Nos. 25-60055, 25-60149, 25-60329 & 25-60453

In the United States Court of Appeals for the Fifth Circuit

VISTRA CORPORATION, ET AL.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

(caption continued on inside cover)

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

JOINT REPLY BRIEF OF THE VISTRA, PSEG, AND ALPHA GENERATION PETITIONERS

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No. 25-60055

VISTRA CORPORATION; DYNEGY MARKETING AND TRADE, L.L.C.; LS POWER DEVELOPMENT, L.L.C.; ALPHA GENERATION, L.L.C.; ELECTRIC POWER SUPPLY ASSOCIATION; NEW ENGLAND POWER GENERATORS ASSOCIATION, INCORPORATED; NATIONAL GRID RENEWABLES DEVELOPMENT, L.L.C.; INDEPENDENT POWER PRODUCERS OF NEW YORK, INCORPORATED; THE PJM POWER PROVIDERS GROUP; LEEWARD RENEWABLE ENERGY, L.L.C.; RWE CLEAN ENERGY, L.L.C.; DESRI HOLDINGS, L.P.; INVENERGY WIND DEVELOPMENT NORTH AMERICA, L.L.C.; INVENERGY SOLAR DEVELOPMENT NORTH AMERICA, L.L.C.; LIGHTSOURCE RENEWABLE ENERGY OPERATIONS, L.L.C.; NEXTERA ENERGY RESOURCES, L.L.C.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

consolidated with

No. 25-60149

INVENERGY NELSON, L.L.C.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

consolidated with

No. 25-60329

LEEWARD RENEWABLE ENERGY, L.L.C.; RWE CLEAN ENERGY, L.L.C.; DESRI HOLDINGS, L.P.; INVENERGY WIND DEVELOPMENT NORTH AMERICA, L.L.C.; INVENERGY SOLAR DEVELOPMENT NORTH AMERICA, L.L.C.; LIGHTSOURCE RENEWABLE ENERGY OPERATIONS, L.L.C.; NEXTERA ENERGY RESOURCES, L.L.C.; VISTRA CORPORATION; DYNEGY MARKETING AND TRADE, L.L.C.; LS POWER DEVELOPMENT, L.L.C.; ALPHA GENERATION, L.L.C.; ELECTRIC POWER SUPPLY ASSOCIATION; NEW ENGLAND POWER GENERATORS ASSOCIATION, INCORPORATED; GERONIMO POWER, L.L.C.; INDEPENDENT POWER PRODUCERS OF NEW YORK, INCORPORATED; THE PJM POWER PROVIDERS GROUP,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

consolidated with

No. 25-60453

PUBLIC SERVICE ELECTRIC AND GAS COMPANY; PSEG POWER, L.L.C.; PSEG ENERGY RESOURCES & TRADE, L.L.C.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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PRELIMINARY STATEMENT

Notwithstanding the highly technical context, this case presents a straightforward question: Can a federal agency compel a regulated entity to provide a mandated service for free? FERC says yes. The Federal Power Act says no.

As FERC acknowledges, generators must supply two kinds of power to run the transmission system: "real" power and "reactive" power. But under Order No. 904, generators are barred from seeking payment for the latter in most circumstances. In practical terms, that means a generator producing 100 megawatts in real power can be forced to produce approximately 30 MVAR, as directed by the transmission provider, to stabilize voltage levels across the electrical transmission system at any given time—all without compensation. *See* FERC Staff Report, *Payment for Reactive Power* 5 n.11 (Docket No. AD14-7, Apr. 22, 2014), tinyurl.com/2014FERCReport (2014 Staff Report). As Petitioners explained in their opening brief, that throw-reactive-power-in-for-free approach is inconsistent with the Federal Power Act's statutory mandate of "just and reasonable" rates, with bedrock principles of cost causation, and with the investment-backed expectations of countless American generators.

Neither FERC nor Intervenors can escape those fundamental defects with FERC's order. Both rely heavily on their assertion that generators can provide reactive power within the standard power factor range (or "deadband") at minimal cost. But they can reach that conclusion only by allocating *all* of the joint costs of real and reactive power to the production of real rather than reactive power (flouting settled precedent), and by ignoring record evidence that the production of reactive power can carry material incremental and opportunity costs. Likewise, although FERC and its intervenors posit that payments for reactive power can result in "excessive compensation" for generators, they do not explain why resolving those problems required FERC to eliminate reactive power compensation entirely. Finally, FERC's repeated appeals to "good utility practice" do not help its cause. FERC can, and regularly does, allow generators to recover the costs of services that good utility practice requires. Indeed, the fact that FERC requires generators to supply reactive power as a critical grid reliability measure justifies requiring reactive power compensation, not eliminating it.

FERC also gives short shrift to Petitioners' extensive arguments regarding cost causation, essentially abandoning the issue. And while Intervenors try to fill in the gap, they do not succeed: They cannot get around the fact that transmission customers both "cause" and benefit

from generators' reactive power production within the deadband by relying on it to transmit power to load. This Court has recognized that FERC-approved "rates must reflect to some degree the costs actually caused by the customer who must pay them." *El Paso Elec. Co. v. FERC*, 76 F.4th 352, 357 (5th Cir. 2023) ("*El Paso II*") (alteration omitted). At bottom, cost causation is a principle of fairly allocating costs; respondents' clever accounting does nothing to undermine its application here.

Finally, FERC all but ignores Order No. 904's independent procedural failures—defects that, standing alone, justify vacatur and remand of FERC's order. Neither FERC nor Intervenors explain why FERC was entitled to sweep aside countless existing reactive power rates—including rates protected by the *Mobile-Sierra* presumption of reasonableness—without any rate-specific analysis or effort to meet *Mobile-Sierra*'s heightened burden. And FERC offers little to justify its cavalier treatment of generators' reliance interests under the existing reactive power framework.

What remains is an appeal to expertise and policy: FERC asserts that it carefully considered whether to eliminate reactive power compensation, claiming that its decision is consistent with the status quo in parts of the country. But neither deliberation nor convention can authorize FERC to exceed the boundaries of the Federal Power Act, which

guarantees generators the right to earn a reasonable return on the property they devote to producing reactive power. This Court should vacate Order No. 904.

