ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 17-1101, 17-1106, and 17-1107 (consolidated)

NEW JERSEY BOARD OF PUBLIC UTILITIES, 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: NOVEMBER 21, 2017

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in Petitioners' Rule 28(a)(1) certificate.

B. Rulings Under Review

1. Order Addressing Filing and Issues Raised At Technical Conference, *PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,180 (2016), R. 102, JA 441; and

2. Order On Rehearing and Compliance, *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,093 (2017), R. 132, JA 861.

C. Related Cases

This case has not previously been before this Court or any other court. Counsel for Respondent Federal Energy Regulatory Commission is not aware of any pending related cases.

/s/ Anand R. Viswanathan
Anand R. Viswanathan
Attorney

November 21, 2017

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GLOSSARY

Br.	Opening brief of Petitioners New Jersey Board of Public Utilities, Delaware Public Service Commission, PJM Independent Market Monitor, Old Dominion Electric Cooperative, and American Municipal Power, Inc.
Commission or FERC	Federal Energy Regulatory Commission
Initial Order	*PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,180 (2016), R. 102, JA 441
Load Serving Entities	Petitioners Old Dominion Electric Cooperative, and American Municipal Power, Inc.
New Jersey	Collectively, all Petitioners
P	The internal paragraph number within a FERC order
PJM	Intervenor PJM Interconnection, L.L.C., operator of the regional grid in 13 states and the District of Columbia
R.	Item in the certified index to the record
Rehearing Order	*PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,093 (2017), R. 132, JA 861
Technical Conference Order	*PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,344 (2015), R. 62, JA 289

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STATEMENT OF THE ISSUES

Even by the standards of the Federal Energy Regulatory Commission ("Commission" or "FERC") and its cases, this case is unusually complicated. Stripped to its essence, however, it involves the allocation of money — here, in the form of financial products administered by PJM Interconnection, L.L.C. ("PJM"), which operates the high-voltage electric transmission network in the mid-Atlantic region and manages the country's largest competitive wholesale electricity market. These products ("financial transmission rights" and "auction revenue rights") are

intended to help protect users of the transmission system from swings in wholesale electricity prices caused by limits in transmission capacity, or "congestion."

While these products have been around for over a decade, this dispute arises now because PJM had less money in recent years to pay the holders of these rights. In the orders now on review, the Commission ruled on a filing by PJM under section 206 of the Federal Power Act, 16 U.S.C. § 824e, to revise its market rules governing financial transmission rights and auction revenue rights.

The issues on appeal are:

1. Whether the Commission appropriately found that PJM's existing rule assessing certain uncollected cost imbalances against financial transmission rights required correction;
2. Whether the Commission reasonably required PJM to stop defining auction rights using an outdated model of its transmission system; and
3. Whether the Commission properly concluded that PJM had failed to show that its existing rule allowing "netting" of negative-value financial transmission rights against positive-value rights required revision.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are contained in the Addendum to this Brief.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the Federal Power Act, 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the transmission and sale at wholesale of electric energy in interstate commerce. *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766-68 (2016) (describing federal regulation and development of energy markets, and citing statutory provisions and Supreme Court cases).

Under section 205 of the Federal Power Act, 16 U.S.C. § 824d, "[a]ll rates and charges . . . by any public utility for or in connection with the transmission or sale of electric energy," "and all rules and regulations affecting or pertaining to such rates or charges," must be "just and reasonable" and not "undu[ly] preferen[tial]."

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

Section 217(b)(4) of the Federal Power Act instructs the Commission to facilitate "the planning and expansion of transmission facilities to meet the

reasonable needs of load-serving entities," and to enable those entities to meet such needs on a long-term basis through either "firm transmission rights (or equivalent tradable or financial rights) . . . ." 16 U.S.C. § 824q(b)(4); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 50-51 (D.C. Cir. 2014).

II. THE RELEVANT FINANCIAL PRODUCTS

A. Congestion Hedging Products In PJM

PJM is a non-profit entity, known as a regional transmission organization, that the Commission has charged with overseeing the electricity grid in all or parts of thirteen mid-Atlantic states and the District of Columbia. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292-93 (2016). (PJM was named after the smaller Pennsylvania-New Jersey-Maryland region in which it first operated.) Regional transmission organizations also run competitive auction markets for wholesale electricity sales. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 537 (2008); *Elec. Power Supply Ass'n*, 136 S. Ct. at 768 ("These wholesale auctions serve to balance supply and demand on a continuous basis, producing prices for electricity that reflect its value at given locations and times throughout each day."). PJM operates a "day-ahead" energy market and a "real-time" energy market. *See Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 233 (D.C. Cir. 2013); *Hughes*, 136 S. Ct. at 1293 (explaining day-ahead and real-time market operations).

In PJM's day-ahead market, market participants may bid on electricity to be transmitted the next day; in the real-time market, participants can adjust any day-ahead projections of supply and demand by trading electricity "at prices quoted for sale and delivery within five-minute intervals." *Black Oak*, 725 F.3d at 233. PJM determines wholesale electricity prices in both markets using "locational marginal pricing," by which "the price any given buyer pays for electricity reflects a collection of costs attendant to moving a megawatt of electricity through the system to a buyer's specific location on the grid." *Id.* at 233-34.

One of those component costs is congestion, which refers to limits on available transmission capacity at a given location on the grid. *Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 250-51 (D.C. Cir. 2007). When demand for electricity at a particular location exceeds available transmission capacity, PJM must rely upon more expensive generators to meet that congested area's demand. "This results in higher energy prices at nodes that require the use of congested transmission lines and lower prices in less congested areas." *Id*.

As a cushion against these price differences, market participants may obtain financial products known as "financial transmission rights" in annual or monthly auctions conducted by PJM. *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,344, at P 3 (2015) ("Technical Conference Order"), R. 62, JA 290; *see also FERC Energy Primer: A Handbook of Energy Market Basics* 62 (Nov. 2015) ("*Energy*

Primer"), https://www.ferc.gov/market-oversight/guide/energy-primer.pdf. Financial transmission rights provide a stream of revenues, or "transmission congestion credits," to hedge or offset differences in locational prices in the day-ahead energy market caused by congestion. *PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,180, at P 6 (2016) ("Initial Order"), R. 102, JA 443; Technical Conference Order P 3, JA 290. Each right is defined in terms of megawatts of electricity from a point on the transmission system at which the energy is inserted (or "source") to a point at which it is delivered ("sink"). *See* Technical Conference Order P 3 n.4, JA 290.

In 2003, PJM created a related financial product called "auction revenue rights." Initial Order P 7, JA 443. They differ in crucial respects from financial transmission rights.

The first is availability. Any PJM member meeting certain credit requirements may obtain financial rights by bidding for them in PJM's auctions. *See Energy Primer* 63. Auction rights, however, are allocated only to historic electric utilities (or, in FERC parlance, "load-serving entities" or simply "transmission customers") obligated to purchase transmission service to deliver electricity to end users. *See id.*; *see also South Carolina*, 762 F.3d at 90 n.12 ("A 'load-serving entity' is a utility obligated by law or contract to provide electricity service to end-use customers or to a distribution utility.") (citing Federal Power

Act section 217(a)(2)-(3), 16 U.S.C. § 824q(a)(2)-(3)); *Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1206 (D.C. Cir. 2004); *Energy Primer* 65. These transmission customers are granted auction rights as consideration for their payment of rates that effectively fund the costs of the transmission system. *See* Technical Conference Order P 3, JA 290; PJM Filing at 3, R. 1, JA 4.

The second distinction between these rights is how they pay, or offer a "hedge" against transmission congestion costs in the day-ahead market. Whether a holder of a financial transmission right gets paid (or must pay) depends on whether there is congestion on the transmission path corresponding to that right and which way that congestion flows. In mathematical terms, the economic value (or "target allocation") of each financial right equals its value in megawatts multiplied by the difference in prices between the source and sink on the transmission path for which the right is held.

So, if the price at the sink is higher than at the source, the holder of a financial transmission right on that path *gets paid* the price difference multiplied by the megawatt value of the right (this is known as a "prevailing flow" right). *See* Technical Conference Order P 3 n.4, JA 290; PJM Filing at 3-4, JA 4-5. (This assumes, however, that PJM has sufficient revenue to pay *all* prevailing-flow financial rights, which, as described *infra*, has not happened in recent years and led

to the dispute now before this Court.[1]) If, however, the sink price is lower than the source price, the holder of that right *must pay* the difference times the megawatts (a "counterflow" right). PJM Filing at 3-4, JA 4-5. In exchange for this payment obligation, the holder of a counterflow right receives the auction clearing price, which "reflects the market's expectation of future [financial right] revenue adequacy." Initial Order P 69, JA 463; *see also* Elliott Bay Energy Trading Post-Technical Conference Comments, at 7 (Mar. 15, 2016) (counterflow financial rights clear the PJM auction with a "negative price," which "represents a payment the [right] holder receives in exchange for taking on the obligation to pay PJM the realized congestion value of the [financial right] path adjusted for underfunding"), R. 75, JA 325.

