No.

In the Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, OFFICE OF THE PEOPLE'S COUNSEL FOR THE DISTRICT OF COLUMBIA, DELAWARE DIVISION OF THE PUBLIC ADVOCATE, MARYLAND OFFICE OF PEOPLE'S COUNSEL, PJM INDUSTRIAL CUSTOMER COALITION & MONITORING ANALYTICS, LLC,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Power Act, 16 U.S.C. § 824 *et seq*, establishes the framework for federal regulation of the electric power industry. Its fundamental premise is that, in exchange for enormously costly infrastructure investments to supply a public good, public utilities like generators retain the right to set their rates in the first instance, subject to reversal by the Federal Energy Regulatory Commission (FERC) only where those rates are unjust, unreasonable, or unduly discriminatory.

Since the advent of regulatory reforms in the late 1990s and early 2000s, much of the electric grid in this country is now governed by sub-regulatory Regional Transmission Organizations and Independent System Operators, which—with oversight from FERC—largely set prices for wholesale electricity products via auctions.

The question presented is whether a public utility supplier's offer into such an auction structure, whereby it offers to provide a given electricity product at or above a specified price, is a "rate[] * * * demanded" under Section 205 of the Federal Power Act (16 U.S.C. § 824d(a)), and therefore may be set aside only by FERC (and not dictated by non-governmental third parties), and then only upon a finding that it is unjust, unreasonable, or unduly discriminatory.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the consolidated proceedings in the court of appeals were:

Petitioners:
Vistra Corporation; Constellation Energy Corporation, LLC; Constellation Energy Generation, LLC; Electric Power Supply Association; PJM Power Providers Group; Calpine Corporation; LS Power Associates, L.P.; Talen Energy Marketing, LLC.

Respondent:
Federal Energy Regulatory Commission.

Intervenors:
PJM Interconnection, L.L.C.; Garrison Energy Center, LLC; PJM Industrial Customer Coalition; Delaware Division of the Public Advocate; Maryland Office of People's Counsel; Office of the People's Counsel for the District of Columbia; Monitoring Analytics, LLC.

CORPORATE DISCLOSURE STATEMENT

Petitioner Electric Power Supply Association (EPSA) is not a public company and has no parent corporation. No publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Vistra Corp. v. *FERC*, No. 21-1214
(D.C. Cir. Aug. 15, 2023)

Constellation Energy Corp. v. *FERC*, No. 21-1216
(D.C. Cir. Aug. 15, 2023)

Elec. Power Supply Ass'n v. *FERC*, No. 21-1217
(D.C. Cir. Aug. 15, 2023)

Constellation Energy Corp. v. *FERC*, No. 22-1063
(D.C. Cir. Aug. 15, 2023)

Elec. Power Supply Ass'n v. *FERC*, No. 22-1065
(D.C. Cir. Aug. 15, 2023)

Vistra Corp. v. *FERC*, No. 22-1066
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Electric Power Supply Association (EPSA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit (App., *infra*, 1a-31a) is reported at 80 F.4th 302. The original 2021 order of the Federal Energy Regulatory Commission (App., *infra*, 145a-201a) is reported at 176 FERC ¶ 61,137. FERC's 2022 order on rehearing (App., *infra*, 32a-144a) is reported at 178 FERC ¶ 61,121.

JURISDICTION

The court of appeals entered judgment on August 15, 2023. On November 3, 2023, The Chief Justice extended the time to file until January 12, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Federal Power Act Section 205, 16 U.S.C. § 824d, provides in relevant part:

> **(a) Just and reasonable rates**
>
> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission * * * shall be just and reasonable[.]
>
> * * *
>
> **(d) Notice required for rate changes**
>
> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service

> * * * except after sixty days notice to the Commission and to the public.
> * * *
>
> **(e) Suspension of new rates; hearings, five-month period**
>
> Whenever any such new schedule is filed the Commission shall have authority * * * to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service[.]

STATEMENT

The Federal Power Act (FPA) provides a critical right to public utilities that invest substantial sums building electric power generation infrastructure that serves the public good. The FPA intentionally leaves primary responsibility for rate-setting with the utilities themselves, subject to relatively deferential review by FERC: "[T]he ability of the utility owner to 'set the rates it will charge prospective customers, and change them at will,' subject to review by the Commission" is "the very thing that the statute was designed to protect." *Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (quoting *City of Cleveland* v. *FPC,* 525 F.2d 845, 855 (D.C. Cir. 1976)).

The electric power industry has changed significantly since Part II of the FPA was enacted in 1935. Rather than vertically integrated local monopolies, we now have a largely interconnected power grid with substantial market competition for the supply of power. FERC's regulation of utilities has evolved in response; through a series of laudable reforms, the agency now "often forgoes * * * cost-based rate-setting," instead frequently employing market-based auction structures "to ensure 'just and reasonable' wholesale rates by enhancing competition." *FERC* v. *Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016).

