In the United States Court of Appeals for the Third Circuit

Nos. 11-4245, *et al.* (consolidated for certain purposes)

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

FINAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

DAVID L. MORENOFF
ACTING GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

CAROL J. BANTA
HOLLY E. CAFER
ATTORNEYS

FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

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GLOSSARY

Auction	PJM's Base Residual Auction
EPSA	Intervenor Electric Power Supply Association
FERC or Commission	Federal Energy Regulatory Commission
First Rehearing Order	Order on Compliance Filing, Rehearing, and Technical Conference, *PJM Interconnection, L.L.C.*, FERC Docket Nos. ER11-2875, *et al.*, 137 FERC ¶ 61,145 (Nov. 17, 2011), R. 278, JA 102 (on petition for review in all consolidated cases)
Initial Reliability Order	*PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (Apr. 20, 2006)
Load Petitioners	Petitioners Old Dominion Electric Cooperative, *et al.* (Case Nos. 12-1085 and 12-1764)
Maryland	Petitioner Maryland Public Service Commission (Case No. 11-4405)
Minimum Price Rule	Minimum Offer Price Rule (also called MOPR)
New Jersey	Petitioners New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel (Case No. 11-4245)
P3	Petitioner PJM Power Providers Group (Case No. 11-4486)
Power Providers	Petitioners P3 and PSEG
PJM	PJM Interconnection, L.L.C., a regional transmission organization that operates the transmission grid and wholesale electricity market in 13 mid-Atlantic states and the District of Columbia

GLOSSARY

PPL	Intervenors PPL Electric Utilities Corporation, *et al.*
PSEG	Petitioner PSEG Energy Resources & Trade LLC (Case No. 11-4487)
Reliability Market	Reliability Pricing Model (also called RPM)
Reliability Rehearing Order	*PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 (June 25, 2007), JA 3104, *reh'g denied*, 121 FERC ¶ 61,173 (Nov. 15, 2007)
Reliability Settlement	Settlement agreement among PJM and various market participants concerning Reliability Market rules, approved with conditions in the Reliability Settlement Order
Reliability Settlement Order	*PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (Dec. 20, 2006), JA 2954, *on reh'g*, 119 FERC ¶ 61,318 (June 25, 2007), JA 3104, *reh'g denied*, 121 FERC ¶ 61,173 (Nov. 15, 2007)
Second Rehearing Order	Order on Rehearing, *PJM Interconnection, L.L.C.*, FERC Docket Nos. ER11-2875, *et al.*, 138 FERC ¶ 61,194 (Mar. 15, 2012), R. 303, JA 180 (on petition for review in Case No. 12-1764)
State Petitioners	Petitioners New Jersey (Case No. 11-4245) and Maryland (Case No. 11-4405)
Tariff Filing	PJM Tariff Filing, FERC Docket No. ER11-2875 (filed Feb. 11, 2011), R. 29, JA 391

GLOSSARY

Tariff Order	Order Accepting Proposed Tariff Revisions, Subject to Conditions, and Addressing Related Complaint, *PJM Interconnection, L.L.C.*, FERC Docket Nos. ER11-2875, *et al.*, 135 FERC ¶ 61,022 (Apr. 12, 2011), R. 203, JA 24 (on petition for review in all consolidated cases)

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FINAL BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

COUNTERSTATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

These consolidated appeals seek review of three final orders of the Federal Energy Regulatory Commission ("Commission" or "FERC"). *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (Apr. 12, 2011), R. 203, JA 24 ("Tariff Order"), *on reh'g*, 137 FERC ¶ 61,145 (Nov. 17, 2011), R. 278, JA 102

("First Rehearing Order"), *on reh'g*, 138 FERC ¶ 61,194 (Mar. 15, 2012), R. 303, JA 180 ("Second Rehearing Order").[1]

PJM Interconnection, L.L.C. ("PJM") operates the high-voltage electric transmission network in the mid-Atlantic region and manages the largest competitive wholesale electricity market in the country. (PJM, when smaller, was named after the Pennsylvania-New Jersey-Maryland region in which it operated.) PJM also administers a tariff, approved by the Commission, that details the rates, terms, and conditions of regional transmission service and wholesale market mechanisms. In the orders challenged on review, the Commission ruled on tariff revisions proposed by PJM to update the rules governing its wholesale capacity market.

This Court has jurisdiction to decide these petitions for review pursuant to section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), with two exceptions. Specifically, this Court lacks jurisdiction to consider petitioners' arguments concerning the Commission's reliance on a seller's administrative costs, *see infra* pp. 74-75, and finding of consistency with regard to the revenue estimating methodology, *see infra* pp. 80-81, because no petitioner adequately raised those arguments to the Commission on rehearing. *See* FPA § 313(b), 16

[1] "R." refers to a record item. "JA" refers to the Joint Appendix page number. "P" refers to the internal paragraph number within a FERC order.

