ARGUED MAY 12, 2017
DECIDED JULY 7, 2017

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

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

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

RESPONSE TO PETITIONS FOR PANEL REHEARING

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September 11, 2017

CORPORATE DISCLOSURE STATEMENTS

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

The NRG Companies

NRG Power Marketing LLC is a Delaware limited liability company with its principal office in Princeton, New Jersey, that engages in electric power marketing by placing market bids and entering into bilateral contracts on behalf of generating facilities for the supply and purchase of energy throughout the United States. The other NRG Companies are each Delaware limited liability companies with their principal offices also located in Princeton, New Jersey. The NRG Companies are subsidiaries of NRG Energy, Inc., a publicly-held corporation. At this time, only NRG Energy, Inc. (NYSE: NRG) has issued shares to the public. The NRG Companies have not issued shares to the public. No publicly-held company has a 10% or greater ownership interest in NRG Energy, Inc.

PJM Power Providers

P3 is a non-profit organization dedicated to advancing federal, state, and regional policies that promote properly designed and well-functioning electricity

markets in the PJM Interconnection, L.L.C. ("PJM") region. Combined, P3 members own over 84,000 MWs of generation assets, produce enough power to supply over 20 million homes, and employ over 40,000 people in the PJM region covering 13 States and the District of Columbia. For purposes of this disclosure statement, P3 respectfully submits that it is a trade association pursuant to Circuit Rule 26.1(b). The content of this pleading represents the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

Respectfully submitted,

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GLOSSARY

FERC	Federal Energy Regulatory Commission, the Respondent
FPA	Federal Power Act
PJM	PJM Interconnection, L.L.C.
Slip Op.	*NRG Power Marketing, LLC v. FERC*, Nos. 15-1452, 15-1454, 862 F.2d 108 (D.C. Cir. July 7, 2017)

INTRODUCTION AND SUMMARY

The petitions for panel rehearing filed by the Federal Energy Regulatory Commission ("FERC") and PJM Interconnection, L.L.C. ("PJM") attempt to sow confusion where none exists. According to FERC and PJM, this Court's opinion impermissibly distinguishes between utilities and Regional Transmission Organizations, demoting the latter to second-class status under the Federal Power Act ("FPA"). That is incorrect. The Court's opinion correctly held that under FPA section 205, 16 U.S.C. § 824d, FERC cannot bypass the requirements for public notice and comment by imposing a materially different rate from the one filed by the applicant. The Court then applied that rule in the context of a rate filed by a Regional Transmission Organization, just as it would have applied the same rule to a rate filed by a traditional utility. And it repeatedly makes clear that the *same* statutory standard applies *identically* to traditional investor-owned utilities and Regional Transmission Organizations alike. *See* Slip Op. 9, 11 & n.2. The petitions thus rest on a premise of differential treatment that is clearly wrong. The decision makes no new law; it applies existing law uniformly.

Although the petitions are framed in terms of protecting Regional Transmission Organizations from statutory diminution, the petitions in fact seek special treatment for Regional Transmission Organizations on policy grounds. FERC does not challenge this Court's central rulings. FERC does not dispute that

it "significantly modified the proposed rate design" filed by PJM. FERC Pet. 2. Nor does it deny that, under this Court's precedents, FERC lacks "authority to require major modifications under section 205 even when the filing utility consents to those conditions." *Id.* Instead, FERC must either (a) reject the filing, leaving the applicant to file a new rate design under section 205, or (b) impose a rate under the more rigorous requirements of section 206, 16 U.S.C. § 824e. *See* Slip Op. 11 & n.2. It cannot hybridize the two by requiring major modifications while purporting to proceed under section 205. *Id.*

Ordinarily, the concession that this Court correctly applied the law to the facts before it would foreclose any rehearing request. FERC nonetheless asserts clarification is needed on whether the law applies differently to "a singular utility with strict separation from its customers" than to "a multi-stakeholder regional transmission organization." FERC Pet. 2. But the Court's opinion is clear. Each time the opinion discusses section 205's requirements, it sets forth a singular articulation of the rule applicable to filings by any "utility or Regional Transmission Organization." Slip Op. 11 & n.2; *see id*. at 9, 13, 15-16. It nowhere states that section 205 sets forth different standards depending on who files a rate. FERC's assertion that the opinion distinguishes between utilities and Regional Transmission Organizations will "impede" its "policy judgment in considering complex, multi-faceted rate design proposals," FERC Pet. 2, thus is unfounded.

