No. 26-404

IN THE
Supreme Court of the United States

AFFIRMED ENERGY LLC,
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS PJM INTERCONNECTION, L.L.C. AND MONITORING ANALYTICS, LLC

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's approval of a tariff amendment to sunset the participation of Energy Efficiency Resources in energy capacity auctions is not retroactive because it applied only to future auctions and Petitioner had only a contingent expectation of participating in those future auctions.

PARTIES TO THE PROCEEDING

Petitioner (petitioner below) is Affirmed Energy LLC. Respondents are the Federal Energy Regulatory Commission (respondent below), PJM Interconnection, L.L.C. (intervenor-respondent below), and Monitoring Analytics, LLC (intervenor-respondent below).

RULE 29.6 DISCLOSURE STATEMENT

Neither PJM Interconnection, L.L.C. nor Monitoring Analytics, LLC has a parent corporation, and no publicly held company owns 10% or more of any membership or other ownership interest in either entity.

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INTRODUCTION

The D.C. Circuit applied settled retroactivity doctrine to the Federal Energy Regulatory Commission's (FERC) approval of a tariff amendment. As even the dissent below noted, the retroactivity question presented in this case is "fact-bound." Pet. App. 51a (Pan, J., dissenting). Because Petitioner seeks error correction of the D.C. Circuit's "fact-bound conclusion," *id.*, the petition should be denied.

Petitioner argues that the decision creates a shallow split with the Third Circuit as to the retroactivity standard, citing *PJM Power Providers Group* v. *FERC*, 96 F.4th 390 (3d Cir. 2024) (*Power Providers*). That is incorrect: the two decisions applied the same retroactivity standard. They simply came to different results based on different facts under that "'fact-intensive'" standard. Pet. App. 42a (Pan, J., dissenting) (citation omitted). The Third Circuit held that a tariff amendment was retroactive as applied to an auction already underway, while the D.C. Circuit here held that a different tariff amendment was prospective because it applied only to future auctions.

Petitioner's claim of broader "confusion" among the circuit courts as to the retroactivity standard suffers from a similar flaw. The two supposedly conflicting retroactivity standards that Petitioner identifies are no more than slightly different phrasings of the same basic standard. Indeed, circuits on both sides of the purported conflict have long used both formulations interchangeably. Petitioner does not cite any case expressing disagreement with another circuit as to the correct standard for assessing retroactivity, or

expressing "confusion" as to that standard. Rather, the retroactivity standard is "well-worn" and "relatively straightforward." *Power Providers*, 96 F.4th at 394, 398.

Because the circuits agree on the correct legal standard, Petitioner's challenge really goes to the D.C. Circuit's application of that standard to the facts here. But such requests for error correction do not warrant this Court's review, Sup. Ct. R. 10—particularly since the decision concerns only a few auctions in a niche corner of PJM's electric capacity market. In any event, there was no error, because the initial tariff provided Petitioner only a contingent business expectation that it may participate in future auctions, not a "vested right" to do so. Pet. i.

Finally, this case would be an exceptionally poor vehicle to resolve the question presented. Petitioner engaged in "brazen fraud[]" in the same capacity auctions at issue here, providing an independent ground to exclude Petitioner from participating. See *Am. Efficient, LLC*, 195 FERC ¶ 61,043, P 1 (2026) (Penalty Order). Petitioner's fraud could present mootness problems, as well as complicate litigation of the question presented. Further complicating matters, Petitioner is in bankruptcy proceedings. These severe vehicle problems provide additional reasons to deny the petition.

STATEMENT OF THE CASE

A. Factual background

1. PJM permitted energy efficiency resources to participate in capacity auctions to address a lag in load forecasting.

The Federal Power Act charges FERC with superintending the interstate sale of electricity. See 16 U.S.C. § 824 *et seq*. "Under that authority, FERC oversees . . . Regional Transmission Organizations (RTOs)." Pet. App. 3a. RTOs "manage the electrical grid in their respective regions" by "'balancing supply and demand, and ensuring a reliable transmission system.'" *Id.* (citation omitted).

Each RTO administers its operations under a tariff on file with FERC. See, *e.g.,* Pet. App. 169a. This tariff establishes the rates and charges that the RTO may impose, and the rules governing its electricity markets. See 16 U.S.C. § 824d. Under the "filed rate doctrine," RTOs cannot "alter a rate retroactively" by charging "rates higher than those filed with the Federal Energy Regulatory Commission." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 573, 577–78 (1981). The filed rate doctrine also extends to matters "directly affect[ing]" rates. *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966–67 (1986); see *FERC* v. *Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016) (holding that FERC's "'affecting' jurisdiction, which extends to rules or practices that '*directly* affect

the [wholesale] rate,'" includes regulation of demand-reducing resources in PJM) (citation omitted).

Respondent PJM Interconnection, L.L.C. (PJM) is the RTO "responsible for managing the electrical grid in portions of thirteen States and the District of Columbia." Pet. App. 2a. PJM hosts "capacity auctions" at least once each year. Pet. App. 3a–4a. At these auctions, PJM purchases commitments to supply its grid with sufficient electrical capacity—that is, commitments to be available to produce a certain amount of electricity (or, in some cases, to reduce a certain amount of electricity consumption) in a future delivery year. *Ibid.*

To determine how much capacity it must purchase, PJM relies on a "load forecast" that predicts electricity demand in a region for a given delivery year. Pet. App. 4a. PJM posts that forecast, and providers then offer the price they would accept to supply specified amounts of generation capacity or load reduction. *Ibid.* PJM accepts offers, starting with the lowest, until it has enough commitments to meet the projected demand (and additional reserve required). *Ibid.* It then sets the "clearing price" based on the last and highest offer accepted. *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 (2009) (2009 Order). A supplier who offers below the clearing price "clears" the auction, and every supplier who "clears" receives the same clearing price. Pet. App. 4a.

Prior to 2009, PJM only accepted offers from participants that could either supply electricity or those

that have demand response capability to reduce electricity consumption when needed. But in 2009, PJM amended its tariff at FERC's suggestion, to allow PJM to accept offers from "Energy-Efficiency Resources" (EERs), such as energy-efficient light bulbs and appliances, that theoretically reduce wholesale demand. 2009 Order, 126 FERC ¶ 61,275, PP 120, 131. FERC encouraged EER participation primarily to correct for an accounting lag in PJM's load forecast. *Id.* at P 132. At the time, there was a four-year lag between when an energy-efficient product began reducing consumption and when PJM's load forecast could account for that reduction. Pet. App. 3a, 4a–5a. During that four-year period, PJM's load forecast might overstate demand, causing it to procure more capacity than necessary. 2009 Order, 126 FERC ¶ 61,275, P 134.

