ORAL ARGUMENT NOT YET SCHEDULED

Nos. 21-1214, 21-1216, 21-1217, 22-1063, 22-1065, and 22-1066 (consolidated)

In the

United States Court of Appeals

for the

District of Columbia Circuit

VISTRA CORP., CONSTELLATION ENERGY CORPORATION, CONSTELLATION ENERGY GENERATION, LLC, ELECTRIC POWER SUPPLY ASSOCIATION, THE PJM POWER PROVIDERS GROUP, CALPINE CORPORATION, LS POWER ASSOCIATES, L.P., AND TALEN ENERGY MARKETING, LLC,

Petitioners,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

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

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Petitioners in these consolidated cases are Vistra Corp., Constellation Energy Corporation,[*] Constellation Energy Generation, LLC,[†] Electric Power Supply Association, The PJM Power Providers Group, Calpine Corporation, LS Power Associates, L.P., and Talen Energy Marketing, LLC. Respondent is the Federal Energy Regulatory Commission.

PJM Interconnection, L.L.C. and Garrison Energy Center, LLC have moved to intervene on behalf of Petitioners in each of the consolidated cases. PJM Industrial Customer Coalition, the Delaware Division of the Public Advocate, the Office of the People's Counsel for the

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[*] Constellation Energy Corporation was a newly formed entity when its shares were distributed to shareholders of Exelon Corporation on February 1, 2022. Constellation Energy Corporation was allowed to intervene out-of-time and take Exelon's place in the FERC proceedings, and this Court granted a motion to substitute it in place of Exelon in these proceedings. References to Exelon's pleadings below have been maintained throughout, however, for consistency with documents in the Joint Appendix.

[†] Prior to February 1, 2022, Constellation Energy Generation, LLC was known as Exelon Generation Company, LLC. References to Exelon's pleadings below have been maintained throughout, however, for consistency with documents in the Joint Appendix.

District of Columbia, the Maryland Office of People's Counsel, have moved to intervene on behalf of Respondent in each of the consolidated cases. The Court granted these motions in an Order dated December 7, 2021.

B. Rulings Under Review

1. *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.,* Order Establishing Just and Reasonable Rates, Docket Nos. EL19-47-000, EL19-63-000, ER21-244-000, 176 FERC ¶ 61,137 (Sept. 2, 2021) (the "September 2 Order") (JA___).

2. *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.,* Notice of Denial of Rehearings by Operation of Law, Docket Nos. EL19-47-000, EL19-63-000, ER21-244-000, 177 FERC ¶ 62,066 (Nov. 4, 2021) (JA___).

3. *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.,* Order Addressing Arguments Raised on Rehearing, Addressing Requests for Clarification, and Accepting Compliance Filing, Docket Nos. EL19-47-002, EL19-63-002, ER21-2877-001 & ER21-244-001, 178 FERC ¶ 61,121 (Feb. 18, 2022) (the "Rehearing Order") (JA___).

C. Related Cases

On November 5, 2021, this Court consolidated Case Nos. 21-1214, 21-1216, and 21-1217. On April 20, 2022, this Court additionally consolidated cases 22-1063, 22-1065, and 22-1066. Petitioners are unaware of any prior or related cases before the Federal Energy Regulatory Commission, this Court, or any other court.

/s/ *Paul W. Hughes*

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of this Court, Petitioners state as follows:

Petitioner Vistra Corp. ("Vistra") is a publicly traded corporation on the New York Stock Exchange (NYSE: VST). Brookfield Asset Management Inc. ("Brookfield"), a publicly traded company, may be deemed to own 10 percent or more of Vistra's stock as a result of Brookfield's 2019 acquisition of a majority interest in Oaktree Capital Group, LLC. The Vanguard Group, Inc. and various subsidiaries and affiliated investment companies,[‡] hold approximately 11 percent of Vistra's stock. Through various subsidiaries, Vistra produces and sells electric energy, capacity, and ancillary services in key U.S. markets, including the PJM Interconnection, L.L.C. ("PJM") markets.

Petitioner Constellation Energy Corporation is a publicly traded company and no publicly traded company owns 10% or more of its stock. Petitioner Constellation Energy Generation, LLC is a wholly owned subsidiary of Constellation Energy Corporation. Constellation Energy

[‡] Including some or all of the following: Vanguard Global Advisors, LLC; Vanguard Asset Management, Ltd.; Vanguard Investments Australia Ltd.; Vanguard Fiduciary Trust Company; and affiliated investment companies and funds.

Generation, LLC and various subsidiaries produce and sell electric energy, capacity and ancillary services into PJM markets.

Petitioner Electric Power Supply Association is a national trade association representing competitive power suppliers. The Electric Power Supply Association advocates on behalf of its members in support of well-functioning competitive wholesale electricity markets, which benefit consumers and power suppliers. Its members are active participants in the wholesale energy and capacity markets, including the market managed by PJM. The Electric Power Supply Association is not a public company, has no parent corporation, and no publicly held corporation owns 10% or more of its stock. It is a trade association within the meaning of Circuit Rule 26.1(b).

Petitioner The PJM Power Providers Group ("P3") is a non-profit organization dedicated to advancing federal, state, and regional policies that promote properly designed and well-functioning electricity markets in the PJM region. Combined, P3 members own over 67,000 megawatts of generation assets and produce enough power to supply over 50 million homes in the PJM region covering 13 States and the District of Columbia. P3 is not a public company, has no parent corporation, and no publicly held corporation owns 10% or more of its stock. It is a trade association within the meaning of Circuit Rule 26.1(b).

Petitioner Calpine Corporation ("Calpine") is a Delaware corporation engaged through various subsidiaries in the development, financing, acquisition, ownership, and operation of independent power production facilities, and the wholesale and retail marketing of electricity in the United States and Canada. Calpine is America's largest generator of electricity from natural gas and geothermal resources with robust commercial, industrial, and residential retail operations in key competitive power markets, including the market operated by PJM.

Calpine is not publicly traded, and there is no publicly held corporation that owns 10 percent or more of Calpine's stock. Calpine is a wholly owned subsidiary of CPN Management, LP. Other than non-voting, purely economic interests held by certain employees of Calpine, the equity interests in CPN Management, LP are owned by (1) Volt Parent, LP, as limited partner, and (2) Volt Parent GP, LLC, as general partner. The equity interests of Volt Parent, LP are owned by (1) Volt Parent GP, LLC, as general partner, (2) AI Holdings (BVI) L.P., as limited partner, (3) CPPIB Calpine Canada Inc., as limited partner, and (4) various passive limited partners.

Volt Parent GP, LLC is an indirect wholly owned subsidiary of ECP ControlCo, LLC ("ECP"). ECP is a Delaware limited liability company that is controlled by five individual persons.

AI Holdings (BVI) L.P. is part of a privately held, U.S.-based industrial group focused on strategic investments in a variety of industry sectors, including natural resources and chemicals. It is under the exclusive control of a single, natural person, who holds and manages the interests in AI Holdings (BVI) L.P.

CPPIB Calpine Canada Inc. is a wholly owned subsidiary of the Canada Pension Plan Investment Board, a professional investment management organization based in Canada.

Petitioner LS Power Associates, L.P. ("LS Power") is a Delaware limited partnership managed by LS Power Development, LLC ("LS Power Development"), its general partner.

LS Power Development is a power generation and transmission developer with a proven track record of successful project development, operations management, and commercial execution. LS Power Development has been involved through various subsidiaries in the development, construction, or operation of over 45,000 MW of power generation throughout the United States, including in the PJM region.

Neither LS Power nor LS Power Development is publicly held or publicly traded. No publicly traded company currently owns 10% or more of LS Power or LS Power Development.

Petitioner Talen Energy Marketing, LLC ("Talen Marketing") is a Pennsylvania limited liability company engaged through various subsidiaries in the wholesale and retail marketing of electricity in the United States. Among other things, Talen Marketing markets the output of generation facilities owned by its affiliates in organized, bid-based markets administered by PJM. Talen Marketing is a wholly owned subsidiary of Talen Energy Supply, LLC.

All of the membership interests of Talen Energy Supply, LLC are currently owned by Talen Energy Corporation ("Talen"). Talen is a non-governmental corporate entity. The stock of Talen is owned by portfolio limited liability companies of Riverstone Holdings, LLC, an energy and power-focused private investment firm. No publicly held company owns more than 10% of Talen's stock.

/s/ *Paul W. Hughes*

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GLOSSARY

APA	Administrative Procedure Act
FPA	Federal Power Act
FERC (or the Commission)	Federal Energy Regulatory Commission

INTRODUCTION

As operator of the electric grid in thirteen states and the District of Columbia, one of PJM Interconnection, L.L.C.'s ("PJM") most critical tasks is to keep the lights on. To do so, PJM operates a capacity market, which trades in advance commitments to supply electricity if called upon by PJM. PJM conducts auctions in which suppliers make offers to sell their capacity and take on the corresponding commitment; an offer is the minimum rate demanded by a supplier for its capacity. The supplier formulates its offer based on the costs and risks it expects to incur to provide the capacity.

This case is about the administrative caps applied to capacity offers by the Federal Energy Regulatory Commission ("FERC") to prevent the exercise of market power. The cap (known as the "Market Seller Offer Cap") is either a default cap or a "unit-specific" cap determined upon a supplier's request, based on a FERC-approved formula. Under PJM's prior rules, the default cap recognized that a competitive capacity offer can include the opportunity cost of assuming a capacity commitment. FERC previously found that feature critical to PJM's market design, and this Court affirmed that finding. In the orders at issue in this appeal, however, FERC abandoned that approach and the economic theory

underlying the broader market structure without explanation or even acknowledgment that it was doing so.