FERC and PJM also accuse this Court of "misapprehend[ing]" how "vital" Regional Transmission Organizations are, urging that the Court could not have meant to reach such an "unsavory outcome." *Id.* at 3; PJM Pet. 2-3. But this Court simply followed the statute. It never drew the extra-statutory distinction that FERC and PJM now invent. The petitions should be denied.

I. THE COURT DID NOT SUGGEST, MUCH LESS HOLD, THAT FPA SECTION 205 OPERATES DIFFERENTLY WITH REGARD TO REGIONAL TRANSMISSION ORGANIZATIONS

FERC and PJM contend that the Court erred in distinguishing Regional Transmission Organizations from traditional utilities. Specifically, FERC and PJM object to the Court's statement that "Regional Transmission Organizations such as PJM are not utilities" when observing—correctly—that FERC's regulations permit Regional Transmission Organizations to make rate proposals under FPA section 205. Slip Op. 9 (citing 18 C.F.R. § 35.34(j)(1)(iii)). The petitions for rehearing treat that statement as if it were a jurisdictional declaration that Regional Transmission Organizations are not "public utilit[ies]" within the meaning of FPA section 201, 16 U.S.C. § 824(e). *See* FERC Pet. 3-8; PJM Pet. 6-9.

That is a leap no reasonable reader would make. The Court simply acknowledged that Regional Transmission Organizations are different from classic investor-owned utilities, but made it absolutely clear that FPA section 205 applies equally to both. Each time this Court described a requirement under FPA section

205, or FERC's obligation under that provision, the Court explained that the requirement applies to utilities as well as Regional Transmission Organizations. Slip Op. 11 & n.2 ("Under Section 205, FERC reviews the proposed rate scheme filed by a utility or Regional Transmission Organization and determines whether the proposal is just and reasonable . . . . Section 205 does not authorize FERC to impose a new rate scheme of its own making without the consent of the utility or Regional Transmission Organization that made the original proposal. . . . FERC may unilaterally impose a new rate scheme on a utility or Regional Transmission Organization only under a different provision of the Act: Section 206."); *see id*. at 9 ("Regional Transmission Organizations file proposed rate changes with FERC in accordance with the procedures ordinarily followed by utilities under Section 205."), 13 (explaining that *City of Winnfield* and *Western Resources* preclude FERC from imposing an "entirely different rate design" on either a utility or a Regional Transmission Organization like PJM), 15-16 (explaining that a "utility's consent does not excuse a Section 205 violation" whether the applicant is a traditional utility or a Regional Transmission Organization like PJM). Other than the sentence invoked by the petitioners, there is nothing in the opinion suggesting that the requirements of section 205, or FERC's obligations under it, differ depending on whether a classic utility or a Regional Transmission Organization made the filing.

Even the sentence invoked by the petitioners conflicts with their characterization. It is difficult to read the paragraph where it resides as reflecting any confusion over whether FPA section 205 applies identically to utilities and Regional Transmission Organizations in general, or even PJM in particular:

> PJM filed the proposal pursuant to Section 205 of the Federal Power Act. Section 205 requires utilities to file proposed rate changes with FERC. 16 U.S.C. § 824d(c). Under FERC's regulations, although Regional Transmission Organizations such as PJM are not utilities, *Regional Transmission Organizations file proposed rate changes with FERC in accordance with the procedures ordinarily followed by utilities under Section 205*. *See* 18 C.F.R. § 35.34(j)(1)(iii). *FERC must accept proposed rate changes filed under Section 205 so long as the changes are just and reasonable*. 16 U.S.C. § 824d(a).