To correct for this lag, PJM amended its tariff to allow EER providers to offer their projected reductions as if they were commitments to supply capacity. *Id.* at PP 121, 130. If the load reduction offer cleared, the EER would be paid the auction clearing price. And to account for all four years of the lag, the amendment provided that EERs "may receive capacity payments for up to four consecutive years." *Id.* at P 131. Section L.1 of the tariff provided that EERs must reduce electricity demand in a manner "that is not reflected in the peak load forecast prepared for the Delivery Year for which the [EER] is proposed." Pet. App. 192a–193a. And Section L.4 provided that "[a]n [EER] that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive

Delivery Years, but shall not be assured of clearing in any such auction." Pet. App. 195a.

FERC approved this amendment in 2009. 2009 Order, 126 FERC ¶ 61,275, P 131. In accepting this provision, FERC confirmed that the primary purpose of the amendment was to address "a mismatch between EE[R]-related load reductions and capacity requirement levels" caused by the four-year lag. *Id.* at P 132.

Petitioner Affirmed Energy LLC (Petitioner or Affirmed) participated in auctions under this regime. Pet. App. 9a. Petitioner did not supply any electricity, nor did it make or sell energy-efficient products. *Ibid.* Instead, Petitioner purportedly paid manufacturers, retailers, and distributors of energy-efficient products for the contractual rights to offer those resources, and aggregated those rights into large blocks. See *ibid.* Petitioner offered the aggregated total into PJM's auctions in exchange for capacity payments. *Ibid.*

But in fact, Petitioner was engaged in "one of the largest and most brazen frauds in the history of the Federal Energy Regulatory Commission"—"a scam for the history books." Penalty Order, 195 FERC ¶ 61,043, PP 1, 5.[1] Petitioner and affiliated companies owned by parent American Efficient "stole half a billion dollars from hard-working Americans by collecting compensation for fake 'energy efficiency resources,'" through a "money-for-nothing scheme" that

[1] Petitioner contests the Penalty Order, which is subject to further federal litigation. See *infra* Statement Section B.

"blatantly violated the . . . tariffs." *Id.* at P 1; see *id.* at PP 12, 233. While claiming to have bought "contractual rights" to offer EERs in capacity auctions, Petitioner instead paid "mere pennies (or fractions of pennies)" for basic "'sales data'" about the EERs. *Id.* at PP 4, 5, 188.

For instance, American Efficient paid a retailer fifteen cents for data on each sale of an energy-efficient refrigerator. *Id.* at P 5. Petitioner would then offer the refrigerator as an EER in PJM auctions, even though it and American Efficient "did nothing to incentivize the sale" of the refrigerator, "had no relationship or contract with the refrigerator purchaser . . . and provided no notice to the purchaser that American Efficient was claiming the right to capture and monetize the capacity value that would otherwise have accrued to the purchaser." *Ibid.*; see *id.* at P 19 ("Starting in 2018, American Efficient participated in PJM's capacity market through Affirmed . . . ."). "[T]o top it off, American Efficient claims the right to force the person who purchased the refrigerator to pay American Efficient, through their electric bills, for the energy savings resulting from the purchaser's own . . . outlay" on the energy-efficient refrigerator. *Id.* at P 5. American Efficient and its subsidiaries, including Petitioner, "made this same claim for more than *one billion items*." *Ibid.*

2. After PJM solves the forecasting lag, it amends its tariff to sunset the EER program.

In 2016, PJM "improved its peak load forecast" to "eliminate[] the four-year lag." Pet. App. 58a. PJM did so by incorporating new data from the Energy Information Administration that captured the effects of EERs immediately. *Ibid.*

From that point forward, the demand reductions from EERs were reflected "within the load forecast" itself. *Ibid.* Accordingly, accounting for these reductions in the load forecast *and* in auction offers would result in "double-counting." Pet. App. 58a–59a. Such double-counting risked leaving PJM without "sufficient capacity" to meet future electricity needs. *Ibid.* EERs, however, continued to participate in capacity auctions and receive payments. *Ibid.* To avoid double-counting, PJM adopted an "addback" mechanism: For each megawatt of EER capacity that cleared an auction, PJM added one megawatt to its capacity target. *Ibid.*

In 2024, PJM removed this load forecast addback mechanism and filed proposed revisions to "prospectively sunset [EER] participation in PJM's wholesale capacity market," Pet. App. 55a, "beginning with the 2026/2027 Delivery Year," Pet. App. 60a. FERC approved the amendment. Pet. App. 55a–112a. FERC explained that it had originally allowed EERs to participate "largely because of" the "four-year lag" in PJM's load forecast, Pet. App. 97a. Since the lag had

been solved, EERs were "no longer needed to serve this original purpose." Pet. App. 101a. Instead, EERs "receive capacity payments despite the fact that they do not reduce or otherwise contribute towards" capacity, and "cannot lower the clearing price or costs paid." Pet. App. 99a. The amendment was therefore "just and reasonable," because it would reduce electricity costs for consumers without compromising the reliability of PJM's grid. Pet. App. 98a.

Protesters, including Petitioner, argued that the amendment's application to two delivery years violated the filed-rate doctrine, interpreting the 2009 tariff as guaranteeing them a right to offer previously cleared EERs in those auctions. Pet. App. 107a–108a. FERC rejected this argument. FERC explained that the amendment made "forward-looking revisions" that "will apply prospectively starting with . . . the 2026/2027 Delivery Year." *Ibid*. The tariff provision allowing EERs to "*offer* into the auctions" never gave any "guarantee that they will *clear* those auctions, discounting Energy Efficiency Resource providers' legitimate reliance on expectations of ultimate capacity market revenues." Pet. App. 109a. And the provision did not create any "legal right" to participate in subsequent auctions, instead "provid[ing] that Energy Efficiency Resources are limited to offering into only three additional subsequent auctions." Pet. App. 107a–108a. "[T]here is always risk that tariffs and regulations can change," and EERs' "expectation" of being able to participate in future auctions "in and of itself does not create a legal right." Pet. App. 108a. FERC also rejected the contention that continued

capacity payments were necessary to incentivize investment in energy efficiency. Pet. App. 11a. FERC recognized that such payments "'may increase incentives to invest'" in EERs, but it determined that those incentives were not "necessary," particularly because PJM would continue to account for energy efficiency "'on the demand side.'" Pet. App. 11a, 26a (citation omitted).

