ORAL ARGUMENT NOT YET SCHEDULED

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

Nos. 21-1214, 21-1216, 21-1217, 22-1063, 22-1065, and 22-1066 (consolidated)

VISTRA CORP., CONSTELLATION ENERGY CORPORATION, CONSTELLATION ENERGY GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, THE PJM POWER PROVIDERS GROUP, CALPINE CORPORATION, LS POWER ASSOCIATES, L.P., AND TALEN ENERGY MARKETING, LLC,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF INTERVENOR PJM INTERCONNECTION, L.L.C. IN SUPPORT OF PETITIONERS

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Dated: June 21, 2022
Final Brief:

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court are as stated in the Opening Brief of Petitioners, with the addition of Monitoring Analytics, LLC as Intervenor for Respondent.

B. Rulings Under Review

1. *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Order Establishing Just and Reasonable Rates, Docket Nos. EL19-47-000, EL19-63-000, and ER21-2444-000, 176 FERC ¶ 61,137 (Sept. 2, 2021) ("Replacement Rate Order") (R.151, JA___-JA___).

2. *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Notice of Denial of Rehearings by Operation of Law and Providing for Further Consideration, Docket Nos. EL19-47-002 and EL19-63-002, 177 FERC ¶ 62,066 (Nov. 4, 2021) (R.196, JA___-JA___).

3. *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Order Addressing Arguments Raised on Rehearing, Addressing Requests for Clarification, and Accepting Compliance Filing, Docket Nos. EL19-47-002, EL19-63-002, ER21-2877-001, and ER21-2444-001, 178 FERC ¶ 61,121 (Feb. 18, 2022) ("Rehearing Order") (R.218, JA___-JA___).

C. Related Cases

This case, consisting of the consolidated petitions listed in the caption, has not previously been before this Court or any other court. Counsel is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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CORPORATE DISCLOSURE STATEMENT

PJM Interconnection, L.L.C. ("PJM") is a limited liability company ("L.L.C.") organized and existing under the laws of the State of Delaware.

PJM is a regional transmission organization ("RTO") for all or portions of Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. PJM is authorized by Respondent Federal Energy Regulatory Commission ("FERC") to administer an Open Access Transmission Tariff ("Tariff"), provide transmission service under the Tariff on the electric transmission facilities under PJM's control, operate an energy and other markets, and otherwise conduct the day-to-day operations of the bulk power system of a multi-state electric control area. PJM was approved by FERC first as an independent system operator and then as an RTO. *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997), *reh'g denied*, 92 FERC ¶ 61,282 (2000), *modified sub nom. Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345 (2002).

PJM has no parent companies. Under Delaware law, the members of an L.L.C. have an "interest" in the L.L.C. *See* Del. Code Ann. tit. 6, § 18-701 (2022). PJM members do not purchase their interests or otherwise provide capital to obtain their interests. Rather, the PJM members' interests are determined pursuant to a

formula that considers various attributes of the member, and the interests are used only for the limited purposes of: (i) determining the amount of working capital contribution for which a member may be responsible in the event financing cannot be obtained;[1] and (ii) dividing assets in the event of liquidation. PJM is not operated to produce a profit, has never made any distributions to members, and does not intend to do so (absent dissolution). In addition, "interest" as defined above does not enter into governance of PJM and there are no individual entities that have a 10% or greater voting interest in the conduct of any PJM affairs.

Respectfully submitted,

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[1] Under the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., the amount of capital contributions received from all PJM members combined is capped at $5,200,000. Because PJM has financed its working capital requirements, there have been no member contributions to date, and none is expected.