As with financial transmission rights, auction revenue rights can translate to money for their holders. But how that happens is up to the holders of the rights: they may keep their auction rights, which entitles them to a share of the funds raised in the annual auction of financial transmission rights; or they may convert their auction rights into an equal quantity of financial transmission rights and

[1] *See, e.g.*, Technical Conference Order P 6 ("PJM states that when [financial transmission rights] are fully funded, [transmission] customers are able to fully hedge their congestion costs. . . . [W]hen there is not enough revenue to fund all prevailing flow [rights], the holder of that prevailing flow [right] will receive a reduced amount of transmission congestion credits, as occurred . . . from 2010-11 through . . . 2013-14, when revenue adequacy ranged from 69-85 percent."), JA 291.

thereby receive revenue from congestion (if available). *See* Technical Conference Order P 3, JA 290; *Energy Primer* 62-63; *see also* PJM's Post-Technical Conference Reply Comments, at 8-9 (Mar. 29, 2016) (auction-right holders receive the "clearing price" determined by the bids submitted in the financial-right auction, which reflects "the bidders' prediction of the value of the [financial right]"), R. 84, JA 430-31.

PJM allocates auction rights in a two-stage process. "Stage 1" rights, as their name indicates, are of the highest priority. They reflect a preference for historic "native load" customers,[2] and in particular for the volume of demand deemed "baseload" (Stage 1A) over that deemed "peak load" (Stage 1B). Initial Order P 7, JA 443; Technical Conference Order P 4, JA 290; *see also Energy Primer* 41 ("Demand is often characterized as baseload or peak. Baseload is demand that occurs throughout the day or throughout the year. Refrigerators, for example, may create baseload demand. Peak load is demand that shows up during part of the day or year, all at the same time – heating or air conditioning, for example."). Any remaining system capability, after distribution of Stage 1 rights, is doled out as "Stage 2" rights to certain qualifying customers. *See* Initial Order P 7, JA 443.

[2] *See Orangeburg v. FERC*, 862 F.3d 1071, 1074 (D.C. Cir. 2017) ("'Native load' is an industry term for customers to whom a power supplier has undertaken a long-term legal obligation to construct and operate its system to serve.").

To take a simplified example, if a utility that serves customers in Baltimore, Maryland expects 1000 megawatts of baseload demand and 1500 megawatts of peak load demand, that utility could qualify for up to 1000 megawatts of Stage 1A auction rights and up to an additional 500 megawatts of Stage 1B rights (i.e., the difference between peak load and baseload).

Of course, like any right that entitles the holder to money, there are limits on how many are available. That is, PJM restricts the quantity of financial rights and auction rights by the actual physical capabilities of the transmission system, as determined by an economic model known as the "simultaneous feasibility test." *See* Initial Order P 9 n.8 ("PJM conducts several tests to ensure [financial transmission rights] and [auction revenue rights] are simultaneously feasible, meaning that the system must be able to physically accommodate the flows associated with these products during the applicable planning year."), JA 444; Technical Conference Order P 5, JA 290-91; *Energy Primer* 62. PJM uses the simultaneous feasibility test to determine how many auction rights (within the physical limits of the system) may be awarded to each qualifying transmission customer, with the goal of ensuring sufficient revenue to cover these rights.[3] *See* Initial Order P 9 n.8, JA 444; PJM Filing at 6 (citing PJM Operating Agreement,

[3] PJM also uses the simultaneous feasibility test when determining whether it needs to upgrade or expand its physical transmission system. *See* PJM Filing at 16, JA 17.

Sch. 1, section 7.5(a)), JA 7; *see also PJM Interconnection, LLC*, 117 FERC ¶ 61,220, at 62,179 (2006) ("PJM uses a simultaneous feasibility test to ensure that the congestion payments due to awarded [auction revenue rights] and [financial transmission rights] can be funded from the congestion payments created in the energy market.").

When it comes to limits on the availability of auction revenue rights, the kind of auction right matters. Stage 1A rights are, by design, more favorable than Stage 1B rights. These rights must be paid their full value in terms of auction revenue—so, if the simultaneous feasibility test finds that the allocated Stage 1A auction rights are not "feasible" under the assumed physical parameters of the transmission system, then PJM must re-run its model using different assumptions to allocate all Stage 1A rights. *See* Technical Conference Order P 5, JA 290-91; PJM Filing at 7 & n.14, JA 8. By contrast, PJM does not re-run the model if the allocated Stage 1B rights are not feasible; rather, each holder of these rights receives a pro-rata reduced amount, meaning a lower share of auction revenue. *See* Technical Conference Order P 5, JA 291.

B. Congestion Revenue Shortfalls In PJM

From 2010 through 2014, PJM had significantly less revenue (i.e., 69-85 percent of full funding) to fund the available "prevailing flow" financial transmission rights. *Id*. P 6, JA 291; Initial Order P 8, JA 444. As a result, the

holders of these rights received less money (or "lower allocations of credits") to hedge against congestion costs. Initial Order PP 2 n.3, 8, JA 442, 444; *see also* PJM Filing at 4-5 ("[T]he hedging is effectuated through the payment of Transmission Congestion Credits based on the value of congestion across a defined pathway. However, when there is not enough revenue to fund all the prevailing flow [financial rights], the prevailing flow [financial right] holder receives a reduced amount of Transmission Congestion Credits."), JA 5-6.

PJM's filing identified several causes of insufficient funding of financial transmission rights, and focused on one of them: the requirement in its Operating Agreement to allocate ten-years' worth of Stage 1A auction revenue rights, even if not feasible. Initial Order P 9, JA 444; PJM Filing at 7, JA 8.

To address these revenue shortfalls, PJM attempted unsuccessfully, on three separate occasions since March 2011, to forge consensus among its stakeholders on reforms of its energy market rules. Initial Order P 10 n.9, JA 444; PJM Filing at 8, 10 & n.22, JA 9, 11. Disputes over these rules were also litigated in several complaint proceedings before the Commission during this time. *See* Technical Conference Order P 7 n.9, JA 292; *FirstEnergy Solutions Corp. v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,209 (2013) ("FirstEnergy Order"); *FirstEnergy Solutions Corp. v. PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,205 (2015) ("FirstEnergy Rehearing Order") (both FirstEnergy orders are collectively

referred to herein as "*FirstEnergy*"). Without the stakeholder consensus needed for broader reforms, PJM instead implemented a series of short-term changes. Initial Order P 10, JA 444-45; PJM Filing at 8, JA 9.

One of those changes, most relevant to this appeal, was to reduce the allocation of Stage 1B auction revenue rights. Initial Order P 10 n.10, JA 445. PJM did so by taking "a more conservative approach" in the simultaneous feasibility model used to allocate auction rights. *Id*.; PJM Filing at 8, JA 9. In so doing, PJM cut allocation of Stage 1B auction rights by an order of magnitude—from 27,850 megawatts in the 2010-11 period to 2,390 in 2014-15. PJM Filing at 8, JA 9.

This amounted to cutting about $257 million that would have accrued to transmission customers holding Stage 1B rights in 2014-15. *See id*. at 13-14, JA 14-15; *PJM Interconnection, L.L.C.*, 158 FERC ¶ 61,093, P 80 & n.90 (2017) ("Rehearing Order"), R. 132, JA 889. This change, along with the other measures taken by PJM, helped restore full funding of financial transmission rights. *See* PJM Filing at 13 ("[Financial transmission right] revenue adequacy has been restored to even better than historical levels; with revenue adequacy at 110% during the 2014/2015 Planning Period and at 116% through the first four months of the 2015/2016 Planning Period."), JA 14.

Still, in PJM's view, these short-term fixes failed to solve the underlying problem of ensuring enough revenue to compensate holders of financial transmission rights their full value, and instead merely shifted money from one group to another. *See id*. at 13-14, JA 14-15; Technical Conference Order P 7, JA 292. That revenue shift—from Stage 1B auction revenue rights to financial transmission rights and Stage 1A auction rights—was unjust and unreasonable in violation of Federal Power Act sections 205 and 206, according to PJM. *See* Technical Conference Order P 8, JA 292; PJM Filing at 14, JA 15.

III. THE COMMISSION PROCEEDINGS AND ORDERS

A. PJM's Filing

To remedy what it viewed as a market-design flaw, PJM sought to fix its market rules governing financial transmission rights and auction revenue rights. On October 19, 2015, PJM brought a complaint under section 206 of the Federal Power Act, 16 U.S.C. § 824e, asking the Commission to find certain relevant provisions in its Operating Agreement unjust and unreasonable and to make "targeted reform[s]" to those provisions. Technical Conference Order P 1, JA 289; Initial Order P 3, JA 442. PJM noted that while it sought stakeholder support to submit these Operating Agreement changes to the Commission under section 205 of the Federal Power Act, it fell one vote short of the super-majority support needed to do so. PJM Filing at 12 & n.27, JA 13; *see Advanced Energy Mgmt. All.*

v. FERC, 860 F.3d 656, 663 (D.C. Cir. 2017) (noting that PJM's Operating Agreement requires a member vote to amend energy market rules under section 205). Along with its section 206 complaint, it also proposed to make corresponding changes to its tariff under section 205 of the Act, 16 U.S.C. § 824d. Technical Conference Order P 1, JA 289.

