ORAL ARGUMENT HEARD FEB. 9, 2018; CASE DECIDED JULY 24, 2018

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

Nos. 16-1068 and 16-1408 (Consolidated)

UTILITY WORKERS UNION OF AMERICA LOCAL 464 AND ROBERT CLARK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

RESPONSE IN OPPOSITION TO PETITION FOR REHEARING

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INTRODUCTION

More than a year after Respondent Federal Energy Regulatory Commission ("FERC" or the "Commission") challenged the standing of Petitioners Utility Workers Union of America Local 464 and Robert Clark (collectively, "the Union"), nearly seven months after oral argument, and more than a month after the Court issued a published opinion dismissing the Union's petition for lack of standing, the Union seeks, belatedly, to supplement the record with expert testimony. Not only is the Union's submission out-of-time and noncompliant with federal rules, its filing again fails to demonstrate Article III standing. The panel should reject the Union's petition for rehearing.

The Union's latest attempt to remedy the jurisdictional deficiency identified by the panel suffers from several defects. First, the Union makes no showing that the panel "misapprehended" or "overlooked" any point of law or fact that would justify rehearing. Fed. R. App. P. 40(a)(2). Nor does it provide any support for leveraging a petition for rehearing to proffer new evidence that should have been submitted with its opening brief or, at a minimum, with its reply brief. The absence of any precedent in support of the Union's position is both conspicuous and unsurprising: Granting the Union's petition would jettison this Court's requirement that the petitioner "establish its standing at the outset of its case." *See Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002).

Even if the Union were permitted to advance a new argument and fresh evidence in support of standing in a petition for rehearing, its analysis misapprehends the Article III standing doctrine itself. The Union argues the Commission was required to show that standing is not "self-evident," but that is incorrect. It is the *petitioner*'s burden to demonstrate its own standing, not the respondent's burden to show the *absence* of standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("[T]he party invoking federal jurisdiction[] bears the burden of establishing" Article III standing); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411–12 (2013); *Sierra Club*, 292 F.3d at 898–99. At any rate, the Commission *did* show that standing was not "self-evident" in its answering brief. *See* FERC Ans. Br. at 4, 38–42.

Finally, even if the panel were to consider the affidavit of Mr. Paul M. Chernick submitted with the petition for rehearing ("2018 Chernick Affidavit"), the result is the same. As the panel correctly recognized, the fatal flaw in the Union's standing analysis was the lack of a causal nexus between the removal of the Brayton Point power plant from the ISO New England forward capacity auction beginning with Auction 8 (2014), and capacity prices produced in Auction 9 (2015) and Auction 10 (2016). *Util. Workers Union of Am. Local 464 v. FERC*, 896 F.3d 573, 577–79 (D.C. Cir. 2018); *ISO New England Inc.*, 151 FERC ¶ 61,226 at P 3 (2015) ("Auction 9 Results Order") (JA 190); *ISO New England Inc.*, 155 FERC

¶ 61,273 at P 3 (2016) ("Auction 10 Results Order") (JA 380). The 2018 Chernick Affidavit fails to supply the missing causal link. Instead, it doubles down on the Union's prior conclusory allegations that Brayton Point's removal from the bid pool must have, somehow, caused higher prices in later auctions.[1]

The panel should reject the petition for rehearing for all these reasons.

ARGUMENT

I. The Union's Belated Effort To Establish Article III Standing Fails As A Matter Of Law

A. The Panel Did Not "Overlook" Or "Misapprehend" Any Point Of Law Or Fact In Holding That The Union Lacks Article III Standing

A petition for rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." Fed. R. App. P. 40(a)(2). The Union's petition fails at the threshold because it does not even attempt to show that the panel "overlooked" or "misapprehended" any point of law or fact in the record that

