

**A CLARIFICATION ON FERC’S DISCRETION IN
FINDING JUST AND REASONABLE RATES IN THE
ELECTRICITY MARKET: PUBLIC CITIZEN, INC. V.
FERC**

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I. INTRODUCTION

In *Public Citizen, Inc. v. FERC (Public Citizen)*, the United States Court of Appeals for the D.C. Circuit unanimously held that the Federal Energy Regulatory Commission (FERC or Commission) decision to uphold Midcontinent Independent System Operator’s (MISO) 2015 Electricity Capacity Auction results was arbitrary and capricious.¹ The auction resulted in prices for a regional zone, covering

1. Pub. Citizen, Inc. v. FERC, 7 F.4th 1177 (D.C. Cir. 2021).

most of Illinois, forty times higher than neighboring zones.² This price anomaly ultimately led to several parties filing complaints at FERC under section 206 of the Federal Power Act (FPA).³ FERC agreed that the auction rules were producing unreasonable price spikes and ordered prospective changes as well as a separate investigation into possible market manipulation.⁴ But it declined to call into question the 2015 auction results themselves and also closed its investigation without bringing an enforcement action against any market participants.⁵ It was the FERC's denial of relief with respect to the 2015 auction results and its decision to close the investigation that prompted the complainants' appeal.⁶

The Court ultimately remanded the case to FERC to provide an explanation for determining that the 2015 Auction results were just and reasonable, rejecting FERC's "breezy" analysis on this question as arbitrary and capricious.⁷ But the Court also held that it could not review FERC's separate decision to close its market manipulation investigation.⁸ Further, and most crucially, the Court held that under section 205 of the FPA FERC is not required to review individual electricity prices for justness and reasonableness before they go into effect where those prices were set as part of an auction whose market-based methodology FERC approved as just and reasonable and where FERC is conducting continual oversight of the functioning of a market-based tariff.⁹

This case note will first discuss the relevant background surrounding the history of the FPA and FERC's administration of the FPA, the just and reasonable electricity rate requirement, and the prohibition of market manipulation within the electricity industry. As further background, the note will discuss MISO's 2015 Capacity Auction, market-based rate tariffs, FERC's involvement with regulating electricity markets, and judicial review of FERC orders. Finally, this note will provide the procedural history of the relevant FERC Orders, an analysis of each of the D.C. Circuit's holdings, and an analysis of whether the Court was correct in not requiring the Commission to approve each individual market-based price for electricity capacity when it had already approved the underlying market-based rate setting methodology producing those prices as just and reasonable.

2. *Id.* at 1182.

3. *Pub. Citizen, Inc.*, 7 F.4th 1177.

4. *Id.*

5. *Id.* at 1190-91.

6. *Id.* at 1182.

7. *Pub. Citizen, Inc.*, 7 F.4th at 1200.

8. *Id.* at 1195-96. See *Heckler v. Chaney*, 470 U.S. 821 (1985) (*Chaney*); 5 U.S.C. § 701(a)(2) (2011).

9. *Pub. Citizen, Inc.*, 7 F.4th at 1193-95.

II. BACKGROUND

A. A Broad Overview of the Federal Power Act and FERC's Creation

To combat “abuses of market power” evident in 1935, Congress enacted the Public Utility Act.¹⁰ Contained within Title II of the Public Utility Act was the first iteration of the FPA.¹¹ The FPA authorized the Federal Power Commission to govern transmission and wholesale sales of electric energy and natural gas in interstate commerce.¹² Years later, Congress passed the Department of Energy Organization Act of 1977, and a newly created administrative agency, FERC was established.¹³ Concurrently with the establishment of FERC, the authority to regulate the wholesale transmission and sale of electricity was transferred from the Federal Power Commission to FERC.¹⁴ FERC’s mission, in part, is to “assist consumers in obtaining . . . secure energy services at a reasonable cost through appropriate regulatory and market means.”¹⁵

FERC’s authorities and responsibilities within the electricity industry encompass jurisdiction over “the transmission of electric energy in interstate commerce and . . . the sale of electric energy at wholesale in interstate commerce.”¹⁶ Accordingly, FERC does not have jurisdiction over intrastate transmission and sales of electric energy, which is instead left to individual States to regulate.¹⁷

Congress amended the FPA by passing the Energy Policy Act of 2005 (EPAc), which expanded the FERC’s responsibilities to include the authority to “issue rules to bar market manipulation” and the authority to impose civil penalties to entities that participate in the market manipulation.¹⁸ As seen in subsequent FERC decisions, the Commission has used this expanded authority to regulate market manipulation in the wholesale electricity market in particular.¹⁹

10. Richard J. Campbell, *The Federal Power Act (FPA) and Electricity Markets* 2, CONG. RES. SERV., (2017), <https://crsreports.congress.gov/product/pdf/R/R44783>. The need to regulate the electric power industry was evident, as electric power companies were notably dominating the industry by practicing interstate activities where no federal regulations existed, and state jurisdiction could be avoided. *Id.* at 1-2.

11. *Id.* Originally titled the “Federal Water Power Act” in 1920, the FPA broadened the scope of its federal regulatory authority to reach natural gas, electricity, and hydroelectric interstate activities. See 16 U.S.C. § 824-824g (2015).

12. 16 U.S.C. § 824(b)(1).

13. Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565 (1977) (amended 1978). In the wake of nonrenewable energy shortages, the Department of Energy Organization Act of 1977 consolidated Federal energy activities and “provided the framework for a comprehensive and balanced national energy plan.” *A Brief History of the Dep’t of Energy*, DEP’T OF ENERGY, <https://www.energy.gov/lm/doe-history/brief-history-department-energy>.

14. THE FEDERAL POWER ACT (FPA) AND ELECTRICITY MARKETS, *supra* note 7, at 3. It has been cited that this transition took place in part because of the public scrutiny surrounding the FPC’s efficiency. *Id.*

15. *About FERC*, FERC, <https://www.ferc.gov/what-ferc#>.

16. 16 U.S.C. § 824(b)(1).

17. *Id.*

18. FERC, FERC & EPAc 2005: MEETING MILESTONES 4 (2006) <https://www.ferc.gov/sites/default/files/2020-04/ferc-and-epact-2005.pdf>.

19. *Barclays Bank PLC*, 144 FERC ¶ 61,041 at P 36 (2013).