Only Petitioner sought rehearing of FERC's order. Pet. App. 115a. FERC denied rehearing in January 2025. Pet. App. 113a–114a. FERC explained that the amendment "applied wholly prospectively," and that Petitioner's argument to the contrary "misconstrues PJM's [t]ariff." Pet. App. 145a–146a. Section L.4 of the tariff did not "provide[] an affirmative legal right for an Energy Efficiency Resource that clears an auction for a Delivery Year to participate in three subsequent auctions"; instead, it was "a limitation on Energy Efficiency Resources' eligibility to participate in capacity auctions to reflect the four-year period necessary to include them in PJM's load forecast." Pet. App. 146a–147a. And Section L.1 had "long provided that only those resources that are 'not reflected in the peak load forecast' qualify as Energy Efficiency Resources." Pet. App. 144a. Accordingly, Petitioner "should not have treated the possibility of obtaining capacity revenues from investments as an entitlement or a guarantee." *Ibid*. FERC also rejected the argument that the amendment was retroactive under *PJM Power Providers Group* v. *FERC*, 96 F.4th 390 (3d Cir. 2024). It explained that Petitioner "disregards the facts underlying *PJM Power Providers*," where the amendment

"sought to adjust the tariff provisions governing . . . [an] in-process auction after the offers had been submitted." Pet. App. 145a. The amendment here, by contrast, applied only prospectively to future auctions that had not commenced and were not otherwise in process. *Id.*

B. Related proceedings

There are also three related ongoing proceedings: penalty proceedings concerning FERC's finding that Petitioner engaged in massive fraud in the capacity auctions, FERC proceedings regarding the lawfulness of the EER payments, and Petitioner's bankruptcy proceedings.

1. Penalty Proceedings: On April 15, 2026, FERC issued an order assessing approximately $410 million in disgorgement payable to PJM and $722 million in civil penalties against Petitioner, its affiliates, and parent company American Efficient for fraud in offering EERs in capacity auctions. Penalty Order, 195 FERC ¶ 61,043, P 1. FERC found that American Efficient "engaged in naked rent-seeking—hijacking a regulatory mechanism intended to promote energy efficiency and converting it into an ATM for American Efficient's worthless paper-shuffling scheme." *Id.* at P 7. FERC found that Petitioner and American Efficient violated the PJM tariff by fraudulently claiming "to own or have contractual authority to control the load reduction capability of the EERs that it bid into the capacity markets," even though it "never had these rights." *Id.* at P 11. They also violated the tariff

by running an EER program that "was not 'designed to achieve' a load reduction, as the PJM . . . Tariff[] require[s]." *Id.* at P 12.

Petitioner also fraudulently misled PJM about its EER program, and failed to disclose to PJM that other American Efficient subsidiaries had been "booted out of" several other capacity markets. *Id.* at P 16. FERC's finding that Petitioner has engaged in fraudulent offers of specious energy efficiency products would effectively require PJM to reject related energy reduction plans Petitioner might propose. See PJM Interconnection, L.L.C., PJM Open Access Transmission Tariff, Attachment DD-1, § L.2 (effective June 27, 2026), https://www.pjm.com/pjmfiles/directory/merged-tariffs/oatt.pdf (see PDF pp. 6291, 6302–03) (requiring EERs to submit "a measurement and verification plan" before participating in capacity auctions); *id.* (see PDF p. 6304) (allowing PJM to "determine, upon review of [this plan], the Nominated Energy Efficiency Value that may be offered"); see also PJM, PJM Manual 18B: Energy Efficiency Measurement & Verification § 5.1.1 (effective Sept. 21, 2022), https://tinyurl.com/3wb9u2fa ("PJM . . . will notify the EE Resource Provider . . . whether or not approval of the initial [Measurement & Verification] plan is granted.").

Petitioner brought suit against FERC in district court, seeking to enjoin the penalty proceedings; that case remains pending. See *Am. Efficient LLC* v. *Fed. Energy Reg. Comm.*, No. 25-cv-68 (M.D.N.C. filed Jan. 29, 2025). Petitioner has also declined to pay the penalty FERC assessed. See Penalty Order, 195 FERC

¶ 61,043, P 17. As Petitioner notes, FERC must bring suit in federal court to enforce the penalty order; it has five years to do so. Pet. 11 n.6; see 16 U.S.C. § 823b(d)(3)(B); 28 U.S.C. § 2462; *FERC* v. *Powhatan Energy Fund, LLC*, 949 F.3d 891, 904 (4th Cir. 2020) (FERC's claim accrues after "the defendant has failed to pay the assessed penalty within 60 days").

2. Additional FERC Proceedings: Consumer advocates and Monitoring Analytics, LLC, brought complaints challenging the lawfulness of PJM's "addback" payments under the 2009 tariff. Compl. of the Independent Market Monitor for PJM, *Indep. Mkt. Monitor for PJM* v. *Indicated Energy Efficiency Sellers*, No. EL24-113-000 (FERC filed May 31, 2024), https://tinyurl.com/4z78zkym; Compl. of the Joint Consumer Advocates, *Joint Consumer Advocates* v. *PJM Interconnection, L.L.C.*, No. EL24-118-000 (FERC filed June 20, 2024), https://tinyurl.com/yck4-ejz3.[2] Monitoring Analytics also filed a complaint on May 29, 2025, in FERC Docket No. EL25-87-000, arguing that Affirmed submitted deficient measurement and verification reports that render it ineligible to receive payments for the 2025/2026 Delivery Year. Compl. of the Independent Market Monitor for PJM, *Indep. Mkt. Monitor for PJM* v. *Indicated Energy Efficiency Sellers*, No. EL25-87-000 (FERC filed May 29,

[2] Respondent Monitoring Analytics is the Independent Market Monitor for PJM. Pet. App. 130a. The Independent Market Monitor is responsible for monitoring the markets administered by an RTO. See 18 C.F.R. § 35.28(b)(7), (g)(3). PJM contends that the "addback" mechanism was lawful prior to the Sunset Orders at issue here.

