ORAL ARGUMENT NOT YET SCHEDULED

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

NRG POWER MARKETING, LLC, *et al.*, Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION, Respondent.
Case Nos. 15-1452, 15-1454

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

PETITIONERS BRIEF OF THE NRG COMPANIES AND PJM POWER PROVIDERS GROUP

Jeffrey A. Lamken
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 556-2000
jlamken@mololamken.com

Abraham Silverman
Assistant General Counsel – Regulatory
Cortney Madea
Assistant General Counsel – Regulatory
NRG ENERGY, INC.
211 Carnegie Center
Princeton, NJ 08540-6213
(609) 524-4696
abraham.silverman@nrgenergy.com

Counsel for the NRG Companies

John N. Estes III
Paul F. Wight
John Lee Shepherd, Jr.
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com
paul.wight@skadden.com
john.shepherd@skadden.com

Counsel for PJM Power Providers Group

Initial Brief: June 7, 2016

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

The parties to this proceeding are as follows:

A. Petitioners

NRG Power Marketing LLC
GenOn Energy Management, LLC
PJM Power Providers Group

B. Respondent

Federal Energy Regulatory Commission

C. Intervenors

American Municipal Power, Inc.
American Public Power Association
CPV Power Holdings, LP
National Rural Electric Cooperative
New Jersey Department of the Public Advocate,
Division of Rate Counsel
Newark Energy Center
Old Dominion Electric Cooperative
PJM Industrial Customer Coalition
PJM Interconnection, L.L.C.
PSEG Energy Resources & Trade LLC
PSEG Power LLC
Public Service Electric and Gas Co.

D. Parties in the Proceeding Below

American Electric Power Service Corporation
American Municipal Power, Inc.
American Public Power Association
Borough of Chambersburg, Pennsylvania
Brookfield Energy Marketing LP
Buckeye Power, Inc.
Calpine Corporation

COMPETE Coalition
CPV Power Development, Inc.
D.C. Office of People's Counsel
Dayton Power and Light Company, The
Delaware Public Advocate
Delaware Public Service Commission
Dominion Resources Services, Inc.
Duke Energy Corporation
Duquesne Light Company
Dynegy Marketing and Trade, LLC, *et al*.
East Kentucky Power Cooperative, Inc.
Edison Mission Energy
Electric Power Supply Association
Exelon Corporation
Federal Energy Regulatory Commission
FirstEnergy Service Company
Hess Corporation
Hess NEC, LLC
Hess Newark, LLC
Lower Mount Bethel Energy, LLC
LS Power Associates, L.P.
Maryland Energy Administration
Maryland Office of People's Counsel
Maryland Public Service Commission
Monitoring Analytics, LLC
National Rural Electric Cooperative Association
New Jersey Board of Public Utilities
New Jersey Division of Rate Counsel
NextEra Energy Generators
North Carolina Electric Membership Corporation
NRG Companies
    NRG Power Marketing LLC
    GenOn Energy Management, LLC
Ohio Consumers' Counsel
Old Dominion Electric Cooperative
Pennsylvania Public Utility Commission
Pepco Holdings, Inc.,
    Potomac Electric Power Company,
    Delmarva Power & Light Company, and
    Atlantic City Electric Company

PJM Industrial Customer Coalition
PJM Interconnection, L.L.C.
PJM Power Providers Group
PPANJ
PPL Brunner Island, LLC
PPL Electric Utilities Corporation
PPL Energy Supply, LLC
PPL EnergyPlus, LLC
PPL Holtwood, LLC
PPL Ironwood, LLC
PPL Martins Creek, LLC
PPL Montour, LLC
PPL New Jersey Biogas, LLC
PPL New Jersey Solar, LLC
PPL Renewable Energy, LLC
PPL Susquehanna, LLC
PSEG Energy Resources & Trade LLC
PSEG Power LLC
Public Service Electric and Gas Company
Public Utilities Commission of Ohio
Rockland Electric Company
Shell Energy North America (U.S.), L.P.
Southern Maryland Electric Cooperative, Inc.
West Virginia Consumer Advocate Division

II. RULINGS UNDER REVIEW

Petitioners seek review of the following orders:

PJM Interconnection, L.L.C., Docket Nos. ER13-535-000 and -001, Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Provisions, Subject to Conditions, 143 FERC ¶61,090 (May 2, 2013) JA____-__; and

PJM Interconnection, L.L.C., Docket Nos. ER13-535-002 and -003, Order on Rehearing and Compliance, 153 FERC ¶61,066 (Oct. 15, 2015), JA____-__.

III. RELATED CASES

The challenged orders have not been reviewed and are not pending on review in this Court or any other court. Counsel are not aware of any related proceedings in this Court or any other court.

Respectfully submitted,

/s/ Paul F. Wight

Jeffrey A. Lamken
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for
the NRG Companies

Paul F. Wight
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
paul.wight@skadden.com

Counsel for
PJM Power Providers Group

June 7, 2016

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of this Court, NRG Power Marketing LLC and GenOn Energy Management, LLC (together, the "NRG Companies") and PJM Power Providers ("P3"), hereby provide their corporate disclosure statements as the petitioners in this case.

The NRG Companies

The NRG Companies are Delaware corporations with principal offices in Princeton, New Jersey. They are each a subsidiary of NRG Energy, Inc., a publicly held corporation (NYSE: NRG) with its principal place of business in Princeton, New Jersey. The NRG Companies have not issued shares to the public and no publicly held company has a 10% or greater ownership interest in NRG Energy, Inc.

PJM Power Providers

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 84,000 MWs of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region covering 13 States and the District of Columbia. For purposes of this disclosure

statement, P3 respectfully submits that it is a trade association pursuant to Circuit Rule 26.1(b). The content of this pleading represents the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

Respectfully submitted,

/s/ Paul F. Wight

Jeffrey A. Lamken
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 556-2000
jlamken@mololamken.com

Counsel for
the NRG Companies

Paul F. Wight
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
paul.wight@skadden.com

Counsel for
PJM Power Providers Group

June 7, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES PAGE(S)

*Authorities upon which we chiefly rely are marked with an asterisk.

*Authorities upon which we chiefly rely are marked with an asterisk.

ADMINISTRATIVE ORDERS

*Authorities upon which we chiefly rely are marked with an asterisk.

FEDERAL STATUTES

OTHER

*Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

APA	Administrative Procedure Act
Commission	Federal Energy Regulatory Commission, the Respondent
CONE	Cost of New Entry
Order	*PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 (2013), JA____-__.
FERC	Federal Energy Regulatory Commission, the Respondent
FPA	Federal Power Act
LSE	Load-serving entity, an electric utility that serves end-use customers.
MOPR	Minimum Offer Price Rule
MW	Megawatt
Net CONE	Net Cost of New Entry
New England ISO	New England Independent System Operator, Inc.
New York ISO	New York Independent System Operator, Inc.
NGA	Natural Gas Act
PJM	PJM Interconnection, L.L.C.
Rehearing Order	*PJM Interconnection, L.L.C.*, 153 FERC ¶61,066 (2015), JA____-__.

JURISDICTIONAL STATEMENT

Petitioners NRG Power Marketing, LLC, and GenOn Energy Management, LLC (together, "NRG"), and other members of the PJM Power Providers Group ("P3"), seek review of two Federal Energy Regulatory Commission ("FERC") orders: *PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 (May 2, 2013) ("*Order*"), JA____, and 153 FERC ¶61,066 (Oct. 15, 2015) ("*Rehearing Order*"), JA____. Those orders rejected tariff modifications filed by PJM Interconnection, L.L.C. ("PJM") to revise the Minimum Offer Price Rule that protects PJM's regional wholesale power markets from below-cost and state-subsidized resources that artificially suppress prices. FERC's orders are final and aggrieve all competitive capacity suppliers in PJM, including petitioners, by permitting uneconomic generation resources to artificially suppress prices. Petitioners timely requested rehearing at FERC on June 3, 2013, and timely petitioned for judicial review on December 14, 2016. This Court has jurisdiction under the Federal Power Act ("FPA") §313(b), 16 U.S.C. §825*l*(b).

STATEMENT OF THE ISSUES

PJM filed modifications to its Minimum Offer Price Rule ("MOPR") under FPA §205 designed to implement a broad stakeholder compromise to protect capacity auctions from uneconomic entry that distorts prices and incentives. PJM proposed to eliminate a non-transparent "unit-specific review" exemption that

repeatedly enabled uneconomic entry. Instead, PJM substituted two categorical exemptions: (i) a "competitive entry" exemption for new resources that receive no discriminatory subsidies and (ii) a "self-supply" exemption for utilities that pass net-short and net-long tests. PJM also proposed that new entrants comply with the MOPR for three years, rather than one.

FERC, however, accepted only one side of the compromise. It accepted the two new categorical exemptions, but required PJM to retain the subjective unit-specific exemption they were designed to replace. FERC also required PJM to exempt any new resource in perpetuity after it clears one auction. The questions presented are whether FERC's orders are arbitrary and capricious, contrary to law, or otherwise inconsistent with the requirements of reasoned decisionmaking under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), because:

1. FERC unlawfully required PJM to retain a unit-specific exemption contrary to FPA ratemaking standards and reasoned decisionmaking requirements;

2. FERC failed to show that diluting the MOPR—through forced retention of an existing exemption, and adding two additional exemptions—was just and reasonable, and provided no reasoned justification for that result; and

3. FERC unlawfully required PJM to cease mitigation of new entry after clearing a single auction, contrary to FPA ratemaking standards and reasoned decisionmaking requirements.

STATUTORY ADDENDUM

An addendum attached to this brief reproduces the statutory provisions discussed herein.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Sections 205 and 206 of the Federal Power Act

The bedrock requirement of the FPA is "just and reasonable" energy rates. Regardless of methodology, it "is axiomatic that the end result of Commission rate orders must be 'just and reasonable' to both consumers and investors." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1172 (D.C. Cir. 1987) (en banc). Since *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), the "Supreme Court has repeatedly reaffirmed the 'end result' standard" for determining whether a rate is just and reasonable. *Jersey Cent.*, 810 F.2d at 1177 (collecting cases).[1]

"Two related but distinct sections of the" FPA "govern FERC's adjudication of just and reasonable rates." *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 348 (D.C. Cir. 2014). First, § 205 "requires regulated utilities to file . . . tariffs out-

[1] *Hope* was decided under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717c, 717d, rather than the FPA. But the "constructions of one are authoritative for the other" because they "are 'in all material respects substantially identical.'" *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) (quoting *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956)).

lining their rates for FERC's approval." *Id.* (citing 16 U.S.C. § 824d(c)). When reviewing such filings, FERC must "ensure" the rates "are just and reasonable" and do not "make or grant any undue preference or advantage . . . or subject any person to any undue prejudice or disadvantage." *Id.* (citing 16 U.S.C. § 824d(a), (b)).

Second, § 206 "empowers FERC to make a determination on *existing* rates and to modify them if they are found to be 'unjust, unreasonable, unduly discriminatory or preferential.'" *FirstEnergy*, 758 F.3d at 348 (emphasis added) (citing 16 U.S.C. § 824e(a)). When FERC "institutes a section 206 proceeding," FERC "is required to shoulder the 'dual burden'" of finding the existing rate unjust and unreasonable and of "find[ing] a just and reasonable rate" to replace it. *Id.* at 353 (citing *Md. PSC v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2011)).

