ORAL ARGUMENT TO BE HELD ON FEBRUARY 14, 2017

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 16-1234, 16-1235, 16-1236, and 16-1239 (Consolidated)

ADVANCED ENERGY MANAGEMENT ALLIANCE, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Final Brief: January 10, 2017

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties, intervenors, and amici before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in the Joint Brief of Petitioners.

B. Rulings Under Review

1. Order on Proposed Tariff Revisions, *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) ("Tariff Order"), R. 312, JA 994; and

2. Order on Rehearing and Compliance, *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157 (2016) ("Rehearing Order"), R. 413, JA 1451.

C. Related Cases

This case has not previously been before this Court or any other court. This Court previously considered petitions for review of earlier Commission orders that established rules for all auctions in this regional (PJM) electricity capacity market (*Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009)) and that upheld the results of transitional auctions (*Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011)). The Third Circuit previously considered petitions for review of earlier Commission orders that approved changes to the market rules (*N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014)).

Two cases pending before this Court involve challenges to Commission orders concerning market rules in the same capacity market. *NRG Power Mktg. LLC, et al.*, D.C. Cir. Nos. 15-1452 & 15-1454 (revisions to mitigation rules) (briefing completed; argument not yet scheduled); *PJM Power Providers Grp., et al. v. FERC*, Nos. 15-1453 & 15-1455 (revisions to demand curve and related inputs) (briefing completed; argument not yet scheduled).

Another case pending before this Court concerns challenges to Commission orders approving a similar capacity performance market mechanism for the New

England region. *New Eng. Power Generators Ass'n v. FERC*, D.C. Cir. Nos. 16-1023 & 16-1024 (briefing completed; argument not yet scheduled).

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Advanced Energy	Advanced Energy Management Alliance, petitioner in Case No. 16-1234
American Municipal	American Municipal Power, Inc., petitioner in Case No. 16-1239
Commission or FERC	Respondent Federal Energy Regulatory Commission
Cost-Benefit Petitioners	Public Power Petitioners, Environmental Petitioners, American Municipal, and Public Power Association of New Jersey
Environmental Petitioners	Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists, petitioners in Case No. 16-1236
FPA	Federal Power Act
JA	Joint Appendix
New Jersey Petitioners	New Jersey Board of Public Utilities and Public Power Association of New Jersey, petitioners (together with Public Power Petitioners) in Case No. 16-1235
Offer Cap Petitioners	Public Power Petitioners, New Jersey Petitioners, and American Municipal
P	Paragraph in a FERC order
PJM	Intervenor PJM Interconnection, L.L.C., operator of the regional grid in 13 states and the District of Columbia

GLOSSARY

Public Power Petitioners	American Public Power Association and National Rural Electric Cooperative Association, petitioners (together with New Jersey Petitioners) in Case No. 16-1235
R.	Record item
Rehearing Order	*PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157 (2016), R. 413, JA 1451
Tariff Order	*PJM Interconnection, L.L.C.*, PJM Interconnection, L.L.C., 151 FERC ¶ 61,208 (2015), R. 312, JA 994

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

COUNTER-STATEMENT OF JURISDICTION

Nine petitioners seek review of orders issued by the Federal Energy Regulatory Commission ("Commission" or "FERC"). *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015) ("Tariff Order"), R. 312, JA 994, *on reh'g*, 155 FERC ¶ 61,157 (2016) ("Rehearing Order"), R. 413, JA 1451.

To obtain judicial review of Commission orders, petitioners must satisfy the requirements of both Article III of the United States Constitution and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). *See, e.g.*, *N.Y. Reg'l*

Interconnect, Inc. v. FERC, 634 F.3d 581, 586 (D.C. Cir. 2011). As discussed more fully in the Argument, this Court lacks statutory jurisdiction to consider some of the arguments presented in the Joint Opening Brief of Petitioners ("Joint Br.") because they were not raised on rehearing before the Commission and because Petitioners do not explain, must less justify, this omission. Section 313(b) of the Federal Power Act provides that: "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." 16 U.S.C. § 825*l*(b). Courts adhere strictly to that requirement. *See, e.g., Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1125 (D.C. Cir. 2002).

STATEMENT OF THE ISSUES

This is the latest in a series of cases concerning the ongoing efforts of the Commission, regional transmission operators, and wholesale electricity market participants to create and implement rate designs that promote the development of sufficient capacity resources to ensure system reliability. (Capacity is not electricity itself; rather, it is the ability to produce electricity when necessary.) The orders on review arose from a market redesign proposed by PJM Interconnection, L.L.C. ("PJM"), which operates the high-voltage electric transmission network in the mid-Atlantic region and manages the largest competitive wholesale electricity

market in the country. (PJM is named after the smaller Pennsylvania-New Jersey-Maryland region in which it first operated.) PJM administers a tariff, approved by the Commission, that details the rates, terms, and conditions of regional transmission service and wholesale market operations.

In the orders challenged on review, the Commission ruled on tariff revisions that PJM proposed to update the rules governing its wholesale capacity market. In particular, PJM proposed to create a new capacity product, a Capacity Performance Resource, and to establish mechanisms to impose charges for non-performance and provide credits for superior performance.

The issues presented for review are:

(1) Whether the Commission reasonably approved the proposed market design as "just and reasonable," within the meaning of the Federal Power Act:

(a) where the Commission found that PJM had demonstrated, with supporting record evidence, that increasing problems with resource performance warranted changes to the regional capacity market, that the proposed Capacity Performance market design would likely provide benefits to reliability and competition; and that the need for and expected benefits of the Capacity Performance market justified its costs; and

(b) where the Commission determined that it was appropriate to consider PJM's proposed capacity market design under section 205 of the

Federal Power Act, 16 U.S.C. § 824d, while approving related energy market changes under section 206 of the Act, 16 U.S.C. § 824e; and

(2) Whether the Commission appropriately found the components of PJM's Capacity Performance market design to be just and reasonable, specifically:

(a) where the Commission approved a default cap on Capacity Performance offers that represents the competitive capacity market offer of a low-cost resource;

(b) where the Commission approved a formula for calculating non-performance charges that uses an estimate of 30 hours of emergency conditions per year;

(c) where the Commission approved imposing non-performance charges on resources that fail to perform due to unit-specific operating parameters;

(d) where the Commission determined that PJM's decision to define Capacity Performance as a year-round commitment, but to allow certain types of resources to submit aggregated offers to meet that commitment, was not unduly discriminatory: (i) (assuming jurisdiction) toward seasonal resources, or (ii) toward conventional resources; and

(e) where the Commission found that PJM's proposed method of measuring real-time performance of demand resources was adequately supported and consistent with precedent.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are contained in the attached Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and wholesale sale of electric energy in interstate commerce. This grant of jurisdiction is comprehensive and exclusive. *See generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). It includes the power to set rates for electricity capacity, either directly or indirectly through a market mechanism, and to review capacity requirements that affect those rates. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 482-84 (D.C. Cir. 2009).[1]

[1] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties — generally, generators — who can either produce more or consume less when required." *Id.* at 479.

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA § 205(a), (b), (e), 16 U.S.C. § 824d(a), (b), (e).

Section 206 of the Federal Power Act, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates are lawful. If the Commission, on its own initiative or on a third-party complaint, finds that an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and set the just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

Courts have long recognized that the Federal Power Act is intended to ensure not only reasonable rates but also reliable service and development of energy supplies. *See*, *e.g.*, *Consol. Edison Co. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) ("the FPA has multiple purposes in addition to preventing 'excessive rates' including protecting against 'inadequate service' and promoting the 'orderly development of plentiful supplies of electricity'") (internal citations omitted); *accord*, *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 111 (2d Cir. 2015); *see also NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (finding it "clear" that the "principal purpose" of the Natural Gas Act and Federal Power Act "was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices").

B. Developing Supplier Competition And Regional Markets

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long distance transmission has enabled electric utilities to make large transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets). In 1996, the Commission furthered the development of such competition with a landmark rulemaking, affirmed by the Supreme Court, that ordered functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to competing suppliers.[2] *See New York*, 535 U.S. at 11-13; *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536 (2008) ("the

[2] *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996), *clarified*, 76 FERC ¶ 61,009 and 76 FERC ¶ 61,347 (1997), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part, Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York*, 535 U.S. 1.

Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity").

To broaden the geographic reach of wholesale competition and to promote efficiencies, the Commission has also encouraged the creation of "regional transmission organizations," independent regional entities that operate the transmission grid on behalf of transmission-owning member utilities and are entrusted to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 169 & n.1 (2010) (explaining responsibilities of an independent system operator); *see also FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 763 (2016) (same). As these regional entities restructured electricity supply options with greater reliance on auction-based electricity markets and price caps or market power mitigation in those markets, they developed new approaches to address reliability needs. *See generally Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 252 (D.C. Cir. 2001) (California required reliability contracts to ensure that generators were available when needed); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1235 (D.C. Cir. 2005) (New York system operator adopted a capacity market); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 (D.C. Cir. 2008) (New England regional system adopted a capacity market) (reversed in one unrelated respect in *NRG Power Mktg*.).

These regional entities also run wholesale auction markets for electricity sales. *See Morgan Stanley*, 554 U.S. at 537. Such organized regional markets are subject to FERC market rules that help mitigate the exercise of market power, to price caps in some instances, and to oversight of market behavior and conditions by the regional entities' own market monitors. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd*, *Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011). *See generally N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 81 (3d Cir. 2014) ("FERC now seeks to ensure that market-based rates are 'just and reasonable' largely by overseeing the integrity of the interstate energy markets.").

PJM is the independent system operator for a regional transmission system that spans thirteen mid-Atlantic states, plus the District of Columbia, stretching as far south as North Carolina and as far west as Chicago. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at PP 2, 8 (2006). Among PJM's responsibilities is "ensuring that its system has sufficient generating capacity," in order to prevent service

interruptions. *Maryland*, 632 F.3d at 1284. A neutral entity called the Independent Market Monitor oversees compliance with the market rules. *See New Jersey*, 744 F.3d at 91 n.15.

II. BACKGROUND: PJM'S CAPACITY MARKET

Like other regional entities, PJM tried several different mechanisms to ensure reliability on its system. *See generally New Jersey*, 744 F.3d at 83. In 2005, PJM and its market participants developed a forward capacity market to ensure the development of sufficient generation facilities to meet the region's needs; that rate design, approved with modifications by the Commission, was incorporated into PJM's Open Access Transmission Tariff ("Tariff") as a new set of market rules. *See PJM*, 117 FERC ¶ 61,331.

Under that capacity market, as modified by the Commission, PJM conducts an auction every year to procure capacity three years in advance of the year in which the capacity will be provided.[3] *Id.* P 6. "This lag time allows competition from new suppliers that lack the capacity to deliver electricity now but could develop that capacity within three years of winning a bid." *Maryland*, 632 F.3d at 1285. PJM predicts electricity demand for the delivery year and assigns a share of that demand to each load-serving entity participating in the market. *See Hughes*,

[3] The delivery year runs from June 1 through May 31.

136 S. Ct. at 1293. Owners of generation resources that will provide capacity in the delivery year submit offers to sell that capacity to PJM. *See id.* Using an administratively-determined demand curve, PJM accepts bids, beginning with the lowest offers, until it meets the projected demand for capacity; load-serving entities then must purchase their assigned shares of capacity from PJM at the highest price that was accepted (the market clearing price). *See id.*

This Court upheld the Commission's approval of the capacity market design in *Public Service Electric & Gas Co.*, 324 F. App'x 1 (D.C. Cir. 2009). The Court later upheld orders that denied challenges to the results of capacity auctions held during the 2007-2011 transitional period leading up to full implementation of the capacity market in the 2011/2012 delivery year. *See Maryland*, 632 F.3d at 1284-85. The Court noted there was substantial evidence that PJM's capacity market had already spurred development of new capacity resources and improved reliability. *Id.* at 1285. *See also New Jersey*, 744 F.3d at 79-80 (upholding orders concerning certain mitigation rules for PJM's capacity market).