PJM proposed in its complaint to forecast a higher rate of growth (a 1.5 percent increase) in demand in each region (or "zone"), as a means "to improve current allocations and avoid further reductions in allocations" of auction rights. *See* PJM Filing at 15, JA 16; Technical Conference Order PP 9, 11, JA 292-93. In PJM's view: (i) forecasting greater demand would translate to an increase in the assumed number of future requests for auction rights; (ii) an increased number of assumed auction rights would increase the likelihood of infeasible auction rights; (iii) more infeasible auction rights would, in turn, lead to earlier identification of needed upgrades to the transmission system; and (iv) earlier upgrades would improve allocations of auction rights, thereby mitigating the inequitable cost shift, described above, that harmed the holders of auction rights. *See* Technical Conference Order PP 11-12, JA 293. PJM also proposed to eliminate the practice of "netting" negative-value financial transmission rights against positive-value rights within each right-holder's portfolio. *Id*. PP 9-10, JA 292-93.

B. The Commission's Orders

Finding that these issues could not be resolved on the existing record, the Commission, in a December 28, 2015 order, directed Commission staff to develop a more complete record through a technical conference. Initial Order P 12, JA 445; Technical Conference Order P 48, JA 302. The conference was to cover the processes for modeling and allocating auction rights, the treatment of positions within portfolios when dealing with funding shortfalls, and the inclusion of certain cost imbalances incurred in the real-time market (or "balancing congestion") in the settlement of financial transmission rights. *See* Initial Order P 12, JA 445-46. Numerous parties, including Petitioners now before this Court, participated in the February 4, 2016 technical conference, and submitted comments to the Commission after the conference. *Id*. PP 13-15, JA 446.

The Commission agreed with PJM that the existing market design was flawed. That is, measures to promote revenue adequacy, among other changes, had rendered the market design unjust and unreasonable in shifting costs between holders of auction rights and financial rights. *See id*. P 2, JA 441-42.

And the Commission also agreed with one of PJM's solutions to this flawed market design—i.e., excluding imbalances in real-time costs (from the definition of financial transmission rights) to mitigate underfunding of financial rights. *See id*. P 5, JA 442. These imbalances arise when PJM incurs uncollected costs in the

real-time market as a result of less real-time transmission capability available than was assumed to be available in the day-ahead market.[4] Under PJM's existing rules, the imbalances were assessed against holders of financial rights. *See* Initial Order P 73 & n.65, JA 464. PJM's proposal to exclude such real-time cost imbalances from the settlement of financial rights meant, in practice, that a holder of a prevailing-flow right would not see a reduction in its value from those imbalances.

But the Commission disagreed with PJM's other two proposed remedies. It rejected, as unsupported, PJM's request to eliminate netting of negative-value financial transmission rights against positive-value rights within each right-holder's portfolio. *See id*. P 4, JA 442. It also rejected PJM's proposal to forecast a higher growth rate of demand to reduce shortfalls in auction revenue rights. *See id*. P 3, JA 442. Instead, the Commission required PJM to stop using older locations on the transmission system that are no longer in use ("historical

[4] *See*, *e.g.*, Initial Order P 83 (noting that PJM referred to these costs as a "a real time 'imbalance' that represents the compensation stemming from the real-time energy market that must be paid to market participants but that has not been collected in real time"), JA 468; *id*. P 85 ("real-time revenue imbalance that does not pertain to day-ahead congestion charges that the [financial right] funds are intended to cover."), JA 469; *id*. P 98 ("There are many reasons why less transmission capability may exist in the real-time energy market than was assumed to be available in the day-ahead energy market, thereby resulting in balancing congestion. PJM market participants, the PJM market operator, outside systems, and other external influences can introduce deviations to effectively increase or decrease balancing congestion."), JA 472.

generation resources") for any pathways corresponding to auction rights, and to develop a method for allocating these rights using only locations that "reflect actual system usage." *See id*.

The Commission also ordered PJM to submit a compliance filing showing these tariff changes. *See id*. P 5, JA 443; Rehearing Order P 84, JA 891. In its Rehearing Order, the Commission accepted PJM's compliance filing, *id*. P 85, JA 891, and required PJM to submit a second compliance filing to provide further detail on one discrete (and highly technical) issue not under review. *See* Rehearing Order P 122, JA 902-03. The Commission also rejected a PJM proposal in the first compliance filing (not relevant to this appeal) as beyond the scope of the orders, and referred this issue to PJM's stakeholder process. *See* Rehearing Order PP 137-38, JA 907. PJM submitted its second compliance filing on March 2, 2017, which the Commission accepted by letter order on April 11, 2017.

After the Commission issued the Rehearing Order, and before it acted on PJM's March 2, 2017 compliance filing, three groups of petitioners (New Jersey Board of Public Utilities and Delaware Public Service Commission; Independent Market Monitor for PJM; and Old Dominion Electric Cooperative and American Municipal Power, Inc.) filed three separate petitions for review before this Court on March 31, 2017, consolidated on April 4, 2017. Except in Part III of the

Argument (addressing an issue raised by only two of the Petitioners), this brief will refer to all Petitioners collectively as "New Jersey."

SUMMARY OF ARGUMENT

This case concerns market design changes that PJM proposed under Federal Power Act section 206, 16 U.S.C. § 824e (due to the terms of the regional Operating Agreement and a lack of stakeholder consensus). PJM proposed revisions to its regional rules for highly complicated financial products, determining what goes into the value of those financial products and the methodology for allocating them. The Commission agreed that the existing market design was "unjust and unreasonable" and thus required correction, but rejected PJM's proposed replacement methodology; it also found that PJM had failed to show that a separate rule must be changed. While "reasonable minds can differ" on the policy judgments involved (*Elec. Power Supply Ass'n*, 136 S. Ct. at 784), the Commission thoroughly explained its reasoning, based on its market expertise, predictive assessments, and substantial record evidence.

First, the Commission agreed with PJM that the existing market design for financial transmission rights and auction revenue rights was flawed. The flawed design arose from a series of short-term patches that PJM adopted after failing to reach consensus with its members on broader reforms to address shortfalls in funding for financial rights. That flaw resulted in an "unjust and unreasonable"

shift of costs that benefited entities holding certain kinds of rights at the expense of other entities holding other rights. Moreover, one of PJM's existing rules contributed to that unjust cost shift and harmed the value of financial rights as a hedge against congestion. Under that rule, PJM penalized financial rights for any uncollected cost imbalances accrued in the real-time energy market unrelated to congestion in the day-ahead market. Thus, the Commission appropriately found that the design was unjust and unreasonable.

The Commission, however, properly rejected PJM's proposal to change its method of allocating auction rights, which would have layered higher growth rates onto an outdated model of historical system usage. The Commission reasonably predicted that this method could result in flawed transmission planning. Therefore, the Commission determined that PJM should model auction rights by actual system usage, consistent with system projections used in its long-term planning process.

In addition, the Commission rejected PJM's proposal to eliminate its portfolio netting rule, which allowed financial rights with negative value to offset positive-value rights. The Commission found that PJM had failed to meet its burden to establish that the rule was unjust and unreasonable, concluding that netting did not result in cross-subsidies among financial rights holders and did not contribute to the funding inadequacy.

ARGUMENT

I. STANDARD OF REVIEW

Review of Commission determinations under the Administrative Procedure Act's "arbitrary and capricious" standard is narrow. 5 U.S.C. § 706(2)(A); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. "Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Id.* (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)) (alterations by Court).

"[N]owhere is that more true than in a technical area like electricity rate design." *Id.* "[I]n rate-related matters, the [C]ourt's review of the Commission's determinations is particularly deferential because such matters are either fairly technical or involve policy judgments at the core of the regulatory mission." *South Carolina*, 762 F.3d at 54-55 (internal quotations and citation omitted).

The Commission's predictive judgments in areas within its expertise are also entitled to "particularly deferential review." *Wis. Pub. Power*, 493 F.3d at 260 (internal quotations and citation omitted). Likewise, "deference is due to the

Commission's interpretation of its own precedent." *Mo. Pub. Serv. Comm'n v. FERC*, 783 F.3d 310, 316 (D.C. Cir. 2015).

The Commission's interpretation of the Federal Power Act is entitled to *Chevron* deference. *South Carolina*, 762 F.3d at 54. And, its factual determinations "are conclusive if supported by substantial evidence." *Id*. (citing 16 U.S.C. § 825*l*(b)); *see also, e.g., 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 DETERMINED THAT THE FINANCIAL RIGHTS MARKET DESIGN SHOULD BE REVISED

A. The Commission Reasonably Found Changed Circumstances In The Increasingly Dire Funding Problem

In the challenged orders, the Commission agreed with PJM that the existing methodology as to real-time imbalance costs had become unjust and unreasonable, resulting in chronic underfunding of financial rights or unrealized value of some auction rights. New Jersey objects that the Commission improperly departed from its precedents in the *FirstEnergy* orders, in which it had denied challenges to the existing methodology. *See, e.g.*, Br. 47-52. But the Commission, like any administrative agency, is not bound in perpetuity to its prior decisions. So long as it provides a reasoned basis for adopting a new direction, it is "free to discard"

prior precedent or practices. *See Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004); *see also State Farm*, 463 U.S. at 57 ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.") (internal quotation marks omitted); *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009) (agency may "shift[] course" if it "provide[s] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored") (internal quotation marks omitted); *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 407 (D.C. Cir. 2000) (affirming change in regulatory approach where the Commission "explained how changed circumstances justified a new policy"). As the Commission noted, its finding in *FirstEnergy* did not preclude it "from re-examining the issue when circumstances have changed or additional evidence has been presented." Initial Order P 92 & n.88, JA 471 (citing cases).