Slip Op. 9 (emphasis added). Even in that paragraph, the Court left no doubt that section 205 applies the same standards to filings by "a utility or a Regional Transmission Organization." *Id.* at 11 & n.2.

Properly understood, the opinion merely identifies Regional Transmission Organizations as distinct from classic utilities to make clear that the same principles apply to both, even if older precedents refer only to the latter. Markets may have evolved such that Regional Transmission Organizations now make many of the filings formerly made by classic investor-owned utilities. But the evolution of modern markets has not displaced the statutory standard that applied to classic electric utilities in *City of Winnfield v. FERC*, 744 F.2d 871 (D.C. Cir. 1984), and natural gas utilities in *Western Resources, Inc. v. FERC*, 9 F.3d 1568 (D.C. Cir.

1993). *See* Slip Op. 12-13 & n.3. Every party in this case treated those decisions as governing precedent and FERC itself agrees that the Court's interpretation of that precedent was correct. *See* FERC Pet. 2. This Court did no more than apply the same statutory standard to Regional Transmission Organizations. If that will somehow "impede" FERC's decision-making process, *id.*, FERC's remedy lies with Congress, not a panel of this Court.

FERC seems to be asking this Court to bless it with authority to treat section 205 filings from Regional Transmission Organizations as *ala carte* menus of rate elements from which it can freely pick, choose, and combine—without a new section 205 filing—no matter how material the differences. But FERC has never had such authority with respect to section 205 filings by traditional utilities. There is no statutory basis for a different result for tariffs filed by Regional Transmission Organizations.

The statutory term of art "public utility" includes Regional Transmission Organizations because they "operate[] facilities subject to the jurisdiction of the Commission." 16 U.S.C. § 824(e). But referring to Regional Transmission Organizations as "utilities" can be confusing because they differ from classic utilities in many respects. For that reason, FERC's regulation governing Regional Transmission Organizations, 18 C.F.R. § 35.34(h), describes them as "transmission entities." FERC's petition itself wrestles with the distinction between Regional

Transmission Organizations and traditional utilities by referring to the latter as "singular utilit[ies]." FERC Pet. 2. The Court can hardly be faulted for simplifying that contrast and referring to traditional utilities as "utilities." We thus do not think the Court's opinion requires any alteration. However, if the Court believes it would diminish the possibility of confusion, the solution is to insert the word "traditional" or "classic" before the word "utility" on page 9 so that it reads as follows: "although Regional Transmission Organizations such as PJM are not [classic or traditional] utilities." Slip Op. 9. Or the Court could choose to delete that phrase altogether, as doing so would not alter the meaning of the sentence in which it appears, much less alter the Court's holding.

II. THE COURT DID NOT MISAPPREHEND THE ROLE OF PJM STAKEHOLDERS OR GIVE PRIMACY TO ANY GROUP OF STAKEHOLDERS

PJM argues that this Court misunderstands the PJM stakeholder process, insisting that it is not bound by that process or its outcomes. *See* PJM Pet. 8-9. FERC contends that "the panel decision appears to give primacy to the view of one group of stakeholders." FERC Pet. 11. But nothing in the Court's opinion turns on the mechanics of PJM's stakeholder process or gives "primacy" to any group of stakeholders. The premise of the Court's decision is that a filing utility (including a Regional Transmission Organization) can typically acquiesce to some modifications proposed by FERC without undermining the statute. *See* Slip Op. 12

(citing *City of Winnfield*, 744 F.2d at 876). But the question in this case was whether the orders on review imposed an "entirely different rate design," so unlike PJM's original proposal that allowing PJM to unilaterally acquiesce would evade the notice and comment requirement. Slip Op. 13, 14 (quoting *Western Resources*, 9 F.3d at 1578).

