

Nos. 08-74439 and 08-74443

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**RICHARD BLUMENTHAL, ATTORNEY GENERAL
FOR THE STATE OF CONNECTICUT, *ET AL.*,
AND PUBLIC CITIZEN, INC., *ET AL.*,**
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**On Petitions for Review of Orders of the
Federal Energy Regulatory Commission**

**BRIEF OF INTERVENORS
ELECTRIC POWER SUPPLY ASSOCIATION,
PPL ENERGYPLUS, LLC, AND PPL MONTANA, LLC
IN SUPPORT OF RESPONDENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, intervenors state as follows:

Electric Power Supply Association. The Electric Power Supply Association (“EPSA”) is a national trade association that represents competitive power suppliers and is incorporated under the laws of the District of Columbia. There is no parent corporation or any publicly held corporation that owns 10 percent or more of EPSA’s stock. EPSA’s members include 17 companies, along with numerous associate and supporting members and state and regional partners, that represent the competitive power industry in their respective regions.

PPL EnergyPlus, LLC; PPL Montana, LLC. PPL EnergyPlus, LLC and PPL Montana are both wholly-owned, indirect subsidiaries of PPL Corporation, whose shares are publicly traded. No other publicly held company has a 10 percent or greater ownership interest in PPL EnergyPlus, LLC, PPL Montana, LLC, or PPL Corporation.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT.....	ii
TABLE OF AUTHORITIES.....	v
GLOSSARY.....	xii
INTRODUCTION.....	1
STATEMENT OF JURISDICTION.....	4
STATEMENT OF ISSUES.....	5
STATUTORY AND REGULATORY PROVISIONS.....	6
STATEMENT OF THE CASE AND FACTS.....	6
SUMMARY OF ARGUMENT.....	6
STANDARD OF REVIEW.....	9
ARGUMENT.....	11
I. The Commission’s Competitive, Market-Based Rate Regime Complies With The Statutory Requirements.	11
II. Petitioners’ Specific Challenges To The Commission’s Market-Based Rate Program Are Meritless.	16
A. The Commission’s Final Rule Complies With The Requirement That Wholesale Rates Be “Just And Reasonable.”	17
1. The Commission’s Interpretation Of The Statute Is Entitled To Deference.	17
2. The Cases Cited By Petitioners Are Readily Distinguished.	19
3. Petitioners’ Contentions Are Meritless And Inconsistent With The Deference Owed To An Expert Administrative Agency.....	23

B.	The Commission’s Market-Based Rate Program Is Consistent With The Statute’s Filed-Rate Provisions.	31
1.	Petitioners’ Position Cannot Be Reconciled With The Statutory Text.	32
2.	Petitioners’ Arguments Are Foreclosed By <i>Lockyer</i>	33
3.	The Cases Cited By Petitioners Are Readily Distinguished.	40
III.	Granting The Relief That Petitioners Seek Would Have Potentially Devastating Effects On Consumers And The Nation’s Competitive Energy Markets.....	44
	CONCLUSION	49
	STATEMENT OF RELATED CASES	50
	CERTIFICATE OF COMPLIANCE	
	ADDENDUM	
	CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Akhtar v. Burzynski</i> , 384 F.3d 1193 (9th Cir. 2004)	10, 44
<i>Alabama Power Co. v. FERC</i> , 993 F.2d 1557 (D.C. Cir. 1993)	39
<i>Blumenthal v. FERC</i> , 552 F.3d 875 (D.C. Cir. 2009)	9, 25
<i>California ex rel. Lockyer v. FERC</i> , 383 F.3d 1013 (9th Cir. 2004)	1, 2, 7, 14, 16, 19, 23, 28, 34, 41, 42, 43
<i>California Trout v. FERC</i> , 572 F.3d 1003 (9th Cir. 2009)	9
<i>Chevron U.S.A. Inc. v NRDC, Inc.</i> , 467 U.S. 837 (1984)	10, 18
<i>ChevronTexaco Expl. & Prod. Co. v. FERC</i> , 387 F.3d 892 (D.C. Cir. 2004)	35
<i>Colorado Office of Consumer Counsel v. FERC</i> , 490 F.3d 954 (D.C. Cir. 2007)	4, 35, 36
<i>E. & J. Gallo Winery v. EnCana Corp.</i> , 503 F.3d 1027 (9th Cir. 2007)	18, 35
<i>Elizabethtown Gas Co. v. FERC</i> , 10 F.3d 866 (D.C. Cir. 1993)	21, 24
<i>Farmers Union Central Exchange Inc. v. FERC</i> , 734 F.2d 1486 (D.C. Cir. 1984)	21, 22
<i>FERC v. Pennzoil Producing Co.</i> , 439 U.S. 508 (1979)	21

<i>FPC v. Texaco, Inc.</i> , 417 U.S. 380 (1974)	20, 21
<i>Les v. Reilly</i> , 968 F.2d 985 (9th Cir. 1992)	15
<i>Louisiana Energy & Power Auth. v. FERC</i> , 141 F.3d 364 (D.C. Cir. 1998)	1, 16, 19, 25
<i>Louisiana Public Serv. Comm'n v. FERC</i> , 688 F.2d 357 (5th Cir. 1982)	38
<i>Maislin Indus. v. Primary Steel, Inc.</i> , 497 U.S. 116 (1990)	40
<i>MCI Telecomms. Corp. v. AT&T</i> , 512 U.S. 218 (1994)	41
<i>Metrophones Telecomms., Inc. v.</i> <i>Global Crossing Telecomms. Inc.</i> , 423 F.3d 1056 (9th Cir. 2005)	13
<i>Mobil Oil Exploration & Producing</i> <i>S.E., Inc. v. United Dist. Co.</i> , 498 U.S. 211 (1991)	16, 18, 24, 41
<i>Montana Consumer Counsel v. FERC</i> , Nos. 07-73256, <i>et. al.</i> , 2009 WL 1649438 (9th Cir. June 8, 2009).....	26
<i>Morgan Stanley Capital Group Inc. v.</i> <i>Public Util. Dist. No. 1 of Snohomish County</i> , 554 U.S. 527 (2008)	10, 13, 14, 16, 18, 25, 26
<i>National Cable & Telecomms. Ass'n v.</i> <i>Brand X Internet Servs.</i> , 545 U.S. 967 (2005)	10, 13
<i>New York v. FERC</i> , 535 U.S. 1 (2002)	12

<i>Northwest Pipeline Corp. v. FERC</i> , 61 F.3d 1479 (10th Cir. 1995)	38
<i>NRG Power Mktg. Ltd v. Maine Pub. Utils. Comm’n</i> , 130 S. Ct. 693 (2010)	18
<i>NSTAR Elec. & Gas Corp. v. FERC</i> , 481 F.3d 794 (D.C. Cir. 2007)	39, 40
<i>Otter Tail Power Co. v. United States</i> , 410 U.S. 366 (1973)	11
<i>Permian Basin Area Rate Cases</i> , 390 U.S. 747 (1968)	9, 24
<i>Public Util. Dist. No. 1 of Grays Harbor v. IDACORP, Inc.</i> , 379 F.3d 641 (9th Cir. 2004)	35, 42
<i>Public Utils. Comm’n of Cal. v. FERC</i> , 254 F.3d 250 (D.C. Cir. 2001)	38
<i>Regular Common Carrier Conference v. United States</i> , 793 F.2d 376 (D.C. Cir. 1986)	41
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	11
<i>Sierra Club v. Bosworth</i> , 510 F.3d 1016 (9th Cir. 2007)	11
<i>Southern California Water Co. v. FERC</i> , 433 F.3d 840 (D.C. Cir. 2005)	39
<i>Tejas Power Corp. v. FERC</i> , 908 F.2d 998 (D.C. Cir. 1990)	18, 22
<i>Transwestern Pipeline Co. v. FERC</i> , 897 F.2d 570 (D.C. Cir. 1990)	38
<i>United Distrib. Cos. v. FERC</i> , 88 F.3d 1105 (D.C. Cir. 1996)	26

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278 F.2d 121 (1960) 15

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502 F.3d 931 (9th Cir. 2007) 32

Verizon Commc’ns. Inc. v. FCC,
535 U.S. 467 (2002) 11, 41

Wah Chang v. Duke Energy Trading & Mktg., LLC,
507 F.3d 1222 (9th Cir. 2007) 16, 35, 36