The Commission explained that PJM had presented new evidence that justified any departure from its prior orders. In *FirstEnergy*, the Commission found that the complaining party had not established that PJM's methodology for allocating real-time cost imbalances was unjust and unreasonable under section 206 of the Federal Power Act. *See* Initial Order P 92 & n.87 (citing FirstEnergy Order P 43), JA 471. At that time, as the Commission noted, PJM faced persistent

underfunding of financial transmission rights. *Id*. P 8, JA 444. PJM made several attempts in its stakeholder process, without success, to forge consensus on broader reforms of its market design related to these rights. PJM Filing at 10 & n.22, JA 11. Without the needed consensus, its response was, among other things, to cut Stage 1B auction revenue rights. *See id*. at 8-12, JA 9-13; Initial Order PP 10 n.10, 93, JA 445, 471.

By the time PJM initiated the proceedings now under review, however, the record demonstrated to the Commission's satisfaction that "circumstances had changed considerably"—i.e., PJM's "conservative" approach to allocating auction rights had led to an unjust and unreasonable shift of revenue from holders of Stage 1B auction rights to holders of Stage 1A auction rights and financial transmission rights. *See* Initial Order P 93, JA 471; Rehearing Order P 80, JA 889.

New Jersey insists that "[t]he current record is not materially different" than the record in the earlier *FirstEnergy* proceeding. Br. 52. Not so. As the *FirstEnergy* proceeding unfurled over several years at the Commission, the record indicates that PJM's views on the underfunding problem evolved. PJM explained here that, when it answered FirstEnergy's 2013 complaint, PJM still held out hope of finding a solution through the stakeholder process. *See* PJM Filing at 10-11 & n.23, JA 11-12 (citing PJM Answer to FirstEnergy Complaint, FERC Docket EL13-47, Accession No. 20130307-5187 (Mar. 7, 2013)); *see also* PJM Answer to

FirstEnergy Complaint at 4 ("While PJM's Board is extremely concerned with the incidence and trend of [financial right] underfunding, the issue at its essence is one of cost allocation. . . . The filing of a pleading under Section 206 is a step the PJM Board never takes lightly, and one it is more likely to take when core interests of reliability or market integrity are at stake, in contrast to[,] say, cost allocation questions which present themselves with unfortunate regularity in PJM stakeholder debate.") (quoted in part at PJM Filing at 11 & n.24, JA 12).

Later in that proceeding, however, PJM revised its assessment of the underfunding issue, informing the Commission of "significantly changed facts since the case was first filed . . . ." *See* PJM Filing at 11 & n.25 (quoting PJM Answer at 5, *FirstEnergy*, FERC Docket EL13-47, Accession No. 20150602-5066 (June 2, 2015)), JA 12; *see also* PJM Answer at 3, *FirstEnergy*, FERC Docket EL13-47 (June 2, 2015) ("PJM believes that the Commission should consider whether improvements should be made to the rules governing [financial right] products on a more general basis in light of several key developments that have recently occurred. Notably, *since the Commission issued its Order Dismissing Complaint almost two years ago on June 5, 2013, funding levels for [financial rights] have changed significantly*.") (emphasis added). And, it predicted that future Commission intervention may be needed to resolve the issue. *See* PJM Filing at 11 & n.25 ("Indeed, PJM expects that in the future any significant[]

proposed market rule changes aimed for an improved, more efficient and equitable [auction right and financial right] design may have to be prompted by a filing made by PJM under section 206 of the Federal Power Act.") (quoting PJM Answer at 5, *FirstEnergy*, FERC Docket EL13-47 (June 2, 2015)), JA 12.

The record shows that PJM grew more skeptical of reaching stakeholder consensus, culminating in its filing here. *See id*. at 11-12 ("[A]greeing on precisely how to adjust PJM's applicable market rules has been a challenge given that redesigning the funding and allocation processes for [financial rights] and [auction rights] can be seen as an issue of cost allocation among different classes of PJM members. Therefore, it is unlikely that stakeholders will be able to come to consensus on a long-term solution to address PJM's [financial right] design as was indicative in the most recent stakeholder endeavor . . . ."), JA 12-13.

With time and experience operating this market, PJM concluded that its conservative allocation of certain auction rights—while helpful in restoring revenue adequacy to financial rights—had led to a serious market design flaw: the unfair transfer of revenue from holders of Stage 1B auction rights to other rights' holders. *See* Initial Order PP 10, 93, JA 445, 471; PJM Filing at 13-14, JA 14-15. PJM thus resorted to the section 206 remedy it had earlier resisted in *FirstEnergy*. *See* PJM Filing at 11, JA 12.

In light of these changed circumstances, the Commission appropriately found that PJM's existing market design—and its shift of revenue from one kind of right (Stage 1B auction rights) to other rights (financial rights and Stage 1A auction rights)—was unjust and unreasonable. And it agreed with PJM that including cost imbalances incurred in the real-time market in the settlement of financial rights significantly contributed to those rights' "chronic" revenue shortfall. *See* Rehearing Order P 75, JA 887; Initial Order PP 94, 96, JA 471-72.

As the Commission explained, because these real-time cost imbalances reduced the "hedge" offered by these financial products, they harmed "not only . . . participants in the real-time market, but also holders of the original transmission rights under certain circumstances," i.e., the Stage 1B auction-right holders. *See* Rehearing Order P 75, JA 887; Initial Order P 94, JA 471; *see also* Initial Order P 97 ("Requiring PJM to account for balancing congestion in its [financial transmission right] modeling has resulted in inefficient [auction revenue right] allocations to the detriment of load serving entities. To the extent this existing allocation results in an underfunding risk, [auction rights] are devalued and load serving entities and their customers receive a discounted value for the transmission network."), JA 472. Without the removal of the real-time costs imbalances from the settlement of financial rights, the unreasonable cost shift identified by PJM would continue, as PJM would continue its conservative allocation of Stage 1B

rights to ensure revenue adequacy. *See* Initial Order PP 94, 96, JA 471-72. *Cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (courts should not disturb the Commission's "judgment, on which reasonable minds can differ," so long as the Commission has "engaged in reasoned decisionmaking").

That PJM supported its complaint with lessons learned by experience makes the Commission's determination all the more reasonable. *See Nuclear Energy*, 373 F.3d at 1296 ("[W]e expect that an[ ] agency may well change its past practices with advances in knowledge in its given field or as its relevant experience and expertise expands."); *see also Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1239 (D.C. Cir. 2005) ("[T]he deference the court affords the Commission is based on the understanding that the Commission will monitor its experiment and review it accordingly.").

B. The Commission Fully Explained Why Eliminating Real-Time Cost Imbalances From The Settlement Of Financial Transmission Rights Is Just And Reasonable

New Jersey contends that the orders unfairly penalized "load" by forcing it to subsidize others and to bear costs for which it does not bear full responsibility. *See* Br. 59-63. It is well settled, however, that an agency finding must stand so long as the agency examined the relevant data and articulated a rational connection between the facts found and the choice made. *Elec. Power Supply Ass'n*, 136 S. Ct. at 782; *see also Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C.

Cir. 2003) ("The question we must answer . . . is not whether record evidence supports [the petitioner's] version of events, but whether it supports FERC's."). Just as the Supreme Court (in *Elec. Power Supply Ass'n*) recently upheld the Commission's valuation of certain resources in wholesale markets at one level rather than another, this Court should likewise uphold the Commission's reasoned decision to remove real-time cost imbalances. *See* 136 S. Ct. at 782; *see also Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216, 238 (D.C. Cir. 2014) ("This court has no business second-guessing the Commission's judgment on the level of compensation.") (Edwards, J., dissenting), *rev'd*, 136 S. Ct. 760 (2016).

Under New Jersey's subsidy claim, alternatively labeled "undue discrimination" (Br. 62), the Commission's removal of real-time cost imbalances from the settlement of financial transmission rights resulted in one group of rights holders (transmission customers) having to pay those cost imbalances while other rights holders did not. *See, e.g.*, Br. 25, 34, 36. But the Commission gave ample grounds, relying on expert judgment and economic theory, for its conclusion that excising these real-time cost imbalances did not create the claimed subsidy. *See* Rehearing Order P 80, JA 889; *cf. Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (affirming Commission' "serious[] and careful[]" reasoning). First, as a result of the "persistent and unpredictable level of [financial rights'] underfunding," transmission customers still would bear the costs associated with underfunding—

regardless of whether real-time cost imbalances were included in settlement of those rights. *See* Rehearing Order P 80, JA 889. Entities that participate in PJM's competitive auctions of financial rights would lower (or "include a risk premium in") their bids based on their rational expectation of underfunding. *See id*. Lower bids in the auctions translate to depressed auction revenue, thereby devaluing the rights to auction revenue and harming the transmission customers that hold those rights. *See id*.; *see also South Carolina*, 762 F.3d at 68 (approving Commission's predictive judgment that the presence of multiple transmission developers would lower costs to customers as "permissibly grounded in basic economic principles") (internal citation omitted).