ARGUMENT

I. ORDER NO. 904 IS INCONSISTENT WITH THE FEDERAL POWER ACT, AND FERC'S CONTRARY DETERMINATION WAS ARBITRARY AND CAPRICIOUS

FERC's defense of Order No. 904 fails at every level. As a matter of law, the Federal Power Act does not permit FERC to set the rate for a discrete, mandatory service at zero—yet that is precisely what FERC has done. As a matter of procedure, FERC never found that the existing reactive power rates on file were unjust or unreasonable, as the Act requires before changing them. And as a matter of fact, FERC's view that reactive power production imposes no compensable costs on generators is contradicted by the record, by FERC's own precedent, and by basic economics. FERC's and Intervenors' responses do not cure any of these deficiencies; they confirm them.

A. As A Matter Of Law, The "Just" And "Reasonable" Rate For Providing Discrete Services Like Reactive Power Cannot Be $0

1. The Federal Power Act protects generators' rights to charge "just" and "reasonable" rates for their services. As Petitioners' opening brief explained (at 24-26), that language entitles generators to earn a

reasonable return on the property they use to provide reactive power service, *i.e.*, their generators, exciters, transformers, and accessory equipment. *Bluegrass Generation Co.*, 118 FERC ¶ 61,214 at P 3 (2007). A zero-dollar rate for reactive power is *per se* inconsistent with that entitlement. *See Covington & L. Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592-593 (1896) ("[T]he [government] cannot require" public utilities to "carry persons and property without reward" "[u]nder the pretense of regulating fares and freights.").

FERC contends (at 57-60) that this principle falls away here because generators also use their equipment to sell real power, and so should recover the costs of reactive power through real power sales. Quite the contrary: A regulated utility cannot be compelled to sell one product for free simply because it sells related products at a profit. The Supreme Court settled that point nearly a century ago. In *Chicago, Milwaukee & St. Paul Railway Co. v. Public Utility Commission of Idaho*, a railroad provided two services—intrastate log hauling and interstate lumber hauling—in tandem, and the State argued that the railroads' total revenues should be considered in determining whether the rate set for the intrastate hauling was confiscatory. 274 U.S. 344, 349-350 (1927). The Court rejected that argument, holding that "[t]he state has no power to require petitioners to haul the logs at a loss, or without compensation

that is reasonable and just, even if they receive adequate revenues from the intrastate log haul and the interstate lumber haul taken together." *Id.* at 350-351. So too here. FERC "has no power to require [generators] to [provide reactive power service] at a loss, or without compensation that is reasonable and just, even if they receive adequate revenues from [the provision of real and reactive power] taken together." *Id.*

2. FERC's and the Intervenors' responses to these points are unsatisfactory. Despite acknowledging that "when providing reactive power within the deadband there are costs," Intervenors' Br. 41, both principally contend that generators are not entitled to reactive power compensation because generators do not incur *incremental* fixed costs for providing reactive power service within the deadband, FERC Br. 57; Intervenors' Br. 59-60. Even if true, *but see* pp. 23-25, *infra*, the incremental-cost metric is the wrong one: It assumes that 100% of the shared costs of producing real and reactive power should be allocated to real power production alone.

But joint costs do not disappear for one output simply because they are shared; they instead must be reasonably allocated between the two outputs. Although FERC has done just that for decades—allocating joint costs for reactive power and for other products, *see* Vistra Br. 34-35—it now abruptly rejects any allocation methodology at all. By analogy, in

St. Paul, many of the costs of hauling logs and lumber were undoubtedly joint—the railroad hauled the logs and lumber with the same railcars over the same track. Even so, the railroad was entitled to earn a reasonable return on transporting both the logs and the lumber taken alone. 274 U.S. at 350-351.

3. FERC next contends that generators are not entitled to reactive power compensation because "the primary function of a generating facility is to produce real power," and reactive power is ancillary to that goal. *See* FERC Br. 58; *see also* Intervenors' Br. 50 (similar). But FERC's "primary function" test is inconsistent with the Federal Power Act's requirement that rates be "just and reasonable," s*ee* Vistra Br. 34-35—not to mention with basic principles of cost causation, *see* 25-27, *infra*. FERC's rules obligate generators to produce or absorb reactive power within the deadband to stabilize system voltage as directed by the transmission provider. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 at PP 5, 542, 741 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 69 Fed. Reg. 15,932 (Mar. 26, 2004) (Order No. 2003-A). FERC cannot strip compensation for a service it simultaneously mandates simply because it deems that service secondary. Indeed, FERC itself has recognized that, in at least some cases, generators should be compensated for reactive power despite its

secondary nature. *See, e.g., Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,581-21,582 (1996); *see also Maine Pub. Util. Comm'n*, 126 FERC ¶ 61,090 at P 41 (2009) (explaining that "reactive service is a unique service," and that "the provision of reactive [power] service"—including within the deadband—"requires payment separate" from compensation through the forward capacity market).

The very authority Order No. 904 invokes to support FERC's "primary function" reasoning proves the point. *See Compensation for Reactive Power Within the Standard Power Factor Range*, Order No. 904, 189 FERC ¶ 61,034 at P 92 n. 281 (2024) (Order No. 904 or Order) (citing *Southern Co. Servs., Inc.*, 80 FERC ¶ 61,318, at 62,091 (1997)). In *Southern Company*, FERC rejected the inverse argument—that the costs of an exciter system "should be entirely assigned to reactive power" because the system's "'predominant' function" was to produce reactive power. 80 FERC at 62,091. Importantly, FERC found that proposition not just factually wrong—because generating plants' primary function is to produce real power—but also *legally* wrong: Regardless of the equipment's primary function, FERC explained, because "the exciter system enables the

generator to produce both real and reactive power," the costs "should be *allocated between* real and reactive power." *Id.* (emphasis added).

FERC's argument also proves too much. If generators can be denied compensation for reactive power because it is not their "primary function," then the same reasoning would justify stripping compensation for *every* other non-primary service that generators and other regulated entities provide. FERC has recognized at least a half dozen ancillary services "needed to accomplish transmission service while maintaining reliability within and among control areas affected by the transmission service." Order No. 888, 61 Fed. Reg. at 21,581. None of them is a generator's "primary function"—yet FERC has never suggested that any of them (aside now from reactive power) must be provided for free. To the contrary, FERC has long insisted that customers, rather than generators, must bear those costs. *See, e.g., id.* at 21,588 (explaining that "[u]nbundling ancillary services" will enable "a more equitable distribution of costs"); *id.* at 21,590 (offering "general guidance on ancillary services pricing principles"). And the same is true of other costs, such as transmission maintenance and vegetation management, for which utilities have historically been compensated. *See* Vistra Br. 40-41.