B. *The Just and Reasonable Electricity Rate Requirement*

FERC's authority over electricity rates in interstate commerce is set forth in sections 205 and 206 of the FPA, which not only mandate that prices charged for electricity rates are "just and reasonable," but also set forth filing requirements for public utilities and provide the Commission with the power to review rates charged for electricity.²⁰ Section 205 of the FPA concerns new or prospective electric rates and requires that "[a]ll rates and charges . . . for or in connection with the transmission or sale of electric energy . . . and all rules and regulations" relating to those rates or charges be "just and reasonable."²¹ FERC must approve tariffs submitted by public utilities before they can go into effect, and the legal burden of demonstrating that rates set forth in these tariffs are "just and reasonable" is born by the utility.²² These section 205 filings are either "new document[s] containing or affecting a rate, term or condition" or proposed documents that amend existing "document[s] . . . already on file and in effect."²³ When reviewing these section 205 filings, FERC "is [given] substantial deference in rate-making decisions because "'just and reasonable' is obviously incapable of precise judicial definition,"²⁴ and rate-related matters "are either fairly technical or involve policy judgments that lie at the core of the regulatory mission."²⁵

On the other hand, section 206 empowers FERC to review existing rates or practices to ensure that they are not "unjust, unreasonable, unduly discriminatory or preferential."²⁶ Either the Commission, of its own accord, or a third-party may initiate a proceeding under section 206.²⁷ In doing so, the filing must "state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for the proposed change."²⁸ Section 206 places the burden of proof on the filing party, which could be the Commission or third-party complainant.²⁹ If FERC determines existing rates are unjust and unreasonable, FERC must proscribe its own "just and reasonable" rates.³⁰

20. 16 U.S.C. § 824d(a), 824e(a).

21. 16 U.S.C. § 824d(a). Section 205 also makes it unlawful for public utilities to "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities." 16 U.S.C. § 824d(b).

22. 16 U.S.C. § 824d(e).

23. PJM, FEDERAL LAW GUIDES CHANGES IN PJM GOVERNING DOCUMENTS (2020), <https://www.pjm.com/~media/about-pjm/newsroom/fact-sheets/federal-power-act-sections-205-and-206.ashx#:~:text=Section%20205%20Filings,charge%20to%20FERC%20for%20approval>.

24. Delaware Div. of Pub. Advocate v. FERC, 3 F.4th 461, 465 (D.C. Cir. 2021) (quoting Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 532 (2008)).

25. *Id.* (quoting S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41, 55 (D.C. Cir. 2014) (internal citations omitted)).

26. 16 U.S.C. § 824e(a).

27. *Id.*

28. *Id.*

29. 16 U.S.C. § 824e(b).

30. 16 U.S.C. § 824e(a).

C. *The Prohibition on Market Manipulation Within the Electricity Industry*

Market manipulation within the energy market not only “render[s] prices and price-setting mechanism inaccurate and unreliable . . . “ but diminishes the overall confidence in the market’s ability to produce just and reasonable rates.³¹ Market manipulation ultimately causes harm to both market participants and energy consumers through interfering with functioning of free markets and driving up electricity prices to end users.³² The danger of market manipulation was illustrated by the Western Energy Crisis, which was the event that ultimately motivated Congress to provide FERC with authority to combat market manipulation.³³

After the events of the Western Energy Crisis, Congress amended the FPA through the EAct of 2005.³⁴ Congress passed the amendment to provide the Commission enforcement tools to prohibit market manipulation and authority to enforce civil penalties, the lack of which had previously provided less accountability for utilities and did not “effectively deter and sanction market manipulation.”³⁵

In turn, the EAct created section 222 of the FPA, which makes it unlawful for public utilities “to use or employ, in connection with the purchase or sale of electric energy or the purchase of transmission services subject to the jurisdiction of the Commission, any manipulative or deceptive device or contrivance”³⁶ FERC exclusively enforces this prohibition on market manipulation.³⁷ Similar in language, FERC has a regulation codifying FPA section 222, known as the Anti-Manipulation Rule, which was promulgated in Order No. 670.³⁸

The Anti-Manipulation Rule prohibits electricity utilities from “engage[ing] in any act, practice, or course of business that operates or would operate as a fraud

31. FERC, STAFF WHITE PAPER ON ANTI-MARKET MANIPULATION ENFORCEMENT EFFORTS TEN YEARS AFTER EACT 2005 1 (2016), <https://www.ferc.gov/sites/default/files/2020-05/marketmanipulationwhitepaper.pdf> [hereinafter STAFF WHITE PAPER].

32. *Id.* at 2. The Western Energy Crisis of 2000 and 2001 resulted from market participants taking advantage of the “underlying supply-demand imbalance and flawed market design.” *Final Report on Price Manipulation In Western Markets, Fact-Finding Investigation of Potential Manipulation of Electric And Natural Gas Prices*, FERC Docket No. PA02-2-00 at ES-1 (2003). The market manipulation included, but was not limited to, false reporting of natural gas prices and various forms of prohibited trading strategies. *Id.* The manipulation ultimately led to consumers experiencing high retail electricity prices and rotating blackouts due to power shortages. *Subsequent Events-California’s Energy Crisis*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/electricity/policies/legislation/california/subsequentevents.html/>.

33. STAFF WHITE PAPER, *supra* note 31, at 2.

34. See EAct of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

35. STAFF WHITE PAPER, *supra* note 31, at 2.

36. 16 U.S.C. § 824v(a).

37. *Id.*

38. 18 C.F.R. § 1c.2 (2006). FERC’s Anti-Manipulation rule prohibits electricity utilities “(1) To use or employ any device, scheme, or artifice to defraud, mak[ing] any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.” Order No. 670, *Prohibition of Energy Market Manipulation*, 114 FERC ¶ 61,047 at P 1 (2006).

or deceit upon any [entity].”³⁹ The Commission defines fraud generally, as “to include any action, transaction or conspiracy for the purpose of impairing, obstructing or defeating a well-functioning market.”⁴⁰ FERC has applied this Anti-Manipulation Rule in subsequent enforcement actions by holding that entities have the ability to commit fraud even when a tariff or market rule has not been violated.⁴¹

D. Market-Based Rate Tariffs and FERC’s Continuing Oversight

The FPA and FERC precedent allows for public utilities to submit market-based rate tariffs for the sale of electricity in interstate commerce under certain proscribed circumstances.⁴² As FERC describes, “[t]he market-based rate tariff governs a seller’s wholesale sales at market-based rates.”⁴³ Market-based rate tariffs “state that a seller will enter into freely negotiated contracts with purchasers” rather than setting forth specific prices.⁴⁴ Market-based rate tariffs are submitted by public utility wholesale power suppliers and are approved by the Commission when certain conditions are met.⁴⁵ In order to secure approval to utilize market-based rates, FERC requires a public utility to show that it lacks or has sufficiently mitigated market power in the market in question, and FERC requires public utilities to abide by the additional market rules set forth by the Regional Transmission Organizations (RTOs) or Independent System Operators (ISOs) tariff.⁴⁶ Additionally, FERC must conduct “ongoing oversight of market-based rate authorizations and market conditions” to ensure that the market-based rates resulting from the tariff are just and reasonable.⁴⁷

This ongoing oversight may include the Commission conducting an investigation into a specific public utility to determine whether it has violated a tariff provision, broken market rules, or engaged in market manipulation.⁴⁸ Public utilities and ISOs/RTOs must regularly submit reports detailing their transactions to FERC, which in turn reviews those transactions to ensure that markets are functioning properly and producing rates that are just and reasonable.⁴⁹ These reports assist FERC in its ongoing oversight, and provide FERC with the ability to “take

39. 17 C.F.R. § 180.1(a)(3)(2011).