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493 F.3d 239 (D.C. Cir. 2007) 9

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AEP Power Mktg., Inc.,
107 FERC ¶ 61,018,
order on reh’g, 108 FERC ¶ 61,026 (2004) 30

Californians for Renewable Energy, Inc. v.
California Public Utils. Comm’n,
120 FERC ¶ 61,272 (2007) 29, 31

Investigation of Terms and Conditions
of Pub. Util. Market-Based Rate Authorizations,
105 FERC ¶ 61,218 (2003) 29

Statutes

16 U.S.C. § 824(a) 12

16 U.S.C. § 824(b) 12

16 U.S.C. § 824d 1

16 U.S.C. § 824d(a) 3, 7, 12

16 U.S.C. § 824d(b) 12

16 U.S.C. § 824d(c) 10, 12, 28, 35

16 U.S.C. § 824d(d) 3, 8, 10, 12, 14, 31, 32, 33
 16 U.S.C. § 824v..... 30
 16 U.S.C. § 825o..... 30
 16 U.S.C. § 825o-1..... 30
 Energy Policy Act of 2005,
 Pub. L. No. 109-58, 119 Stat. 594 (2005)..... 15

Rules and Regulations

18 C.F.R. § 35.10b..... 27
 18 C.F.R. § 35.37..... 27, 43
 18 C.F.R. § 35.42..... 27, 43
 18 C.F.R. § 385.211..... 42
 18 C.F.R. § 385.212..... 42

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 Capacity and Ancillary Services by Public Utilities,*
 Order No. 697, FERC Stats & Regs. ¶ 31,252,
 119 FERC ¶ 61,295 (2007) 2, 27, 30, 33, 42

Pet. Opening Br.,
Colorado Office of Consumer Counsel v. FERC,
 No. 04-1238,
 2007 WL 432409 (D.C. Cir. Feb. 7, 2007)..... 4, 36

Pet. Opening Br.,
Lockyer v. FERC,
 No. 02-73093,
 2002 WL 32178975 (9th Cir. Dec. 30, 2002)..... 4, 31, 34

Prohibition of Energy Market Manipulation,
 Order No. 670,
 114 FERC ¶ 61,047 (Jan. 26, 2006),
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reh’g denied, 114 FERC ¶ 61,300 (2006) 30

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Electricity Restructuring: What Has Worked,
What Has Not, and What is Next (Apr. 5, 2008),
available at <http://www.justice.gov/atr/public/eag/232692.pdf>..... 46

Frank Huntowksi, *et al.*,
Embrace Electric Competition Or It’s
Déjà Vu All Over Again (Oct. 2008),
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Helping Meet This Public Policy Objective (Oct. 16, 2007),
available at http://www.isorto.org/atf/cf/%7B5B4E85C6-7EAC-40A0-8DC3-003829518EBD%7D/IRC_Renewables_Report_101607_final.pdf. 48

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The Value of Indep. Regional Grid Operators (Nov. 2005),
available at <http://www.caiso.com/14c6/14c6c4291aa40.pdf>..... 46

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Market & Performance Metrics (Jan. 20, 2011),
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2010 ISO/RTO Metrics
Report PJM Highlights (Jan. 20, 2011),
available at <http://www.ferc.gov/EventCalendar/Files/20110120100702-6-PJM-print.pdf>..... 47

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Markets on Consumer Electricity Charges (Nov. 20, 2006),
available at http://www.hks.harvard.edu/hepg/Papers/LECG_Analysis_112006pdf.pdf. 47

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Report to Congress on Competition in Wholesale and
Retail Markets for Electric Energy (Apr. 2007),
available at <http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf>. 45

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Open Letter to Policy Makers (May 31, 2007),
available at <http://www.epsa.org/forms/uploadFiles/8d9200000007.filename>.
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GLOSSARY

<i>CARE</i>	<i>Californians for Renewable Energy, Inc. v. California Pub. Utils. Comm'n</i> , 120 FERC ¶ 61,272 (2007)
Commission	Federal Energy Regulatory Commission
EPAct	Energy Policy Act of 2005
EPSA	Electric Power Supply Association
FERC	Federal Energy Regulatory Commission
<i>Lockyer</i>	<i>California ex rel. Lockyer v. FERC</i> , 383 F.3d 1013 (9th Cir. 2004)
<i>Morgan Stanley</i>	<i>Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County</i> , 554 U.S. 527 (2008)
Order No. 670	<i>Prohibition of Energy Market Manipulation</i> , Order No. 670, 114 FERC ¶ 61,047, FERC Stats. & Regs. ¶ 31,202, <i>reh'g denied</i> , 114 FERC ¶ 61,300 (2006)
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INTRODUCTION

For the last two decades, the Federal Energy Regulatory Commission (the “Commission”) has taken steps to protect consumers and promote competition in the Nation’s energy markets by imposing market-based reforms and permitting market-based pricing of wholesale power sales. These pro-competitive policies have been challenged in court and consistently upheld as permissible exercises of the broad discretion that Congress granted to the Commission under the Federal Power Act. *See* 16 U.S.C. § 824d. In particular, courts have expressly held that the Commission’s market-based rate program is consistent with the statutory requirements that rates be “just and reasonable” and that rates be filed “within such time and in such form as the Commission may prescribe.” *California ex rel. Lockyer v. FERC*, 383 F.3d 1013 (9th Cir. 2004); *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998).

This case arises out of rulemaking proceedings in which the Commission codified its pre-existing, market-based rate program, with certain enhancements. *See* ER 2-145 (*Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by*

Public Utilities, Order No. 697, FERC Stats & Regs. ¶ 31,252, 119 FERC ¶ 61,295 (2007)). That program is based on the dual protections of, first, “an *ex ante* finding” that wholesale sellers seeking authority to sell electricity at market-based rates lack market power or that any market power they may possess has been adequately mitigated, and, second, extensive “post-approval reporting requirements” that provide for continuing regulatory oversight of market-based rate sellers and sales. *Lockyer*, 383 F.3d at 1013. Hundreds of parties, from all corners of the electricity industry, commented on the proposed rule. *See* FERC Br. 15. The Commission entertained 26 requests for rehearing, and issued numerous orders to address parties’ concerns. *See id.* at 16. And, as a result of these efforts, almost all of the parties who initially filed petitions for review have dismissed their appeals. *See id.*

The only parties that are continuing to challenge the Commission’s final rule are two public policy groups, one State office of consumer counsel, and three State Attorney Generals. None of these petitioners purports to be directly regulated by, or subject to, the Commission’s regulations or to be direct customers of entities so regulated. Nor do any of these petitioners object to the specific details

of the Commission's final rule. Instead, they are opposed writ large to the Commission's pro-competitive policies and seek to deprive the Commission of discretion to implement market-based approaches that economists and policymakers from all sides of the political spectrum have recognized as providing enormous benefits to retail ratepayers and market participants. In particular, petitioners mount a sweeping challenge to the Commission's market-based rate program, arguing that it violates the statutory requirements that rates be "just and reasonable," 16 U.S.C. § 824d(a), and parties provide 60-days advance notice of "changes" in rates unless otherwise ordered by the Commission. *Id.* § 824d(d).

For reasons explained in the Commission's brief and for the additional reasons set forth below, petitioners' arguments lack merit. Petitioners have not demonstrated and cannot demonstrate that the statutory requirements unambiguously preclude the Commission's market-based rate approach, or that the Commission's expert policy judgments are so manifestly unreasonable that they are not entitled to deference. To the contrary, the arguments that petitioners have raised are essentially the same arguments that this Court rejected in *Lockyer*

and, more recently, that the D.C. Circuit rejected as not even meriting discussion in *Colorado Office of Consumer Counsel v. FERC*, 490 F.3d 954 (D.C. Cir. 2007). See Pet. Opening Br., *Lockyer v. FERC*, No. 02-73093, 2002 WL 32178975 (9th Cir. Dec. 30, 2002); Pet. Opening Br., *Colorado Office of Consumer Counsel v. FERC*, No. 04-1238, 2007 WL 432409 (D.C. Cir. Feb. 7, 2007). Those decisions were correct and are consistent with the statute and a large body of precedent confirming that the Commission has authority to protect consumers and promote competition by implementing market-based rate policies. The petitions for review should be denied.