Consider the impact of FERC's reasoning on capacity sales, too. Generators sell capacity—meaning, "a commitment by electric suppliers

to produce electricity at a certain time in the future"—as a product separate from real power. *PJM Power Providers Grp. v. FERC,* 96 F.4th 390, 395 (3rd Cir. 2024); *Am. Efficient, LLC,* 195 FERC ¶ 61,043 at P 20 n.38 (2026) (distinguishing between markets for energy, capacity, and ancillary services). A generator's commitment to make itself available in a future period to meet reliability needs is plainly not its "primary function," yet FERC recognizes capacity as a distinct compensable product—including in Order No. 904 itself, which goes so far as to suggest that reactive power costs could be recovered through capacity payments. *See* Order at P 141. FERC cannot simultaneously maintain that reactive power deserves no compensation because it is ancillary to a generator's primary function and that generators should try to recover reactive power costs through another product that is equally ancillary to that function. The contradiction speaks for itself.

4. FERC's contention that reactive power within the deadband serves only "the operating requirements of the generating facilities to deliver real power"—and not "the separate needs of transmission customers"—is flatly inconsistent with FERC's own order, not to mention decades of FERC statements to the contrary. FERC Br. 62; *see also* Intervenors' Br. 37 (similar). Order No. 904 itself acknowledges that generators must provide reactive power not merely to inject their own real power

into the grid, but to maintain the grid's stability as real power from other sources flows across it. *See* Order at P 3 ("[G]enerating facilities must either produce or absorb reactive power for the transmission system to maintain voltage levels required to reliably supply real power from generation to load."); *see also* FERC, Pro Forma OATT, Schedule 2 (Mar. 14, 2022), https://www.ferc.gov/media/pro-forma-oatt-effective-march-14-2022 (affirming that reactive power is necessary "to maintain transmission voltages on the [grid operator]'s transmission facilities within acceptable limits"). FERC's own brief likewise acknowledges the point. *See, e.g.*, Br. 49 ("[R]eactive power within the standard power factor range provides some reliability benefits[.]"); *id.* at 56 (conceding "reactive power cannot be transmitted long distances, unlike real power, and thus must be provided by transmission providers *and generators* alike" (emphasis added)). That is a system-wide service performed for the benefit of the grid generally and transmission customers primarily, not a private operating cost borne solely for generators' own convenience. *See* R.91 Attach. A ¶ 48 (Affidavit of Dennis W. Bethel, P.E.) (Bethel Aff.) ("[T]here is no support for FERC's . . . presumption that the reactive power a generator supplies is meant to offset the impact of its active power (MWh) injections.").

Indeed, for decades FERC has recognized the utility of reactive power service to transmission customers and the system as a whole—and without drawing a distinction between service provided inside versus outside the deadband. In denying rehearing of its decision to uphold Order No. 2003, FERC rejected the argument that independent generators risked a windfall for providing reactive power "within the established range" because such generators were providing an "important *system* service." *Standardization of Generation Interconnection Agreements and Procedures*, Order on Rehearing, Order No. 2003-C, 111 FERC ¶ 61,401 at P 42 (2005) (emphasis added), *aff'd sub nom. National Ass'n of Regul. Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007). In the *Dynegy* proceedings, FERC took it a step further, explaining that generators must be "capable of producing reactive power in excess of that which ultimately reaches the transmission system in order to have enough reactive power remaining to provide adequate voltage support on the transmission system . . . for the benefit of transmission customers."[1] *Dynegy*

[1] Quoting the administrative law judge's initial decision, intervenors attempt to distinguish *Dynegy* by arguing that FERC's statements there concerned only the provision of reactive power outside the deadband. Intervenors' Br. 39. FERC does not join that argument—and pointedly declines to address the relevant *Dynegy* decision at all. For good reason: That proceeding concerned Dynegy's proposed rate under Schedule 2 of the MISO tariff, which allowed resources capable of operating *within the deadband* to recover their investment in reactive power capability.

Midwest Generation, Inc., Opinion No. 498, 121 FERC ¶ 61,025 at P 82 (2007) (internal quotation marks omitted). And in Order No. 827, FERC reaffirmed the critical "benefits to the transmission system" of reactive power—including reactive power provided within the deadband—when it extended reactive power obligations to non-synchronous generators such as wind and solar facilities. *Reactive Power Requirements for Non-Synchronous Generation*, Order No. 827, 155 FERC ¶ 61,277 at PP 1, 4-6, 35 (2016) (Order No. 827), order clarified, 157 FERC ¶ 61,003 (2016).

FERC's rationale in Order No. 827 was telling: "[E]xempting a class of generators from providing reactive power [within the deadband] could create reliability concerns, especially if those generators represent a substantial amount of total generation in a particular region, or if many of the resources that currently provide reactive power are retired from operation." Order No. 827 at P 25. In other words, generators' provision of reactive power within the deadband was necessary not just for their own benefit but to "control system voltage for efficient and reliable operation of [the] transmission system" as a whole. *Id.* at P 6; *see also* Bethel Aff. ¶ 108 ("[A] generator might be providing a lot of reactive power and

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FERC's reasoning in *Dynegy* thus draws no distinction between reactive power provided inside versus outside the deadband, addressing only whether the generator's reactive power revenue requirement "should be adjusted for [its] own use of reactive power." 121 FERC ¶ 61,025 at P 81.

little active power if the transmission line it is connected to is under stress for reasons other than active power production at that particular generator[.]"); R.101 at 6 (NYISO Comments) (observing that "producing or absorbing reactive power within" the deadband helps "maintain system reliability"); R.110 at 9 (ISO-NE Comments) (noting that a generator's "entire capability" of reactive power—*i.e.*, both within and outside the deadband—"has the same value to" ISO-NE).

Moreover, no record evidence supports the necessary implication of FERC's logic: that the deadband aligns with the precise amount "necessary" for a generator to ensure its own reliable interconnection. A generator satisfies its obligations if it is merely "*capable* of providing reactive power within [the deadband] when called upon," and it was this "*capability* for which generators [we]re compensated"—regardless of the amount actually provided. *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,192 at P 19 (2006) (first emphasis added). In fact, as Intervenors themselves explain, Br. 48-49, the deadband is simply the administrable benchmark that FERC selected among various options because it was "common practice" in certain NERC regions, not because it is required as a matter of "engineering and physics," *id.* at 1.[2] *See* Bethel Aff.