III. THE COMMISSION PROCEEDINGS AND ORDERS

A. PJM's Tariff Filings

On December 12, 2014, PJM submitted two related, but separate, filings. In one filing, under section 205 of the Federal Power Act, 16 U.S.C. § 824d, PJM proposed to revise its Tariff to restructure its capacity market. *See* PJM

Transmittal Letter in FERC Docket No. ER15-623 ("PJM Filing"), R. 2, JA 1. Among the more significant changes was the creation of a new capacity product, called a Capacity Performance Resource, with an obligation to deliver energy and reserves during emergency conditions. In particular, the Capacity Performance Resource would have few excuses for non-performance, with financial penalties for non-performance and rewards for good performance. *See id.* at 21-22, JA 28-29. PJM explained that its proposal was modeled on a similar market construct that the Commission had approved for the New England region. *See id.* at 2, 28, 39-41; JA 9, 35, 46-48. *See generally ISO New Eng. Inc.*, 147 FERC ¶ 61,172 (2014), *reh'g denied*, 153 FERC ¶ 61,223 (2015), *on appeal in New Eng. Power Generators Ass'n v. FERC*, D.C. Cir. Nos. 16-1023, *et al.* (filed Jan. 19, 2016; briefing completed).

As discussed in more detail, as relevant, in the Argument, PJM proposed a non-performance charge for resources that fall short during emergency conditions, to be calculated by dividing the yearly net cost of new entry by an estimate of emergency hours per year. *See* PJM Filing at 39, JA 46. Revenues from such charges would be distributed to all resources that perform above expectations. *See id.* at 40, JA 47. To allow suppliers to recover the costs, investments, and expenses to ensure performance, PJM also proposed modifying the cap on capacity market

offers to provide a default offer cap for Capacity Performance Resources equal to the net cost of new entry. *See id.* at 54, JA 61.

PJM proposed a phase-in over several years, with the goal to shift to a 100-percent Capacity Performance market by the 2020/2021 delivery year. PJM Filing at 27, JA 34. PJM would seek voluntary offers of Capacity Performance Resources for a portion of the regional capacity requirement (60 percent for the 2016/2017 delivery year and 70 percent for 2017/2018), then procure Capacity Performance Resources for 80 percent of the requirement in the auctions for 2018/2019 and 2019/2020. *See id.*

In the second filing, PJM proposed changes to its energy market rules; because the revisions would be primarily to the PJM Operating Agreement, which requires a two-thirds vote by PJM's members to support a section 205 filing, PJM made its filing under section 206 of the Federal Power Act, 16 U.S.C. § 824e. PJM proposed revisions to rules that address operating parameters, force majeure, generator outages, and Maximum Emergency Offers (a category of day-ahead offers designated as available only in certain emergency conditions). *See* PJM Transmittal Letter in FERC Docket No. EL15-29, R. 3, JA 103.

On March 31, 2015, the Commission issued a Deficiency Letter (R. 276) notifying PJM that the Commission would need further information to process the section 205 proposal. PJM supplemented its filing in April 2015. Deficiency

Letter Response, R. 279, JA 932. (PJM also obtained the Commission's approval to delay the 2015 auction for the 2018/2019 delivery year until after the Commission ruled on the tariff filing. *See* Tariff Order P 3, JA 999.)

B. Tariff Order

On June 9, 2015, the Commission issued its Tariff Order, which largely accepted PJM's proposed revisions, subject to conditions. Tariff Order PP 2, 4-15 JA 998-99, 100-05. Among other changes, the Commission approved the establishment of the Capacity Performance Resource. *Id.* PP 41-50, JA 1012-15. The Commission accepted the change to a default offer cap (*id.* PP 11-12, 334-58, JA 1003, 1112-22), the proposed method of calculating the non-performance charge (*id.* PP 158-63, JA 1053-55), the narrow exemptions for non-performance (*id.* PP 167-74, JA 1057-61), the allowance of aggregated offers by some resources (*id.* PP 99-103, JA 1033-35), the method for measuring demand resource performance (*id.* P 180, JA 1064), and the phased-in implementation of the Performance Capacity market (*id.* PP 253-61, JA 1086-89). The Commission also accepted the related changes to PJM's energy market rules. *See generally id.* PP 400-501, JA 1132-62.

C. Rehearing Order

Numerous parties and groups, including all of the petitioners, filed timely requests for rehearing of the Tariff Order. *See* R. 328, JA 1224 (American

Municipal Power, Inc.); R. 331, JA 1267 (Advanced Energy Management Alliance); R. 338, JA 1339 (American Public Power Association and National Rural Electric Cooperative Association); R. 344, JA 1365 (New Jersey Board of Public Utilities and Public Power Association of New Jersey); R. 345, JA 1395 (Natural Resources Defense Council, Sierra Club, and Union of Concerned Scientists). On May 10, 2016, the Commission issued the Rehearing Order, denying rehearing on all but one issue (not relevant to this appeal) and accepting compliance filings that PJM had submitted in July 2015.

These appeals followed.

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to balance the various interests of all parties involved in a regional, auction-based capacity market. In the challenged orders, the Commission considered and approved PJM's proposal to redesign its capacity market to address increasing reliability problems by establishing penalties for resource non-performance and rewards for good performance.

In these consolidated appeals, most petitioners argue that the Commission approved the Capacity Performance market design without properly weighing the costs and benefits. But the Commission gave detailed consideration to the compelling need for reform, the many short- and long-term benefits (some more

readily quantifiable than others) to market participants and customers, and the potential costs. Based on PJM's showing and other evidence in the record, the Commission fully explained its policy judgment that the market redesign was just and reasonable, as contemplated by the Federal Power Act.

In addition, the Commission properly considered PJM's Capacity Performance proposal under the burden of proof set forth in section 205 of the Federal Power Act, 16 U.S.C. § 824d. The Commission reasonably concluded that PJM's separate filing to make related modifications to its energy market rules, which for technical reasons was subject to the burden in Federal Power Act section 206, 16 U.S.C. § 824e, should not vitiate PJM's reserved right to file changes to its capacity market rules.

The various challenges to particular elements of the Capacity Performance proposal are likewise without merit. In approving the default cap on Capacity Performance Resource offers, the Commission reasonably judged, based on economic principles, that the default cap would represent a low-end competitive offer from a low-cost resource, taking into account costs and risks. The Commission properly approved PJM's estimate of 30 emergency hours per year to calculate non-performance charges, based not only on historical data but also forward-looking changes in the PJM region. That the Commission directed PJM to report annually on its effectiveness and to reassess the estimate after gaining more

experience with the new market design demonstrates the Commission's commitment to reasonable oversight. The Commission also fully explained its policy judgment that non-performance charges are appropriate where a Capacity Performance Resource fails to perform due to its own specified operating parameter limitations.

The remaining challenges to the Commission orders also fail. Petitioners who contend that the Capacity Performance rules discriminate against seasonal resources failed to raise that argument on rehearing before the agency and thus are jurisdictionally barred from doing so on judicial review. Even assuming jurisdiction, the Commission properly approved PJM's requirement that Capacity Performance Resources be able to perform in emergency conditions throughout the year, and found that allowing certain types of resources to submit aggregated offers was a reasonable accommodation for the inherent limitations of those resources. The Commission agreed with PJM, however, that aggregation should not be extended to conventional resources, because such resources generally can improve performance with appropriate investment, and because widespread aggregation could fundamentally change bidding in PJM's capacity market. Finally, the Commission reasonably approved PJM's approach to measuring the performance of demand resources, using a well-established method that is consistent with Commission precedent.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g.*, *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). The "scope of review under [that] standard is narrow." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (citation omitted). The relevant inquiry is whether the agency has "articulate[d] 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) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decisionmaking where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Maryland*, 632 F.3d at 1286 ("[B]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at

the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citation omitted). *See also Morgan Stanley*, 554 U.S. at 532 ("The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."); *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 951 (D.C. Cir. 2007) ("In reviewing FERC's orders, we are 'particularly deferential to the Commission's expertise' with respect to ratemaking issues.") (citation omitted).

The Commission's policy assessments also are afforded "great deference." *Transmission Access*, 225 F.3d at 702. *See also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014) ("the Commission must have considerable latitude in developing a methodology responsive to its regulatory challenge") (internal quotation marks and citations omitted); *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014) (court "properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions") (internal quotation marks and citation omitted).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b). The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522

F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord South Carolina*, 762 F.3d at 54. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

II. THE COMMISSION REASONABLY FOUND PJM'S PROPOSAL TO ESTABLISH THE CAPACITY PERFORMANCE MARKET TO BE JUST AND REASONABLE

A. The Commission Appropriately Balanced The Likely Benefits And Potential Costs Of The Capacity Performance Market Design

Seven petitioners ("Cost-Benefit Petitioners") — all except the New Jersey Board of Public Utilities and the Advanced Energy Management Alliance — challenge the Commission's approval of PJM's Capacity Performance market design because, they contend, the Commission did not adequately consider the relative costs and benefits of the proposed market design. The orders on review, however, show the Commission's thorough analysis of the demonstrated need for market reform, the likelihood of substantial benefits to system reliability, and the expected costs. The Commission carefully considered the appropriate balance of all competing interests, and its reasoned judgment should be affirmed. *See, e.g.*, *Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (electricity market

"presents 'intensely practical difficulties' demanding a solution from FERC . . . and the Commission must be given the latitude to balance the competing considerations and decide on the best resolution") (citation omitted); *Maryland*, 632 F.3d at 1286 ("issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission").

1. The Commission Reasonably Found That PJM Had Demonstrated The Need For Changes To The Capacity Market To Ensure Resource Performance

Having proposed the changes to its tariff under section 205 of the Federal Power Act, 16 U.S.C. § 824d, PJM was not required to show that its existing capacity market was no longer just and reasonable. *See*, *e.g.*, *Duke Energy Trading & Mktg., L.L.C. v. FERC*, 315 F.3d 377, 382 (D.C. Cir. 2003) (discussing similar provision of Natural Gas Act). Nevertheless, PJM extensively explained the need to redesign the capacity market to address both immediate and long-term concerns about the reliability of regional resources.

In particular, PJM presented "compelling evidence" that resource performance had "deteriorated significantly" since the capacity market was implemented. Rehearing Order P 11, JA 1459. Though the capacity market had succeeded in procuring advance commitments from capacity resources, it had not

ensured that the resources would actually perform when called upon in the delivery year. Tariff Order P 44, JA 1013.

The Polar Vortex, which caused temperatures throughout the PJM region to drop well below normal winter levels in January 2014, "illustrated the severity" of that deterioration. Rehearing Order P 11, JA 1459. *See generally* PJM, *Analysis of Operational Events and Market Impacts During the January 2014 Cold Weather Events* at 4 (May 8, 2014), available at http://www.pjm.com/~/media/library/reports-notices/weather-related/20140509-analysis-of-operational-events-and-market-impacts-during-the-jan-2014-cold-weather-events.ashx ("The January 6-8 Polar Vortex brought prolonged, deep cold to the entire PJM footprint and surrounding regions. PJM set a new wintertime peak demand record [on January 7] . . . while dealing with higher than normal generation outages."); *see also id.* at 9-10 (discussing weather and load forecasts). The Commission found the Polar Vortex significant not only for the extent of the emergency — when the forced outage rate spiked to 22 percent — but also for "the scope and breadth" of the reasons that various resources failed to perform. Tariff Order P 42, JA 1012 (citing PJM's report that the largest single cause, fuel interruptions to natural gas-fired generators, accounted for about one-fourth of the megawatts on forced outage); *see also* PJM Filing at 17-18, JA 24-25.