Below, FERC found that the existing default offer cap was too high—higher than suppliers' actual opportunity costs—and thus allowed for the potential exercise of market power. But rather than simply recalibrating the associated parameters so that the cap matched actual opportunity costs, FERC instead discarded the opportunity cost-based default cap altogether. Suppliers now are limited to offers based on their net operating costs as projected by PJM's Independent Market Monitor ("Market Monitor"). FERC provided no explanation for this abandonment of precedent and fundamental economic principles.

To make matters worse, the methodology for determining a seller's projected net operating costs adopted in the orders below is woefully inadequate. Capacity suppliers incur not only costs, but also risks when making a commitment to provide capacity three years in the future. FERC's methodology, however, leaves suppliers unable to include in their offers a quantification of the full range of risks they incur when accepting a capacity commitment. The result is that suppliers' offers are capped at a level below the amount needed to justify a capacity commitment, which cannot be just and reasonable. FERC's embrace of that methodology was arbitrary and capricious.

Compounding the problem further, FERC would deprive suppliers of their statutory right to develop their own capacity offers under the new offer cap, effectively transferring that right to the Market Monitor. Even if a supplier follows FERC's flawed offer cap method to the letter, the process FERC established gives the Market Monitor the authority to impose an alternative offer for the supplier. If there is a disagreement between a supplier and the Market Monitor, PJM will use the Market Monitor's alternative offer, unless the supplier can demonstrate to FERC that the Market Monitor's cost calculation is unjust and unreasonable.

That aspect of FERC's decision blatantly violates the plain text of Section 205 of the Federal Power Act ("FPA"), 16 U.S.C. § 824d, which provides that a supplier has the right to set the rate it demands for a FERC-jurisdictional sale, subject to FERC's review under the just and reasonable standard. If other parties (*e.g.*, the Market Monitor) wish to challenge the rate demanded, they bear the burden of demonstrating to FERC that the rate is unjust and unreasonable. Section 205 does not permit FERC to transfer a public utility's rate-setting rights to a third party, or to shift the burden to the public utility to disprove a third party's calculation of the utility's own costs. The orders should be vacated and the matter remanded.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case pursuant to 16 U.S.C. § 825*l*, which provides for judicial review in this Court of orders issued by FERC under the Federal Power Act.

FERC entered its order on September 2, 2021. (JA___). Multiple parties including Petitioners filed requests for rehearing, but FERC took no action, and the rehearing requests were denied by operation of law on November 4, 2021. (JA___); *see* 16 U.S.C. § 825*l*(a). Petitioners filed timely petitions for review on November 4, 2021 (JA___) (Vistra), and on November 5 (JA___) (Indicated Suppliers)[1]; (JA___) (Constellation).[2]

FERC entered an Order Addressing Arguments Raised on Rehearing on February 18, 2022 (JA___) ("Rehearing Order"). Vistra timely filed an amended petition for review on March 15, 2022, and a new, timely petition for review on April 19, 2022. Indicated Suppliers

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[1] The "Indicated Suppliers" are petitioners Electric Power Supply Association, The PJM Power Providers Group, Calpine Corporation, LS Power Associates, L.P., and Talen Energy Marketing LLC.

[2] "Constellation" refers to petitioners Constellation Energy Corporation and Constellation Energy Generation, LLC (f/k/a Exelon Generation Company, LLC. As noted above, Constellation was substituted in this proceeding for Exelon Corporation. References to pleadings filed by these entities are to "Exelon" for consistency with documents in the Joint Appendix.

filed a timely, amended petition for review on March 17, 2022, and a new, timely petition for review on April 18, 2022. Constellation filed a timely, amended petition for review on March 17, 2022, and a new, timely petition for review on April 14, 2022. The Court has consolidated all of these petitions into this case.

ISSUES PRESENTED FOR REVIEW

Did FERC act arbitrarily, capriciously, or contrary to law by:

1. Eliminating an opportunity cost-based default offer cap, without explaining its abandonment of prior FERC factfinding and policies or analyzing substantial alternatives?

2. Adopting an operating cost-based offer cap that disregards many significant risks that result from a capacity commitment?

3. Prioritizing the Market Monitor's determination of the rate demanded by a supplier for capacity over the supplier's own determination of the rate it demands for capacity, in violation of Section 205 of the Federal Power Act?

STATEMENT OF THE CASE

A. PJM's Capacity Market and the Preexisting Capacity Performance Structure.

1. PJM serves as the regional transmission organization that "operates the transmission system spanning all or part of thirteen mid-

Atlantic and Midwestern states" and "manages the markets in which electricity is bought and sold within this territory." *Duke Energy Corp. v. FERC*, 892 F.3d 416, 417 (D.C. Cir. 2018).

Among other tasks, "PJM is responsible for preventing interruptions of the delivery of electricity … by ensuring that its system has sufficient generating capacity." *Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011). To do so, PJM administers an auction for electric capacity. "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option." *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). Thus, "[u]nlike the electricity market, in which generators sell actual power to retailers, the capacity market trades in the *future* supply of electrical power." *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013). When PJM "experiences a high demand for electricity, it can call on the capacity resource to produce that electricity." *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017).

Under its capacity market rules, "PJM conducts a yearly auction in which electricity suppliers submit offers to be available to provide capacity during a one-year period, three years in the future." *Delaware Div. of the Public Advocate v. FERC*, 3 F.4th 461 (D.C. Cir. 2021). The

Court recently described the overarching structure of PJM's capacity auctions:

> PJM estimates the demand for electricity three years into the future, and electricity generators estimate their capacity for producing electricity three years into the future. Generators then make bids to sell their future capacity to PJM. Starting with the lowest bid, PJM accepts bids until it has purchased enough capacity to meet its estimate of future demand. The highest accepted bid sets the "clearing price" in the capacity market. The clearing price is the price that generators receive from PJM when their bids are accepted by PJM. Generators are paid the clearing price regardless of the rates listed in their initial bids.

NRG Power Marketing, LLC v. FERC, 862 F.3d 108, 111 (D.C. Cir. 2017).

In sum, the price for capacity is determined based on suppliers' offers and PJM's projections of future demand. Suppliers are paid for their commitment to produce a certain quantity of power if needed, regardless of whether they are actually called on to operate.

2. This appeal concerns the rules governing the cap imposed by FERC on offers submitted into the capacity auction, known as the Market Seller Offer Cap. "PJM requires resource owners to offer capacity at a cost-based rate." *Advanced Energy*, 860 F.3d at 666. "This requirement prevents dominant resource owners from exercising market power and raising the price of capacity." *Id.*

The rules in place until FERC's recent orders were an integral part of an overall market design intended to prevent generators from "making capacity commitments but not providing electricity when it was needed." *Id.* This problem came to a head in January of 2014, when a "polar vortex" in the Eastern United States resulted in "a dramatic increase in demand for electricity," causing "a serious risk of power outages during subzero temperatures." *Duke Energy*, 892 F.3d at 418. A significant portion of "PJM's resources experienced an outage and could not provide any power," which threatened grid reliability. *Advanced Energy*, 860 F.3d at 661. PJM and FERC diagnosed the problem as stemming from market rules that did not adequately penalize a capacity supplier for failing to perform. In short, "[t]he penalties for a capacity resource that did not provide electricity were slight and easily avoided." *Id.*

Accordingly, PJM proposed a new "Capacity Performance" structure, designed to "ensure resources that made a capacity commitment provided electricity when called upon" (*Id.* at 660), and in 2015 FERC approved PJM's proposed reforms. *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) ("Capacity Performance Order"), *on reh'g*, 155 FERC ¶ 61,157 (2016) ("Capacity Performance Rehearing Order").

FERC determined that the pre-2015 rules allowed a seller to "earn substantial revenues through PJM's capacity auctions by committing its resource as capacity, with little concern that it will lose significant revenue even if it performs poorly." Capacity Performance Order, 151 FERC ¶ 61,208 at P158. The Capacity Performance structure addressed this issue in several ways.

First, it "eliminate[d] most of the excuses for resources that did not perform." *Advanced Energy*, 860 F.3d at 661.

Second, the new rules enforced the heightened performance obligation "through a robust penalty and payment mechanism." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P18. FERC reasoned that "a non-performing capacity resource should be penalized at a rate that approximates the expected full costs of procuring replacement capacity" because "a Capacity Performance Resource that does not perform during emergencies" is equivalent to a resource that does not supply capacity at all. *Id*. at P66. Those penalties are, in turn, distributed in the form of bonus payments to resources that overperform, including both capacity resources that provide energy in excess of their capacity obligations and resources that have no capacity obligations but that provide needed energy during emergency conditions. *Id.*

3. Calculation of the penalty rate begins with an estimate of the cost of procuring replacement capacity. FERC held that this cost could be approximated by the "Net Cost of New Entry." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P67. This value is an estimate of the "revenue a hypothetical new generator … would need to earn in the capacity market to justify construction." *Delaware Div. of the Public Advocate*, 3 F.4th at 464. It is a fixed value that is calculated by PJM and approved by FERC. *Advanced Energy*, 860 F.3d at 666. To obtain the per-hour penalty rate, the Net Cost of New Entry is divided by the expected number of emergency hours (also called a "Performance Assessment Hour" or "PAH"[3]) that the PJM region will experience in a given year.

