Nos. 21-3068, 21-3205 & 21-3243 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PJM POWER PROVIDERS GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT-INTERVENORS PJM INTERCONNECTION, L.L.C. AND SUPPORTING STAKEHOLDERS

Paul M. Flynn
Ryan J. Collins
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005
202-393-1200
flynn@wrightlaw.com
collins@wrightlaw.com

Chenchao Lu
Assistant General Counsel
PJM Interconnection, L.L.C.
2750 Monroe Blvd.
Audubon, PA 19403
610-666-2255
Chenchao.Lu@pjm.com

Counsel for PJM Interconnection, L.L.C.

Matthew E. Price
Zachary B. Cohen
Kevin J. Kennedy
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
202-639-6000
mprice@jenner.com
zcohen@jenner.com
kkennedy@jenner.com

Counsel for Constellation Energy Corporation and Constellation Energy Generation, LLC

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

Danielle C. Fidler
Earthjustice
1001 G Street, NW, Suite 1000
Washington, DC 20001
202-667-4500
dfidler@earthjustice.org

Counsel for Sierra Club and Union of Concerned Scientists

Casey A. Roberts
Sierra Club
Environmental Law Program
1536 Wynkoop Street, Suite 200
Denver, CO 80202
303-454-3355
casey.roberts@sierraclub.org

Megan Wachspress
Sierra Club
Environmental Law Program
2101 Webster St., 13th floor
Oakland, CA 94612
650-746-8504
megan.wachspress@sierraclub.org

Counsel for Sierra Club

Caroline Reiser
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
202-717-8341
creiser@nrdc.org

Counsel for Natural Resources Defense Council

Gerit F. Hull
Deputy General Counsel
for Regulatory Affairs
American Municipal Power, Inc.
1111 Schrock Rd, Suite 100
Columbus, OH 43229
614-540-0852
ghull@amppartners.org

Counsel for American Municipal Power, Inc.

Cynthia S. Bogorad
Lauren L. Springett
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
202-879-4000
cynthia.bogorad@spiegelmcd.com
lauren.springett@spiegelmcd.com

Counsel for Buckeye Power, Inc.

Jeffery S. Dennis
Advanced Energy Economy
1010 Vermont Ave, N.W.
Washington, D.C. 20005
202-380-1950
jdennis@aee.net

Counsel for Advanced Energy Economy

Adrienne E. Clair
Rebecca L. Shelton
Jecoliah R. Williams
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-1167
(202) 585-6900
aclair@thompsoncoburn.com
rshelton@thompsoncoburn.com
jwilliams@thompsoncoburn.com

Counsel for Old Dominion Cooperative Electric

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
1200 G. Street, NW, Suite 800
Washington, D.C. 20005
202-409-4170
bweishaar@mcneeslaw.com

Kenneth R. Stark
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17101
717-237-5378
kstark@mcneeslaw.com

Counsel for PJM Industrial Customer Coalition

Adrienne E. Clair
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-1167
202-585-6900
aclair@thompsoncoburn.com

Counsel for the National Rural Electric Cooperative Association

Daniel E. Frank
Allison E. Speaker
Eversheds Sutherland (US) LLP
700 Sixth St., N.W., Suite 700
Washington, DC 20001-3980
202-383-0838
DanielFrank@eversheds-sutherland.com
AllisonSpeaker@eversheds-sutherland.com

Counsel for East Kentucky Power Cooperative, Inc.

Gary R. Studen
PSEG
80 Park Plaza – T10
Newark, NJ 07102
973-430-7150
gary.studen@pseg.com

Counsel for PSE&G, PSEG Power, and PSEG ER&T

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Fed. R. App. P. 26.1 and Third Circuit R. 26.1.1, Respondent-Intervenors state as follows:

Advanced Energy Economy is a not-for-profit business association dedicated to making energy secure, clean, and affordable. AEE does not have any parent companies or issue stock, and no publicly held company has a 10% or greater ownership interest in AEE.

American Municipal Power, Inc. is a non-profit Ohio corporation organized in 1971. AMP has 133 members, including 132 member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland, and the Delaware Municipal Electric Corporation, a joint action agency with nine members that is headquartered in Smyrna, Delaware. American Municipal Power provides wholesale energy supply and related services to its members. American Municipal Power issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

Buckeye Power, Inc. is a non-profit generation and transmission cooperative, owned and governed by its member distribution

cooperatives, which are in turn each (predominantly Ohio) non-profit cooperatives owned by their retail member-consumers. Buckeye Power, Inc. has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in Buckeye Power, Inc.

Constellation Energy Corporation is a publicly traded company. No publicly traded company owns 10 percent or more of its stock; however, Vanguard, which is not publicly traded, owns more than 10 percent of its stock. Through Constellation Energy Generation, LLC, Constellation Energy Corporation owns in whole or in part 18 nuclear generation units in the PJM region, providing more than 18,000 MW of zero-emissions capacity. Several of these nuclear units in Illinois and New Jersey receive support through state programs.

Constellation Energy Generation, LLC is a wholly owned subsidiary of Constellation Energy Corporation, a publicly traded company. No publicly traded company owns 10 percent or more of Constellation Energy Corporation's stock; however, Vanguard, which is not publicly traded, owns more than 10 percent of its stock. Constellation Energy Generation, LLC, directly or indirectly, owns in whole or in part 18 nuclear generation units in the PJM region, providing more than

18,000 MW of zero-emissions capacity. Several of these nuclear units in Illinois and New Jersey receive support through state programs.

East Kentucky Power Cooperative, Inc. ("EKPC") is a not-for-profit generation and transmission cooperative that provides wholesale electric power to 16 owner-member cooperatives in Kentucky. EKPC's principal place of business is in Winchester, Kentucky. EKPC is owned by its 16 retail electric distribution cooperative members. None of EKPC's members owns 10% or more of EKPC.

National Rural Electric Cooperative Association ("NRECA") is the national trade association representing the nation's nearly 900 local, not-for-profit electric cooperatives. It has no parent company, no outstanding shares or debt securities in the hands of the public, and no publicly owned company has a 10% or greater ownership interest in NRECA.

Natural Resources Defense Council, Inc. ("NRDC") is a national non-profit corporation with members in all fifty United States dedicated to safeguarding the Earth, including by achieving energy solutions that accelerate the use of renewable energy and ensure that clean energy is affordable and accessible to all. NRDC has no parent

companies, subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in NRDC.

Old Dominion Electric Cooperative ("ODEC") is a not-for-profit power supply electric cooperative, organized and operating under the laws of the Commonwealth of Virginia. ODEC supplies capacity and energy to its eleven electric member distribution cooperatives, which are located within the control area of PJM. None of ODEC's members owns 10% or more of ODEC.

PJM Industrial Customer Coalition ("PJMICC") is an *ad hoc* association of large industrial and commercial end-users of electricity in the PJM Interconnection, L.L.C., region operated for the purpose of representing the interests of large energy consumers. PJMICC is not a corporation. PJMICC does not issue securities to the public and is not owned by any publicly held company.

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 (2021). 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.

Public Service Electric and Gas Company ("PSE&G") and PSEG Power LLC ("PSEG Power") are each wholly-owned, direct subsidiaries of Public Service Enterprise Group Incorporated ("PSEG"). PSEG is the only publicly-held corporation that owns 10% or more of PSE&G's common stock and PSEG Power's limited liability company interests. **PSEG Energy Resources & Trade LLC ("PSEG ER&T")** is a wholly-owned, direct subsidiary of PSEG Power and an indirect subsidiary of PSEG. PSEG is the only publicly-held corporation

[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 are expected.

that indirectly owns (i.e., via its 100% ownership of PSEG Power) more than 10% of PSEG ER&T's limited liability company interests.

Sierra Club is a national organization with more than 60 chapters; consistent with Sierra Club's purpose to explore, enjoy, and protect the wild places of the earth, the organization advocates for wholesale market designs and rules that facilitate fair participation by renewable energy resources, demand-side management, and storage and against rules that increase consumer cost for the benefit of fossil fuel generation. Sierra Club has no parent companies, subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in Sierra Club.

Union of Concerned Scientists ("UCS") is a science-based environmental nonprofit organization whose member scientists provide technical analyses and advocate for the maximization of renewable energy resources and non-generation supply such as demand response in ways that keep electrical energy reliable and affordable to all. UCS has no parent companies, subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in UCS.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTS..i

TABLE OF AUTHORITIES..x

INTRODUCTION..1

STATEMENT OF RELATED CASES AND PROCEEDINGS.................3

STATEMENT OF THE CASE 3

I. The PJM Capacity Market..3

II. Evolution of the Minimum Offer Price Rule...................................6

III. PJM's Focused MOPR Filing 12

SUMMARY OF ARGUMENT..21

ARGUMENT 24

I. Section 205(g) Allows Review of the Merits of the Acceptance Order, Based on the Joint Statement's Reasoning........................24

A. A Prior Section 206 Ruling Does Not Limit a Utility's Rights Under Section 205(d)...27

B. Petitioners' Proposed Interpretation of Section 205(g) Produces Absurd Results. 30

C. Under Section 205(g), Commissioner Statements Supply the Reasoning For and Against the Commission's Acceptance Order, to Facilitate Judicial Review on the Merits. 32

1. The Text of Section 205(g) Refutes the Petitioners' Position..33

2. The Legislative History Confirms That Petitioners' Position Is Erroneous. 37

3. Petitioners' Contrary Arguments Are Without Merit. 40

II. On the Merits, the Acceptance Order Is Not Arbitrary or Capricious. 42

A. Standard of Review 42

B. The Joint Statement Provides a Reasoned Explanation for the Acceptance Order. 44

1. The Joint Statement Justified a Return to the Commission's Longstanding MOPR Policy. 45

2. Nothing Compels FERC to Apply the MOPR to All Resources Receiving State Support. 50

C. The Focused MOPR is a Just and Reasonable Tool to Prevent the Exercise of Buyer-Side Market Power. 56

1. The Focused MOPR Will Adequately Prevent the Exercise of Buyer-Side Market Power. 57

2. PJM's Conditioned State Support Test is a Just and Reasonable Tool to Mitigate Unlawful State Programs. 64

3. The Exception for Self-Supply, Energy Efficiency, and Demand Resources Is Not Unjust or Unreasonable. 67

D. The Focused MOPR Achieves the Central Aim of the Capacity Market to Provide Resource Adequacy at Least Cost. 72

III. Vacatur of the Tariff Is Not an Available Remedy. 74

CONCLUSION 77

TABLE OF AUTHORITIES

CASES

Atlantic City Electric Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002) 21, 25, 27, 28, 29

Blumenthal v. FERC, 552 F.3d 875 (D.C. Cir. 2009) 30

Burlington Northern, Inc. v. United States, 459 U.S. 131 (1982) 24, 75

California Department of Water Resources v. FERC, 306 F.3d 1121 (2002) 68

City of Arlington v. FCC, 569 U.S. 290 (2013) 24

Coalition for Competitive Electricity v. Zibelman, 906 F.3d 41 (2d Cir. 2018) 9, 53

Delaware Riverkeeper Network v. FERC, No. 20-1206, __ F4th __, 2022 WL 3036392 (D.C. Cir. Aug. 2, 2022) 41

Delaware Division of Public Advocate v. FERC, 3 F.4th 461 (D.C. Cir. 2021) 75

Democratic Congressional Campaign Committee v. Federal Election Commission, 831 F.2d 1131 (D.C. Cir. 1987) 34-35

Electric Power Supply Ass'n v. Star, 904 F.3d 518 (7th Cir. 2018) 8, 9

FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) 47

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 40

FEC v. National Republican Senatorial Committee, 966 F.2d 1471 (D.C. Cir. 1992) 35, 36

FERC v. Electric Power Supply Ass'n, 577 U.S. 260 (2016) 4, 9, 53

FPC v. Conway Corp., 426 U.S. 271 (1976) 30

Gozlon-Peretz v. United States, 498 U.S. 395 (1991) 40

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 32

Grocery Manufacturers Ass'n v. EPA, 693 F.3d 169 (D.C. Cir. 2012) 68

Hughes v. Talen Energy Marketing, LLC, 578 U.S. 150 (2016) 4, 5, 7, 53

Illinois Commerce Commission v. FERC, No. 20-1645 (7th Cir.) 12, 47

Laborers' International Union of North America, AFL-CIO v. Foster Wheeler Energy Corp., 26 F.3d 375 (3d Cir. 1994) 60

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) 36

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 44

New England Power Generators Ass'n v. FERC, 757 F.3d 283 (D.C. Cir. 2014) 5, 54

New Jersey Board of Public Utilities v. FERC, 744 F.3d 74 (3d Cir. 2014)...2, 3, 4, 6, 7, 8, 21, 27, 42, 45, 46, 47, 51, 54, 61, 71, 72

NRG Power Marketing, LLC v. FERC, 862 F.3d 108 (D.C. Cir. 2017) 46

In re NTE Connecticut, LLC, 26 F.4th 980 (D.C. Cir. 2022) 65

PPL Energyplus, LLC v. Solomon, 766 F.3d 241 (3d Cir. 2014) 4, 5, 9, 53

Public Citizen, Inc. v. FERC, 839 F.3d 1165 (D.C. Cir. 2016) 25, 31, 36, 37, 41, 76