Second, not only did PJM's existing rules devalue these auction rights, they also restricted such rights' availability. That is, PJM's "conservative" approach to restoring funding resulted in drastic cuts to Stage 1B auction revenue rights, denying transmission customers the value of those unallocated rights: $257 million in the 2014-2015 annual planning period. *See* Rehearing Order P 80 & n.90 (citing PJM Filing at 14, JA 15), JA 889. Failing to remove real-time cost imbalances from settlement of financial rights, as the Commission explained, would have sustained that flawed approach to PJM's underfunding crisis, thus harming one group of transmission customers (Stage 1B holders) to benefit other entities (holders of Stage 1A rights and financial rights). *See id*. P 80, JA 889.

Accordingly, the Commission agreed with PJM that eliminating these cost imbalances would rectify the "inequitable cost shifts" between different classes of rights and remove the market incentive to add "imprecise risk premiums." *See id*. This reform would "restore[] the integrity" of financial transmission rights as a hedge against day-ahead congestion. *Id*. The Commission's thorough analysis should be upheld. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784 ("Our important but limited role is to ensure that the Commission engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice."); *accord Advanced Energy*, 860 F.3d at 673.

New Jersey also claims the Commission erred on "cost causation"; in their view, the Commission assigned costs to one particular group not fully responsible for the costs even though it could not define who was responsible. *See* Br. 59-60. But the Commission explained why it would not make judgments as to who was responsible for the cost imbalances. *See* Initial Order P 98 ("There are many reasons why less transmission capability may exist in the real-time energy market than was assumed to be available in the day-ahead energy market, thereby resulting in balancing congestion. PJM market participants, the PJM market operator, outside systems, and other external influences can introduce deviations to effectively increase or decrease balancing congestion. . . . Network topology

differences, such as a transmission line tripping out of service, as well as facilities taken out of service early or back in service late can also impact and determine whether congestion manifests as day-ahead or balancing congestion. The multi-faceted nature of balancing congestion does not easily permit a granular allocation to those parties causing and directly benefiting from balancing congestion."), JA 472-73.

The Commission based its decision, instead, on who realized the benefits of imbalances in real-time costs. *See* Rehearing Order P 78, JA 888. This is consistent with existing Commission policy broadly assigning to customers any costs that have system-wide benefits, "on a pro-rata basis where specific beneficiaries or the parties causing the cost cannot be identified." *See id*. & n.88 (citing *Cal. Indep. Sys. Operator Corp*., 119 FERC ¶ 61,076, at P 44 (2007)), JA 888; *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007) ("We have endorsed the approach of assign[ing] the costs of system-wide benefits to all customers on an integrated transmission grid.") (internal quotation marks omitted).

New Jersey does not dispute the existence of that policy, and does not challenge the Commission's finding that the costs here have system-wide benefits. *See* Br. 59-61. Nor can they. Unexpected costs incurred in real-time are a necessary byproduct of having separate real-time and day-ahead energy markets in

PJM. *See, e.g.*, Rehearing Order P 51 ("Congestion imbalance arises on a real-time basis when less transmission capability exists in the real-time energy market than was assumed to be available in the day-ahead energy market."), JA 879; *id*. P 79 ("[W]e accept PJM's explanation in this record that balancing congestion does not represent congestion but rather an imbalance in real-time compensation."), JA 888; Initial Order P 94 ("[B]alancing congestion, whether positive or negative, is a settlement based on costs incurred in the real-time market."), JA 471. And the benefits of maintaining these separate markets have not been disputed here. *See generally Wis. Pub. Power*, 493 F.3d at 245-46 (noting improvements from having separate day-ahead and real-time markets, including "more sophisticated pricing and congestion-management mechanisms that increase the efficiency and reliability of the transmission grid").

Nevertheless, New Jersey again reaches for *FirstEnergy*, claiming that "no new arguments or changes in facts or circumstances" contravene the finding there that "FirstEnergy [did] not provide evidence" as to why customers should cover any underfunding. *See* Br. 61. Pointing to new evidence offered by PJM, however, the Commission gave a reasoned explanation why *FirstEnergy* did not preclude its determination here that PJM's rule had become unjust and unreasonable. *See supra* pp. 24-30; Initial Order P 92 & n.88, JA 471; Rehearing Order PP 74-75, JA 886-87. That is all that this Court's precedent requires. *See*,

e.g., *ANR Pipeline*, 205 F.3d at 407; *see also Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 552 (D.C. Cir. 2010) ("a point-by-point rebuttal is not necessarily required").

C. The Commission's Determination Is Consistent With Commission Precedent On Financial Transmission Rights And With The Federal Power Act

Many of New Jersey's claims, nominally couched in terms of whether the Commission acted consistent with its policy and the Federal Power Act, advance little more than their own preferences (with almost no citations) for how PJM's market for financial transmission rights should operate. That is not enough under this Court's precedent to reverse an agency decision as arbitrary and capricious. *See, e.g.*, *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1009 (D.C. Cir. 2005) ("[M]ore than second-guessing close judgment calls is required to show that a rate order is arbitrary and capricious.").

1. The Commission's Decision Is Consistent With The Design Of Financial Transmission Rights

Petitioners raise several complicated and overlapping policy challenges, citing a single 1997 FERC order. *See* Br. 66-70. The Commission, however, is entitled to deference on matters involving policy judgment and the agency's interpretation of its own orders. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 784; *South Carolina*, 762 F.3d at 54-55; *see also Elec. Consumers Res. Council*, 407 F.3d at 1241-42 (deferring to Commission's "policy choice" because the

Commission provided "a reasonable explanation" for its choice of a revised demand curve design "despite the proposed alternatives"); *Mo. Pub. Serv. Comm'n*, 783 F.3d at 316 (finding that "deference is due to the Commission's interpretation of its own precedent").

First, New Jersey disputes the orders here on the correct "policy goal" for financial rights, which in its view was to return to transmission customers all costs associated with congestion (both day-ahead and real-time). *See* Br. 66-67 & n.87 (citing *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, at 61,241 (1997)); *id.* 69-70 & n.93. The Commission, for its part, found otherwise: "We reject the arguments that the sole purpose of [financial transmission rights] is to return congestion revenue to [customers] and the market should therefore be redesigned to accomplish that directive." Rehearing Order P 27, JA 871. As the Commission explained, these rights "were designed to serve as the financial equivalent of firm transmission service and play a key role in ensuring open access to firm transmission service by providing a congestion hedging function." *Id.*

Thus, financial rights were not created to favor one particular group of market participants, as New Jersey contends. *See, e.g.*, Br. 58 ("The original purpose of [financial rights] was to return Congestion Revenue to Load that pays for the transmission system and that pays Congestion."); *id*. 66-69. These rights—available to both transmission customers (through conversion of auction rights)

and any PJM member that chooses to participate in PJM's auctions—were intended, rather, to offer a protection or "hedge" against congestion costs to whoever holds them. *See* Initial Order P 6 ("[Financial transmission rights] are financial contracts that entitle their holders to day-ahead hourly congestion revenue (a Transmission Congestion Credit), as measured between the location at which power is injected into the system and the location at which it is withdrawn."), JA 443.

This is not a "new" conclusion. *See* Br. 69. Commission precedent, stretching back to the 1997 order cited by New Jersey (*id*. 66 n.87) establishing PJM's auction-based market for financial rights, supports the agency's findings here on the actual purpose of these rights. *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, at 62,254 ("Congestion charge revenues will be distributed to the holders of [financial transmission rights] whose receipt and delivery points were used by others. Thus, if a firm transmission customer schedules energy between its points of receipt and delivery for which it holds [financial transmission rights], it will pay no congestion charges, i.e., its congestion charges will be exactly offset by its congestion revenues."); Initial Order P 6, JA 443.

That is not to say that transmission customers serving end users are treated the same, in all respects, as any other entities that participate in PJM's market for

financial rights. Transmission customers still get priority under the existing PJM construct because only they may receive auction rights. *See* Initial Order P 7, JA 443; Technical Conference Order P 3, JA 290. And they receive first priority on financial transmission rights and the accompanying stream of payments from congestion, without having to bid for them at auction, if they choose to convert their auction rights into financial rights. *See, e.g.*, PJM's Post-Technical Conference Reply Comments, at 11-12 (Mar. 29, 2016) ("The PJM [auction right/financial right] construct was designed to give [load serving entities] priority over non-[load serving entities] in the allocation of long-term firm transmission rights. This is accomplished by allocating [auction rights] to [load serving entities] only. [Auction rights] can be converted to [financial rights] by [load serving entities] at no cost and are guaranteed to be converted to [financial rights] before any [financial rights] are auctioned to non-[load serving entities]. Therefore, [load serving entities] are guaranteed first rights to congestion revenues."), R. 84, JA 433-34.

Second, as a corollary to New Jersey's argument that these rights were intended to return all "Congestion" revenue (as New Jersey defines it) to transmission customers, Br. 66-69, New Jersey contends the Commission gave no evidence or explanation to support another "new conclusion": that financial rights "should now be a hedge against Day-Ahead Congestion," *see id*. 69.

Again, however, this is not new. Even a cursory review of past Commission orders (including the *FirstEnergy* order cited repeatedly by New Jersey) reveals that FERC consistently has treated financial transmission rights as related to PJM's *day-ahead* energy market. *See, e.g.*, *FirstEnergy Rehearing Order* P 2 ("The value of [a financial transmission right] is based upon the difference between the *day-ahead congestion price* at specific source (sending end/generator) and sink (receiving end/load) points on the transmission system.") (emphasis added); *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157, at P 252 n.279 (2016) ("[A financial transmission right], which can be purchased in an annual auction or obtained through the conversion of an [auction revenue right], entitles its holder to a stream of revenues based on the locational price differences in the *day-ahead energy market* when the transmission grid is congested.") (emphasis added).