Historically, PJM estimated that the region would experience 30 emergency hours each year. This value exceeded "the average number of emergency hours over recent years" but was "within the range." *Advanced Energy*, 860 F.3d at 666. Specifically, in 2015, FERC found it

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[3] PJM has since converted from Performance Assessment Hours to five-minute "Performance Assessment Intervals," meaning that twelve Performance Assessment Intervals constitute a Performance Assessment Hour. *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,212 at P4 n.11 (March 18, 2021) ("March 18 Order"). Since the conversion simply involves multiplication or division by a fixed quantity, Petitioners use Performance Assessment Hours here for simplicity.

to be a "reasonable approximation of the upper bound of hours during which the system is likely to experience Emergency Actions over the relevant commitment period." Capacity Performance Order, 151 FERC ¶ 61,208 at P163. At the same time, FERC also recognized this 30-hour estimate "affects core components of the Capacity Performance design" and so conditioned its "acceptance of PJM's proposal on PJM making annual informational filings with FERC to provide updates on the use of 30 hours for this parameter." *Id.* at P163. This Court upheld that determination on review. *Advanced Energy*, 860 F.3d at 666. Thus, assuming an expectation of 30 Performance Assessment Hours per year, a non-performing resource would pay total penalties equal to the cost of new capacity.

4. PJM recognized that by adopting a stricter, more punitive penalty structure it was increasing the risk (and therefore cost) associated with a generator's submission of a capacity offer. In particular, even after making all reasonable preparations, a generator could still find itself unable to perform during a prolonged reliability event and incur tens of millions of dollars in penalties. Increasing the cost and risk of capacity commitments without allowing resources to incorporate their assessments of this cost and risk into their capacity offers would potentially force suppliers out of the capacity markets. To avoid this

outcome, which would undermine the capacity market's ability to support reliability, PJM and FERC adjusted the Market Seller Offer Cap rules.

Under the Capacity Performance structure, resources are penalized for failing to meet their capacity commitments and rewarded for exceeding them. This creates an opportunity cost for suppliers assuming capacity commitments—a supplier without a capacity commitment is positioned to earn bonuses for generating electricity during emergency hours without taking on the risks of a capacity commitment. As this Court explained it:

> Say, for example, Resource A and Resource B can both produce 50 megawatts of power for a given emergency hour. Resource A has a 45 megawatt capacity commitment and Resource B does not have a capacity commitment. Resource A will receive bonuses for only 5 megawatt-hours. Resource B, on the other hand, will receive bonuses for all 50 megawatt-hours. If both resources can only produce 40 megawatts of power during the emergency hour, Resource A will owe a penalty for 5 megawatt-hours and receive no bonuses. But Resource B will still receive bonuses for all 40 megawatt-hours. Resource A has to earn enough in the capacity market to make up for these lost bonuses.

Advanced Energy, 860 F.3d at 667.

The opportunity cost of taking on a capacity commitment was not adequately reflected in the default offer cap in place prior to the Capacity Performance reforms. The pre-2015 rules capped capacity offers at the resource's projected avoidable costs, which are "the operational costs the

resource would not incur in the following year if it did not have a capacity commitment." *Advanced Energy*, 860 F.3d at 667. Introducing penalties and bonuses while maintaining the operating cost-based cap would "prevent capacity sellers from submitting legitimate, competitive offers" based on their opportunity costs. Capacity Performance Order, 151 FERC ¶ 61,208 at P344. That would ultimately create disincentives for participation in the capacity market, undermining the capacity market's role in ensuring reliability.

To address this issue, PJM implemented a new, opportunity cost-based default offer cap as part of its 2015 reforms. *Advanced Energy*, 860 F.3d at 667. The default cap was set at the rate "a resource needs in the capacity market to earn more with a capacity commitment than without"—that is, the minimum rate that a resource must earn in the capacity market to make up for the 30 hours of performance bonuses it could otherwise expect to receive if it did not have a capacity commitment. *Id.*[4] As FERC explained, "an appropriate competitive offer

[4] The offer cap equaled the penalty rate, times the expected number of Performance Assessment Hours in a given year, which was set at 30, times a Balancing Ratio (*B*). Assuming that the estimates for the number of yearly emergency hours is the same in both the penalty rate and offer cap formulas, the offer cap formula simplifies to Net Cost of New Entry *

includes all of the marginal *and opportunity costs* a resource faces to participate in the capacity market." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P185 (emphasis added). FERC and this Court rejected arguments that the new cap would inappropriately allow generators to submit offers in excess of their projected operating costs, explaining that its offer cap rule "should not[] protect consumers from actual capacity cost increases that are attributable to necessary investments that allow a capacity resource to participate in the capacity market, *including relevant opportunity costs faced by said resource*...." *Id.* at P183 (emphasis added); *accord Advanced Energy*, 860 F.3d at 668 ("PJM … can allow resource owners to submit offers that take into consideration opportunity costs.").

B. FERC's Alterations to the Capacity Performance Structure in the Orders Under Review.

1. On February 21, 2019, the Market Monitor filed a complaint with FERC under Section 206 of the FPA, 16 U.S.C. § 824e. IMM Compl. (JA___). On April 15, 2019, the "Joint Consumer Advocates" filed a complaint seeking similar relief. JCA Compl. (JA___). The complaints

B. *See* September 2 Order at P4 (JA___). This value represents "the opportunity cost that a resource faces when choosing whether to become a capacity resource." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P175.

alleged that PJM's continued use of 30 estimated emergency hours in calculating the default offer cap was unjust and unreasonable because it overestimated the number of hours in which capacity resources would actually be called upon to perform in an emergency in any given year. IMM Compl. 5 (JA___); JCA Compl. 1-2 (JA___). Instead of a 30-hour estimate, the Market Monitor argued that, "[d]uring 2015, 2016 and 2017, there were zero emergency events that would have triggered [capacity resources] in PJM," IMM Compl. 17 (JA___), and thus "the actual expected number of" Performance Assessment Hours should be "a very small number close to zero," *id.* at 5 (JA___). As a result, it argued, the penalties that a nonperforming resource could expect to face were actually much lower than the cost of replacement capacity—and the opportunity costs resulting from taking on a capacity commitment were also much lower than the default offer cap assumed. The Market Monitor asserted that this miscalibration allowed sellers to exercise market power, by offering at a level below the default offer cap, but above their actual costs and opportunity costs. Neither complaint sought to eliminate PJM's opportunity cost mechanism; rather they sought to revise the number of Performance Assessment Hours used. *See* IMM Compl. 20 (JA___); JCA Compl. 13-14 (JA___).

2. On March 18, 2021, FERC granted the complaints, finding that 30 hours "exceeds market participants' reasonable, actual expectations of the number of [Performance Assessment Hours] the system will experience in a given year." March 18 Order at P65 (JA___). It concluded that the default offer cap "is incorrectly calibrated such that it may unjustly and unreasonably prevent the appropriate review of offers, thereby allowing potential exercises of market power, and reducing the capacity market's overall competitiveness." *Id*. FERC ordered additional briefing "to set the appropriate replacement rate," including changes to both the offer cap and penalty calculations. *Id.* at P72 (JA___).

3. After receiving comments, FERC eliminated the opportunity cost-based default offer cap altogether, returning to the operating cost-based offer cap used prior to the 2015 adoption of the Capacity Performance structure. Under FERC's order, capacity resources would have two options when submitting offers in capacity auctions. First, a seller could use a default rate set forth in PJM's Tariff for the applicable technology class, minus projections of revenues from PJM's energy and ancillary services market. September 2 Order at P8 (JA___). Alternatively, a seller would have the option of providing cost-based information to obtain a unit-specific cost determination from the Market Monitor based on that seller's "avoidable" costs. *Id.*

The formula for estimating avoidable costs is set forth in the PJM Tariff at Attachment DD, Section 6.8(a). (JA___). The avoidable cost formula does not expressly consider opportunity cost in setting the maximum rates capacity suppliers can seek in capacity auctions. It also does not include any risks, other than Capacity Performance Quantifiable Risk, which consists of the risk of paying performance penalties in the event that a resource fails to satisfy its capacity commitment. *Id.* Moreover, to the extent the Market Monitor and a supplier disagree regarding the calculation of avoidable costs, PJM treats the Market Monitor's determination as the supplier's offer, unless the supplier can persuade FERC that the Market Monitor's determination is unjust and unreasonable.

In reshaping the entire market structure, FERC rejected Petitioners' alternative proposals to retain an opportunity cost-based offer cap and recalibrate the Performance Assessment Hours value used to calculate it (as well as the Performance Assessment Hours value used to calculate penalties). September 2 Order at P64 (JA___). FERC also rejected arguments by Petitioners and PJM that, if FERC accepted the Market Monitor's proposal, changes would be needed to the unit-specific cap to ensure that resources could submit offers reflecting all of their costs and risks. September 2 Order at P72 (JA___).

4. Petitioners sought rehearing before FERC. Indicated Suppliers Rehearing Request (JA___); Vistra Rehearing Request (JA___); Exelon & PSEG Rehearing Request (JA___). These requests were denied by FERC's inaction on November 4, 2021. (JA___); *see* 16 U.S.C. § 825*l*(a). Petitioners then timely petitioned this Court for review.

Several months later, FERC issued its Rehearing Order. Rehearing Order (JA___). It "continue[d] to reach the same result" as in the September 2 Order, but "modif[ied] the discussion" in that order. *Id.* at P2 (JA___). FERC also held Section 205 does not apply to sellers' offers in PJM's capacity auctions. *Id.* at P95 (JA___). Petitioners amended their original petitions for review (JA___, JA___, JA___)[5] and filed timely additional petitions (JA___, JA___, JA___).

