ORAL ARGUMENT NOT YET SCHEDULED
No. 21-3243
(consolidated with Nos. 21-3068, 21-3205)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PENNSYLVANIA PUBLIC UTILITY COMMISSION AND PUBLIC UTILITIES COMMISSION OF OHIO,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

NEW JERSEY DIVISION OF RATE COUNSEL, *et al*., *Respondent-Intervenors*

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

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May 9, 2022

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STATEMENT OF SUBJECT MATTER & APPELLATE JURISDICTION

Under Section 205 of the Federal Power Act, 16 U.S.C. §824*d*(d), and 18 C.F.R. §35.13, PJM Interconnection LLC ("PJM") filed an amendment to its tariff with the Federal Energy Regulatory Commission ("FERC" or "Commission") to implement changes to its Minimum Offer Price Rule ("MOPR") on July 30, 2021. PJM Tariff Filing, Docket No. ER21-2582-000 (July 30, 2021) (PJM Tariff Filing), JA____. The Pennsylvania Public Utility Commission and Public Utilities Commission of Ohio ("Joint Commissions") protested the tariff amendment. Joint Protest of the Pennsylvania Public Utility Commission and Public Utilities Commission of Ohio, Docket No. ER21-2582-000 (August 20, 2021), JA____.

On September 29, 2021, FERC issued a Notice of Filing Taking Effect by Operation of Law, Docket No. ER21-2582-000 (September 29, 2021), JA____. The Joint Commissions timely filed requests for rehearing under 16 U.S.C. §§824*d*(g), 825*l*(a). Joint Petition for Rehearing, Docket No. ER21-2582-002 (October 28, 2021), JA_____. On November 29, 2021, FERC issued a Notice of Denial of Rehearing by Operation of Law. *PJM Interconnection LLC*, 169 FERC ¶ 61,013 (2019), JA_____.

The failure of the Commission to issue an order accepting or denying the Section 205 filing shall be considered an order issued by FERC accepting the change for the purposes of rehearing and appeal. 16 U.S.C. §824*d*(g). In response, the Joint

Commissions timely filed a Petition for Review with this Court under 16 U.S.C. §§824*d*(g)(2) and 825*l*(b). Venue in this Court is proper under 16 U.S.C. §825*l*(b).

INTRODUCTION

This case involves a monumental departure from decades-old jurisprudence addressing market power mitigation rules in FERC-regulated wholesale electricity markets. FERC effected this departure not through a reasoned decision supported by findings of fact and conclusions of law, but through its failure to act, allowing a public utility's (PJM's) contested tariff to take effect by operation of law. FERC's inaction steered PJM's markets away from long-established market rules involving the sale of electricity in thirteen states and the District of Columbia. In addition, this case presents a question of first impression involving the proper judicial standard of review under Section 205(g) of the Federal Power Act where the Commission fails to act on a public utility's tariff filing within the period established by law because the Commissioners are divided two against two as to the lawfulness of the change.

Generally, the regulation of electricity service is a shared function among state and federal regulatory bodies, with states retaining jurisdiction over the facilities used for the generation and distribution of electric energy, and FERC exercising jurisdiction over the transmission of electric energy and the sale of such energy at wholesale in interstate commerce. 16 U.S.C. §824*e*(b). Electricity service consists of three main components: generation, distribution, and transmission. While the distribution and transmission components are still monopoly services and compensated through traditional cost of service regulation, the generation

component—the actual electricity—has been sold for more than two decades in FERC-regulated organized wholesale markets that are subject to competitive market rules. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 153-6 (2016). As wholesale markets have evolved, FERC has established rules that protect the wholesale markets' integrity and competitive price signals used to retain existing and attract new economic generation resources sufficient to meet electricity needs within regions. *Id*. at 160.

The Joint Commissions are state regulatory agencies tasked with ensuring that electricity markets provide safe and reliable electric service in a competitive and non-discriminatory manner. *See* 66 Pa.C.S. §§2801–2815 and O.R.C. §4928.02. Both Pennsylvania and Ohio have restructured their regulation of electricity service from traditional cost of service regulation to relying on competitive FERC-regulated wholesale electricity markets for the generation component of the service, as both states have determined that competition for generation is effective at controlling consumer costs. *See* 66 Pa.C.S. §2802; O.R.C. §4928.02. To that end, the Joint Commissions have spent significant time implementing rules and regulations to develop retail electricity markets that are dependent on a well-functioning, highly competitive, and stable wholesale market to provide adequate electricity to retail customers at rates that are just and reasonable. A well-functioning wholesale electricity market is a prerequisite to a well-functioning retail electricity market

under this restructured construct. FERC's failure to protect against the exercise of market power in PJM's capacity market severely impedes the Joint Commissions' ability to ensure that adequate electric generation is available to meet the needs of retail customers.

FERC has an ongoing obligation to deliver a wholesale electricity market that is based on actual competition and has strong measures in place to prevent anti-competitive market behavior. *See Pub. Citizen v. FERC*, 7 F.4th 1177 (D.C. Cir. 2021), *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014). Instead of upholding that obligation, FERC tacitly approved tariff provisions that allow for the unchecked exercise of buyer-side market power, thereby compromising competitive structures, prices, and the crucial element of reliability in PJM's capacity market. By doing so, FERC jeopardized the Joint Commissions' responsibility to ensure well-functioning and reliable retail electricity service.

STATEMENT OF THE ISSUES

1. Whether FERC's order accepting PJM's tariff changes was arbitrary and capricious because FERC failed to provide a reasoned explanation for its departure from established precedent designed to proactively screen out market power from the PJM capacity market?

2. Whether PJM's tariff changes are unjust and unreasonable by introducing intent of the market seller into the market-power screen, in conflict with established precedent?

3. Whether PJM's tariff changes are unjust and unreasonable because they do not meaningfully review the potential for exercises of buyer-side market power?

4. Whether PJM's tariff changes are unjust and unreasonable because they exempt from mitigation pre-existing state policies that conflict with *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016)?

STATEMENT OF RELATED CASES

The present proceeding has not been before this or any other Court. A related proceeding is currently in abeyance in the Court of Appeals for the Seventh Circuit. The Seventh Circuit proceeding, a set of 32 consolidated cases led by *Illinois Commerce Comm'n v. FERC*, Case No. 20-1645, relates to this case in that those cases challenge a prior version of PJM's MOPR that is no longer in effect. The Seventh Circuit Court of Appeals has not issued any orders on the merits of that MOPR.

This Petition for Review is consolidated with two others in this Court of Appeals. They are *PJM Power Providers Group v. FERC*, Case No. 21-1308, and *Elec. Power Supply Ass'n v. FERC*, Case No. Nos. 21-3205.

CONCISE STATEMENT OF THE CASE

A. The Original, "Targeted MOPR"

PJM has historically conducted annual Base Residual Auctions ("BRAs") to procure capacity commitments three years in advance of a delivery year. These BRAs are an important part of PJM's Reliability Pricing Model ("RPM"), ensuring long-term reliability for the regional grid. As old generators retire, the BRA clearing price increases, causing new generators to enter the market seeking that higher price.

