ORAL ARGUMENT NOT YET SCHEDULED

Nos. 14-1244 and 14-1246
(consolidated)

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

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PUBLIC CITIZEN, INC., ET AL.,

*Petitioners*,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

*Respondent*.

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# BRIEF OF INTERVENORS IN SUPPORT OF RESPONDENT

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INITIAL BRIEF: November 18, 2015

# CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

## A. Parties and Intervenors

All parties and intervenors appearing before this Court are identified in petitioners' briefs.

## B. Rulings Under Review

The Federal Energy Regulatory Commission has not issued any final rulings that are being challenged by the consolidated petitions. Instead, petitioners challenge the following two notices:

1. Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Dkt. No. ER14-1409 (Sept. 16, 2014);

2. Notice of Dismissal of Pleadings, *ISO New England Inc.*, Dkt. No. ER14-1409 (Oct. 24, 2014).

## C. Related Cases

This case has not previously been before this Court or any other court. Intervenor-respondents are not aware of any related cases.

/s/ Ashley C. Parrish
Ashley C. Parrish

## CORPORATE DISCLOSURE STATEMENTS

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, intervenors supporting respondent make the following disclosures:

***New England Power Generators Association, Inc.*** ("***NEPGA***"). NEPGA, a not-for-profit entity duly organized under the laws of the Commonwealth of Massachusetts, is a trade association that advocates for the business interests of non-utility competitive electric power generators. NEPGA's member companies represent approximately 26,000 megawatts of installed capacity throughout the New England region. They are responsible for generating and supplying electric power for sale within the New England bulk power system, and are active participants in the ISO-NE capacity and wholesale electricity markets. NEPGA has no corporate parents and does not issue stock.

***Electric Power Supply Association*** ("***EPSA***"). EPSA is a national trade association that represents the competitive power industry and is incorporated under the laws of the District of Columbia. EPSA's members include 14 companies, along with numerous supporting members, and state and regional partners, that represent the

competitive power industry in their respective regions. There is no parent corporation or any publicly held corporation that owns 10 percent or more of EPSA's stock.

***H.Q. Energy Services (U.S.) Inc.*** ("***HQUS***"). HQUS is a power marketer with its corporate headquarters in Hartford, Connecticut. HQUS is the marketing arm of Hydro-Québec Production, the independent generating division of Hydro-Québec, a mandatory of the province of Québec. Hydro-Québec, acting through its division Hydro-Québec Production, generates electricity to supply the Hydro-Québec market and sells its excess output in wholesale markets in the United States.

***NRG Power Marketing LLC*** and ***GenOn Energy Management LLC*** (collectively, the "***NRG Companies***"). NRG Power Marketing, LLC and GenOn Energy Management, LLC are Delaware corporations with principal offices in Princeton, New Jersey. They are each a subsidiary of NRG Energy, Inc., a publicly held corporation, with its principal place of business in Princeton, New Jersey. The NRG Companies have not issued shares to the public, and no publicly held company has a 10% or greater ownership interest in NRG Energy, Inc.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Public Citizen, Inc. and certain Connecticut governmental entities are dissatisfied with the rates resulting from the competitive eighth Forward Capacity Auction administered by ISO New England Inc. for the New England energy markets. Consistent with the requirements of its tariff, ISO New England filed those rates with the Federal Energy Regulatory Commission pursuant to section 205 of the Federal Power Act. After 60 days, because the Commission did not take action on the filing, the rates went into effect by operation of law under section 205(d). *See* 16 U.S.C. § 824d(d).

In response, Public Citizen and Connecticut could have filed a complaint, as permitted under section 206 of the Act, challenging the rates as unjust and unreasonable and asking the Commission to set them aside. *See id.* § 824e. Instead, they have tried to short-circuit required procedures by filing petitions with this Court. But they have not identified any order reflecting final, reviewable action taken by the Commission. Instead, they seek review of certain public notices, which indicate that the rates took effect by operation of law, and attempt to infer the agency's reasoning from statements made by individual

Commissioners. According to petitioners, review is appropriate because the Commission "failed to act" before the rates became effective.

