Nos. 21-3068 & 21-3205
(consolidated with Nos. 21-3243 & 22-1158)

In the

United States Court of Appeals

for the

Third Circuit

PJM POWER PROVIDERS GROUP and
ELECTRIC POWER SUPPLY ASSOCIATION,
Petitioners,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On petition for review of orders of the
Federal Energy Regulatory Commission

MOTION TO STRIKE BRIEF FILED BY THE FEDERAL ENERGY REGULATORY COMMISSION SOLICITOR

JOHN LEE SHEPHERD, JR.
TED MURPHY
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave, NW
Suite 900
Washington, DC 20037
(202) 955-1500

Counsel for The PJM Power Providers Group

PAUL W. HUGHES
DAVID G. TEWKSBURY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

Counsel for the Electric Power Supply Association

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 27(a) and Local Appellate Rule 27.0, Petitioners Electric Power Supply Association (EPSA) and the PJM Power Providers Group (P3) hereby respectfully request that the Court strike the document entitled "Response Brief of Respondent FERC." (Dkt. 153) (the "Solicitor's Brief"). Additionally, the Court should preclude the Solicitor's Office of FERC from presenting oral argument putatively on FERC's behalf.

As a recent Statement from FERC Commissioner Danly has unequivocally revealed, the Solicitor's Brief does not in fact represent the views of FERC. Danly Statement (Ex. 1), at 1-2 ("[T]he brief filed does not represent the position of the Commission."). Rather, that brief reflects the views of two Commissioners, which is not a majority here. The brief adopts and advocates legal and policy positions that have never received the support of a majority of Commissioners.

For two reasons, the Chairman lacked the authority to direct—and the Solicitor's Office lacked the authority to file—a brief putatively on behalf of the Commission, but that did not in fact accurately reflect the view of the Commission as a legal entity. *First*, FERC's organic statute holds that FERC adopts official legal policy and positions by majority vote. The Chairman may not wield his administrative and ministerial authority to control

substantive legal outcomes—yet that would be the result of tolerating an unauthorized brief.

Second, the Chairman's usurpation of the Commission's authority here imperils the constitutionality of his office. The Supreme Court has carved out a narrow exception to the ordinary requirement that those who wield executive power must be fully accountable to the President, holding that members of multi-member Commissions may sometimes be constitutional notwithstanding a for-cause removal structure. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 (2020) (discussing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)).

While Congress plainly structured FERC with this exception for multi-member agencies in mind, the Chairman's claimed authority to unilaterally set the agency's litigation position by directing the filing of briefs is irreconcilable with these constitutional limits. That is, if the Chairman *does* have the statutory right to direct the Solicitor to file a brief taking a litigation position not supported by a FERC Majority, then the office of the Chairman is unconstitutional—and the brief, which would rest on an unconstitutional claim to authority, should be struck for that reason.

Because the filing of the Solicitor's brief rests on an unlawful exercise of the Chairman's authority, the Court should strike it. The brief is simply not what it claims to be—it does not represent the views *of the Commission*,

and the Solicitor should not be permitted to suggest otherwise in this proceeding. More, the misattribution of the Solicitor's positions to the Commission would have substantial, adverse effects. In particular, it changes both the deference the Court owes to those arguments and the legal effects those arguments may have in this and future proceedings. The Court should remedy the prejudice to this litigation by striking the Solicitor's Brief.

ARGUMENT

This matter is a review of significant changes to a regional electric capacity market that spans thirteen states and the District of Columbia. *See, e.g.*, *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 79 (3d Cir. 2014) (describing the territory of PJM Interconnection LLC as "a vast region"). The parties here include three separate petitioners or groups of petitioners; two intervenors for petitioners; FERC as respondent; and no less than twenty-five intervenors for respondent. FERC was unable to assemble a majority of active Commissioners in the proceedings below, and so the proposed rate change was deemed accepted as a matter of law. *See* 16 U.S.C. § 824d(g).

On July 22, 2022, the General Counsel and Solicitor of FERC filed a document in this case entitled "Brief for Respondent Federal Energy Regulatory Commission." Dkt. 153 ("Solicitor Br."). The brief contained a variety of jurisdictional and procedural arguments, as well as a "defen[se]" of "the

electric rate that has taken effect by operation of law." Solicitor Br. 1. The bulk of the brief is a full-throated attempt to vindicate the practical outcome of the agency proceeding below—that is, it seeks to justify the enormous changes brought to the PJM market.

Ordinarily, this would be wholly unremarkable in an appeal from an agency's determination. In nearly every such case, the agency adopts a position as the *agency* and supplies reasoning for its result. When that reasoning is challenged, the agency's lawyers defend both its reasoning and its substantive decision on appeal. So long as the agency's appellate brief accords with the agency's action below, there is little doubt that it is a brief "for" the agency.

But this case is quite different. Because the Commissioners deadlocked below, FERC produced no majority. The Commission as an entity, therefore, has taken no legal or policy positions with respect to the substantive rate-making issues presented here. There is thus no position fairly attributable *to the agency*. The Chairman's direction of the filing of a substantive brief anyway—putatively on behalf of the Commission as an entity—violates both the Department of Energy Organization Act and constitutional limitations on the authority of executive officials.

I. The brief filed on behalf of FERC does not represent the views of the Commission, and is therefore unauthorized by statute.

a. FERC's organic statute—the Department of Energy Organization Act—establishes that the agency is a commission "composed of five members." 42 U.S.C. § 7171(b). The Act specifies that "a quorum for the transaction of business shall consist of at least three members" and that "[e]ach member of the Commission, including the Chairman, shall have one vote." *Id.* § 7171(e). Categorically, the act prescribes that "[a]ctions of the Commission shall be determined by a majority vote of the members present." *Id*. This is in keeping with the "'almost universally accepted common-law rule' that only a 'majority of a collective body is empowered to act for the body.'" *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) (quoting *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967)).

A corollary of this fundamental rule is that "the Commission" can "formulate valid original decisions" only "as an entity." *Pub. Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 776 (D.C. Cir. 1974). That is, all "institutional decisions" of the Commission are those "by a majority vote duly taken." *Id.* Because the Commissioners could not reach an agreement, FERC could not make an "institutional decision[]" on the proposed changes below. *Id.* The

changes were deemed accepted by operation of law, rather than as a formulation or adoption of any policy on behalf of the Commission. *Id.*; *accord* Danly Statement (Ex. 1) at 10-11.

Despite the Solicitor's statements that the purported brief is "for" FERC, the document is not FERC's brief and thus "is not what it purports to be." Danly Statement (Ex. 1), at 1. Indeed, despite the Solicitor's representations, Commissioner Danly's statement clarifies that the brief filed "for" FERC "does not represent the view of the Commission as a body, and it does not represent [his] views on the merits nor those of Commissioner Christie." *Id.* at 2. To the contrary, both Commissioners opposing the change argued in their individual statements that PJM's tariff filing was unjust and unreasonable, only to have FERC's Solicitor take the opposite position, purportedly *on behalf of the Commission*. *Id; accord* Solicitor Br. 28-31. The Solicitor argues at some length, for example, that "[t]he Joint Statement reasonably explains why abandoning the Expanded MOPR and approving the Focused MOPR rationally balances consumer and investor interests and is therefore just and reasonable and not unduly discriminatory." Solicitor Br. 93. Commissioner Danly, by contrast, argued that the "proposed revisions … are unjust and unreasonable." Danly Dissent P 3 (JA ___). Commissioner Christie agreed. *See* Christie Dissent at P6 n.11 ("Chairman Glick and Commissioner Clements seem to suggest that the three of us may be on

the same page …. To be clear: we are not on the same page, which is why I would *reject* the PJM section 205 MOPR Proposal filing as unjust and unreasonable.").

It is thus plain that the Solicitor's brief does not represent the views of the Commission as a body. As a result, it should never have been filed. FERC's Chairman is "responsible o*n behalf of the Commission* for the executive and administrative operation of the Commission." 42 U.S.C. § 7171(c) (emphasis added). His specific duties are ministerial and routine—appointment and employment of examiners, compensation and supervision of personnel, assignment of work to personnel, and the procurement of experts and consultants. *Id.* He also may designate attorneys to "appear for, and represent *the Commission* in, any civil action brought in connection with any function carried out by the Commission." *Id.* § 7171(i) (emphasis added).

The purported FERC brief falls short of these basic standards. The DOE Organization Act requires that the Commission's positions "be determined by a majority vote of members present." 42 U.S.C. § 7171(e). In directing filing of a brief that represents the opinions of less than a majority of participating Commissioners, the Chairman exceeded his statutory authority to act "on behalf of *the Commission*" when fulfilling his executive and administrative duties. *Id.* § 7171(c) (emphasis added); *see* Danly Statement (Ex. 1), at 4 ("[A]n agency's authority runs to it as 'an entity apart

from its members, and it is its *institutional decisions*—none other—that bear legal significance.") (quoting *Pub. Citizen*, 839 F.3d at 1169). And he failed in his obligation to designate attorneys to act "for, and represent *the Commission*." 42 U.S.C. § 7171(i) (emphasis added).

Because the Chairman and Solicitor exceeded their statutory authority in authorizing and filing the purported FERC brief, their action "is a mere nullity." *Dixon v. United States*, 381 U.S. 68, 74 (1965). The same result obtains under a straightforward application of traditional agency principles. Because the Chairman acts "on behalf of the Commission" in his administrative role, he is "akin to" an agent. Danly Statement (Ex. 1), at 4 (quoting 42 U.S.C. § 7171(e)). But acts which exceed the scope of agency authority are voidable. *Eaglebank v. BR Professional Sports Group, Inc.*, 649 Fed. App'x 209, 211 n.1 (3d Cir. 2016) (quoting 2A C.J.S. *Agency* § 163). Both approaches yield identical results: the Court should strike the brief as it does not represent the views of FERC as a body, and is therefore unauthorized by the agency's organic statute.

b. This position is fully consistent with the FPA's provisions concerning judicial review. That Act provides that orders of the Commission are ordinarily reviewable. *See* 16 U.S.C. § 825*l*. And another provision specifically authorizes judicial review in cases of Commission deadlock. *Id.* § 824d(g).

In deadlocked cases, there is certainly a way for the Solicitor to represent *the Commission*. The Solicitor could file a brief that describes in detail the proceedings below. *See* Danly Statement (Ex. 1), at 2-3 ("[T]he Commission's lawyers should have instead filed a brief that explained the statute's operation and appended the three Fair RATES Act statements, declining to either advance a merits argument or to advocate for particular relief."). This brief could also describe the statutorily required statements from each Commissioner. 16 U.S.C. § 824d(g)(1)(B); *see* Danly Statement (Ex. 1), at 2 n.7 (describing FERC counsel's attempts to allow Commissioners "to ensure [the brief's] fidelity to [their] statement[s]"). Concluding there, the Solicitor could appropriately represent *the Commission*—and would then leave to the Court whether the practical result reached by virtue of a deadlock should be set aside.

Instead of following that path here, the Chairman directed the Solicitor to file a brief, putatively on behalf of the Commission. But that brief advocated for positions that the Commission *never adopted*. As FERC has long held, it "speaks through, and only through, its orders." *CAlifornians for Renewable Energy v. Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,213 at P 13 (2021) (listing orders); *see* Danly Statement (Ex. 1), at 8 & nn.35-36. Even more directly, FERC has explained that, while "the Chairman is responsible for the direction of litigation on behalf of the Commission," "'[t]he

Commission speaks through its orders,' which reflect a majority vote of a quorum of the Commission." *PJM Interconnection, LLC*, 180 FERC ¶ 61,051 at PP 105-06 (2022) (alteration in original) (footnote omitted).

If the Solicitor's office were to confine itself to representing the agency, as we outlined above, that would have no prejudicial effects on litigation, including the presentation of fulsome argument to a court of appeals. The nature of the proceedings at issue guarantees that there will be adverse, interested parties willing and capable of airing the necessary legal arguments implicated by petitions for review.

To explain: The circumstances at issue here occur only when a rate filer proposes a rate, and the Commission deadlocks in response. If an aggrieved party petitions for review of that rate, the filer itself will have an immediate stake in defending its proposed rate—and it will invariably be allowed to intervene. That indeed occurred here; PJM unsurprisingly intervened to defend the rate it proposed. Dkt. 15. In fact, *twenty-five* parties have intervened in support of the default approval of PJM's proposal. These intervenors produced more than one hundred pages of briefing in defense of the outcome below. These extensive briefs confirm that, even absent a substantive brief from the Solicitor, the issues in dispute will be fully explored and presented for the Court's review.

On the flip side of the coin, allowing the Solicitor to file a brief advancing merits arguments putatively on behalf of FERC—but which the Commission itself never adopted—does grave damage to the Commission as an institution. To start with, as Commissioner Danly explained, the brief does not accurately describe what it is: It does *not* represent the views of *the Commission*. Danly Statement (Ex. 1), at 1-2. If a court were to accept this kind of brief anyway, material adverse consequences would result. For example, FERC's Solicitor, acting under the direction of the Chairman, may choose to waive arguments, and such a brief may even claim deference to positions that the Commission never itself endorsed.

That is apparent here. The Solicitor confidently informs the Court that "[t]he Commission receives 'great deference' for 'its rate decisions,' including its reasonable 'predictive expertise.'" Solicitor Br. 33-34 (citations omitted). The Solicitor rests on the claim that "[a]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable." *Id*. at 96. But neither the Solicitor nor the pair of Commissioners whose position his brief defends is "the Commission." It is categorically improper for the Solicitor's Brief to cloak itself in the robe of deference that may be due the positions of an *agency*—when it is clear that the Brief does not reflect the position of the agency itself. Danly Statement (Ex. 1), at 1-2.

Substantive decisions about which positions to advance in a brief are especially impactful because they can and do bind an agency going forward. "[D]octrines like law of the case, and estoppel by judgment …. have a rightful and reasonable application to the workings of administrative agencies." *Retail Clerks Union, Local 1401 v. NLRB*, 463 F.2d 316, 322 (D.C. Cir. 1972). And an agency's arguments, concessions, and waivers on appeal can alter the substantive outcome of the appeal, the breadth and reasoning of the resulting opinion, and the agency's options moving forward. *See, e.g.*, *Chennareddy v. Bowsher*, 935 F.2d 315, 320-21 (D.C. Cir. 1991); *City of Redding v. FERC*, 693 F.3d 828, 846 (9th Cir. 2012) (McKeown, J., dissenting) ("By adopting this position on appeal, FERC surely waives any argument to the contrary."); *Northern States Power Co. v. FERC*, 176 F.3d 1090, 1092-93 (8th Cir. 1999) (restricting FERC's jurisdiction based on a concession contained in the agency's brief on appeal).

In all, these litigation tactics have material consequences for legal outcomes, which in turn govern the Commission—as well as all those regulated by the Commission. Thus, if the Solicitor is authorized to file a brief that is deemed *on behalf of the Commission*—but is in fact not authorized by the Commission—the result is still that the legal rights and obligations of the *Commission as a whole* will be altered by virtue of that brief. The Chairman

cannot use his administrative powers to dictate outcomes *for the Commission*, when the Commission never in fact approved those outcomes.

