

ORAL ARGUMENT NOT YET SCHEDULED**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Nos. 22-1090 & 22-1106

**CITADEL FNGE LTD.,
*Petitioner,*****v.****FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.***

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

**BRIEF OF INTERVENORS
PJM INTERCONNECTION, L.L.C. AND MONITORING ANALYTICS, LLC
IN SUPPORT OF RESPONDENT**

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Dated: January 24, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

To counsel's knowledge, the parties and intervenors before this Court are as stated in the Opening Brief of Petitioner, *Citadel FNGE Ltd. v. FERC*, Brief for Petitioner Citadel FNGE Ltd., Nos. 22-1090 & 22-1106 (D.C. Cir. Oct. 5, 2022).

B. Rulings under Review

1. *PJM Interconnection, L.L.C.*, Order Finding Operating Agreement Unjust and Unreasonable and Establishing Replacement Rate, Docket Nos. EL22-26-000 & ER22-957-000, 178 FERC ¶ 61,104 (2022) (R.80, JA____-JA____);
2. *PJM Interconnection, L.L.C.*, Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, Docket Nos. EL22-26-001 & ER22-957-001, 179 FERC ¶ 62,034 (2022) (R.84, JA____-JA____); and
3. *PJM Interconnection, L.L.C.*, Order Addressing Arguments Raised on Rehearing, Docket Nos. EL22-26-001, ER22-957-001, 179 FERC ¶ 61,161 (2022) (R.87, JA____-JA____).

C. Related Cases

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

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**CORPORATE DISCLOSURE STATEMENT
OF PJM INTERCONNECTION, L.L.C.**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 15(c)(6) and 26.1 of the Circuit Rules of this Court, intervenor PJM Interconnection, L.L.C. (“PJM”), states that it is a limited liability company (“L.L.C.”) organized and existing under the laws of the State of Delaware. PJM is a regional transmission organization (“RTO”) for all or portions of Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. PJM is authorized by Respondent Federal Energy Regulatory Commission (“FERC”) to administer an Open Access Transmission Tariff (“Tariff”), provide transmission service under the Tariff on the electric transmission facilities under PJM’s control, operate an energy and other markets, and otherwise conduct the day-to-day operations of the bulk power system of a multi-state electric control area. PJM was approved by FERC first as an independent system operator and then as an RTO. *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997), *reh’g denied*, 92 FERC ¶ 61,282 (2000), *modified sub nom. Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345 (2002).

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

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

Respectfully submitted,

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

**CORPORATE DISCLOSURE STATEMENT
OF MONITORING ANALYTICS, LLC**

Monitoring Analytics, LLC has no parent corporation. Because Monitoring Analytics, LLC does not issue stock, no corporation can own ten percent or more of its stock.

Respectfully submitted,

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GLOSSARY

2022 Rule	PJM Operating Agreement Schedule 1 § 5.6.3(c) accepted in the Initial Order
Bresler Aff.	Affidavit of Frederick S. Bresler, III on behalf of PJM Interconnection, L.L.C. (PJM Complaint, Attachment C) (R.2, JA____-JA____)
Citadel	Citadel FNGE Ltd., Petitioner
Dominion	Dominion Energy or an affiliate
FERC	Federal Energy Regulatory Commission, Respondent
FERC Primer	Energy Primer: A Handbook of Energy Market Basics, Federal Energy Regulatory Commission (April 2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf
FPA	Federal Power Act
Initial Order	PJM Interconnection, L.L.C., 178 FERC ¶ 61,104 (2022), which accepted the 2022 Rule and is appealed in this proceeding (R.80, JA____-JA____)
Lanexa-Dunnsville line	A transmission line owned by Dominion located in the Northern Neck
Market Monitor	Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM, Intervenor for Respondent
Market Monitor Comments	Comments of the Independent Market Monitor for PJM, Docket Nos. EL22-26-000 & ER22-957-000 (Feb. 2, 2022) (R.22, JA____-JA____)
Market price	The wholesale energy market price (known as the “locational marginal price” or “LMP”)
Northern Neck	The peninsula between the Potomac and Rappahannock Rivers in the Commonwealth of Virginia

P	Paragraph in a FERC order
Pet. Br.	<i>Citadel FNGE Ltd. v. FERC</i> , Brief for Petitioner Citadel FNGE Ltd., Nos. 22-1090 & 22-1106 (Oct. 5, 2022)
PJM	PJM Interconnection, L.L.C., Intervenor for Respondent
PJM Answer	Motion for Leave to Answer and Answer of PJM, Docket Nos. ER22-957-000 & EL22-26-000 (Feb. 10, 2022) (R.74, JA____-JA____)
PJM Complaint	Section 206 Filing Demonstrating the Existing Transmission Constraint Penalty Factor Rules are Unjust and Unreasonable of PJM Interconnection, L.L.C., Docket No. EL22-26-000 (Jan. 31, 2022)
PJM May 2022 Informational Filing	Informational Filing on Status of Transmission Constraint in the Northern Neck Peninsula of PJM Interconnection, L.L.C., Docket Nos. ER22-957 & EL22-26-000 (May 18, 2022) (R.85, JA____-JA____)
Pre 2022 Rule	PJM Operating Agreement Schedule 1 § 5.6 (Transmission Constraint Penalty Factors) as it existed prior to the 2022 Rule
R.	Record
Reconductoring Projects	Harmony Village-Greys Point and Rappahannock-White Stone Reconductoring Upgrades
Rehearing Order	PJM Interconnection, L.L.C., 179 FERC ¶ 61,161 (2022), that denied rehearing of the Initial Order and is appealed in this proceeding (R.87, JA____-JA____)
Tariff	PJM Open Access Transmission Tariff

INTRODUCTION

This case concerns the Federal Energy Regulatory Commission (“FERC”) barring inclusion of a rate component when the facts and circumstances show it to be unjustified. At the request of PJM Interconnection, L.L.C. (“PJM”), FERC determined that the continued imposition of one component of the rate charged to wholesale electricity customers in the Northern Neck peninsula of Virginia would, as a result of unique circumstances, produce unjust and unreasonable rates in violation of the Federal Power Act (“FPA”). The rate component in question is a “scarcity” component (known formally as the Transmission Constraint Penalty Factor, but for ease of understanding referred to in this brief as the “scarcity rate”) that increases wholesale electricity prices when transmission facilities reach their physical limit, i.e., when the transmission lines are “congested.” The purpose of the scarcity rate is to incentivize additional energy supply or demand reductions to alleviate the congestion in a specific locality. In the orders below, based on an extensive record, FERC found that the scarcity rate could not accomplish its purpose in the geographically limited Northern Neck peninsula of Virginia in the circumstance where one of three transmission lines (the “Lanexa-Dunnsville line”) has been taken out of service for a two-year upgrade project. Accordingly, FERC found that the continued application of the scarcity rate in this unique circumstance was unjustified and therefore produced unjust and unreasonable rates. In its place,

FERC adopted a replacement rate that effectively suspended the application of the scarcity rate until the outage of the transmission line is placed back into service.