The MOPR, which has been included in the RPM since its inception,[1] sets a minimum offer price for resources being offered into the BRA if there is reason to believe the offers are not cost-based or were exercises of buyer-side market power. In the context of a capacity auction, a seller's offer could be an exercise of buyer-side market power if a buyer (e.g., a state) enabled a resource to make an artificially low offer. The original MOPR ("Targeted MOPR") applied to all new natural gas-fired resources, and only such units. *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 86 (3d Cir. 2014) (*NJBPU*). The idea was that "the characteristics of gas units make them more likely to be used as price suppression tools," *id.* at 106, and therefore a gas unit would be the resource of choice if a "developer's primary

[1] *PJM Interconnection, L.L.C. et al.*, 135 FERC ¶ 61,022, ¶6 (2011) (describing inclusion of the MOPR in the Settlement Order which created the Reliability Pricing Model).

purpose [was] to suppress capacity prices." *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, ¶153 (2011). Whether a developer intended to suppress prices was irrelevant to the application of the Targeted MOPR. What mattered was whether there was the potential for price suppression, and whether that was the result.

B. The 2011 MOPR Revisions

In 2011, PJM Power Providers ("P3") filed a complaint requesting reforms to the Targeted MOPR because of state initiatives supporting generators through out-of-market contracts, contracts that sought to ensure the generators cleared the auctions. *See NJBPU*, 744 F.3d at 88-90 (describing P3's complaint). In response, PJM proposed to "update and simplify" the Targeted MOPR and conform it to FERC precedent in other regions. Proposed Revisions of PJM Interconnection, L.L.C., Transmittal Letter at 1, Docket No. ER11-2875-000 (Feb. 11, 2011). PJM explained the Targeted MOPR, without revision, generally could not prevent price suppression caused by these out-of-market contracts. *Id.* at 3.

FERC accepted these revisions and removed the MOPR exemption for resources that made offers due to state mandates, recognizing state rights "to pursue legitimate policy interests," but explaining that FERC's duty to ensure just and reasonable rates may require "effective mitigation of state-sponsored uneconomic entry." 135 FERC ¶ 61,022, ¶143 (2011).

On rehearing, FERC reaffirmed that "the MOPR serves a critical function to ensure that wholesale prices are just and reasonable" and that "[t]he long-term viability of the PJM market demands an assurance of *competitive* offers from new entrants." *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, ¶2 (2011) (emphasis added). FERC also found that a unit-specific, cost-justification process could allow a resource to make an unmitigated offer, provided there was specific review, even if it was initially subject to the MOPR screen. *Id.* ¶¶5, 26. The unit-specific exemption process thus had two steps. First, apply the MOPR as a screen, and second, put the onus on the market seller to show a unit-specific exemption is appropriate. *Id.* ¶26.

Numerous parties were dissatisfied with FERC's 2011 Order on Rehearing and petitioned for review in various federal courts. This Court was designated to hear the appeal and affirmed FERC's 2011 MOPR Orders in *New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014). This Court held, among other things, that FERC was within its jurisdiction to eliminate the MOPR exemption for state-mandated resources, because FERC's elimination of that rule "ensures that its sponsor cannot exercise market power by introducing a new resource into the auction at a price that does not reflect its costs and that has the effect of lowering the auction clearing price." *Id.* ¶97.

C. The 2013 Attempt At Stakeholder Compromise

In 2013, "to address the effects of new, state-supported natural gas-fired entrants on its capacity market," PJM and its stakeholders proposed to replace the unit-specific review process with a competitive-entry exemption and a self-supply exemption. *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, ¶14 (2018). FERC accepted these new exemptions but decided to apply the exemptions in addition to unit-specific review, rather than as a replacement. FERC's acceptance was subsequently vacated in *NRG Power Mktg., LLC v. FERC*, in which the D.C. Circuit held FERC exceeded its authority under Section 205 of the Federal Power Act by modifying PJM's proposal. 862 F.3d 108, 117 (2017). On remand, FERC rejected PJM's new exemptions. *See PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 (2017).

D. The Expanded MOPR

In March 2016, a group of generators brought a complaint to FERC under Section 206 of the FPA, 16 U.S.C. §824*e*, claiming that the MOPR had become unjust and unreasonable because it was limited to new units and thus allowed non-competitive offers from existing units that received out-of-market state support. *Calpine Corp. v. PJM Interconnection, L.L.C.*, Docket No. EL16-49 (Complaint filed March 21, 2016).

FERC did not act on the complaint, and in April 2018, PJM proposed MOPR modifications under FPA Section 205 to address out-of-market state revenues. *PJM Interconnection L.L.C.*, Docket No. ER18-1314 (April 9, 2018). PJM explained the MOPR was unreasonably limited and allowed new subsidies to escape mitigation. PJM argued that "in 2011, the concern was new entry, natural gas projects; today the concern arises from state programs to maintain and support existing resources and (to a lesser degree) induce entry of alternate energy resources." *Id.* at 36.

Responding to both the generator complaint and PJM's tariff filing, FERC held in June 2018 under FPA Section 206 that the PJM MOPR was no longer just and reasonable—by applying only to new natural gas-fired resources, it failed to mitigate price-suppressive effects of out-of-market state support. *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018). To set a replacement rate, FERC initiated paper hearing procedures and permitted additional argument and evidence. *See Id.* ¶149.

In December 2019, FERC directed PJM to establish a replacement rate expanding the MOPR "to include both new and existing resources, internal and external, that receive, or are entitled to receive, certain out-of-market payments." *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239, ¶2 (2019) (Order Establishing Just and Reasonable Rate). In doing so, FERC greatly expanded the scope of the MOPR ("Expanded MOPR") and held that all resources that receive or

are eligible to receive a state subsidy must be mitigated, because not doing so "would have unacceptable market distorting impacts that would inhibit incentives for competitive investment in the PJM market over the long term." *Id.* ¶6. FERC applied this Expanded MOPR to any state subsidy, regardless of whether the subsidy targeted the capacity market.

To "reflect reliance on prior Commission decisions" FERC exempted existing self-supply, demand response, energy efficiency, and storage resources as well as existing resources participating in renewable portfolio standards programs. *Id.* ¶2. FERC also reestablished "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.*

On rehearing and during compliance, FERC continued to modify the Expanded MOPR. FERC repeatedly postponed PJM's annual capacity auctions, originally scheduled for May 2019 and May 2020, to accommodate the hearing, rehearing, and compliance processes. *PJM Interconnection, L.L.C,* 164 FERC ¶ 61,153, ¶1 (2018); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,051, ¶2 (2019), *modified by* 169 FERC ¶ 61,239, ¶4 (2019), *modified by* 173 FERC ¶ 61,061, ¶358 (2020), *reversed in part by* 174 FERC ¶ 61,109 (2021); *see also PJM Interconnection, L.L.C*, Docket No. ER18-1314-011 (Letter Order issued

March 10, 2021) ("Expanded MOPR Compliance Orders"). More than 20 parties filed for judicial review of FERC's Expanded MOPR Orders; all were consolidated in the Seventh Circuit. *Illinois Commerce Comm'n, et al., v. FERC,* Case Nos. 20-1645, *et al*.

E. Results Of The May 2021 Base Residual Auction

In May 2018, the base residual auction ("BRA") for the 2021/2022 Delivery Year was held. Since then, only one BRA has been held—the sole auction held under the Expanded MOPR. *See* Protest of the Joint Commissions at 19, JA____ (citing *2022/2023 RPM Base Residual Auction Results*, available at https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2022-2023/2022-2023-base-residual-auction-report.ashx). From the prior BRA, the region-wide clearing price fell from $140 per MW-day to $50 per MW-day, while retaining a reserve margin of 19.9%. *Id*. at 19-20, JA_____.