These are all commendable developments. But in the proceedings below, FERC reached—and the D.C. Circuit affirmed—a novel and atextual legal interpretation that undermines the basic premise of ratemaking under the FPA. FERC and the court of appeals held that a public utility's offer into an auction to supply power at or above a particular price is not a "rate[] * * * demanded * * * for or in connection with the transmission or sale of electric energy" (FPA § 205(a), 16 U.S.C. § 824d(a)), and that as a result, generators do *not* have the right to determine the amount of their bids in the first instance, as they would if they were setting rates directly.

Instead, the court upheld a structure in which a supplier's proposed auction offer can be "accept[ed] or reject[ed]" by a non-governmental third party, with no recourse for the supplier under FPA Section 205 to file its rate with FERC for a determination of its legality. App., *infra*, 194a-195a. Even worse the rules governing this market *require* many suppliers to submit offers into the capacity auction (see *Advanced Energy Mgmt. All.* v. *FERC*, 860 F.3d 656, 667-668 (D.C. Cir. 2017))—so such a supplier cannot simply sit out the auction if the offer imposed upon it by these third-party market administrators is insufficient to recover the supplier's costs.

The conclusion reached by FERC and the D.C. Circuit below—that such a structure is permissible because auction offers are not "rates * * * demanded" within the meaning of FPA Section 205—is wrong. It is contrary to the plain text of the FPA, and turns the essential premise of the statute—ratemaking by the utilities in the first instance—on its head, permitting instead a structure in which "generators [can] offer only that rate [which third-party market administrators] *tell them* to offer." App., *infra*, 132a (dissenting

statement of Commissioner Danly). FERC has thus provided to a non-governmental third party the ability unilaterally to force a rate upon unwilling suppliers, depriving the suppliers of their core rights pursuant to Section 205. The Court should not permit such a brazen attempt by an administrative agency to redistribute powers intentionally reserved to the regulated industry by Congress.

Because of the gravity of the agency's (and the court of appeals') error, and because of the immense importance of a properly functioning electric power industry, the Court should grant review.

A. Statutory Background

Part II of the Federal Power Act, enacted in 1935, "charged FERC's predecessor agency with undertaking 'effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce.'" *Elec. Power Supply Ass'n*, 577 U.S. at 266 (quoting *New York* v. *FERC*, 535 U.S. 1, 6 (2002)). "Under the statute, the Commission has authority to regulate 'the transmission of electric energy in interstate commerce' and 'the sale of electric energy at wholesale in interstate commerce.'" *Ibid.* (quoting 16 U.S.C. § 824(b)(1)).

Nonetheless, under the FPA, public utilities[1]—not regulators—have the primary role in setting rates for

[1] "Public utility" is defined to mean "any person who owns or operates facilities subject to the jurisdiction of the Commission under" the FPA. 16 U.S.C. § 824(e). FERC's jurisdiction extends to facilities used for the "transmission of electric energy in interstate commerce and * * * the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The term "facilities" has "long been read broadly to include, among other intangibles, contracts used by resellers." *Automated Power Exch., Inc.* v. *FERC*, 204 F.3d 1144, 1147 (D.C. Cir. 2000).

their wholesale sales. Section 205 of the FPA provides that public utilities shall set their own rates by filing rate schedules with FERC; absent action by the Commission, those rates take effect automatically. 16 U.S.C. § 824(d), (e). The Commission has the power to set aside rates only if they are not "just and reasonable," or are unduly discriminatory or preferential. *Id.* § 824d(a), (b).

This substantive just-and-reasonable standard leaves significant rate-setting discretion with the utilities. That is, "there is not a single 'just and reasonable rate' but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone." *Maine Pub. Utils. Comm'n* v. *FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008), *rev'd in part on other grounds*, 558 U.S. 165 (2010); accord, *e.g.*, *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.").

So long as a utility's chosen rate is within that zone of reasonableness, therefore, FERC cannot substitute a different rate. See, *e.g.*, *Atlantic City Elec. Co.*, 295 F.3d at 9 ("Section 205 of the Federal Power Act gives a utility the right to file rates and terms for services rendered with its assets," and FERC "can reject them only if it finds that the changes proposed by the public utility are not 'just and reasonable.'"); *id.* at 10 ("The courts have repeatedly held that FERC has no power to force public utilities to file particular rates unless it first finds the existing filed rates unlawful.").