U.S.C. § 825*l*(b) ("[n]o objection . . . shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing"). *See, e.g.*, *Cities of Newark v. FERC*, 763 F.2d 533, 543-44 (3d Cir. 1985) (recognizing jurisdictional bar).

STATEMENT OF THE ISSUES

As noted *supra*, in the challenged orders, the Commission ruled on PJM's proposal to update the rules in its tariff governing its wholesale capacity market; in particular, PJM proposed revisions to the Minimum Offer Price Rule applied to its forward capacity auctions.

Petitioners

Of the seven petitions for review, five claim that the Commission's orders went too far in acting to prevent the exercise of buyer-side market power in the forward capacity market, and present the questions whether:

(1) The Commission acted within its broad statutory jurisdiction over rules affecting wholesale rates [*See* First Rehearing Order P 206, JA 164; NJ Br. 22-26[2]];

[2] This brief will refer to the various Petitioners and Cross-Petitioners and their respective opening briefs as follows: Maryland Public Service Commission ("Maryland"; "MD Br."); New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel ("New Jersey"; "NJ Br."); Old Dominion Electric Cooperative, *et al.* ("Load Petitioners"; "Load Br."); and PJM Power Providers Group ("P3") and PSEG Energy Resources & Trade LLC ("PSEG," and together with P3, "Power Providers"; "Providers Br." or (in Argument, Part III, *infra*)

(2) The Commission reasonably determined, based on substantial evidence, that eliminating the exemption of state-mandated generation resources from the Minimum Offer Price Rule was just and reasonable [*See* Tariff Order PP 139-43, JA 66-68; First Rehearing Order PP 87-101, JA 129-33; NJ Br. 9-27; MD Br. 4-11; CPV Int. Br. 3];

(3) The Commission reasonably determined, based on substantial evidence, that revising the tariff to clarify that the Minimum Offer Price Rule applies to planned resources designated as self-supply was just and reasonable [*See* Tariff Order PP 191-97, JA 80-82; First Rehearing Order PP 204-10, JA 163-65; Second Rehearing Order PP 19-28, JA 188-93; Load Br. 10-30]; and

(4) The Commission reasonably determined, based on substantial evidence, that exempting solar and wind generation resources from the Minimum Offer Price Rule was not unduly discriminatory as to natural gas-fired resources [*See* Tariff Order PP 152-57, JA 70-71; First Rehearing Order PP 109-12, JA 135-36; NJ Br. 14-15, 27-29; CPV Int. Br. 3-4].

"Br."). This brief will refer to the Petitioners/Cross-Respondents' Joint Statements as "Joint Pet. Br."; to the opening brief of Intervenor in Support of Petitioners CPV Power Development, Inc. as "CPV Int. Br."; and to the opening brief of Intervenors in Support of Cross-Petitioners PPL Electric Utilities Corporation, *et al.* as "PPL/EPSA Int. Br."

Cross-Petitioners

Two petitions for review challenge the Commission's orders from an opposing perspective, that the orders did not go far enough, and present the questions whether:

(1) The Commission reasonably balanced the competing interests by setting the threshold price level to trigger cost review and/or mitigation at less than 100 percent of estimated entry costs [*See* Tariff Order PP 66-74, JA 47-49; First Rehearing Order PP 43-47, JA 117-18; Providers Br. 32-39; PPL/EPSA Int. Br. 12-14];

(2) The Commission reasonably adopted, based on substantial evidence, a revenue estimating methodology, for use in the threshold price level, that reflects location-based price differences and real-time prices [*See* Tariff Order PP 43-47, JA 40-41; First Rehearing Order PP 23-31, JA 111-14; Providers Br. 39-49; PPL/EPSA Int. Br. 14-17];

(3) The Commission reasonably required, based on substantial evidence, a new entrant to clear the capacity market near its net entry cost once, and not two or three times, in order to secure future exemption from the Minimum Offer Price Rule [*See* Tariff Order PP 172-78, JA 75-77; First Rehearing Order PP 122-33, JA 37-41; Providers Br. 49-56; PPL/EPSA Int. Br. 17-18]; and

(4) The Commission reasonably determined that the Minimum Offer Price Rule remains just and reasonable, without adopting Power Providers' proposed exemption for any resource able to verify that it will not receive subsidies [*See* Tariff Order P 123, JA 61; First Rehearing Order P 75, JA 125; Providers Br. 56-62; PPL/EPSA Int. Br. 19].

STATUTORY PROVISIONS

The pertinent statutes are contained in the Addendum to this Brief.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This is merely the latest in a series of cases arising from the ongoing efforts of the Commission, regional transmission operators, and electricity market participants to create and implement rate designs that promote the development of sufficient capacity resources to ensure system reliability.

Specifically, this case concerns recent efforts of PJM, a regional transmission operator in certain mid-Atlantic states, and its market participants to develop a rate design to ensure reliability, especially in capacity-deficient areas of New Jersey, Maryland, the District of Columbia, and the Delmarva Peninsula.