The circumstances which gave rise to FERC's orders are extremely narrow and fact-specific, limited to the Northern Neck and limited in time. This Court affords significant deference to FERC's expert judgment on matters related to rate design and determinations of fact. In this case, FERC's findings were robustly supported by record evidence. The petition for review should be denied.

BACKGROUND

I. The Congestion Scarcity Rate Directly Increases Energy Market Prices for the Purpose of Resolving Transmission Constraints

In PJM, the wholesale energy market price (known as the “locational marginal price” or “LMP” but referred to in this brief as “market price”) represents the cost of making an additional unit of electricity available at a particular location in the grid. *See Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 233-34 (D.C. Cir. 2013). The market price reflects the cost of meeting demand at a specific location by reflecting the sum of the incremental cost of the next unit of generation available, the cost of transmission “congestion,” and the cost associated with transmission line losses. *Id.* This case is about the congestion cost component of the market price.

Generally, the cost of electricity is set through a day-ahead market, in which generators of electricity enter offers to sell electricity to meet the next day's anticipated demand. *See id.* at 233. In addition to the day-ahead market, PJM

operates a real-time market to account for unexpected deviations from the supply and demand expectations settled in the day-ahead market, resulting from, e.g., generation outages, transmission outages, and changes in expected energy demand. *See id.* at 233; *see also Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 245-46 (D.C. Cir. 2007) (per curiam) (“*WPPP*”).

When the PJM region is unconstrained, i.e., there is no transmission congestion, and energy can move freely on the transmission system, the market price at each node would be essentially the same, reflecting the market clearing price for electricity. *See Black Oak Energy*, 725 F.3d at 234. However, when the physical limitation of a transmission facility is reached, the most economic generation cannot be delivered to consumers, and PJM must dispatch more expensive generation (or demand reduction resources) located inside the constrained area to ensure that flows on transmission facilities are maintained within their operating limits. *See Black Oak Energy*, 725 F.3d at 234. Congestion costs arise when energy demand over a transmission line exceeds that line’s capabilities. The difference between the price where the energy is delivered (the “sink”) and the price where the energy is generated (the “source”) is the congestion cost component used in setting the market price. *See Energy Primer: A Handbook of Energy Market Basics*, Federal Energy Regulatory Commission, 62 (April 2020),

https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf

(“FERC Primer”).

The PJM market rules set the uppermost bound for congestion costs at the “scarcity” rate of \$2,000/megawatt-hour (“MWh”) for PJM’s real-time energy market.¹ PJM’s market clearing algorithm exhausts all available actions to economically relieve a transmission constraint up to the relevant scarcity rate. If no resource is available to resolve the transmission constraint, PJM’s real-time energy market rules require PJM to include the \$2,000/MWh scarcity rate in the congestion cost of the market price. Tariff, Attachment K-Appendix, section 5.6.1 (R.1, JA__); *see also id.*, Attachment K-Appendix, section 2.5(c) (“Congestion Price, which is the effect on transmission congestion costs (whether positive or negative), including [the scarcity rate], associated with increasing the output of a generation resource or decreasing the consumption by a Demand Resource, based on the effect of increased generation from the resource on transmission line loadings.”).

In short, when a transmission constraint cannot be addressed through available generation or demand reduction in the real-time market, the scarcity rate is set at \$2,000/MWh and the inability to resolve the congestion is reflected in higher market

¹ While the Tariff includes different scarcity rates for different markets, e.g., the day-ahead market scarcity rate is \$30,000/MWh, *see* Tariff, Attachment K-Appendix, section 5.6.2 (R.1, JA____-JA____), this case concerns the application of the \$2,000/MWh scarcity rate in the real-time market.

prices, which include the \$2,000/MWh scarcity rate. As a general matter, the higher market prices fulfill the purpose of the scarcity rate—signaling the need for generation or demand reduction resources to respond in the short-term, or for the development of additional generation, demand reduction, or transmission in the long-term. *See* Section 206 Filing Demonstrating the Existing Transmission Constraint Penalty Factor Rules are Unjust and Unreasonable of PJM Interconnection, L.L.C., Docket No. EL22-26-000 (Jan. 31, 2022) (“PJM Complaint”) (R.2, JA____-JA____), Affidavit of Frederick S. Bresler, III on behalf of PJM Interconnection, L.L.C. (Attachment C) ¶ 8 (“Bresler Aff.”) (R.2, JA____).

II. The Scarcity Rate Cannot Achieve Its Purpose in the Northern Neck During the Temporary, Two-Year Outage of One of Three Transmission Lines, Given Supply and Demand Conditions

The Northern Neck is normally served by three transmission lines. Only a few relatively small generation resources are located on the Northern Neck, and of these limited resources, only one small combustion resource is capable of serving load at all times of day. *PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,104, at PP 3-4 (2022) (“Initial Order”) (R.80, JA____-JA____); *see* PJM Complaint at 7, Figure 1 (R.2, JA____) (map of transmission lines). In January 2022, one of the three transmission lines serving the Northern Neck was placed on outage to allow for installation of facilities to reinforce the transmission capabilities in Northern Neck. Initial Order at P 3 (R.80, JA____-JA____); Bresler Aff. ¶ 11 (R.2, JA____-

JA____). The outage is expected to last for about two years. Initial Order at P 5 (R.80, JA____).