40. Order No. 670, *supra* note 38, at P 50.

41. *Houlian Chen Powhatan Energy Fund*, 151 FERC ¶ 61,179 at P 5 (2015) (citing *Competitive Energy Services, LLC*, 144 FERC ¶ 61,163 at P 50 (2013) (internal citations omitted); *Richard Silkman*, 144 FERC ¶ 61,164 at P 50 (2013); *Lincoln Paper and Tissue, LLC*, 144 FERC ¶ 61,162 at P 36 (2013)).

42. Electric rates may also be set under cost-based rate tariffs. *Frequently Asked Questions (FAQs) Market-Based Rates*, FERC, <https://www.ferc.gov/power-sales-and-markets/electric-market-based-rates/frequently-asked-questions-faqs-market-based> (last updated May 24, 2022).

43. *Market-Based Rate Tariffs*, FERC, <https://www.ferc.gov/industries-data/electric/overview/electric-market-based-rates/filing-process-information/market-based-rate-etariff> (last updated Aug. 7, 2020).

44. *Morgan Stanley Cap. Grp. Inc.*, 554 U.S. at 531.

45. *Market-Based Rates For Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, 72 Fed. Reg. 39,904, 39,906 (2007).

46. *Id.*

47. *Id.*

48. *Id.*

49. 72 Fed. Reg. 39,904, at 39,906.

steps [in] address[ing] seller market power or modify[ing] rates.”⁵⁰ Accordingly, FERC has the authority to remedy any violation through ordering refunds to customers or through imposing civil penalties.⁵¹

FERC’s market-based rate powers are based on “longstanding precedent” that the Court identifies in *Public Citizen*.⁵² According to these cases, FPA Section 205 does not “dictate[] the precise methodology the Commission must use to ensure the justness and reasonableness of rates.”⁵³ Rather, as the Court notes, the only requirements that the Commission must meet to authorize market-based prices set by auction to satisfy FPA Section 205 are that “(1) sellers participating in regional markets obey the rules designed to ensure fair and competitive markets, and (2) the Commission’s continuing and vigilant monitoring of transaction reports verify that the markets work properly when the rubber meets the road.”⁵⁴ Satisfying these two requirements allows the Commission to assume that the individual market-based prices produced by a particular auction methodology are just and reasonable.⁵⁵ Given “the dual requirement of an *ex ante* finding of the absence of market power and sufficient post-approval reporting requirement,” this market-based tariff regime has continuously been upheld by the circuit courts.⁵⁶

E. Midcontinent Independent System Operator and its Capacity Auction

In the United States, electricity is predominantly generated at centralized generation facilities.⁵⁷ During 2021, about 61% of the resources used to generate electricity utilized fossil fuels, with nuclear energy accounting for around 19% of the resources used, and renewable energy sources accounting for about 20%.⁵⁸ From these centralized generation facilities, generated electricity travels through “high-voltage transmission lines” across long distances, often interstate.⁵⁹ At substation facilities, the voltage of the electricity is adjusted, where it is then distributed to the end users through power lines.⁶⁰ The U.S. electric grid is “compris[ed] [of] 7,700 power plants, 3,300 utilities, and over 2.7 million miles of power lines.”⁶¹

50. *Id.*

51. *Id.*

52. *Pub. Citizen, Inc.*, 7 F.4th at 1194.

53. *Id.* (citing *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993)).

54. *Id.*

55. *Id.* (quoting *Montana Consumer Counsel v. FERC*, 659 F.3d 910, 919 (9th Cir. 2011)).

56. *Pub. Citizen, Inc.*, 7 F.4th at 1194 (quoting *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004)).

57. *Centralized Generation of Electricity and its Impacts on the Environment*, ENV’T PROT. AGENCY, <https://www.epa.gov/energy/centralized-generation-electricity-and-its-impacts-environment> (last updated Feb. 23, 2023).

58. *What is U.S. electricity generation by energy source?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (last updated Mar. 2, 2023).

59. James McBride and Anshu Siripurapu, *How Does the U.S. Power Grid Work?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/background/how-does-us-power-grid-work> (last updated July 5, 2022).

60. *Id.*

61. *Id.*; Tim Meko, *Six Maps That Show the Anatomy of America’s Vast Infrastructure*, WASH. POST. (Dec. 1, 2016), <https://www.washingtonpost.com/graphics/national/maps-of-american-infrastructure/>.

RTOs and ISOs collectively manage the electricity system in much of the United States.⁶² With the ultimate goal of “foster[ing] competitive neutrality in wholesale electricity markets,”⁶³ these ISO/RTOs serve functions ranging from managing its regional power grids to providing reliable transmission.⁶⁴ For several of these ISOs and RTOs, its management also includes operating capacity auctions, which are aimed at setting market-based rates for electric capacity.⁶⁵

The primary ISO involved in *Public Citizen*, MISO, delivers electric power across fifteen states, primarily in the Midwest and the South.⁶⁶ Responsible for “operat[ing] one of the world’s largest energy markets,” MISO services a total of forty-two million people.⁶⁷ MISO runs a capacity market, and does so by conducting an annual “Planning Resource Auction,” where market participants can buy and sell capacity for each of the nine regional zones designated within MISO’s area.⁶⁸ This “Planning Resource Auction” is a market-based auction whose methodology the Commission approved as satisfactory to ensure fair and competitive outcomes within that market.⁶⁹ Within MISO’s capacity auction, generators offer to sell commitments to provide specified amounts of electricity to utilities in the future at a specific price.⁷⁰ The minimum amount of capacity required to meet the anticipated need in each MISO zone is categorized as a “local clearing requirement.”⁷¹ Prices are measured in dollars per Megawatts (MW) day.⁷²

In conducting its Planning Resource Auctions during the period at issue in *Public Citizen*, MISO maintained FERC-approved auction rules to help mitigate market power and ensure that the market-based rates produced by such auctions were just and reasonable.⁷³ As discussed in *Public Citizen*, MISO’s rules for Planning Resource Auctions in effect during 2015 allowed generators to export their

62. *Electric Power Markets*, FERC, <https://www.ferc.gov/electric-power-markets#> (last updated July 20, 2021). Electric energy in the Southeast and much of the West is provided by vertically integrated public utilities, rather than RTOs/ISOs. *Id.*

63. REGUL. ASSISTANCE PROJECT, *ELECTRICITY REGULATION IN THE US: A GUIDE* 17 (2011), <https://www.raponline.org/wp-content/uploads/2016/05/rap-lazar-electricityregulationintheus-guide-2011-03.pdf>.

