meaning of § 824d(d) once a market-based-rate tariff is filed rests on the premise that the rates and charges of utilities under such a tariff are nothing more than the unchanging abstraction of the "market-based rate," not the actual prices that wholesale power sellers charge their customers. But courts must "construe a statutory term in accordance with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *accord*, *Metro Leasing & Dev. Corp. v. Comm'r of Internal Revenue*, 376 F.3d 1015, 1021 (9th Cir. 2004). FERC's view cannot be squared with the statute's plain meaning.

As the Supreme Court has noted, the ordinary meaning of "rate" is "the '[p]rice or amount stated or fixed on any thing.'" *Smiley v. Citibank*, 517 U.S. 735, 746 (1996) (quoting N. Webster, American Dictionary of the English Language 910 (1849)). Current dictionary definitions of the term agree with the definition used in *Smiley*. Thus, Merriam Webster's Online Dictionary gives the definition for the relevant sense of the noun "rate" as:

> 3b: a charge, payment, or price fixed according to a ratio, scale, or standard: as (1): a charge per unit of a public-service commodity (2): a charge per unit of freight or passenger service (3): a unit charge or ratio used in assessing property taxes ....

http://www.merriam-webster.com/dictionary/rate. More simply, the word has been defined as "a measure of value or charge or cost." Oxford American Dictionary 745 (1980).

This Court adhered to a similar reading of the plain meaning of "rate" in *Peck v. Cingular Wireless, LLC*, 535 F.3d 1053 (9th Cir. 2008). There, the issue was whether a federal statute preempting states from regulating "rates" for cell phone services also preempted states from regulating the manner in which line-item charges appeared on consumers' bills. Although the FCC had construed the statute to preempt such regulation, this Court held that "rates" must be more narrowly construed and that the state regulation was not preempted. The Court adopted the reasoning of the Eleventh Circuit's earlier opinion in *National Association of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (2006) ("*NASUCA*"), which had similarly rejected the FCC's broad reading of "rates." *See Peck*, 535 F.3d at 1057. As *NASUCA* explained,

> A "rate," as defined by the Oxford English Dictionary, is "[t]he amount of a charge or payment ... having relation to some other amount or basis of calculation." Oxford English Dictionary (2d ed. 1989). Other dictionaries define a "rate" as "[a]n amount paid or charged for a good or service," Black's Law Dictionary 1268 (7th ed. 1999), or "a charge per unit of a public-service commodity," Merriam-Webster Online Dictionary, available at www.m-w.com/cgi-bin/dictionary ....

457 F.3d at 1254. Accordingly, *NASUCA* held that notwithstanding the agency's contrary view, the plain meaning of the statutory language preventing states from

regulating rates only foreclosed them from regulating "the amount that a user is charged for service." *Id*.

This common-sense definition of "rate" is, unlike FERC's, consistent with decades of judicial usage under the FPA, in which the word is used to describe the amount that a seller charges a buyer for power. Thus, for example, in *Morgan Stanley*, the Supreme Court uniformly used the term "rate" to refer to the price "set out in a ... wholesale energy contract," 128 S. Ct. at 2737, not to the market-based-rate authorization contained in the underlying tariff. The Court repeatedly referred to the rates challenged in the case—which were charged by sellers with market-based-rate tariffs—as having been "set by contract," not by the market-based-rate tariffs. *See id*. at 2744, 2745, 2749; *see also id*. at 2742 (pointing out that market-based-rate tariffs do not set rates). Similarly, the Court in *NRG* used the term "rates" throughout to refer to the actual amounts wholesalers charge customers. *See, e.g.*, 130 S. Ct. at 696 (referring to "rates set by contract").

Given the ordinary meaning of "rates" as encompassing the actual amounts buyers are charged for service, there can be no doubt that the "rates" wholesale power companies charge buyers "change" following the filing of a market-based-rate tariff—that is, they go up and down depending upon the terms of market transactions. And because § 824d(d) provides that no change in any rate may be made without a filing 60 days in advance describing *that change*, and a market-

based-rate tariff does not and cannot describe all the changes in rates that will be made in individual transactions after it goes into effect, it follows that FERC's position that the "only change" that requires an advance filing is the filing of the market-based-rate tariff itself is directly contrary to the statute.