Radio-Television News Directors Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999) 35, 43

In re Radio-Television News Directors Ass'n, 159 F.3d 636 (D.C. Cir. 1998) 36

Seila Law, LLC v. CFPB, 140 S. Ct. 2183 (2020) 41

Southern Railway Co. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979) 76

Southwestern Pennsylvania Growth Alliance v. Browner, 121 F.3d 106 (3d Cir. 1997) 67-68

United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division, 358 U.S. 103 (1958) 24-25

United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) 28

Western Coal Traffic League v. STB, 998 F.3d 945 (D.C. Cir. 2021) 37, 76

STATUTES

16 U.S.C. § 824(b) 9, 53, 56

16 U.S.C. § 824d 1

16 U.S.C. § 824d(d) 12, 19, 24, 25

16 U.S.C. § 824d(e) 75

16 U.S.C. § 824d(g) .... 1 ,2, 19, 22, 31, 33, 34, 40

16 U.S.C. § 825*l*(a) 19

16 U.S.C. § 825*l*(b) 2, 33, 34

16 U.S.C. § 825o-1(b) 17, 62

42 U.S.C. § 7171(e) 40

America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, 132 Stat. 3765 39

N.J.S.A. 48:3-87.3 *et seq.* 8

LEGISLATIVE MATERIALS

164 Cong. Rec. H8227 (daily ed. Sept. 13, 2018) 33, 37, 38

Fair RATES Act, S. 186, 115th Cong., 1st Sess. (2017) (as introduced in Senate Jan. 23, 2017), https://www.congress.gov/bill/115th-congress/senate-bill/186/text/is 38

Fair RATES Act, S. 186, 115th Cong., 2d Sess. (2018) (as reported with amendment June 18, 2018), https://www.congress.gov/bill/115th-congress/senate-bill/186/text/rs 39

Hearing on S. 186 et al., Before the Subcomm. on Energy of the S. Comm. on Energy and Natural Resources, 115th Cong. (2017) 39

S. Rep. No. 115-278 (2018) 39

ADMINISTRATIVE RULINGS

Calpine Corp. v. PJM Interconnection, L.L.C., 169 FERC ¶ 61,239 (2019) 11, 12, 49

Calpine Corp. v. PJM Interconnection, L.L.C., 171 FERC ¶ 61,035 (2020) 12

ISO New England Inc., 161 FERC ¶ 61,031 P 25 (2017) 75

ISO New England Inc., 179 FERC ¶ 61,139, 45 (2022) 20, 49

New York Independent System Operator, Inc., 179 FERC ¶ 61,102 (2022) 20, 49

New York State Public Service Commission v. New York Independent System Operator, Inc., 158 FERC ¶ 61,137 (2017) 9

PJM Interconnection, L.L.C., 135 FERC ¶ 61,022 (2011), *aff'd*, *New Jersey Board of Public Utilities v. FERC*, 744 F.3d 74 (3d Cir. 2014) 8

OTHER AUTHORITIES

18 C.F.R. § 35.41(b) 17, 62

18 C.F.R. § 385.211 67

18 C.F.R. § 385.214 67

Glossary, FERC, https://www.ferc.gov/about/what-ferc/about/glossary (last updated Aug. 31, 2020) 5

PJM, *2023/2024 RPM Base Residual Auction Results*, https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2023-2024/2023-2024-base-residual-auction-report.ashx 74

INTRODUCTION

Under Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, a public utility may submit a revision to its tariff at any time. The Federal Energy Regulatory Commission ("FERC" or "the Commission") may investigate whether the tariff change is just and reasonable and can suspend the revision. However, if FERC does not act within a specified time, the revised tariff takes effect by operation of law.

In 2018, Congress amended the FPA to facilitate judicial review when FERC's inaction results from a deadlocked vote or lack of quorum. In those circumstances, the new provision, Section 205(g), states that FERC's failure to act "shall be considered to be an order … accepting the [tariff] change" for purposes of judicial review. 16 U.S.C. § 824d(g)(1)(A). Section 205(g) also requires each Commissioner to include in the Commission record a written statement explaining their views of the change. These statements allow the court to conduct a meaningful review of the "order … accepting the change." *Id.*

That is what occurred here. PJM Interconnection, L.L.C. ("PJM") filed a revised tariff pursuant to Section 205(d) that resulted in a deadlocked vote at the Commission. The Commission issued a notice

stating that the revised tariff became effective by operation of law ("the Acceptance Order"). Chairman Glick and Commissioner Clements jointly issued an 86-page statement (R.125, the "Joint Statement," JA__-__) providing their reasoning for accepting PJM's tariff filing.

Petitioners ask this Court to ignore that thoroughly reasoned explanation. They theorize that Congress—despite deeming inaction to constitute "an order … *accepting* the [rate] change," 16 U.S.C. § 824d(g)(1)(A) (emphasis added), requiring a written rationale as part of the record, and providing for judicial review under a provision that allows courts to "affirm[]" a Commission order, *id*. § 825*l*(b)—instead created a convoluted process that must result in the automatic *vacatur* of that order and *rejection* of the underlying rate change. Petitioners' contention turns the statutory text upside down. It is also belied by the legislative history. If Congress wanted a deadlocked vote to result in the rejection of a rate change, it would have said so. Instead, it directed the opposite.

Once the Petitioners' flawed interpretation of Section 205(g) is swept away, this becomes an ordinary agency review case in which the Court affords FERC "broad deference." *N.J. Bd. of Pub. Utils v. FERC*, 744 F.3d 74, 94 (3d Cir. 2014) ("*NJBPU*"). The Joint Statement provides

a comprehensive, reasoned explanation why PJM's new tariff is just and reasonable, and not unduly discriminatory. The Joint Statement also considered the minimal reliance interests in the existing rule, which had been in place for only two years and one capacity auction. It carefully considered Petitioners' arguments and found them to lack merit. The Acceptance Order should be affirmed.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Intervenors adopt FERC's statement of related cases and proceedings.

STATEMENT OF THE CASE

I. The PJM Capacity Market

PJM operates a regional transmission system governing "the transmission of electricity to fifty million consumers in thirteen different states and the District of Columbia." *NJBPU*, 744 F.3d at 82.

PJM primarily uses wholesale markets to procure the energy and services needed to operate the grid. Electricity itself is bought and sold in PJM's short-term wholesale energy market. Because electricity "cannot be stored effectively," energy market "[s]uppliers must generate—every day, hour, and minute—the exact amount of power

necessary to meet demand…." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 268 (2016) ("*EPSA*").

To ensure sufficient supply even at times of peak demand, PJM also operates a capacity market. "'Capacity' is not electricity itself but the ability to produce it when necessary." *NJBPU*, 744 F.3d at 82 (quotation marks omitted). The capacity market pays participants for a promise to produce electricity when called by PJM to do so, thereby ensuring that "there are enough … generators connected to the transmission grid for the system to function at peak load." *Id.*

PJM administers an auction to procure capacity "for a one-year period beginning three years in the future." *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 251 (3d Cir. 2014). PJM determines the necessary quantity of capacity, and "[o]wners of capacity … bid to sell that capacity to PJM at proposed rates." *Hughes v. Talen Energy Mktg. LLC*, 578 U.S. 150, 155-56 (2016). The auction proceeds as follows:

- "[Sellers] propose an amount of capacity they will offer to PJM … and the price at which they will offer that capacity." *PPL*, 766 F.3d at 251.
- "PJM orders these bids from lowest in price to highest in price." *Id.*

- “PJM then accepts bids, starting with the lowest-price bid, until the cumulative capacity it has accepted satisfies PJM's auction goal. At that point, PJM rejects all other bids.” *Id.*
- “The price of the last accepted bid becomes the price PJM will pay for all accepted auction bids.” *Id.* Thus, all capacity sellers receive the same market price.
- PJM bills capacity buyers (such as local utilities) for their respective share of the capacity PJM has procured through the auction.

“FERC extensively regulates the structure of the PJM capacity auction to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price.” *Hughes*, 578 U.S. at 157. To be just and reasonable, capacity market rules must, among other things, prevent anticompetitive exercises of market power. *See New England Power Generators Ass’n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014) (“*New England*”).[2]

---

[2] “Market Power” is “[t]he ability of any market trader with a large market share to significantly control or affect price…” *Glossary*, FERC, https://www.ferc.gov/about/what-ferc/about/glossary (last updated Aug. 31, 2020).

II. Evolution of the Minimum Offer Price Rule

A. This appeal concerns a capacity market rule known as the Minimum Offer Price Rule ("MOPR"), which sets a floor price below which certain generators are not permitted to offer. Ordinarily, competitive pressures lead generators to offer as low as they can. The MOPR, however, was adopted to prevent market manipulation through the use of "buyer-side market power." *NJBPU*, 744 F.3d at 88-89. Theoretically,[3] a net buyer of capacity—a market participant that owns some generation capacity but buys more capacity in the market than it supplies—could strategically offer its capacity at an economic loss to "so depress the capacity price that [it] would more than recover any loss on the uneconomic capacity offer through the savings realized by reducing its total cost of capacity," via a lower market price paid for its capacity purchases overall. Joint Stmt., P 6, JA__. The depressed market price would not reflect the true cost of supplying capacity in the PJM region. It therefore would fail to send the proper market signal both for potential future capacity suppliers as well as for buyers. *Id.*, P 8, JA__.

[3] Petitioners do not point to any actual exercise of buyer-side market power in the PJM capacity market.

To thwart the potential exercise of buyer-side market power, the MOPR requires certain generators "to bid capacity into the auction at or above a price specified by PJM, unless those generators can prove that their actual costs fall below the [specified] price." *Hughes*, 578 U.S. at 157. This administratively determined offer floor "prevents an uneconomically low capacity offer from a net buyer from depressing the capacity price below the competitive level…." Joint Stmt., P 7, JA__.

The MOPR was first implemented in 2006. Since then, PJM and FERC have periodically refined the rules to "balanc[e] the need to mitigate the exercise of buyer-side market power against the harms that can come from over-mitigation." *See id.*, P 8, JA__ (reviewing history). In particular, if the MOPR is applied too broadly and captures suppliers not exercising buyer-side market power, the MOPR will interfere with competition and result in unnecessary price increases for customers. *Id.*, P 7, JA__.

Until 2019, FERC struck the balance by applying the MOPR *only* to new natural gas plants, which PJM and FERC considered to be the resource type most likely to be used to exercise buyer-side market power. *See NJBPU*, 744 F.3d at 106; *accord* State Petrs. Br. 8 ("The original

MOPR … applied to all new natural gas-fired resources, and only such units.”). By contrast, PJM and FERC considered *existing* plants (including nuclear and coal), as well as *new renewable-energy plants* (such as wind and solar), to be poor candidates for exercising buyer-side market power. Because the MOPR was not applied to these plants, they were free to submit offers as low they wished. *NJBPU*, 744 F.3d at 90, 106; *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, P 152 (2011), *aff'd*, *NJBPU*, 744 F.3d 74.[4]

During this same period, states within the PJM region increasingly sought to promote energy policy goals through support for certain types of generation—particularly renewable and nuclear. R.2, PJM Transmittal Letter (“PJM Ltr.”), 7 & n.15, JA__. State programs supporting renewable-energy generation became widespread in the early 2000s, and by 2018 Illinois and New Jersey had each adopted programs to preserve certain existing nuclear power plants. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 521-22 (7th Cir. 2018); N.J.S.A. 48:3-87.3 *et*

[4] Originally, only nuclear, coal, and hydroelectric resources were exempt. PJM subsequently added solar and wind as exempt resources. *NJBPU*, 744 F.3d at 90.

seq. Retail customers in the states enacting such programs ultimately bear the costs on their electric bills.

States have authority to adopt these programs under the FPA, which expressly reserves to states regulatory authority over "the type of generation to be built—wind or solar, gas or coal—and where to build the facility." *PPL*, 766 F.3d at 247, 255; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 56-57 (2d Cir. 2018); *Star*, 904 F.3d at 525; 16 U.S.C. § 824(b)(1). That is so even though these programs will affect prices in federally regulated markets. After all, "[i]t is a fact of economic life" that the state and federal spheres "are not hermetically sealed from each other." *EPSA*, 577 U.S. at 281; *PPL*, 766 F.3d at 255 (holding that "the law of supply-and-demand" does not dictate the line between federal and state authority). As former FERC Chairman Bay concluded, an "idealized vision of markets free from the influence of public policies … does not exist, and it is impossible to mitigate[[5]] our way to its creation." *N.Y. State Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,137 (2017) (Bay, Chairman, concurring at 2).

[5] "Mitigate" is FERC lingo for adjusting suppliers' offers using the MOPR.

State programs supporting certain types of generation are not an exercise of buyer-side market power—indeed, states do not generally buy capacity at all. State programs pursue legitimate policy goals, not market price manipulation. And through 2019, the MOPR was not applied to generators receiving compensation through these policies.