64. *Coming together to create a smarter & stronger North American power grid*, ISO/RTO COUNCIL, <https://isorto.org/#about-section> (last accessed Oct. 3, 2021). *See also* FERC, *ENERGY PRIMER: A HANDBOOK FOR ENERGY MARKET BASICS* 61 (2020), https://www.ferc.gov/sites/default/files/2020-06/energyprimer-2020_Final.pdf.

65. MISO, *2021/2022 PLANNING RESOURCE AUCTION (PRA) RESULTS 3* (2021) <https://cdn.misoenergy.org/PY21-22%20Planning%20Resource%20Auction%20Results541166.pdf>.

66. MISO, *FACT SHEET*, <https://cdn.misoenergy.org/Fact%20Sheet%20-%20March%202023627569.pdf>.

67. *Id.*

68. POTOMAC ECONOMICS, *2020 STATE OF THE MARKET REPORT FOR THE MISO ELECTRICITY MARKETS* at vii-viii (2020), https://www.potomaceconomics.com/wp-content/uploads/2021/05/2020-MISO-SOM_Report_Body_Compiled_Final_rev-6-1-21.pdf.

69. *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199 (2012), *order on reh’g*, 153 FERC ¶ 61,229 (2015).

70. *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017).

71. *Pub. Citizen, Inc.*, 168 FERC ¶ 61,042 at P 3 (2019) [hereinafter 2019 Order].

72. *Id.* at P 5.

73. *ELECTRICITY REGULATION IN THE US: A GUIDE*, *supra* note 63, at 17.

capacity to other ISOs/RTOs, including to PJM Interconnection, LLC (PJM).⁷⁴ In order to prevent sales to other ISOs/RTOs from leading to unjust and unreasonable rates, MISO calculated the “initial reference level” based on the “opportunity cost” of selling capacity in its own auction versus selling capacity into the PJM capacity market.⁷⁵ In the case of the 2015 Auction at issue in *Public Citizen*, offers were lowered in that auction by using a formula containing the initial reference level and the cost of new entry, which is the cost required for a new generation resource to sell in a particular zone.⁷⁶

As described in *Public Citizen*, FERC ultimately found MISO’s auction methodology unworkable following the anomalous outcome of the 2015 Auction, which produced market-based prices that were both unjust and unreasonable, and prospectively changed the initial reference level and local clearing requirement calculations because the tariff methodology was “no longer just and reasonable for prospective application.”⁷⁷ FERC explained that the change to the initial reference level was necessary because of PJM’s transition to the Capacity Performance Construct, which would have required “MISO capacity resources [to] satisfy additional requirements to sell capacity into PJM.”⁷⁸ PJM’s construct change would in turn “make PJM capacity prices non-comparable to MISO capacity prices, and thus make that opportunity a less appropriate basis for MISO’s market power mitigation provisions [for future auctions].”⁷⁹

The Commission also concluded that there was “neither sufficient demand in PJM nor sufficient transmission availability into PJM to make [selling electricity capacity into PJM in future auctions] possible.”⁸⁰ Accordingly, FERC separately found that the local clearing requirement calculation required change because of its consideration for when locally generated capacity is exported to other regions, like PJM, in each MISO zone.⁸¹

The initial reference level, based on the opportunity cost of selling into PJM, “directly affected the boundaries within which rates were set” and “helped set the upper limit on permissible offers into MISO’s auction.”⁸² Based on “the evidence and data [regarding] demand and transmission availability,” the methodology allowed for Dynegy Marketing and Trade, LLC (Dynegy) to take advantage of its place as a pivotal supplier in the 2015 Auction as well.⁸³ Since “the demand for capacity could not be met without it,” Dynegy could “submit [offers] 600% higher” than they would have been had the initial reference level set at \$0, the level that FERC proscribed for future auctions, all while still remaining within the

74. 2019 Order, *supra* note 71, at P 34.

75. *Pub. Citizen, Inc.*, 7 F.4th at 1189.

76. *Id.* at 1187.

77. *Id.* at 1189 (quoting *Pub. Citizen, Inc.*, 153 FERC ¶ 61,385 at P 3 (2015)).

78. 153 FERC ¶ 61,385 at P 87.

79. *Id.*

80. *Pub. Citizen, Inc.*, 7 F.4th at 1189.

81. *Id.* at 1190.

82. *Id.* at 1189.

83. *Id.* at 1197.

market-based rate boundaries as a permissible offer under the 2015 MISO tariff.⁸⁴ As a result, FERC required MISO to revise its auction methodology to ensure that prices produced through the auction produce just and reasonable market-based results.⁸⁵ But while FERC ordered prospective changes to the market rules at issue, it declined to adjust prices produced under those same rules in the 2015 auction and as noted earlier, closed its separate market manipulation investigation without taking further action.⁸⁶

F. Judicial Review of FERC Orders

Under the FPA, after the Commission issues an order, a party may seek review of that order by submitting a request for rehearing.⁸⁷ FERC has the power to grant or deny the rehearing request, and after this has occurred, an “aggrieved” party may seek judicial review of that order in the appropriate federal appellate court.⁸⁸ The courts are limited in what aspects of administrative orders they may review, as the Administrative Procedure Act (APA) precludes judicial review of agency actions that are “committed to agency discretion by law.”⁸⁹ Courts have held that an agency’s decision not to take enforcement action is unreviewable.⁹⁰

To the extent the Commission’s order are reviewable, appellate courts review Commission orders under the “arbitrary and capricious” standard, and have long recognized this scope of review as narrow.⁹¹ The APA requires a reviewing court to invalidate “agency actions, findings, and conclusions [that are] found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .”⁹² Therefore, courts must review FERC decisions under this standard, and have held FERC conclusions as arbitrary and capricious where FERC did not provide an adequate or reasonable explanation for its findings.⁹³ As such, to survive judicial review, FERC must demonstrate a “rational connection between the facts found and the choice made” and base its decision on the evidence before it.⁹⁴ Despite the narrow scope of review, courts have consistently held agency decisions as arbitrary and capricious where the agency has “failed to consider an important aspect of the problem.”⁹⁵

84. *Pub. Citizen, Inc.*, 7 F.4th at 1190, 1197.

85. 153 FERC ¶ 61,385.

86. *Pub. Citizen, Inc.*, 7 F.4th at 1082.

87. 16 U.S.C. § 825I (1995).

88. *Id.*

89. 5 U.S.C. § 701(a)(2).

90. *Chaney*, 470 U.S. at 831.

91. *Motor Vehicle Mfgs. Ass’n v. State Farm Mutl. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

92. 5 U.S.C. § 706 (2011).

93. *Delaware Div. of Pub. Advocate*, 3 F.4th at 469; *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112 (D.C. Cir. 2002).