The "entirely different rate design" standard affords FERC broad latitude, but this Court properly concluded that the orders on review crossed the statutory limit based on the particular facts before it. *Id.* at 13-16. The Court examined and applied its precedents. Nothing in either petition supports any claim that the Court incorrectly applied *City of Winnfield*, *Western Resources*, or *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1986). Indeed, FERC explicitly says it does not seek rehearing of the Court's interpretation of those decisions. FERC Pet. 2. Thus, those case-specific arguments, *see* FERC Pet. 12; PJM Pet. 9-14, were either previously considered and rejected, or waived. As this Court explained, PJM's original filing "would have *narrowed* the availability of exemptions to the price floor" for many generators by eliminating one broad exception—so called unit-specific review—with "two narrow, categorical exemptions." Slip Op. 13-14. But the proposed modifications "went in the opposite direction," "*expand[ing]* the exemptions by layering the two new exemptions on top of unit-specific review."

Id. A more obviously material change, that creates an "entirely different rate design," is hard to imagine.

III. THE COURT HAS ALREADY CONSIDERED AND REJECTED ARGUMENTS THAT THE PUBLIC NOTICE VIOLATION IN THIS CASE WAS CURED IN OTHER WAYS

FERC and PJM resurrect arguments that the public notice problem in this case was somehow cured by subsequent events. FERC claims there was no reason to have notice and comment, because parties had an opportunity to seek rehearing after FERC imposed a new rate design. *See* FERC Pet. 13-14. This Court squarely rejected FERC's rehearing theory. *See* Slip Op. 15-16. And FERC offers no good reason for reconsideration. The ability to seek rehearing is no substitute for the right to be heard before the agency decides. *See Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3d Cir. 1979); *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 901-02 (D.C. Cir. 1978) (notice and comment is required while a decision is still in the "formative . . . stage"). This Court certainly would not announce its decision before briefing and remit parties to seeking rehearing. The FPA likewise provides for comments before decision, not just rehearing after. FERC cannot depart from that design by deciding the issue first and seeking public comment later.

Both FERC and PJM also argue that a new section 205 filing, and the notice and comment it would have permitted, were unnecessary because the parties could

have responded to FERC's deficiency letter. *See* FERC Pet. 12-13; PJM Pet. 15-16. But both sides of this case brought the deficiency letter process to the Court's attention. *See* FERC Br. 17; Intervenor Br. 4, 16, 21-24; *see also* Pet. Br. 45 n.12, 51; Pet. Reply Br. 18 n.3, 22. PJM is correct that the Court's opinion does not discuss the Deficiency Letter. *See* PJM Pet. 16. But the Court had no reason to comment on it, because no one argued it was a substitute for adhering to statutory requirements.

Nor can such an argument be made. For one thing, FERC can issue a deficiency letter requesting further information in any case whenever it wants and such letters are interlocutory. If a deficiency letter could substitute for a new section 205 filing, the requirement of a new section 205 filing for materially new rate structures would be a dead letter. Moreover, in this case, PJM's response to the deficiency letter did not signal that a wholly new rate design was being put out for comment. PJM defended its initial proposal as-filed, not the modifications FERC imposed. *See* R.80, JA549-604. Under section 205, it is the utility or Regional Transmission Organization that files new rates, which are then subject to notice and comment. For the rate FERC imposed and this Court overturned, that first step in the opportunity for full notice and comment did not take place—either in the first instance or in response to the deficiency letter.

CONCLUSION

For the foregoing reasons, the petitions for rehearing should be denied.

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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to this Court's order directing a response to the petitions for panel rehearing, I hereby certify that the foregoing document contains no more than 3,900 words (2,386 words using the word-count feature in Microsoft Word) not including the tables of contents and authorities, glossary, and certificates of counsel.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedure and Rule 25(c) of the Circuit Rules of this Court, I hereby certify that on September 11, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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