Consequently, "§ 205, unlike § 206, allows the Commission to approve rate increases without a showing that current rates are unjust and unreasonable; it need only find the *proposed* rates to be just and reasonable." *City of Winnfield v. FERC*, 744 F.2d 871, 874-75 (D.C. Cir. 1984).

B. PJM's FERC-Regulated Capacity Market

PJM is the "regional transmission organization that operates the power grid for over 60 million customers in the mid-Atlantic region and the Midwest." *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 8-9 (D.C. Cir. 2015). PJM also operates the world's "largest centrally dispatched power market." *PPL*

EnergyPlus, LLC v. Solomon, 766 F.3d 241, 247 (3d Cir. 2014). PJM thus does not merely "transmit" energy on the grid; it operates the market for the purchase and sale of electricity.

PJM provides wholesale energy products to electric utilities—called "Load Serving Entities" or "LSEs"—by "administer[ing] a number of competitive wholesale auctions: for example, a 'same-day auction' for immediate delivery of electricity to LSEs facing a sudden spike in demand; a 'next-day auction' to satisfy LSEs' anticipated near-term demand; and a 'capacity auction' to ensure the availability of an adequate supply of power at some point far in the future." *Hughes v. Talen Energy Mktg. LLC*, 136 S. Ct. 1288, 1293 (2016).

This case concerns PJM's capacity markets. "'Capacity' is not electricity itself but the ability to produce it when necessary." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009) ("*CTDPUC*"). "To maintain the reliability of the grid, electricity providers generally purchase more capacity, *i.e.*, rights to acquire energy, than necessary to meet their customers' anticipated demand." *NRG Power Mktg., LLC v. Me. PUC*, 558 U.S. 165, 168-69 (2010).

PJM uses capacity auctions to ensure there are "enough idle generators connected to the transmission grid for the system to function at peak load." *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 82 (3d Cir. 2014) ("*NJBPU*"). The capacity auction process functions as follows:

> PJM predicts electricity demand three years ahead of time .... Owners of capacity to produce electricity in three years' time bid to sell that capacity to PJM at proposed rates. PJM accepts bids, beginning with the lowest proposed rate, until it has purchased enough capacity to satisfy projected demand .... [A]ll accepted capacity sellers receive the highest accepted rate, which is called the "clearing price." LSEs then must purchase from PJM, at the clearing price, enough electricity to satisfy their PJM-assigned share of overall projected demand.

Hughes, 136 S. Ct. at 1293 (footnote omitted). Prices vary in certain locations because energy transmission is sometimes constrained by distance and congestion. Consequently, capacity offers "are grouped based on the particular 'locational delivery area' ... the resource will serve," and clearing prices are set for each location. *NJBPU*, 744 F.3d at 83-84.

Capacity auctions are designed to "incentivize the development of new generation resources by establishing a market-based means by which those resources can recover their investment costs." *Id.* at 82-83. Ordinarily, competitive markets tend to produce prices that allow efficient sellers to recover their investments plus a return on capital. Capacity markets are supposed to mimic those dynamics. FERC has found that "a competitive capacity market would provide annual revenues over time that, on average, would approximate" the cost of building a new generation resource (minus any revenues from other energy products)—*i.e.*, the Net Cost of New Entry ("Net CONE"). *PJM Interconnection, L.L.C.*, 137 FERC ¶61,145, P 25 (2011) ("*2011 MOPR Rehearing Order*"), *aff'd*,

NJBPU, 744 F.3d 74; *see ISO New Eng. Inc.*, 125 FERC ¶61,102, P 43 (2008) ("to attract and retain sufficient capacity," prices must "average out over time to the cost of new entry").

This Court and FERC have concluded that Net CONE sets "appropriate rates" consistent with the FPA's just-and-reasonable requirement because it "approximates reasonable compensation for existing as well as new generators," and "ensure[s] both that existing generators are adequately compensated and that prices support new entry when additional capacity is needed." *Me. Pub. Util. Comm'n v. FERC*, 520 F.3d 464, 473 (D.C. Cir. 2008) ("*Maine PUC*"). "Theoretically, such a pricing scheme allows for the market to signal its need for additional electrical generation, while enabling generators to recover their costs." *New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 287 (D.C. Cir. 2014) ("*NEPGA*"). "A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence; a low clearing price discourages new entry and encourages retirement of existing high-cost generators." *Hughes*, 136 S. Ct. at 1293; *accord CTDPUC*, 569 F.3d at 480 ("[C]ompetitive bidding for future capacity contracts . . . both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers.").

C. Buyer-Side Market Power and Uneconomic Entry

For capacity markets to operate properly, new suppliers cannot offer capacity at prices that fail to reflect actual costs. Below-cost entry prevents market prices from, over time, averaging out to Net CONE. It prevents "existing as well as new generators" from recovering "adequate[] compensate[ion]"; and it precludes the market from achieving "prices" that "support new entry when additional capacity is needed." *Maine PUC*, 520 F.3d at 473. Thus, FERC and this Court have "found that uneconomic entry, regardless of resource and regardless of intent, 'can produce unjust and unreasonable prices by artificially depressing capacity prices.'" *NEPGA*, 757 F.3d at 290-91 (quoting *ISO New Eng. Inc.*, 135 FERC ¶61,029, P 170 (2011)).

Artificial price suppression from below-cost entry is a serious concern in capacity markets. Because supply and demand curves in capacity markets are steep, selling a small amount of capacity below the cost of producing it can suppress prices dramatically. *PJM Interconnection, L.L.C.*, 135 FERC ¶61,022, P 196 (2011) ("*2011 MOPR Order*"), *reh'g denied*, 137 FERC ¶61,145, *aff'd*, *NJBPU*, 744 F.3d 74. Indeed, the decline in capacity prices can be so extreme that buyers save more on purchases than it costs them to fund price-suppressing below-cost entry. Buy-side participants thus have an "interest in depressing the auction price." *Devon Power L.L.C.*, 115 FERC ¶61,340, P 113 (2006).

For example, electric utilities known as "net-buyers"—*i.e.*, utilities that act as both buyers and sellers but that buy more capacity than they sell—"have an incentive to keep auction prices as low as possible" and "can achieve that objective by offering their capacity at artificially low prices that are sure to clear the auction." *NJBPU*, 744 F.3d at 85; *see also, e.g.*, *Devon*, 115 FERC ¶61,340, P 113 (explaining why self-supplied utilities "may not have an incentive to submit bids that reflect their true cost of new entry").

States too have subsidized the development of capacity to lower prices for utilities and thus for consumers as well. They likewise rely on the fact that the total return from lower rates can exceed the cost of the subsidy. *See Order* P 108, JA____. New suppliers that receive revenues from state-mandated contracts or programs often "have no interest in compensatory auction prices because their revenues have already been determined by contract." *Devon*, 115 FERC ¶61,340, P 113. Indeed, state-sponsored price suppression in PJM's capacity markets recently prompted several federal courts—including the Supreme Court—to declare the conduct preempted. *See PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372, 407-11 (D.N.J. 2013), *aff'd*, *Solomon*, 766 F.3d at 253-54, *cert. denied sub nom. Fiordaliso v. Talen Energy Mktg., LLC*, 136 S. Ct. 1728 (2016); *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467, 476-80 (4th Cir. 2014), *aff'd, Hughes*, 136 S. Ct. at 1297-99.

Uneconomic "resources—whether self-supplied, state-sponsored, or otherwise—directly impact the price at which" the capacity "auction clears." *NEPGA*, 757 F.3d at 290. FERC has therefore held that it is "statutorily mandated to protect the [PJM capacity market] against the effects of such entry." *2011 MOPR Order*, 135 FERC ¶61,022, P 143.

D. The Rule at the Center of This Controversy

To limit uneconomic entry, PJM employs a Minimum Office Price Rule "that is designed to curb monopsony power, *i.e.*, the power of a buyer facing many sellers and little to no competition from other buyers," and other incentives to bid below cost. *NJBPU*, 744 F.3d at 85. "To counteract manipulation of the market, the MOPR seeks to identify uneconomic offers and 'mitigate' them by raising them to a price that more accurately approximates their net costs." *Id.*[2]

Under the MOPR, new entrants into capacity auctions ordinarily may not bid below Net CONE—the minimum price a competitive entrant would be expected to demand. *2011 MOPR Order* P 6. PJM has, at different times, provided different exemptions from the Net CONE price floor. For example, FERC originally exempted state-sponsored resources. *Id.* P 124. But in 2011 PJM proposed removing that exemption; FERC conducted a hearing on that proposal under FPA

[2] Other FERC-jurisdictional capacity markets have similar rules. *See, e.g.*, *NEPGA*, 757 F.3d at 287 (New England ISO); *TC Ravenswood LLC v. FERC*, 705 F.3d 474, 476 (D.C. Cir. 2013) (New York ISO).

§ 205, and parallel stakeholder complaints under FPA § 206; and FERC made three determinations central to this case.

First, FERC concluded it was unjust and unreasonable to permit a categorical exemption for uneconomic entry by state-sponsored resources. It explained that "there is no valid state interest in ensuring that uneconomic [resources] can submit below-cost offers into the [PJM capacity] auction" and it is FERC's "duty under the FPA to assure just and reasonable rates in wholesale markets." *2011 MOPR Order* PP 142-43. FERC held the intent of "state and local policies and objectives with regard to the development of new capacity resources" was irrelevant, because FERC is "forced to act . . . when subsidized entry . . . has the effect of disrupting the competitive price signals that PJM's [capacity market] is designed to produce, and that PJM as a whole [and many States] . . . rely on to attract sufficient capacity." *2011 MOPR Rehearing Order* P 3. The Third Circuit affirmed. *NJBPU*, 744 F.3d at 100-01.

Second, FERC rejected a categorical exemption for "self-supply" resources (*i.e.*, utilities that both sell capacity into PJM markets and purchase it from those markets). FERC agreed with PJM that "planned generation designated by a load serving entity as self-supply should be classified as a capacity resource and be subject to an offer floor based on its entry costs until it clears in the base residual auction." *2011 MOPR Order* P 139. FERC found that "permitting new self supply

investment to compete as a price-taker" (without regard to the price floor or actual cost)—would artificially "suppress[] market clearing prices." *Id.* P 195. On rehearing, FERC reaffirmed its finding "that a blanket, across-the-board MOPR exemption for resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and thus could inhibit competitive investment." *2011 MOPR Rehearing Order* P 205. The Third Circuit held that the challenges to FERC's order were moot because FERC's initial order below accepted a self-supply exemption. *See NJBPU*, 744 F.3d at 105.

Third, FERC rejected PJM's proposal to apply the MOPR to new entrants for three years (as opposed to exempting new entrants from the MOPR in perpetuity once they successfully bid into even a single auction). "[O]nce a new resource has cleared in one auction at the offer price floor," FERC stated, "the resource has demonstrated that it is needed by the market and it is therefore economic." *2011 MOPR Order* P 175; *see 2011 MOPR Rehearing Order* PP 130-33. The Third Circuit affirmed, holding that FERC had "adequately responded" to contrary arguments. *NJBPU*, 744 F.3d at 111.

II. PROCEEDINGS BELOW

This case has its genesis in a grand compromise—supported by an unprecedented 89% of PJM members—designed to address the MOPR's widespread failure to achieve its purposes.