94. *Motor Vehicle Mfgs. Ass’n*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

95. *Id.*

G. Procedural History of FERC Orders Relevant to Public Citizen

In the 2015 MISO Planning Resource Auction, the auction clearing price was \$150 per MW-day for Zone 4.⁹⁶ The clearing prices of neighboring zones were established at \$3.50 per MW-day in the 2015 Auction, and the capacity price for Zone 4 during the previous 2014 MISO Planning Resource Auction was \$16.75.⁹⁷ In comparison, this price was not only over forty times higher than neighboring zones, but nine times greater than the prior year's prices for Zone 4.⁹⁸

As a result of this anomalous auction result, Public Citizen and several other complainants filed a FPA Section 206 complaint with FERC, alleging that the auction resulted in unjust and unreasonable rates for Zone 4.⁹⁹ In doing so, Public Citizen alleged that these unjust and unreasonable rates were a result of Dynegy exercising market power, and Dynegy's "illegal market manipulation of the auction through withholding competitive offers."¹⁰⁰ Complainants alleged that the MISO tariff's "initial reference level" within the auction rules did not accurately estimate the opportunity cost of selling generated electricity outside of MISO and into the PJM RTO.¹⁰¹

However, most crucially for the analysis conducted here, complainants "separately argued that, notwithstanding any filed market-based tariffs, all auction results 'must be reviewed after the fact to determine whether they actually produce just and reasonable rates.'"¹⁰² This was a direct challenge to FERC's practice of deeming all market-based prices produced as part of a Commission-approved auction methodology as just and reasonable.

While the Complainants challenged both the outcome of the 2015 MISO Capacity Auction and the auction's methodology, FERC addressed only part of these complaints in a December 2015 Order, focusing exclusively on the auction's methodology and not addressing the outcome of the 2015 MISO auction.¹⁰³ In this December 2015 Order, FERC prospectively changed the initial reference level and local clearing requirement tariff calculations because of the changes to the PJM capacity market, the lack of sufficient demand in PJM, and PJM's lack of sufficient transmission ability, which would have affected the functionality of future auctions.¹⁰⁴

In addition to the MISO tariff calculation changes, FERC announced that it would be conducting a market manipulation investigation into the 2015 MISO auction.¹⁰⁵ FERC then conducted its market manipulation investigation, waiting

96. *Pub. Citizen, Inc.*, 7 F.4th at 1182.

97. *Id.*

98. *Id.* This would allegedly lead to total capacity charges increasing by \$102.1 million for consumers in 2015. *Id.* at 1188

99. *Id.* at 1188.

100. *Pub. Citizen, Inc.*, 7 F.4th at 1188.

101. *Id.* at 1188-89.

102. *Id.* at 1188.

103. 153 FERC ¶ 61,385 at P 3.

104. *Pub. Citizen, Inc.*, 7 F.4th at 1189.

105. 153 FERC ¶ 61,385 at P 4.

approximately three years before releasing another order on the pending complaints in 2019.¹⁰⁶

In the 2019 Order, FERC denied the other complaints and found that the auction results for Zone 4 were just and reasonable.¹⁰⁷ FERC advised that it had closed the market manipulation investigation against Dynegy because it had not found any violation of FERC's anti-manipulation regulations.¹⁰⁸ FERC's sole explanation for finding that Dynegy had not exercised market power to cause the unjust and unreasonable auction clearing price was that the auction resulted from MISO's application of the previously accepted, just and reasonable MISO tariff.¹⁰⁹ The methodology that the Commission stated was just and reasonable in the 2019 Order was the same methodology that the Commission found to be prospectively unjust and unreasonable in its December 2015 Order.¹¹⁰

FERC rejected Public Citizen's argument that each individual auction price must be reviewed before taking effect, explaining that no affirmative finding of justness and reasonableness was required on its end "before allowing the rate to go into effect."¹¹¹ According to FERC, "the rate on file with the Commission is the Tariff describing the Auction procedures, not the prices that may change over time."¹¹² As the Commission reasoned, since the auction methodology had been deemed just and reasonable, all prices produced through that auction were considered just and reasonable without the requirement of evaluating the lawfulness of individual rates.¹¹³

In 2020, Public Citizen sought rehearing, and argued that FERC had failed to determine whether Dynegy had manipulated the market, while pointing out that FERC relied only on a tariff that the Commission earlier found to be defective to support its decision that the rates were just and reasonable.¹¹⁴ In turn, FERC concluded that Public Citizen had not properly defined market manipulation and failed to meet its burden of showing that the rates were unjust and unreasonable.¹¹⁵

III. ANALYSIS

Public Citizen sought review of the 2019 Order and 2020 Rehearing Order in the D.C. Circuit, raising three challenges.¹¹⁶ Public Citizen's petition for review argued that the Commission's orders were deficient because (1) "the Commission failed to meet its obligation to ensure just and reasonable rates because it did not review the prices resulting from the 2015 Auction before those prices went into

106. *Pub. Citizen, Inc.*, 7 F.4th at 1190.

107. 2019 Order, *supra* note 71, at P 2.

108. *Id.* at P 32.

109. *Id.* at P 84.

110. 2019 Order, *supra* note 71; 153 FERC ¶ 61,385.

111. *Pub. Citizen, Inc.*, 7 F.4th at 1190.

112. *Id.*

113. *Id.*

114. *Id.* (citing *Pub. Citizen, Inc.*, 170 FERC ¶ 61,227 at P 6 (2020) [hereinafter Rehearing Order]).

115. 170 FERC ¶ 61,227 at P 14.

116. *Pub. Citizen, Inc.*, 7 F.4th at 1192-93.

effect;” (2) “the Commission was arbitrary and capricious in failing to adequately explain its decision to close its investigation into whether Dynegy engaged in market manipulation;” and (3) “the Commission failed to adequately explain its conclusion that the results of the 2015 Auction were just and reasonable.”¹¹⁷

In the unanimous decision, the Court determined that it could not review FERC’s decision to close the market manipulation investigation into Dynegy, nor could it review FERC’s short explanation for making this decision because those enforcement decisions were “committed to agency discretion by law.”¹¹⁸ The Court also held that FERC’s decision to leave the 2015 auction results undisturbed was arbitrary and capricious because it failed to explain how the same market rules if found unreasonable (and ordered changed prospectively) could nonetheless produce just and reasonable auction results.¹¹⁹ But while it remanded *that* decision, the Court rejected Public Citizen’s challenge that FERC had failed to review “each individual market-based price” *before* they went into effect, holding that this was not a requirement for market-based rates under section 205 of the FPA.¹²⁰

A. Closing A Market Manipulation Investigation Is an Unreviewable Decision Committed to FERC’s Administrative Discretion

One of Public Citizen’s challenges was that FERC’s decision was arbitrary and capricious for the failure to provide an adequate explanation for closing its market manipulation investigation into Dynegy.¹²¹ Holding that it could not review FERC’s enforcement decision, the Court looked to the long-held principle that an agency’s decision not to take enforcement action or pursue further investigation is discretionary and presumptively precluded from judicial review.¹²²

In doing so, it applied *Heckler v. Chaney*, a case that holding that agency enforcement decisions are examples of agency actions “committed to agency discretion by law” and hence unreviewable.¹²³ In addition to the Supreme Court’s *Chaney* opinion, the Court pointed to its own precedent in *Baltimore Gas & Elec. Co. v. FERC*, which specifically addressed FERC’s nonreviewable enforcement discretion.¹²⁴ According to *Baltimore*, FERC’s decision to close an investigation

117. *Id.*

118. *Id.* at 1195.

