Nos. 21-3068, 21-3205 & 21-3243 (consolidated)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PJM POWER PROVIDERS GROUP
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF PJM POWER PROVIDERS GROUP

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May 9, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of this Court's Local Appellate Rules, The PJM Power Providers Group ("P3") states as follows:

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, LLC (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, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

P3 is represented in these proceedings by attorneys from Hunton Andrews Kurth LLP.

Local Appellate Rule 26.1.1(b) provides that "[e]very party to an appeal must identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest." In light of that rule, P3 provides the following list of its members:

Advanced Power
Caithness Energy, L.L.C.

Calpine Corporation
Cogentrix Energy Power Management, LLC
Competitive Power Ventures
Eastern Generation, LLC
GenOn Holdings, Inc.
J-POWER USA Development Co., Ltd
LS Power Development, LLC
NRG Energy, Inc.
Starwood Energy Group, LLC
Talen Energy Supply, LLC
Tenaska Energy , Inc.
Vistra Corp.

As in all other proceedings where P3 is a party, the positions taken in this petition for review represent the positions 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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2011 MOPR Order	*PJM Interconnection, L.L.C.,* 135 FERC ¶ 61,022 (2011)
2011 MOPR Rehearing Order	*PJM Interconnection, L.L.C.,* 137 FERC ¶ 61,145 (2011)
APA	Administrative Procedure Act
April 2020 Order	*Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,034 (2020)
Base Residual Auction	"BRA"; Defined in the PJM Tariff as "the auction conducted three years prior to the start of the Delivery Year to secure commitments from Capacity Resources as necessary to satisfy any portion of the Unforced Capacity Obligation of the PJM Region not satisfied through Self-Supply."
BSMP	Buyer-Side Market Power
Commission	Federal Energy Regulatory Commission
Conditioned State Support	"CSS"; Defined by the PJM Tariff in relevant part as: "any financial benefit required or incentivized by a state, or political subdivision of a state acting in its sovereign capacity, that is provided outside of PJM Markets and in exchange for the sale of a FERC-jurisdictional product conditioned on clearing in any RPM Auction …."
Cost of New Entry	"CONE"; Defined by the PJM Tariff as "the nominal levelized cost of a Reference

	Resource as determined in accordance with Tariff, Attachment DD, section 5."
December 2019 Order	*Calpine Corp. v. PJM Interconnection, L.L.C.,* 169 FERC ¶ 61,239 (2019)
Expanded MOPR Orders	*Calpine Corp. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61,236 (2018), *order establishing just & reasonable rate,* 169 FERC ¶ 61,239 (2019), *order on reh'g & clarification,* 171 FERC ¶ 61,034, *order on reh'g & clarification,* 171 FERC ¶ 61,035, *order on reh'g & compliance,* 173 FERC ¶ 61,061 (2020), *order on compliance & clarification*, 174 FERC ¶ 61,036, *order vacating footnote*, 174 FERC ¶ 61,109 (2021)
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
IMM	Independent Market Monitor
ISO-NE	ISO New England Inc.
June 2018 Order	*Calpine Corp. v. PJM Interconnection, L.L.C.,* 163 FERC ¶ 61,236 (2018)
kV	Kilovolt
LDA	Local Delivery Areas
Load Serving Entity	"LSE"; Defined in relevant part by the PJM Reliability Assurance Agreement as : "any entity … serving end-users within the PJM Region … that has been granted the authority or has an obligation … to sell electricity to end-users located within the PJM Region."

Market Monitoring Unit or MMU	Defined by the PJM Tariff as the unit "responsible for implementing the Market Monitoring Plan, including the Market Monitor …."
Market Violation	Defined by the PJM Tariff as "a tariff violation, violation of a Commission-approved order, rule or regulation, market manipulation, or inappropriate dispatch that creates substantial concerns regarding unnecessary market inefficiencies …."
Mobile	*United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956)
MOPR	Minimum Offer Price Rule
MW	Megawatt
Narrow MOPR	Revisions to the Application of Minimum Offer Price Rule, Docket No. EL21-2582-000 (July 30, 2021)
NEPGA	*New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014)
Net Sell Position	Defined by the PJM Tariff as "the amount of Net Obligation when Net Obligation is negative."
NGA	Natural Gas Act
NJBPU	*New Jersey Board of Public Utility Control v. FERC,* 744 F.3d 74 (3d Cir. 2014)
NYISO	New York Independent System Operator, Inc.
P3	PJM Power Providers Group

PJM	PJM Interconnection, L.L.C.
RPM	Reliability Pricing Model
RPS	Renewable Portfolio Standard
Self-Supply Entity	Defined by the PJM Tariff in relevant part as: "types of Load Serving Entity that operate under long-standing business models: single customer entity, public power entity, or vertically integrated utility …."
Supporting Statement	Joint Statement of Chairman Glick and Commissioner Clements re PJM Interconnection, LLC under Docket No. EL21-2582
Tariff	PJM Open Access Transmission Tariff
Variable Resource Requirement Curve	Defined by the PJM Tariff in relevant part as: "a series of maximum prices that can be cleared in a Base Residual Auction for Unforced Capacity …."
VRR	Variable Resource Requirement

INTRODUCTION

This case concerns a radical reversal in policy by the Federal Energy Regulatory Commission (FERC) that eviscerated more than a decade of FERC precedent—including orders previously upheld by this Court—concerning the Minimum Offer Price Rule (MOPR) that controls the exercise of market power in the thirteen-state regional market for electric generation capacity administered by PJM Interconnection, L.L.C. (PJM). This policy reversal was not made through a FERC order, but rather announced by FERC's Secretary on the basis of a tie vote.

FERC has long held it has a statutory duty under the Federal Power Act (FPA) to prevent individual states from employing out-of-market subsidies to suppress the price of capacity sold in the interstate market or to shift the costs of one state's preferred generation resources to consumers in other states. This Court affirmed that principle in *New Jersey Board of Public Utility Control v. FERC*, 744 F.3d 74 (3d Cir. 2014) (*NJBPU*), upholding FERC's 2011 MOPR Orders[1] eliminating PJM's state mandate exemption after New Jersey and Maryland required utilities to enter contracts that enabled new natural gas-fired plants to offer capacity at prices below their actual costs. This Court, the Fourth Circuit, and the Supreme Court separately found those states' policies preempted by the FPA. *See PPL EnergyPlus, LLC v.*

[1] *See PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011) (2011 MOPR Order), *reh'g denied*, 137 FERC ¶ 61,145 (2011) (2011 MOPR Rehearing Order) (collectively, 2011 MOPR Orders).

Solomon, 766 F.3d 241 (3d Cir. 2014); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014), *aff'd sub nom. Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016).

Following *NJBPU* and *Hughes*, certain PJM states devised new ways to subsidize preferred generation resources. These programs typically focused on retaining existing nuclear generation capacity or promoting new renewable resources, neither of which were covered by FERC's 2011 MOPR reforms. By 2018, rapid expansion of these state programs materially affected capacity prices, prompting PJM to propose market rule modifications under FPA section 205, 16 U.S.C. § 824d. However, FERC found PJM's proposal insufficient to address these new threats and imposed a remedial rate on PJM under FPA section 206, 16 U.S.C. § 824e. FERC's Expanded MOPR Orders established the minimum requirements PJM's MOPR must have to preserve meaningful competition.[2]

Then-Commissioner Glick, who became FERC's Chairman in January 2021, dissented from the Expanded MOPR Orders, arguing they would increase capacity prices and impede renewable resource development. However, when PJM held its

[2] *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (June 2018 Order), *order establishing just & reasonable rate*, 169 FERC ¶ 61,239 (2019) (December 2019 Order), *order on reh'g & clarification*, 171 FERC ¶ 61,034 (April 2020 Order), *order on reh'g & clarification*, 171 FERC ¶ 61,035, *order on reh'g & compliance*, 173 FERC ¶ 61,061 (2020), *order on compliance & clarification*, 174 FERC ¶ 61,036, *order vacating footnote*, 174 FERC ¶ 61,109 (2021) (collectively, Expanded MOPR Orders).

first and only auction under the Expanded MOPR in May 2021, capacity prices fell dramatically, and large amounts of new renewable resources displaced thermal resources. *See infra* at 21. Nevertheless, Chairman Glick repeatedly threatened PJM and other Regional Transmission Organizations to propose their own modifications or FERC would "do it for them." *Infra* note 4.

In response, PJM expedited a stakeholder process to file market rule changes under FPA section 205 on July 30, 2021. JA0001. PJM's new Narrow MOPR proposal was explicitly designed to erase the reforms required by FERC's Expanded MOPR Orders and 2011 MOPR Orders, which PJM calls the Legacy MOPR. JA0002. Thus, rather than prevent state subsidies from distorting competitive prices, the Conditioned State Support (CSS) prong of PJM's revisions ignores the effect of any state subsidy not already preempted under *Hughes*. The Buyer-Side Market Power (BSMP) prong of PJM's revisions further limits the rule, creating a complex intent-based standard that ensures few, if any, entities will be subject to the MOPR.

Supporters of the Narrow MOPR include: (i) certain utilities and electric cooperatives that benefit from state subsidies, (ii) New Jersey and Maryland, which are promoting large offshore wind generation projects for commercial operation in 2024, and (iii) a collection of self-styled public interest organizations. Opponents include (i) competitive power producers, who object that PJM's proposal makes it impossible to compete with state-subsidized resources, (ii) Pennsylvania and Ohio,

which object to bearing the costs of out-of-market resources subsidized by other states, and (iii) PJM's Independent Market Monitor, who contends PJM's proposal eliminates meaningful control over state-sponsored market power.