A. The Failed Unit-Specific Exemption

One exemption from the MOPR's price floor proved a failure: The "unit-specific" exemption. Under that exemption, a proposed new entrant could bid below Net CONE—that is, below the estimated minimum price necessary to make new entry economic—*if* it could show its bid reflected its *actual* costs. *See Hughes*, 136 S. Ct. at 1294; *Rehearing Order* P 3, JA____. The idea was that, if unique efficiencies lower a generator's actual costs below Net CONE, the generator should be allowed to bid its actual costs. *Order* P 141, JA____.

The unit-specific exemption, however, enabled widespread below-cost entry and price suppression. FERC itself has repeatedly concluded that "uneconomic" capacity had entered the market through unit-specific review. FERC Br. 10, *PPL EnergyPlus, L.L.C. v. Solomon*, Nos. 13-4330, 13-4501 (3d Cir. Mar. 20, 2014); *id.* (describing various bids as "below-cost and market distorting"). Such bidding had "directly affect[ed] (suppress[ing]) the auction's resulting wholesale capacity rate, to the detriment of generation resources in every other PJM state." *Id.* at 13-14.[3]

---

[3] FERC repeated that concession in the Supreme Court in *Hughes*, explaining that state subsidies, "combined with state-mandated bidding and clearing, can have a price-suppressive effect on federally-regulated capacity markets *even where the generators comply with the FERC-adopted minimum-offer-price rule*" because a state-supported generator "can bid the minimum-offer default price—even if the generator's actual costs are higher than the default price." U.S. Br. 25-26, *Hughes v. Talen Energy Mktg., L.L.C.*, Nos. 14-614, 14-623 (U.S. Jan. 19, 2016) (citations omitted) (emphasis added). Allowing a "state-subsidized generator" to bid successfully in a PJM auction where it would be unsuccessful absent the subsidy,

Indeed, the large quantities of state-subsidized capacity that resulted in federal preemption rulings all entered through the unit-specific exemption. One state-sponsored entrant was guaranteed a minimum of $286.03/MW-day when Net CONE was $232/MW-day, allowing it to offer capacity at $151.24/MW-day: a fraction of Net CONE and $135 below its contract price. *Hannah*, 977 F. Supp. 2d at 399-400. Another state-supported entrant attempted to bid its capacity at $13.95/MW-day, less than 10% of Net CONE. *Nazarian*, 974 F. Supp. 2d at 884. Such uneconomic, highly subsidized units suppressed prices in one auction by about 10%. *See* pp. 42-43, *infra*.

B. PJM's Stakeholder Process and Resulting § 205 Filing

While litigation surrounding FERC's 2011 MOPR orders and state-subsidized entry were pending, PJM began a "stakeholder-driven process" to reform the MOPR. *Order* P 12, JA____. The resulting modifications "received broad stakeholder support with an 89 percent sector-weighted vote" after being "fully vetted through a [tariff-mandated] stakeholder process." *Id*. P 227, JA____. PJM's filing "represent[ed] the first time that PJM ha[d] submitted significant MOPR provisions that ha[d] been endorsed by a two-thirds or greater super-majority of the PJM stakeholders." PJM Filing Letter 2, JA____.

---

the government continued, "displaces more efficient capacity" and "undermines the Commission's goal to ensure an economically efficient PJM market." *Id.*

The package addressed sellers' concerns about the failure of the unit-specific review exemption—in particular, its failure to prevent price suppression from three plainly subsidized resources that entered below cost. *See Order* PP 116-17, 128, 135, JA____-__, ____, ____ (summarizing evidence of uneconomic entry); CMC Rehearing 8-16, JA____-__ (detailing evidence); pp. 35-39, *infra*. PJM's filing therefore eliminated that exemption and extended the mitigation period during which new entrants would have to bid above Net CONE or qualify for an exemption. Although FERC had rejected extending the period to three years in 2011, subsequent events showed that limiting mitigation to a single auction failed to deter uneconomic entry. *See Order* PP 199-200, JA____.

The package also addressed buyers' (load-serving members') desire for new, categorical exemptions from the price floor. To address their interests, the proposal included a "self-supply exemption" with "net-short" and "net-long" limitations (described below). *Id.* PP 63-68, JA____-__. The proposal also added a "competitive entry exemption" for unsubsidized resources that either (i) receive no out-of-market revenues tied to capacity sales or (ii) sell capacity pursuant to a non-discriminatory state-sponsored mechanism open to all resources. *Id.* PP 28-29, JA____-__.

The resulting compromise eliminated the *ad hoc* unit-specific exemption that had proved an easy means for below-cost entry, and replaced it with categorical exemptions.

C. FERC's Order

PJM filed the reforms with FERC under FPA §205, explaining that the proposal "provides a more transparent process that will provide the market greater confidence in . . . auction price signals." PJM Filing Letter 1, JA____. PJM "credit[ed] the overwhelming stakeholder approval to the strenuous efforts by diverse stakeholder groups to find common ground with a balanced proposal for MOPR revisions," urging FERC "to view this filing not as a list of discrete Tariff changes, but as a hard-fought compromise package, and to approve it as such." *Id.* at 14-15, JA____-__. Several parties filed comments and protests, often with extensive data and expert affidavits that detailed problems with the unit-specific exemption and the PJM one-year mitigation period. *See* CMC Comments (Newell Affidavit), JA____; P3 Comments, JA____; FirstEnergy Comments (Tabors Affidavit), JA____; NRG Comments (Stoddard Affidavit), JA____; PSEG Comments, JA____; Calpine Comments, JA____; NextEra Comments, JA____.

1. Rather than heed PJM's request to review the filing as a "hard-fought compromise package," FERC accepted one side of the compromise. In particular, FERC approved the two new categorical exemptions for self-supply and

competitive entry, but rejected elimination of the unit-specific exemption and rejected extending the mitigation period from one to three years. *See Order* P 19, JA____ (summarizing holdings). Essentially, FERC responded to a proposal designed to eliminate an exemption proven to artificially suppress prices, and to replace it with different exemptions, by directing PJM to retain the price-suppressive exemption and to layer the proposed replacements on top.

FERC did not state whether it was acting under FPA §205 or §206 when refusing to allow PJM to eliminate the unit-specific exemption. FERC did not dispute that the exemption had permitted significant quantities of below-cost capacity to enter. But FERC stated that "PJM does not argue that *a* unit-specific review process is unjust and unreasonable." *Id.* P 142, JA____ (emphasis added). And FERC declared the exemption was appropriate because "there *may* be resources that have lower competitive costs than the default offer floor, and these resources should have the opportunity to demonstrate their competitive entry costs." *Id.* P 141, JA____ (emphasis added). Regarding the exemption's proven failure to exclude below-cost bidding, FERC "encourage[d]" PJM "to remedy these asserted deficiencies" in some future proposal. *Id.* P 144, JA____. FERC also rejected extending mitigation from one to three years, finding that its original rationale for refusing to extend mitigation in 2011 was "not altered by PJM's filing." *Id.* P 211, JA____.

FERC therefore "accept[ed] PJM's filing conditioned on the retention of its unit-specific review process." *Id.* P 26, JA____. FERC "required" PJM "to submit a compliance filing with[in] 30 days of the date of this order." *Id*. Ordering Paragraph (B), JA____. It said nothing—anywhere in its order—about PJM having the option to withdraw its § 205 filing.

2. FERC accepted the new self-supply exemption. Under the exemption, self-suppliers can bid new capacity below estimated Net CONE so long as their net-short position (how much more they buy than they sell) or net-long position (how much more they sell than they buy) is within certain thresholds. *Id.* P 25, JA____. FERC stated that "PJM's proposed net-short and net-long thresholds, in principle, adequately protect the market from the price effects attributable to uneconomic new self-supply," *id.* P 107, JA____, and "establish[ ] reasonable thresholds for evaluating whether a self-supply resource would benefit economically from uneconomic entry," *id.* P 112, JA____. FERC did not address evidence that it had set the net-short and net-long thresholds so high that no market participant would fail to qualify. Nor did FERC respond to evidence that new entrants could suppress prices significantly while staying below the thresholds.

FERC also accepted the new competitive-entry exemption. Under that exemption, new entrants can bid below estimated Net CONE so long as they do not receive any out of-market revenues for the unit, such as those from nonbypassable

charges to ratepayers, state-sponsored contracts procured through a non-competitive or discriminatory auction, or other concessions, rebates, or subsidies. *Id.* P 24, JA____. FERC held the exemption is "just and reasonable," because it would "remove an unnecessary barrier to entry for merchant projects and other projects that are procured on a competitive basis." *Id.* P 53, JA____.

D. Rehearing

Petitioners and others sought rehearing, arguing that FERC applied the wrong standard in imposing a substantially different set of reforms than those sought by PJM under FPA §205. *See* P3 Rehearing 12-14, JA____-__; CMC Rehearing 16-23, JA____-__. Because FERC's changes significantly modified PJM's proposal, they argued, FERC should have acted pursuant to FPA §206. *Id.* They also argued that FERC ignored evidence that the unit-specific exemption allowed subsidized resources to clear the auction with offers far below their actual costs, artificially depressing market prices. *See, e.g.*, P3 Rehearing 6-7, JA____-__; CMC Rehearing 8-15, JA____-__; pp. 35-43, *infra*. Petitioners also argued that FERC erred in failing to accept the just-and-reasonable stakeholder package and failed to address the cumulative effect of the exemptions it was imposing. *See* P3 Rehearing 5-6, JA____-__; CMC Rehearing 21-23, JA____-__.

Over two years later, FERC denied rehearing. FERC held that it was "not improperly imposing" retention of the unit-specific exemption under §205 but

rather was "finding only that the filing has not been shown to be just and reasonable as filed, unless the utility . . . makes the revisions identified by the Commission. Accordingly, the utility . . . is free to indicate that it is unwilling to accede to the Commission's conditions by withdrawing its filing and returning to the use of its prior rate." *Rehearing Order* P 17, JA____.

Citing "administrative convenience" and *Winnfield*, 744 F.2d at 875, FERC ruled that

> the conditional acceptance process utilized by the Commission gives the utility . . . an opportunity, through a compliance filing, to cure the problems the Commission has found in its filing, without having its entire filing rejected. As long as the utility or pipeline accepts the condition, this process allows their FPA section 205 . . . filing to take effect, without the delay or administrative difficulties attributable to the submission of a new FPA section 205 filing . . . to cure the problems identified by the Commission.

Rehearing Order P 18, JA____. FERC "clarif[ied] this action was not taken pursuant to section 206." *Id*. P 22, JA____.

FERC did not address evidence the unit-specific exemption had permitted substantial below-cost entry. It stated that "[w]hile the Commission, in the May 2013 Order, acknowledged that this [unit-specific] review process warranted additional stakeholder review and the consideration of certain enhancements, we cannot conclude, based on the record before us, that review of individual unit['s] costs and revenues is an unjust and unreasonable method of determining rates." *Id.* P 22, JA____.

FERC again declared it would limit mitigation to one year, because "[c]onstruction costs . . . are sunk costs" and "[t]he one year application of the MOPR therefore permits a resource to submit a competitive offer price reflecting its going forward costs and excluding construction costs incurred after the resource has cleared." *Id.* P 77, JA____. Extending mitigation for three years "would create the risk that the generator would fail to clear in the second and third auctions, even though its going forward costs are below the clearing price and below the going forward costs of other, higher cost resources." *Id*.