When these state-supported generators formulated their capacity offers, they presumably accounted for all revenues they expected to receive—including those associated with state programs—in determining how much revenue they needed to receive from the capacity market to be viable. Thus, the revenue from the state programs potentially allowed them to offer capacity at a lower price. Such offers were not strategic below-cost bids submitted by net buyers seeking to reduce their power purchase costs, and thus bore none of the hallmarks of buyer-side market power. Rather, these offers represented the actual cost of supplying capacity after accounting for revenue resulting from the state programs.

In sum, from 2006, when the capacity market was first formed, through 2019, the MOPR was not applied to any existing plants, or to any

new plants other than natural gas plants, regardless of whether the plant received revenues pursuant to a state policy.

B. In December 2019, invoking Section 206 of the FPA, FERC instituted a dramatic policy shift that, as the State Petitioners acknowledge, "greatly expanded the scope of the MOPR." State Petrs. Br. 12. In this new rule, appropriately dubbed "the Expanded MOPR," FERC for the first time applied the MOPR to *all* "new and existing capacity resources that receive, or are entitled to receive, a State Subsidy…." *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239, PP 37, 50, 67 (2019) ("December 2019 Order"). Thus, any capacity supplier receiving compensation pursuant to a state program would now be subjected to an offer floor that imagined the minimum amount the supplier would need from the capacity market if it were *not* receiving such compensation. By raising their offer prices, the Expanded MOPR made it more difficult for suppliers receiving state-directed compensation to successfully sell their capacity in the auction.

As FERC admitted, the Expanded MOPR was not based on the same buyer-side market power concerns that had driven the rule since 2006. "[T]he expanded MOPR does not focus on buyer-side market power

mitigation, but rather addresses the impact of State Subsidies on the market." *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035, P 45 (2020) (Order on Rehearing) ("April 2020 Order"). The goal, which FERC had never previously pursued in PJM, was to counteract the indirect effect on the capacity market of state policies supporting certain types of generation facilities. *See* December 2019 Order at PP 37-39.

Many parties contested the Expanded MOPR. More than forty parties filed for rehearing and/or clarification. *See* April 2020 Order Appendix. Thereafter, over twenty parties filed petitions for review, which were consolidated before the U.S. Court of Appeals for the Seventh Circuit and remain in abeyance pending the outcome of this appeal. *See Ill. Com. Comm'n v. FERC*, No. 20-1645 (7th Cir.).

III. PJM's Focused MOPR Filing

A. In 2021, PJM submitted a revised tariff under Section 205 to replace the Expanded MOPR with what PJM called the "Focused MOPR." *See* 16 U.S.C. § 824d(d). Although PJM was under no obligation to show that its existing tariff was unjust and unreasonable, it nevertheless provided a lengthy discussion and extensive evidence explaining its

rationale for revisiting the MOPR. *See* PJM Ltr. and Exhibits, JA__-__. PJM offered a four-fold rationale.

First, the Expanded MOPR had not deterred states from enacting energy policies to support particular types of generation. PJM Ltr. 7-8, JA__. Rather, since FERC enacted the Expanded MOPR, "policy support [for renewable and nuclear resources] has only been expanded and extended." PJM Ltr. 7, JA__ (collecting state laws).

Second, against the backdrop of those state programs, the Expanded MOPR distorted the economics of the capacity market. When a resource is not selected in the auction because the MOPR forces it to offer a higher price, "the resource … remains in service," but it is not compensated and "its capacity is not counted towards meeting reliability requirements in PJM." PJM Ltr. 8, JA__. As a result, the capacity market signals that there is less capacity than there really is, "incentiviz[ing] resources to be built that are not needed to maintain reliability." PJM Ltr. 11, JA__. Moreover, competition is squelched, as "the Expanded MOPR has become a mechanism designed primarily for extensive administrative redetermination of supply offers in PJM's capacity auctions" by Petitioner-Intervenor Independent Market Monitor

("Market Monitor"), based on its own judgment about a capacity resource's costs. PJM Ltr. 6, JA__. In short, the Expanded MOPR "produce[s] prices that do not reflect actual supply and demand fundamentals." PJM Ltr. 11, JA__ & Att. D ("Keech Aff.") ¶¶ 11-12, JA__.

Third, the Expanded MOPR unnecessarily increased costs to customers. As noted, state-supported resources that the MOPR prevents from selling capacity still effectively provide capacity to the system. Those resources do not disappear. Yet the capacity market procures a quantity of capacity as though those state-supported resources did not exist, causing customers throughout PJM to pay for capacity that was not in fact needed to ensure reliability. What is more, customers in states that support particular types of generating facilities continue to pay to support those facilities even as they also pay for unneeded capacity from the market—that is, they end up "pay[ing] twice, i.e., for both the [excluded resource] and the resource committed through the auction" in place of the excluded resource. Keech Aff. ¶ 11, JA__.

For example, in Illinois, a nuclear plant that sold zero-emission credits under a state program was subjected to the Expanded MOPR, and as a result failed to sell its capacity for 2022-23. Even though the nuclear

plant remains in operation, and in practice provides capacity to the system, Illinois customers are forced to pay other generators for capacity as though the nuclear plant has disappeared. In all, in this single year, Illinois customers will pay $90 million more as a result of the Expanded MOPR, for capacity that is not actually needed. R.66 ("Exelon Comments") at 12, JA__. This problem, moreover, would grow over time as states supports an ever-increasing quantity of renewable, nuclear, and other preferred resources. *See* PJM Ltr. 7 & n.15, JA__.

Fourth, in part because of these higher prices and interference with states' efforts to regulate the composition of their generation fleets, the Expanded MOPR resulted in major utilities and states reconsidering their participation in PJM's capacity market altogether. For example, prior to PJM's May 2021 capacity auction, a major utility serving Virginia removed its entire footprint from that auction, citing concerns about the impacts of the Expanded MOPR. PJM Ltr. 12-13, JA__. Multiple states, including New Jersey, Maryland, and Illinois, also began reconsidering their participation in PJM's capacity market. *Id.* at 13, JA__. These actions threatened the viability of the market. *Id.*

B. To avoid the harms of the Expanded MOPR, PJM submitted the Focused MOPR to FERC. PJM's filing explained that the goal of the MOPR is not to eliminate the influence of any state policy, but rather to counter attempted exercises of buyer-side market power. PJM Ltr. 20-23, JA__. PJM thus returned to the basic premise of the MOPR from 2006 through 2019.

PJM explained that the Expanded MOPR was not necessary to prevent buyer-side market power, which by definition "occurs when a [seller] has the economic incentive and ability to suppress market prices…." *Id.* 32, JA__. But "there is no reason to suspect that [state policies] represent an exercise of buyer-side market power." *Id.* at 8 (quotation marks omitted), JA__. Rather, most state policies "address externalities that are not accounted for in the PJM wholesale markets" and "can be entirely supported on economic grounds as welfare-enhancing." *Id.* (quotation marks omitted).[6] Allowing resources to

[6] Externalities occur when the private cost or benefit of an activity is different from the society-wide cost or benefit. For example, when fossil-fuel generators produce power, they release harmful pollutants, including carbon dioxide. However, they do not pay for the societal health and environmental costs of these pollutants, which can amount to as much as $16 billion per year *in PJM alone*. R.108, Exelon-PSEG Answer

formulate capacity offers after accounting for state-directed compensation benefits customers, because it permits plants to submit the lowest possible offers that still cover their actual costs. *Id.* at 10, JA__.

To counteract attempted exercises of true buyer-side market power, PJM's tariff filing adopted a two-part test. First, PJM requires sellers to self-certify their compliance with PJM's market rules. *Id.* at 26-32, JA__-__. False responses are subject to FERC enforcement action and civil penalties of up to $1,000,000 per day that a violation continues. *See* 16 U.S.C. § 825o-1(b); 18 C.F.R. § 35.41(b).

In addition, PJM or the Market Monitor can review any offer they suspect reflects the exercise of buyer-side market power. PJM Ltr. 32-35, JA__-__. In deciding whether the offer should be adjusted through the MOPR, PJM and the Market Monitor "would review whether the seller has *the ability* and *incentive* to exercise Buyer-Side Market Power

at 5, JA__ & Att. A, Declaration of Robert Willig ("Willig Decl.") ¶¶ 25, 31, JA__, __. Meanwhile, non-emitting generators like wind, solar, and nuclear produce power without emitting these harmful pollutants. Basic economic principles teach that, without correction, negative externalities drive inefficient resource investments and operations. *Id.* ¶¶ 30 n.28, 31 n.29, 34 n.32, JA__; R.78, Comments of Natural Resources Defense Council *et al.*, Ex. A, Written Testimony of Dr. Kathleen Spees and Dr. Samuel A. Newell at 4, 16-17, JA__ ("Brattle Aff.").

through a Sell Offer for the subject [resource]." *Id.* at 34 (emphasis added), JA__. During this investigation, sellers may "explain and justify why … [their proposed offer] would not be an Exercise of Buyer-Side Market Power." *Id.* (quotation marks omitted). Any seller disagreeing with PJM's determination can seek relief from FERC. *Id.* at 35, JA__.

PJM also established the Conditioned State Support test. *Id.* at 42-47, JA__-__. Once again, sellers must certify that they are not receiving any state support that "is conditioned on either the resource clearing a[capacity] Auction or the seller offering the resource at a specific price level…." *Id.* at 26-27, 42, JA__-__, __. State programs of this type were held to be federally preempted by this Court in *PPL* and by the Supreme Court in *Hughes*. The Conditioned State Support test thus applies the MOPR to prevent a preempted state program from affecting a capacity offer. PJM submits a list of any such state policies to FERC prior to the applicable auction with enough time to build a complete record and for FERC to render a decision regarding application of the MOPR. *Id.* at 44, JA__. To address reliance interests, PJM's filing exempted from the MOPR any resources participating in such state programs already in existence. Of course, nothing in PJM's filing prevented a party aggrieved

by such a program from filing a complaint at FERC or in district court to declare the program preempted or enjoin its operation.

C. After receiving multiple rounds of comments from numerous parties, FERC deadlocked at a 2-2 vote regarding PJM's filing. Because tariff revisions become effective after sixty days "[u]nless the Commission otherwise orders," 16 U.S.C. § 824d(d), the Secretary issued the Acceptance Order stating that PJM's filing would become effective by operation of law. R.122, Sept. 2021 Notice, JA___.

As required by Section 205(g) of the FPA, 16 U.S.C. § 824d(g)(1)(B), Chairman Glick and Commissioner Clements issued the Joint Statement thoroughly explaining why the Focused MOPR is "just and reasonable and not unduly discriminatory or preferential, consistent with the requirements of section 205 of the Federal Power Act." Joint Stmt., P 1, JA__. Commissioners Christie and Danly each issued statements explaining their dissenting views. R.126, JA__ (Christie); R.128, JA___ (Danly).

Several parties moved for rehearing, and after the thirty-day statutory period elapsed, 16 U.S.C. § 825*l*(a), the Secretary issued a

notice that those requests were denied as a matter of law. R.138, JA___ (Nov. 2021 Order).

D. Six months later, in a separate proceeding, with a full complement of commissioners, FERC approved by a majority vote of 4-1 a tariff revision filed by the market operator for New England that exempts most state-supported resources from the MOPR rule in that region. *ISO New England Inc.*, 179 FERC ¶ 61,139, PP 26-29, 45 (2022); *see also N.Y. Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,102, PP 35-43 (2022) (similar for the New York region). As explained in more detail *infra* at 44-50, FERC restored its long-standing view that "market rules seeking to 'hermetically seal[]' ISO-NE's markets from the indirect effects of state policies are not necessary…." *ISO New England*, 179 FERC ¶ 61,139, P 53 (footnote omitted), and specifically disavowed the rationale and policy choice reflected in the December 2019 Order concerning PJM's market. *Id.*, P 53 & n.111. No party to the New England proceeding, including Petitioner Electric Power Supply Association ("EPSA"), sought rehearing of FERC's order.

SUMMARY OF ARGUMENT

I.A. Petitioners make two arguments for why the Court must vacate the Acceptance Order without regard to the merits of the Focused MOPR, but neither is persuasive. Under FPA Section 205(d), "public utilities may change their rates unilaterally…. It is *not* necessary … that FERC find that the previous rate was unjust or unreasonable." *NJBPU*, 744 F.3d at 94 (emphasis in original). That is so regardless of whether the previous rate was set by the utility itself or the Commission, because "nothing in section 206 sanctions denying [utilities] their right to unilaterally file rate and term changes." *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002). Petitioners' contrary argument, asserting that PJM lacked the ability to file the Focused MOPR under Section 205 because FERC had previously established the Expanded MOPR under Section 206, *see* Brief of PJM Power Providers Group ("P3") Br. 30-33, is without support in the statute or case law.

I.B. Equally meritless is Petitioners' contention that when Congress directed the Commission in Section 205(g) to issue an order "accepting" a tariff change in the case of a deadlocked vote, it actually intended to trigger a judicial review process that would lead to the

automatic vacatur of that very order. *See* P3 Br. 33-39; EPSA Br. 16-29. Petitioners' view is contrary to the plain statutory language, as well as the legislative history, and would produce absurd results. In reality, Congress intended to facilitate judicial review on the merits of the approval. Thus, Congress modeled Section 205(g) on the approach taken by the D.C. Circuit when faced with certain agency deadlocks and directed the Commissioners to add statements to "the record of the Commission" explaining their views with respect to the tariff change. 16 U.S.C. § 824d(g). These statements provide the explanation for the Commission's order, which the reviewing court can evaluate on the merits using the familiar standards for agency review.