Thus, as this Court has explained, a public utility, "like the seller of an unregulated commodity, has the

right in the first instance to change its rates as it will," subject only to FERC review under the deferential just-and-reasonable standard. *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958).[2] As a result, FERC's role under Section 205 is "an essentially passive and reactive" one. *City of Winnfield* v. *FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.).[3] And, "FERC lacks the authority to require [utilities] to cede their right under section 205 of the Act to file changes in rate design with the Commission." *Atlantic City*, 295 F.3d at 11.

B. Factual and Procedural History

1. As the Court has explained, "FERC's role has evolved" in the decades since the FPA's passage, as the electric power sector itself has progressed from an industry composed of "vertically integrated monopolies in confined geographic areas" to "a competitive interstate business." *Elec. Power Supply Ass'n*, 577 U.S. at 267. "In this new world, FERC often forgoes the cost-based rate-setting traditionally used to prevent monopolistic pricing," instead "undertak[ing] to ensure 'just and reasonable' wholesale rates by enhancing competition" and "break[ing] down regulatory and economic barriers that hinder a free market in

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[2] *United Gas* involved the Natural Gas Act (NGA), the other primary statute administered by FERC. As the Court has explained, "the relevant provisions of the two statutes are analogous," and the Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 164 n.10 (2016).

[3] In a proceeding under Section 206 of the FPA, by contrast, FERC is empowered to set its own just and reasonable rate, but only after first finding that the existing rate is unjust, unreasonable, or unduly discriminatory—*i.e.*, outside the zone of reasonableness. 16 U.S.C. § 824e(a); see, *e.g.*, *Atlantic City*, 295 F.3d at 10.

wholesale electricity." *Ibid.* (quoting *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008)).

"As part of that effort, FERC encouraged the creation of nonprofit entities"—Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs)—"to manage wholesale markets on a regional basis." *Elec. Power Supply Ass'n*, 577 U.S. at 267. See also *Morgan Stanley*, 554 U.S. at 536-537. Each of these entities "administers a portion of the grid, providing generators with access to transmission lines and ensuring that the network conducts electricity reliably." *Elec. Power Supply Ass'n*, 577 U.S. at 268. "And still more important for present purposes, each operator conducts a competitive auction to set wholesale prices for electricity." *Ibid.*

2. The dispute giving rise to this case concerns the auction-based regional capacity market administered by PJM Interconnection, "an RTO that oversees the electricity grid in all or parts of 13 mid-Atlantic and Midwestern States and the District of Columbia." *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016). This market, like all RTO- and ISO-administered markets, is governed by a tariff that is itself subject to FERC's just-and-reasonable review under FPA Section 205.

"'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option." *Connecticut Dep't of Pub. Util. Control* v. *FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). Thus, "[u]nlike the electricity market, in which generators sell actual power to retailers, the capacity market trades in the *future* supply of electrical power." *TC Ravenswood, LLC* v. *FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013). When PJM "experiences a high demand for

electricity, it can call on the capacity resource to produce that electricity." *Advanced Energy Mgmt.*, 860 F.3d at 659.

As the Court explained in a previous case arising from the same structure:

> The PJM capacity auction functions as follows. PJM predicts electricity demand three years ahead of time, and assigns a share of that demand to each participating [load-serving entity]. Owners of capacity to produce electricity in three years' time bid to sell that capacity to PJM at proposed rates. PJM accepts bids, beginning with the lowest proposed rate, until it has purchased enough capacity to satisfy projected demand. No matter what rate they listed in their original bids, all accepted capacity sellers receive the highest accepted rate, which is called the "clearing price." [Load-serving entities] then must purchase from PJM, at the clearing price, enough electricity to satisfy their PJM-assigned share of overall projected demand.

Hughes, 578 U.S. at 155-156 (footnote omitted). In sum, the price for capacity is determined based on suppliers' offers and PJM's projections of future demand. Suppliers are paid a price no lower than their offer price for their commitment to produce a certain quantity of power if needed, regardless of whether they are actually called on to operate.

Notably, pursuant to PJM's aptly named "must-offer requirement," many "[r]esource owners must offer their capacity in PJM's capacity market in order to participate in PJM's energy market." *Advanced Energy Mgmt.*, 860 F.3d at 667-668; see also *ibid.* (explaining that this "must-offer requirement is a market

mechanism to prevent artificial scarcity"). That is, as a condition of selling energy in PJM markets at all, these suppliers are required to offer capacity into the auction.

3. Under PJM's tariff, however, suppliers are not free to set their offers at whatever level they choose. Instead, their offer prices are limited by what is known as the "market seller offer cap." *E.g.*, App., *infra*, 146a.

Historically, a resource owner could only offer capacity into the PJM-administered auction "at a rate equal to each individual resource's avoidable costs," that is, "the operational costs the resource would not incur in the following year if it did not have a capacity commitment." *Advanced Energy Mgmt.*, 860 F.3d at 666-667. These rules were briefly changed in 2015, but in the orders under review here, FERC returned to the pre-2015 operating cost-based offer cap. See generally App., *infra*, 145a-201a.