F. MOPR Revisions In 2021: The "Focused MOPR"

At a March 2021 technical conference, FERC Chairman Glick directed PJM to move away from the Expanded MOPR and develop an alternative by working with stakeholders, stating: "with regard to the PJM MOPR in particular … I don't think it's sustainable. … if for whatever reason PJM and the stakeholders aren't able to act, in my opinion I think we need to do it for them." *Technical Conference regarding Resource Adequacy in the Evolving Electricity Sector*, Docket No. AD21-

10-000, Transcript at 9 (filed April 26, 2021). Following an expedited stakeholder process, on July 30, 2021, PJM submitted tariff revisions to FERC under Section 205 of the Federal Power Act constituting a new MOPR proposal. PJM Tariff Filing, Transmittal Letter, JA_____.

PJM proposed to implement a "Focused MOPR" that would apply only in two circumstances: first, for any private "Exercise of Buyer-Side Market Power;" and second, whenever a resource received "Conditioned State Support." PJM's proposal defined "Exercise of Buyer-Side Market Power" as:

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

PJM Tariff Filing, Proposed Tariff, Definitions, JA_____. As a component of the test for Exercise of Buyer-Side Market Power, the tariff defined "Buyer-Side Market Power" as "the ability of Capacity Market Sellers with a Load Interest to suppress RPM Auction clearing prices for the overall benefit of their (and/or affiliates) portfolio of generation and load." *Id.*, JA_____; *see also* PJM Tariff Filing,

Proposed Tariff, Attachment DD, section 5.14(h-2)(2)(B), JA_____. The Tariff makes clear that "[o]nly Generation Capacity Resources of Capacity Market Sellers with a 'Load Interest' could be subject to the MOPR based on buyer-side market power concerns." PJM Tariff Filing, Proposed Tariff, Transmittal Letter at 24, JA_____. PJM proposed that a seller has a "Load Interest" when the seller has a responsibility for serving load in the PJM region. PJM Tariff Filing, Proposed Tariff, Definitions, JA_____.

PJM proposed that "Conditioned State Support" is when a state provides out-of-market revenues to a capacity market seller on condition of the seller bidding into the capacity market at a specific price or bidding into the capacity market and clearing. Tariff Filing, Proposed Tariff, Definitions, JA_____. PJM exempted "legacy" state policies enacted prior to October 1, 2021, from the application of the Focused MOPR. *Id.*; *see also* Tariff Filing, Proposed Tariff, Definitions, "Legacy Policy", JA_____.

To determine whether a seller is engaged in an Exercise of Buyer-Side Market Power or receives Conditioned State Support, PJM proposed using an attestation sellers would submit before the auction. PJM Tariff Filing, Proposed Tariff, Transmittal Letter at 24-29, JA_____. Accordingly, under PJM's proposal, whether a capacity market seller intended to engage in price suppressive behavior would be

judged by the seller itself. And, as noted above, whether the seller's conduct actually was price suppressive would be irrelevant.

G. The September 29, 2021 Notice And Commissioners' Statements

On September 29, 2021, FERC issued a Notice of Filing Taking Effect by Operation of Law "because the Commissioners are divided two against two as to the lawfulness of the change." JA____. When this occurs, under Section 205(g)(1)(B) of the FPA, 16 U.S.C. §824*d*(g)(1)(B), each Commissioner adds their view of the change to the record. Chairman Glick and Commissioner Clements filed their Joint Statement supporting PJM's proposal on October 19, 2021, JA____ ("Joint Statement"). The same day, Commissioner Christie filed his statement opposing PJM's proposal. JA____. Commissioner Danly filed a separate statement opposing PJM's proposal on October 27, 2021. JA____. Under these circumstances, FERC's failure to issue an order is treated as an order accepting the tariff change for the purposes of rehearing. 16 U.S.C. §824*d*(g)(1).

The Joint Commissions filed, on October 28, 2021, a timely request for rehearing of FERC's failure to issue an order accepting or denying PJM's proposed tariff changes. Section 205(g)(2) of the FPA, 16 U.S.C. §824*d*(g)(2), provides that if FERC fails to act on the merits of a rehearing request within 30 days after it is filed, the aggrieved party may file an appeal. FERC memorialized its failure to act

on the rehearing request through a Notice of Denial of Rehearing by Operation of Law on November 29, 2021.

STANDARD OF REVIEW

This case presents the first opportunity for a court to address the standard and scope of review in an appeal of a FERC inaction taken under Section 205(g) of the FPA, 16 U.S.C. §824*d*(g). Before the enactment of Section 205(g) in 2018, petitioners' cases would not have been reviewable. No court has yet determined the appropriate standard of review for tariff changes approved through FERC inaction.

A. PJM's Tariff Changes Should Be Reviewed *De Novo* To Determine Whether They Are Just And Reasonable

Based on the structure of Section 205(g), as well as the structure of review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§701, 706, this Court should review PJM's tariff changes *de novo* to determine whether they are just and reasonable.

Under 16 U.S.C. §824*d*(d), FERC has discretion to allow a Section 205 filing to go into effect by operation of law, but that discretion is limited by the law FERC would have needed to apply to actively approve the filing. The Court must apply that law to determine whether FERC's inaction was proper. As explained in detail, *infra*, when FERC, through inaction, approves a Section 205 tariff change and an appeal is taken, a reviewing court must conduct a *de novo* review of whether the agency could have approved the change based on the record before it.

1. *Public Citizen I:* FERC Has Discretion Not To Act

In 2016, prior to the enactment of Section 205(g) of the Federal Power Act ("FPA"), the Court of Appeals for the D.C. Circuit directly addressed the reviewability of tariff changes submitted under Section 205 of the FPA that go into effect by operation of law. *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1167 (D.C. Cir. 2016) (*Public Citizen I*). The court held that FERC deadlocks under Section 205 do not constitute reviewable agency action either under the FPA or under Section 701 of the APA. *Id.* at 1172, 1174. The structure of Section 205 amounted to a grant of discretion to FERC to allow a tariff change to go into effect, *Id.* at 1174, because, when a statute allows something to occur "by operation of law," it is not the agency's decision that effected the occurrence, but Congress' decision when it wrote the statute. *Sprint Nextel Corp. v. F.C.C.*, 508 F.3d 1129, 1132 (D.C. Cir. 2007). Consequently, under *Public Citizen I*, parties could not seek redress if FERC allowed an unjust and unreasonable tariff to go into effect.

2. 2018 Congressional Action Allowed For Judicial Review

Because of the harsh result, Congress responded to *Public Citizen I* by adding Section 205(g) to the Federal Power Act ("FPA"), which provides:

> [I]f the Commission permits the 60-day period established therein to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the

> Commission, or if the Commission lacks a quorum-- (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 [rehearing under] section 825*l*(a) of this title.

16 U.S.C. §824*d*(g)(1).

Further, if FERC should fail to act on rehearing for any of the same reasons, aggrieved parties may appeal under Section 313 of the FPA, 16 U.S.C. §825*l*. 16 U.S.C. §824*d*(g)(2). Notably, Congress did not modify the automatic approval of tariff filings but just added a remedy on appeal.