A. Statutory And Regulatory Background

1. Federal Power Act

Section 201 of the Federal Power Act ("FPA"), 16 U.S.C. § 824, gives the Commission jurisdiction over the rates, terms, and conditions of service for the

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

All rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure they are just and reasonable, and not unduly discriminatory or preferential. FPA §§ 205(a), (b), (e), 16 U.S.C. §§ 824d(a), (b), (e). Section 206 of the FPA, 16 U.S.C. § 824e, authorizes the Commission to investigate whether existing rates are lawful. If the Commission, on its own initiative or on a third-party complaint, finds that an existing rate or charge is "unjust, unreasonable, unduly discriminatory or preferential," it must determine and set the just and reasonable rate. FPA § 206(a), 16 U.S.C. § 824e(a).

Sections 205 and 206 both permit the agency to determine whether rates are reasonable. They "differ as to the allocation of the burden of proof and the event

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[3] "'Capacity' is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option that electricity transmitters purchase from parties — generally, generators — who can either produce more or consume less when required." 569 F.3d at 479.

which triggers initiation of the rate-review proceedings." *N. Penn Gas Co. v. FERC*, 707 F.2d 763, 768 (3d Cir. 1983) (discussing similar provisions in the Natural Gas Act, 15 U.S.C. § 717 *et seq.*). Under section 205, the burden of proof is on the filing utility to show that its proposed rate change is just and reasonable. Under section 206, by contrast, the burden is on the Commission or the complainant to show that the existing rate structure results in an unjust and unreasonable rate. *See id.*

2. Developing Supplier Competition And Regional Markets

Since the 1970s, a combination of technological advances and policy reforms has given rise to market competition among power suppliers. The expansion of vast regional grids and the possibility of long distance transmission has enabled electric utilities to make large transfers of electricity in response to market conditions, thereby creating opportunities for competition among suppliers. *See New York*, 535 U.S. at 7-8 (explaining evolution of competitive markets). In 1996, the Commission furthered the development of such competition with a landmark rulemaking, affirmed by the Supreme Court, that ordered functional unbundling of wholesale generation and transmission services, requiring utilities to provide open, non-discriminatory access to their transmission facilities to

competing suppliers.[4] *See New York*, 535 U.S. at 11-13; *cf. Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008) ("the Commission has attempted to break down regulatory and economic barriers that hinder a free market in wholesale electricity").

To broaden the geographic reach of wholesale competition and to promote efficiencies, the Commission has also encouraged the creation of "regional transmission organizations," independent regional entities that operate the transmission grid on behalf of transmission-owning member utilities and are required to maintain system reliability. *See NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 130 S. Ct. 693, 697 & n.1 (2010) (explaining responsibilities of an independent system operator). As these regional entities restructured electricity supply options with greater reliance on auction-based electricity markets and price caps or market power mitigation in those markets, they developed different approaches to address reliability needs. *See generally Pub. Utils. Comm'n of Cal. v. FERC*, 254 F.3d 250, 252 (D.C. Cir. 2001)

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

(California required reliability contracts to ensure that generators were available when needed); *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1235 (D.C. Cir. 2005) (New York system operator adopted a capacity market); *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 (D.C. Cir. 2008) ("*Maine*") (New England regional system adopted a capacity market) (reversed in one unrelated respect in *NRG Power Mktg.*).

These regional entities also run auction markets for electricity sales. *See Morgan Stanley*, 554 U.S. at 537. Such organized regional markets are subject to FERC market rules that help mitigate the exercise of market power, to price caps in some instances, and to oversight of market behavior and conditions by the regional entities' own market monitors. *See, e.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904, FERC Stats. & Regs. ¶ 31,252, 119 FERC ¶ 61,295 at P 955 (2007), *on reh'g and clarification*, Order No. 697-A, 73 Fed. Reg. 25,382, FERC Stats. & Regs. ¶ 31,268, 123 FERC ¶ 61,055 at P 395 (2008), *aff'd, Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied sub nom. Pub. Citizen, Inc. v. FERC*, 133 S. Ct. 26 (2012).

PJM is the independent system operator for a regional transmission system that spans thirteen mid-Atlantic states, plus the District of Columbia, stretching as far south as North Carolina and as far west as Chicago. *See Md. Pub. Serv.*

Comm'n v. FERC, 632 F.3d 1283, 1284 (D.C. Cir. 2011) ("*Maryland*"); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at PP 2, 8 (2006). Among its responsibilities is "ensuring that its system has sufficient generating capacity," in order to prevent service interruptions. *Maryland*, 632 F.3d at 1284.