II. If the statute authorizes the Chairman to unilaterally direct the filing of a substantive legal brief, the Chairman is exercising unconstitutional authority.

As discussed above, the plain import of FERC's organic statute, the agency's own precedent, and decades of judicial holdings all confirm that the Chairman lacks the authority to direct the Solicitor to file a brief advancing positions that lack the backing of a majority of a quorum of Commissioners. *See* Danly Statement (Ex. 1), at 5 (questioning whether the Chairman can "employ instrumentalities of the Commission, like the Solicitor's Office, to advance litigation positions in pursuit of his own particular goals when they are not the position of the Commission, especially when done so under the guise of representing the body *as a body*").

If the Chairman asserts that the governing statute, however, authorizes him to engage in such an action, then the very structure of FERC is unconstitutional, and the Solicitor's Brief should be struck for that reason. The best approach—for both the Court and the agency—is to avoid these constitutional concerns by properly interpreting the Department of Energy Organization Act. *See, e.g.*, *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1622 (2021); *accord Burton v. Schamp*, 25 F. 4th 198, 212 (3d Cir.

2022) ("It is well settled that federal courts should avoid a statutory interpretation that creates constitutional issues.").

a. Article II of the U.S. Constitution provides that "[t]he executive Power shall be vested in a President." U.S. Const. Art. II, § 1, cl. 1. While the President may delegate the executive power to lesser officers who will "assist the supreme Magistrate in discharging the duties of his trust" (30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)), such officers must ordinarily be removable at will by the President. *See Bowsher v. Synar*, 478 U.S. 714, 726 (1986). The Supreme Court has expounded a narrow exception to this otherwise "unrestricted removal power." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2198 (2020). "In short," the Constitution permits Congress to "give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [can be] said not to exercise any executive power." *Id.* at 2199 (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)).

In its ordinary functions, FERC at least arguably meets these criteria. Like the agency whose constitutionality was upheld in *Humphrey's Executor*, FERC is composed of five members, who are each entitled to a single vote, and no more than three of which can be from the same political party. *See* 42 U.S.C. § 7171(b); *Humphrey's Executor*, 295 U.S. at 624. The Com-

mission oversees a "complex and highly technical" regulatory program" requiring "particular substantive expertise and specialized experience." *Helen Mining Co. v. Elliott*, 859 F.3d 226, 238 (3d Cir. 2017) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *accord FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 295 (2016); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992). And "the Commissioners' staggered, [five]-year terms enable[] the agency to accumulate technical expertise and avoid a 'complete change' in leadership 'at any one time.'" *Seila Law*, 140 S. Ct. at 2199 (quoting *Humphrey's Executor*, 295 U.S. at 624; *see* 42 U.S.C. § 7171(b). Thus, despite the fact that "Members … may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office" (*id.*), the Commission's structure appears constitutional so long as *Humphrey's Executor* remains good law.

b. By structuring the agency such that all "[a]ctions of the Commission shall be determined by a majority vote" of a quorum, Congress thus plainly intended to structure FERC in accordance with *Humphrey's Executor*'s safe harbor for multimember agencies. 42 U.S.C. § 7171(e). But the Chairman's abuse of his administrative authorities threatens to cast FERC into stormier seas.

The Chairman is "responsible on behalf of the Commission for the executive and administrative operation of the Commission." 42 U.S.C.

§ 7171(c); *see* Danly Statement (Ex. 1) at 4 n.18. When he confines himself to the ministerial duties set forth in the statute—payroll, supervision of personnel, and the like—there is no doubt that he can properly act with unilateral authority since such actions do not infringe on the "executive Power." U.S. Const. Art. II, § 1, cl. 1; *see Morrison v. Olson*, 487 U.S. 654, 681 (1988) (holding that "powers granted" which "are themselves essentially ministerial" "are not inherently 'Executive'").

But these administrative responsibilities stand in stark contrast with the "core executive power" that the Chairman has attempted to unilaterally wield here. *Seila Law*, 140 S. Ct. at 2200. The Executive Power unquestionably includes power over key, substantive litigation decisions of components of the Executive Branch. *See id*; *see also Consumer Energy Council of Am. v. FERC*, 673 F.2d 425, 472 (D.C. Cir. 1982) ("Although FERC is substantially independent of the Executive, it nonetheless performs executive functions."). When a Commission majority has adopted a position, the Solicitor's authority to defend that position on appeal is obvious. But when the Chairman attempts to unilaterally wield (or unilaterally delegate) that power, he cannot seek refuge in *Humphrey's Executor*'s carveout for multimember bodies.

Nor do his actions fall within *Morrison*'s exceptions for exercises of "essentially ministerial" functions exercised by officers "with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." 487 U.S. at 691. First, and most obviously, "[e]veryone agrees" that the Chairman "is not an inferior officer, and [his] duties are far from limited." *Seila Law*, 140 S. Ct. at 2200. But more to the point, directing an agency's legal and policy positions in litigation is in no way "ministerial." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498 (1866) ("A ministerial duty … is one in respect to which nothing is left to discretion. It is a simple, definite duty … imposed by law."); *Nealon v. Davis*, 18 F.2d 175, 176 (D.C. Cir. 1927) ("A ministerial act is one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of his own judgment upon the propriety of the act being done."). Thus, when the Chairman unilaterally directs the substantive positions to be taken in a brief filed by the Solicitor, he does so in violation of Article II.

By directing the filing of the Solicitor's brief, the Chairman has exceeded his constitutional authority. In adopting the policies contained in the brief, the Chairman (through the Solicitor and General Counsel) "wield[s] power alone rather than as members of a board or commission." *Seila Law*, 140 S. Ct. at 2201. If, contrary to our statutory argument, the Chairman in

fact has the authority to direct the filing of a brief such as the Solicitor's, then the Chairman is both subject only to good cause removal (42 U.S.C. § 7171(b)) and capable of unilaterally wielding the executive power (*Morrison*, 487 U.S. at 681). That is precisely what the Supreme Court recently found constitutionally intolerable in *Seila Law*. 140 S. Ct. at 2201.

A simple analogy makes this conclusion perfectly clear. If the Chairman found himself the lone dissenter in a case where four other Commissioners agreed on the opposite outcome, could he still direct FERC's attorneys to file a brief adopting and advocating for the positions he advanced in his dissent? Of course not. That power is obviously inconsistent with his obligation to act "on behalf of the Commission" in his supervision of the agency's counsel. 42 U.S.C. § 7171(c). But more fundamentally, a statutory scheme that allowed the Chairman to exercise such unilateral authority to dictate the substantive positions the agency takes in litigation—indeed, to nullify contrary votes of fellow Commissioners—would run afoul of the principles thoroughly and recently expounded in *Seila Law*. 140 S. Ct. at 2203 (holding that Congress may not "vest[] significant governmental power in the hands of a single individual accountable to no one"). And such a scheme would undermines Congress's attempts to ensure nonpartisan, expert decisionmaking. *Id.* at 2200 (holding that a "single [Commissioner] … cannot be described as a 'body of experts' and cannot be considered 'non-partisan' in

the same sense as a group of officials drawn from both sides of the aisle") (quoting *Humphrey's Executor*, 295 U.S. at 624).

* * *

The Chairman's abuse of his authority in this case has imperiled the constitutionality of his office. The Chairman's attempt to arrogate powers properly belonging only to a majority of the Commission has resulted in the filing of a brief purporting to represent the Commission, but which does no such thing. Danly Statement (Ex. 1), at 1-2 ("[T]he brief filed does not represent the position of the Commission."). The action taken here is thus inconsistent with FERC's organic statute and the Constitution.

To avoid this grave constitutional question, the Court should hold that the Chairman's statutory powers do not authorize him to direct the filing of a brief like the Solicitor's. Alternatively, the Court should determine that the Chairman's claim of authority is unconstitutional. Either way, the Court should strike the Solicitor's Brief and deny the Solicitor's Office the right to appear at oral argument.

CONCLUSION

The Court should strike Solicitor's Brief and preclude the Solicitor's Office from appearing at oral argument.

Dated: September 7, 2022

Respectfully submitted,

/s/ *Paul W. Hughes*

JOHN LEE SHEPHERD, JR.
TED MURPHY
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave, NW
Suite 900
Washington, DC 20037
(202) 955-1500

C. DIXON WALLACE III
Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

Counsel for The PJM Power Providers Group

PAUL W. HUGHES
DAVID G. TEWKSBURY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000

Counsel for Petitioner Electric Power Supply Association

CERTIFICATE OF SERVICE

I hereby certify that that on September 7, 2022, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: September 7, 2022 /s/ *Paul W. Hughes*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for Petitioner certifies that this motion:

(i) complies with Rule 27(d)(2)(a) because it contains 4,307 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 365 and is set in New Century Schoolbook in a size equal to 14-point font.

Dated: September 7, 2022 /s/ *Paul W. Hughes*

L.A.R. 31.1(c) CERTIFICATE

Pursuant to L.A.R. 31.1(c), the undersigned counsel for Petitioner certifies that the PDF file of this brief has been scanned with Windows Security Antivirus Version 1.363.1825.0, and no virus was detected. *See* L.A.R. 31.1(c).

Dated: September 7, 2022 /s/ *Paul W. Hughes*

EXHIBIT 1

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C. Docket No. ER21-2582-000

STATEMENT OF JAMES P. DANLY

(Issued August 26, 2022)

1. I do not write today in order to relitigate the merits of the case. We have already done that and I append my Fair RATES Act[1] statement for the reader's convenience.[2] Instead, I write to make everyone aware that the brief filed by the FERC Solicitor's Office on July 22, 2022[3] is not what it purports to be and to further explain why the brief should be accorded no greater deference or regard than any other litigant's submission. It should never have been filed.

2. I caution anyone who chances to read this brief—do not be fooled. Its references to "FERC" and "the Commission," are *in reality* references to "Chairman Glick and Commissioner Clements."[4] There is no question—the brief filed does not represent the

[1] In October 2018, the America's Water Infrastructure Act became law. America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, 132 Stat. 3765 (2018). That Act included provisions from the Fair Ratepayer Accountability, Transparency, and Efficiency Standards Act (the Fair RATES Act) amending Federal Power Act (FPA) section 205 to treat inaction by the Commission that allows a rate change to take effect as an order for purposes of rehearing and appeal. *See id*. § 3006.

[2] *See infra* at Appendix; Statement of Commissioner Danly, Docket No. ER21-2582-000 (Oct. 27, 2021) (FERC Accession No. 20211027-4003) (Danly Fair RATES Act Statement).

[3] Brief for Respondent Federal Energy Regulatory Commission, *PJM Power Providers Group v. FERC*, Nos. 21-3068, *et al.* (3d Cir. July 22, 2022) (Solicitor's Office Br.). I refer to the brief as the "Solicitor's Office Brief" because that is the office within Commission staff that submits appellate court filings, but I should note that the Solicitor's Office acts under the supervision of FERC's General Counsel and at the direction of the Chairman.

[4] *But see* Solicitor's Office Br. xiv (providing a glossary and defining "Commission or FERC" as "Respondent Federal Energy Regulatory Commission"); *id*. at 1 ("In this brief, the Federal Energy Regulatory Commission ('Commission' or 'FERC') gives meaningful effect to Congress' language and intent in enacting new

position of the Commission.[5] That this brief was filed "for Respondent Federal Energy Regulatory Commission"[6] is untrue as a matter of fact. It does not represent the view of the Commission as a body, and it does not represent my views on the merits nor those of Commissioner Christie[7]—both of us voted to reject PJM Interconnection, L.L.C.'s (PJM) tariff filing because it is unjust and unreasonable and we each explained why in our individual Fair RATES Act statements.[8]

3. Since the Commission never issued an order,[9] the Commission's lawyers should have instead filed a brief that explained the statute's operation and appended the three

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Section 205(g) of the Act, 16 U.S.C. §824d(g). As discussed *infra*, the Commission herein defends the electric rate that has taken effect by operation of law.").

[5] Once the Solicitor's Office Brief was filed, I wanted to directly participate in this litigation in order to eliminate the asymmetry that has arisen by the advancement of only two of the four voting commissioners' views on the merits of PJM's submission. However, following consultation with the Designated Agency Ethics Official, the fact that there was no safe harbor for my attorneys meant that, while perhaps a remote possibility, my participation could expose them to liability under 18 U.S.C. § 205(a).

[6] *E.g.*, Solicitor's Office Br. 1.

[7] Fairness demands that I pause to note my appreciation for the accuracy of the discussion of my Fair RATES Act Statement in the Solicitor's Office Brief. I am grateful to have been afforded the opportunity to edit and comment on the section containing the 419 words describing my position in order to ensure its fidelity to my statement as well as the addition of a handful of other minor edits. *See* Solicitor's Office Br. 29-31.

[8] *See* Danly Fair RATES Act Statement at P 3 (explaining that "PJM's proposed revisions to its [Minimum Offer Price Rule (MOPR)] are unjust and unreasonable and why the Commission should have rejected PJM's submission in an order denying its FPA section 205 filing"); Statement of Commissioner Christie, Docket No. ER21-2582-000, at P 6 n.11 (Oct. 19, 2021) (FERC Accession No. 20211019-4002) (disagreeing with the position of Chairman Glick and Commissioner Clements and stating that he "would *reject* the PJM section 205 MOPR Proposal filing as unjust and unreasonable and immediately initiate a FPA section 206 proceeding to develop a just and reasonable alternative") (emphasis in original).

[9] Actually, it did: pursuant to FPA section 206, 16 U.S.C. § 824e, a Commission majority found that the then-prevailing rate was unjust and unreasonable and set a replacement rate which the instant PJM filing, if upheld on appeal, would reverse. *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018), *order establishing just & reasonable rate*, 169 FERC ¶ 61,239 (2019), *order on reh'g & clarification*, 171 FERC ¶ 61,034, *order on reh'g & clarification*, 171 FERC ¶ 61,035,

Fair RATES Act statements, declining to either advance a merits argument or to advocate for particular relief.

4. To have done so runs afoul of the Department of Energy Organization Act (DOE Organization Act) which provides that "attorneys designated by the Chairman of the Commission may appear for, and represent *the Commission* in, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law."[10] Although the statute plainly designates them the *Commission's* lawyers, the FERC Solicitor's Office has nevertheless filed a brief advancing the position of only two of the four voting commissioners. The joint statement of Chairman Glick and Commissioner Clements argues for approval of the tariff filing that went into effect by operation of law[11]—those were arguments that the Commission *could have* adopted but did not. The Solicitor's Office Brief now purports to advance those same arguments on behalf of the body that did not adopt them.

I. Advancing Positions in Litigation on Behalf of the Commission that the Commission Considered—but Did not Adopt—is Inconsistent with the DOE Organization Act

5. The DOE Organization Act declares that the Chairman acts *on behalf of the Commission* when serving as the agency's executive and administrative head.[12] It further provides that "[t]he Commission shall be composed of five members,"[13] that "[e]ach member of the Commission, including the Chairman, shall have one vote," and that "[a]ctions of the Commission shall be determined by a majority vote of the members

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order on reh'g & compliance, 173 FERC ¶ 61,061 (2020), *order on compliance & clarification*, 174 FERC ¶ 61,036, *order setting aside prior order, in part*, 174 FERC ¶ 61,109 (2021).