The Court should deny the petitions. Public Citizen's and Connecticut's arguments fundamentally misunderstand the Federal Power Act. There is no requirement that the Commission take action to approve rates as just and reasonable before they take effect. Instead, the statute unambiguously provides that rates become effective as a matter of law without Commission action. (*See* Section I, below.) This Court has no jurisdiction to review public notices or to transform individual Commissioner statements into agency reasoning. The notices do not qualify as reviewable "orders," and the statements reflect only the personal views of the individual Commissioners and not the institutional views of the Commission as a whole. 42 U.S.C. § 7171(e). The narrow exceptions for granting mandamus relief when agency action is unreasonably delayed, and for granting judicial review when an agency fails to take a non-discretionary act, do not apply. (*See* Section II, below.) Finally, even if there were final reviewable agency action, the petitions are legally meritless. If Public Citizen and Connecticut want to challenge the rates resulting from the eighth Forward Capacity Auction,

they should file a complaint under section 206 and comply with the procedures required under the Federal Power Act. (*See* Section III, below.)

## ARGUMENT

### I. Public Citizen's And Connecticut's Arguments Misunderstand Section 205 Of The Federal Power Act.

Public Citizen's and Connecticut's arguments — on both jurisdictional matters and the merits — fundamentally misunderstand the Federal Power Act. Contrary to their mistaken assertions, there is no requirement that the Commission approve rates as just and reasonable before they take effect. Instead, unless the Commission affirmatively acts, rates become effective by operation of law.

Section 205 requires that every public utility file with the Commission "schedules showing all rates and charges … together with all contracts which in any manner affect or relate to such rates, charges." 16 U.S.C. § 824d(c). It also requires that any changes in rates or charges be filed with the Commission at least 60 days in advance of the change becoming effective. *Id.* But these "notice" requirements are not accompanied by any obligation for the Commission to approve rates before they go into effect. Just the opposite: As this Court has long

recognized, the Commission's role under section 205 is "essentially passive and reactive." *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.). The statute imposes no obligation on the Commission to take action on proposed rates and unambiguously provides that, "*[u]nless* the Commission otherwise orders," rates and charges become automatically effective by operation of law. *Id.* § 824d(d) (emphasis added); *see also id.* § 824d(e) (granting the Commission discretion to suspend a rate's effectiveness for up to five months pending a hearing "concerning the lawfulness of the rate").

This long-standing interpretation of the Federal Power Act's plain text is reflected in an unbroken line of cases. *See Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 341 (D.C. Cir. 1974); *see also Alabama Power Co. v. FERC*, 22 F.3d 270, 271 (11th Cir. 1994); *H.S. Phillips v. FERC*, 586 F.2d 465, 467 (5th Cir. 1978). Courts have consistently held that, although the Federal Power Act requires that "all rates and charges" in connection with the transmission or sale of wholesale electric energy be "just and reasonable," 16 U.S.C. § 824d(a), as long as appropriate notice is provided, rates set by either tariff or private contract go into effect by operation of law. *See, e.g., Morgan Stanley*

*Capital Grp., Inc. v. Pub. Util. Dist. No. 1,* 554 U.S. 527, 532–33, 545 (2008); *United Gas Pipe Line Co. v. Mobile Gas Corp.,* 350 U.S. 332, 339 (1956) ("*Mobile*").

Indeed, underscoring that the Commission has no obligation to approve rates before they become effective, courts have recognized that the Commission's "passive permission" for a rate to take effect does not "constitute approval by the Commission." *Morgan Stanley*, 554 U.S. at 532 (allowing a rate to go into effect "does not amount to a determination that the rate is 'just and reasonable'"). The Commission's regulations include the same disclaimer. 18 C.F.R. § 35.4.

