ORAL ARGUMENT NOT YET SCHEDULED

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

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

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

REPLY BRIEF FOR PETITIONERS THE NRG COMPANIES AND PJM POWER PROVIDERS GROUP

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Initial Reply Brief: September 13, 2016

CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

The parties to this proceeding are as follows:

A. Petitioners

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

B. Respondent

Federal Energy Regulatory Commission

C. Intervenors

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

D. Parties in the Proceeding Below

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

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

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

II. RULINGS UNDER REVIEW

Petitioners seek review of the following orders:

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

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

III. RELATED CASES

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

Respectfully submitted,

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September 13, 2016

CORPORATE DISCLOSURE STATEMENTS

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

The NRG Companies

The NRG Companies are Delaware corporations with principal offices in Princeton, New Jersey. They are each a subsidiary of NRG Energy, Inc., a publicly held corporation (NYSE: NRG) with its principal place of business in Princeton, New Jersey. The NRG Companies have not issued shares to the public. As of this date, T. Rowe Price Group, Inc. (NASDAQ: TROW), through T. Rowe Price Associates, Inc., 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

2011 MOPR Rehearing Order	*PJM Interconnection, L.L.C.*, 137 FERC ¶61,145 (2011)
Commission	Federal Energy Regulatory Commission, the Respondent
CONE	Cost of New Entry
Order	*PJM Interconnection, L.L.C.*, 143 FERC ¶61,090 (2013), JA____-__.
FERC	Federal Energy Regulatory Commission, the Respondent
FPA	Federal Power Act
MOPR	Minimum Offer Price Rule
Net CONE	Net Cost of New Entry
PJM	PJM Interconnection, L.L.C.
Rehearing Order	*PJM Interconnection, L.L.C.*, 153 FERC ¶61,066 (2015), JA____-__.

SUMMARY OF ARGUMENT

I. PJM filed its proposal—with overwhelming stakeholder support—under Federal Power Act ("FPA") § 205. Consequently, FERC could not impose a "materially different" rate design. *Western Resources, Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993). FERC argues it did not impose a material modification here because PJM "acquiesced" to FERC-mandated changes by making a "compliance filing." But PJM's submission was hardly a "compliance filing." It was a radically different proposal that honored only one side of the hard-fought compromise PJM originally submitted. The truncated "compliance" review, moreover, prevented stakeholders from exercising their statutory right to protest.

FERC also denies that it inverted the burdens under § 205, asserting that it did not require PJM to show the unit-specific exemption was "unjust and unreasonable" to justify replacing it. But FERC's orders say the opposite. And FERC's finding that retaining the exemption would be just and reasonable cannot preclude PJM from adopting a different—though still just and reasonable—market design.

II. FERC's decision is not reasoned. FERC required PJM to retain a concededly flawed unit-specific exemption, but did nothing to evaluate or redress those flaws, while adding two new categorical exemptions alongside the unit-specific exemption they were supposed to replace. Numerous parties showed the unit-specific exemption facilitated below-cost entry, allowing subsidized resources

to enter at 40% or 50% of PJM's estimated minimum cost. PJM itself decried the unit-specific exemption's opacity, which precludes anyone but PJM and its market monitor (or FERC) from evaluating cost data. Yet FERC does not claim it reviewed bids, evaluated costs, or performed any analysis itself to determine whether resources bid below cost. Nor does FERC give a good reason for refusing to do so. FERC, moreover, repeats rather than defends its circular claims about the exemption's putative benefits.

FERC's defense of the replacement exemptions fares no better. FERC's brief, like its orders, refuses to address holes in those exemptions that allow below-cost entry. For example, FERC fails to address whether the thresholds for self-supply offer meaningful protection. Intervenors attempt to fill the gaps in FERC's analysis, but they cannot provide the reasoned analysis FERC omitted. And FERC's cursory attempt to defend its failure to examine the modified tariff's total effect rests on a meritless waiver claim and post-hoc rationalizations that are neither logical nor sufficient.

III. FERC's rationale for rejecting the proposal to increase the duration of mitigation, from one year to three, reduces to the claim that it reasonably rejected the same proposal in 2011. But FERC has different evidence before it, including 2012 auction results showing both the existence of "discriminatory subsidies" and the need to address them.

ARGUMENT

No one disputes that the orders below impose a tariff that departs radically from the one PJM originally filed with overwhelming stakeholder support. PJM proposed replacing an "opaque" unit-specific exemption, PJM Filing Letter 9, JA____, that was "flawed and difficult to implement," FERC Br. 29, and at a minimum, raised "concern[s]" it enabled below-cost entry, Intervenors Br. 16. The "hard-fought compromise" PJM proposed would have replaced that flawed exemption with two categorical exemptions. PJM Filing Letter 15, JA____. FERC, however, decided to approve only one side of the compromise: It required PJM to retain the "flawed" unit-specific exemption and then added the two new categorical exemptions that were supposed to replace it.

FERC and intervenors attempt to reconcile FERC's rationale with the requirements of FPA §205. But their briefs would require this Court to rewrite both the FPA and FERC's orders. Moreover, neither FERC's brief nor its orders address the flaws that led PJM to propose replacing the unit-specific exemption. FERC claims unit-specific review provides benefits because it allowed certain new resources to enter the market without having their bids mitigated. But FERC never addresses evidence those bids *should have been mitigated*—and that their entry through the unit-specific exemption without mitigation *proves* the need to replace

or repair it. FERC also continues to elide its obligation to evaluate the total effect of *combining* the three exemptions, relying on an unsustainable waiver argument.