Under FERC's order, capacity resources would have two options when submitting offers in capacity auctions. First, a seller could use a default offer cap set forth in PJM's Tariff for the applicable technology class, minus projections of revenues from PJM's energy and ancillary services market. App., *infra*, 149a-150a, 176a. Alternatively, a seller would have the option of providing cost-based information to obtain a unit-specific offer cap determination from the Market Monitor—a non-governmental third party—based on that seller's "avoidable" costs. *Ibid.*

Critically for current purposes, to the extent the Market Monitor and a supplier disagree regarding these unit-specific calculations, those figures will be "calculated by the Market Monitor" and "the ultimate determination" of the offer will be made "by PJM."

App., *infra*, 177a, 180a; see also *id.* at 194a-195a (revisions to PJM's tariff, providing that suppliers must "attempt to reach agreement" with the Market Monitor regarding the level of the offer; if there is no agreement, PJM "shall review the data submitted by the [supplier]," and "make a determination whether to accept or reject the requested" offer level). And as FERC later confirmed, its scheme does not provide an opportunity for suppliers to file an offer with the Commission under Section 205—for a determination whether the *supplier's* version of its offer is just and reasonable—if, for example, the offer level unilaterally determined by the Market Monitor and PJM does not sufficiently reflect the supplier's going-forward costs.

4. Various participants in the FERC proceeding petitioned for rehearing, including on the grounds that this process for administratively determining a resource's offer deprived resource owners of their right to set their own rates in the first instance, subject to FERC review under FPA Section 205. C.A. J.A. 1195-1201.

In its rehearing order, FERC did not contest the premise that the auction design it had approved permits PJM and the Market Monitor to essentially set generators' bids unilaterally. Instead, it asserted that Section 205 was not implicated at all, because—in its view—"capacity offers into the PJM capacity market are not 'rates made, demanded, or received' under FPA section 205." App., *infra*, 100a. On that theory, it held that "the unit-specific review process established in the September 2021 Order cannot—and does not—deprive sellers of their FPA section 205 filing rights." *Id.* at 101a.[4]

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[4] The Commission also claimed in the alternative that sellers "voluntarily" give up their Section 205 rights by agreeing to

Commissioner Danly dissented, objecting to the agency's extinguishing of sellers' Section 205 rights. See App., *infra*, 132a ("Apparently, we can now therefore approve a tariff that requires generators to offer only the rate the [Market Monitor] and PJM *tell them* to offer. No court has ever upheld such reasoning."). In his view, "[e]ach individual seller has the statutory right to propose its offer to sell under FPA section 205," and "[t]he Commission has no choice under the statute but to allow sellers the opportunity to make this showing. While multiple individual seller offers compete against each other to set the price in the auction, this does not change the fact that each individual seller offer is a proposed rate." *Id.* at 140a. As Commissioner Danly explained, FERC's ruling "flips section 205 right on its head" by providing that "the [Market Monitor's] rate gets the 205 rights, *not the seller's rate*." *Id.* at 141a.

5. Several interested parties petitioned for review of FERC's orders, again arguing, in part, that FERC's orders deprive generation resources of their Section 205 rights.

In a brief analysis, the D.C. Circuit, too, concluded that "capacity market offers are not 'rates' within the statutory meaning of Section 205; they are inputs into determining the market-clearing price." App., *infra*, 30a. The court's reasoning was essentially limited to the observation that, under PJM's tariff, capacity auction offers are not "'file[d] with the Commission' and 'ke[pt] open * * * for public inspection,'" and are not individually reviewed by FERC for justness and

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participate in a market-based auction structure. App., *infra*, 101a-108a. The D.C. Circuit, however, did not adopt this reasoning. See *id.* at 28a-30a.

reasonableness, as the FPA generally requires of rate schedules. App., *infra*, 29a.

REASONS FOR GRANTING THE PETITION

The D.C. Circuit's holding below is gravely wrong: It conflicts with the plain statutory text and turns the fundamental design of the FPA squarely on its head. Because of the severity of these errors—and because of the significant importance of the issue, which goes to the very nature of permissible regulation of the Nation's power grid—certiorari is warranted.

A. The question presented is critically important.

1. The question whether electricity suppliers' offers into auction-based markets are "rates" for purposes of FPA Section 205—and are therefore to be set by suppliers in the first instance, subject to FERC's just-and-reasonable review—is a critically important one to modern electric power regulation.

