UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ISO New England Inc.	)	**ER14-1409-001**

REQUEST FOR REHEARING BY GEORGE JEPSEN, ATTORNEY GENERAL FOR THE STATE OF CONNECTICUT, THE CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY, THE CONNECTICUT OFFICE OF CONSUMER COUNSEL AND THE CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission"),[1] George Jepsen, Attorney General for the State of Connecticut ("CT AG"), the Connecticut Public Utilities Regulatory Authority ("Connecticut PURA"), the Connecticut Office of Consumer Counsel ("Connecticut OCC"), the Connecticut Department of Energy and Environmental Protection ("Connecticut DEEP") (collectively, "Connecticut") request that the Commission grant rehearing of its *Notice of Filing Taking Effect by Operation of Law* issued September 16, 2014 ("Notice"). In its Notice, the Commission announced that the results from the eighth forward capacity auction ("FCA-8") would go into effect "by operation of law," but without the Commission resolving the challenges to the FCA-8 results and without any Commission review and determination that the rates produced thereunder were just, reasonable and free from the exercise of market power. The Commission's acts, and failures to act, were inconsistent with ISO New England Inc.'s ("ISO-NE") Transmission,

[1] 18 C.F.R. § 385.713 (2014).

Markets and Services Tariff ("Tariff") approved as part of a New England wide settlement agreement,[2] as well as with its obligations under the Federal Power Act ("FPA") to determine that the rates produced under the Tariff were just, reasonable and free from the exercise of market power.

In particular, the Commission unreasonably failed to resolve the various protests to the rates resulting from FCA 8 – protests that the participants were entitled to have adjudicated both under the plain terms of the Tariff and the FPA. The Commission's decision also has no evidentiary foundation. While the participants to the present docket fully briefed their respective positions on the reasonableness of the FCA 8 results, no party briefed the Commission's obligation under the Tariff and the FPA to resolve those protests. If permitted to stand, the approach adopted in the Notice could unlawfully impose unjust and unreasonable tariff rates and charges on electric customers throughout New England. Rehearing should be granted to: (1) determine that the Commission is required under the terms of the Tariff to review the protests to the FCA 8 results and determine whether those rates are just and reasonable; and (2) determine that the Commission is required under the FPA to review whether the underlying rates were affected by the exercise of market power and, therefore, more than just and reasonable. In the alternative, the Commission should issue an order reviewable pursuant to 16 U.S.C. § 825l that the Commission either has those obligations, or does not.

[2] *See generally Devon Power LLC*, 115 FERC ¶ 61,340 (FCM Settlement Order), *order on reh'g*, 117 FERC ¶ 61,133 (2006) (FCM Rehearing Order).

I. INTRODUCTION

On February 3, 2014, ISO-NE conducted FCA-8 as required by its Tariff. On February 28, 2014, in accordance with section III.13.8.2 of the Tariff, ISO-NE submitted the results of FCA 8 to the Commission pursuant to Section 205 of the FPA. FCA 8 Results Submission. ISO-NE sought approval of the rates on June 28, 2014, which was 120 days after the submission of the auction results pursuant to Section III.13.8.2 of the Tariff.

The Tariff provides the following exclusive procedural avenue for any party wishing to object to the results of an FCA:

> (c) Any objection to the Forward Capacity Auction results must be filed with the Commission within 45 days after the ISO's filing of the Forward Capacity Auction results. **The filing of a timely objection with the Commission will be the exclusive means of challenging the Forward Capacity Auction results.**

(Emphasis added).[3] ISO-NE therefore noted that "any objections must be filed on or before April 14, 2014." FCA 8 Results Submission, 1.

On April 14, 2014, a number of state and consumer advocates as well as load serving entities[4] exercised their right under Section III.13.8.2(c) of the Tariff to protest and object to

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[3] *Id.* at Section III.13.8.2(c).