FERC failed to issue an order on PJM's proposal within 60 days as required by FPA section 205(d), 16 U.S.C. § 824d(d). Instead, FERC's Secretary issued a Notice declaring PJM's filing went into effect by operation of law "because the Commissioners are divided two against two as to the lawfulness of the change." JA____. Chairman Glick and Commissioner Clements would have supported PJM's proposal, while Commissioners Christie and Danly would have rejected it. *See infra* at 25-27. FPA section 205(g), 16 U.S.C. § 824d(g), was enacted in 2018 to preserve protestors' rights to seek rehearing and judicial review in this circumstance.

The Notice is not a FERC order. It contains no findings of fact or conclusions of law authorizing PJM to implement market rule changes that reverse long-standing FERC precedent and defy minimum requirements for controlling state-sponsored market power set by the Expanded MOPR Orders and 2011 MOPR Orders. A market rule change proposed under FPA section 205 that fails to secure a FERC majority cannot override remedial rule changes previously imposed by FERC under FPA section 206. Nothing in the FPA excuses FERC from complying with its obligation under the Administrative Procedure Act (APA) to acknowledge and explain the radical departure from precedent announced in the Secretary's Notice.

For these reasons, the Notice must be vacated. To the extent this Court chooses to address the Commissioners' conflicting views on the merits of PJM's proposal, it should find the MOPR revisions unjust, unreasonable, and unduly discriminatory.

JURISDICTIONAL STATEMENT

On September 29, 2021, FERC's Secretary issued a Notice memorializing FERC's failure to issue an order on PJM's filing within 60 days under 16 U.S.C. § 824d(d). JA____. The PJM Power Providers Group (P3) timely filed an emergency request for rehearing on October 5, 2021, JA____, and timely petitioned for review on November 5, 2021. On November 29, 2021, FERC's Secretary issued a Notice memorializing FERC's failure to act on rehearing within 30 days under 16 U.S.C. § 825*l*(a). JA____. This Court has jurisdiction under FPA sections 205(g) and 313(b), 16 U.S.C. §§ 824d(g), 825*l*(b).

STATEMENT OF ISSUES

The central issues presented in this petition, as detailed in P3's specifications of error on rehearing, JA____-__, are:

1. Whether the Notice is *ultra vires* because it directs a rate change under FPA section 205 on the basis of a tie vote notwithstanding direct conflict with remedial rates previously imposed by FERC under FPA section 206.

2. Whether the Notice is arbitrary and capricious *per se* because it entirely fails to (a) respond to objections and evidence presented by P3 or any other party, and (b) acknowledge or explain the reversal of the Expanded MOPR Orders and 2011 MOPR Orders.

3. Whether PJM's 2021 MOPR revisions are unjust, unreasonable, and unduly discriminatory because they (a) provide undue preferences for state-sponsored resources and unduly discriminate against competitive resources, (b) allow certain states to shift the costs of their preferred generation resources to consumer-constituents in other states, and (c) fail to prevent or mitigate the exercise of market power through out-of-market subsidies.

STATEMENT OF RELATED CASES AND PROCEEDINGS

The FERC Notice challenged here has not been and is not now on review in this Court or any other court. The Notice reverses FERC's 2011 MOPR Orders, which this Court upheld in 2014. *See NJBPU*, 744 F.3d at 80. The Notice also reverses FERC's Expanded MOPR Orders, which are subject to petitions for review the Seventh Circuit is holding in abeyance pending the outcome of this case. *See Ill. Commerce Comm'n v. FERC*, Nos. 20-1645, *et al*. (7th Cir. Dec. 30, 2021).

STATEMENT OF FACTS

A. Ratemaking Procedures Under the FPA

FPA section 201(b), 16 U.S.C. § 824(b), grants FERC "exclusive jurisdiction over wholesale sales of electricity in the interstate market." *Hughes*, 578 U.S. at 153. FERC's exclusive jurisdiction includes regulation of market rules governing sales of electric generation capacity, notwithstanding the preemptive impact those rules have on state jurisdiction over electric generation facilities. *See id.* at 162-64; *see, e.g.*, *Solomon*, 766 F.3d at 252-55; *NJBPU*, 744 F.3d at 95-97; *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

FPA section 205 requires FERC to ensure "[a]ll rates and charges made, demanded or received by any public utility for or in connection with the transmission or sale of electric energy … and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable." 16 U.S.C. § 824d(a). Specifically, FERC may not "(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." *Id*. § 824d(b). All rates, terms, and conditions for FERC-jurisdictional service—collectively known as tariffs—must be filed with FERC and public utilities may propose changes to their own tariffs upon 60 days' prior notice so that FERC may examine whether such changes are just and reasonable. *See id.* § 824d(c)-(d).

FPA section 206 permits FERC to impose tariff changes, either on its own initiative or pursuant to a complaint, if FERC determines the existing tariff is "unjust, unreasonable, unduly discriminatory or preferential." 16 U.S.C. § 824e(a). After making that determination, section 206 directs that FERC itself "shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order." *Id*.

The Department of Energy Reorganization Act, which created FERC as successor to the Federal Power Commission, requires a quorum of three Commissioners and that all "[a]ctions of the Commission shall be determined by a majority vote of the members present." 42 U.S.C. § 7171(e).

Deadlocked votes were extremely rare at FERC before 2021. The first judicial guidance on tie votes at FERC occurred in *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016), which held "FERC did not engage in collective, institutional action when it deadlocked on" capacity auction results filed by ISO New England Inc. (ISO-NE) and therefore "the Notices describing the effects of that deadlock are not reviewable orders under the FPA." *Id.*

Following *Public Citizen*, FPA section 205(g) was enacted to permit rehearing and judicial review if FERC "permits the 60-day period [in section 205(d)] to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change." 16 U.S.C. § 824d(g)(1). When this occurs, the statute provides that:

> (A) the failure to issue an order accepting or denying the change by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 825*l*(a) of this title; and
>
> (B) each Commissioner shall add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.

Id. § 824d(g)(1)(A)-(B). The statute further provides that if "a person seeks a rehearing … and the Commission fails to act on the merits of the rehearing request" within 30 days because the deadlock continues then "such person may appeal under section 825*l*(b)." *Id.* § 824d(g)(2).

B. The Reliability Pricing Model and the Original MOPR

PJM's capacity market framework, the Reliability Pricing Model (RPM), was adopted after FERC found PJM's market design "unjust and unreasonable because the market revenues received by capacity providers were likely to be insufficient to sustain the continued and future investment in capacity resources, potentially causing multiple reliability violations." *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276, at P 2 (2008). The original RPM construct was conditionally approved by FERC in 2006 and implemented in 2007. *See NJBPU*, 744 F.3d at 83.

PJM conducts annual Base Residual Auctions (BRAs) to procure capacity three years before the Delivery Year capacity will be provided. Supply offers are cleared in economic order against a downward-sloping demand curve, called the Variable Resource Requirement (VRR) curve. The final increment of capacity needed to meet demand sets the market clearing price paid to the final supplier and other suppliers who clear the auction with lower offers, thus driving competitors to offer below the anticipated clearing price. *See id.* at 83-84 & nn.4-6.

At its inception, RPM included a MOPR to "address[] the concern that net buyers might have an incentive to depress market clearing prices by offering some self-supply at less than a competitive level." *Id.* at 89. Under the original MOPR, "offers for capacity were subject to mitigation if they failed three 'screens': a conduct screen, an impact screen, and an incentive screen (also known as the 'net-short test')." *NJBPU*, 744 F.3d at 85. The original MOPR only applied to new natural gas-fired resources, the costs of which determine the Cost of New Entry (CONE) value that drives the VRR Curve. *See id.* at 86. The original MOPR included a State Mandate exemption for "any planned resource being developed in response to a state regulatory or legislative mandate to resolve a projected capacity shortfall." *Id.* It "also provided special treatment to resources designated as 'self-supply,' which are capacity resources that an LSE [Load Serving Entity] builds to serve its own load." *Id.* Under these constraints, "the original MOPR was never triggered, meaning that no offer was subject to mitigation." *Id.* at 87.

C. The 2011 MOPR Revisions

In 2011, PJM proposed to reform its MOPR in response to a complaint by P3 requesting expedited reforms to address state initiatives to support new natural gas-fired generation through out-of-market payments via contracts for differences. *See NJBPU*, 744 F.3d at 88-90. PJM explained its original MOPR had "never been triggered" and could not prevent price suppression caused by "state programs

intended to support new generation entry through out-of-market payments" because the "net short" incentive screen "puts such programs beyond the reach of PJM's MOPR, unless the buyer and seller in such contracts happen to be affiliates." Proposed Revisions of PJM Interconnection, L.L.C., Transmittal Letter at 3, Docket No. ER11-2875-000 (Feb. 11, 2011) (PJM 2011 Filing).

