ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1238

COLORADO OFFICE OF CONSUMER COUNSEL, *et al.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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FINAL BRIEF: January 9, 2007

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

All parties appearing before the Commission and this Court are listed in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review

The following orders of the Federal Energy Regulatory Commission are under review here:

1. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, "Order Amending Market-Based Rate Tariffs and Authorizations," 105 FERC ¶ 61,218 (2003), JA 135;

2. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, "Order on Rehearing," 107 FERC ¶ 61,175 (2004), JA 201.

C. Related Cases

Five related petitions for review, D.C. Cir. Nos. 04-1168, 04-1170, 04-1188, 04-1235 and 04-1237, were previously before this court but have been dismissed. Counsel is not aware of any other related cases pending before this or any other court.

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Michael E. Kaufmann
Attorney

January 9, 2007

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REGULATIONS:

GLOSSARY

Brief or Br.	Opening Brief of Petitioners re-filed August 30, 2006
CA Initial Br.	Consumer Advocates' Initial Opening Brief filed April 29, 2005
Commission or FERC	Federal Energy Regulatory Commission
Consumer Advocates	Petitioners Colorado Office of Consumer Counsel, *et al.*
EPAct	Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005)
FPA	Federal Power Act, 16 U.S.C. § 824 *et seq.*
JA	Joint Appendix
NGA	Natural Gas Act
Order No. 644	*Amendments to Blanket Sales Certificates*, FERC Stats. & Regs. ¶ 31,153 (2003)
Proposed Rules Order	*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC ¶ 61,349 at P 1 (2003), JA 69
Rehearing Order	*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 107 FERC ¶ 61,175 (2004), JA 201
Rules Order	*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), JA 135

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BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC"), in requiring that, in order to be just and reasonable, market-based rate tariffs of public utilities subject to FERC jurisdiction under the Federal Power Act ("FPA") must include provisions that prohibit any type of market manipulation ("Market Behavior Rules"), acted in accord with the notice and filing requirements of FPA Sections 205 and 206, 16 U.S.C. §§ 824d and 824e.

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The applicable statutes and regulations are set out in an addendum to this Brief. In addition, Appendix A includes the Market Behavior Rules and the Remedies and Complaint Procedures issued in the orders on review.

COUNTERSTATEMENT OF JURISDICTION

As will be explained more fully *infra*, this Court should dismiss this appeal for lack of jurisdiction on any of several grounds: (1) Petitioners' central challenge in this appeal – the legitimacy of market-based rates – was never appropriately before the Commission for resolution in the proceedings below; (2) Petitioners have failed to demonstrate injury arising out of the orders on appeal sufficient to warrant standing; (3) With the recent implementation of a new statutory and regulatory regime over the issues on appeal, Petitioners cannot claim meaningful relief from this Court; and (4) Petitioners did not adequately preserve several of their FPA arguments for appeal.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case resulted from the Commission's concern that existing tariffs and blanket certificates that allowed for market-based rates did not sufficiently ensure the consumer protection that is at the heart of FERC's responsibilities under the

FPA and the Natural Gas Act ("NGA").[1] In response to that concern, the Commission in late 2001 "proposed to condition all new and existing market-based rate tariffs and authorizations to include a provision prohibiting the seller from engaging in anticompetitive behavior or the exercise of market power." *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 103 FERC ¶ 61,349 at P 1 (2003) ("Proposed Rules Order"), JA 69.

The instant proceeding, commenced under FPA § 206, *id*. at P 10, JA 70, proposed tariff provisions designed to protect against problems and abuses encountered as part of the implementation of organized energy markets around the country, particularly those arising in the California energy markets during 2000-01. *Id*. at P 4, JA 69. Paper hearing procedures were established with comments and reply comments; in addition, FERC Staff held a technical conference in March 2001 to address the proposed tariff provisions that was followed by more comments. *Id*. at P 12, JA 70.

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[1] The challenged orders also required similar Market Behavior Rules to apply to natural gas companies subject to FERC jurisdiction under the NGA, 15 U.S.C. § 717 *et seq*. These gas company provisions of the orders are no longer on appeal.

The Proposed Rules Order put forward a set of market behavior rules for inclusion with all market-based rate tariffs and authorizations, *see generally id*. at pp. 62,375-78 and 62,380-81, JA 72-75, 77-78, and invited comments and reply comments. *Id*. p. 62,380 at P (D), JA 77. On November 17, 2003, the Commission established market behavior rules: on the electric side, the rules were specified in *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003) ("Rules Order"), JA 135; and, on the natural gas side, comparable regulations were set forth in *Amendments to Blanket Sales Certificates*, FERC Stats. & Regs. ¶ 31,153 (2003) ("Order No. 644"). Both orders mandated, *inter alia*, a general prohibition against market manipulation. *See* Rules Order at P 35, JA 74 (setting out Rule 2).[2]

Parties' requests for rehearing of both orders were generally denied, albeit with modifications of Rule 2's language. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 107 FERC ¶ 61,175 (2004) ("Rehearing Order"), JA 201.[3] Six petitions for review followed; only one remains before this Court.

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[2] On the gas side, *see* Order No. 644 at P 27 (setting out proposed 18 C.F.R. §284.288(a)).

[3] *See also In the Matter of Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 (2004).

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

FERC has been delegated authority to set just and reasonable rates for the wholesale sale of electric energy by FPA §§ 205 and 206, 16 U.S.C. §§ 824d and 824e. As relevant to this petition for review, the underlying proceeding arose from FERC's concern that the then-existing language of the tariffs authorizing sellers to employ market-based rate pricing was inadequate to ensure the level of customer protection required by the FPA. Proposed Rules Order at P 1, JA 69. To remedy those concerns, the Commission instituted proceedings under FPA § 206 to promulgate market behavior rules applicable to all sellers with market-based rate authority.

The primary goal of customer protection had to be balanced against the need for notice and a fact-specific resolution process in the promulgation of the rules, reflecting:

> first, the need to provide for effective remedies on behalf of customers in the event anticompetitive behavior or other market abuses occur; second, the need to provide clearly-delineated "rules of the road" to market-based rate sellers while, at the same time, not impairing the Commission's ability to provide remedies for market abuses whose precise form and nature cannot be envisioned today; and third, the need to provide reasonable bounds within which conditions on market conduct will be implemented so as not to create unlimited regulatory uncertainty for individual market participants or harm to the marketplace in general.

Rules Order at P 4, JA 136.

B. Events Leading to the Orders on Review

A paper hearing was conducted as part of the rules' promulgation, with parties having an opportunity to file comments and reply comments, and to participate in a technical conference that led to another round of comments. *See* Rules Order, Appendix C, JA 165-66 (listing 66 individual or groups of parties that filed comments). The comments "generally concurred that establishing a clear set of market behavior standards governing sellers' conduct in the wholesale markets is necessary." Rules Order at P 8, JA 137.

C. The Market Behavior Rules

Five petitions for review of the orders below took issue with different aspects of the Market Behavior Rules. However, after the enactment of the anti-market manipulation provisions of the Energy Policy Act of 2005 and FERC's implementation proceedings, *see infra* next section, these objections to the substance of the Market Behavior Rules became moot and those five petitions were dismissed.

Therefore, the details of the Market Behavior Rules are no longer being challenged. Nevertheless, for purposes of context, the Market Behavior Rules can be summarized as follows (and are included as Appendix A):[4]

Market Behavior Rule 1. Rule 1 related to generators and required sellers to operate, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with the Commission-approved rules and regulations of the applicable power market.