The statutory scheme makes sense because once rates become effective under section 205, whether as the result of a Commission order or by operation of law, they remain subject to modification under section 206 of the Act. *See* 16 U.S.C. § 824e. That provision grants the Commission authority — on its own initiative or in response to a party's complaint — to modify rates "then in force" if it finds them to be "unjust, unreasonable, unduly discriminatory or preferential." *Id.* § 824e(a). Sections 205 and 206 are thus "parts of a single 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." *Mobile*, 350 U.S. at 341; *see also Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (same). Sections 205 and 206 "distinguish between the rate-setting roles of utilities (which initially set rates) and the Commission (which may override utility-set rates that are not just and reasonable)," but in either case, "the standard of review is the same — rates must be just and reasonable." *Morgan Stanley*, 554 U.S. at 556.

## II. Public Citizen And Connecticut Have Not Challenged Reviewable Final Agency Action.

Because the rates resulting from the eighth Forward Capacity Auction became effective by operation of law, Public Citizen and Connecticut are not aggrieved by "an[y] order issued by the Commission," as section 313(b) of the Federal Power Act requires, and they are therefore not entitled to judicial review. 16 U.S.C. § 825*l*(b). The public notices do not qualify as judicially reviewable "orders," and individual Commissioner statements cannot be construed to represent the institutional views of the agency as a whole.

### A. Public Notices Are Not Reviewable Final Orders.

This is hardly the first time in the roughly 80 years since the enactment of the Federal Power Act (and the similarly worded Natural Gas Act) that rates have taken effect by operation of law. That is a regular occurrence in Commission rate proceedings. *See, e.g., Southern Co. Servs., Inc.*, 106 FERC ¶ 61,248 at PP 1, 5–6 (2004); *PJM Interconnection, LLC*, Notice of Acceptance of Filing by Operation of Law, Docket No. ER05-10-000 (Nov. 30, 2004), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10321912; *Tennessee Gas Pipeline Co.*, Notice of Acceptance of Filings by Operation of Law, Docket Nos. RP96-312-141, *et al.* (Nov. 1, 2004), http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=10282321. Yet neither Public Citizen nor Connecticut cite a single case that has ever held that this type of inaction by the Commission is subject to judicial review.

Courts have rejected the argument in analogous circumstances. For instance, in *American Rivers v. FERC*, 170 F.3d 896 (9th Cir. 1999), several parties urged the Commission to "initiate consultation" on a matter and asserted that if the Commission did not act within 30 days, they would deem the request constructively denied. When the

Commission failed to respond, the parties filed a rehearing request and, in response, the Commission issued a "Notice Rejecting Request for Rehearing," dismissing the rehearing request and noting that "there [was] no order from which to seek rehearing." *Id.* at 897. The parties then filed a petition for review, arguing that the Commission's notice qualified as reviewable agency action. The Ninth Circuit rejected that argument. After quoting the relevant language in section 313(b), the Ninth Circuit held that "[m]ere inaction by the [Commission] cannot be transmuted by petitioners into an order rejecting their petition," and "[b]ecause appellate jurisdiction is dependent on the issuance of an order," the court lacked jurisdiction. *Id.*

Public Citizen attempts to distinguish *American Rivers*, arguing that the Ninth Circuit's decision there was limited to addressing situations where a party attempts to "contrive reviewable failure to act by unilaterally setting a deadline by which it insists that the agency act or be 'deemed' to have failed to act." Pub. Citz. Br. 21, n. 1. But that is precisely what Public Citizen and Connecticut are attempting to accomplish here. They seek to impose a new, extra-statutory obligation that would require the Commission to take action by a date certain and

to affirmatively approve rates as just and reasonable before they become effective under section 205.