[4] These protestors include:
(1) the CT AG;
(2) New Hampshire Office of Consumer Advocate, Maine Office of the Public Advocate and the Connecticut Office of Consumer Counsel ("State Advocates");
(3) the Massachusetts Electric Company, Nantucket Electric Company, and Narragansett Electric Company d/b/a National Grid ("National Grid"), the Massachusetts Attorney General, the Massachusetts Department of Public Utilities ("MA DPU"), the Northeast Utilities Companies, and the United Illuminating Company (the "Joint Parties");
(4) the Belmont Municipal Light Department ("Belmont"), Braintree Electric Light Department ("Braintree"), Concord Municipal Light Plant ("Concord"), Georgetown Municipal Light Department ("Georgetown"), Groveland Electric Light Department ("Groveland"), Hingham Municipal Lighting Plant ("Hingham"), Littleton Electric Light and Water Department ("Littleton"), Merrimac Municipal Light Department ("Merrimac"), Middleton Electric Light Department ("Middleton"), Rowley Municipal Lighting Plant ("Rowley"), Taunton Municipal Lighting Plant ("Taunton") and Wellesley
(continued...)

the prices resulting from the auction. On June 27, 2014, the Commission issued a deficiency letter to ISO-NE pursuant to 18 C.F.R. § 375.307 (2013) and required ISO-NE to submit additional information concerning its conduct of FCA 8 and its evaluation of bidder behavior during the auction.

On July 17, 2014, ISO-NE responded to the Commission's deficiency letter. ISO-NE Deficiency Letter Response. ISO-NE stated that the Commission could issue an order on or before October 20, 2014 without impacting the timeline for the qualification of resources for the next auction, FCA 9. ISO-NE Deficiency Letter Response, Attachment A, 1. On September 16, 2004, the Commission issued a "Notice of Filing Taking Effect by Operation of Law," which provided that "[p]ursuant to section 205 of the FPA, in the absence of Commission action on or before September 15, 2014, ISO-NE's filing, as amended, became effective by operation of law."

Also on September 16, 2014, the Commission issued an order to show cause pursuant to Section 206 of the FPA requiring ISO-NE to revise the Tariff to provide for the review and mitigation of capacity importers' offers in the same manner that existing resources are reviewed and mitigated. Order to Show Cause, EL14-99, *ISO New England, Inc.*, 148 FERC 61,201, P12. In that Order to Show Cause, the Commission revealed that shortly after filing the FCA 8 results, ISO-NE and the Internal Market Monitor made a non-public referral to the Commission's Office of Enforcement concerning potential market manipulation by certain capacity suppliers in FCA 8. *ISO New England, Inc.*, 148 FERC

Municipal Light Plant ("Wellesley") (collectively the Eastern Massachusetts Consumer Owned Systems" or "EMCOS");
(4) the Connecticut Municipal Electric Energy Cooperative ("CMEEC") and New Hampshire Electric Cooperative, Inc. ("NHEC");
(5) Public Citizen, Inc.; and
(6) Utility Workers of America Local 464 ("UWUA Local 464"), and Robert Clark.

61,201, P11. The Commission sought prospective changes to Tariff rules because, as they currently stand, those rules "may create an opportunity for the exercise of market power by importers and otherwise result in preferential or unduly discriminatory treatment favoring importers over other capacity resources." *Id.*, P 10. With respect to the results of FCA 8, FERC stated that the "Commission staff continues to investigate the behavior that was the subject of the non-public referral." *Id.*, P 11.

The "Notice of Filing Taking Effect by Operation of Law" did not adjudicate any of the issues raised by the various protesters concerning the resulting rates produced in the FCA 8 auction. Instead, it revealed a split in the Commission on its appropriate role in examining the resulting rates of the auction to determine whether they were affected by the exercise of market power and whether those rates were just and reasonable. "While a tariff filing rarely takes effect without an order by the Commission, such a result will happen when a four-member panel finds itself deadlocked." September 16, 2014, *Statement of Commissioner Philip D. Moeller on FERC's Lack of Action in Docket No. ER14-1409-000*, 1. Two Commissioners concluded that the FERC was required to examine the reasonableness of the resulting prices from FCA 8.