STATEMENT OF JURISDICTION

Intervenor-Respondents do not object to the statement of jurisdiction set forth in petitioners' opening brief.

STATEMENT OF ISSUES

1. Whether petitioners' facial challenge to the Commission's final rule codifying the agency's well-established market-based policies is foreclosed by this Court's precedents upholding the Commission's market-based rate policies and rejecting virtually identical arguments complaining that the Commission's approach does not comply with the statutory requirements.

2. Whether the Commission reasonably determined in its final rule, based on decades of experience and its own expert policy judgment, that a market-based approach to rate setting — which involves an *ex ante* determination that a seller lacks market power combined with extensive, ongoing reporting and monitoring requirements — will ensure that rates for sales of wholesale electricity are “just and reasonable” under the Federal Power Act and consistent with the rate-filing requirements Congress has granted the Commission broad discretion to administer.

STATUTORY AND REGULATORY PROVISIONS

The relevant statutes and regulations are reproduced in the Addendum to the Commission's brief.

STATEMENT OF THE CASE AND FACTS

A statement of the case and salient facts is set forth in the Commission's brief.

SUMMARY OF ARGUMENT

1. Petitioners' sweeping facial attack on the Commission's market-based rate regime fails for three fundamental reasons. *First*, the relevant statutory text does not unambiguously support petitioners' interpretation, and petitioners cannot demonstrate that the Commission's decision to implement a market-based rate program is a manifestly unreasonable policy decision that is entitled to no deference. *Second*, if there were any doubt over the appropriateness of the Commission's program, that doubt was resolved when Congress amended the Federal Power Act in the Energy Policy Act of 2005. The 2005 amendments reinforced the Commission's market-based rate policies and ratified the agency's interpretation of the statutory requirements. *Third*, the Commission's market-based rate regime has

been upheld in previous cases and these cases are dispositive here. (*See* Section I, below.)

2. Petitioners' specific challenges are likewise unavailing. Petitioners complain that a market-based rate program cannot be reconciled with the requirement that rates be "just and reasonable." 16 U.S.C. § 824d(a). But as courts have consistently recognized, the statutory terms "just and reasonable" are incapable of precise judicial definition and do not preclude the Commission's approach. The cases cited by petitioners are readily distinguished because they involved situations where the Commission exceeded its authority by effectively deregulating what Congress had required it to regulate — specifically, by relying solely on market forces to establish rates and exercising no continuing oversight. As *Lockyer* recognized, the Commission's market-based rate program is very different because the Commission makes both an *ex ante* determination that a wholesale seller lacks market power and imposes sufficient reporting requirements to allow the Commission to exercise continuing regulatory oversight. *Lockyer*, 383 F.3d at 1013. Moreover, since this Court decided *Lockyer*, Congress and the Commission have strengthened the Commission's oversight role and

adopted new requirements to ensure that its market-based rate program results in rates that satisfy the statutory requirements. (*See* Section II.A., below.)

Petitioners also complain that the Commission's market-based rate program is inconsistent with the purported requirement that the Commission and the public receive 60 days advance notice of "changes" in rates. But, here again, the statute does not support petitioners' position. To the contrary, it expressly vests the Commission with broad discretion to modify the 60-day notice requirement. *See* 16 U.S.C. § 824d(d) (the 60-day requirement applies "[u]nless the Commission otherwise orders"). The Commission's market-based program is consistent with the statute because it requires sellers to file their market-based tariffs with the Commission and to provide notice of changes to the tariff. The Commission has reasonably concluded, consistent with precedent, that the statutory requirement to provide notice of changes in rates does not require notice of every time there is a change in price. (*See* Section II.B., below.)

3. Granting petitioners the relief they seek would pose grave and potentially disastrous consequences for consumers and the Nation's

energy markets. Many of those markets could not function if the Commission's market-based rate regime were struck down as contrary to the statutory requirements. And eliminating the Commission's pro-competitive regime would inflict potentially billions of dollars of injury on consumers and parties that have made substantial investments in reliance on the long-standing market-based rate policies that the Commission has implemented and Congress has affirmed. (*See* Section III, below.)

STANDARD OF REVIEW

Because Congress “has entrusted the regulation of the [] industry to” the Commission, “not to the preferences of reviewing courts,” *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968), this Court’s “review of the Commission’s decisions is by law highly deferential.” *California Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009); *see also Blumenthal v. FERC*, 552 F.3d 875, 884 (D.C. Cir. 2009). The deference owed to the Commission is at its apex where, as here, a party is challenging policy decisions relating to technical issues of rate design that fall at the core of the Commission’s regulatory responsibilities. *See Wisconsin Pub. Power v. FERC*, 493 F.3d 239, 256 (D.C. Cir. 2007); *see*

also *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 531 (2008) (Commission’s rate decisions entitled to “great deference”).

Because the Federal Power Act does not unambiguously prohibit the Commission from adopting a market-based rate program, and because the statutory provisions grant the agency express discretion to establish appropriate filing requirements, *see* 16 U.S.C. § 824d(c), (d), the Court should defer to the Commission unless petitioners can prove that the agency’s final rule is an impermissible interpretation of the statutory requirements. *See Chevron U.S.A. Inc. v NRDC, Inc.*, 467 U.S. 837, 842 (1984). An agency’s interpretation is permissible if it reflects “a reasonable policy choice.” *Id.* at 845; *see also National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005).

Because petitioners are pursuing a facial (and not an as-applied) challenge to the Commission’s market-based rate program, they have the additional burden of showing that there is “no set of circumstances” under which the Commission’s regulations would be valid. *Akhtar v. Burzynski*, 384 F.3d 1193, 1198 (9th Cir. 2004) (citing *Reno v. Flores*,

507 U.S. 292, 301 (1993)); *but cf. Sierra Club v. Bosworth*, 510 F.3d 1016, 1023–24 (9th Cir. 2007) (expressing doubt as to whether the no-set-of-circumstances test applies to challenges to agency procedures). Enforcing this requirement is especially appropriate here because the relief that petitioners seek — a sweeping ruling that the Commission’s market-based rate program is *per se* unlawful under the Federal Power Act — would unravel decades of settled Commission policy and precedent, with grave, potentially disastrous consequences for consumers and the Nation’s energy markets.

ARGUMENT

I. The Commission’s Competitive, Market-Based Rate Regime Complies With The Statutory Requirements.

When Congress enacted Part II of the Federal Power Act in 1935, it “rejected a pervasive regulatory scheme ... in favor of voluntary commercial relationships.” *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). The statute thus “departed from the scheme of purely tariff-based regulation” and instead “acknowledged that contracts between commercial buyers and sellers could be used in rate setting.” *Verizon Commc’ns. Inc. v. FCC*, 535 U.S. 467, 479 (2002).

To implement the statutory scheme, Congress granted the Commission broad and exclusive authority over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See* 16 U.S.C. §§ 824(a), (b); *see also New York v. FERC*, 535 U.S. 1 (2002). Under the statute, the Commission’s core responsibility is to ensure that wholesale-electricity rates are “just and reasonable” and to prevent undue discrimination. 16 U.S.C. § 824d(a), (b). The statute also grants the Commission expansive authority to establish appropriate tariff filing requirements. Regulated parties are required — “[u]nder such rules and regulations as the Commission may prescribe” — to file, “within such time and in such form as the Commission may designate,” schedules showing the rates and charges for any transmission or sale subject to the Commission’s jurisdiction. *Id.* § 824d(c). In addition, regulated parties are required — “*unless* the Commission otherwise orders” — to provide 60 days notice to the Commission and public before changing any rate, charge, classification or service subject to the Commission’s jurisdiction. *Id.* § 824d(d) (emphasis added).

Over the last two decades, the Commission has exercised its statutory authority to promote competition and thereby to allow consumers to benefit from an efficient, market-based regulatory regime. Petitioners nonetheless argue that the statutory provisions unambiguously preclude the Commission from adopting a market-based rate program. As described in more detail below, the particulars of these arguments disintegrate on examination. More fundamentally, there are at least three flaws that run through all of the petitioners' arguments.