Even if § 824d(d)'s reference to changes in any "rate" left some room for doubt on the matter, the statute's requirement that power wholesalers file advance notice of changes in any "charge" would eliminate it. The relevant definition of the noun "charge" is "the price asked for goods or services." Oxford American Dictionary 140; *see also* Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/charge ("5a: expense, cost <gave the banquet at his own charge> b: the price demanded for something <no admission charge>"). FERC's assertion that the only change requiring advance filing under § 824d(d) is the change to market-based-rate authority ignores the fact that sellers with market-based-rate authority change the prices they ask for wholesale electricity—that is, their "charges"—constantly.

The contention that no change in charges occurs once FERC confers market-based-rate authority on a seller can be tested with a simple hypothetical. A restaurant offers Dungeness crab at "market price." A diner orders crab on Monday and pays $24. On Tuesday, alarmed by rumors of a sudden shortage, she returns and asks what the restaurant is charging for crab. Based on the waiter's answer that

they are charging the "same as yesterday," she orders crab again, but when the waiter brings the check it shows that the price for her meal is over $3,000. Would any reasonable English speaker agree with the waiter that the "charge" for crab had not "changed" simply because the menu still read "market price"? No. Yet that is precisely the argument FERC advances to maintain that there is no change in the "charge" under a market-based-rate tariff when the amount buyers are charged goes from, say, $24/MWh to $3,300/MWh (to use an example drawn from the facts of *Morgan Stanley*, *see* 128 S. Ct. at 2743). This Court should no more accept such Humpty-Dumpty word games than should the diner in the hypothetical.

2. Requests for Market-Based-Rate Authority Do Not Satisfy § 824d(d)'s Requirement of Advance Notice of Changes in Rates Because They Do Not Set Forth a Rate at All.

For much the same reasons, FERC is also wrong in contending that a seller's request for market-based-rate authority satisfies the requirement of advance filing of notice of changes in rates or charges. Such a filing does not, as § 824d(d) requires, "stat[e] plainly" the changes in rates or charges that are contemplated. In seeking authority to file a market-based-rate tariff, a seller gives notice only that, under the terms of the tariff, "[a]ll sales shall be made at rates established by agreement between the purchaser and Seller." www.ferc.gov/industries/electric/gen-info/mbr/authorization.asp. The tariff itself disclaims any pretense that it sets forth changes in rates or charges that will take place once it is in effect by

saying only that the rates will be established later. *See Morgan Stanley*, 130 S. Ct. at 2741.

A wealth of precedent establishes that such a filing does not set forth a rate or charge (and, hence, that it cannot satisfy the specific requirement of § 824d(d) that any change in a rate or charge be "state[d] plainly"). In *Regular Common Carrier*, for example, then-Judge Scalia explained that a tariff under the ICA that provided only that an "average rate" would be charged did not "set[] forth a rate, but rather ... simply announce[d] a pricing policy" that was "nothing more than an offer to negotiate and agree with shippers upon an 'average rate.'" 793 F.2d at 380. Such a tariff, *Regular Common Carrier* held, "does not meet the [statutory] requirement ... for a 'rate ... contained in a tariff.'" *Id.* at 380.[9] By the same token, a filing that seeks authority for a tariff that contains nothing more than an offer to negotiate electrical power rates cannot meet the requirement of § 824d(d) that all changes in such rates be stated plainly in a filing 60 days before they go into effect.

Similarly, in *Southwestern Bell Corp. v. FCC*, the D.C. Circuit held that the Communications Act's requirement that telecommunications carriers file "schedules showing all charges" did not permit the FCC to allow "nondominant

[9] *See also Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 495 (D.C. Cir. 1985) (Scalia, J.) (holding that a FERC order that merely sets forth general principles for determining a rate does not "fix" the rate because "the Commission cannot fix a rate, as it purports to have done here, without ever seeing it").

carriers" (i.e., those without market power) to file schedules showing only a "reasonable range of rates" within which the charges actually paid by customers would be determined by market forces. 43 F.3d at 1517. As the court explained, "the clear and definite language of the rate-filing provision does not encompass the concept of ranges." *Id.* at 1520. The statutory requirement of "schedules showing all charges," the court stated, "connotes a specific list of discernable rates," but "[a] range of rates simply does not cater to public knowledge because the public cannot discern the actual rate proposed to be charged by nondominant carriers." *Id.* at 1521. Because *Congress* "decided to require common carriers to file 'schedules showing all charges' not ranges of rates," the court concluded, the agency "cannot abandon the legislative scheme because it thinks it has a better idea." *Id.* at 1525. The same is true here: The statute expressly requires that all changes in rates and charges be plainly stated in a filing made before they go into effect, and a filing that does not allow the public to discern the actual changes in rates and charges contemplated by the seller does not satisfy that requirement.