Market Behavior Rule 2. Rule 2, the centerpiece of the Market Behavior Rules, prohibited manipulative conduct, and was envisioned "to capture manipulative conduct in all its forms . . . [and] to prohibit market-based rate sellers from taking actions which interfere with the prices that would otherwise be set by competitive forces, or from manipulating market conditions or market rules." Rules Order at P 36, JA 141 (footnote omitted). Its subparts prohibited (a) "wash trades;" (b) transactions predicated on false information; (c) transactions in which

[4] In their request for rehearing and originally-filed brief, dated April 29, 2005, in this case, the Consumer Advocates raised a number of disputes about the specific Market Behavior Rules the Commission adopted. *See* Rehearing Request at 9-28, JA 179-98; CA Initial Br. at 27-46. However, the Consumer Advocates do not press those disputes in their re-filed brief here, dated August 30, 2006, and, therefore, they are waived. *See, e.g., Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (even if argued in earlier proceedings, appellants must raise all of their arguments in brief); *see also, e.g., City of Waukesha v. EPA*, 320 F.3d 228, 250 n.22 (D.C. Cir. 2003) (same).

an entity creates artificial congestion and then purports to relieve the same; and (d) various other forms of collusion.

Market Behavior Rule 3. Rule 3, *inter alia*, required sellers to provide accurate and factual information and prohibited the submission of false or misleading information.

Market Behavior Rule 4. Rule 4 required, to the extent applicable, the reporting of accurate and factual information to publishers of price indices and prohibited the submission of false or misleading information, or material omissions to the same.

Market Behavior Rule 5. Rule 5 required the retention of relevant pricing records for three years.

Market Behavior Rule 6. Rule 6 prohibited violation or collusion with other parties to violate a seller's market-based rate code of conduct.

As approved, any violation of these Market Behavior Rules would constitute a tariff violation that would subject the seller to disgorgement of unjust profits associated with the tariff violation. The seller also could be subject to the suspension or revocation of its authority to sell at market-based rates or other appropriate non-monetary remedies. Rules Order, Appendix A, JA 165. The

Commission also provided for remedies and complaint procedures for violations of the Market Behavior Rules. *Id.* at Appendix B, JA 165.

D. The Statutory Change Regarding Market Manipulation

While the six petitions for review were pending before this Court, Congress dramatically altered the statutory and jurisdictional framework underlying the FERC's actions. Under the new statute, in order to confront and remedy manipulative behavior by sellers of electricity and natural gas in wholesale markets, the FERC is no longer limited to action under the more general provisions of the Federal Power Act and the Natural Gas Act that require just and reasonable rates and prohibit undue discrimination or preference. Now, FERC has explicit statutory authority to prohibit "any manipulative or deceptive device or contrivance" by "any entity" in connection with a FERC-jurisdictional transaction. *See* Energy Policy Act of 2005 ("EPAct"), Pub. L. No. 109-58, secs. 315, 1283, 119 Stat. 594 (2005) (to be codified in 15 U.S.C. § 717c-1 and 16 U.S.C. § 824v).

Thus, since issuance of the orders on review, Congress has provided the FERC with more tools to effectively carry out its consumer-oriented mission – to vigorously investigate and remedy manipulative market behavior. When afforded additional and precise statutory authority to do so in the EPAct, the FERC acted to

rescind in most respects the Market Behavior Rules adopted under preexisting, more general statutory authority.

E. FERC's Implementation of EPAct's Anti-Manipulation Provisions

On February 16, 2006, the Commission issued a bundle of orders addressing its Market Behavior Rules. In one, addressing jurisdictional sellers of electricity under the FPA, the FERC rescinded the heart of its Market Behavior Rules (Rules 2 and 6 and complaint procedures) prohibiting market manipulation by public utility sellers acting under market-based rate authority. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 (Feb. 16, 2006), *reh'g denied*, 115 FERC ¶ 61,053 (Apr. 17, 2006) (no petitions for review filed). The FERC did so in light of its January 19, 2006 promulgation of new regulations, implementing sections 315 and 1283 of the EPAct, adding new section 4A of the NGA and new section 222 of the FPA, prohibiting the use of manipulative or deceptive devices or contrivances in wholesale electricity and natural gas transactions. *See Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (Jan. 19, 2006), *reh'g denied*, 114 FERC ¶ 61,300 (Mar. 22, 2006) (no petitions for review filed).

The remaining Market Behavior Rules (Rules 1, 3, 4 and 5) that were not completely rescinded were removed from public utility market-based rate tariffs and instead codified in the FERC's regulations. *See Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 114 FERC ¶ 61,163 (Feb. 16, 2006) (amending 18 C.F.R. Part 35) (no requests for rehearing or petitions for review filed).[5]

Since becoming moot in light of these recent FERC actions implementing the anti-market manipulation provisions of the EPAct, five of the six petitions pending before this Court were voluntarily dismissed – only the petition filed by Colorado Office of Consumer Counsel, *et al*. (collectively "Consumer Advocates") remains.

[5] In another February 16, 2006 order, addressing natural gas sales, the FERC rescinded certain of its regulations, in particular 18 C.F.R. §§ 284.403(a), (d), and (e) (2005), that no longer were needed in light of the FERC's January 19, 2006 rulemaking implementing the anti-market manipulation provisions of the EPAct. *See Amendments to Codes of Conduct for Unbundled Sales Service and for Persons Holding Blanket Marketing Certificates*, Order No. 673, 114 FERC ¶ 61,166 (2006) (no requests for rehearing or petitions for review filed).

SUMMARY OF ARGUMENT

This Court should dismiss this appeal for lack of jurisdiction on any of several grounds. First, Consumer Advocates' central challenge in this appeal – the legitimacy of market-based rates – was never appropriately before the Commission for resolution in the proceedings below. Second, in that events have outrun the controversy, with the recent implementation of a new statutory and regulatory regime over the issues on appeal, Consumer Advocates can no longer claim meaningful relief from this Court. Third, they have failed to demonstrate injury arising out of the orders on appeal – which advance the cause of consumer protection championed by Consumer Advocates – sufficient to warrant standing. Fourth, they did not adequately preserve several of their FPA arguments for appeal.

Here, FERC promulgated a series of Market Behavior Rules for inclusion in market-based rate tariffs and authorizations to protect energy consumers against manipulative behavior that could prevent or impede markets from working in a competitive manner. Assuming jurisdiction, FERC's actions were completely consistent with FPA §§ 205 and 206 and judicial precedent.

Consumer Advocates challenge FERC's authority to adopt a market-based rate regime. That issue has been addressed previously, and FERC's authority has

been upheld on several occasions, most recently in the Ninth Circuit in *Lockyer*. Indeed, much of their argument seems to challenge the Ninth Circuit's, not FERC's, reasoning. Here, the Commission was attempting to ensure that all market-based rates remain just and reasonable by proscribing manipulative, anticompetitive behavior. It was not reexamining its longstanding, court-approved market-based rate program.

The instant orders, establishing Market Behavior Rules, introduced just one of many means to ensure that markets are competitive, and thus that rates remain just and reasonable, by proscribing conduct that could lead to anticompetitive conditions. Contrary to Consumer Advocates' claim, the Commission's market-based rate program protects against undue discrimination in many ways, including the industry-wide use of open access transmission tariffs and the operation of energy markets by FERC-approved regional transmission organizations and independent system operators.

The market-based rate regime is not the equivalent of the detariffing present in *Maislin* and *MCI*, both of which involved a complete lack of any filing requirement. FERC's market-based rate regime includes both pre- and post-authorization filing requirements that help ensure markets remain competitive, and thus that the resulting rates are just and reasonable.