First, petitioners cannot show that the statutory language unambiguously addresses whether the Commission's market-based rate program is appropriate, or that the Commission's interpretation of the statute as permitting market-based rates represents an unreasonable policy choice. *Brand X*, 545 U.S. at 986. As courts have recognized, the requirement that rates be "just and reasonable" is "obviously incapable of precise judicial definition" and, therefore, the Commission's rate decisions are entitled to "great deference." *Morgan Stanley*, 554 U.S. at 532; *see also Metrophones Telecomms., Inc. v. Global Crossing Telecomms. Inc.*, 423 F.3d 1056, 1067 (9th Cir. 2005) (terms such as

“just” and “unreasonable” are ambiguous). Moreover, the statute on its face confers “broad discretion” on the Commission to “establish effective reporting requirements.” *Lockyer*, 383 F.3d at 1013. Indeed, the statute is clear that, although there is a default 60-day notice requirement for filing changes in rates, the Commission may modify that requirement at its discretion. 16 U.S.C. § 824d(d) (60-day requirement applies “unless the Commission otherwise orders”). Nothing in petitioners’ opening brief demonstrates that the Commission has abused that discretion in promulgating a final rule codifying its long-standing market-based rate policies.

Second, any faint shadow of doubt that might have existed regarding the Commission’s authority to implement a market-based rate regime was dispelled when Congress enacted the Energy Policy Act of 2005 (“EPAAct”). *See* FERC Br. 47–51. Over the last two decades, the Commission has consistently interpreted the Federal Power Act as promoting competition and authorizing market-based rate regulation. *See Morgan Stanley*, 554 U.S. at 535–38 (describing history of the Commission’s pro-competition, market-based reforms). The Commission’s long-standing interpretation was well known to Congress.

It is therefore significant that, in the 2005 statute, Congress did not seek to roll back the Commission's pro-competition, pro-consumer, market-based policies. Instead, among other things, Congress established a special remedial provision for sales of wholesale electricity occurring before June 20, 2001, in circumstances where the Commission had "revoked the seller's authority to sell any electricity at market-based rates." EAct, Pub. L. No. 109-58 § 1290(a)(1), 119 Stat. 594, 984 (2005). This provision would make no sense if, as petitioners contend, the Commission lacks the statutory authority to grant authority to sell electricity at market-based rates in the first instance. Instead, this provision, like other provisions cited in the Commission's brief, makes clear that Congress ratified the Commission's authority to approve market-based rate tariffs under the Federal Power Act. *See Les v. Reilly*, 968 F.2d 985, 990 (9th Cir. 1992); *United States v. Kennedy*, 278 F.2d 121, 126 (1960).

Third, petitioners' position relies on recycled arguments that have been already been tested in the crucible of litigation and rejected. This Court, like other courts, has upheld the Commission's program of market-based tariffs as consistent with the Federal Power Act. *See*

Lockyer, 383 F.3d at 1011–13; *see also Morgan Stanley*, 554 U.S. at 538 (“the Ninth Circuit and the D.C. Circuit have generally approved” the “scheme of market-based tariffs”). This Court, like other courts, has rejected petitioners’ suggestion that market-based rate tariffs are not valid “rates” within the meaning of the Federal Power Act. *See Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225 (9th Cir. 2007) (citing cases). It is well-established that the statute affords the Commission “broad ratemaking authority.” *Mobil Oil Exploration & Producing S.E., Inc. v. United Dist. Co.*, 498 U.S. 211, 224 (1991). And numerous courts have recognized that allowing suppliers to sell at market-based rates, when combined with appropriate reporting requirements and continuing Commission oversight, benefits consumers and is “perfectly reasonable.” *Louisiana Energy*, 141 F.3d at 371; *see also Lockyer*, 383 F.3d at 1016.

II. Petitioners’ Specific Challenges To The Commission’s Market-Based Rate Program Are Meritless.

Petitioners cannot overcome these fundamental flaws in their position. They nonetheless argue that the Commission’s market-based rate program is facially invalid because it purportedly violates the Federal Power Act’s requirements that rates be “just and reasonable”

and that the Commission receive advance notice of changes to rates.

Neither argument has any merit.

A. The Commission’s Final Rule Complies With The Requirement That Wholesale Rates Be “Just And Reasonable.”

Petitioners first contend that, because Congress required all “rates and charges” for wholesale electricity to be “just and reasonable,” the Commission may not implement a market-based rate program that relies on a combination of pre-approval market-based rate authority based on both an initial analysis of market power and a rigorous post-approval monitoring. Pet. Br. 42. Petitioners are wrong. Their arguments are inconsistent with the deference owed to the agency’s interpretation of open-ended statutory text, and their position cannot be reconciled with precedent.

1. The Commission’s Interpretation Of The Statute Is Entitled To Deference.

Petitioners’ arguments fail at the outset because petitioners cannot show that the terms “just and reasonable” unambiguously preclude the Commission from adopting a market-based rate program. As the Supreme Court has recognized, the Commission is entitled to broad deference because the “statutory requirement that rates be ‘just

and reasonable' is obviously incapable of precise judicial definition.” *Morgan Stanley*, 554 U.S. at 532. The Commission has “wide latitude to determine the most effective way to carry out its charge from Congress.” *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1039 (9th Cir. 2007) (citing *Mobil Oil*, 498 U.S. at 224).

Nor have petitioners demonstrated that the Commission’s interpretation of the statutory requirements as permitting a market-based approach to rate-setting is “arbitrary, capricious, or manifestly contrary to the statute.” *Chevron*, 467 U.S. at 844. To the contrary, the appropriateness of relying on market forces to help ensure that rates are just and reasonable has long been recognized. In “a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable....” *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *see also NRG Power Mktg. Ltd v. Maine Pub. Utils. Comm’n*, 130 S. Ct. 693, 700 n.4 (2010) (“well-informed wholesale market participants of approximately equal bargaining power generally can be expected to negotiate just and reasonable rates”). Indeed, because it is likely that “competition and consumer welfare will be enhanced rather

than undercut by the ability” of a power supplier “to sell at market-based rates,” the Commission’s approach is “perfectly reasonable.” *Louisiana Energy*, 141 F.3d at 371. Indeed, as this Court has previously held, if a market-based rate program includes appropriate reporting requirements, the program is permissible under the statute. *Lockyer*, 383 F.3d at 1016.

2. The Cases Cited By Petitioners Are Readily Distinguished.

Ignoring the deference owed to the expert agency, petitioners cite cases where courts have held that the Commission may not effectively deregulate that which Congress has chosen to regulate by relying *solely* on market prices to establish just and reasonable rates. *See* Pet. Br. 42–49. But, as the Commission’s brief explains, those cases are readily distinguished. *See* FERC Br. 23–24. Under its final rule, the Commission’s approval of a market-based tariff is conditioned on (1) an *ex ante* finding that the seller and its affiliates lack (or have adequately mitigated) market power, and (2) rigorous post-approval monitoring enforced through extensive reporting requirements. ER 116 (Order 697 at ¶ 953); *see also Lockyer*, 383 F.3d at 1012–13. Because the Commission’s final rule does not rely *solely* on market prices and

provides for ongoing regulatory oversight, the cases cited by petitioners are not on point.

Petitioners place heavy emphasis on *FPC v. Texaco, Inc.*, 417 U.S. 380 (1974), which overturned a decision of the Federal Power Commission (the Federal Energy Regulatory Commission's predecessor) to evaluate small gas producers' rates by referring to prevailing market prices. The Court concluded that the agency's order was "so ambiguous that it [fell] short of that standard of clarity that administrative orders must exhibit." *Id.* at 395–96. In reaching that conclusion, the Court observed that, given the anticompetitive nature of the "heavily concentrated" natural gas industry in which "monopolistic forces were distorting the market price," the "prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates." *Id.* at 397–98; *see also id.* at 400 (agency "lacks the authority to place exclusive reliance on market prices").