SUMMARY OF THE ARGUMENT

FERC's decision was arbitrary and capricious and contrary to law. Under the Administrative Procedure Act, it must be set aside.

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[5] On April 13, the Court ordered the Parties to "address in their briefs whether new petitions for review, rather than amended petitions, are required to obtain review of respondent's February 18, 2022 order addressing arguments raised on rehearing." Because Petitioners have all filed new, timely petitions for review of the Rehearing Order, this question is moot.

I.A. FERC's action constituted an unreasoned departure from FERC's prior policy. That prior policy, consistent with economic theory, and approved by this Court, recognized that an opportunity cost-based offer was a competitive offer. But in the orders under review, FERC discarded that policy and eliminated a supplier's ability to submit an offer based on opportunity costs in excess of avoidable costs. FERC failed to acknowledge and provided no explanation for its abandonment of prior settled policy.

B. FERC's abandonment of the economic theory underlying the Capacity Performance structure is particularly illogical in light of Petitioners' well-reasoned alternative proposal: simply recalibrate the Performance Assessment Hours variable so that, instead of being set at 30 hours, it accurately reflects current expectations regarding the number of performance assessment hours that generators in PJM may face. In fact, that was the solution suggested by the complainants themselves, as well as by this Court when it reviewed the Capacity Performance structure, *see Advanced Energy*, 860 F.3d at 668 n.9. But FERC dismissed this suggestion without giving it the consideration that reasoned decisionmaking requires.

II.A. FERC's unexplained departure from an opportunity cost-based offer cap is compounded by its adoption of an arbitrary and capricious methodology for setting the new avoidable cost-based offer cap. In formulating a capacity offer, the owner of a resource considers the costs and risks it will incur to provide capacity and then translates those costs and risks into an offer—*i.e.*, the price below which it is unwilling to provide capacity. FERC provided no meaningful response to arguments that the unit-specific avoidable cost-based offer cap calculation does not provide generators with the ability to include in their offers all of the costs and risks associated with accepting a capacity commitment. And FERC failed to address arguments that excluding such costs and risk premiums would cap offers at a level so low as to deprive suppliers of any opportunity to recover their cost of providing capacity.

B. FERC's methodology for setting avoidable cost-based caps is also unlawful because, in the event of disagreement between a supplier and the Market Monitor, FERC supplants the supplier's cost-based offer with the Market Monitor's alternative version of the supplier's cost-based offer. If the supplier disagrees, it must file a complaint with FERC and demonstrate that the Market Monitor's version of the offer is unjust and unreasonable before PJM can use the supplier's offer.

The Federal Power Act prohibits this shifting of rights and burdens. Under Section 205, a public utility has the right to determine its offer, subject to FERC's review to determine whether the offer is just and reasonable. If the Market Monitor disagrees, the Market Monitor bears the burden of demonstrating in a complaint before FERC that the supplier's offer is unjust and unreasonable. In response to Petitioners' arguments on this point, FERC claimed that offers are not "rates" for purposes of Section 205. FERC's response is contradicted by the plain statutory text. An offer is a "rate demanded" for capacity, so it falls within the scope of Section 205. FERC also contended that suppliers give up their Section 205 rights when they participate in the PJM capacity market. But that is contradicted by this Court's decision in *Atlantic City Electric v. FERC*, 295 F.3d 1 (D.C. Cir. 2002). The harm that results from this deprivation of Section 205 rights, moreover, is not merely theoretical. Significant record evidence shows that disagreements are likely to arise, with the consequence that suppliers will be forced to submit cost-based offers based on a third party's assessment of their costs, rather than their own. That result defies the statutory scheme.

STANDING

Petitioners, parties to the regulatory proceedings below, seek review of FERC's orders under 16 U.S.C. § 825*l*. Their standing to do so

is clear from the face of the administrative record. *See* D.C. Cir. R. 28(a)(7). Petitioners Calpine, LS Power, Talen Marketing, Constellation, and Vistra actively participate, directly or through subsidiaries, as capacity suppliers in PJM's capacity market. The September 2 Order's abandonment of the default offer cap (and the adherence to this decision in the Rehearing Order) will constrain the supply offers they can place in the capacity market to a level below their own assessment of the costs and risks of accepting a capacity commitment and reduce the rate they receive for their capacity. These Petitioners cannot avoid the harm by simply declining to participate in the capacity market; FERC's rules effectively require generators either to submit a capacity offer or to retire. Such economic injury is precisely the kind of "injury in fact, fairly traceable to the challenged agency action, that will likely be redressed by a favorable decision" that gives rise to standing. *Exxon Mobil Corp. v. FERC*, 571 F.3d 1208, 1219 (D.C. Cir. 2009). Additionally, the Rehearing Order purports to deny these petitioners their rights under Section 205 of the FPA, which this Court has recognized suffices to present standing. *Exelon Corp. v. FERC*, 911 F.3d 1236, 1243 (D.C. Cir. 2018).

Petitioners Electric Power Supply Organization and P3 are trade associations whose members include capacity suppliers similarly affected by FERC's order. These members "would…have standing to sue in their

own right," "the interests at stake are germane to the organization[s'] purpose," and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000).

ARGUMENT

The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). This Court "review[s] FERC's decisions under the familiar arbitrary-and-capricious standard of the Administrative Procedure Act." *Verso Corp. v. FERC*, 898 F.3d 1, 7 (D.C. Cir. 2018).

I. FERC'S ABANDONMENT OF THE OPPORTUNITY COST-BASED DEFAULT OFFER CAP WAS ARBITRARY AND CAPRICIOUS.

In the proceedings culminating in the 2015 Capacity Performance reforms, PJM and FERC carefully fashioned a default offer cap designed to ensure that the PJM market would procure the resources needed to maintain grid reliability during emergency conditions. Based on sound economic theory, FERC adopted an opportunity cost-based default offer cap, recognizing that a capacity offer based on a seller's opportunity costs

is a competitive offer, even if that offer is above the seller's avoidable costs. This Court upheld that conclusion.

In the orders under review, FERC found that the assumption that PJM would experience 30 Performance Assessment Hours (that is, 30 hours of emergency conditions) each year was too high, and therefore the existing offer cap "allow[ed] potential exercise of market power." March 18 Order at P65 (JA___). Instead of fixing the miscalibrated assumption as Petitioners and other commenters urged, and even the complainants originally sought, FERC abandoned an opportunity cost-based offer cap altogether, without explanation or even acknowledgment, in favor of an offer cap based solely on a flawed calculation of projected operating costs.

While FERC is permitted to change course when needed, this Court has made clear that a "full and rational explanation" is "'especially important' when, as here, an agency elects to 'shift [its] policy.'" *Southwest Airlines Co. v. FERC*, 926 F.3d 851, 856 (D.C. Cir. 2019). But here, FERC failed to adequately explain its chosen approach, offered no explanation whatsoever for its departure from its prior findings, and failed to address Petitioners' reasonable alternative proposals. FERC thus failed to comply with the APA. *See West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (FERC must "provide[] a reasoned explanation for departing from precedent") (quotation marks omitted);

ABM Onsite Servs.—West, Inc. v. NLRB, 849 F.3d 1137, 1142 (D.C. Cir. 2017) ("[A]n agency's unexplained departure from precedent is arbitrary and capricious.").

A. FERC departed from prior precedent without explanation or acknowledgment by eliminating an opportunity cost-based offer cap.

The Capacity Performance structure was designed to "strengthen the relationship between a market seller's capacity revenues and its resource's real-time performance." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P28; *accord* Capacity Performance Order, 151 FERC ¶ 61,208 at P158. Accordingly, under the Capacity Performance structure, capacity sellers are penalized for underperformance and resources are rewarded for overperformance at a rate sufficient to ensure that the system will have enough capacity.

As explained above, in establishing that structure, FERC allowed suppliers to submit an offer based on the opportunity cost of accepting a capacity commitment, even when the opportunity cost exceeded actual costs. As FERC made clear, "an appropriate competitive offer includes *all* of the marginal *and opportunity costs* a resource faces to participate in the capacity market." Capacity Performance Order, 151 FERC ¶ 61,208 at P 185 (emphasis added).

In the orders under review, however, FERC abandoned that policy. Suppliers now face an offer cap based on their "avoidable costs," which do not include the opportunity cost of accepting a capacity commitment. They are forced, in other words, to offer at a level *below* what FERC previously recognized as "an appropriate competitive offer." *Id.*

Ordinarily, of course, when an agency departs from a prior policy it "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). But an agency *does* have to "provide a more detailed justification than what would suffice for a new policy created on a blank slate" if "its new policy rests on factual findings that contradict those which underlay its prior policy." *Id.* FERC's position in the proceedings below is just such a reversal, and FERC has not "provide[d] a reasoned explanation for departing from precedent." *West Deptford Energy*, 766 F.3d at 20.

Here, FERC did not acknowledge the repudiation of its prior findings regarding what amounts to a competitive offer. Instead, FERC claims to have honored that principle, because "unit-specific review still allows sellers to include opportunity costs in their unit-specific offer caps." Rehearing Order at P 22 (JA___). But this is sleight of hand; as FERC later concedes, the only opportunity costs sellers may now include

in unit-specific offers are "opportunity cost[s] of *selling capacity into a market external to PJM*." Rehearing Order at P25 (emphasis added) (JA___). A supplier can no longer submit an offer based on the opportunity cost of forgoing bonus payments that it could receive in the PJM market. Yet the latter is the type of opportunity cost-based offer FERC previously found to be competitive.