I. FERC VIOLATED § 205 AND SETTLED PRECEDENT

A. PJM's Putative "Acquiescence" to a Fundamentally Different Tariff Through a Compliance Filing Subverts FPA § 205

Everyone agrees FERC may not impose a condition on a utility that yields a "materially different" rate than the one the utility proposed under § 205. *Western Resources*, 9 F.3d at 1578-79; *see* Pet'rs Br. 21-22, 27-31; FERC Br. 35-36; Intervenors Br. 9-10. Although FERC says (at 36) it "did not impose a 'materially different rate,'" it does not seriously argue the *substantive differences* between PJM's initial filing and the "compliance filing" were inconsequential.

Nor can it. PJM presented the MOPR reform proposal not as "a list of discrete Tariff changes, but as a hard-fought compromise package," urging that FERC should "approve it as such." PJM Filing Letter 14-15, JA____-__. No one disputes that FERC did the opposite. FERC rejected the core purpose of the MOPR-reform proposal, which was to replace the opaque unit-specific exemption with two clearly defined categorical exemptions. *Order* P 19, JA____. And FERC rejected another key element, requiring PJM to continue exempting new entrants from MOPR review once they clear just one auction. *Id.* The resulting "compliance filing" represented only one side of the initial bargain: It gave load-

serving entities what they desired (two categorical exemptions), while rejecting the concessions other PJM stakeholders bargained for in return.

1. FERC and intervenors deny that the "compliance filing" was "materially different" because PJM "acquiesced" to FERC-imposed modifications by making the compliance filing and not seeking rehearing of FERC's initial order. FERC Br. 36-37; Intervenors Br. 8-12, 38. That supposed "acquiescence," however, cannot be accepted. FERC's initial order never suggested PJM had the option to withdraw its filing; it just required a compliance filing. *See, e.g.*, *Order* P 3, JA____. PJM then submitted a new package that would never have survived stakeholder review, retaining a non-transparent, unit-specific exemption in which PJM itself remains the ultimate arbiter of whether a new entrant's offer is cost justified. Intervenors ask (at 11) "what more" PJM could have done. The answer is that PJM could have withdrawn its initial filing once FERC-imposed conditions destroyed the underlying compromise, seeking stakeholder approval of that very different reform package. *See* FERC Br. 37; Intervenors Br. 10.

Intervenors respond that "PJM does not require a stakeholder vote to amend its Open Access Transmission Tariff ('Tariff')," where "the Minimum-Offer Rule, reside[s]," Intervenors Br. 12, but they overlook limits on that authority. In the very FERC order intervenors cite for PJM's supposed authority to "make unilateral section 205 filings to revise its . . . [Tariff]," FERC explained that, "[u]nder the

terms of the PJM Operating Agreement, PJM can make section 205 filings to change the energy market provisions *only if* approved by a supermajority vote of its members." *PJM Interconnection, L.L.C.*, 155 FERC ¶61,157, P 15 (2016) (emphasis added).[1] Article 7.2 of the PJM Transmission Owner Agreement similarly bars PJM from making "Section 205 filings to change the PJM Regional Rate Design" without a two-thirds supermajority of Transmission Owner votes through Article 8.5's stakeholder process. PJM Consolidated Transmission Owners Agreement, Rate Schedule FERC No. 42, https://www.pjm.com/~/media/documents/agreements/toa.ashx.

2. Even if PJM can make a capacity-market compliance filing without stakeholder review, §205 does not permit FERC to "split [a] proposal, accepting the first part and rejecting the second, thereby effectively imposing" a rate scheme nobody proposed. *Pub. Serv. Comm'n v. FERC*, 866 F.2d 487, 491 (D.C. Cir. 1989). Yet that is what FERC did. The supposed "compliance filing" here was not just "materially different" from PJM's initial proposal, *Western Resources*, 9 F.3d

[1] In that case, PJM's allied intervenors here—the American Public Power Association and National Rural Electrical Cooperative Association—argued that PJM's recent Capacity Performance proposal required stakeholder approval because it altered capacity and energy markets. The PJM Capacity Performance orders are before the Court in *Advanced Energy Management Alliance v. FERC*, Nos. 16-1234, *et al.* (D.C. Cir. filed July 8, 2016).

at 1579; it was nearly the *opposite* of that proposal. No one pretends it represented the "hard-fought compromise" PJM originally touted.

Consequently, requiring PJM to re-file that fundamentally different proposal under § 205 (rather than allowing a "compliance" filing) would not have been "empty formalism." Pet'rs Br. 29, 31 (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984)). For one thing, "rejecting PJM's filing *en toto* would have returned the question to PJM's stakeholders and restored *both* buyers and sellers to their respective bargaining positions." *Id.* at 31. "FERC's initial order destroyed that possibility." *Id.* There was no incentive for stakeholders to reach another agreement because load-serving entities got everything they desired.