But PJM's rationale for revising its market design did not rest on the single event of the Polar Vortex; that experience highlighted broader, ominous trends. Forced outage rates had increased steadily since the first capacity auctions. *See* Rehearing Order P 24, JA 1463-64. Though Cost-Benefit Petitioners suggest that improved capacity performance in the following winter of 2014/2015 proves that the market redesign was unnecessary (*see* Joint Br. 32), the Commission noted that outage rates remained above historic levels during that winter and that the long-term reliability concerns, which Cost-Benefit Petitioners ignore, remained. *See* Tariff Order P 44, JA 1013; Rehearing Order P 24 & n.25, JA 1464; *see also* Comments and Partial Protest of Exelon Corporation ("Exelon Comments") at 16 n.35, R. 183, JA 414 (detailing differences in temperatures and peak loads to refute claims that improved performance in January 2015 indicated that that the system would perform well "if faced with the same conditions experienced during the Polar Vortex") (citing Prepared Direct Testimony of Michael M. Schnitzer ("Schnitzer Aff.") at 43-46, attached to Exelon Comments, JA 523-26).

The Commission identified three primary reasons for resources' failure to perform under the existing capacity market construct: "(i) a lack of an adequate penalty structure; (ii) a limited ability to recover costs of necessary investments, and (iii) an incentive to trim capital improvement plans and operating budgets." Rehearing Order P 23, JA 1463; *accord*, Tariff Order P 44, JA 1013. *See also id.*

P 45, JA 1014 (describing failure of existing non-performance penalties and concluding PJM had shown "there is little incentive" for sellers to make capital improvements or to increase operating maintenance); *id.* P 46, JA 1014 (explaining that existing rules limit sellers' ability to recover costs necessary for improving performance, such as costs of fuel arrangements; PJM predicted the deficiencies would increase as more natural gas-fired resources were added in the region); *id.* P 47, JA 1014-15 (agreeing with PJM that capacity market rules encouraged sellers to delay capital improvements and trim operating budgets); *id.* P 48, JA 1015 (existing market design not only failed to incent performance, but could result in selection of less reliable resources because sellers that chose not to invest in improving performance would offer capacity at lower prices).

Thus, the Commission found that the existing capacity market rules, including the penalties for non-performance, were inadequate to ensure resource performance during the most critical periods of a given delivery year. *See* Rehearing Order P 12, JA 1459. Moreover, "ongoing changes in the resource mix in the PJM region" — that is, the addition of new, largely gas-fired, generation and the expected retirement of aging units — warranted changes in the market to improve performance. Rehearing Order P 25, JA 1464; *see also id.* P 26, JA 1465 (finding changes justified "based on existing and projected market dynamics, including resource retirements and an increased reliance on natural gas as a fuel

source"); Tariff Order P 7, JA 1001 (noting that the changes in the resource mix "are projected to accelerate"); PJM Filing at 12, JA 19 ("since 2008, and projecting forward to 2019, over 26,000 megawatts of coal and oil-fired generation in the PJM Region have retired or are expected to retire"); *id.* at 12-14, JA 19-21 (analyzing region's "rapid shift" to natural gas-fired generation); Exelon Comments at 18-20, JA 25-27 (same).

Indeed, the Commission found that failing to reform the capacity market now could cost customers more in the long run: "Given the forward nature of PJM's capacity market, failure to act today to address recent generator performance issues and anticipated resource fleet changes could cause reliability issues years from now, at realized cost levels potentially significantly higher to customers," not only in "extreme price spikes" in the energy markets but also in potential loss of load or other reliability events. Tariff Order P 7, JA 1001. *Cf. South Carolina*, 762 F.3d at 96 ("[I]t is within the scope of the agency's expertise to make . . . a prediction about the market it regulates, and a reasonable prediction deserves our deference notwithstanding that there might also be another reasonable view.") (internal quotation marks and citations omitted).

In addition, the Commission noted that PJM's market proposal was "part of a broader effort" by regional operators, market participants, and the Commission to adapt wholesale electric markets across the nation to ongoing changes in

generation and challenges to reliability. *See* Rehearing Order P 25, JA 1464-65 (describing Commission initiatives, industry efforts, and regional market developments).

For all these reasons, the Commission agreed with PJM that implementing reforms to improve reliability and to incent resource performance was "both appropriate and necessary." Tariff Order P 7, JA 1001.

2. The Commission Reasonably Determined That The Proposed Market Design Would Likely Provide Significant Benefits

Having affirmed the need for reform, the Commission considered the benefits that PJM's proposal would likely provide. Though Cost-Benefit Petitioners dismiss the value of any such benefits — *see* Joint Br. 57 ("questionable"), 67 ("speculative") — the Commission identified a number of expected benefits that it found significant. *Cf. Elec. Consumers*, 407 F.3d at 1239 (deferring to Commission's "predictive judgments and policy choices" in approving an experimental rate design).

First, improved reliability is a critical benefit. This and other Courts have affirmed, again and again, that system reliability is a significant benefit to customers. *See Elec. Consumers*, 407 F.3d at 1240 (affirming Commission's policy judgment in balancing short-term cost increases with the long-term reliability benefits of reducing price volatility and encouraging entry of new

capacity resources); *see also Cent. Hudson*, 783 F.3d at 110-11 (affirming both the Commission's focus on reliability and its predictive judgments about long-term benefits in adopting new capacity zone); *Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 775 (7th Cir. 2013) (recognizing that system reliability is a benefit to market participants and consumers); *Blumenthal*, 552 F.3d at 879 (describing system reliability as "a primary goal").

But the Commission did not simply cite reliability and end its analysis there. The Commission went on to describe substantial additional benefits, both near- and long-term, to the region's electricity customers. It found that the Capacity Performance market would provide greater certainty for customers that they will actually receive the service for which they have paid. *See* Rehearing Order P 18, JA 1461; *see also id.* PP 32-33, JA 1469. By factoring expected performance into capacity market bids, the new construct would use market forces to incent reliable resources to remain in the market and push less reliable resources to retire, while encouraging entry of reliable new capacity. *See id.* P 33, JA 1469. And because the capacity commitment would include performance, PJM should need to procure less capacity (that is, procure less "extra" capacity to cover for non-performing resources). *See id.* Other benefits include reductions in generation costs, reductions in out-of-market payments in energy markets, more efficient energy market dispatch, reduced volatility in energy and natural gas markets, and better

price signals for natural gas infrastructure investment. *Id.* P 34, JA 1470. Moreover, absent reforms, continuing (and growing) reliability problems could cost consumers more later. *See supra* p. 25. The Commission concluded that, "while these costs may be difficult to quantify in advance, they are very real . . . ." *Id.* P 33, JA 1469.

Nevertheless, evidence in the record offered some bases for quantifying benefits. In particular, Exelon submitted expert testimony analyzing the problems in PJM's existing capacity market and estimating the impacts of adopting PJM's proposal. *See* Exelon Comments and Schnitzer Aff., JA 395. Exelon estimated that the value of avoiding load curtailment and scarcity pricing would range from $3.8 billion to over $7 billion. *See* Exelon Comments at 40, JA 438; Schnitzer Aff. at 8-9, JA 488-89; Rehearing Order P 34, JA 1470. *See generally* Schnitzer Aff. at 32-33, 36-37, JA 512-13, 516-17 (discussing and quantifying benefits). Cost-Benefit Petitioners dispute the relevance of Exelon's analysis, noting that Exelon supported a different calculation of the non-performance charge than PJM proposed, and cautioned that its estimates depended on using that calculation. Joint Br. 61-63. *See infra* Part III.B (discussing penalty calculation). But Exelon's expert testified that, if PJM's proposed calculation were not changed, "the net benefits shown by my analysis will be much lower" (Schnitzer Aff. at 100,

JA 580) — meaning not only that the market redesign would still provide significant benefits, but that benefits would still exceed costs.

3. The Commission Appropriately Considered The Likely Costs Of The Capacity Performance Market

Cost-Benefit Petitioners contend that the Commission made no effort to balance the costs and benefits of PJM's proposed market redesign. Joint Br. 57, 67. To the contrary, the Commission addressed concerns about costs and explained its determination that, balancing all factors, the proposal was just and reasonable. *See* Tariff Order P 49, JA 1015; Rehearing Order P 31, JA 1469.

Neither the Federal Power Act nor any FERC precedent requires "the mathematical specificity of a cost-benefit analysis" for a market rule change. Tariff Order P 49, JA 1015; *see also* Rehearing Order P 30, JA 1468 ("a quantitative cost-benefit analysis" is not required). Rather, the Commission must "consider all relevant factors and make a 'common-sense assessment' that the costs that will be incurred are consistent with the ratepayers' overall needs and interests . . . ." Rehearing Order P 30, JA 1467-68 (quoting *Process Gas Consumers Grp. v. FERC*, 866 F.2d 470, 476-77 (D.C. Cir. 1989)). In making that assessment, the Commission has "broad authority to consider non-cost factors as well as cost factors." Rehearing Order P 30, JA 1467; *see also id.* n.39, JA 1467-68 (citing court and agency cases).

In the orders on review, the Commission laid out all the factors it considered and made just such an assessment. In particular, the Commission took seriously the concern that the market redesign would likely increase customers' capacity costs, compared to the existing capacity market. *See* Rehearing Order P 30, JA 1467 ("costs are an important consideration in our decision-making"). That distinguishes this case from *Michigan v. EPA*, 135 S. Ct. 2699 (2015), where the agency had deemed costs irrelevant to the decision before it. *See id.* at 2709-10. It also distinguishes this case from *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1 (D.C. Cir. 2015). In that case, the Commission had approved a temporary out-of-market program, based on bids from oil-fueled generation resources, to ensure winter reliability. *See id.* at 4-5. The Court held that the Commission, by declining to consider the costs underlying the suppliers' bids, had failed to support its determination that the resulting rates were just and reasonable. *See id.* at 11-12. In that case, however, the Court found that the record was "devoid of any evidence" of the costs and the Commission had failed to explain how it considered non-cost factors, or how it had weighed various cost and non-cost factors. *Id.* Here, by contrast, the Commission took into account record evidence of both costs and benefits, and discussed the various factors at considerable length.

Moreover, in *TransCanada*, the Commission also had not determined that the bidding process was competitive, such that market forces could be expected to

produce just and reasonable rates. *See* 811 F.3d at 13 (noting, in rejecting an intervenor's argument, that the Commission did not "purport to explain the economic forces" that would restrain supply offers, and "made no effort to define the relevant market or determine the participants' market power"). Here, by contrast, PJM's Capacity Performance Market is premised upon competitive auctions (and market rules) that use market forces to determine pricing. *See* Rehearing Order P 30 n.40, JA 1468.[4]

Cost-Benefit Petitioners argue that the Commission failed to analyze whether the costs of PJM's proposal were "at least roughly commensurate" with the benefits, consistent with *Illinois Commerce Commission v. FERC*, 756 F.3d 556, 559 (7th Cir. 2014). *See* Joint Br. 66. But even if that standard, derived from cost causation principles in the separate context of cost allocation, applied in the context of approving a proposed market design, the Commission's analysis would satisfy it. The Commission found that the Capacity Performance market could

[4] In dissent, the FERC Chairman disputed that PJM's revised rules will prevent the exercise of market power. *See* Rehearing Order, Dissent at 4 n.11, JA 1597 (distinguishing *TransCanada*). As discussed in Part III.A, *infra*, the Commission found that the proposed market rules would produce competitive offers. In any event, a dispute as to whether the particular components of the market rules are properly calibrated to ensure a competitive market (subject to further monitoring and adjustment, as appropriate) does not undermine the Commission's fundamental determination that an auction construct using market forces to drive resource selection and to set prices was just and reasonable.

improve the alignment between the costs and benefits of the capacity market, agreeing with PJM's concern that a "resource adequacy construct that fails to provide adequate incentives for resource performance" — as the existing capacity market did — "can threaten the reliable operation of PJM's system and force consumers to pay for capacity without receiving commensurate reliability benefits." Tariff Order P 5, JA 1000.

The Commission went on to explain why the costs of the Capacity Performance market, even if higher than costs in the existing capacity market, would be reasonable. *Cf. Maryland*, 632 F.3d at 1285 (upholding results of transitional capacity auctions in PJM, notwithstanding price increases, because substantial evidence supported Commission's judgment that the capacity market "was an appropriate tool for increasing reliability"); *Cent. Hudson*, 783 F.3d at 111 (upholding the Commission's judgment "that higher prices were necessary to ensure reliability by generating accurate price signals in the long run"). Whereas the existing market placed much of the risk and cost of underperformance on load, PJM's proposal would "reallocate a significant portion of this performance risk to capacity resource owners and operators." Rehearing Order P 27, JA 1466. Thus, the Commission determined that PJM's proposal was "based on sound economic principles," because linking capacity revenues and actual performance was consistent with the market's purpose of ensuring reliability. *Id.* P 28, JA 1466.