B. Background Of PJM's Reliability Market

1. History Of PJM's Capacity Requirements

Like other regional entities, PJM has tried several different mechanisms to ensure reliability on its system, especially in capacity-deficient areas of New Jersey, Maryland, the District of Columbia, and the Delmarva Peninsula. Since its inception as a tight power pool, PJM required member utilities to commit capacity in advance to support their customers' electrical capacity needs or pay a deficiency charge based on the fixed costs of a new generator. *Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257, at 62,276 n.197 (1997) ("deficiency charge is . . . based on the cost of installing a combustion turbine generator"). In 1999, PJM modified the reliability requirement to allow load-serving utilities to wait until the day before the operating day to procure needed capacity. *See PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 9 (2006) ("Initial Reliability Order"). At the same time, PJM instituted daily and monthly market opportunities for the purchase of capacity credits, in which a single clearing price was paid to all suppliers to meet each day's capacity requirement. *See id.*; *see also Utilimax.com,*

Inc. v. PPL Energy Plus, LLC, 378 F.3d 303, 305 (3d Cir. 2004) (describing ways a load-serving utility could satisfy its capacity obligation and the method for determining prices in the capacity credit markets). PJM kept the deficiency charge for load-serving utilities that failed to procure sufficient capacity to meet peak demand plus a reserve margin. *See* Initial Reliability Order P 9.

With about a year of experience under this new market, PJM found that the modifications it had made to the capacity market were creating supply insufficiencies and volatile capacity prices in certain locations. *See id*. P 11 ("the limitations of PJM's capacity construct will result in multiple reliability criteria violations in Eastern PJM, particularly in New Jersey, the Delmarva Peninsula and the Baltimore-Washington area"); *id*. P 23 ("daily prices in the PJM capacity credit market have been at or near zero for most of the 2000 – 2004 period, with occasional spikes (some lasting multiple months) of well over $100 per megawatt-day"); *see also Utilimax.com*, 378 F.3d at 305 (during the first quarter of 2001, the capacity deficiency rate was $177.30 per megawatt-day and double that when there was an overall shortage).

2. Development Of PJM Capacity Market

In 2000, PJM responded to those problems by initiating negotiations with stakeholders and neighboring transmission grid operators to reform the capacity market. *See* Initial Reliability Order P 12. After a prolonged period with lack of

sufficient majority support, PJM submitted its own proposal for a new market in 2005. *Id*. P 13. While the Commission found that the existing capacity market was unreasonable, it did not adopt PJM's replacement proposal in full; instead, the Commission directed additional process to develop a just and reasonable capacity market. *Id*. P 6. The Commission encouraged PJM to address the shortcomings in its existing market, including any need for location-specific capacity requirements and incentives to retain existing generation and attract new sources of supply through transmission expansion, demand response, and new generation resources. *Id*.

In 2005 and 2006, at the urging of the Commission, PJM market participants intensified debate on reform of the market, with at least three formal technical conferences and many informal discussions to consider multiple proposals. *See id.* PP 11, 26; *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at PP 21-22 (2006) ("Reliability Settlement Order"), *on reh'g*, 119 FERC ¶ 61,318 ("Reliability Rehearing Order"), *reh'g denied*, 121 FERC ¶ 61,173 (2007). At the request of parties, an administrative law judge facilitated a settlement agreement ("Reliability Settlement") that resolved all remaining issues regarding implementation of the Reliability Market. Reliability Settlement Order PP 22-24.

The Reliability Market proposed in the Settlement, approved with modifications by the Commission, and incorporated into PJM's tariff contains

features previously approved for other regional entities' markets.[5] A proxy demand curve, called the Variable Resource Requirement Curve, is used to set the price and amount of annual capacity needed for each of the 23 delivery areas established for the Market. *See id.* PP 25-26. The Curve is a downward sloping demand curve, and the height of the curve is determined by the net cost of new entry, the calculation of which is governed by PJM's tariff. *See id.* P 26. In general, the net cost of new entry is the gross cost of new entry less an offset for energy and ancillary services revenues. *See id.* The downward-sloping curve is intended to reduce price volatility, rendering capacity investments less risky and encouraging increased investment at a lower financing cost. *Id.* P 75. PJM is required to evaluate the need for changes to the Variable Resource Requirement Curve and its inputs, including the net new entry cost, at least every three years. *Id.* P 27. Utilities can opt out of the reliability auctions by supplying sufficient

[5] *See Elec. Consumers*, 407 F.3d at 1239-42 (upholding FERC's approval of the New York Independent System Operator's market design, which caps prices that must be paid for various quantities of capacity using an administratively-determined demand curve); *Maine*, 520 F.3d at 467-76 (upholding in relevant respect FERC's approval of the New England region's Forward Capacity Market, using a location component that would set higher prices in capacity-deficient areas); *see also Connecticut*, 569 F.3d at 480 (detailing auction process); *Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (upholding FERC's denial of a complaint challenging high capacity prices during the transitional period before that market took effect; noting that "the Forward Capacity Market [] has met our approval and is being put into place").

capacity from their own generation or through bilateral contracts with suppliers. *Id*. P 6.