Finally, Congress effectively ratified the Commission's market-based rate authority, and efforts to detect and eliminate market manipulation, with its enactment of the EPAct in 2005 that presumes the existence of market-based rate tariffs and market-based transactions.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the arbitrary and capricious standard set out in 5 U.S.C. § 706(2)(A). *E.g.*, *Public Utils. Comm'n of California v. FERC*, 254 F.3d 250, 253-54 (D.C. Cir. 2001). Under this standard, a "court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency." *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002) (citations and internal quotation marks omitted).

Where a court is called upon to review an agency's construction of the statute it administers, well-settled principles apply. If Congress has directly spoken to the precise question at issue, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Defense Council*, 467 U.S.C. 837,

842-43 (1984). *See also, e.g., Whitman v. American Trucking Ass'n*, 531 U.S. 457, 481 (2001). If the statute is silent or ambiguous as to the question at issue, then the Court "must defer to a reasonable interpretation made by the . . . agency." *Whitman*, 531 U.S. at 481; *Chevron*, 467 U.S. at 843 (same).

Here the Commission considered and reasonably responded to all concerns and objections raised by the diverging parties in promulgating the Rules at issue.

II. PETITIONERS' APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. Consumer Advocates' Primary Issue Was Beyond the Scope of the FERC Proceedings

Consumer Advocates' quarrel is not so much over what the Commission actually did – impose anti-manipulation Market Behavior Rules as a condition of all market-based rate tariffs to enhance consumer protection – but rather over what the Commission did not do – jettison market-based rates in their entirety. However, Consumer Advocates' primary claim – that the FERC's market-based rate program is inconsistent with the prior notice and filing requirement of the Federal Power Act – was never appropriately before the Commission for resolution.[6]

[6] On May 17, 2006, the Commission filed a motion to dismiss this petition (and other then-pending petitions) for lack of jurisdiction. By Order of this Court filed July 20, 2006, that motion was carried over for briefing on the merits.

The FERC never proposed to scrap its longstanding market-based rate program or otherwise revisit its earlier approval of individual market-based rate tariffs; rather, it proposed at the outset of the proceeding to impose tariff conditions on all public utility sellers with market-based rate authorization. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 FERC ¶ 61,220 at 61,975-76 (2001) ("we believe it is necessary and appropriate to impose a tariff condition" on sellers), JA 2-3; and Proposed Rules Order at P 1 (2003) (proposal was "to condition all new and existing market-based rate tariffs and authorizations to include a provision prohibiting the seller from engaging in anticompetitive behavior or the exercise of market power"), JA 69.

In the Rehearing Order, the Commission pointed to the Consumer Advocates' threshold "challenge [to] the scope of the Commission's undertaking in this proceeding," and to their "assert[ion] that the assumption on which the Commission's Market Behavior Rules stand, *i.e.*, that market-based rates can be just and reasonable, must be rejected on legal grounds as inconsistent with the FPA." Rehearing Order at P 114, JA 217. In that context, the Commission correctly "decline[d] to address" the Consumer Advocates' claims[7] because its proceeding was "focus[ed] . . . on seller conduct relative to the industry as a

[7] Consumer Advocates were one of 66 entities filing comments, and one of 18 entities filing rehearing requests.

whole," and claims that the Commission had always lacked authority to approve market-based rate tariffs were beyond the scope of the proceeding. *Id.* P 118, JA 217.

That Consumer Advocates submitted comments that the FERC should take an entirely different approach and revisit its decision to allow market-based rates in the first instance does not mean that the FERC was obligated to proceed in that direction. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos*., 498 U.S. 211, 230 (1991) (explaining that an agency – there the FERC – "enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities," and that a reviewing court would "clearly oversho[o]t the mark" if it compelled an agency to resolve a particular issue in a particular proceeding) (citations omitted); *Fla Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003) ("[a]dministrative agencies enjoy 'broad discretion' to manage their own dockets") (citation omitted). This is especially so when Consumer Advocates never have claimed that they have been injured by the FERC's imposition of tariff conditions prohibiting manipulative market behavior or conduct otherwise detrimental to consumers.

Consumer Advocates' only claim is that the FERC failed to afford consumers even *greater* relief, in the form of cost-based or negotiated rates filed

with specificity before their imposition, an issue left outside the scope of the proceeding the FERC itself instituted. *See California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) ("*Lockyer*") (upholding, in relevant respect, FERC's denial of complaint of consumer representatives that its market-based rate program, based on both before-the-fact filing and after-the-fact reporting requirements, violated prior notice and filing requirements of the FPA).

B. Events Have Outrun the Controversy

Nor can Consumer Advocates claim any "meaningful relief" from this Court. *McBryde v. Comm. To Review*, 264 F.3d 52, 55 (D.C. Cir. 2001) (addressing mootness); *see also, e.g.*, *Honig v. Doe*, 484 U.S. 305, 317 (1988); *Southern Co. Services, Inc. v. FERC*, 416 F.3d 39, 43-44 (D.C. Cir. 2005). As explained above, *see supra* section II.E., the Market Behavior Rules that were adopted in the orders under review have, in most respects, been rescinded in light of the FERC's implementation of the anti-market manipulation provisions of the EPAct. Where not rescinded, the remaining Market Behavior Rules have been removed from the tariffs of sellers with market-based rate authority and codified in the FERC's regulations.

While events in recent months have "outrun the controversy," *McBryde*, 264 F.3d at 55, Consumer Advocates have been sitting on the sidelines. They have not

participated in any of the recent FERC proceedings. They have not filed comments or requests for rehearing, and thus have not articulated to the FERC whether or how they remain harmed from the FERC's implementation of the new statute, through rulemaking rather than tariff conditioning, and its new authority to reach manipulative or deceptive practices in connection with the purchase, sale or transmission of electricity subject to the FERC's jurisdiction. To the extent they remain harmed, Consumer Advocates have not offered any argument to the FERC how that harm could be ameliorated in light of the FERC's new authority and its new implementing regulations. *Cf. Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006) (explaining that an agency has the authority to consider whether to modify a rule on appeal, before issuance of the mandate, thus "allowing an agency broad scope to carry out its mission") (following *Alabama Power Co. v. FPC*, 511 F.2d 383, 388-89 (D.C. Cir. 1974)).

Consumer Advocates simply have failed to confront the FERC's expanded statutory authority and the FERC's recent implementation of that authority.[8] The FERC has acted, and continues to act, in a manner entirely in accord with the statute, namely the FPA as first enacted in 1935 and now revised extensively in

[8] Indeed, Consumer Advocates only make passing reference to the EPAct. *See* Brief at 9 (noting that section 1285 allows FERC to make the date of a complaint the refund effective date).

2005. *See, e.g., Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 114 FERC ¶ 61,165 at P 11 (Feb. 16, 2006) (noting FERC's judgment that "rescission of the Market Behavior Rules will simplify the Commission's rules and regulations, avoid confusion, and provide greater clarity and regulatory certainty to the industry, . . . consistent with Congressional intent in EPAct 2005, . . . yet not eliminate beneficial rules governing market behavior").