The market design also is fair: "Resources should be compensated in proportion to their performance," and if a resource fails to perform when it is most needed, during an emergency, "it is just and reasonable for that resource to receive reduced, or even no, net capacity compensation based on that resource's specific performance results." *Id.* P 29, JA 1466-67.

As the Commission's analysis of the relative benefits and costs of PJM's Capacity Performance proposal "involves both technical understanding and policy judgment," it is not enough that Petitioners disagree with the Commission's conclusion. *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("It is not our job to render that [policy] judgment, on which reasonable minds can differ."). The Commission addressed the issues "seriously and carefully, providing reasons in support of its position and responding" to numerous parties' arguments. *Id.* at 784. That satisfies the standard of reasoned decisionmaking. *See id.*

B. The Commission Properly Approved The Capacity Performance Market Proposal Under Section 205 Of The Federal Power Act

The American Public Power Association and the National Rural Electric Cooperative Association ("Public Power Petitioners")[5] argue that the Commission

[5] The Joint Brief states that these two parties and the Public Power Association of New Jersey present this argument. Br. 52. On rehearingbefore the agency, however, only the first two raised this argument in a (joint) rehearing request. The Public Power Association of New Jersey filed a request for rehearing,

contravened the Federal Power Act by basing its findings, under section 206, that certain energy market rules in the Operating Agreement were unjust and unreasonable on changes to the Tariff that the Commission approved under section 205. *See* Joint Br. 52-57. They do not challenge the energy market changes that the Commission approved under FPA section 206. Rather, their procedural argument targets the capacity market revisions that PJM proposed, and the Commission approved, under FPA section 205; they argue that the Commission was required to consider the capacity performance revisions to the Tariff under the FPA section 206 standard as well.

The Commission, however, appropriately rejected that argument. The Tariff permits PJM to make unilateral filings under FPA section 205 to revise capacity market provisions because they relate to reliability of the regional system. Rehearing Order P 15, JA 1460.

Moreover, PJM emphasized that, while it intended the filings to "provide complementary solutions to the same underlying problem," the capacity performance filing could stand alone: "[T]his section 205 filing is not dependent upon Commission acceptance of the section 206 filing. . . . The Commission could find the changes in this section 205 filing to be just and reasonable without first (or

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with the New Jersey Board of Public Utilities and other parties (as "Joint Consumer Representatives," R. 344, JA 1365), that did not raise this issue.

concurrently) accepting the changes in the section 206 filing." PJM Filing at 5, JA 12. *Cf.* PJM Transmittal Letter in Docket No. EL15-29 at 3-4, R. 3, JA 106-07 (explaining that the revisions in the Tariff filing "encompass all changes needed to reform PJM's capacity market, and are just and reasonable standing alone").

In light of the "unusual situation" created by the different filing rights under the Tariff and the Operating Agreement (Rehearing Order P 16, JA 1460), the Commission determined that the need for a handful of related changes to energy market rules should not be the tail that wags the (capacity market) dog: "[W]e cannot conclude that a proper interpretation of the FPA would deny PJM the right it has reserved unilaterally to file changes to its [Tariff] under section 205 merely because some related provisions of the Operating Agreement may be implicated by the filing." *Id.* That was the Commission's judgment to make. *See*, *e.g.*, *Transmission Access*, 225 F.3d at 687 (Commission's interpretation of the Federal Power Act it administers is entitled to *Chevron* deference). Nor do Public Power Petitioners offer any authority that would require the Commission to interpret the Federal Power Act to abrogate PJM's filing rights. *See* Rehearing Order P 16, JA 1460 (noting that parties "cite no case or tariff authority in support of [their] attempt to narrow PJM's reserved section 205 filing rights"); *cf. Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) (holding that the Commission cannot deny PJM utilities' statutory filing rights under FPA section 205).

Furthermore, though the Commission was not required to assess PJM's market redesign under FPA section 206, the Commission did make findings that refute Public Power Petitioners' claims. First, they do not appear to argue that the Commission could not reasonably have found the existing market design to be unjust and unreasonable. PJM explained at length, with evidentiary support and the Commission's agreement, that the existing capacity market had not adequately ensured resource performance and that persistent reliability issues and ongoing changes in the region's resource mix threatened more problems and greater costs in the future. *See supra* Part II.A.1.

Public Power Petitioners' challenge, then, centers on the second step of the Commission's analysis under section 206: the just and reasonable replacement. But the Commission could approve PJM's proposal as the just and reasonable replacement, for all the same reasons that it cited in approving the proposal under section 205. *See supra* Part II.A. Indeed, even as Public Power Petitioners cite the Commission's treatment of a similar capacity performance market design for the New England region under section 206 (*see* Joint Br. 55), they overlook the fact that the Commission then approved the system operator's proposal as just and reasonable, without assessing alternative designs. *See ISO New Eng. Inc.*, 147

FERC ¶ 61,172 at PP 1, 23-25 (2014), *reh'g denied*, 153 FERC ¶ 61,223 at pp 1, 4 (2015).[6]

Moreover, the Commission did consider alternatives to PJM's market design, and rejected claims that such alternatives "could better achieve PJM's performance objectives at a lower cost." Joint Br. 56. The Commission was "unpersuaded that any of the reforms identified by [other parties] are substitutes for this proposal or render it unjust and unreasonable." Tariff Order P 50, JA1015.

III. THE COMMISSION REASONABLY APPROVED THE SPECIFIC ELEMENTS OF PJM'S CAPACITY PERFORMANCE MARKET DESIGN

Various petitioners challenge the Commission's approval of five elements of the Capacity Performance market design: (1) the establishment of a default offer cap, below which individual resource offers will not be reviewed; (2) the

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[6] The Commission considered the New England proposal under section 206 for procedural reasons that do not apply here. Under the regional participants' agreement, where the system operator and the participants committee do not agree on a proposed tariff revision, the tariff provides for both to file their own proposals under a so-called "jump ball" procedure. The Commission can approve either proposal under section 205. In the New England capacity performance proceeding, the Commission determined that it could not approve either proposal standing alone (FPA section 206, step one), and instead adopted both — the system operator's longer-term capacity market redesign and the power pool's near-term incentives for energy markets — with certain modifications (FPA section 206, step two). *See* 147 FERC ¶ 61,172 at P 1 & n.2.

One issue in those orders is on review before this Court in a pending case, *New England Power Generators Ass'n v. FERC*, Case Nos. 16-1023, *et al.*, but no party challenged the Commission's approval of the capacity performance market.

calculation of the non-performance charge; (3) the imposition of charges when failure to perform is due to unit-specific operating parameters; (4) the requirement of year-round performance, with a limited accommodation allowing certain types of resources to submit aggregated offers to meet the year-round obligation; and (5) the method for measuring real-time performance of demand resources. As to each, the Commission adequately considered the objections and determined, based on its policy judgment and substantial record evidence, that the proposed elements were just and reasonable.

A. The Commission Properly Approved PJM's Default Offer Cap To Mitigate Market Power

The American Public Power Association, the National Rural Electric Cooperative Association, American Municipal Power, the Public Power Association of New Jersey, and the New Jersey Board of Public Utilities (collectively, the "Offer Cap Petitioners") argue that the default offer cap eliminates mitigation and scrutiny, and enables the exercise of market power, up to the level of the cap. *See* Joint Br. 84-88. Their claims, however, are based on a flawed interpretation of the relevant economic principles and certain aspects of the market design. In accepting the default offer cap as an effective market power mitigation mechanism, the Commission reasonably relied on sound economic theory and thoroughly explained its decision. *See* Tariff Order PP 334-58, JA 1112-22; Rehearing Order PP 182-96, JA 1528-34; *see generally South*

Carolina, 762 F.3d at 68 (deferring to Commission's predictive judgment "grounded in basic economic principles"); *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 256-61 (D.C. Cir. 2007) (affirming Commission's approval of Midwest regional system operator's energy market offer cap, which included an adder to provide an efficient incentive to invest).

1. The Commission Reasonably Found That The Default Offer Cap Represents A Low-Cost Competitive Offer

At the heart of this issue is the question whether, under PJM's market design, the default offer cap adequately represents the competitive capacity market offer of a low-cost resource. If it does, then the default offer cap successfully mitigates potential exercises of market power from those resources. Offer Cap Petitioners wrongly assume that it does not. As explained below, the Commission relied on sound economic principles, supported by both PJM and the Independent Market Monitor, in concluding that the default offer cap does represent a competitive offer.

The purpose of market power mitigation is "to ensure that capacity prices do not reflect the improper exercise of market power." Rehearing Order P 183, JA 1528-29. Several design features in PJM's capacity market work in concert to "guard against the exercise of market power and ensure competitive behavior and outcomes." PJM Deficiency Response at 3, JA 935. The combination of those market power mitigation features has resulted in PJM's capacity market producing

competitive results, despite the fact that the market is structurally non-competitive.[7] *See id.* The default offer cap, which is just one of the mitigation features in PJM's market design, serves that purpose by estimating the auction clearing price below which a low-cost resource would not be willing to take on a capacity obligation. Tariff Order P 336, JA 1113; *see also id.* P 335 n.281, JA 1112-13 (explaining competitive offer equation in algebraic terms). Such a resource would not be expected to take on a capacity obligation below that clearing price because the resource could earn more than that amount by forgoing a capacity obligation and instead participating only in the energy market. *See id.* PP 336-39, JA 1113-14; Rehearing Order PP 183-88, JA 1528-31. In the context of PJM's market design, this forgone cost of taking on a capacity obligation is the resource's "opportunity cost." *See* Tariff Order PP 337-38, JA 1113-14; *see also id.* P 338 n.283, JA 1114 (explaining this opportunity cost in algebraic terms).

As the Commission explained, the default offer cap is based on a competitive offer equation that "properly accounts for all unit-specific costs and risks and all relevant system parameters that a rational seller would consider in

[7] Under PJM's tariff, the capacity market is deemed "structurally non-competitive" if, based on the amount of supply and demand in the auction, removing the three largest suppliers from the auction would cause supply to not meet demand. *See* PJM Filing, Attachment A at 132, JA 1713 (describing the Market Structure Test).

determining a competitive offer" as a capacity resource. Rehearing Order P 184, JA 1529. The Commission emphasized that the default offer cap represents a *low-end* competitive offer for a low-cost resource, because PJM determined the cap by setting all parameters of the competitive offer equation "to their lowest possible value of zero." *Id.* Thus, the default offer cap represents the auction clearing price below which an economically rational low-cost resource would not be willing to take on a capacity obligation because it could earn more money by not taking on that obligation and instead participating only in the energy market. *See id.* PP 183-88, JA 1528-31; Tariff Order PP 336-39, JA 1113-14.

This is because, under PJM's proposed market design, bonus payments are made to *all* over-performing resources — including resources that do not have capacity obligations and participate *only* in the energy market. *See* Tariff Order P 336, JA 1113. Due to that aspect of the market design, which is necessary to provide resources the incentive to perform when needed, it is possible for a resource to earn more net revenues *without* a capacity obligation than *with* one. *See id.* As a result, an economically rational resource owner ordinarily would not want to take on a capacity obligation unless the capacity market clearing price covers the opportunity cost of forgoing that obligation and instead participating as an energy-only resource. *See id.*; *cf. Cent. Hudson*, 783 F.3d at 114 (deferring to Commission's economic predictions and judgments in a "highly technical area").