2025), https://tinyurl.com/ye285x9w. The outcome of these pending FERC proceedings may moot Petitioner's claims to offer EERs for any additional Delivery Years, as FERC could determine that the Petitioner was not entitled to participate or otherwise did not sufficiently support its EER commitments in the relevant past capacity auctions. See *id.*

3. Bankruptcy Proceedings: Roughly three months after FERC issued the Penalty Order, Petitioner filed for bankruptcy under Chapter 11. Pet. ii. In May 2024—several months before PJM proposed the tariff amendments at issue here—PJM sent Petitioner an "unreasonable credit risk notification." Emergency Compl. Requesting Fast Track Processing, Ex. A, *Affirmed Energy LLC* v. *PJM Interconnection, L.L.C.*, No. EL24-124-000 (FERC filed July 3, 2024), https://tinyurl.com/bdhftrm7 (Emergency Compl. Ex. A). PJM's tariff provides that "[i]f PJM has reasonable grounds to believe that a Market Participant . . . poses an unreasonable credit risk to any PJM Markets," then PJM may "limit or suspend the Market Participant's participation in any PJM Markets, to the extent and for such time period [as] PJM determines is necessary." PJM Interconnection, L.L.C., PJM Open Access Transmission Tariff, Attachment Q.II.E.8 (effective Feb. 11, 2026), https://www.pjm.com/pjm-files/directory/merged-tariffs/oatt.pdf (see pdf pp. 6012, 6026). In July 2024, PJM exercised that authority by notifying Petitioner that PJM would "not permit [it] to participate in PJM's 25/26 [Base Residual Auction] due to Affirmed's lack of liquidity . . . without Affirmed posting additional collateral." Emergency

Compl. Ex. A at 1. PJM ultimately agreed to allow Petitioner to participate in the 2025/2026 auction, but Petitioner's financial condition continued to decline until Petitioner ultimately filed for bankruptcy. The bankruptcy court has thus far approved financing for Affirmed only on an interim basis. See, *e.g.,* Third Interim Order Granting Debtor's Motion for Authorization to Enter Into Debtor-in-Possession Financing, *In re Am. Efficient LLC*, No. 26-30968 (Bankr. W.D.N.C. Oct. 28, 2026), Dkt. No. 138 (Third Interim DIP Order).

C. Procedural history

Affirmed (and only Affirmed) petitioned the D.C. Circuit for review of FERC's decision approving the tariff amendment. Pet. App. 12a. PJM and Monitoring Analytics intervened in support of FERC. *Ibid*.

The D.C. Circuit denied the petition for review. Pet. App. 1a–32a. The majority held that FERC's orders did not violate the filed-rate doctrine because the amendment "applied solely to future capacity auctions." Pet. App. 3a. It explained that this Court's decision in *Landgraf* v. *USI Film Products*, 511 U.S. 244, 269–70 (1994), held that orders are retroactive if they "attach new legal consequences to events completed before their enactment, or . . . take away or impair vested rights." Pet. App. 13a–14a, quoting *Landgraf*, 511 U.S. at 269–70 (cleaned up). It further explained that an order "'is not retroactive' if it 'alters the future effect' but 'not the past legal consequences of an action.'" Pet. App. 17a–18a, quoting *Mobile Relay*

Assocs. v. *FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006). The tariff amendment here is not retroactive, the majority held, because it "did not force Affirmed to return the 'payments [it] had received' from earlier auctions," and "did not render Affirmed's 'past actions illegal or otherwise sanctionable.'" Pet. App. 18a–19a (citations omitted). Section L.4 of the 2009 tariff "is itself entirely prospective," and "'set forth what [PJM] intended to do' once a provider's bid cleared at an auction." Pet. App. 19a (citation omitted). The provision did not give EERs a right to "regulatory gridlock . . . for two more capacity auctions." *Id*. The majority cited the Third Circuit's decision in *Power Providers*, 96 F.4th 390, approvingly in describing how PJM's capacity auctions operate. Pet. App. 4a. It expressed no disagreement with that ruling, or any decision of any other court of appeals.

The dissent would have held that the tariff amendment operated retroactively as to the "2026/27 and 2027/28 delivery-year auctions." Pet. App. 34a (Pan, J., dissenting). The dissent agreed with the majority as to the legal standard governing retroactivity: "a law or regulation is retroactive if it 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,'" Pet. App. 41a, quoting *Landgraf*, 511 U.S. at 269, and "'[r]etroactive rules alter the past legal consequences of past actions,'" Pet. App. 42a (citation omitted). However, the dissent disagreed with the majority's application of that "fact-intensive" retroactivity standard to the tariff amendment. Pet. App.

43a. The dissent interpreted the 2009 tariff as creating a "vested entitlement to bid the continued energy savings from [Affirmed's] cleared EERs" in two future auctions. Pet. App. 50a. It therefore concluded that the amendment retroactively impaired this right. *Id*. The dissent explained that this was a "fact-bound conclusion" based on "the terms of the tariff provision at issue." Pet. App. 51a. It did not contend that the majority had applied the wrong legal standard, or created a split with the Third Circuit, or any other circuit.

Affirmed filed a petition for rehearing en banc, which the D.C. Circuit denied without dissent. Pet. App. 159a–160a. Affirmed then filed a petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE PETITION

There is no conflict among the courts of appeals as to the question presented. Petitioner contends that the decision below creates a shallow split with the Third Circuit on the legal standard for retroactivity. But the decision below and the Third Circuit agree on the legal standard; they simply come to different results based on different facts under that fact-intensive standard. Petitioner's claim of "confusion" in the courts of appeals as to the retroactivity standard has the same flaw. What Petitioner contends are two conflicting standards are no more than slightly different phrasings of the same standard, which courts of appeals have long used interchangeably.

The decision below also does not conflict with this Court's precedent. The "past legal consequences of past actions" phrasing that Petitioner criticizes is substantively the same retroactivity standard that this Court has long applied. Petitioner seeks fact-bound error correction as to the application of this settled standard to the particular tariff amendment at issue. That question does not warrant this Court's review. In any event, there was no error, because the tariff amendment did not deprive Petitioner of any vested right to participate in future auctions.

Finally, this case would be a poor vehicle to decide the question presented. FERC found that Petitioner engaged in massive fraud in the PJM capacity auctions, which would independently disqualify it from participating in the auctions even without the tariff amendment. And the validity of the "addback" mechanism—which allowed EERs to participate in PJM auctions after 2016—is currently being disputed in ongoing proceedings before FERC. Petitioner is also in bankruptcy proceedings. These related issues raise serious mootness concerns and complicate Petitioner's participation in this litigation, providing yet another reason to deny the petition.