Soon after the outage commenced, real-time energy market prices in Northern Neck began to spike in the early morning due to application of the \$2,000/MWh scarcity rate. *See* PJM Complaint at 9-12 (R.2, JA____-JA____). That is, in the early morning hours, the two remaining lines delivering energy into Northern Neck reached their physical limits and the small combustion generation resources in the Northern Neck proved insufficient to manage the congestion. As a winter day continues, the constraints disappear as demand usage changes and solar generation resources in Northern Neck are able to produce energy. *See* PJM Complaint at 11 (R.2, JA____); *see also* *PJM Interconnection, L.L.C.*, Motion for Leave to Answer and Answer of PJM, Docket Nos. ER22-957-000 & EL22-26-000, at 15 (Feb. 10, 2022) (“PJM Answer”) (R.74, JA____) (“[I]n the winter periods, congestion occurs mostly before sunrise and [after] sunset so solar resources have less of an impact on the congestion.”).

During each day in the second half of January, severe market price fluctuations between prices set by the offers of the in-location generation resources (typically around \$300/MWh, Informational Filing on Status of Transmission Constraint in the Northern Neck Peninsula of PJM Interconnection, L.L.C., Docket Nos. ER22-957-000 & EL22-26-000, at 3 (May 18, 2022) (“PJM May 2022

Informational Filing”) (R.85, JA____-JA____) and prices set by the \$2,000/MWh scarcity rate. Initial Order at P 4 (R.80, JA____); PJM Complaint at 10 n.25 (R.2, JA____). The record shows the existing generation resources and the 0.1MW of demand reduction resources proved unable to address the constraint. PJM Complaint at 11 n.27 (R.2, JA____); Bresler Aff. ¶ 16 (R.2, JA____). The price signal sent by the scarcity rate failed to incentivize sufficient demand reduction. Bresler Aff. ¶ 16 (R.2, JA____) (“[T]here would need to be more than 1,000 times as much demand response registered on the peninsula”). And, the two-year outage timeframe precluded the possibility of the price signal spurring additional generation to be constructed and come online before the third transmission line is to be placed back into service, resolving the constraint and obviating the seemingly daily application of the scarcity. Initial Order at PP 6, 12, 60-61 (R.80, JA____-JA____, JA____, JA____-JA____).

Because application of the scarcity rate increased prices but did not result in any observed response capable of resolving the near-daily constraints, PJM submitted a filing under FPA section 206 asking FERC to find, in these circumstances, application of the scarcity rate unjustified and the existing market rules unjust and unreasonable.

FERC agreed. FERC found that based on the narrow and specific circumstances presented in this case (which were both location and time-bound)

imposition of the scarcity rate on the Northern Neck would not achieve its intended short-term or long-term purposes. Initial Order at PP 61-62 (R.80, JA____-JA____). Accordingly, FERC found that continued application of the scarcity rate in the Northern Neck would only produce higher prices without an offsetting benefit. *Id.* (R.80, JA____-JA____). In short, FERC held that application of the scarcity rate in the Northern Neck “in these particular circumstances produces unjust and unreasonable rates.” *PJM Interconnection, L.L.C.*, 179 FERC ¶ 61,161, at P 14 (2022) (“Rehearing Order”) (R.87, JA____).

III. Petitioner’s Financial Position Profits from Application of the Scarcity Rate to the Northern Neck

To protect market participants from congestion cost uncertainty in day-ahead market prices, PJM and other organized wholesale electricity markets developed financial transmission rights, through which transmission service customers can offset their exposure to day-ahead congestion charges. *See WPPI*, 493 F.3d at 251. Financial transmission rights holders, which can include financial traders who are not exposed to congestion charges, receive the day-ahead congestion charges collected by PJM for a specific quantity of energy transmitted over a specific transmission path. FERC Primer at 66. If congestion charges are positive over a specific path (which occurs when prices at the “source” are lower than at the “sink”), the financial transmission rights holder receives a share of the congestion revenues, which allows the holder to offset day-ahead congestion costs. FERC Primer at 66.

Conversely, if congestion charges on a path are negative, the financial transmission rights holder must make a payment.

Petitioner holds financial transmission rights on paths in the Northern Neck. *Citadel FNGE Ltd. v. FERC*, Brief for Petitioner Citadel FNGE Ltd., Nos. 22-1090 & 22-1106, at 41 (Oct. 5, 2022) (“Pet. Br.”). Thus, Petitioner may benefit financially from application of the scarcity rate in the Northern Neck.

SUMMARY OF ARGUMENT

Petitioner alleges that FERC acted arbitrarily and capriciously and that its orders are not supported by substantial evidence for three reasons, and on that basis asks the Court to vacate the orders. But FERC acted lawfully and the orders on review provide FERC’s well-reasoned decision-making, drawing a clear path between FERC’s decision and substantial evidence in the record.

First, FERC examined the evidence in the record and found that application of the scarcity rate, in the narrow circumstances presented, would be unjustified. FERC found that substantial evidence showed that the scarcity rate was not providing the intended incentive, in the short-term, for increased generation or demand response (i.e., reduced demand) to alleviate the transmission congestion, and that no evidence supported that such a short-term response would be forthcoming. FERC also found that the scarcity rate could not incentivize the

development of a long-term solution because the reason for the congestion—a time-limited outage of the Lenexa-Dunnville line—also provided the long-term solution.

Second, FERC reasonably concluded that application of the scarcity rate in these circumstances produces unjust and unreasonable rates. While Petitioner complains that FERC failed to evaluate the magnitude of the market price increase attributable to application of the scarcity rate, FERC is under no obligation to evaluate the impact of an unjustified rate component. Under the FPA, FERC is tasked with ensuring just and reasonable rates, and part of that responsibility requires FERC to ensure that costs included in rates are incurred for the benefit of ratepayers. Because record evidence showed that the scarcity rate lacked justification in these circumstances, FERC needed no further analysis to reasonably exclude that price component from rates.

Third, FERC properly disposed of Petitioner's arguments that FERC's orders on review are inconsistent with FERC's existing policy regarding the scarcity rate. FERC's orders are confined to the limited circumstances present in the Northern Neck and do not undermine FERC's prior determinations that application of the scarcity rate produces just and reasonable rates to incentivize short-term or long-term solutions to resolve transmission congestion. FERC also confronted Petitioner's concerns about the impact of the replacement rate on market integrity, explaining that FERC's obligation to ensure just and reasonable rates is paramount.

Fourth, if, despite the above arguments, the Court decides to remand, it should do so without vacatur. Given that Petitioner does not allege that FERC acted ultra vires, any deficiency in FERC's reasoning can be remedied on remand. Moreover, vacatur would be highly disruptive to PJM's real-time energy market, which settles and sets new prices every five minutes, and could require re-running each 5-minute settlement interval in the Northern Neck area during the period after the replacement rate became effective on February 1, 2022. Such disruptive consequences weigh against vacatur.