Further insisting that it was not abandoning its prior finding that an opportunity cost-based offer was competitive, FERC claims it was simply "recognizing that the formula used to calculate opportunity costs established in the Capacity Performance Order is no longer just and reasonable because it incorporated an excessive Expected [Performance Assessment Hours]." Rehearing Order at P25 (JA___). That characterization is belied by the fact that, rather than adjusting the number of Performance Assessment Hours to be more reasonable, FERC reverted to an avoidable cost-based offer cap that tightly restricts the types of costs that suppliers can include. The new cap will require offers that are below-cost and divorced from a resource's real-time performance.

Nor can the Commission plausibly defend its claim that "[b]asing the replacement rate on unit-specific review of sellers' individual avoided costs is intended to achieve the same purpose" as the opportunity cost-based cap. Rehearing Order at P25 (JA__). The purpose of allowing

suppliers to include opportunity costs in their offers was to account for the lost potential for bonuses that a resource incurs when accepting a capacity commitment. *Advanced Energy*, 860 F.3d at 667. It is tautologically impossible that the avoidable cost-based cap "achieve[s] the same purpose" while excluding that opportunity cost. Rehearing Order at P25 (JA___).

FERC's refusal to acknowledge its change in direction violates the Administrative Procedure Act. "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position." *Fox Television*, 556 U.S. at 515. And "[w]hen an agency in FERC's position is confronted with evidence that … the factual premises underlying its prior judgment have eroded, it must offer more to justify its decision to retain its [approach] than mere conclusory statements." *Envt'l Health Trust v. FCC*, 9 F.4th 893, 903 (D.C. Cir. 2021).

B. FERC failed to address Petitioners' reasonable alternative proposals.

FERC's unexplained departure from precedent is even more egregious in light of Petitioners' substantial, well-reasoned alternative to FERC's course of action: simply reducing Performance Assessment Hours to a more accurate value. As this Court has explained, "[i]n cases where

parties raise reasonable alternatives to FERC's position, … reasoned decisionmaking requires considering those alternatives." *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). The APA requires, at the very least, that "the agency must *either* "consider th[is] alternative[] *or* give some reason … for declining to do so." *Laclede Gas Co. v. FERC*, 873 F.2d 1494, 1498 (D.C. Cir. 1989). Here, FERC did neither.

Essentially scrapping the default offer cap altogether was hardly the natural fix to the problem identified in the March 18 Order.[6] FERC's primary concern with the prior default offer cap was that 30 hours was "no longer a reasonable estimate" for Performance Assessment Hours. March 18 Order, 174 FERC ¶ 61,212 at P65 (JA___). Rather than discard the entire formula, which constituted a significant aspect of the overall design of the Capacity Performance structure, Petitioners suggested that FERC could better address its concerns by adjusting the Performance Assessment Hours variable to more accurately reflect real-world conditions. *See, e.g.*, Exelon and PSEG Initial Br. 17-26 (JA___);

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[6] While a technology-specific default offer cap option still exists in theory, it is set too low to be of any practical utility to capacity suppliers. *See* September 2 Order at P8 (JA___); Vistra Rehearing Request at 21 (JA___) ("As a practical matter, the flaw[s] in the technology-specific default offer caps renders those caps useless as an approximation of any resource's actual risks and costs associated with its capacity supply obligations.").

Indicated Suppliers Initial Br. 12-15 (JA___); Indicated Suppliers Reply Br. 6 (JA___). Such an adjustment was, after all, exactly what FERC had contemplated when it first approved the Capacity Performance structure and was precisely the remedy the complainants originally sought. *See* Capacity Performance Order, 151 FERC ¶ 61,208 at P163 (encouraging PJM "to reassess the assumed number of Performance Assessment Hours after it has gained more experience with Capacity Performance and submit a filing if it finds a revision is warranted").

Specifically, as Petitioners' experts explained, lowering the Performance Assessment Hours value in both the offer cap and penalty formulas would fully address the concerns that initially motivated FERC to adjust the default offer cap—essentially, that the default offer cap did not accurately reflect sellers' reasonable expectations of the risks and opportunity costs of taking on a capacity obligation. *See* Indicated Suppliers Rehearing Request 26 (JA___) (citing Shanker Initial Affidavit ¶¶ 25-26); *see also* Indicated Suppliers Initial Br. 15-19 (JA___); Exelon & PSEG Initial Br. 15-16 (JA___). For example, one of Petitioners' experts, Dr. Shanker, demonstrated that reducing the expected Performance Assessment values to between 11.5 and 20 hours would properly account for the opportunity costs and risks associated with

taking on a capacity obligation. Indicated Suppliers Initial Br. 12 (JA___); Exelon Initial Br. 2 (JA___).

FERC offered two responses to Petitioners' alternative, neither of which satisfies the APA's requirements for reasoned decisionmaking. FERC began by disavowing any duty to address alternatives on the theory that it "need *only* explain its choice and how it has chosen a just and reasonable rate." Rehearing Order P27 (JA___). But where "parties raise reasonable alternatives to FERC's position"—particularly reasonable alternatives that are aligned with the remedy sought and that, unlike FERC's own position, respect FERC's own prior findings on what constitutes a competitive offer—"reasoned decisonmaking" requires more than a flat refusal to consider alternatives. *Am. Gas Ass'n*, 593 F.3d at 19.

FERC offered only a single sentence as a *substantive* response to Petitioners' alternative: "This approach would likely increase costs to customers because sellers can include penalty risk in their capacity offers, and [Petitioners] have failed to demonstrate any commensurate benefits with those increased costs." Rehearing Order P29 (JA___). But this answer cannot be squared with FERC's *rejection* of that very same argument in the Capacity Performance proceeding. There, FERC stated: "Mitigation does not, and should not, protect consumers from actual

capacity cost increases that are attributable to necessary investments that allow a capacity resource to participate in the capacity market, *including relevant opportunity costs faced by said resource, or risks associated with that resource's participation*." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P183 (emphasis added); *see also Advanced Energy*, 860 F.3d at 662 (noting that FERC "decided that, on balance, increased system reliability justified even a net increase in costs").

As FERC explained, the Capacity Performance reforms struck a balance between "consumers' interest in price stability" and "the need to ensure resource adequacy and system reliability." Capacity Performance Order, 151 FERC ¶ 61,208 at P237. Adjusting the Performance Assessment Hours value to a level consistent with expectations would have maintained that balance consistent with the Capacity Performance structure. *See* Capacity Performance Order, 151 FERC ¶ 61,208 at P163. But FERC conducted no such balancing in the order below, prioritizing consumer costs over system reliability without any weighing whatsoever.

FERC cannot avoid its obligation to consider well-reasoned alternatives by disregarding evidence or arguments in the record. *See, e.g.*, *Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency cannot ignore evidence contradicting its position.").

II. FERC DID NOT ADEQUATELY RESPOND TO PETITIONERS' ARGUMENTS THAT SUPPLIERS SHOULD BE ABLE TO REFLECT RISKS IN THEIR CAPACITY OFFERS.

Not only did FERC violate the APA by abandoning the opportunity cost-based default offer cap without explanation, but the replacement it selected is arbitrary and capricious in its own right. The new cap excludes numerous risks faced by suppliers, for which they reasonably seek compensation through the capacity market.

A. A cost-based offer cap must also account for risks.

For PJM, the purpose of the capacity markets is to ensure an adequate reserve of production capacity to satisfy grid demands in certain extreme circumstances. *Advanced Energy*, 860 F.3d at 659. For suppliers, "the purpose of capacity markets is to provide the 'missing money' that resources need to remain viable but are unable to earn by providing energy and ancillary services due to various limitations in the market for those services." *Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,118, Glick Dissent at P4 (2020). In theory, the goal of a cost-based offer cap is to reflect this quantity of "missing money"—*i.e.*, the revenue that a unit would need to earn to warrant remaining in operation rather than retiring, after accounting for its other (energy and ancillary services) anticipated

revenue. *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 at P148 (2019).

However, because capacity auctions occur up to three years in advance, the amount of "missing money" needed to remain available in the capacity delivery period is not precisely known when suppliers are required to submit their capacity offers. Patterson Aff., ¶ 48 (JA___); *accord* Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P72. Accordingly, in formulating its capacity offer, each supplier must necessarily make a variety of predictive judgments about future conditions. Of course, "[s]ome uncertainty" about future conditions "is unavoidable, and no" capacity market structure "based on future conditions can resolve that uncertainty." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P72. But as FERC itself has recognized, "capacity suppliers are in the best position to assess and price the performance risk associated with their resources, including performance risks beyond a resource owner's control, such as weather-related outages." Capacity Performance Order, 151 FERC ¶ 61,208 at P464.

Petitioners urged FERC to recognize that the avoidable-cost cap deprives capacity sellers of the flexibility they need to incorporate important costs and risks (including opportunity cost) into their offers.

Petitioners specifically identified costs associated with liquidated damages, unanticipated outages, and labor as well as risks including lower energy revenues, weather, supply chain restrictions, unit performance, and labor disputes. For example, the compensation that a supplier needs from the capacity market will depend on what the supplier can expect to earn in the energy and ancillary services markets. However, no one knows for certain what a plant's energy and ancillary revenues will be three years in the future, see Rehearing Order at P35 (JA___), for several reasons. This makes it risky to accept a capacity commitment. Petitioners identified with specificity several of the types of risks that can materialize, and for which capacity offers must account.