II. On the merits, FERC's order approving PJM's tariff changes easily survives review. The Joint Statement consists of an 86-page, thorough explanation for why the tariff changes are just and reasonable, and for why a change in Commission policy is warranted. Petitioners characterize the Focused MOPR as a "monumental departure" from past precedent, but in fact the Expanded MOPR was the monumental departure. The Focused MOPR returns to the regulatory approach the

Commission had adopted for more than a decade, for reasons the Joint Statement fully explains.

The FPA permits states to enact programs supporting particular types of generation facilities, even though the programs may indirectly affect wholesale rates for energy and capacity. Such policies can be entirely supported on economic grounds as welfare-enhancing. Even if they have the ancillary effect of lowering market prices, there is no reason to suspect that they constitute an exercise of buyer-side market power. PJM Ltr. 8, JA_. Nothing in the FPA requires the Commission to counteract those state policies or attempt to insulate the capacity market from their indirect effects—an attempt that, in any event, would be futile. The Focused MOPR appropriately deters the exercise of buyer-side market power, while avoiding the increase in customer costs and potential instability to the capacity market resulting from a more far-reaching approach. That more than satisfies the deferential standard of review that applies to Commission orders.

III. Finally, the State Petitioners request the Court to vacate the underlying tariff provision, but that is not an available remedy. The Court has the power to set aside FERC's order and remand the matter to

the agency, but may not directly address the tariff itself. *See Burlington N., Inc. v. United States*, 459 U.S. 131, 141 (1982).

ARGUMENT

I. Section 205(g) Allows Review of the Merits of the Acceptance Order, Based on the Joint Statement's Reasoning.

Section 205(g) requires this Court to review the Commission's approval of PJM's Focused MOPR filing on the merits, with the Joint Statement providing the basis for approval. Petitioners' contrary position disregards both the text and purpose of Sections 205(d) and (g).

Standard of Review. The Court's review of the meaning of Section 205(g) is *de novo*. However, the Court defers to FERC's interpretation of any statutory ambiguities. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

* * *

Under FPA Section 205(d), public utilities may change "any … charge, classification, or service … after sixty days' notice to the Commission and to the public." 16 U.S.C. § 824d(d). Thus, each public utility possesses "the right in the first instance to change its rates as it will." *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358

U.S. 103, 113 (1958); *Atl. City*, 295 F.3d at 10 (utilities may "change [rates] at will." (quotation marks omitted)).

The Commission, of course, may review those filed rates. But unless the Commission affirmatively rejects a filing or sets it for hearing, the rates filed by the utility "become effective by operation of law pursuant to … Section 205." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168 (D.C. Cir. 2016). That result is explicitly set out by statute. 16 U.S.C. § 824d(d). Here, PJM filed the Focused MOPR under Section 205(d), the sixty-day period elapsed, and the rates thus went into effect.

Prior to Section 205(g)'s enactment, no court had jurisdiction to review the Commission's inaction. A rate filing that goes into effect by operation of law pursuant to Section 205(d) involves no agency action, and therefore there is nothing for a court to review. *Pub. Citizen*, 839 F.3d at 1170. In 2018, however, Congress created Section 205(g) to enable judicial review when Commission inaction in response to a Section 205 filing results from a lack of quorum or deadlock. In those circumstances, Congress deemed the Commission's non-action after 60 days to be final agency action accepting the tariff change that, following a denial of rehearing, is subject to judicial review.

Section 205(g) requires the submission of statements by each Commissioner. The statements of those Commissioners in support of approving the tariff change are treated, for purposes of judicial review, as providing the reasoning for the agency's action, thereby facilitating the court's review. As explained in more detail below, this straightforward reading of the statute's text is also confirmed by Section 205(g)'s legislative history and is consistent with the approach the D.C. Circuit has applied to other agencies to enable judicial review of agency non-action resulting from a deadlock.

To evade Congress's chosen approach, Petitioners EPSA and P3 make two main arguments. First, P3 argues that PJM lacked the authority to file the Focused MOPR under Section 205(d) because the Commission had previously established the Expanded MOPR pursuant to Section 206. That is incorrect. A prior Section 206 determination does not limit a utility's right to change its rates under Section 205. P3's position runs counter to statutory text and well-established precedent.

Second, EPSA and P3 argue that Section 205(g) precludes review on the merits because nonaction deemed to be final agency action is inherently unsupported by agency reasoning. Under EPSA/P3's view,

Congress directed FERC to issue an order approving rates, and thereby enable judicial review, simply to require an automatic vacatur of that very order. That cannot be right.

A. A Prior Section 206 Ruling Does Not Limit a Utility's Rights Under Section 205(d).

Nothing in Sections 205 or 206 precludes a utility (here, PJM) from making a new Section 205 filing following a Section 206 ruling by the Commission. *Cf.* P3 Br. 30-33 (arguing otherwise). As this Court held in *NJBPU*, "Under § 205 …, public utilities may change their rates unilaterally…. It is *not* necessary, in a filing pursuant to § 205, that FERC find that the previous rate was *unjust* or *unreasonable*." *NJBPU*, 744 F.3d at 94. By contrast, Section 206 allows FERC "to initiate changes to *existing* utility rates and practices" after finding that the existing rate is unjust and unreasonable. *Atl. City*, 295 F.3d at 10.

FERC's power to change existing rates under Section 206 does not imply "the power to deny a utility the right to file changes in the first instance." *Id.* In rejecting a Commission rule that restricted utilities' Section 205 filing rights, the D.C. Circuit concluded that "nothing in section 206 sanctions denying [utilities] their right to unilaterally file rate and term changes." *Id.* Properly understood, Sections 205 and 206

"are simply parts of a single statutory scheme under which all rates are established initially by the [public utilities], by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful." *Id.* (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956) (alteration in original)).

P3's lone cited authority—the Supreme Court's *Mobile-Sierra* doctrine, P3 Br. 32-33—does not support them. That doctrine holds that when utilities negotiate a fixed-rate contract, they may not unilaterally change the agreed-upon rate just by giving notice under Section 205. *United Gas*, 350 U.S. at 339-40. Such a unilateral change is a "nullity" as to the contractual counterparty because the utility lacked the "power" to make the change in light of its prior contractual agreement. *Id.* at 339, 342. P3 simply asserts (Br. 33)—citing no support—that a Commission's Section 206 determination operates similarly to remove a utility's Section 205 rights.

In fact, the *Mobile-Sierra* doctrine confirms that only the utility, not the Commission, can limit the utility's ability to change its rates under Section 205. The utility—and only the utility—may "choose to voluntarily give up, by contract, some of [its] rate-filing freedom under

section 205." *Atl. City*, 295 F.3d at 10. But where (as here) the utility did *not* contract away Section 205 rights and the *Mobile-Sierra* doctrine does not apply, nothing prevents the utility from changing its rates under Section 205(d).

P3's theory, moreover, would produce a plainly unworkable scheme. In its view, whenever the Commission changes a rate or term under Section 206, that part of the tariff becomes walled-off from the utility's Section 205 filing rights—an accretion of Commission authority that would go in only one direction. Over time, as the Commission changes various rates and terms under Section 206, it would gradually eliminate the utility's rights under Section 205. That system is directly at odds with the text and structure of the FPA. Indeed, it would "eliminate[] the very thing that the [FPA] was designed to protect—the ability of the utility owner to 'set the rates it will charge prospective customers, and change them at will,' subject to review by the Commission." *Atl. City*, 295 F.3d at 10 (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 855 (D.C. Cir. 1976)).

In reality, the FPA balances the Commission's authority to adjust rates with the utility's prerogative to set rates in the first instance.

Following a Section 206 decision, for example, a utility may reasonably seek to replace the rate adopted by the Commission with an alternative just and reasonable rate. "The Supreme Court has repeatedly rejected the argument that there is only one just and reasonable rate possible…." *Blumenthal v. FERC*, 552 F.3d 875, 883 (D.C. Cir. 2009) (internal quotation marks omitted) (collecting cases). Rather, "reasonableness … allows a substantial spread…." *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976) (quotation marks omitted). Thus, a Section 206 decision directing a utility to adopt a particular rate does not preclude that utility from making a Section 205 filing to adopt an alternative rate, especially as circumstances evolve.[7]

B. Petitioners' Proposed Interpretation of Section 205(g) Produces Absurd Results.

Section 205(g) does not modify a utility's right to file tariff revisions under Section 205(d). Rather, it takes Section 205(d) as its starting point. As noted above, prior to the passage of Section 205(g), if the Commission failed to act in response to a Section 205 filing—whether as a result of a

[7] Several Respondent-Intervenors protested the Expanded MOPR as unjust, unreasonable, and unduly discriminatory and sought review in the Seventh Circuit, which has held those cases in abeyance.

deadlock or ordinary acquiescence—the rate change would take effect by operation of law without any "agency action." *Pub. Citizen*, 839 F.3d at 1169. Therefore, there could be no judicial review. *Id.* at 1169-72.

Section 205(g) enables judicial review when the Commission fails to act in response to a Section 205 filing in specific circumstances: when "the Commissioners are divided two against two as to the lawfulness of the change" or lacks a quorum. 16 U.S.C. § 824d(g). Congress did so by deeming the Commission's inaction in those circumstances to be "an order issued by the Commission *accepting* the change." *Id.* (emphasis added).

EPSA and P3 nevertheless contend that the Court must necessarily remand (or vacate) the "order … accepting the change," *id.*, because there is no reasoning of the agency to support it. EPSA Br. 16-29; P3 Br. 33-39. Petitioners' position transforms Section 205(g) into a convoluted scheme that would make Rube Goldberg proud: (1) the Commission must wait sixty days and then issue a notice that the tariff has taken effect, which constitutes an order accepting the change; (2) an aggrieved party must petition for rehearing of the acceptance order; (3) that same party must then appeal to a court of appeals; (4) the court of appeals must

docket and hear the case; (5) the court of appeals must then automatically remand or vacate the Commission's acceptance order because it lacks any reasoning; and (6) finally, the Commission must reconsider the filed tariff revision, but without any guidance from the court regarding the merits. And if the Commission's composition is unchanged, another deadlock will likely result and the machine will be set in motion once again.

Such a scheme cannot be what Congress intended. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (courts should avoid interpreting statutes to "produce absurd results"). If Congress had wanted to prevent Section 205 filings from taking effect when the Commission was deadlocked or lacked a quorum, it would have written that statute. For example, instead of writing in Section 205(g)(1)(A) that "the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission *accepting* the change," Congress would have said that such a failure shall be considered an order *rejecting* the change.

C. Under Section 205(g), Commissioner Statements Supply the Reasoning For and Against the Commission's Acceptance Order, to Facilitate Judicial Review on the Merits.

Properly interpreted, the statutory scheme is straightforward.

Section 205(g) was written to provide for judicial review on "the merits." *See* 164 Cong. Rec. H8227 (daily ed. Sept. 13, 2018) (statement of Rep. Kennedy). Section 205(g) accomplishes that by providing the court with the reasoning contained within the Commissioner statements supporting the Commission's Acceptance Order—here, the Joint Statement by Commissioners Glick and Clements. The court can review that reasoning as the explanation for the agency's order accepting the tariff filing, and can decide whether to "affirm[], modify[], or set[] aside" that order, as the FPA's judicial review provision provides. 16 U.S.C. § 825*l*(b). Both the text and legislative history of Section 205(g) support this conclusion.

1. The Text of Section 205(g) Refutes the Petitioners' Position.

The statutory text plainly supports review on the merits, based on the reasoning provided in the Commissioner statements. Section 205(g)(1)(A), 16 U.S.C. § 824d(g)(1)(A), states that Commission inaction due to deadlock or lack of quorum shall be considered "an order *issued by the Commission* accepting the change" (emphasis added), with appellate review available under 16 U.S.C. § 825*l*(b), the FPA's judicial review provision. That provision states: "the Commission shall file with the court [of appeals] the record upon which the order complained of was

entered" and the court will then "affirm[], modify[], or set[] aside such order in whole or in part." 16 U.S.C. § 825*l*(b). Section 205(g)(1)(B) provides the basis on which review of the Commission's Acceptance Order shall occur: "each Commissioner shall add to *the record of the Commission* a written statement explaining the views of the Commissioner with respect to the change." *Id.* § 824d(g)(1)(B) (emphasis added). The plain reading is that the Commissioner statements in support of the filing and included in the agency record provide the rationale for the Acceptance Order, which the court can then affirm, modify, or set aside based on that record.