Indeed, this Court's decision in *Lockyer*, on which FERC purports to rely, is in fact fatal to FERC's theory that the filing of a request for approval of a market-based-rate tariff is sufficient to satisfy the FPA's requirement of *advance* notice of changes in rates and charges. The Court recognized in *Lockyer* that a market-based-rate tariff *by itself* does not comply with the FPA's general filing

requirement in § 824d(c) and that subsequent "transaction-specific reporting 'is necessary so that the marketer's rates will be on file as required by section [824d(c)],'" because without filing of actual rates charged, "there is no filed tariff in place at all." 383 F.3d at 1014, 1016. The court pointed out that without the actual rates on file, the filing of the market-based-rate tariff would not allow either FERC or any affected party "to challenge the rate," and that "[i]f the ability to monitor the market, or gauge the 'just and reasonable' nature of the rates is eliminated, then effective federal regulation is removed altogether." *Id*. at 1015.

Lockyer posited that compliance with post hoc reporting requirements, together with the market-based-rate tariff, could satisfy § 824d(c) because of that provision's express authorization for FERC to regulate the time and form of filings. *See id.* at 1013. But, as explained above, the Court did not address compliance with § 824d(d)'s explicit requirement that changes in rates and charges be filed *before* they go into effect, which is necessary to effect § 824d(e)'s provisions for *advance* review (and suspension pending such review) of rate increases. When *Lockyer*'s recognition that market-based-rate tariffs by themselves do not specify a rate is coupled with the express statutory requirement that changed rates be publicly filed 60 days before they go into effect, it is evident that the filing of a market-based-rate tariff cannot comply with § 824d(d)'s file-all-new-rates requirement.

FERC's convoluted theories for how its MBR Rule complies with the statutory requirement that changes in rates and charges be filed before they go into effect contradict the plain language of the statute. Rates and charges do change, and the filing for a market-based-rate tariff does not give advance notice of those changes. In *Morgan Stanley*, the Supreme Court, having had FERC's theories described to it, pointedly refrained from deciding their validity. But the Court did note skeptically that FERC did not subject contract rates under market-based-tariffs "to § 824d's *requirement* of immediate filing, apparently on the *theory* that the requirement has been satisfied by the initial filing of the market-based tariffs themselves." 128 S. Ct. at 2741 (emphasis added). The Court pointed out that the consequence was that the actual rates charged by sellers with market-based-rate tariffs are no longer "filed with FERC (and subjected to its investigatory power) before going into effect." *Id*. at 2741. And the Court drily described FERC's theory that advance filing of the market-based-rate tariff substitutes for advance filing (and opportunity for review of) changes in rates themselves as "somewhat metaphysical." *Id*. at 2744. But the Court emphasized that it was "not address[ing] the lawfulness of FERC's market-based-rates scheme," and that "any needed revision in that scheme is properly addressed in a challenge to the scheme itself ...." *Id*. at 2747.

As the Supreme Court has elsewhere stated, when a statute's "language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 27 (1998). Given that a proper challenge to FERC's market-based-rate scheme is now before this Court, the Court should reject FERC's metaphysics in favor of a straightforward reading of the statutory requirement that *no* change in rates or charges may be made without filing in advance.

E. FERC's Assertion That Requiring Advance Filing of Changes in Rates or Charges Would Render Its Market-Based-Rate Authorizations "Pointless" Is Itself Beside the Point.

In its order denying rehearing, FERC complained that if all changes in the actual rates and charges imposed by a seller had to be filed in advance as required by § 824d(d), "then the original market-based rate authorization would be a pointless exercise." Order 697-A, at ¶ 434 n.650. That may be so, but it hardly excuses FERC's failure to abide by the statute's clear commands. FERC's argument amounts to the assertion that having taken an action premised on the notion that the agency can sidestep clear statutory requirements, it now must be permitted to avoid those statutory commands so that its original action will not be "pointless."

FERC has it precisely backwards. The very fact that compliance with the requirements of the statute calling for advance filing of all changes in rates and charges would make FERC's market-based-rate tariffs "pointless" is the best possible indication that the MBR Rule providing for approval of such tariffs is inconsistent with the rate-regulation mechanisms provided for in the FPA, which rely on the filing of new rates *before* they go into effect. Put another way, it is FERC's practices that must conform to the statutory requirements imposed by Congress, not Congress's commands that must bend so that FERC's attempt to do things some other way is not rendered "pointless."

