UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.) Docket No. ER21-2582-001

RESPONSE OF THE PJM POWER PROVIDERS GROUP TO SUPPORTING STATEMENT FILED UNDER FPA SECTION 205(g)(1)(B)

The PJM Power Providers Group ("P3")[1] hereby responds to the Statement of Chairman Glick and Commissioner Clements ("Supporting Statement") added to the record pursuant to Federal Power Act ("FPA") section 205(g)(1)(B)[2] late on October 19, 2021. The Supporting Statement appeared twenty days after the Notice of Filing Taking Effect by Operation of Law in this proceeding on September 29, 2021 ("Notice").[3] The Notice was released the day after the Commission failed to issue an order in response to PJM's August 30, 2021 proposal to modify the Minimum Offer Price Rule ("MOPR") in a manner that squarely contradicted the Commission's previous directives under FPA section 206 and more than a decade of Commission precedent governing the PJM capacity market. P3 filed an Emergency Request for Rehearing of the Notice on October 5, 2021 and expressly reserved the right to respond to any separate statements by individual Commissioners that might issue thereafter.[4] This response is not an additional, supplemental, or new request for rehearing: P3 will have satisfied any statutory preconditions for judicial review of the Notice if the Commission fails to grant rehearing by November 4, 2021.

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[1] P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. ("PJM") region. Combined, P3 members own over 67,000 MWs of generation assets and produce enough power to supply over 50 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained herein represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

[2] 16 U.S.C. § 824d(g)(1)(B) (2020).

[3] *PJM Interconnection, L.L.C.*, Notice of Filing Taking Effect by Operation of Law, Docket No. ER21-2582-000 (Sept. 29. 2021) ("Notice").

[4] *See* Emergency Request for Rehearing of the PJM Power Providers Group at 5, Docket No. ER21-2582-001 (Oct. 5. 2021).

I. THE SUPPORTING STATEMENT INCORRECTLY SUGGESTS THAT A REHEARING REQUEST MUST RESPOND TO COMMISSIONERS' SEPARATE STATEMENTS UNDER FPA SECTION 205(g)(1)(B)

The Supporting Statement notes that FPA section 313(a)[5] requires parties to seek rehearing of a Commission order within thirty days and further stated, after twenty of those days had already passed, that "it would not be fair to further withhold [that] statement" because "parties to this proceeding are entitled to a full and fair opportunity to consider and respond to the arguments made in the Commissioners' section 205(g) statements in any rehearing request they may file."[6] This statement appears to suggest that a rehearing request filed in response to a notice issued under FPA section 205(g)(1)(A) must respond to arguments made in the Supporting Statement under FPA section 205(g)(1)(B). There is no such requirement.

FPA section 313(a) sets the timeline for requesting rehearing of "*an order* issued by the Commission."[7] The separate statements of individual Commissioners, by definition, do not constitute a Commission order. Rather, it is the Commission's "failure to issue an order" that is "considered to be an order" for the purpose of preserving litigants' rights to seek rehearing and judicial review.[8] FPA section 205(g)(1)(B) requires "each Commissioner" to file a statement when the Commission is unable to issue an order for the reasons described in section 205(g)(1), but does not state when such statements must be filed and does not extend the time to seek rehearing under FPA section 313(a). Therefore, it cannot be true that litigants are required to wait for separate statements to issue at some unspecified time before seeking rehearing of a failure to act in the first place. In the alternative, absence of such statements here for two-thirds of the available time to

[5] 16 U.S.C. § 825*l*(a) (emphasis added).

[6] Supporting Statement at P 4 n.4.

[7] 16 U.S.C. § 825*l*(a) (emphasis added).

[8] 16 U.S.C. § 824d(g)(1)(A); *see also id.* § 824d(g)(2).

seek rehearing is a "reasonable ground" under FPA section 313(b)[9] for reserving any response until briefing commences on judicial review.

The Federal Election Campaign Act ("FECA") appears to be the only federal statutory scheme under which courts have contemplated judicial review of separate statements by individual Commissioners as reflecting the position of a multi-member federal agency. Unlike FERC, deadlock votes are an anticipated result of the uniquely partisan structure of the Federal Elections Commission. For that reason, the United States Court of Appeals for the District of Columbia Circuit's recent decision in *Public Citizen, Inc. v. FERC*[10] expressly rejected any analogous treatment of separate Commissioner statements issued in deadlocked FERC proceedings:

> Congress uniquely structured the FEC toward maintaining the status quo, increasing the appropriateness of recognizing deadlocks as agency action in that specific context. . . . The voting and membership requirements [of the FEC] mean that, unlike other agencies—where deadlocks are rather atypical—FEC will regularly deadlock as part of its *modus operandi*. Taken together, FEC's structural design and FECA's legal requirement to dismiss complaints in deadlock situations mark FECA as an exception to the rule. Absent a similar congressional indication in the FPA or FERC's enabling statute, the FEC approach should not be imported here.[11]

FPA section 205(g) was enacted in response to *Public Citizen*, but nothing in FPA section 205(g) indicates that Congress "imported" the unique judicial review procedure applied under FECA. If the Supporting Statement was meant to test drive this idea for purposes of judicial review in this proceeding, that theory should be abandoned.