[10] 42 U.S.C. § 7171(i) (emphasis added).

[11] *See* Joint Statement of Chairman Glick & Commissioner Clements, Docket No. ER21-2582-000 (Oct. 19, 2021) (FERC Accession No. 20211019-4001).

[12] *See* 42 U.S.C. § 7171(c) ("The Chairman shall be responsible *on behalf of the Commission* for the executive and administrative operation of the Commission . . . .") (emphasis added); *id*. § 7171(i) ("attorneys designated by the Chairman of the Commission *may appear for, and represent the Commission in*, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law") (emphasis added).

[13] *Id*. § 7171(b)(1).

present."[14] As the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently explained, the requirement that "'[a]ctions of the Commission shall be determined by a majority vote'"[15] "comport with the 'almost universally accepted common-law rule' that only a 'majority of a collective body is empowered to act for the body.'"[16] It is also axiomatic, as the D.C. Circuit has stated, "that an agency's authority runs to it as 'an entity apart from its members, and it is its *institutional decisions*—none other—that bear legal significance.'"[17] Thus, the DOE Organization Act establishes a relationship between the Commission and the Chairman akin to that of a principal and agent since the Chairman acts "on behalf of the Commission."[18] And it is the

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[14] *Id*. § 7171(e).

[15] *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) (quoting 42 U.S.C. § 7171(e)).

[16] *Id.* (quoting *Fed. Trade Comm'n v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967)).

[17] *Id*. (quoting *Pub. Serv. Comm'n of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974)).

[18] 42 U.S.C § 7171(c) (describing the duties and responsibilities of the Chairman as follows: "The Chairman shall be responsible *on behalf of the Commission* for the executive and administrative operation of the Commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of Title 5, (2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director, (3) the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff, (4) the distribution of business among personnel and among administrative units of the Commission, and (5) the procurement of services of experts and consultants in accordance with section 3109 of Title 5.") (emphasis added). *Cf. Div. of Power & Responsibilities Between the Chairperson of the Chem. Safety & Hazard Investigation Bd. & the Bd. As A Whole*, 24 U.S. Op. Off. Legal Counsel 102 (2000) ("We believe that, under the Act and general principles governing the operation of boards, the day-to-day administration of Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole. In disputes over the allocation of authority in specific instances, the Board's decision controls, as long as it is not arbitrary or unreasonable."); *This Decision to the Equal Emp. Opportunity Comm'n (EEOC) is in Response to a Request by Three Commissioners of EEOC for Our Interpretation of That Portion of Section 705(a) of the Civil Rights Act of 1964, As Amended, 42 U.S.C. 2000a-4(a), Which in Establishing EEOC Provides, Quoting from the Code[]*, B-167015, Comp.

Commission's pronouncements as a body—and only its pronouncements as a body, that have legal effect.[19] It at least runs contrary to the spirit of the DOE Organization Act, and may well violate it, for the Chairman to employ instrumentalities of the Commission, like the Solicitor's Office, to advance litigation positions in pursuit of his own particular goals when they are not the position of the Commission, especially when done so under the guise of representing the body *as a body*.

II. Advancing Positions in Litigation on Behalf of the Commission that the Commission Considered—but Did not Adopt—is Inconsistent with the Administrative Procedure Act

6. Before Congress enacted FPA section 205(g),[20] parties were unable to obtain judicial review in the event of a tariff filing going into effect by operation of law because of either a 2-2 deadlock or because of a lack of quorum.[21] FPA section 205(g) was

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Gen., at P 1 (Sept. 19, 1974) ("Section 705(A) of [the] Civil Rights Act, which vests responsibility for administrative operations of Equal Employment Opportunity Commission (EEOC), in the Commission Chairman, is analogous to provisions in several [reorganization] plans which assign administrative responsibilities to Chairmen of independent Commissions. Since background of these reorganization plans, which seems applicable under section 705(A), indicates generally that such provisions are not intended to supersede or diminish substantive powers of full commissions, EEOC Chairman's exercise of administrative functions is subject to general policies and directives of [the] full Commission and *cannot derogate* from substantive responsibilities of [the] full Commission") (emphasis added).

[19] *See Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n*, 543 F.2d at 776 ("Only as an entity can the Commission formulate valid original decisions; by the same token, only in that character can it fashion new decisions remaking those which it has already promulgated. Collective action is prerequisite to any alteration of a preexisting order, whether a grant or denial of rehearing, or a total abrogation or partial modification of that order."). *Cf. W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 25 (D.C. Cir. 2014) (recognizing that a court "need not—and indeed cannot—consider 'appellate counsel's *post hoc* rationalizations' for Commission action") (quoting *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010)); *N.C. Utils. Comm'n v. FERC*, 42 F.3d 659, 663 (D.C. Cir. 1994) (explaining that a "court cannot accept appellate counsel's post hoc rationalization of an agency decision" and "[t]he Commission's decision 'must be upheld, if at all, on the basis articulated by the agency itself'") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (*State Farm*)).

[20] 16 U.S.C. § 824d(g).

[21] *See Pub. Citizen, Inc. v. FERC*, 839 F.3d at 1172 (holding that "FERC's deadlock does not constitute agency action, and the Notices describing the effects of the

enacted for a specific purpose: to ensure that the appeal rights that would otherwise be enjoyed by litigants would not be extinguished when "the Commission permits the 60-day period established"[22] in FPA section 205(d)[23] "to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum."[24]

7. In such circumstances, "the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title."[25] To be clear: the statute declares this "failure" to be "an order" for the sole and specific purpose of seeking rehearing pursuant to FPA section 313(a).[26] Further, FPA section 205(g)(2)[27] provides that a party that seeks rehearing of a proceeding that triggered FPA section 205(g)(1)(A)[28] may appeal pursuant to FPA section 313(b)[29] if "the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum."[30] This section merely provides an avenue for rehearing and appeal.[31] And

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deadlock are not reviewable orders under the FPA.") (footnotes omitted).

[22] 16 U.S.C. § 824d(g)(1).

[23] *Id*. § 824d(d).

[24] *Id*. § 824d(g)(1).

[25] *Id.* § 824d(g)(1)(A).

[26] *Id*. § 825*l*(a).

[27] *Id.* § 824d(g)(2).

[28] *Id.* § 824d(g)(1)(A).

[29] *Id*. § 825*l*(b).

[30] *Id.* § 824d(g)(2).

[31] *See* S. Rep. 115-278, at 2 (2018) ("The purpose of S. 186 is to amend the [FPA] to provide that any inaction by the Federal Energy Regulatory Commission . . . that allows a rate change to go into effect shall be treated as an order by the Commission *for purposes of rehearing and court review*.") (emphasis added); *see also* 16 U.S.C. § 824d(g)(1)(A) (providing that the failure to issue an order due to a deadlock vote is

while FPA section 205(g)(1)(B) does require that "each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change,"[32] nothing in section 205(g) provides that that those statements may be advanced on appeal in order to serve as the reasoning required to satisfy the Commission's obligations to engage in reasoned decision making under the Administrative Procedure Act (APA).

8. The Solicitor's Office Brief asserts that "the most natural basis for that review is the Commissioner statements that support 'accepting the [rate] change' that has now become the filed rate, although that does not preclude the Court from also considering the statements of other Commissioners, as it would in reviewing a typical Commission order."[33] The Solicitor's Office Brief sets forth this position as if a joint statement (one by fewer than a majority of voting commissioners) could be treated as the equivalent of a Commission order. It is not and it cannot. In the recent *Midcontinent Independent System Operator, Inc*. order,[34] all four of my colleagues issued a joint separate statement attached to the order. The contents of that joint separate statement were not part of the order because my colleagues chose to issue it separately, despite having a majority that could have voted to include any or all of the separate statement's content in the order's

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"considered to be an order issued by the Commission accepting the change *for purposes of section 825l(a) of this title*") (emphasis added); *id*. § 824d(g)(2) ("If, pursuant to this subsection, a person seeks a rehearing under section 825*l*(a) of this title, and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the Commissioners are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, or if the Commission lacks a quorum, such person may appeal under section 825*l*(b) of this title."); *id*. § 825*l*(b) ("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.").

[32] 16 U.S.C. § 824d(g)(1)(B).

[33] Solicitor's Office Br. 51-52.

[34] *See Midcontinent Indep. Sys. Operator, Inc*., 180 FERC ¶ 61,040 (2022) (attaching a joint statement by Chairman Glick, Commissioner Clements, Commissioner Christie and Commissioner Phillips in a proceeding where the fifth Commissioner, Commissioner Danly, voted to approve the order without a separate statement).

text. Would anyone suggest that that statement could be accorded the same status as a Commission order?

9. It is only Commission orders that matter. And the Commission has repeatedly recognized as much, as it has in recent orders issued unanimously by all four commissioners who participated in this proceeding. In one such order we all declared that "[t]he Commission speaks through, *and only through*, its orders."[35] The Commission underscored this very point in an order issued only *six days* after the Solicitor's Office Brief was filed:

> As we have stated before, "[t]he Commission speaks through its orders," which reflect a majority vote of a quorum of the Commission. The Chairman's responsibilities for executive and administrative operations are undertaken "on behalf of the Commission."[36]

10. And although this has been the explicit, repeated, and invariant position of the Commission[37]—the Solicitor's Office Brief now asserts that the joint Fair RATES Act

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[35] *Californians for Renewable Energy v. Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,213, at P 13 (2021) (citations omitted) (emphasis added) (voting commissioners consist of Chairman Glick, Commissioner Chatterjee, Commissioner Danly, Commissioner Clements and Commissioner Christie).

[36] *PJM Interconnection, L.L.C.*, 180 FERC ¶ 61,051, at P 106 (2022) (citing 42 U.S.C. § 7171(e); *see Entergy Servs., Inc.*, 119 FERC ¶ 61,187, at P 52 n.44 (2007), *order on reh'g*, 122 FERC ¶ 61,216 (2008) (collecting cases for the proposition that the Commission speaks through its orders, which are issued following a majority vote); *but see* 16 U.S.C. § 824d(g) (providing procedures for lack of quorum in matters under FPA section 205(d), 16 U.S.C. § 824d(d)) (citations and footnotes omitted). I pause to note that I dissented from the cited proceeding because I objected to the process by which the proceeding had come before the Commission and also disagreed on the merits. *Id*. (Danly, Comm'r, dissenting at P 2). In that proceeding, the FERC Solicitor's Office was directed by the Chairman to seek a voluntary remand of orders that were approved by the Commission without the knowledge or acquiescence of the other Commissioners, which at least violated longstanding Commission practice and may have been unlawful. *Id*. (Danly, Comm'r, dissenting at P 2).

[37] *See, e.g.*, *Rockies Express Pipeline LLC*, 172 FERC ¶ 61,279, at P 32 (2020) ("However, as the Commission recently explained to the bankruptcy court in the Ultra bankruptcy proceeding, the Commission is a deliberative body that speaks through its orders: the Commission cannot take a position on the merits of a public interest inquiry in a bankruptcy proceeding without first examining the relevant evidence and issuing an order based on that evidence.") (citation omitted); *Jordan Cove Energy Project*

statement of Chairman Glick and Commissioner Clements may stand in the place of a Commission order by serving as the reasoned decision making required for APA review.[38] I disagree.[39] Since there is no *order* in which the Commission, acting as a body, has provided the reasoning upon which the Commission's action (such as it was) was taken, there is no order amenable to being reviewed or upheld on appeal.

L.P., 171 FERC ¶ 61,136, at P 9 (2020) ("The Commission, an independent agency that consists of up to five members, acts through its written orders, which are issued following a favorable vote of the majority.") (citations omitted); *MidAmerican Energy Holdings Co.*, 118 FERC ¶ 61,003, at P 18 n.45 (2007) ("The Commission, a five-member agency . . . , acts through its written orders . . . , which are 'issued' following a favorable vote of the majority. . . . Phrased differently, in the absence of such orders, including before it has issued such orders, the Commission cannot be said to have acted.") (internal citations omitted); *Fraser Papers, Inc.*, 83 FERC ¶ 61,129, at 61,575 n.12 (1998) ("The Commission speaks through its issued orders, which must stand or fall on the evidence, application of pertinent statutes and regulations, and reasoning contained therein."); *Wis. Valley Improvement Co.*, 80 FERC ¶ 61,054, at 61,164 n.19 (1997) (same); *Indianapolis Power & Light Co.*, 48 FERC ¶ 61,040, at 61,203 (1989) ("The Commission speaks through its orders.") (citations omitted); *N. Nat. Gas Co.*., 31 FERC ¶ 61,011, at 61,022 (1985) ("Without question, the Commission speaks through its decisions and orders.").

[38] *See, e.g.*, Solicitor's Office Br. 51-52 ("[T]he Court's review should evaluate whether the statements provide a rationale for accepting the rate sufficient to meet the APA's standards of review, which are embedded in [FPA] [s]ections 205(g) and 313(b). . . . [T]he most natural basis for that review is the Commissioner statements that support 'accepting the [rate] change' that has now become the filed rate, although that does not preclude the Court from also considering the statements of other Commissioners, as it would in reviewing a typical Commission order.").

[39] *See Testimony of James Danly, General Counsel of the Federal Energy Regulatory Commission Before the United States Senate Committee on Energy & Natural Resources Subcommittee on Energy* (Oct. 3, 2017), S. Rep. 115-278 at 7-8 ("[E]ven if a Court of Appeals accepted the petition, the Court would almost certainly remand the case back to the Commission for further adjudication. When sitting in review of agency action, Courts of Appeals review the evidentiary record compiled below and the reasoning the agency employed–as reflected in its orders–to support its decision based on that record. In the case of a serial 2–2 split, no orders would issue and such a review would be impossible. Remand would appear to be the Court's only option.").

11. The Fair RATES Act does not provide that individual statements by commissioners can take the place of Commission orders.[40] The FPA is an important statute, to be sure, but narrow. The principles governing administrative law, on the other hand, are universal. To adopt the position advanced by the Solicitor's Office Brief would require believing that Congress, while legislating relief to a small class of litigants harmed by the operation of a procedural provision in an idiosyncratic statute,[41] intended to eliminate the APA's bedrock requirement that agencies engage in reasoned decision making.[42] Would it not be surprising to discover the partial repeal of the APA when it informs the mechanics and contents of *every* order issued by *every* administrative agency in whole of government, especially when the statute that worked this repeal did not breathe a word about it? Put simply, the Fair RATES Act did not overturn the entire canon of APA law and its attendant judicial doctrines *soto voce* because "Congress . . .

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[40] Nothing in the Fair RATES Act or its legislative history suggests that the individual statements by commissioners were intended to be used for anything other than to further transparency and encourage an attempt to reach common ground among commissioners. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (recognizing that Congress "'says in a statute what it means and means in a statute what it says there'") (citations omitted); S. Rep. 115-278 at 3 ("Having the benefit of these statements may discourage ties by highlighting more precisely the reasoning that leads each Commissioner to his or her views and, consequently, to enable the fashioning of an order that could attract a majority vote.").