Going forward, Consumer Advocates had full opportunity to offer any objections as to the FERC's implementation of its new statutory authority. They concede, however, that they did not do so, Br. at 57, preferring instead to focus all efforts on judicial review in this Court from old orders issued under preexisting authority. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 115 FERC ¶ 61,053 at P 33 (Apr. 17, 2006) (explaining, in denying rehearing request of former Petitioner California Public Utilities Commission, that pending appeals of orders adopting Market Behavior Rules did not preclude the FERC from "rescind[ing] rules prospectively based on a new record in a newly-instituted proceeding," and that the FERC's later proceeding "is at its core a rulemaking for electric market-based rate sellers, not an adjudication . . . to which the decision on the underlying record, once filed with the

court, cannot be changed by the agency") (citing this Court's *Alabama Power* and *Chamber of Commerce* opinions).

C. Consumer Advocates Have Shown No Injury

Going backward in time, Consumer Advocates do not claim, nor can they, that they have been harmed by the FERC's development or exercise of Market Behavior Rules. FERC is "not obligated to respond to every comment" it receives, *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760, 765 (D.C. Cir. 2000), such as those offered by Consumer Advocates to expand the scope of its inquiry, but rather "only those that can be thought to challenge a fundamental premise" underlying the agency proceeding. *Id*. *See also Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998) ("An agency must . . . demonstrate the rationality of its decisionmaking process by responding to those comments that are relevant and significant."). Here, the FERC reasonably chose to confine its proceeding to a consideration of appropriate rules to limit the exercise of market-based rate authority, rather than initiate an open-ended, far-reaching generic investigation of market-based rate authority it had afforded individual sellers in individual proceedings over the prior two decades. *See Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 498 U.S. at 230; *Fla Mun. Power Agency v. FERC*, 315 F.3d at 366, both discussed *supra* at section II.A.

D. Consumer Advocates Could Have, But Did Not, Preserve Its Issues for FERC Review and Judicial Review

As evinced by the orders on appeal, FERC never considered scrapping market-based rates in general as part of this proceeding. The guiding premise in this case was that market-based rates were here to stay, but that the FERC could enhance consumer protection and benefits by adding the Market Behavior Rules to all market-based rate tariffs in order to prevent more Enron-like market abuses. *See* Rules Order at PP 36, 92, JA 141, 148; Rehearing Order at P 78, JA 212.

When, in its orders, the Commission made it clear to Consumer Advocates that the overall issue of legitimacy of market-based rates under the FPA was not being considered in this case, Consumer Advocates could have preserved this issue by filing a complaint with the Commission under FPA § 206. Had they done so, the issue of the legitimacy of market-based rates, and their consistency with FPA requirements, could have been fully litigated before the FERC, and Consumer Advocates' appellate rights could have been preserved.

In proposing this alternative litigation path, the FERC is not playing "Monday morning quarterback;" rather, it is recognizing a real world, contemporaneous example of how this issue actually had been litigated before FERC and properly preserved for appeal. When the State of California wanted to challenge the legality of market-based rates under the FPA, and their consistency

with statutory notice and filing requirements, it brought a complaint under FPA § 206. The issue was fully litigated before the FERC, and, having lost there, California appealed to the Ninth Circuit in what resulted in *Lockyer*.[9] Thus, Consumer Advocates already had a nearly contemporaneous example before it of how to have its issues heard before the FERC and, if necessary, by a reviewing court, notwithstanding that those issues were beyond the scope of this proceeding.

III. FERC'S MARKET-BASED RATE REGIME IS FULLY CONSISTENT WITH SECTIONS 205 AND 206 OF THE FPA

Consumer Advocates used the occasion of the Rules' implementation to mount a full-scale attack on FERC's authority to adopt a market-based rate regime, and continue that attack before this Court. Br. 15-43. Although Consumer Advocates assert (*id*. at 16-17) that the Commission simply ignored its arguments (*see* Rehearing Order at PP 114 & 118, JA 217, citing Rules Order at PP 137-38,

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9 As discussed *infra* at Argument section III.B.2.b. & c., in *Lockyer*, the Ninth Circuit held that FERC's authorization of market-based tariffs was consistent with the FPA. While the Ninth Circuit did criticize FERC for inadequate post-approval reporting requirements at the time the *Lockyer* complaint had been filed (*id.* at 1014), by the time *Lockyer* was decided, FERC had already moved to rectify those shortcomings. *See id.*; *Revised Public Utility Filing Requirements*, (Order No. 2001), 99 FERC ¶ 61,107 (2002) (requiring electronic filing of quarterly reports summarizing pertinent data on wholesale power sales), *order on reh'g*, 100 FERC ¶ 61,074 (2002) (Order 2001-A), *order on reh'g*, 100 FERC ¶ 61,342 (2002) (Order 2001-B); *see also* footnote 10 *infra*.

JA 154) challenging the market-based rate regime, the validity of FERC's longstanding use of a market-based rate regime was never the subject of the instant proceeding, and has been litigated many times previously – most recently by the Ninth Circuit in *Lockyer*.

Indeed, it appears that, to no small degree, the market-based rate argument challenges the *Lockyer* decision itself, not a FERC order. *See, e.g.*, Br. 24 ("the Ninth Circuit in *Lockyer*, 383 F.3d at 1013, mistakenly relied on decisions of this Circuit . . . . *Lockyer* analyzed the issue exactly in reverse order of the Supreme Court's analysis . . . ."). Further, although their later brief argues that it is arbitrary and capricious for the challenged orders not to discuss their contentions at length, Consumer Advocates previously disclaimed any interest in a remand for further explanation because "FERC's views are known from the Ninth Circuit *Lockyer* proceeding and its initial orders herein." CA Initial Br. at 27. As shown below, the challenges to FERC's market-based rate regime are invalid.

A. The Commission's Orders Complied Fully with FPA § 206

In the orders on review, the Commission concluded that existing market-based rate tariffs, "without clearly-delineated rules of the road to govern market participant conduct, are unjust and unreasonable." Rules Order at P 3, JA 136;

accord id. at P 11, JA 137 ("market-based rate tariffs and authorizations that do not include such standards are unjust and unreasonable").

The Commission then required that all such tariffs be amended to include its Market Behavior Rules, based on its findings that those rules "are just and reasonable" and that such amended tariffs "will help ensure that rates are the product of competitive forces and thus remain just and reasonable" by "inform[ing] market-based rate sellers of the type of activities that are consistent with just and reasonable rates." *Id.* at PP 3, 168, JA 136, 159-60; *accord id.* at P 169, JA 160 (explaining that the Commission had "establish[ed] general rules to prohibit a class of behavior going forward . . . to ensure that rates are the product of competitive forces (and thus are just and reasonable)"); *id.* P 174, JA 160 (finding that the Market Behavior Rules "will allow [the Commission] to assure just and reasonable rates"); *id.* at P 182, JA 161 ("Through our administration of these rules, the Commission can assure that anti-competitive behavior is not countenanced and that rates remain just and reasonable.").

In making these findings, the Commission complied fully with FPA § 206, which provides that the Commission may, "after a hearing," "find that any rate, charge, or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly

discriminatory or preferential." 16 U.S.C. § 824e(a). That is precisely what the Commission did here in finding that existing market-based rate tariffs, to the extent they lacked the Market Behavior Rules, were unjust and unreasonable.

FPA § 206 goes on to provide that the Commission, having made such a finding, "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, *or* contract to be thereafter observed and in force, and shall fix the same by order." *Id.* (emphasis added). The Commission complied with this aspect of § 206 when it "fix[ed] . . . by order" the "rule[s], regulation[s], [and] practice[s]" that market-based rate sellers must follow – namely, compliance with the Market Behavior Rules. Contrary to Consumer Advocates' assertions, Section 206(a) requires nothing further.

