NO. 11-1009

In the
Supreme Court of the United States

PUBLIC CITIZEN, INC., ET AL.,

PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,

RESPONDENTS.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' decision, which conflicts with no decision of any circuit or this Court, correctly held that the Federal Energy Regulatory Commission complied with the Federal Power Act in promulgating a final rule that codifies its long-standing policies authorizing the sale of wholesale electricity at market prices, subject to extensive, continuing regulatory oversight.

PARTIES TO THE PROCEEDINGS

Petitioners inaccurately state that the Electric Power Supply Association was the only intervenor in support of the Federal Energy Regulatory Commission that actively participated in the proceedings before the court of appeals. In fact, respondents PPL EnergyPlus, LLC and PPL Montana, LLC also actively participated in the proceedings below and joined the brief filed by the Electric Power Supply Association.

RULE 29.6 STATEMENT

Respondent Electric Power Supply Association ("EPSA") is a national trade association that represents competitive power suppliers and is incorporated under the laws of the District of Columbia. There is no parent corporation or any publicly held corporation that owns 10 percent or more of EPSA's stock. EPSA's members include 15 companies, along with numerous associate and supporting members and state and regional partners, that represent the competitive power industry in their respective regions.

Respondents PPL EnergyPlus, LLC and PPL Montana, LLC are wholly owned, indirect subsidiaries of PPL Corporation, whose shares are publicly traded. PPL EnergyPlus, LLC and PPL Montana, LLC each sell wholesale electricity at market prices. *See Montana Consumer Counsel v. FERC*, 326 Fed. Appx. 990 (9th Cir. 2009) (upholding Commission's grant of market-based rate authority to PPL Montana). No other publicly traded company has a 10 percent or greater ownership interest in PPL Energy Plus, LLC, PPL Montana, LLC, or PPL Corporation.

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The opinion of the court of appeals is reported at 659 F.3d 910, and is reproduced in the petition's appendix at 1a. The Federal Energy Regulatory Commission's order (Order 697) is reported at 119 FERC ¶ 61,295 (2007) and 72 Fed. Reg. 39,904 (2007), and is reproduced in the petition's appendix at 23a. The Commission's rehearing order (Order 697-A) is reported at 123 FERC ¶ 61,055 (2008) and 73 Fed. Reg. 25,832 (2008), and is reproduced in the petition's appendix at 89a.

STATEMENT

Over the last two decades, the Federal Energy Regulatory Commission has taken steps to protect consumers and to promote competition in the nation's energy markets by implementing reforms to permit market-based pricing of wholesale power sales, subject to the Commission's extensive, continuing regulatory oversight. Congress confirmed the validity of this approach by enacting the Energy Policy Act of 2005, which includes multiple provisions premised on the Commission's authority to approve market-based rate tariffs. Moreover, every court to have considered the issue has upheld the Commission's market-based rate regime as a permissible exercise of the broad discretion granted to the agency under the Federal Power Act. The unanimity with which courts have upheld the Commission's market-based rate regime is unsurprising given the importance of market-based rates to maintaining competitive and reliable energy markets throughout the country. Economists and policymakers from all sides of the political spectrum

have recognized that market-based reforms have provided enormous benefits to consumers.

This case arises out of rulemaking proceedings in which the Commission codified its long-standing market-based rate policies, with certain modifications and enhancements. *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Servs. by Public Utils.*, Order 697, FERC Statutes & Regs. ¶ 31,252, 119 FERC ¶ 61,295 (2007) (Pet. App. 23a). Hundreds of parties with interests in the electricity markets, including buyers, sellers, regulators, and consumer groups, commented on the proposed rule and, after numerous requests for rehearing and clarification, the Commission issued a series of orders refining the rule in response to their concerns. *See* Order on Reh'g and Clarification, 124 FERC ¶ 61,055 (July 17, 2008); Order on Reh'g, Order 697-B, 125 FERC ¶ 61,326 (Dec. 19, 2008); Order on Reh'g, Order 697-C, 127 FERC ¶ 61,284 (June 18, 2009); Order on Reh'g, Order 697-D, 130 FERC ¶ 61,206 (Mar. 18, 2010); Order on Request for Clarification, 131 FERC ¶ 61,021 (Apr. 15, 2010). In the wake of those proceedings, almost all of the parties who sought rehearing and had initially filed petitions for review dismissed their appeals. Pet. App. 6a.

The only parties who have continued to challenge the Commission's final rule are the petitioners in this case—two public policy groups, one state office of consumer counsel, and three State Attorneys General. None of these parties is directly regulated by, or subject to, the Commission's regulations. None of them participates in the markets affected by the Commission's regulations. And none of them object to

the specific details of the Commission's final rule. Instead, they all contend that the Commission's final rule is invalid on its face, arguing that the Federal Power Act locks the Commission into an inefficient, command-and-control model of regulation and prohibits the Commission's two decades of efforts to introduce competition into the nation's wholesale electric power markets. In particular, petitioners contend that the statutory requirements that rates be "just and reasonable," 16 U.S.C. § 824d(a), and that parties provide 60-days advance notice of "changes" in rates unless otherwise ordered by the Commission, *id.* § 824d(d), prohibit the Commission from implementing market-based reforms and authorizing market-based rate tariffs.