FERC's effort to avoid a new filling—by rebadging a fundamental tariff change as a "compliance filing"—also destroys petitioners' statutory right to protest that "entirely different rate design." *Western Resources*, 9 F.3d at 1578. This Court has reserved whether FERC can "impose[] an entirely new rate scheme" even with utility acquiescence where it circumvents the procedural protections § 205 affords *other* market participants. *See Winnfield*, 744 F.2d at 876. The process here eviscerated those protections. FERC narrowly limits the scope of compliance-filing protests to whether the filing comports with FERC's instructions. *See, e.g.*, *Rehearing Order* PP 95, 100, 107, JA____, ____, ____ (examining whether PJM's "compliance filing" was "consistent with the

requirements of the May 2013 Order" and rejecting protests to PJM's compliance filing as "beyond the scope" of that order or because the order "did not prohibit" PJM's approach). PJM's unilateral "acquiescence" to FERC's conditions deprived petitioners of the opportunity to withdraw their support from PJM's proposal and protest PJM's radically revised "compliance filing" on the merits.

Consequently, at least on these facts, the answer to the question reserved in *Winnfield*—whether a filing utility's supposed assent allows FERC to proceed under § 205 when its "order imposes an entirely new rate scheme," 744 F.2d at 876—must be "no." Here, FERC did not require PJM to "adhere[ ] to a preexisting *scheme*," *id.* (emphasis added)—that is, the original set of rules. FERC instead directed PJM to retain some preexisting rules (the unit-specific exemption) and approved new ones (the categorical exemptions). FERC thus imposed a new mix of rules—a new rate scheme—that reversed the core purpose of the "hard-fought compromise" in PJM's tariff filing without providing petitioners and other PJM stakeholders the statutorily mandated opportunity to protest that unforeseen market rule on the merits.

B. FERC Reversed the Burdens Under FPA § 205

FERC also improperly reversed the evidentiary burden under FPA § 205. Pet'rs Br. 32-34. FERC asserts that petitioners "ignore the Commission's actual holding," FERC Br. 24, *i.e.*, that the categorical exemptions PJM proposed were

not "just and reasonable without the retention of a unit-specific review process," *Order* P 142, JA___. But FERC's *reasoning* inverted the burden of proof.

First, FERC's initial order relied on the fact that, when PJM proposed replacing the unit-specific exemption, PJM "d[id] not argue that" the exemption "is unjust and unreasonable." *Id.* That placed the onus on PJM. On rehearing, FERC "reject[ed] petitioners' argument that the unit-specific review process is not just and reasonable." *Rehearing Order* P 23, JA____. Neither of those rationales can be squared with the FPA: Everyone agrees that "neither petitioners nor PJM were required to show the prior rate was unreasonable" in a § 205 proceeding. Pet'rs Br. 32-33.

FERC declares that it "did not suggest that any party had the burden (as under Federal Power Act section 206 . . .) to show that the existing process was *not* just and reasonable." FERC Br. 29. FERC asserts that it instead "cited PJM's position on the reasonableness of unit-specific review . . . *only to reinforce the Commission's own determination* that the existing process should fill the gaps left by the categorical exemptions." *Id.* at 30 (emphasis added). But the orders' plain terms show otherwise: FERC's "own" determination concededly rests on its view that PJM and petitioners failed to prove the unit-specific exemption unjust and unreasonable.

That leaves FERC's assertion that unit-specific review "yields benefits that warrant[] its retention," *Rehearing Order* P 23, JA___, because it allows "resources that likely would not have qualified for either of PJM's proposed exemptions . . . to justify their net costs," *Order* P 143, JA____. Even setting aside that assertion's other flaws, FERC's conclusion that *retaining* the unit-specific exemption *would be reasonable* is legally insufficient. The putative reasonableness of an existing rule does not bar its elimination or alteration under § 205. *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2003). Besides, as explained below, FERC's example of the unit-specific exemption's benefit—that it had allowed certain resources to enter without mitigation—illustrates exactly its defect: The resources FERC identifies as having benefited from the exemption were *subsidized, below-cost* entrants that *should have been mitigated* but entered through the exemption nonetheless.

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

FERC does not dispute that PJM proposed eliminating the unit-specific exemption, and replacing it with two categorical exemptions, because the unit-specific exemption was "flawed and difficult to implement." FERC Br. 29. PJM concedes it sought to eliminate unit-specific review not merely because the exemption's opacity undermined market confidence, but also because (at the very least) market participants had "concern[s]" the exemption allowed below-cost

entry. Intervenors Br. 16. But FERC required PJM to retain the unit-specific exemption without doing *anything* to evaluate, much less redress, those problems. Pet'rs Br. 40-45.

Party after party urged that the unit-specific exemption had facilitated below-cost entry. Pet'rs Br. 35-37 (collecting filings). Even now, however, FERC does *not* contend it actually evaluated those claims on the merits, looking at costs, bids, or data. PJM itself decried the process's opacity. But FERC does not claim it evaluated or did anything about that. And neither PJM nor FERC provide any good reason for FERC's failure to evaluate the unit-specific exemption's impacts. FERC's defense of the categorical exemptions fares no better. Confronted with serious gaps that would allow still more below-cost entry, FERC's brief (like its orders) ignores them or responds with non-sequiturs. Having commanded that PJM *retain* the unit-specific exemption it sought to replace—and having *added* the proposed replacements on top—FERC was also obligated to find that the tariff "as a whole" is just and reasonable. *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944). FERC's response is a waiver argument that proves unfounded. And while FERC invokes its discretion to "balance" competing considerations, the required balancing and evaluating is precisely what FERC's orders lack.