As the Court has observed, "wholesale market operators"—that is, RTOs and ISOs—"now serve areas with roughly two-thirds of the country's electricity 'load' (an industry term for the amount of electricity used)." *Elec. Power Supply Ass'n*, 577 U.S. at 267. See also FERC, *Energy Primer: A Handbook for Energy Market Basics* 61 (April 2020) ("Two-thirds of the population of the United States is served by electricity markets run by regional transmission organizations or independent system operators," which "deliver electricity through competitive market mechanisms."), perma.cc/U3UH-NX5E.

And, one of the "two mechanisms" through which transactions in restructured markets "typically occur" is the "competitive wholesale auction[]" structure typified by PJM's capacity auction. *Hughes*, 578 U.S. at 155. Thus, although some power even in RTO/ISO

markets is secured through bilateral contracting (*ibid.*), a significant proportion of the Nation's wholesale electricity supply is bought and sold through wholesale auctions like the one at issue here. See *ibid.* (explaining that, in addition to capacity auctions, "RTOs and ISOs administer * * * for example, a 'same-day auction' for immediate delivery of electricity to [load-serving entities] facing a sudden spike in demand; [and] a 'next-day auction' to satisfy [load-serving entities'] anticipated near-term demand.").[5]

The issue presented here lies at the heart of this wholesale auction mechanism: Does a utility have a right, secured by Section 205, to determine the price of its own offer into an auction, subject to FERC review via the statutorily prescribed standard? Or may the utility's choice be overridden by a non-governmental, sub-regulatory entity (here PJM), which substitutes an offer of its own choosing?[6] Indeed, there is no guarantee that the non-governmental third party will substitute an offer that allows the supplier to recover its costs. See, *e.g.*, *Federal Power Comm'n* v. *United Gas Pipe Line Co.*, 386 U.S. 237, 243 (1967) (in its traditional formulation, "just and reasonable rates" are

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[5] PJM's auctions alone are hugely important; PJM "oversees the electricity grid" in "a very large region of the country"; specifically, "all or parts of 13 mid-Atlantic and Midwestern States and the District of Columbia." *Hughes*, 578 U.S. at 155-156 & n.2. Indeed, it is the largest of the seven regional RTO/ISO markets by peak load served, and by a significant margin. See FERC, *Energy Primer*, *supra*, at 61-62; cf. *id.* at 59 (map of RTO/ISO regions).

[6] To be sure, as described below, offers may be subject to certain mitigation rules contained within a tariff. Moreover, FERC—with the advice of third parties, such as PJM or the Market Monitor—maintains the power to reject offers where appropriate under the statute.

those "which will be sufficient to permit the company to recover its costs of service and a reasonable return on its investment."). And this significant concern is only heightened in auction structures like this one, where a supplier cannot opt out of the auction if the substituted offer is unacceptable to it. See *Advanced Energy Mgmt.*, 860 F.3d at 667-668 (discussing PJM's "must-offer requirement").

The decision below, which empowers PJM to run roughshod over a utility's chosen offer, thus deprives utilities of the essential right that Congress secured in the FPA. And in so doing, it eliminates a vital safety valve to ensure that a supplier is not forced to submit an offer that does not adequately reflect its costs of providing capacity—a safety valve on which FERC itself initially relied to justify the result below. See App., *infra*, 181a (stating that "should a dispute arise between a seller and the Market Monitor, a seller may seek Commission action" and would only "have to show that its offer is just and reasonable"). That not only harms the individual supplier, but also undermines the ability of the market to "efficiently balance[] supply and demand, producing a just and reasonable clearing price." *Hughes*, 578 U.S. at 157.

Moreover, the capacity markets are important not only for the economic magnitude of the transactions they enable, but for their effects on grid reliability and resource adequacy as well. "[C]apacity auction[s]" are used "to ensure the availability of an adequate supply of power at some point far in the future" (*Hughes*, 578 U.S. at 155)—specifically, in times of "high demand for electricity" (*Advanced Energy Mgmt.*, 860 F.3d at 659) such as extreme weather events.

The proper functioning of capacity markets like PJM's is therefore a reliability issue, not just an

economic one. For this reason, too, the court of appeals' decision—which, as described below, departs from a fundamental premise underlying the FPA—thus amply warrants the Court's review.