These arguments are the same arguments that courts have repeatedly rejected. *Every* court to have opined on the issue has reached the same conclusion: the Commission's longstanding market-based rate regime does not violate the Federal Power Act. *See, e.g., California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004); *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998); *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000). Indeed, with minor variations, petitioners' arguments are the same arguments that were presented to this Court in two earlier petitions, which this Court denied. *See Office of Consumer Counsel v. FERC*, 552 U.S. 1310 (2008); *California v. Coral Power, LLC*, 551 U.S. 1140 (2007).

There is no reason for a different result here. The court of appeals properly rejected petitioners' request to rewrite the Federal Power Act and second-

guess the Commission's expert determinations. Certiorari is unwarranted.

REASONS FOR DENYING THE PETITION

The Court should deny the petition for at least three reasons. *First*, no decision of this Court or any court of appeals conflicts with the lower court's holding that the Commission's market-based rate regime comports with the requirements of the Federal Power Act. *Second*, the court of appeals correctly held that the Commission's market-based rate regime does not violate any statutory requirement. In fact, Congress ratified the regime when it enacted the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, which includes multiple provisions that would make no sense if, as petitioners contend, the Commission lacked authority to approve market-based rate tariffs. *Third*, denying the petition would not raise any issues of exceptional importance. In contrast, granting the relief petitioners seek could have devastating consequences for the nation's energy markets and the consumers who rely on those markets. In light of these risks, and because the decision below preserves petitioners' ability to pursue an appropriate as-applied challenge, there is no reason the Court should entertain petitioners' sweeping facial attack on the Commission's final rule.

I. There Is No Conflict In Authority Warranting This Court's Intervention.

Petitioners contend that the Commission's market-based rate regime violates the statutory requirements (1) that all "rates and charges" for wholesale electricity be "just and reasonable," and (2) that no changes in rates can occur "except after

sixty days' notice to the Commission and to the public." 16 U.S.C. § 824d. In petitioners' view, these requirements prevent the Commission from relying on market forces to help ensure that rates are just and reasonable, and require the Commission to receive advance notice of every fluctuation in *price* that might occur under a market-based rate tariff. This cramped interpretation of the statute is unreasonable and unworkable, and has never been accepted by any court.

Petitioners have not and cannot identify any conflict in existing precedent that might warrant this Court's intervention. As this Court has previously recognized, both "the Ninth Circuit and the D.C. Circuit have generally approved" the "scheme of market-based tariffs." *Morgan Stanley Capital Grp. Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 538 (2008). These courts have consistently held that allowing suppliers to sell at market-based rates, when combined with appropriate reporting requirements and continuing regulatory oversight, benefits consumers and is "perfectly reasonable." *Louisiana Energy*, 141 F.3d at 371; *Lockyer*, 383 F.3d at 1016. No court has ever disagreed.

Unable to identify any court that has reached a contrary conclusion, petitioners suggest that the decision below "cannot be squared" with certain D.C. Circuit precedent. *See* Pet. 17, 20–23, 28–29. But they neglect to mention that in another, more recent D.C. Circuit case—*Colorado Office of Consumer Counsel v. FERC*—certain state Attorneys General and public interest groups (including petitioner Public Citizen, Inc.) raised the same arguments relying on the same precedent that petitioners have

advanced here. *See Colorado Office of Consumer Counsel v. FERC*, Petitioners' Brief, No. 04-1238, 2007 WL 432409 (D.C. Cir. Feb. 7, 2007). Those arguments were rejected by the D.C. Circuit as not even meriting discussion. *See Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007). Continuing to press the issues, petitioners in that case sought rehearing en banc, which was denied by the D.C. Circuit, and then filed a petition seeking review by this Court, which was also denied. *See Office of Consumer Counsel v. FERC*, 552 U.S. 1310 (2008); *Office of Consumer Counsel v. FERC*, Petition for a Writ of Certiorari, No. 07-835, 2007 WL 4618414 (Nov. 19, 2007).

There is thus no basis for suggesting that the D.C. Circuit would disagree with the holding below. To the contrary, since its *Consumer Counsel* decision, the D.C. Circuit has continued to issue decisions premised on the view that the Commission's market-based rate regime conforms to the statutory requirements. *See*, *e.g.*, *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 988 (D.C. Cir. 2009); *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009); *see also Mobil Pipe Line Co. v. FERC*, __ F.3d. __, 2012 WL 1292564 (D.C. Cir. Apr. 17, 2012) (discussing the Commission's market-based rate regime as applied to oil pipelines). Indeed, the decision below relies expressly on D.C. Circuit precedent as supporting its conclusions. *See* Pet. App. 9a (citing *Blumenthal*, 552 F.3d at 882); *id.* at 14a (citing *Louisiana Energy*, 141 F.3d at 365; *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870–71 (D.C. Cir. 1993)).