PJM accordingly proposed to eliminate the MOPR's State Mandate Exemption and require parties to request state policy-based exemptions through FPA section 206 complaints. *Id.* at 14-16. PJM also proposed to eliminate the "net short criterion," which restricted the MOPR to sellers that were "effectively buying substantially more capacity from the auction than they are selling into it," because that rule was "too easily gamed." *Id.* at 16. PJM emphasized those changes were necessary to "conform [its] rule to the Commission's recent precedents on similar rules in New York and New England." *Id*. at 1; *see id.* at 16-17.[3]

In its 2011 MOPR Order, FERC agreed to eliminate the State Mandate Exemption based on "mounting evidence of risk from what was previously only a

[3] ISO-NE's rule changes to combat New England state subsidies, which FERC accepted, were litigated alongside PJM's 2011 MOPR proposal. *See ISO New England, Inc.*, 135 FERC ¶ 61,029, at P 170 (2011), *reh'g denied*, 138 FERC ¶ 61,027 (2012), *aff'd sub nom. New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 293-95 (D.C. Cir. 2014) (*NEPGA*). FERC eliminated a "net buyer" requirement in the New York Independent System Operator (NYISO) because "all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address." *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301, at P 29 (2008).

theoretical weakness in the MOPR rules that could allow uneconomic entry." 135 FERC ¶ 61,022 at P 140. FERC explained that "uneconomic entry can produce unjust and unreasonable wholesale rates by artificially depressing capacity prices, and therefore the deterrence of uneconomic entry falls within [its] jurisdiction." *Id.* P 141. FERC found that "effective mitigation of uneconomic entry into wholesale capacity markets does not encroach on a state's ability to act within its borders to ensure resource adequacy or to favor particular types of new generation," and that "there is no valid state interest in ensuring that uneconomic offers can submit below-cost offers into the RPM auction." *Id.* P 142.

FERC rejected requests to exempt state-sponsored projects unless "the IMM or other party can demonstrate that a project resulted from a state-mandated process intended solely to suppress wholesale capacity prices." *Id.* P 143. FERC held that its "duty under the FPA to assure just and reasonable rates in wholesale markets" includes "effective mitigation of state-sponsored uneconomic entry." *Id.* FERC added that the Fixed Resource Requirement alternative in PJM's Tariff provides a mechanism for "states seeking full independence in resource procurement choices" to "implement a form of capacity procurement that complements the RPM or … opt out of the RPM." *Id.* P 141 n.76; *accord id.* P 193.

FERC also eliminated the "net-short" incentive screen as "ineffective and unnecessary" because an exemption "based on the perceived incentives of an entity

will be ineffective at protecting against buyer market power." *Id.* PP 84, 86. FERC rejected claims that eliminating the "net-short" provision would result in "over-mitigation." *Id.* P 89. In addition, FERC: (i) accepted PJM's proposal to remove an "impact screen" under which the MOPR would not apply unless the offer would decrease the market clearing price by a significant amount (described as 20-30% or $25/MW-day, depending on the zone), because the screen allowed uneconomic offers to escape the MOPR, was unnecessary to prevent "over-mitigation," and did not address the cumulative impact of multiple uneconomic offers, *id.* PP 101, 106; (ii) required PJM to develop procedures for PJM and the IMM to review unit-specific cost justifications to submit sell offers the MOPR would otherwise mitigate, *id.* P 121; and (iii) restricted the MOPR to new natural gas-fired plants because they were the most likely resource type to exploit market power, *id.* P 153.

On rehearing, FERC reaffirmed the 2011 MOPR revisions were necessary because "[t]he long-term viability of the PJM market demands an assurance of competitive offers from new entrants." 2011 MOPR Rehearing Order at P 2. As FERC explained:

> Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources, or unreasonably interfere with those objectives. We are forced to act, however, when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's RPM is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity.

Id. P 3; *accord, e.g.*, *id.* P 189. FERC "continue[d] to find that an across-the-board exemption from MOPR for new resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and inhibit competitive investment." *Id.* P 5. In FERC's view, the "unit-specific cost justification process" would allow self-suppliers to defend their offers, *see id.*, and also "reconcile the tension that has arisen between policies enacted by states and localities that seek to construct specific resources, and [FERC's] statutory obligation to ensure the justness and the reasonableness of the prices determined in the RPM." *Id.* P 4. And, if the unit-specific review proved insufficient, states and market participants remained free to file complaints seeking a MOPR exemption under FPA section 206. *Id.* P 5.

This Court affirmed FERC's 2011 MOPR Orders in *NJBPU*. First, the Court affirmed FERC's jurisdiction and rejected arguments that FERC's orders unreasonably caused consumers to "pay twice for capacity." 744 F.3d at 97. Second, the Court found that many of the key issues on review had been mooted by a 2013 FERC order that, as discussed below, resolved the petitioners' objections. *Id.* at 105. Third, the Court agreed it was appropriate to limit the MOPR to new natural gas-fired resources because subsidies for those resources were the only material threat to competitive capacity prices at that time. *Id.* at 106.

D. The 2013 MOPR Compromise

In 2013, PJM made a new filing reflecting a compromise among PJM stakeholders to replace the unit-specific review process with two categorical exemptions: a competitive entry exemption and a self-supply exemption. June 2018 Order at P 14. FERC accepted those exemptions, but only in addition to the unit-specific review process the stakeholder-supported categorical exemptions were meant to replace. Those orders were vacated in *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108, 117 (D.C. Cir. 2017), which held FERC exceeded its FPA section 205 authority by modifying PJM's proposal. On remand, FERC rejected PJM's competitive entry exemption and self-supply exemption, leaving unit-specific review as the only way for a new natural gas-fired resource to obtain a MOPR exemption. *See PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 (2017). However, FERC declined to modify the results of the auctions held under the vacated rule, explaining it would upend market participant expectations. *Id.* P 55 & n.116.

E. The Expanded MOPR

In 2016, power suppliers filed a complaint against PJM arguing the MOPR had become unjust and unreasonable because it was limited to new market entrants and thus allowed below-cost offers from existing resources under newly-enacted state subsidy programs to unjustly displace non-subsidized resources. June 2018 Order at P 15. FERC took no immediate action on that complaint, but convened a

technical conference in 2017 to explore the impact of subsidies in PJM and other regional markets. *See id.* P 16. FERC identified "five potential paths forward":

> (1) a limited, or no MOPR approach; (2) an approach that would accommodate resources receiving out-of-market support; (3) retention of the status quo; (4) an approach that would balance state policy goals and the needs of a centralized capacity market; and (5) an extension of the MOPR to apply to both new and existing resources.

Id. In 2018, PJM proposed MOPR modifications to implement the fifth path, urging FERC to address the adverse impacts of rapidly proliferating state subsidies. *See* Capacity Repricing or in the Alternative MOPR-Ex Proposal: PJM Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market, Docket No. ER18-1314 (Apr. 9, 2018).

PJM explained the MOPR was unreasonably limited to new gas-fired resources, allowing other subsidies to escape mitigation. PJM warned that:

> if a material fraction of resources price their capacity offers relying on their selective receipt of subsidies, then: [1] other sellers in PJM's interstate market that do not receive subsidies will receive an artificially suppressed, unjust and unreasonable rate; [2] competitive entry will face a significant added barrier; [3] new subsidies will be encouraged; and [4] one state's policy choices could contribute to a 'crowding out' of other competitive resources and resulting policy choices on which other states rely.

Id. at 4. PJM argued FERC has a statutory duty to correct these problems and that "Commission action is needed now" to address "state programs to maintain and support existing resources and (to a lesser degree) induce entry of alternate energy resources." *Id.* at 36.

In its June 2018 Order, FERC declared PJM's capacity market had "become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market." 163 FERC ¶ 61,236 at P 1. FERC held the PJM MOPR was no longer just and reasonable under FPA section 206 because it applied only to new natural gas-fired resources and failed to mitigate price distortions caused by out-of-market support granted to other types of entrants or to existing capacity resources of any type. *Id.* P 5. As FERC explained,

> [T]he PJM Tariff allows resources receiving out-of-market support to significantly affect capacity prices in a manner that will cause unjust and unreasonable and unduly discriminatory rates in PJM regardless of the intent motivating the support. We are compelled by the evidence presented by PJM, Calpine, and other parties to these consolidated proceedings to conclude that out-of-market payments by certain PJM states have reached a level sufficient to significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely to guide the orderly entry and exit of capacity resources. We cannot rely on such a construct to harness competitive market forces and produce just and reasonable rates. The PJM Tariff, therefore, is unjust and unreasonable.

Id. P 156 (footnote omitted).

FERC "propose[d] that the replacement rate include an expanded MOPR that covers out-of-market support to all new and existing resources, regardless of resource type" because the record demonstrated "that state-subsidized resources—not just entities exercising buyer-side market power—can cause significant price

suppression." *Id.* P 158. In FERC's view, "[a]n expanded MOPR, with few or no exceptions, should protect PJM's capacity market from the price suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price." *Id.* FERC initiated a "paper hearing" to permit additional briefing and evidence to establish a just and reasonable replacement rate under FPA section 206. *See id.* P 149.

In December 2019, FERC directed PJM to establish a replacement rate "that retains PJM's current review of new natural gas-fired resources under the MOPR and extends the MOPR to include both new and existing resources, internal and external, that receive, or are entitled to receive, certain out-of-market payments." December 2019 Order at P 2. FERC also required "three categorical exemptions to reflect reliance on prior Commission decisions" for "(1) existing self-supply resources, (2) existing demand response, energy efficiency, and storage resources, and (3) existing renewable resources participating in [Renewable Portfolio Standard (RPS)] programs." *Id.* FERC reestablished "a fourth exemption, the Competitive Exemption, for new and existing resources that are not subsidized" and also allowed "new and existing suppliers that do not qualify for a categorical exemption to justify a competitive offer below the applicable default offer price floor through a Unit-Specific Exemption." *Id.* FERC explained its "replacement rate does not purport to solve every practical or theoretical flaw in the PJM capacity market," emphasizing

its focus on the "core problem" PJM and the complainants both identified, "that is, the manner in which subsidized resources distort prices in a capacity market that relies on competitive auctions to set just and reasonable rates." *Id.* P 5.