The Commission adopted this position as far back as 2003, when it first approved PJM's creation of auction revenue rights. *See PJM Interconnection, L.L.C.*, 102 FERC ¶ 61,276, at P 3 (2003) ("[Financial transmission rights] are financial rights that entitle the holder to receive transmission congestion credits. These credits can be used to hedge or offset transmission congestion charges *in PJM's day-ahead market* during periods in which transmission capacity is constrained.") (emphasis added). So too with PJM's Operating Agreement, which confirms that differences in the day-ahead energy market prices, at the points of

delivery and receipt, determine the economic value of financial transmission rights. *See, e.g.*, PJM Filing, Att. A, § 5.2.2(b) (tariff language identical to corresponding section of PJM Operating Agreement, Schedule 1), JA 32.

The Commission reasonably explained how its decision would help, not harm, transmission customers by protecting the value of their "hedge." That is, cost imbalances incurred in the real-time market lowered the value of financial rights and thus limited these rights' effectiveness as a hedge against congestion in the day-ahead market. *See* Initial Order P 94, JA 471. By eliminating these cost imbalances from the settlement of financial rights, the holders of those rights—including any transmission customers who opt to convert their auction rights—receive their unencumbered value. *See* Rehearing Order P 81, JA 890. These reasonable findings are due deference. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 782.

2. The Commission's Decision Is Consistent With The Federal Power Act

The Commission also reasonably interpreted the Federal Power Act. New Jersey contends that the Commission's decision defies transmission customers' entitlement, in Federal Power Act section 217(b)(2), to use financial transmission rights to "facilitate the delivery of energy." Br. 68 (arguing the Commission improperly "redefine[d]" these financial rights as day-ahead instruments, to the detriment of load that is "ultimately served in real-time"). But, as the Commission

noted, financial transmission rights "were designed to serve as the financial equivalent of firm transmission service . . . ." Rehearing Order P 27, JA 871. Section 217(b)(4) of the Federal Power Act, 16 U.S.C. § 824q(b)(4), requires the Commission to enable transmission customers ("load-serving entities") "to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis . . . ." Rehearing Order P 27, JA 871 (internal quotation marks omitted); *see also id*. P 81, JA 889. The Commission reasonably aligned its decision with that congressional directive, as described *supra* pp. 27, 39, by preserving the value of that financial equivalent to firm transmission service. *See, e.g.*, *id*. PP 80-81, JA 888-89; Initial Order PP 94, 97, JA 471-72.

3. The Commission Did Not Abdicate Its Regulatory Authority Over Financial Transmission Rights

New Jersey further contends that the Commission's decision removing real-time cost imbalances untethers financial transmission rights from the physical delivery of energy, effectively stripping FERC's authority over these products and transferring it to the Commodity Futures Trading Commission ("CFTC"). *See* Br. 72-73. In New Jersey's view, without that link to real-time prices, transactions for financial rights are "redefined" as "contracts of sale of a commodity for future delivery" under the CFTC's exclusive statutory jurisdiction. *Id*. 73. As support, however, New Jersey relies only on its own reading of the CFTC order that

exempts these products from CFTC regulation and places them under the Commission's purview.[5] *See id*. 72-73.

But nothing in the sparse language of the CFTC Final Order validates that reading. It states that the exemption applies so long as: (1) the volume of available financial rights is limited by the physical capability of the transmission system; (2) the transaction for those rights takes place in a market administered by the regional "market administrator" (here, PJM); (3) each party to the transaction is a member of that regional market; and (4) the transaction for those rights does not require the physical delivery of electricity. CFTC Final Order at 19,912-13; Rehearing Order P 82 (citing CFTC Final Order), JA 890. None of those basics changed as a result of the Commission's action. *See* Rehearing Order P 82 ("Removing balancing congestion does not change the basic nature of [financial transmission rights] in that they are no longer covered by the exemptive order."), JA 890.

Other CFTC orders also contradict New Jersey's assertion that a financial product must be tied to a real-time energy market to be exempt under the Final Order. For example, as the Commission noted, the CFTC recently exempted a financial product intended to hedge congestion based solely on *day-ahead* energy

[5] *Final Order in Response to a Petition from Certain Indep. Sys. Operators*, 78 Fed. Reg. 19,880 (Apr. 2, 2013) ("CFTC Final Order").

prices in a different regional market for wholesale electricity. Rehearing Order P 82 & n.93 (citing *Final Order Regarding Sw. Power Pool, Inc. Application To Exempt Specified Transaction*, 81 Fed. Reg. 73,065 (Oct. 24, 2016)), JA 890.

And the Commodity Exchange Act, under which the CFTC operates, contains no suggestion that the Commission's decision here encroaches upon what the CFTC may exempt from its exclusive regulatory authority over commodity futures contracts. *See id*. P 82 (noting that CFTC's statute allows exemptions for contracts approved by FERC, so long as CFTC makes a "public interest" determination), JA 890. There is no basis to support New Jersey's novel inter-agency jurisdiction claim.

III. THE COMMISSION REASONABLY DETERMINED THAT PJM MUST ALLOCATE AUCTION RIGHTS BY ACTUAL SYSTEM USAGE

Though the Commission agreed with PJM that its existing methodology was unjust and unreasonable, the Commission rejected PJM's proposal to use increased zonal load in its feasibility analysis. Initial Order P 42, JA 454. The Commission instead directed PJM to change its modeling to use only actively used source-to-sink paths—i.e., to match auction rights to "actual system usage." *Id.* P 45, JA 455. Petitioners Old Dominion Electric Cooperative and American Municipal Power, Inc. (collectively "Load Serving Entities") object to the Commission's

remedy, arguing there is "no evidence in the record" that doing so will "restore value" to auction rights. *See* Br. 80.

Before the Commission, PJM argued that its proposal to use a higher growth rate of demand ("a zonal load forecast growth rate of +1.5 percent") would lead to earlier identifications of needed upgrades to PJM's transmission system—i.e., assuming higher demand translates to an increase in assumed auction revenue rights, which would increase the potential for Stage 1A auction rights to be "infeasible" under the simultaneous feasibility model, thereby leading to earlier upgrades.[6] *See* Initial Order PP 22-23, JA 448-49; Technical Conference Order PP 11-12, JA 293; PJM Filing at 16, JA 17. But PJM acknowledged that the sources and sinks used for auction rights were based on "historical generation resource locations" that existed as far back as 1998, and thus did not align with the current usage of the transmission system. *See* Initial Order P 21 & n.15 (noting PJM's usage of historical generators from 1998, unless otherwise specified, many of which are no longer in service), JA 448; *accord id*. P 25 & n.18 (noting PJM rules preserved historical locations for auction rights even after retirement of

[6] If allocation of a Stage 1A right is infeasible under the existing physical conditions of the transmission system, PJM "will be required to increase the capability limits on the restricted facilities in order to allocate all Stage 1A [rights]." *See* Technical Conference Order P 5, JA 290-91; PJM Filing at 7 & n.14 (citing Operating Agmt., Schedule 1, § 7.4.2(i)), JA 8.

generators at those locations) (citing PJM's Initial Post-Technical Conference Comments, at 6 (Mar. 15, 2016), R. 77, JA 398), JA 449.

The Commission, however, found that the assumption of higher demand on transmission pathways no longer in use "could result in unwarranted transmission enhancements." *See* Rehearing Order P 23, JA 869. That is, an escalated growth rate intended to determine whether and when to upgrade the transmission system "could trigger transmission enhancements that would otherwise not be built or trigger them sooner than necessary." Initial Order P 44, JA 455. Such predictive judgments are appropriate and well within the Commission's expertise. *See*, *e.g.*, *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); *id.* at 68 ("a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency") (internal quotation marks and citation omitted); *E. Niagara Pub. Power All. & Pub. Power Coal. v. FERC*, 558 F.3d 564, 567 (D.C. Cir. 2009) (finding "no room to overturn [FERC's] reasoned and reasonable determination" of "a difficult valuation question," which required "predictive and inherently speculative" judgment).

Instead, the Commission concluded that PJM should align its process for determining auction-right paths (which had been based on the system as it existed in 1998, with some exceptions) with its long-term process for planning upgrades to its transmission system, which, under PJM rules, is based on projections of future system conditions. *See* Rehearing Order PP 24-25, JA 869-70; *see generally N.C. Utils. Comm'n v. FERC*, 741 F.3d 439, 445 (4th Cir. 2014) (describing PJM's transmission planning process as "a long-term planning process by PJM to identify areas where infrastructure upgrades or improvements are needed to ensure compliance with national and regional reliability standards"); *Energy Primer* 65 (describing purposes of regional transmission planning).