I. There is no circuit split or "confusion" as to the question presented.

A. The D.C. Circuit and Third Circuit are not in conflict.

The D.C. Circuit's decision in this case does not conflict with the Third Circuit's decision in *Power Providers*. The two cases applied the same fact-intensive legal standard, and reached different results based on different facts.

First, the D.C. Circuit here did not disagree with *Power Providers*. It cites the case approvingly for its description of PJM capacity auctions. Pet. App. 4a. At no point does the majority contend that *Power Providers* either applied the wrong standard or reached the wrong result. The dissent also nowhere argues that the majority decision conflicts with *Power Providers*, despite citing the case. Pet. App. 41a. Similarly, *Power Providers* does not disagree with D.C. Circuit precedent. To the contrary, *Power Providers* approvingly cites the D.C. Circuit's "helpful" formulation of the retroactivity standard. 96 F.4th at 398, citing *Bd. of Cnty. Comm'rs of Weld Cnty.* v. *U.S. EPA*, 72 F.4th 284, 293–94 (D.C. Cir. 2023).

Second, the decision below and *Power Providers* do not use different legal standards. Petitioner contends that *Power Providers* followed the standard set forth in *Landgraf*, asking among other things whether a change "'takes away or impairs vested rights.'" Pet. 16–18, 20. It claims that the D.C. Circuit instead

followed a standard set forth in Justice Scalia's concurrence in *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988), asking whether a change "'alter[s] the *past* legal consequences of past actions,'" or has only "'future effect.'" Pet. 22.

The problem with this argument is that neither the Third Circuit nor the D.C. Circuit sees these formulations as two conflicting standards. Rather, both decisions treat them as alternative phrasings of the same standard, and use both formulations. The Third Circuit begins to "define retroactivity" by citing the "helpful" formulation from D.C. Circuit precedent: "'[R]etroactive rules alter the past legal consequences of past actions.'" *Power Providers*, 96 F.4th at 398, quoting *Weld*, 72 F.4th at 293–94. It then goes on to quote *Landgraf*, 511 U.S. at 269–70, 280, stating that retroactivity turns on "'whether the new provision attaches new legal consequences to events completed before its enactment,'" or "'impair[s] rights a party possessed when he acted.'" *Id.* Far from viewing these as conflicting tests that it must choose between, *Power Providers* treats them as interchangeable formulations of the same test. Indeed, *Power Providers* explains that the D.C. Circuit "in *Weld County* drew this definition from *Landgraf*," and that "the legal principles . . . are relatively straightforward." *Id.* at 394.

The D.C. Circuit decision below likewise quotes both formulations with no suggestion that they are any different, much less in conflict. Compare Pet. App. 13a–14a ("'impair[] vested rights'") (citation omitted) with Pet. App. 17a–18a ("'alters the future effect' but

'not the past legal consequences of an action'") (citation omitted). And the dissent below also uses both formulations interchangeably, and never contends that the majority erred by using the wrong legal standard. Compare Pet. App. 41a (Pan, J., dissenting) ("'impair[] vested rights'") (citation omitted) with Pet. App. 43a (Pan, J., dissenting) ("Under *Landgraf*, the retroactivity analysis turns on whether PJM's pre-existing tariff attached a past legal consequence to a past action").

The D.C. Circuit has similarly used both formulations of the retroactivity standard interchangeably in other cases. See *e.g., Arkema Inc.* v. *Env't Prot. Agency,* 618 F.3d 1, 7 (D.C. Cir. 2010) (equating "'*past* legal consequences'" formulation with "impair rights" formulation) (citation omitted); *Celtronix Telemetry, Inc.* v. *FCC*, 272 F.3d 585, 588–89 (D.C. Cir. 2001) (same). *Weld* expressly equates the two, explaining that "'alter the past legal consequences of past actions'" was the same test as "'impair rights a party possessed when he acted,'" expressed "in other words." *Weld Cnty.,* 72 F.4th at 292–93 (citations omitted). The D.C. Circuit and the Third Circuit are not in conflict as to the retroactivity standard.

Third, there is no conflict between the decision below and *Power Providers* even as to the application of this settled legal standard. The two cases come to different results based on different facts. Critically, *Power Providers* involved a tariff amendment that "appl[ied] a new rule to an auction that was already underway." 96 F.4th at 401; see Pet. 17. PJM had

already "calculated and posted" the capacity it would buy; had already received binding "offers from suppliers"; and was less than a week from posting results. *Power Providers*, 96 F.4th at 395–97. PJM then halted the auction when it discovered a "faulty assumption" in the posted capacity value, and amended its tariff to allow for an immediate, mid-auction adjustment. *Id.* at 396–97. The Third Circuit narrowly held that this amendment was retroactive in this specific circumstance because it "nullified a legal consequence attached to a past action taken in the Auction." *Id.* at 401. But it expressly distinguished any application of the amendment to future auctions, holding that "only the portion of the orders that allows PJM to apply the Tariff Amendment to the [pending] capacity auction is retroactive." *Id.* at 402. So Petitioner is wrong that "[i]t did not matter to the Third Circuit's analysis that . . . the relevant auction was not completed." Pet. 18.

By contrast, the D.C. Circuit held that the amendment in this case is not retroactive because it impacts only "*future* capacity auctions." Pet. App. 3a (emphasis added). It changes no capacity requirements already posted, and affects no binding offers already submitted. It is therefore very different from the amendment in *Power Providers*.

Petitioner claims that the amendments in both decisions "altered a future legal consequence that had been guaranteed under the tariff based on the completion of a past event." Pet. 2. But that is not what *Power Providers* held: it held that the amendment "nullified" a past legal consequence, because it interpreted the

prior tariff as imposing a "require[ment] to use [the capacity value] in the Auction" after the auction already commenced. 96 F.4th at 400, 401. Conversely, the D.C. Circuit here interpreted the tariff provision as giving EERs a contingent "permission to bid" in future auctions, not a vested right. Pet. App. 14a. Thus, the D.C. Circuit concluded that the amendment was not retroactive because it "merely 'upsets expectations based on prior law.'" Pet. App. 18a (citation omitted); see *infra* Section II.B.