PJM's market design also incorporates a deliverability requirement, ensuring that generators committing capacity can deliver that capacity to the load, even in the presence of transmission constraints. This provides a possibility for 23 different annual capacity prices in the Reliability Market when transmission constraints limit the amount of generation that can be imported into each of PJM's 23 sub-regions. *Id.* PP 14, 30. The Reliability Market also provides for auctions to be conducted every year to procure capacity three years in advance of the year in which the capacity will be provided. *Id.* P 6. "This lag time allows competition from new suppliers that lack the capacity to deliver electricity now but could develop that capacity within three years of winning a bid." *Maryland*, 632 F.3d at 1285.

In addition, the Reliability Market includes measures to mitigate any supplier market power identified by PJM's independent Market Monitor. *See* Reliability Settlement Order PP 33-35. The tariff prevents existing capacity resources from physically withholding their supply by requiring "that all available capacity must be offered in the Base Residual Auction [("Auction")] and incremental auctions . . . ." *Id*. P 33 (explaining that the Commission will halt Auction processes if the Market Monitor suspects physical withholding). To

prevent suppliers from driving prices to above-competitive levels through bidding strategies, the tariff specifies rules for capping bids in noncompetitive conditions at a supplier's avoidable or opportunity cost. *Id*.

PJM's Reliability Market also includes measures to mitigate buyer market power in the form of artificial price suppression caused by below-cost offers. The Minimum Offer Price Rule ("Minimum Price Rule" or "MOPR"), as originally implemented, employed three screens: a conduct screen, an impact screen, and a net-short requirement. *See* Tariff Order P 6, JA 29-30. The conduct screen (i.e., the minimum offer price) is a threshold price set at a percentage of the Net Asset Class Cost of New Entry, determined separately for combustion turbine and combined cycle units. *Id.* P 6 & n.13, JA 29. For combustion turbine and combined cycle units, the threshold was 80 percent of the applicable net new entry cost. *Id.* For other resources subject to the Rule, the threshold was 70 percent of the net entry cost for a combustion turbine resource. *Id.*

An offer failing the conduct screen threshold was next subjected to an impact test, which would re-run the Auction to compare the clearing price with the offer as submitted and with mitigation imposed. *Id.* P 6, JA 29. An offer failed the impact screen when it would depress the clearing price in the applicable delivery area by 20 to 30 percent (depending on the area), or $25/megawatt-day. *Id.* P 6 n.14, JA 29. Such an offer was then subject to the net-short requirement, which

identified capacity market sellers who were net buyers in the Reliability Market. *Id.* P 6 n.15, JA 30.

An offer that failed all three screens would be "subject to a mitigated price, i.e., the uneconomic offer is increased to a competitive level." *Id.* P 6, JA 30. The mitigated price was 90 percent of the applicable net entry cost for combustion turbine and combined cycle resources. Other resources were mitigated to 80 percent. The screens and mitigation, however, applied only to the first Auction in which a planned generation resource was offered. *Id.*

In previous appeals concerning PJM's forward-looking locational capacity market, the U.S. Court of Appeals for the D.C. Circuit upheld the Commission's approval of that rate design (*Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. Mar. 17, 2009)), and later upheld the Commission's denial of challenges to the results of capacity auctions held during the transitional period leading up to full implementation of the capacity market (*Maryland*, 632 F.3d 1283). In the latter case, the Court noted there was substantial evidence that PJM's Reliability Market had spurred development of new capacity resources and improved reliability. 632 F.3d at 1285.

II. THE COMMISSION PROCEEDINGS AND ORDERS ON REVIEW

A. Tariff Order

On February 1, 2011, PJM Power Providers Group ("P3") filed a complaint under Federal Power Act section 206 against PJM, claiming that the Minimum Price Rule was ineffective in deterring buyer market power. *See* Complaint, R. 1, JA 194. PJM, after holding a conference call with stakeholders, submitted its own filing under FPA section 205, proposing revisions to its tariff, on February 11, 2011. *See* Tariff Filing, R. 29, JA 391. PJM stated that its proposed revisions were designed to update and clarify the Minimum Price Rule, consistent with reforms implemented by system operators in New York and New England and in response to certain state initiatives in New Jersey and Maryland. *See id.* at 1, 3-4, JA 391, 393-94.

