No. 23-773

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 THE PEOPLE'S COUNSEL, PJM INDUSTRIAL CUSTOMERS 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

BRIEF OF RESPONDENT CONSTELLATION ENERGY GENERATION, LLC IN SUPPORT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission ("FERC") is permitted to subdelegate to private entities the power to review the rate demanded by a supplier in a FERC-supervised wholesale electricity auction and displace that rate without ever demonstrating to FERC that the supplier's rate is unjust and unreasonable.

CORPORATE DISCLOSURE STATEMENT

Constellation Energy Generation, LLC is wholly owned by Constellation Energy Corporation, a publicly traded corporation. Vanguard holds more than 10% of Constellation Energy Corporation's stock.

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INTRODUCTION

For over a century, a bedrock principle of public utility regulation has been the statutory rule that a utility may state the rate it demands for sales to the public, subject to review by the regulator to ensure that the rate is "just and reasonable"—a term that encompasses a range of permissible outcomes. Part II of the Federal Power Act ("FPA"), enacted in 1935, reflects this scheme. *See* 16 U.S.C. § 824d. So long as a utility's rate and its practices affecting rates are just and reasonable, the statute does not allow their rejection. If third parties seek to challenge the utility's rate or practices, they bear the burden of demonstrating that the rate or practice is unjust and unreasonable. *See id.* § 824e.

Historically, utilities publicly posted their numerical rates in tariff sheets, open to public inspection and filed with the regulator. In recent years, the Federal Energy Regulatory Commission ("FERC") has moved toward market-based rates—effectively an authorization for electricity suppliers to sell at whatever price a competitive market will pay—and toward the use of reverse auctions to discover the price at which supply will meet demand most efficiently. In these auctions, electricity suppliers state the minimum price at which they are willing to sell. The auction administrator then uses those offers to construct a supply curve and identify the market price at which supply will meet demand; all suppliers with offers less than or equal to the market

price successfully sell their output and receive the market price.

To ensure that the market price reflects competitive forces, FERC has adopted rules that prevent the exercise of market power. Among these are rules under which suppliers' offers are reviewed to ensure they are based on competitive considerations. Under FPA Section 205, so long as suppliers can establish that their offers are just and reasonable—again, a standard which permits a range of acceptable outcomes—FERC has no basis for rejecting an offer. *Id.* § 824d. If a third party seeks to displace a supplier's offer on the ground that it reflects an exercise of market power, the third party bears the burden of demonstrating that the supplier's practices are unjust and unreasonable. *Id.* § 824e.

This case arose because FERC chose to outsource to private third parties—a private market operator and a private consultant the market operator engages known as the "market monitor"—the task of reviewing suppliers' offers to determine whether they were just and reasonable or instead reflected market power. It further allowed the market operator and market monitor to replace a supplier's offer price with a lower offer price, but without ever obtaining a FERC ruling that the supplier's offer price was unjust or unreasonable. The supplier's only recourse is to persuade FERC that the alternative offer price imposed on it by these third parties is unjust and unreasonable. The D.C. Circuit affirmed this unlawful framework.

The subdelegation scheme that FERC embraced turns the statute on its head: Rather than requiring the *market operator* and *market monitor* to prove to FERC

that the *supplier*'s offer is unjust and unreasonable, the supplier's offer can be displaced without any such showing, and the onus is on the supplier to persuade FERC that the substitute offer imposed upon it is unjust and unreasonable.

This inversion of the FPA will negatively impact investors' willingness to build new power plants and threaten electric reliability at a time when a large amount of new generating capacity is needed. Suppliers are being asked to accept market returns rather than a traditional regulated return, while at the same time being told that they can be forced to accept a market price lower than their own view of their costs—unless they can establish that the price imposed upon them is unjust and unreasonable. Congress wisely rejected such a scheme in the FPA. This Court's intervention is needed to protect the balance Congress struck to promote plentiful supplies of power at reasonable prices.