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*** The cases principally relied upon are noted with an asterisk.**

STATUTES

GLOSSARY

Brief of Petitioners	Brief of Petitioners, *Vistra Corp. v. FERC*, Nos. 21-1214, et al. (D.C. Cir. June 13, 2022)
FERC	Respondent Federal Energy Regulatory Commission
Indicated Suppliers Initial Brief	Initial Brief of the Indicated Suppliers, Docket Nos. EL19-47-000, et al. (May 3, 2021) (R.118, JA___-JA___)
Indicated Suppliers Reply Brief	Reply Brief of the Indicated Suppliers, Docket Nos. EL19-47-000, et al. (June 9, 2021) (R.129, JA___-JA___)
Joint Consumer Advocates	Office of the People's Counsel for the District of Columbia, Delaware Division of the Public Advocate, Indiana Office of Utility Consumer Counselor, Maryland Office of People's Counsel, Pennsylvania Office of Consumer Advocate and the PJM Industrial Customer Coalition
Joint Consumer Advocates Reply Brief	Reply Brief of the Joint Consumer Advocates, Docket Nos. EL19-47-000, et al. (June 9, 2021) (R.125, JA___-JA___)
Market Monitor	Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM
MWh	Megawatt hour
Offer Cap	Market Seller Offer Cap
Petitioners	Vistra Corp.; Constellation Energy Corporation; Constellation Energy Generation, LLC; Electric Power Supply Association; The PJM Power Providers Group; Calpine Corporation; LS Power Associates, L.P.; and Talen Energy Marketing, LLC
PJM	PJM Interconnection, L.L.C.
PJM Initial Brief	Initial Brief of PJM Interconnection, L.L.C., Docket Nos. EL19-47-000, et al. (May 3, 2021) (R.114, JA___-JA___)

PJM Reply Brief	Reply Brief of PJM Interconnection, L.L.C., Docket Nos. EL19-47-000, et al. (June 9, 2021) (R.126, JA___-JA___)
Rehearing Order	*Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Order Addressing Arguments Raised on Rehearing, Addressing Requests for Clarification, and Accepting Compliance Filing, Docket Nos. EL19-47-002, EL19-63-002, ER21-2877-001, and ER21-2444-001, 178 FERC ¶ 61,121 (Feb. 18, 2022) (R.218, JA___-JA___)
Replacement Rate Order	*Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, Order Establishing Just and Reasonable Rates, Docket Nos. EL19-47-000, EL19-63-000, and ER21-2444-000, 176 FERC ¶ 61,137 (Sept. 2, 2021) (R.151, JA___-JA___)
Tariff	PJM Open Access Transmission Tariff

STATEMENT OF ISSUES

PJM's brief in support of the Petitioners is limited to Issue No. 2 in the Petitioners' "Issues Presented for Review," as elaborated in Argument Section II of the Brief of Petitioners. Specifically, FERC's adoption of a replacement rate that effectively eliminated the default Offer Cap and subjected all existing resource offers above $0/MWh to a unit-specific review process that, at FERC's insistence, would not consider relevant risks of offering capacity for a future Delivery Year, was arbitrary and capricious and not supported by substantial evidence.[1]

STATEMENT OF THE CASE

PJM adopts the Statement of the Case contained in the Brief of Petitioners, subject to the clarification that when the Market Monitor and a capacity market seller disagree on the proper calculation of avoidable costs under the Tariff's rules governing the unit-specific review, PJM reviews the seller-provided data and makes the determination whether to accept or reject the seller's requested unit-specific Offer Cap. *See* Tariff, Attachment DD, section 6.4(b) ("[I]f no agreement has been reached [between the seller and the Market Monitor] specifying the level of Market

[1] PJM does not challenge FERC's finding that the previously effective Offer Cap approach was unjust and unreasonable. PJM also does not support Petitioners' argument that the revised offer-capping approach violates section 205 of the Federal Power Act, 16 U.S.C. § 824d, or Petitioners' request that the Court not only remand, but also vacate, the orders on review.

Seller Offer Cap to which [the seller] commits . . . [PJM] shall review the data submitted by the Capacity Market Seller, [and] make a determination whether to accept or reject the requested unit-specific Market Seller Offer Cap." If PJM "rejects the Capacity Market Seller's requested unit-specific Market Seller Offer Cap," the seller may submit an offer up to (1) the default avoidable cost rate, less expected energy and ancillary service revenues, "or (2) the unit-specific Market Seller Offer Cap proposed by the Market Monitoring Unit upon PJM approval of such value."). PJM thus adopts the Market Monitor's proposed calculation only if PJM first determines that the seller's calculation does not comply with the Tariff and if PJM then "approv[es]" the Market Monitor's proposed Offer Cap value. *Id.*; *cf.* Brief of Petitioners at 17 ("[T]o the extent the Market Monitor and a supplier disagree regarding the calculation of avoidable costs, PJM treats the Market Monitor's determination as the supplier's offer, unless the supplier can persuade FERC that the Market Monitor's determination is unjust and unreasonable.").