> The ISO-New England's (ISO-NE) forward capacity market (FCM) is unique in that the auction results are subject to Commission review under the just and reasonable standard. This review process was part of a carefully negotiated settlement meant to allay stakeholder concerns over the market's design. Here, there is evidence suggesting the exercise of market power, and it is uncontroverted that the market power, if it existed, was not mitigated. In the words of ISO-NE, prices resulted from a "non-competitive auction." To the extent any portion of those prices was attributable to an exercise of market power, the auction will have imposed unwarranted costs upon consumers. Moreover, it is possible that ISO-NE may have violated its Tariff in the way it conducted the auction. On this record, we do not believe that ISO-NE has carried its burden of establishing that the auction results are just and reasonable. As a result,

> we would set this matter for a fast-track hearing and settlement procedures.

September 16, 2014, *Joint Statement by Commissioner Tony Clark and Commissioner Norman Bey*, 1. Another Commissioner, however, concluded that FERC should limit itself to considering whether ISO-NE conducted FCA 8 consistent with the Tariff and, if so, the Commission should not independently assess whether the resulting rates were just and reasonable. Specifically:

> [s]ince the inception of the FCM, the Commission has consistently followed a clearly-defined approach to determine whether the rates produced by the Forward Capacity Auction are just and reasonable. Specifically, the Commission's determination has been based solely on its assessment of whether ISO-NE conducted the auction in accordance with its established, Commission-approved tariff. This approach is consistent with both Commission and judicial precedent that the tariff on file, which specifies the rules and procedures by which a particular rate is calculated, is the pertinent filed "rate."
> I believe that the Commission's precedent should be followed with respect to FCA 8. Importantly, no party in the FCA 8 proceeding alleges that ISO-NE failed to follow its tariff in conducting the auction, and the IMM states that the FCA "was conducted in accordance with the rules and the resultant prices were calculated in accordance with the tariff."
> Accordingly, I would accept the FCA 8 results as just and reasonable.

(footnotes omitted) September 16, 2014, *Statement of Chairman Cheryl A. LaFleur on the Forward Capacity Auction 8 Results Proceeding*, 2-3.

The Chairman further argued that a substantive review of the rates would violate the "filed rate doctrine" and would constitute poor public policy by introducing uncertainty among auction participants as to their ultimate compensation. Specifically:

> [u]nder the filed rate doctrine, a regulated entity may not charge, or be required by the Commission to charge, a rate different from the one on file with the Commission. However, under the alternative approach that would evaluate the resulting *rates*, rather than compliance with the tariff provisions that produced those rates, the only way to achieve different final rates would be to – implicitly or explicitly – retroactively revise the Commission-approved rules upon which ISO-NE conducted the auction

> and require ISO-NE to charge a rate not on file with the Commission. I believe that the alternative approach would constitute retroactive ratemaking in violation of the filed rate doctrine, which prohibits precisely that type of after-the-fact revision of the auction rules on file.
> The alternative approach is also flawed as a matter of Commission policy. First, it creates a disincentive for auction participation, as all parties could follow the auction rules outlined in a Commission-approved tariff, yet the resulting rate could nonetheless be found unjust and unreasonable. What will the expectations of auction participants be if the rules for auction participation can be changed after the auction is conducted? A regime in which auction rules can be changed after-the-fact would introduce significant regulatory uncertainty and risk.

(footnotes omitted) September 16, 2014, *Statement of Chairman Cheryl A. LaFleur on the Forward Capacity Auction 8 Results Proceeding*, 4.

The Commission's failure to adjudicate the protests to the FCA 8 auction rates is inconsistent with the plain language of the Tariff as well as the Federal Power Act ("FPA"). Accordingly, Connecticut requests that the Commission grant rehearing, review the underlying FCA 8 rates and issue an order addressing the protests that would be subject to review pursuant to 16 U.S.C. § 825l. In the alternative, the Commission should issue an order stating why it is not required to review the underlying rates pursuant to the Tariff and the FPA, an order that would also be subject to review pursuant to 16 U.S.C. § 825l.