Nothing in *Texaco* suggests that the Commission is precluded from relying on market forces, combined with ongoing market monitoring, reporting, and regulatory oversight, to ensure that rates are just and reasonable. In fact, *Texaco* expressly recognized that

market prices “may certainly be taken into account” when setting rates and that the Commission could employ “indirect regulation” to satisfy the statutory requirements. *Id.* at 387, 399. Moreover, in *FERC v. Pennzoil Producing Co.*, 439 U.S. 508 (1979), the Supreme Court emphatically rejected the narrow interpretation of *Texaco* that petitioners embrace here. The *Pennzoil* Court explained that, although its concern in *Texaco* “was that rates of small producers might be totally exempted” from the statutory requirements, it did not conclude that that “rates would be *per se* unjust and unreasonable” merely because they are “related to the unregulated price of natural gas.” *Id.* at 516. *Texaco* “did not purport to circumscribe so severely the Commission’s discretion to decide what formulas and methods it will employ to ensure just and reasonable rates.” *Id.*; see also *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (“nothing in *FPC v. Texaco, Inc.* precludes” the Commission “from relying upon market-based pricing”).

Similarly, petitioners cite *Farmers Union Central Exchange Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984), which involved a Commission order specifying a generic ratemaking methodology for oil pipelines.

Even though it had made no finding that the oil transportation market was workably competitive, the Commission adopted a generic price ceiling that, in the agency's words, would ensure that pipelines receive "creamy returns." *Id.* at 1497. The D.C. Circuit struck down the order because it would protect only against "gross overreaching and unconscionable gouging." *Id.* at 1502. Although competition could drive "actual prices back down" into a zone of reasonableness, the Commission had not determined whether it would in this particular instance, where "nothing in the regulatory scheme" acted "as a monitor" to confirm that competition would discipline rates. *Id.* at 1509.

Petitioners also rely on the D.C. Circuit's *Tejas* decision, which struck down a settlement between a gas pipeline and certain local distribution companies because the Commission had failed to determine independently that the settlement's agreed-upon gas inventory charge was just and reasonable. *Tejas*, 908 F.2d at 1003. As the D.C. Circuit explained, the Commission had failed to determine whether the parties lacked market power and had simply assumed that, because the local distribution companies had agreed to its terms, the settlement embodied a just and reasonable price. *Id.* at 1005.

Here, in sharp contrast to those cases, the Commission has not abdicated its regulatory obligations by relying solely on the market to determine whether a rate is just and reasonable. Instead, as noted above and described in more detail below, the Commission's final rule requires an *ex ante* finding that the seller and its affiliates lack (or have adequately mitigated) market power before a market-based rate tariff is approved. In addition, the Commission has imposed extensive reporting requirements on holders of market-based rate tariffs to allow the Commission to monitor and ensure that the seller is subject to the discipline of market forces. Under this Court's precedent, these requirements are sufficient to satisfy the Commission's statutory obligations. *See, e.g., Lockyer*, 383 F.3d at 1013–14, 1016.

3. Petitioners' Contentions Are Meritless And Inconsistent With The Deference Owed To An Expert Administrative Agency.

Apart from citing inapplicable precedent, petitioners press several arguments inviting the Court to second-guess the Commission's judgment and, instead of deferring to the expert agency, to enforce petitioners' policy preferences. Each of these arguments disintegrates on examination.

Petitioners first contend that the Commission is required to make a finding that the market as a whole “for wholesale electrical power is in fact competitive.” Pet. Br. 50. But there is no basis in the statute for this requirement. The Commission has broad authority as to what methods should be employed to ensure that rates are just and reasonable. *See Mobil Oil*, 498 U.S. at 224; *see also Permian*, 390 U.S. at 767. And courts lack “authority to set aside any rate selected by the Commission” that falls within a “zone of reasonableness.” *Permian*, 390 U.S. at 767.

With no viable statutory argument, petitioners contend that a competitive-market finding is nonetheless required under D.C. Circuit precedent based on *dicta* plucked selectively from some of that court’s decisions. *See* Pet. Br. 50 (citing *Elizabethtown Gas*, 10 F.3d at 870–71). But the cases petitioners cite do not support their position. *See* FERC Br. 33–34 (explaining that no court to have considered the Commission’s “market-based rate program has adopted such a requirement”). In fact, this same argument was recently raised by one of these same petitioners and squarely rejected in *Blumenthal*. As the D.C. Circuit explained, there is no requirement the Commission

“establish the competitiveness of an entire market before permitting any participant to charge market-based rates.” 552 F.3d at 882. Indeed, in *Morgan Stanley*, the Supreme Court noted that the contract rates entered into under market based rate authority in that case may have been of particular importance precisely because the rates responded to a “dysfunctional” market. 130 S. Ct. at 2746 (“Markets are not perfect, and one of the reasons that parties enter into wholesale-power contracts is precisely to hedge against the volatility that market imperfections produce.”).

What matters “is whether an individual seller is able to exercise anticompetitive market power, not whether the market as a whole is structurally competitive.” *Id.*; see also *Louisiana Energy*, 141 F.3d at 365 (Commission must determine that “the seller and its affiliates do not have, or adequately have mitigated, market power”). And petitioners raise no challenge to the Commission’s careful procedures for making this *ex ante* assessment of individual seller market power, under which sellers who fail a conservative market power screen bear the burden of showing, on the basis of a record that includes consideration of generation market power in the relevant market and

applicable transmission constraints, that they lack market power. Indeed, this Court has reviewed one such extensive record and affirmed the Commission's determination as to the absence of market power. *Montana Consumer Counsel v. FERC*, Nos. 07-73256, *et al.*, 2009 WL 1649438 (9th Cir. June 8, 2009).

Petitioners next complain that the Commission undertook no "empirical analysis" to support its conclusion that when a seller lacks market power, the seller's rates are presumptively just and reasonable. But no empirical analysis is necessary because the Commission is entitled to rely on its experience and substantive expertise. *See United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1146 (D.C. Cir. 1996) (Commission's "experience with the industry provides substantial evidence" supporting policy judgment). Moreover, if the contract rate negotiated by two market participants is presumptively just and reasonable, as the Supreme Court has held, *see Morgan Stanley*, 554 U.S. at 543, it follows that when a seller lacks market power, the rate at which it agrees to sell power to a buyer is also just and reasonable. In any event, as described in more detail below, the Commission has imposed reporting and monitoring requirements that put it in a position

to identify market problems and to protect consumers. *See* 18 C.F.R. § 35.10b (requiring Electric Quarterly Reports); *id.* § 35.37 (requiring triennial market power updates); *id.* § 35.42 (requiring sellers to report any changes relevant to their market-based rate authority); ER 118 (Order No. 697 at P 967); ER 207-08 (Order No. 697-A at P 417). This is more than sufficient to satisfy the Commission’s obligation to ensure that its market-based rate program will produce rates within a zone of reasonableness.

Finally, petitioners assert that the “promise of regular after-the-fact monitoring to ensure that sellers remain without market power” is “less stringent” than this Court understood in *Lockyer* and that the Commission’s ongoing market monitoring is purportedly “illusory.” Pet. Br. 52–53. But petitioners’ cursorily raised contentions do not come close to establishing that the reporting requirements set out in the final rule are impermissibly inadequate. *Lockyer* did not deprive the Commission of discretion to determine what reporting requirements are appropriate. To the contrary, it recognized that, under the statute, the Commission has broad discretion to “prescribe” rules and regulations

that require filing “within such time and in such form as the Commission may designate.” 16 U.S.C. § 824d(c).

Petitioners’ assertions are in any event misleading and inaccurate. This Court’s concerns in *Lockyer* were not directed to the adequacy of the Commission’s reporting requirements but instead to the enforcement of those requirements, specifically to the Commission’s failure to address “rampant” non-compliance with quarterly transaction reporting requirements. *Lockyer*, 383 F.3d at 1013. Taking this Court’s concerns to heart, the Commission has enforced reporting requirements — especially the quarterly transaction reporting requirements — with rigor since that time, revoking the market-based rate authorizations of more than 150 sellers for non-compliance with quarterly transaction reporting and other requirements since 2003. *See* Addendum, Ex. B (listing proceedings). At the same time, the Commission has substantially upgraded the quarterly transaction reporting requirement by replacing voluminous paper filings with electronic filings on a Commission-prescribed form, thereby facilitating both more effective enforcement and analysis of the transaction data by the Commission and the public. *See, e.g., Revised Public Utility Filing Requirements*,

Order No. 2001, FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,127, at P 7; Order No. 2001-E, 105 FERC ¶ 61,352 (2003) (defining filing requirements); Order No. 2001-G, 120 FERC ¶ 61,270, order on reh'g and clarification, Order No. 2001-H, 121 FERC ¶ 61,289 (2007) (revising filing requirements); Order No. 2001-I, 125 FERC ¶ 61,103 (2008) (same).