[1] The panel expressed concern in its opinion that the Commission had yet to respond to the Union's request that it "revisit Brayton Point's retirement in the FCA 8 proceedings." *Util. Workers*, 896 F.3d at 579. The Commission has now responded. In its order of September 20, 2018, the Commission dismissed the Union's protest of the Auction 8 results, concluding that "credible justifications" exist "for the [Brayton Point] owners' retirement decision …." *ISO New England Inc.*, 164 FERC ¶ 61,196 at P 10 (2018) (internal quotation marks omitted) (copy attached).

was before the panel with regard to Article III standing. Instead, the Union suggests that the panel erred in not giving it a third chance—after two attempts in its briefing—to correct its own failure to establish standing. *See* Pet. at 6–8. The Union even goes so far as to argue that the panel should have requested additional evidence from the Union after oral argument, even though the Union indicates it could have included the latest testimony from Mr. Chernick in its briefs. *See* Pet. at 1, 6–8.

At bottom, the Union seeks rehearing to correct its own error, not any error by the panel. Because such a maneuver fails to comply with the federal rules, the panel should reject the petition on this basis alone. *Cf. Trans Union Corp. v. Fed. Trade Comm'n*, 267 F.3d 1138, 1144 (D.C. Cir. 2001) ("Since Trans Union's petition for rehearing merely clarifies arguments the company's briefs had muddied, instead of restating arguments claimed to have been overlooked or misunderstood, the petition comes too late.").

Even if the Union had challenged the court's standing analysis, any such argument is meritless because the panel correctly determined that the Union failed to show causation. It is well-established that the party seeking review of an agency's decision must satisfy the "irreducible constitutional minimum" of Article III standing—"injury in fact, causation, and redressability"—and must do so "at the first appropriate point in the review proceeding." *Util. Workers*, 896 F.3d at

577 (quoting *Spokeo*, 136 S. Ct. at 1547) (internal quotation marks omitted); *Sierra Club*, 292 F.3d at 900. This typically means demonstrating standing in the opening brief, *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 224–25 (D.C. Cir. 2018) (citing *Sierra Club*, 292 F.3d at 900), "and not … in reply to the brief of the respondent agency," *Sierra Club*, 292 F.3d at 900. Even if the petitioner "shows in its opening brief that its claim to standing is beyond serious question," it is obliged to "reply to th[e] objection" made by the respondent in its reply brief. *See id*. at 901. Moreover, where, as here, the case involves a direct challenge to an agency action, "the petitioner's 'burden of production … is accordingly the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing by affidavit or other evidence,' including whatever evidence the administrative record may already contain." *Util. Workers*, 896 F.3d at 577 (quoting *Sierra Club*, 292 F.3d at 899–900 (internal quotation marks omitted)).

Applying the standard set forth in *Spokeo*, *Clapper*, and *Sierra Club*, the panel correctly held that the Union failed to demonstrate a causal nexus between the alleged injury—higher prices in Auctions 9 and 10—and the removal of Brayton Point from the capacity auctions beginning with Auction 8. *Util. Workers*, 896 F.3d at 577–79. The Union's opening brief made only a conclusory assertion that the closure of Brayton Point "inflat[ed] market prices for capacity." Union

Opening Br. at 22–23. And even after the Commission explained at length in its answering brief that the Union had not demonstrated either an injury-in-fact or causation, FERC Ans. Br. at 38–42, the Union provided a non-response in its reply brief: Instead of explaining *how* Brayton Point's retirement affected prices in future auctions, the reply brief simply doubled down on the Union's prior allegation that it did, asserting—without any evidence—that "withholding of Brayton Point … increased market wide capacity charges … in FCA8, 9 and 10." Union Reply Br. at 5–6.