[41] *Cf. ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) ("In light of the clear text of the statute, we feel no compulsion to assign a purpose to the rule Congress prescribed, but one comes readily to mind. A mandatory petition-for-rehearing requirement, with or without the additional requirement of raising the very objection urged on appeal, is virtually unheard-of, but both requirements happen to exist in all three of the major statutes administered by FERC. See, in addition to § 19 of the NGA, 15 U.S.C. § 717r, § 506 of the NGPA, 15 U.S.C. § 3416, and § 313 of the Federal Power Act, 16 U.S.C. § 825*l*.").

[42] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.") (emphasis in original) (citation omitted); *State Farm*, 463 U.S. at 43 (requiring agencies to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."[43]

12. The "order" went into effect by operation of law. There is thus no reasoning articulated by the agency for why it took its actions. The Commission's "action" therefore cannot be found to satisfy the bedrock principles of *Chenery*—a court can only sustain agency action on grounds actually articulated by the agency.[44] It also falls short under *State Farm*.[45] The Commission had found, in an earlier order, that the then-prevailing rates in PJM were unjust and unreasonable and fixed a replacement rate under FPA section 206.[46] The PJM filing at issue in this proceeding attempts to undo that finding. Given the absence of a Commission order adopting reasoning that acknowledges this departure and explaining the connection between the facts found and the choice made, the Commission cannot satisfy the requirements of *State Farm.* To allow the separate statement of two commissioners to satisfy these requirements would be to allow a minority to overturn the actions of the full Commission acting as a body. It seems unlikely that the Fair RATES Act contemplated the reversal and nullification of a Commission-majority order based upon reasons provided by fewer than a majority of the Commission.

III. Conclusion

13. "How quick come the reasons for approving what we like!"[47] In this case, the Chairman oversaw the submission of a brief that presents the position of two

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[43] *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (citations omitted).

[44] *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (*Chenery*) ("We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."); *id*. at 88 (explaining that the Court would "confin[e] [its] review to a judgment upon the validity of the grounds upon which the Commission itself based its action . . . .) (citation omitted); *id*. ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment."); *id*. ("For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.").

[45] *See State Farm*, 463 U.S. at 43.

[46] *See supra* note 9.

[47] Jane Austen, *Persuasion* 16 (Gillian Beer ed., Penguin Classics 1998).

commissioners as if it were the position of the Commission. This flouts the structure of DOE Organization Act, upsetting the norms of corporate action that govern an independent agency like FERC. The Chairman should have directed the Solicitor's Office to file a brief that did no more than explain the statutory operation of FPA section 205(g) with the Commissioners' separate Fair RATES Act statements attached, as the statute contemplates, and it should have refrained from either advancing merits arguments or from seeking specific relief. The Solicitor's Office Brief is not a Commission order, cannot stand in for one, and is owed no greater deference or solicitude by any reader than is due to the submission of any other litigant.

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James P. Danly
Commissioner

APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C. Docket No. ER21-2582-000

STATEMENT OF JAMES P. DANLY

(Issued October 27, 2021)

1. I submit this statement in accordance with section 205(g)(1)(B) of the Federal Power Act (FPA).[1] I voted to deny the proposal.

2. PJM Interconnection, L.L.C. (PJM) filed revisions to its Open Access Transmission Tariff (OATT) on July 30, 2021, to change the application of the Minimum Offer Price Rule (MOPR) in its capacity market, pursuant to FPA section 205.[2] On September 29, 2021, the Commission's Secretary issued a notice stating that due to "the absence of Commission action on or before September 28, 2021, PJM's proposal became effective by operation of law."[3]

3. Accordingly, I provide this statement to explain why PJM's proposed revisions to its MOPR are unjust and unreasonable and why the Commission should have rejected PJM's submission in an order denying its FPA section 205 filing.[4]

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[1] 16 U.S.C. § 824d(g)(1)(B). In October 2018, the America's Water Infrastructure Act became law. America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, 132 Stat. 3765 (2018). That Act included provisions from the Fair Ratepayer Accountability, Transparency, and Efficiency Standards Act (the Fair RATES Act) amending FPA section 205 to treat inaction by the Commission that allows a rate change to take effect as an order for purposes of rehearing and judicial review. *See id.* § 3006.

[2] 16 U.S.C. § 824d. PJM's FPA section 205 filing is hereafter referred to as the "Focused MOPR."

[3] September 29, 2021 Notice of Filing Taking Effect by Operation of Law.

[4] Because the scope of our inquiry is narrow when evaluating proposed tariff revisions under FPA section 205, it is unnecessary to respond to all of the arguments set forth in my colleagues' statements. My decision not to respond to a particular argument should not be read as acquiescence. Similarly, litigants seeking rehearing also need not feel compelled to reply to specific arguments presented in the Commissioners' statements. Though required by law, the statements are legally irrelevant. Because there is no Commission determination or reasoning in an actual Commission order, the

4. As an initial matter, it is important to recognize what this case is *not* about. It is *not* about whether PJM's Expanded MOPR[5]—previously approved by an order of the Commission—is just and reasonable. Rather, the question before the Commission is whether PJM has demonstrated that its new proposal, the Focused MOPR, is just and reasonable.[6] No critique of the now-accepted Expanded MOPR, regardless of how convincing or well-reasoned, can inform the determination we are called upon to make here under FPA section 205. Because this case is about the proposal before us, and not about the Expanded MOPR, the discussions of the claimed deficiencies in the Expanded MOPR made by PJM in its filing (Transmittal), by certain parties in their comments, and by my colleagues, are simply irrelevant.

5. Further, it is not my contention that the Expanded MOPR represents the only acceptable means by which to establish the necessary safeguards against the price-suppressive effects of state subsidies that are required to ensure a just and reasonable capacity market. I recognize that at different times the Commission has found, and the courts have upheld, varying approaches to address this price suppression on Regional Transmission Organizations' (RTO) capacity markets. In these cases, the Commission approved less comprehensive MOPRs that did not apply to state subsidies as widely as

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arguments that litigants must "urge[] before the Commission" on rehearing to ensure preservation should probably be rooted in first principles, case law, and reference to the contents of PJM's filing. 16 U.S.C. § 825*l*(b).

[5] *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order), *order establishing just & reasonable rate*, 169 FERC ¶ 61,239 (2019) (December 2019 Order), *order on reh'g & clarification*, 171 FERC ¶ 61,034 (Order Denying Rehearing of June 2018 Order), *order on reh'g & clarification*, 171 FERC ¶ 61,035 (Rehearing Order of December 2019 Order), *order on reh'g & compliance*, 173 FERC ¶ 61,061 (2020) (October 2020 Rehearing Order), *order on compliance & clarification*, 174 FERC ¶ 61,036 (January 2021 Compliance & Clarification Order), *order setting aside prior order, in part*, 174 FERC ¶ 61,109 (2021) (Order Setting Aside Prior Order) (collectively, the Expanded MOPR).

[6] *See Neb. Pub. Power Dist. v. FERC*, 957 F.3d 932, 943 (8th Cir. 2020) (recognizing that "courts have made it clear that FERC 'restricts itself to evaluating the confined proposal'" and "[t]herefore, FERC 'need only find the *proposed* rates to be just and reasonable.'") (citations omitted); *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) ("When acting on a public utility's rate filing under section 205, the Commission undertakes 'an essentially passive and reactive role' and restricts itself to evaluating the confined proposal.") (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875-76 (D.C. Cir. 1984)).

the Expanded MOPR.[7] Those approaches were upheld, in part, because the Commission balanced competing interests when evaluating those proposals and determined that the exemptions afforded to state subsidies would not have had a sufficiently significant effect on capacity market prices to require mitigation. Depending on its details, any number of proposals could be offered to replace the Expanded MOPR and still satisfy the FPA's just and reasonable standard.

6. However, the precedent approving such approaches in the past cannot be read to support the proposal before us. By allowing this filing to be accepted by operation of law, the Commission has abandoned its responsibility to mitigate price suppression by state subsidies, which PJM's filing characterizes as not involving "actual" market power.

7. Because we need engage in only a narrow inquiry, it is worth dispelling two misunderstandings that have unfortunately crept into the discussion and development of PJM's Focused MOPR proposal. First, a conceit has developed that the institution of a MOPR and the consequent mitigation of the offers of state-supported resources somehow represent an unlawful intrusion into the FPA's reservation of the states' authority over generation. As I explain in detail below, the courts of appeals in both the Third Circuit and the District of Columbia Circuit (D.C. Circuit) have unequivocally rejected this assertion in *New Jersey Board of Public Utilities. v. FERC*,[8] and *New England Power Generators Association, Inc. v. FERC*.[9] In light of these decisions, this argument is simply untenable.

8. The second misunderstanding that has regrettably informed much of the discussion leading up to this submission is the belief that the application of a MOPR to a state subsidy is tantamount to finding the subsidy "illegitimate" and therefore worthy of discouragement. I take no position on the legitimacy of such subsidies, which is a matter outside the Commission's jurisdiction.[10] Instead, the issue we must grapple with is what

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[7] *See, e.g.*, *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14 (D.C. Cir. 2018) (*NextEra*); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 100 (3d Cir. 2014) (*NJBPU*); *New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 286-87, 290-91 (D.C. Cir. 2014) (*NEPGA*).

[8] 744 F.3d 74.

[9] 757 F.3d 283.

[10] I want to make clear that my opposition to the Focused MOPR is not part of a "campaign to 'nullify' the effects of legitimate state policies." Chairman Glick and Commissioner Clements Statement at P 3 (Glick-Clements Statement). My opposition is grounded solely in our obligation under the FPA to ensure that capacity prices are just and reasonable.

effects such subsidies—legitimate or not—will have on the wholesale markets within our jurisdiction. We are, after all, charged with the responsibility for policing wholesale capacity market rates in order to ensure that they remain just and reasonable.[11]

I. Mitigation of the Price Suppressive Effects of State Subsidies is Required to Ensure that Rates Produced by PJM's Capacity Market Are Just and Reasonable

9. There seems to be some confusion as to why a MOPR, or some other mitigation of the price-suppressive effects of state-supported resources and buyer-side market power, is required. The purpose of a MOPR is not to "deter[ ] state subsidy programs."[12] Rather, mitigation is required by our statutory duty to ensure that PJM's capacity rates are just and reasonable, the fundamental requirement of FPA section 205. In order to explain why the courts have required such mitigation, a brief description of the development of the Commission's market-based rate regime is in order.

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[11] The submission of PJM's Focused MOPR represents the culmination of a long process involving PJM, the Commission, Commission staff and PJM's stakeholders. During those discussions, I issued a series of white papers to serve as a basis for public engagement on a number of the issues that are squarely raised in this proceeding. *See* Comm'r James P. Danly, *White Paper: Commissioner James Danly on the Requirement that Competitive Markets be Protected from the Exercise of Market Power Applied to RTO Capacity Markets*, FERC (July 15, 2021), https://cms.ferc.gov/news-events/news/white-paper-commissioner-james-danly-requirement-competitive-markets-be-0; Comm'r James P. Danly, *White Paper: Commissioner James Danly on Results of The PJM Capacity Auction (2022/2023 RPM Base Residual Auction)*, FERC (June 17, 2021), https://cms.ferc.gov/news-events/news/white-paper-commissioner-james-danly-results-pjm-capacity-auction-20222023-rpm; Comm'r James P. Danly, *White Paper: Commissioner James Danly on the Requirement that Competitive Markets be Protected from the Exercise of Market Power Applied to RTO Capacity Markets*, FERC (June 17, 2021), https://cms.ferc.gov/news-events/news/white-paper-commissioner-james-danly-requirement-competitive-markets-be-protected; Comm'r James P. Danly, *Danly Office White Paper: The Requirement that Competitive Markets be Protected from the Exercise of Market Power Applied to RTO Capacity Markets*, FERC (May 20, 2021), https://www.ferc.gov/news-events/news/danly-office-white-paper-requirement-competitive-markets-be-protected-exercise; Comm'r James P. Danly, *Commissioner James Danly Proposal: State Option to Choose Resources for RTO Capacity Markets* (Apr. 15, 2021), https://www.ferc.gov/news-events/news/commissioner-james-danly-proposal-state-option-choose-resources-rto-capacity.

[12] Transmittal at 7.

A. Judicial Precedent Requires the Commission to Mitigate the Effects of Market Power in Order to Satisfy FPA Section 205's Just and Reasonable Standard

10. Rate regulation under both the FPA and the Natural Gas Act (NGA) is governed by the same statutory standard: the Commission can only approve proposed rates that are just and reasonable.[13] Although the just and reasonable standard is most often thought of as designed to protect consumers from unreasonably high rates, it also protects sellers from being required to provide service at rates that are unreasonably low. As the Supreme Court put it in its seminal *Federal Power Commission v. Hope Natural Gas Co.* decision, "[t]he rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of *the investor and the consumer interests*."[14]

11. The Supreme Court has held on numerous occasions that, under the just and reasonable standard, "the Commission is not bound to any one ratemaking formula."[15] Nevertheless, for most of its history, the Commission generally employed a cost-of-service approach, in which service providers were entitled to recover their costs plus the additional rate of return deemed sufficient to attract necessary capital.[16]

12. In the early 1970s—at a time when the Commission was charged with the formidable task of regulating the prices of all natural gas sold in interstate commerce—the Commission attempted to apply a market-based approach to regulating sales by small producers. This attempt was soundly rejected by the Supreme Court in 1974 in *Federal Power Commission v. Texaco Inc*.[17] The Court's reasoning was as follows:

> For the purposes of the proceedings that may occur on remand, we should also stress that in our view *the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates* mandated by the Act. It is abundantly

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[13] *See* 16 U.S.C. §§ 824d, 824e (FPA sections 205 and 206); 15 U.S.C. §§ 717c, 717d (NGA sections 4 and 5).

[14] 320 U.S. 591, 603 (1944) (emphasis added).

[15] *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008) (citing *Mobil Oil Exploration & Producing Se., Inc. v. United Distribution Cos.*, 498 U.S. 211, 224 (1991); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968)).

[16] *See id.*

[17] 417 U.S. 380 (1974) (*Texaco*).

> clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas. Hence, the necessity for regulation . . . . *In subjecting producers to regulation because of anticompetitive conditions in the industry, Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price*.[18]

13. This holding appeared to drive a stake into the heart of market-based pricing under the just and reasonable standard. More than fifteen years later, however, the Commission turned again to market forces to aid in setting rates and this time met with more success as it sought to reconcile the employment of market forces with its obligations to ensure just and reasonable rates.

14. The first step came in a case—*Tejas Power Corporation v. FERC*[19]—that did not actually involve a market-based rate. There, the D.C. Circuit reviewed a natural gas pipeline rate settlement that had been approved by the Commission on the grounds that all of the pipeline's local distribution company (LDC) customers had agreed to it.[20] The court observed that: "[i]n a competitive market, where *neither buyer nor seller has significant market power*, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that price is close to marginal cost, such that the seller makes only a normal return on its investment."[21]

15. The court then went on to reject the Commission's approval of the settlement because it had not determined whether the pipeline had market power.[22] Absent that determination, there was no basis for the Commission to conclude that the LDCs' voluntary agreement could show that the settlement rates were just and reasonable.[23] The court's observation that market-based rates *could* be just and reasonable "where neither

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[18] *Id.* at 397-99 (emphasis added).