*American Rivers* is thus on point. This Court lacks jurisdiction because the Commission has not entered any order that "impose[s] an obligation, den[ies] a right, or fix[es] some legal relationship as a consummation of the administrative process." 170 F.3d at 897 (citations omitted). The Commission "speaks through its orders," *Entergy Servs. Inc.*, 119 FERC ¶ 61,187, at P 52 n.44 (2007), and public "notices" do not qualify as an institutional decision reflecting a majority vote of Commission members. As the Commission explains in its brief, Congress made clear that "action" by the Commission requires a quorum of at least three Commissioners and "shall be determined by a majority vote by the members present." FERC Br. 4 (quoting 42 U.S.C. § 7171(e)); *Public Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 776 (D.C. Cir. 1974) ("it is its institutional decisions — none other — that bear legal significance").

In this case, the Commission, as a body, never issued any order — much less a final, judicially reviewable order — because a majority of the Commissioners could not reach agreement, which resulted in ISO New

England's filing taking effect by operation of law. The Commission's notices are not reviewable orders. *See AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004) (holding that public notices do not qualify as reviewable orders). Instead, they are exactly what they purport to be, *see Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 n.2 (D.C. Cir. 1989) (embracing the "now-infamous 'duck-test'") — *notices* that alerted the public that the Commission had not taken action and that, as a result, the rates took effect as a matter of law.

### B. This Case Does Not Fit Into The Narrow Exceptions To Ordinary Rules Of Judicial Review.

Implicitly conceding that the notices are not reviewable orders, Public Citizen and Connecticut attempt to fit this case into two narrow exceptions to ordinary rules of judicial review. Neither applies here.

#### 1. Cases Addressing "Unreasonably Delayed" Agency Action Are Irrelevant.

Public Citizen and Connecticut first cite cases where, pursuant to 7 U.S.C. § 706(1), courts have issued a writ of mandamus to an agency to end a "marathon round of administrative keep-away" — that is, where an agency has unreasonably delayed action that Congress has required it to take. *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004) (directing agency to take action on a petition that had

been pending for six years); *see* Pub. Citz. Br. 21. But those cases did not involve and do not sanction judicial review of agency non-orders. Instead, they authorize *mandamus* relief — a judicial order directing the agency to act — in extraordinary circumstances when there are "transparent violations of a clear duty to act" and judicial intervention is needed to safeguard the courts' "prospective jurisdiction." *In re Am. Rivers*, 372 F.3d at 418 (citations omitted); *see also Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (a court "may resolve claims of unreasonable delay in order to protect its future jurisdiction").

The cases are irrelevant here because Public Citizen and Connecticut are not seeking mandamus relief. They have not argued that the Commission unreasonably and egregiously delayed action. *See In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 836 (D.C. Cir. 2012). Nor have they attempted to meet the burdensome requirements for seeking extraordinary relief. *In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013). They have not demonstrated that they have a "clear and indisputable right to relief," that the Commission had a "clear, nondiscretionary duty to act," or that they have exhausted all avenues of

available relief. *Power v. Banhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). As explained below, the Commission's alleged inaction does not prevent Public Citizen, Connecticut, or anyone else from obtaining judicial review with respect to the auction results. They have the option to file a complaint under section 206, 16 U.S.C. § 824e, and to seek review of the Commission's final order addressing that complaint.

### 2. Cases Addressing An Agency's Failure To Take Required Discrete Action Are Also Irrelevant.

Public Citizen and Connecticut also rely on cases where an agency has "failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004); *see* Pub. Citz. Br. 23. But these cases are likewise inapposite.

As explained above, nothing in section 205 of the Federal Power Act *requires* the Commission to act on rate filings and approve rates before they take effect. Instead, the Commission's role under section 205 is "essentially passive," *Winnfield*, 744 F.2d at 876, with filed rates taking effect by operation of law unless the Commission chooses *in its discretion* to suspend or reject them. 16 U.S.C. § 824d(d); *see also El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 890–91 (D.C. Cir. 2014) (a "failure to act" claim arises only when affirmative action is "legally

required"). Because the Commission here did not take action within the statutory notice period, it was "Congress's decision — not the agency's — [that] took effect." *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