The panel zeroed in on this deficiency. It correctly explained that the Union "made only conclusory assertions—both before the Commission and in [its] briefs—that Brayton Point's absence shifted the results of FCA 9 by 'approximately $1 billion' and the results of FCA 10 by 'an amount estimated to exceed $400 million.'" *Util. Workers*, 896 F.3d at 578 (quoting Mot. to Intervene and Protest of UWUA Local 464 and Robert Clark at 6, *In re: ISO New England Inc.*, *Tenth Forward Capacity Auction Results Filing*, FERC Dkt. No. ER16-1041 (Apr. 14, 2016) (JA 357)). In light of complex market dynamics, it was not enough for the Union to simply invoke "the laws of supply and demand" by reasoning that the withdrawal of Brayton Point from future auctions would "exert some upward pull on auction prices." *Id.* at 579. The Union had to show that it was the withdrawal of Brayton Point *and not other factors*—e.g., market adjustments due

to Brayton Point's retirement and changes in the auction rules—that caused any price increases in subsequent auctions. *See id*. at 578–79. As the panel recognized, "auction rules give … prior [auction] results no direct role in the calculus" of prices resulting from later auctions. *Id.* at 579.

Critically, the Union does not actually challenge the panel's analysis. Thus, because the Union fails to show that the panel "overlooked" or "misapprehended" any point of law or fact on the record before it, and because any such argument would be futile in any event, the panel should reject the Union's too-late plea to consider new evidence.

B. The Union Also Misapprehends The Relevant Standard For Establishing Article III Standing

While the panel's opinion does not "misapprehend" or "overlook" anything, the Union's petition does. The Union argues that the Commission shoulders at least some of the responsibility in addressing Article III standing. Pet. at 5–6. It suggests that the Commission was required to show "that the withholding of Brayton Point did ***not*** in fact increase the FCA9 and FCA10 prices." Pet. at 6 (emphasis in original). But this fundamentally misconstrues the parties' burdens in the standing analysis. Standing is the petitioner's burden to build up, not the respondent's burden to tear down. *See Sierra Club*, 292 F.3d at 898–99. As the panel correctly recognized, the Union could not simply assume that the withdrawal

of Brayton Point in Auction 8 caused higher prices in Auctions 9 and 10. *Util. Workers*, 896 F.3d at 578–79; *see also* FERC Ans. Br. at 40.

In a similar vein, the Union erroneously asserts that the Commission's decision to raise the issue of standing in its answering brief amounts to a "gotcha" tactic aimed at "depriv[ing] [the Union] of [its] standing on appeal on evidentiary grounds." Pet. at 7. But the Union can hardly complain about a flaw that it had an opportunity to correct in its reply brief. *Cf. Am. Library Ass'n v. FCC*, 401 F.3d 489, 493 (D.C. Cir. 2005) (finding a "gotcha" trap where the respondent conceded standing, and so the "parties … reasonably assumed that [the] petitioner's standing [was] self-evident"). A contrary finding would disrupt the "fair and orderly process by which to determine whether the petitioner has standing to invoke the jurisdiction of this court." *See Sierra Club*, 292 F.3d at 901.

C. The Union's Failure To Demonstrate Standing Prior To The Panel Issuing Its Opinion Cannot Be Excused By Invoking A Prior Belief That Standing Was "Self-Evident"

Under *Sierra Club*, a party must provide evidence demonstrating standing unless standing is "self[-]evident." *Id.* at 900. The Union argues that because it believed this exception applied here, it was liberated from providing any "further proof" of a causal nexus in its merits briefing beyond making bare allegations. Pet. at 5. Not so.

First, the Union's "belie[f] that [standing] was self-evident" is beside the point—what matters is the court's view. *Am. Library*, 401 F.3d at 495; *cf.* Pet. at 5. Indeed, whether standing is "self-evident" "must be judged from the perspective of the court, not the petitioner." *Am. Library*, 401 F.3d at 495. The panel here made clear that the Union's standing was manifestly not "self-evident." *See Util. Workers*, 896 F.3d at 577–79 (requiring the Union to "do the necessary work of 'explain[ing] and substantiat[ing]' claims of standing that are not self-evident (and could not be reasonably mistaken as such) in [its] opening brief[]" (quoting *Sierra Club*, 292 F.3d at 900–01)).