SUMMARY OF ARGUMENT

FERC's orders below set the default Offer Cap at levels that exclude any possibility of compensation for a seller's risks in taking on a forward capacity commitment. Sellers' only recourse to submit an offer above the default level is to undergo the unit-specific review process. But that process also precludes recovery for any risks beyond the risk of paying performance penalties. FERC thus barred

sellers from accounting for such other risk in their offers, regardless of whether such risks are real and quantifiable, and regardless of whether a seller would only be willing to commit capacity at an offer price that compensates it for such risks. FERC's insistence on that limitation, in the face of reasonable objections that such risks are real and their costs legitimate, was unreasoned, and thus falls short of the requirements of the Administrative Procedure Act.

ARGUMENT

I. FERC's Adoption of a Revised Offer-Capping Approach that Does Not Permit Sellers to Include in Their Offers Any Costs of Quantifiable Risks of Committing to Provide Capacity During a Future Capacity Commitment Period (Other than the Risk of Paying Non-Performance Charges) Is Arbitrary and Capricious and Not Supported by Substantial Evidence.

FERC's adoption of a replacement rate effectively eliminated the default Offer Cap and subjected all existing resource offers above $0/MWh to a unit-specific review process. FERC's insistence on this replacement rate does not allow capacity offers to include risks of committing capacity for a future year despite well-supported objections in the record. Therefore, the underlying FERC orders were arbitrary and capricious and not supported by substantial evidence. FERC's response below to this issue therefore does not satisfy the statutory requirements.

A. PJM Administers the Capacity Auctions that Are Intended to Secure Advance Commitments from Capacity Resources at the Levels Needed to Provide a High Level of Assurance that Customers Will Continue to Be Served Even When Demand Is High or Conditions Are Otherwise Adverse.

PJM "operates the largest competitive wholesale electricity market in the country," covering all or part of thirteen states and the District of Columbia, "from the Eastern Seaboard as far south as North Carolina and as far west as Chicago." *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 2 (2006), *order on reh'g*, 119 FERC ¶ 61,318 (2007). "PJM is responsible for ensuring the reliability of the system it operates." *Id.* at P 8. "To protect customers" served by the PJM regional energy market "against the possibility of losing service, PJM is responsible for ensuring that its system has sufficient generating [and demand response] capacity to meet its reliability obligations." *Id.* at P 2.

PJM uses capacity auctions "to ensure an adequate long-term supply of electricity." *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 111 (D.C. Cir. 2017). PJM's capacity auctions secure commitments to provide capacity generally three years in the future,[2] and sellers offer to provide a specific amount of capacity in that future year at a specific price. *See Del. Div. of the Pub. Advocate v. FERC*, 3 F.4th

[2] For reasons unrelated to this review proceeding, the first auctions that the Tariff changes at issue here have affected and will affect are being held much closer in time to the twelve-month period for which each commits capacity.

461, 463 (D.C. Cir. 2021). The set of capacity offers forms a supply curve. The intersection of the supply curve with an administratively determined demand curve "dictates the amount of capacity committed and the price suppliers are paid." *Id.* A key determinant of that demand curve is a planning assessment of the level of "capacity that must be produced to meet peak demand, including a reserve margin, which together are intended to allow no more than one power outage every decade." *See id.* at 463-64.

B. Tariff-Prescribed Caps on the Offers Sellers Can Submit in the Auction Are Intended to Reflect the Offer a Seller Would Submit in a Competitive Market to Recover Its Costs and Risks of Providing Capacity During the Future Delivery Year.