FERC issued several orders on rehearing and compliance through February 2021 that continued to clarify and refine the replacement rate implementing FERC's directives under FPA section 206. *See supra* note 1. FERC repeatedly postponed PJM's annual capacity auctions to accommodate the hearing, rehearing, and compliance processes. *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,051, at P 2 (2019), *extended by* 169 FERC ¶ 61,239, at P 4, *extended by* 173 FERC ¶ 61,061, at P 358 (2020).

F. FERC's Leadership Transition

In January 2021, Commissioner Glick replaced Commissioner Danly as Chairman and FERC held its first meeting as a five-member Commission since June 2018. Commissioner Glick vigorously dissented from the Expanded MOPR Orders, arguing that they unlawfully invaded state jurisdiction, would cause a "multi-billion-dollar-per-year rate hike for PJM customers," and "ossify the current resource mix." December 2019 Order (Glick, Comm'r, dissenting) at PP 3-4.

Chairman Glick made reversal of the Expanded MOPR Orders and similar rules governing other markets a top priority, warning PJM and other Regional Transmission Organizations to propose their own changes quickly or FERC would

"do it for them." *E.g.*, Catherine Morehouse, *FERC Open to Revisiting MOPR, as Grid Operators, Utilities Mull Future of Wholesale Markets*, Utility Dive (Mar. 24, 2021);[4] *see also, e.g.*, *ISO New England, Inc.*, 175 FERC ¶ 61,195 (2021), at P 5 (Glick, Comm'r, dissenting in part) ("I urge ISO-NE to move expeditiously to replace its ORTP and MOPR-related rules or the Commission will be left with little choice but to step in and establish new rules ourselves.").

Meanwhile, Commissioner Danly solicited industry comments and published several whitepapers on MOPR reform topics in response. *See* Commissioner James P. Danly, *The Requirement that Competitive Markets be Protected from the Exercise of Market Power Applied to RTO Capacity Markets* (May 20, 2021), JA____; Supp. 1 (June 17, 2021), JA____; Supp. 2 (July 15, 2021), JA____; *Results of The PJM Capacity Auction (2022/2023 RPM Base Residual Auction)* (June 17, 2021) (Danly BRA Results Whitepaper), JA____.

[4] https://www.utilitydive.com/news/ferc-open-to-revisiting-mopr-as-grid-operators-utilities-mull-future-of-w/597233/; *accord, e.g.*, Sean McMahon, *A Conversation with FERC Chairman Richard Glick*, SmartBrief (Apr. 5, 2021), https://www.smartbrief.com/original/2021/04/conversation-ferc-chairman-richard-glick; Catherine Morehouse, *Glick: FERC Should Tackle MOPR if PJM Can't Agree on Update by December Capacity Auction*, Utility Dive (Apr. 16, 2021), https://www.utilitydive.com/news/glick-ferc-should-tackle-mopr-if-pjm-cant-agree-on-update-by-december-cap/598324/.

G. The May 2021 BRA Results

On June 2, 2021, PJM announced the results of the May 2021 BRA for the 2022/2023 Delivery Year, the first auction to be held under the Expanded MOPR. *See 2022/2023 RPM Base Residual Auction Results* (June 2, 2021) (2022/2023 BRA Results), JA____. "Prices were significantly lower than in the previous auction." *PJM Successfully Clears Capacity Auction to Ensure Reliable Electricity Supplies: Auction Attracts Diverse and Efficient Resources at Lower Wholesale Costs* (PJM Press Release) at 1, JA____. The RTO-wide price of $50 was approximately 36% of the $140 RTO-wide price from the previous auction. This was the lowest RTO-wide price in over a decade and the fourth lowest RTO-wide price ever. Prices in certain constrained local delivery areas (LDAs) were higher than $50, but still lower than the prior BRA and on the low side of constrained LDA prices in all previous auctions. *See* Danly BRA Results Whitepaper at 1 & nn.3-6, JA____.

Furthermore, cleaner energy resources made significant gains. "Renewables, nuclear and new natural gas generators saw the greatest increases in cleared capacity, while coal units saw the largest decrease." PJM Press Release at 1, JA____. Specifically, "1,728 MW of wind cleared in the auction, representing an increase of 312 MW over the previous capacity auction," while "[s]olar increased by 942 MW over the previous capacity auction, with 1,512 MW clearing." *Id.* at 2, JA____. Moreover, "Nuclear generators cleared an additional 4,460 MW when compared to

the last auction," while "[c]oal generators," by contrast, "cleared 8,175 fewer megawatts than in the previous auction." *Id.*

The Expanded MOPR did not present an insuperable barrier to new entry or compel the failure of subsidized resources. The overwhelming majority of capacity offered into the 2021 BRA was not subject to the Expanded MOPR: 167,698 MW of capacity was offered and 155,669 MW (approx. 93%) of those offers were expressly exempt or otherwise unaffected by the Expanded MOPR. *See* PJM, *May 2021 BRA Clearance Data by Resource Type and MOPR Status*, JA____. 10,220 MW (approx. 6%) of the total offered was subject to the MOPR, and only 1,810 MW (approx. 1%) of the total offered was subject to the MOPR. *See id.* 8,404 MW (82%) of the offers subject to the MOPR cleared and 513 MW (28%) of the offers subject to the MOPR cleared. *See id.* Moreover, renewable resources subject to the Expanded MOPR were more successful than thermal resources. *See* P3 Protest at 30-31, JA____-__.

H. PJM's July 2021 Narrow MOPR Revisions

On July 30, 2021, PJM submitted tariff revisions to FERC under FPA section 205 proposing to terminate, effective with the 2023/24 Delivery Year, both the existing MOPR for natural gas resources (which PJM calls the Legacy MOPR) and the Expanded MOPR. *See* Revisions to the Application of Minimum Offer Price Rule, Docket No. EL21-2582-000 (July 30, 2021) (Narrow MOPR), JA0001.

PJM proposed to implement a "focused" or "narrow" MOPR that would apply only in two limited circumstances: first, any actual "Exercise of Buyer-Side Market Power," and second, any instance of "Conditioned State Support." PJM redefined "Buyer-Side Market Power" as the "[a]bility of market participant(s) with a load interest to suppress market clearing prices for the overall benefit of their portfolio." *Id.* at 3, JA0003. PJM redefined "Exercise of Buyer-Side Market Power" to mean:

> "anti-competitive behavior" by a Capacity Market Seller with a Load Interest of any kind, i.e., a "responsibility for serving load within the PJM Region," whether through its own load service obligations, that of an affiliate, or through a contractual arrangement with a [Load Serving Entity] "for the overall benefit of the Capacity Market Seller's (and/or affiliates of Capacity Market Seller) portfolio of generation and load or that of the directing entity with a Load Interest." Thus, only Generation Capacity Resources of Capacity Market Sellers with a "Load Interest" could be subject to the MOPR based on buyer-side market power concerns.

Id. at 24 (footnotes omitted), JA0024.

The Narrow MOPR primarily relies on sellers to "'self-certify' whether their resources should be subject to the MOPR" by attesting they (1) are not "receiving or expected to receive Conditioned State Support" and (2) do "not intend to Exercise Buyer-Side Market Power." *Id.* at 26, 28, JA0026-28. Self-certification entails a "presumption of innocence" and is not challenged unless "PJM or the Market Monitor has a reasonable basis to initiate an inquiry" into a seller's veracity. *Id.* at 29-30, JA0029-30.

The Narrow MOPR applies only to sellers deemed to have both the ability and incentive to lower market prices, as determined by various screens, which effectively confines mitigation to sellers with a Load Interest who are in a "net short" position (*i.e.*, the seller buys more than it sells in the RPM). *Id.* at 35-39, JA0035-39. Thus, the Narrow MOPR categorically excludes (a) merchant generation not contracted to load, (b) resources acquired through a competitive and non-discriminatory state procurement process, and (c) generation resources owned or contracted by a Self-Supply Entity (*i.e.*, vertically-integrated, cooperative, or municipal utilities) that are included in a Self-Supply Entity's state-approved long-range resource plan, provided the plan "does not direct the submission of an uneconomic offer to deliberately lower market clearing prices." *Id.* at 40-42, JA0040-42. In addition, the Narrow MOPR excludes any resource "receiving compensation in support of characteristics aligned with well-demonstrated customer preferences." *Id.* at 42, JA0042.

"Conditioned State Support," the other practice prohibited by the Narrow MOPR, is defined as "any financial benefit required or incentivized by a state, or political subdivision of a state acting in its sovereign capacity, provided outside of PJM markets and in exchange for the sale of a FERC-jurisdictional product conditioned on clearing in any RPM Auction," including "directives as to the price level at which a Generation Capacity Resource must be offered." *Id.* at 25, JA0025. Thus, "Conditioned State Support" is essentially limited to circumstances where a

state engages in conduct that is preempted under *Hughes*. *Id.* The term "Conditioned State Support" expressly excludes state-level environmental initiatives (for example, Renewable Energy Credits and Zero Emissions Credits), state and local tax incentives, state retail default service auctions, fuel supply incentives, and federal programs administered by states (e.g., elements of the Public Utility Regulatory Policies Act of 1978), and "legacy" state policies enacted prior to September 1, 2021. *Id.* at 45-47 n.153, JA0045-47.