Public Citizen asserts that this case is "completely unlike one where an agency's inaction is unreviewable because it merely allows consequences attributable solely to a statute to occur." Pub. Citz. Br. 24; *see also* Conn. Br. 24–25. In fact, those cases are squarely on point. In *AT&T Corp. v. FCC*, 369 F.3d 554 (D.C. Cir. 2004), for example, this Court considered whether the Federal Communication Commission's failure to issue a decision on the expiration of statutory "safeguards" could be reviewed as final agency decision. *Id.* Under the governing statute, the "safeguards" expired after three years "unless the [FCC] extends such 3-year period by rule or order." 369 F.3d at 556 (citing 47 U.S.C. § 272(f)(1)). At the end of the 3-year period, the FCC did not act and issued a public notice stating that the safeguards had expired "by operation of law." *Id.* at 556. AT&T petitioned for review, arguing that the FCC was required to act and that its failure to do so was reviewable. *Id.* at 559.

The Court rejected that argument, finding that the FCC's notice did not qualify as reviewable agency action. Because Congress, not the FCC, dictated the expiration of the regulatory safeguards, the agency was not obligated to render a decision on the extension or expiration of the regulatory safeguards, and the FCC's public notice did not qualify as reviewable agency action. *Id.* at 560–562 ("Congress made the decision to extinguish the protections of § 272 *by operation of law*. Congress did not 'delegate' this decision to the Commission.") (emphasis in original). The Court later reaffirmed its approach in *Sprint Nextel*, holding that it lacked jurisdiction to review the FCC's failure to render a decision on a forbearance petition, which under the governing statute would be "deemed granted" if not affirmatively denied by the FCC. *Sprint Nextel,* 508 F.3d at 1132.

Attempting to avoid *AT&T* and *Sprint Nextel*, Public Citizen and Connecticut argue that this case should be controlled by *Amador County v. Salazar,* 640 F.3d 373 (D.C. Cir. 2011). *See* Pub. Citz. Br. 25; Conn. Br. 25. But that case is readily distinguished. In *Amador*, the Court interpreted the Indian Gaming Regulatory Act as "imposing an obligation on the Secretary [of the Interior] to affirmatively disapprove"

any gaming compact that was inconsistent with the statutory standards. *Id.* at 382. Distinguishing *Sprint Nextel*, the Court emphasized that the Indian Gaming Regulatory Act "limited the extent to which a compact could be approved by operation of law, thus imposing an obligation on the Secretary to affirmatively disapprove any compact exceeding that limit." *Id.* (noting that in *Sprint Nextel*, the Telecommunications Act provided that, absent agency action, the forbearance request would be granted by operation of law "without limitation"). Moreover, because the only issue before the Court was a pure question of law — whether the compact met the statutory requirements — there was no need to wait for the agency to provide a basis for its decision. The Indian Gaming Regulatory Act thus "invite[d] judicial review by setting out a clear standard for reviewing courts to apply." *Id.* at 380.

Section 205 of the Federal Power Act is nothing like the provision of the Indian Gaming Regulatory Act at issue in *Amador*. While section 205(a) declares unjust and unreasonable rates to be "unlawful," it imposes no limit on when rates are allowed to take effect by operation of law. Nor does section 205 impose any affirmative obligation on the Commission to take action before rates take effect. Instead, unless the

Commission acts, rates become effective under section 205 by operation of law. *See Indiana & Michigan Elec.*, 502 F.2d at 341. If a party is dissatisfied, it may then challenge the rates by filing a complaint under section 206 and argue that the rates are not just and reasonable. After the record is developed and the Commission decides the section 206 complaint, there will be an opportunity for judicial review. *See NetCoalition v. SEC*, 715 F.3d 342, 352 (D.C. Cir. 2013) (distinguishing *Amador* based on "the availability of other avenues of [judicial] review").