ARGUMENT

I. Standard of Review

“FERC has ‘undoubted power under section 206’ to change an existing rate ‘whenever it determines such rate to be unlawful.’” *Emera Maine v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956)). Challenges to FERC's ratemaking decisions “face an uphill battle,” *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 181 (D.C. Cir. 2013), because “[t]he [FPA] statutory requirement that rates be ‘just and reasonable’ is obviously incapable of precise judicial definition, and [courts] afford great deference to [FERC] in its rate decisions.” *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008). Thus, “[i]n matters of ratemaking, [this Court's] review is highly deferential, as [i]ssues 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.” *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010) (“*SMUD*”) (citation omitted); *see also Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) (describing rate design as “much less a science than an art”). Deference is particularly due to FERC’s orders (as here) on whether a scarcity rate can provide the price signal for additional short-term or long-term investment to resolve a transmission constraint on a peninsula, an exercise which involves FERC’s “predictive judgment” on whether such investment will appear. *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1239 (D.C. Cir. 2005). And, this court’s “role is ‘not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives.’” *PJM Power Providers Grp.*, 880 F.3d 559, 562 (D.C. Cir. 2018) (quoting *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016)).

FERC, moreover, is “not required to address every argument advanced by petitioners,” but only to “state the main reasons for its decision and indicate that it has considered the most important objections.” *Town of Barnstable v. FAA*, 740 F.3d 681, 690 (D.C. Cir. 2014) (quoting *Simpson v. Young*, 854 F.2d 1429, 1434-35 (D.C. Cir. 1988)).

FERC’s findings, “as to the facts, if supported by substantial evidence, shall be conclusive.” 16 U.S.C. § 825l(b); *see also La. Pub. Serv. Comm’n v. FERC*, 522

F.3d 378, 395 (D.C. Cir. 2008) (“Because substantial record evidence supports FERC’s decision, we deny the petition for review as to this issue. . . . While there may be evidence supporting petitioner’s position, we must determine ‘not whether record evidence supports [petitioner’s] version of events, but whether it supports FERC’s.’” (alteration in original) (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003))).

II. FERC Reasonably Concluded, Based on Extensive Record Evidence, that the Scarcity Rate Was Not and Could Not Accomplish Its Purpose in the Northern Neck

A. FERC Reasonably Determined that Imposition of the Scarcity Rate in These Circumstances Would Not Elicit Meaningful Supply or Demand Responses.

FERC determined that it was unjust and unreasonable to require PJM to set the congestion component of the market price to \$2,000/MWh on the Northern Neck based on the administratively determined scarcity rate because such prices did not and would not attract short or long term market responses from either supply or demand resources. *See* Initial Order at PP 59-66 (R.80, JA____-JA____). Accordingly, FERC approved PJM’s proposal to set the scarcity rate to the marginal cost of the last available resources (i.e., the Northern Neck combustion turbine generators) on the supply curve for constraint relief. Initial Order at PP 67-68 (R.80, JA____). FERC based these decisions on information and data about market conditions provided by PJM and the Independent Market Monitor for PJM

Interconnection (“Market Monitor”). *See, e.g.*, Initial Order at P 65 (citing PJM’s evidence showing application of the scarcity rate and high congestion prices); Rehearing Order at P 20 (R.87, JA____-JA____) (citing the Market Monitor’s evidence “demonstrat[ing] that an increase in real-time prices at the Northern Neck peninsula has the effect of increasing the real-time average zonal prices in a way that renders them unjust and unreasonable in these circumstances”).

Petitioner objects that the record does not provide “sufficient basis to conclude that the scarcity rate did not produce any meaningful supply or demand responses to help mitigate congestion.” Pet. Br. at 57. Specifically, Petitioner alleges that the “charts reflecting 15 days of scarcity pricing” do not show that “continued scarcity pricing would not have such an effect at any point during the two-year construction project.” Pet. Br. at 57.

Petitioner mischaracterizes the replacement rate and the FERC’s conclusion. The price signal was not removed; it was reduced to a level based on local market supply and demand fundamentals that was much higher than average prices at that location. FERC reasonably found, based on the record, that continued application of the full \$2,000/MWh scarcity rate would not result in generation, demand response, or transmission investment to address the issues. Initial Order at P 62 (R.80, JA____-JA____). The record contains no evidence that the continued application of the full scarcity rate would resolve the congestion.

In these circumstances, the record established that imposition of the full scarcity rate would not serve its intended purpose as an appropriate investment signal because it was clear that: (1) in the long-term, the resulting high prices would be eliminated by the upgrade to the Lanexa-Dunnsville line that was the immediate cause of the transmission congestion; and (2) in the short term, the lack of available generation or demand response on the Northern Neck demonstrated that applying the full scarcity rate would be punitive to customers on the Northern Neck with no corresponding benefit to alleviating the constraint. Initial Order at PP 61-62 (R.80, JA____-JA____); *see also* Informational Update on Status of Transmission Constraint in the Northern Neck Peninsula of PJM Interconnection, L.L.C., Docket Nos. ER22-957-00 & EL22-26-000, at 2-3 (Feb. 15, 2022) (R.79, JA____-JA____). FERC's conclusion was bolstered by PJM's explanation that the temporary nature of the transmission outage meant that a new resource sufficient to relieve the constraint would be unlikely to recover its costs. PJM Complaint at 14 (R.2, JA____); Bresler Aff. ¶ 16 (R.2, JA____). The lack of actual response (including the lack of new generation, existing generation in the area providing additional energy at the upper end of their dispatchable range, or new demand response registrations) confirmed preexisting expectations that there could not and would not be a timely response. No countervailing evidence was presented that additional generation could be physically produced by the existing local resources, or that any

prospective response was on the horizon to significantly alleviate the constraint. In such circumstances, it would not have been just nor reasonable to leave the unjust and unreasonable prices in place longer solely for the purpose of providing more evidence that there would no response. The result would simply have been a wealth transfer to financial transmission rights holders like Petitioner from ratepayers paying the unjust and unreasonable prices.