3. *Amador County*: Independent Judicial Review Of Agency Inaction

The new structure of the Federal Power Act ("FPA") now mirrors the Indian Gaming Regulatory Act ("IGRA"), which provides that compacts between states and tribes for gaming on tribal land may be submitted to the Secretary of the Interior for approval. *Amador County, Cal. v. Salazar*, 640 F.3d 373, 375 (D.C. Cir. 2011). Under the IGRA, if the Secretary does not act within 45 days, the compact is deemed to be approved, "but only to the extent the compact is consistent with the provisions of" the IGRA. *Id.*; 25 U.S.C. §2710(d)(8)(c). Congress thereby limited agency discretion to approve these compacts through inaction. This limitation preserved judicial review of agency inaction under the IGRA, *Amador County*, 640 F.3d at

380, and Congress' 2018 amendment to the FPA similarly preserves judicial review of FERC inaction.

Here, FERC's inaction should be treated as an order accepting the change. 16 U.S.C. §824*d*(g). But, if the tariff changes are unjust and unreasonable, then FERC is required to disapprove the change. 16 U.S.C. §824*d*(a). Thus, it is up to the reviewing court to determine, on a *de novo* basis, whether the tariff change is just and reasonable as a predicate to deciding whether discretion to approve was properly exercised. *Amador County*, 640 F.3d at 380 ("[S]omeone—i.e., the courts—must decide whether those provisions are in fact lawful.").

This Court must determine whether the changes to PJM's tariff are just and reasonable based on an independent review of the record. If they are not, this Court should vacate the changes.

B. Alternatively, The Court Should Apply The Administrative Procedure Act's Arbitrary And Capricious Standard Of Review

Alternatively, this Court should review FERC's inaction on an arbitrary and capricious basis for its failure to provide a reasoned explanation for its policy departure, *CBS Corp. v. F.C.C.*, 663 F.3d 122, 145 (3d Cir. 2011), and failure to meaningfully respond to the Joint Commissions' arguments. *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011).

While PJM's tariff changes are unjust and unreasonable, and we encourage the Court to so hold based on an independent evaluation of the record, alternatively,

under the Administrative Procedure Act, the Court's general review of FERC orders is "to determine whether they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Braintree Elec. Light Dep't v. FERC*, 667 F.3d 1284, 1288 (D.C. Cir. 2012) (quoting 5 U.S.C. §706(2)(A)).

SUMMARY OF ARGUMENT

At the heart of this case is FERC's approval, by operation of law, of PJM's MOPR proposal in direct contradiction of its own fully litigated orders. FERC's inaction is invalid twice over; not only is the result of FERC's inaction unjust and unreasonable, but FERC's approval was arbitrary and capricious because it allowed PJM, a FERC-regulated public utility, to overturn a FERC-defined rate without any supportive reasoning or public decision-making whatsoever.

FERC's approval by inaction should be vacated because PJM's changes will allow buyer-side market power to infiltrate its capacity market with a low likelihood of screening. Some capacity market sellers have an obligation to serve load. If the balance of their load obligations outweighs their supply-side interests, then these sellers would be served by lower capacity prices, and they could offer into the market below their costs without fear of mitigation. To prevent manipulative behavior like this, time and again, FERC and the courts have emphasized that market power must be reviewed. For its part, FERC has repeatedly approved buyer-side screens that review this sort of behavior without looking to intent. That review is not merely an option; it's a critical feature of functioning competitive markets. PJM has followed this with a long history of using the MOPR as a screen to prevent buyer-side interests from engaging in market-manipulation practices. Never has PJM taken into

consideration the intent of the market seller to mitigate against potential anti-competitive buyer-side market power.

PJM's Focused MOPR allows a capacity market seller to promise to PJM that it has no intent to exercise market power. That promise cannot be meaningfully reviewed because PJM and its Independent Market Monitor have only 15 days to review each offer for an exercise of market power. Even if PJM conducts a review of a market seller's promise, that review might not mitigate the situation because PJM's consideration of intent is built into PJM's definition of an "Exercise of Buyer-Side Market Power." Yet a seller's intent should be irrelevant, *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014), and PJM's consideration of that intent makes its tariff unjust and unreasonable.

Separately, PJM's tariff changes unjustly and unreasonably allow states to both subsidize resources and set a price contrary to the PJM capacity market auction price approved by FERC. PJM's changes adopt a test from *Hughes v. Talen Mktg., LLC,* 578 U.S. 150 (2016), to determine if state action constitutes market power. This adoption subjects state action to the MOPR if a state requires a resource, as a condition of receiving a state payment, to bid into PJM's capacity market and clear the auction. When a state does this, it is stepping into the shoes of a buyer while also setting a price for its resource that is different from FERC's rate, the auction clearing price. The Supreme Court's *Hughes* decision said this behavior was

preempted by the FPA, but PJM's tariff nonetheless now allows it for "Legacy Policies" in existence prior to October 1, 2021. Regardless of when these policies were put in place, they have the effect of uncompetitively reducing prices through the market for the benefit of the buyer, and they therefore are an exercise of buyer-side market power. PJM and its supporters provide no coherent reason why old policies that exercise market power should be treated differently from new policies that do the same.

FERC's inaction will have the effect of lowering prices below the competitive level. When that happens, electric reliability suffers because capacity is underbuilt. In the past, FERC has authorized MOPR reforms for PJM that involved meaningful review of capacity market offers and mitigation of uncompetitive conditions. FERC has done this under Section 206 of the Federal Power Act, 16 U.S.C. §824*e*, and has made its own determination of just and reasonable rates. FERC may not now abdicate its duty and allow a FERC-regulated utility, PJM, to change its own tariff without any FERC action. Such an abdication is the very definition of arbitrary and capricious agency action.

Since FERC gave no reason for the tariff approval and is, therefore, unable to explain its reasoning in more detail, sending this case back to FERC would serve no useful purpose. The Court should vacate FERC's approval through inaction.

ARGUMENT

I. FERC'S FAILURE TO EXPLAIN ITS DEPARTURE FROM YEARS OF PRECEDENT REQUIRES REVERSAL

FERC must provide a reasoned explanation when it departs from precedent. *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981). Starting in 2016 with a complaint from generation owners,[2] FERC began to examine the long-existing MOPR, which has been a part of PJM's capacity market since its foundation. In 2018, FERC acted on the complaint, and opened a proceeding to determine the solution.[3] In December 2019, FERC found a new market structure to be just and reasonable and ordered PJM to implement it.[4] PJM filed rounds of compliance filings with FERC until March 2021, when all pieces of the Expanded MOPR were in place and approved. *See* Expanded MOPR Compliance Orders, *supra* at 13-14.

Under Section 205 of the FPA, FERC may approve or disapprove tariff changes proposed by a utility. 16 U.S.C. §824*d*. PJM's tariff filing was almost a total reversal of its FERC-approved tariff from just a few months prior, but instead of defending its prior order or explaining that facts, circumstances, or its reasoning had changed, FERC took no action on the Section 205 filing, resulting in PJM's proposed tariff changes going into effect by operation of law. 16 U.S.C. §824*d*(d).

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[2] *Calpine Corp. v. PJM Interconnection, L.L.C.*, Docket No. EL16-49 (Complaint filed March 21, 2016).
[3] *Calpine Corp. v.PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).
[4] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019).