In contrast, where (as here) rates have taken effect by operation of law under section 205, there is no final order by the Commission and no Commission reasoning that can serve as a proper basis for judicial review. The *Amador* court was not required to consider whether the agency inaction was "unreasoned" and instead focused on whether it was "contrary to law" under the "clear standard" established by the Indian Gaming Regulatory Act. *Amador,* 640 F.3d at 380, 382. The same is not true here. To be sure, Public Citizen and Connecticut couch their arguments as challenges to the Commission's compliance with law. But, as highlighted by their heavy reliance on the statements by individual Commissioners, their challenge is to reasoning that was never

articulated or adopted by the Commission as a whole. *See, e.g.*, Pub. Citz. Br. 28–34 (section entitled "FERC's refusal to review the justness and reasonableness of the actual rates resulting from the capacity auction is contrary to law" but devoted to responding to the individual statement of Commissioner LaFleur); Conn. Br. 14–15 (arguing that Commissioner LaFleur's statements were "plain legal error").

It is no surprise that Public Citizen and Connecticut would want to blur this line, as it is well-established that whether rates are just and reasonable is not a pure question of law. To the contrary, "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition." *Morgan Stanley*, 554 U.S. at 532. As a result, the Commission is entitled to "great deference" in its rate decisions. *Id.* This Court cannot properly defer to the Commission in the absence of any final order reflecting the institutional views of the Commission as a whole.

## III. Public Citizen's And Connecticut's Substantive Arguments Are Meritless.

Public Citizen's and Connecticut's arguments on the merits are also unavailing. Even if there were some defensible way for them to cobble together a reviewable "order" from public notices and statements made

by individual Commissioners, the resulting "order" would satisfy the requirements of both the Federal Power Act and the Administrative Procedure Act.

### A. Rates Produced Through An Auction Do Not Require Commission Approval Before They Take Effect.

Public Citizen and Connecticut argue that the Commission cannot rely on a competitive auction process to set rates and, instead, that all auction clearing prices must be reviewed and approved by the Commission under section 205 before they are allowed to take effect. *See* Pub. Citz. Br. 30; Conn. Br. 14–15. As explained above, that argument is contrary to the statutory requirements and long-standing precedent. Moreover, taken to its logical end, it would eliminate the benefits of competitive auctions and force the Commission into the type of command-and-control regulation that Congress has never required. In this respect, Public Citizen's and Connecticut's arguments reflect the same type of misguided attack on the Commission's discretion to employ appropriate rate-setting mechanisms, including market-based mechanisms, that courts have repeatedly rejected. *See*, *e.g.*, *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870–71 (D.C. Cir. 1993); *see also Montana Consumer*

*Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011); *California ex rel. Lockyer v. FERC*, 383 F.3d 1013, 1016 (9th Cir. 2004); *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000).

To be sure, when considering the Commission's use of market-based rate-setting mechanisms, courts have emphasized the need for ongoing Commission oversight to ensure that markets are competitive and that auction processes produce just and reasonable rates. *See Elizabethtown Gas*, 10 F.3d at 870–71. But that does not mean, as Public Citizen and Connecticut suggest, that the Commission must pre-approve individual rates under section 205 before they take effect. *See* Pub. Citz. Br. 29–33; Conn. Br. 18–20. To the contrary, the *Louisiana Energy* and *Elizabethtown Gas* decisions on which they rely make clear that the Commission need only be prepared to act prospectively under section 206 if its "sanguine predictions about market conduct turn out to be incorrect." *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 370 (D.C. Cir. 1998); s*ee also Elizabethtown Gas*, 10 F.3d at 870. There is, in short, nothing about the Commission's competitive rate policies that changes the statutory scheme and requires the Commission to approve rates as just and reasonable before they take effect. If there

were, it would be impracticable (if not impossible) to administer competitive energy markets, where competitive prices are set (and change) on an hourly basis or less.