[19] 908 F.2d 998 (D.C. Cir. 1990) (*Tejas Power*).

[20] *See id*. at 1000.

[21] *Id.* at 1004 (emphasis added).

[22] *See id*. at 1004, 1006.

[23] *See id.*

buyer nor seller has significant market power"[24] suggested a means by which market-based rates might be consistent with the Supreme Court's holding in *Texaco* that "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates."[25] The Supreme Court's holding had been grounded on the then-prevailing market conditions, where "the natural gas industry was heavily concentrated and . . . monopolistic forces were distorting the market price for natural gas."[26] Where, however, the Commission took steps to show that neither buyers nor sellers had significant market power, demonstrating that monopolistic forces were not distorting market prices, the prevailing market price would *not* be the "final measure," and the use of market-based rates could satisfy the just and reasonable standard.

16. Viewed in isolation, *Tejas Power* may appear to have had little value in advancing the progression from cost-based to market-based rates. But the import of this decision does not lie in its substantive ruling on the proposed settlement, but rather in the language quoted above, which paved the way for today's market-based rate regime. This part of *Tejas Power* has been cited in almost every subsequent court decision addressing the legitimacy of the Commission's market-based rate orders.[27]

17. In order to meet the requirements of *Tejas Power*, the Commission's subsequent orders granting market-based rates have relied upon a finding that the participants in the market either do not have market power or that any market power they possess has been mitigated. For example, in *Elizabethtown Gas*, the D.C. Circuit described in detail the market analysis conducted by the Commission before approving Transcontinental Gas Pipe Line Company's (Transco) request that its merchant function be permitted to sell natural gas at market-based rates. From this, the court concluded that the Commission's

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[24] *Id*. at 1004.

[25] *Texaco*, 417 U.S. at 397.

[26] *Id.* at 397-98.

[27] *See, e.g.*, *Mont. Consumer Counsel v. FERC*, 659 F.3d 910, 916, 919 (9th Cir. 2011) (quoting *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004), which quotes *Tejas Power*, 908 F.2d at 1004); *Blumenthal v. FERC*, 552 F.3d 875, 882 (D.C. Cir. 2009) (citing *Tejas Power*, 908 F.2d at 1004); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d at 1013 (quoting *Tejas Power*, 908 F.2d at 1004); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (*Elizabethtown Gas*) (quoting *Tejas Power*, 908 F.2d at 1004).

analysis "provides strong reason to believe that Transco will be able to charge only a price that is 'just and reasonable' within the meaning of [section] 4 of the NGA."[28]

18. Order No. 697,[29] in which the Commission issued its regulations governing market-based rate sales in the electric industry, similarly focuses on ensuring that market prices are not distorted by market power. Under Order No. 697, the Commission analyzes whether a seller has market power and, if so, whether that market power has been mitigated.[30] The Commission recognized that monopsony power could also be an important issue, but there was insufficient evidence to confirm what was—at the time—a theoretical problem, and the Commission reserved taking action until monopsony power issues were raised in a market-based rate proceeding or in a complaint.[31] On appeal, the United States Court of Appeals for the Ninth Circuit upheld the general principle that market power must be mitigated in order for competitive markets to be just and reasonable.[32] "By screening for market power before authorizing market-based rates, and by continually monitoring sellers for evidence of market power, FERC has adopted a permissible approach to fulfilling its statutory mandate *to ensure that rates are just and reasonable.*"[33]

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[28] *Elizabethtown Gas*, 10 F.3d at 871.

[29] *Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, *order clarifying final rule*, 121 FERC ¶ 61,260 (2007), *order on reh'g and clarification*, Order No. 697-A, 123 FERC ¶ 61,055, *order on reh'g and clarification*, 124 FERC ¶ 61,055, *order on reh'g and clarification*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh'g and clarification*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g and clarification*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel*, 659 F.3d 910.

[30] Order No. 697, 119 FERC ¶ 61,295 at P 3. More recently, the Commission held that, because RTO mitigation measures adequately mitigate market power, sellers need not demonstrate a lack of market power in order to make market-based sales in RTO markets. *See Refinements to Horizontal Mkt. Power Analysis for Sellers in Certain Reg'l Transmission Orgs. & Indep. Sys. Operator Mkts.*, Order No. 861, 168 FERC ¶ 61,040 (2019), *order on reh'g and clarification*, Order No. 861-A, 170 FERC ¶ 61,106 (2020).

[31] *See* Order No. 697, 119 FERC ¶ 61,295 at P 463.

[32] *See Mont. Consumer Counsel*, 659 F.3d at 919.

[33] *Id.* (emphasis added).

19. As the Supreme Court has made clear, "the prevailing price in the marketplace *cannot be the final measure of 'just and reasonable' rates*."[34] Instead, in order for sales at a market-based rate to be just and reasonable, the sales must be made in a market "where neither buyer nor seller has significant market power."[35] Where buyers or sellers do have market power and that market power is not mitigated, market-based rates cannot satisfy the just and reasonable standard.

20. It is true that none of the cases I cite above involve mechanisms designed to mitigate the price-suppressive effects of state subsidies in capacity markets, but I do not raise them for that purpose. Rather, their relevance to this proceeding is that they establish a fundamental principle: that competitive markets—such as PJM's capacity market—cannot be deemed just and reasonable unless measures have been taken to ensure that they are free from the exercise of both buyer-side and seller-side market power. We need not argue from principles, however. There is Commission and court precedent that specifically addresses the need to mitigate the price-suppressive effects of state subsidies.

B. The Exercise of Buyer-Side Market Power in RTO Capacity Markets Through State Subsidies

21. As the Supreme Court has explained, buyer-side market power, more commonly known as monopsony market power,[36] "is market power on the buy side of the market."[37] The Court went on to observe that "monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a 'buyer's

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[34] *Texaco*, 417 U.S. at 397 (emphasis added).

[35] *Tejas Power*, 908 F.2d at 1004.

[36] Neither the Commission's orders nor judicial precedent have employed consistent terms to describe different market participants' exercise of market power. *See, e.g.*, *NJBPU*, 744 F.3d at 85 n.7 (describing the "imprecise usage" of the terms "monopolist" and "monopsonist" as applied to the MOPR because "the terms are used loosely by the parties to mean, respectively, sellers and buyers who exercise disproportionate power in imperfectly competitive markets. More particularly, they use the term 'monopsony' to mean net-buyers in the auction who sell into the auction at artificially low prices in order to depress the clearing price"). This is particularly troubling in this case because PJM seeks to define its way out of the obligation to guard against the exercise of market power. *See infra* PP 59-60.

[37] *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312, 320 (2007) (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 Cornell L. Rev. 297 (1991)).

monopoly.'"[38] Further, "[m]onopoly and monopsony are symmetrical distortions of competition from an economic standpoint."[39]

22. In most markets, buyer-side market power is exercised through the prices offered by the buyer of a product. For example, the claim examined by the Supreme Court in *Weyerhaeuser* was that a buyer with monopsony power artificially raised the price it paid for saw logs, thereby raising the market price for the logs and driving a competing lumber company out of business.[40] Such a tactic is known as "predatory bidding."[41]

23. Buyer-side market power in RTO capacity markets, while similarly distorting competition, is exercised in a completely different manner. This is because of the relative inability of buyers to directly influence capacity prices through the submission of offers to purchase at a particular price. Instead, the demand curves used by RTOs to set capacity prices are administratively established by the RTOs. Such administrative processes are necessary because there is very little price-elasticity in demand for capacity in the RTO markets, especially during the peak periods used to determine the level of demand in the capacity auctions.[42]

24. Buyer-side market power is exercised in RTO capacity markets not through altering the price offered for purchases by a buyer, but rather by subsidizing or otherwise paying owners of generation to submit below-cost offers to sell capacity into the RTO capacity markets. The submission of below-cost offers into a capacity auction can artificially suppress the resulting price for capacity in one of two ways: (1) if a subsidized resource would have submitted the marginal cost offer had it not been subsidized, offering that resource's capacity below its marginal cost would cause the market clearing price to be lowered to the price offered by the next highest cost offer; or (2) if the cost of

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[38] *Id.* (citations omitted).

[39] *Id.* at 322 (quoting *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984)).

[40] *See id.* at 314-16.

[41] *See id.* at 320.

[42] The complex reasons for this are beyond the scope of this statement, but include that: (1) at present, there is little storage capacity for electricity, which otherwise must be consumed when generated; (2) electricity is an essential commodity that most consumers demand with little regard to price; (3) most consumers do not know the price of the electricity at the time they are consuming it; and (4) most consumers are charged an average rate for the electricity over a period of time, such as one month, and therefore do not pay the cost of the electricity they consume at the time they consume it.

a subsidized resource is higher than the market clearing price, then offering the resource below its cost will lower the supply curve, thereby lowering the point of intersection of the supply curve and the demand curve and lowering the resulting capacity price.

25. The Commission and the RTOs recognized the potential for the exercise of buyer-side market power to reduce capacity prices almost from the first RTO capacity auctions. For example, PJM's Reliability Pricing Model (RPM) was approved in 2006 and subsequently modified. The RPM forms the basis for PJM's capacity market today. The Commission approved PJM's proposed MOPR—intended to mitigate buyer-side market power—finding the MOPR to be "a reasonable method of assuring that net buyers *do not exercise monopsony power by seeking to lower prices* through self supply."[43]

26. The Commission also approved buyer-side market power mitigation provisions in early versions of the ISO New England, Inc. (ISO New England) and New York Independent System Operator, Inc. (New York ISO) capacity markets.[44]

27. The first iteration of PJM's tariff governing the RPM capacity auction did not apply the MOPR to generation resources subsidized by states, as opposed to the potential monopsony power of load-serving entities. The Commission did not base its approval of this exclusion on a finding that state subsidies did not represent a form of buyer-side market power. Rather, the Commission approved the exclusion because it "enables states to meet their responsibilities to ensure local reliability."[45] This did not, however, constitute a finding that it was somehow inappropriate to mitigate price-suppressive effects of state subsidies.

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[43] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 104 (2006), *order on reh'g and clarification*, 119 FERC ¶ 61,318 (2007) (emphasis added).

[44] *See Devon Power LLC*, 115 FERC ¶ 61,340, at P 113 (2006) ("[W]hen loads own new resources, they may have an interest in depressing the auction price, since doing so could reduce the prices they must pay for existing capacity procured in the auction."); *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 103 ("Markets require appropriate price signals to alert investors when increased entry is needed. By allowing net buyers to artificially depress prices, these necessary price signals may never be seen."), *order on reh'g*, 124 FERC ¶ 61,301, at P 27 (2008) ("[T]he proposed rules, as modified herein, assure that uneconomic new capacity will not be allowed to distort market supply curves and inefficiently depress market clearing prices below a competitive level.").

[45] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at P 104.

28. The Commission made this clear in 2011, when it approved PJM's proposal to eliminate the exclusion of state-supported resources from its MOPR.[46] The Commission explained that:

> *The mounting evidence of risk from what was previously only a theoretical weakness in the MOPR rules* that could allow uneconomic entry has caused us to reexamine our acceptance of the existing state exemption, which we approved as part of the 2006 RPM Settlement Order. For these reasons, we accept as just and reasonable PJM's proposal to eliminate the current state exemption.[47]

In reaching this conclusion, the Commission found that "*we are statutorily mandated* to protect the RPM against the effects of such entry."[48]

29. The Commission's approval of the elimination of the exemption for state-supported resources was upheld on appeal to the Third Circuit.[49] The court found that the Commission's decision to apply the MOPR was reasonable because the Commission explained that:

> [T]he actual prospect of thousands of megawatts of new generation, developed under arrangements that would explicitly subsidize the resources regardless of Auction price, potentially being offered into the Reliability Market at a zero bid brought into focus the distortive effect—no longer "theoretical"—that the state exemption could have on market prices for all capacity.[50]

30. The court also rejected the claim that the Commission does not have jurisdiction to apply a MOPR to state-supported resources because the FPA does not give the Commission jurisdiction over generation:

> After reviewing the FERC Orders at issue here and the relevant case law, *we conclude that FERC did not exceed its*

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[46] *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011).

[47] *Id.* P 139 (emphasis added).

[48] *Id.* P 143 (emphasis added).

[49] *See NJBPU*, 744 F.3d at 96-102.

[50] *Id.* at 100 (citation omitted).

> *jurisdiction in eliminating the state-mandated provision*. Under the FPA, FERC has jurisdiction over rules affecting the rates of the transmission or sale of energy in interstate commerce. *See* 16 U.S.C. § 824d. Here, it is undisputed that New Jersey and Maryland's plans to introduce thousands of megawatts of new capacity into the Base Residual Auction would have had an effect on the prices of wholesale electric capacity in interstate commerce. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 374, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (holding, among other things, that FERC had jurisdiction over power allocations that affect wholesale rates, and stating that "[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.") (emphasis added); *Municipalities of Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (rejecting jurisdictional challenge to FERC's authority to levy deficiency charges on utilities that failed to procure generating capacity sufficient to meet its load requirements, and stating that, "[i]t is sufficient for jurisdictional purposes that the deficiency charge affects the fee that a participant pays for power and reserve service, irrespective of the objective underlying that charge.").[51]

31. The D.C. Circuit reached the same conclusion later that year in an appeal of ISO New England's buyer-side market power mitigation provisions.[52] The petitioners in that case similarly argued that "the orders serve to dictate which resources a utility must use to satisfy its capacity obligations, in violation of the FPA," and that "FERC's orders impermissibly determine the makeup of a state's resource portfolio."[53] In response, the court held:

> Out-of-market resources—whether self-supplied, state-sponsored, or otherwise—directly impact the price at which the Forward Capacity Market auction clears. *As the price of capacity is indisputably a matter within the Commission's*

[51] *Id.* at 96 (emphasis added). The Third Circuit went on to reject New Jersey's assertion that the Commission "is preventing New Jersey from using the resources it has chosen to promote," holding that "FERC is doing no such thing." *Id.* at 97.

[52] *See NEPGA*, 757 F.3d at 291.

[53] *Id.* at 290.

> *exclusive jurisdiction, FERC likewise has jurisdiction to mitigate buyer-side market power as to out-of-market entrants.* We agree with the Commission's finding that it has jurisdiction over mitigation matters "affecting or relating to wholesale rates" under FPA § 201 and 206. Third Order ¶ 220 (emphasis omitted) (citing *Conn. Dep't of Pub. Util. Control*, 569 F.3d at 478, 481). We stress that FERC's mitigation measures here do not entail direct regulation of facilities, a matter within the exclusive control of the states. *See* 16 U.S.C. § 824(b)(1). The Commission also found that uneconomic entry, regardless of resource and regardless of intent, "can produce unjust and unreasonable prices by artificially depressing capacity prices." *Id.* ¶ 170. *As it is FERC's statutory obligation to ensure that rates are appropriate, we must respect its decision to maintain just and reasonable rates through curbing or mitigating buyer-side market power*.[54]

32. It is true that these cases do not represent a mandate for the imposition of any particular mitigation regime. In some cases, the Commission has approved certain limited exemptions from the MOPR for state-supported resources on the grounds that the limited exception would not lead to significant price suppression.[55] And in reviewing those orders, the courts have found that the Commission "reasonably acted to balance competing interests."[56]

33. This precedent does, however, instruct us that PJM's proposal is not just and reasonable. I am unaware of the Commission ever finding it appropriate to grant a blanket exemption to state-supported resources from the buyer-side market power mitigation provisions applied to RTO capacity markets. Such a blanket exemption would fail to prevent the exercise of market power, and would thus fail to ensure that capacity

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[54] *Id.* at 290-91 (emphasis added) (citation omitted).