2. In this unique context, the lack of a developed circuit conflict is no basis to withhold review. To start, the FPA sets the D.C. Circuit as the default venue for challenges to FERC actions; petitions for review may be filed in a public utility's home circuit, but any petitioner may also file in the D.C. Circuit. 16 U.S.C. § 825*l*(b). As a result, the vast majority of FERC cases are decided by that single court, giving the D.C. Circuit the practical, if not literal, last word on many FERC-related issues.[7]

Moreover, it is difficult to see how this question could practically receive further percolation in other courts of appeals. That would require a generator to submit a now-doomed Section 205 filing to FERC regarding an offer into an auction (which the agency would doubtless deny on the basis of its decision, and the D.C. Circuit's, in this case); then seek review by a different circuit; and then, if a conflict emerges, petition for certiorari. But such a litigation campaign would take years, during which the auctions would continue to be run on an annual, monthly or even daily basis—and because FERC's longstanding policy is not to re-run auctions even if they are later determined to be legally flawed (see, *e.g.*, App., *infra*, 141a), such a petitioner would have no practical ability to receive meaningful relief. A claim would thus be rendered moot long before it reaches this Court. The

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[7] A Westlaw search for court of appeals decisions with "Federal Energy Regulatory Commission" in the caption returned 2,309 results; of those, 1,760 (76 percent) were D.C. Circuit cases.

circumstances here thus present a unique and compelling vehicle to review this important question.

Perhaps because of these features of FERC review—and likely because of the extreme practical importance of a properly functioning electric grid—the Court has not previously insisted on circuit conflicts when choosing to review FPA cases. To the contrary, the Court has repeatedly granted certiorari to review important questions about the proper scope and functioning of the Federal Power Act, like this one, without any apparent circuit split. See *Hughes*, 578 U.S. 150; *Elec. Power Supply Ass'n*, 577 U.S. 260; *Morgan Stanley*, 554 U.S. 527; *New York*, 535 U.S. 1; *NRG Power Mktg., LLC* v. *Maine Pub. Utils. Comm'n*, 558 U.S. 165 (2010). The Court should not hesitate to do so again here.

B. The court of appeals' decision turns the Federal Power Act on its head.

On the merits, the court of appeals' decision contravenes both the statutory text and the fundamental premise underlying the FPA, the basis for the Nation's system of federal electric power regulation. And the reasons the court gave for doing so—to the extent it acknowledged the problems caused by its interpretation at all—do not withstand scrutiny. Further review is warranted.

1. As a textual matter, auction offers to supply capacity are plainly encompassed within Section 205's scope. That scope extends to "[a]ll *rates* and charges made, *demanded*, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission." 16 U.S.C. § 824d(a) (emphases added).

An offer into an auction is, by definition, a "rate[] * * * demanded" within the ordinary meaning of those

terms. A "rate" is "[a]n amount paid or charged for a good or service" (Rate, *Black's Law Dictionary* (11th ed. 2019)), and a "demand" is a "request for payment of a debt or an amount due" (Demand, *Black's Law Dictionary* (11th ed. 2019)). A "rate[] * * * demanded" is therefore the minimum amount a supplier requests to be paid for a good or service—which precisely describes a capacity auction offer: An offer is the rate at or above which a supplier will sell capacity; if the supplier's demanded rate is not met, it will not provide capacity at all. Cf. Bid, *Black's Law Dictionary* (11th ed. 2019) ("A submitted price at which one will perform work or supply goods.").

If there were any ambiguity about whether the phrase "rate[] * * * demanded" extends to its full definitional reach—thus easily encompassing capacity auction offers—its pairing with the modifier "[a]ll" would extinguish that doubt. See, *e.g.*, *AK Futures LLC* v. *Boyd St. Distro, LLC*, 35 F.4th 682, 690-691 (9th Cir. 2022) ("The use of 'all' indicates a sweeping statutory reach."); cf. *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 n.2 (2020) ("We have repeatedly explained that 'the word "any" has an expansive meaning.'") (quoting *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008)). And no one disputes that capacity suppliers like petitioner's members are "public utilit[ies]" (see 16 U.S.C. § 824(e)), satisfying Section 205's final condition. The text alone therefore forecloses FERC's, and the D.C. Circuit's, interpretation.[8]

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[8] This Court, too, has recently described PJM capacity auction offers as rates. See *Hughes*, 578 U.S. at 155-156 ("Owners of capacity to produce electricity in three years' time bid to sell that capacity to PJM at *proposed rates*. PJM accepts bids, beginning with the lowest proposed *rate*, until it has purchased enough capacity to satisfy projected demand. No matter what *rate* they listed in their original bids, all accepted capacity sellers receive

2. The result below also undermines the entire premise of ratemaking under the FPA, which establishes the utility itself, not regulators or sub-regulatory third parties, as the primary actor. See, *e.g.*, *Czyzewski* v. *Jevic Holding Corp*, 580 U.S. 451, 466-467 (2017) ("'[S]tatutory construction is a holistic endeavor' and * * * a court should select a 'meaning that produces a substantive effect that is compatible with the rest of the law.'") (quoting *United Sav. Ass'n of Tex*. v. *Timbers of Inwood Forest Associates, Ltd*., 484 U.S. 365, 371 (1988)) (alterations incorporated).