Public Citizen recognizes that section 206 is a very large fly in its ointment, for it is forced to argue that it has no right to file a complaint under section 206. *See* Pub. Citz. Br. 19–20. But that is wrong and the Commission's brief explains why Public Citizen is mistaken. *See* FERC Br. 45. Public Citizen has not even attempted to exercise a right to file a section 206 complaint, and its suppositions about how the Commission might resolve a section 206 complaint are entirely speculative. *See id.* Indeed, the Commission's confirmation in its brief that Public Citizen and Connecticut can still file a section 206 complaint belies any argument that judicial review is required now before the Commission has taken any action or developed the record necessary to consider the merits of Public Citizen's and Connecticut's claims. Moreover, the fact that such a complaint would be evaluated under the *Mobile-Sierra* public interest standard does not mean that any customer has been deprived of its statutory right to just and reasonable rates. As the courts have consistently held, this standard ensures that rates are just and

reasonable, as required by the Act. *See Morgan Stanley*, 554 U.S. at 535; *Mobile*, 350 U.S. at 344.

### B. The Commission's Review Of The Eighth Forward Capacity Auction Followed Well-Settled Precedent.

Allowing the auction rates to take effect by operation of law in this case was consistent with a long line of decisions permitting rates to be set through appropriate market-based mechanisms, and for challenges to be brought under section 206. As Commissioner LaFleur explained, the Commission reviewed the results filings for the first seven Forward Capacity Auctions conducted by ISO New England "based solely on its assessment of whether ISO [New England] conducted the auction in accordance with its established, Commission-approved tariff." R.57, Statement of Chairman Cheryl A. LaFleur on Forward Capacity Auction 8 Results Proceeding, Docket No. ER14-1409-000, at p.1 (JA__); *see also id.* at p. 2 n.6 (citing orders) (JA__). No party challenging the results of the eighth auction, including Public Citizen and Connecticut, alleged that ISO New England failed to conduct the auction in accordance with its tariff, and ISO New England's Internal Market Monitor affirmatively found that the auction was conducted in accordance with the rules set forth in the tariff. *See id.* at p. 2 (JA__); R.1, ISO New England, Forward

Capacity Auction Results Filing, Attachment C, Testimony of David LaPlante at 4–5, Dkt. No. ER14-1409-000 (Feb. 28, 2014) ("FCA 8 Results Filing") (JA__).

There is nothing wrong with the Commission taking an approach consistent with longstanding precedent. To the contrary, the Commission would have been hard pressed to justify a different approach. *See, e.g.*, *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently.'" (citation omitted)). Having accepted the results of past auctions, which, with the exception of one capacity zone in the seventh Forward Capacity Auction, cleared at the administratively established price floor, it would undermine "the long-term viability of the market" to apply a different standard as soon as supply tightens and the market clears at a higher price. R.57, Statement of Chairman LaFleur, at p. 3 (JA__). Such a one-way ratchet would upset the "balancing of the investor and the consumer interests," *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944), struck by the Commission in accepting the Forward Capacity Market rules in the first instance.

The result here is also consistent with precedent relating to the Commission's broader market-based rate regime. The Commission has accepted market rules designed to ensure that any market power possessed by a given supplier is mitigated and then engages in ongoing oversight to ensure that the market is producing just and reasonable rates. *Louisiana Energy*, 141 F.3d at 371.

It is neither surprising nor indicative of any market failure that prices were higher in the eighth auction, when supply was relatively scarce, than in the first seven auctions, when there was significant excess supply. *See* R. 1, FCA 8 Results Filing, Attachment B, Testimony Stephen J. Rourke at 7–8 (JA__), R.40, ISO New England, Resp. to Ltr. dated June 27, 2014, Attachment A at 2–5, Dkt. No. ER14-1409-001 (July 17, 2014) (JA__). As this Court has recognized, prices can be expected to increase during periods of scarcity and such price increases "serve a critical signaling function: encouraging new development that will increase supply." *Blumenthal*, 552 F.3d at 883; *see also Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 968-69 (D.C. Cir. 2005). The "concededly noncompetitive conditions" to which Public Citizen alludes, Pub. Citz. Br. 3, merely underscore that the market rules were

operating as intended: conditions were identified that met the tariff's definition of "noncompetitive," and tariff-prescribed mitigation (in the form of substituting an administratively determined price for the market price) was imposed. *See* R.1, FCA 8 Results Filing, Attachment B, Testimony Stephen J. Rourke at 9–11 (JA __); *id.*, Attachment C, Testimony of David LaPlante at 5–6 (JA __).