First, a plant may not operate as expected. A plant that in most years generates electricity 98% of the time (as some nuclear units do) may experience an outage that leaves it incapable of generating for weeks or months. As a result of the outage, the plant could experience a massive revenue shortfall that may result in significant losses.

Second, energy and ancillary services prices change over time. Patterson Aff., ¶¶ 48-51 (JA___). Large "baseload" plants, like nuclear plants, are especially susceptible to such changes because these plants operate during virtually all hours. *Id.* ¶¶ 51, 54 (JA___). Thus, even a

small decline in the price of energy can make a plant unprofitable. Suppliers, therefore, must take into account the possibility that energy and ancillary services revenue may be lower than anticipated—increasing the amount of "missing money" they need to reflect in their offers in the capacity market. *Id.* ¶¶ 48-49, 51 (JA___).

Third, many suppliers seek to mitigate risk by entering contracts to sell the output of their plants at a particular price (referred to as hedges). But under these contracts, if a plant goes out of service, the supplier may be required to cover the contractual obligation by procuring replacement power from the spot market at elevated prices. Patterson Aff., ¶ 51 (JA___).

As commenters explained, suppliers naturally consider these and other risks when deciding how much capacity revenue they need to justify remaining in operation. *E.g.*, Exelon and PSEG Initial Br. 32-33 (JA___). If the capacity market will provide enough revenue to make a supplier whole only in years where no risks materialize and prices are as forecasted, it makes little sense to remain in operation. To make it worthwhile to remain in operation and supply capacity, capacity revenue must also be sufficient to justify taking on the risks. Accordingly, suppliers reasonably will seek to include a valuation of these risks in

their capacity offers. Patterson Aff., ¶¶ 48-49 (JA___). The opportunity cost-based default offer cap generally allowed suppliers the flexibility to do so, so long as the offers remained below the cap.

The only allowance for risk in the Market Monitor's cost-based formula is the Capacity Performance Quantifiable Risk component, which consists of a supplier's "costs that are quantifiable, reasonably supported, and attributable to a seller's capacity obligation *under Capacity Performance*." Rehearing Order at P7 (emphasis added) (JA___). However, the risks just described are not covered by Capacity Performance Quantifiable Risk, even though suppliers account for them in formulating their capacity offers. *See id.* at P51. FERC's exclusion of risks from the determination of cost-based offers will force capacity providers to "submit offer[s] that [are] less than the unit owner[s'] assessment of what [they] must earn in the capacity market to continue operation." Exelon Rehearing Request 16 (JA___); *see also* Indicated Suppliers Rehearing Request 14 (JA___); Indicated Suppliers Reply Br. 10 (JA___); Shanker Reply Affidavit at ¶¶ 10-11 (JA___); Patterson Affidavit at ¶¶ 48-49 (JA___). Commissioner Danly made the same point in his dissent. Danly Rehearing Dissent at PP6-7 (JA___).

B. FERC failed to provide a reasoned explanation for excluding all but one risk from the cost-based offer cap.

FERC failed to adequately respond to Petitioners' identification of numerous specific types of costs and risks associated with taking on a capacity commitment that FERC's new offer cap does not permit to be included in a supplier's offer. FERC's primary response to Petitioners' concerns was to incorrectly dismiss them as inconsistent with the Capacity Performance structure. FERC relied heavily on its prior findings that "resources are permitted to recover in their capacity supply offer costs and risks that arise from participation in the capacity market under the Capacity Performance construct, not the energy market." Rehearing Order at P50 (JA___) (citing Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P183). FERC dismissed several categories of risks—including unanticipated outages, hedging, and volatile energy prices—on the basis that they are "not unique to resources with a Capacity Performance obligation." *Id.* at P51.

FERC either misunderstood or mischaracterized Petitioners' arguments. That a risk is *shared* by capacity and energy sellers does not mean that the risk poses the same financial consequences for both types of sellers, and it is irrelevant to the question of whether suppliers must seek to recover compensation for that risk from the capacity market.

Energy offer prices are based on the marginal cost of producing electricity in real time and necessarily do not account for risks resulting from accepting a *future* commitment to deliver energy whenever called upon to do so. But assuming a capacity commitment unquestionably furthers a supplier's exposure to certain types of risk, such as unexpected outages due to weather, the lost revenue such outages will cause (in addition to performance penalties), and the need to cover the cost of replacement energy. *See* Danly Rehearing Dissent at P6 (JA___). The only way a supplier can ensure compensation for these additional and heightened risks is to include them in its capacity offer.

The importance to suppliers of being able to reflect such risks in their capacity offers is amplified by two related aspects of PJM's market design.

First, most units are subject to a capacity must-offer requirement: that is, they are effectively required either to offer in the capacity auction or to mothball or retire. *See* Exelon & PSEG Rehearing Request at 15-16 (JA___).

Second, once a unit receives a capacity obligation, it is typically subject to an energy must-offer requirement, under which it must offer its output into the day-ahead energy market during the applicable Delivery Year. *Id.* Thus, many suppliers cannot easily decide to forgo

participation in the capacity market and just sell energy when they wish. Rather, they must make an "in or out" decision to either take on a capacity obligation—and a concomitant commitment to offer into the energy market daily for an entire year—or to mothball or retire, and they must make that decision three years in advance of when that obligation will be performed.

The upshot of FERC's exclusion of these categories of risks—when combined with its must-offer rules—is that suppliers will be forced to make offers that are lower than the suppliers reasonably believe they need to justify continued operations. The only logical alternative is to retire, and imposition of that kind of Hobson's choice cannot be just and reasonable. As FERC has explained, power plants participating in competitive markets are no longer "guarantee[d] that they will recover [their] costs," but the market must at least allow them "*an opportunity*" to do so. *ISO New England Inc.*, 130 FERC ¶ 61,108 at P24 (emphasis added); *see also Advanced Energy*, 860 F.3d at 668 ("Resource owners need to be able to offer capacity at a higher price in order to recover the costs."). By preventing suppliers from submitting an offer that values the risks inherent in accepting a capacity commitment, FERC has effectively guaranteed that resources will lack the opportunity to recover their true costs, including their risks.

FERC provided three other responses to challenges regarding the risk exclusions, all inadequate. First, FERC said that it already "rejected such requests in" the Capacity Performance proceeding. September 2 Order at P72 (JA___) (citing Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P203). But that mischaracterizes the Capacity Performance orders. In that proceeding, FERC approved PJM's proposal to include one particular source of risk in a cost-based offer: the risk of incurring a regulatory penalty for failing to provide capacity when called upon. Capacity Performance Order, 151 FERC ¶ 61,208 at P353. On rehearing, FERC rejected commenters' request to expand the reach of this feature to other risks, stating that the risk premium it included was "not intended to permit market sellers to include all market risks a capacity resource faces from participating in PJM's markets, for example energy market-related risks that are not new to the Capacity Performance construct." Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P203. FERC's decision in the Capacity Performance proceeding was limited; it addressed only the risk component that was introduced as an element of PJM's new market design. FERC made no broader holding about whether the Net Avoidable Cost Rate formula should incorporate other

risks more generally. Indeed, the fact that FERC recognized the legitimacy of valuing one type of risk in the Capacity Performance proceeding underscores the inadequacy of FERC's explanations in the orders below. FERC provided no explanation as to what sets that one "approved" risk apart from other risks incurred by capacity suppliers, who must recover from the capacity market sufficient revenue to warrant taking on those risks. Further, unlike in the Capacity Performance proceeding, one of the primary purposes of FERC's orders underlying this appeal was to determine how to construct a competitive offer. Accordingly, the risks commenters raised below were directly relevant to the tariff changes at issue.

Second, FERC said that "[i]t is not appropriate for a cost-based offer to allow sellers to price every possible adverse outcome, because … such an approach would unreasonably shift all risk from the investors to consumers, effectively holding sellers harmless at the expense of ratepayers." September 2 Order at P72 (JA___). This is a strawman—Petitioners are not asking to be held "harmless" or to "shift all risk" to ratepayers. *See, e.g.*, Exelon and PSEG Rehearing Request at 16 (JA___). Rather, Petitioners simply seek to ensure that the cap imposed on their capacity offers reflects the revenue needed to justify taking on the risks associated

with accepting a capacity obligation. FERC never explained why it is inappropriate, unreasonable, or anti-competitive for suppliers to account for the range of risks they face when determining the "missing money" needed from the capacity market.

Third, in the Rehearing Order, FERC noted that "only sellers that fail PJM's Market Structure Test and therefore are deemed to have market power are subject to capacity market offer caps; other sellers are not limited on what costs or risks to include in their offers." Rehearing Order at P 47 (JA___); *see also id.* at PP 15, 47, 54, 55, 56, 61 (JA___). FERC's response is a complete *non sequitur*—it says nothing whatsoever about Petitioners' arguments, which deal only with the kinds of risks that may be included in offers that *are* subject to the caps. *See City of Vernon v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988) ("No matter how rudimentary a claim, an agency is not entitled under the APA to respond with a non sequitur."). Moreover, the response does nothing to help FERC's case. As FERC acknowledges, "most sellers fail the [screen] in PJM's capacity market." Danly Rehearing Dissent at P4 (JA___) (alteration in original) (citing Rehearing Order at 15 n.26 (JA___)). "Only a handful of sellers have ever passed the screen in its history, and *none* currently pass it." *Id.* (emphasis in original). FERC's response that a

class of capacity suppliers *which does not currently exist* will not experience the problems Petitioners have identified seems facetious.