Petitioners also suggest that the decision below is inconsistent with the Ninth Circuit's earlier *Lockyer*

decision. *See* Pet. 29. But the Ninth Circuit itself squarely rejected that characterization, *see* Pet. App. 11a–12a, 15a–17a, 20a–21a, and this Court does not grant certiorari to review purported conflicts in decisions originating from the same courts of appeals. (If petitioners perceived a conflict between the decision below and *Lockyer*, they should have petitioned for rehearing en banc.) In any event, the same arguments relying on the same precedent advanced by petitioners were also raised in an earlier conditional cross-petition challenging the *Lockyer* decision. *California v. Coral Power, LLC*, Conditional Cross-Petition for Writ of Certiorari, No. 06-1100, 2007 WL 419295 (Feb. 5, 2007). The Court also declined to grant review in that case. *California v. Coral Power, LLC*, 551 U.S. 1140 (2007).

In short, petitioners' claims of conflict cannot obscure the fact that every court to have considered the issue has upheld the legality of the Commission's market-based rate regime. This Court has previously denied requests to grant review in cases raising essentially identical issues. There is no reason for any different result in this case.

II. The Court Of Appeals Appropriately Upheld The Commission's Reasonable Interpretation Of The Statute.

That the court of appeals rejected petitioners' facial challenge is unsurprising; petitioners' arguments are meritless. The Commission's market-based rate regime satisfies the Federal Power Act's requirements. Indeed, Congress eliminated any doubt about the Commission's authority to approve

market-based rate tariffs when it enacted the Energy Policy Act of 2005.

A. The Commission's Market-Based Rate Regime Complies With The Statutory Requirements.

Petitioners' facial challenge fails because they cannot demonstrate that the Federal Power Act unambiguously precludes the Commission from adopting a market-based rate regime or that the Commission's interpretation is unreasonable. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005). In fact, the Commission's market-based rate regime complies with the statutory requirements because it requires sellers to file their market-based tariffs and to provide notice of any tariff changes. The Commission has reasonably concluded that, as long as a seller lacks market power and the Commission exercises continuing regulatory oversight, sales under an approved market-based tariff are presumptively just and reasonable and, because the sales will occur at the market-based rate, the statute does not require an unworkable 60-days notice of every fluctuation in the numeric price at which energy is bought and sold. That onerous requirement would not work in today's efficient, competitive, high-speed, and often high-volume energy markets.

1. The Commission's Market-Based Rate Regime Ensures That Rates Are "Just And Reasonable."

The requirement that rates be "just and reasonable" is "obviously incapable of precise judicial

definition" and, therefore, the Commission's rate decisions are entitled to "great deference." *Morgan Stanley*, 554 U.S. at 532. Because the statute does not "compel the Commission to use any single pricing formula," *Mobil Oil Exploration & Producing S.E., Inc. v. United Distrib. Cos.*, 498 U.S. 211, 224 (1991), courts have recognized the appropriateness of relying on market forces to help ensure that rates are just and reasonable. *See NRG Power Mtkg., LLC v. Maine Pub. Utils. Comm'n*, 130 S. Ct. 693, 700 n.4 (2010); *see also Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *Louisiana Energy*, 141 F.3d at 371.

Ignoring the deference owed to the expert Commission, petitioners cite cases holding that an agency may not deregulate an industry that Congress intended to regulate by relying *solely* on market forces to establish just and reasonable rates. These cases are readily distinguished because the Commission is not deregulating or relying solely on market forces. Instead, under the terms of its final rule, the Commission's approval of a market-based tariff is conditioned on both (1) an *ex ante* finding that the seller and its affiliates lack, or have adequately mitigated, market power; and (2) rigorous, post-approval monitoring enforced through extensive reporting requirements. Order 697 ¶ 953 (Pet. App. 48a–49a); *see also* 18 C.F.R. § 35.10b (requiring quarterly reports); *id.* § 35.37 (requiring triennial market power updates); *id.* § 35.42 (requiring sellers to report any changes relevant to their market-based rate authority). Because the Commission has imposed detailed reporting and monitoring requirements to put itself in a position to identify

market problems and to protect consumers, this is more than sufficient to satisfy the Commission's obligation to ensure that the market-based rate regime produces rates within a zone of reasonableness. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) (courts lack "authority to set aside any rate selected by the Commission" that falls within a "zone of reasonableness").

Petitioners mistakenly assert that the court's decision below "directly conflict[s]" with *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), Pet. 28, which overturned a decision of the Federal Power Commission to implement "a scheme of *total deregulation* by applying no standard of review at all to small-producer rates." *Morgan Stanley*, 554 U.S. at 546 (emphasis in original). In these circumstances, the Court concluded that the agency's order was "so ambiguous that it" fell "short of that standard of clarity that administrative orders must exhibit." *Texaco*, 417 U.S. at 395–96. The Court also observed that "[i]t is abundantly clear from the history of the [Natural Gas] 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," *Id.* at 397–98. Given this congressional finding, the Court concluded that the "prevailing price in the marketplace cannot be a *final measure* of 'just and reasonable' rates." *Id.* (emphasis added). As the Court explained, the agency lacked "authority to place *exclusive* reliance on market prices." *Id.* at 400 (emphasis added). There is no such congressional finding here.