To protect against the exercise of market power through economic withholding of existing resources by capacity suppliers, PJM's capacity market rules provide that sellers who fail PJM's market power test will have their offers price capped. *See PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,151, at P 52 (2016) ("Market power mitigation in the [PJM] capacity market entails limiting the capacity offers of all existing capacity resources to either the default or unit-specific value to prevent economic withholding that could otherwise result in market clearing capacity prices exceeding a competitive level."). The Tariff provides for default Offer Caps, and sellers wishing to offer above the default level may seek a unit-specific Offer Cap. In practice, the Offer Cap rules apply to *all* existing capacity resources, as few sellers have ever passed this test. *See* PJM Initial Brief at 11 n.21

(R.114, JA___); Rehearing Order, dissent op. (Commissioner Danly) at P 4 & n.5 (R.218, JA___).

In order to take on a capacity obligation, a competitive resource would require that its capacity payment exceed the costs it faces from taking on the obligation. *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at P 338 (2015), *order on reh'g*, 155 FERC ¶ 61,157 (2016). As FERC has held, an Offer Cap is just and reasonable if it reflects the amount that a competitive resource would accept in the capacity market. *Id.* at P 336. A seller would reasonably include in such a competitive resource offer the seller's estimated quantifiable risks of adverse outcomes from making a capacity commitment. *See, e.g.*, *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 668 (D.C. Cir. 2017) (per curiam) (While a must-offer requirement "prevents resource owners from making rational economic decisions [whether to offer] based on the risks and benefits of offering to sell capacity in the market[,] PJM can still allow resources to recover these costs from the market.").

C. The Issue on Review Is Not How to Define or Quantify Any Other Specific Risks—FERC Never Reached that Issue Because It Categorically Excluded from Offers *All* Risks Other than the Risk of Paying Non-Performance Charges.

PJM emphasizes that the issue before the Court is not *how* to account in the PJM market rules for any specific risks. FERC did not reach that issue, because it held categorically and in a manner not supported by reasoned decision-making that no capacity seller risks other than the risk of paying a non-performance penalty could

be included in seller offers. If the Court finds FERC erred in categorically excluding recognition of any other risks in the offer-capping rules, then the remand to FERC can provide a forum for consideration of market rule changes that accommodate appropriate and quantifiable risks.

D. The Orders on Review Create the Problem at Hand: The Prior Offer-Capping Approach Afforded Sellers Room to Price Other Risks (other than Non-Performance Charge Risk) into Their Offers, but the Revised Offer-Capping Approach Takes that Away.

The orders on review take away sellers' ability to price other risks into their offers through FERC's very considerable changes to the offer-capping rules. Although FERC had, through a Federal Power Act section 206 finding, indicated that the prior cap had certain flaws, *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,212, at P 65 (2021) (R.106, JA___), the replacement rate that FERC instituted simply took away the opportunity for generating units to include risk of taking on a capacity obligation (other than the risk of non-performance charges) as a recoverable cost. In this way, the remedy that FERC crafted went far beyond its initial findings as to the flaws in the then existing default Offer Cap. FERC could have crafted a replacement rate that preserved the benefits, but eliminated the flaws, of the prior approach—and there were multiple proposals in the record, *see infra* Section I.E.1, to do just that—but FERC instead veered in an arbitrary and capricious direction.

First, FERC reduced the default rate—the rate at or below which offers would be deemed acceptable—to specified numeric values *that categorically eliminated any allowance for the risks a generating unit takes on by being selected as a capacity resource*. The default rate—actually multiple different default rates applicable to different resource technology types—utilize avoided-cost values for the different resource types that incorporate *no* risk factors. *See* PJM Initial Brief at 12 (R.114, JA___) (explaining that FERC's adopted approach establishes default Offer Caps that "do not include consideration of Capacity Performance risk"). These default rates do not even include an allowance for the risk that a capacity seller may incur non-performance charges, which is one of the significant risks of taking on a capacity commitment.

Second, the default values specified by FERC address only the gross cost inputs to an offer, which are netted against the seller's expected revenues earned in the energy and ancillary services markets. *See* Replacement Rate Order at PP 8, 63 (R.151, JA___-JA___). PJM estimated in the record below that subtracting the expected revenues would reduce, for most resource types, to $0/MWh the value above which offers would be impermissible absent unit-specific review. *See* PJM Initial Brief at 12 (R.114, JA___) ("[T]he default gross [cost rate] for the different technology classes, which do not include consideration of Capacity Performance risk, will likely result in a Net [cost rate] of zero or very close to zero for most

technology classes and resources." (footnote omitted)). A default Offer Cap of $0/MWh effectively eliminates any allowance for risk and creates an obligation without a concurrent opportunity to earn a fair return on a resource owner's investment and costs of operating a unit. In short, FERC's orders below changed the approach for default rates from one that allowed sellers to price into their capacity offers their estimated risks of committing capacity to one that left no room for recovery of quantifiable costs from any such risks.