Second, even if the panel were to credit the Union's subjective belief, the Union was disabused of any such notion by the Commission's answering brief. We devoted several pages to explaining why the Union's conclusory assertion "that capacity prices in Auctions 9 and 10 were higher than they would have been had Brayton Point participated in those auctions" was both speculative and lacked the requisite causal nexus. FERC Ans. Br. at 39–41. Yet the Union did nothing to address this deficiency in its reply brief by proffering fresh evidence. Under *Sierra Club*, the reply brief was the Union's last opportunity to provide affidavits or other evidence to shore up its standing analysis. *See Sierra Club*, 292 F.3d at 901.

The Union cites three cases in support of its position, all of which are inapposite. In *American Library*, both the petitioner and respondent Federal

Communications Commission "apparently assumed that petitioners' standing was 'self-evident' under *Sierra Club*." 401 F.3d at 491. The court observed that the FCC "was not challenging petitioners' standing in th[at] case" and that it had even conceded an injury to petitioners. *Id.* at 491–92. Beyond a terse and oblique challenge to standing made by an intervenor, standing only became an issue when the court raised it at oral argument, prompting post-argument submissions that the court considered *before* issuing its decision. *Id.*; *see also Ctr. for Energy and Econ. Dev. v. EPA*, 398 F.3d 653, 657 (D.C. Cir. 2005) (requesting post-argument briefing on an issue not previously addressed related to standing); *Action on Smoking and Health v. Dep't of Labor*, 100 F.3d 991, 992 (D.C. Cir. 1996) (explaining that standing first became an issue when the court raised it at argument). The court made clear, however, that it was carving out a narrow exception to the rule set forth in *Sierra Club*, cautioning that "[t]he decision in *Sierra Club* reminds petitioners challenging administrative actions that, *when they have good reason to know that their standing is not self-evident*, they should explain the basis for their standing at the earliest appropriate stage in the litigation." *Am. Library*, 401 F.3d at 493 (emphasis in original). As the court put it, "a party who knows or should know that there are doubts about its standing should address those doubts before oral argument." *Id.*

This case differs from *American Library* in relevant part. Unlike the petitioner there, the Union had "good reason" to know its standing was not "self-evident" in light of the Commission's answering brief. Nor is this a case where the respondent effectively conceded standing, or where the panel *sua sponte* sought additional submissions post-argument. Indeed, the Union cites no case—nor is the Commission aware of one—where a party was permitted to proffer new evidence in support of standing after an opinion had issued, let alone do so through a petition for rehearing.

Even if *Sierra Club* and its progeny did not foreclose the Union's late submission (which they do), the equities strongly favor rejecting it. The Union's position, if ratified, would allow petitioners in future cases to offer vague allegations in support of standing, knowing they could potentially correct any deficiencies after the case had been fully briefed, argued, and even decided. Such an approach would thwart principles of judicial economy and judicial restraint that inhere in the standing doctrine itself, while prejudicing the opposing party.

II. Mr. Chernick's Latest Affidavit Again Fails To Show A Causal Link Between The Brayton Point Retirement And The Prices In Auctions 9 And 10

Even if the panel were to consider Mr. Chernick's post-opinion affidavit, it does not establish a causal link between Brayton Point's retirement and the outcomes of Auctions 9 and 10—the fatal flaw identified by the panel. *Util.*

Workers, 896 F.3d at 577–79. Instead, it simply provides numbers to accompany the Union's prior assertion that Brayton Point's retirement "increased market-wide capacity prices" in those auctions. Union Reply Br. at 6 (internal quotation marks omitted); 2018 Chernick Aff. at PP 6–9. But the axiomatic notion that greater supply will place downward pressure on prices was never disputed in this case. The issue has always been one of causation. Indeed, the panel's opinion makes plain why a simple analysis of supply and demand is inadequate. The panel explained that retiring Brayton Point likely affected prices in Auction 8 because that event was determinative: the retirement occurred "after the deadline for new entrants to participate" in the auction, meaning supply was necessarily less than it would have been had Brayton Point participated. *Util. Workers*, 896 F.3d at 578. But while "the laws of supply and demand … might suffice in relation to FCA 8, … where petitioners challenge successive forward capacity auctions exclusively by reference to events during FCA 8, the link is missing." *Id.* at 579.