The outcomes in the decision below and *Power Providers* are fully consistent. At most, any inconsistency is limited to the highly fact-bound application of settled retroactivity doctrine to the particular tariff amendments at issue in the two cases. The petition should therefore be denied.

B. The courts of appeals are not confused as to the legal standard for retroactivity.

Petitioner's argument that the decision "deepens confusion in federal courts" on "the proper legal test for retroactivity" is wrong for similar reasons. Pet. 26. Petitioner contends that the D.C., Ninth, Tenth, and Eleventh Circuits use "Justice Scalia's formulation" that a law is retroactive if it "alters past legal consequences of past actions,'" while the First, Third, and Seventh Circuits use the "impair vested rights" formulation. Pet. 26–27. But the circuits use both formulations of the standard interchangeably. Petitioner points to no case disagreeing with another circuit as to the governing legal standard—or even expressing

any "confusion" about what that standard is. The supposed conflict is illusory.

Start with the four circuits that Petitioner puts on the "past legal consequences" side. Petitioner correctly acknowledges that two of these circuits also use the "impair rights" formulation. Pet. 26 (claiming a conflict "within the Ninth and Eleventh Circuits"). The Eleventh Circuit, for instance, has discussed "retroactive effect in the ordinary sense of 'altering the *past* legal consequences of past actions,'" while also examining "whether the statute would have a 'retroactive effect' in that 'it would impair rights a party possessed when he acted . . . .'" *Sunshine State Reg'l Ctr., Inc.* v. *Dir., US Citizenship & Immigr. Servs.*, 143 F.4th 1331, 1346 & n.7 (11th Cir. 2025), quoting *Bowen*, 488 U.S. at 219 (Scalia, J., concurring)); *id.* at 1346, quoting *Landgraf*, 511 U.S. at 280). The Ninth Circuit decision Petitioner cites similarly uses both formulations together. *Solar Energy Indus. Ass'n* v. *FERC*, 80 F.4th 956, 981 (9th Cir. 2023).

The other two circuits Petitioner places on the "past legal consequences" side likewise use both formulations interchangeably. See *supra* Section I.A (discussing the decision below and other D.C. Circuit decisions); compare *In re FCC 11-161*, 753 F.3d 1015, 1072 (10th Cir. 2014) (quoting the "'past legal consequences'" formulation) with *United States* v. *Piette,* 45 F.4th 1142, 1160–61 (10th Cir. 2022) ("[W]e look for an impermissible retroactive effect, defined as an effect that 'would impair rights a party possessed when he acted' . . . ."), quoting *Landgraf*, 511 U.S. at 280. None

of these decisions states, or even suggests, that these formulations are meaningfully different.

The circuits Petitioner puts on the "impair rights" side also do not demonstrate any conflict or confusion over the question presented. The Third Circuit likewise uses both formulations. See *supra* Section I.A. Petitioner points to a First and a Seventh Circuit case, both holding that changes to discretionary relief from removal under immigration law were retroactive. See Pet. 26–27, citing *Jeudy* v. *Holder*, 768 F.3d 595, 603–05 (7th Cir. 2014); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 15 (1st Cir. 2003). But neither case mentioned any conflict with the "past legal consequences" formulation, or suggested that using that formulation instead would make any difference to their analysis. Rather, the only conflict either case noted was over whether immigrants must show "subjective reliance" on the former law—a question not presented by this case, and which this Court already settled in *Vartelas* v. *Holder*, 566 U.S. 257, 268 (2012). See *Jeudy*, 768 F.3d at 604. And as Petitioner acknowledges, the Ninth and Eleventh Circuits agree with the First and Seventh Circuits that revocation of an immigrant's application for discretionary relief is retroactive. Pet. 27, citing *Ortega* v. *Holder*, 747 F.3d 1133, 1134 (9th Cir. 2014); *Rendon* v. *U.S. Att'y Gen.*, 972 F.3d 1252, 1263 (11th Cir. 2020).

Petitioner contends that these rulings show "deep doctrinal confusion," Pet. 27, but they instead confirm that the purported conflict does not exist. Rather, as the Third Circuit put it, "courts routinely apply

Landgraf's well-worn retroactivity principles" to a wide variety of circumstances. *Power Providers*, 96 F.4th at 398. The "past legal consequences" and "impair rights" formulations are not conflicting tests, but different ways of phrasing the same standard. Because there is no conflict or confusion in the courts of appeals as to the question presented, the petition should be denied.

II. The D.C. Circuit decision does not present important questions of law and is correct.

The decision below also does not conflict with this Court's prior decisions regarding the retroactivity standard, or otherwise present an important question of federal law. Petitioner is left only with a request for error correction. But any error in the D.C. Circuit's application of that fact-bound standard would not justify this Court's review. Further, the D.C. Circuit correctly applied settled retroactivity principles.

A. The D.C. Circuit decision does not conflict with this Court's precedent or present important questions of federal law.

Petitioner's argument that the decision below conflicts with *Landgraf* and *Chew Heong* v. *United States*, 112 U.S. 536 (1884), regarding the retroactivity standard is incorrect. Pet. 20. The "past legal consequences" phrasing is consistent with the standard set forth in those cases. This case thus presents only the question whether the D.C. Circuit correctly applied that settled retroactivity standard to the tariff amendment at

issue here. That question does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Landgraf held that a law authorizing new damages for intentional employment discrimination was "retroactive" as applied to discrimination that occurred before the law was passed. *Landgraf*, 511 U.S. at 280. It did not hold that courts must use a single precise formulation in assessing retroactivity. To the contrary, it explained that "formulas have varied," and itself proposed several variations on the same basic standard. *Id*. at 269. *Landgraf* stated that a retroactive law "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *Id.* (citation omitted). It also stated that a retroactive law "attaches new legal consequences to events completed before its enactment." *Id.* at 269–70. And it stated that a law is *not* retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id*. at 269.

After articulating these various formulations, the Court acknowledged that "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a

relevant past event." *Id*. at 270. Further, *Landgraf* explained, "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." *Ibid*. Earlier, in *Chew Heong*, the Court similarly described a retroactive change as one "whereby rights previously vested are injuriously affected." 112 U.S. at 559.