[2] Specifically, in Order No. 2003, NERC proposed using 0.95 leading to 0.90 lagging because "such a range provides more responsive reactive

¶ 104 (explaining "the +/-0.95 minimum power factor band is arbitrary"). FERC underscored the merely administrative character of the deadband range by permitting grid operators to adopt different power factor requirements "as long as the power factor requirement applies to all generators on a comparable basis"—and at least one grid operator has adopted a broader range. *See NorthWestern Corporation (Montana)*, Docket No. ER17-87-000, Order Nos. 827 and 828 Combined Compliance Filing at 4 (Oct. 14, 2016) (adopting a "0.90 leading/lagging . . . power factor range"). The deadband is thus a policy choice, not a precise engineering threshold—and FERC offers no evidence justifying "compensat[ion] for providing reactive power outside the standard range" but none for reactive power produced within it. FERC Br. 47.

If anything, FERC's rationale creates a perverse incentive: It invites grid operators, or even FERC itself, to expand the deadband—as NorthWestern has already done—which would thereby force generators to provide substantially increased reactive power generation and absorption gratis as a matter of "good utility practice." Under Order No. 904's logic, FERC could simply widen the deadband to 0.90 leading to 0.90

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absorption and supply than the range proposed [i.e., 0.97 leading to 0.95 lagging]." Order No. 2003 at P 541. FERC nonetheless chose to adopt "0.95 leading to 0.95 lagging because it is a common practice in some NERC regions." *Id.* at P 542.

lagging (or further) as a condition for interconnection, and FERC's rationale would require generators to provide the additional reactive power for free. Nothing in the Federal Power Act permits such an outcome.

5. Finally, FERC and Intervenors emphasize that some grid operators do not currently pay for reactive power. FERC Br. 16-19; Intervenors' Br. 13-14. That does not change the analysis. PJM Interconnection (PJM) and the Midcontinent Independent System Operator (MISO)—the latter of which supplied reactive power compensation until 2022, *see Capital Power Corp. v. FERC*, 156 F.4th 644, 647 (D.C. Cir. 2025) (vacating FERC's approval of MISO's termination of reactive power compensation)—together constitute the dominant share of organized wholesale electricity markets in the United States by power output. Along with New York Independent System Operator (NYISO) and ISO New England (ISO-NE), that four-market group comprises a clear national majority. And FERC does not dispute that no one has ever challenged the denial of reactive power compensation until this case. *See* Vistra Br. 11 n.4.

B. FERC Did Not Adequately Find That Existing Reactive Power Rates Were Unjust Or Unreasonable

As Vistra Petitioners explained in their opening brief (at 28-32), FERC also failed to satisfy the "condition precedent" for rate-setting under Section 206. *Emera Maine v. FERC*, 854 F.3d 9, 25 (D.C. Cir. 2017). Specifically, the Federal Power Act required FERC to determine that

existing reactive power rates were unjust and unreasonable before requiring a new rate. *See id.* And because a filed rate remains binding "unless and until" that specific rate is changed under Section 206, FERC could not proceed generically through a modification to the *pro forma* tariff, but instead had to find each rate "unjust and unreasonable." *Midwest ISO Transmission Owners*, 122 FERC ¶ 61,305 at 62,769 (2008), *aff'd in part, vacated in part by Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122 (D.C. Cir. 2011); *see* Br. of FERC as Respondent, *Dynegy Midwest Generation, Inc. v. FERC*, Nos. 09-1306 & 09-1308, 2010 WL 4569087, at *42-43 (D.C. Cir. Oct. 7, 2010) (arguing that, even after *pro forma* tariff was modified, transmission customers should continue to pay rates on file until FERC found them unjust and unreasonable under Section 206). At a minimum, FERC had to consider any relevant differences among generators and regions before zeroing out existing rates. *See Citadel FNGE Ltd. v. FERC*, 77 F.4th 842, 857 (D.C. Cir. 2023) ("[W]hether rates are unjust and unreasonable is a context-specific inquiry."). But FERC did none of the above.

FERC's brief offers no explanation for that failure. FERC does not identify any particular generator, region, or rate schedule for which compensation was excessive, much less explain why *all* existing rates should be reduced to zero. *See* Vistra Br. 28-29. Nor does FERC grapple with

the substantial variation among generators and markets—the differing conditions, generator technologies, cost structures, rate structures, and system needs. Those variations are precisely why utilities file individual rate schedules and why, under the Federal Power Act, FERC must examine the "particular circumstances" of a rate before setting it aside. *Emera Maine*, 854 F.3d at 23.

FERC also never disputes that its approach here differs, without explanation, from its 2008 position in *Dynegy:* that even once a new tariff provision is adopted, generators should continue to be paid, and an "existing contract rate can only be changed" going forward, if FERC finds that same contract rate to be unjust or unreasonable. 2010 WL 4569087, at *42; *see* Vistra Br. 30-32. Nor do Intervenors. *See* Intervenors' Br. 68 ("Vistra Petitioners' reliance on a 2008 reactive power case and FERC's brief therein is also unavailing. The [pre-2008] caselaw above is clear, as is FERC precedent.").

Intervenors' contrary position—that FERC was free to use a "generic" proceeding and to leave rates on file because such rates "only establish the rate at which the generator requests to be paid for selling reactive power," Intervenors' Br. 66-67—is not supported by any caselaw. Worse yet, it would eviscerate the filed-rate doctrine, which bars FERC from "forc[ing a utility] . . . to charge[] a rate different from the one on

file." *Louisiana Pub. Serv. Comm'n v. FERC*, 10 F.4th 839, 845 (D.C. Cir. 2021). This is a case in point. Grid operators are continuing to use the reactive capability of generators to meet their reactive power service obligations to their transmission customers, just as they did before, with one key difference—generators can no longer charge, and transmission customers no longer pay, the rates on file.

FERC also effectively ignores Petitioners' argument that specific reactive power rate settlements are, by their terms, protected by the heightened "public interest" standard under the *Mobile-Sierra* doctrine. Its sole response—consigned to a footnote—is that reactive power rates are established through rate proceedings and thus not entitled to the *Mobile-Sierra* presumption. FERC Br. 51 n.14. FERC, however, has previously concluded that some filed rates *are* subject to the requirements of *Mobile-Sierra*. *See, e.g.*, *BE KJ LLC*, 122 FERC ¶ 61,292 at P 3 (2008) (holding "that the public interest standard should apply" to modifications directed by Commission to settlement agreement establishing reactive power rates in MISO); *Virginia Elec. & Power Co.*, 162 FERC ¶ 61,029 at P 19 (2018). It gives no explanation for why the freely negotiated rates at issue here are different.[3] Before abrogating filed rates, FERC was thus

[3] Intervenors (at 54) contend that FERC has said some settlement agreements do not implicate *Mobile-Sierra*. Yet Intervenors' own cases

required to make the requisite showing under *Mobile-Sierra* for any rate settlement agreements entitled to the presumption.