More fundamentally, nothing in *Texaco* suggests that the Commission is precluded from relying on market forces as a tool that, when combined with extensive market monitoring, reporting, and regulatory oversight, as well as a prior finding that the seller lacks market power, helps to ensure that rates are just and reasonable. In fact, *Texaco* recognized that market prices "may certainly be taken into account" when setting rates and that the Commission could employ "indirect regulation" to satisfy the statutory requirements. *Id.* at 387, 389. As the Court confirmed in *FERC v. Pennzoil Producing Co.*, 439 U.S. 508 (1979), *Texaco* did not conclude that "rates would be *per se* unjust and unreasonable" merely because they are "related to the unregulated price of natural gas." *Id.* at 516. Instead, contrary to petitioners' characterization, *Texaco* "did not purport to circumscribe so severely the Commission's discretion to decide what formulas and methods it will employ to ensure just and reasonable rates." *Id.*; *see also Elizabethtown*, 10 F.3d at 870 ("nothing in *FPC v. Texaco, Inc.* precludes" the Commission "from relying upon market-based pricing").

Perhaps recognizing that *Texaco* cannot bear the weight of their position, petitioners pluck dicta from three D.C. Circuit decisions—*Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984), *Tejas Power Corp. v. FERC*, 908 F.2d 998 (D.C. Cir. 1990), and *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866 (D.C. Cir. 1993)—to suggest that as a pre-condition for implementing a market-based rate regime, the Commission must determine whether the market is "structurally competitive" and make a

finding based on "empirical evidence" that market forces will produce just and reasonable rates. Pet. 29–31. But petitioners are misreading these decisions. This same argument, relying on the same precedent, was litigated by one of these same petitioners and rejected by the D.C. Circuit in *Blumenthal*. *See* 552 F.3d at 882; *see also Lockyer*, 383 F.3d at 1013. As the D.C. Circuit held, there is no requirement that the Commission "establish the competitiveness of an entire market before permitting any participant to charge market-based rates." *Blumenthal*, 552 F.3d at 882. What matters "is whether an individual seller is able to exercise anticompetitive market power, not whether the market as a whole is structurally competitive." *Id.*; *see also* Pet. App. 9a.

The D.C. Circuit's conclusions in *Blumenthal* are consistent with this Court's decision in *Morgan Stanley*, which recognized that because "[m]arkets are not perfect … one of the reasons … parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce." 554 U.S. at 547. If a contract rate negotiated between two market participants is presumptively just and reasonable, regardless of whether the market is structurally competitive, *see id.* at 542, it follows logically that when a seller lacks market power (or its market power has been adequately mitigated), the rate at which it agrees to sell power to a buyer on the open market is also just and reasonable. Indeed, the *Mobile-Sierra* doctrine affirmed in *Morgan Stanley* was first articulated in the context of agreements negotiated by presumed monopolists. *See United Gas Pipe Line Co. v. Mobile*

Gas Serv. Corp., 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). There is no basis in the context of this facial challenge to assume, contrary to the agency's expert judgment, that the Commission's market-based rate regime will inevitably result in unjust and unreasonable rates.

2. The Commission's Market-Based Rate Regime Satisfies The Filed-Rate Requirement.

Petitioners also contend that the Commission's market-based rate regime violates the statutory requirement that no "change" in rates may occur "except after sixty days' notice to the Commission and to the public." 16 U.S.C. § 824d(d). In petitioners' view, the Commission must be given advance notice of not only the terms of the market-based rate tariff but also every fluctuation in the specific, numeric price that may occur under that tariff. *See* Pet. App. 19a (noting that petitioners mistakenly assume "rate" means "price"). The statute is not so inflexible or constraining. Instead, it provides that notice is required "[u]nless the Commission otherwise orders" and makes clear that, "for good cause shown," the Commission "may allow changes to take effect without requiring the sixty days' notice." *Id.*; 16 U.S.C. § 824d(d))

Exercising its broad discretion under the statute, the Commission has ordered that market-based rate tariffs qualify as valid filed rates, *see*, *e.g.*, Pet. App. 53a–62a, 150a–164a, and this reasonable determination has been consistently upheld by the lower courts. *See Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225 (9th Cir.

2007) (market-based tariffs qualify as valid filed rates); *Public Util. Dist. No. 1 of Grays Harbor v. IDACORP, Inc.*, 379 F.3d 641, 649 (9th Cir. 2004) (same); *Norwood*, 202 F.3d at 419 (same); *see also Lockyer*, 383 F.3d at 1008. As courts have recognized in other contexts, a "method or formula for calculating a rate … when enshrined in an approved tariff, is itself a 'filed rate.'" *ChevronTexaco Exploration & Prod. Co. v. FERC*, 387 F.3d 892, 894 (D.C. Cir. 2004).