The default offer cap, and the competitive offer equation on which it is based, relies on that fundamental economic logic. *See, e.g.*, Tariff Order PP 336-38, JA 1113-14. Because the default offer cap includes the resource's opportunity cost, a resource owner will only offer below that cap — thereby increasing the chance that it clears in the capacity auction — if it has a specific reason to forgo the additional revenue it could expect to earn by not taking on the capacity obligation. *See id.*; *see also* Rehearing Order P 184, JA 1529. In other words, the opportunity cost of taking on a capacity obligation under PJM's capacity market design gives low cost resources a valid, cost-based reason to offer at the default offer cap. Thus, every offer from a low cost resource up to the default offer cap necessarily is competitive. *See* Tariff Order PP 336-38, JA 1113-14.

Because the competitive offer equation is based on sound economic theory, the Commission reasonably concluded that the default offer cap accurately represents a low-end competitive offer from a low-cost resource. That conclusion is entirely consistent with the Commission's precedent on offer caps, *see* Rehearing Order P 187, JA 1530 (citing *ISO New Eng., Inc.*, 153 FERC ¶ 61,223 at P 102 (2015), and *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 at P 151 (2007)), and the Commission provided a detailed explanation of its reasoning in this case. Its expertise and reasoned decision-making should be afforded deference

on this issue. *See Morgan Stanley*, 554 U.S. at 532; *see also Wis. Pub. Power*, 493 F.3d at 256-61 (affirming Commission's approval of energy market offer cap).

2. The Petitioners' Objections To The Default Offer Cap Are Without Merit

Offer Cap Petitioners claim that the default offer cap creates an "incentive for market sellers to submit offers up to that amount . . . ." Joint Br. 88. The Commission disagreed, explaining that "sellers may incorporate differing assumptions or other, non-market considerations in formulating their offers." Rehearing Order P 184, JA 1529; *see also* PJM Deficiency Response at 11-12, JA 948-49. *See, e.g.*, *Elec. Consumers*, 407 F.3d at 1239 (deferring to Commission's "predictive judgments and policy choices" in approving an experimental rate design).

Offer Cap Petitioners also assert that the impact of the default offer cap will be intensified by an imbalance in the bonus payments and non-performance charges under PJM's capacity market design. *See* Joint Br. 89-91 (describing the combined effect as "two carrots and a partial stick"). None of the Offer Cap Petitioners raised this argument on rehearing; therefore, it is jurisdictionally barred by section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b). *See* Public Power Rehearing Request at 21-24, JA 1360-63; American Municipal Power Rehearing Request at 19-21, JA 1243-45; New Jersey Rehearing Request at 14-20, JA 1379-85.

Nevertheless, the Commission explained that, given how bonus payments and non-performance charges are calculated and how the energy markets operate, it expected that those two rates generally would not diverge significantly. *See* Tariff Order P 343, JA 1115-16. The Commission further found that the benefit of the "simplifying assumption" that the rates are the same (which simplifies the capacity offer review process and adequately protects against exercises of market power) "outweighs any minor distortions . . . ." *Id.* That policy judgment deserves judicial respect. *See New Eng. Power Generators*, 757 F.3d at 293 ("FERC evaluated the relative importance of several parameters . . . . Such a juggling act would not benefit from our rearranging"); *Blumenthal*, 552 F.3d at 885 (electricity market "presents 'intensely practical difficulties' demanding a solution from FERC . . . and the Commission must be given the latitude to balance the competing considerations and decide on the best resolution").

Offer Cap Petitioners also argue that the Commission ignored the fact that PJM's capacity market is structurally non-competitive. *See* Joint Br. 88-89. But the Commission explained that "[i]t is "precisely because the PJM capacity market is structurally non-competitive that mitigation is necessary . . . ." Tariff Order P 12, JA 1003. The Commission concluded that PJM's proposal, which was modeled on the capacity performance construct that the Commission had approved for the New England region, was "an appropriate mitigation construct." *Id.*

Furthermore, to the extent Public Power is asserting that the market's structural non-competitiveness somehow bears on the default offer cap's efficacy as a mitigation measure, such an assertion would put the cart before the horse. Structural non-competitiveness is a condition that warrants mitigation measures, but those measures do not cure that structural condition. If the mitigation measures are effective, the result is a competitive market *outcome*, not a competitive market *structure*.

Offer Cap Petitioners also object to the change from the unit-specific offer cap under PJM's previous capacity market design to the default offer cap under the Capacity Performance market design. *See* Joint Br. 85-87. The Commission, however, explained that unit-specific review of offers from low-cost resources would "yield an offer cap equal to the default offer cap" anyway. Rehearing Order P 186, JA 1530. The Commission therefore concluded that it would be "redundant and unnecessary for PJM and the Market Monitor to conduct a unit-specific review of sell offers at or below the default offer cap." *Id.*

Offer Cap Petitioners' only attempt to challenge the economic theory behind the default offer cap is their contention that, because capacity resources are obligated to submit an offer in the capacity market (referred to as a "must-offer obligation"), they do not have the option of forgoing a capacity obligation and participating as energy-only resources. Joint Br. 91. Thus, Offer Cap Petitioners

argue, the default offer cap should not include the opportunity cost of forgoing a capacity obligation. *Id.* This argument misunderstands the nature of the obligation to bid into the capacity market: it is a must-*offer* obligation, not a must-*clear* obligation. In other words, while a resource may be obligated to offer into the capacity market, it is free to base its offer on all costs, risks, and relevant system parameters that a rational seller would consider, including opportunity costs. *See* Rehearing Order P 184, JA 1529; *see also* PJM Deficiency Response at 14, JA 951 (stating that any offer cap that does not allow for the inclusion of opportunity costs would frustrate the goal of creating incentives to increase performance). If that offer is at or below the default offer cap, it can properly be deemed competitive; if it is above the offer cap, it will be scrutinized by the Market Monitor and PJM to ensure that it is based on legitimate costs and reasonable estimates of unit-specific performance and system parameters. Tariff Order P 340, JA 1115. In either instance, if the resource's offer does not clear in the capacity auction, the resource is then free to participate as an energy-only resource.

In sum, Offer Cap Petitioners fail to demonstrate that the competitive offer equation, the default offer cap, or the economic principles underlying them are flawed. Because the Commission's reliance on those principles is sound and well-reasoned, the Court should defer to the Commission's reasoned decision-making on this issue. *See Morgan Stanley*, 554 U.S. at 532 (affording "great deference" to

Commission's rate decisions); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) (Commission may rely on economic theory).

B. The Commission Reasonably Approved The 30-Hour Estimate For Use In Calculating The Non-Performance Charge

Under the revised market design, a Capacity Performance resource that fails to perform in an emergency condition will incur a non-performance charge. *See* Tariff Order PP 108-10, JA 1036-37. This penalty rate is calculated by dividing the net cost of a new resource entering the market (i.e., the numerator) by the estimated number of hours of emergency conditions the PJM system is likely to experience in a year (i.e., the denominator). *See, e.g.*, *id.* P 112, JA 1037. Petitioners Public Power Association of New Jersey and New Jersey Board of Public Utilities ("New Jersey Petitioners") challenge only the denominator in this formula, arguing that 30 hours is an unreasonably high estimate of emergency hours and generates an ineffective penalty. *See* Joint Br. 92-97. The Commission's acceptance of that estimate, and the resulting penalty rate, was based on substantial evidence and struck an appropriate balance of competing interests. *See* Tariff Order PP 13, 158-64, JA 1003, 1051-56; Rehearing Order PP 65-73, JA 1480-85. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 784.

First, ample record evidence supported an estimate of 30 hours. The Commission cited uncontroverted evidence showing that the PJM system experienced: (1) exactly 30 hours of system-wide emergency conditions in the

2013/2014 delivery year; (2) an average of fewer than 30 hours of system-wide emergency conditions in each delivery year from 2009/2010 to 2012/2013; and (3) more than 30 hours — in fact, up to 62 hours — of emergency conditions in several of PJM's pricing zones in the 2010/2011 and 2013/2014 delivery years. *See* Rehearing Order P 70, JA 1483; *see also id.* nn.73-76, JA 1483 (citing submissions by PJM and the Independent Market Monitor). Based on that evidence, the Commission determined that, "while 30 hours may be greater than the recent average number of hours per year, it is not an unjust and unreasonable choice as it is within the range of hours seen in recent years in which some or all of the PJM region experienced worse-than-normal weather conditions." *Id.*

In addition to the historical data, the Commission also considered forward-looking evidence of how the PJM system is changing. *Id.* P 71, JA 1483-84. As discussed *supra* in Part II.A.1, the PJM region "is currently undergoing a retirement and investment cycle and seeing an increased reliance on natural gas-fired generation," trends that "may, at least in the near term, lead to a greater number of emergency conditions than the 2009-2014 data would suggest." Rehearing Order P 71, JA 1483-84; *see also id.* P 65, JA 1481 ("Developing any penalty rate requires the use of estimates and projections."). In fact, those changes, which are already well underway, contributed to the very increase in resource non-performance that prompted PJM to propose these market design changes. *See*

Tariff Order PP 7-8, 41-43, JA 1001, 1012-13; Rehearing Order PP 24-26, JA 1463-65.

The Commission also considered whether PJM's 30-hour estimate is appropriate in light of the end result produced by the penalty formula and concluded that it is. *See* Rehearing Order PP 65, 70, 72-73, JA 1480, 1483-85. The Commission explained that "a reasonable non-performance charge seeks a middle ground between a penalty rate that is too high and introduces excessive risk, and one that is too low and fails to spur performance improvement." *Id.* P 73, JA 1485. With that balance in mind, the Commission determined that PJM's proposed rate fell within that middle ground. *See id.*; *see also id.* P 65, JA 1480-81 (noting that various parties objected that the non-performance charge was too high and others that it was too low). *See*, *e.g.*, *Morgan Stanley*, 554 U.S. at 532 (Commission's statutory responsibilities include "an appropriate 'balancing of the investor and the consumer interests'") (citation omitted); *Blumenthal*, 552 F.3d at 885 (Commission deserves latitude to balance competing considerations).

The Commission acknowledged that finding the appropriate number of emergency hours, which is inherently difficult to estimate given the dynamic nature of PJM's generation fleet and the unpredictability of the weather (Rehearing Order P 71, JA 1484), is particularly important because it is used in determining both the non-performance charge and the default offer cap. *See* Tariff Order

P 163, JA 1055. Therefore, the Commission conditioned its acceptance on PJM's submission of annual filings that analyze the incentive effect of the 30-hour estimate relative to both higher and lower alternative estimates. *See id.* The Commission also encouraged PJM to reassess the estimate after it gained more experience with the new Capacity Performance market design, and to file a revision if warranted. *See id.* PP 13, 163, JA 1004, 1056. *Cf., e.g.*, *Ill. Commerce Comm'n*, 721 F.3d at 774 (noting Commission's ongoing oversight, through reporting directive and potential tariff revisions); *Blumenthal*, 552 F.3d at 882 (discussing Commission's ongoing oversight of market).

New Jersey Petitioners point to this directive as "reflect[ing] a lack of confidence" in the 30-hour estimate. Joint Br. 96. To the contrary, it reflects the Commission's appreciation for both the importance and the inherent uncertainty of this element of the market design, as well as its expectation that, while 30 hours was reasonable based on the record evidence, the appropriate estimate might change as the PJM system evolves in response both to national trends and the incentives produced by this capacity market redesign. *See, e.g.*, Rehearing Order P 71, JA 1483-84. *Cf. Elec. Consumers*, 407 F.3d at 1239 (court's deference to the Commission on complex market rate design "is based on the understanding that the Commission will monitor its experiment and review it accordingly").