Finally, FERC argues that its conclusion that "requiring [transmission] customers" to pay for reactive power "without corresponding benefits[] is not 'just and reasonable'" in fact constituted a finding that *all* reactive power rates are "unjust and unreasonable." FERC Br. 54. That argument does not cohere. The only reason transmission customers supposedly get no "corresponding benefits" from paying for reactive power within the deadband is that (as noted) FERC requires generators to provide it regardless. Just like a State cannot decree that a railroad transport logs within a state and then deny compensation on the theory that customers get no benefit from paying for that delivery, *cf. St. Paul*,

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make clear that (1) the doctrine fully applies to rates established by settlement and (2) its application turns on whether the rates in question apply to "sophisticated parties who negotiated them freely at arm's length." *Plum Point Energy Assocs., LLC*, 151 FERC ¶ 61,185 at PP 3-4 (2015). There can be little doubt that the vast majority of reactive power rates in PJM and MISO have been established through settlement agreements "negotiated . . . freely" by "sophisticated parties," including the individual generators, FERC trial staff, and other interested parties, such as the grid operator (*e.g.*, PJM), transmission customers, and market monitors. *See Northern Va. Elec. Coop., Inc.*, 130 FERC ¶ 61,240 (2010) (approving settlement among generation owner, PJM, and other parties establishing reactive rates for two generation facilities); *Calpine Mid-Merit II, LLC*, 171 FERC ¶ 63,041 (2020) (approving settlement agreement in proceeding where PJM was participant and did not oppose settlement).

274 U.S. at 349-350, FERC cannot rely on such bootstrapping to claim there is an insufficient economic basis for compensation.

C. FERC's Factual Findings Concerning The Costs Of Reactive Power Production Were Arbitrary And Capricious

In the proceedings below, FERC failed adequately to engage with Petitioners' evidence that producing reactive power within the deadband carries compensable costs. On appeal, FERC repeats these same errors—and fails to rehabilitate its flawed Order.

1. There is no dispute that "real and reactive power are provided as 'joint products with joint costs[.]'" FERC Br. 39-40 (quoting Order at P 90 & n.268); *see also* Intervenors' Br. 41 ("there are costs" to "providing reactive power within the deadband"). The central question, then, is how those joint costs should be allocated between the two products. But rather than confront that question, FERC devotes pages to attacking one particular method of allocation—the AEP methodology—that FERC had affirmed as just and reasonable for the last 30 years. *See* FERC Br. 33-38.

Even crediting every one of FERC's criticisms, they do not justify abandoning cost allocation altogether. As Petitioners explained (Vistra Br. 35), a flawed methodology is a reason to fix the methodology: It is not a reason to set the rate at zero. FERC does not respond. Little wonder:

Fixing the AEP methodology is, after all, what FERC originally set out to do. *See id.* at 12-13; *see also Reactive Power Capability Compensation*, 177 FERC ¶ 61,118 at P 20 (2021) (Notice of Inquiry stating that FERC "wish[ed] to explore several potential issues with reactive power capability compensation based on the AEP Methodology"). It is also what FERC's statutory obligations required. Under Section 206, FERC was required to "determine a 'just and reasonable' replacement rate," *American Clean Power Ass'n v. FERC*, 54 F.4th 722, 724 (D.C. Cir. 2022) (quoting 16 U.S.C. § 824e(a)), not default to a rate of $0 by giving up on cost allocation entirely.[4]

FERC's and Intervenors' fixation on the AEP methodology is also misplaced because the methodology is not even relevant to many of the rates at issue. As Order No. 904 acknowledges, NYISO and ISO-NE compensate generators for reactive power service at flat rates based on a resource's capability to provide the service—rates that have nothing to do with the AEP methodology. Order at P 13. FERC's response ignores this point entirely, offering no explanation for why, even accepting that the

[4] Intervenors take a different tack, arguing that "the AEP methodology is irrelevant" because it is based on a generator's total reactive power capability rather than its capability within the deadband specifically. Br. 46-47. But that is not at all responsive to Petitioners' point, which is that the undisputed joint costs associated with reactive power (inside or outside the deadband) can and must be allocated.

AEP methodology is flawed, those capability-based rates must go, too. *See, e.g.*, R.110 at 14 (ISO-NE Comments) (noting ISO-NE's rate design does not share flaws identified in the AEP Methodology).

2. In its brief, FERC again fails adequately to address unrebutted evidence that producing reactive power imposes additional costs. For example, when faced with evidence of real opportunity costs on generators—including a sacrifice of up to 5% of potential real power output, Vistra Br. 38 (citing Knight Aff. ¶¶ 12-13)—FERC's sole response is that "[g]enerators are required to operate their facilities within a standard range," Br. 46. That misses the point. Generators operate within the standard range because FERC requires them to do so. The existence of a regulatory mandate to provide reactive power does not mean that doing so is costless; rather, it means that generators are compelled to bear costs they might not otherwise incur.

FERC's treatment of incremental equipment costs is no more satisfactory. The record demonstrates that generators must invest in larger, more capable equipment to produce (or absorb) reactive power within the deadband—and that doing so carries real costs. FERC criticizes Petitioners for suggesting that reactive power capability can amount to 20% of a project's total costs but, regardless of the exact figure, the key point is that FERC does not and cannot dispute that the cost is significant. It

does not disagree, for example, that the cost of additional reactive power equipment for wind generators ranges from 3.18% to 4% of capital costs, or that adding reactive power capability to solar photovoltaic generators can amount to 2% of a project's total costs—which, for a large project, can be many millions of dollars.[5] 2014 Staff Report, App. 2, at 2-3; *see* FERC Br. 42-43. Critically, those figures are wholly independent of the AEP methodology and thus untainted by any of its alleged flaws. Nor does FERC contest evidence that generators have installed larger and more capable equipment specifically to provide reactive power within the dead-band—equipment beyond what they would need to produce real power alone. *See* Bethel Aff. ¶ 102.

Rather than engage with this evidence, FERC reprises the refrain that the "standard power factor range is an obligation of the generating facility as an interconnection customer" (which remains non-responsive), and speculates that some generators may have "invested in superior equipment beyond what is required" (which, even if true, does not deny the incremental nature of those costs). FERC Br. 45-46.