A. FERC Failed To Justify Retention of an Unmodified Unit-Specific Exemption

1. FERC begins by suggesting that any evaluation of the unit-specific exemption (and whether it facilitates below-cost entry) is beyond the scope of this proceeding. FERC Br. 31. But *FERC* made the exemption's effects a critical question here when it *rejected* PJM's effort to eliminate it and mandated its retention. As PJM explained, a key purpose of its tariff filing was to "displace" the unit-specific exemption with "substitute" categorical exemptions. PJM Filing Letter 1, 15 JA____. PJM deemed it "no longer necessary *or appropriate* to retain a unit-specific review," because the replacement categorical exemptions "leave[] behind only those [resources] that *are likely to raise price suppression concerns*." *Id*. at 16, JA____ (emphasis added); *see id*. at 25, JA____. Numerous parties supported the unit-specific exemption's elimination, likewise urging that it had enabled below-cost entry. *See* Pet'rs Br. 35-37 (citing P3 Comments 6-8, JA____-__; PPL Comments 22-24, JA____-__; CMC Comments 5, 7-9, JA____, ____-__; EPSA Comments 6, JA____; NRG Rehearing 8, JA____; CMC Rehearing 4, JA____; P3 Rehearing 1, JA____).

FERC seems to contend that, when it *mandates* that a utility retain a tariff element under § 205, FERC is under no obligation to evaluate evidence concerning the element's actual effect. To state that proposition is to refute it. Reasoned decisionmaking requires FERC to consider "the advantages *and* the disadvantages

of" its chosen course. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). Here, FERC articulated a reason for retaining the unit-specific exemption (allegedly to ensure economic bids are *never* subject to mitigation). But FERC made no attempt to evaluate the costs of the "flawed and difficult to implement" exemption it imposed to accomplish that goal.

Confronted by serious arguments that the unit-specific exemption was broken, FERC could have allowed PJM to eliminate it. Alternatively, FERC could have required the exemption's repair. Or FERC could have evaluated the asserted costs and compared them to the putative benefits. But FERC instead followed the one course not open to it—mandating the exemption's retention without addressing proven defects, without evaluating their impact, and without considering repairs.

2. FERC's treatment of evidence of uneconomic entry—including three recent examples of below-cost bidding by subsidized resources in New Jersey and Maryland—underscores its failure to address the key issues before it. Petitioners and others presented extensive evidence and argument that those resources had entered the market below cost through the unit-specific exemption. Pet'rs Br. 35-39 (collecting filings). FERC's sole response was that no party showed that unit-specific review was "unjust and unreasonable," FERC Br. 31—a showing no party was required to make, *see* pp. 8-9, *supra*. More fundamentally, FERC refused and

still refuses to respond to petitioners' showings that the unit-specific exemption facilitates below-cost entry.

For example, FERC's orders deemed the unit-specific exemption necessary because, in 2012, some resources "that likely would not have qualified for" the categorical exemptions "were able to justify their net costs through the unit specific review process." *Order* P 143, JA____. As petitioners explained, that pointed out the *problem* with the unit-specific exemption: The resources FERC relied on appear to be the very resources—three heavily subsidized New Jersey and Maryland resources—that numerous commenters identified as having submitted below-cost offers through the unit-specific exemption. Pet'rs Br. 15, 41-42. FERC responds with silence.

Nor does FERC address the logical flaw in its reasoning. In essence, FERC's orders deemed the unit-specific exemption necessary because, absent it, certain bids that avoided mitigation through the exemption would have been mitigated. But that assumes the bids should not have been mitigated. If resources *were* bidding below cost, the fact they escaped mitigation through the unit-specific exemption proves the exemption is broken—not that its retention is appropriate. FERC's brief repeats the same error: To rebut petitioners' contention those resources were "uneconomic," FERC argues they "were able to justify their bids *as economic* through unit-specific review." FERC Br. 32. That is circular. The

question is whether unit-specific review allows below-cost entry. The fact that certain resources avoided mitigation through unit-specific review does not show whether or not they are economic.

3. FERC and PJM, moreover, ignore the numbers. As petitioners explained, PJM's "Net CONE" is designed to reflect the *minimum* capacity prices needed to support an average new entrant building a gas-fired plant—a mature technology where costs are unlikely to vary from plant to plant. Pet'rs Br. 38 (citing Stoddard Aff. ¶¶16-17, JA____-__). Consequently, absent some breakthrough technology, *all* new suppliers should offer capacity "near Net CONE." *2011 MOPR Rehearing Order* P 25. Yet the unit-specific exemption permitted a subsidized Maryland resource to enter at about 40% of Net CONE. *See* Pet'rs Br. 38-39 (citing CMC Rehearing 10, JA____). Neither FERC nor PJM deny that. Nor do they offer any reason why that resource's costs would be just 40% of the estimated *minimum* calculated by PJM. That silence speaks volumes.