STATEMENT

1. The FPA vests FERC with regulatory authority over 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 FPA requires all rates subject to FERC's jurisdiction to be "just and reasonable." *Id.* § 824d(a). The just-and-reasonable requirement applies to "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with" interstate transmission or wholesale sales, as well as "all rules and regulations affecting or pertaining to such rates or charges." *Id.*; *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016). The just-and-reasonable standard allows for a

range of permissible outcomes. *See Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). Under the FPA, so long as the utility can justify the rate or charge "made, demanded, or received" as just and reasonable, 16 U.S.C. § 824d(a), FERC has no authority to displace it. If a third party seeks to displace the rate or charge made, demanded, or received by the utility, the third party bears the burden of demonstrating to FERC that the rate or charge is unjust or unreasonable. *Id.* § 824e. This structure ensures that, in the absence of any "unjust and unreasonable" finding by FERC, "the rate-making powers of [utilities] [are] no different from those they would possess in the absence of the [FPA]: to establish *ex parte*, and change at will, the rates offered to prospective customers…." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 342-44 (1956).[1]

2. As this Court has recognized, electricity "has increasingly become a competitive interstate business." *Elec. Power Supply Ass'n*, 577 U.S. at 267. FERC has sought market-based solutions to enhance competition and "break down regulatory and economic barriers that hinder a free market in wholesale electricity." *Id.* (quoting *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008)).

To that end, FERC has encouraged the creation of private, nonprofit entities to manage wholesale markets on a regional basis. *Id.* These private entities—known as regional transmission organizations and independent

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[1] *United Gas Pipe Line Co.* involved the Natural Gas Act, but this Court has interpreted the Natural Gas Act and the FPA in parallel. *See, e.g.*, *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 164 n.10 (2016).

system operators—now serve customers across the nation and together account for roughly two-thirds of the country's usage of electricity (or, in FERC parlance, "load"). *Id.* Market operators conduct competitive auctions to set wholesale prices for electricity. *Id.* at 268. The market operators contract with third-party consultants, known as market monitors, to monitor the competitiveness of their markets.[2]

3. This case concerns an auction conducted by one such market operator, PJM Interconnection, L.L.C. ("PJM"). PJM, a private entity that is itself a utility regulated by FERC, oversees the electricity grid in all or portions of 13 states and the District of Columbia. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016). PJM contracts with a consultant called Monitoring Analytics, Inc., to act as its market monitor.[3]

Each year, PJM conducts an auction for "capacity," which is a commitment to offer electricity for sale in the future. PJM procures capacity commitments to ensure there is adequate generating capacity on the grid to meet peak demand. In the auction, suppliers designate the minimum rate they demand in exchange for their capacity. *Id.* at 155–56. PJM sorts these offers into a supply curve, and then, starting with the lowest-price offer, purchases capacity until it has procured a

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[2] *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1260 (D.C. Cir. 2004) ("[M]arket monitors are private parties who work outside the agency. They are not hired, paid, or directly managed by FERC in their work.").

[3] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1228 (D.C. Cir. 2018) (noting that "PJM retained a private company, Monitoring Analytics, LLC … to act as its independent market monitor.").

sufficient quantity to satisfy its projection of peak customer demand. *Ibid.* All suppliers who successfully sell their capacity in the auction receive the market rate (known as the "clearing price"), which is the price at which supply meets peak demand. *Id.* at 156.

Under the FERC-approved rules for the auction, suppliers of capacity may not demand a rate higher than a price called the "market seller offer cap." Pet. App. 2a–3a, 8a n.5. In the orders under review here, FERC approved PJM's replacement of a "default offer cap" (which applied to all market participants) with a "unit-specific" offer cap based on a calculation of each supplier's avoidable costs. *Id.* at 3a, 13a; *see also Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 667 (D.C. Cir. 2017) ("A resource's avoidable costs are the operational costs the resource would not incur in the following year if it did not have a capacity commitment.").

Under the auction rules, the supplier determines its "unit-specific" offer cap in the first instance. That determination is then reviewed by the Market Monitor. If the Market Monitor disagrees with the supplier's determination of its avoidable costs, it is "empowered to substitute its judgment" as to those costs and reduce the supplier's offer cap. Pet. App. 199a. If the supplier disagrees with Market Monitor's determination, it can ask PJM to resolve the impasse. PJM then decides whether to accept the supplier's proposed offer cap or the Market Monitor's. *Id.* at 26a, 199a; *see also id.* at 27a ("If the Independent Market Monitor and a supplier cannot agree, the supplier may still submit its offer and supporting data to PJM, which PJM then reviews

independently. *PJM, alone, decides 'whether to accept or reject the requested unit-specific' offer*." (emphasis added) (quoting Tariff, Attachment DD, § 6.4(b))).