Context also supports that reading, as Congress did not fashion this mechanism for enabling meaningful judicial review from scratch. Rather, on multiple occasions, the D.C. Circuit had interpreted existing statutory schemes to provide for review of individual statements in precisely this way. For example, the D.C. Circuit concluded that under the Federal Election Campaign Act ("FECA"), the Federal Elections Commission ("FEC") engages in a final and reviewable agency action when it dismisses a complaint to investigate campaign finance violations after deadlocking over probable cause. *See Democratic Cong. Campaign*

Comm. v. FEC, 831 F.2d 1131 (D.C. Cir. 1987)*; FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). Although there is no "opinion" of the FEC itself in a deadlock among commissioners, the court has directed the commissioners voting to dismiss the complaint to "provide a statement of their reasons for so voting" in order "to make judicial review a meaningful exercise." *NRSC*, 966 F.2d at 1476. These commissioners "constitute a controlling group for purposes of the decision[and] their rationale necessarily states the agency's reasons for acting as it did." *Id.*; *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 875, 878 (D.C. Cir. 1999) (noting that the court had previously held that "the commissioners voting against repeal were obliged to submit a statement of reasons to the court in order to facilitate judicial review" and looking to "the joint statement of [the] Commissioners … supporting retention of the rules as the opinion of the agency").[8]

---

[8] EPSA says this approach can "raise[] problems of its own," EPSA Br. 26 (quoting *Citizens for Resp. & Ethics in Wash. v. FEC*, 892 F.3d 434, 437-38 (D.C. Cir. 2018)), but the problems referred to by the court arise when the controlling commissioners themselves disagree as to the rationale. Here, that problem does not exist: the controlling commissioners filed a joint statement.

The D.C. Circuit, in *Public Citizen*, had distinguished the FEC cases in declining to review Commission nonaction, prior to the passage of Section 205(g). *See* 839 F.3d at 1170-71. The court explained that those cases were inapposite because "[u]nlike [the] FPA," "FECA's text explicitly permits review of probable-cause deadlocks as agency action." *Id.* at 1170. In enacting Section 205(g) after *Public Citizen*, Congress changed the FPA explicitly to allow exactly that review when Commission inaction results from a deadlock.

When Congress adopted Section 205(g), it presumably was aware of the D.C. Circuit's practice of treating commissioner statements as the rationale for a deadlocked agency's action. The "assum[ption] that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), is particularly credible here. Section 205(g)'s commissioner-statement requirement mirrors the judicially required statements in the D.C. Circuit's FEC and FCC cases. *See NRSC*, 966 F.2d at 1476; *In re Radio-Television News Directors Ass'n*, 159 F.3d 636 (D.C. Cir. 1998).[9] Congress acted, moreover, shortly after

---

[9] By contrast, no such deadlock provision exists for the Surface Transportation Board, distinguishing that agency from FERC and the

the D.C. Circuit issued its opinion in *Public Citizen*, which noted that if "unfairness" stemmed from the decision, "it lies with Congress, not this Court, to provide the remedy." 839 F.3d at 1174. The natural inference is that Congress took the court's suggestion. To allow for review on the merits, Congress not only deemed Commission non-action due to deadlock to be a reviewable order accepting a tariff change, but also proactively required (rather than left it to the courts to require) explanatory statements for the courts to review.

2. The Legislative History Confirms That Petitioners' Position Is Erroneous.

The legislative history confirms what the text makes clear. In his statement on the passage of the bill, the House Sponsor, Congressman Kennedy, stated that the statute "would not allow … the courts to simply dismiss a challenge because FERC failed to issue an order," as the D.C. Circuit did in *Public Citizen*. *See* 164 Cong. Rec. H8227 (daily ed. Sept. 13, 2018) (statement of Rep. Kennedy). Instead, the bill "is intended to ensure that FERC and the courts consider the *merits* of a rate change

FEC. *Cf. W. Coal Traffic League v. STB*, 998 F.3d 945, 952 & n.6 (D.C. Cir. 2021) (noting that "the same 'statutory policies'" were not "at play") (cited by EPSA Br. 26).

and whether such a change is *just and reasonable* as required by the Federal Power Act." *Id.* (statement of Rep. Kennedy) (emphasis added). In seeking an automatic remand without consideration of the merits, Petitioners are asking the Court to do exactly the opposite of what Congress prescribed.

P3's reliance on then-FERC General Counsel Danly's statement is misplaced. P3 Br. 35-36. The Senate amended the proposed text of Section 205(g) to add the requirement for commissioner statements *after* Danly made it aware that the initial proposal would preclude review on the merits.

The relevant history begins in January 2017, when the bill that would become Section 205(g) passed the House and was referred to the Senate. Fair RATES Act, S. 186, 115th Cong., 1st Sess. (2017) (as introduced in Senate Jan. 23, 2017), https://www.congress.gov/bill/115th-congress/senate-bill/186/text/is. At that time, the proposed language lacked a requirement that commissioner statements be added to the record. *Id.*

That text had not been amended when Danly testified in October 2017. Thus, given that the bill did not provide for commissioner

statements, Danly correctly observed that the proposal would "almost certainly" result in a remand. *Hearing on S. 186 et al., Before the Subcomm. on Energy of the S. Comm. on Energy and Natural Resources*, 115th Cong. 13 (2017). The court would not be provided with "the reasoning the agency employed" and thus "review would be impossible." *Id.*

Alerted to the problem, Senator Markey introduced a revised version of the bill into the Senate in June 2018. The amended bill remedied the deficiency by, among other things, adding the requirement for commissioner statements to be included in the record, thus enabling appellate review. *See* Fair RATES Act, S. 186, 115th Cong., 2d Sess. (2018) (as reported with amendment June 18, 2018), https://www.congress.gov/bill/115th-congress/senate-bill/186/text/rs. The Senate Report that accompanied the amended bill noted that the amendment was designed to "compile an adequate administrative record of the proceeding for a court to review." S. Rep. No. 115-278, at 4 (2018). A substantially similar version of Section 205(g) was ultimately passed into law as part of America's Water Infrastructure Act of 2018. *See* Pub. L. No. 115-270, 132 Stat. 3765. This history refutes P3's reading of Section

205(g). The Senate acted to foreclose the argument Petitioners advance in this case.

3. Petitioners' Contrary Arguments Are Without Merit.

EPSA and P3 offer a grab bag of reasons why this reading of Section 205(g) is nonetheless unlawful. None has merit.

EPSA first contends that the FPA itself precludes this reading of Section 205(g). The Act provides that, in general, "[a]ctions of the Commission shall be determined by a majority vote of the members present." 42 U.S.C. § 7171(e). According to EPSA (Br. 24), that general rule controls over the specific instructions provided in the later-enacted Section 205(g). EPSA's view, of course, gets the well-known rule backwards: "[A] specific provision controls one of a more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 396 (1991). That is especially so where the more specific provision is also more recent. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Thus, to the extent there is any conflict, the specific rule in Section 205(g) prevails: in the case of a deadlocked vote, a tie shall be considered "an order issued by the Commission accepting" the utility's filing. 16 U.S.C. § 824d(g).

Second, Petitioners' reliance on the common-law rule that only a "majority of a collective body is empowered to act for the body," *Pub. Citizen*, 839 F.3d at 1169 (quotation marks omitted), is similarly misplaced. EPSA Br. 24; P3 Br. 36. As the court in *Public Citizen* recognized, the common-law rule is merely a background principle that may be displaced by a contrary statutory scheme in which "the treatment of … deadlocks as agency action is baked into the very text of the statute." *See Pub. Citizen*, 839 F.3d at 1170. Section 205(g), like FECA, accomplishes just that, and thus the common-law rule is irrelevant here.

Finally, EPSA attempts to argue that this reading of Section 205(g) raises separation-of-powers concerns under the Supreme Court's decision in *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183 (2020). EPSA Br. 27-29. EPSA did not raise this argument in their rehearing petitions, so it is waived. *Del. Riverkeeper Network v. FERC*, No. 20-1206, __ F4th __, 2022 WL 3036392, at *8 (D.C. Cir. Aug. 2, 2022) (FPA's exhaustion requirement applies to constitutional claims). Regardless, *Seila Law* is irrelevant here. The agency at issue there is "led by a single Director." 140 S. Ct. at 2191. But the Commission remains a multi-member body. Indeed, deadlocked votes are only possible in the context of multimember

commissions. Moreover, the Commissioner statement supporting the Acceptance Order was authored by not one, but *two* Commissioners. Thus, unlike in *Seila Law*, no single Commissioner wielded authority in this case.

II. On the Merits, the Acceptance Order Is Not Arbitrary or Capricious.

A. Standard of Review

"In reviewing FERC's orders, the Court must determine 'whether a rational basis exists for a conclusion, whether there has been an abuse of discretion, or whether the Commission's order is arbitrary or capricious or not in accordance with the purpose of the [FPA].'" *NJBPU*, 744 F.3d at 94 (quoting *Cities of Newark v. FERC*, 763 F.2d 533, 545 (3d Cir. 1985)) (alterations incorporated).

"FERC's decisions regarding wholesale rate issues are entitled to broad deference." *Id.* (citing *Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 532 (2008)). In particular, "issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission." *Id.* (quotation marks omitted).

The Acceptance Order is reviewed pursuant to this familiar, deferential standard of review, based on the reasoning supplied by the Joint Statement. *See supra* at 32-39 (explaining Congress's intent in requiring the Commissioners to submit statements of position for the Commission record).

State Petitioners contend that the merits of the Acceptance Order should be reviewed *de novo*, State Petrs. Br. 22, but that is incorrect. In an analogous context, for example, where the effect of the FCC's deadlocked vote was to leave in place certain rules, the court reviewed "the joint statement of [the] Commissioners … supporting retention of the rules as the opinion of the agency." *Radio-Television News*, 184 F.3d at 875. The court explicitly rejected petitioners' argument that the joint statement should be afforded no deference—rather, the statement was entitled to "the same respect normally accorded agency decisions in rulemaking proceedings." *Id.* at 880. To do otherwise would give the court no "framework to guide its review," leaving it "to pick the position it favored most, in effect becoming a phantom commissioner with power to break ties." *Id.*

De novo review would be particularly inappropriate here. The Court lacks the tools to make the determination, in the first instance, of whether a rate is "reasonable" under Section 205. As the Supreme Court has explained, "[T]he prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.... [E]xcept for review of the Commission's orders, the courts can assume no right to a different [just and reasonable rate] on the ground that, in its opinion, it is the only or the more reasonable one." *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951).

Accordingly, the same deferential standard that always applies to review of FERC orders applies with equal force in this case.

B. The Joint Statement Provides a Reasoned Explanation for the Acceptance Order.

The Joint Statement is a detailed, cogent, 86-page explanation of the Acceptance Order. It explains why PJM's tariff is just and reasonable and consistent with the Commission's long-standing approach to buyer-

side market power, and it comprehensively considers and rejects each of Petitioners' merits arguments. It easily passes muster.

1. The Joint Statement Justified a Return to the Commission's Longstanding MOPR Policy.

Petitioners frame their merits case around the notion that the PJM's tariff is "a monumental departure from decades-old jurisprudence." State Petrs. Br. 3. That is simply false. As recounted above, *supra* at 7-8, "[f]rom its inception" in 2006 until 2019, the PJM capacity market "exempted from the MOPR nuclear, coal, and hydroelectric generation, permitting those resources to bid zero-price offers into the Auction," and in 2011, "FERC accepted PJM's proposal to add wind and solar facilities to this list of exemptions." *NJBPU*, 744 F.3d at 106. These resources were exempt regardless of whether they were new or existing or received state support. "[T]he *only* resources subject to the MOPR" until 2019 were new, gas-fired power plants. *Id.* (emphasis added). This was so even though state energy programs supporting particular types of generation facilities other than gas-fired plants existed before the capacity market's inception in 2006 and expanded in the years following. Yet until 2019, the Commission never sought to expand the MOPR to curb their effects.

Petitioners' own recounting admits that "[t]he original MOPR [only] applied to … new natural gas-fired resources." State Petrs. Br. 8. That limitation remained in place five years later when, in 2011, it was affirmed by this Court in *NJBPU*, 744 F.3d at 106. Challengers there urged that the limitation was arbitrary and capricious and the MOPR should be applied more broadly, because "[b]elow-cost offers from gas, nuclear, hydroelectric, wind, or solar facilities all have the same 'price suppression' impacts." *Id.* This Court rejected that argument, holding that "FERC fully explained its reasons for approving PJM's proposal to subject gas-fired resources to the MOPR while exempting other types of generation." *Id.* at 107.[10]

Another five years passed before certain members of P3 and EPSA filed a complaint in 2016 asking FERC to expand the MOPR to encompass, for the first time, existing power plants and new renewable resources receiving state support. Petitioners acknowledge that "FERC did not act on the complaint" for two years. State Petrs. Br. 12. FERC

[10] Changes to the MOPR proposed in 2013, *see* State Petrs. Br. 15; *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 112-13 (D.C. Cir. 2017), likewise would not have expanded the MOPR to encompass resources other than new gas-fired resources.

adopted the Expanded MOPR only in December 2019, and in so doing, as Petitioners concede, it *"greatly expanded the scope of the MOPR* … and held that all resources that receive or are eligible to receive a state subsidy" would be subjected to the MOPR. *Id.* at 12-13 (emphasis added).