On April 12, 2011, the Commission issued its Tariff Order, which largely accepted PJM's proposed revisions, subject to conditions. Tariff Order P 3, JA 28. The Commission also addressed some issues in P3's complaint and deferred others. *Id.*

Among other changes to PJM's tariff, the Commission approved the elimination of the impact screen and the net-short requirement. Tariff Order PP 86, 101, JA 52, 56. As relevant to these appeals, the Commission accepted PJM's proposals to eliminate the exemption of state-mandated projects from the

Minimum Price Rule, to clarify that new generation designated as self-supply is subject to the Rule, and to exempt wind and solar generation from the Rule. *Id.* PP 139, 191, 152, JA 66, 80, 70. The Commission also accepted revisions to the level and methodology used to set the conduct screen, in particular increasing the threshold price for combustion turbine and combined cycle resources from 80 to 90 percent of net new entry costs. *Id.* PP 43, 66, JA 40, 47. In addition, the Commission revised the Rule to apply to a new resource only until that resource clears in one Auction (*id.* P 176, JA 76), and declined to adopt an additional exemption, proposed by P3, for resources that do not receive state subsidies (*id.* P 123, JA 61).

With respect to the review of mitigated sell offers, however, the Commission rejected PJM's proposal to allow parties to seek review of such mitigation directly from the Commission. The Commission directed PJM to submit a proposal for a process and applicable criteria for the independent Market Monitor and/or PJM to review parties' cost justifications. *Id.* PP 118-22, JA 60-61.

B. First Rehearing Order

Numerous parties filed requests for rehearing and/or clarification of the Tariff Order. On June 13, 2011, the Commission directed its staff to convene a technical conference to explore certain issues raised on rehearing (in particular, PJM's proposed clarification that self-supply sell offers for planned resources

submitted into the auction are subject to the Minimum Price Rule) and to provide an opportunity for parties to file comments after that conference. Order Granting Rehearing for Further Consideration and Establishing Technical Conference, *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,228 at P 6 (2011), R. 239, JA 92, 95. Commission staff convened that conference on July 28, 2011, and various parties subsequently filed comments.[6]

On November 17, 2011, the Commission issued the First Rehearing Order, which ruled on the requests for rehearing or clarification, addressed arguments raised in the comments submitted after the technical conference, and partially accepted and partially rejected PJM's compliance filing. The Commission largely reaffirmed its findings in the Tariff Order, and approved PJM's proposal for a unit-specific review process that would take into account longstanding business models used by load-serving entities in developing resources for self-supply. *See, e.g.*, First Rehearing Order PP 3-5, JA 105-06.

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[6] The Commission continues to oppose Maryland's efforts to supplement the administrative record with a transcript of the staff technical conference, for reasons stated more fully in the Commission's response, filed on April 5, 2012, in opposition to Maryland's March 23, 2012 motion to supplement the record. On April 25, 2012, a motions panel of this Court referred Maryland's motion to the merits panel.

The Commission itself has ruled that the technical conference is not a part of the administrative record and that the Commission did not base its decisionmaking upon that conference. *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,011 at PP 22-24 (2012).

New Jersey filed a petition for review (Case No. 11-4245) in this Court, while P3 and PSEG filed petitions for review in the D.C. Circuit. The U.S. Judicial Panel on Multidistrict Litigation consolidated the petitions and, by random selection, designated this Court to consider them. (The transferred P3 and PSEG petitions are Case Nos. 11-4486 and 11-4487, respectively.) Maryland (Case No. 11-4405), Hess Corporation (Case No. 12-1086), and Load Petitioners (Case No. 12-1085) also filed petitions for review in this Court.

C. Second Rehearing Order

The Load Petitioners, among others, filed requests for rehearing and/or clarification of the Commission's ruling on PJM's compliance filings.

On March 15, 2012, the Commission issued its Second Rehearing Order, affirming its previous ruling on PJM's compliance filing regarding the unit-specific review process. Second Rehearing Order PP 1, 18-28, JA 180, 188-93.

The Load Petitioners filed a petition for review (Case No. 12-1764) of the Second Rehearing Order; the petition was consolidated with the other pending cases.

D. Later Commission Proceedings

The Reliability Market and the Minimum Price Rule have continued to evolve since the Commission issued the orders on review here. Following the triennial review of the Variable Resource Requirement Curve and its inputs, as

well as a study of Reliability Market performance, PJM proposed a number of updates, which the Commission approved in part, and suspended subject to a hearing in part, on January 30, 2012. *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,062, *on reh'g*, 139 FERC ¶ 61,031 (2012). As relevant to the issues before this Court, the Commission approved a change in the methodology for calculating revenues used to determine the net new entry cost, to incorporate consideration of day-ahead market prices. *Id.* PP 69, 144. That change became effective January 31, 2012, in time for the 2012 Auction. *Id.* P 144. The Commission set for hearing PJM's proposal to update the gross cost of new entry values used in determining the Variable Resource Requirement Curve and the conduct screen threshold. *Id.* P 15. The parties conducted settlement discussions and PJM filed, on November 21, 2012, an offer of settlement that would resolve all issues in that proceeding. The Commission has not yet acted on the settlement.