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[9] *See* 16 U.S.C. § 825*l*(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing *unless there is reasonable ground for failure so to do*.") (emphasis added).

[10] 839 F.3d 1165 (D.C. Cir. 2016).

[11] *Id.* at 1171; *accord Western Coal Traffic League v. STB*, 998 F.3d 945, 952-54 (D.C. Cir. 2021) ("We exercise judicial review only over the actions of the Board, not over the substance of the views of the individual commissioners.").

II. THE SUPPORTING STATEMENT IS RIDDLED WITH INACCURATE AND INTERNALLY INCONSISTENT CLAIMS THAT FALL FAR SHORT OF REASONED DECISIONMAKING UNDER THE ADMINISTRATIVE PROCEDURE ACT

Although P3 is not required to respond to the Supporting Statement for the reasons given above, P3 offers this limited response to some of that statement's more egregious inaccuracies and mischaracterizations. P3 reserves the right to develop these and other points further on judicial review. P3 offers these observations now in the hope that the Commission might abandon its destructive course of action and return to some semblance of regular order in the manner P3 and other parties have previously recommended. The Electric Power Supply Association ("EPSA") is contemporaneously filing a request for rehearing that offers a lengthy response to the Supporting Statement. P3 concurs with the arguments advanced in EPSA's pleading, which fit comfortably within the specifications of error P3 has already filed in its rehearing request, and hereby reserves the right to make those arguments in future proceedings on judicial review.

A. The Supporting Statement Mischaracterizes Commissioner Christie's Position In a Misguided Effort to Claim Majority Support for a Non-Existent Ruling Under FPA Section 206

In its Emergency Request for Rehearing, P3 argued that one half of an equally divided Commission could not, through its inaction on a filing submitted under FPA section 205, override tariff modifications the Commission had required PJM to make under FPA section 206 in its Expanded MOPR Orders.[12] Aware of this argument, the Supporting Statement asserts several times that there is a three-vote majority to set aside the Expanded MOPR Orders as unjust and unreasonable[13] and that it is "important not to overstate the extent of [their] disagreement" with

[12] *See* Emergency Request for Rehearing at 2; *see also id.* at 4-5, specifications 1 & 5.

[13] *See, e.g.*, Supporting Statement at P 48 ("three Commissioners – a majority of those participating – in their statements accompanying that 'order' explicitly support the conclusion that the Expanded MOPR is unjust and unreasonable and that a change of course is required"); *id.* at P 65 ("statements of three Commissioners reflect the judgment that the Expanded MOPR, the zenith of the Commission's approach to aggressively mitigate state policy, is

Commissioner Christie.[14] These claims would be devoid of any legal merit, even if they were true, because the Commission failed to initiate a proceeding under FPA section 206, much less vote on one, and such a proceeding would require a majority of the Commission first to find that the Expanded MOPR regime is unjust and unreasonable (which did not happen) and then also set a replacement rate that a new majority would agree is just and reasonable (which also did not happen).

But the more immediate problem with the Supporting Statement's claims is that they are not accurate. Commissioner Christie strongly rejected the Supporting Statement's adventurous mischaracterization of his position, clarifying in unmistakable terms that he is "not on the same page" with the Supporting Statement, that any modifications he might accept in a theoretical proceeding under FPA section 206 would be nothing like the modifications PJM proposed, and that his concerns with the Expanded MOPR rules are not driven by "its merits or demerits in terms of economics," but rather by his view that "the incumbent MOPR is unsustainable *because of the political realities* relevant to an RTO consisting of thirteen sovereign states and the District of Columbia and their increasingly divergent policies."[15]

Commissioner Christie was also unequivocally clear about his position regarding the merits of the 205 proceeding that was actually before the Commission: he "would have voted to reject PJM's proposal because it fails to meet even the minimum standard required by FPA section 205."[16] Commissioner Christie elaborated on the core problem with allowing PJM's proposal to take effect by operation of law as follows:

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not just and reasonable"); *id.* at P 81 ("three Commissioners agree that the harm of the Expanded MOPR is worse than any purported benefit it may bring to 'market integrity'").

[14] *Id.* n.99.

[15] Statement of Commissioner Christie at 4 n.11 (quoting *id.* P 2).

[16] *Id.* P 5.