II. CONCISE STATEMENT OF ERRORS AND ISSUES

In accordance with Rule 713(c),[5] Connecticut provides the following statement of issues on which they seek rehearing and representative authority in support thereof:

(1) Whether the Commission's decision-making is arbitrary, capricious, an abuse of discretion, unreasoned or otherwise unlawful in violation of Section 706 of the Administrative Procedure Act ("APA"), by failing to consider, review and

[5] 18 C.F.R. § 385.713(c)(2).

rule on the protests to the FCA 8 rates as required by the Tariff. *See* 5 U.S.C. § 706 (2006); 16 U.S.C.§§ 824d, 825*l* (2006). *See also*; *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. 2004); *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 26 (2012).

(2) Whether the Commission's decision-making is arbitrary, capricious, an abuse of discretion, unreasoned or otherwise unlawful in violation of Section 706 of the Administrative Procedure Act, because it failed to review the rates resulting from FCA 8 as required under the FPA. *See* 5 U.S.C. § 706 (2006); 16 U.S.C.§§ 824d, 825*l* (2006). *See also; Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. 2004); *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011) *cert. denied*, 133 S.Ct. 26 (2012).

III. REQUEST FOR REHEARING

A. The Commission Erred by Failing to Consider, Review and Rule on the Protests in the Proceedings as Required under the Tariff.

As noted above, six separate groups of entities filed protests and challenges to ISO-NE's Section 205 filing presenting the rates resulting from FCA 8 to the Commission for review and approval. These protesters have an unambiguous right, under the Tariff and the settlement agreement approved by the Commission in 2006,[6] to challenge the auction clearing prices and to have the Commission resolve those challenges. The Commission erred in failing either to approve the rates as just and reasonable or to disallow the rates. The Commission should reconsider its initial determination to allow the FCA 8 auction results to become "effective by operation of law" without resolving the protestors' objections or determining that the rates are just and reasonable.

The Tariff at issue here was the product of contentious discussions among 115 different parties in New England and 30 formal settlement conferences.[7] It followed

[6] *Devon Power LLC*, 115 FERC ¶ 61,340 (2006) "Order Accepting Proposed Settlement Agreement" and *Devon Power, LLC*, "Order on Rehearing and Clarification," 117 FERC ¶ 61,133 (October 31, 2006).
[7] *Devon Power LLC*, 115 FERC ¶ 61,340 P 15 (2006).

years of litigation, the passage of an Act of Congress specifically concerning the underlying dispute, a rare full day oral argument before the full Commission, and months of settlement discussions with significant compromises among all participants.[8] A central compromise concerned balancing the consumers' rights to ensure that resulting auction rates were just and reasonable with the need to provide suppliers the necessary price certainty to attract and retain generators needed for reliability.

The resulting compromise, approved by the Commission, allowed a limited period of time after each auction for any objecting party to challenge the rates resulting from the auction in the Section 205 filing following the auction. Once that limited protest period lapsed and those prices were approved as just and reasonable, they would be subject to the *Mobile-Sierra*[9] presumption of reasonableness, rendering the resulting rates virtually unchallengeable. Courts of Appeals have characterized the *Mobile-Sierra* public interest standard as being "much more restrictive than the FPA's 'just and reasonable' standard, even describing the burden of the public interest standard as 'practically insurmountable' and 'almost insurmountable.'" *Potomac Elec. Power Co. v. FERC*, 210 F.3d 403, 407-08 (D.C. Cir. 2000) (citations omitted).

In approving this settlement, and specifically this balancing of interests, the Commission concluded:

> In the June 16 Order, we explained that the Settlement Agreement ***provides for thorough review of the final auction clearing prices by the Commission and any interested parties***. In particular, the Settlement Agreement provides that ISO-NE will make both an informational filing

[8] *See* Energy Policy Act of 2005. Pub. L. No. 109-58, 119 Stat. 594, Section 1236.
[9] The doctrine is named after two cases, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*"); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956) ("*Sierra*").