These formulations do not conflict with the formulation set forth in Justice Scalia's *Bowen* concurrence: a law operates retroactively when it "alter[s] the *past* legal consequences of past actions," as distinct from having an "exclusively future effect." *Bowen*, 488 U.S. at 219 (Scalia, J., concurring).[3] Indeed, that formulation has no substantive difference from *Landgraf*'s statement that a retroactive law "attaches new legal

[3] While Justice Scalia concurred in the judgment in *Landgraf*, that concurrence involved different questions than the *Bowen* concurrence; indeed, it mentioned the *Bowen* concurrence only in a footnote. The *Landgraf* concurrence argued that the majority's application of the "vested rights approach" to "changes in rules of procedure" was "inadequa[te]." 511 U.S. at 290, 292 (Scalia, J., concurring). The majority, it argued, should have first identified "the relevant activity that the rule regulates," before deciding whether that activity preceded "the effective date of the statute." *Id.* at 291. In other words, because a change in procedural rules is not a "regulation of primary conduct," it is not retroactive where the *procedure* occurs after the change, even if the primary conduct occurred before. *Id*. at 294. That question is not presented in this case, as neither the D.C. Circuit decision nor the petition contends that the retroactivity question here turns on whether the tariff amendment is categorized as "procedural."

consequences to events completed before its enactment." 511 U.S. at 269–70.

Petitioner argues that the "past legal consequences" formulation conflicts with *Landgraf* because "a legal change can be retroactive even if the impaired benefit would have been exercised only in the future, so long as that entitlement arose from past conduct." Pet. 28. But that argument misunderstands the "past legal consequences" formulation: a change in law can "alter[] the *past* legal consequences of past actions," *Bowen*, 488 U.S. at 219 (Scalia, J., concurring), by impairing a past legal right, even if that right would have first been exercised in the future. Indeed, deprivation of a vested right necessarily alters a past legal consequence, because the right must have vested *in the past*—prior to the change in law. By contrast, a law is not retroactive if it has "exclusively future effect," even if it injures reasonable expectations for "past transactions." *Id*. For instance, a new tax on a person's existing property is not generally retroactive, even though it makes the property less valuable than the person expected when buying it. *Id*.

Chew Heong, far from conflicting with the decision below, illustrates the congruence between the "vested right" and "past legal consequence" formulations. In that case, treaties with China had expressly guaranteed Chinese laborers already present in the United States the right "to go and come of their own free will," 112 U.S. at 542 (citation omitted), with "no limitation in respect of time," *id.* at 543. A later statute impaired that right by requiring Chinese laborers to obtain a

certain "certificate"—before leaving the country—in order to reenter later. *Id.* at 553. That exit certificate was "impossible" to obtain for laborers who had already left the country, in reliance on their prior treaty rights, before the new requirement took effect. *Id.* at 551. The Court held that applying this law to laborers who had left before it was passed would retroactively injure their "vested" right to return to the United States. *Id.* at 559.

Under the *Bowen* concurrence formulation, the law's application to those laborers was plainly retroactive because it altered the "past legal consequences" of the laborers' "past conduct" of departing the United States. At the time of their departure, the law imposed no requirement to first obtain a certificate; after the new law, the laborers' failure to have obtained the certificate *in the past* had the legal consequence of barring them from returning as soon as they had departed. *Chew Heong*, 112 U.S. at 538. *Chew Heong* is therefore a textbook example of altering a past legal consequence of a past action.

Petitioner argues that its future ability to participate, like the laborer's future ability to return, is a "vested" right that it had not yet "exercised," but Petitioner is incorrect. Pet. 20. Petitioner had no such "vested right"; the 2009 tariff gave it only a contingent expectation, *limited* to offering only up to three additional subsequent auctions with no entitlement if the load forecast lag was corrected. See *infra* Section II.B. In any event, the question whether the D.C. Circuit correctly interpreted the tariff amendment as

impairing no vested right (and altering no past legal consequence) is highly fact-bound and does not warrant this Court's review.

The D.C. Circuit's ruling here lacks any broader importance. The decision addresses only EER offers, which constituted only a small fraction of PJM's "multi-billion-dollar [electricity] market." Pet. 19.[4] And it addresses only two years of these offers: those attached to EERs that cleared in the final years of EER participation. Indeed, the decision below ultimately impacts only the parties to this suit. Petitioner was the only EER participant to seek rehearing of the orders below—a prerequisite to judicial review under the Federal Power Act. See 16 U.S.C. § 825l(a). So a ruling in Petitioner's favor would not even apply to any other EER provider. See *New England Power Generators Ass'n* v. *FERC,* 879 F.3d 1192, 1198 (D.C. Cir. 2018) ("[Section 825l(a)] deprives us of jurisdiction over the claims of a petitioner who failed to seek rehearing, even if some other party sought rehearing.").

This case presents only the narrow fact-bound question whether the D.C. Circuit erred in concluding that the particular tariff amendment was not

[4] In the last auction where EERs participated, they accounted for approximately one percent of total auction payments. See PJM, 2025/2026 Base Residual Auction Report at 3 (July 30, 2024), https://tinyurl.com/m337x489 (total payment of $14.7 billion); Monitoring Analytics, LLC, 2025 State of the Market Report for PJM, Vol. 2 § 6 at 372 (Mar. 12, 2026), https://tinyurl.com/ykpd-uuyy (payments to EERs of $148 million).

retroactive under this Court's settled legal standards for assessing retroactivity. There is no "compelling reason[]" for this Court to review that question. Sup. Ct. R. 10.

B. The D.C. Circuit decision correctly applied settled retroactivity principles.

Further, the D.C. Circuit correctly applied settled retroactivity doctrine here. The tariff amendment did not deprive Petitioner of any vested right because it applied only to future auctions and merely affected Petitioner's contingent future expectations of being able to participate in those auctions.

First, as the D.C. Circuit explained, the tariff amendment was prospective because it applied only to future auctions. It "did not render Affirmed's 'past actions illegal or otherwise sanctionable,'" and "did not force [it] to return the 'payments [it] had received' from earlier auctions." Pet. App. 18a–19a (citations omitted). Rather, it barred only offers in "future auctions" postdating the amendment. *Id.* at 18a.

Second, Petitioner does not even contend that it had a vested right to any *revenue* from future auctions. The 2009 tariff expressly provided that in any future auctions, EERs "shall not be assured of clearing," and therefore it gave them no right to any future revenue. Pet. App. 195a; see *supra* Statement Section A.1. Indeed, Petitioner argues only that once its EERs cleared an auction, it gained a "vested right" to *participate* in future auctions. Pet. 23.