In *Southwestern Bell*, the D.C. Circuit confronted a similar argument that clear congressional rate-filing commands should bow to an agency's view that another system better accorded with its own preference for fostering market-based rate-setting. The court summed up its rejection of the agency's attempt to substitute its policy views for the law enacted by Congress in these words, which are equally applicable here:

> This case primarily turns on one fundamental notion: Congress enacted the ... Act and the mandates of the Act are not open to change by the Commission or the courts. If the Commission believes those mandates inadequate to the task of regulating the ... industry in light of changed circumstances, the Commission must take its case to Congress. The Commission may not, instead, ignore congressional directives because it believes "traditional tariff regulation" is "unnecessary" and "counterproductive." Justice Scalia made this point most recently in *MCI v. AT&T:*

> [O]ur estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the [Act]. For better or worse, the Act establishes a rate-regulation, filed-tariff system ..., and the Commission's desire "to 'increase competition' cannot provide [it] authority to alter the well-established statutory filed rate requirements," .... "[S]uch considerations address themselves to Congress, not to the courts."

43 F.3d at 1519 (quoting *MCI v. AT&T*, 512 U.S. at 234) (other internal citations omitted by *Southwestern Bell*).

Thus, FERC's complaint that compliance with the statute's file-all-new-rates requirement would render its own policy choices pointless is "ultimately irrelevant." *Id*. at 1520. Whether a system in which changes in rates and charges did not have to be filed before they went into effect would be a better one because it would allow the agency greater flexibility to give effect to market conditions that the agency believes produce reasonable rates is not for the agency or this Court to decide. Congress already made that choice, and advance filing of rate changes was "'*Congress's* chosen means of preventing unreasonableness and discrimination in charges.'" *Id*. at 1524 (quoting *MCI*, 512 U.S. at 230) (emphasis added). "Congress is free to select the remedial tools it deems appropriate .... The [agency] cannot abandon the legislative scheme because it thinks it has a better idea." *Id*. at 1525. The "different regime of regulation" FERC has substituted for the one enshrined in the FPA "may or may not be a better regime, but is not the one that Congress established." *Id.* at 1526. It is indeed "pointless" (to use FERC's word) for FERC

to take actions that conflict with the statute, but that is because such actions are unlawful.

II. FERC's MBR Rule Also Violates the FPA's Fundamental Substantive Command that Wholesale Power Rates Be "Just and Reasonable."

The MBR Rule's incompatibility with the FPA's central requirement of advance filing of changes of rates and charges is reason enough to set it aside as not in accordance with law and in excess of statutory authority. However, the MBR Rule is unlawful not only in that it cannot be squared with Congress's chosen *mechanism* for regulation of wholesale power rates—the file-all-new-rates requirement—but also because it conflicts with the *substantive standard* that the filing requirement is designed to effectuate: Congress's command in § 824d(a) that "[a]ll rates and charges" for wholesale electricity "shall be just and reasonable." FERC's substitution of the standards of the marketplace for its own obligation to ensure that rates are just and reasonable is unlawful.

A. FERC May Not Rely on the Market as the Measure of What Is Just and Reasonable.

As the Supreme Court emphasized in *Morgan Stanley*, "There is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff—the just-and-reasonable standard." 128 S. Ct. at 2745. Although the standard does not leave FERC "bound to any one ratemaking formula," "FERC must choose a method that entails an appropriate 'balancing of the investor and the

consumer interests.'" *Id*. at 2738 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)). Such a balance, moreover, must give due regard to what then-Judge Scalia, writing for the D.C. Circuit, described as "the Federal Power Act's primary purpose of protecting the utility's customers." *Elec. Dist. No. 1*, 774 F.2d at 192-93. The statutory "just and reasonable" standard was intended to serve this purpose by "afford[ing] consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378, 388 (1959).

In *FPC v. Texaco, Inc.*, the Supreme Court construed the requirement of just and reasonable rates under the parallel provisions of the Natural Gas Act to foreclose the Commission from relying on market forces to determine the reasonableness of rates charged by sellers—even sellers the Commission had determined to lack market power. *See* 417 U.S. at 394-400. The Commission had purported to issue a "blanket" certificate (similar to the market-based-rate tariffs at issue here) authorizing small producers of natural gas to sell gas "at the price the market would bear" and relieving them from statutory rate filing requirements. *Id.* at 384. Although the Commission "asserted" that it would continue "to review new contract prices charged by small producers 'to assure . . . the reasonableness of the rates charged by such producers pursuant to the action we are taking herein,'" *id.* at

397, the Supreme Court concluded that the "implication" of its action was that "reasonableness would be judged by the standard of the marketplace." *Id.* at 396.