The panel's distinction between Auction 8 on the one hand and Auctions 9 and 10 on the other is correct for several reasons. First, as the panel correctly observed, "[b]y the time of FCA 9 and FCA 10 … market actors had had a year or more to respond to the news of Brayton Point's retirement and to offer new capacity in those auctions." *Id*. at 578. Thus, while there existed little opportunity for the market to adjust to a decrease in supply in Auction 8, by the time Auction 9

took place new generation resources had time and incentive to enter the market and offer new supply. *See id.* Indeed, the Market Monitor determined that Auctions 9 and 10 were competitive, resulting in a just and reasonable clearing price.[2] Auction 9 Results Order at PP 20–21 (JA 195–96); Auction 10 Results Order at PP 26–27 (JA 388–89); FERC Ans. Br. at 25–27, 45–51.

Moreover, the auction rules changed between Auctions 8 and 9. As explained in the Commission's answering brief, the Commission modified the rules with Auction 9 due to concerns about an opportunity for the exercise of market power by importing resources. FERC Ans. Br. at 37 (citing *ISO New England Inc.*, 148 FERC ¶ 61,201 at PP 10–11 (2014)); *ISO New England Inc.*, 164 FERC ¶ 61,196 at P 11 (2018). The new rules required ISO New England to impose price mitigation on New Import Capacity Resources that exercise market power. *ISO New England Inc.*, 149 FERC ¶ 61,227 at PP 9–14, 24 (2014), *reh'g denied*, 153 FERC ¶ 61,096 (2015). In addition, as reflected in the orders on review in this case, many of the modeled inputs to the auction changed between Auctions 8 and 9. For example, the modeled capacity zones changed, and ISO New England

[2] The Market Monitor elaborated that "sufficient new resources remained in the auction long enough such that, with the [Independent Market Monitor] mitigation of existing resources and New Import Capacity Resources associated with pivotal suppliers, the outcome of the auction system-wide was competitive." *In re: ISO New England Inc., Ninth Forward Capacity Auction Results Filing*, FERC Dkt. No. ER15-1137, Attachment D to ISO New England Transmittal Letter (Testimony of Jeffrey McDonald) at 4 (Feb. 27, 2015) (JA 157).

introduced a new sloped demand curve to model capacity requirements. Auction 9 Results Order at P 4; *ISO New England Inc.*, 150 FERC ¶ 61,003 at P 3 (2015); *see also ISO New England Inc. and New England Power Pool Participants Comm.*, 147 FERC ¶ 61,173 at P 29 (2014) (accepting use of a sloped demand curve beginning in Auction 9).

Mr. Chernick's latest affidavit makes no attempt to address or control for any of these variables in arguing that the Brayton Point retirement in Auction 8 was the direct cause of the prices produced in Auctions 9 and 10. His observation that a capacity shortfall persisted in Auction 9 in a particular zone (SEMA/RI), and his suggestion that Brayton Point's participation in Auction 9 would have injected a supply boost into the market that would have lowered prices, 2018 Chernick Aff. at P 6, fails to provide the missing causal link. Indeed, Mr. Chernick offers no rationale for simply adding Brayton Point's capacity to the supply that ultimately existed in Auction 9. As a result, the affidavit does not confront the core defect identified by the panel: a failure to conduct an analysis that "disentangles" and controls for "crosscutting dynamics" that frustrate a direct comparison between auctions.[3] *See Util. Workers*, 896 F.3d at 578–79.