These petitions for review followed.

SUMMARY OF THE ARGUMENT

Confronted by a "unit-specific review" exemption that facilitated un-economic bidding in capacity auctions, PJM filed a compromise set of tariff modifications (a) eliminating that exemption, (b) replacing it with two others, and (c) extending the MOPR mitigation period. FERC's orders accepting only one side of that bargain—rejecting anything to strengthen the MOPR and accepting all that dilutes it—defy the FPA and APA.

I. FERC rejected PJM's modifications because it thought PJM's prior tariff was more reasonable. But FPA §205 bars FERC from rejecting a tariff unless *that* tariff is unreasonable or unduly discriminatory; the prior tariff is irrelevant. FERC imposed its own tariff without meeting the requirements of

§206. FERC suggested PJM could reject FERC's revisions by withdrawing its filing, but FERC did not identify that option until more than two years after imposing its revisions when withdrawal was practically impossible. FERC cannot fundamentally modify a tariff contrary to the filing utility's wishes. If the modifications here were not fundamental, it is hard to imagine what is.

II. FERC gave no viable reason for requiring PJM to retain the unit-specific review exemption, which concededly facilitated below-cost entry. FERC speculated about potential benefits, but never balanced those against proven harms. FERC's examples of past bids PJM's proposal would block exemplify uneconomic behavior, not efficient competition.

FERC piled two additional exemptions atop the already porous unit-specific review exemption, but failed to consider that combination's "total effect." Each additional exemption exacerbates risk of below-cost entry. While petitioners disagree on whether the two new exemptions are proper standing alone, they agree FERC failed to justify them as *cumulative* additions to the defective process FERC required PJM to retain.

III. FERC's refusal to extend the mitigation period violates the FPA and APA. Responding to arguments that extended mitigation is needed to prevent unduly discriminatory subsidies, FERC endorsed discriminatory subsidies. But the FPA's text expressly prohibits discrimination. And FERC's retention of a

moribund rationale for rejecting PJM's proposal ignored fresh evidence that reforms were required.

STANDING

The orders on review eviscerate a broad stakeholder compromise and harm all competitive capacity suppliers in PJM, including petitioners, by permitting new generation resources to offer below-cost capacity under the offer floor, artificially suppressing prices. This Court can redress that injury by granting the petitions for review.

ARGUMENT

The Minimum Offer Price Rule ("MOPR") is critical to capacity markets. Those markets serve their function—ensuring the development of efficient generation resources and just-and-reasonable prices—*only* if they are not distorted by uneconomic, below-cost entry. FERC thus has long emphasized the importance of mitigating "[a]ll uneconomic entry," *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶61,301, P 29 (2008) ("*NYISO*"), because all "uneconomic entry, regardless of resource and regardless of intent, 'can produce unjust and unreasonable prices by artificially depressing capacity prices,'" *NEPGA*, 757 F.3d at 291.

For years, one MOPR exemption—the "unit-specific" exemption—repeatedly allowed below-cost entry and artificially suppressed capacity prices. FERC itself has identified specific instances where significant uneconomic

capacity entered through that exemption. Indeed, the evidence was overwhelming. PJM stakeholders therefore developed a grand compromise designed to reform the MOPR, garnering unparalleled support from *both* seller and purchaser members. The broken unit-specific exemption that damaged sellers would be replaced with two categorical exemptions supported by purchasers, and the review period would be extended, balancing the stronger MOPR rule sellers needed with the categorical exemptions buyers desired.

But when PJM filed that tariff modification, FERC accepted only one side of the compromise. It prohibited PJM from removing the unit-specific exemption while accepting the additional exemptions that were supposed to replace it. FERC thus responded to PJM's compromise effort to strengthen the MOPR—which had proven ineffective at preventing below-cost entry—by requiring PJM to water down the MOPR further still. That result cannot be sustained. FERC exceeded its authority under the FPA, conflating its power to respond to filings under § 205 with its authority to impose new rates under § 206 (Point I, *infra*). Its decision to retain a defective exemption, while adding two further exemptions on top, defies reasoned decisionmaking and arbitrarily guts a critical bulwark against below-cost entry. FERC never balanced the proven harms of retaining the unit-specific exemption against any perceived benefits. And it failed to consider the "total effect" of the mix of exemptions it approved (Point II, *infra*). Finally, FERC

arbitrarily rejected modest adjustments to the time-periods covered by the MOPR without reasoned justification (Point III, *infra*).

Those departures from governing principles are particularly problematic. FERC may rely on market-like mechanisms to ensure just-and-reasonable pricing. But those mechanisms must afford participants the *opportunity* to recover costs and earn a return. Generation requires enormous investments that may not yield returns for 20 years or more, and even limited uneconomic entry can destroy any possibility of cost recovery. Requiring the retention of an exemption that concededly allows uneconomic entry, while adding additional exemptions that were supposed to replace that defective exemption, virtually guarantees that result. FERC's decision will reduce investment in capacity precisely when it is needed most.

Standard of Review: This Court will "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] (E) unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). While FERC's determinations under the FPA's "just and reasonable" standard are generally entitled to "great deference," *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008), FERC may not exceed its statutory authority. As "a 'creature of statute,'" FERC has "*only* those authorities conferred upon it by Congress." *Atl.*

City Elec. Co. v. FERC, 295 F.3d 1, 9 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). This Court will uphold FERC's construction of the FPA under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), only if it does not conflict with Congress's "unambiguously expressed intent," and it "is based on a permissible construction of the statute." *Atlantic City*, 295 F.3d at 9 (quotation marks omitted).

"The Commission's discretion is [also] bounded by the requirements of reasoned decisionmaking." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). FERC must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

I. FERC VIOLATED FPA RATEMAKING STANDARDS AND THE REQUIREMENTS OF REASONED DECISIONMAKING

This Court has repeatedly emphasized that "two related but distinct sections of the" FPA—§§ 205 and 206—"govern FERC's adjudication of just and reasonable rates." *FirstEnergy*, 758 F.3d at 348. In this case, FERC disregarded the fundamental distinction between its power to review *utility-initiated* rate changes under § 205, and FERC's power to replace *existing* rates with rates of FERC's choosing under § 206.

A. FERC Improperly Rejected PJM's Proposal Under FPA §205, and Imposed a Materially Different Rate While Attempting to Circumvent Its Burdens Under FPA §206

FERC does not dispute that it fundamentally altered the careful stakeholder compromise filed by PJM. Nor could it: FERC required PJM to retain the unit-specific exemption that PJM's proposed reforms were supposed to replace. *See Order* P 141, JA____; *see, e.g.*, P3 Rehearing 4 (specification 4), 13-14, JA____, ____-__; CMC Rehearing 7-8 (specifications 3 and 4), 18-23, JA____-__, ____-__. This Court has long held that FERC may not purport to act under FPA §205 when it imposes a "materially different" rate than the filing utility proposes. *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1579 (D.C. Cir. 1993). Here, as in *Western Resources*, "the imposition by the Commission of only half of [the] proposed rate" was unlawful. *Id.*

1. The FPA (like the NGA) is structured to separate FERC review of a tariff-holder's voluntary proposal to change rates under FPA *§205*, from FERC review of complaints by other parties (including FERC itself) challenging an existing tariff under FPA *§206*. *Winnfield*, 744 F.2d at 875. Simply put, FERC cannot use a utility's voluntary filing of a new rate "under §205" as an excuse to impose a rate "*the utility* . . . does not desire." *Id.*[4]

[4] The same is true of the NGA, which has materially identical provisions, NGA §§4-5, 15 U.S.C. §§717c-717d. *See* p. 3 n.1, *supra*.

Consequently, "the power to initiate rate changes rests with the utility and cannot be appropriated by FERC in the absence of a finding that the *existing* rate was unlawful" under FPA § 206. *Atlantic City*, 295 F.3d at 10 (emphasis added). Thus, to modify a rate proposal, FERC must demonstrate that (A) the *existing* rate is unjust and unreasonable; (B) the utility's *proposed* rate is also unjust and unreasonable; and (C) FERC's modifications are just and reasonable. *See id.* at 9-10; *Western Resources*, 9 F.3d at 1579.

That did not happen here: FERC maintains its "action was not taken pursuant to section 206." *Rehearing Order* P 22, JA____. Instead, FERC contends that its evisceration of PJM's proposal was merely an optional "condition" PJM was free to reject by withdrawing its filing, which PJM did not do. *See id.* But FERC first clarified that PJM was free to reject the condition on rehearing *more than two years* after FERC's initial order. That delay rendered the option of withdrawing the filing functionally meaningless.

PJM's option to "withdraw" its filing was also meaningless because PJM is not a traditional, unified utility. It is a regional organization composed of stakeholders with opposing points of view. The load-serving entities (which benefit from reduced prices) had no reason to provide the stakeholder votes necessary to withdraw PJM's compromise filing once FERC conditioned its approval of the reforms they wanted (new exemptions) on the denial of the reforms

sellers wanted (elimination of an existing exemption). *See Order* P 141, JA____. FERC's order gave load-serving entities their half of the "hard-fought compromise package" for free. PJM Transmittal Letter 15, JA____.[5]

For those reasons alone, FERC's reliance on *Winnfield* is misplaced. FERC urges that "administrative convenience" permits FERC to "revise" a § 205 rate proposal so long as the utility "accepts" the change. *Rehearing Order* P 17, JA____. But *Winnfield* does not let FERC impose a result in a § 205 proceeding and announce *two years later* that the utility can reject it by withdrawing its filing, especially where FERC's decision itself makes withdrawing the filing a practical impossibility.

2. FERC's reliance on *Winnfield* fails for another reason. FERC observes that *Winnfield* allows it to accept § 205 filings conditioned on modifications because requiring FERC to reject the filing under § 205, and then start the § 205 process over, would impose an "empty formalism." But such a formalism was "empty" in *Winnfield* only because the filing utility, Louisiana Power & Light Co., *wanted* the rate increase; it was a customer, Winnfield, that challenged FERC's orders on the ground they deviated from the utility's proposal. *See* 744

[5] *See, e.g.*, CMC Rehearing 18, 23, JA____, ____ (stating that buyers who "got what they wanted" had no incentive to press PJM to request rehearing, and that FERC "eviscerated any leverage that any proponents of reforming the unit-specific review process might have had" by "essentially approv[ing] almost everything that the other voting blocs would want in a deal").

F.2d at 875-77. The Court emphasized that the procedural protections embedded in §§205 and 206 were "intended *for the benefit of the utility*." *Id.* at 875 (emphasis added). And the Court explained that it was *not* faced with an order that "imposes an entirely new rate scheme." *Id.* at 876. Thus, the Court found it "need not decide" whether FERC may modify rate filings under §205 only "if the utility's initial filing itself sets forth the basic scheme ultimately adopted." *Id.* That is not true here.