In the Rehearing Order, the Commission noted arguments by two parties that claimed that the Commission had not fully complied with FPA § 206:

> Consumer Advocates and Cinergy also allege that the Commission has not satisfied its section 206 burden in this case by demonstrating that its Market Behavior Rules are just and reasonable. Cinergy asserts that this finding has not been made with respect to every market, every product, and every seller in the country. Consumer Advocates adds that the Market Behavior Rules Order, in adopting only guidelines regarding market participant conduct, fails to 'fix' a particular rate as section 206 requires.

Rehearing Order at P 156, JA 222. The full quotation makes clear that the Commission understood the Consumer Advocates to have been arguing that the

Commission's order had not made all the determinations necessary under FPA § 206. The order does not suggest that the Commission understood the Consumer Advocates to have claimed that, to comply with FPA § 206, FERC was obligated to eliminate all sellers' market-based rate authority.

1. Consumer Advocates' FPA § 206 Arguments Lack Merit

The Consumer Advocates' claim (Br. at 18) that the Commission was obligated "to determine and 'fix' the 'just and reasonable' rate to be charged prospectively" is based on a misunderstanding of the Commission's holdings in the orders on review and of the text of FPA § 206. First, contrary to the Consumer Advocates' repeated claims, the Commission did *not* hold that "existing market-based *rates* were 'unjust and unreasonable'" or that "existing 'market-based *rates*' were unlawful." *E.g.*, Br. at 15, 18 (emphasis added); *accord id*. at 46.

To the contrary, as shown above (Argument section III.A. *supra*), the Commission found only that the *tariffs* were unjust and unreasonable to the extent they did not include the Market Behavior Rules – a point made clear from the portions of the Commission's orders that the Consumers Advocates themselves quote (Br. 15 n.12). To the extent the Commission discussed *rates*, it found only that tariffs without the Market Behavior Rules "*may* lead to unjust and unreasonable rates," Rehearing Order at P 159, JA 222-23 (emphasis added) – not,

as the Consumer Advocates claim, that any market-based rate tariffs had, in fact, resulted in unjust and unreasonable rates, much less that all such tariffs had done so.

Because the Commission did not find that any seller's rates were unjust and unreasonable, it had no possible obligation under FPA § 206 to "determine the just and reasonable rate . . . and [to] fix the same by order." Moreover, the Consumer Advocates ignore that, even when the Commission "fixes" a rate, the Commission cannot guarantee that the rate will remain just and reasonable forever. Even under cost-based ratemaking, future changes can render old rates unjust and unreasonable. For this reason, as the Commission noted in the Rehearing Order at P 45 n.28, JA 208, the Market Behavior Rules did not supersede or replace the ability of purchasers to file complaints under FPA § 206 claiming that a seller's rates had become unjust and unreasonable.

In addition, FPA § 206 gives the Commission significant discretion in the exercise of its remedial authority. *See, e.g.*, *Towns of Concord, Norwood and Wellesley, Mass. v. FERC,* 955 F.2d 67, 72-73 (D.C. Cir. 1992) (explaining Commission's broad remedial discretion under the FPA). That section requires the Commission to "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force." 16 U.S.C.

§ 824e(a). These items are listed in the disjunctive, giving the Commission discretion to choose among the items. Indeed, nothing in FPA § 206 states that the Commission must determine a "rate," much less a cost-based rate – as opposed to (or in addition to) a "classification, rule, regulation, practice, or contract" – in every case in which it finds a violation of that section, or even in cases (unlike here) where it finds that a rate was unjust and unreasonable.

2. Because the Remainder of the Consumer Advocates' Arguments Are Contingent on Their Meritless FPA § 206 Argument, Consideration of Their Arguments Should End Here

As has been demonstrated, the Commission did not find that any rates were unjust and unreasonable and, moreover, had no obligation to fix sellers' just and reasonable rates prospectively. Thus, the Commission could not have violated FPA § 206 when it did not prescribe non-market-based rates for all sellers operating under market-based rate tariffs. There was no statutory bar to the Commission requiring those sellers to amend their tariffs to include Market Behavior Rules, which the Commission had found would enable it to "assure that anti-competitive behavior is not countenanced and that rates remain just and reasonable." Rules Order at P 182, JA 161.

The Consumer Advocates argue briefly (Br. at 43) that the Commission acted arbitrarily and capriciously with respect to the particular Market Behavior

Rules it adopted. Their claim – that the Commission lacked substantial evidence that charges under tariffs including the Market Behavior Rules "will approximate truly 'competitive rates' such that they do not result in excessive returns" – ignores the deference due to the Commission's predictive judgments. *See, e.g., Electricity Consumers Resource Council v. FERC,* 407 F.3d 1232, 1338-39 (D.C. Cir 2005) ("the formulation of such an experimental policy (where the probability of success is uncertain) is the type of activity that the [Commission] was created to perform, and we give great weight to the Commission's determination regarding this policy"), citing *Interstate Natural Gas Ass'n v. FERC,* 285 F.3d 18, 30 (D.C. Cir. 2002); *Pub. Serv. Comm'n of New York v. FPC,* 463 F.2d 824, 828 (D.C. Cir. 1972) (same). The record, with numerous comments in support of the Commission initiative, plainly gave the Commission sufficient basis to predict that, "[t]hrough [its] administration of these rules, the Commission can assure that anti-competitive behavior is not countenanced and that rates remain just and reasonable." Rules Order at P 182, JA 161.

B. The Commission's Decision Not To Invalidate Prospectively Sellers' Market-Based Rate Tariffs Is Consistent with FPA § 205

1. Even if the Court Were to Go Beyond the FPA § 206 Issue, It Would Lack Jurisdiction to Consider Consumer Advocates' FPA § 205 Arguments that Were Not Raised with Specificity on Rehearing

a. Consumer Advocates' FPA §§ 205(c), (d), and (e) Arguments Have Been Waived

In requesting rehearing, the Consumer Advocates raised what they described as the "threshold issue" of whether the FPA authorizes the Commission to approve market-based rate tariffs. Rehearing Request at 4, JA 174. However, in making that claim, the Consumer Advocates did not cite or quote FPA § 205(c), (d), or (e), even though those provisions form the bulk of their argument now. *Compare id*. at 4-8, JA 174-78, with Br. at 18-23, 26-34.

As a result, the Consumer Advocates' arguments based on those statutory provisions are waived. *See Domtar Maine Corp. v. FERC*, 347 F.3d 304, 313 (D.C. Cir. 2003) ("If Domtar wished to argue that FERC was ignoring the language of [FPA] section 23(b)(1), it had an obligation to make that argument to the Commission. Having failed to do so, it may not ask us to entertain the argument now."); *see also, e.g.*, *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 21 (D.C. Cir. 2006) (finding an argument waived where the parties "did not make this argument before the agency and in fact never even cited

the sections of the tariff upon which they now rely"); FPA § 313(b), 16 U.S.C. § 825*l*(b).

Although Consumer Advocates cited in their rehearing request many of the same cases they now cite in their brief, their failure on rehearing to tie those cases – which to the extent they found agency actions to be unlawful arose under statutes other than the FPA – to their statutory arguments based on the FPA precludes the Court from considering those claims.

b. Consumer Advocates' FPA § 205(a) Argument Also Has Been Waived

Also waived is the Consumer Advocates' argument (Br. at 35-41) that the Commission failed to comply with FPA § 205(a) because it supposedly lacked a means to monitor whether sales in competitive markets by sellers complying with the Market Behavior Rules would result in just and reasonable rates.