[3] In any event, Mr. Chernick's assertion that a capacity shortfall existed in the SEMA/RI zone is nothing new. It was part of the record on review and so does not provide any additional evidence of standing. *See* Auction 9 Results Order at PP 5–6 (JA 190–91).

Finally, Mr. Chernick's entire affidavit rests on a flawed premise: that the "withholding of Brayton Point violated the norms of behavior in the New England capacity market." 2018 Chernick Aff. at P 9. That assertion crumbles under the weight of the Commission's own findings—reflected in its September 20, 2018 order—that there were "credible justifications for the [Brayton Point] owners' retirement decision," thus indicating the absence of any market manipulation. 164 FERC ¶ 61,196 at P 10 (internal quotation marks omitted). That determination deserves the Court's respect. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016).

Putting it all together, Mr. Chernick's post-opinion affidavit relies exclusively on events that occurred during Auction 8, and fails to do what the panel's opinion correctly demands: conduct an analysis that controls for market variables from one auction to the next, and which accounts for changes in auction rules between Auctions 8 and 9. *See Util. Workers*, 896 F.3d at 578–79. Accordingly, even were the panel to consider it, Mr. Chernick's affidavit does not advance the Union's argument in support of standing. As the panel correctly recognized, "the [causal] link is [still] missing." *Id.* at 579.

CONCLUSION

For the foregoing reasons, the Union's petition for rehearing should be denied.

Respectfully submitted,

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October 1, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and Circuit Rules 35 and 40, I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 35(b) and 40(b) because this brief contains 3,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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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October 1, 2018

ADDENDUM

164 FERC ¶ 61,196
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
and Richard Glick.

ISO New England Inc. Docket No. ER14-1409-000

ORDER DISMISSING AMENDED PROTEST

(Issued September 20, 2018)

1. The Commission hereby dismisses as untimely the amended protest filed by the Utility Workers Union of America Local 464 (UWUA) in the above-referenced proceeding.

I. Background

2. On February 28, 2014, ISO-NE submitted the results of its eighth Forward Capacity Auction (FCA 8) to the Commission for acceptance under section 205 of the Federal Power Act (FPA).[1]

3. On April 14, 2014, Utility Workers of America Local 464 and Robert Clark (collectively, UWUA) filed a timely motion to intervene and protest. On June 11, 2014, UWUA filed an answer to other comments. In those pleadings, UWUA alleged that the FCA 8 clearing price was the result of market manipulation because Energy Capital Partners (ECP), the owner of the Brayton Point plant, deliberately withheld Brayton Point from FCA 8 with the intent of raising the price that would be paid to ECP's other resources.[2]

4. In response to questions from Commission staff, ISO-NE amended its filing on July 17, 2014.

5. On September 16, 2014, the Secretary of the Commission issued a notice stating that, in the absence of Commission action on or before September 15, 2014, pursuant to

[1] 16 U.S.C. § 824d (2012).

[2] UWUA Motion to Intervene and Protest at 1-2 (filed April 14, 2014).

section 205 of the FPA, ISO-NE's filing, as amended, had become effective by operation of law.[3]

6. Multiple parties sought rehearing of the September 16, 2014 notice. In response, on October 24, 2014, the Secretary issued a notice stating that rehearing did not lie in the absence of "an order issued by the Commission,"[4] and noting that the rehearing petitions were dismissed on that basis.

7. On October 25, 2016, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) addressed an appeal of these notices. The court stated that the Commission, which at that time had four members, had "deadlocked about whether to approve the rates or set them for hearing," and that the FPA provided that "[a]ctions of the Commission shall be determined by a majority vote of the members present."[5] The court found that "FERC's deadlock does not constitute agency action, and the Notices describing the effects of the deadlock are not reviewable orders under the FPA."[6]

II. Amended Protest

8. On February 10, 2015, UWUA filed an amended protest. UWUA asserted that, as a fifth Commissioner had since joined the Commission, it would be possible to break the two-two deadlock. Therefore, UWUA urged the Commission to rule on the merits of the objections originally argued in UWUA's earlier protest and answer.