> prior to the auction that includes information regarding the zones to be used and qualifying bids, and a section 205 filing following the auction containing the results. Because the limited *Mobile-Sierra* provision in section 4.C does not apply to these filings, ***parties may challenge them under the "just and reasonable standard" and the Commission will address such challenges under that standard***. These provisions also address concerns that the FCM market design is untested; these regular filings will reveal any unanticipated problems with that design, giving the parties an opportunity to address them under the just and reasonable standard.

(Emphasis added) *Devon Power, LLC*, 117 FERC ¶ 61,133 P 93 (October 31, 2006). The Commission could not have been more clear that the Section 205 proceeding was the proper vehicle for a "thorough review of the final auction clearing prices" before they become final rates and that the "Commission will address such challenges."

In return, consumer interests provided significant concessions to generation interests concerning their need for price certainty after the Commission has approved the Section 205 auction results filing as just and reasonable by applying the "practically insurmountable" *Mobile-Sierra* presumption of reasonableness to any future challenges to those rates. As the Commissioned explained:

> price certainty is important to ensure that the FCM achieves its goals of attracting and retaining generators needed for reliability. As we stated in the June 16 Order, stability is of particular importance in this case, given that these proceedings were initiated in part because of the unstable nature of ICAP revenues and the negative effect that it has had on New England's infrastructure. ***Section 4.C achieves this stability while still allowing the Commission and the parties to thoroughly and regularly review and raise objections to the prices produced by the FCM.***

(Emphasis added) *Devon Power, LLC*, 117 FERC ¶ 61,133 P 95 (October 31, 2006).

Moreover, as noted above, Section III.13.8.2(c) of the Tariff provides:

> (c) Any objection to the Forward Capacity Auction results must be filed with the Commission within 45 days after the ISO's filing of the Forward Capacity Auction results. **The filing of a timely objection with the Commission will be the exclusive means of challenging the Forward Capacity Auction results.**

(Emphasis added).

The Commission improperly deprived the protesting parties of their rights to have a substantive review of the auction prices in the Section 205 proceeding. In the Settlement Agreement the parties specifically negotiated an exclusive means of challenging the prices resulting from the forward capacity auctions, and the Commission specifically approved those provisions. The Commission cannot now unilaterally upset the balance it approved by drastically altering the manner in which challenges to the prices resulting from the forward capacity auction are reviewed. The protesting parties are entitled to both the right to object to the results of the forward capacity auction and the right to have those objections adjudicated by the Commission. It would be meaningless to have the specific right to challenge rates in a Section 205 proceeding, only to have the Commission conclude it need not, indeed could not, resolve those protests.

The Commission is also wrong to suggest that a successful challenge to the auction prices in the Section 205 proceeding would introduce uncertainty into the capacity market as a whole, discouraging participation in the auction. As noted above, the parties in their settlement agreement specifically addressed those concerns – through arms-length negotiations among multiple, sophisticated parties - and designed a solution acceptable to all. Consumers have one time-limited opportunity to challenge the auction results in the Section 205 proceeding and then the rates, if approved as just and reasonable, are forever after shielded from review under the "practically insurmountable" *Mobile-Sierra* doctrine. Ironically, the Commission's failure to approve the FCA 8 auction results as just and reasonable likely negates those Tariff provisions that would otherwise impose the *Mobile-Sierra* presumption on future challenges to those rates. The Commission cannot impose a *Mobile-Sierra* presumption on the auction prices if it has

failed to determine that those rates were just and reasonable in the first place. Overall, the Commission's failure to resolve the protests injects more uncertainty, not less, into the auction results.