New Jersey Petitioners' objection that the Commission failed to consider various alternatives to PJM's proposal, *see* Joint Br. 93-95, is without merit. The Commission's assessment whether a proposal under section 205 of the Federal Power Act, 16 U.S.C. § 824d, is just and reasonable does not require finding that the proposal "is more or less reasonable than alternative rate designs." *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984). New Jersey Petitioners' claim that PJM revised its proposal to use a three-year rolling average of actual emergency hours instead of the 30-hour estimate (*see* Joint Br. 94-95) rests on a mischaracterization of a PJM filing. In answering comments and protests to its market design proposal, PJM defended its proposed 30-hour estimate, while acknowledging that a three-year average "could also be reasonable." PJM Answer (Feb. 2015) at 64, R. 240, JA 753. In any event, the Commission noted that, in contrast to the estimate that it approved, a measure derived only from backward-looking data would not account for the ongoing changes in the regional resource mix and the variability and unpredictability of weather conditions. *See* Rehearing Order P 71 & n.77, JA 1484; *id.* n.77 ("Just as the calculation of capacity is based on [the net cost of new entry], rather than past capacity payments, the estimate of performance hours should not necessarily be determined exclusively by historic averages as the rehearing requesters posit."); *cf. id.* PP 67-68, JA 1481-82 (explaining use of net cost of new entry, rather than past capacity payments, as the

numerator). *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (deference appropriate where rate issue "involves both technical understanding and policy judgment").

C. The Commission's Treatment Of Unit-Specific Operating Parameters Was Reasonable

American Municipal also challenges the imposition of Capacity Performance penalties on resources that fail to perform due to unit-specific constraints. *See* Joint Br. 108-10. PJM proposed two narrow exemptions that would spare a capacity resource from incurring non-performance penalties if it did not operate in an emergency hour: first, if the resource was unavailable due to a PJM-approved planned or maintenance outage; and second, if PJM did not schedule the resource to operate. The latter exemption, however, is subject to two exceptions, either of which removes the exemption and triggers the non-performance penalty: (1) if PJM did not schedule the resource due to the seller's own operating parameter limitations specified for that unit; or (2) PJM did not schedule the resource because the seller offered its energy at a market-based price that was higher than its cost-based price. *See* Tariff Order P 167, JA 1057-58.

Put simply, Capacity Performance Resources are not penalized for an approved outage or for PJM's operational decisions based on its independent assessment of system needs. *See id.* They are, however, penalized if they fail to meet their performance commitments due to their own operating parameter

limitations or their own offer strategies. *See id.* PP 167-68, JA 1057-59. *See generally id.* PP 167-73, JA 1057-61.

On appeal, American Municipal argues that the capacity market rule is inconsistent with energy market rules. Joint Br. 108-10. Specifically, it contends that imposing non-performance charges if a resource is not scheduled due to its operating parameter limitations is inconsistent with energy market rules that provide "make-whole" payments if PJM requires a resource to operate outside those limitations. Joint Br. 108-09. American Municipal further objects that penalizing a resource for failing to perform despite constraints is unreasonable. *See* Joint Br. 109-10. Both arguments are meritless.

The capacity market and energy market rules are entirely consistent because they serve different purposes. *See* Rehearing Order PP 105-06, JA 1498. The out-of-market (make-whole) payments under energy market rules ensure that resources are appropriately compensated for service that they actually provide. *Id.* P 250, JA 1553. But a Capacity Performance Resource undertakes to offer its capacity with the commitment to perform when needed, and sets its market offer to cover its costs of ensuring its ability to perform. *See id.* PP 106, 110, JA 1498, 1500. If it fails to perform, the market rules rightly hold it accountable (with penalty charges), and compensate other resources that do provide the needed service (with bonus payments).

In the Commission's reasoned policy judgment, attaching financial and market consequences to parameter limits that otherwise could justify chronic under-performance is essential to the performance incentives at the core of PJM's market design. *Id.* P 103, JA 1497. "It is critical that the capacity market rules send the proper long-term investment signals to ensure capacity that can meet the reliability needs of the region." *Id.*; *see also id.* PP 104-12, JA 1497-1501. *See Blumenthal*, 552 F.3d at 883 (emphasizing "critical [price-] signaling function" of capacity rates); *cf. New Eng. Power Generators*, 757 F.3d at 297 ("this type of decision is precisely the sort of policy matter FERC is charged with considering").

D. The Commission Reasonably Approved PJM's Proposal To Allow Certain Types Of Resources To Submit Aggregated Offers In The Capacity Performance Market

In proposing a new Capacity Performance Resource product premised upon year-round commitments to perform in emergency conditions, PJM recognized that some resources might not be capable of sustained, predictable operation in all seasons, but sought to encourage their continued participation in the capacity market. *See* PJM Filing at 33, JA 40. Accordingly, PJM proposed that owners of certain defined types of resources be permitted to submit aggregated offers — i.e., to combine the unforced capacity value of more than one resource into a single Capacity Performance Resource offer. *See id.*; Tariff Order P 53, JA 1016. PJM

also offered to allow aggregation of resources in different Locational Delivery Areas. PJM Answer (Feb. 2015) at 25-26, JA 714-15.

The Commission approved PJM's proposal to permit aggregated offers, agreeing that such aggregation would benefit reliability and competition. *See* Tariff Order P 101, JA 1033-34 ("allow[ing] resources that would generally not be able to offer as Capacity Performance Resources to aggregate their capabilities in order to reliably perform . . . will likely enhance their ability to provide reliability benefits to the PJM region and may increase competition in the capacity market"); Rehearing Order P 51, JA 1475-76 (same). The Commission rejected aggregation across Locational Delivery Areas, however, finding that PJM had failed to support the proposal. *See* Tariff Order P 103, JA 1034-35.

Two of the consolidated appeals challenge the Commission's rulings on aggregation. The Environmental Petitioners argue that PJM's proposed market design, defining Capacity Performance as a year-round product, discriminates against seasonal resources and that aggregation does not fully ameliorate that discrimination. *See* Br. 67-76. American Municipal contends that aggregation is discriminatory because PJM accommodated environmentally-limited resources but did not extend the aggregation option to conventional resources. *See* Br. 98-103.

Both challenges (to the extent they are properly before the court) are without merit. The Commission reasonably explained why PJM's definition of its

proposed market was reasonable, why accommodating certain types of resources by permitting aggregated offers would benefit consumers, and why extending aggregation further would not be appropriate.

1. The Treatment Of Seasonal Resources Under PJM's Capacity Performance Market Design, Which Petitioners Did Not Challenge On Rehearing, Is Just And Reasonable

a. The Arguments Raised By The Environmental Petitioners And The Petitioner-Intervenors Are Jurisdictionally Barred

In the Tariff Order, the Commission accepted PJM's definition of a Capacity Performance Resource as a year-round commitment and found that the option to submit aggregated offers was a reasonable accommodation of resources that cannot commit the same level of performance throughout the year. *See* Tariff Order P 99, JA 1033. The contrary arguments presented on appeal — in Part I.C of the Argument in the Joint Opening Brief of Petitioners (at pp. 67-76) and as the sole focus of the Brief of Intervenors in Support of Petitioners — are not within the Court's jurisdiction because the Environmental Petitioners failed to raise those arguments on rehearing before the Commission.

The Environmental Petitioners claim (Joint Br. 72) to have argued on rehearing that the Capacity Performance market design was unduly discriminatory. But the arguments they now present on appeal — about the rationality of a twelve-month performance requirement, the benefits provided by seasonal resources, and

the burdens of aggregation — are strikingly absent from that rehearing request. *See* R. 345 at 10-11, JA 1405-06. That filing presented no argument about discrimination against seasonal resources, and did not specify that issue as an error on rehearing. *See id.* at 2-3, JA 1397-98 (Specification of Error); *id.* at 4, JA 1399 (Specification of Issues); *see also* 16 U.S.C. § 825*l*(a) ("The application for rehearing shall set forth specifically the ground[s]"); 18 C.F.R. § 385.713(c)(2) (2016) (request must identify issues); *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012) (holding that judicial review is limited to grounds "'set forth specifically'" in rehearing request) (quoting 16 U.S.C. § 825*l*(a)).

The Environmental Petitioners' rehearing request made — at best — only a passing reference, in a footnote toward the end of their Rehearing Request (at 11 n.24, JA 1406), to points raised in their earlier protest (R. 181, JA 350). This Court has appropriately declined to consider "arguments 'tucked away in a footnote' in a request for rehearing." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2015) (citation omitted); *see also Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164, 1170 (D.C. Cir. 2007) ("It would be a stretch — and, as we shall see, too great a one — to say that petitioners made this argument below" where the rehearing request "merely noted the alleged error in a single opaque sentence").

Furthermore, the Court has long held that it is not enough that a party raised an issue in a protest or other filing before the agency. *See, e.g.*, *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773 (D.C. Cir. 1985) (rehearing requirement "must be complied with even if the point sought to be appealed was raised, considered and rejected in the original proceeding"). Nor does a mere reference to an earlier filing meet the requirement to raise the issue on rehearing. *See, e.g.*, *Indiana*, 668 F.3d at 739 (petitioner "mentioned the issue in its request for rehearing, but it did so by referring only in a general way to an argument it had made in other filings; that is not sufficient") (internal quotation marks and citation omitted). Therefore, the Environmental Petitioners are statutorily barred from now pursuing arguments that they raised, if at all, only in their initial protest.

Likewise, because the Brief of Intervenors in Support of Petitioners focuses entirely on the unpreserved arguments, the Court should disregard that Brief. "[A]bsent extraordinary circumstances, intervenors may join issue only on a matter that has been brought before the court by a petitioner." *E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1305 (D.C. Cir. 2007) (internal quotation marks and citation omitted); *accord Cal. Dep't of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002). No such circumstances are present in this case. Even the Petitioner-Intervenors themselves did not raise arguments about discrimination

against seasonal resources before the agency on rehearing — indeed, they did not seek rehearing on *any* issue.

b. Assuming Jurisdiction, The Commission Reasonably Found That PJM's Market Design Was Not Unduly Discriminatory

Assuming jurisdiction, Environmental Petitioners' arguments fail on the merits. First, Environmental Petitioners argue that the annual performance requirement is unreasonable and unduly discriminatory. *See* Joint Br. 68-72. The Commission found PJM's design reasonable "because it creates the same expectations for all Capacity Performance Resources (i.e., the expectation that such resources will be available to provide energy and reserves when called upon), without regard to technology type." Tariff Order P 99, JA 1033.

Nevertheless, Environmental Petitioners insist that such expectations are discriminatory because certain resources, such as wind and solar generation, perform well seasonally but cannot perform at the same level year-round. *See* Joint Br. 68. They argue that such seasonal resources should be permitted to offer their capacity in partial-year commitments. *See id.* 74. But the Commission appropriately rejected such "special treatment for certain resources." Rehearing Order P 59, JA 1478. (Though the Environmental Petitioners failed to raise their arguments on rehearing, other parties raised a similar argument in challenging the elimination of seasonal demand response resources from the capacity market. *See*

id. P 55, JA 1477-78. Those parties did not seek judicial review and are not supporting the petitioners in these consolidated appeals.) The Commission "[could not] find unreasonable PJM's conclusion that non-year-round resources do not provide equivalent service as year-round resources." *Id.* P 59, JA 1478.

Environmental Petitioners dismiss that finding as "illogical and conclusory" (Joint Br. 72), but the Commission explained that allowing non-year-round resources to participate in the capacity performance market could result in a loss of reliability in those resources' lower-performing seasons, because PJM would have fewer resources available to respond to emergency conditions. *See* Rehearing Order P 59, JA 1478. That judgment is entitled to deference. *See, e.g.*, *Elec. Consumers*, 407 F.3d at 1239 (deferring to Commission's "predictive judgments and policy choices" in approving an experimental rate design); *see also Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010) ("The court will not find a Commission determination to be unduly discriminatory if the entity claiming discrimination is not similarly situated to others.") (citing *Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007)).

Conversely, Environmental Petitioners' narrow focus on the January 2014 Polar Vortex, when wind resources overperformed in emergency conditions (*see* Joint Br. 70-71), ignores the broader concerns about resource performance that underpinned PJM's proposal and the Commission's consideration. *See supra* Part

II.A.1 (discussing performance problems and regional trends). As noted above, Environmental Petitioners suggest that PJM should procure capacity in partial-year increments (Joint Br. 74), but PJM has required annual capacity commitments from the inception of its capacity auction (*see, e.g.*, *PJM*, 117 FERC ¶ 61,331 at P 28) and chose to continue that construct in the market design that it proposed for the reliability of its regional system.