The Court held that such a yardstick for determining the lawfulness of rates could not be squared with the requirement that *all* rates be just and reasonable, or with the Act's erection of an administrative structure requiring the Commission rather than the marketplace to apply that standard:

> [I]n our view the prevailing price in the marketplace cannot be the final measure of "just and reasonable" rates mandated by the Act. It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas. Hence, the necessity for regulation and hence the statement in [*FPC v. Sunray DX Oil Co.*, 391 U.S. 9, 25 (1968)], that if contract prices for gas were set at the market price, this "would necessarily be based on a belief that the current contract prices in an area approximate closely the 'true' market price—the just and reasonable rate. Although there is doubtless some relationship, and some economists have urged that it is intimate, such a belief would contradict the basis assumption that has caused natural gas production to be subjected to regulation. ..." (Footnote omitted.)
>
> In subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price. .... This does not mean that the market price of gas would never, in an individual case, coincide with just and reasonable rates or not be a relevant consideration in the setting of area rates, ... it may certainly be taken into account along with other factors .... It does require, however, the conclusion that Congress rejected the identity between the "true" and the "actual" market price.

Id. at 398-99 (footnote and citations omitted).

In rejecting the Commission's reliance on its belief that market prices charged by small producers would be reasonable, the Court pointed out that "there is no finding in the Commission's order as to the actual impact the projected market price increases would have on consumer expenditures for gas." *id*. at 399, and that, even if the Commission had found only a small impact, the Act "does not say a little unlawfulness is permitted." *Id*. The Court acknowledged that "[i]t may be, as some economists have persuasively argued, that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today." *Id*. at 400. Whatever its own view of that matter—or the Commission's view—might be, the Court declined "to overturn congressional assumptions embedded into the framework of regulation established by the Act." Id. Such sweeping changes are, instead, "a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process." *Id.*

Likewise, *Lockyer* declined to label market-based-rates per se unlawful—the Court stated that there is "nothing inherent in the *general concept* of a market-based tariff that violates the FPA," 383 F.3d at 1014 (emphasis added)—but it recognized that FERC may not "rel[y] on market forces alone in approving market-

based tariffs." *Id.* at 1013.[10] Indeed, *Lockyer* recognized that the Supreme Court's decisions precluded exclusive reliance on market-based-rates as the touchstone of reasonableness even in "highly competitive markets." *Id*. at 1013 (citing *Maislin*).

Thus, *Lockyer*'s view that FERC's market-based-rate scheme did not "facial[ly]" (*id*.) violate the FPA by relying only on market forces to determine the justness and reasonableness of rates rested not only on FERC's "ex ante" determinations that sellers lacked market power (*id*.), but also, crucially, on what the Court saw as checks to ensure that actual market-based-rates were in fact just and reasonable. Specifically, the Court relied on its understanding that "FERC required the wholesale seller to file a market analysis every four months," *id*., allowing FERC to "determine ... whether market forces were truly determining the price." *Id*. at 1014.[11] Most critically, *Lockyer* based its conclusion that FERC was not relying solely on market forces on the understanding that FERC would review the after-the-fact quarterly reports of actual prices charged by sellers over the past three months "to determine whether the rates were 'just and reasonable.'" 383 F.3d at 1014; *see also id*. at 1013 (referring to FERC's reliance on rate-reporting

[10] *Lockyer*'s recognition that FERC could not rely on market forces alone was consistent with *Texaco*, though it cited *Maislin* and *MCI* rather than *Texaco*.

[11] The Supreme Court in *Morgan Stanley*, citing this passage in *Lockyer*, similarly expressed its understanding that under a market-based-rate tariff, a seller "must also demonstrate every four months that it still lacks or has adequately mitigated market power." 128 S. Ct. at 2741.

requirements "to ensure that the rate is 'just and reasonable'"). As the Court put it, "[i]f the ability to ... gauge the 'just and reasonable' nature of the rates is eliminated, then effective federal regulation is removed altogether." *Id.* at 1015.