That silence is equally as telling with respect to the two subsidized New Jersey resources. Pet'rs Br. 36-39. Those resources cleared at just 53% of Net CONE, even though they used the same mature gas-fired technology on which Net CONE is based. *Id.* at 38 (citing Stoddard Aff. ¶¶16-17, JA____-__). FERC nowhere explains why those resources' costs would be *half* of PJM's estimated minimum cost of new entry. FERC's (unpersuasive) claim that it has not *conceded*

those offers were below cost (at 32-34) is thus irrelevant: The numbers speak for themselves, and FERC offers no reasoned analysis of, much less response to, the data.[2]

Intervenors admit that, before FERC, petitioners identified the "offers submitted by" the New Jersey and Maryland suppliers in the 2012 auction—"seven months" before these proceedings began—as examples of below-cost entry. Intervenors Br. 13 n.3. Intervenors urge, however, that those offers "were not at issue" below. *Id*. That assertion is puzzling. FERC put those offers at issue when it identified them as grounds *for retaining* the unit-specific exemption because, absent the exemption, the offers might have been mitigated. Pet'rs Br. 41-42; p. 10, *supra*. And the parties put the offers at issue when they cited the offers as showing that the "broken" unit-specific exemption permits below-cost entry. *See, e.g.*, CMC Rehearing 12-14, JA____-__; CMC Comments 8, JA____; P3 Comments 7-8, JA____-__. FERC, however, never—and never claims to have—reviewed costs, examined bids, or otherwise evaluated the evidence.

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[2] Besides, FERC did recognize that New Jersey's state-sponsored contracts actually had (not merely *could* have) a "price-suppressive and distorting effect on PJM's wholesale capacity market prices." Brief for United States and FERC as *Amici Curiae* 9-10, *PPL EnergyPlus, LLC v. Solomon*, Nos. 13-4330, 13-4501 (3d Cir. filed Mar. 20, 2014). Two of those suppliers, Hess and CPV, avoided mitigation in the 2012 auction through the unit-specific exemption. *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp. 2d 372, 400 (D.N.J. 2013), *aff'd sub nom. PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014).

Attempting to rely on PJM for the analysis FERC was obliged to perform, FERC urges that it "agreed" with PJM that the 2012 auction produced "cost-justified bids." FERC Br. 32-33. But FERC did not so much agree as abdicate. FERC never claims it conducted *any* analysis itself. Its orders rest on a supposed PJM "concession" that the auction results were just and reasonable. *Order* P 143, JA____. That is not reasoned decisionmaking. Regardless of what—if anything—PJM "conceded," *petitioners* disputed that the auction results reflected cost-justified offers. *See* FERC Br. 31. Thus, FERC was required to give the "reasons" why it disagreed; it could not simply announce they were wrong and PJM was right. *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1058 (D.C. Cir. 2003).

Moreover, the purported "concession" turns out to be PJM's assertion that it administered the auctions with *the goal* of ensuring just-and-reasonable outcomes. Pet'rs Br. 45 n.12. Doubling down, intervenors (including PJM) now assert that PJM's *tariff* somehow shows there was no below-cost bidding. "Petitioners' claim that unit-specific review allowed below-cost offers," intervenors urge, "is contradicted by the Tariff language governing that review—which PJM was required to follow." Intervenors Br. 14. That is like arguing that crimes do not occur because the law prohibits them. The fact that the rules—paper barriers—forbid uneconomic bidding does not show that the unit-specific exemption actually

prevents it. Pet'rs Br. 37 n.7 (explaining defects in the process that preclude its effectiveness). The remainder of intervenors' positions (at 15-19) likewise cannot backfill the reasoning FERC failed to supply. Indeed, while PJM now claims that it was concerned about the unit-specific exemption's opacity—not below-cost bidding[3]—FERC did nothing to address opacity, either.

Turning that vice into virtue, intervenors (including PJM) belittle petitioners' showing on below-cost entry. Petitioners could not "speak to the cost support or any other details of the Unit-Specific Exception," they assert, "because that process is confidential." Intervenors Br. 16. But that opacity is precisely one of the defects FERC ignored. Moreover, the fact that petitioners have no access to cost data (aside from limited information about the New Jersey and Maryland plants) is all the more reason why FERC must do the job it abandoned: obtaining and evaluating data.

For that reason, FERC steps into quicksand by asserting that it must "weigh" the objective of "guard[ing] against price suppression" against the "concern that excessive mitigation efforts could impede competition." FERC Br. 26; *see id.* at

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[3] PJM's positions are highly variable. Before FERC, it expressed "concern[ ]" that "the current unit specific review is so broad that it may invite" manipulation. PJM Deficiency Response 3-4, JA____-__. Before this Court, it presents unit-specific review as an air-tight barrier to below-cost entry. PJM now claims its concerns before FERC arose from the process's opacity. Intervenors Br. 16-17. But opacity was a concern precisely because there were reasons to doubt outcomes. P3 Comments 6-8, JA____-__; *see also* PJM Filing Letter 10, JA____.

27. That "weigh[ing]" is absent here. FERC required retention of the unit-specific exemption based on concern that, absent that exemption, economic offers might be mitigated. *Order* P 143, JA____. But FERC made no effort to identify how often, if ever, truly economic offers would fail to qualify for the categorical exemptions or what the market effect might be. Petitioners pointed that out (at 41), and FERC says nothing in response. The only examples of at-risk offers FERC mustered, moreover, are apparently the very offers parties repeatedly identified as below-cost bids that should have been mitigated. Pet'rs Br. 41-42. Nor did FERC make an effort to address the costs the unit-specific exemption imposed. FERC thus failed even to evaluate the exemption's costs and putative benefits, much less "weigh" one against the other. Its decision cannot stand.