Arguments must be raised with sufficient specificity so as to put the Commission on notice of the ground on which rehearing was being sought. *E.g.*, *Intermountain Municipal Gas Agency v. FERC*, 326 F.3d 1281, 1285 (D.C. Cir. 2003). In its rehearing request, without elaboration so as to put the Commission on notice as to the nature of the argument it now raises on appeal, the Consumer Advocates merely cited to FPA § 205(a) in a footnote on page 4, JA 174. Later, on pages 10-12, JA 180-82, Consumer Advocates argued that the Commission did not

define the "zone of reasonableness" in a market-based rate regime; however, that section of the rehearing request challenged the market-behavior rules themselves, not the Commission's compliance with FPA § 205(a). Thus, the Consumer Advocates failed to adequately present to the Commission the FPA § 205(a) argument they raise now.

Additionally, while the Consumer Advocates assert (Br. at 38) that they "argued below" their claim that electric power plants are economically distinct from natural gas wells, they did so only in their earlier-filed comments with the Commission – they did not do so in their rehearing request. This Court has previously held that a party cannot comply with the rehearing requirement in the FPA by "incorporat[ing] by reference" arguments raised in an earlier pleading, because "[u]nder [FPA] § 313(b) [16 U.S.C. § 825*l*(b)] an objection cannot be preserved 'indirectly,' but must be raised with 'specificity'" in the rehearing request itself. *Allegheny Power v. FERC*, 437 F.3d 1215, 1220 (D.C. Cir. 2006).

2. Assuming Jurisdiction, Consumer Advocates' FPA § 205 Claims Regarding the Lawfulness of Market-Based Rates Are Meritless

a. The Market-Based Rate Regime Is Consistent with FPA § 205

Consumer Advocates assert that the Rules are part of a hodge-podge of market power determinations "that assume competitive markets exist." Br. at 35-36; *see also id*. at 35 ("FERC is attempting to regulate electric markets through conditions on market participants"). In their view, such an approach does not amount to a "ratemaking method" that "FERC must apply" to ensure just and reasonable rates. *Id.* While conceding FERC's approach "eventually" will show whether a market is competitive, Consumer Advocates contend that is not enough: "FERC is still relying solely on the assumption that all rates set in competitive markets will be just and reasonable, contrary to [*FPC v. Texaco Inc.*, 417 U.S. 380 (1974)]." *Id*. at 35-36. They posit the problem with FERC's approach as being "no objective standard to determine if the market produces just and reasonable rates, or rates within a zone of reasonableness," and thus it is an "indirect method" of regulation that, they claim, was rejected in *Texaco*. *Id*. at 36.

Consumer Advocates' claims resemble those that have been made and rejected by the courts previously. Just the opposite of their assertion, the Court in *Texaco* stated, "We do, however, make clear that under the present Act the

Commission is free to engage in indirect regulation . . . providing that it insures that the rates . . . ultimately borne by the consumer, are just and reasonable." 417 U.S. at 401; *see id*. at 387 (Court "see[s] nothing in the Act . . . which proscribes the kind of indirect regulation undertaken here"). While Consumer Advocates are wrong that FERC's market-based rate regime relies on indirect methods to ensure the lawfulness of market-based rates, even if they were correct, indirect regulation is permissible.

Similarly, Consumer Advocates' position, that *Texaco* does not allow FERC to rely on competitive markets to produce just and reasonable rates due to the lack of an objective standard (Br. 35-36), was found "not [to be] a tenable position" by this Court:

> First, nothing in [*Texaco*] precludes the FERC from relying upon market based pricing. The Supreme Court's point in that case was only that where the Congress has "subject[ed] producers to regulation because of anticompetitive conditions in the industry," 417 U.S. at 399, the market cannot be the "final" arbiter of the reasonableness of a price. 417 U.S. at 397. In *Texaco*, the Commission had failed even to mention the "just and reasonable" standard; it appeared to apply only the "standard of the marketplace" in reviewing the "reasonableness of a rate." 417 U.S. at 396-97. Here, in contrast, the FERC has made it clear that it will exercise its [NGA] § 5 authority upon its own motion or upon that of a complainant to assure that the market (*i.e.*, negotiated) rate is just and reasonable.

Elizabethtown Gas Co. v. FERC, 10 F.3d 866, 870 (D.C. Cir. 1993).

The instant matter makes good on FERC's promise. The Rules had their

genesis in FERC's investigation of the 2000-01 price spikes in Western energy markets, and provide one (of many) responses resulting from that investigation as well as FERC's ongoing review of energy markets. "[FERC] issued this proposal, in the form of proposed *pro forma* tariff provisions, to address on an industry-wide basis the types of market abuses that had occurred in the western market during 2000-01, which were only then being uncovered in our then-pending investigation of these markets." Rehearing Order at P 2, JA 201; *see* Rules Order at P 1, JA 136 (same).

Further, the Rules were designed as one (rather than the only) means to ensure that customers pay just and reasonable rates under a market-based rate regime: "Without such behavioral prohibitions, the Commission will not be able to ensure that rates are the product of competitive forces and thus will remain within a zone of reasonableness. [FERC] further finds that [its] Market Behavior Rules . . . are just and reasonable and will help ensure that rates are the product of competitive forces and thus remain just and reasonable." *Id*. at P 3, JA 136.

Contrary to Consumer Advocates' assertions (Br. 35-36), FERC's ratemaking method of ensuring markets are competitive, by itself, sufficiently meets the FPA's requirement that the rates in such markets are just and reasonable based on objective measures. "In a competitive market, where neither buyer nor

seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer the price is close to marginal cost, such that the seller makes only a normal return on investment." *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *accord Elizabethtown*, 10 F.3d at 870.

Consumer Advocates make related assertions that even if FERC can rely on a competitive market, "FERC has not offered a theory whereby the market can prevent rates that are unduly preferential or discriminatory," and "has no standard" to make such judgments. Br. at 42. Both assertions are unfounded. The standard for judging undue discrimination or preference remains what it has always been: disparate rates or service for similarly situated customers. *See, e.g., Southwestern Elec. Coop., Inc., v. FERC,* 347 F.3d 975, 981 (D.C. Cir. 2003). FERC's market-based rate regime includes many regulatory policies designed to prevent such unlawful behavior. One prominent market-based rate ratemaking "theory" is the adoption of *pro forma* tariff conditions that apply industry-wide, *e.g*., the *pro forma* open access transmission tariff under FERC Order 888, which ensures that potential customers are treated similarly in obtaining access to energy providers. *See* Rules Order at P 24, JA 139-40 (noting one tool used is "non-discriminatory transmission access").

Moreover, FERC-approved regional transmission organizations and independent system operators run real time energy markets under FERC-approved tariffs. These single price auction markets set clearing prices on economic dispatch principles (that is, prices are set based on the lowest priced energy needed to serve load), to which various safeguards have been added to protect against anomalous bidding. *See generally, e.g.*, *PSEG Energy Res. & Trade, LLC v. FERC*, 360 F.3d 200 (D.C. Cir. 2004) (describing New York ISO's real time market bidding and safeguards). All of these FERC-approved ratemaking mechanisms are means to prevent discriminatory or preferential rates. For bilateral markets, quarterly reporting requirements, which are "transaction summaries [that] include long and short-term contracts," *Lockyer*, 383 F.3d at 1013, provide a means for monitoring the rates charged for reasonableness, including whether transactions are unduly discriminatory or preferential. *See supra* note 9 (noting recent FERC improvements to after-the-fact reporting of market transactions).