Lockyer's insistence that FERC do more than rely upon markets, and that it retain its own gauge of the justness and reasonableness of rates charged by power wholesalers, echoes not only *Texaco*, but also a number of decisions of the D.C. Circuit stressing that FERC cannot abandon its statutory obligation to ensure that rates are just and reasonable. For example, in *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984), the court held that FERC's attempt to permit oil pipelines to charge market-based rates (subject to caps) "failed to satisfy th[e] statutory mandate" of "'just and reasonable' rates." *Id*. at 218. Although recognizing that FERC was not limited to any one method of determining just and reasonable rates, the court held that it was required to ensure that rates were "neither 'less than compensatory' nor 'excessive.'" *Id*. at 219. Faulting FERC for its "largely undocumented reliance on market forces as the principal means of rate regulation," *id.* at 225 (footnote omitted), the Court held that FERC's scheme violated the statute because there was "nothing in the "regulatory scheme" to determine whether "competition ... drives actual prices back down into the zone [of reasonableness]" or "to check rates if it does not." *Id.* at 226. Because "FERC failed to show that the rates resulting from its newly

articulated ratemaking principles would *necessarily* satisfy the 'just and reasonable' standard," *id.* at 227 (emphasis added), the court held that FERC's allowance of market rates "contravene[d] its statutory responsibilities." *Id.*

Similarly, in *Tejas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990)—a case cited in *Lockyer* for its dictum that it is "rational' to assume that the terms of voluntary agreements "in a competitive market" between buyers and sellers who lack market power are reasonable, *id*. at 1004 (quoted in *Lockyer*, 383 F.3d at 1013)—the court's actual *holding* was that FERC could *not* find a market rate lawful absent "substantial evidence upon the basis of which the Commission could conclude that market forces will keep ... prices in reasonable check." 908 F.2d at 1005. Moreover, the court emphasized that in considering whether market forces would produce reasonable rates, FERC could not ignore the possibility that buyers would be relatively indifferent to the prices charged by sellers because (like the retail electric utilities that buy power from wholesalers in transactions governed by the FPA), the buyers "might with reason assume that they can recover from end users any costs they incur" in the transactions at issue. *Id*. at 1005.

Even in *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993), where the D.C. Circuit stated that market-based gas rates were consistent with the

Natural Gas Act's requirement of just and reasonable rates,[12] the court did not countenance reliance by FERC simply on the theory that markets would produce just and reasonable rates. Rather, the court stressed that FERC had both made a specific finding that the relevant market was a competitive one, *see id*. at 870-71, *and* that FERC would continue to review rates actually charged to "assure that a market (*i.e.*, negotiated) rate is just and reasonable." *Id.* at 870. Similarly, in *Interstate Natural Gas Association v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), the court upheld market rates for gas pipelines only after a rigorous analysis of the *Farmers Union* analysis, requiring FERC to show detailed empirical evidence that market rates could be expected to be within a zone of reasonableness (that is, neither excessive nor insufficiently compensatory), and to demonstrate that it had the ability to "check" excessive rates if it found that competition had not in fact resulted in just and reasonable rate. *See id.* at 31-35.

B. FERC's MBR Rulemaking Fails to Ensure Just and Reasonable Rates.

FERC's explanations for its MBR Rule show that it has failed to demonstrate that its market-based-rates scheme will ensure that rates are just and

[12] *Elizabethtown Gas* did not, however, hold that FERC's market-based-rate regime for gas was consistent with the Act's requirement that rates be filed and that sellers give advance notice of changes in rates. The court declined to reach that issue because it had not been properly preserved before the agency or in the petitioners' opening brief. *Id.* at 871.

reasonable, as the statute requires. FERC's system fails to satisfy the criteria set forth in *Texaco*, *Lockyer*, and the other cases discussed above.

First, FERC has not even made the basic finding that, as *Elizabethtown Gas* indicates, is the necessary premise of any system that relies on the market to determine just and reasonable rates: that the market for wholesale electrical power is in fact competitive. *See Elizabethtown Gas*, 10 F.3d at 870-71; *see also Lockyer*, 383 F.3d at 1012 ("approval of such tariffs was conditioned on the existence of a competitive market"); *Tejas Power*, 908 F.2d at 1004. Here, FERC has expressly disclaimed any finding that power markets themselves are competitive, and has limited it analysis to whether particular sellers have market power. Order 697-A at ¶¶ 425-26. But absent a competitive market, sales by an individual seller in that market, even one without market power, will reflect the noncompetitive nature of the market as a whole. FERC offers no reasoned explanation of why it is adequate to look only at individual sellers, rather than whether competitive markets exist.