As described above, Section 205 of the Federal Power Act "gives a utility the right to file rates and terms for services rendered with its assets." *Atlantic City*, 295 F.3d at 9 (citing 16 U.S.C. § 824d). "Section 205(d) provides that a public utility may file changes to rates, charges, classification, or service at any time upon 60 days notice." *Id.* (citing 16 U.S.C. § 824d(d)). "FERC can then review those changes under section 205 and suspend them for a period of five months, but it can reject them only if it finds that the changes proposed by the public utility are not 'just and reasonable.'" *Id.* (quoting 16 U.S.C. § 824d(e)).

Section 205 thus confirms a public utility's "right * * * to change its rates * * * [at] will, unless it has undertaken by contract not to do so." *United Gas*, 358 U.S. at 113. And the provision forms an integral part of the FPA's overall statutory scheme, "under which all rates are established initially by the [public utilities], * * * and all rates are subject to being modified by [FERC] upon a finding that they are unlawful."

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the highest accepted *rate*, which is called the 'clearing price.'") (emphases added).

United Gas Pipe Line Co. v. *Mobile Gas Serv. Corp.* 350 U.S. 332, 341 (1956).

In this respect, Section 205 "is intended for the benefit of the utility." *City of Winnfield*, 744 F.2d at 875. Indeed, "the ability of the utility owner to 'set the rates it will charge prospective customers, and change them at will,' subject to review by the Commission" is "the very thing that the statute was designed to protect." *Atlantic City*, 295 F.3d at 10 (quoting *City of Cleveland,* 525 F.2d at 855).

FERC's approach, by contrast, turns the statute on its head: PJM's tariff, as approved by FERC and the D.C. Circuit, "requires generators to offer only that rate the IMM and PJM *tell them* to offer." App., *infra*, 132a (dissenting statement of Commissioner Danly); see *id.* at 97a (FERC rehearing order) (explaining that, if a supplier challenges the Market Monitor's offer, FERC will review them both "to ensure they comply with PJM's tariff provisions" but failing to conclude that, if both offers are consistent with the tariff, the supplier's offer must be used). And, under this view, the supplier has no right to take its own offer to FERC under Section 205 for a determination of its legality. This shifting of rights and responsibilities impermissibly allows the Market Monitor, PJM, and ultimately FERC, to replace suppliers' rates even when they fall within the ordinary "zone of rates that are just and reasonable." *Maine Pub. Utils. Comm'n*, 520 F.3d at 471.

3. In holding that auction offers are *not* rates demanded, the D.C. Circuit did not meaningfully contend with either the straightforward textual analysis above or the fundamental changes its interpretation would wreak on the statute. Instead, it merely observed that "reading [auction] offers as 'rates . . .

demanded' would not seem to comport with" the statutory requirement that rates be "'file[d] with the Commission' and 'ke[pt] open * * * for public inspection,'" which FERC does not require of auction offers. App., *infra*, 29a. First, that reasoning is entirely circular; it contends that offers cannot be rates because FERC does not currently treat them as such—but petitioner's whole point is that FERC is not complying with the statute in its treatment of offers.

Second, and in any event, these particular statutory requirements are subject to change by FERC order: The requirement to change rates via "notice to the Commission and to the public" applies "[u]nless the Commission otherwise orders" (16 U.S.C. § 824d(d)), and the general requirement of publicly filed rate schedules is subject to "such rules and regulations as the Commission may prescribe" (*id.* § 824d(c)). Auction offers' status as Section 205 "rates" is entirely consistent with this structure: FERC, in its grant of blanket market-based rate authorization to public utility suppliers and its approval of PJM's tariff and its auction provisions, has "otherwise order[ed]" that auction bids need not be filed with FERC and may be submitted confidentially. It is well established that FERC has "broad discretion" in prescribing such rate-filing rules. *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004)

The D.C. Circuit's only other analysis was to cite to circuit precedent holding that FERC can "ensure the justness and reasonableness of rates" produced by a market-based auction structure "through reviewing and monitoring the process by which rates are computed," rather than reviewing each resulting rate individually. *Public Citizen, Inc.* v. *FERC*, 7 F.4th 1177, 1194 (D.C. Cir. 2021); see App., *infra*, 30a. To the extent that the court was reasoning that the PJM tariff

containing the auction structure is itself a rate subject to Section 205 review,[9] that observation is no impediment to concluding that individual bids are also Section 205 "rates * * * demanded." As the D.C. Circuit has previously explained, "[w]hile an ISO may have certain section 205 rights, there is simply no denying [individual utilities'] section 205 rights." *Atlantic City*, 295 F.3d at 11.