> We can now dispense with the charade that what is called the "PJM capacity market" is, in fact, a market, the central characteristic of which is actual competition with consumers as the winners. A construct in which winners and losers are determined by which interest groups' lobbyists can obtain the biggest subsidies from politicians is no market, but a rent-seekers' paradise in which consumers lose. While the PJM capacity market has never been a true market but rather an administrative construct with some market characteristics, in the beginning there was agreement among all of the participating states that *non-discriminatory competition on a level-playing field* should be the central principle that would animate this capacity construct (and energy as well, by the way). FERC policy reinforced that common understanding.[17]

Commissioner Christie also disclaimed the notion that PJM's Narrow MOPR Proposal was an improvement to the *status quo*, writing that PJM's Narrow MOPR proposal "is the flawed and rushed result of an 'expedited' stakeholder process and results in a structure that the PJM Independent Market Monitor (IMM) says is *even worse* than having no MOPR at all."[18]

B. Contrary to the Supporting Statement, Nothing in FPA Section 205(g) Excuses the Commission from Complying with the Essential Requirements of Reasoned Decisionmaking Under the Administrative Procedure Act

In its Emergency Request for Rehearing, P3 argued that "[t]he Notice is arbitrary and capricious *per se* because the Commission entirely failed to respond to facially legitimate objections raised by P3 in its Protest, Reply to Comments, and Supplemental Protest."[19] Aware of this argument, the Supporting Statement argues—contrary to the position Commissioner Danly must have previewed before issuing his own statement on October 27, 2021—that the Commission's Notice cannot be subject to the requirements of the Administrative Procedure Act

[17] *Id.* P 12.

[18] *Id.* P 3 & n.5 (footnotes omitted) (citing Independent Market Monitor Protest at 1).

[19] Emergency Request for Rehearing at 6, specification 2 (citations omitted); *see also id*. specification 1 ("The Notice is arbitrary and capricious per se because the Commission failed to explain its reversal of the Expanded MOPR Orders24 and more than a decade of precedent requiring mitigation of the artificial price suppression caused by out-of-market subsidies.") (footnotes and citations omitted).

(APA) on judicial review.[20] According to the Supporting Statement, this contention is "head scratching" because:

> Commissioner's Danly's interpretation would have the consequence of ensuring that every filing that goes into effect by operation of law under section 205(d) of the FPA would be guaranteed to lose on appeal under section 205(g) because, by definition, the Commission could not possibly address the relevant protests. Such an absurd result—which would interpret section 205(g) to *sub silentio* gut the operation-of-law provisions in section 205(d)—finds no support in the text or history of any part of section 205. In any case, we note that the protests he describes are fully addressed in this statement.[21]

This position has no merit.

First, the Supporting Statement turns the statutory analysis upside down by contending that a Notice issued under FPA section 205(g) escapes judicial review under the APA if there is no *affirmative* "support in the text or history of … section 205" for the proposition that the APA applies. That is nonsense. The APA governs judicial review in the absence of any expressly contrary indication in a specific statute[22] and reviewing courts have uniformly applied APA review to FERC proceedings under FPA section 205 ever since the APA became law. Here, there is nothing in FPA section 205 generally, or FPA section 205(g) specifically, that modifies the standard applied on judicial review.

The Supporting Statement also overstates the supposed conflict between FPA Section 205(g) and the APA in this proceeding. "Every filing" that goes into effect by operation of law would not necessarily fail. But, in the circumstances presented here, it cannot possibly be lawful that a naked Notice documenting the Commission's failure to achieve a majority position can now

[20] Supporting Statement P 48. This is also one of the paragraphs for which the Supporting Statement inaccurately claims agreement with Commissioner Christie.

[21] *Id.*

[22] *See* 7 U.S.C. § 701(a) ("This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.").

instantly override recent Commission mandates under Section 206 and sweep aside a decade of precedent the Supporting Statement views as "wrongly decided." Reviewing courts do not accept the "post hoc rationalizations" of FERC counsel as a substitute for explanations the Commission itself, acting through a majority, is obliged to provide.[23] The same should be true for Commissioner statements.

The authors of the Supporting Statement may find that inconvenient for purposes of advancing their policy preferences in this case, but it is also a problem of their own making. There are only two other alternatives. One alternative would be to regard any filing that goes into effect by operation of law under FPA section 205(g) as immune from judicial review, which not only cuts sharply against the longstanding rule that administrative action is presumptively subject to judicial review,[24] but also squarely contradicts FPA section 205(g)(2), which expressly states that the Commission's failure to issue an order is subject to review under FPA section 313(b).[25] That approach would also have the perverse effect in this case of allowing a filing under FPA section 205 to reverse Commission policy repeatedly endorsed by a majority of Commissioners for more than a decade, as well as contravene express Commission directives issued under FPA section 206, without ever being endorsed (much less explained) by a majority of the Commission.