I. The September 29, 2021 Notice and the Commissioners' Separate Statements

On September 29, 2021, FERC's Secretary issued a Notice declaring that PJM's filing went into effect by operation of law as the result of a tie, adding that any written statements explaining a Commissioner's position would be added to the record later per FPA section 205(g)(1)(B). JA____. After waiting a reasonable time for those statements to appear, P3 filed its emergency request for rehearing on October 5, 2021. JA____. Chairman Glick and Commissioner Clements filed a joint statement supporting PJM's proposal (Supporting Statement) on October 19, 2021—one week before the opportunity to seek rehearing expired. Commissioner Christie and Commissioner Danly subsequently filed separate statements rejecting PJM's proposal.

The Supporting Statement argued PJM's Narrow MOPR Proposal "rights the wrongs created by [FERC's] most recent orders on the topic" and "abandons

[FERC's] deeply misguided campaign to 'nullify' the effects of legitimate state policies." Supporting Statement at PP 2-4, JA____-__. The Supporting Statement asserted several times that three Commissioners agreed the Expanded MOPR Orders were unjust and unreasonable. *Id.* PP 48, 65, 81, n.99, JA____. The Supporting Statement also claimed the Secretary's September 29 Notice is not subject to APA requirements on judicial review because, if it were, then every filing that results in a tie "would be guaranteed to lose on appeal under section 205(g) because, by definition, [FERC] could not possibly address the relevant protests." *Id.* The Supporting Statement concluded that, after more than ten years of contrary precedent, PJM's proposal "puts PJM back on course" and finally "establishes a construct that is just and reasonable and not unduly preferential." *Id.* PP 162-63.

Commissioner Christie rejected the Supporting Statement's mischaracterization of his position and clarified that he is "not on the same page" as Chairman Glick and Commissioner Clements. Christie Statement at 4 n.11, JA____. Instead, he would unequivocally "*reject* the PJM section 205 MOPR Proposal filing as unjust and unreasonable and immediately initiate a FPA section 206 proceeding to develop a just and reasonable alternative." *Id.* He explained his concerns with the Expanded MOPR are not driven by "its merits or demerits in terms of economics," but rather by his view that "the incumbent MOPR is unsustainable *because of the political realities* relevant to an RTO consisting of thirteen sovereign

states and the District of Columbia and their increasingly divergent policies." *Id.* Commissioner Christie disagreed that PJM's proposal improved the status quo, stating it was "the flawed and rushed result of an 'expedited' stakeholder process and results in a structure that the PJM Independent Market Monitor (IMM) says is *even worse* than having no MOPR at all." *Id.* P 3, JA____. In his view, PJM's rule changes created "[a] construct in which winners and losers are determined by which interest groups' lobbyists can obtain the biggest subsidies from politicians" and that is "a rent-seekers' paradise in which consumers lose." *Id.* P 12, JA____.

Commissioner Danly found that "PJM's proposal eliminating all mitigation of the price-suppressive effects of state subsidies is irredeemably inconsistent with FPA section 205's requirement that proposed rates must be just and reasonable." Danly Statement at P 75, JA____. FERC therefore "abandoned its responsibility to mitigate price suppression by state subsidies" by declaring the Narrow MOPR had taken effect by operation of law. *Id.* P 6, JA____. This also caused fatal defects under the APA—which were forecasted before section 205(g) was enacted, *see infra* at 35-36—because the Notice provided no explanation for reversing "years of [FERC] and court precedent holding that [FERC] is statutorily obligated to address and mitigate the price-suppressive effects of such subsidies." *Id.* P 36, JA____.

All rehearing requests were denied without an order on November 29, 2021, JA____, and this petition followed.

SUMMARY OF THE ARGUMENT

The September 29, 2021 Notice declared PJM's Narrow MOPR revisions went into effect by operation of law on the basis that FERC was divided 2-2 on the merits. That announcement overturned FERC's Expanded MOPR Orders and 2011 MOPR Orders, likewise disregarding FERC precedent governing other regional markets. The Notice violates the text and structure of the FPA, as well as the principle of majority rule, by allowing a mere section 205 filing to contravene remedial rules FERC imposed under section 206 without any FERC order authorizing that reversal. The Notice is irreconcilable with Supreme Court precedent limiting the scope of unilateral filings under FPA section 205, including the *Mobile-Sierra* doctrine. The Notice also violates the APA because it includes no reasoning at all: it responds to none of the arguments protesting PJM's filing and it neither acknowledges nor explains FERC's radical departure from precedent.

If this Court chooses to evaluate the merits of PJM's proposal itself in the absence of a FERC order, the Court should find PJM's submission unjust, unreasonable, unduly discriminatory, and preferential. First, independent power producers cannot compete effectively against resources that employ state subsidies to submit uneconomic offers below their actual costs. Second, PJM's MOPR revisions allow certain states to shift the cost of subsidized resources to consumers in other states through a market-wide clearing price. Third, PJM's mitigation rules

entirely fail to control the exercise of state-sponsored or buyer-side market power, which is a prerequisite for allowing market-based rates set through competition.

STANDARD OF REVIEW

No court has addressed the standard of review for petitions under FPA section 205(g). The statute preserves petitioners' ability to seek rehearing and judicial review of FERC's failure to issue an order, but does not establish a standard of review or assign any weight to Commissioners' separate statements. To the extent the extra-statutory Notice issued by FERC's Secretary constitutes "agency action" under 5 U.S.C. § 551(13), the APA requires this Court to "set aside" the Notice if it is deficient for any of the reasons described in 5 U.S.C. § 706(2).

This Court "review[s] questions of law, including issues of statutory interpretation, de novo, subject to applicable principles of deference." *Reyes-Ortiz v. Att'y Gen*., 860 F. App'x 815, 818 (3d Cir. 2021) (citing *Smriko v. Ashcroft*, 387 F.3d 279, 282 (3d Cir. 2004)). Because FERC issued no order, FERC made no institutional findings of fact or conclusions of law to which this Court might defer under 5 U.S.C. § 706(2), 16 U.S.C.§ 825*l*(b), *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000), *Chevron, U.S.A., Inc. v. Natural Resources. Defense Council, Inc*., 467 U.S. 837, 843-44 (1984), or *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

ARGUMENT

I. The Notice Must Be Vacated Because It Unlawfully Voids Market Rules FERC Imposed Under FPA Section 206

PJM's Narrow MOPR was designed to erase FERC's Expanded MOPR Orders and 2011 MOPR Orders so that "none of the elements of the Legacy or Expanded MOPR will be operative after May 31, 2023, the end of that Delivery Year." PJM Filing at 3, 20-21 & n.66, JA____, ____-__. FERC generally rejects filings that conflict with FERC precedent as impermissible collateral attacks when the filing party participated in the earlier proceeding and fails to show materially changed circumstances. *See* P3 Protest at 37-39 & nn.140-43, JA____-__. Here, PJM's collateral attack was urged by a sitting Chairman. *See supra* note 4. It exploited FERC's "passive and reactive role" under section 205, *NRG*, 862 F.3d at 114, to avoid demonstrating the existing MOPR was unjust and unreasonable under section 206,[5] and also relieved FERC from crafting a replacement rate. *See* P3 Protest at 37, JA___. The Notice accepting PJM's collateral attack "by operation of law" must be set aside under 5 U.S.C. § 706(2) because it violates the structural separation between sections 205 and 206 as well as "the 'almost universally accepted common-law rule' that only a 'majority of a collective body is empowered to act for the body.'" *Pub. Citizen*, 839 F.3d at 1169 (citation omitted).

[5] The May 2021 BRA results, which PJM's filing never acknowledged, made that showing difficult, if not impossible. *See supra* at 21.

The Expanded MOPR Orders were directed by FERC under section 206. *See* June 2018 Order at P 6. The 2011 MOPR Orders were issued and upheld under sections 205 and 206. *See, e.g.*, *NJBPU*, 744 F.3d at 99 ("[W]e hold that FERC acted reasonably in eliminating the state-mandated exemption under either § 205 or § 206."); 2011 MOPR Rehearing Order at P 96 ("[W]e find that our actions … satisfied the requirements of section 206."); *id.* at P 125 & n.56 (rejecting section 205 argument because FERC "acted pursuant to [P3's] section 206 complaint"). P3 and other parties explained to FERC that the correct procedure for reversing those orders was not through section 205, but through a complaint under section 206. *See* P3 Protest at 46-52, JA____; PAPUC/PUCO Joint Protest at 1-5, JA____-__; IMM Protest at 1, JA____; Christie Statement at 5-6, JA____-__.

Utilities are generally free to propose changes to *their own* rates under FPA section 205, but P3 is unaware of any authority that permits a public utility to change rates *imposed on that utility by FERC* under FPA section 206 without FERC's affirmative consent. The September 29 Notice did not provide that consent. The announcement of a tie vote in a section 205 proceeding provides no basis for nullifying remedial market rules ordered by FERC under section 206.

Unlike FPA section 205, ratemaking changes imposed under section 206 can only be made through a FERC order that "fix[es]" the "just and reasonable rate, charge, classification, rule, regulation, practice, or contract *to be thereafter observed*

and in force." 16 U.S.C. § 824e(a) (emphasis added). Section 206 clearly permits FERC to modify any rates or practices previously accepted under section 205. *See, e.g.*, *Fed. Power Comm'n v. Sierra Pac. Power Co*., 350 U.S. 348, 353 (1956) (*Sierra*) ("The Commission has undoubted power under § 206(a) to prescribe a change in contract rates whenever it determines such rates to be unlawful."). But nothing in the FPA's text permits mere section 205 filings to modify the just and reasonable rate fixed by FERC under section 206.