[5] In light of FERC's concession, this Court should reject Intervenors' contention that "the same equipment that is needed to produce, and is used to produce, real power also provides the reactive power function, at *no* additional capital cost." Br. 40 (emphasis added).

FERC's position, stripped to its essentials, is that these incremental costs are small relative to generators' total costs and therefore should not count. But at most, that justifies making reactive power payments small, not reducing those payments to $0. FERC has made no attempt to quantify the total incremental costs borne by generators in the aggregate for equipment upsizing and forgone real power output, rendering its zero-compensation conclusion arbitrary at best. Nor, for reasons already discussed (pp. 5-6), can FERC suggest that generators should recover these costs in the market for real power. Even if reduced, those payments will remain a meaningful source of revenue for generators. By contrast, the record in this case demonstrates that reactive power payments, even at their current size, represent just a small portion of the costs borne by customers in wholesale markets. *Order Addressing Arguments Raised on Rehearing*, 191 FERC ¶ 61,188 at P 82 (2025) (Rehearing Order) (noting evidence showing that reactive service charges "represent a small share of total billings in both ISO-NE (0.25% of the total energy, ancillary services, and capacity markets combined) and PJM (0.6% of PJM's total billings).").

II. ORDER NO. 904 DEFIES PRINCIPLES OF COST CAUSATION

Independently, as Petitioners' opening brief (at 49-51) explained, Order No. 904 is inconsistent with bedrock principles of cost causation.

FERC freely recognizes that reactive power "stabilizes voltage levels," a function that "must" be performed to "enable the delivery of real power and maintain system reliability." FERC Br. 10. FERC's own brief therefore confirms that transmission customers, who rely on reactive power service within the deadband to keep voltage stable across the grid, both "cause" and benefit from generators' reactive power production. *See El Paso II*, 76 F.4th at 357; Vistra Br. at 49-53. Accordingly, to comply with the cost-causation principle, transmission customers must contribute to cover the costs of the reactive power service they need. Vistra Br. 49-51. Because Order No. 904 lets transmission customers free-ride on generators' investment in reactive power capability instead, it conflicts with the Federal Power Act's cost-causation requirement and must be set aside. *See El Paso II*, 76 F.4th at 362.

Below, FERC primarily argued that the cost-causation principle did not apply to Order No. 904 because "real and reactive power are provided as joint products." Order at P 148. On appeal, however, FERC has abandoned that (erroneous) position. Instead, FERC and its intervenors posit that Order No. 904 is consistent with the cost causation principle because *transmission customers* do not benefit from generators' reactive power production within the deadband and hence only *generators*—not transmission customers—"cause" reactive power needs within the deadband.

FERC Br. 61-62; Intervenors' Br. 34-40. Because FERC did not make clear that it would have adopted Order No. 904 even absent its joint-products rationale, FERC's failure to justify Order No. 904's joint-products rationale is fatal to its defense of the Order. *See, e.g.*, *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 321 (D.C. Cir. 2006). And the parties' remaining defenses of Order No. 904 independently lack merit.

A. FERC No Longer Defends Its Cost Causation Analysis Based On A Joint-Products, Joint-Costs Rationale

When Petitioners raised Order No. 904's cost-causation problems in FERC's administrative proceedings, FERC's first and principal response was that the cost-causation principle did not apply. "[R]eal and reactive power," FERC said, "are provided as joint products, with joint costs, and are produced using the same equipment." Order at P 148. "[T]herefore," FERC continued, "a separate cost compensation mechanism for the provision of reactive power within the standard power factor range is not necessary." *Id.*

But as Petitioners explained in their opening brief (at 54-57), FERC's rationale did not hold up. If anything, the allocation of joint costs is a *paradigmatic* application of the cost causation principle: If (*e.g.*) multiple transmission customers benefit from the joint costs of new transmission infrastructure, each customer must pay their fair share of that

new infrastructure's costs. Vistra Br. 54-56. So too for reactive power. Generators use their equipment, including their generators, exciters, transformers, and accessory electric equipment, to produce both real and reactive power jointly (in material part).[6] Accordingly, real and reactive power customers must cover those costs together, lest reactive power consumers mooch a "free ride." *El Paso II*, 76 F.4th at 364 n.7.

Faced with those arguments, FERC no longer defends the joint-product rationale as to cost causation on appeal. That omission, on its own, is sufficient to justify vacatur of Order No. 904. "[W]hen an agency relies on multiple grounds for its decision, some of which are invalid," a reviewing court "may only sustain the decision where one is valid and the agency would *clearly* have acted on that ground even if the other were

[6] Without specifically discussing cost causation, Intervenors also posit "there are little or no incremental costs associated with reactive power production within the deadband." Intervenors' Br. 40 (formatting omitted). Even if that were correct, the cost-causation principle would still require FERC to allocate the *non*-incremental costs of reactive power across real and reactive power consumers, for essentially the reasons given above. *See* pp. 6-7, *supra*. In any case, it is not. Generation resources are dispatched to provide reactive power service outside of the deadband rarely—typically only in system emergencies—indicating that transmission customers rely for the most part on reactive power within the deadband to transmit power to load. *See, e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,033, 61,396 & n.194 (2023) (explaining that "manual redispatch instruction for voltage control"—in which a generator is directed "to provide reactive power outside of the standard power factor range"—is "rare").

unavailable." *Williams Gas Processing Gulf-Coast Co.*, 475 F.3d at 321 (citation and internal alterations omitted, emphasis added). Nowhere in Order No. 904 did FERC make it clear that it would have adopted the $0 compensation rule even without its erroneous joint-products reasoning. Quite the opposite: FERC's discussion of cost causation began with its joint-products argument, and FERC made clear that its other cost-causation conclusions provided only "[a]dditional[]" support for its conclusions. *Compare* Order at P 148 ("We disagree with commenters' contention that eliminating compensation for reactive power within the standard power factor range would violate the cost causation principle."), *with id.* at P 149 ("Additionally, we disagree with claims that transmission customers are the sole beneficiaries and cost causers.").

As a consequence, because it is not obvious whether FERC would have adopted Order No. 904 without justifying cost causation based on an erroneous joint-products rationale, Order No. 904 should be vacated.