Petitioner misunderstands the point. A planned transmission outage (which was, like a road under construction, necessary to be taken in order to safely construct the new transmission solution) created the short-term conditions on the Northern Neck. By definition, a planned transmission outage will have a clear end date and the need for additional resources to resolve the constraint caused by the outage will end. As FERC understood, the scarcity rate could not send a long-term investment signal because of the short-term nature of the issue, after which the high prices would be eliminated. While the scarcity rate may have been able to send a short-term signal for additional generation or demand response, the record shows no additional generation available and “there would need to be more than 1,000 times as much demand response” than the 0.1 MW registered and available to resolve the issue. PJM Complaint at 14 (R.2, JA_____). Thus, consistent with FERC’s obligations to protect consumers from unjust and unreasonable rates, 16 U.S.C. §§ 824d–824e,

FERC eliminated the artificially high prices that were not a competitive or just and reasonable result.

In summary, FERC reasonably relied on the record when it found “that PJM’s continued application of the [scarcity rate] to congestion in the Northern Neck region resulting from the Lanexa-Dunnsville-Northern Neck line outage will not produce the intended short-term or long-term responses and, instead, will only result in higher costs to ratepayers without a commensurate benefit.” Initial Order at P 61 (R.80, JA____).

B. FERC Correctly Determined that Continued Imposition of the Scarcity Rate in These Circumstances Did Not Provide an Incentive for Transmission Investment.

Petitioner claims that the scarcity rate worked as designed, citing as evidence Dominion’s (the local utility) acceleration of one specific reconductoring upgrade. Pet. Br. at 57-58. Petitioner states: “This is just the sort of market-based solution that the scarcity rate was designed to incentivize.” Pet. Br. at 58.

Again, Petitioner misunderstands the point. Transmission projects are cost of service projects and not market-based solutions. The reconductoring project was a cost of service project that was pursued for reliability reasons based on a planning study. In other words, Dominion developed that upgrade for reliability reasons in the ordinary course of PJM’s regional transmission expansion development process. Initial Order at P 40 (R.80, JA____-JA____); Rehearing Order at P 15 n.42 (R.87,

JA____); PJM Answer at 10–12 (R.74, JA____-JA____). Therefore, there is no evidence that Dominion developed the reconductoring project in direct response to prices attributable to the scarcity rate.

In any event, the record shows that this upgrade *did not completely resolve* the constraint. Rehearing Order at P 15 (R.87, JA____-JA____) (citing PJM Answer at 12 (R.74, JA____) & PJM May 2022 Informational Filing at 4 (R.85, JA____)). FERC therefore reasonably held the upgrade “does not guarantee” that ““anomalous price signals that are not warranted or actionable”” “will not recur.” Rehearing Order at P 15 (R.87, JA____-JA____).

C. FERC Reasonably Removed an Unwarranted Wealth Transfer.

FERC made clear that the high prices resulting from the scarcity rate were “creating anomalous price signals that are not warranted or actionable,” and that FERC must ensure that the market produces just and reasonable rates avoid harm to the public interest. Initial Order at P 60 (R.80, JA____-JA____).

In addition to the evidence that high prices would not incent new investment, the unwarranted prices created windfall profits for the holders of financial transmission rights on the Northern Neck, including those of the Petitioner. Initial Order at P 21 (R.80, JA____) (summarizing Comments of the Independent Market Monitor for PJM, Docket Nos. EL22-26-000 & ER22-957-000, at 2-3 (Feb. 2, 2022) (R.22, JA____-JA____) (“Market Monitor Comments”)). The scarcity rate

produced high prices made Northern Neck financial transmission rights dramatically more valuable. While the revised scarcity rate was reduced as a result of the replacement rate, those same financial transmission rights were still significantly more valuable as a result of the high prices that reflected supply and demand fundamentals, e.g., the \$300+/MWh prices yielded by the in-location combustion turbines. *See* PJM Complaint at 11 (R.2, JA_____).

The Market Monitor provided facts for FERC's consideration showing that prior to the reduction of the scarcity rate in these circumstances, the application of the scarcity rate did directly cause significantly higher prices, which created windfall profits for traders of financial transmission rights and virtual products.

The Market Monitor stated in the record:

In August 2021, virtual traders made \$0.4 million in profits at the Northern Neck, Arnold's Corner, and Westmoreland Solar nodes. In January 2022, total virtual profits at these nodes was \$3.8 million. In February 2022, virtual profit was \$9.8 million at these same nodes even after PJM eliminated the [scarcity rate].

The supporters of the [scarcity rate] include the top four most profitable [financial transmission rights] participants in January from [financial transmission rights] related to the Greys Point – Harmony Village constraint. The top four [financial transmission rights] traders made more than \$50 million in [financial transmission rights] profits in January.

Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket Nos. EL22-26-000, -001 & ER22-957-000, -001, at 4 (Apr. 5, 2022) (R.83, JA_____).

The Market Monitor explained the potential for continued windfalls if PJM's proposed replacement rate had not been approved. Specifically, the Market Monitor stated in its comments:

In this case, virtual traders have engaged in market manipulation by engaging in false arbitrage and taking advantage of a "money tree" that has nothing to do with market fundamentals. Virtual traders have already profited significantly and there have been increasing levels of virtual activity in the area.

Market Monitor Comments at 4 (R.22, JA_____).

The Market Monitor further stated:

PJM's proposed February 1, 2022, refund date and the intended immediate implementation are necessary to correct the energy market price signals. Differences between day-ahead and real-time market models create the opportunity for false arbitrage and market manipulation. For the month of January 2022, the volume of [financially traded virtual demand ("DECs")] at the Northern Neck pnodes was 243 GWh while the actual load was only 149 GWh. The result is already millions of dollars in increased costs to customers with no economic benefit to the market.

Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket Nos. EL22-26-000 & ER22-957-000, at 5 (Feb. 14, 2022) (R.76, JA_____).

III. FERC Based Its Decision that Application of the Scarcity Rate Was Unjust and Unreasonable on Substantial Evidence

A. Upon Finding the Scarcity Rate Unjustified in These Circumstances, FERC Properly Excluded It From Rates.

Petitioner argues that FERC failed to consider the “magnitude” of the market price increase due to application of the scarcity rate, Pet. Br. at 42, and “do the work” to determine “how much the scarcity rate would raise prices” before finding resulting market prices unjust and unreasonable. Pet. Br. at 43.