Third, FERC's orders shunt offers from essentially all capacity sellers to the unit-specific review process, a consequence of the fact that all existing sellers fail the Tariff's market power screening tests. *See* PJM Initial Brief at 11 n.21 (R.114, JA___); Rehearing Order, dissent op. (Commissioner Danly) at P 4 & n.5 (R.218, JA___). FERC itself characterized its approach as "eliminat[ing] the default offer cap in favor of [a] unit-specific review of offers from sellers that have been shown to have market power." Rehearing Order at P 22 (R.218, JA___). But the Tariff's unit-specific review rules establish that only one type of risk is fair game in that review—the risk a seller may have to pay non-performance charges. *See* Tariff, Attachment DD, section 6.8. Creating a default Offer Cap that does not allow for the recovery of *any* of the risks of taking on a capacity obligation and then turning around and allowing *only one* form of risk to be recovered in a unit-specific review process underscores the arbitrary nature of FERC's remedy imposed on the market

in this case. FERC arbitrarily crafted contradictory remedies (one for the default Offer Cap and a different one for unit-specific reviews), neither of which allows for the opportunity for the recovery of the full range of demonstrated risks of taking on a capacity commitment.

In short, the net effect of FERC's orders was to shift sellers from the prior offer-capping approach that allowed them to price capacity commitment risks in their offers into a new offer-capping approach that allows them to include only the risk of paying non-performance charges.

E. FERC Failed to Respond Meaningfully to the Reasonable Objections in the Record that the Change in Offer-Capping Rules Prevents Sellers from Basing Capacity Offers on the Quantifiable Risks of Undertaking a Forward Capacity Commitment.

1. FERC's Adopted Change to the Offer-Capping Rules Lacked Record Support.

FERC's dramatic departure from an offer-capping approach with a default rate sufficient to encompass a range of seller risks and costs to an approach that requires virtually all sellers to undergo unit-specific review lacked support. Dozens of parties proposed and supported various replacement default Offer Caps. The pleadings in the replacement-rate phase of FERC's proceeding were primarily focused on default Offer Cap proposals submitted by PJM, *see* PJM Initial Brief at 3-5 (R.114, JA___-JA___), by a group of state-level consumer advocates, *see* Joint Consumer Advocates Reply Brief at 20-22 (R.125, JA___-JA___), and by various

generation owners. *See, e.g.*, Indicated Suppliers Initial Brief at 12-15 (R.118, JA___-JA___); Initial Brief of Exelon Corporation and the PSEG Companies, Docket Nos. EL19-47-000, et al., at 13 (May 3, 2021) (R.120, JA___). None of those proposals would have reduced the default Offer Cap to the avoided-cost level FERC ultimately ordered.

The lone record support for FERC's adopted default Offer Cap approach came from the Market Monitor, but even the Market Monitor did not fully describe what the default Offer Cap levels actually would be. *See* Brief of the Independent Market Monitor for PJM, Docket Nos. EL19-47-000, et al., at 3-5 (Apr. 28, 2021) (R.111, JA___-JA___). Indeed, even the Joint Consumer Advocates, charged with arguing for the interests of end-use customers, dismissed the Market Monitor's default Offer Cap proposal because it lacked detail on the Offer Cap levels. *See* Joint Consumer Advocates Reply Brief at 19 (R.125, JA___); *see also id.* at Exhibit A, Affidavit of James F. Wilson ¶ 66 (R.125, JA___) (explaining that the record contains "insufficient information . . . available to assess [the Market Monitor's] approach"). Multiple other parties, including Petitioners and PJM, supplied record evidence demonstrating that such an approach would be unjust and unreasonable. *See, e.g.*, PJM Initial Brief at 11-15 (R.114, JA___-JA___); PJM Reply Brief at 5-7 (R.126, JA___-JA___); Indicated Suppliers Initial Brief at 15-19 (R.118, JA___-JA___); Indicated Suppliers Initial Brief, Attachment A, Affidavit of Roy J. Shanker, Ph.D.