In sum, FERC's decision to set a cost-based offer cap, without any regard for numerous risks that suppliers undertake, is inadequately explained and inconsistent with both the basic requirements for agency decisionmaking and with the FPA.

III. FERC'S DETERMINATION THAT CAPACITY SELLERS LACK SECTION 205 RIGHTS IS CONTRARY TO LAW.

FERC's arbitrary and capricious approach to determining an offer cap is exacerbated by its decision to give the Market Monitor the right to replace a supplier's own assessment of its costs with the Market Monitor's alternative projection of those costs. That approach contradicts the text of the Federal Power Act and is contrary to this Court's precedents and FERC's past positions. The APA thus requires the Court to "hold unlawful and set aside" FERC's orders as "not in accordance with law." 5 U.S.C. § 706(2)(A).

1. Section 205 of the Federal Power Act "gives a utility the right to file rates and terms for services rendered with its assets." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (citing 16 U.S.C. § 824d). "Section 205(d) provides that a public utility may file changes to rates, charges, classification, or service at any time upon 60 days notice." *Id.*

(citing 16 U.S.C. § 824d(d)). "FERC can then review those changes under section 205 and suspend them for a period of five months, but it can reject them only if it finds that the changes proposed by the public utility are not 'just and reasonable.'" *Id.* (quoting 16 U.S.C. § 824d(e)). Section 205 confirms a public utility's "right … to change its rates … [at] will, unless it has undertaken by contract not to do so." *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113-14 (1958). The provision forms an integral part of the FPA's overall statutory scheme, "under which all rates are established initially by the [public utilities], … and all rates are subject to being modified by [FERC] upon a finding that they are unlawful." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* 350 U.S. 332, 341 (1956).[7]

The statute is clear as to what falls within Section 205's scope: "*[a]ll rates* or charges made, *demanded*, or received *by any public utility* for or in connection with the transmission or sale of electric energy." 16 U.S.C. § 824d(a) (emphasis added). The plain text clearly encompasses offers in PJM's capacity market, which are the "rates … demanded" by public utilities for the sale of electric capacity. Therefore, to the extent there is

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[7] This Court has recognized that Supreme Court precedent interpreting "the provisions of the Natural Gas Act parallel to the Federal Power Act" apply to the interpretation of both statues. *Atlantic City*, 295 F.3d at 10.

a disagreement between the Market Monitor and a supplier regarding its cost-based offer, Section 205 dictates that the "rate[] … demanded" by the supplier takes precedence, unless the Market Monitor can carry the burden of establishing that the rate is unlawful under Section 206 of the FPA.

FERC's approach turns the statute on its head: FERC gives precedence to the *Market Monitor*'s alternative version of the supplier's offer and requires the supplier to make a filing with FERC to challenge the Market Monitor's version of the supplier's offer. In other words, if the supplier wishes to demand a rate based on its own determination of its costs, it must first establish that the Market Monitor's alternative version of the supplier's offer is unjust and unreasonable.

On rehearing, FERC justified that result on the ground that capacity suppliers in PJM's market are not entitled to Section 205 rights because their "offers—standing alone—are not themselves rates … subject to [FERC] review under FPA section 205." Rehearing Order at P95 (JA___). As an initial matter, that response completely undermines the rest of FERC's order. If FERC truly believes that offers are not rates subject to Commission review, then why—and under what authority—is FERC going to such lengths to regulate and review those offers? Beyond that, Petitioners disagree with FERC's internally inconsistent

interpretation of Section 205. Most capacity suppliers (including Petitioners) are "public utilities" under the FPA (*see* 16 U.S.C. § 824(e) (defining "public utility")), and public utilities' capacity auction offers unambiguously *are* "rates and charges made, demanded, or received." 16 U.S.C. § 824d(a). In PJM's capacity market, suppliers offer their resources' capacity into an annual auction. *Advanced Energy*, 860 F.3d at 659. PJM accepts offers starting with the lowest rate and proceeding until "the system has sufficient capacity to meet projected demand." *Id.* PJM then purchases all capacity "at the rate of the highest accepted bid—the market clearing price." *Id.* at 660. In this context, utilities' offers are plainly "rates," which are "amount[s] of payment or charge based on another amount." *Rate*, Merriam-Webster (2022). The offers are indisputably "demanded," in that the utilities set a minimum price below which they will not provide capacity, and at or above which they do agree to provide capacity. *See Demand*, Merriam-Webster (2022) ("[T]o ask or call for with authority: claim as due or just."). And no one disputes that capacity suppliers are "public utilities." 16 U.S.C. § 824e.

FERC provides no explanation for its statutory reading other than to claim that "capacity offers are inputs to the ultimate market clearing price for capacity that is determined by the operation of the rules and that is paid by load." Rehearing Order at P95 (JA___). This

unsubstantiated claim does nothing to undercut the plain meaning of the statute and is contrary to court precedent. Courts have repeatedly explained that Section 205 rights extend to much more than just the rate a seller ultimately receives. *See, e.g.*, *Okla. Gas and Elect. Co. v. FERC*, 11 F.4th 821, 830 (D.C. Cir. 2021) (explaining that Section 205 protections extend to all rate and non-rate terms). Indeed, Section 205 itself lists both the rate "received" *and* the rate "demanded." 16 U.S.C. § 824d.

The Supreme Court, too, has recently described PJM capacity auction offers as rates. *See Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 155-56 (2016) ("Owners of capacity to produce electricity in three years' time bid to sell that capacity to PJM at *proposed rates*. PJM accepts bids, beginning with the lowest proposed *rate*, until it has purchased enough capacity to satisfy projected demand. No matter what *rate* they listed in their original bids, all accepted capacity sellers receive the highest accepted *rate*, which is called the 'clearing price.'") (emphasis added). And FERC has appeared to adopt Petitioners' reading in prior litigation before this Court. *Exelon Corp. v. FERC*, 911 F.3d 1236, 1243 (D.C. Cir. 2018).

What's more, FERC's alternative reading of this unambiguous statutory language is inconsistent with the statutory scheme. Section 205

is part of a system in which utilities have the freedom to set rates, which FERC may modify only after finding that they are unjust or unreasonable. *United Gas Pipe Line Co.*, 350 U.S. at 341. In this respect, Section 205 "is intended for the benefit of the utility." *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984). But FERC's order flips this scheme on its head, allowing utilities' offer prices—rates demanded for capacity—to be established initially by the Market Monitor and then denying the utilities even a secondary opportunity to obtain FERC review of their proposed offer prices under Section 205. As FERC indicated, the Market Monitor's version of a supplier's offer will be given precedence even if the supplier seeks FERC review and demonstrates that the supplier's own offer is consistent with the tariff. *See* Rehearing Order at P98 (explaining that, if a supplier challenges the Market Monitor's offer, FERC will review them both "to ensure they comply with PJM's tariff provisions" but failing to conclude that, if both offers are consistent with the tariff, the supplier's offer must be used) (JA___). This shifting of rights and responsibilities impermissibly allows the Market Monitor, PJM, and ultimately FERC, to replace suppliers' rates even when they fall within the ordinary "zone of rates that are just and reasonable." *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008). This Court has previously implied that such an arrangement with respect

to capacity offers may constitute a deprivation of a utility's Section 205 rights. *See Exelon Corp.*, 911 F.3d at 1243. And a reading of the statute that arrogates such power to PJM, the Market Monitor, and FERC in defiance of the regulatory statutory order is surely incorrect and unlawful.

2. In the face of the plain meaning of Section 205, FERC's argument that capacity market offers are merely "inputs" to a rate has no merit. As described above, utilities' capacity auction offers are plainly "rates … demanded." 16 U.S.C. § 824d(a). Of course, as Commissioner Danly noted in dissent, offers are obviously "inputs" into the final rate—the market clearing rate—paid for capacity. But that "does not change the fact that each individual seller offer is a proposed rate." Danly Rehearing Dissent at P13-14 (JA___).

FERC's only support for its contention that capacity auction offers are mere inputs that are not entitled to Section 205 review is wholly inapposite. Rehearing Order P100 & n.228 (JA___). To begin, *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (D.C. Cir. 2011) addressed only a question of when a rate *change* occurs. Thus, the Court concluded that "FERC's assertion that a rate 'change' occurs only once, when an authorized seller files a market-based rate, is a reasonable interpretation" of the relevant statutory language. *Id.* at 921-22.

Contrary to FERC's implication, the Court was interpreting the language of 16 U.S.C. § 824d(d)'s notice provision, and never suggested that the "initial rates" at issue there were not "rates" *at all*. Nor does *Devon Power LLC*, lend any support. 137 FERC ¶ 61,073 (2011), *review denied sub nom. New England Power Generators Ass'n, Inc. v. FERC*, 707 F.3d 364 (D.C. Cir. 2013). As the language omitted from FERC's quotation makes clear, FERC held in those proceedings only that "the rates set by the forward capacity auctions represent tariff, *not contract*, rates." *Id.* at P21. Clearly, a determination that a rate is not a *contract* rate is not a determination that the rate is not a rate at all. *Id.*

Additionally, FERC's orders in this proceeding contradict its own interpretation of the statutory language and structure. In its September 2 Order, the Commission explained that where "sellers dispute the ultimate determination by PJM, sellers may seek Commission action," where they "would have to show that its offer is just and reasonable." September 2 Order at P66 & n.123. And the bulk of the Rehearing Order consists of FERC's consideration of precisely which types of offers are or are not just and reasonable. But why? If offers in PJM's capacity auctions are not subject to Section 205, FERC would have no reason to determine whether and under what circumstances they would be just and reasonable. FERC cannot have it both ways.