But FERC is under no obligation to evaluate the impact of an unjustified rate. If a rate component has no basis, then it cannot be said to provide benefit to ratepayers, and it cannot be included in just and reasonable rates. Such would violate the cost-causation principle embodied in the FPA’s just and reasonable rate requirement. *See LSP Transmission Holdings II v. FERC*, 45 F.4th 979, 984 (D.C. Cir. 2022) (“Under the [FPA], electric utilities must charge just and reasonable rates . . . [a] standard [that] requires applying a concept called the ‘cost-causation principle’”); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 87 (D.C. Cir. 2014) (the cost-causation principle “requires costs ‘to be allocated to those who cause the costs to be incurred and reap the resulting benefits.’” (quoting *Nat’l Ass’n of Regul. Util. Comm’rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007))); *Black Oak Energy*, 725 F.3d at 237 (“The cost-causation principle has its roots in monopoly rate regulation, where rates are required to ‘be based on the costs of providing service . . . plus a just

and fair return on equity.” (quoting *Ala. Elec. Coop. v. FERC*, 684 F.2d 20, 27, 221 U.S. App. D.C. 246 (D.C. Cir. 1982))). A rate component that is not justified, by definition, is not caused by ratepayers and is not incurred for their benefit. Including an unjustified component in rates is therefore per se unjust and unreasonable. Indeed, the FPA by its very terms provides for exclusion of any part of a rate or charge that is not justified. *See* 16 U.S.C. § 824d(e) (in a section 205 proceeding, FERC may require “refunds . . . [of] such portion of such increased rates or charges as by its decision shall be found not justified”).

In any event, contrary to Petitioners’ argument, FERC “d[id] the work.” FERC examined the record and found that “high energy prices result[ed] from application of the [scarcity rate].” Initial Order at P 61 (R.80, JA____). Specifically, FERC found that, because the scarcity rate “will not produce the intended short-term or long-term responses,” inclusion of the scarcity rate in the overall market rate “will only result in higher costs to ratepayers without commensurate benefit.” Initial Order at P 61 (R.80, JA____). FERC found that record evidence “demonstrate[s] the link between high prices and the [scarcity rate],” Initial Order at P 65 (R.80, JA____), and that the high prices were the result of “all available [generation] operating yet still insufficient to control the constraint and no other controlling actions [were] available.” Rehearing Order at P 21 (R.87, JA____-JA____) (quoting *Bresler Aff.* ¶ 12 (R.2, JA____)). FERC held that this evidence of

congestion price increases flowed through and “increase[d] real-time prices at the Northern Neck peninsula,” which “ha[d] the effect of increasing the real-time average zonal prices” in the Dominion transmission zone in which Northern Neck is located. Rehearing Order at P 20 (R.87, JA____-JA____).

In other words, if FERC did nothing, ratepayers would continue to pay high congestion prices in exchange for no benefit. Initial Order at P 61 (R.80, JA____) (“Based on the evidence in the record, we find that PJM’s continued application of the [scarcity rate] to congestion in the Northern Neck region resulting from the Lanexa-Dunnsville-Northern Neck line outage will not produce the intended short-term or long-term responses and, instead, will only result in higher costs to ratepayers without a commensurate benefit.”); Rehearing Order at PP 19-22 (R.87, JA____-JA____). Thus, FERC’s actions were consistent with the “cost causation principle [which] requires comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party.” *ODEC v. FERC*, 898 F.3d 1254, 1260 (D.C. Cir. 2019).

Petitioner attempts to analogize FERC’s section 206 action here with FERC’s section 206 inaction in *Public Citizen v. FERC*, 7 F.4th 1177 (D.C. Cir. 2021). *See* Pet. Br. at 43-44. However, *Public Citizen* is inapposite. There, the Court found “inadequate” FERC’s “truncated analysis” of whether alleged market manipulation had affected clearing prices in the midcontinent-area capacity market. *Id.* at 1198.

In the orders on review in *Public Citizen*, FERC dismissed calls to take action on the “anodyne statement that ‘an Auction Clearing price is not unjust and unreasonable because it is higher than expected’” and failed to “grappl[e] with” the price spike. *Id.* at 1199 (quoting *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042, at P 84 (2019)). In contrast, here, FERC grappled with the facts; found that the scarcity rate was causing the market prices to spike; examined the basis for the scarcity rate; and found it lacked justification in these circumstances. Initial Order at PP 59-65 (R.80, JA____ - JA____); Rehearing Order at PP 14-22 (R.87, JA____ - JA____). Unlike *Public Citizen*, FERC did not “backhand[]” the price spikes, but rather found their cause (the scarcity rate), examined whether they were justified (they were not), and concluded that application of the scarcity rate “in these particular circumstances produces unjust and unreasonable rates.” Rehearing Order at P 14 (R.87, JA____). FERC’s findings are grounded in the record, and the orders on review clearly delineate the path from “the facts found to the choice made.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”).

Further, Petitioner’s claim that FERC “cannot declare an existing rate unjust and unreasonable because it raises prices” without evaluating “how much” prices actually increased misses the mark. Pet. Br. at 44; *see also id.* at 47 (“How large of a price increase is unacceptable to [FERC]? \$100 per megawatt hour? \$10? \$1?”).

At root, this argument implies that unjustified costs may be included in rates so long as the impact is small. But the FPA simply does not allow unjustified costs in rates. *See* 16 U.S.C. § 824d(e) (in a section 205 proceeding, FERC may require “refunds . . . [of] such portion of such increased rates or charges as by its decision shall be found not justified”). Because FERC found application of the scarcity rate unjustified in these circumstances and its *application* produced unjust and unreasonable rates, Initial Order at PP 60-63 (R.80, JA____ - JA____), no amount of price increase resulting from the scarcity rate would be acceptable. FERC did not need to conduct a meaningless analysis of the justness and reasonableness of different future levels of price increase, because *no* price increase resulting from application of the scarcity rate would be supportable in “these particular circumstances.” Rehearing Order at P 14 (R.87, JA____). Moreover, such analysis inherently would be speculative because the scarcity rate’s future impact on energy prices would depend on future consumption levels and consumption patterns. There is no need for FERC to prognosticate such future impacts on customers after already determining that the rate component produces unjust and unreasonable rates.