Aligning auction-right paths with the existing transmission planning process would help prevent infeasible Stage 1A auction rights because the planning process "already conducts long-term (10-year) studies to meet reliability criteria and to relieve areas of congestion." Rehearing Order P 25, JA 869-70 *see also* Initial Order P 43 ("If the Stage 1A [auction right] pathways were projected to raise reliability concerns, the PJM [regional planning] process would have identified a need for a transmission enhancement."), JA 455. That transmission planning process historically identified and addressed the majority of infeasible Stage 1A auction rights in PJM. *See* Initial Order P 43, JA 455. Therefore, any auction rights shown to be infeasible under PJM's process for determining auction-right

paths that were not already identified in the process for identifying transmission upgrades illustrated "the disconnect between requested Stage 1A [auction right] paths and actual system usage." *Id*.

The Commission thus reasonably concluded that requiring this link to actual system usage would not lead to fewer feasible Stage 1A rights, as Load Serving Entities speculate (Br. 80). *See* Rehearing Order P 25, JA 869-70. Rather, it merely would provide consistency by conforming the pathways defining auction rights with the existing transmission system. *See id*.

Nor did the Commission fail to consider evidence supporting PJM's proposal. *See* Br. 81-82 (citing a transmission project that, if constructed earlier, purportedly would have mitigated the revenue shortfall for auction rights); Rehearing Order P 19 (summarizing parties' argument), JA 867. Rather, the Commission found this "single example" was "insufficient evidence" to undermine the Commission's conclusion. Rehearing Order P 23, JA 869.

Moreover, the Commission's finding here was not inconsistent with Federal Power Act section 217 (*see* Br. 80)—as neither that provision nor the Commission order implementing it obligated PJM to use "historical paths . . . no longer in service in its Stage 1A [auction right] allocation." *See* Rehearing Order P 25, JA 869-70; Initial Order P 41, JA 454; *see also South Carolina*, 762 F.3d at 76, 86 (deferring to FERC's reasonable statutory interpretation).

Finally, Load Serving Entities introduce a new argument based on a recent decision concerning Commission-ordered modifications to a tariff proposal under Federal Power Act section 205. *See NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017), *discussed in* Br. 78 n.118. Here, however, the Commission reviewed PJM's proposal entirely under section 206. *See* Initial Order P 1 n.2, P 39, JA 441, 453. *NRG* is inapposite. *Cf.* 862 F.3d at 114 n.2 (recognizing the Commission's authority to impose tariff revisions under section 206, which was not at issue in that case).

IV. THE COMMISSION REASONABLY REJECTED PJM'S PROPOSAL TO END NETTING

New Jersey also challenges the Commission's determination that PJM had not justified changing its "portfolio netting" rule, under which negative-value (counterflow) financial transmission rights offset positive-value (prevailing flow) rights. *See* Initial Order PP 46, 65-71, JA 455, 462-64. New Jersey contends this rule forces transmission customers to subsidize "the speculative activities of financial entities that take positions in counterflow (i.e., negative)" financial rights. *See* Br. 76-78.

But the Commission explained, relying on expert testimony, why it found no such subsidy from one group of rights holders to another. As it explained, if anyone with a "net positive portfolio" of financial rights (i.e., more prevailing flow rights than counterflow rights) assumes a counterflow right obligation (i.e., a right

with a negative "target allocation"), that negatively settling right "cancels out a proportionate amount of congestion credits that PJM would otherwise owe to these [right] holders at settlement." *See* Rehearing Order P 45, JA 876; Initial Order P 69, JA 463 (referring to expert testimony); *see also PJM Interconnection, LLC*, 121 FERC ¶ 61,073, at P 7 n.10 (2007) (defining "target allocation" as "equal to the product of the [megawatts of financial rights] and the price differences between sink and source that occur in the Day-Ahead energy market.").

Because the amount of congestion credits that this entity must pay (for taking on a counterflow right) is offset by an "equal and opposite" number of credits that PJM would pay it (for holding a net positive portfolio), the Commission reasonably found no subsidy in favor of counterflow-right holders. *See* Rehearing Order P 45, JA 876; Initial Order P 70, JA 464. In other words, both prevailing flow and counterflow target allocations are treated the same, in terms of payout, on an individual basis for net positive portfolios. Rehearing Order P 45, JA 876; Initial Order P 69, JA 463. Without this equal treatment afforded by the netting rule, the Commission warned of a "mismatch in settlement values" between prevailing flow and counterflow rights—thereby altering the willingness of market participants to transact for these rights. *See* Rehearing Order P 46 & n.45 (citing Elliott Bay Post-Technical Conference Reply Comments, at 4 (Mar. 29, 2016), R. 87), JA 877; *see also* Elliott Bay Comments at 10 & n.33

(elimination of netting would result in less trading of financial rights, thereby "reducing the availability of congestion hedges") (quoting Pope Aff. at 17, JA 362), JA 328.

These findings, supported by expert evidence, are due deference. *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (approving FERC's reliance on "an eminent regulatory economist's views"); *Transmission Agency of N. Cal.*, 628 F.3d at 551 (noting the court's deference to the Commission's resolution of factual disputes between expert witnesses.); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 529-30 (D.C. Cir. 2010) (concluding that the record before the Commission, including testimony by two different expert witnesses, "contained evidence adequate to support the Commission's finding"). Moreover, the Commission's findings were consistent with its precedent. *See* Initial Order P 71 & n.64 (noting prior finding that PJM's netting rule was "a just, reasonable, and desirable feature in [financial right] markets") (citing *PJM Interconnection*, 121 FERC ¶ 61,073, at P 16), JA 464.

New Jersey bases its subsidy theory on a definition of "payout ratio" neither adopted by the Commission nor supported by citations to precedent. *See* Br. 76-77; Rehearing Order P 45, JA 876; Initial Order P 71 & n.64, JA 464. But there was no improper subsidy under FERC's definition of payout ratio, i.e., "available congestion credits as a percentage of the *net* target allocations" instead of *positive*

target allocations. Rehearing Order P 45, JA 876; *see also id.* P 48 (rejecting scenarios presented by Market Monitor for purported differing payout ratios; "In both of the Market Monitor's scenarios, each market participant's payout ratio *with* portfolio netting remains at 50 percent, when measured as a percentage of net target allocation"), JA 877-78. Nor does New Jersey offer any support for its claim that the Commission's decision violated the statutory priority accorded to transmission customers under section 217 of the Federal Power Act—a claim based entirely on the erroneous subsidy argument. *See* Br. 76-78.

Finally, the Commission appropriately rejected New Jersey's claim that the netting rule furthers revenue inadequacy of financial rights by enabling counterflow-right holders to pay back less in congestion rents than they receive as upfront payments in the auction. *See* Br. 77; Initial Order P 69, JA 463. Counterflow rights do not offer such a shield against revenue inadequacy, the Commission explained, because the auction price received in exchange for those rights "will fully reflect . . . any [market] expectations of revenue inadequacy." Rehearing Order PP 45-46, JA 876-77; *accord* Initial Order P 69 & n.63 (noting that Market Monitor acknowledged that participants in PJM's financial-right auctions took into account expectations of revenue inadequacy), JA 463; Elliott Bay Comments at 10-12, JA 328-30. Eliminating the netting rule would not actually address the "fundamental" market design issues associated with revenue

inadequacy, but rather merely reallocate that revenue inadequacy among market participants. *See* Initial Order P 68, JA 463; Rehearing Order P 48, JA 877-78.

That determination was particularly within the Commission's authority to make, given its "expertise in evaluating complex market conditions." *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 293 (D.C. Cir. 2014); *see also South Carolina*, 762 F.3d at 96 ("it is within the scope of the agency's expertise to make . . . a prediction about the market it regulates").

CONCLUSION

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

Respectfully submitted,

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November 21, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,649 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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November 21, 2017

ADDENDUM

STATUTES

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for such purpose in such order, or otherwise in contravention of such order.

(d) Authorization of capitalization not to exceed amount paid

The Commission shall not authorize the capitalization of the right to be a corporation or of any franchise, permit, or contract for consolidation, merger, or lease in excess of the amount (exclusive of any tax or annual charge) actually paid as the consideration for such right, franchise, permit, or contract.

(e) Notes or drafts maturing less than one year after issuance

Subsection (a) of this section shall not apply to the issue or renewal of, or assumption of liability on, a note or draft maturing not more than one year after the date of such issue, renewal, or assumption of liability, and aggregating (together with all other then outstanding notes and drafts of a maturity of one year or less on which such public utility is primarily or secondarily liable) not more than 5 per centum of the par value of the other securities of the public utility then outstanding. In the case of securities having no par value, the par value for the purpose of this subsection shall be the fair market value as of the date of issue. Within ten days after any such issue, renewal, or assumption of liability, the public utility shall file with the Commission a certificate of notification, in such form as may be prescribed by the Commission, setting forth such matters as the Commission shall by regulation require.

(f) Public utility securities regulated by State not affected

The provisions of this section shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission.

(g) Guarantee or obligation on part of United States

Nothing in this section shall be construed to imply any guarantee or obligation on the part of the United States in respect of any securities to which the provisions of this section relate.

(h) Filing duplicate reports with the Securities and Exchange Commission

Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under sections 77g, 78*l*, and 78m of title 15.

(June 10, 1920, ch. 285, pt. II, § 204, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 850.)

TRANSFER OF FUNCTIONS

Executive and administrative functions of Securities and Exchange Commission, with certain exceptions, transferred to Chairman of such Commission, with authority vested in him to authorize their performance by any officer, employee, or administrative unit under his jurisdiction, by Reorg. Plan No. 10 of 1950, §§ 1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out in the Appendix to Title 5, Government Organization and Employees.