Second, FERC has engaged in no empirical analysis, let alone offered "substantial evidence" (*Tejas Power*, 908 F.2d at 1005), that competition among sellers with market-based-rate authority will in fact drive rates to reasonable levels—levels that do not offer excessive returns to sellers or impose hardship on the ultimate consumers of power. *See Farmers Union*, 734 F.2d at 1501-10; *Tejas Power*, 908 F.2d at 1005; *Interstate Natural Gas Ass'n*, 285 F.3d at 30-33. FERC

instead has asserted that "markets rates *can be* just [and] reasonable," Order 697-A at PP 435, 453 (emphasis added), and that courts, including this court in *Lockyer*, have so held.

FERC's answer begs the question. The issue is not whether a rate determined in some manner "can" be just and reasonable. Even rates determined by throwing darts "can" be just and reasonable. The issue is whether they will "necessarily satisfy the 'just and reasonable' standard." *Farmers Union*, 734 F.2d at 1510. The FPA, after all, requires that all rates "shall" be just and reasonable, not just that they "can" be. 16 U.S.C. § 824d(a). And FERC offers no analysis or evidence, beyond its own faith in the outcome of market transactions in which individual sellers lack market power, to demonstrate that market-based-rates are in fact just and reasonable.

Indeed, FERC's analytical framework does not even allow it to attempt such a demonstration, because it has no benchmark for the justness and reasonableness of market-based rates beyond whether, in its view, a seller has market power and has not engaged in manipulative practices. In the absence of such failures of the market, FERC appears to take the position that market rates are necessarily and, indeed, as a matter of law, reasonable. *See* Order 697-A at ¶¶ 417, 419, 435, 453. Again, however, FERC has it backwards. The courts, from the Supreme Court in *Texaco*, to the D.C. Circuit in *Farmers Union*, *Tejas Power*, *Elizabethtown Gas*

and *Interstate Natural Gas Association*, to this Court in *Lockyer*, have repeatedly insisted that agencies operating under a mandate of just and reasonable rate regulation must offer some standard *other than* the operation of market forces to test whether a market-based-rate system will produce the required just and reasonable rates. FERC has entirely failed to do so.

Third, the MBR Rule makes clear that the promise of regular after-the-fact monitoring to assure that sellers remain without market power, on which this Court relied in *Lockyer*, is much less stringent than the *Lockyer* Court understood. In *Lockyer*, this Court stated that market-based-rate sellers would be required to submit updated market analyses every four months (that is, three times a year) to demonstrate that they continued to meet FERC's no-market-power criterion. *See* 383 F.3d at 1013; *see also Morgan Stanley*, 128 S. Ct. at 2741. The MBR Rule, however, makes clear that FERC is in fact requiring only "*triennial*" market analysis updates, Order 697, at ¶ 3 (emphasis added)—that is, a market analysis not every four months, but "every *three years*." 18 C.F.R. § 35.37(a)(1) (emphasis added). Moreover, for an entire category of smaller power producers (so-called "Category 1" sellers that control less than 500 MW of generation and meet certain other criteria), FERC has eliminated the updated market analysis requirement entirely. *See* Order 697 at ¶ 30. Thus, like the small market participants in *Texaco*, these entities effectively receive perpetual market-based-rate authority unless

someone without the benefit of an updated analysis later carries the burden of proving that they possess market power.

Fourth, and most importantly of all, the MBR Rule makes clear that the promise of ongoing review to ensure that market-based-rates are "just and reasonable," on which this Court relied in *Lockyer*, is illusory. The MBR Rule makes clear that FERC has no intention to examine the after-the-fact reports of rates charged under market-based-rate tariffs to determine whether the rates *themselves* are in fact just and reasonable, and no criteria that could guide it in doing so. Although FERC maintains that it is not relying solely on the market to enforce the requirement of just and reasonable rates, its explanation of how it will use reported rates as a check on the operation of its scheme reveals just the opposite. FERC promises only to examine reported rates to determine if they suggest that sellers have acquired market power or engaged in manipulative practices, in which case their market-based-rate authority may be prospectively revoked, with no remedy to correct unreasonable rates or charges. *See* Order 697-A, at ¶¶ 417-19. But absent such market failures, FERC conclusively presumes that, by definition, "rates resulting from competitive forces will not be excessive to customers and will allow the seller the opportunity to earn a fair return." *Id*. at ¶ 419.