Instead, this case resembles *Western Resources*, where this Court held that "the imposition by the Commission of only half of a proposed rate" was unlawful under NGA §4. 9 F.3d at 1579. There, the pipeline proposed setting identical forward-haul and backhaul rates. FERC, however, "set the backhaul rate at one-half the forward-haul rate," and this Court found FERC had "reached beyond approval or rejection of the pipeline's proposal to adoption of an entirely different rate design." *Id.* at 1578. *Compare Winnfield*, 744 F.2d at 873-74 (approving rate increase the utility wanted). The Court's analysis bears reproduction:

> After careful consideration of the statutory framework, we cannot accept the Commission's argument that §4 permits it to approve any rate, no matter how materially different from that proposed by the pipeline, so long as it can be viewed as a "part" of the original request . . . . [M]inor deviations from the pipeline's proposed rate . . . may be handled in a §4 proceeding, but the imposition by the Commission of only half of a proposed rate surely requires more. When the rate imposed by the Commission differs significantly from that proposed by the pipeline, it can no longer be attributed to the pipeline—at least without the pipeline's consent—so as to qualify for

> §4 treatment. Accordingly, we find the Commission's . . . "partial approval" of the pipeline's request is precluded by the statutory design, as well as by our own precedent.
>
> In sum, we hold that §4 cannot accommodate the Commission's action below . . . . Not only did the Commission set a rate different from that proposed by the pipeline, it also employed a completely different strategy . . . . If the Commission wished to impose its own rate, the Commission was required to bear the burden of proving that it was just and reasonable in a §5 proceeding.

Western Resources, 9 F.3d at 1579 (citations and footnotes omitted).

That analysis squarely applies here. *See* P3 Rehearing 4, 13, JA____, ____; CMC Rehearing 19-21, JA____-__. FERC accepted "only half" the bargain proposed by PJM; it imposed a "materially different" rule; and it "employed a completely different strategy" for controlling buyer market power under the guise of "partial approval." *Western Resources*, 9 F.3d at 1579.

FERC declined any serious attempt to distinguish *Western Resources*, noting only that the decision states FERC can change rates "when the utility or pipeline 'consents' to the change." *Rehearing Order* P 17, JA____. No consent was given here. And acquiring PJM's *affirmative* consent to fundamentally alter its carefully-balanced proposal would not have been "empty formalism." *Id.* (quoting *Winn-field*, 744 F.2d at 875). To the contrary, rejecting PJM's filing *en toto* would have returned the question to PJM's stakeholders and restored *both* buyers and sellers to their respective bargaining positions. FERC's initial order destroyed that possibility and abused FERC's jurisdiction to review rates under FPA §205.

B. FERC Reversed the Burdens Under FPA § 205

FERC compounded its error by repeatedly applying the wrong standard. A rate proponent under FPA § 205 is required to show only that its new rate is just and reasonable. It is not required to show the "proposed rate schedule is more or less reasonable than alternative rate designs." *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984). And it is not required to prove the rate it seeks to replace is unjust and unreasonable. *See, e.g., Duke Energy Trading & Mktg., L.L.C. v. FERC*, 315 F.3d 377, 382 (D.C. Cir. 2003); *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2003).

FERC offered two reasons for its conclusion that PJM had failed to show that eliminating the unit-specific exemption was just and reasonable under FPA § 205. First, FERC observed that PJM "d[id] not argue that a unit-specific review process is unjust and unreasonable." *Order* P 142, JA____. But PJM was *not* required to make that showing. Section 205 filings may be rejected only if the rates they propose are unjust, unreasonable, or unduly discriminatory; the status of the rates they replace is irrelevant. 16 U.S.C. § 824d(a); *Duke Energy*, 315 F.3d at 382. On rehearing, FERC "reject[ed] petitioners' argument that the unit-specific review process is not just and reasonable." *Rehearing Order* P 23, JA____. Even apart from the overwhelming evidence of below-cost entry, *see* pp. 35-39, *infra*, that again ignores the rule that neither petitioners nor PJM were required to show

the prior rate was unreasonable, as petitioners pointed out. P3 Rehearing 4-5 (specification 4), 13-14, JA____-__, ____-__; CMC Rehearing 7 (specification 3), 16-18, JA____, ____-__.

Second, FERC declared that it "found the unit-specific review process just and reasonable in the 2011 MOPR proceeding" because it "yields benefits that warrant[] its retention." *Rehearing Order* P 23 & n.37, JA____ & n.__ (citing *Order* P 143, JA____). But FERC's response that *retaining* the unit-specific exemption would be reasonable ignores the rule that the putative reasonableness of a *prior* rate is no barrier to its modification. Even if FERC had shown in this case that retaining the unit-specific exemption would be just and reasonable—and it did not—that could not justify imposing a "material change" on PJM's carefully balanced proposal. Under FPA § 205, FERC must approve PJM's proposal "'even if other rates would also be just and reasonable.'" *Exxon Mobil*, 315 F.3d at 309 (quoting *Western Resources*, 9 F.3d at 1578-79); *Exxon Corp. v. FERC*, 206 F.3d 47, 51 (D.C. Cir. 2000) (same).

This case illustrates why scrupulous adherence to the FPA's structure and this Court's precedents is critical. Using § 205, PJM filed a careful compromise designed to shore up the MOPR by combining the elimination of a failed exemption with the creation of two new exemptions to replace it. Rather than review that filing under § 205, FERC treated it as an *a la carte* menu and imposed a

mix of exemptions that PJM would *never* have proposed itself and that, as explained below, exacerbates rather than mitigates the already unacceptable reality of below-cost entry.

II. THE FERC-MANDATED EXEMPTIONS ARBITRARILY AND UNLAWFULLY EXACERBATE THE RISK OF BELOW-COST BIDDING

FERC's orders do not merely violate the FPA. They violate the APA's requirement of reasoned justification based on substantial evidence. PJM and its stakeholders confronted overwhelming evidence that the unit-specific exemption allowed uneconomic capacity to enter PJM's auctions, significantly suppressing prices. FERC itself repeatedly acknowledged as much, identifying specific (successful) offers in PJM's capacity auctions as "below-cost and market distorting." FERC Br. 10 in *PPL EnergyPlus*, *supra*; pp. 13-14, *supra*. PJM thus could either (1) repair the unit-specific exemption or (2) replace it with different exemptions. PJM chose the latter: It proposed to *replace* the unit-specific exemption with self-supply and competitive-entry exemptions.

FERC, however, decided that PJM must *keep* the unit-specific exemption despite its proven failure. FERC then *added* the proposed replacement exemptions on top. But FERC never provided a "reasoned explanation" for how that result "strik[es] a fair balance between the financial interests" of the industry and "'the relevant public interests.'" *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1500, 1502 (D.C. Cir. 1984). FERC, moreover, had to consider its order's

"'total effect.'" *Hope Nat. Gas*, 320 U.S. at 602. FERC did not. It failed to justify retaining a unit-specific exemption that—by allowing significant uneconomic entry—had become a virtual on-ramp for price-suppressive, below-cost entry. It made no attempt to balance the proven problems with that exemption against any identifiable benefits from retaining it. And it offered no reasoned evaluation of whether the order's individual elements would "together produce just and reasonable consequences." *Jersey Cent.*, 810 F.2d at 1177. Ultimately, FERC responded to a proposal that sought to remedy proven uneconomic entry by mandating that the obvious cause remain in place and that protections be diluted further still. Neither that result nor FERC's rationale can be sustained.

A. FERC Arbitrarily and Unlawfully Required the Retention of an Exemption Proven To Permit Below-Cost Bidding

FERC has never disputed that the unit-specific exemption is broken. PJM proposed replacing unit-specific review precisely because it had failed to prevent below-cost bidding. PJM "concluded that the unit-specific MOPR exception process is not serving the long-term interests of the capacity market and should be replaced as soon as possible." PJM Tariff Filing 9, JA____. Petitioners and other stakeholders agreed. They observed that the "unit-specific review process" does "not work to prevent buyer side market manipulation," P3 Comments 8, JA____, and that the entry of "subsidized" generators constituted "critical evidence" that "the unit-specific review process [is] broken," CMC Rehearing 4, JA____; *see also*

P3 Rehearing 1, JA____ ("the critical loophole that plague[s] the old rule"); PPL Comments 23-24, JA____ -__ ("fraught with flaws and loopholes"); CMC Comments 5, JA____ ("easily circumvented and unworkable"); EPSA Comments 6, JA____ (similar).

1. The record is replete with evidence that, while the MOPR's purpose is to prevent below-cost entry, unit-specific review facilitates it. Party after party provided specific examples of "uneconomic offers" that entered through the unit-specific exemption. CMC Comments 9 & n.9, JA____; *see* P3 Comments 6, JA____; NRG Rehearing Request 8, JA____. The parties identified three new plants with 2,080 MW of generating capacity—Hess Corporation's Newark Energy Center (655 MW) and CPV's Woodbridge Energy Center (700 MW) in New Jersey, and CPV's St. Charles Energy Center (725 MW) in Maryland—as state-sponsored resources that entered below cost through the unit-specific exemption. *See* CMC Comments 7-9, JA____-__; P3 Comments 6-8, JA____-__; PPL Comments 22-23, JA____-__.[6] New Jersey supported its resources by guaranteeing them above-market revenues for 15 years, so long as they bid low enough to clear in PJM's auctions. *Solomon*, 766 F.3d at 248-49, 252. The Maryland plant was also supported by a state-sponsored contract guaranteeing

[6] 2,080 MW is enough capacity to power 200,000 homes. PJM, *Alternative & Renewable Generation*, http://learn.pjm.com/energy-innovations/alternative-renewable-gen.aspx.

revenues in return for clearing. *Nazarian*, 974 F. Supp. 2d at 824. The subsidy level required to support those resources suggested that their (far lower) bids were "well below . . . true costs." PPL Comments 23, JA____.

FERC never disputed that those (and other) resources had entered markets with below-cost bids through the unit-specific exemption. To the contrary, FERC itself has cited their below-cost bids as "'mounting evidence'" that price suppression from state-supported resources "was no longer merely 'theoretical.'" *NJBPU*, 744 F.3d at 99. FERC specifically decried the New Jersey units' offers as "below-cost and market distorting." FERC Br. 10 in *PPL EnergyPlus*, *supra*. That "uneconomic entry into PJM's capacity auction," FERC observed, "directly affects (suppresses) the auction's resulting wholesale capacity rate, to the detriment of generation resources in every other PJM state." *Id.* at 13-14. It made that very point to the U.S. Supreme Court in a parallel case. *See* p. 13 n.3, *supra*.[7]

[7] Because cost-estimates require complicated modeling and are sensitive to assumptions, careful and uniform modeling assumptions—absent from PJM's processes—are critical. For example, many costs fluctuate, requiring judgments about "inherently uncertain" events. *2011 MOPR Rehearing Order* P 28; *see also id.* PP 66, 68, 245. Cost allocations for joint and common costs are largely predictive as well. PJM Tariff Filing, Attach. B § 5.14(h), JA____ (requiring allocation based on predicted revenues). Even small changes to assumptions can dramatically alter results: Changing a facility's lifespan from 20 years to 30 can cut gross costs by 40% and net costs by more than 90%. *See* Newell Aff. ¶11, JA____. Projecting higher revenues from other products (like energy sales) can further reduce capacity cost estimates. *See id.* PJM's unit-specific exemption, however, did not require common modeling assumptions, *Order* P 144, JA____,

While most cost studies are confidential, PJM Tariff Filing 10, JA____, the available evidence confirms FERC's statements. The Net Cost of New Entry ("Net CONE") calculated by PJM is designed to reflect the *minimum* capacity prices needed to support an average new entrant building a gas-fired plant. *2011 MOPR Order* P 43. Because gas-fired plants use "mature" technologies and financing costs vary little, it would be highly unusual for one gas-fired plant's costs to be substantially lower than another's. Stoddard Aff. ¶¶16-17, JA____. Thus, new suppliers offering competitive pricing should offer new capacity "near Net CONE." *2011 MOPR Rehearing Order* P 25.