Under section 206 of the FPA, FERC must evaluate whether the existing rate is unjust and unreasonable. 16 U.S.C. § 824e. FERC met that burden here. Based on substantial evidence, FERC held that the scarcity rate “pricing signal is unnecessary and unwarranted,” Initial Order at P 63 (R.80, JA____), and application

of the scarcity rate “in these particular circumstances produces unjust and unreasonable rates.” Rehearing Order at P 14 (R.87, JA____). The Court should therefore deny Petitioner’s challenges on this issue. *La. Pub. Serv. Comm’n*, 522 F.3d at 395-96 (“Because substantial record evidence supports FERC’s decision, we deny the petition for review as to this issue. . . . While there may be evidence supporting petitioner’s position, we must determine ‘not whether record evidence supports [petitioner’s] version of events, but whether it supports FERC’s.’” (alteration in original) (quoting *Fla. Mun. Power Agency*, 315 F.3d at 368)).

B. FERC Fulfilled Its Obligation to Consumers by Protecting Them from the Unjust and Unreasonable Rates Produced by Application of the Scarcity Rate in These Circumstances.

Petitioner asserts FERC’s orders are arbitrary and capricious because FERC “lacked any price evidence to corroborate its determination that applying the scarcity rate at Northern Neck was imposing unjust and unreasonable prices on retail customers.” Pet. Br. at 47-48. Petitioner argues that there is no evidence that the “scarcity pricing at Northern Neck impacted the price paid by retail consumers in any material way,” and FERC cannot find rates unjust and unreasonable “[w]ithout establishing this elementary fact.” Pet. Br. at 50.

However, as FERC recognized, whether a wholesale rate is unjust and unreasonable “does not necessarily require ‘evidence of alleged harm to retail ratepayers.’” Rehearing Order at P 20 (R.87, JA____-JA____) (quoting Request for

Rehearing of Citadel FNGE Ltd., Docket Nos. ER22-957-000 & EL22-26-000, at 7 (Mar. 18, 2022) (R.82, JA_____)). Stated another way, FERC does not need to identify particularized harm to consumers. FERC fulfills its obligations by protecting consumers from unjust and unreasonable, i.e., excessive wholesale rates within its purview under the FPA. See *Xcel Energy Servs. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (“It is long-established that the ‘primary aim [of the FPA] is the protection of consumers from excessive rates and charges.’” (quoting *Mun. Light Bds. of Reading & Wakefield v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971))); *PUC v. FERC*, 462 F.3d 1027, 1060 (9th Cir. 2006) (“FERC is obligated to protect consumers from unjust or unreasonable rates.”). Any unjust and unreasonable wholesale rate inherently harms consumers because retail ratepayers are the ultimate consumers of energy, and ultimately pay FERC-approved charges. See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986) (“When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.”). In any event, FERC here found that the record evidence demonstrates that the wholesale price increase due to the scarcity rate “has the effect of increasing the real-time average zonal prices in a way that renders [the wholesale prices] unjust and unreasonable in these circumstances.” Rehearing Order at P 20 (R.87, JA____-JA_____).

C. FERC Properly Held, Based on Substantial Evidence, that the Circumstances in Which Application of the Scarcity Rate Produces Unjust and Unreasonable Rates Would Persist, Notwithstanding Installation of a Transmission Upgrade on Lines Serving Northern Neck.

Petitioner argues that FERC failed to address adequately the “changed circumstances” associated with the accelerated in-service date of a transmission upgrade to reconductor one of the two in-service lines serving Northern Neck prior to FERC issuing the Rehearing Order, and FERC “summar[il]y dismiss[ed]” this issue. Pet. Br. at 53-55.

But FERC did what was required. FERC examined the evidence and “agree[d] with PJM’s assessment that the [separate] upgrade does not guarantee that the flaws [FERC] identified in the [Initial] Order would not reoccur, i.e., that the [scarcity rate] could be triggered, and that any price signals flowing from such an event would remain unwarranted and nonactionable.” Rehearing Order at P 15 (R.87, JA____-JA____). FERC also found no evidence in the record that the reconductoring upgrade “will completely resolve” the constraint and “prevent application of the [scarcity rate] in pricing, which [FERC] found was inappropriate in these circumstances for the reasons described above and in the [Initial] Order.” Rehearing Order at P 15 (R.87, JA____-JA____). That is, FERC found that the reconductoring upgrade by itself does not allow the scarcity rate to fulfil its intended purposes of sending price signals for short-term or long-term action in the Northern

Neck area to resolve the constraint, and thus, it “do[es] not obviate the need for the temporary removal of the [scarcity rate] while the Lanexa-Dunnsville line remains out of service.” Rehearing Order at P 15 (R.87, JA____-JA____); *see FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 292 (2016) (“[T]he court must uphold a rule if the agency has ‘examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.’” (quoting *State Farm*, 463 U.S. at 43)).

IV. FERC Reasonably Distinguished the Replacement Rate from Prior Precedents Establishing the Scarcity Rate’s Importance to Ensuring Price Transparency and Reliable Price Signals in PJM’s Markets

A. The Replacement Rate Does Not Disturb FERC’s Prior Findings Regarding the Scarcity Rate.

Petitioner argues that the replacement rate constitutes a “manifest change in agency policy” that departs from prior precedent without explanation. Pet. Br. at 61. Not so. In fact, FERC specifically *affirmed* its position on the scarcity rate, holding that the replacement rate is just and reasonable “because it . . . provides for reinstatement of the [scarcity rate] upon completion of the transmission upgrade,” with the scarcity rate “able to perform as designed to send price signals regarding any future needs for investment in generation or transmission in the Northern Neck area.” Initial Order at P 67 (R.80, JA____); Rehearing Order at P 23 (R.87, JA____-JA____). While Petitioners would have this Court view the replacement rate as a wholesale departure from prior precedent, FERC’s findings demonstrate that the

replacement rate is a just and reasonable exception to that precedent, supported by the unique and time-limited circumstances presented in the record. *Cal. Pub. Util. Comm'n v. FERC*, 988 F.2d 154, 167 (D.C. Cir. 1993). FERC's prior findings regarding scarcity pricing remain undisturbed, and do not constitute a departure from prior precedent.

As required by the Administrative Procedure Act, FERC justified the application of its "existing policy" regarding PJM's scarcity rate (i.e., that the scarcity rate is just and reasonable) to the unique circumstances of the Northern Neck congestion issue. *New Fortress Energy Inc. v. FERC*, 36 F.4th 1172, 1176 (D.C. Cir. 2022) (citing *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144, 1146 (D.C. Cir. 2000)). FERC concluded that the scarcity rate, as applied to Northern Neck, did not produce the intended short-term or long-term responses to congestion and instead resulted in higher costs to ratepayers with no commensurate benefit. Initial Order at P 61 (R.80, JA____). FERC further concluded that the scarcity rate would be reinstated and perform as designed upon completion of transmission outage affecting Northern Neck.