119. *Id.* at 1200.

120. *Pub. Citizen, Inc.*, 7 F.4th at 1193.

121. *Id.* at 1195.

122. *Id.* at 1196 (citing *Chaney*, 470 U.S. at 831; 5 U.S.C. § 701(a)(2)).

123. *Id.* at 1195-96. As cited by the Court, *Chaney* outlined the various discretionary determinations that an agency must make before deciding to bring an enforcement action, including whether “agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. *Id.* See *Chaney*, 470 U.S. at 821; 5 U.S.C. § 701(a)(2).

124. *Pub. Citizen, Inc.*, 7 F.4th at 1195-96 (citing *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 460 (D.C. Cir. 2001)).

is “a paradigmatic instance of an agency exercising its presumptively nonreviewable enforcement discretion.”¹²⁵

Based on these precedents, the Court concluded that FERC’s decision to close the market manipulation investigation fit within FERC’s nonreviewable enforcement discretion, and therefore it could also not review FERC’s explanation for doing so.¹²⁶ In the Court’s view, the explanation FERC provided “was made for the sole purpose of explaining the Commission’s decision not to pursue an enforcement action.”¹²⁷ Overall, the D.C. Circuit applied precedent regarding the non-reviewability of agency enforcement decisions and interpreted those precedents and the FPA as giving FERC broad discretion in dealing with market manipulation investigations and determining whether those investigations should continue.

B. FERC Must Provide an Explanation for Its Finding That the 2015 MISO Auction Resulted in Just and Reasonable Rates

In the evaluation of another argument brought by Public Citizen, the Court held that FERC failed to provide an explanation for how MISO Zone 4’s 2015 auction results could logically be just and reasonable in light of the prospective changes to the MISO tariff FERC required in its December 2015 Order.¹²⁸ More specifically, it faulted FERC for failing to explain how the 2015 Order, which found that the auction provisions in the MISO’s tariff as constituted and applied in the 2015 MISO Auction could no longer “protect against anticompetitive behavior” in future auctions, nonetheless resulted in just and reasonable rates in that same 2015 Auction.¹²⁹ Nor, the Court concluded, did FERC explain how “market manipulation did not lead to unjust and unreasonable rates” as it pertained to the 2015 MISO Auction.¹³⁰ Accordingly, the Court held that FERC’s decision was arbitrary and capricious and remanded the orders to FERC to provide an explanation.¹³¹

In reaching its conclusion, the Court rejected FERC’s explanation that the 2015 MISO Auction results were just and reasonable because Dynegey’s auction offers were permissible under the MISO tariff then in effect.¹³² As the court pointed out, FERC had already found in its December 2015 Order that the tariff provisions were no longer producing reasonable prices, a conclusion it failed to reconcile with FERC’s 2019 order to allow the auction results as just and reasonable.¹³³ The problems the Commission identified with the MISO tariff provisions

125. *Pub. Citizen, Inc.*, 7 F.4th at 1195 (citing 252 F.3d at 460).

126. *Pub. Citizen, Inc.*, 7 F.4th at 1195.

127. *Id.*

128. *Id.* at 1196.

129. *Id.*

130. *Pub. Citizen, Inc.*, 7 F.4th at 1196.

131. *Id.* at 1200.

132. *Id.* at 1197.

133. *Id.* at 1198-99.

governing the Planning Resource Auction logically not only affected future auctions, but the 2015 auction.¹³⁴ The Court reasoned that these issues directly impacted how rates were set and thus also created the price anomaly seen in the 2015 Auction.¹³⁵ Earlier in the opinion, the Court observed that the auction provisions allowed for Dynegy to offer and receive any price it desired while still remaining in the boundaries of a permissible offer under the tariff.¹³⁶ This is because the opportunity cost calculation of selling to PJM was inapplicable to the market, and based on this inapplicability, sellers – including Dynegy – could essentially “exercise[] . . . market power or market manipulation” without accountability.¹³⁷

The Court then examined FERC’s response to the market manipulation allegation in its 2020 Rehearing Order.¹³⁸ According to the D.C. Circuit, FERC could not rely on what the Commission determined to be a failure to define market manipulation, as Public Citizen had “straightforwardly asserted” its allegation that Dynegy had manipulated the market through economic withholding and caused the unjust and unreasonable rates.¹³⁹ The Court determined that FERC’s bare statement that higher clearing prices do not necessarily mean market manipulation has occurred in a market was insufficient to address the potential market manipulation alleged.¹⁴⁰ In light of the significant evidence brought by Public Citizen, the Court also held that FERC failed to provide a rational explanation for how the MISO 2015 Auction prices in Zone 4 were just and reasonable when they were implemented under a tariff methodology that FERC itself recognized was seriously flawed and could “no longer produce just and reasonable results.”¹⁴¹

C. FERC Is Not Required to Review Individual Market-Based Electricity Prices Before They Go into Effect Under FPA Section 205

Public Citizen also sought the Court to require FERC to review each price produced by a pre-approved market-based rate auction methodology to determine that the individual prices were just and reasonable before they went into effect.¹⁴² Ultimately, the Court rejected Public Citizen’s argument, finding that the Commission’s market-based rate methodology was lawful and produced just and reasonable rates, and that FERC was not required to evaluate each individual rate produced by the rate auction to determine whether those individual rates were just and reasonable before they could go into effect.¹⁴³

In its analysis rejecting Public Citizen’s argument, the Court first observed that the market-based rate procedures FERC uses to ensure just and reasonable

134. *Pub. Citizen, Inc.*, 7 F.4th at 1197.

135. *Id.* at 1198.

136. *Id.* at 1188.

137. *Id.* at 1200.

138. *Pub. Citizen, Inc.*, 7 F.4th at 1198.

139. *Pub. Citizen, Inc.*, 7 F.4th at 1199.

140. *Id.* at 1200.

141. *Id.*

142. *Id.*

143. *Pub. Citizen, Inc.*, 7 F.4th at 1193.

rates has been found to satisfy FPA section 205 in previous cases.¹⁴⁴ In support of that conclusion, the Court primarily cited to four cases – *Elizabethtown*,¹⁴⁵ *Lockyer*,¹⁴⁶ *Montana Consumer Counsel*,¹⁴⁷ and *Blumenthal*.¹⁴⁸ Each of these cases informed the Court’s analysis.