In short, a panoply of FERC-approved mechanisms (the Market Behavior Rules at issue being just one), integral to the market-based rate regime, are in place to prevent, to discover, and to remedy unduly discriminatory rates.

b. The Market-Based Rate Regime Does Not Violate FPA Filing Requirements

Consumer Advocates argue at length (Br. 18-26) that FERC's market-based rate regime violates the plain language of FPA § 205(c), and exceeds the authority granted by FPA § 205(d). To a large degree, those arguments repeat the arguments recently raised against the market-based rate regime in *Lockyer*, and decided against Consumer Advocates' position by the Ninth Circuit. Despite Consumer Advocates' disdain for the *Lockyer* analysis and ruling, nothing they raise undercuts the validity of the Ninth Circuit's reasoning that FPA filing requirements do not proscribe adoption of a market-based rate regime to set just and reasonable rates.

Most of Consumer Advocates' argument attempts vainly to show that FERC's market-based rate regime is equivalent to the "detariffing" undertaken in *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994), and *Maislin Indus. U.S. v. Primary Steel Inc.*, 497 U.S. 116 (1990). Br. at 18-26. The Ninth Circuit correctly ruled that the FERC market-based rate regime "is different from those under consideration in *MCI* and *Maislin*," finding that in both those cases the agency "relied on market forces alone in approving market-based tariffs." 383 F.3d at 1013. Consumer Advocates contend that ruling was mistaken and improperly analyzed. Br. at 24-26.

But the contrast in the regulatory regimes involved is striking. In *MCI*, the FCC first adopted "a mandatory detariffing policy, which prohibited nondominant carriers from filing tariffs," which was struck down as *ultra vires* on appeal, 512 U.S. at 221, followed by "a permissive detariffing policy" that effectively led to the same result. *Id*. at 223. Similarly, in *Maislin*, the Court was faced with an ICC policy under which "many of the carrier's rates are privately negotiated and *never* disclosed to the ICC." 497 U.S. at 132-33 (emphasis added). In contrast, FERC's market-based rate regime requires every seller to make two types of filings: "the crucial difference between *MCI/Maislin* and the present circumstances is the dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirements." *Lockyer*, 383 F.3d at 1013.

Contrary to Consumer Advocates' argument, the Ninth Circuit neither "mistakenly relied on decisions in this Circuit" nor "analyzed the issue exactly in reverse order of the Supreme Court's analysis." Br. at 24. First, the Ninth Circuit relied on this Circuit's opinions for a different point (what prerequisites are needed to establish a valid market-based rate regime, 383 F.3d at 1012-13), not as guides to whether FERC's regime differed from those in *MCI* or *Maislin.* Consumer Advocates state that *Elizabethtown* and *Louisiana Energy and Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998), "never addressed the statutory procedural

requirements" that Advocates are raising here. Br. 26. But, contrary to their implication (*id*.), the Ninth Circuit did not rely on those decisions to reach its rulings that before-the-fact and after-the-fact filings under FERC's market-based rate regime satisfy FPA § 205(c). *See Lockyer*, 383 F.3d at 1013 (relying on statutory language in concluding FERC "has broad discretion to establish effective reporting requirements for administration of the tariff").

Second, the Ninth Circuit did not have to analyze the statutory schemes in *MCI* or *Maislin* to decide factually that differing regulatory regimes were at issue. 383 F.3d at 1013. Indeed, FPA § 205(c) provides that:

> *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*, . . . schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, 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.

16 U.S.C. § 824d(c) (emphases added). Congress, therefore, specifically delegated to FERC the authority to establish rules governing the "form" of schedules filed under FPA § 205(c). As the Ninth Circuit has recognized, this includes the authority to establish rules that permit schedules in the form of market-based rate tariffs. *See Lockyer*, 383 F.3d at 1013.

In point of fact, FERC had already established such rules, even before the addition of the Market Behavior Rules that are at issue in this case. FERC has developed a thorough process to evaluate the sellers that it authorizes to enter into transactions at market-based rates. FERC requires each applicant for market-based rate authority to demonstrate that it either does not have, or has adequately mitigated, market power before FERC allows the applicant to sell at market-based rates. *See, e.g.*, *Grand Council of the Crees v. FERC*, 198 F.3d 950, 953 (D.C. Cir. 2000). All applications are publicly noticed, entitling parties to challenge an applicant's claims, and to seek judicial review if such a tariff is approved over their objections. *See Louisiana Energy*, 141 F.3d at 366-69. In addition, FERC has established "post-approval reporting requirements," including a regularly-conducted "market analysis" and "quarterly reports summarizing [the applicant's] transactions during the preceding three months." *Lockyer*, 383 F.3d at 1013.[10] In claiming that FERC's approval of market-based rate tariffs violates FPA § 205(c), the Consumer Advocate petitioners disregard all of this. *See* Br. at 18-19.

[10] FERC considers the electronic quarterly reporting of transactions to be so useful to consumers that it also requires the filing of such reports by sellers that operate under cost-based rate tariffs, in order "to provide the public with more accurate information as to the rates actually charged." *Revised Public Utility Filing Requirements*, Order No. 2001, 67 Fed. Reg. 31,043, FERC Stats. & Regs., Regs. Preambles at P 52 (2002) (subsequent history omitted).

Other cases on which Consumer Advocate rely (Br. at 20-24) are equally inapposite. Contrary to their claims, neither *Regular Common Carrier Conference, et al. v. ICC*, 793 F.2d 376 (D.C. Cir. 1986), nor *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985), hold that FPA § 205(c) requires all rate schedules to include a specific "price to be charged." Br. at 23. *Regular Common Carrier* involved a decision by the Interstate Commerce Commission to approve a tariff provision providing that "freight forwarders" could charge "an average rate based on the average characteristic rating and mileage of freight tendered by the customer." 793 F.2d at 378. The specific flaw the Court identified is that this tariff provision gave no explanation of "how the 'averaging' is conducted," or "whether it is conducted in the same fashion for . . . [all] shippers." *Id.* at 380. The portion of the Interstate Commerce Act at issue there expressly prohibited the charging of any rate different from the tariffed rate. *See id.* at 379 (quoting 49 U.S.C. § 10761(a)). FPA § 205(c), in contrast, as explained above, expressly permits sellers to set rates by tariff or contract.

In addition, FERC's rules governing the approval of market-based rate tariffs ensure that FERC has fully considered market conditions, the geographic definition of the market, and the type of control a seller has over facilities in the relevant market. Therefore, approval of a market-based rate tariff based on a lack

of market power establishes that customers have genuine alternatives to buying the seller's product. *See Elizabethtown Gas*, 10 F.3d at 871. Any concerns about disparate treatment, moreover, can be identified through the quarterly reporting requirement or raised in a complaint filing.