Finally, FERC explicitly rejected the premise that the Lanexa-Dunnsville line outage is "similar" to prior transmission constraints in the Northern Neck such that its reasoning, "grounded in the unique circumstances presented in the record of this proceeding," required explanation. Initial Order at P 66 (R.80, JA____); Rehearing

Order at P 16 (R.87, JA____). None of FERC’s findings here disturb its prior finding that the scarcity rate is just and reasonable. Pet. Br. at 59-60. FERC’s findings regarding the scarcity rate are therefore “in harmony with its relevant precedent” and do not require further justification. *Automated Power Exchange*, 204 F.3d at 1146.

Rather than a departure from prior precedent, FERC’s orders in the case on review are wholly consistent with its prior scarcity rate findings. The exception necessitated by the unique and extraordinary circumstances of the Northern Neck constraint aligns with prior FERC findings, is fully explained, and is amply supported by evidence in the record. Petitioner’s attempts to reframe FERC’s findings as a change in agency policy should therefore be dismissed

B. FERC Squarely Addressed Arguments Regarding Preservation of Market Integrity.

Having determined that an exception to the scarcity rate was required, FERC correctly concluded that the replacement rate was the just and reasonable solution “because it is time-limited and provides for the reinstatement of the [scarcity rate] upon the completion of the transmission upgrade as well as being geographically limited to the load pocket affected by this outage.” Initial Order at P 67 (R.80, JA____) (emphasis added). Petitioner argues this conclusion was insufficient, as FERC was required to consider the “significant impacts” of the replacement rate on the integrity of PJM’s markets. Pet. Br. at 64.

Rather than ignoring the alleged potential for some manner of market impact, FERC squarely addressed Petitioner's arguments on rehearing and found them without merit. Rehearing Order at P 23 (R.87, JA____-JA____). Responding to Petitioner's concern that the replacement rate "fosters regulatory uncertainty," FERC held that it may "require or approve changes in rates or market designs that may in some ways be counter to investor expectations in order to ensure that rates are just and reasonable." Rehearing Order at P 23 (R.87, JA____-JA____) (citing *Midcontinent Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,139, at P 98 (2020); *PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,020, at P 20 n.44 (2022)).

Whether FERC's ruling may "chill" investment in financial transmission rights is not dispositive of FERC's section 206 obligation to demonstrate that a replacement rate is just and reasonable. *See* Pet. Br. at 62; 16 U.S.C. § 824e(a). Indeed, this Court has held that changes in market design, when based on substantial evidence, are not arbitrary or capricious when the record demonstrates that such changes will send more accurate price signals to market participants, even if those changes may deter investment. *See SMUD*, 616 F.3d at 538.

Here, as in *SMUD*, FERC had a sound basis for dismissing concerns that an exception to the scarcity pricing rule would disincentivize investment in PJM's financial transmission rights market. As FERC explained, the Tariff provisions governing the scarcity rate were in fact creating anomalous price signals that failed

to accomplish the purpose and intent of the scarcity rate. Initial Order at P 60 (R.80, JA____-JA____); Rehearing Order at P 23 (R.87, JA____-JA____). Rather than “disrupt[ing] settled expectations,” Pet. Br. at 63, the replacement rate ensures that market participants receive more accurate price signals regarding the need for development of additional supply or transmission investment to resolve the Northern Neck constraint. Rehearing Order at P 23 (R.87, JA____-JA____). These findings were properly based on substantial record evidence demonstrating that the scarcity rate was not functioning in the Northern Neck region as designed. *ESI Energy LLC v. FERC*, 892 F.3d 321, 329 (D.C. Cir. 2010) (per curium). Accordingly, Petitioner’s claims that FERC failed to meet its statutory burden regarding the replacement rate are without merit.

V. The Court Should Carefully Avoid Undue Market Disruption in any Remedy It Adopts in this Case.

For the foregoing reasons, the orders on review should be affirmed and no remand is necessary. If the Court disagrees, it should remand without vacatur. “The decision to vacate depends on two factors: the likelihood that ‘deficiencies’ in an order can be redressed on remand, even if the agency reaches the same result, and the ‘disruptive consequences’ of vacatur,” *Black Oak Energy*, 725 F.3d at 244 (quoting *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Both weigh against vacatur here.

Petitioners do not argue FERC lacks authority to find application of the scarcity rate unjust and unreasonable and approve a replacement rate. Rather, they fault only FERC's rationale and support for its findings regarding application of the scarcity rate. Thus, to the extent a deficiency exists, there is a "serious possibility that [FERC] will be able to substantiate its decision on remand." *Allied-Signal*, 989 F.2d at 151. That is precisely the circumstance where this Court remands without vacating. *See, e.g., Black Oak Energy*, 725 F.3d at 244; *Allied-Signal*, 988 F.2d at 150-51.

Vacatur also would be highly disruptive. PJM's real-time energy market settles every 5 minutes, that is 12 times an hour, 288 times a day, and 105,120 times a year. Vacatur without remand could require re-running each 5-minute settlement interval in the Northern Neck area since the replacement rate became effective on February 1, 2022, to determine each 5-minute settlement interval in which the scarcity rate would have been used to determine the congestion cost component of the real-time energy market price. Given the magnitude of required resettlements, it would be difficult, if not impossible, to restore the status quo. *Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020) (citing *Sugar Cane Growers v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002)). These "disruptive consequences," *Black Oak Energy*, 725 F.3d at 244 (quoting *Allied-Signal*, 988 F.2d at 150-51), thus counsel against vacatur.

CONCLUSION

For the reasons presented here and in FERC's brief, the petition for review should be denied.

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**IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Citadel FNGE Ltd.,)	
)	
Petitioner,)	
)	
v.)	Nos. 22-1090 & 22-1106
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Pursuant to Rules 32(a)(7)(B) and 32(g)(1) of the Federal Rules of Appellate Procedure, the undersigned certifies that the foregoing brief complies with the applicable type-volume limitations. The brief was prepared using a proportionally spaced type (Times New Roman, 14 point) and contains 8,025 words, not including the cover page, corporate disclosure statement, tables of contents and authorities, the glossary, the certificates of counsel, the signature block, and proof of service. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2016) used to prepare the brief.

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January 24, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 2023, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. There are no other parties to be served.

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