[55] *See, e.g.*, *ISO New Eng. Inc.*, 147 FERC ¶ 61,173, at PP 81-88 (2014) (approving exemption for 200 MW/year of state-supported Renewable Technology Resources), *order on reh'g*, 150 FERC ¶ 61,065 (2015), *order on remand*, 155 FERC ¶ 61,023, at P 33 (2016), *order on reh'g*, 158 FERC ¶ 61,138, at PP 43, 48-49 (2017), *aff'd sub nom*. *NextEra*, 898 F.3d 14.

[56] *NEPGA*, 757 F.3d at 295; *see NextEra*, 898 F.3d at 21-23 (recognizing the Commission's "balancing" approach).

market prices are just and reasonable. The Commission's refusal to grant a blanket exemption has been upheld for this very reason.[57]

C. RTO Capacity Markets Must Be Protected Against Both Seller-Side and Buyer-Side Market Power in Order for the Resulting Capacity Prices to be Just and Reasonable

34. As the above discussion makes clear, RTO capacity markets must be protected against the exercise of market power. It is not optional. The market-based prices derived from the RTO capacity markets are just and reasonable *only* when those prices are unaffected by the exercise of market power. That means that markets must not only include provisions to mitigate seller-side market power, but also buyer-side market power. RTO capacity markets must be markets "where *neither* buyer *nor* seller has significant market power."[58] Otherwise, it would not be "rational to assume that the terms of their voluntary exchange are reasonable," or "to infer that [the] price is close to marginal cost."[59]

35. And, because state subsidies to generation owners distort market clearing prices to below competitive levels, RTO capacity markets must have provisions to mitigate the effects of such subsidies, as the Commission has held on numerous occasions. This is not a requirement based on an attempt to discourage renewable resources, as PJM implies. Rather, the Commission has consistently held—and the courts have consistently affirmed—that RTO capacity markets must have provisions mitigating the price-suppressive effects of state subsidies. Without mitigation, the prices that result from those markets cannot—as a legal matter—be deemed just and reasonable. The Commission has stated that it based "its decision to require [an Independent System Operator] to implement a renewable resources exemption on the Commission's duty to ensure just and reasonable rates pursuant to the FPA," and not on whether the exemption is consistent with federal, state, and municipal renewable energy policies.[60]

36. Some have argued that the assertion that the Commission must address "price suppression" is based on a misreading of caselaw and that the Commission has discretion

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[57] *See NEPGA*, 757 F.3d at 295 ("We defer to the Commission's decision to decline a categorical mitigation exemption for self-supplied and state-sponsored resources.").

[58] *Tejas Power*, 908 F.2d at 1004 (emphasis added).

[59] *Id.*

[60] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,088, at P 12 (2016) (citation omitted).

to determine what conduct is anti-competitive and unjust and unreasonable. While the Commission may have considerable discretion, any Commission action will be reversed under the Administrative Procedure Act (APA), regardless of the subject matter at issue, if it is arbitrary and capricious.[61] This means that the Commission "must examine the relevant [considerations] and articulate a satisfactory explanation for its action[,] including a 'rational connection between the facts found and the choice made.'"[62] No such explanation can be found in the approval of PJM's proposal by operation of law, which, as noted, is an "order" only insofar as it is legally decreed to be so for the limited purposes of establishing rehearing and appeal rights. Putting that aside, no order could ever survive judicial review under the APA's arbitrary and capricious standard if it held that no action whatsoever were required to mitigate the known and significant price-suppressive effects of state subsidies. It simply would not be possible to square such an exercise of discretion with years of Commission and court precedent holding that the Commission is statutorily obligated to address and mitigate the price-suppressive effects of such subsidies.[63]

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[61] *See* 5 U.S.C. § 706.

[62] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*State Farm*) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *accord FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016) (quoting *State Farm*, 463 U.S. at 43).

[63] The Supreme Court did not "unanimously reject[]" the argument that the Commission must mitigate the price-suppressive effects of state subsidies in *Northwest Central Pipeline Corporation v. State Corporation of Kansas*. Glick-Clements Statement at P 75 (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493 (1989)). One of the questions in that case was whether a challenged state regulation was preempted under the Supremacy Clause. The Court found that the challenged regulation was "a regulation of 'production or gathering' within Kansas' power under . . . NGA" section 1(b), 15 U.S.C. § 717(b), which reserves to states the authority to regulate production and gathering, and therefore was not preempted. *Nw. Cent. Pipeline Corp.*, 489 U.S. at 513. As I explain below, the question of whether state action is preempted is not relevant to the question of the Commission's obligation to ensure just and reasonable rates. Further, the Commission's action to mitigate the price suppressive effects of state subsidies does not prevent states from making decisions pursuant to their authority under FPA section 201(b). 16 U.S.C. § 824(b). States simply "bear the costs of [those] decision[s]." *NJBPU*, 744 F.3d at 97 (quoting *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009)) (internal quotation marks omitted).

II. PJM's Proposal is Unjust and Unreasonable and it is Bad Policy

37. PJM's proposal includes lengthy provisions addressing the imposition of a MOPR. However, these provisions do not evince a careful or balanced attempt to ensure the mitigation of market power (including that created by state support of resources). Rather, PJM's tariff provisions are structured so as to ensure that it is virtually certain that the MOPR will *never* be applied to *any* generation resource. These provisions are so deliberately ineffectual that their approval violates our statutory duty to ensure that PJM's capacity market produce just and reasonable rates.[64]

A. PJM's Proposed Changes

38. PJM's current Expanded MOPR[65] applies to the following: (1) new natural-gas-fired resources; and (2) resources that receive or are eligible to receive State Subsidies,[66] subject to certain exemptions.[67] PJM's proposed revisions to section 5.14 of Attachment DD of its OATT alter the application of the MOPR in PJM's capacity market. In doing so, PJM proposed several newly defined terms. Two main aspects to PJM's Focused MOPR proposal are: (1) changes regarding what PJM calls "actual" buyer-side market power mitigation; and (2) the definition of "Conditioned State Support."

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[64] *See* 16 U.S.C. § 824d(a) ("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*.") (emphasis added).

[65] *Supra* note 5.

[66] *See* December 2019 Order, 169 FERC ¶ 61,239 at P 2; *id.* P 67 (defining State Subsidy); *see also* October 2020 Rehearing Order, 173 FERC ¶ 61,061 at P 41 ("We accept PJM's proposed definition of State Subsidy as consistent with the December 2019 Order.").

[67] Those exemptions included: (1) existing self-supply resources; (2) existing demand response, energy efficiency, and storage resources; (3) existing renewable resources participating in renewable portfolio standard programs; and (4) the Competitive Exemption for new and existing resources that are not subsidized and do not generally require review. *See* December 2019 Order, 169 FERC ¶ 61,239 at P 2. Additionally, resources could qualify for a unit-specific exception or a resource-specific exception. *See id.*

39. PJM proposes to define "Buyer-Side Market Power" as "the ability of Capacity Market Sellers with a Load Interest to suppress RPM Auction clearing prices for the overall benefit of their (and/or affiliates) portfolio of generation and load."[68] Further, PJM proposes to define the "Exercise of Buyer-Side Market Power" as the

> anti-competitive behavior of a Capacity Market Seller with a Load Interest, or directed by an entity with a Load Interest, to uneconomically lower RPM Auction Sell Offer(s) in order to suppress RPM Auction clearing prices for the overall benefit of the Capacity Market Seller's (and/or affiliates of Capacity Market Seller) portfolio of generation and load or that of the directing entity with a Load Interest as determined pursuant to Tariff, Attachment DD, section 5.14(h-2)(2)(B). A bilateral contract between the Capacity Market Seller and an entity with a Load Interest with the express purpose of lowering capacity market clearing prices shall be evidence of the Exercise of Buyer-Side Market Power.[69]

40. PJM proposes that Conditioned State Support be defined as

> any financial benefit required or incentivized by a state, or political subdivision of a state acting in its sovereign capacity, that is provided outside of PJM Markets and in exchange for the sale of a FERC-jurisdictional product conditioned on clearing in any RPM Auction, where 'conditioned on clearing in any RPM Auction' refers to specific directives as to the level of the offer that must be entered for the relevant Generation Capacity Resource in the RPM Auction or directives that the Generation Capacity Resource is required to clear in any RPM Auction.[70]

41. Under PJM's revised tariff provisions, the scope of the prohibition against Conditioned State Support is virtually coterminous with the prohibitions established in

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[68] PJM, Intra-PJM Tariffs, OATT, Definitions A-B (16.0.0).

[69] *Id.*, Definitions E-F (31.0.0). In PJM's proposed definitions, "Load Interest" is defined as the "responsibility for serving load within the PJM Region, whether by the Capacity Market Seller, an affiliate of the Capacity Market Seller, or by an entity with which the Capacity Market Seller is in contractual privity with respect to the subject Generation Capacity Resource." *Id.*, Definitions L-M-N (30.0.0).

[70] *Id.*, Definitions C-D (30.0.0).

Hughes v. Talen Energy Marketing, LLC and the restriction on Buyer-Side Market Power is now limited to those entities with a load interest that intend to exercise market power.[71] In addition, a generation resource may be subject to the Focused MOPR, if PJM, with the advice and input of the IMM, has a reasonable basis to believe that the sell offer is a result of an exercise of buyer-side market power. Under PJM's proposal, capacity market sellers may reflect all state support in their offers provided that the support is not Conditioned State Support. The proposed revisions also include a self-certification requirement and provisions to allow PJM and the IMM to conduct further inquiry when appropriate.

42. PJM's proposal also includes a "non-exhaustive list of circumstances that would not support an inquiry into or a determination that a resource may be used in an Exercise of Buyer-Side Market Power":

> (a) the Generation Capacity Resource is a merchant generation supply resource that is not contracted to an entity with a Load Interest;
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> (b) the Generation Capacity Resource is acquired by or under the contractual control of the Capacity Market Seller through a competitive and non-discriminatory procurement process open to new and existing resources; or
>
> (c) the Generation Capacity Resource is owned by or bilaterally contracted to a Self-Supply Seller and such resource is demonstrated as consistent with or included in the Self-Supply Seller's long-range resource plan (e.g., a long-range hedging plan) that is approved or otherwise accepted by the [Relevant Electric Retail Regulatory Authority (RERRA)], provided that any such plan approval or contracts do not direct the submission of an uneconomic offer to deliberately lower market clearing prices or for the Capacity Market Seller to otherwise perform an Exercise of Buyer-Side Market Power . . . .[72]

43. PJM explains in its Transmittal that "[t]he Expanded MOPR tests for whether a state-subsidized Capacity Resource offer is below a competitive level and—if it is—

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[71] *See* Transmittal at 25 (citing *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) (*Hughes*)).

[72] *Id*. at 40-41 (quoting PJM, Intra-PJM Tariffs, OATT, Attach. DD, § 5.14(h-2)(2)(B)(ii)).

resets the offer to a higher level that excludes the economic benefit of any state support or subsidy[,]" and "[i]f that higher offer price does not clear the auction, the resource is not committed to provide capacity to the PJM Region, and its capacity is not counted towards meeting reliability requirements in PJM."[73] In justification of its proposed revisions, PJM asserts that "the Expanded MOPR's broad reach and expanded definition of subsidies poses an increased risk that resources receiving such perceived subsidies will not clear the market, resulting in either (1) frustration of the state policy objective or Load Serving Entity ('LSE') resource strategy; or (2) customer payment for duplicative resources."[74] Therefore, PJM states, the consequence is a double payment for consumers in the states where the subsidies originated, i.e., a payment for the excluded resource (the one that did not clear the auction and received a state subsidy) and the resource committed by clearing the auction.[75]

44. PJM also asserts that "the evidence indicates that states and Self-Supply entities are more likely to exit the capacity market to meet their policy and business objectives, rather than remain in the capacity market and curtail those objectives."[76] Further, PJM submits that, because the Expanded MOPR results in capacity prices that do not reflect actions taken by states and by Self-Supply Entities to support resources, capacity prices will create incentives for resources to be built that are not needed to maintain reliability.[77] PJM also acknowledges that implemented states' policies that favor certain generation resources may result in a reduction in capacity clearing prices but asserts that such reduction should not be viewed as harmful to other states.[78] I disagree with these assertions.

B. The Focused MOPR Fails to Protect the Wholesale Capacity Market from Buyer-side Market Power

45. Let me begin with the Focused MOPR provisions applicable to state-supported resources. Those provisions do not even purport to protect the market against the price-suppressive effects of market power. The Focused MOPR applies only to generation resources receiving "improper" state support, which PJM describes as "material benefits

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[73] *Id*. at 8.

[74] *Id*. at 12.

[75] *Id*. at 9.

[76] *Id*. at 12.

[77] *Id*. at 11.

[78] *See id.* at 10.

from a state policy in exchange for the sale of a FPA-jurisdictional product *and* such support is conditioned on either the resource clearing an RPM Auction or the seller offering the resource at a specific price level."[79]

46. As PJM acknowledges, this is the same standard established by the Supreme Court for finding that state support for a resource is preempted by the FPA.[80] In *Hughes*, the Supreme Court held that because Maryland's program "condition[ed] payment of funds on capacity clearing the auction," its program suffered a "fatal defect that render[ed] [its] program unacceptable."[81] Therefore, the Supreme Court rejected Maryland's program on the basis that it "disregard[ed] an interstate wholesale rate required by FERC."[82] But the *Constitutional* standard animating the preemption-based prohibitions set forth in *Hughes* is absolutely irrelevant to the *statutory* standard the Commission must apply under FPA section 205, which is to ensure that PJM's capacity market prices are just and reasonable.[83]

47. I question the need for the incorporation of *Hughes* into PJM's proposed definition of Conditioned State Support because the courts are more than capable of providing relief to plaintiffs bringing preemption claims. I would not object to its inclusion as part of a set of provisions establishing an adequate program of market-power mitigation, but there is nothing else within PJM's proposal. And this single provision is inadequate protection against the price-suppressive effects of state subsidies. A just and reasonable capacity market must protect against all market-power driven price suppression, not just the price

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[79] *Id*. at 42; *see* PJM, Intra-PJM Tariffs, OATT, Definitions C-D (30.0.0) (defining "Conditioned State Support" as "any financial benefit required or incentivized by a state, or political subdivision of a state acting in its sovereign capacity, that is provided outside of PJM Markets and in exchange for the sale of a FERC-jurisdictional product conditioned on clearing in any RPM Auction . . . .").

[80] Transmittal at 43.

[81] *Hughes*, 136 S. Ct. at 1299.

[82] *Id*.