Contrary to Petitioners' revisionist narrative, the Expanded MOPR was a two-year aberration during which only a single capacity auction took place, *see* State Petrs. Br. 14 (referring to the "sole auction held under the Expanded MOPR"), and which was subject to challenge in the Seventh Circuit the entire time. *See Ill. Com. Comm'n v. FERC*, No. 20-1645 (7th Cir.). This case does not involve the abandonment of any long-standing policy.

Even if it did, however, agencies are entitled to change their policies. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Agencies must simply acknowledge the change and provide a reasoned explanation for it. *Id.*; *NJBPU*, 744 F.3d at 100 ("Courts have repeatedly held that an agency may alter its policies despite the absence of a change in circumstances.").

Here, the Joint Statement provided a fulsome explanation for accepting the Focused MOPR. It acknowledged that the Focused MOPR

turned away from the prior policy in effect for less than two years. *See* Joint Stmt., P 46, JA__ ("Allowing the Focused MOPR to go into effect is a change from that prior policy."). It expressly concluded that the short-lived policy should properly be changed. *See id.* (concluding that "it is not only appropriate but past time to revise the Commission's prior policy"). And it thoroughly explained "the considerable set of harms that are avoided by PJM's adoption of the Focused MOPR," *id.* P 49, JA__, including: "prevent[ing] the one-two punch of forcing customers to pay higher capacity prices for resources that are not needed to meet the system's resource adequacy need," *id.* PP 49-53, JA__; correcting the Expanded MOPR's inaccurate price signals "about the need for and price of additional capacity," *id.* PP 54-56, JA__; avoiding the "tremendous uncertainty" and "administrative burden" of fruitless attempts to seal off PJM's capacity market from the influence of state policies, *id.* P 57, JA__; and eliminating the "significant threat" to the integrity of and participation in PJM's wholesale markets that would result from state withdrawal, *id.* PP 58-59, JA__. On each point, the Joint Statement considered contrary arguments, but found them unpersuasive.

Moreover, the full Commission, by a vote of four to one, has subsequently confirmed that change in policy, and no party has sought rehearing. *ISO New England Inc.*, 179 FERC ¶ 61,139, PP 26-29, 45; *N.Y. Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,102, PP 35-43. In accepting a tariff revision from the market operator for New England to exempt renewable resources from that region's MOPR rule even when they receive state support, FERC reiterated the Joint Statement's reasoning and expressly repudiated the December 2019 Order:

> In prior orders, the Commission treated the indirect price impacts of state policy choices as equivalent to anti-competitive conduct [citing the December 2019 Order]. Upon further review, we no longer find it appropriate to presume that states' exercise of their reserved authority over generation facilities is the equivalent of anticompetitive conduct, simply because of the inevitable, albeit indirect, effect on [capacity auction] prices.

ISO New England Inc., 179 FERC ¶ 61,139, P 53 & n.111.

Nonetheless, EPSA contends that the Joint Statement gave short shrift to reliance interests. EPSA Br. 29-34. But the "billions of dollars," *id.* at 30, its members invested in power plants occurred largely during a 15-year period in which the MOPR *did not apply to existing power plants or any new plants except gas-fired ones.* *See* December 2019 Order, P 8 (expanding the MOPR to apply to other resources was a "significant

change”). As noted above, “only one” auction has been “held under the Expanded MOPR.” State Petrs. Br. 14. EPSA says nothing specific about reliance it placed on the Expanded MOPR’s adoption two years ago. And even if it had, no firm reliance interests can be formed by a two-year experiment that broke from longstanding agency policy and was subject to legal challenge from the moment it was adopted. *See supra* at 12.

2. Nothing Compels FERC to Apply the MOPR to All Resources Receiving State Support.

Petitioners argue that it *cannot* be a reasonable policy choice to apply the MOPR only to resources that can be used to exert buyer-side market power, while exempting from the MOPR state-supported resources that offer at a lower price than would be possible without the state support. EPSA Br. 43-44; P3 Br. 44-46. But the two concerns—exercise of buyer-side market power in wholesale auctions, and the indirect effects of state policies on wholesale markets—are not the same, and need not be treated the same. Indeed, regarding the latter, this Court has already rejected Petitioners’ argument in *NJBPU*. As noted above, this Court rejected the argument that “[b]elow-cost offers from gas, nuclear, hydroelectric, wind, or solar facilities all have the same ‘price suppression’ impacts,” and that “subjecting only gas-fired resources

to the MOPR undermines the competitive goals FERC is purportedly trying to achieve." 744 F.3d at 106. Rather, this Court held that FERC had fully explained its reasoning for not applying the MOPR to those resources. *Id.* at 107.

Moreover, state-supported resources are not submitting below-cost offers. As the Joint Statement explained, state policy support for particular types of generation facilities do not involve the exercise of buyer-side market power, and thus do not undermine the competitive goals FERC is trying to achieve through the capacity market. "In the context of capacity markets, … a competitive market is one where resources compete with each other to submit capacity offers that are as low as possible to cover their net going forward costs, receive a capacity commitment, and contribute to resource adequacy." Joint Stmt., P 11, JA__. "[O]ffers that incorporate the reality of state policies reflect the real-world economic decisions facing particular resources" and thus the resulting capacity prices "reflect supply and demand fundamentals." *Id.* P 55, JA__. Therefore, "[w]here offers reflect revenues earned pursuant to state policies and yield decreased capacity prices, that is an economic and competitive outcome." *Id.* P 56, JA__.

P3 asserts that "[i]t is beyond legitimate argument that subsidies disrupt competition, distort market prices, and harm non-subsidized resources." P3 Br. 39. That simply ignores the Joint Statement's legitimate response: "[I]f the capacity market ignores some of a resource's actual costs and revenues"—such as the cost of pollution—the market "may not actually reflect the lowest-cost or most efficient means of ensuring resource adequacy." Joint Stmt., P 11, JA__. The Joint Statement accepted PJM's explanation "that state policies are often designed to address externalities that are neither accounted for nor compensated in PJM's wholesale markets." *Id.* P 36, JA__ (citing PJM Ltr., Att. E, Graf Aff. ¶ 17 ("Graf Aff."), JA__). These policies include efforts to "ensur[e] the differentiated value between carbon-emitting and carbon-free resources is recognized," and "can be entirely supported on economic grounds as welfare-enhancing." Graf Aff. ¶ 17, JA__.[11]

States are permitted to adopt policies favoring particular types of generation facilities under the FPA, which reserves to the states the

---

[11] Record evidence showed that state programs compensating these non-emitting generators were examples of appropriate policy responses. Willig Decl. ¶¶ 36-37, JA__; R.67, Comments of the Institute for Policy Integrity at New York University School of Law at 8-10, JA__-__; Brattle Aff. at 16-18, JA__-__.

authority to "select the type of generation to be built—wind or solar, gas or coal." *PPL*, 766 F.3d at 247, 255. The Supreme Court has been careful not to disturb the states' lawful power to "encourage development of new or clean generation" through methods such as "tax incentives, land grants, [and] direct subsidies." *Hughes*, 578 U.S. at 166. That is true even though states' choices regarding the generation mix may have an "incidental effect on wholesale prices…." *Zibelman*, 906 F.3d at 56 (quotation marks omitted).

Nothing in the FPA *requires* FERC to counteract these state programs and insulate the capacity market from their indirect effects by forcing recipients to make offers as though the state programs did not exist. To the contrary, when Congress divided authority over the electric sector and assigned generation facilities to the states and wholesale markets to FERC, *see* 16 U.S.C. § 824(b), it understood that each would be affected by the other. "It is a fact of economic life" that the state and federal spheres "are not hermetically sealed from each other." *EPSA*, 577 U.S. at 281. "States[] … may regulate within the[ir] assigned domain … even when their laws incidentally affect areas within FERC's domain." *Hughes*, 578 U.S. at 164; *Zibelman*, 906 F.3d at 57 (stating that the

"background assumption" for FERC's markets is that "states engage in public policies that affect the wholesale markets").

EPSA and P3 cite two cases that they claim support their view, *see* EPSA Br. 46 (quoting *NJBPU*, 744 F.3d at 97); P3 Br. 46 (quoting *New England*, 757 F.3d at 290-91), but neither case holds that FERC *must* apply the MOPR to *all* types of resources that receive *any* state support. Rather, these cases just hold, based on the record in those cases, that FERC made a permissible policy judgment in applying the MOPR to new, gas-fired power plants even when they received state support, because those plants still could be used to exercise buyer-side market power. *NJBPU*, 744 F.3d at 100-02; *New England*, 757 F.3d at 294-95.[12]

Here, the Joint Statement explains in detail why it is reasonable to return the MOPR's focus to preventing the exercise of buyer-side market power, rather than applying the MOPR broadly to all resources receiving

[12] While this Court held in *NJBPU* that FERC was *permitted* to adopt a rule that could result in customers "pay[ing] twice" for capacity, 744 F.3d at 97, nothing *required* FERC to adopt that rule. Rather, the court deferred to the agency's choice. *Id.* However, it characterized FERC's position with respect to state incentives as "mildly disturbing" and suggested the outcome requiring ratepayers to pay twice for capacity was "worthy of condemnation" but "not so deficient" that it failed the "high bar" of the arbitrary and capricious standard. *Id.* at 102.

state support, regardless of whether they have any incentive or ability to exercise buyer-side market power. To begin, any other policy would be "futile." Joint Stmt., P 19, JA__. "Because so many federal, state, and local policies shape the demand and supply fundamentals of the market, seeking to segregate their effects inevitably leads to … arbitrary and burdensome line-drawing." *Id.* P 57, JA__. But, even more than that, the Joint Statement explained that "those cross-jurisdictional effects are the product of the 'congressionally designed interplay between state and federal regulation.'" *Id.* P 18 (citation omitted), JA__. And "[m]aintaining that interplay and permitting each sovereign to carry out its designated role without direct interference by the other sovereign is essential to the cooperative federalism regime that Congress made the foundation of the FPA." *Id.*

Nor does this approach unduly discriminate among generators. The Focused MOPR is resource neutral. Other than those resources the Joint Statement affirmatively found could not be used to leverage buyer-side market power, every resource, whether subsidized or not, whether fossil-fuel powered, renewable, or nuclear, is subject to the Buyer-Side Market Power test in PJM's new tariff. (The Focused MOPR thus sweeps

more broadly than the MOPR in effect until 2019.) State policies may treat generators differently depending on their emission profile or other non-capacity attributes, but that is the states' prerogative as regulators of generation facilities. 16 U.S.C. § 824(b). Nothing requires FERC to adopt auction rules that counteract those state regulatory choices.[13]

C. The Focused MOPR is a Just and Reasonable Tool to Prevent the Exercise of Buyer-Side Market Power.

As the Joint Statement confirmed, the Focused MOPR "is just and reasonable … [and] provides PJM's capacity market with appropriate protection against anti-competitive conduct." Joint Stmt., P 1, JA__. P3 and the State Petitioners disagree, complaining of a host of supposed defects. None is borne out by the record. Rather, the Joint Statement appropriately considered and reasonably rejected each argument. It explained that the Commission's role under Section 205 is not to identify the *best* policy, or whether there is a *better* tariff than the one filed by the utility, but simply to determine whether the proposed change is just and reasonable. *Id.* P 4, JA__ ("[O]ur statutory role when considering a filing

[13] Petitioners' baseless claim that the Focused MOPR discriminates against states, EPSA Br. 44-46; P3 Br. 42-46, is addressed by FERC and the State and Consumer Advocate Respondent-Intervenors.

under section 205 of the FPA does not permit the perfect to be the enemy of the good….”). Thus, arguments that the Focused MOPR could have been *more* just and reasonable are misplaced.

1. The Focused MOPR Will Adequately Prevent the Exercise of Buyer-Side Market Power.

PJM designed the Focused MOPR to provide a multi-layered approach to protect the market against attempted exercises of buyer-side market power. The Focused MOPR provides three layers of defense against such conduct:

- No later than 150 days prior to the auction, all sellers must "'self-certify' whether their resources should be subject to the MOPR." PJM Ltr. 26, JA__. Sellers themselves are most knowledgeable about their own resources, and the Commission's candor requirement ensures truthful submissions. *Id.* at 26-27, JA__-__.
- PJM and the Market Monitor maintain the right to initiate a fact-specific review of any seller months before the auction. *Id.* at 30-31, 33, JA__-__, __. The seller would participate in that review and PJM would determine whether mitigation was necessary, *i.e.*, whether the seller has the ability and incentive

to exercise buyer-side market power. *Id.* at 32-35, JA__-__. Any seller that disagrees with PJM's decision can seek relief from the Commission. *Id.* at 35, JA__.

- PJM and the Market Monitor reserve the right to refer any resource suspected of exercising buyer-side market power to FERC enforcement where warranted, no matter when identified.

P3 and the State Petitioners raise various supposed shortfalls with the Focused MOPR, but as the Joint Statement concluded, none is valid.