B. FERC's Remaining Cost Causation Arguments Lack Merit

To fill the gap left by FERC's deficient joint-products reasoning, FERC and its intervenors offer two attempts to reconcile Order No. 904 with the cost causation principle. *First*, FERC says that ratepayers do not "benefit[]" from reactive power production. FERC Br. 61-62. *Second*, FERC and its intervenors say that generators "cause" their own reactive

power needs, at least within the deadband. FERC Br. 62-63; Intervenors' Br. 35-40. Both arguments lack merit.

1. FERC starts its discussion of cost causation by asserting that, in its proceedings below, FERC "found that . . . transmission customers are making reactive power payments that lack a 'sufficient economic basis' and do not produce 'commensurate reliability benefits.'" FERC Br. 61 (quoting Order at P 50). But in the relevant sections of its order—the sections discussing cost causation—FERC found no such thing. Rather, FERC's sole explanation of its cost-causation reasoning was that "real and reactive power are provided as joint products, with joint costs" and that generators' reactive power costs were "caused" by their own operating requirements. Order at PP 148-149. And on appeal, FERC cannot invent *post hoc* explanations for its order that it did not present below. *SEC v. Chenery*, 332 U.S. 194, 196 (1947); *see, e.g.*, *Williams Gas Processing-Gulf Coast Co.*, 475 F.3d at 321; *Allegheny Power v. FERC*, 437 F.3d 1226 (D.C. Cir. 2006); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1059 (D.C. Cir. 2003) (reminding FERC of this rule).

Nor, at any rate, does the passage of Order No. 904 that FERC cites say what FERC now contends. True enough, FERC did assert that existing reactive power rates lacked "a sufficient economic basis." Order at P 50. But as noted, FERC reached that conclusion because it chose to

disregard the joint costs of reactive power production: FERC went on to explain that "real and reactive power are provided as joint products, with joint costs," and that as a result "charging transmission customers for the provision of reactive power within the standard power factor range results in unjust and unreasonable rates." Order at P 51. In other words, FERC found that existing reactive power rates lacked "a sufficient economic basis" because it closed its eyes to reactive power production's joint costs. That was error as a matter of law. *See* pp. 6-7, *supra*; *cf. El Paso II*, 76 F.4th at 362-363.

Finally, even assuming (contrary to fact) that FERC reasonably found that then-existing reactive power rates were economically unwarranted, it does not follow that a reactive power rate of *zero* reflects the benefits gleaned by transmission customers from reactive power production. And as a matter of common sense, it does not. As discussed, FERC has readily acknowledged that transmission customers derive significant benefits from reactive power service by generators; again, reactive power is used to stabilize voltage levels across the grid and thus support overall grid reliability. *See* pp. 10-14, *supra*. That material benefit requires *some* degree of material compensation in return. *El Paso II*, 76 F.4th at 362-363.

2. Alternatively, FERC and its intervenors posit that generators "cause" their own reactive power needs because "providing reactive power within the standard range 'enables generating facilities to reliably deliver real power to the transmission system (i.e., make real power sales).'" FERC Br. 62 (quoting Order at P 149); Intervenor Br. 35-39. What FERC and its intervenors mean by this observation is not entirely clear, in part because FERC's own brief spends essentially no time examining the question. *See* FERC Br. 62. In any event, however construed, respondents' theory cannot succeed.

a. Intervenors say that, "as a matter of physics," "generators must . . . provide reactive power *within the deadband* to interconnect reliably to the grid and sell their power." Intervenor Br. 35. As a result, they conclude, generators are the sole beneficiaries of reactive power production within the deadband. *See, e.g.*, Intervenor Br. 37. To the extent that generators produce reactive power to support the broader operation of the grid, they do so only *outside* the deadband. Intervenor Br. 36.

Notably, FERC does not endorse Intervenors' physical-necessity understanding of generators' reactive power obligations. And for good reason: As previously discussed, *see* pp. 10-15, *supra*, that understanding is inaccurate and is not what FERC found when it adopted Order No. 904. As FERC itself explained in its order, "generating facilities must

either produce or absorb reactive power for the *transmission system*"—taken as a whole—"to maintain voltage levels required to reliably supply real power from generation to load." Order at P 3 (emphasis added); *see also* pp. 10-14, *supra*. In other words, regardless of whether a generating facility is operating inside or outside the deadband, the mandatory *capability* of such a facility to provide or absorb reactive power based on a grid operator's specific instructions is what FERC refers to when it says the facility must "do [its] part to maintain adequate voltages" across the grid as a whole. Order at P 8; *see also* Bethel Aff. ¶ 47 (generators are not obligated "to supply reactive power in a certain range" but instead "to follow the Transmission Operator's voltage schedule and dispatch instructions because the Transmission Operator has the obligation to maintain voltage stability and dispatches all available reactive power resources to meet its obligation").

Confirming the point, if producing reactive power within the deadband were necessary "as a matter of physics" for generators to sell the power they produce, there would be no need for FERC to impose an *obligation* on generators to affirmatively provide reactive power. *Contra* Intervenor Br. 35. That obligation is only necessary because producing reactive power within the deadband is *not* required for generators as a matter of physics. It is required because FERC requires it.

b. Changing gears, FERC and Intervenors occasionally suggest that generators "cause" their need for reactive power simply because, "without reactive power," "a generating facility's real power will not reliably flow to load." Intervenor Br. 38 (quoting Rehearing Order at P 137). In other words, the argument goes, generators cause the grid's need for reactive power because they rely on the reliability of the electrical grid—which, in turn, is sustained in part by the flow of reactive power—to make real power sales. *Id.*

But it is transmission customers, not generators, that care about transmitting power to load. The primary purpose of a generator is to deliver real power to the energy grid. The primary purpose of a transmission customer, by contrast, is to pay to transmit that power across the grid to their end-users—with the support of reactive power supplied by generators. It is transmission customers that "cause" the need for such reactive power, not generators.

Even were that not the case, FERC's and the Intervenors' argument proves too much. If generators "cause" all costs necessary for "real power" to "reliably flow to load," then by the same logic they cause *every* cost associated with the transmission system. Intervenor Br. 38 (quoting Rehearing Order at P 137). That cannot be right. Regular maintenance on overhead transmission lines, for instance, is equally necessary to ensure

real power reliably flows to load. Yet neither FERC nor the Intervenors seriously contend that generators should bear the costs of transmission maintenance (which are instead ultimately borne by transmission customers).

All told, FERC and its intervenors have not explained how Order No. 904 comports with the cost causation principle. That is because it does not. As a result, Order No. 904 warrants vacatur.