If PJM selects the Market Monitor's offer instead of the supplier's offer, the supplier has no opportunity under the FERC-approved scheme to seek a FERC determination as to whether its offer is just and reasonable. The supplier's only recourse is to file a complaint at FERC, where the supplier would bear the burden to show the Market Monitor's replacement offer is unjust and unreasonable.

The upshot of these rules is to take away the supplier's right to decide what rate to demand for its capacity, without any FERC determination that the supplier's proposed rate is unjust and unreasonable. For example, suppose that a supplier wishes to demand a minimum of $50/MW-day for its capacity, which it believes reflects its avoidable costs. The Market Monitor, applying a different view of avoidable costs, determines that the supplier should not be permitted to demand more than $40/MW-day, and PJM agrees. If the supplier nevertheless attempts to demand $50 in the auction, PJM will replace that offer with the $40 level approved by the Market Monitor. Yet FERC will never have made any finding that the $50 level is unjust or unreasonable. Rather, if the supplier asks FERC to resolve the dispute, the *supplier* will bear the burden of showing that the *Market Monitor's* $40 determination is unjust and unreasonable.

4. FERC affirmed these tariff rules on the ground that offers into an auction are not "rates … demanded" under the Federal Power Act and therefore can be

displaced by PJM and the Market Monitor without their having to demonstrate to FERC that the supplier's proposed offer is unjust and unreasonable. Pet. App. 100a, 101a.

Commissioner Danly dissented, and pointed out that the statute obligates FERC "to allow sellers the opportunity" to propose an offer to sell under Section 205. *Id.* at 140a. FERC's decision, in his view, takes away that right of sellers and gives it to the Market Monitor. *Id.* at 141a.

5. The D.C. Circuit affirmed, holding that rates demanded by capacity suppliers in their auction offers are not "rates" within the statutory meaning of Section 205, but rather are inputs into the determination of the auction market clearing price. *Id.* at 30a. Therefore, the court held, suppliers' offers do not enjoy Section 205's protection.

ARGUMENT

This Court should grant certiorari and reverse. FERC may not relieve third parties of their burden to demonstrate that the rate demanded by a supplier is unjust and unreasonable before that offer can be displaced. FERC also may not subdelegate to private third parties its own authority to review and replace a supplier's rate. The D.C. Circuit's rationale for avoiding these problems—treating auction as offers as mere "inputs" not as "rates … demanded"—conflicts with the statute's plain text.

A. FERC Unlawfully Transferred the Supplier's Rate-Making Power Under Section 205 to Private Third Parties.

For almost one hundred years, it has been settled that Congress, through Section 205 of the FPA, vested utilities with the power to propose their own rates. On this score, the text is unambiguous. Section 205(a) makes clear that the utility gets to decide what rate to demand, so long as that rate is just and reasonable: "*[a]ll rates* or charges made, *demanded*, or received *by any public utility* for or in connection with the transmission or sale of electric energy" must be just and reasonable. 16 U.S.C. § 824d(a) (emphases added). Section 205(d), which contains the public notice requirement for rates, similarly makes clear that the utility has the power to change its rates: "no change shall be made *by any public utility* in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public." *Id.* § 824d(d) (emphasis added). Section 205 also constrains FERC's power to reject rates demanded or charged by a utility: it can reject a rate only if it finds the rate does not meet the just-and-reasonable standard. *Id.* § 824d(a), (e).

The phrasing of each of these subsections leaves no doubt that the setting of rates under Section 205 is left to utilities in the first instance, subject to FERC review under the deferential just-and-reasonable standard. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958). In 1956, this Court aptly described the statutory scheme "under which all rates are established initially by the [public utilities], …

and all rates are subject to being modified by the Commission upon a finding that they are unlawful." [4] *Mobile Gas*, 350 U.S. at 341. Two years later, the Court confirmed a public utility's "right … to change its rates … [at] will, unless it has undertaken by contract not to do so." *Memphis Light*, 358 U.S. at 113–14; *see also Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9–10 (D.C. Cir. 2002) (citing 16 U.S.C. § 824d). And forty years ago, the D.C. Circuit explained that Section 205 "is intended for the benefit of the utility" and FERC plays "an essentially passive and reactive" role under this provision. *City of Winnfield v. FERC*, 744 F.2d 871, 875–76 (D.C. Cir. 1984).