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[3] Notice of Filing Taking Effect by Operation of Law, *ISO New England, Inc.*, Docket No. ER14-1409-000 (September 16, 2014).

[4] Notice of Dismissal of Pleadings, *ISO New England, Inc.*, Docket No. ER14-1409-000 at 2 (October 24, 2014) ("Under section 313(a) of the FPA, '[a]ny person . . . aggrieved by an order issued by the Commission in a proceeding under [the FPA]. . . may apply for a rehearing within thirty days after the issuance of such order.' The Secretary's September 16, 2014 notice acknowledging that those filings had become effective pursuant to section 205 of the FPA in the absence of Commission action on those filings on or before September 15, 2014, was not 'an order issued by the Commission.' Rehearing therefore does not lie; the Commission did not issue an order in this proceeding, and the referenced pleadings are therefore dismissed").

[5] *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168-69 (D.C. Cir. 2016) (*Public Citizen*) (citing FPA Section 313(b), 16 U.S.C. § 825l(b)).

[6] *Public Citizen*, 839 F.3d at 1172 (footnoted omitted).

III. Discussion

9. The Commission dismisses UWUA's amended protest as untimely for two reasons. First, pursuant to the notice of filing issued in this proceeding, 79 Fed. Reg. 14,026 (2014), protests were required to be filed on or before April 14, 2014. The amended protest at issue here was not filed until February 10, 2015. Second, at the time UWUA filed the amended protest, this proceeding was no longer pending at the Commission. As confirmed by the D.C. Circuit, the FCA 8 results had become effective by operation of law and the subsequent requests for rehearing had been dismissed.

10. We note that UWUA raised similar challenges in the later proceedings in which ISO-NE submitted, respectively, the results of the ninth and tenth Forward Capacity Auctions. In orders in those proceedings, the Commission addressed UWUA's argument that the capacity prices resulting from those auctions were the result of ECP's withholding of Brayton Point, stating, "during a non-public investigation into the bidding behavior in FCA 8, [Commission Office of Enforcement] staff conducted a limited review of Brayton Point's bidding behavior and found credible justifications for the owners' retirement decision and elected not to widen its investigation to include Brayton Point."[7]

11. We further note that due to an overall shortage of existing capacity, administrative pricing rules were triggered, providing existing resources the lower of the auction clearing price or an administrative price in all zones but one.[8] Additionally, following FCA 8, the Commission initiated an investigation under section 206 of the FPA[9] into ISO-NE's treatment of import capacity resources.[10] That proceeding resulted in

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[7] *ISO New England Inc*., 151 FERC ¶ 61,226, at P 22 n.35 (2015) (citing *ISO New England Inc*., 148 FERC ¶ 61,201, at P 11 (2014)), *reh'g denied*, 153 FERC ¶ 61,378 (2015); *see also ISO New England Inc*., 155 FERC ¶ 61,273, at P 26, *reh'g denied*, 157 FERC ¶ 61,060 (2016). The D.C. Circuit similarly upheld these Commission orders. *Utility Workers Union of America Local 464 v. FERC*, 896 F.3d 573 (D.C. Cir. 2018).

[8] *See ISO New England Inc.*, 146 FERC ¶ 61,038 (2014), *reh'g denied*, 150 FERC ¶ 61,066 (2015). *See also Public Citizen*, 839 F.3d at 1168 (noting that the administrative pricing rules were triggered in FCA 8).

[9] 16 U.S.C. § 824e.

[10] *See ISO New England Inc.*, 148 FERC ¶ 61,201.

enhanced review and mitigation of capacity bids from such resources in order to limit the exercise of market power.[11]

The Commission orders:

The Commission hereby dismisses UWUA's amended protest as untimely, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[11] *See ISO New England Inc.*, 149 FERC ¶ 61,227 (2014); *reh'g denied*, 153 FERC ¶ 61,096 (2015).

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 1st day of October 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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