In the wake of the California energy crisis, both Congress and the Commission took a number of other important steps to reinforce the Commission's ongoing oversight of market-based rates and to strengthen its enforcement authority. *See generally Californians for Renewable Energy, Inc. v. California Public Utils. Comm'n*, 120 FERC ¶ 61,272 at PP 32–43 (2007) (“*CARE*”).

- The Commission created a separate Office of Enforcement with the mission of protecting “customers by timely identifying market problems and recommending appropriate remedies.” *CARE*, 120 FERC ¶ 61,272 at P 40.
- The Commission adopted “market behavior rules.” *See* 18 C.F.R. § 35.41 (2010); *see also Investigation of Terms and Conditions of Pub. Util. Market-Based Rate Authorizations*, 105 FERC ¶ 61,218 (2003), *superseded in part by Conditions for Public Utility Market-Based Rate Authorization Holders*, Order No. 674, 71 Fed. Reg. 9,695 (Feb. 27, 2006), FERC Stats. & Regs. ¶ 31,208 (2006).
- The Commission adopted a more sophisticated and stringent market power analysis that sellers must satisfy to obtain

and retain market-based rate authority. *See generally AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026 (2004).

- The Commission required transmission providers to adopt various market power monitoring and mitigation measures to deter and prevent the exercise of market power by market-based rate sellers. *See* ER 148 (Order 697-A at P 5).

Congress also enacted the Energy Policy Act of 2005, which substantially expanded the Commission's enforcement powers to address market manipulation. *See* 16 U.S.C. § 824v (2006) (prohibiting use of manipulative or deceptive devices); *see also Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 (Jan. 26, 2006), FERC Stats. & Regs. ¶ 31,2002 (2006), *reh'g denied*, 114 FERC ¶ 61,047 (2006). These new powers include authority to impose \$1 million in penalties per day per regulatory violation. 16 U.S.C. §§ 825o, 825o-1. As noted above, Congress' action would make no sense if there were some doubt as to the Commission's authority in this area or if it had any intent to eliminate that authority altogether.

These and other measures have substantially "strengthened the Commission's market-based rate program, its market oversight and enforcement capabilities, and its ability to impose meaningful remedies, as compared to the 2000–2001 energy crisis time period" discussed in

Lockyer. See *CARE*, 120 FERC ¶ 61,272 at ¶ 43. Moreover, the Commission has not hesitated to enforce these new requirements. Since 2004, the Commission has instituted at least 18 investigations under section 206 of the Federal Power Act to determine whether market-based rate authority granted to affiliated groups of market-based rate sellers should be revoked. See Addendum, Ex. A (listing proceedings). And most of these investigations have resulted in the seller either relinquishing its market-based rate authority or adopting some form of market power mitigation measures.

B. The Commission’s Market-Based Rate Program Is Consistent With The Statute’s Filed-Rate Provisions.

Petitioners recycle the argument, rejected in *Lockyer*, that the Commission’s market-based rate program violates the Federal Power Act’s filing requirements. Compare Pet. Br. 11–42 with Pet. Br., *Lockyer v. FERC*, No. 02-73093, 2002 WL 32178975 (9th Cir. Dec. 30, 2002). In particular, petitioners contend that the Commission’s market-based rate program does not comply with the supposed requirement that no “change” to rates or charges may be made “except after sixty days’ notice to the Commission and to the public.” 16 U.S.C. § 824d(d). This argument fails because it cannot be reconciled with the statute,

which grants the Commission broad authority to establish appropriate filing requirements and to deviate from the otherwise applicable requirements at its discretion.

1. Petitioners' Position Cannot Be Reconciled With The Statutory Text.

Petitioners' filed-rate argument collapses when the statutory text is examined in its entirety with every word given meaning and effect. *See United States v. Mitchell*, 502 F.3d 931, 948 (9th Cir. 2007) (observing "the 'settled principle of statutory construction that [courts] must give effect, if possible, to every word of the statute"). Contrary to petitioners' suggestions, section 824d(d) does not mandate an inflexible requirement that all rate changes be filed with the Commission at least 60 days in advance of the commencement of service. Instead, the statute expressly provides that advance notice is required "[u]nless the Commission otherwise orders." 16 U.S.C. § 824d(d) (emphasis added). In addition, the statute makes clear that, "for good cause shown," the Commission "may allow changes to take effect without requiring the sixty days' notice" otherwise required under the statute. *Id.*

The statute thus forecloses petitioners' position. The text evinces Congress's intent to grant the Commission broad discretion to

determine when the 60-day notice requirement is appropriate and petitioners cannot prevail without excising this part of the statutory text. *See id.* Moreover, properly interpreted, it is clear that the Commission has fully complied with the statute. The Commission's final rule confirms that the Commission has "otherwise order[ed]" that, when a seller is permitted to file a market-based rate tariff, the 60-day notice requirement does not apply in the same manner as it does to sellers that are not entitled to market-based rates. In addition, the Commission has properly concluded that under its "market-based rate program, the rate change is initiated when a seller applies for authorization of market-based pricing." ER 117 (Order 697 at P 962); *see also* FERC Br. 36–43. Petitioners have made no showing that this interpretation runs afoul of the broad discretion that Congress vested in the Commission.

2. Petitioners' Arguments Are Foreclosed By *Lockyer*.

Petitioners argue that these filing requirements do not satisfy the requirements of section 824d(d) because (1) "a market-based rate tariff does not specify a rate at all," and (2) the "myriad increases and decreases in prices actually charged by power wholesalers under

market-based-rate tariffs are ‘changes’ in ‘rates’ or ‘charges’” that purportedly cannot occur without advance notice to the Commission and public. Pet. Br. 29. These arguments are foreclosed by both this Court’s decision in *Lockyer* and numerous other decisions.

In *Lockyer*, this Court considered a facial challenge to the Commission’s market-based rates policy, asserting that market-based rates violate the Federal Power Act’s filing requirements. See Pet. Opening Br., *Lockyer v. FERC*, No. 02-73093, 2002 WL 32178975, at *5 (9th Cir. Dec. 30, 2002) (noting section 824d(d)’s requirement that schedules provide notice of changes in rates 60 days before the new rates take effect); *id.* at *11–13 (arguing that market-based rates violate the statute because they do not include the price established for each transaction). Rejecting these arguments, *Lockyer* held that the Commission’s authorization of market-based rate tariffs complies with the Federal Power Act. *Lockyer*, 383 F.3d at 1008. The Court emphasized that the statute’s “just and reasonable standard does not compel the Commission to use any single pricing formula,” *id.* at 1012, and recognized that, under the statutory language, the Commission had “broad discretion to establish effective reporting requirements.” *Id.* at

1013 (citing 16 U.S.C. § 824d(c)). Although the Court did not specifically discuss section 824d(d) — a sign that the Court believed the issue, although raised, was unworthy of discussion — it plainly held that the Commission’s market-based rate tariffs did not violate the Federal Power Act’s filing requirements.

Lockyer is supported by a long line of precedent from this Court rejecting claims that a market-based rate is not a valid filed rate under the Federal Power Act. See, e.g., *Wah Chang*, 507 F.3d at 1225 (market-based tariffs qualify as valid filed rates); *Public Util. Dist. No. 1 of Grays Harbor v. IDACORP, Inc.*, 379 F.3d 641, 649 (9th Cir. 2004) (same); *E&J Gallo*, 503 F.3d at 1041 (interpreting substantively identical provisions of the Natural Gas Act and concluding that market-based rates qualify as valid filed rates). As courts have recognized in other contexts, a “method or formula for calculating a rate ... when enshrined in an approved tariff, is itself a ‘filed rate.’” *ChevronTexaco Expl. & Prod. Co. v. FERC*, 387 F.3d 892, 894 (D.C. Cir. 2004).