Thus, at the end of the day, FERC relies solely on competitive market forces to determine whether a rate is just and reasonable—exactly what the Supreme Court in *Texaco* and this Court in *Lockyer* said FERC cannot do. As in *Texaco*, FERC has *claimed* that it is not relying solely on the market and is not abdicating its responsibility to review the justness and reasonableness of rates. *See* 417 U.S. at 397. But, as in *Texaco*, the Commission's "generalities do not supply the requisite clarity" that the agency is fulfilling its statutory responsibilities. *Id*. And when one moves beyond the generalities to examine what FERC is actually doing, it becomes evident that it is relying solely on what it regards as a fair market (one in which individual sellers lack market power and do not engage in misconduct) to produce just and reasonable rates, with neither any evidence that it will in fact do so, any ongoing review to ensure that it does, or any standard by which to judge whether it does. Such a regulatory scheme does not comply with the statute's command that rates "shall be just and reasonable." 16 U.S.C. § 824d(a).

* * *

The MBR Rule is premised on FERC's assertion that it has authority, upon finding that particular sellers of wholesale electricity lack market power, to (1) excuse those sellers from compliance with the Act's central regulatory mechanism, the requirement of advance filing of all changes in rates or charges so that they may be reviewed (and, if appropriate) suspended before they go into

effect, and (2) abdicate its own responsibility to determine the justness and reasonableness of rates offered by those sellers and substitute the standard of the marketplace for the statutory standard of lawfulness. FERC may or may not be correct that the MBR Rule reflects sound policy—a doubtful proposition in light of the troubles that the power market has suffered through during the ascendancy of market-based-rates and that have been thoroughly documented in the many opinions this Court has written arising from the crisis of 2000-2001. But that policy question is not the issue here.

The issue is, rather, whether FERC's action can be squared with its statutory authority. FERC's MBR Rule twists the FPA beyond anything that its congressional authors would recognize. Congress enacted a statute requiring rate regulation, and the rate-filing requirements it included in that statute are the "essential characteristics" of such a statutory scheme. *MCI*, 512 U.S. at 231. FERC has substituted a scheme of rate-deregulation, coupled with an abandonment of the statute's critical file-all-new-rates requirement.

The agency lacks the authority to turn its own governing statute upside-down. As the Supreme Court observed in *MCI*, "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Id*. It certainly did not do so in the FPA. If the FPA is to be rewritten to substitute unfiled market rates for

filed, just and reasonable rates, it is up to Congress to do so. *Maislin*, 497 U.S. at 136. Unless and until it does, both the conflict between the MBR Rule and the Act's express requirement of advance filing of changes in rates and charges, and the conflict between the MBR Rule and the Act's command that rates be "just and reasonable," provide independent bases for setting aside the MBR Rule.

CONCLUSION

For the foregoing reasons, this Court should set aside FERC's MBR Rule as not in accordance with law and in excess of statutory authority.

Respectfully submitted,

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

Lynn N. Hargis
Public Citizen, Inc.
215 Pennsylvania Avenue SE
Washington, DC 20003
(202) 454-5183

Attorneys for Petitioners in No. 08-74443 (Public Citizen, Inc., Colorado Office of Consumer Counsel, and Public Utility Law Project of New York, Inc.)

John S. Wright
Michael C. Wertheimer
Assistant Attorneys General
Connecticut Office of the
Attorney General
10 Franklin Square
New Britain, CT 06051
(860) 827-2620

Lisa Madigan, Attorney General for
the State Of Illinois
By: Michael Scodro
Solicitor General
Janice A. Dale
Assistant Attorney General
Office of the Illinois Attorney General
100 West Randolph Street
11th Floor
Chicago, IL 60601
(312) 814-3736

Patrick C. Lynch, Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

Counsel for Petitioners in No. 08-74439 (Richard Blumenthal, Attorney General for the State of Connecticut, Lisa Madigan, Attorney General of the State of Illinois, and Patrick C. Lynch, Attorney General of the State of Rhode Island)

September 23, 2010

STATEMENT OF RELATED CASES

Petitioners and counsel are aware of no related cases pending in this Court, with the exception of No. 08-71827, *Montana Consumer Counsel v. FERC*, a petition from the same underlying orders. At the time of submission of this brief, a motion by the petitioner in No. 08-71827 to dismiss the petition is pending. There were originally four other related petitions all arising from the same order, Nos. 08-72672, 08-72673, 08-72675, and 08-74442, but all of those petitions have been dismissed. All of the related petitions were consolidated by order of this Court issued November 13, 2008.

.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionally-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Office Word 2007), contains 13,810 words.

September 23, 2010

/s/Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2010, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all parties participating in the case are represented by lawyers/law firms that are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

September 23, 2010

/s/ Scott L. Nelson
Scott L. Nelson