Yet the New Jersey resources discussed above were able to bid into PJM's base-residual auction—and clear—at less than *53%* of Net CONE. *Compare Hanna*, 977 F. Supp. 2d at 400, *with* CMC Comments 8-9, JA____. No one has identified any reason generation costs at those gas-fired plants would be half the average PJM estimated.[8] Similarly, CPV bid capacity from its Charles County

---

causing estimates to diverge "wildly," P3 Reply Comments 4, JA____; CMC Rehearing 10-11, JA____-__, and making them "vulnerable to manipulation," Newell Aff. ¶9, JA____. For example, PJM and the Independent Market Monitor reached estimates more than 40% apart for the same resource. *See Nazarian*, 974 F. Supp. 2d at 823-24. PJM's method of calculating "energy and ancillary services offsets"—*i.e.*, anticipated earnings in the energy markets—was a significant concern in prior cases. *See NJBPU*, 744 F.3d at 108-10.

[8] Those plants were able to bid below cost because of state support. New Jersey, for instance, guaranteed CPV a 57% premium over the 2016 market rate. *See Hanna*, 977 F. Supp. 2d at 397.

facility at $96.13/MW-day—*41%* of Net CONE. *See Nazarian*, 974 F. Supp. 2d at 824; CMC Rehearing 10, JA____. No one has ever identified any reason why costs at CPV's gas-fired facility would be only 2/5 the costs of other gas-fired resources.[9] Yet the unit-specific exemption allowed precisely such bidding.[10]

2. Consequently, nearly *89%* of PJM stakeholders voted to replace PJM's unit-specific exemption. PJM Tariff Filing 1-2, JA____-__. It was not merely the generators that overwhelmingly agreed to replace it. A majority of purchasers voted to replace it as well. To justify overturning that near consensus, FERC needed (at the very least) to explain why the reasons for retaining the exemption outweighed its readily apparent costs. *See Jersey Cent.*, 810 F.2d at 1178. It was required to respond to legitimate arguments and record evidence, *see PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208, 209-10 (D.C. Cir. 2011), especially undisputed evidence of the unit-specific exemption's price-

[9] CPV suggested that PJM's estimated Net CONE was high, citing an economist who suggested lowering it by $100/MW-day. CPV Protest 13, JA____. Even subtracting $100/MW-day from PJM's estimate for CPV's local-deliverable area ($232/MW-day), leaves CPV's bid of $96.13/MW-day more than 25% below the resulting estimate of $132/MW-day.

[10] It is no answer to suggest that the Supreme Court's decision in *Hughes* preempts the specific type of state-approved contracts that supported the New Jersey and Maryland plants. *See* 136 S. Ct. at 1299. The decision does not preclude States from offering generators other subsidies that facilitate below-cost bidding. *See id.* Besides, the reason for the below-cost entry is irrelevant. The point is that the unit-specific exemption was so porous it failed to prevent that entry. To argue that *Hughes* fixes the problem with the exemption is like saying that a hole in the dam has been plugged because it stopped raining.

suppressive impact. And it was required to "'support its decision with enough data'" or other facts "'to enable an adversely affected party . . . to understand'" its conclusions. *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 951 (D.C. Cir. 1999). FERC did none of that.

As an initial matter, FERC gave no reason for refusing to patch a gaping hole in the primary bulwark against below-cost entry. FERC has long emphasized the importance of mitigating "[a]ll uneconomic entry." *NYISO*, 124 FERC ¶61,301, P 29; *see NEPGA*, 757 F.3d at 290-91 ("uneconomic entry, regardless of resource and regardless of intent, 'can produce unjust and unreasonable prices by artificially depressing capacity prices'"). But FERC simply refused to address the uneconomic entry that the unit-specific exemption concededly permitted. That was particularly glaring given that a primary reason for PJM's filing was to eliminate that failed exemption and thereby dispense with the necessity of correcting its myriad defects.

The resulting orders defy not merely the requirement of reasoned decision-making, but also the statutory just-and-reasonable rate requirement and its purpose. Because uneconomic entry prevents competitive suppliers from recovering their costs, it undermines incentives to develop new capacity. *2011 MOPR Order* P 16; Newell Aff. ¶18, JA____. Less investment in capacity, in turn, can lead to higher energy prices in the long term and, more importantly, a less-stable grid. *2011*

MOPR Order P 16; Newell Aff. ¶16, JA____. The result can be blackouts or brownouts at peak demand. *See Morgan Stanley Capital*, 554 U.S. at 539-40; *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013).

2. FERC's rationale for requiring the exemption's retention largely reduced to the assertion that "there *may be* resources that have lower competitive costs than the default offer floor"; that some of those *may* not qualify for other exemptions; and that those resources "should have the opportunity to demonstrate their competitive entry costs." *Order* PP 141, 143, JA____, ____ (emphasis added). But hypothesizing the existence of such entities does not address whether the benefits of the exemption outweigh its proven costs. Nor does anything else in FERC's orders. For example, FERC did not identify how often resources are (1) subsidized (and are thus disqualified from the competitive-entry exemption) *and* (2) buy or sell significant amounts of capacity beyond what they produce themselves (and are thus excluded from the self-supply exemption), *and* (3) have actual costs below PJM's Net CONE estimate, making recourse to the unit-specific exemption necessary and appropriate.

FERC asserts (without citation) that, in the base "residual auction for 2012, resources that likely would not have qualified for either of PJM's proposed [new] exemptions were able to justify their net costs through the unit specific review process." *Id.* P 143, JA____. But that identifies *the problem* with the unit-specific

exemption. The most obvious (and perhaps only) example of resources that entered through the unit-specific exemption, but that would *not* have qualified under PJM's proposed replacement exemptions, were the heavily subsidized New Jersey and Maryland resources discussed above. *See* pp. 36-39, *supra*. Those, however, are precisely the "below-cost and market distorting" bids FERC itself has repeatedly decried. *See* p. 37, *supra*.

More important, FERC never explained how any speculated benefit from retaining the unit-specific exemption (with other exemptions on top) would outweigh its proven price-suppressive impacts. *See Order* PP 142-43, JA____-__; *Rehearing Order* P 21, JA____. And those impacts are grave. Because the supply curve is "fairly steep" and the "demand curve is even steeper," Newell Aff. ¶13, JA____, "even small amount[s] of additional supply can result in large price reductions," *2011 MOPR Order* P 196. For example, "a three percent increase in supply" in one auction "decrease[d] capacity prices by 60 percent." *Id.*

Such price-suppressive impacts are exacerbated by exit barriers, which cause generators to remain in capacity markets even at below-cost rates.[11] Consequently,

[11] Must-run reliability requirements can prevent generators from retiring power plants. The Electric Energy Market Competition Task Force, *Report to Congress on Competition in Wholesale and Retail Markets for Electric Energy* 81 (Apr. 2007). So can economic barriers. Building a power plant requires extensive capital outlays—in the hundreds of millions of dollars—that take years to recoup. Sidney A. Shapiro & Joseph P. Tomain, *Rethinking Reform of Electricity Markets*,

in the 2015/2016 auction, PJM estimated that adding *1,500 MW* of capacity (2.3% of the amount cleared) to the local-deliverable area where Hess and CPV New Jersey proposed to build *1,355 MW* of generation would depress clearing prices by *10%* or more. Newell Aff. ¶14, JA____. The projected effects in CPV Maryland's local-deliverable area were similar. PJM's sensitivity study showed that, had generators there supplied 750 MW less capacity (a little over what CPV built), prices would have risen by 16%. *Nazarian*, 974 F. Supp. 2d at 824.

To provide a "reasoned explanation," FERC must "show that it has considered relevant factors and struck a reasonable accommodation among them." *Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007). Here, FERC summarily declared it had "appropriately balance[d] the need for mitigation of buyer-side market power against the risk of over-mitigation." *Order* P 26, JA____. But the "balance" is missing from its discussion. Rather than "balance" those goals, FERC appears to "have forgotten" the price suppression that results from the unit-specific exemption, pursuing other goals instead. *Process Gas Consumers Grp. v. FERC*, 177 F.3d 995, 1004 (D.C. Cir. 1999).

3. Ultimately, FERC fell back to two assertions. First, it "encourage[d]" PJM to solve problems with unit-specific review. *Order* P 144, JA____. But hor-

---

40 Wake Forest L. Rev. 497, 505 (2005). So generators will often continue to supply capacity even as prices fall below the level needed to permit full cost recovery.

tatory suggestions do not absolve FERC of its obligation to consider the "total effect" of the rate *it* is imposing *now*. The speculative possibility of unspecified changes, at some undetermined point in the future, does not mean FERC can wash its hands of *proven* below-cost entry and *ongoing* price suppression that will last decades. Wishful thinking about future reforms is not reasoned decisionmaking about the present. PJM sought to solve the problem of price-suppressive, below-cost bids by deleting the unit-specific exemption that had enabled them. FERC cannot leave that construct in place and hope PJM might find another solution—much less exacerbate the problem by adding more exemptions that create additional risks of artificial price suppression.

Second, FERC invoked a 2011 order, and supposed concessions by PJM, as indicating that PJM's auctions had produced just and reasonable rates despite the exemption. *Id.* P 143, JA____; *Rehearing Order* P 23 & n.34, JA____. As explained above, that makes no difference: PJM's burden was not to show the prior rate unreasonable, but to show the replacement is reasonable. The 2011 order, moreover, makes no such findings. The cited passage concerns challenges to the relative roles of PJM, the Independent Market Monitor, and FERC in administering the exemption. *See 2011 MOPR Order* P 119. Besides, the *2011* order could not respond to evidence that auction results from *2012* confirm that the unit-specific exemption allows uneconomic entry. *See* pp. 36-39, *supra*. Finally,

even had PJM conceded the auction results were reasonable—which it did not[12]—that would not bind petitioners who urged the opposite. *See* pp. 35-36, *supra*.

Simply put, FERC evaded its obligation to give "reasoned consideration" to the arguments for and against an exemption. *Jersey Cent.*, 810 F.2d at 1184. FERC cannot deliberately choose a system of exemptions that tends to suppress price signals, and reject proposals to produce more accurate signals, by asserting the FPA is not violated. FERC at the very least must provide a reasoned basis, founded on record evidence, for selecting one system over another, particularly where it chooses to impose its own system over the one PJM proposed with unprecedented stakeholder support. FERC failed to provide that reasoned justification here.

B. The Commission Failed To Justify Super-Imposition of Further Exemptions

Having commanded the retention of a concededly defective exemption, FERC compounded its error. The two exemptions PJM had proposed to replace the unit-specific review exemption, FERC declared, would become *additional* exemptions alongside it. Petitioners are not of one mind about the propriety of

---

[12] The supposed concession is PJM's statement that "[P]JM and the IMM have administered the current exemption process to ensure reasonable results." *Order* P 143 n.75, JA____. But that describes PJM's goal—not actual results—and it is only part of what PJM wrote. The sentence continues: "PJM is concerned that the current unit specific review is so broad that it may invite sellers" to manipulate it. PJM Deficiency Response 3-4, JA____-__.

those two exemptions standing on their own. But FERC failed to consider the consequences of punching those additional holes alongside the already-porous unit-specific exemption PJM had sought to replace. No matter how well-crafted, each exemption increases the potential for below-cost entry. FERC failed to address the risk created by piling new exemptions atop an old one.