¶¶ 36-37 (R.118, JA___-JA___); Indicated Suppliers Initial Brief, Attachment B, Affidavit of William Stokes ¶¶ 6-14 (R.118, JA___-JA___); Indicated Suppliers Reply Brief at 7-14, 18-21 (R.129, JA___-JA___, JA___-JA___); Indicated Suppliers Reply Brief, Attachment A, Reply Affidavit of Roy J. Shanker, Ph.D ¶¶ 31-40 (R.129, JA___-JA___).

Yet, in the face of this opposition, FERC veered even further from the record, and adopted numeric values not found in any of the parties' briefs. Specifically, FERC ordered the adoption of numeric values that had the result of setting the default *minimum* level for a capacity offer exactly the same as the default *maximum* level for a capacity offer. *See* Replacement Rate Order at P 63 & Appendix A (revisions to Tariff, Attachment DD, section 6.4(a)) (R.151, JA___-JA___, JA___-JA___). Those are the bare minimum cost levels below which an offer is presumed to be uncompetitively *low*, *see* Replacement Rate Order at P 63 & n.116 (R.151, JA___-JA___) (citing *Calpine Corp. v. PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,061, at P 201 (2020) (accepting gross cost rates for existing resources for use in setting the "default offer price floors" for existing resources subject to buyer-side market power mitigation)), and thus do not include any seller-estimated costs from the risks of taking on a capacity commitment.

This mismatch between the record support for offer-capping rules that recognize and accommodate seller risks and the record support for the adopted rules

which largely exclude such risks, is highlighted by the repeated failures of the orders on review to engage meaningfully with the evidence and arguments showing a need to allow such risks to be included in capacity offers, as discussed in the following two subsections of this brief.

2. As Petitioners Show in Their Brief, FERC Failed to Engage with Their Reasonable Objections that the Offer-Capping Changes Foreclosed Seller's Ability to Submit Capacity Offers that Would Compensate Them for the Risks of Agreeing to Commit Capacity in a Future Delivery Year.

In their brief, Petitioners detail: (i) the capacity commitment risks of concern; (ii) extensive evidence that their offers reasonably should reflect those quantifiable risks, Brief of Petitioners at 33-37; (iii) each FERC rationale for declining to allow sellers to include such risks in their capacity offers, *id.* at 38-44; and (iv) how each of those rationales is unreasoned and unsupported, *id.* PJM will not repeat those arguments here, beyond noting Petitioners' summary that "FERC's decision to set a cost-based offer cap, without any regard for numerous risks that suppliers undertake, is inadequately explained and inconsistent with both the basic requirements for agency decision-making and with the [Federal Power Act]." *Id.* at 44.

3. PJM Likewise Raised Reasonable Objections to FERC's Revised Offer-Capping Approach that Effectively Foreclosed Including Other Risks in Capacity Offers.

In its submitted evidence, PJM similarly pointed to legitimate risks capacity sellers face, and explained that FERC's replacement rate for the Offer Cap should

follow FERC's guidance in *ISO New England, Inc.*, 174 FERC ¶ 61,162 (2021) ("*ISO New England*"), and avoid administrative interference in the market.

Yet FERC failed to engage meaningfully with the argument that the unit-specific approach should not be blind to relevant risks of undertaking a capacity obligation beyond those associated with non-performance charges. FERC stated that it rejected including such risk-based costs in the unit-specific offer review adopted as part of 2015 capacity market reforms, Replacement Rate Order at P 72 (R.151, JA___); *see also* Rehearing Order at PP 48-51 (R.218, JA___-JA___), but FERC needed to do more, given that its central action in the orders below was to order a replacement rate that excluded relevant risks. FERC's response thus fails to engage with objections explaining that other risks should be considered in light of the change in the default Offer Cap to "zero or very close to zero." PJM Initial Brief at 12 (R.114, JA___); *see PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) ("[A]n agency's failure to response meaningfully to objections raised by a party renders its decision arbitrary and capricious." (internal quotation marks and citation omitted)); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ("Unless [FERC] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.").