If FERC wants to change its view of a particular precedent, it must affirmatively issue an order explaining itself. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Instead of staying silent, FERC should have denied the PJM Tariff filing and opened a proceeding under Section 206 of the FPA, 16 U.S.C. §824*e*. Section 206 allows FERC to start afresh and make changes to a utility's tariff, unlike Section 205, where FERC cannot create an original rate and must approve or disapprove the utility's proposal. *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 116 (D.C. Cir. 2017). Section 206 also requires FERC to determine a just and reasonable rate with greater precision and authority to seek a particular outcome. As an example, FERC ordered PJM to incorporate a prior version of the MOPR into its tariff through a Section 206 proceeding. *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239, ¶1 (2019).

Under an arbitrary and capricious standard, this case is simple; FERC allowed a tariff change to go into effect, which overturned its prior practice that had been determined just and reasonable under the higher Section 206 standard. FERC cannot overturn its prior precedent through inaction. *Fox Television Stations*, 556 U.S. at 515. To allow a utility to overturn a FERC-specified rate is even more offensive to the requirement for reasoned decision-making.

In December 2019, FERC ordered[5] PJM to implement a replacement rate that it found to be just and reasonable, and less than two years later it allowed a complete reversal of its order to go into effect without saying a word on the topic. This is entirely improper. "An agency may not…depart from a prior policy *sub silentio*." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As such, PJM's tariff changes should be vacated.

II. FERC'S FAILURE TO RESPOND TO THE JOINT COMMISSIONS' ARGUMENTS REQUIRES REVERSAL

In their protests and on rehearing, the Joint Commissions and others properly raised arguments challenging the justness and reasonableness of PJM's new MOPR that were never addressed by FERC. Chairman Glick and Commissioner Clements issued a Joint Statement in support of PJM's filing, and Commissioners Christie and Danly issued separate statements in opposition. Yet, these statements are not *FERC* statements. FERC can address issues only as a body, and the statements of individual commissioners do not serve to meaningfully address a properly raised argument. *Public Citizen I*, 839 F.3d at 1169 (only a majority of the agency is empowered to act for the body). But, even if the Commissioners' statements could be attributed to the agency itself, the arguments of the Joint Commissions were not examined by the Commissioners who supported approval. Particularly, while a

[5] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019).

cursory review was given to some of the Joint Commissions' arguments,[6] other arguments, like the legal infirmity of PJM's definitions regarding buyer-side market power, were left out of the discussion.

Under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. §706(2), FERC's order must fail. Under that standard, FERC must meaningfully engage objections that are appropriately raised. *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011); *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018). FERC's failure to do so renders its action (truly inaction) arbitrary and capricious.

Protesters' arguments highlighted flaws in PJM's compliance filings; FERC failed to meaningfully address those arguments, making FERC's approval arbitrary and capricious under the Administrative Procedure Act. *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018); *see also NVE, Inc. v. Dep't of Health & Hum. Servs.*, 436 F.3d 182, 190 (3d Cir. 2006) (Agency action is arbitrary and capricious if it fails to "consider an important aspect of the problem.")

III. REMAND WITHOUT VACATUR WILL NOT REMEDY PJM'S UNJUST AND UNREASONABLE TARIFF

PJM's hasty disassembly of the Expanded MOPR rules neither produces the benefits of state accommodation nor protects the capacity market from buyer-side

[6] *See* Joint Statement, fn. 206, 211, 275.

market power. As explained below, the PJM MOPR in this proceeding is neither just nor reasonable as it fails to adequately mitigate buyer-side market power, a requirement of the Federal Power Act. In addition, as discussed above, the inaction by FERC represents arbitrary and capricious action. Vacatur is the normal remedy under the Administrative Procedure Act when an agency acts in an arbitrary or capricious manner or otherwise contrary to law. 5 U.S.C. §706(2). While this Court has sometimes found remand without vacatur to be appropriate,[7] because of the depth of the infirmities in PJM's MOPR and the impossibility of a FERC-issued remedy in this specific proceeding, remand without vacatur would serve no purpose. Thus, FERC's silent acceptance of PJM's changes to the tariff should be vacated.

A. As Remand Would Serve No Useful Purpose, The Court Should Vacate PJM's Changes Without Remand

The Supreme Court has explained that a court may remand for an agency to do one of two things: (1) provide a "fuller explanation of the agency's reasoning at the time of the agency action," or (2) "deal with the problem afresh" by taking new agency action. *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S.Ct. 1891, 1896 (2020) (*Regents*).

The first option is unavailable in this case. The agency provided no justification, and when pursuing the first *Regents* option, an "agency must defend its

[7] *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 824 F.3d 33, 52 (3d Cir. 2016).

actions based on the reasons it gave when it acted." *Id.* at 1909. To follow this road would not allow FERC to expand on its reasoning, because it did not act and gave no reasons, and remand would therefore lead to identical appeals in the future.

The second option, to deal with the problem afresh, is unavailable in the context of an appeal of a Section 205 proceeding–at least without vacatur. To require FERC to "start afresh" under Section 205 does not track with the structure of the statute. No part of Section 205 provides any authority for FERC to initiate its own action with respect to a utility's tariff filings. Section 205(d) and (e), 16 U.S.C. §824*d*(d) & (e), provide a method by which utilities may adjust their own tariffs with notice to the Commission and the public.

Instead, for FERC to act on its own in this context would require it to open a proceeding under Section 206 of the FPA. 16 U.S.C. §824*e*. Section 205 and Section 206 are governed by separate standards. While Section 205 only requires that the Commission determine that a tariff rate change is not unjust and unreasonable, Section 206 requires that the Commission determine *the* just and reasonable rate. 16 U.S.C. §824*e*(a). Because Section 206 requires an active engagement by the Commission to set the new rate, which will take time, it would be inappropriate to maintain an unjust and unreasonable tariff approved through inaction while FERC determines *the* just and reasonable rate. If the Court vacates, it could remand with instructions for FERC to open a Section 206 proceeding.

If this Court determines that the tariff changes were unlawful, only vacatur will resolve the matter. Remand without vacatur would put the parties back in the position where they started, with no relief, and the loop of inaction would resume. Remand should be avoided when it would create an idle and useless formality. *NLRB v. Wyman–Gordon Co.*, 394 U.S. 759, 766–67 n. 6 (1969). This is even more true of a remand without vacatur.

B. Vacatur Is Appropriate Under The Traditional Remand Analysis

In evaluating whether vacatur is appropriate during remand, this Court has traditionally followed the test of the D.C. Circuit in *Allied-Signal, v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). *See Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 824 F.3d 33, 52 (3d Cir. 2016). Under the *Allied-Signal* test, the "decision whether to vacate depends on [(1)] the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and [(2)] the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993) (internal quotation marks omitted).

Decisions to vacate under *Allied-Signal* are heavily weighted toward the first factor: possibility of satisfactory explanation on remand. *Long Island Power Auth. v. FERC*, 27 F.4th 705, 714 (D.C. Cir. 2022) ("The 'seriousness' of agency error

turns in large part on 'how likely it is the agency will be able to justify its decision on remand.'").