In contrast to Section 205, Section 206 allows third parties to file a complaint with FERC contesting a utility's rate. Under Section 206, FERC has authority to displace the utility's rate, but only upon a finding that it is unjust, unreasonable, or unduly discriminatory. 16 U.S.C. § 824e(a); *Elec. Power Supply Ass'n*, 577 U.S. at 266.

Applying the statute as written, if the Market Monitor or PJM believes that the rate demanded by the supplier reflects an exercise of market power, the onus would be on these third parties to file a complaint with FERC under Section 206, 16 U.S.C. § 824e. These third parties would then bear the burden of demonstrating that the rate demanded by the supplier was unjust and

[4] The FPA defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under" the Act. 16 U.S.C. § 824(e).

unreasonable. If FERC agreed, it could then impose a substitute rate.

FERC's orders and the D.C. Circuit's opinion upend that statutory scheme. Under FERC's rules, if the Market Monitor or PJM believe that a rate demanded by the supplier reflects an exercise of market power, the Market Monitor and PJM can simply replace the supplier's offer with an offer that the Market Monitor and PJM believe to be competitive. FERC's scheme transfers Section 205's rate-making authority away from the supplier to the Market Monitor: rather than requiring the Market Monitor or PJM to bring a complaint to FERC to establish that the supplier's rate demanded is unjust and unreasonable, FERC instead requires the supplier to make that showing with regard to the substitute rate established by the Market Monitor and accepted by PJM.

B. FERC Unlawfully Subdelegated to Private Third Parties Its Statutory Responsibilities.

This scheme not only contravenes the statute, but also presents a "double delegation" defect that is anathema to the Constitution. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (delegation to private persons instead of to an official or official body is "legislative delegation in its most obnoxious form"); *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 62 (2015) (Alito, J. concurring) ("When it comes to [delegations to] private entities, however, there is not even a fig leaf of constitutional justification."). FERC's subdelegation transfers to unaccountable private entities the agency's power to review and replace a

supplier's rate.

Neither PJM nor the Market Monitor are federal agencies, actors, or instrumentalities. The PJM Independent Market Monitor is a private firm, Monitoring Analytics, retained by PJM. As the D.C. Circuit has explained, market monitors "are not hired, paid, or directly managed by FERC in their work." *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1260 (D.C. Cir. 2004). As for PJM, FERC has described it as a private, non-profit corporation. *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,229 at P 20 (2016); *see also* FERC, *Energy Primer: A Handbook of Energy Market Basics* 67 (Jan. 2024) ("All [regional transmission operators and independent system operators] function as non-profit entities that operate markets to dispatch and price electricity across a large, defined footprint.").

"[I]t is one thing to bless a Congressional decision to involve private parties in the rulemaking process. It is quite another to allow an agency—already acting pursuant to delegated power—to *re*-delegate that power out to a private entity." *Texas v. Rettig*, 993 F.3d 408, 415 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc), *cert. denied*, 142 S. Ct. 1308 (2022); *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565–66 (D.C. Cir. 2004) ("[W]hen an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making. … In short, subdelegation to outside entities aggravates the risk of policy drift inherent in any principal-agent relationship.").

Nothing about the unit-specific review scheme suggests the Market Monitor or PJM function

subordinate to, or in aid of, FERC. Neither PJM nor the PJM Independent Market Monitor constitute a "subordinate federal officer." *Cf. U.S. Telecom Ass'n*, 359 F.3d at 565 ("When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent."); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 872 (5th Cir. 2022) ("A cardinal constitutional principle is that federal power can be wielded only by the federal government. Private entities may do so only if they are subordinate to an agency."). Nor can the roles of the Market Monitor and PJM under unit-specific review—literally swapping a supplier's chosen price at which to sell capacity for a different, lower price—be described as mere "ministerial and fact-gathering functions." *Consumers' Rsch. v. FCC*, 67 F.4th 773, 796–97 (6th Cir. 2023).