Mitigating offers to ensure they reflect a resource's actual costs is a well-accepted form of market power mitigation. *Advanced Energy Mgmt. All. v. FERC*,

860 F.3d at 668 ("Market mitigation measures do not need to protect consumers from the actual costs of capacity"). However, unless all costs are considered, such an administrative exercise cannot reflect actual costs. Capping offers in a manner which categorically disallows recovery of risks for taking on the capacity obligation is unreasonable over-mitigation, and over-mitigating resources can lead to suppressed market prices. *See* PJM Reply Brief at 5 (R.126, JA___) ("[T]he risk of the default [Offer Cap] being set too low results in over-mitigation and suppressed market clearing prices.").

FERC's action is contrary to its 2021 decision finding just and reasonable for the New England capacity market an Offer Cap approach that "reasonably balances the objectives of protecting against the exercise of market power and minimizing interference with competitive bidding." *ISO New England* at P 19. While PJM asked FERC to engage in the same balancing, *see* Request for Clarification and Request for Rehearing of PJM Interconnection, L.L.C., Docket Nos. EL19-47-001, et al., at 7 (Oct. 4, 2021) (R.185, JA___), FERC declined. Rehearing Order at P 84 (R.218, JA___) ("We also disagree with PJM that the [Replacement Rate] Order failed to balance concerns about market power with the need to preserve competitive bidding."). Further, FERC failed to distinguish the two approaches and failed to explain why its approach in the orders on review was consistent with the objective to "minimiz[e] interference with competitive bidding." *ISO New England* at P 19.

The approach falls short of the requirements of the Administrative Procedure Act. *See New Eng. Power Generators Ass'n v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) ("Although case-by-case adjudication sometimes results in decisions that seem at odds but can be distinguished on their facts, it is the agency's responsibility to provide a reasoned explanation of why those facts matter."); *W. Deptford Energy v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently . . . .'" (alteration in original) (quoting *ANR Pipeline Co v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995))); *cf. Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 47 (2015) (While FERC "allow[s] for each region to develop rules to address the differing concerns of the regions[,] [t]hat is not to say, however, that principles underlying market design in one region are not applicable to another.").

In order to avoid over-mitigation and ensure appropriate market outcomes, sellers must be allowed to price the clear risks they take on in being designated as a committed capacity resource. However, the replacement default Offer Cap set by FERC in the underlying proceeding does not incorporate any costs of such risks, while the unit-specific Offer Cap allows sellers to include only the risk associated with non-performance charges. Thus, FERC's change in the default Offer Cap requires revisiting the components allowed to constitute a unit-specific Offer Cap.

See PJM Reply Brief at 7 (R.126, JA___) ("Sellers should be given the opportunity to include all relevant risk costs in calculating a unit-specific [Offer Cap] beyond simply the non-performance charges for committed Capacity Resources."). FERC's mere recitation of its prior findings, made in a different context, is not reasoned decision-making. *See PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d at 210 (remanding back to FERC where "the order does nothing more than make the quoted statement; it does not suggest that—let alone explain how—it was a response to PSEG's . . . arguments").

CONCLUSION

For the reasons presented here and in Argument Section II of the Brief of Petitioners, the petition for review should be granted as to Issue No. 2 of Petitioners' "Issues Presented for Review."

Respectfully submitted,

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IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

Vistra Corp., et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Nos. 21-1214, et al.
	)	
Federal Energy Regulatory Commission,	)	
	)	
Respondent.	)	
_____	)	

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Rules 32(a)(7)(B) and 32(g)(1) of the Federal Rules of Appellate Procedure, the undersigned certifies that the foregoing brief complies with the applicable type-volume limitations. The brief was prepared using a proportionally spaced type (Times New Roman, 14 point) and contains 4,061 words, not including the cover page, corporate disclosure statement, tables of contents and authorities, the glossary, the certificates of counsel, the signature block, and proof of service. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2016) used to prepare the brief.

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June 21, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system and unregistered participants will be served via U.S. Mail.

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