Petitioners' alternative reading—that the statute requires every fluctuation in price for every sale made under a market-based tariff to be filed for 60 days before a buyer can purchase energy at that price—is unworkable and would prevent the Commission from fulfilling its statutory mission to implement procedural requirements ensuring that rates are just and reasonable. It is also inconsistent with this Court's recognition that when Congress enacted the Federal Power Act, it "rejected a pervasive regulatory scheme … in favor of voluntary commercial relationships." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); *Verizon Commc'ns Inc. v. FCC*, 535 U.S. 467, 479 (2002) (Congress "departed from the scheme of purely tariff-based regulation"). And it would have the absurd result of rendering unlawful not only the Commission's market-based rate regime but also long-established rate-setting approaches, including formula rates and umbrella tariffs that authorize sales at prices up to a prescribed ceiling.

The Commission "has been accepting formula rates since the early 1970s." *Public Util. Comm'n of Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001).

And courts have consistently rejected arguments that a formula rate is not a filed rate, holding that the Commission "need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' or a rate 'rule.'" *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990); *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1490 (10th Cir. 1995) (the Commission may approve not only a "specific numeric value" but also a "calculational formula or 'rate rule'"). Once a formula rate is filed and in effect, the actual amount that a seller charges a buyer for power "may constantly change … without prior notice to the Commission or the public," but that does not render the formula rate invalid. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007); *Louisiana Pub. Serv. Comm'n v. FERC*, 688 F.2d 357, 361 (5th Cir. 1982) (prices under formula rates will change to reflect "actual increases and decreases in cost").

The Commission's market-based rate regime follows a similar approach. In approving market-based rates, the Commission has effectively adopted a market-based "rate rule" under which changes in price will occur in accordance with what the market dictates. The Commission has reasonably determined that as long as the seller has no power to distort the market, and as long as the Commission continues to exercise close regulatory monitoring and oversight, including quarterly transaction reporting, the agreed-on price will be just and reasonable. It has also reasonably determined that, as long as the Commission and the public have notice that sales will occur at the market rate, the fact that the specific, numeric price may fluctuate does not mean that

advance notice of each and every change in price must be provided. *NSTAR*, 481 F.3d at 801. As the court of appeals correctly recognized, even if the statute does not clearly authorize the Commission to implement its market-based rate regime, the Commission's reasonable determinations are entitled to deference. Pet. App. 20a.

B. Congress Has Affirmed The Legality Of The Commission's Market-Based Rate Regime.

For reasons explained above, the Commission's market-based rate regime complies with the statutory requirements. If any faint shadow of doubt might ever have existed on that score, it was dispelled when Congress enacted the Energy Policy Act of 2005.

In 2005, Congress was well aware that for many years the Commission had interpreted the Federal Power Act as authorizing the agency to implement market-based rate regulation. *See Morgan Stanley*, 554 U.S. at 535–38 (describing history of the Commission's market-based reforms); *see also California Energy Markets—Refunds and Reform: Hr'g Before the Subcomm. on Energy Policy, Natural Res. and Regulatory Affairs of the H. Comm. on Gov't Reform*, 108th Cong. 41 (2003) (testimony of Commission Chairman that "since 1992, people have come in and asked for … authority to sell power at market-based rates"). It is therefore significant that when Congress enacted the Energy Policy Act of 2005, it did not seek to roll back the Commission's market-based policies. Instead, "against the background" of repeated and consistent agency action, Congress included specific provisions in the

statutory amendments that "effectively ratified" the Commission's market-based rate regime. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155–56 (2000); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 600–01 (1983).

Most notably, Congress established a special remedial provision for sales of wholesale electricity occurring before June 20, 2001, in circumstances where the Commission had "revoked the seller's authority to sell any electricity at *market-based rates*." Energy Policy Act of 2005, Pub. L. No. 109-58, § 1290(a)(2), 119 Stat. 984 (emphasis added). This provision would make no sense if, as petitioners contend, the Commission lacks statutory authority to authorize the sale of electricity at market-based rates in the first instance.

Other provisions of the 2005 statute are to the same effect. For example, Congress prohibited market-manipulation, making it "unlawful for any entity … to use or employ, in connection with the purchase or sale of electric energy … any manipulative or deceptive device or contrivance." *Id.* § 1283, 119 Stat. 979. Similarly, Congress directed the Commission to take actions to "facilitate price transparency in *markets* for the sale and transmission of electric energy." *Id.* § 1281, 119 Stat. 978 (emphasis added). Congress also provided the Commission with new enforcement authority over entities that make "short-term sale[s] of electric energy through an *organized market* in which rates for the sale[s] are established by Commission-approved tariff." *Id.* § 1286, 119 Stat. 981 (emphasis added). These provisions likewise confirm the legitimacy of the Commission's market-based rate

regime; they all presume the existence of rates set in a market and not through inefficient command-and-control regulation.

C. The Cases Cited By Petitioners Addressing Other Statutes In Other Contexts Are Readily Distinguished.

In light of the statutory scheme, Congress's 2005 statute, and the unbroken line of precedents that foreclose petitioners' cramped interpretation of the Federal Power Act, petitioners' heavy reliance on and extended discussion of cases addressing other statutes is both telling and beside the point. The cases cited by petitioners involve fundamentally different agency actions under fundamentally different statutory schemes.