Moreover, the Commission found that PJM had provided "reasonable accommodation" to allow non-year-round resources to participate in the capacity market. Rehearing Order P 59, JA 1478. Recognizing that some types of resources may not be capable of sustained, predictable operation and may not be able to perform in both summer and winter emergency conditions, PJM proposed to facilitate such resources' participation in the capacity market by permitting them to combine their capabilities and submit aggregated offers. *See* PJM Filing at 33, JA 40. The Commission agreed, concluding that allowing aggregated offers "is a reasonable accommodation to permit greater participation in the capacity market by those resource types that would generally lack incentives to offer as Capacity Performance Resources on a stand-alone basis, and will provide benefits to consumers through greater competition in the capacity market." Rehearing Order P 51, JA 1476. Aggregation also would make such resources more able "to provide reliability benefits to the PJM region . . . ." Tariff Order P 101, JA 1034.

In addition to submitting aggregated offers in the Capacity Performance market, such resources could continue to participate as capacity resources (under the previous market design) in the transitional period. *See* Rehearing Order P 59, JA 1478. And, of course, such resources are not precluded from participating in the Capacity Performance market. They may submit stand-alone offers of the amounts of capacity for which they can guarantee performance year-round, and — whether or not they participate in the Capacity Performance market — they can earn bonus performance payments by participating in the energy markets in emergency conditions. *See* Tariff Order PP 100, 115, JA 1033, 1038-39; PJM Answer (Feb. 2015) at 24, JA 713.

2. The Commission Reasonably Declined To Expand The Availability Of Aggregated Offers

Separately, American Municipal objects that the aggregation rule is unduly discriminatory because it is available only to some types of resources. *See* Joint Br. 98-104. As discussed *supra* in Part C.1.b, the Commission found merit in allowing aggregation for certain resource types as an accommodation for their inherent performance limitations. *See* Tariff Order P 101, JA 1033-34. American Municipal argues that the Commission's reasons for permitting those resources to submit aggregated offers apply equally to conventional resources. Joint Br. 99-100.

The Commission, however, declined to modify PJM's proposal, explaining that the limited availably of aggregation was based on a reasonable distinction: "resources that PJM permits to aggregate are unlike other resource types — such as natural gas-, coal-, and nuclear-powered combustion or steam turbines — because no reasonable amount of investment can mitigate the non-performance risk they face." Rehearing Order P 51, JA 1476; *accord*, Tariff Order P 102, JA 1034; *cf. Transmission Agency*, 628 F.3d at 549 (agency determination is not unduly discriminatory if entities are not similarly situated). Put simply, wind resources cannot acquire more wind in lower-performing seasons. By contrast, conventional generators can improve performance with spending on fuel supply arrangements, equipment upgrades, and improved operations. *See* PJM Answer (Feb. 2015) at 26-27, JA 715-16. American Municipal posits that, hypothetically, a conventional resource might be unable to mitigate its non-performance (Joint Br. 101), but it was not unreasonable for PJM, and the Commission, to define the rule by resource types based on general characteristics. *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (deferring to the Commission's policy judgment).

The Commission further found that the limitation to a handful of resource types was reasonable. Expanding aggregation to all resources could transform the capacity market bidding process "to a portfolio bidding approach" (Tariff Order P 102, JA 1034) — a change the Commission found unnecessary and one that

would upend "the individual-unit bidding approach that is central to PJM's capacity auction process." Rehearing Order P 51, JA 1476. *Cf.* PJM Answer (Feb. 2015) at 26-27, JA 715-16 (explaining that PJM had not previously used portfolio bidding in its capacity market or any other market).

American Municipal also argues that the Commission unreasonably rejected aggregation across Locational Delivery Areas, which are the 23 pricing zones in PJM's capacity market. *See* Br. 104-07. Though PJM's initial proposal did not allow interzonal aggregation, PJM later agreed to change its proposal. *See* PJM Answer (Feb. 2015) at 25-26, JA 714-15. But the Commission rejected the revised proposal, finding that PJM had failed to show that it was appropriate. Tariff Order P 103, JA 1034-35. The Commission found that PJM had not accounted for the effects of transmission constraints or explained how it would calculate auction prices, non-performance penalties, or bonus payments for aggregated offers across zones. *Id.* The Commission further noted that cross-zonal aggregation appeared inconsistent with the Capacity Performance market design, as several key components are zone-specific. *Id.* With all of those questions, the Commission determined that the proposal "was not fully developed" and "not sufficiently substantiated" to meet PJM's burden. Rehearing Order P 52, JA 1476. That judgment was the Commission's to make.

E. The Commission's Acceptance of PJM's Rules For Measuring The Performance Of Demand Resources Is Well-Supported And Consistent With Precedent

Advanced Energy Management Alliance raises a narrow challenge to the Commission's approval of PJM's demand resource rules.[8] Joint Br. 76-83. Advanced Energy, however, misinterprets both Commission and Court precedent and fundamentally mischaracterizes how demand resources are compensated in the organized wholesale markets.

1. The Scope Of Advanced Energy's Appeal Is Limited

As an initial matter, it is instructive to identify exactly what aspects of the demand resource rules Advanced Energy is, and is not, challenging — and what relief it seeks. Advanced Energy does not challenge the annual nature of the capacity product, the rules governing how much capacity a demand resource is allowed to offer into the capacity auction, or the premise that a demand resource's capacity revenues should fluctuate based on the resource's real-time performance. *See generally* Joint Br. 76-83. Advanced Energy challenges *only* the rules governing the measurement of demand resources' real-time performance. *Id.*

Simply stated, the real-time performance of a demand resource at any given time equals its customers' expected consumption minus their actual consumption.

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[8] Demand response is a program by which electricity consumers are paid for commitments to curtail their use of power, which serves to lower wholesale rates and prevent shortages. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 769-70.

See, e.g., PJM Filing, Attachment A at 187-88, JA 1714-15. Because the actual consumption is observable, the crux of the calculation is determining the customers' expected consumption — i.e., how much they are expected to consume if PJM does not instruct them to reduce their consumption consistent with their contractual commitment as a demand resource. How the expected consumption is calculated is the only aspect of PJM's capacity market design that Advanced Energy challenges on appeal. *See* Joint Br. 76-83. PJM proposed to use two well-established formulas for calculating expected consumption — one formula that is suited to estimating expected consumption during summer peaks, and one formula that is better-suited to estimating expected consumption in non-summer months. *See* PJM Filing at 36, JA 43.

The summer formula is based on a demand resource customer's contribution to the system's annual peak load in the previous year. *See, e.g.*, *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,108 at n.2 (2011) (*PJM Interconnection*) (explaining that the summer measurement formula is based on customers' consumption during the five hours of the previous year when system-wide demand was at its peak); *see also* PJM Filing at 36, JA 43. This brief refers to that approach as the "annual-peak method" (designated in the Commission's orders and the Joint Brief as Peak Load Contribution). In comparison, the non-summer formula is based on a demand resource customer's contribution to the system's

peak load during the most recent forty-five days. *See, e.g.*, *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,216 at P 47 (2011) (explaining that the non-summer measurement formula is based on customers' consumption during the four days in which the system-wide load was at its highest in the most recent forty-five day period); *PJM Interconnection,* 137 FERC ¶ 61,108 at n.24 (same); *see also* PJM Filing at 36, JA 43. This Brief refers to that approach as the "recent-peak method" (designated in the Commission's orders and the Joint Brief as Customer Baseline Load).[9]

Advanced Energy supports the annual-peak method, *see* Petitioners' Initial Brief at 78, but takes issue with the recent-peak method, *see id.* at 81. Although Advanced Energy now seeks vacatur of the Commission's orders, Joint Br. 110-12, the relief that Advanced Energy sought on rehearing was merely a different measurement approach than the Commission accepted. *See* Advanced Energy Rehearing Request at 30, JA 1297. Advanced Energy does not question the

[9] While the recent-peak method is called Customer Baseline Load in PJM's tariff, the use of the word "baseline" could be misleading here because that term often connotes a minimum quantity. The "baseline" that is calculated under this formula in no way refers to a minimum quantity, as it represents the customers' contribution to recent system *peaks*. *See, e.g.*, 137 FERC ¶ 61,216 at P 47. In short, both the annual-peak method and the recent-peak method estimate demand resource customers' expected peak consumption, but they do so using data from different time periods. *Compare* 137 FERC ¶ 61,108 at n.2 *with id.* at n.24.

conclusion that the recent-peak method accurately estimates customers' expected consumption in non-summer months, and, therefore, that PJM's proposal would accurately measure demand resources' real-time performance in those months. *See generally* Joint Br. 76-83. Rather, Advanced Energy asserts that the Commission's acceptance of the recent-peak method in this context is inconsistent with Commission and Court precedent. *Id.* Those arguments are without merit.

2. The Commission's Acceptance Of The Demand Resource Measurement Rules Is Well-Reasoned, Balanced, And Consistent With Precedent

As the Commission repeatedly explained in the orders on review, PJM's capacity market changes are intended to strengthen the relationship between a resource's capacity revenues and its real-time performance, in order "to provide greater certainty that consumers will receive the service for which they paid through PJM's capacity market." Rehearing Order P 18, JA 1461; *see also id.* at PP 31, 110, 133, JA 1469, 1500, 1509. The ability to effectively and accurately measure each capacity resource's real-time performance is essential to such a market design. *See, e.g.*, PJM Filing at 24, JA 31 (citing *PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,150 (2014)). This is no less true for demand resources than it is for generation resources. *Id.* The Commission scrutinized PJM's proposal, carefully considered the comments filed in response, and concluded that PJM's proposal for measuring the real-time performance of demand resources is

reasonable given the purpose of the changes to PJM's capacity product. *See* Rehearing Order PP 120-26, JA 1504-07; Tariff Order P 180, JA 1064. In reaching that conclusion, the Commission considered that there are other — stricter *and* looser — ways to measure demand resources' real-time performance. *Compare* Rehearing Order P 121, JA 1505 (noting stricter approach), *with id.* P 124, JA 1506 (noting that PJM's proposal is stronger than its previous approach). However, the Commission ultimately determined that PJM's proposal struck a reasonable balance by providing the necessary performance incentive while also allowing flexibility. *Id.* P 121, JA 1505. The Commission's technical expertise and reasoned decision-making on this issue deserves deference. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (finding reasoned decision-making where Commission "weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice").

Advanced Energy argues that the Commission's approval of PJM's measurement approach is inconsistent with the policy that "interruptible customers should be compensated in proportion to PJM's cost savings." Joint Br. 77. It further contends that the agency's 2011 *PJM Interconnection* decision applied that policy to demand resource compensation. Joint Br. 78, 82-83. Advanced Energy is wrong on both counts.

First, the policy to which it refers applied only to the allocation of capacity costs in the context of a cost-of-service ratemaking regime. Likewise, the three cases on which Advanced Energy relies address that specific — and inapposite — context. *See, e.g.*, *La. Pub. Serv. Comm'n v. FERC*, 184 F.3d 892 (D.C. Cir. 1999); *Town of Norwood v. FERC*, 962 F.2d 20 (D.C. Cir. 1992); *Delmarva Power & Light Co.*, 24 FERC ¶ 61,199 (1983). Second, Advanced Energy misreads *PJM Interconnection*. *See infra* Part III.E.3. The Commission follows a different policy for pricing capacity in the organized wholesale markets. In those markets, resources generally are compensated based on their contributions to balancing supply and demand. *See Hughes*, 136 S. Ct. at 1294 ("FERC extensively regulates the structure of the PJM capacity auction to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price.") (citing *Elec. Power Supply Ass'n*, 136 S. Ct. at 769).

This is no less true for demand resources, which are treated as supply-side resources. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 772 ("the value of an accepted demand response bid to the wholesale market is identical to that of an accepted supply bid because each succeeds in cost-effectively 'balanc[ing] supply and demand'") (citation omitted); *see also Wholesale Competition in Regions with Organized Electric Markets*, 129 FERC ¶ 61,252 at P 11 (2009) (explaining that the Commission's regulations on the aggregation of retail customers for demand

response purposes apply equally to all demand response offers, including those for capacity products). The Commission's orders on review are entirely consistent with that principle. While PJM's capacity market changes in this case alter the product to be supplied in the capacity market, changing the product in this way does not change the principle that the resources supplying the product are compensated based on their contributions to balancing supply and demand.