Nor is this the first time that these same petitioners have raised these arguments. In *Colorado Office of Consumer Counsel*, petitioners the Colorado Office of Consumer Counsel, Public Citizen, Inc., and the

Attorney General for Rhode Island, pressed arguments identical to those that they have raised in their opening briefs. *See, e.g.*, Pet. Opening Br., *Colorado Office of Consumer Counsel*, 2007 WL 432409, at *18–35. These arguments were easily dispatched by the D.C. Circuit and rejected as meritless without discussion. *See Colorado Office of Consumer Counsel*, 490 F.3d at 957 (“finding no error ..., we deny the petition”). The D.C. Circuit also rejected petitioners’ request for rehearing and rehearing *en banc*.

Petitioners fail to acknowledge that their arguments are the same arguments that this and other Courts have rejected. They instead argue that *Lockyer* does not apply because it did not specifically address section 824d(d)’s purported requirement that “sellers give 60 days’ advance notice of any change in a rate or charge by filing a schedule” with the Commission. Pet. Br. 26. But this is “an asthenic distinction at best.” *Wah Chang*, 507 F.3d at 1226. If *Lockyer* is not on all fours with this case, it is “standing on three legs, with the fourth just a millimeter off the ground.” *Id.* If there is “nothing inherent in the general concept of a market-based tariff that violates” the Federal Power Act’s requirement that rates when initially established be filed

with the Commission, the Commission's market-based rate program also cannot inherently violate the statutory requirement that "changes" to such rates be filed with the Commission. Nothing in the statute suggests that Congress intended to draw such a distinction between initial and changed rates.

Petitioners' argument that a filing under section 205(d) is required every time there is any "change" in "the amount that a seller charges a buyer for power" depends on an overly simplistic reading of the statutory requirements that would prevent the Commission from fulfilling its statutory mission to implement appropriate procedural requirements to ensure that rates are just and reasonable. It would also have the absurd result of rendering unlawful not only the Commission's market-based rate program but also established cost-based rate-setting approaches, including formula rates and umbrella tariffs that authorize sales at rates up to a prescribed ceiling. *See* FERC Br. 40–41.

A formula rate "specifies the cost components that form the basis of the rates a utility charges its customers" and thus "allows a utility to recover costs that may fluctuate over time." *Public Utils. Comm'n of*

Cal. v. FERC, 254 F.3d 250, 254 (D.C. Cir. 2001). The Commission “has been accepting formula rates since the early 1970s.” *Id.* Although a formula rate, like a market-based-rate, does not account for the “myriad increases and decreases in prices actually charged by power wholesalers,” Pet. Br. 29, courts have consistently rejected arguments that a formula rate is not a filed rate under the Federal Power Act or that the Commission must receive advance notice of every change in price. As courts have explained, the Commission “need not confine rates to specific, absolute numbers but may approve a tariff containing a rate ‘formula’ or a rate ‘rule.’” *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990); *PUC of California*, 254 F.2d at 254. Under the Federal Power Act “approval of a ‘rate’ is not always confined to the approval of a specific numeric value, but may instead extend to the approval of a calculational formula or ‘rate rule.’” *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1490 (10th Cir. 1995). Accordingly, once a formula rate is in effect, the actual amount that a seller charges a buyer for power will change to reflect “actual increases and decreases in cost.” *Louisiana Public Serv. Comm’n v. FERC*, 688 F.2d 357, 361 (5th Cir. 1982). Although the price charged for wholesale

services “may constantly change ... without prior notice to the Commission or the public, and are thus not precisely knowable at the time of sale.” *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007); *see also Alabama Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993) (discussing a formula rate that “would automatically adjust the rates each year under designated schedules” without the need for separate section 205 filings).

Petitioners’ argument would likewise foreclose sales under umbrella tariffs, such as the Western System Power Pool (“WSPP”) Agreement, that authorize sales at rates up to a prescribed ceiling. Courts have recognized that even if a WSPP member lacks the authorization necessary to transact at market-based rates, it may still make sales under the WSPP Agreement subject to the agreement’s “cost-based limit — its provision that prices must not ‘exceed the Seller’s forecasted Incremental Cost’ plus a so-called ‘adder.’” *Southern California Water Co. v. FERC*, 433 F.3d 840, 842 (D.C. Cir. 2005). The numeric prices for sales under this and other umbrella tariffs will, like prices set by formula rates and market-based rates, change frequently and without any filing with the Commission.

The same logic and principles apply here. In approving market-based rates, the Commission has effectively adopted a market-based “rate rule” under which changes in prices will occur in accordance with what the market dictates. Framed in terms of petitioners’ restaurant analogy, the Commission has appropriately determined that, as long as a restaurant lacks power to distort the market price for crab, and as long as the Commission continues to exercise regulatory oversight, it is just and reasonable for the restaurant to sell crab at the “market price” without specifying “actual amounts buyers are charged.” Pet. Br. 32–34. As long as the Commission and the public are aware that prices will be set at the market price (whatever that price may be), the fact that the price for crab may “constantly change” does not mean that notice of each and every price change must be given to the Commission and the public. *NSTAR*, 481 F.3d at 801.

3. The Cases Cited By Petitioners Are Readily Distinguished.

In light of the statutory scheme and the long line of precedents that foreclose petitioners’ cramped interpretation, petitioners’ extended discussions of cases discussing other statutes — including *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), *MCI Telecomms.*

Corp. v. AT&T, 512 U.S. 218 (1994), and *Regular Common Carrier Conference v. United States*, 793 F.2d 376 (D.C. Cir. 1986) — are beside the point. These are the very same cases that this Court properly distinguished in *Lockyer*.

As *Lockyer* explained, the Commission’s “regulatory scheme ... is different from those under consideration in *MCI* and *Maislin*.” *Lockyer*, 383 F.3d at 1013. The Federal Power Act, and the Commission’s implementing regulations, depart from the common carrier “scheme of purely tariff-based regulation” because the statute permits “contracts between commercial buyers and sellers” to be used in rate setting. *Verizon*, 535 U.S. at 479; see also *Mobil Oil*, 350 U.S. at 378 (because the Federal Power Act expressly permits rates to be set by contract, it stands in “marked contrast” to other statutes that require “rates to all shippers be uniform”). A statute’s filing requirements necessarily must be interpreted in the context of the overarching regulatory scheme that the statute establishes. Naturally, in a common carrier regime that requires that “rates to all shippers be uniform,” *Mobil Oil*, 350 U.S. at 378, one could reasonably expect greater emphasis on the filing of

specific, numeric rates, as distinct the sort of rates filed in the market-based rate or formula rate setting under a contract carrier regime.

Moreover, the Commission's market-based rate program presents none of the concerns raised in *MCI* and *Maislin*. As *Lockyer* recognized, because the Commission's regulations involve "the dual requirement of an *ex ante* finding of the absence of market power *and* sufficient post-approval reporting requirements," *MCI* and *Maislin* do not apply. *Lockyer*, 383 F.3d at 1013. Unlike the regulatory programs addressed in those cases, under the Commission's market-based rate program all market-based rate applications, notices of change-in-status and triennial market power updates are publicly noticed, entitling interested parties to challenge a seller's market-based rate authorization. See ER 117 (Order No. 697 at ¶ 962); 18 C.F.R. §§ 385.211, 385.214. Equally significant, sellers with market-based rate authorization have a market-based rate tariff filed with the Commission. As the Commission has made clear, this tariff is the filed rate required under section 205 of the Federal Power Act. See ER 117 (Order No. 697 at ¶ 961); ER 211 (Order No. 697-A at ¶ 434); see also *Grays Harbor*, 379 F.3d at 649. Unlike in *Maislin* and *MCI*, sellers

operating under market-based rate tariffs are not violating any statutory prohibition because they are complying with the filed rate.

As mentioned above, the Commission's regulatory scheme also includes other filing requirements that distinguish it from traditional common carrier statutes. For example, sellers operating under market-based rate tariffs are required to file Electric Quarterly Reports summarizing their transactions during the preceding three months. *See Lockyer*, 383 F.3d at 1013. These reports reflect thousands of transactions, including long-term and short-term contracts, including short-term sales for intervals as small as ten minutes. *See id.*; *see also* Order No. 2001, 67 Fed. Reg. 31,044 (May 8, 2002). In addition, each seller is required to file triennially (and at any intervening time when so ordered) a detailed and updated market analysis that allows the Commission and the public to determine whether the seller has acquired market power or has otherwise gained the ability to erect barriers to entry. *See* 18 C.F.R. § 35.37. In addition, sellers are required to notify the Commission of "any change in status that would reflect a departure from the characteristics the Commission relied upon in granted market-based rate authority." 18. C.F.R. § 35.42.