The Commission is similarly incorrect to the extent it asserts that a substantive review of the auction prices in the Section 205 proceeding would be "retroactive ratemaking" in violation of the "filed rate doctrine." Such a construction is plainly inconsistent with Section 205 of the FPA. Section 205(c) of the FPA, 16 U.S.C. § 824d(c), requires public utilities to file tariff schedules with the Commission showing their rates and terms of service, along with related contracts, for service subject to FERC jurisdiction. When those Tariff schedules are filed, Sections 205(a)-(b) of the FPA, 16 U.S.C. §§ 824d(a)-(b), direct the Commission to assure that the rates and services described in the tariff are just and reasonable and not unduly discriminatory. The burden is on the utility to show that its rate is lawful, 16 U.S.C. § 824d(e). *Boston Edison Co. v. FERC,* 233 F.3d 60, 64 (1st Cir.2000).

Treating a rate filed for review by the Commission pursuant to Section 205 as a "filed rate" not subject to review by the Commission is simply illogical. See *Devon Power LLC,* 115 FERC ¶ 61,340 P 185 (2006). Moreover, as the Commission described the standard of review under the Section 205 proceeding to the U.S. Court of Appeals for the District of Columbia Circuit:

> Section 4.C only applies the "public interest" standard to challenges to . . . the *final* prices produced by the Forward Capacity Market auctions. As the Commission explained, those prices do not become final until ISO New England has made both an informational filing prior to the auction, and a post-auction filing under FPA § 205, 16 U.S.C. § 824d, containing the results. Settlement Order at P 185; Settlement Rehearing Order at P 93. Both filings will be addressed under the just and reasonable standard *before* the public interest standard attaches, and contrary to Non-Settling

> States' assertion (Pet. Br. at 53), parties will be able to challenge the auction clearing prices. *Id.*

Commission Brief, Docket No. 06-1403, *Maine Public Utilities Commission, et al, v. FERC*, 55. *See also, ISO New England Inc.*, 148 FERC ¶ 61,185, at P 30 ("clearing prices becoming 'finalized' after the Commission approves ISO-NE's FCA results filing."). The Commission should respect the plainly stated expectations of all the participants in this proceeding, as well the Commission itself when it approved the Settlement Agreement in 2006, that the auction results would be subject to a thorough review in the Section 205 proceeding to determine that they were just and reasonable.

B. The Commission Erred by Failing to Determine that Prices Produced Pursuant to FCA 8 were Just and Reasonable as Required by the FPA.

In addition to being inconsistent with the plain terms of the Tariff and settlement agreement, the Commission's singular reliance on the operation of the Tariff, without any further review of the auction prices, is inconsistent with its obligations under the FPA. As noted above, ISO-NE and the Internal Market Monitor made a non-public referral to the Commission's Office of Enforcement concerning the potential market manipulation by certain capacity suppliers in FCA 8. *ISO New England, Inc.*, 148 FERC 61,201, P11. The Commission was sufficiently concerned to issue its Order to Show Cause seeking to revise the Tariff to prevent such actions in the future. *Id*. The "Commission staff continues to investigate the behavior that was the subject of the non-public referral." *Id*. *See also* September 16, 2014, *Joint Statement by Commissioner Tony Clark and Commissioner Norman Bey*, 1 ("Here, there is evidence suggesting the exercise of market power, and it is uncontroverted that the market power, if it existed, was not mitigated").

Despite the potential exercise of market power affecting the clearing prices in FCA 8, the Commission nonetheless allowed the rates to become final "by operation of law" without any determination that the rates themselves were just and reasonable. At least one Commissioner stated that the Commission's determination on whether the rates were just and reasonable should be "based solely on its assessment of whether ISO-NE conducted the auction in accordance with its established, Commission-approved tariff." September 16, 2014, *Statement of Chairman Cheryl A. LaFleur on the Forward Capacity Auction 8 Results Proceeding*, 2.

This is clear error. The Commission may only rely upon a market-based tariff to produce just and reasonable rates[10] where an individual seller does not have, or has adequately mitigated, market power.[11] The appearance and existence of unmitigated market power corrupts the operation of any market-based tariff and renders the resulting prices unjust and unreasonable.