3. FERC next erroneously argues that Petitioners' position would "make market mitigation mechanisms optional" or permit sellers to "skirt" PJM's market rules. Rehearing Order at PP 111, 112 (JA___). Nothing could be farther from the truth. Instead, Petitioners' position that offers are subject to FERC review under Section 205 is entirely consistent with a robust market monitoring and mitigation framework. In fact, it is consistent with the *same* standard of review FERC has imposed here—as long as FERC, rather than the Market Monitor or PJM—makes the requisite determination that a supplier's offer is unjust and unreasonable before "mitigating" that offer. Petitioners fully acknowledge that an effective market monitoring and mitigation regime is a critical aspect of FERC's regulation of market-based rates—and they have not argued otherwise. But it is important to recognize which entities are tasked with which functions in that regime, to ensure that those roles are consistent with the statutory framework Congress established.

The Market Monitor can make recommendations for market improvements and can notify PJM or FERC if it believes it has identified an issue, but it is not itself a public utility. In fulfilling this important role, the Market Monitor can raise its questions and concerns about market power with the public utility whose offer is at issue. If the public utility disagrees with the Market Monitor's position, it can raise the issue

with PJM. And if PJM also disagrees, the Market Monitor can raise the issue with FERC, giving FERC the opportunity to adjudicate the justness and reasonableness of the utility's offer.

What the Market Monitor *cannot* do is step into the utility's shoes and force it to submit an offer to provide capacity, pursuant to Section 205, at a different rate than the utility has proposed. To hold otherwise would accomplish a total inversion of the FPA's scheme, in which "the power to initiate rate changes rests with the utility and cannot be appropriated by FERC in the absence of a finding that the existing rate was unlawful." *Atlantic City*, 295 F.3d at 10. This Court has thus previously rebuffed FERC's and PJM's attempts to appropriate utilities' Section 205 rights. *See id.* at 9-10. But that is precisely what FERC's mitigation rules in the PJM tariff would permit—just by an entity employed by PJM rather than PJM itself.[8]

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[8] FERC asserts that a paradigm in which FERC must satisfy the statutory prerequisites before "mitigating" a public utility's offer to sell capacity is "inconsistent with the basic structure of modern, organized electricity markets." Rehearing Order at P112. (JA___). As Petitioners have explained, this is false—mitigation is possible using the same metrics for market power and reasonableness, so long as the standard of review and the reviewing entity are consistent with the FPA. In any event, as Commissioner Danly explained, concerns about policy outcomes do not give agencies the right to evade clearly expressed statutory mandates. Danly Rehearing Dissent at P19 (JA___).

4. The Commission's final justification for its denial of utilities' Section 205 rights—that Petitioners effectively waived their rights by obtaining market-based rate authorization—fares no better. This Court has squarely held that "FERC lacks the authority to require the utility owners to give up their statutory rights under section 205." *Atlantic City*, 295 F.3d at 9. FERC only attempts to distinguish *Atlantic City* on the grounds that "public utilities … have *voluntarily* elected to exercise their FPA section 205 filing rights by seeking and using market-based rate authority." Rehearing Order at P108 (JA___) (emphasis in original). But the utilities in *Atlantic City* also voluntarily elected to transfer operational control of their transmission system assets to PJM. 295 F.3d at 5, 9. And while "utilities may choose to voluntarily give up, by contract, some of their rate-filing freedom under section 205," (*id.*), nothing of the kind occurred here. Indeed, Petitioners have never been told that electing to use market-based rate authority meant forfeiting their Section 205 rights (nor has that ever been suggested prior to the Rehearing Order), and they certainly have not made the voluntary and knowing decision to surrender or limit those rights by contract.

Moreover, FERC's new theory that sellers with market-based rate authority cede their rights to make Section 205 filings is inconsistent with its own ongoing practice. As FERC noted, sellers are allowed to seek

additional compensation for providing capacity under Section 205 in certain circumstances. Rehearing Order at P111 (JA___). While FERC focused on just one scenario (where a resource seeks to retire but is needed for reliability), there are many others. *Id.* For example, FERC regularly permits, and in some cases requires, sellers with market-based rate authority to submit their own Section 205 filings to receive compensation for providing services like reactive power and voltage control. In fact, earlier this year, this Court upheld a FERC order that requires certain sellers with market-based rate authority in New England to submit their own Section 205 filings to recover the cost of certain reliability-related expenses—and to demonstrate that the proposed cost recovery is just and reasonable—despite the fact that those costs would be billed to customers through the ISO New England tariff. *Cogentrix Energy Power Mgmt., LLC v. FERC*, 24 F.4th 677, 681 (D.C. Cir. 2022); *ISO New England Inc.*, 171 FERC ¶ 61,160, at P 20 (2020).

5. FERC's transfer of Section 205 rights away from suppliers is also squarely foreclosed by this Court's recent precedent. In *Exelon*, the Court rejected FERC's attempts to implement a system in which "FERC vets the *market monitor*'s mitigated bid, which will be used in the auction if it is just and reasonable, whereas in the normal course … a *supplier*'s bid is vetted under that standard and would be entered in the auction if it

passes." *Exelon Corp.,* 911 F.3d at 1239. FERC attempts to distinguish *Exelon* by noting that, unlike in the market at issue there, PJM does not submit capacity auction offers to FERC in a Section 205 prior to running its auction. But that fact does not help FERC. If anything, the fact that PJM does not submit such a filing makes it *even more* imperative that PJM use the capacity offer submitted by a seller unless PJM or the Market Monitor successfully makes a case to FERC that the seller's offer is not just and reasonable. Otherwise, capacity sellers in PJM would suffer an even greater deprivation of Section 205 rights than the capacity sellers who successfully challenged the scheme at issue in *Exelon*.

6. To be clear, the harm resulting from FERC's illegal burden-shifting is far from theoretical. As Petitioners demonstrated below, the Market Monitor was unlikely to permit sellers to include a meaningful Capacity Performance Quantifiable Risk component in their offers under unit-specific review. Indicated Suppliers Rehearing Request 19-22 (JA___); Vistra Rehearing Request 9 (JA___). Since FERC's order, the Market Monitor has already rejected "*all* of the unit-specific offer caps" that had been requested. PJM Rehearing Request at 6 (JA___) (emphasis added). FERC acknowledged this fact but brushed it away as "inapposite." Rehearing Order at P 90 (JA___). But the fact that the Market Monitor has denied *all* unit-specific reviews that differ from its

own assessments is obviously relevant to the question of whether it will substitute its judgments for those of suppliers going forward. FERC cannot simply disregard contrary evidence by claiming that it is "inapposite." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 311 (D.C. Cir. 2018).

The likelihood that the Market Monitor will deny unit-specific assessments is confirmed by its unambiguous position on the amount of risk that capacity suppliers face. Throughout these proceedings, the Market Monitor has asserted that there is a "low expected number of [Performance Assessment Hours]." *Id.* at 4 (JA___); *see also* Indicated Suppliers Reply Br. 10 (noting "the [Market Monitor's] insistence in these proceedings that the expected [Performance Assessment Hours] should be zero or close to zero") (JA___).[9] Suppliers cannot reasonably price in

[9] The Market Monitor has already revealed its intent to use its powers to curb disagreement. It issued a notice threatening capacity resources that "indicate[d] disagreement" with its offer cap determinations with a referral to FERC, which could result in investigations and potential penalties. Indicated Suppliers Rehearing Request at 21-22 (JA___); Vistra Rehearing Request at 9-11 (JA___). FERC dismisses this as simply a statement that "the Market Monitor will evaluate the matter brought to its attention." Rehearing Order at P89 (JA___). But, as Petitioners explained, an investigation resulting from a referral to the Commission comes at significant expense to suppliers. Vistra Rehearing Request at 9-11 (JA___). It is thus impossible to read the Market Monitor's statement as anything other than a thinly veiled threat.

the risk they face if their proposals must be approved by an adjudicator who has already decided there is no such risk.

Every relevant fact in the record points in the opposite direction from FERC's conclusion. And "[a]gency action"—like this one—that is "based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard." *City of Kansas City v. Dep't of Housing & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991). This Court has thus held that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence." *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992).

Finally, FERC's assertion that it is "speculative" to think that generators will be unable to adequately price their risks into their capacity offers is logically incoherent on its own terms. The Commission chose to "eliminat[e] the default offer cap in favor of the Unit-Specific [Avoidable Cost Recovery] proposal" precisely because the latter would purportedly "ensure that the marginal offer is reviewed." September 2 Order at P62 (JA___). But the whole purpose of this review is to allow the Market Monitor to substitute its judgment for the supplier's. The entire value of the review, then, presupposes that the Market Monitor *will* do what FERC held was speculative to assume the Market Monitor *would*

do. "Such self-contradictory…logic does not constitute an adequate explanation" sufficient to sustain Commission action. *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1520 (D.C. Cir. 1984).

CONCLUSION

The petitions for review should be granted. The Court should vacate FERC's order and remand the case to FERC for further proceedings.

Dated: June 13, 2022

Respectfully submitted,

/S/ *Paul W. Hughes*

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CERTIFICATE OF COMPLIANCE

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

(i) complies with this Court's order of February 8, 2021 because it contains 12,745 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 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: June 13, 2022 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that that on June 13, 2022, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: June 13, 2022 /s/ *Paul W. Hughes*