In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), for instance, the Court struck down a policy of the Interstate Commerce Commission ("ICC") that prevented common carriers from recovering the filed rate from shippers if they had secretly negotiated a lower rate that was not on file with the ICC. 497 U.S. at 130–32. The Court held that the ICC's policy of enforcing unfiled, privately negotiated rates undermined "the basic structure" of the Interstate Commerce Act, which prohibited "the secret negotiation and collection of rates lower than the filed rate." *Id.* at 130, 132. The problem in *Maislin* was not that the rates were set in a market-based transaction but that those rates differed from the rates on file with the agency. Here, in contrast, sellers charge only the rate set forth in their market-based rate schedules on file with the Commission—that is, the market rate—and they do

so under a regulatory regime that ensures the absence of market power that could be abused in the type of secretly negotiated transactions addressed in *Maislin*. Sellers operating under market-based rate tariffs are not violating any statutory prohibition because their sales comply with the filed rate.

Similarly, in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Court invalidated a policy of the Federal Communications Commission ("FCC") to exempt "nondominant" carriers from the tariff-filing requirement of the Communications Act of 1934. 512 U.S. at 221. The agency's policy eliminated "the heart of the common-carrier section of the Communications Act"—the tariff filing requirement—and therefore could not be justified by the FCC's general authority to "modify" the statute's requirements. *See id.* at 229–32. Here, in contrast, the Commission has not eliminated the Federal Power Act's filing requirement. Instead, electricity sellers are required to file and abide by the terms of their market-based rate tariffs, and they must comply with a host of other regulatory requirements. Far from having "deregulate[d]" the wholesale power industry, *id.* at 220, the Commission exercises substantial continuing regulatory oversight. *See* App. 1–3 (listing investigations instituted by the Commission to determine whether to revoke a sellers' market-based rate authority).

Accordingly, unlike the common-carrier regulatory programs addressed in *Maislin* and *MCI*, the Commission's market-based rate regime requires all market-based rate applications to be publicly noticed, entitling interested parties to challenge a seller's market-based rate authorization. *See* Order

697 ¶ 962 (Pet. App. 55a); 18 C.F.R. §§ 385.211, 385.214. Sellers operating under market-based rate tariffs are required to file quarterly reports containing relevant details of each transaction during the preceding three months, which reflect thousands of transactions, including short-term sales for intervals as small as ten minutes. *See* Order 2001, 99 FERC ¶ 61,107, 67 Fed. Reg. 31,044 (May 8, 2002). Moreover, sellers are required to file triennially (and at any intervening time when so ordered) a detailed and updated market analysis that allows the Commission and the public to determine whether the seller has acquired market power or has otherwise gained the ability to erect barriers to entry. *See* 18 C.F.R. § 35.37. In addition, sellers are required to notify the Commission of "any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority." 18 C.F.R. § 35.42.

These features of the Commission's regulatory program underscore that, unlike the common carrier statutes at issue in *Maislin* and *MCI*, the "heart" of the Federal Power Act is the integrity of privately negotiated agreements. In a common carrier regime requiring that "rates to all shippers be uniform," *Mobile*, 350 U.S. at 338, one could reasonably expect greater emphasis on the filing of specific, numeric rates. But the Federal Power Act stands in "marked contrast" to statutes that require "rates to all shippers to be uniform." *Id.* As this Court has recognized, in enacting the Federal Power Act, "Congress departed from the scheme of purely tariff-based regulation and acknowledged that contracts between commercial buyers and sellers could be used

in ratesetting." *Verizon*, 535 U.S. at 479. Congress did so because it recognized that in "wholesale markets, the party charging the rate and the party charged [are] often sophisticated businesses enjoying presumptively equal bargaining power" who can be expected "to negotiate a 'just and reasonable' rate as between the two of them." *Id.*

III. Denying The Petition Would Not Raise Any Issues Of Exceptional Importance.

While no doubt a source of consternation to petitioners and other "critics" who have set their faces like flint against the pro-competitive policies of Congress and the Commission, *Morgan Stanley*, 554 U.S. at 548, the decision below is not exceptionally important in any way that would warrant this Court's intervention. The court of appeals rejected petitioners' sweeping facial challenge but made clear that petitioners are not precluded from bringing an as-applied challenge in an appropriate case where the Commission's policies can be tested in a concrete setting. Pet. App. 11a n.2, 16a n.5, 22a n.6. Given the posture of the case, and because there is no conflict in lower court authority, there is no reason for the Court to grant review. Absent an especially clear showing that the Commission's final rule, which codifies decades of long-standing agency practice, violates the statutory requirements—a showing petitioners have not come close to satisfying—there is nothing to gain from entertaining petitioners' broadside challenge to competition and market-based rates.

Petitioners seek to cloak their attempt to substitute their views for those of the expert agency

with soothing references to protecting consumers and unproven allegations about the root causes of the 2000-2001 western energy crisis. Pet. 31–32. But let there be no mistake: granting petitioners the relief they seek could have devastating consequences for the well-being of the nation's energy markets and harm the very consumers whose interests the few petitioners who remain in this case claim to be championing.