The other alternative, which the Supporting Statement appears to embrace, is to regard the Supporting Statement as an adequate response to the protests filed in this proceeding.[26] However,

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[23] *E.g.*, *New Eng.Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 213 (D.C. Cir. 2018) ("As this Court has noted, "we need not—and indeed cannot—consider 'appellate counsel's *post hoc* rationalizations' for Commission action.") (quoting *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 25 (D.C. Cir. 2014) (quoting *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010)).

[24] *See, e.g.*, *Sierra Ass'n for Env't v. FERC*, 791 F.2d 1403, 1406 (9th Cir. 1986) ("There is a presumption that persons aggrieved by administrative action are afforded judicial review.").

[25] *See* 16 U.S.C. § 205(g)(2).

[26] *See* Supporting Statement P 48 ("In any case, we note that the protests [Commissioner Danly] describes are fully addressed in this statement.").

as P3 explained above, the only judicial review mechanism for which courts have contemplated review of individual Commissioner statements in this manner is the FECA and, notwithstanding that FPA section 205(g) was enacted in response to *Public Citizen*, FPA section 205(g) does nothing to modify the standard of review applicable under FPA section 313(b) or the APA. In any event, as we next explain, the Supporting Statement falls far short of the APA's requirements for reasoned decisionmaking.

C. The Supporting Statement Ignores Critical Evidence and Relies on Material that is Outside the Record in this Proceeding and Patently Meritless

The APA requires the Commission to respond to facially legitimate arguments;[27] both the APA and the FPA require the Commission to base its conclusions on substantial evidence.[28] The Supporting Statement broadly disregards both of these requirements. The examples of arguments and evidence ignored by the Supporting Statement are legion, but P3 need look no further than the testimony submitted by its own expert witnesses—Dr. J. Arnold Quinn and Dr. Roy Shanker—to illustrate this point.

Dr. Shanker is one of the foundational theorists for capacity markets and has been a participant in nearly every significant FERC capacity market proceeding or capacity market technical conference for the past two decades. He submitted multiple affidavits in this proceeding, focusing most of his effort on exposing the serious methodological flaws in the testimony filed by Dr. Peter Cramton. As Dr. Shanker explains, Dr. Cramton's analysis falls so far short of the standards demanded from economic analysis that it simply not credible.[29] The Supporting Statement relies on Cramton to support positions taken by PJM,[30] but never acknowledges Dr.

[27] *See* 5 U.S.C. § 706(2).

[28] *See id*.; *accord* 16 U.S.C. § 825*l*(b).

[29] *See, e.g*., Shanker Aff. PP 1, 13-21; Shanker Reply Aff. *passim*.

[30] *See, e.g*., Supporting Statement P 36 & n.72; *id.* P 92 & n.194.

Shanker beyond footnote 2, which correctly credits Dr. Shanker for introducing the term "missing money" into the FERC lexicon.

Dr. Quinn is never mentioned in the Supporting Statement except as a parenthetical reference in two footnotes[31] that purport to summarize P3's position on only one of the many issues that P3 raised in its Protest—including not only the risk of over-mitigation as compared to under-mitigation, but also several other significant flaws in the testimony presented by PJM. One would reasonably expect the Supporting Statement to devote more attention to objections from an economist who served for several years as the Commission's Director of the Office of Energy Policy and Innovation, which is responsible for conducting the Commission's economic analysis. The only response to Dr. Quinn's testimony, which is entirely confined to the comparative risk of under-mitigation versus over-mitigation, is point to PJM's answer to protests.[32] That response, such as it is, was not only evasive, but is also based on material that is outside of the record. The Commission's Rules of Practice and Procedure prohibit answers to protests unless specifically authorized by the Commission.[33] The Commission issued no such order. That fact did not deter the authors of the Supporting Statement from citing PJM's prohibited Answer many times,[34] but it does preclude PJM's Answer, and the various other answers to protests in this proceeding from being treated as substantial evidence.

[31] *See* Supporting Statement at P 92 nn.203 & 204.

[32] *See id.* P 93 & n.205.

[33] *See* 18 C.F.R. § 385.213(a)(2).

[34] *See, e.g.*, Supporting Statement PP 93, 94, 95, 97, 112, 115, 117, 119, 132, 141, 153, 160. Footnote 243 is particularly interesting, because it goes so far as to scold Commissioner Christie for "fail[ing] to acknowledge any of the arguments that PJM made in its Answer."

CONCLUSION

For the foregoing reasons, as well as those documented in the EPSA rehearing request, the Supporting Statement does not constitute an order of the Commission, P3 was not obliged to respond to the Supporting Statement on rehearing, and, to the extent the Supporting Statement is reviewable explanation for the Commission's failure to act in this proceeding, it does not meet the minimum requirements for reasoned decisionmaking under the APA.

Respectfully submitted,

On behalf of the PJM Power Providers Group

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October 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2020).

Dated at Washington, DC this 28th day of October, 2021.

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