Allied-Signal's first factor is satisfied here. FERC's error was serious. PJM designed a rule that does two things: (1) it creates unworkable and meaningless definitions and attestation processes for buyer-side market power with little to no possibility of enforcement, and (2) it explicitly permits Legacy Policies that would otherwise violate its Buyer-Side Market Power test to affect the capacity auction results. PJM and FERC are under a duty to prevent market power. These rules fail to meet that duty, and FERC's acceptance has failed to meet its oversight responsibility to explain its decisions. FERC may not rehabilitate its acceptance of PJM's tariff except by elaborating on the original reasons it has already given. *Regents*, 140 S.Ct. at 1896. But FERC gave no reasons, and new reasons require a new decision. *Id*.

Regarding the second factor, whether a vacatur would cause disruptive consequences, this case and *Allied-Signal* are distinguishable. *Allied-Signal* involved the recovery of fees by the Nuclear Regulatory Commission ("NRC") from those who were subject to its oversight. The petitioners in the *Allied-Signal* appeal and others had paid fees to fund the NRC. When it was determining whether to vacate, the *Allied-Signal* Court considered that if the rule were to be vacated, the NRC would have to refund the significant fees which would not be recoverable by

other means, creating a disruptive consequence. *Allied-Signal*, 988 F.2d at 151. Combining the possibility that the rule was justifiable on remand with the potential harm to the NRC's fee structure, the Court ordered remand without vacatur. *Id.*

These disruptive consequences are not present here. First, by vacating the Order, the PJM tariff would merely revert to the prior version of the MOPR. A disruptive consequence does not exist when a prior rule will govern if the current rule is vacated. *Council Tree Commc'ns, Inc. v. F.C.C.*, 619 F.3d 235, 258 (3d Cir. 2010). FERC itself ordered the prior PJM MOPR tariff,[8] which PJM has successfully implemented in a BRA in 2021.[9] Second, reverting to this prior MOPR, even if it were to be later changed, would not cause disruptions. The Court's vacatur of the new MOPR provisions would allow PJM's upcoming capacity auctions to proceed under the prior MOPR provision. At the same time, FERC or PJM and its stakeholders may consider a new tariff without disrupting the auctions as they progress. No party is asking for auctions to be re-run following the outcome of this case; thus, no market participant's positions will be impacted if the MOPR is vacated.

For these reasons, to vacate the Order and to allow FERC to open a Section 206 proceeding, or to allow the stakeholders to file a revised Section 205 proposed

[8] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019).
[9] *See, e.g.*, https://insidelines.pjm.com/pjm-successfully-clears-capacity-auction-to-ensure-reliable-electricity-supplies/.

tariff change, would not be disruptive. Either way, the proper remedy in this case must include vacatur of PJM's changes.

IV. PJM'S TARIFF CHANGES ARE UNREASONABLE BECAUSE THEY FAIL TO INCLUDE MEASURES THAT PREVENT ANTI-COMPETITIVE MARKET BEHAVIOR

As one of its core duties, FERC must produce just and reasonable rates in the wholesale electricity markets. 16 U.S.C. §824*d*. In the previous century, wholesale rates were set administratively through individualized tariff rates. A utility would determine the rates it wanted for a unit of electricity and then seek FERC approval to provide the electricity into the grid at that tariffed rate. 16 U.S.C. §824*d*(d); *Pub. Citizen, Inc. v. FERC*, 7 F.4th 1177, 1184 (D.C. Cir. 2021) (*Public Citizen II*) (recounting history).

Increasingly, FERC has relied on competitive markets (such as the auctions administered by PJM) to accomplish rate-setting. The "market-based rate" tariffs used today do not announce a price, but instead create a competitive market structure by which the price is determined. Courts have endorsed this approach so long as FERC takes the necessary steps to ensure that market participants cannot exercise anti-competitive market power. *See, e.g., California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 871 (D.C. Cir. 1993). Accordingly, FERC cannot simply allow the markets to operate without any oversight. FERC is "statutorily bound to ensure that the resulting rates

are just and reasonable." *Public Citizen II*, 7 F.4th at 1184. For market-based rates to be just and reasonable, the sales must be made in a market "where neither buyer nor seller has significant market power." *Tejas Power v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990).

By allowing the flawed PJM tariff to go into effect, FERC fell woefully short of the goal of ensuring a competitive market for capacity. As Commissioner Danly noted in dissent, the PJM MOPR contains a "convoluted and impossible to enforce definition of market power." Statement of Commissioner Danly at ¶66, JA_____. Commissioner Christie, also dissenting, similarly characterized the replacement MOPR as "the flawed and rushed result of an 'expedited' stakeholder process." Statement of Commissioner Christie at ¶3 (footnote omitted), JA_____. The Independent Market Monitor ("IMM") for PJM went so far as to say that "the PJM markets would be better off, more competitive, and more efficient with no MOPR than with PJM's proposed approach." August 20, 2021 Protest of PJM Independent Market Monitor at 1, JA_____ (IMM Protest). The IMM explained that the replacement MOPR "would effectively eliminate the MOPR while creating a confusing and inefficient administrative process" that makes it virtually impossible to ever prove buyer-side market power. *Id.*, JA____.

The Joint Commissions are charged with promoting effective competition in the retail electricity markets of their respective states. *See, e.g.*, 66 Pa.C.S. §§2801–

2812; O.R.C. §4928.02. In executing this charge, they depend on well-functioning and competitive wholesale markets in PJM. The replacement MOPR, however, will impair competitive prices in the market for capacity by allowing market power to flourish.

This Court must vacate PJM's tariff changes caused by FERC's failure to address the serious flaws in the replacement MOPR. The changes are arbitrary and capricious, and they are not in accordance with the Federal Power Act's assurances of just and reasonable rates.

A. PJM's Tariff Changes Unlawfully Consider Intent To Exercise Buyer-Side Market Power In The Capacity Market

PJM's proposed tariff definitions regarding buyer-side market power, quoted above (*supra* at 15), err by introducing the intent of the market participant into the test when applying the definition. PJM requires stated intent, but any just and reasonable rule must mitigate market power based on the potential exercise of such power, whether intentional or not.

1. Mitigation Must Be Based On The Potential Exercise Of Market Power

FERC has a long-established and prudent policy to mitigate market power in a market-based rate tariff: "it is the possession of market power (and, therefore, the *potential* to exercise it) ... that triggers the need for mitigation. Once it is shown that market power exists, adequate mitigation of the *potential* to exercise market power

becomes essential." *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,150, ¶71 (2009) (emphasis added). Market power must therefore be mitigated based on its potential exercise, not the market participant's subjective intent to exercise market power. As emphasized by the Court of Appeals for the D.C. Circuit, FERC has found that uneconomic entry into the capacity market, "regardless of resource and regardless of intent, 'can produce unjust and unreasonable prices by artificially depressing capacity prices.'" *New England Power Generators Ass'n, Inc. v. FERC,* 757 F.3d 283, 291 (D.C. Cir. 2014).

2. PJM Now Unlawfully Conditions Market Power Mitigation On A Finding Of Intent

PJM failed to adhere to this established judicial precedent when it introduced the element of intent in its definitions regarding buyer-side market power and the tariff references in its attestation process. FERC's failure to reject those definitions and the tariff references to intent in PJM's attestation process is unjust and unreasonable, and further represents an unlawful departure from its own precedent without reasoned explanation. *See* Administrative Procedure Act, 5 U.S.C. §706(2)(A); *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981).