§ 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 de-

livering 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,

(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.

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(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) of this section, in a proceeding commenced under this section involving two or more electric utility companies

of a registered holding company, refunds which might otherwise be payable under subsection (b) of this section 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

Section 4 of Pub. L. 100–473 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 complaints may be withdrawn and refiled without prejudice.''

[1] See References in Text note below.

(i) Interstate compacts

(1) The consent of Congress is given for three or more contiguous States to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to—

(A) facilitate siting of future electric energy transmission facilities within those States; and

(B) carry out the electric energy transmission siting responsibilities of those States.

(2) The Secretary may provide technical assistance to regional transmission siting agencies established under this subsection.

(3) The regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in national interest electric transmission corridors (other than facilities on property owned by the United States).

(4) The Commission shall have no authority to issue a permit for the construction or modification of an electric transmission facility within a State that is a party to a compact, unless the members of the compact are in disagreement and the Secretary makes, after notice and an opportunity for a hearing, the finding described in subsection (b)(1)(C).

(j) Relationship to other laws

(1) Except as specifically provided, nothing in this section affects any requirement of an environmental law of the United States, including the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) Subsection (h)(6) shall not apply to any unit of the National Park System, the National Wildlife Refuge System, the National Wild and Scenic Rivers System, the National Trails System, the National Wilderness Preservation System, or a National Monument.

(k) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

(June 10, 1920, ch. 285, pt. II, § 216, as added Pub. L. 109–58, title XII, § 1221(a), Aug. 8, 2005, 119 Stat. 946.)

REFERENCES IN TEXT

The National Forest Management Act of 1976, referred to in subsec. (h)(6)(D)(i), is Pub. L. 94–588, Oct. 22, 1976, 90 Stat. 2949, as amended, which enacted sections 472a, 521b, 1600, and 1611 to 1614 of this title, amended sections 500, 515, 516, 518, 576b, and 1601 to 1610 of this title, repealed sections 476, 513, and 514 of this title, and enacted provisions set out as notes under sections 476, 513, 528, 594–2, and 1600 of this title. For complete classi-fication of this Act to the Code, see Short Title of 1976 Amendment note set out under section 1600 of this title and Tables.

The Endangered Species Act of 1973, referred to in subsec. (h)(6)(D)(ii), is Pub. L. 93–205, Dec. 28, 1973, 87 Stat. 884, as amended, which is classified principally to chapter 35 (§ 1531 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of this title and Tables.

The Federal Water Pollution Control Act, referred to in subsec. (h)(6)(D)(iii), is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816, which is classified generally to chapter 26 (§ 1251 et seq.) of Title 33, Navigation and Navigable Wa-ters. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of Title 33 and Tables.

The National Environmental Policy Act of 1969, referred to in subsecs. (h)(6)(D)(iv) and (j), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Federal Land Policy and Management Act of 1976, referred to in subsec. (h)(6)(D)(v), is Pub. L. 94–579, Oct. 21, 1976, 90 Stat. 2743, as amended, which is classified principally to chapter 35 (§ 1701 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1701 of Title 43 and Tables.

§ 824q. Native load service obligation

(a) Definitions

In this section:

(1) The term ''distribution utility'' means an electric utility that has a service obligation to end-users or to a State utility or electric cooperative that, directly or indirectly, through one or more additional State utilities or electric cooperatives, provides electric service to end-users.

(2) The term ''load-serving entity'' means a distribution utility or an electric utility that has a service obligation.

(3) The term ''service obligation'' means a requirement applicable to, or the exercise of authority granted to, an electric utility under Federal, State, or local law or under long-term contracts to provide electric service to end-users or to a distribution utility.

(4) The term ''State utility'' means a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or a corporation that is wholly owned, directly or indirectly, by any one or more of the foregoing, competent to carry on the business of developing, transmitting, utilizing, or distributing power.

(b) Meeting service obligations

(1) Paragraph (2) applies to any load-serving entity that, as of August 8, 2005—

(A) owns generation facilities, markets the output of Federal generation facilities, or holds rights under one or more wholesale contracts to purchase electric energy, for the purpose of meeting a service obligation; and

(B) by reason of ownership of transmission facilities, or one or more contracts or service agreements for firm transmission service, holds firm transmission rights for delivery of the output of the generation facilities or the purchased energy to meet the service obligation.

(2) Any load-serving entity described in paragraph (1) is entitled to use the firm transmission rights, or, equivalent tradable or financial transmission rights, in order to deliver the output or purchased energy, or the output of other generating facilities or purchased energy to the extent deliverable using the rights, to the extent required to meet the service obligation of the load-serving entity.

(3)(A) To the extent that all or a portion of the service obligation covered by the firm transmission rights or equivalent tradable or finan-

cial transmission rights is transferred to another load-serving entity, the successor load-serving entity shall be entitled to use the firm transmission rights or equivalent tradable or financial transmission rights associated with the transferred service obligation.

(B) Subsequent transfers to another load-serving entity, or back to the original load-serving entity, shall be entitled to the same rights.

(4) The Commission shall exercise the authority of the Commission under this chapter in a manner that facilitates the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities to satisfy the service obligations of the load-serving entities, and enables load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term power supply arrangements made, or planned, to meet such needs.

(c) Allocation of transmission rights

Nothing in subsections (b)(1), (b)(2), and (b)(3) of this section shall affect any existing or future methodology employed by a Transmission Organization for allocating or auctioning transmission rights if such Transmission Organization was authorized by the Commission to allocate or auction financial transmission rights on its system as of January 1, 2005, and the Commission determines that any future allocation or auction is just, reasonable and not unduly discriminatory or preferential, provided, however, that if such a Transmission Organization never allocated financial transmission rights on its system that pertained to a period before January 1, 2005, with respect to any application by such Transmission Organization that would change its methodology the Commission shall exercise its authority in a manner consistent with the[1] chapter and that takes into account the policies expressed in subsections (b)(1), (b)(2), and (b)(3) as applied to firm transmission rights held by a load-serving entity as of January 1, 2005, to the extent the associated generation ownership or power purchase arrangements remain in effect.

(d) Certain transmission rights

The Commission may exercise authority under this chapter to make transmission rights not used to meet an obligation covered by subsection (b) available to other entities in a manner determined by the Commission to be just, reasonable, and not unduly discriminatory or preferential.

(e) Obligation to build

Nothing in this chapter relieves a load-serving entity from any obligation under State or local law to build transmission or distribution facilities adequate to meet the service obligations of the load-serving entity.

(f) Contracts

Nothing in this section shall provide a basis for abrogating any contract or service agreement for firm transmission service or rights in effect as of August 8, 2005. If an ISO in the Western Interconnection had allocated financial transmission rights prior to August 8, 2005, but had not done so with respect to one or more load-serving entities' firm transmission rights held under contracts to which the preceding sentence applies (or held by reason of ownership or future ownership of transmission facilities), such load-serving entities may not be required, without their consent, to convert such firm transmission rights to tradable or financial rights, except where the load-serving entity has voluntarily joined the ISO as a participating transmission owner (or its successor) in accordance with the ISO tariff.

(g) Water pumping facilities

The Commission shall ensure that any entity described in section 824(f) of this title that owns transmission facilities used predominately to support its own water pumping facilities shall have, with respect to the facilities, protections for transmission service comparable to those provided to load-serving entities pursuant to this section.

(h) ERCOT

This section shall not apply within the area referred to in section 824k(k)(2)(A) of this title.

(i) Jurisdiction

This section does not authorize the Commission to take any action not otherwise within the jurisdiction of the Commission.

(j) TVA area

(1) Subject to paragraphs (2) and (3), for purposes of subsection (b)(1)(B), a load-serving entity that is located within the service area of the Tennessee Valley Authority and that has a firm wholesale power supply contract with the Tennessee Valley Authority shall be considered to hold firm transmission rights for the transmission of the power provided.

(2) Nothing in this subsection affects the requirements of section 824k(j) of this title.

(3) The Commission shall not issue an order on the basis of this subsection that is contrary to the purposes of section 824k(j) of this title.

(k) Effect of exercising rights

An entity that to the extent required to meet its service obligations exercises rights described in subsection (b) shall not be considered by such action as engaging in undue discrimination or preference under this chapter.

(June 10, 1920, ch. 285, pt. II, § 217, as added Pub. L. 109–58, title XII, § 1233(a), Aug. 8, 2005, 119 Stat. 957.)

FERC RULEMAKING ON LONG-TERM TRANSMISSION RIGHTS IN ORGANIZED MARKETS

Pub. L. 109–58, title XII, § 1233(b), Aug. 8, 2005, 119 Stat. 960, provided that: ''Within 1 year after the date of enactment of this section [Aug. 8, 2005] and after notice and an opportunity for comment, the [Federal Energy Regulatory] Commission shall by rule or order, implement section 217(b)(4) of the Federal Power Act [16 U.S.C. 824q(b)(4)] in Transmission Organizations, as defined by that Act [16 U.S.C. 791a et seq.] with organized electricity markets.''

[1] So in original. Probably should be ''this''.

New Jersey Board of Public Utilities, et al. **Docket No. EL16-6, *et al.***
v. FERC
D.C. Cir. Nos. 17-1101, 17-1106 and 17-1107

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 21st day of November 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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