The Court relied on *Elizabethtown* for its reasoning that “[t]he use of market-based tariffs was first approved in the natural gas context,” and “conditioned on the existence of a competitive market.”¹⁴⁹ In *Elizabethtown*, the Court held that FERC’s reliance on the market-based rate bidding system “in lieu of cost-of-service regulation” was permissible and found that FPA section 205 does not “dictate[] the precise methodology the Commission must use to ensure the justness and reasonableness of rates.”¹⁵⁰ In adopting *Elizabethtown*, the D.C. Circuit expanded upon the prior court’s reasoning by giving examples of some allowable review methods including “individualized review or [the] review[] and monitoring [of] the process by which rates are computed.”¹⁵¹ The Court embraced *Elizabethtown*’s holding that FERC has broad discretion to structure methodologies to ensure just and reasonable rates.¹⁵²

The Court then relied on *Lockyer* in concluding that a proven competitive market should be presumed to produce just and reasonable rates, assuming the agency monitors the functioning of that market to ensure it remains competitive.¹⁵³ In *Lockyer*, California challenged market-based tariffs, relying on Supreme Court precedent which disapproved of other agencies’ regulatory schemes that “relied on market forces alone in approving market-based tariffs.”¹⁵⁴ *Lockyer* distinguished those schemes however, noting the “dual requirement of an ex ante finding of the absence of market power and sufficient post-approval reporting requirements” meant that it was safe to assume that rates produced by such a system were just and reasonable.¹⁵⁵ As the Court explained, “[i]n 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, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment.’”¹⁵⁶

Relying on this case, the Court in *Public Citizen* then held that the FPA’s use of the term “rates and charges” found within section 205, does not justify requiring

144. *Id.*

145. *Elizabethtown Gas Co.*, 10 F.3d 866.

146. *Lockyer*, 383 F.3d 1006.

147. *Montana Consumer Couns.*, 659 F.3d 910.

148. *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009).

149. *Lockyer*, 383 F.3d at 1012 (citing *Elizabethtown Gas Co.*, 10 F.3d at 870).

150. *Pub. Citizen, Inc.*, 7 F.4th at 1194 (citing *Elizabethtown Gas Co.*, 10 F.3d at 870).

151. *Id.*

152. *Id.*

153. *Id.* at 1194 (citing *Lockyer*, 383 F.3d at 1013-14).

154. *Lockyer*, 383 F.3d at 1013.

155. *Id.*

156. *Elizabethtown Gas Co.*, 10 F.3d at 870 (quoting *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

an additional review to determine whether prices determined under a properly constituted market-based rate regime produce just and reasonable rates.¹⁵⁷ As the Court stated, “[t]he whole premise of the Commission’s market-based system is that a properly competitive market will necessarily produce just and reasonable prices.”¹⁵⁸ The *Lockyer* decision thus follows from *Elizabethtown* by approving of FERC’s exercise of its broad ratemaking discretion to craft a market-based system relying on the participation in competitive markets to presumably produce just and reasonable rates.¹⁵⁹

The Court goes on to cite its prior decision in *Blumenthal* where it previously found that “the Commission requires assurance from any market-based rate tariff that the seller cannot exercise anticompetitive market power.”¹⁶⁰ The Court then details all the measures that FERC took in this instance to ensure that sellers could not exercise market power and therefore the market was reasonably competitive.¹⁶¹ These measures include (1) a determination that sellers lack market power; (2) that sellers have abided by the tariff rules of the RTO administering the auction; and (3) that the Commission conducts continual oversight of market participants and outcomes to ensure that the market remains competitive.¹⁶² The Court found that the Commission met all of these criteria in the case of the electric capacity auction in *Public Citizen*.¹⁶³

The Court emphasized that continuing oversight by FERC is necessary to ensure that competitive markets are functioning as intended and thus are continuing to produce just and reasonable rates.¹⁶⁴ In examining FERC’s oversight of the market-based rate auction in *Public Citizen*, the Court found that FERC’s oversight of established competitive markets was sufficient to meet that requirement.¹⁶⁵ This led the Court to then reject *Public Citizen*’s argument that FPA section 205 requires FERC to examine “each individual [resulting] market-based price [for justness and reasonableness] . . . before they go into effect.”¹⁶⁶

To support this aspect of its decision, the Court relied upon *Montana Consumer Counsel* which found that sufficient oversight of competitive markets does not require FERC to determine whether individual prices set by the market are just and reasonable, but rather FERC only must review prices “to ensure that [they] are consistent with the data expected of a competitive, unmanipulated market.”¹⁶⁷ The Court found that the Commission met this requirement here.¹⁶⁸ FERC required sellers to file quarterly sales reports and periodic market power analyses, while

157. *Pub. Citizen, Inc.*, 7 F.4th at 1194 (quoting 16 U.S.C. § 824d(a), (c), (d), (e)).

158. *Id.*

159. *Lockyer*, 383 F.3d at 1012.

160. *Pub. Citizen, Inc.*, 7 F.4th at 1185 (citing *Blumenthal*, 552 F.3d at 882).

161. *Id.* at 1185-86.

162. *Pub. Citizen, Inc.*, 7 F.4th at 1193.

163. *Id.* at 1182.

164. *Id.* at 1193.

165. *Id.* at 1193-94.

166. *Pub. Citizen, Inc.*, 7 F.4th at 1193.

167. *Id.* (quoting *Montana Consumer Couns.*, 659 F.3d at 919).

168. *Id.* at 1194.

RTOs/ISOs were required to submit market data on an ongoing basis.¹⁶⁹ These reporting requirements, combined with the Commission's active review of those reports and willingness to revoke market-based rate authority where necessary, were enough to convince the Court that FERC met its obligations under *Blumenthal* and *Montana Consumer Counsel*.¹⁷⁰

In summary, the Court held that the individual prices, while important to FERC's supervisory process, do not need to be found just and reasonable because the market-based system itself should presumably result in "just and reasonable" rates.¹⁷¹ According to the Court, rates can be considered just and reasonable because FERC must find that public utilities lack or have sufficiently mitigated market power before granting market-based rate authority and approving a market-based rate tariff, and FERC conducts "ongoing oversight of market-based rate authorizations and market conditions" to ensure that markets remain competitive.¹⁷² Therefore, the Court ultimately held that, if market power is sufficiently mitigated, tariff rules are followed, and FERC continues its oversight, the reliance on the market-based system to set just and reasonable rates satisfies FERC's obligations under FPA section 205.¹⁷³

D. The Court Was Justified in Finding that the Commission Did Not Need to Determine that Individual Auction Prices Were Just and Reasonable

As noted above, the Court found *Lockyer, Elizabethtown*, and other D.C. Circuit precedent to be convincing when it found that FERC need not review each individual price produced in the market to be just and reasonable before taking effect. In doing so, the Court relied on the premise that the market-based system, in theory, will already produce just and reasonable rates in a competitive market and laying out the thoroughness of FERC's current supervisory system to support the finding that the additional review is unnecessary.¹⁷⁴ The Court's decision to rely on these cases to make this determination was reasonable because Congress gave FERC a great deal of discretion in crafting methodologies to ensure that rates are just and reasonable, and the methodology that FERC did adopt was rationally relied on both market-based rate economics and included backstops in the form of reporting requirements to protect against uncompetitive outcomes.