B. FERC Failed To Justify Adding the Categorical Exemptions

FERC did not merely require retention of the unit-specific exemption. FERC also combined it with the two new categorical exemptions that were supposed to replace it. A resource that does not qualify for the unit-specific exemption can seek to avoid mitigation through those exemptions. FERC Br. 40. The piling of exemption on exemption compounds the risks of below-cost entry—risks FERC failed to evaluate.

1. *Self-Supply Exemption*

Petitioners explained why the self-supply exemption creates incentives for uneconomic behavior by self-supply entities. Pet'rs Br. 46-51. FERC's brief, like its orders, offers no response.

For example, as petitioners explained, self-supply entities with guaranteed revenue streams have incentives to suppress prices, even if their purchases and sales are otherwise balanced. *Id.* at 47-49. FERC urges that PJM selected net-long and net-short thresholds that, "'in principle, adequately protect the market from . . . uneconomic new self-supply.'" FERC Br. 41. But thresholds cannot counter the effects of guaranteed revenue streams. As petitioners explained, guaranteed revenues "can give utilities with relatively balanced purchases and sales"—including those operating under the thresholds—"an incentive to suppress prices." Pet'rs Br. 50; *see id.* at 47-49. FERC ignores the argument and the problem entirely.

Nor does FERC address long-term incentives. For example, an otherwise qualifying self-supply entity that "knows it will become a net-buyer" in the future would have strong incentives to enter below cost now, and suppress prices indefinitely, so as to maximize future profits for years to come. *Id.* at 49. FERC's brief, like its orders, overlooks that danger. FERC failed to fulfill its obligation to

"'answer objections that on their face seem legitimate.'" *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 209 (D.C. Cir. 2011).

Intervenors attempt to compensate for FERC's silence, arguing that long-term uncertainties (*e.g.*, the risk of cost disallowance by state regulators) prevent guaranteed revenue streams from creating a significant risk of uneconomic bidding. Intervenors Br. 24-29. But such "post-hoc rationalizations in . . . intervenors' brief[]" are no "substitute for record evidence or reasoned decision-making." *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1518 (D.C. Cir. 1984). "The agency" must "consider and explain" why guaranteed revenue streams and long-term incentives do not present the identified risk. *Id.* That is especially true where, as here, the evidence intervenors cite was disputed. Petitioners, for example, argued that the risk of cost disallowance is too small to prevent below-cost bidding because state regulators "infrequent[ly]" initiate proceedings that can lead to cost disallowance. Stoddard Reply Aff. ¶19, JA____. FERC failed to evaluate that issue at all.

FERC's treatment of the net-long and net-short thresholds is equally bereft of reason. As petitioners explained (at 49-51), FERC set the thresholds so high that no existing public power provider (or any other self-supplier) actually crosses them; its limits are so permissive they are not limits at all. FERC's riposte is that it "reasonably relied on PJM's analysis." FERC Br. 41. But FERC, not PJM, is the

regulator. And FERC points to nothing in its orders providing any reason for crediting PJM's analysis over (for example) the analysis of NRG's economist, who reached the opposite conclusion. If FERC is to credit one expert over another, it must give "reasons" for its choice. *KeySpan-Ravenswood*, 348 F.3d at 1058. FERC did not.

That failure is especially troubling given that petitioners explained why PJM's analysis was flawed. PJM's expert failed to "analyze the impacts of the self-supply exemption during the most important market conditions" (*i.e.*, when conditions are tightest), and gave inadequate weight to certain long-term business strategies. *See* NRG Deficiency Protest 4, 6-7, JA____, ____-__. FERC's response is, once again, silence. Intervenors' attempt to fill that silence (at 20-29) again cannot provide the analysis FERC failed to give in its orders.

2. *Competitive-Entry Exemption (NRG Only)*

FERC likewise failed to give reasons for rejecting arguments against the competitive-entry exemption. FERC still does not dispute that the exemption permits a merchant generator to bid below its costs. FERC argues that the prospect of below-cost bidding is "speculati[ve]" because a merchant generator "'places its own capital at risk.'" FERC Br. 42-43. But FERC ignores real-world examples of generators bidding below true cost, whether due to unrealistic expectations of future energy prices or long-term profit-maximization strategies. For example,

FERC itself observed that, in the early 2000s, generators overbuilt because "investment decisions were made using more optimistic projections of market conditions than were realized." FERC, *2004 State of the Markets Report* 28-29 (June 2005); *see* Pet'rs Br. 52 (citing the report). There is more to the argument than mere "speculation."

Intervenors concede (at 30) that generators may "offer their products at prices that prove too low to recover their costs." Contrary to their assertion (at 30), however, the MOPR is supposed to prevent unrealistic projections from distorting markets. It should "identify uneconomic offers and 'mitigate' them by raising them to a price that more accurately approximates their net costs." *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 85 (3d Cir. 2014). That mechanism is essential to FERC's administratively constructed markets because participants are entitled to at least the opportunity to recover efficient investments. Pet'rs Br. 52-54. But uneconomic entry can prevent prices from recovering to competitive levels for decades. *Id.* By failing to evaluate the competitive-entry exemption in light of those market realities, FERC again ignored an "'important aspect of the problem.'" *Michigan*, 135 S. Ct. at 2706.