Also, on December 7, 2012, PJM proposed a package of reforms to the Minimum Price Rule developed as part of its stakeholder process, requesting an effective date of February 5, 2013, in order to be effective for the 2013 Auction. *See* PJM Proposal at 2, 16-17, FERC Docket No. ER13-535 (filed Dec. 7, 2012), available at http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13127750. PJM now proposes to implement two broad, categorical exemptions to the Minimum Price Rule, for self-supply for certain load-serving entities, and for

competitive entry projects that receive no out-of-market payments. *Id.* at 15. Certain state-sponsored projects may also be eligible for an exemption. *Id.* PJM also proposes to narrow the Minimum Price Rule to apply only to certain generating technologies (gas-fired combustion turbine, combined cycle, or integrated gasification combined cycle). *Id.* PJM further proposes to increase the mitigation period, in general, and to set the conduct screen threshold at 100 percent of the net new entry cost. *Id.* at 16. Finally, in light of the proposed changes to exemptions to the rule and other changes, PJM proposes to eliminate the unit-specific cost review process. *Id.* PJM states that stakeholders overwhelmingly approved the package of reforms. *Id.* at 1. The Commission has not yet acted on PJM's filing.

STATEMENT REGARDING RELATED CASES AND PROCEEDINGS

There are no related proceedings pending before this Court. As noted *supra* at p. 17, past related appeals, concerning PJM's Reliability Market, were decided by the U.S. Court of Appeals for the D.C. Circuit (affirming the Commission) in *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (D.C. Cir. 2009), and *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011). A case currently pending before the D.C. Circuit, *New England Power Generators v. FERC*, D.C. Cir. No. 12-1060, raises similar issues with respect to the New England regional operator's tariff.

In addition, further revisions to PJM's Reliability Market and Minimum Price Rule are currently pending before the Commission, as discussed *supra*.

STANDARD OF REVIEW

"This Court's review of the Commission's rate-setting function is limited." *Cities of Newark v. FERC*, 763 F.2d 533, 545 (3d Cir. 1985) (citing *N. Penn Gas Co. v. FERC*, 707 F.2d 763, 766 (3d Cir. 1983)). "The court is restricted to determining 'whether a rational basis exists for a conclusion, whether there has been an abuse of discretion, or . . . whether the Commission's order is arbitrary or capricious or not in accordance with the purpose of the [Federal Power] Act.'" *Cities of Newark*, 763 F.2d at 545 (internal quotation marks and citation omitted). *See generally Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (Court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Reviewing courts "afford *Chevron* deference to the Commission's assertion of jurisdiction" under the Federal Power Act. *See Connecticut*, 569 F.3d at 481 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *see also Air Courier Conference of Am./Int'l Comm. v. U.S. Postal Serv.*, 959 F.2d 1213, 1223 (3d Cir. 1992). If, in reviewing the statute, "the intent of

Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 401 (D.C. Cir. 2004) (quoting *Chevron*, 467 U.S. at 842-43). But if the statutory text is ambiguous, the Court "will defer to the agency's interpretation if it is reasonable." *Id.*; *see also Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 343 (3d Cir. 2007) (requiring only a "permissible interpretation" under *Chevron* step two).

In addition, the Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also Maryland*, 632 F.3d at 1286 ("[B]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.") (internal quotation marks and citation omitted); *accord Elec. Consumers*, 407 F.3d at 1236. Because Congress entrusted regulation under the Federal Power Act "to the informed judgment of the Commission," the agency's exercise of its expertise carries "a presumption of validity" that imposes upon those who would overturn the Commission's judgment "the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *N. Penn Gas Co.*, 707 F.2d at 766

(internal quotation marks and citations omitted).[7] Accordingly, "[t]his court's scrutiny of the Commission's rate-review function is limited." *Id.*

Moreover, the "great deference" that courts afford to the Commission's rate decisions derives from the standards in the Federal Power Act itself, because "[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition . . . ." *Morgan Stanley*, 554 U.S. at 532; *see also Permian Basin*, 390 U.S. at 767 ("[C]ourts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness.'") (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984) (reasonableness is a "zone," not a precise point, and FERC has discretion to consider legitimate non-cost factors to allow variation within that zone); *Maine*, 520 F.3d at 471 (reviewing cases and noting FERC's pricing flexibility).

The Commission's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *see Cities of Newark*, 763 F.2d at 545. The substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the

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[7] Though *North Penn Gas* and cases cited therein arose under the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, the relevant provisions of the Federal Power Act are substantially identical and courts apply the same standard of review. *See Cities of Newark*, 763 F.2d at 545 & n.20 (citing cases).

evidence.'" *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (citation omitted); *accord Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted); *accord Consol. Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 279 (D.C. Cir. 1986); *Mars Home for Youth*, 666 F.3d at 853. If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency's findings. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966); *accord Fla. 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 [petitioner]'s version of events, but whether it supports FERC's."); *see also Dynamic Sec. Concepts, Inc. v. FAA*, 408 F. App'x 624, 630 (3d Cir. 2010).