III. Granting The Relief That Petitioners Seek Would Have Potentially Devastating Effects On Consumers And The Nation's Competitive Energy Markets.

An additional reason the Court should deny the petition is that petitioners have not carried their heavy burden to demonstrate that the Commission's market-based rate program is invalid in all of its many applications. *See Akhtar*, 384 F.3d at 1198. Absent an especially clear showing that the Commission's final rule, which codifies decades of long-standing agency practice, violates the statutory requirements — a showing that petitioners have not come close to satisfying — the Court should reject petitioners' broadside challenge to competition and market-based rates.

Granting the relief that petitioners seek would have potentially devastating consequences to consumers and the well-being of the Nation's energy markets. The Commission's market-based rate regime has reshaped the entire electric power industry and has become a central pillar of broader pro-competitive initiatives that are being pursued at both the federal and state level. As a number of former Commissioners stated in an open letter supporting the Commission's market-based rate program, the Commission has issued literally

“thousands of competition-friendly rules and case decisions” in recognition of the fact that “the incentives and risk-allocation properties of competitive markets represent the best means to product at the least cost the reliable supply of electricity needed for the national welfare and economic competitiveness.” Vicky A. Bailey, *et al.*, Open Letter to Policy Makers, at 1 (May 31, 2007), *available at* http://www.epsa.org/forms/uploadFiles/8d9200000007.filename.Open_Letter_to_Policymakers.pdf. As of April 2006, the Commission had already granted market-based rate authority to approximately 1,170 entities, including 390 independent power marketers, 100 power marketers affiliated with traditional utilities, and 30 financial institutions. *See* The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy*, at 31 (Apr. 2007), *available at* <http://www.ferc.gov/legal/fed-sta/ene-pol-act/epact-final-rpt.pdf>.

These pro-competitive, market-based policies have delivered enormous benefits to consumers. *See, e.g.*, Department of Justice, Economic Analysis Group, *Electricity Restructuring: What Has Worked, What Has Not, and What is Next*, at 5 (Apr. 5, 2008), *available at* <http://>

www.justice.gov/atr/public/eag/232692.pdf (there “is substantial evidence that significant benefits have been achieved by market restructuring”). It has been estimated that the Commission’s pro-competition, market-based policies “resulted in \$34 billion in savings to residential customers across the country between 1997 and 2004 compared to what would have been paid under traditional regulation.” Bailey, *et al.*, Open Letter, at 2. As one would expect, market-based reforms have “improved the operating efficiency of power plants and helped lower costs.” *Id.*; see also Frank Huntowksi, *et al.*, *Embrace Electric Competition Or It’s Déjà Vu All Over Again*, at 3–4 (Oct. 2008), available at http://www.nbgroupp.com/publications/Embrace_Electric_Competition_Or_Its_Deja_Vu_All_Over_Again.pdf.

The Commission’s pro-competitive policies have also facilitated the development of organized, bid-based markets administered by independent entities that have resulted in “significant savings for electricity buyers.” ISO/RTO Council, *The Value of Independent Regional Grid Operators*, at 25 (Nov. 2005), available at <http://www.caiso.com/14c6/14c6c4291aa40.pdf>. A 2006 study estimates a net savings of \$1.2 million *per day* in portions of the East and Midwest

where ISO/RTO markets have been established. See Scott M. Harvey, *et al.*, *Analysis of the Impact of Coordinated Electricity Markets on Consumer Electricity Charges*, at 1 (Nov. 20, 2006), available at http://www.hks.harvard.edu/hepg/Papers/LECG_Analysis_112006pdf.pdf. In addition, in recent presentations to the Commission, New York Independent System Operator, Inc. (NYISO) reported that competitive pricing has resulted in a \$2.2 billion savings in annual energy and capacity in its market, and PJM Interconnection, L.L.C., another Regional Transmission Operator, reported cost efficiency savings across its footprint of \$80 million to \$105 million per year. See, NYISO, *Market & Performance Metrics*, at 4 (Jan. 20, 2011) available at <http://www.ferc.gov/EventCalendar/Files/20110120100409-2-NYISO-print.pdf>; PJM, *2010 ISO/RTO Metrics Report PJM Highlights*, at App. 3 (Jan. 20, 2011), available at <http://www.ferc.gov/EventCalendar/Files/20110120100702-6-PJM-print.pdf>. These organized markets have also facilitated the development of renewable energy resources. See ISO/RTO Council, *Increasing Renewable Resources: How ISOs and RTOs Are Helping Meet This Public Policy Objective*, at ES-2 (Oct. 16, 2007), available at [47](http://www.isorto.org/atf/cf/%7B5B4E85C6-7EAC-</p></div><div data-bbox=)

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_final.pdf.

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

CONCLUSION

For the reasons set forth above, the petitions for review should be denied.

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DATED: January 28, 2011

STATEMENT OF RELATED CASES

Intervenors are not aware of any related cases pending in this Court.

**CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1**

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C) and Ninth Circuit Rule 32(a), the attached intervenor brief is proportionately spaced, has a typeface of 14 points, and contains 8,822 words, not including the table of contents and authorities, the glossary, the certificates of counsel, and the addendum (the addendum consists of an additional 413 words).

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Dated: January 28, 2011

ADDENDUM

ADDENDUM A

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

1. *Duke Power*, 109 FERC ¶ 61,270 (2004).
2. *Southern Co. Energy Mktg., Inc. and Southern Co. Servs., Inc.*, 109 FERC ¶ 61,275 (2004).
3. *Alliant Energy Corporate Servs., Inc.*, 109 FERC ¶ 61,289 (2004).
4. *Pinnacle West Capital Corp.*, 109 FERC ¶ 61,295 (2004).
5. *The Empire District Elec. Co.*, 110 FERC ¶ 61,214 (2005).
6. *Westar Energy, Inc. and Kansas Gas and Elec. Co.*, 110 FERC ¶ 61,316 (2005).
7. *Tucson Elec. Power Co.*, 111 FERC ¶ 61,037 (2005).
8. *Entergy Servs., Inc.*, 111 FERC ¶ 61,145 (2005).
9. *Florida Power Corp.*, 111 FERC ¶ 61,154 (2005).
10. *PacifiCorp and PPM Energy, Inc.*, 111 FERC ¶ 61,205 (2005);.
11. *South Point Energy Center, LLC*, 111 FERC ¶ 61,239 (2005).
12. *Xcel Energy Servs. Inc.*, 111 FERC ¶ 61,343 (2005).
13. *South Carolina Elec. and Gas Co.*, 111 FERC ¶ 61,410 (2005).
14. *Exelon Generation Co., LLC*, 112 FERC ¶ 61,027 (2005).
15. *PPL Montana, LLC*, 112 FERC ¶ 61,237 (2005).
16. *BE Louisiana, LLC*, 132 FERC ¶ 61,118 (2010).
17. *Dogwood Energy LLC*, 132 FERC ¶ 61,120 (2010).

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

ADDENDUM B

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

1. *Electric Quarterly Reports*, 105 FERC ¶ 61,219 (2003) (order revoking market-based rate authority of 39 market-based rate sellers).
2. *Electric Quarterly Reports*, Docket No. ER02-2001-003 (Sept. 20, 2004) (notice revoking market-based rate authority of 90 market-based rate sellers).
3. *Electric Quarterly Reports*, 114 FERC ¶ 61,171 (2006) (order revoking market-based rate authority of eight market-based rate sellers).
4. *Electric Quarterly Reports*, 115 FERC ¶ 61,073 (2006) (order revoking market-based rate authority of six market-based rate sellers).
5. 2008 Report on Enforcement at 30, Docket No. AD07-13-001 (Oct. 31, 2008) (FERC revoked market-based rate authority of two market-based rate sellers in FY 2008).
6. 2009 Report on Enforcement at 28–29, Docket No. AD07-13-002 (Dec. 17, 2009) (FERC revoked market-based rate authority of eight market-based rate sellers in FY 2009).
7. 2010 Report on Enforcement at 35–36, Docket No. AD07-13-003 (Nov. 18, 2010) (FERC revoked market-based rate authority of six market-based rate sellers in FY 2010).

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participants:

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