[83] Mitigation of bids submitted by resources accepting state payments in violation of *Hughes* should be unnecessary. Those state programs fail to pass constitutional scrutiny and the state should not enact them. If enacted, they should be challenged, not through tariff mechanisms in a FERC proceeding, but through Federal court actions sounding in preemption. But state-subsidized bids that do not violate *Hughes* will nevertheless artificially suppress capacity prices and must be mitigated through tariff provisions in order for those tariffs to meet the statutory requirement of the FPA's just and reasonable standard.

suppression caused by a small subset of "improper" state subsidies. Simply put, it is the just and reasonable standard, not preemption, that applies to PJM's jurisdictional wholesale market.

48. PJM does at least acknowledge the obligation to mitigate the exercise of buyer-side market power by load-serving market participants.[84] However, rather than a straightforward mitigation of these entities' buyer-side market power, PJM proposes a number of additional inquiries leading to off ramps from mitigation.[85] The number of off-ramps is so extensive that it is exceedingly unlikely that any offer from a load-serving market participant ever will be mitigated. For example, mitigation can be avoided by a market participant's self-certification that does not *intend* to exercise market power—this is an off-ramp that no market participant will fail to exploit.[86]

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[84] *See* Transmittal at 23-24.

[85] *See* Independent Market Monitor for PJM (IMM) August 20, 2021 Protest at 1 ("The PJM markets would be better off, more competitive, and more efficient with no MOPR than with PJM's proposed approach. PJM's proposal would effectively eliminate the MOPR while creating a confusing and inefficient administrative process that effectively makes it both unnecessary and impossible to prove buyer side market power . . . .").

[86] While not the most important element of PJM's proposal, the self-certification procedure is doubtless the most inexplicable and unjustifiable. Surely, all are aware of the long history of Commission precedent holding that subsidies can suppress prices regardless of intent, and that regardless of intent, the Commission has an obligation to mitigate price suppression. *See, e.g.*, *NEPGA*, 757 F.3d at 292 ("[C]apacity offered into the market through below-cost bids can suppress prices even when no actor has the intent to do so.") (citations omitted); *id.* at 290-91 ("The Commission also found that uneconomic entry, regardless of resource and regardless of intent, 'can produce unjust and unreasonable prices by artificially depressing capacity prices.'") (citations omitted). By including an element of intent, PJM introduces a completely foreign concept into the Commission's economic analysis. The IMM was quite right to have said,

> An asserted lack of intent to raise or lower prices is not part of the Commission's review of [market-based rates] applications or merger filings, and it is not a condition for the application of market power mitigation in any market. The purpose of the MOPR is not to prevent market manipulation, which does require intent under Commission policy. The purpose is to prevent buyer side market power from undermining market efficiency and competitiveness.

49. PJM's Focused MOPR also fails to satisfy the FPA's just and reasonable standard by not applying the MOPR to demand resources and energy efficiency resources. As noted by the IMM, PJM's proposal to exclude energy efficiency resources from the MOPR has previously been rejected.[87] The IMM recognized in its protest that PJM is incorrect in asserting that "these resources tend to be 'small scale and low cost.'"[88] I agree with the IMM. In my view, demand resources and energy efficiency should not be excluded from the MOPR.

C. The Proffered Justifications for Approving the Focused MOPR Are Unconvincing

50. First, PJM's proposal does not further efficient market outcomes by allowing subsidies of renewable resources to suppress capacity market prices. To the contrary, subsidies of renewable resources by their very nature distort the efficient integration of such resources into PJM's energy and capacity markets. That subsidies result in market inefficiencies is beyond cavil. And while I do not question the right of the states to grant such subsidies to encourage the construction of certain favored resources, it simply is not possible to justify such subsidies on the claim that they *enhance* market efficiency.

51. Second, we must dismiss misguided arguments that we should "allow capacity market sellers to reflect all state support in their offers"[89] on the grounds that capacity market signals no longer are important. One such argument would have it that:

> States are playing a more active role in shaping the resource mix—including both entry and exit—than they were at the time the Commission issued previous orders addressing the scope and purpose of PJM's MOPR. *Consequently, the relative importance of capacity market price signals in guiding resource entry and exit*, a key consideration when PJM's capacity market was first developed, *has declined and likely will continue to decline in the future*, further tilting the

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IMM August 20, 2021 Protest at 10. The entire structure is flawed and inadequate.

[87] *Id*. at 7 (citing December 2019 Order, 169 FERC ¶ 61,239 at P 54)).

[88] *Id*.

[89] Glick-Clements Statement at P 43.

> balance against the sort of extreme mitigation imposed by the Expanded MOPR.[90]

52. There is a logical flaw here. The following two propositions cannot both be true at once: 1) that state subsidies are reducing the importance of capacity market signals needed for efficient entry and exit decisions; and 2) that elimination of the tariff provisions mitigating the effect of state subsidies leads to more efficient market outcomes. If indeed states subsidies are masking capacity market signals, that means that the market is under *more* threat than it was in the past. The only conclusion to draw is that the Commission's role to ensure just and reasonable rates is that much more important.

53. Finally, I am not persuaded by the argument that the adoption of PJM's proposal is necessary because its adoption would have made states and Self-Supply entities less likely to exit the capacity market.[91] In my view, this argument appears to be greatly exaggerated, particularly in light of the results of PJM's most recent auction.[92] Those results reflect that a combined 3,239.7 MW of wind and solar resources cleared the 2022/2023 Auction, out of approximately 11,761 MW of installed wind and solar capacity.[93] This constituted a combined approximate 63% increase (1,253 MW) over the wind and solar capacity awards in the previous auction for the 2021/2022 delivery year, [94] which was not conducted under the Expanded MOPR rules. Moreover, almost all renewable resources that offered into the auction at their minimum offer price received capacity awards. These results demonstrate that renewable resources were cost

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[90] *Id*. P 59 (footnote omitted).

[91] *See id*. P 58 (asserting that the continued application of the Expanded MOPR "poses a significant threat . . . as several states have considered abandoning the capacity market altogether rather than have the resources needed to meet their public policy goals be subjected to mitigation").

[92] I discuss these results in more detail in a White Paper. *See* Comm'r James P. Danly, *White Paper: Commissioner James Danly on Results of The PJM Capacity Auction (2022/2023 RPM Base Residual Auction)*, FERC (June 17, 2021), https://cms.ferc.gov/news-events/news/white-paper-commissioner-james-danly-results-pjm-capacity-auction-20222023-rpm.

[93] *See 2022/2023 RPM Base Residual Auction Results*, PJM 13-14, https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2022-2023/2022-2023-base-residual-auction-report.ashx.

[94] *See id*.

competitive even though the clearing prices in the 2022/2023 Auction were significantly lower than those in previous auctions.[95]

54. It is worth noting that different PJM states have different policies and different favored resources. We would do well to understand that the Focused MOPR itself could cause different states to consider leaving PJM. This risk apparently is going unheeded.[96]

55. In any event, the possibility that a state or a Self-Supply entity may leave PJM if its policy objectives are not accommodated in the capacity market cannot serve as a basis for the Commission to disregard its obligation to ensure just and reasonable rates. By default, it is the privilege of states and utilities to participate in the organized markets as they see fit. It is a state's prerogative to leave an RTO if and when it comes to believe that the costs of membership outweigh the benefits. The markets, however, are not an end in themselves and we cannot abandon our core statutory duty in our zeal to preserve them.

D. Mitigation of Buyer-Side Market Power is Not an Impermissible Intrusion Upon Reserved State Authority

56. Arguments that market-power mitigation impermissibly invades the states' prerogatives under the FPA are directly contrary to judicial precedent. The Third Circuit recognized that states "are free to make their own decisions regarding how to satisfy their capacity needs, but they 'will appropriately bear the costs of [those] decision[s],' . . . including possibly having to pay twice for capacity."[97] States may decide how to manage their capacity needs; the Commission, however, does not need to accommodate those policies at the expense of ensuring adequate mitigation of buyer-side market power. New Jersey tried to argue that the Commission interfered with its rights under the FPA saying:

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[95] My colleagues cite to Exelon's Quad Cities Generating Station as a resource that was subjected to the Expanded MOPR in the most recent auction and failed to clear. *See* Glick-Clements Statement at P 52. I agree that this happened. Quad Cities is not a renewable resource, so of course this failure says nothing about the cost competitiveness of renewables. In any event, this outcome is proof that the Expanded MOPR narrowly targeted the exact resources to which it should be applied. Quad Cities is a large, relatively expensive nuclear facility, and if it had been permitted to offer at $0, that offer undoubtedly would have suppressed PJM capacity prices. I do not question the State of Illinois' right to subsidize Quad Cities to keep it in service, but the costs of that subsidy should be borne by the citizens of Illinois alone.

[96] *See id*. P 58 n.125.

[97] *NJBPU*, 744 F.3d at 97 (quoting *Conn. Dep't of Pub. Util. Control*, 569 F.3d at 481).

"'FERC here interferes directly and materially with state efforts to sponsor new capacity resources precisely because those efforts could affect market prices.'"[98] The court determined that New Jersey was wrong.[99] The court explained that "what FERC has actually done here is permit states to develop whatever capacity resources they wish, and to use those resources to any extent that they wish, while approving rules that prevent the state's choices from adversely affecting wholesale capacity rates. Such action falls squarely within FERC's jurisdiction."[100]

57. The D.C. Circuit similarly rejected an argument that the Commission, in imposing buyer-side market power mitigation measures, "improperly regulat[ed] 'facilities used for the generation of electric energy.'"[101] In finding that the Commission acted within its jurisdiction, the court explained that "states remain free to subsidize the construction of new generators, and load serving entities to build or contract for any self-supply they believe is necessary," and the Commission acted within its authority in "regulat[ing] the 'price constructs that result in offers into the capacity market from these resources that are not reflective of their actual costs.'"[102]

58. In light of this case law, arguments that the Commission's market-power mitigation regimes violate the states' reserved powers under the FPA are doomed to fail.

E. The Commission Cannot Rely Upon PJM's Attempt to Define A Way Out of the Commission's Obligation to Mitigate the Effects of Price Suppression

59. What is "*actual* buyer-side market power"? PJM proposed to define a narrower category of buyer-side market power, creating a new category (so-called "actual" buyer-side market power) as opposed to all of the other, well-recognized and equally deleterious exercises of price-distortive market power that the Commission and the courts have long held require mitigation. PJM defines this new, narrower version of buyer-side market power as the "ability of Capacity Market Sellers with a Load Interest to suppress RPM Auction clearing prices for the overall benefit of their (and/or affiliates) portfolio of

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[98] *Id*. at 98 (citation omitted).

[99] *See id*.

[100] *Id*. (footnote omitted).

[101] *NEPGA*, 757 F.3d at 291 (quoting 16 U.S.C. § 824(b)(1)).

[102] *Id*. at 290-91 (reaffirming "that the Commission has jurisdiction to regulate certain parameters of the capacity market related to the price of capacity, even if those determinations touch on states' authority.") (citations omitted).

generation and load."[103] And while this new, narrowed definition has gained some currency in others' arguments,[104] even the most charitable among us can be forgiven for taking the somewhat cynical view that PJM is merely attempting to define its way out of a problem.

60. Thankfully, when sitting in review of PJM's proposal, the court's analysis will not be constrained by PJM's definition. Whether or not PJM denominates a particular species of market power as "actual" market power, the case law is clear that no tariff can be found to satisfy the just and reasonable standard absent guardrails mitigating the effects of price-suppressive market behavior. The mitigation of price-suppressive state subsidies in the wholesale markets is absolutely necessary—it takes only one unit's offer to suppress capacity prices and those prices will be suppressed for all participants. PJM's narrow application of the MOPR to only a subset of those entities that can (and do) exercise buyer-side market power will undermine the capacity market and result in unlawful rates.

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[103] PJM, Intra-PJM Tariffs, OATT, Definitions A-B (16.0.0).

[104] *See* Glick-Clements Statement at P 10 ("Beginning in 2018, the Commission rewrote PJM's MOPR rules in an apparent effort to 'nullify'" the effects of disfavored state policies—explicitly abandoning any link to *actual buyer-side market power* and, at best, disregarding the harms caused by its actions.") (emphasis added) (citations omitted); *id*. P 20 ("Instead of interfering with state policies, the Commission's buyer-side market power mitigation regime should be all about—and only about—*actual buyers with market power*.") (emphasis added); *id*. ("And finally, taking the MOPR back to the core function of addressing *actual* buyer-side market power also provides a path for the Commission to get out of the interminable disputes that have plagued the Commission in recent years and cast a cloud of uncertainty over the Eastern RTO/ISO capacity markets—which, after all, is the last thing one should want for a construct that is supposed to send investment-guiding price signals.") (emphasis in original) (citations omitted); *id*. P 22 ("For all these reasons, we believe that PJM had no choice but to return the MOPR's focus to the core problem of *actual buyer-side market power*, free from the misguided notion that state resource decision making is inherently anti-competitive.") (emphasis added); *id*. P 43 ("At bottom, the Focused MOPR is an attempt to return the MOPR to its original purpose by focusing on *actual buyer-side market power*.") (emphasis added); *id*. P 83 ("PJM's proposal appropriately targets the *actual* exercise of buyer-side market power . . . .") (emphasis added).

F. Reliability and Resource Adequacy Are Necessary Considerations in Assessing the Justness and Reasonableness of PJM's Proposal

61. When it comes to capacity markets, rate design has profound practical implications: if we get the rates wrong, the electric system will be unreliable. One purpose of the capacity markets is to ensure resource adequacy. It does so by sending the price signals required to procure the correct quantity of the correct type of generation such that there is sufficient generation, with the correct attributes, to meet system demand and ensure system stability. The Focused MOPR will permit unmitigated state subsidies to suppress prices thereby distorting the market's price signals. The result will be that the market will fail to send the price signals necessary both to induce new, required generation to enter the market and to retain needed, existing generation. Rates that fail to advance or, as in the case of the Focused MOPR, actually obstruct, the capacity market's purpose of ensuring resource adequacy are not just and reasonable.

62. Because state subsidies are directed toward intermittent resources, the generators that will suffer their price-suppressive effects will be the marginal coal and gas units whose offers must reflect their fuel costs.[105] They will fail to clear the market as subsidized units undercut their offers and will thereby be denied the capacity payments required to remain solvent. The attributes provided by these dispatchable generators are required for system stability—they cannot simply be replaced by additional intermittent generation. While some downplay these reliability concerns, I note that the instant proposal comes on the heels of PJM's Effective Load Carrying Capability (ELCC) submission which assigns varying capacity values to intermittent resources, in recognition of their reduced reliability value.[106] When the inevitable price suppression caused by unmitigated state subsidies results in the premature retirement of too many conventional, dispatchable resources (like gas and coal-fired generators), reliability will be compromised.[107]

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[105] Another significant challenge is that gas-fired generators do not sign firm transportation contracts because they are unable to recover the additional cost in the markets. This creates a reliability problem that will only get worse due to artificial price suppression resulting from state subsidies.

[106] *See PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,056 (2021).