1. *FERC Failed To Address the Additional Risk Created by the Self-Supply Exemption*

The self-supply exemption seeks to accommodate load-serving entities, such as vertically integrated utilities, public power providers, and co-ops that supply their own capacity. *Order* P 25, JA____. In 2011, FERC rejected an across-the-board exemption for self-suppliers. It held that allowing "new self supply to compete as a price-taker"—in effect, allowing them to bid into the market at zero—"impermissibly shifts the investment costs of self-supply to competitive supply by suppressing market clearing prices." *2011 MOPR Order* P 195; *see 2011 MOPR Rehearing Order* P 205 ("across-the-board MOPR exemption for resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and thus could inhibit competitive investment"). The exemption under review here differs from that prior proposal by specifying "net-short" and "net-long" limits. *Order* P 63, JA____.

FERC's sole rationale for approving that exemption was that self-suppliers that meet those limits—*i.e.*, that buyers deemed not to buy or sell "substantially

more" megawatts than they generate—have no incentive to suppress market prices by selling below cost. *Id.* PP 108, 111-12, JA____, ____-__. But FERC ignored the myriad reasons self-suppliers will suppress prices even if they are neither net-long nor net-short. And it failed to address evidence that the net-long and net-short thresholds are meaningless, excluding no self-suppliers at all.

The effect of guaranteed revenue streams. At the outset, FERC ignored the effect of guaranteed revenue streams enjoyed by public power providers and many other self-suppliers. Such generators "'have an incentive'" to bid uneconomically, particularly where "'their revenues'" are not tied to auction prices but "'have already been determined by contract.'" *PJM Interconnection, L.L.C.*, 119 FERC ¶61,318, P 165 (2007). Because those generators need to price low enough to clear the auction—otherwise they cannot sell the capacity they will re-buy from PJM—they will often bid at or near zero to ensure they clear, "disrupt[ing] . . . competitive price signals." *NJBPU*, 744 F.3d at 88, 99, 101. For that reason, this Court has termed such bidding "definitional market distortion in favor of buyers." *NEPGA*, 757 F.3d at 294-95.

As FERC itself has recognized, moreover, self-supply entities with guaranteed revenues from capacity sales often *do* have an incentive to suppress prices. *See, e.g.*, *2011 MOPR Rehearing Order* P 210; *PJM Interconnection*, 119 FERC ¶61,318, P 165. No one disputes that *net-buyers* have incentives to

suppress prices: If they offer below-cost capacity and "crowd out" higher (but correctly) priced competitors, prices fall. Even though they lose money on their own capacity sales, they profit on the whole because they buy more capacity than they sell. *NJBPU*, 744 F.3d at 84.

Entities with guaranteed revenues from capacity sales can have that same incentive even if they are *not* net-buyers. In PJM's base auctions, self-suppliers sell *all* their capacity into the auction, and then buy back from auction *all* the capacity they require. If the self-suppliers' revenues from their sales are guaranteed, suppressed capacity prices do not affect their sales' revenue: They earn the same amount regardless of the auction price paid for their capacity. *See PJM Interconnection*, 119 FERC ¶61,318, P 165. But those same self-suppliers *benefit* from price suppression *as buyers*—paying less for capacity—even if they are simply buying back the capacity they sold. Self-suppliers with guaranteed income from sales thus can have an incentive to suppress prices. And the more they buy, the stronger the incentive. *See Rehearing Order* P 36, JA____.

The risks are not theoretical. In 2013, a vertically integrated utility, Dominion Virginia Power, began building its 1,358 MW Brunswick County Power Station. NRG Rehearing 28-29, JA ____-__. Clearing prices in that year's base-residual auction, however, *were less than 33%* of Net CONE—the estimated level needed to support new entry. *Id.* Virginia regulators nevertheless guaranteed

Dominion sufficient revenues even though capacity prices were signaling that the resource was not needed. *Id.* That guaranty enabled Dominion to build generation and bid its capacity at rates that are wholly uneconomic.

Long-term incentives. The self-supply exemption also ignores long-term incentives. To qualify for the exemption, a self-supplier need only demonstrate that it meets the net-long and net-short requirements *for a single year*. *Order* P 77, JA____. The exemption thus screens out only suppliers with an obvious incentive to suppress prices the moment the resource is *first* bid into the auction. But self-suppliers do not make decisions based on single-year forecasts. Power plants last decades. And utilities contract for capacity many years in advance. *See Morgan Stanley*, 554 U.S. at 540-41. A utility that is not presently a net-buyer thus often knows that it will become a net-buyer; and it may know it will remain a net-buyer in the long term. That utility would have a strong incentive to build a plant that can sell into the market below cost—and thereby depress prices for decades—even if it is not a net-buyer the first time it offers capacity at auction. FERC's claim that self-suppliers lack any incentive to distort the market if they have neither sufficient net-short nor net-long positions when they first enter, *Order* P 108, JA ____, ignores that fact.

The net-long and -short thresholds. FERC disputed none of the above analysis. Instead, it asserted that the solution is "properly-calibrated" net-long and

net-short thresholds that prevent self-suppliers from saving more on capacity than they would spend on new price-suppressing production. *Order* PP 25, 108, JA____, ____; *Rehearing Order* P 55, JA____. But that ignores the effect of guaranteed revenues, which can give utilities with relatively balanced purchases and sales an incentive to suppress prices. *See* pp. 47-48, *supra*. FERC cannot address a problem by invoking "calibration" of a rule that ignores it.

More fundamentally, even if proper calibration were the answer, FERC never explained why the chosen thresholds are properly calibrated. Poorly conceived thresholds can be "ineffective at protecting against buyer market power." *2011 MOPR Order* P 88. Here, the chosen thresholds are potentially illusory. Under the FERC-approved thresholds, a public power provider operating in a single State can qualify even if it is 1,000 MW net-short—*i.e.*, even if it buys 1,000 MW more from the auction than it sells. *Order* P 90, JA____. A public power provider operating in multiple States can be 1,800 MW net-short. *Id.* Those thresholds are so high that no public power providers (or any other identified self-supplier) actually crosses them. Stoddard Aff. ¶11, JA____. A limit so generous that everyone qualifies is no limit at all.

The risk of significant price suppression under those thresholds is genuine. In one local deliverable region, for example, a 1,195 MW swing in supply would send capacity prices from their PJM-imposed ceiling to *zero*. Stoddard Aff. ¶10,

JA____. FERC's sole analysis of the issue was its assertion that PJM's review of the 2012 base-residual auction, and "additional data submitted in its response to Commission Staff's deficiency letter," supported the thresholds. *Rehearing Order* P 59, JA____; *see also id.* P 55, JA____; *Order* P 113, JA____. But FERC must "supply" the "reasons" why PJM's submissions allayed the concerns raised by parties here. *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1058 (D.C. Cir. 2003). Asserting that unspecified data supports the thresholds for unstated reasons will not suffice.

That is not to say that all petitioners on this brief oppose a self-supply exemption. But they agree that a self-supply exemption creates some additional risk of uneconomic entry. Some petitioners agreed to accept that risk in return for eliminating a unit-specific exemption that had proved itself an on-ramp for below-cost entry. But none of them agreed that the risks created by the self-supply exemption should be added to the proven harms of the unit-specific exemption. And all agree that FERC failed to offer a reasoned analysis of the cumulative risks of buyer-side manipulation—the "total effect"—imposed by the combination of exemptions it imposed.

2. *The Competitive-Entry Exemption Imposes Additional Risks (NRG Only)*

The competitive-entry exemption allows new generators to bid below Net CONE if they "receive no out-of-market funding," such as state subsidies. *Order*

P 24, JA____.[13] FERC upheld that exemption on the theory that, absent outside funding, a generator will "have a strong incentive to bid its true costs." *Id.* P 57, JA____. To the extent that exemption extends to utilities that both generate and buy capacity, it is self-evidently defective: One critical reason for the MOPR is that self-interested buyers *can* profit by injecting below-cost capacity into the market. *Id.* P 20, JA____. That is why FERC's self-supply exemption has a net-short threshold: It recognizes that "buyers can reduce their total capacity costs by financing uncompetitive entry." *Id.* P 108, JA____.

In any event, the competitive-entry exemption creates a gaping hole in the MOPR. Even developers with no motive to distort market prices have often entered based on unrealistic assessments of financing costs, future demand, or fuel prices. *See, e.g.*, FERC, *2004 State of the Markets Report* 28-29 (June 2005); Jordan Blum, *Power Company Sues Grid Operator over Demand, Supply Projections*, Houston Chronicle (Mar. 26, 2016), http://www.houstonchronicle.com/business/energy/article/Power-company-sues-grid-operator-over-demand-7122935.php. When that happens, it is not just the new entrant that loses money; efficient, pre-existing generators lose money too. Because of barriers to exit resulting from enormous investments in industry-specific capital, those generators

[13] Any resource that obtains "outside funds" through "a competitive auction open to all available resources" also qualifies. *Order* P 24, JA____.

(like the new entrant) are forced to sell at depressed prices with no hope of recovering their initial investment. *See* p. 42 & n.11, *supra*.

Traditionally, the MOPR policed that negative outcome by requiring proposed new entrants to demonstrate that their pricing is realistic, as judged by PJM and its Independent Market Monitor. The MOPR thus acted "as a gating element" that helped prevent "over-building" that can lead to "depressed prices." Stoddard Aff. ¶18, JA____. The competitive-entry exemption lacks any mechanism to guard against that sort of uneconomic entry.

FERC's sole response was that the FPA does not require it to protect new entrants from "poor investment decision[s]." *Order* ¶57, JA____. But new entry has ramifications beyond the new entrant. Once built, plants have lengthy useful lives. And the capacity market is difficult to exit. *See* p. 42 & n.11, *supra*. If a new entrant overbuilds, the uneconomic entry prevents *other* suppliers—no matter how efficient—from recovering their capital investments. *See TC Ravenswood*, 741 F.3d at 114. That results in "disruptive" bankruptcies; unstable markets; and, in the long term, inadequate incentives to enter the market. Stoddard Aff. ¶18, JA____. Such boom-and-bust cycles also increase capital costs, which increases rates. *Id.* That is precisely what the MOPR should prevent. The need to mitigate "[a]ll uneconomic entry" does not evaporate simply because uneconomic entry results from unrealistic assumptions rather than wrongful intent. *NYISO*, 124

FERC ¶61,301, P 29; *see NEPGA*, 757 F.3d at 290-91; *2011 MOPR Rehearing Order* P 98 & n.47.

The competitive-entry exemption fails to address that reality. Some petitioners believe the exemption nonetheless would be advisable if considered on its own. Indeed, P3 is on record as supporting a competitive-entry exemption. Others, like NRG, have opposed such an exemption as unlawful and artificially price-suppressive. But all of the signatories to this brief agree that FERC improperly imposed excessive risks of below-cost pricing, and fatally departed from the requirement of reasoned decisionmaking, when it rewrote PJM's tariff modification to pile exemption on top of exemption here.