Invalidating the Commission's market-based rate regime would not, as petitioners mistakenly contend, impose careful regulation in the place of deregulation. As noted above, the Commission's market-based rate regime, with its extensive monitoring and reporting requirements, is hardly deregulatory. But it would upend the competitive markets that Congress and the Commission have sought to nurture. It would also likely wipe out important short-term markets for wholesale electricity that cannot function without market-based rate tariffs. *See generally* Energy Information Administration, U.S. Dep't of Energy, *The Changing Structure of the Electric Power Industry 2000: An Update*, at 63 (Oct. 2000) (without "approval to sell power at market-based rates, these competitive centralized markets could not exist"). And it would eliminate individually negotiated short-term transactions and hourly trades that occur outside of organized markets.

The Commission's market-based rate regime has become a central pillar of broader pro-competitive initiatives that have been pursued at both the federal and state level. *See Morgan Stanley*, 554 U.S. at 535–39. As a number of former Commissioners stated in an open letter supporting the Commission's market-

based rate program, the Commission has issued literally "thousands of competition-friendly rules and case decisions" in recognition that "the incentives and risk-allocation properties of competitive markets represent the best means to produce at the least cost the reliable supply of electricity needed for the nation's welfare and economic competitiveness." Vicky A. Bailey, *et al.*, Open Letter to Policy Makers, at 1 (May 31, 2007), *available at* http://www.epsa.org/forms/uploadFiles/8d9200000007.filename.Open_Letter_to_Policymakers.pdf. As of April 2006, the Commission had granted market-based rate authority to approximately 1,170 entities, including 390 independent power marketers, 100 power marketers affiliated with traditional utilities, and 30 financial institutions. *See* The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy*, at 31 (Apr. 2007), *available at* http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf; *see also* FERC, *Companies With Market-Based Rate Authority* (as of Apr. 30, 2012), *available at* http://www.ferc.gov/industries/electric/gen-info/mbr/list.asp.

These pro-competitive, market-based policies have delivered enormous benefits to consumers. *See, e.g.*, Department of Justice, *Economic Analysis Group, Electricity Restructuring: What Has Worked, What Has Not, and What is Next*, at 5 (Apr. 5, 2008), *available at* http://www.justice.gov/atr/public/eag/232692.pdf (there "is substantial evidence that significant benefits have been achieved by market restructuring"). As a number of noted economists have explained, "[a]mong economists, it is almost

universally accepted that well functioning competitive electricity markets yield the greatest benefits to consumers in terms of price, investment and innovation," and "there is growing evidence and convincing studies that show that consumers have saved billions of dollars in energy costs as a result of competitive markets when compared to the traditional regulation in effect before competition was implemented." Paul L. Joskow, *et al.*, Open Letter to Policymakers, at 1, 2 (June 26, 2006), *available at* http://www.competecoalition.com/files/Letter_062606.pdf.

It has been estimated that the Commission's pro-competition, market-based policies "resulted in $34 billion in savings to residential customers across the country between 1997 and 2004 compared to what would have been paid under traditional regulation." Bailey, *et al.*, Open Letter, at 2. As one would expect, market-based reforms have "improved the operating efficiency of power plants and helped lower costs." *Id.*; *see also* Frank Huntowksi, *et al.*, *Embrace Electric Competition Or It's Déjà Vu All Over Again*, at 3–4 (Oct. 2008), *available at* http://www.nbgroup.com/publications/Embrace_Electric_Competition_Or_Its_Deja_Vu_All_Over_Again.pdf.

The Commission's pro-competition policies have also facilitated the development of organized, bid-based markets administered by independent entities that have generated "significant savings for electricity buyers." ISO/RTO Council, *The Value of Independent Regional Grid Operators*, at 25 (Nov. 14, 2005), *available at* http://www.caiso.com/14c6/14c6c4291aa40.pdf; *see also RTO and ISO Markets are Essential to Meeting Our Nation's Economic, Energy and*

Environmental Challenges (Oct. 6, 2010), *available at* http:// www.competecoalition.com/files/RTO%20White%20Paper_update%2010.6.10.pdf; EPSA, *Organized Wholesale Markets Are Competitive and Delivering Benefits to Consumers* (Aug. 25, 2010), *available at* http:// www.epsa.org/forms/uploadFiles/16CC400000003.filename.EPSA_PowerFact_-_RTOs_Competitive_and_Providing_Benefits_to_Consumers.pdf. A 2006 study estimates a net savings of $1.2 million per day in portions of the East and Midwest where ISO/RTO markets have been established. See Scott M. Harvey, *et al.*, *Analysis of the Impact of Coordinated Electricity Markets on Consumer Electricity Charges*, at 1 (Nov. 20, 2006), *available at* http://www.hks.harvard.edu/hepg/Papers/LECG_Analysis_112006pdf.pdf. In addition, in presentations to the Commission, the New York Independent System Operator, Inc. reported that competitive, market-based pricing has resulted in a $2.2 billion savings in annual energy and capacity in its market, and PJM Interconnection, L.L.C., another regional transmission operator, reported cost efficiency savings across its footprint of $80 million to $105 million per year. *See* NYISO, *Market & Performance Metrics*, at 4 (Jan. 20, 2011) *available at* http://www.ferc.gov/EventCalendar/Files/20110120100409-2-NYISO-print.pdf; PJM, *2010 ISO/RTO Metrics Report PJM Highlights*, at 12 (Jan. 20, 2011), *available at* http://www.ferc.gov/EventCalendar/Files/20110120100702-6-PJM-print.pdf. These organized markets have also facilitated the development of renewable energy resources. *See* ISO/RTO Council, *2009 State of the Markets Report*, at 28–31; ISO/RTO Council, *Increasing Renewable Resources: How ISOs and RTOs Are Helping Meet*