FERC's practice of allowing rates to go into effect by "operation of law" when it fails to issue a timely order under section 205(d) is atextual. It is inferred from the absence of language requiring FERC to affirmatively accept section 205 filings before they can enter effect. *See, e.g.*, *Pub. Citizen*, 839 F.3d at 1174. The same is true for filings under the substantively identical provision in Natural Gas Act (NGA) section 4(d), 15 U.S.C. § 717c(d). But the Supreme Court decision that originally endorsed the inference that filings may take effect without Commission action also emphasized that a unilateral rate filing must be "one the natural gas company has the power to make." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp*., 350 U.S. 332, 342 (1956) (*Mobile*).

Mobile held that a natural gas company cannot unilaterally change a contract rate under NGA section 4 even when that change is accepted in a Commission order. *See* 350 U.S. at 344. The Supreme Court's companion decision in *Sierra*, issued the

same day, likewise held that a public utility cannot unilaterally change a contract rate under FPA section 205 even when that change is accepted in a Commission order. *See* 350 U.S. at 353. The Supreme Court has repeatedly confirmed the vitality of the *Mobile-Sierra* doctrine. *See, e.g.*, *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 550-51 (2008). By focusing on whether a "company has the power to make" a filing in the first place, the *Mobile-Sierra* doctrine is fundamentally incompatible with the proposition that PJM may unilaterally void FERC's Expanded MOPR Orders and 2011 MOPR Orders by "operation of law" in the absence of an actual FERC order. Neither a contract rate nor a remedial rate may be unilaterally modified without a FERC order accepting the change.

In sum, the Notice must be vacated because it disregards the text and structure of the FPA by elevating a mere filing under section 205 above FERC orders under section 206 and also countermands the universal principle of majority rule by elevating the legal force of a tie vote over final orders issued by several different FERC majorities over the past decade and beyond.

II. The Notice Must Be Vacated Because It Fails to Comply With APA Requirements

The APA's arbitrary and capricious standard requires an agency to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted); *see* 5 U.S.C.

§ 706(2). "[A]n agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious." *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) (alterations and citation omitted); In addition, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *see Gulf S. Pipeline Co. v. FERC*, 955 F.3d 1001, 1012 (D.C. Cir. 2020) ("It is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently.").

The September 29, 2021 Notice issued by FERC's Secretary must be "set aside" because it entirely failed to satisfy minimum requirements under 5 U.S.C. § 706(2). The Notice merely announced that FERC "did not act on PJM's filing because the Commissioners are divided two against two as to the lawfulness of the change." JA____. As Commissioner Danly correctly observed, the Notice "cannot satisfy the basic requirements of the APA" because it does not include a reasoned response to any party's objections and it does not acknowledge, much less explain, the sweeping reversal of FERC precedent it caused by declaring the Narrow MOPR effective. Danly Statement at PP 70-71, JA____-__; P3 Response to Supporting Statement at 6-9, JA____-__.

The Supporting Statement claims it is "head-scratching" to suggest the Notice "must be invalidated" and "absurd" to require adherence to minimum APA standards when FERC lacks the majority needed to issue an order because that would "ensur[e] that every filing that goes into effect by operation of law under section 205(d) of the FPA would be guaranteed to lose on appeal under section 205(g) because, by definition, the Commission could not possibly address the relevant protests." Supporting Statement at P 48, JA____. That claim turns the statutory analysis upside down: the APA governs judicial review by default unless "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law," 5 U.S.C. § 701(a), and neither exception applies here. Moreover, "Congress does not hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Nothing in FPA section 205 modifies the APA standard uniformly applied on judicial review of FERC proceedings since the APA became law.

Furthermore, Congress was aware when it enacted FPA section 205(g) that judicial review of deadlocked FERC proceedings would inevitably end in vacatur and remand under the APA. Commissioner Danly, in his prior role as FERC's General Counsel, testified that would be the only lawful result:

> When sitting in review of agency action, Courts of Appeals review the evidentiary record compiled below and the reasoning the agency employed—as reflected in its orders—to support its decision based on that record. In the case of a serial 2–2 split, no orders would issue and such a review would be impossible. Remand would appear to be the Court's only option.

S. Rep. 115-278, at 7-8 (quoting Danly testimony); *accord Pending Legislation: Hearing on S. 186, S. 1059, S. 1337, S. 1457, S. 1799, S. 1860, and H.R. 1109 Before the Subcomm. on Energy & Nat. Res.*, 115th Cong. 31 (Oct. 3, 2017), https://www.energy.senate.gov/services/files/16BBBF18-53F2-451E-87F2-0E53132944F9.

The Supporting Statement offers an alternative argument that the protests to PJM's filing were "fully addressed in [that] statement." Supporting Statement at P 48, JA____. But that undeveloped assertion has no merit. While section 205(g) requires each Commissioner to provide "a written statement explaining the views of the Commissioner with respect to the change," 16 U.S.C. § 824d(g)(2), the statute ascribes no weight to such statements on judicial review. Individual statements by FERC Commissioners cannot substitute for FERC orders because "[a]ctions of the Commission shall be determined by a majority vote of the members present." 42 U.S.C. § 7171(e). Section 205(g) does not change that directive in FERC's enabling statute or "the almost universally accepted common-law rule that only a majority of a collective body is empowered to act for the body." *Pub. Citizen*, 839 F.3d at 1169 (alterations and citation omitted). In past cases, FERC has uniformly held that "[i]ndividual Commissioners' statements reflect their personal views and do not reflect the views of the Commission as a deliberative body. The Commission speaks

through, and only through, its orders." *Californians for Renewable Energy*, 175 FERC ¶ 61,213, at P 13 (2021) (footnotes citing precedent omitted).

The legislative history demonstrates why section 205(g) requires individual Commissioner statements. The House sponsor explained the statements were needed "for purposes of transparency and good government" and to facilitate compromises that could break deadlocks. 164 Cong. Rec. H8227 (daily ed. Sept. 18, 2018) (statement of Rep. Kennedy), perma.cc/3B7P-XDDH. The Senate report similarly explained that "[h]aving the benefit of these [individual Commissioner] statements may discourage ties by highlighting more precisely the reasoning that leads each Commissioner to his or her views and, consequently, to enable the fashioning of an order that could attract a majority vote." S. Rep. 115-278, at 3. Nothing in the legislative history suggests that individual Commissioner statements can satisfy the APA's requirement for a reasoned explanation by a FERC majority.

The Federal Election Campaign Act is the only federal statute under which any court has contemplated judicial review of individual Commissioner statements in a multi-member federal agency. *See* P3 Response to Supporting Statement at 3, JA____. Unlike FERC, the Federal Elections Commission is "uniquely structured" to "regularly deadlock as part of its *modus operandi*," and for that reason *Public Citizen* flatly rejected arguments that the court's singular approach in deadlocked election matters should be "imported" for deadlocked FERC proceedings. 839 F.3d

at 1171. Indeed, the D.C. Circuit has cast doubt upon the validity of its approach in election cases as "a rather apparent fiction raising problems of its own." *Citizens for Resp. & Ethics in Washington v. FEC*, 892 F.3d 434, 438 (D.C. Cir. 2018).

The instant controversy suggests FPA section 205(g) cannot be reconciled with APA requirements, but that is not correct. The problem is that two Commissioners insist on declaring that a tie vote makes the Narrow MOPR effective "by operation of law" despite the fact that section 205(g) was enacted to reverse that very outcome in *Public Citizen*. Section 205(g) performs a valuable function when it is used for its sole intended purpose—i.e., to preserve rights to rehearing and judicial review under the FPA's rigid jurisdictional deadlines until FERC can form a majority.

FERC's only prior experience with navigating section 205(g) illustrates how that section properly works. In the ISO-NE Inventoried Energy case, two of four Commissioners were recused and FERC was unable to form a quorum initially or on rehearing; however, FERC asked to hold the petition for review in abeyance and was later granted a voluntary remand when Commissioner Danly's confirmation made it possible to form a quorum and accept ISO-NE's filing over then-Commissioner Glick's dissent. *See ISO New England Inc.*, 171 FERC ¶ 61,235, at P 1 (2020) (recounting procedural history). Here, by contrast, the Court must force FERC to comply with the APA by vacating and remanding the unlawful September 29, 2021

Notice, which will provide FERC an opportunity to form the majority necessary to issue a reasoned, APA-compliant order.

III. The MOPR Revisions Proposed By PJM Are Unjust, Unreasonable, Unduly Discriminatory and Preferential

A. The Narrow MOPR Unlawfully Discriminates Against Competitive Power Suppliers by Establishing Insurmountable Preferences for State-Sponsored Resources That Reduce Market Prices Below Just and Reasonable Levels

It is beyond legitimate argument that subsidies disrupt competition, distort market prices, and harm non-subsidized resources. *See, e.g.*, Shanker Aff. ¶ 22, JA____ ("The mechanics of uneconomic entry via subsidies and the resulting suppression of prices below the competitive level are not complicated…. [W]hen a generation resource that is not otherwise economic … is provided with a subsidy, the resource is no longer dependent on the market to cover its costs, and can instead offer at a lower price that is designed to allow it to clear."). FERC has long held "that all uneconomic entry has the effect of depressing prices below the competitive level and that this is the key element that mitigation of uneconomic entry should address." *N.Y. Indep. Sys. Operator, Inc.*, 124 FERC ¶ 61,301 at P 29; *see also* Quinn Affidavit ¶ 11, JA____ ("Over time, there was a general appreciation by [FERC] and the ISOs that any subsidized uneconomic entry or retention would suppress the capacity market price."). This position is so well-settled that FERC has repeatedly found it may rely on economic theory alone to find that subsidies suppress

competitive prices, making it unnecessary "to build an evidentiary record by pinpointing instances of 'but for' relatively low offers due specifically to subsidies." April 2020 Order at P 29 & n.94 (citing *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 65 (D.C. Cir. 2014); *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 109 (D.C. Cir. 2014)).