Thus, as Commissioner Danly explained in dissent, even if "sellers' offers are 'inputs' to the capacity auction, * * * they are inputs that independently enjoy [S]ection 205 rights." App., *infra*, 139a. Indeed, a supplier's "sell offer is quite the input—it *determines* the rate. And that rate determines whether there is a transaction at all." *Id.* at 140a.

Nor would this conclusion raise any practical conflict. The assessment of whether a supplier's individually filed offer is just and reasonable and not unduly discriminatory will necessarily occur in the context of the broader rules for, and purpose of, the auction. In that context, a supplier whose offer affirmatively conflicts with specific directives of the RTO/ISO tariff will have an uphill battle to demonstrate why the reasoning underlying FERC's prior approval of those

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[9] The court of appeals seems to have misunderstood its own precedent. "[O]pen-access transmission tariffs" are not "produced by [an] auction" (App., *infra*, 30a); the tariff is the ex ante set of rules that determine how an auction is conducted. Similarly, the "auction prices" held in *Public Citizen* to not require individual Section 205 review were not the "predicate" offers "submitted into the market" (*ibid.*), but rather the *output* clearing prices of the auctions in question. See *Public Citizen*, 7 F.4th at 1194 (rejecting "Public Citizen's demand that the Commission must examine and approve every individual price *resulting from* every single auction to reconfirm that the price is 'just and reasonable' in its own right.") (emphasis added).

directives does not apply in the same way to the supplier's proposal, which will strongly discourage the use of Section 205 filings in such circumstances. It may be the case that issues explicitly addressed in the RTO/ISO tariff can effectively occupy the field, requiring as a practical matter a Section 206 filing to dislodge.

Of significant concern here, however, many of the factors considered in the Market Monitor's review—and ultimately addressed by PJM in setting an offer—are not defined in the FERC-approved tariffs.[10] At the very least, suppliers' Section 205 rights must permit them to submit any bid that is within the zone of reasonableness with respect to these undefined parameters.

4. This observation also goes a long way to answering FERC's erroneous contention below that petitioner would "make market mitigation mechanisms optional" or permit sellers to "skirt" PJM's market rules. App., *infra*, 109a, 111a. Petitioner's position that offers are subject to FERC review under Section 205 is entirely consistent with a robust market monitoring and mitigation framework. Indeed, it is consistent with the same standard of review FERC has

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[10] Examples abound, but to highlight just one: To calculate unit-specific cost factors under the PJM tariff, a broad variety of expenses may be considered. These include "[a]voidable corporate level expenses," including "avoidable expenses" for "legal services." C.A. J.A. 640 (Tariff § 6.8(a)). The tariff does not, however, specify how a generator that owns multiple units is to allocate its costs, including for legal services, that are applicable to multiple units, and there are multiple reasonable models to do so. And there are hundreds more similar examples. The question posed here decides whether a generator has Section 205 rights in such circumstances, which—when considered in the aggregate—often have enormous practical significance.

imposed here—as long as FERC, rather than non-governmental third parties like the Market Monitor or PJM—makes the requisite determination that a supplier's offer is unjust and unreasonable before disallowing that offer. Put differently, respecting suppliers' statutory filing rights would only undermine mitigation mechanisms and other market rules if FERC is unwilling to perform its function as the congressionally designated regulator.

Petitioner fully acknowledges that an effective market monitoring and mitigation regime is a critical aspect of FERC's regulation of market-based rates—and they have not argued otherwise in this case. But that monitoring and mitigation must take place within the statutory framework Congress established.

As petitioner sees it, the Market Monitor has a voice at every stage. It can raise its questions and concerns about market power with the actual public utility whose offer is at issue. If the public utility disagrees with the Market Monitor's position, the Market Monitor can reassert the issue with PJM, urging PJM to disallow an offer in the absence of a Section 205 filing at FERC. And if a supplier pursues a Section 205 filing, the Market Monitor can object before FERC, providing FERC the opportunity to adjudicate the justness and reasonableness of the utility's offer. Finally, the Market Monitor may always pursue a Section 206 proceeding (see note 3, *supra*), if it deems warranted.

But what *no* non-governmental third party can do—be it the Market Monitor, PJM, or someone else—is step into FERC's shoes as the regulator or usurp the Section 205 filing rights of a public utility supplier to propose a just and reasonable rate. To hold otherwise would invert the FPA's scheme, in which "the power

to initiate rate changes rests with the utility and cannot be appropriated by FERC in the absence of a finding that the existing rate was unlawful." *Atlantic City*, 295 F.3d at 10. See also, *e.g.*, *United Gas*, 358 U.S. at 113 (public utility "has the right in the first instance to change its rates as it will," subject only to FERC's just-and-reasonable review).

Yet that is precisely what the D.C. Circuit has permitted here. The Court should grant certiorari to rectify this fundamental reshaping of a critically important statute.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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JANUARY 2024