PJM's problems first arise when it defines an "Exercise of Buyer-Side Market Power" in a way that introduces the intent of the Capacity Market Seller into PJM's test:

> [A]nti-competitive behavior of a Capacity Market Seller with a Load Interest, or directed by an entity with a Load Interest, to uneconomically lower [Reliability Pricing Model (RPM)] Auction Sell Offer(s) *in order to* suppress RPM Auction clearing prices for the overall benefit of the Capacity Market Seller's … portfolio of generation and load or that of the directing entity with a Load Interest (emphasis added).

PJM Tariff Filing, Proposed Tariff, Definitions, JA_____.

This problem is not only present in the definitions; PJM's attestation process deepens the improper inclusion of intent. Capacity Market Sellers are required to attest that they do not "*intend* to submit a Sell Offer for their Generation Capacity Resource as an Exercise of Buyer-Side Market Power." PJM Tariff Filing, Proposed Tariff, Attachment DD, section 5.14(h-2)(1)(A)(ii) (emphasis added), JA_____.

PJM's witness, Dr. Walter Graf, tries to explain that the definitions of "Buyer-Side Market Power" and "Exercise of Buyer-Side Market Power" trigger tests for ability and incentive which will control the mitigation process.[10] According

[10] PJM Tariff Filing, Graf Affidavit, ¶¶6-11 JA_____; *see also* PJM Tariff Filing, Proposed Tariff, Attachment DD, section 5.14(h-2)(2)(B), JA_____ ("The fact-specific review will determine, as necessary, whether a Capacity Market Seller has the *ability and incentive* to submit a Sell Offer for the Generation Capacity Resource that could be an Exercise of Buyer-Side Market Power." (emphasis added)).

to Dr. Graf, PJM's ability test determines whether a market seller has sufficient market power to impact the market clearing price. The incentive test likewise determines whether a market seller would benefit from a lower clearing price. Taken together, these tests determine whether a utility would have the motive and opportunity to suppress the market price, and thus would potentially exercise unlawful market power. That is, according to PJM, the certification is used only initially and then a more objective test is applied. Yet the record reflects that even after the performance of its fact-specific review, PJM reverts to intent:

> The Office of Interconnection … shall determine whether a Generation capacity Resource may be the subject of a Sell Offer that would be an Exercise of Buyer-Side Market Power.

PJM Tariff Filing, Proposed Tariff, Attachment DD, section 5.14(h2)(2)(B)(iii), JA_____.

In a circular fashion, PJM reintroduced the element of intent in the final analysis by returning to the definition of Exercise of Buyer-Side Market Power and thereby tainting the ability and incentive tests. In the end, PJM's initial certification and secondary "more objective test" both inappropriately use the subjective intent of the market seller.

Intent is not an appropriate consideration in a screen for potential mitigation. While it might be a factor in a complaint against an individual market participant after-the-fact, the MOPR has always served to screen out *potential* exercises of

buyer-side market power, regardless of intent. *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 292 (D.C. Cir. 2014) (discussing a similar rule in the New England capacity market). By approving this tariff, FERC deviated from its longstanding and judicially recognized policy of mitigating potential market power, without any, let alone an adequate, explanation. PJM's tariff changes are unjust and unreasonable because they rely on the stated intent of an interested Capacity Market Seller before preventing buyer-side market power.

The only viable remedy for these defects is vacatur.

B. PJM's Tariff Changes Do Not Preserve Meaningful Review For Exercises Of Buyer-Side Market Power And Are Unjust And Unreasonable

PJM's "check the box" process for attestations does not afford a meaningful opportunity for review. PJM Tariff Filing, Transmittal Letter at 26, JA_____. PJM's Office of Interconnection and Independent Market Monitor ("IMM") will each have only 15 days to review attestations from market participants and decide to conduct a fact-specific review. Combined with sparse attestations, two weeks of review has poor prospects to identify and prevent exercises of buyer-side market power.

To explain, there are two attestations, which are subject to slightly different processes. A seller will attest: (1) whether it intends to exercise Buyer-Side Market Power; and (2) whether it is receiving or will receive Conditioned State Support.

The tariff requires the seller to make its attestation 150 days prior to the auction. PJM Tariff Filing, Proposed Tariff, Attachment DD, section 5.14(h-2)(1)(A), JA_____. If PJM's Office of the Interconnection or the IMM reasonably suspects that an attestation contains fraudulent or material misrepresentations regarding buyer-side market power, they have only 15 days to determine whether to initiate a fact-specific review. PJM Tariff Filing, Attachment DD, section 5.14(h-2)(1)(A), (2)(B)(i), JA_____.[11] PJM and the IMM must examine certifications from every market participant and there is little to aid in the analysis as the attestations need not be accompanied by support or explanation. PJM testified that requiring sellers to annually submit data "would be overly burdensome." PJM Tariff Filing, Transmittal Letter at 30, JA_____. Instead, the determination that must be made in 15 days is to be based on such amorphous factors as whether there is a "large purchase position" by the seller and "an observed lack of merchant investment." PJM Tariff Filing, Morelli Affidavit at 8, JA_____. In contrast, the IMM explained that the 15-day deadline is more likely to prevent investigations of market power than to facilitate them. IMM Protest at 12, JA_____.

[11] The market seller must submit its certification 150 days before an auction, and the Office of Interconnection and Independent Market Monitor must decide to conduct a fact-specific review by Day 135, leaving 15 days to decide.

The Conditioned State Support attestation process is similarly flawed. PJM keeps on file with FERC a list of programs constituting Conditioned State Support. PJM Tariff Filing, Transmittal Letter at 44, JA_____. PJM intends to make this filing about 40 days after the attestations are filed, allowing 110 days for the FERC proceeding on the list. The list is to be derived from PJM's own knowledge and a review of the attestations. PJM Tariff Filing, Morelli Affidavit at 4, JA_____. There is no transparency to this 40-day review. Parties such as the Joint Commissions will not be made aware when PJM deems a program conditioned state support, or even when it is reviewing a program to make that determination.

Rather, during the 40-day period, if PJM identifies factors, such as whether two resources made contradictory attestations, PJM would then "have a conversation with the market seller" to identify further details. PJM Tariff Filing, Morelli Affidavit at 7, JA_____. Then, if PJM "reasonably believes" – without consulting the IMM – that there is Conditioned State Support, the program will go on the list to be filed. PJM Tariff Filing, Attachment DD, section 5.14(h-2)(2)(A), JA_____; IMM Protest at 12, JA_____. Chairman Glick and Commissioner Clements, in their Joint Statement, directed entities to file a protest or complaint at FERC if they wish to challenge the list. Joint Statement at ¶142, JA_____. It is not just and reasonable to require parties such as the Joint Commissions to bear this burden of proof—or to place the onus on an interested seller to interpret the definition of Conditioned State

Support and to be correct in that regard. PJM Tariff Filing, Proposed Tariff, Definitions, JA____; *see also* Morelli Affidavit at 3, JA _____. The burden of ensuring wholesale electricity market competition is on FERC—who was tasked with that responsibility by Congress—not market participants, state regulators, and other interested parties. *See Public Citizen II*, 7 F.4th at 1184-1186; *Hughes*, 578 U.S. at 154-155; Statement of Commissioner Danly at ¶8, JA_____.