The foundational principle that subsidies are anti-competitive is directly incorporated into the statutes FERC administers, *see, e.g.*, FPA section 203, 16 U.S.C. § 824b(a)(4), and it is incorporated throughout the Commission's policies under the FPA and NGA, *see, e.g.*, *Cross-Subsidization Restrictions on Affiliate Transactions*, Order No. 707, FERC Stats. & Regs. ¶ 31,264, *order on reh'g*, Order No. 707-A, FERC Stats. & Regs. ¶ 31,272 (2008); *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,745 (1999) ("[T]he threshold question applicable to existing pipelines is whether the project can proceed without subsidies from their existing customers.").

In PJM, "[t]he suppression of prices below the competitive level based on out-of-market subsidies remains a material and valid concern that requires a broad MOPR." Shanker Affidavit ¶ 9, JA____. PJM's Adam Keech found in 2018 that "reduced capacity price offers from resources that receive such subsidies can significantly reduce capacity clearing prices" and PJM accordingly opined that "such offer price reductions due to subsidies for select resources, as opposed to lower price

offers based on resource efficiency, unreasonably suppress wholesale prices." 2018 MOPR Filing at 25.[6] Nonetheless, under the Narrow MOPR's discriminatory provisions "it is unlikely that any unsubsidized investor will risk substantial sums of money in the PJM capacity market without MOPR protection against price suppression because unsubsidized investors will be at a substantial disadvantage when competing with state subsidized resources." Joint Protest of Carroll County Energy LLC and South Field Energy LLC at 3, JA____.

Moreover, this case does not concern pricing externalities. *Contra* Supporting Statement at n.170; *id.* n.129, JA____, ____. Regardless of state policies, the FPA requires that FERC ensure rates are the product of competitive markets that are not distorted by buyer-side market power. No party can reasonably expect a state to pick its "externality," pay only in-state resources for that "externality," and have FERC ignore its impact on the wholesale market rate. *See, e.g.*, *Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 776 (7th Cir. 2013) ("Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."). FERC's duty as an economic regulator is to ensure rates are just, reasonable, and not unduly discriminatory; it may not abdicate that role, or assume duties committed to other agencies, to advance or hinder social policies that

[6] The 2018 affidavit from Adam J. Keech, then PJM's Executive Director, Market Operations, was submitted as Attachment K to P3's Protest below to impeach his diametrically contrary testimony in 2021.

materially affect jurisdictional rates. *See, e.g.*, *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976) (holding that FERC's ratemaking standard is confined to economic regulation, "not a broad license to promote the general public welfare"); *Grand Council of Crees v. FERC*, 198 F.3d 950, 956-58 (D.C. Cir. 2000) (holding that complaints motivated by environmental concerns are not within, but orthogonal to, the zone of interests regulated under the FPA). PJM's Narrow MOPR discriminates against all unsubsidized power suppliers and cannot produce just and reasonable wholesale rates as required under the FPA.

B. The Narrow MOPR Unlawfully Discriminates Against States That Rely on Competitive Markets by Shifting the Costs of State-Sponsored Resources to Consumers in Other States

The FPA was enacted under the Commerce Clause to fill a regulatory gap created by the Supreme Court's decision in *Public Utilities Commission of Rhode Island. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), which held Rhode Island's attempt to set a rate for sales of electricity by a Rhode Island company to a Massachusetts company was "a direct burden upon interstate commerce, from which the state is restrained by the force of the commerce clause." *Id*. at 89. Moreover, it is "perfectly clear that the original FPA did a good deal more than close the gap in state power identified in *Attleboro,*" because it also authorized federal regulation "of wholesale sales that had been *previously subject* to state regulation" under *Attleboro*. *New York v. FERC*, 535 U.S. 1, 20–21 (2002). As relevant here, the FPA's

prohibition against unduly discriminatory or preferential rates in FPA sections 205 and 206, 16 U.S.C. §§ 824d(b), 824e(a), incorporates the Commerce Clause principle that "no single State" may "impose its own policy choice on neighboring States" or otherwise intrude upon the "autonomy of [other] States within their respective spheres." *BMW of N. Am. v. Gore*, 517 U.S. 559, 571 (1996) (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989)).

While a State is free to choose significant aspects of power policy within its borders, FERC is obligated to ensure that interstate power markets do not permit "the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 337. FERC must therefore prevent States from abusing FERC-regulated markets to intrude upon other States' jurisdiction. As the Fourth Circuit explained:

> Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the FPA and achieve the coordinated approach to regulation found necessary in *Attleboro*. No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination.

Appalachian Power Co. v. Pub. Serv. Comm'n of W.V., 812 F.2d 898, 905 (4th Cir. 1987).

Prior to the Notice at issue here, FERC's orders governing PJM's capacity market have been squarely grounded on the principle that FERC has a statutory duty to prevent states from projecting the costs of their unique energy preferences onto

one another. For example, FERC's elimination of PJM's State Mandate Exemption was justified on the basis that FERC is "forced to act … when subsidized entry supported by one state's or locality's policies has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce, and that PJM as a whole, including other states, rely on to attract sufficient capacity." 2011 MOPR Rehearing Order at P 3. That explanation of FERC's duty was quoted with approval by the Supreme Court in *Hughes*, 578 U.S. at 160, and by this Court in *NJBPU*, 744 F.3d at 101. And FERC reiterated that position in its Expanded MOPR Orders. *See, e.g.*, June 2018 Order at P 67 & n.111; December 2019 Order at P 7 & n.23.

The Narrow MOPR violates this core principle because it allows one State's subsidized preference for a particular generation mix to impact other States' ability to pursue their own preferred energy policies. This occurs through artificially depressed auction prices that will ultimately force States to subsidize their own preferred generators or allow non-subsidized, economically efficient generators to retire. As FERC previously explained:

> Out-of-market payments, whether made or directed by a state, allow the supported resources to reduce the price of their offers into capacity auctions below the price at which they otherwise would offer absent the payments, causing lower auction clearing prices. As the auction price is suppressed in this market, more generation resources lose needed revenues, increasing pressure on states to provide out-of-market support to yet more generation resources that states prefer, for policy reasons, to enter the market or remain in operation. With each such

> subsidy, the market becomes less grounded in fundamental principles of supply and demand.

June 2018 Order at P 2: *see also* Christie Statement at P 12 (arguing that PJM's would sanction "[a] construct in which winners and losers are determined by which interest groups' lobbyists can obtain the biggest subsidies"), JA____.

P3 and other parties argued to FERC that accepting the Narrow MOPR will eventually destroy competition in PJM's capacity market and force States that rely on competition to bear the costs of resources propped up by other States out-of-market subsidies. *See, e.g.*, P3 Protest at 8, 34-35, JA____; P3 Reply to Comments at 7-8, JA____-__; P3 Emergency Request for Rehearing at 7, JA____; EPSA Protest at 19-25, JA____-__; Cain Aff. ¶ 44, JA____; PaPUC/PUCO Protest at 7, JA____; Letter from Ohio State Senator Romanchuk, JA____; Letter from Ohio State Senators Huffman & McColley, JA____; Ohio Consumers' Counsel Comments at 2, JA____. FERC's empty Notice engaged with none of these arguments, which requires remand under the APA. *See supra* at 33-36.

To the extent this Court may look to the Supporting Statement for an explanation—which it should not do for the reasons explained *supra* at 36-39—Commissioners Glick and Clements simply reject FERC's longstanding position that the FPA requires FERC to prevent the exercise of market power through state subsidies because, in their view, the impacts on other states are "incidental" and inevitable." Supporting Statement at PP 63-65 & n.141, JA____-__. That position

cannot be reconciled with this Court's finding in *NJBPU* that states remain "free to make their own decisions regarding how to satisfy their capacity needs, but they 'will appropriately bear the costs of [those] decision[s].'" 744 F.3d at 97 (quoting *Conn. DPUC*, 569 F.3d at 481). Nor can it be reconciled with the D.C. Circuit's decision in *NEPGA*:

> Out-of-market resources—whether self-supplied, state-sponsored, or otherwise—*directly impact* the price at which the Forward Capacity Market auction clears. As the price of capacity is *indisputably a matter within the Commission's exclusive jurisdiction,* FERC likewise has jurisdiction to mitigate buyer-side market power as to out-of-market entrants.… As it is *FERC's statutory obligation* to ensure that rates are appropriate, we must respect its decision to maintain just and reasonable rates through curbing or mitigating buyer-side market power.

757 F.3d at 290-91 (emphasis added) (citation omitted).

In sum, the Narrow MOPR must be rejected because it creates an unduly discriminatory and preferential rate structure under the FPA that conflicts with the principles animating dormant Commerce Clause jurisprudence as well as FERC and judicial precedent holding that States may not impose their own policy preferences on unwilling States through out-of-market subsidies that distort the competitive price signals other States rely on to attract sufficient capacity. *See, e.g.*, *Hughes*, 578 U.S. at 160 (quoting 2011 MOPR Rehearing Order at P 3). The Notice allowing the Narrow MOPR to take effect must be vacated because it abdicates FERC's statutory duty and fails to acknowledge or explain its reversal of FERC policy.