This Public Policy Objective, at ES-2 (Oct. 16, 2007), *available at* http://www.isorto.org/atf/cf/%7B5B4E85C6-7EAC-40A0-8DC3-003829518EBD%7D/IRC_Renewables_Report_101607_final.pdf.

Any decision that accepts petitioners' suggestion that the Commission's market-based program is per se unlawful under the Federal Power Act would jeopardize these markets and set the stage for crisis. Even if one could ignore the billions of dollars in benefits that would be lost from a retreat from a competitive, market-based regime, there is no ignoring the substantial costs that such a retreat would impose on consumers. Moreover, thousands of market participants have built power plants, made other investments and ordered their affairs based on the pro-competitive policies that the Commission has implemented over the last two decades, which have been consistently upheld by courts, and which Congress affirmed in the 2005 legislation. Especially given the weakness of petitioners' arguments, and the lack of any conflict in authority, there is no basis for accepting petitioners' invitation to second-guess the Commission's expert judgment as to the most appropriate methods for regulating wholesale rates.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

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APPENDIX

This appendix reproduces materials included in an addendum to respondent-intervenors' brief filed in the court of appeals.

The following is a list of proceedings in which the Commission has instituted investigations under section 206 of the Federal Power Act to determine whether the market-based rate authority of affiliated groups of sellers should be revoked.

1. *Duke Power*,
   109 FERC ¶ 61,270 (2004).
2. *Southern Co. Energy Mktg., Inc and Southern Co. Servs., Inc.*,
   109 FERC ¶ 61,275 (2004).
3. *Alliant Energy Corporate Servs., Inc.*,
   109 FERC ¶ 61,289 (2004).
4. *Pinnacle West Capital Corp.*,
   109 FERC ¶ 61,295 (2004).
5. *The Empire District Elec. Co.*,
   110 FERC ¶ 61,214 (2005).
6. *Westar Energy, Inc. and Kansas Gas & Elec. Co.*,
   110 FERC ¶ 61,316 (2005).
7. *Tucson Elec. Power Co.*,
   111 FERC ¶ 61,037 (2005).
8. *Entergy Servs., Inc.*,
   111 FERC ¶ 61,145 (2005).
9. *Florida Power Corp.*,
   111 FERC ¶ 61,154 (2005).
10. *PacifiCorp and PPM Energy, Inc.*,
    111 FERC ¶ 61,205 (2005).

11. *South Point Energy Center, LLC*,
    111 FERC ¶ 61,239 (2005).

12. *Xcel Energy Servs. Inc.*,
    111 FERC ¶ 61,343 (2005).

13. *South Carolina Elec. and Gas Co.*,
    111 FERC ¶ 61,410 (2005).

14. *Exelon Generation Co., LLC*,
    112 FERC ¶ 61,027 (2005).

15. *PPL Montana, LLC*,
    112 FERC ¶ 61,237 (2005).

16. *BE Louisiana, LLC*,
    32 FERC ¶ 61,118 (2010).

17. *Dogwood Energy LLC*,
    132 FERC ¶ 61,120 (2010).

18. *Shell Energy North America (US), LP*,
    133 FERC ¶ 61,033 (2010).

The following is a list of proceedings in which the Commission has revoked the market-based rate authority of sellers for failure to timely file or for other deficiencies in their Electric Quarterly Reports.

1. *Electric Quarterly Reports*,
   105 FERC ¶ 61,219 (2004)
   (order revoking market-based rate authority of 39 market-based rate sellers).

2. *Electric Quarterly Reports*,
   Docket No. ER02-2001-003 (Sept. 20, 2004)
   (notice revoking market-based rate authority of 90 market-based rate sellers).

3. *Electric Quarterly Reports*,
   114 FERC ¶ 61,171 (2006)
   (order revoking market-based rate authority of eight market-based rate sellers).

4. *Electric Quarterly Reports*,
   115 FERC ¶ 61,073 (2006)
   (order revoking market-based rate authority of six market-based rate sellers).

5. 2008 Report on Enforcement at 30,
   Docket No. AD07-13-001 (Oct. 31, 2008)
   (FERC revoked market-based rate authority of two market-based rate sellers in FY 2008).

6. 2009 Report on Enforcement at 28–29,
   Docket No. AD07-13-002 (Dec. 17, 2009)
   (FERC revoked market-based rate authority of eight market-based rate sellers in FY 2009).

7. 2010 Report on Enforcement at 35–36,
   Docket No. AD07-13-003 (Nov. 18, 2010)
   (FERC revoked market-based rate authority of six market-based rate sellers in FY 2010).