The FPA is primarily a consumer protection statute. *See Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944) ("primary aim of this

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[10] The Supreme Court has neither approved nor disapproved of the use of market-based tariff systems such as the Tariff at issue here. In *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 535 (2008), the Court observed that "we have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system." 554 U.S. at 538. Later, the Court "reiterate[d] that we do not address the lawfulness of FERC's market-based-rates scheme, which assuredly has its critics. But any needed revision in that scheme is properly addressed in a challenge to the scheme itself …." *Id*. at 548.

[11] *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009); *La. Energy & Power Auth. v. FERC*, 329 U.S. App. D.C. 401, 141 F.3d 364, 365 (D.C. Cir. 1998); *see also Consumers Energy Co. v. FERC*, 361 U.S. App. D.C. 292, 367 F.3d 915, 922-23 (D.C. Cir. 2004); *Elizabethtown Gas Co. v. FERC*, 304 U.S. App. D.C. 91, 10 F.3d 866, 871 (D.C. Cir. 1993); *Tejas Power Corp. v. FERC*, 285 U.S. App. D.C. 239, 908 F.2d 998, 1004 (D.C. Cir. 1990).

legislation was to protect consumers against exploitation."). The FPA requires just and reasonable rates in order to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Serv. Comm'n*, 360 U.S. 378, 388 (1959). The just and reasonable standard was instituted to address the complete market break-down resulting from the unfettered exercise of market power in the context of the electric utility industry. *See e.g. Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 758 (1973); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610 (1944). Courts have consistently recognized that rates resulting from the exercise of market power are injurious to consumers and to the economy. Rates that reflect the exercise of market power, and therefore allow for the collection of monopoly rents, are *per se* outside the permissible zone of reasonableness.

The Commission may not defer to the market when the prevailing market structure allows for the exercise of undue market power because such a market cannot be relied on to fulfill the statutory mandate that rates be just and reasonable. Courts have uniformly held that the Commission has an affirmative obligation to approve market-based rates and tariffs only where the Commission has made specific findings that markets are workably competitive. Only "where there is a competitive market" may the Commission "rely on market-based rates in lieu of cost-of-service regulation to ensure that rates satisfy" the just and reasonable requirement. *La. Elec. & Power Author. v. FERC*, 141 F.3d 364, 365 (D.C. Cir. 1998); *see also California v. FERC*, 383 F.3d 1006, 1012 (9th Cir. 2004) (observing that approval of market-based rate tariffs "was conditioned on the existence of a competitive market."). The Commission may rely on market-based rate authority only where the Commission finds "empirical proof" that

competitive markets can exist and "ensure that the actual price is just and reasonable." *Farmers Union*, 734 F. 2d at 1510; *see also El Paso Natural Gas Co.*, 56 FERC ¶ 61,290 at p. 61,179 (1991) (concluding that "empirical evidence" supported a finding that El Paso could not exercise market power).

FERC must do more than simply assume that the Tariff, if properly applied, guarantees that the rates will be free from the exercise of market power and will therefore be just and reasonable. The courts also require the Commission to exercise its regulatory obligations and review the results of the Tariff to determine that the rates are indeed just and reasonable, especially where, as here, real questions of market power have been raised.

> FERC may not determine in advance that the prevailing market rate is by definition just and reasonable. *Texaco*, 417 U.S. at 397, 94 S.Ct. 2315. Such a policy would be regulation in name only. Nor may FERC, in an ambiguous order, assure the public that it will adjust prices when rates are "unreasonably high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market price for intrastate sales." *Id.* at 396, 94 S.Ct. 2315. Comparisons of the rates charged by sellers to the rates charged by other sellers are insufficient—such comparisons tell FERC nothing about whether the rates are just and reasonable. FERC may not substitute prevailing market prices for its own judgment.

Montana Consumer Counsel v. FERC, 659 F.3d 910, 918-9 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 26 (2012).

Instead, the Commission must review the rates themselves, and not just the process, to determine if the rates are subject to market power. The Ninth Circuit stated that the Commission must review not only sellers' market power and behavior, but also their actual rates to determine whether they exceeded those that would be expected in a competitive market.