Neither does *Electrical District No. 1* adopt the interpretation of FPA § 205(c) advanced here by the Consumer Advocates. In that case, this Court resolved a "disagreement over what it means to 'fix' a rate within the meaning of 16 U.S.C. § 824e(a)" – that is, FPA § 206(a), *not* § 205(c). 774 F.2d at 492. The Court rejected FERC's "new policy of making rates effective as of the date of an order [under FPA § 206] setting forth no more than the basic principles pursuant to which the new rates are to be calculated." *Id.* at 493. This Court later explained that *Electrical District No. 1* holds only that FERC cannot, in a proceeding under FPA § 206, "announce some formula and *later* reveal that the formula was to govern from the date of announcement." *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990) (emphasis in original). That case, therefore, says nothing about whether FERC can establish rules under FPA § 205(c) that permit the filing and approval of market-based rate tariffs.

c. The Market-Based Rate Regime Does Not Violate FPA §§ 205(d) or 205(e)

Consumer Advocates assert that the filing requirements under FERC's market-based rate regime "cannot possibly satisfy [FPA § 205(d)'s] 'definite and specific' statutory notice-by-filing requirement." Br. at 28.[11] In their view, "FERC's sweeping reclassification of 'changes' in rates and charges as subject to mere 'reporting requirements' has been done without explanation of how this satisfies the plain language" or intent of FPA § 205(d). *Id.* Recognizing that their position was raised and rejected in *Lockyer*, Consumer Advocates state the Ninth Circuit "didn't go far enough," but should have voided the entire market-based rate regime altogether as eliminating "all of the other consumer protections in sections

[11] Consumer Advocates rely on *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1521 (D.C. Cir. 1995), to bolster their FPA interpretation. Br. 28. However, *Southwestern* involved different statutory language than that found in FPA § 205(d) and a different regulatory approach from FERC's market-based rate regime. On the latter point, the FCC "adopt[ed] a policy of permitting non-dominant common carriers to file a range of rates as opposed to fixed rates showing a schedule of charges." 43 F.3d at 1517 (citation omitted). This Court ruled the Federal Communications Act language "connotes a specific list of discern[i]ble rates; it does not admit the concept of ranges." *Id*. at 1521. Consumer Advocates' apparent reliance on that ruling is misplaced because the FERC quarterly reports require each seller to list the terms of each transaction individually. *See Lockyer* at 1014 (noting the "transaction-specific nature of the required filings and quoting FERC that the filings by many sellers of "aggregate data did not comply with the reporting requirements"). The transaction-specific data required in FERC's quarterly reports do not constitute a range of rates similar to what was rejected in *Southwestern.*

205(c), (d), and (e)." Br. at 31-32. Those assertions misapprehend nearly every relevant aspect of the market-based rate regime as well as the ruling in *Lockyer*.

As summarized in *Lockyer*, 383 F.3d at 1012-13, following this Court's instruction in *Tejas*, *Louisiana Energy*, and *Elizabethtown*, "FERC's system consists of a finding that the applicant lacks market power (or has taken sufficient steps to mitigate market power), coupled with a strict reporting requirement to ensure that the rate is 'just and reasonable' and that markets are not subject to manipulation." *Id*. at 1013. Under the market-based rate regime, the rate change occurs when an applicant makes a FPA § 205 filing to shift from cost-of-service pricing to market-based pricing. At that time, there is an "opportunity for rate suspension and hearing with the burden of proof on the [applicant], and the immediate imposition of a refund obligation," Br. at 32, consistent with FPA § 205, as the applicant must show it lacks, or has adequately mitigated, market power before being authorized to charge market-based rates; *see generally* 18 C.F.R. Part 35 (filing requirements and procedures).

If an applicant is granted market-based rate authority, then it must file quarterly reports showing transaction-specific data for all transactions. *See* 18 C.F.R. § 35.10b. Consumer Advocates apparently believe those reports should be replaced by "procedures for notice and review" as the only means to comply with

the FPA refund protection. Br. at 32. The Ninth Circuit reached the opposite conclusion, ruling that FERC has "the authority to impose retroactive refunds for § 205 violations" in cases where sellers "overcharge and manipulate markets in violation of the FPA." *Lockyer*, 383 F.3d at 1017. In contrast to Consumer Advocates' view that the reports are *per se* invalid, the Ninth Circuit found "the reporting requirements as integral to the [market-based rate] tariff, with implied enforcement mechanisms sufficient to provide substitute remedies for the obtaining of refunds for the imposition of unjust, unreasonable and discriminatory rates." *Id.* at 1016; *see id*. at 1017 ("it is clearly incorrect to conclude that the reporting requirements are anything less than essential to a valid administration of the market-based system at issue in this case").

That ruling refutes Consumer Advocates' assertion that, by relying on quarterly reports as an integral part of the market-based rate regime's monitoring and protection, "FERC has relegated ratepayers entirely to the Section 206 [complaint] process for protection against unjust and unreasonable rates." Br. at 34 (citation omitted).

C. Congress Effectively Ratified the Commission's Market-Based Rate Authority

With the enactment of the Energy Policy Act of 2005, *see supra* Statement of Facts section II.D., Congress has eliminated any doubts that may have lingered regarding FERC's authority to approve market-based rate tariffs under the FPA. In amending a statute, Congress can "effectively ratif[y] the [agency's] previous position" regarding its authority under the statute. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000). Numerous provisions of the EPAct presume that sellers will operate under market-based rate tariffs – and in centralized and bilateral markets that necessitate the use of such tariffs – demonstrating Congress's acquiescence in FERC's interpretation of FPA §§ 205 and 206.

Most tellingly, Congress adopted a prohibition on "market manipulation" that is essentially based on fraud and scienter in, among other things, market-based transactions.[12] Congress made 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 (as those terms are used in section 10(b) of the

[12] Unlike FERC's Market Behavior Rules, the market manipulation provisions of the EPAct apply to all "entities," 16 U.S.C. § 824v(a), and not just to those entities that are public utilities subject to FERC's jurisdiction under other provisions of the FPA.

Securities Exchange Act of 1934)." EPAct, Pub. L. No. 109-58, § 1283, 119 Stat. 979 (to be codified at 16 U.S.C. §824v). Considered against the background of FERC's high-profile investigations of allegations of manipulation in the California and Western energy markets – as well as the logical imperative that a prohibition on market manipulation presumes the existence of rates set by the market – Congress necessarily ratified FERC's approval of the very market-based rate tariffs that could be affected by the prohibited manipulation.

Other provisions of the EPAct are to the same effect. Congress adopted a new provision ("Electricity Market Transparency Rules") that directs FERC to take actions to "facilitate price transparency in *markets* for the sale and transmission of electric energy," and to "ensure that consumers and *competitive markets*" are protected from harm due to "untimely public disclosure of *transaction-specific* information." EPAct § 1281, 119 Stat. 978 (to be codified at 16 U.S.C. §824t(a)(1), (b)(2)) (emphases added). Congress provided FERC with new "refund authority" over entities that make "short-term sale[s] of electric energy through an *organized market* in which the rates for the sale are established by Commission-approved tariff." EPAct § 1286, 119 Stat. 981 (to be codified at 16 U.S.C. §824e(e)(2)) (emphasis added).[13] And Congress established a special

[13] All FERC-approved tariffs for organized markets provide for sales of

provision offering "relief for extraordinary violations," specific to the events in California and the West during 2000 and 2001, which applies to "seller[s] of wholesale electricity," but only if FERC, among other things, has "revoked the seller's authority to sell any electricity *at market-based rates*." EPAct § 1290(a)(2), 119 Stat. 983 (emphasis added).

These provisions, alone and taken together, confirm, generally, FERC's authority to approve market-based rate tariffs, and specifically, FERC's actions (including the Market Behavior Rules at issue here) to ensure that energy suppliers are not able to manipulate markets or otherwise act in an anticompetitive manner.

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electric energy at market-based rates. *See, e.g., AEP Power Mktg., Inc., et al.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

CONCLUSION

For the reasons stated, the challenged Orders should be sustained in all respects, and the petition for review either dismissed or denied.

Respectfully submitted,

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***Colorado Office of Consumer Counsel, et al.*,** **Docket No. EL01-118**
D.C. Cir. No. 04-1238

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 10934 words, not including the tables of contents and authorities, the certificates of counsel, the glossary or the addendum.

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