First, P3 and the State Petitioners challenge PJM's revised definition of buyer-side market power for considering intent, arguing that previous Commission orders applied the MOPR regardless of intent. P3 Br. 52; State Petrs. Br. 39-42. But the Focused MOPR does too: intent is sufficient to trigger the MOPR, but it is not necessary. If a seller fails to certify that it does not intend to exercise buyer-side market power, PJM applies the MOPR. But PJM also applies the MOPR if there is an ability and an incentive to exercise buyer-side market power, regardless of whether such exercise may be intended.

Moreover, the fact that the Focused MOPR differs from previous versions does not mean that it is unreasonable. The Joint Statement

acknowledged that the Focused MOPR differed from past versions, and for good reason: to "balanc[e] the need to mitigate the exercise of buyer-side marker power against the harms [of] over-mitigation." *E.g.*, Joint Stmt., PP 8, 100, 105, JA__, __, __. The Joint Statement concluded that the Focused MOPR appropriately "target[ed] the textbook definition of buyer-side market power." *Id.* at PP 99, 100, JA__.

That conclusion was well supported by the record. PJM's Senior Director for Economics, for example, noted that buyer-side market power "cannot happen by accident." R.109, PJM Answer, Att. B, Graf Reply Aff. ¶ 10, JA__. A more focused approach towards preventing buyer-side market power also reflects the reality that "exercising buyer-side market power is exceedingly difficult, usually unsuccessful, and therefore rare—not unsurprisingly, since the cost of failure is that the seller loses money." Joint Stmt., P 104, JA__; *see also id.* P 101, JA__ ("[A]ttempting to exercise buyer-side market power in PJM's capacity market is a risky and difficult proposition."); Graf Aff. ¶¶ 11-12, JA__ ("[I]t is theoretically possible to exercise buyer-side market power …, but it poses substantial risks to the market participant."). The Focused MOPR was thus a just and reasonable approach.

Second, P3 criticizes PJM's "ability" and "incentive" test as "very similar to" two tests that PJM abandoned in 2011. P3 Br. 52-53. However, P3 does not address the Joint Statement's explanation that "the proposed tests are distinguishable from the 2011 ones." Joint Stmt., P 97, JA__. That issue is therefore waived. *See, e.g.*, *Laborers' Int'l Union of N. Am., AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 398 (3d Cir. 1994) (new arguments in reply brief not permitted). In any case, PJM explained that the Focused MOPR's "incentive test" avoids a weakness of the 2011 test that allowed a seller to circumvent the MOPR by contracting with third parties. *See* PJM Answer 30-31, JA__-__. The Focused MOPR's "ability test" applies a different standard than the 2011 impact test, and does so before the auction. *Id.* at 32-33, JA__-__.

The Joint Statement also provided a detailed justification for why the "ability" and "incentive" test is just and reasonable. It explained that "[h]aving the ability to suppress prices is important because without it, any attempt to exercise Buyer-Side Market Power would necessarily fail." Joint Stmt., P 100, JA__. And "requiring an economic incentive is reasonable because without such an incentive, a seller would not take the risk of offering a resource below net going forward costs given the

likelihood of not recovering sufficient revenue in the long term to recover the costs of funding the uneconomically low offer." *Id.*, JA__-__; *see also* Graf Aff. ¶¶ 6-9, JA__-__ ("It is reasonable to require such economic incentive in defining Buyer-Side Market Power, as a resource offer that may appear too low to reflect costs is not, in and of itself, problematic for the integrity of market outcomes."); PJM Ltr. 32, JA__ (explaining the same). This conclusion is reasonable and well-explained, and the precise formulation of the test involves a matter of technical expertise on which the Court should give particular deference to the agency. *NJBPU*, 744 F.3d at 94.

Third, P3 asserts that PJM "provides no bright-line test for [buyer-side market power] violations," which it says "renders [the test] practically useless." P3 Br. 53-54. However, the Joint Statement explained that PJM's Tariff "*requires* action by PJM and/or the [Market Monitor], … stat[ing] that PJM and/or the [Market Monitor] 'shall initiate a fact-specific review' when either suspects that a capacity offer may be based on an Exercise of Buyer-Side Market Power." Joint Stmt., P 113, JA__ (quoting Tariff, Attachment DD, § 5.14(g-2)(B)(i)). This is *in addition* to PJM and the Market Monitor's obligation to refer suspected

violations to FERC's Office of Enforcement. *Id.* at P 113, JA__. Taken as a whole, the Focused MOPR allows PJM and the Market Monitor to consider "each unique circumstance" while also not granting "unfettered discretion." *Id.* at PP 114-15, JA__.

Finally, P3 and the State Petitioners argue that self-certification is an inadequate check on market power. State Petrs. Br. 42-43, 44-47; P3 Br. 50-51. In particular, the State Petitioners express concern that the proposed schedule for auctions would leave inadequate time to review attestations. *See* State Petrs. Br. 42-45.

The Joint Statement rejected these arguments. At the threshold, PJM does not rely solely on self-certification. Rather, the self-certification requirement is in addition to the ability and incentive test. Moreover, attestation requirements are common in the regulated electric industry. *See* Joint Stmt., P 143, JA__. Market participants have incentives to respond honestly. The FPA and Commission regulations prescribe enforcement penalties of up to $1,000,000 per day for submitting false information, 16 U.S.C. § 825o-1(b); 18 C.F.R. § 35.41(b). *See id.*, P 120, JA__.

The Joint Statement explained that the timing concerns were misplaced. *See id.* On the front end, "uneconomic resources are known in advance of any seller certifications," so PJM and the Market Monitor will know which market participants require extra scrutiny even before the 150-day deadline for self-certifications. *Id.* P 96, JA__. And on the back end, even if the timeline proved too compressed in advance of the auction (and there is no reason to believe it would), PJM and the Market Monitor each retain the right to "refer the offending seller to the Commission's Office of Enforcement." *Id.* P 96, JA__. In no case would the exercise of buyer-side market power be allowed to fall through the cracks.

* * *

The Joint Statement carefully reviewed the Focused MOPR's scheme for mitigating buyer-side market power, and found it just and reasonable. None of the Petitioners or supporting Intervenors have shown otherwise. There is no basis for the Court to remand or set aside the Commission's Acceptance Order with respect to the Focused MOPR.

2. PJM's Conditioned State Support Test is a Just and Reasonable Tool to Mitigate Unlawful State Programs.

Petitioners' and Intervenors' challenges to PJM's Conditioned State Support test reflect their disagreement with the Joint Statement's policy choice rather than any flaw with the test. As already explained, the decision to restore the MOPR to a more focused role of addressing the actual exercise of buyer-side market power, and to allow resources to shape their capacity offers after accounting for revenue from state programs, was consistent with the FPA and well supported by the record. "Assuming that any such [state program] is inherently an exercise of buyer-side market power runs contrary to the role that Congress reserved for the states under section 201(b) of the FPA." Joint Stmt., P 62 n.131, JA__. The subsidiary challenges to PJM's Conditioned State Support test are each easily addressed.

First, P3 complains that the Conditioned State Support test "does nothing to prevent the exercise of state-sponsored market power because it only mitigates state actions that are already unlawful." P3 Br. 49. Just because a program is unlawful, however, does not mean that it has already been enjoined. Unlawful state programs may go unchallenged in

court because no party has an interest or the resources to bring suit, or because parties may lack standing or a cause of action. And judicial challenges may take years to reach judgment, with capacity auctions occurring in the meantime that cannot easily be undone. *See, e.g.*, *In re NTE Conn., LLC*, 26 F.4th 980, 991 (D.C. Cir. 2022) ("FERC does not generally direct entities like [PJM] to vacate the results of earlier auctions and rerun them…."). The Conditioned State Support test thus allows FERC to prevent a state program that fails the Supreme Court's test for preemption from adversely affecting the capacity auction, without regard to whether there has been a judicial decision enjoining or declaring the state program to be preempted. *See* Joint Stmt., P 122, JA__.

Second, P3 inaccurately claims that the Conditioned State Support test "purports to place any existing state program beyond challenge by categorically excluding 'Legacy Policies' that are currently 'on the books or effective.'" P3 Br. 49 (quoting PJM Ltr. at 46-47); *see also* State Petrs. Br. 47-51 (raising similar arguments). As neither P3 nor State Petitioners identifies such a legacy policy, their concern appears hypothetical. Because parties have presumably relied on any such

existing policies to make substantial investments, and no court has held them invalid, FERC accepted that the MOPR need not be applied to them. A party seeking to block those policies may still proceed to court. That strikes a reasonable balance between recognizing parties' reliance interests and protecting the market's integrity. *See* Joint Stmt., PP 144-145, JA__.

Third, P3 and other parties also challenge the Focused MOPR's requirement that Sellers self-certify that they are not receiving Conditioned State Support. The reasonableness of a certification requirement is discussed above. *See supra* at 62-63; Joint Stmt., PP 126, 143, JA__-__.

Fourth, the State Petitioners assert that PJM's process for determining whether a policy constitutes Conditioned State Support is insufficiently transparent, State Petrs. Br. 44-45, but the tariff shows otherwise. It establishes that *prior to an auction*, PJM would submit a filing under Section 205 alerting parties that PJM believed an identified state policy may constitute impermissible Conditioned State Support. *See* Joint Stmt., P 123, JA__. Any interested party could intervene in that Section 205 proceeding and challenge PJM's list as incomplete, or

file a complaint if PJM does not make a filing. *See, e.g.*, 18 C.F.R. §§ 385.211, 214. The Commission would then decide based on a record in a public proceeding and issue an order. That process is transparent by any definition.

3. The Exception for Self-Supply, Energy Efficiency, and Demand Resources Is Not Unjust or Unreasonable.

None of the Petitioners raised specific objections to the Focused MOPR's exception for self-supply, energy efficiency, and demand resources.[14] These issues are raised only by the Market Monitor.[15] Consequently, these arguments are outside the scope of this appeal. In administrative review cases, "it is a general rule that an intervenor may argue only the issues raised by the principal parties and may not enlarge those issues." *Sw. Pa. Growth All. v. Browner*, 121 F.3d 106, 121 (3d Cir.

---

[14] Self-supply resources include, for example, resources owned by vertically integrated utilities, municipal utilities, and electric cooperatives ("Self-Supply Sellers"). Energy Efficiency resources include projects that exceed current appliance standards (*e.g.*, efficient lighting) to reduce electricity demand. Demand Resources refer to customers who can reduce consumption when directed.

[15] Petitioner-Intervenor Office of the Ohio Consumers' Counsel (Br. 22-25) does not oppose the self-supply exemption, arguing only that clarification is required to confirm that Ohio's default service solicitation auctions are exempt.

1997); *see also Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 185 n.5 (D.C. Cir. 2012). Here, because no petitioner brief objects to the Focused MOPR's exception for self-supply, energy efficiency, and demand response, or even incorporates the Market Monitor's arguments by reference, the Market Monitor's arguments should not be considered.[16]

In any event, the Market Monitor's arguments lack merit.

a. With respect to self-supply resources, as the Joint Statement explains, PP 154, 157-159, JA__, __, PJM reasonably provided a partial exception for resources offered by Self-Supply Sellers. The Focused MOPR precludes treating these resources as exercising buyer-side market power based solely on their owners' Self-Supply Seller status. PJM Ltr. 40-41, JA__. PJM explained that these entities are by definition subject to regulatory oversight of their rates and long-term planning, and they construct resources and make long-term contracts to balance supply and demand. Customers benefit through relatively stable costs. *Id.* This, PJM concluded, makes "[i]t entirely economic for such

[16] Nor can the Market Monitor partake in the "exception to this rule" applicable where the "the intervenor has preserved the issue in its own petition for rehearing before the Commission." *Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002). The Market Monitor did not file a petition for rehearing before the Commission.

an entity to make long-term plans, and to offer resources consistent with these plans into the capacity market." *Id.* at 41-42, JA__ (quoting Graf Aff. ¶ 25, JA__). These owners, however, still must comply with the Focused MOPR's self-certification requirement.

The Joint Statement acknowledged PJM's rationale for this approach. Joint Stmt., P 148, JA__. The Joint Statement also considered record evidence demonstrating that the absence of a self-supply exemption in the Expanded MOPR imposed undue burdens on Self-Supply Sellers, including doubling their capacity costs. *Id.* P 152, JA__ (citing R.90, Comments of American Municipal Power, Inc., at 1-2, 5-6, 13-15, JA__; R.77 at 4, JA__; R.71, Comments of the National Rural Electric Cooperative Association, at 9-10, JA__; R.75, Conditional Protest of Old Dominion Electric Cooperative et. al, at 4-5, JA__). The record likewise showed that PJM's self-supply exemption "does not inhibit PJM's ability to mitigate offers that are determined to be an Exercise of Buyer-Side Market Power and appropriately recognizes the disincentives to exercise Buyer-Side Market Power contained in the self-supply business model itself." *Id.* The Joint Statement also noted, but did not

agree with, the Market Monitor's argument in opposition. Joint Stmt., P 159, JA__.

The Joint Statement concluded that "[s]ubjecting such resources to the MOPR based on the hypothetical fear that Self-Supply Sellers might be seeking to Exercise Buyer-Side Market Power would have the effect of inappropriately obstructing an otherwise legitimate and long-standing business model and conduct by entities that make resource decisions on a long-term basis." *Id.* P 157, JA__. Further, the Joint Statement concluded that oversight of Self-Supply Sellers by their regulators would provide sufficient assurance that Self-Supply Sellers do not exercise buyer-side market power. *Id.* P 158, JA__.