C. FERC Failed To Consider the "Total Effect" of Piling the Categorical Exemptions on the Flawed Unit-Specific Exemption

FERC does not deny that it must consider its orders' "total effect," *Hope*, 320 U.S. at 602—whether the individual elements "*together* produce just and

reasonable consequences," *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (emphasis added). Instead, it offers excuses for failing to do so.

1. FERC first contends (at 39) that petitioners never raised its obligation to consider the rate's total effect below. But NRG argued that FERC "incorrectly treated the filing, *not as an integrated whole*, but as separate rate elements, which it was free to accept or reject *without taking into account the delicate interplay between the various provisions*." NRG Rehearing 19, JA____ (emphasis added); *see also id.* at 7, 15, 25-26, JA____, ____, ____-__. P3 likewise argued that FERC "failed to make findings of fact—as required by FPA section 206—that . . . the replacement MOPR, which *includes both the retention of the unit-specific review process and the two new exemptions*, is just and reasonable." P3 Rehearing 14, JA____ (emphasis added); *see also id*. at 4, 7-8, JA____, ____-__. Waiver indeed.

Petitioners "did not explicitly include a subheading" with the words "total effect" in their "request[s] for rehearing," but that makes no difference where the "substance of [the] arguments" were before FERC. *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 958 (D.C. Cir. 2013). "Read in the[ir] entirety," *Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 683 (D.C. Cir. 1978), the requests make clear that FERC—having created a "fundamentally" new tariff by requiring PJM to

retain "the unworkable unit-specific" exemption with two new exemptions—was required to evaluate *that* tariff as a whole, P3 Rehearing 1, 7, JA____, ____.

2. Before this Court, FERC begins by rejecting the idea that adding exemption to exemption has *any* cumulative effect, urging they "are not 'piled' in layers," but rather are "complementary, and both lead to . . . resources bidding their actual costs." FERC Br. 39-40. That is not merely an impermissible "post-hoc rationalization." *Elec. Consumers Res. Council*, 747 F.2d at 1518. It is unsustainable. The challenged orders, for example, nowhere declare that every bid that survives the current unit-specific review process necessarily reflects actual costs; FERC merely declined to find the process "unjust and unreasonable." FERC Br. 31. FERC likewise failed to address the cumulative risk that is imposed when suppliers are given three ways to avoid the MOPR, rather than just one (or two). And FERC all but concedes the effect is cumulative. A resource that "does not qualify for a[ ] [categorical] exemption," it explains, can try to "justify its cost-based offer" through the unit-specific exemption instead. FERC Br. 40. Because the exemptions are not perfect screens for uneconomic offers—and FERC nowhere argues they are—they create a *cumulative* risk of uneconomic entry that FERC never evaluated.

FERC also argues it "fully explained its policy judgment that, together, [the exemptions] reasonably balance the twin goals of preventing price suppression

while avoiding unwarranted mitigation of economic offers." FERC Br. 40 (citing FERC Br. 24-28). But the sentence FERC cites *explains* nothing: It says "the MOPR as modified herein appropriately balances the need for mitigation of buyer-side market power against the risk of over-mitigation." *Order* P 26, JA____. One-sentence *ipse dixit* is not balancing. One searches FERC's orders in vain for a meaningful evaluation of *either side* of the balance (such as the costs and benefits of unit-specific review). Pet'rs Br. 43, 54-56; pp. 18-19, *supra*. FERC all but "'forgot[]'" about the risk side of the equation. *Process Gas Consumers Grp. v. FERC*, 177 F.3d 995, 1004 (D.C. Cir. 1999).

FERC's remaining citations fare no better. FERC once again (at 25) cites the *Order*'s claim that some resources which might "not qualify for a categorical exemption might still merit a unit-specific exemption." *E.g.*, *Order* P 107, JA____. But that assertion fails for the reason given above (at 14-15, *supra*): FERC's orders do not say how often that would occur; what the market impact might be; or whether that impact outweighs the adverse impacts of retaining the exemption. They thus do not prove that FERC considered, much less "balanced," the combined risk the three exemptions impose. The remaining citations (at 26-27) are off-topic—they concern an increase to the MOPR benchmark value, the duration of the mitigation period, and the MOPR's geographical reach. *See Order* PP 195, 212, 217, JA____, ____, ____. None touch on the exemptions. FERC

may have broad policy-making authority to balance risks. *See* FERC Br. 26-28. But FERC must provide a reasoned basis for its decision. *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010). It neglected to do that here.

III. FERC UNLAWFULLY REQUIRED PJM TO CEASE MITIGATION OF NEW ENTRY UPON CLEARING A SINGLE AUCTION

FERC rejected PJM's proposal to increase the duration of MOPR compliance by new entrants from one to three years because, in FERC's view, clearing one auction "reasonably demonstrates that a new resource is needed by the market at a price near its full cost of entry." *Order* P 211 n.100, JA____ (quoting *2011 MOPR Rehearing Order* P 131). FERC and its supporting intervenors—with the notable exception of PJM[4]—argue that FERC rejected the same proposal in 2011 and reasonably rejected it again here. *See* FERC Br. 44-48; Intervenors Br. 31-34.