C. FERC's Approach Departs from Statutory Mandate and Common Sense

Having piled MOPR exemption upon MOPR exemption, FERC was required at some point to consider their cumulative effect. It did not. Under *Hope Natural Gas*, that is fatal: FERC must consider the "total effect" of its rules. 320 U.S. at 602.

Petitioners do not contend that PJM should have *no* MOPR exemptions. But each exemption compounds the risk of uneconomic entry. FERC's "conclusory statement[s]" that the exemptions are "just and reasonable," *Rehearing Order* PP 21, 54, JA____, ____; *Order* PP 19, 26, JA____, ____, are no substitute for analysis of cumulative impact, *Keyspan-Ravenswood*, 474 F.3d at 812. And if

FERC is going to add multiple exemptions—including a unit-specific exemption that had concededly enabled below-cost entry—it needed to offer a "reasoned explanation" for doing so. *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 672 (D.C. Cir. 2007).

FERC's failure to conduct that analysis is troubling. The need to prevent uneconomic entry is more critical today than ever before. Increasing reliance on renewable resources with low marginal costs (*e.g.*, wind turbines) is driving energy prices down—sometimes below zero during low-demand periods, so that generators must *pay* to produce. E. Ela, *et al.*, *Evolution of Wholesale Electricity Market Design with Increasing Levels of Renewable Generation* 52 (Sept. 2014), http://www.nrel.gov/docs/fy14osti/61765.pdf. Generators thus increasingly rely on capacity revenues to recoup multi-million dollar capital investments in generation facilities. *Id.* at viii. Concomitantly, there is an ever-greater need for accurate price signals that encourage the installation of new capacity resources when needed. Solar or wind plants produce energy only while the sun shines or the wind blows. *2011 MOPR Rehearing Order* P 110. Consequently, sufficient investment in capacity—so energy is available on demand when the skies are quiet and dark—is essential. Ela, *supra*, 2-3.

FERC's administratively created markets will procure sufficient investment only if the MOPR prevents uneconomic entry from skewing prices. *See TC*

Ravenswood, 741 F.3d at 114. And whether the MOPR accomplishes that aim must be evaluated—both as a legal and practical matter—based on its "total effect." *Hope Nat. Gas*, 320 U.S. at 602. Yet FERC nowhere provided a reasoned explanation as to why the *three* exemptions here will produce just-and-reasonable rates when buyer-side market power distorted markets, suppressing prices, even when there was only one. By failing to address the cumulative impact of these exemptions—or even seriously consider the defects in each—FERC crossed the line from reasoned to arbitrary decisionmaking.

III. FERC UNLAWFULLY REQUIRED PJM TO CEASE MITIGATION OF NEW ENTRY UPON CLEARING A SINGLE AUCTION CONTRARY TO FPA RATEMAKING STANDARDS AND REASONED DECISIONMAKING

Since 2011, PJM and its competitive capacity suppliers have urged FERC to extend the duration of buyer market-power mitigation measures by requiring new suppliers to demonstrate their economic merit beyond only a single auction. That helps prevent new suppliers from entering at an artificially low price with the intent of recovering their actual costs through subsidies received in later years (evading limits on the competitive-entry exemption) or through purchases at suppressed prices in later years when they become net-buyers (evading limits on the self-supply exemption).

FERC continues to refuse that exemption, asserting that clearing one auction "reasonably demonstrates that a new resource is needed by the market at a price

near its full cost of entry." *Order* P 211 n.100, JA____ (quoting *2011 MOPR Rehearing Order* P 131). Despite fresh evidence of market-power abuse presented in this case, *see, e.g.*, CMC Rehearing 10-16, JA____-__ (summarizing record evidence of uneconomic entry), FERC's initial order tersely concluded the "basis on which the Commission made its earlier decision on this matter is not altered by PJM's filing," *Order* P 211, JA____. On rehearing, FERC again ignored this evidence, asserting that clearing a single auction is sufficient "[e]ven if a generator has received a discriminatory subsidy." *Rehearing Order* P 79, JA____. FERC's orders not only ignore new and unmistakable evidence of buyer market power abuse, but are also unsustainable under FPA ratemaking standards.

A. FERC's Deliberate Acceptance of Unnecessary Discrimination Is Unlawful

Confronted by evidence that its "one-auction only" approach to the MOPR leads to discriminatory subsidies, FERC signed off on those subsidies. New suppliers may properly enter the market by clearing in one auction, it ruled, "[e]ven if a generator has received a discriminatory subsidy." *Rehearing Order* P 79, JA____. That defies FPA § 205, which does not allow FERC to accept "any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage," or "any unreasonable difference in rates, charges, service, facilities, or in any other respect." 16 U.S.C. § 824d(b). Petitioners squarely objected that FERC could not merely posit that "clearing the market is

sufficient to show that a resource is 'needed'"; FERC must also show that "'discriminatory subsidies' are 'needed'" to acquire sufficient capacity—and, here, the "record shows that they are not." P3 Rehearing 9, JA____.

FERC did not respond to petitioners' arguments that the FPA prohibits discrimination and that there was no evidence discrimination was necessary to secure capacity. *See* P3 Rehearing 4 (specification 2), JA____. That silence requires remand. *See, e.g.*, *PSEG Energy*, 665 F.3d at 208. Petitioners anticipate that, if FERC chooses to explain itself now, FERC will argue that FPA §205 only prohibits "undue" discrimination. But FERC never explained why discrimination here is "due," and the "'post hoc salvage operations of counsel' cannot overcome the inadequacy of the Commission's explanation" in any event. *KeySpan-Ravenswood*, 348 F.3d at 1059 (quoting *Fla. Power & Light Co. v. FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996)).

B. FERC Failed To Show That PJM's Consensus Proposal To Extend Mitigation Review Was Unjust and Unreasonable Under FPA §205 or That Limiting Review to a Single Auction Was Just and Reasonable

Extending the mitigation period for new entry was, like elimination of unit-specific review, an essential part of the suppliers' bargain with buyers in exchange for the competitive entry exemption and self-supply exemption. FERC's decision to reject that part of the bargain imposed a "materially different" rate than PJM's proposal. *Western Resources*, 9 F.3d at, 1579. FERC was therefore required to

demonstrate both that PJM's consensus proposal was unjust and unreasonable under FPA § 205, and that the fundamentally altered substitute rules FERC wished to impose were just and reasonable under FPA § 206. *See, e.g.*, *id.*; *Atlantic City*, 295 F.3d at 10. FERC did not meet either burden. Nor did FERC supply a reasoned basis for the "end result" under its cherry-picked modifications. *Jersey Cent.*, 810 F.2d at 1172, 1177.

FERC "reject[ed] PJM's argument, as supported by EPSA and P3, that increasing the duration of mitigation is warranted" by declaring "that the focus of the MOPR, after the exemptions[,] is on those entities most likely to pose price suppression concerns." *Order* P 212, JA____. But that claim is an artfully phrased *non sequitur* given FERC's simultaneous command that PJM retain the unit-specific review exemption. That exemption is open to any new entrant and defeated PJM's purpose of having just the new exemptions that narrowly focused "on those entities most likely to pose price suppression concerns." *Id.* Nor did FERC explain how forced retention of a single-auction clearance requirement, when coupled with its forced retention of the unit-specific review exemption, produced a just-and-reasonable "end result" when also combined with two new exemptions proposed by PJM. That approach was unreasoned because FERC considered "only half of a proposed rate." *Western Resources*, 9 F.3d at 1579.

Moreover, FERC's justification for keeping the single-auction clearance rule ignored undisputed record evidence of harmful uneconomic entry. Petitioners presented detailed evidence that three new resources cleared the auction with extremely low offers, made possible only by state-mandated subsidies. *See* CMC Rehearing 10-15, JA____-__. Having suppressed capacity prices by slipping through an ineffective unit-specific review exemption, those new entrants then declared they would not build, *id.*, but nevertheless entered later auctions as "existing" resources exempt from the MOPR because they had already "cleared" one auction.

Finally, the federal courts have found, *see, e.g.*, *Nazarian*, 974 F. Supp. 2d at 824-25, and FERC itself has repeatedly argued to lower courts and the Supreme Court, that subsidized uneconomic entry distorts and artificially suppresses prices even when those offers comply with PJM's existing MOPR, *see* p. 13 n.3, *supra* (quoting FERC's position in *Solomon* and *Hughes*). FERC's orders make no attempt to balance the concrete problems caused by uneconomic entry against the "extra risk that a resource may not clear at all in the second and third years" under a three-year mitigation regime. *Rehearing Order* P 87, JA____. That is not reasoned decisionmaking.

CONCLUSION

For the reasons set forth above, the petition for review should be granted.

Respectfully submitted,

/s/ Jeffrey A. Lamken
Jeffrey A. Lamken
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, DC 20037
(202) 556-2000
jlamken@mololamken.com

Abraham Silverman
Assistant General Counsel – Regulatory
Cortney Madea
Assistant General Counsel – Regulatory
NRG ENERGY, INC.
211 Carnegie Center
Princeton, NJ 08540-6213
(609) 524-4696
abraham.silverman@nrgenergy.com

Counsel for the NRG Companies

/s/ John N. Estes III
John N. Estes III
Paul F. Wight
John Lee Shepherd, Jr.
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com
paul.wight@skadden.com
john.shepherd@skadden.com

Counsel for PJM Power Providers Group

June 7, 2016

CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Circuit Rule 32(a)(2), I hereby certify that the foregoing document contains no more than 14,000 words (13,952 words using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, and certificates of counsel.

Respectfully submitted,

/s/ John N. Estes III
John N. Estes III
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7950
john.estes@skadden.com

Counsel for PJM Power Providers Group

June 7, 2016

ADDENDUM

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 provides:

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 205 of the Federal Power Act, 16 U.S.C. §824d provides:

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly

the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does

not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

Section 206 of the Federal Power Act, 16 U.S.C. § 824e provides:

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its

best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Com-mission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b) of this section, in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term "short-term sale" means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term "applicable Commission rule" means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the

Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

Section 313 of the Federal Power Act, 16 U.S.C. § 825*l* provides:

16 U.S.C. § 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. 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. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

Section 4 of the Natural Gas Act, 15 U.S.C. § 717c provides:

15 U.S.C. § 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly

the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Storage services

(1) In exercising its authority under this chapter or the Natural Gas Policy Act of 1978, the Commission may authorize a natural gas company (or any person that will be a natural gas company on completion of any proposed construction) to provide storage and storage-related services at market-based rates for new storage capacity related to a specific facility placed in service after August 8, 2005, notwithstanding the fact that the company is unable to demonstrate that the company lacks market power, if the Commission determines that—

(A) market-based rates are in the public interest and necessary to encourage the construction of the storage capacity in the area needing storage services; and

(B) customers are adequately protected.

(2) The Commission shall ensure that reasonable terms and conditions are in place to protect consumers.

(3) If the Commission authorizes a natural gas company to charge market-based rates under this subsection, the Commission shall review periodically whether the market-based rate is just, reasonable, and not unduly discriminatory or preferential.

Section 5 of the Natural Gas Act, 15 U.S.C. § 717d provides:

15 U.S.C. § 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) Costs of production and transportation

The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure and Rule 25(c) of the Circuit Rules of this Court, I hereby certify that on June 7, 2016, I electronically filed the foregoing document 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

/s/ John N. Estes III
John N. Estes III
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7950
john.estes@skadden.com

Counsel for PJM Power Providers Group

June 7, 2016