Finally, the Joint Statement acknowledged that FERC had declined to exempt self-supply resources in the December 2019 Order—at odds with FERC's historical approach[17]—and concluded that a reversion back to the historical approach was "necessary in light of the adverse effects of the Expanded MOPR identified by PJM and the majority of its stakeholders." *Id.* P 159, JA__. The record therefore contains ample

[17] *See* P3 Br. 10; State Petrs. Br. 11, 13 (acknowledging FERC's historical approval of a self-supply exemption).

support for the self-supply exemption and the Joint Statement's conclusion that it is just, reasonable, and not unduly discriminatory. *Id.* PP 154, 157, JA__, __; *see, e.g.*, *NJBPU*, 744 F.3d at 107-08 (upholding consideration of long-standing business models in relation to unit-specific MOPR exemptions).

b. The Joint Statement also found PJM's exemptions for Energy Efficiency and Demand Resources to be just and reasonable. The Joint Statement acknowledged that these resources "could *theoretically* be used as a tool to seek to uneconomically depress prices," but it noted that there was no evidence "that they have ever been, or are likely to be, used in this way." Joint Stmt., P 160, JA__ (emphasis added). Specifically responding to the Market Monitor's concern that these resources are becoming more common in PJM, the Joint Statement pointed out that "prevalence is not evidence that these resources are a practical tool by which a seller could seek to [e]xercise Buyer-Side Market Power." *Id.* Instead, such resources "appear a poor mechanism for such action due to their generally low costs and disparate nature." *Id.* The Joint Statement further noted that PJM had committed "to continue monitoring for evidence of potential Buyer-Side Market Power exercised by Demand

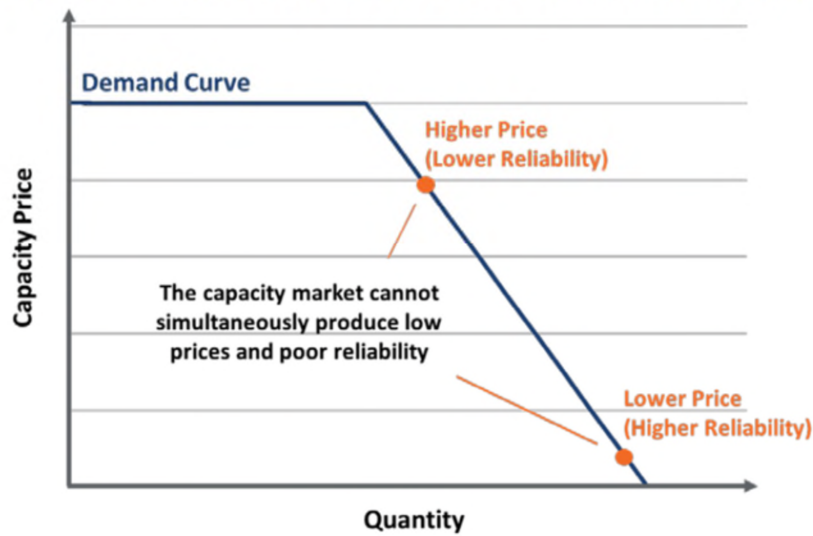
Resources and Energy Efficiency Resources," so the rules could be modified in the future if needed. *Id.* The Market Monitor has not pointed to anything arbitrary or capricious about this analysis.

D. The Focused MOPR Achieves the Central Aim of the Capacity Market to Provide Resource Adequacy at Least Cost.

The central aim of PJM's capacity market is "to procure the least-cost, competitively-priced combination of resources necessary to meet the region's reliability objectives." *NJBPU*, 744 F.3d at 101. State Petitioners speculate that returning the MOPR to its original purpose will so lower prices as to jeopardize reliability due to insufficient building of capacity. State Petrs. Br. 26.

The Joint Statement thoroughly refuted these concerns. PJM's capacity auctions use a derived demand curve as a proxy for customers' desire for reliability, based on planners' assessment of a required percentage reserve margin. The downward sloping curve assigns diminishing value to resource procurements at capacity levels above that reserve margin. In simple terms, when the auction clears more capacity, it does so at a lower price, as shown by the following graph reproduced from the record:

FIGURE 3: CAPACITY MARKETS WITH DOWNWARD-SLOPING DEMAND CURVES CANNOT SIMULTANEOUSLY PRODUCE LOW PRICES AND POOR RESOURCE ADEQUACY



Brattle Aff. at 20, Fig. 3, JA__.

The Joint Statement accordingly explained that "in a properly designed capacity market, including the one with the Focused MOPR, as supply tightens, the price for capacity will increase to reflect the need for additional capacity and provide an incentive for investment." Joint Stmt., P 62, JA__. Under this structure, it is "a mathematical impossibility" that outcomes could reflect both low prices and low reliability at the same time. Brattle Aff. at 20, JA__. When supply tightens, prices will go up, incentivizing new entry. *See* Joint Stmt., P 62 & n.129, JA __ (collecting authorities). Moreover, PJM's expert found in his comprehensive modeling no difference in reliability in the long term

(through 2040) between the Focused MOPR and Expanded MOPR. PJM Ltr. at 16-18, JA__-__ & Att. C, Cramton Aff. ¶ 74, JA__.

In fact, there remains ample supply to meet PJM reliability requirements. The amount of capacity procured by PJM has consistently exceeded the targeted reserve margin. New entry—including by gas-fired combined cycle units—has continued to occur.[18] These outcomes show that the State Petitioners' reliability concern is not credible, and the Joint Statement reasonably rejected State Petitioners' unsupported speculation about what may happen in the future. *See* Joint Stmt. P 62, JA__ (finding the State Petitioners' reliability claim was "speculative" and supported by "no evidence").

III. Vacatur of the Tariff Is Not an Available Remedy.

The State Petitioners—but not EPSA or P3—ask the Court not only for a remand or vacatur of the Acceptance Order, but also for a vacatur of the underlying tariff provision. *See* State Petrs. Br. 51. That is not an available remedy. When a Commission order approving a Section 205 filing is remanded or vacated, the matter returns to FERC for further

[18] PJM, *2023/2024 RPM Base Residual Auction Results*, 1, 6, 21, https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2023-2024/2023-2024-base-residual-auction-report.ashx.

consideration of the Section 205 filing. *See, e.g., Del. Div. of Pub. Advoc. v. FERC*, 3 F.4th 461, 469 (D.C. Cir. 2021) ("remand[ing] for reassessment" of rate approved by FERC). The court's ruling does not eliminate the underlying tariff filing.

For example, in *Burlington Northern, Inc. v. United States*, which involved the substantially similar provisions of the Interstate Commerce Act, the Supreme Court held that a "federal court['s] authority to reject … rate orders for whatever reason extends to the orders alone, and not to the rates themselves." 459 U.S. at 141. FERC has recognized that this rule applies with equal force to the FPA. *See ISO New England Inc.*, 161 FERC ¶ 61,031, P 25 (2017). Thus, a vacatur or remand of the Acceptance Order will leave PJM's filed rate in effect, and on remand, FERC will reconsider its acceptance of that filed rate.

Nor can Petitioners request an order from this Court *requiring* FERC to reject PJM's tariff on remand. Section 205(e) provides that, when presented with a Section 205 filing, the Commission "*may* suspend the operation of such [rate] schedule and defer the use of such rate" pending a "hearing and the decision thereon," 16 U.S.C. § 824d(e) (emphasis added), but nothing *requires* the Commission to act. As the

D.C. Circuit has held, Section 205 "contains no standards cabining FERC's discretion or enabling this Court to meaningfully review how the Commission exercises its discretion" whether or not to suspend a filing made under Section 205. *Pub. Citizen*, 839 F.3d at 1174; *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-59 (1979) (holding under identical Interstate Commerce Act provision that the court lacked jurisdiction to review a rate-setting agency's inaction in response to a filed tariff). Whether to accept, reject, or remain passive in response to a Section 205 filing is a decision for FERC to make, and this Court "lack[s] the power to issue an order to break the [Commission]'s deadlock." *W. Coal Traffic League v. STB*, 998 F.3d 945, 951 (D.C. Cir. 2021).

To the extent State Petitioners complain that such an outcome is unfair because, if a deadlocked Commission persists, PJM's tariff filing will remain in effect, State Petrs. Br. 32, their dispute is with the FPA itself. "Any unfairness associated with this outcome inheres in the very text of the FPA," which allows rates to become effective without Commission approval. *Pub. Citizen*, 839 F.3d at 1174.

CONCLUSION

For the foregoing reasons, the petitions for review should denied, and the Acceptance Order affirmed.

August 12, 2022

Respectfully submitted,

/s/ Matthew E. Price

Matthew E. Price
Zachary B. Cohen
Kevin J. Kennedy
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
202-639-6000
mprice@jenner.com
zcohen@jenner.com
kkennedy@jenner.com

Counsel for Constellation Energy Corporation and Constellation Energy Generation, LLC

Paul M. Flynn
Ryan J. Collins
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005
202-393-1200
flynn@wrightlaw.com
collins@wrightlaw.com

Chenchao Lu
Assistant General Counsel
PJM Interconnection, L.L.C.
2750 Monroe Blvd.
Audubon, PA 19403
610-666-2255
Chenchao.Lu@pjm.com

Counsel for PJM Interconnection, L.L.C.

Gerit F. Hull
Deputy General Counsel
for Regulatory Affairs
American Municipal Power, Inc.
1111 Schrock Rd, Suite 100
Columbus, OH 43229
614-540-0852
ghull@amppartners.org

Counsel for American Municipal Power, Inc.

Danielle C. Fidler
Earthjustice
1001 G Street, NW, Suite 1000
Washington, DC 20001
202-667-4500
dfidler@earthjustice.org

Counsel for Sierra Club and Union of Concerned Scientists

Casey A. Roberts
Sierra Club
Environmental Law Program
1536 Wynkoop Street, Suite 200
Denver, CO 80202
303-454-3355
casey.roberts@sierraclub.org

Megan Wachspress
Sierra Club
Environmental Law Program
2101 Webster St., 13th floor
Oakland, CA 94612
650-746-8504
megan.wachspress@sierraclub.org

Counsel for Sierra Club

Caroline Reiser
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, DC 20005
202-717-8341
creiser@nrdc.org

Counsel for Natural Resources Defense Council

Cynthia S. Bogorad
Lauren L. Springett
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
202-879-4000
cynthia.bogorad@spiegelmcd.com
lauren.springett@spiegelmcd.com

Counsel for Buckeye Power, Inc.

Jeffery S. Dennis
Advanced Energy Economy
1010 Vermont Ave, N.W.
Washington, D.C. 20005
202-380-1950
jdennis@aee.net

Counsel for Advanced Energy Economy

Adrienne E. Clair
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-1167
202-585-6900
aclair@thompsoncoburn.com

Counsel for the National Rural Electric Cooperative Association

Adrienne E. Clair
Rebecca L. Shelton
Jecoliah R. Williams
Thompson Coburn LLP
1909 K Street, N.W., Suite 600
Washington, D.C. 20006-1167
(202) 585-6900
aclair@thompsoncoburn.com
rshelton@thompsoncoburn.com
jwilliams@thompsoncoburn.com

Counsel for Old Dominion Cooperative Electric

Daniel E. Frank
Allison E. Speaker
Eversheds Sutherland (US) LLP
700 Sixth St., N.W., Suite 700
Washington, DC 20001-3980
202-383-0838
DanielFrank@eversheds-sutherland.com
AllisonSpeaker@eversheds-sutherland.com

Counsel for East Kentucky Power Cooperative, Inc.

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
1200 G. Street, NW, Suite 800
Washington, D.C. 20005
202-409-4170
bweishaar@mcneeslaw.com

Kenneth R. Stark
McNees Wallace & Nurick LLC
100 Pine Street
Harrisburg, PA 17101
717-237-5378
kstark@mcneeslaw.com

Counsel for PJM Industrial Customer Coalition

Gary R. Studen
PSEG
80 Park Plaza – T10
Newark, NJ 07102
973-430-7150
gary.studen@pseg.com

Counsel for PSE&G, PSEG Power, and PSEG ER&T

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) and the briefing format and schedule this Court approved on April 18, 2022. Case No. 21-3068, Dkt. 127). Excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 15,058 words and Respondent-Intervenors' briefs collectively contain fewer than 26,000 words.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Century Schoolbook 14-point font using Word for Microsoft 365.

I further certify that, pursuant to Circuit Rule 31.1(c), the text of the electronic brief is identical to the text in paper copies sent to the Court, and that the electronic brief was scanned for viruses using Microsoft Security Essentials and that no viruses were detected.

/s/ Matthew E. Price
Matthew E. Price

CERTIFICATE OF SERVICE

I certify that on August 12, 2022, I filed the foregoing brief using the Court's CM/ECF system. Service will be effected by and through the Court's CM/ECF system.

/s/ Matthew E. Price
Matthew E. Price