III. FERC IGNORED PETITIONERS' RELIANCE INTERESTS

Finally, as Petitioners explained in their opening brief (at 59-69), Order No. 904 is independently arbitrary and capricious because, in adopting it, FERC disregarded generators' investment-backed reliance interests in continued reactive power payments. Below, generators presented evidence that—in the short term—eliminating compensation for reactive power within the deadband would cause them to under-collect revenue under long-term power purchase agreements and threaten violations of their contractual financing obligations with investors. FERC did not meaningfully engage with those concerns in promulgating Order No. 904, and its counsel's submissions to this Court cannot close that gap.

1. For over twenty years, FERC treated reactive power service as a distinct service for which generators could seek compensation on a standalone basis. Generators signed contracts and made investment

decisions against that regulatory backdrop. For example, many generators entered into long-term "power purchase agreements" priced based on the assumption that reactive power payments would remain available, and they will "undercollect" under such agreements if "reactive power compensation is eliminated." Vistra Br. at 63 (quoting R.88 at 2-4). Likewise, many investors have "financed the development and acquisition of utility-scale generation resources and portfolios based, in part, on the expectation that these resources would be eligible for and continue to receive reactive revenues." *Id.* (quoting Borgatti Aff. 4:14-17). With reactive power compensation eliminated, those projects may find themselves in breach of their "contractual financing obligations." *Id.* at 63-64.

FERC was not obliged to treat those reliance interests as dispositive. But in assessing them, it *was* obliged to explain why they were "either inconsequential or outweighed by countervailing considerations." *Capital Power Corp.*, 156 F.4th at 651.

2. As FERC and its intervenors' briefs confirm, FERC fell well short of its obligation to take generators' reliance interests seriously. Its topline position—that generators could not have reasonably relied on continued payments for reactive power—is deficient as a matter of law. And FERC's remaining reliance arguments, along with those of its intervenors, overlook crucial record evidence.

a. FERC's principal reliance argument below was that "because market rules can change," "no generating facility could have reasonably relied on an inherent right to separate compensation for reactive power capability." Order at P 145. FERC repeats that argument before this Court: "[T]he Commission explained that long-term power contracts are not immune from regulatory changes," and "developers and generating facilities [had] been on notice since at least 2003 that their ability to file . . . to establish rates for reactive power compensation was subject to change." FERC Br. 70 (ellipsis in original); *see also* Intervenors' Br. 70-71.

As Petitioners explained in their opening brief (at 65-66), that rationale for disregarding generators' reliance interests in their reactive power payments is "squarely foreclosed" by precedent. *Texas v. Biden*, 10 F.4th 538, 553 (5th Cir. 2021). Rather, under settled law, regulated entities can develop significant reliance interests even when an agency retains discretion to change its mind. That is why, for example, both the Supreme Court and this Court have held that undocumented immigrants could hold cognizable reliance interests in the Deferred Action for Childhood Arrivals program, which was always avowedly discretionary. *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020); *Biden*, 10 F.4th at 553.

Neither FERC's brief nor Intervenors' brief meaningfully engages on this point: neither, for instance, explains why the teachings of *Regents* and *Biden* do not equally apply to this case. And, once again, it is far from clear that FERC would have adopted Order No. 904 without its mistaken view that generators' reliance on the continued availability of reactive power payments was categorically unreasonable. Accordingly, Order No. 904 is subject to vacatur. *See, e.g.*, *Williams Gas Processing-Gulf Coast Co.*, 475 F.3d at 330.

b. FERC and the intervenors also raise a flurry of other arguments concerning reliance. None can salvage FERC's position.

FERC emphasizes that, unlike in *Capital Power*, Order No. 904 contains a "transition period" over which reactive power payments will come to an end. FERC Br. 69-70. But FERC did not find, explicitly or implicitly, that the transition period adopted by Order No. 904 would be adequate to protect generators' reliance interests—hardly a surprise given FERC's topline position that those reliance interests were simply unworthy of credence. Nor, in fact, will Order No. 904's transition period protect generators' reliance interests. As Petitioners explained in their opening brief (at 68), generators enter into power purchase contracts with a lifespan of ten years or more. *See, e.g.*, *Capital Power*, 156 F.4th at 653. FERC's 90-day transition period, Order at P 226, will do little to address

the injuries suffered by generators now locked into such long-term contracts.

Likewise, FERC contends that the record below "lack[ed] any concrete evidence showing whether . . . generating facilities factored reactive power revenues into their [power purchase agreements]." FERC Br. 70 (alterations and ellipsis in original) (quoting Order at P 226). But the record did contain that evidence, as Petitioners observed in their opening brief. *See, e.g.*, R.88 at 2-4; R.85 at 1-18. It likewise contained evidence that a 90-day end to reactive power compensation would cause violations of generators' contractual financing commitments with *investors*, evidence that FERC's brief—like Order No. 904 itself—simply overlooks. R.85 Attach. B at 4:7-20 (Affidavit of Michael Borgatti). And to the extent that Intervenors add that generators did not present specific contracts reflecting their reliance on reactive power payments, Intervenors' Br. 78, neither Intervenors nor FERC cite any authority suggesting that such granular evidence of reliance is necessary.

Finally, Intervenors—but not FERC—add that, in FERC's telling, generators might "still be able to recover costs, if any, through other revenue streams." Intervenors' Br. 74. But FERC did not say expressly that those other cost-recovery mechanisms were sufficient to outweigh

generators' legitimate reliance interests in their reactive power payments. Again, FERC cannot bridge that gap now.

IV. VACATUR IS THE APPROPRIATE REMEDY

As Vistra Petitioners argued, if the Court agrees with any of the above arguments, vacatur of Order No. 904 is warranted. Vacating would have no "disruptive consequences" within the meaning of this Court's precedent and is the appropriate remedy here. Vistra Br. 69. FERC does not dispute that proposition and thus has forfeited any counterargument. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 & n.1 (5th Cir. 2021) (stating that a party forfeits an argument by "failing to adequately brief the argument on appeal"). Accordingly, this Court should follow its usual practice and order vacatur of Order No. 904.

CONCLUSION

FERC Order No. 904 should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, James E. Tysse, a member of the Bar of this Court and counsel for Vistra petitioners, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), Fifth Circuit Rule 32.3, the Court's August 25, 2025 Order, Dkt. 129, and the Court's February 19, 2026 Order, Dkt. 217, that the attached Joint Reply Brief of Petitioners is proportionately spaced, has a typeface of 14 points or more, and contains 8,839 words.

/s/ James E. Tysse
JAMES E. TYSSE

July 6, 2026