While it is true enough that ongoing oversight is critical to the lawfulness of market-based ratemaking, *see* Pub. Citz. Br. 30–32; Conn. Br. 19–21, it does not follow that the Commission can, much less must, retroactively modify prices whenever it concludes that market power was not adequately mitigated. *See generally Town of Concord, Norwood v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992) (reaffirming that the Commission's refund authority is discretionary). To the contrary, this Court has found that the prospective modification available under section 206 is an adequate remedy if the Commission's expectations about market power later prove to be incorrect. *See Louisiana Energy*, 141 F.3d at 370.

### C. The Commission Complied With The Tariff Requirements.

Finally, contrary to Public Citizen's and Connecticut's assertions, allowing the rates to take effect by operation of law complies with the applicable tariff and settlement agreement. Pub. Citz. Br. 24; Conn. Br. 22–23. ISO New England's Commission-approved tariff requires it to file certain information after each Forward Capacity Auction in order for the Commission to determine whether ISO New England followed its tariff in administering the auction. ISO New England is "obligated solely to demonstrate that it conducted the [auction] pursuant to its own market rules." *ISO New England Inc.*, 127 FERC ¶ 61,040 at P 28 (2009). The extent of the Commission's review is therefore to "evaluate the filing to determine whether ISO-NE conducted the [auction] in accordance with its [market] rules." *ISO New England, Inc.*, 140 FERC ¶ 61,143 at P 23 (2012).

The Commission has consistently (and reasonably) rejected protests and comments seeking to negate auction results when they fail to question whether ISO New England conducted the auction according to the approved rules, and instead raise other issues not germane to ISO New England's tariff obligations. In such a case, "in essence, parties

attempt to relitigate the Commission's original acceptance of those markets rules." *ISO New England, Inc.,* 127 FERC ¶ 61,040 at P 30. A party "may disagree with the outcome of the auction … but if so, its recourse is to seek to change the market rules" through the New England stakeholder process, not through a challenge to the auction results. *Id.*

Where a party "alleges that ISO-NE did not conduct [an auction] in accordance with its market rules … [t]he protest is properly before [the Commission]." *ISO New England Inc.*, 133 FERC ¶ 61,230 at PP 28–30 (2010) (ordering compliance filing to comply with market rule that requires the ISO to identify alternatives to resolve a reliability need). In several orders, the Commission has repeated the extent of its review, most recently in its order on the sixth auction results filing, stating that "ISO-NE is required to file the results of each [Forward Capacity Auction] with the Commission, and we must evaluate the filing to determine whether ISO-NE conducted the [auction] in accordance with its [Commission-approved market] rules." *ISO New England, Inc.*, 140 FERC ¶ 61,143 at P 23. The Commission's interpretation is entitled to "substantial deference." *S. Cal. Edison Co. v. FERC*, 415 F.3d 17, 21 (D.C. Cir. 2005).

## CONCLUSION

This Court should grant the Commission's motion to dismiss and deny the petitions.

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INITIAL BRIEF: November 18, 2015

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(2), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of content and authorities, certificates of service and compliance, but including footnotes) contains 5,269 words as determined by the word-counting feature of Microsoft Word 2010.

/s/ Ashley C. Parrish
Ashley C. Parrish

## CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I certify that November 18, 2015, I caused the foregoing to be filed with the Clerk of the Court through the Court's CM/ECF system, which will serve notice of the filing on all filers registered in this case.

/s/ Ashley C. Parrish
Ashley C. Parrish