As the Court reasoned, FERC created a market-based auction system that first ensured that none of the market participants could exercise market power and then set forth procedures to ensure that the auction system remained competitive over time.¹⁷⁵ Since the Commission has determined that none of the market participants has market power, the economics of market-based rates dictates that any prices

169. *Id.* at 1185-86.

170. *Pub. Citizen, Inc.*, 7 F.4th at 1194.

171. *Montana Consumer Couns.*, 659 F.3d at 919; *see Market-Based Rates*, 72 Fed. Reg. 39,904, at 39,906, 39,919.

172. *Pub. Citizen, Inc.*, 7 F.4th at 1194; 72 Fed. Reg. 39,904, at 39,906.

173. *Pub. Citizen, Inc.*, 7 F.4th at 1194.

174. *Id.* at 1194-95.

175. *Id.* at 1194.

produced as part of this competitive market would be set free of the influence of any sellers' market power, no one seller could exercise market power to imposed supra-competitive prices, and therefore prices produced through that market would presumably be just and reasonable.

The Commission then actively monitors markets with market-based rate authority to ensure that sellers do not amass market power and thus drive up prices to supra-competitive levels.¹⁷⁶ Instead of “pil[ing] on another layer of agency review” the Court reasoned that FERC’s system sufficiently adheres to the requirements of the FPA by ensuring that a competitive market exists and remains competitive in producing market-based prices for electricity.¹⁷⁷ In doing so, the Court correctly found that whether specific auction prices are just and reasonable is not the main inquiry to whether electric prices are just and reasonable under the FPA, but rather whether the system that produced those prices was and remains reasonably competitive.¹⁷⁸ As the Court explains, “[t]he ‘rate’ filed by authorized power wholesalers is the ‘market rate,’ and that rate does not ‘change’ even though the prices charged by the wholesalers may rise and fall with the market.”¹⁷⁹

The Supreme Court has never directly weighed in on whether the market-based regime is permissible under the FPA, specifically reserving this judgment in 2011.¹⁸⁰ However, if the issue of whether individual prices produced pursuant to a market-based electricity auction must be individually assessed to determine whether they are just and reasonable were raised before the Court, one could expect the Court to uphold the reasoning like that set forth in *Public Citizen* because the D.C. Circuit’s findings were well founded. In addition to being based on longstanding precedent, the *Public Citizen* Court acknowledged FERC’s discretion to craft a reasonable system to ensure just and reasonable rates and evaluated FERC’s methodology for granting market-based rates, as well as its ongoing review and supervisory measures concerning the functioning of competitive markets.

While FERC could review each individual resulting price if it chose, *Public Citizen* clarifies that it does not violate the FPA for FERC to decline to evaluate individual rates and instead construct a market-based system that relies on the outcomes of demonstrably competitive markets to produce just and reasonable rates. As the Court correctly noted, the FPA does not require a “precise methodology [for] the Commission . . . to [use] to ensure the justness and reasonableness of rates.”¹⁸¹ Additionally, FERC’s supervision of ongoing, functioning competitive markets does include reviewing prices, but the prices are reviewed “to ensure that the reported transactions are consistent with the data expected of a competitive, unmanipulated market,” rather than to evaluate the justness and reasonableness of the prices.¹⁸²

176. *Id.* at 1193-94.

177. *Pub. Citizen, Inc.*, 7 F.4th at 1194.

178. *Id.* at 1185.

179. *Id.* at 1194 (quoting *Montana Consumer Couns.*, 659 F.3d at 921).

180. *Morgan Stanley Cap. Grp. Inc.*, 554 U.S. at 527.

181. *Pub. Citizen, Inc.*, 7 F.4th at 1194 (citing *Elizabethtown*, 10 F.3d at 870).

182. *Id.* at 1186 (quoting *Montana Consumer Couns.*, 659 F.3d at 919).

Therefore, it was reasonable for the Court in *Public Citizen* to hold that FERC has discretion to craft a market-based auction methodology that presumably produces just and reasonable rates rather than evaluate every rate individually. The Court relied on several cases that interpret the FPA to give FERC broad discretion to determine how to supervise electric rates, which includes relying on the competitive market-based system to produce just and reasonable rates, an assumption continually confirmed by FERC's ongoing monitoring of markets where the Commission has granted market-based rates.¹⁸³ Market-based tariff rules were "designed to ensure fair and competitive markets,"¹⁸⁴ so it follows that FERC need not review each individual prices for justness and reasonableness before taking effect, as in design, those resulting prices should be just and reasonable where there is competition and a lack of market manipulation -- market manipulation that FERC looks for in the required transaction reports that wholesalers must submit.

IV. CONCLUSION

Despite the complex set of facts and procedural history, the D.C. Circuit's holdings in *Public Citizen* seem to clarify FERC's decision-making authority and obligations as they relate to just and reasonable rates.¹⁸⁵ With its holding that FERC is not required to give its affirmative approval to each individual market-based price for justness and reasonableness before taking effect, the Court made clear that FERC's market-based rate powers remain valid under the FPA.¹⁸⁶ The Supreme Court has yet to approve of the Commission's approach, yet *Public Citizen* would likely be upheld because of its extensive reasoning supporting why "when the rubber meets the road," FERC has an effective process in place.¹⁸⁷ As the *Public Citizen* Court noted, FERC has an effective process in place to ensure that markets are and remain competitive and produce market-based rates that are presumed to be just and reasonable.¹⁸⁸ *Public Citizen* provides future electricity wholesalers, consumers, and FERC with a clarification on the electricity market-based system, and it is likely that future courts will adopt *Public Citizen's* reasoning if the system is challenged.

*Sotheby Shedeck**

183. See generally *Pub. Citizen, Inc.*, 7 F.4th 1177.

184. *Id.* at 1194.

185. 5 U.S.C. § 706; 16 U.S.C. § 824d(a), 824e(a).

186. See generally *Pub. Citizen, Inc.*, 7 F.4th 1177.

187. *Id.* at 1194.

188. See generally *Pub. Citizen, Inc.*, 7 F.4th 1177.

* Sotheby Shedeck is a third-year law student at the University Of Tulsa College Of Law. The author would like to thank Mr. Harvey Reiter, Mr. Alex Goldberg, Mr. Joseph R. Hicks, and the *Energy Law Journal* student editors for all their help throughout the publication process. Shedeck would also like to thank her family, friends, her mentor Kierstin Stapleton, and her father Scott Shedeck for all their support.