C. The Narrow MOPR Unlawfully Abdicates Any Meaningful Control Over State-Sponsored Market Power in Violation of FPA Requirements for Market-Based Rates

FERC's authority to permit market-based rates is "conditioned on the existence of a competitive market" in which sellers either do not have market power or market power is adequately mitigated. *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012 (9th Cir. 2004). "The principle justifying this approach as 'just and reasonable' was that "[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Id.* at 1012-13 (quoting *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)). Without measures to ensure that neither buyer nor seller have market power, "the prevailing price in the marketplace cannot be the final measure of 'just and reasonable' rates mandated by the Act." *FPC v. Texaco Inc.*, 417 U.S. 380, 397 (1974); *see Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1504 (D.C. Cir. 1984) (holding that FERC "abdicated its statutory responsibilities" by accepting a market-based ratemaking method that "guards against only grossly exploitative pricing practices").

PJM's Narrow MOPR violates the precondition for allowing rates to be set through market competition because its two components—the Conditioned State

Support (CSS) and Buyer-Side Market Power (BSMP) rules—do virtually nothing to prevent the exercise of state-sponsored market power. Instead, they establish an opaque and toothless process of exclusions and exceptions that "is *even worse* than having no MOPR at all." Christie Statement at P 3, JA____ (citing IMM Protest at 1, JA____ ("The PJM markets would be better off, more competitive, and more efficient with no MOPR than with PJM's proposed approach.")).

1. The CSS Prong of the Narrow MOPR Is Unjust, Unreasonable, and Unduly Discriminatory

The CSS prong of the Narrow MOPR prohibits "any financial benefit required or incentivized by a state, or political subdivision of a state acting in its sovereign capacity, provided outside of PJM markets and in exchange for the sale of a FERC-jurisdictional product conditioned on clearing in any RPM Auction." PJM Filing at 25, JA____. The phrase "conditioned on clearing in any RPM Auction" means "directives as to the price level at which a Generation Capacity Resource must be offered in the RPM Auction or directives that the Generation Capacity Resource is required to clear in any RPM Auction." *Id.* These definitions were expressly intended to isolate state actions that incorporate the specific "fatal defect" *Hughes* determined is facially preempted under the FPA. *Id*. In addition to displacing the definition of "State Subsidies" imposed by FERC under section 206 without a FERC order authorizing that change, *see supra* at 30-33, the CSS mechanism falls short of the FPA's requirement to control market power in at least three ways.

First, the CSS prong of the Narrow MOPR does nothing to prevent the exercise of state-sponsored market power because it only mitigates state actions that are *already* unlawful. *See, e.g.*, Shanker Aff. at ¶ 48 (explaining why "the entire proposition of having a 'Conditioned State Support' provision in the proposed MOPR is a sham and accomplishes nothing"). Moreover, PJM's approach abdicates any responsibility by PJM or FERC to mitigate harmful market distortions caused by state policies by wrongly conflating the standard for facial preemption with the just and reasonable standard. Those standards cannot be the same without inverting the division of federal and state authority under the FPA. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (holding that the Illinois Zero Emission Credit program was not facially preempted under *Hughes*, but observing that FERC's June 2018 order opening an investigation so that FERC "may determine for itself what changes, if any, should be made to auctions for interstate sales of electricity").

Second, and still worse, the Narrow MOPR purports to place any existing state program beyond challenge by categorically excluding "Legacy Policies" that are currently "on the books or effective." PJM Filing at 46-47, JA____-__. As P3 explained, this provision is "legally indefensible" because neither PJM nor FERC itself may create a "'grandfathering exemption' to federal preemption through a tariff change." P3 Protest at 65, JA____.

Third, the CSS review mechanism is riddled with practical defects that neuter its effectiveness because it is enforced primarily through a self-certification provided by capacity sellers to which PJM will "grant a presumption of innocence." PJM Filing at 29, JA____. PJM's reliance on the self-certification means that CSS mitigation would be triggered only in event that a seller confesses to receiving unconstitutional financial support in violation of *Hughes*. Furthermore, PJM itself would take no action against a seller for violating the CSS test without an express, fact-specific authorization from FERC that PJM may choose to request through a filing under FPA section 205. PJM Filing at 44, JA____. P3 explained to FERC that this head-in-the-sand approach violates FERC's regulations, which require Market Monitoring Units to refer Market Violations and report "all instances where the Market Monitoring Unit has reason to believe market design flaws exist that it believes could effectively be remedied by rule or tariff changes." 18 C.F.R. § 35.28(3)(iv)-(v); *see* P3 Protest at 61-63, JA____-__. Furthermore, PJM's abdication of its traditional role as the first-line of defense against attempts to exercise market power severely prejudices market participants, who have no access to confidential offer information provided to PJM in the absence of discovery procedures only available through a FERC hearing. *See* P3 Protest at 63-64, JA____-__.

For these reasons, the CSS test provides no protection at all from state-sponsored market power. It leaves the market undefended from state efforts to exercise buyer market power through state subsidies unless such efforts are already facially preempted under *Hughes*.

2. The BSMP Prong of the Narrow MOPR Is Unjust, Unreasonable, and Unduly Discriminatory

The Narrow MOPR defines Buyer-Side Market Power (BSMP) as "the ability of Capacity Market Sellers with a Load Interest to suppress RPM Auction clearing prices for the overall benefit of their (and/or affiliates) portfolio of generation and load." PJM Filing at 32, JA___ __. This test essentially reverts to an even weaker version of market power mitigation than the original MOPR, trampling over prior FERC determinations governing PJM and other regional markets without any order accepting or explaining this radical departure. As P3 explained to FERC, the new BSMP test is so limited in scope and includes so many exclusions and exceptions that it cannot possibly be an effective check on buyer-side market power. *See* P3 Protest at 67-80, JA____-__.

First, like the CSS test, PJM enforces the BSMP test through an attestation that a seller does not intend for its sell offer to constitute an exercise of buyer market power. PJM Filing at 21, JA____. FERC previously required more robust and thorough statements, particularly where the self-certification is the primary monitoring mechanism. *See Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys.*

Operator, Inc., 150 FERC ¶ 61,139 at P 79 (2015). PJM did not even attempt to justify a departure from this policy.

Second, the application of BSMP mitigation turns on a seller's intent and is easily evaded for that reason. Reinstituting an intent requirement defies FERC's June 2018 Order (at P 156), which found PJM's MOPR unjust and unreasonable under section 206 for that very reason, as well as FERC's orders governing BSMP in other markets, *see, e.g., NEPGA*, 757 F.3d at 294 (upholding FERC's 2011 ISO-NE reforms, which found that "capacity offered into the market through below-cost bids can suppress prices even when no actor has the intent to do so"); *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc*., 173 FERC ¶ 61,060 (2020) (finding "that uneconomic new entry must not be permitted to suppress market prices, *regardless of intent*" because "all uneconomic entry has the effect of depressing prices below the competitive level") (citation omitted). PJM provided no basis for ignoring or departing from these precedents.

Third, BSMP mitigation is triggered only if a seller has the "ability and incentive" to exercise buyer market power, PJM Filing at 34-35, JA____-__. This test is very similar to PJM's old "impact screen," which PJM abandoned with FERC's agreement in 2011 on the ground that it was unnecessary to prevent over-mitigation and prevented PJM from addressing the impact of multiple uneconomic offers that might individually fall short of the impact threshold but could have a

substantial aggregate impact. *See* 2011 MOPR Order at P 106. FERC has consistently reiterated the importance of protecting against the combined effects of entry by numerous, small, subsidized resources. *See, e.g.*, *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,119, at P 39 (2020) ("[B]uyer-side market power mitigation is driven not by the size of individual projects, but by the aggregate amount of generating capacity that receives out-of-market subsidies."). Similarly, the BSMP incentive screen relies on a "net short" analysis. JA____. This is the same net short analysis that PJM eliminated with FERC's consent, in 2011 because it was "ineffective and unnecessary" and could easily "be gamed." 2011 MOPR Order at PP 86, 88. PJM advanced the BSMP proposal as if none of this history had happened and as if FERC's orders on impact and net short issues are simply irrelevant. PJM failed to provide any basis for ignoring this important precedent.

Finally, PJM intentionally provides no bright-line test for BSMP violations, while PJM and the IMM have substantial discretion to decline to institute an investigation, even where one is warranted, for a wide variety of reasons. *See* PJM Filing at 39-42, JA____-__. These limitations on the BSMP test render it practically useless in detecting or preventing buyer market power. FERC precedent holds that RTO mitigation measures must be reasonably transparent and must not give the RTO excessive discretion. *See PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at PP 183-190 (2009); *Wholesale Competition in Regions with Organized Electric*

Markets, Order No. 719, 125 FERC ¶ 61,071, at P 379 (2008) (directing RTOs to make mitigation provisions "as non-discretionary as possible"); *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318, at PP 180-81 (2007). The Narrow MOPR's BSMP mechanism contravenes these important precedents.

CONCLUSION

For the reasons set forth above, the petition for review should be granted and the September 29, 2021 Notice issued by FERC's secretary should be vacated.

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May 9, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Rules 32(a)(5) and 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) because it contains fewer than 13,000 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word. Pursuant to Third Circuit Local Appellate Rule 31.1(c), I certify that the electronic brief was scanned for viruses using the VirusTotal virus detection program and that no viruses were detected.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I caused this brief to be electronically filed with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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