But neither FERC nor PJM address the critical difference between this case and the 2011 orders: the record. Here, FERC had the benefit of the 2012 capacity-auction results, which demonstrated that PJM's unit-specific review process failed to stop new resources—supported by "discriminatory subsidies"—from artificially

[4] PJM does not join Part IV of the Intervenors Brief defending a one-year MOPR mitigation period. PJM claims that "nothing in FERC's orders prevents" FERC from addressing "broader concerns about the impact of subsidies" in future proceedings "with an appropriate record." Intervenors Br. 31 n.5. But FERC's rationale—that clearing *one* auction proves a new resource is "needed by the market"—defies that construction. *Order* P 211 n.100, JA____. PJM cannot have it both ways.

suppressing capacity-market prices. Neither FERC's orders, nor any supporting briefs, offer a sustainable response.

A. FERC Still Fails To Explain How Permitting "Discriminatory Subsidies" Complies with the FPA

FERC's orders squarely hold that new suppliers may properly enter the market by clearing in one auction "[e]ven if a generator has received a discriminatory subsidy." *Rehearing Order* P 79, JA____. That defies FERC's statutory mandate. FPA §205 does not allow FERC to accept "any undue preference or advantage" regarding "rules and regulations affecting or pertaining to [FERC-jurisdictional] rates or charges." 16 U.S.C. §824d(a)-(b). FPA §206 similarly directs that "any rule, regulation, practice, or contract affecting [a FERC-jurisdictional] rate, charge or classification" may not be "unduly discriminatory or preferential." *Id.* §824e(a).

FERC contends it has not "endorsed discriminatory subsidies" because "the first-year offer floor vitiates the effect of any such subsidy on the market price." FERC Br. 47. In essence, FERC urges that discriminatory subsidies are acceptable because the damage will be *limited* by the MOPR's default price floor (or a lower price PJM authorizes under the unit-specific exemption) for one year. *See id.*; *Rehearing Order* P 79, JA ____. Intervenors argue the same thing. Intervenors Br. 35-36. But that is just another way of saying that unit-specific review is

effective—something FERC and intervenors say but never support. *See* pp. 12-17, *supra*.

FERC's response, in any event, sidesteps the statutory objection. Petitioners have repeatedly argued that FERC cannot disregard the FPA's prohibition against discrimination by finding that "clearing the market is sufficient to show that a resource is 'needed'"; rather, FERC must show that "'discriminatory subsidies' are 'needed'" to acquire sufficient capacity—and, here, the "record shows that they are not." Pet'rs Br. 57-58 (quoting P3 Rehearing 9, JA____). Nothing in FERC's orders, or its brief, answers that objection. And there is no reasonable response because PJM's proposal to extend the mitigation period was not absolute: To forestall capacity shortfalls, PJM's filing authorizes "new entry that presents price subsidization concerns" when "the Base Residual Auction clears a quantity of capacity less than the Installed Reserve Margin minus three percentage points." PJM Filing Letter 29, JA____.

B. FERC Fails To Show That Limiting Review to a Single Auction, Contrary to PJM's Consensus Proposal, Was a Reasoned Response to Evidence of Uneconomic Entry

PJM's proposal to extend the mitigation period went hand-in-hand with elimination of the unit-specific exemption. Both were essential elements of PJM's original compromise package. And both were justified by strong evidence that a unit-specific exemption limited to only one auction had enabled market-distorting

quantities of subsidized capacity to enter the market. *See* CMC Rehearing 10-15, JA____-__ (detailing evidence that state-support permitted three new resources to clear the auction with extremely low offers); Pet'rs Br. 35-39 (same). Those new entrants then declared they would not build, but nominally entered later auctions as "existing" resources exempt from the MOPR because they had already "cleared" one auction. Pet'rs Br. 60. That much appears to be uncontested.

FERC, however, argues that a resource supported by a "discriminatory subsidy" does "not artificially suppress the market price, if the generator clears [one] auction" because clearing one auction demonstrates "the resource is needed." FERC Br. 47 (quoting *Rehearing Order* P 79, JA____, and *2011 MOPR Order* P 177). That argument is circular. It turns on the premise, stated elsewhere in FERC's brief, that a subsidized resources are "able to justify their bids as *economic* through unit-specific review." FERC Br. 32.[5] But the failure of unit-specific review is at the center of this dispute. It is the very thing PJM proposed to replace with overwhelming stakeholder support. And the single-auction-clearance rule makes it easier for subsidized entrants to game that process: So long as they

[5] Intervenors take FERC's position to a more naked extreme. They contend uneconomic entry and artificial price suppression are impossible "[b]y definition," Intervenors Br. 32, "because the Minimum-Offer Rule is expressly designed to negate the effect of any impermissible subsidies," *id.* at 36; *accord id.* at 38-39. That response, once again, is akin to arguing crimes do not occur because the law, by definition, prohibits them.

manage to make it through for *one* auction, they can bid whatever they want—regardless of cost—for all auctions to come.

FERC claims that its "policy judgment" here was "'a proper exercise of its role in balancing competing interests.'" FERC Br. 48 (quoting *New Eng. Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014)). But there was no "balancing" here. FERC held fast to a policy judgment it made in an earlier proceeding without weighing new evidence—that subsidized resources had suppressed prices—against the "extra risk that a resource" clearing one auction "may not clear at all in the second and third years." *Rehearing Order* P 87, JA____. Nor did FERC address whether its approval of PJM's new categorical exemptions lessened or eliminated that "extra risk." That is not reasoned decisionmaking.

CONCLUSION

The petitions for review should be granted.

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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Circuit Rule 32(a)(2), I hereby certify that the foregoing document contains no more than 7,000 words (6,954 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 13, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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