Commissioner Christie appropriately highlighted the IMM's Protest on this topic, quoting the IMM: "PJM creates … a complex set of barriers to gathering information and impossible deadlines for the Market Monitor." Statement of Commissioner Christie, ¶9 fn. 13, JA_____. Similarly, Commissioner Danly explained:

> PJM's tariff provisions are structured so as to ensure that it is virtually certain that the MOPR will *never* be applied to *any* generation resource. These provisions are so deliberately ineffectual that their approval violates our statutory duty to ensure that PJM's capacity market produce just and reasonable rates.

Statement of Commissioner Danly, ¶37, JA_____ (emphasis in original).

The D.C. Circuit has held that FERC must conduct an "*active* ongoing review" of whether the market remains competitive and to detect anti-competitive behavior. *Public Citizen II*, 7 F.4th at 1185-1186 (emphasis added). In the same case, the court found that market participants could comply with a transmission organization's tariff

but still manipulate the market, causing unjust and unreasonable rates. The court concluded that FERC "could not rely reactively on compliance with a hobbled tariff as the lodestar of competitiveness." *Id.* at 1200. FERC, and not an intrinsically biased seller, has the statutory responsibility of ensuring that rates are just and reasonable. *New England Power Generators Ass'n, Inc. v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014), *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016). Allowing the operation of a tariff that relies on sellers to self-certify their competitive behavior, with a deficient review process, runs contrary to the law and logic. FERC itself has recognized that adequate mitigation of the potential to exercise market power is essential. *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,150, ¶71 (2009).

The tariff's attestation process was designed "to switch the paradigm away from the [Expanded] MOPR's presumption of guilt … to one of presumed innocence." PJM Tariff Filing, Morelli Affidavit at 2, JA_____. Treating self-interested market participants with a presumption that they will not exercise market power is dubious at best. Nevertheless, even if PJM's presumptions were worthwhile, any change from established precedent must be accompanied by an explanation from FERC that justifies deviating from its long-established protections against potential exercises of market power. Here, FERC not only failed to offer a *reasoned* explanation; it provided no explanation at all. Again, an "agency may not

… depart from a prior policy *sub silentio*." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

C. PJM's Exemption Of State Legacy Policies From Buyer-Side Market Power Review Flouts Controlling Legal Precedent

States are prohibited by law from setting the wholesale rate in favor of preferred resources, thereby supplanting FERC's statutory responsibility to set the just and reasonable rate. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016). The prohibition on Conditioned State Support in PJM's tariff changes embeds this principle. Yet, PJM then explicitly exempts pre-existing Legacy Policies based on a reliance interest that cannot exist, given that these policies are preempted.

Hughes addressed a regulatory program enacted by Maryland to encourage the development of new in-state generation by requiring Maryland's consumer electric providers to sign 20-year contracts with Maryland's preferred new generators. Critically, the contracts linked the generators' compensation to the clearing price of PJM's regional capacity market and encouraged the generators to bid into the capacity market in such a manner as to clear the auction by providing no payment in the event the generators failed to clear the auction. *Hughes*, 578 U.S. at 157-159. Thus, Maryland's program incentivized the generators to bid at the lowest possible price to clear PJM's capacity auction and receive the benefits of the state's contract, plus PJM's capacity payment.

In response to Maryland's regulatory program and a similar one in New Jersey, FERC eliminated the then-existing MOPR exemption for new state-supported generation, reasoning that the Commission "[was] 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." *PJM Interconnection LLC*, 135 FERC ¶ 61,106 (2011).

On review, the Supreme Court held that Maryland's program is preempted because it "invades FERC's regulatory turf" over interstate wholesale rates by second-guessing and adjusting the reasonableness of the rates. *Hughes*, 578 U.S. at 163. While states may encourage production of generation, they may only do so through measures "untethered to a generator's wholesale market participation," that do not condition payment of funds on capacity clearing the auction. *Id*. at 166.

Now, only five years after *Hughes*, PJM inexplicably proposed in this MOPR precisely what the Supreme Court ruled preempted: an exemption from buyer-side market power mitigation for existing state policies and programs that are tethered to PJM's capacity market and conditioned on clearing the market. To be sure, PJM understood the significance of *Hughes* when it incorporated the decision's holding in its definition of Conditioned State Support and proposed to apply the MOPR to such resources. PJM Tariff Filing, Morelli Affidavit at 3, JA_____.

PJM excluded Legacy Policy resources that otherwise meet the definition of preempted Conditioned State Support from price mitigation:

> Conditioned State Support shall mean 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 [Reliability Pricing Model (RPM)] Auction, where "conditioned on clearing in any RPM Auction" refers to specific directives as to the level of the offer that must be entered for the relevant Generation Capacity Resource in the RPM Auction or directives that the Generation Capacity Resource is required to clear in any RPM Auction. *Conditioned State Support shall not include any Legacy Policy*.

PJM Tariff Filing, Proposed Tariff, Definitions, JA_____. A "Legacy Policy" is a policy that directs a payment and was in effect prior to October 1, 2021. PJM Tariff Filing, Proposed Tariff, Definitions, JA_____.

In effect, PJM allowed states to set the wholesale rate with their Legacy Policy resources and to have an opportunity to exercise buyer-side market power in direct conflict with *Hughes*. FERC's inaction allowed this provision to take effect without any reasoned explanation for failing to adhere to its own precedent regarding subsidized entry that "has the effect of disrupting the competitive price signals that PJM's [capacity auction] is designed to produce." *PJM Interconnection LLC*, 135 FERC ¶ 61,106 (2011). FERC also provided no explanation as to why it was reasonable or appropriate to broaden its MOPR exemption for all currently effective

state policies and programs that have been on notice of the Commission's policy and the holding of *Hughes* for five years.

The two FERC Commissioners in support of PJM's filing go so far as agreeing that Conditioned State Support resources should be subject to the MOPR "because such state programs are likely preempted under the *Hughes* standard." Joint Statement at ¶135, JA_____. For no good reason however, they then stop short, and explain that the MOPR should not apply to Legacy Policy resources because such resources "were not on notice of this aspect of the MOPR when they enacted Legacy Policies." Joint Statement at ¶144, JA_____. Such an explanation defies logic as they are preempted by law regardless of when they were enacted. Moreover, *Hughes* was decided in 2016—more than five years before PJM's proposal—and all resources had sufficient time to adjust to the controlling precedent.

The Joint Statement's adoption of the *Hughes* test to justify applying the MOPR to Conditioned State Support resources while at the same time punting application of the *Hughes* test for Legacy Policy resources to the courts is the epitome of arbitrary and capricious reasoning. Ultimately, there is no reasonable explanation for distinguishing older legacy state policies from newer state policies when it comes to *Hughes*. Incorporating this illogical distinction into PJM's tariff is unjust and unreasonable, and FERC's failure to provide a reasoned explanation is

arbitrary and capricious. The Court should vacate FERC's Order approving PJM's tariff changes on those bases.

CONCLUSION

The Joint Commissions' Petition for Review should be granted, and this Court should vacate the tariff changes effected by FERC's failure to act on PJM's filing under Section 205 of the Federal Power Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and this Court's briefing order because it contains 10,710 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office in Times New Roman 14-point font.

3. Pursuant to Local Appellate Rule 31.1(c), I certify that the text of the electronic brief is identical to the text of the paper copies.

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May 9, 2022

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on May 9, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Third Circuit using the appellate CM/ECF system and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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