Third, the amendment was not retroactive because the 2009 tariff gave EERs no vested right even to participate in future auctions. Petitioner defines a "vested right" as "'an immediate, fixed right of present or future enjoyment,'" as opposed to a "'contingent'" expectation. *Id.* at 24 (citations omitted). But Petitioner's ability to participate in future auctions under the 2009 tariff was a contingent expectation, not a fixed right. Section L.4 provided that a cleared EER "'may be offered in auctions for *up to* three additional consecutive Delivery Years.'" Pet. App. 195a (emphasis added) (citation omitted). As FERC explained, the "up to three" language in the tariff "provide[d] that Energy Efficiency Resources are *limited* to offering into only three additional subsequent auctions," unlike any other capacity resource that could be offered for an unlimited number of delivery years. Pet. App. 107a–109a (emphasis added). It did not create a "legal right" to participate in exactly three additional auctions. Pet. App. 108a. "Up to three" warned that EERs might be offered for a lesser number of delivery years, or none at all. Below, Petitioner argued that "up to" merely conveyed that it could choose whether to exercise its "right" to participate in each of the future auctions. Final Reply Br. for Pet'r at 11, *Affirmed Energy LLC* v. *FERC*, No. 25-1091 (D.C. Cir. Aug. 11, 2025), Dkt. No. 2129603. But that ability not to participate is already conveyed by the phrase "may be offered." Pet. App. 195a.

In addition, Section L.1 of the 2009 tariff provided that EERs' ability to participate was contingent on the energy reductions not appearing in the load forecast.

It defines EERs as resources that "achieve a . . . reduction in electric energy consumption . . . that is not reflected in the peak load forecast." Pet. App. 192a–193a. As the decision below explained, this provision puts EERs "on notice that improvements to the forecast might render their projects ineligible for the auctions." Pet. App. 12a; see *supra* Statement Section A.2.

All participants were also on notice that their ability to participate in future auctions was contingent for numerous other reasons. For example, PJM's tariff expressly allows it to "limit or deny [an] Applicant's participation in the PJM Markets" if PJM "determines that an Applicant poses an unreasonable credit risk," PJM Interconnection, L.L.C., PJM Open Access Transmission Tariff, Attachment Q.II.D. (effective Feb. 11, 2026), https://www.pjm.com/pjmfiles/directory/merged-tariffs/oatt.pdf (see pdf pp. 6012, 6023), or if PJM rejects an EER's "measurement and verification plan," see *supra* Statement Section B. And FERC can exclude any participant who "manipulat[es] or dece[ives]" these markets. 16 U.S.C. § 824v(a); see also *id.* § 825h (giving FERC the "power to perform any and all acts . . . as it may find necessary or appropriate to carry out the provisions of this chapter"). Indeed, both of these provisions independently barred Petitioner from participating in the auctions here. See *supra* Statement Section B; *infra* Section III. Given all these contingencies on its ability to participate in future auctions, Petitioner did not have a vested right to do so under the 2009 tariff.

III. This case is an exceptionally poor vehicle to resolve the question presented.

Finally, the petition should be denied because this case would be a poor vehicle for at least three reasons.

First, the fact that Petitioner's offers in PJM auctions were fraudulent raises serious mootness concerns. See *supra* Statement Sections A.1, B.1. That fraud would invalidate the very offers that Petitioner claims give it a "vested right" to continue participating in future auctions. See *Johannessen* v. *United States,* 225 U.S. 227, 242 (1912) ("[T]here is no such thing as a vested right to do wrong"); *The Amistad*, 40 U.S. (15 Pet.) 518, 594 (1841) ("Fraud will vitiate any, even the most solemn transactions; and an asserted title to property, founded upon it, is utterly void."). To be sure, FERC has not yet sued to enforce its penalty order in federal court. See *supra* Statement Section B.1; Pet. 11 n.6. But FERC's findings of Petitioner's extensive and "brazen" violations of PJM's tariff, Penalty Order, 195 FERC ¶ 61,043, P 1, provide independent grounds to exclude Petitioner from participating in future PJM auctions even apart from the amendment. See *supra* Statement Section B.1. Petitioner's fraud could therefore moot Petitioner's challenge to the tariff amendment. See *Church of Scientology of Cal.* v. *United States,* 506 U.S. 9, 12 (1992) ("[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed.") (citation omitted).

Second, as explained above, FERC is currently reviewing the legality of the "addback" mechanism used for *all* EER offers made after 2016, when PJM's load forecast improved. See *supra* Statement Section B.2. If all uses of the "addback" mechanism were deemed to have violated the tariff, then Petitioner's claim here would be moot on that independent basis as well. See *Church of Scientology*, 506 U.S. at 12.[5]

Third, because of Petitioner's pending bankruptcy, Petitioner does not control whether it continues to fund this litigation.[6] Recent filings show that Petitioner is quickly running out of funds. See Third

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[5] Petitioner cites to the stay briefing below, Pet. 14 n.7, but that briefing did not address these mootness concerns. PJM noted that Petitioner had not shown irreparable injury from the D.C. Circuit decision because it "'failed to demonstrate that financial relief could not be fashioned on remand of the order.'" Resp. of PJM in Opp'n to Mot. for Stay at 17–18, *Affirmed Energy LLC* v. *FERC*, No. 25-1091 (D.C. Cir. Mar. 31, 2025), Dkt. No. 2108610 (quoting FERC's order denying rehearing). But PJM never suggested that separate legal proceedings could not potentially render relief unwarranted. Indeed, FERC's finding that Petitioner had engaged in fraud in the capacity auctions was not issued until after PJM had filed its stay opposition. See *supra* Statement Section B.

[6] See 11 U.S.C. § 330(a)(1) ("[T]he court may award to a trustee . . . reasonable compensation for actual, necessary services rendered by . . . [an] attorney"); *id.* § 1107(a) ("[A] debtor in possession shall have all the rights . . . and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter."); *id.* § 541(a) (bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case").

Interim DIP Order, No. 26-30968 at 7. And because Petitioner's entire business model was to offer EERs in PJM capacity auctions, and it is undisputed that PJM properly terminated the EER program aside from the two contested auctions, Petitioner has no way to recover financially. See *supra* Statement Sections A.1–A.2. This financial reality provides yet another reason to deny the petition. See Stephen M. Shapiro et al., *Supreme Court Practice*, § 19.2 (11th ed. 2019) ("Cases may also terminate, or abate, if a necessary party . . . goes out of business.").

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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