[107] As a side note, I was unaware of Chairman Glick's decision to direct the Commission's attorneys to file a motion to voluntarily remand the Commission's orders modifying PJM's Operating Reserve Demand Curves (ORDCs), Reserve Penalty Factor, and Energy and Ancillary Service Offsets until after the motion had already been granted by the D.C. Circuit. *See PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,153, *order on reh'g*, 173 FERC ¶ 61,123, *order on compliance*, 173 FERC ¶ 61,134 (2020), *order on*

63. I am hardly alone in these concerns; they are shared widely among those charged with the responsibility of ensuring the stable operation of the electric system in our markets. As we recently learned from the head of the North American Electric Reliability Corporation and his colleagues, gas-fired generation is necessary to maintain system reliability and, in fact, more gas-fired resources will be needed to meet demand:

> The North American bulk-power system (BPS) is undergoing major transformation, driven by a rapidly changing generation resource mix. Traditional baseload generation plants are retiring, while significant amounts of new natural gas and variable energy generating resources are being developed. During this transition, natural gas-fired generation is becoming more critical to provide both 'bulk

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reh'g, 174 FERC ¶ 61,180 (2021) (collectively, ORDC Orders). At the same time as PJM eliminates controls preventing price suppression in PJM's capacity market, the Chairman also asked to take back on voluntary remand the ORDC Orders, which are an important source of ancillary service revenues. In combination, the resulting reduction in revenues that generators will earn in PJM's markets cannot help but have an effect on system reliability. I therefore disagree with the decision to seek voluntary remand. As I noted in my separate statement in *Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (Danly, Comm'r, dissenting at P 9 n.17, it is something akin to an article of faith among FERC Commissioners and staff that the Chairman has unilateral authority over litigation positions, though that power is not unambiguously conferred by the Department of Energy Organization Act (DOE Organization Act) and has never been tested in court. The DOE Organization Act instead emphasizes that the Chairman's actions should be *on behalf of the Commission*. *See* 42 U.S.C. § 7171(c) ("The Chairman shall be responsible *on behalf of the Commission* for the executive and administrative operation of the Commission . . . .") (emphasis added); *id*. § 7171(i) ("attorneys designated by the Chairman of the Commission *may appear for, and represent the Commission in*, any civil action brought in connection with any function carried out by the Commission pursuant to this chapter or as otherwise authorized by law") (emphasis added). I question whether the DOE Organization Act either intends or contemplates such unilateral authority asserted by the Chairman to request a voluntary remand, in effect nullifying the votes of a majority of the Commissioners that approved the orders at issue, particularly when the Chairman dissented in those orders. *See id*. § 7171(b)(1) ("The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate."); *id*. § 7171(e) ("Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by a majority vote of the members present.").

> energy' and 'balancing energy' to support the integration of variable energy resources.[108]

64. PJM recently recognized the reliability challenges that attend increasing proportions of intermittent generation and the potential need for rates that take into account the attributes required for system stability:

> Given the ongoing evolution of the markets, we believe that we and our stakeholders should evaluate the need for procurement of additional reliability attributes, such as ramping, flexibility and inertia that may be required for a system with increased intermittent and distributed energy resources. Resource adequacy in the future should no longer be measured based solely on the characteristics of the peak day; it must evolve to include the ability to serve load in all hours of the year.[109]

65. ISO New England agrees: "the capacity market must evolve to ensure 'energy adequacy'—resources that can provide on-call electrical energy for extended periods when energy is unavailable from intermittent generation and generation with 'just in time' fuel sources."[110]

66. Resource adequacy for the entire region depends upon PJM's capacity market. As Ohio Public Utility Commissioner Dan Conway explained earlier this year, Ohio relies on PJM's market mechanisms to ensure resource adequacy and reliability:

> First, some background. Ohio restructured its retail generation service markets in 2000. We have retail competition; our vertically integrated electric utilities were required to separate from their generation assets; and Ohio has a default standard service option, procured through a

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[108] James B. Robb, et al., Statement of the North American Electric Reliability Corporation, 2021 Annual Reliability Technical Conference, Docket No. AD21-11-000, at 1 (filed Oct. 1, 2021).

[109] Manu Asthana, Statement of PJM Interconnection, L.L.C., Modernizing Electricity Market Design, Technical Conference on Resource Adequacy in the Evolving Electricity Sector, Docket No. AD21-10-000, at 8 (filed Mar. 24, 2021).

[110] Gordon van Welie, ISO New England, Inc., Pre-Conference Statement, Modernizing Electricity Market Design, Technical Conference on Resource Adequacy in the Evolving Electricity Sector, Docket No. AD21-10-000, at 3 (filed Mar. 24, 2021).

> competitive wholesale auction and provided by the utilities for customers who don't shop.
>
> Our transmission owners were required to become members of and transfer control of their facilities to a FERC-approved RTO, which they did, and that is PJM.
>
> Ohio restructured, and joined PJM, *based on the expectation that PJM would provide a reliable transmission grid, and the wholesale bulk power markets that PJM oversees would provide adequate supplies of power—at all times. And, we rely upon the competitive model for those bulk power markets to deliver reasonable prices*.[111]

67. The bottom line is this: the Focused MOPR will allow state subsidies to suppress capacity prices, depriving needed dispatchable generation of the revenue required to remain in service. PJM will be unable to discharge its responsibility to ensure resource adequacy as those generators leave the market—reliability will suffer as a result. This cannot be just and reasonable.

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[111] Commissioner Dan Conway, Public Utilities Commission of Ohio, Modernizing Electricity Market Design, Technical Conference on Resource Adequacy in the Evolving Electricity Sector, Docket No. AD21-10-000, at 1 (Mar. 29, 2021) (emphasis added); *see also* Ohio State Senator Matt Huffman and Ohio State Senator Rob McColley, Joint Comments, Docket No. ER21-2582-000, at 1 (Sept. 1, 2021) ("Ohio utilities joined PJM with the expectation of joining a regional market in which reliability would be ensured by competitive resources vying to serve load at the[lowest] cost. Ohio desires a market based on competition, not subsidies, and FERC has a duty to protect that market from the disruptive actions of a one state that impact the outcomes for other states."); Pennsylvania State Senator Gene Yaw, Written Comments, Modernizing Electricity Market Design: Resource Adequacy in the Evolving Electricity Sector, Docket No. AD21-10-000, at 1 (filed Apr. 23, 2021) ("Pennsylvania is rightfully proud of its successful efforts to restructure our electricity markets based on PJM's equally successful wholesale construct . . . . Pennsylvania's efforts should not be undermined by the actions of neighboring states that have abandoned their support for competitive markets in favor of subsidies for their politically favored resources.").

III. The Commission's "Order" Should be Remanded upon Petition for Review

68. Because of a 2-2 vote, the Commission did not form a majority and consequently "fail[ed] to issue an order accepting or denying" PJM's proposed tariff revisions.[112] Under FPA section 205(g)(1)(A), that failure is "considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a)."[113] The designation of our failure to issue an order to be, itself, an order, will present a handful of novel but foreseeable issues on appeal,[114] all of which counsel the reviewing court to vacate and remand the matter back to the Commission for an opportunity to issue a merits order in the first instance.

69. The acceptance of the Focused MOPR appears, on its face, to work multiple violations of the APA. Courts review final Commission orders under the APA's arbitrary and capricious standard.[115] Commission orders will be upheld if the agency "articulate[s] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[116] The Commission's factual findings will be upheld if supported by "substantial evidence."[117] When an order is seemingly inconsistent with past precedent and practice, courts require thorough reasoning.[118] "The Commission can

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[112] 16 U.S.C. § 824d(g)(1)(A).

[113] *Id*.

[114] *See Hearing on Pending Legislation S. 186, S. 1059, S. 1337, S. 1457, S. 1799, S. 1860, H.R. 1109 Before Subcomm. On Energy of the Comm. on Energy & Nat. Res.* 115th Cong. 13 (2017) (statement of James Danly, Gen. Counsel, FERC) (explaining that "the bill may not afford the relief anticipated by the Subcommittee."); *id*. ("Should the Commission's inaction be the result . . . of a 2-2 split, a similar result could obtain for a later order on rehearing. In that case, there would be another 2-2 split and no order on rehearing would issue. In such a case, it would be exceedingly unlikely that a Court of Appeals would entertain a petition for review[, and if a court did, it] would almost certainly remand the case back to the Commission for further adjudication.").

[115] *See* 5 U.S.C. § 706 ("The reviewing court shall— . . . (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 . . . .").

[116] *State Farm*, 463 U.S. at 43 (citation omitted).

[117] 16 U.S.C. § 825*l*(b).

[118] *See New Eng. Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (remanding because "FERC did not engage in the reasoned decisionmaking

depart from a prior policy or line of precedent, but it must acknowledge that it is doing so and provide a reasoned explanation."[119]

70. Here, the acceptance of PJM's Focused MOPR has effectively reversed years of Commission precedent without any explanation. The Commission has a long history of orders explaining how and why it has required or accepted numerous market-power mitigation provisions.[120] One such order was that which imposed the Expanded MOPR.[121] To jettison an established market-power mitigation regime which was itself the result of extensive findings and reasoning by the Commission without a word of explanation cannot satisfy the basic requirements of the APA.[122] This is in addition to the other obvious violation of the APA—the acceptance of PJM's proposal without any response to protestors' arguments.[123]

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required by the Administrative Procedure Act" as it "failed to respond to the substantial arguments put forward by Petitioners and *failed to square its decision with its past precedent*") (emphasis added); *id.* at 210 ("It is textbook administrative law that an agency must provide[] a reasoned explanation for departing from precedent or treating similar situations differently.") (citation omitted) (internal quotation marks omitted).

[119] *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1303 (D.C. Cir. 2014) (citations omitted).

[120] *See, e.g.*, *ISO New Eng. Inc.*, 135 FERC ¶ 61,029, at PP 15, 170-171 (2011) (recognizing that resources receiving out-of-market subsidies are capable of suppressing market prices, regardless of intent). This determination has been affirmed on judicial review. *See NEPGA*, 757 F.3d at 290-91 ("The Commission also found that uneconomic entry, regardless of resource and regardless of intent, 'can produce unjust and unreasonable prices by artificially depressing capacity prices.' . . . As it is FERC's statutory obligation to ensure that rates are appropriate, we must respect its decision to maintain just and reasonable rates through curbing or mitigating buyer-side market power.") (citations omitted).

[121] *See* December 2019 Order, 169 FERC ¶ 61,239.

[122] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*Fox*) ("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.") (citation omitted).

[123] *See New Eng. Power Generators Ass'n, Inc.*, 881 F.3d at 211 (finding that the Commission "failed to respond to the substantial arguments put forward by Petitioners"); *see also State Farm*, 463 U.S. at 43 (explaining that an agency decision "would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem,

71. Rate structures are not permanent, and rates, even those imposed as replacement rates under FPA section 206, can change. My colleagues remind us that "[a] utility may file to update its tariff at any time by proposing what it believes to be a just and reasonable rate even if it differs from past filings, as '[a] rate order is not *res judicata.* Every rate order made may be superseded by another.'"[124] True enough. But that is not the point. The problem with this "order" is that, the Commission, having made a series of unambiguous determinations in the earlier section 206 proceeding (and absent a change in circumstances), will face a substantial challenge when trying to explain its abrupt 180-degree turn.[125] PJM's proposal was accepted without the opportunity to offer the explanation needed to justify this reversal. The same goes for what appears to be the tacit repudiation of years' worth of Commission precedent regarding our obligations to mitigate the exercise of market power.

72. Some contend that the Fair RATES Act entitles a court to affirm the acceptance of the proposal absent an order that offers the Commission's reasoned explanation for its choices. *Chenery* holds otherwise.[126] Courts sit in review of an agency's reasoning. And while FPA section 205(g) provides an avenue for rehearing and judicial review, it does not, by its plain terms, purport to extinguish the Commission's obligations under the APA. It would be surprising indeed if Congress were to have intended, in what amounts

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offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

[124] Glick-Clements Statement at P 32 (quoting *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 445 (1930)).

[125] *See, e.g.*, June 2018 Order, 163 FERC ¶ 61,236 at P 149 (finding that state "subsidies allow resources to suppress capacity market clearing prices, rendering the rate unjust and unreasonable"). *But see* Transmittal at 23 ("[T]he MOPR will no longer mitigate all forms of state subsidies . . . .").

[126] *See SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943) (*Chenery*) ("We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."); *id*. at 88 (explaining that the Court would "confin[e] [its] review to a judgment upon the validity of the grounds upon which the Commission itself based its action . . . .) (citation omitted); *id*. ("If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment."); *id*. ("For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.").

to a minor amendment to a single administrative agency's organic statute, to undermine bedrock principles of administrative law like *Chenery*. One would expect that if Congress had intended to do so, it would have included language to that effect.[127]

73. Commissioners' written statements[128] are not, individually or collectively, an "institutional decision," [129] nor can they be cobbled together to form a "majority vote."[130] The Commission speaks through its orders, not the opinions of individual Commissioners. Our statements have no legal significance.[131] Neither does the Secretary's notice: it is merely an acknowledgement of the Commission's failure to act within the statutorily-prescribed time period and it serves to inform litigants that their rehearing rights have been perfected. Because it contains no findings of fact, no choices made, no legal analysis, and no reasoned explanations, the notice cannot serve as a stand-in for an order.

74. Remand, at a minimum, appears to be the necessary remedy on appeal. Given that this "order" necessarily contains no reasoning, a court might well be reluctant to reach a decision on the merits[132] and decide to remand the matter back to the Commission with

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[127] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (citations omitted).

[128] *See* 16 U.S.C. § 824d(g)(1)(B).

[129] *See, e.g.*, *Pub. Serv. Comm'n of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974) (recognizing that an agency's authority runs to it as "an entity apart from its members, and it is its institutional decisions—none other—that bear legal significance") (citations omitted); *see also Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016) (recognizing that "FERC did not engage in collective, institutional action when it deadlocked").

[130] *See* 42 U.S.C. § 7171(e) ("Each member of the Commission, including the Chairman, shall have one vote. *Actions of the Commission shall be determined by a majority vote of the members present*.") (emphasis added).

[131] *Cf. W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 25 (D.C. Cir. 2014) (recognizing that a court "need not—and indeed cannot—consider 'appellate counsel's *post hoc* rationalizations' for Commission action.") (quoting *Me. Pub. Utils. Comm'n v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010)). I can imagine a reviewing court would be similarly unimpressed by Commissioners' statements submitted under FPA section 205(g).

[132] *Chenery* and *Fox* require a remand where, as in this case, there is no agency

instructions to issue an order on the merits. It might also consider vacating the order, a power which the courts should employ when sitting in review of manifestly deficient issuances, such as the one at hand.[133]

IV. Conclusion

75. PJM's proposal eliminating all mitigation of the price-suppressive effects of state subsidies is irredeemably inconsistent with FPA section 205's requirement that proposed rates must be just and reasonable. For this reason, I voted to reject.

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James P. Danly
Commissioner

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order that could explain the radical departure from Commission and judicial precedent. *See Fox*, 556 U.S. at 515 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.") (emphasis in original); *Chenery*, 318 U.S. at 95 (remanding based on its "hold[ing] that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."). "It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

[133] "The decision whether to vacate depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). A reviewing court should vacate the "order . . . accepting the change" in light of the severe deficiency represented by an "order" that contains no reasoning and therefore necessarily departs from years of Commission precedent absent acknowledgment or explanation and which provides no basis for the outcome. 16 U.S.C. § 824d(g)(1)(A).

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