This case is unlike *Sunshine Anthracite Coal Co. v. Adkins*, where Congress itself, not the agency, enlisted private entities in a rulemaking. 310 U.S. 381, 388 (1940). Those private parties (coal producers organized under a code and into several district boards) functioned subordinately to the agency (the National Bituminous Coal Commission), as an "aid" that "propose[d]" minimum prices and regulations—but the agency itself ultimately exercised authority to approve, disapprove, or modify proposals offered by the industry. *Ibid.* (noting that the code members "are to operate as an aid to the Commission but subject to its pervasive surveillance and authority"); *see also id.* at 399 ("The members of the code function subordinately to the

Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities.").

Not so here. The private entities to which FERC has subdelegated the power to review and displace a supplier's rate are not assisting FERC—they are supplanting the agency entirely. They are making the decision to replace the rate demanded by the utility with an alternative rate they believe to be more appropriate. That is a regulatory role that must be performed by FERC consistent with the standard set forth in the FPA, not subdelegated to private parties who displace the utility's rate-making power under Section 205. *See Nat'l Horsemen's Benevolent & Protective Ass'n*, 53 F.4th at 872 ("For good reason, the Constitution vests federal power only in the three branches of the federal government.").

C. FERC Cannot Cure Its Statutory Violation By Labeling Auction Offers "Inputs" to the Auction.

FERC and the D.C. Circuit's only answer for FERC's statutory violation was that auction offers are not "rates" within the meaning of Section 205, but rather are mere inputs into the determination of the auction clearing price. Pet. App. 30a. But that is no answer. Plainly, a binding offer to sell at a particular minimum price, but at no less than that price, is a "rate[] … demanded" under the unambiguous text of the statute. 16 U.S.C. § 824d(a).

The Court of Appeals nevertheless found that an auction offer was not a "rate" because auction offers

were not publicly filed with the Commission, as rates usually are. Pet. App. 29a. But suppliers in PJM sell into the auction based on market-based tariffs. "These tariffs, instead of setting forth rate schedules or rate-fixing contracts, simply state that the seller will enter into freely negotiated contracts with purchasers." *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008). As this Court explained, "FERC does not subject the contracts entered into under these tariffs (as it subjected traditional wholesale-power contracts) to § 824d's requirement of immediate filing, apparently on the theory that the requirement has been satisfied by the initial filing of the market-based tariffs themselves." *Id.* Instead, suppliers must simply "file quarterly reports summarizing the contracts that it has entered into" and periodically demonstrate that they lack market power or that any market power has been adequately mitigated by market rules. *Id.*

If market-based tariffs are lawful under the FPA—and no one disputes that they are, not least of all FERC—then the D.C. Circuit's reasoning cannot be right. After all, a supplier involved in a bilateral contract negotiation who tells its counterparty, "I want at least $50/MWh for my output," plainly is demanding to be paid a particular rate, even though FERC does not require every offer and counteroffer to be publicly reported. Instead, FERC only requires any resulting sale to be reported and treats that as satisfying the requirements of Section 205(c). The same is true of an auction offer, which sets forth the minimum price at which a supplier demands to be compensated; only the resulting sale must

be reported, but the auction offer is still a "rate … demanded" under Section 205.

* * *

The power sector requires large capital investments that must be recovered over long periods. Congress understood that when it enacted the FPA, and accordingly allowed utilities to set their rates in the first instance and afforded them broad latitude to do so. So long as the rate demanded by the utility is just and reasonable, there is no ground to displace it. Congress also provided utilities with the assurance that their rates could not be displaced unless a challenger could establish that the utility's rate fell outside that broad zone of reasonableness. This structure is a bedrock component of a regulatory compact that has delivered plentiful and cheap electricity for more than 80 years. The decision below destabilizes that structure. A Court of Appeals has allowed FERC to delegate rate review to a private third party and, for the first time, allowed the private third party to displace the utility's rate without ever making the showing required by the plain text of the statute. This Court's review is urgently needed to restore balance in an industry where massive new capital investment is urgently needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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