> FERC has confirmed that it will monitor the data to ensure that the reported transactions are consistent with the data expected of a competitive, unmanipulated market. FERC is able to evaluate the reported data to determine whether the average prices charged by a seller are comparable to the average prices that would be charged in a competitive market where no sellers were able to exercise market power. If the data are consistent with a competitive market, FERC may properly assume that the charged rates fall within a zone of reasonableness.

Id., 659 F. 3d at 919. The reporting requirements are essential to ensuring the Commission can comply with its obligations to oversee the competitiveness of the market.

> If the ability to monitor the market, or gauge the "just and reasonable" nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all.

Cal. ex rel. Lockyer v. FERC, 383 F.3d 1006, 1015 (9th Cir. 2004); *See also, Blumenthal v. FERC*, 552 F.3d 875, 883 (D.C. Cir. 2009).

Implicit in this analysis, however, is that once the Commission discovers that the reported rates may reflect market power, the Commission cannot fail to act. The very purpose of the reporting is to provide a vehicle under Section 205 to challenge rates that are unfair.

> For example, in *Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305, FERC emphasized that transaction-specific reporting "**is necessary so that the marketer's rates will be on file as required by section 205(c) of the FPA, to evaluate the reasonableness of the charges, and to provide for ongoing monitoring of the marketer's ability to exercise market power**." Similarly, FERC has stated that transaction-specific data is the "minimum needed for market monitoring purposes." *Revised Public Utility Filing Requirements*, 99 FERC ¶ 61,107 (2002).

Cal. ex rel. Lockyer v. FERC, 383 F.3d at 1014 (emphasis added). The prices that may reflect the exercise of market power must be subject to challenge by consumers or the Commission itself.

> Consumers, competitors, and other complainants may challenge, through FERC's processes and the courts, the determination that markets are competitive and that rates are just and reasonable. FERC may sua sponte or upon complaint investigate sellers to determine whether they are unjustly or unreasonably exercising market power and, in its discretion, remedy such violations through rebates and disgorgement of profits. By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power, FERC has adopted a permissible approach to fulfilling its statutory mandate to ensure that rates are just and reasonable. . . . .
>
> As we have discussed, there is nothing inherent in the general concept of a market-based tariff that violates the FPA; however, as *MCI* and *Maislin* affirm, a market-based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily required oversight. The structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were "just and reasonable" and whether market forces were truly determining the price.

Montana Consumer Counsel v. FERC, 659 F.3d 910, 918-9 (9th Cir. 2011), *cert. denied*, 133 S.Ct. 26 (2012).

Rates that are the result of an exercise of market power are not just and reasonable and are unlawful. Prospective tariff changes alone are inadequate. The Commission is aware that the FCA 8 auction prices may reflect the exercise of market power, and the Commission is obligated to ensure that the rates charged customers are no more than just and reasonable. "The Commission would abdicate its responsibility under section 205 of the FPA if it treated the FCA 8 Results Filing as a mere informational filing and determined without further review that the prices resulting from the auction must

necessarily be just and reasonable." September 16, 2014, *Joint Statement by Commissioner Tony Clark and Commissioner Norman Bey*, 1.

IV. CONCLUSION

For the reasons stated in sections A and B above, the Commission should rehear its decision and determine that: (1) the Commission is required under the terms of the Tariff to review the protests to the FCA 8 results and determine whether those rates are just and reasonable; and (2) the Commission is required under the FPA to review whether the underlying rates were affected by the exercise of market power and, therefore, more than just and reasonable. In any event, the Commission should issue an order reviewable pursuant to 16 U.S.C. § 825l holding that the Commission either has those obligations, or does not. The ability of parties to challenge the Tariff rates as unjust and unreasonable is a central consumer protection embedded in both the Tariff and the FPA. The Commission may not simply allow rates potentially subject to the exercise of market power to go into effect in such a manner as to deprive the protesting parties of any opportunity to seek a meaningful review of those rates.

For the foregoing reasons, Connecticut requests the Commission grant rehearing as described above.

Dated: October 16, 2014

Respectfully Submitted,

CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY

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