3. Advanced Energy Misreads The Commission's 2011 *PJM Interconnection* Decision

Advanced Energy contends that the Commission rejected PJM's use of the recent-peak method for measuring capacity performance in *PJM Interconnection*; therefore, Advanced Energy argues, it is inconsistent for the Commission now to accept the recent-peak method in this case. *See* Joint Br. 78-79. But Advanced Energy's misinterprets *PJM Interconnection*, which in fact approved that method, and disregards the Commission's acceptance, again, of that method in an order issued *after* that case. *See* Rehearing Order P 122, JA 1505 (citing both FERC Docket No. ER11-3322-000, in which 137 FERC ¶ 61,108 issued, and a subsequent order in a different proceeding, *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,216 (2011)). Thus, as all of the cited orders involving the recent-peak method show, that method is an established tool for measuring demand resources' real-time performance, and the Commission has consistently approved its use in the context of PJM's capacity and energy markets.

PJM Interconnection addressed a filing that PJM made, under section 205 of the Federal Power Act, to clarify the performance measurement rules for demand resources that offered and cleared in PJM's capacity market. 137 FERC ¶ 61,108 at P 1. Under the capacity market rules in place at the time, a demand resource could offer into the market an amount of capacity that was determined using the annual-peak method and then measure its real-time performance using one of multiple approaches, including the annual-peak method and the recent-peak method at issue here. *See id.* at PP 6-11, n.2, n.24. In its section 205 filing in *PJM Interconnection*, PJM proposed to continue allowing the use of both the annual-peak method and the recent-peak method for measuring demand resources' real-time performance for capacity purposes. *Id.* at P 11.

A nuanced explanation of *PJM Interconnection* may be helpful in understanding this point, because the terminology in that case differs somewhat from the terminology used in this case. In *PJM Interconnection*, PJM proposed to measure demand resources' load reductions relative to "a baseline that is the lesser of [the load calculated using the peak load approach], or comparison load." *Id.* at P 64. As the Commission explained elsewhere in that order, under PJM's tariff, "A variety of options are available to estimate comparison loads, such as . . . customer baseline (CBL) [i.e., the recent-peak approach]." *Id.* at P 10. Using the "customer baseline" to estimate the "comparison load" component of PJM's

proposal in *PJM Interconnection* is another way of describing the recent-peak method that the Commission accepted in this case. Indeed, the formula underlying both descriptions is identical. *Compare id.* at n.24 (describing the formula for the recent-peak method) *with PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,004, at PP 1, 37 (2016) (accepting same formula for the recent-peak method under Capacity Performance market design, in a separate docket because PJM inadvertently neglected to include the tariff record in its original Capacity Performance filing). The Commission in *PJM Interconnection* accepted that proposal. 137 FERC ¶ 61,108 at P 64. Thus, contrary to Advanced Energy's claim, the Commission in *PJM Interconnection* did not reject, but in fact accepted, PJM's use of the recent-peak method for purposes of measuring demand resources' compliance with their capacity commitments.

Advanced Energy also mistakes *PJM Interconnection* and an earlier order in the same proceeding as condemning use of the recent-peak method to measure real-time performance for capacity market purposes. *See* Joint Br. 80 (quoting *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,212 at P 13 (2011), and citing *PJM Interconnection*, 137 FERC ¶ 61,108 at P 61). In those cases, PJM sought to address efforts by demand resources to be paid twice for the same customer load reduction, by using the recent-peak method to measure their real-time performance even when that method produced a figure that exceeded their offers that had

cleared in the capacity market using the annual-peak method. *See* 135 FERC ¶ 61,212 at PP 9-17; *see also* 137 FERC ¶ 61,108 at PP 11-14. PJM explained that such an interpretation would be detrimental to reliability and would force consumers to pay for capacity that is not actually delivered (135 FERC ¶ 61,212 at PP 14-16), so PJM proposed to continue allowing use of both methods but capping the calculation at the annual-peak method figure. *See id.* at P 72. That cap, however, in no way undermines the recent-peak method's effectiveness in measuring real-time performance, and the Commission accepted the continued use of the recent-peak method in that proceeding. *See* 137 FERC ¶ 61,108 at P 64.

Furthermore, *PJM Interconnection* directly supports the Commission's acceptance of separate summer and non-summer measurement approaches in this proceeding. As the Commission explained in that case, "While there may be other methods of designing a capacity market and measuring Capacity [Demand Response] performance, PJM's proposal before us here fits within the market design it uses for its capacity market." 137 FERC ¶ 61,108 at P 75. Of particular relevance to this proceeding, the Commission in that order also noted that PJM had recently added an annual demand resource product to its capacity market. *Id.* at P 85. The Commission explained that the annual product is "not entirely based on the peak load projections that PJM currently uses in its capacity auctions." *Id.* Accordingly, the Commission urged PJM "to give consideration to how to

appropriately measure performance of capacity for resources that are procured specifically to perform outside of PJM's June through September summer period." *Id.*

As the above language indicates, PJM and the Commission have both been contemplating ways to measure the performance of annual demand resources since at least 2011. In designing its capacity performance product in the case at hand, PJM concluded that using different formulas in summer and non-summer months is an appropriate way to accomplish that. The Commission acknowledged that there may be other valid ways — including stricter ways — to make these measurements, but ultimately concluded that PJM's approach struck a reasonable balance by providing both accuracy and flexibility. The Commission's balanced and well-supported determination on this issue warrants deference from the Court. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 784.

CONCLUSION

For the reasons stated, the petitions should be denied, and the challenged FERC orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(B), (f), and (g), I certify that the Brief of Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2010, in 14-point Times New Roman) and contains 17,036 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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January 10, 2017

ADDENDUM

STATUTES
AND
REGULATION

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§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (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.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f) Review of automatic adjustment clauses and public utility practices; action by Commission; "automatic adjustment clause" defined

(1) Not later than 2 years after November 9, 1978, and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause,

if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term ''automatic adjustment clause'' means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

(June 10, 1920, ch. 285, pt. II, § 205, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 851; amended Pub. L. 95–617, title II, §§ 207(a), 208, Nov. 9, 1978, 92 Stat. 3142.)

AMENDMENTS

1978—Subsec. (d). Pub. L. 95–617, § 207(a), substituted ''sixty'' for ''thirty'' in two places.

Subsec. (f). Pub. L. 95–617, § 208, added subsec. (f).

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

Section 207(b) of Pub. L. 95–617 directed chairman of Federal Energy Regulatory Commission, in consultation with Secretary, to conduct a study of legal requirements and administrative procedures involved in consideration and resolution of proposed wholesale electric rate increases under Federal Power Act, section 791a et seq. of this title, for purposes of providing for expeditious handling of hearings consistent with due process, preventing imposition of successive rate increases before they have been determined by Commission to be just and reasonable and otherwise lawful, and improving procedures designed to prohibit anticompetitive or unreasonable differences in wholesale and retail rates, or both, and that chairman report to Congress within nine months from Nov. 9, 1978, on results of study, on administrative actions taken as a result of this study, and on any recommendations for changes in existing law that will aid purposes of this section.

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission 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. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Refund considerations; shifting costs; reduction in revenues; "electric utility companies" and "registered holding company" defined

Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a reg-

istered holding company, refunds which might otherwise be payable under subsection (b) shall not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: *Provided*, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms ''electric utility companies'' and ''registered holding company'' shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.[1]

(d) Investigation of costs

The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e) Short-term sales

(1) In this subsection:

(A) The term ''short-term sale'' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term ''applicable Commission rule'' means a Commission rule applicable to sales at wholesale by public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 824(f) of this title voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

(June 10, 1920, ch. 285, pt. II, § 206, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 852; amended Pub. L. 100–473, § 2, Oct. 6, 1988, 102 Stat. 2299; Pub. L. 109–58, title XII, §§ 1285, 1286, 1295(b), Aug. 8, 2005, 119 Stat. 980, 981, 985.)

REFERENCES IN TEXT

The Public Utility Holding Company Act of 1935, referred to in subsec. (c), is title I of act Aug. 26, 1935, ch. 687, 49 Stat. 803, as amended, which was classified generally to chapter 2C (§ 79 et seq.) of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58, § 1295(b)(1), substituted ''hearing held'' for ''hearing had'' in first sentence.

Subsec. (b). Pub. L. 109–58, § 1295(b)(2), struck out ''the public utility to make'' before ''refunds of any amounts paid'' in seventh sentence.

Pub. L. 109–58, § 1285, in second sentence, substituted ''the date of the filing of such complaint nor later than 5 months after the filing of such complaint'' for ''the date 60 days after the filing of such complaint nor later than 5 months after the expiration of such 60-day period'', in third sentence, substituted ''the date of the publication'' for ''the date 60 days after the publication'' and ''5 months after the publication date'' for ''5 months after the expiration of such 60-day period'', and in fifth sentence, substituted ''If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision'' for ''If no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision''.

Subsec. (e). Pub. L. 109–58, § 1286, added subsec. (e).

1988—Subsec. (a). Pub. L. 100–473, § 2(1), inserted provisions for a statement of reasons for listed changes, hearings, and specification of issues.

Subsecs. (b) to (d). Pub. L. 100–473, § 2(2), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

EFFECTIVE DATE OF 1988 AMENDMENT

Pub. L. 100–473, § 4, Oct. 6, 1988, 102 Stat. 2300, provided that: ''The amendments made by this Act [amending this section] are not applicable to complaints filed or motions initiated before the date of enactment of this Act [Oct. 6, 1988] pursuant to section 206 of the Federal Power Act [this section]: *Provided, however*, That such

[1] See References in Text note below.

(June 10, 1920, ch. 285, pt. III, § 311, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

§ 825k. Publication and sale of reports

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and is authorized to sell at reasonable prices copies of all maps, atlases, and reports as it may from time to time publish. Such reasonable prices may include the cost of compilation, composition, and reproduction. The Commission is also authorized to make such charges as it deems reasonable for special statistical services and other special or periodic services. The amounts collected under this section shall be deposited in the Treasury to the credit of miscellaneous receipts. All printing for the Federal Power Commission making use of engraving, lithography, and photolithography, together with the plates for the same, shall be contracted for and performed under the direction of the Commission, under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe, and all other printing for the Commission shall be done by the Director of the Government Publishing Office under such limitations and conditions as the Joint Committee on Printing may from time to time prescribe. The entire work may be done at, or ordered through, the Government Publishing Office whenever, in the judgment of the Joint Committee on Printing, the same would be to the interest of the Government: *Provided*, That when the exigencies of the public service so require, the Joint Committee on Printing may authorize the Commission to make immediate contracts for engraving, lithographing, and photolithographing, without advertisement for proposals: *Provided further*, That nothing contained in this chapter or any other Act shall prevent the Federal Power Commission from placing orders with other departments or establishments for engraving, lithographing, and photolithographing, in accordance with the provisions of sections 1535 and 1536 of title 31, providing for interdepartmental work.

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859; amended Pub. L. 113–235, div. H, title I, § 1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, § 4(b), Sept. 13, 1982, 96 Stat. 1067, the first sec-tion of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Docu-ments.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§ 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the

hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, § 313, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 860; amended June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 85–791, § 16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, § 1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amend-ed (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Proce-dure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, § 16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, § 16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for ''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amendedJune 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver*. If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver*. If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver*. Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule*. If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument*. When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review*. After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability*. (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file*. A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request*. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled ''Statement of Issues,'' listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers*. (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay*. Unless otherwise ordered by the Commission, the filing of a request for rehearing does

not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995; Order 663, 70 FR 55725, Sept. 23, 2005; 71 FR 14642, Mar. 23, 2006]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

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D.C. Cir. Nos. 16-1234*, et al.*

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 10th day of January 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or by U.S. Mail, as indicated below:

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