SUMMARY OF ARGUMENT

This case concerns the Commission's responsibility under the Federal Power Act to balance the various interests of all parties involved in a regional, auction-based capacity market. In the challenged orders, the Commission considered, and largely approved as just and reasonable, PJM's proposed revisions to rules governing its market mechanism for securing sufficient capacity to ensure reliability of the regional power system. The Commission also required certain

changes to the process for mitigating uncompetitively low auction bids, to further the goal of preventing artificial price suppression while accounting for business considerations of market participants.

In these consolidated appeals, two states and a group of load-serving entities contend that the Minimum Price Rule, as revised, goes too far in subjecting new capacity resources to possible price mitigation, while groups of power suppliers contend that the Rule does not go far enough, potentially allowing exercises of market power. But the Commission fully considered all aspects of the Minimum Price Rule, with a focus on the purpose and function of the Reliability Market, and reasonably balanced those conflicting interests and its own statutory responsibilities in deciding each of the contested issues.

The State Petitioners' and Load Petitioners' challenges to the Commission's well-reasoned orders lack merit. First, in approving PJM's market rules, the Commission acted within its long-recognized statutory jurisdiction over wholesale capacity prices. The Minimum Price Rule affects only the price at which a capacity resource may bid into the Reliability Market; it does not dictate any choices of states to regulate or subsidize generation, or of load-serving entities to build or contract for new resources, but permissibly determines how such decisions may affect wholesale prices.

With its focus on such market effects, the Commission reasonably approved elimination of an exemption for state-mandated resources. The Commission appropriately found that allowing state-promoted resources to bid into the Auction at zero could result in artificial price suppression, distorting the price signals that the Reliability Market is designed to produce. The Commission similarly found that guaranteeing clearance of self-supply in the Auctions could unreasonably suppress prices; the Commission appropriately determined that self-supply resources should instead have the opportunity to justify low-cost offers as economic in a unit-specific review process that would take into account load-serving entities' business models. The Commission also reasonably determined that the Minimum Price Rule is not unduly discriminatory with respect to natural gas-fired resources.

Power Providers' claims that the Commission's orders fall short in preventing buyer-side market power likewise lack merit. The Commission's decisions concerning the appropriate conduct screen threshold, the duration of mitigation, and an additional exemption for so-called "no-subsidy" resources reflect a reasoned balance of competing interests, based on the record before the Commission at this time. Power Providers, however, continue to assume that all offers below the threshold are illegitimate, without acknowledging the Commission's findings to the contrary. Power Providers have not demonstrated

that the Commission acted unreasonably, let alone arbitrarily, in refusing to require perfect adherence to an imperfect estimate — particularly in light of the administrative burdens of the cost review process. Indeed, theoretical perfection is not necessary at this time — all the reviewing Court need do is assure itself that the agency, as here, has confronted the arguments and explained adequately why and how the market is improving itself.

ARGUMENT

I. THE COMMISSION APPROPRIATELY FULFILLED ITS RESPONSIBILITY UNDER THE FEDERAL POWER ACT TO BALANCE VARIOUS INTERESTS

In this case, various petitioners challenge the Commission for applying the Minimum Price Rule too stringently (State Petitioners and Load Petitioners) and not stringently enough (Power Providers). As discussed more fully in Parts II and III, *infra*, however, the Commission reasonably carried out its statutory responsibility to balance different, and often conflicting, interests in determining how to ensure that the Reliability Market produces just and reasonable outcomes. *Cf. Blumenthal*, 552 F.3d at 885 (regional electricity market presents "'intensely practical difficulties' demanding a solution from FERC, and the Commission must be given the latitude to balance the competing considerations and decide on the best resolution") (internal citation omitted).

Courts have long recognized that the Federal Power Act is intended to ensure not only reasonable rates but also reliable service and development of energy supplies. *See, e.g.*, *Consol. Edison Co. v. FERC*, 510 F.3d 333, 342 (D.C. Cir. 2007) ("the FPA has multiple purposes in addition to preventing 'excessive rates' including protecting against 'inadequate service' and promoting the 'orderly development of plentiful supplies of electricity'") (quoting *Cities of Anaheim v. FERC*, 723 F.2d 656, 663 (9th Cir. 1984), and *Pub. Utils. Comm'n of Cal. v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004)); *see also NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (finding it "clear" that the "principal purpose" of the Natural Gas Act and Federal Power Act "was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices"). Seeking that balance is at the center of the Commission's decisions regarding the rate design and oversight of capacity markets.

In addition, the Commission's rate responsibilities under the Federal Power Act include choosing "an appropriate 'balancing of the investor and the consumer interests.'" *Morgan Stanley*, 554 U.S. at 532 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944)); *accord Permian Basin*, 390 U.S. at 776; *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-78 (D.C. Cir. 1987) (en banc) (in assessing justness and reasonableness of rates, "courts must determine whether or not the end result of that order constitutes a reasonable balancing, based

on factual findings, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates") (reviewing *Hope Natural Gas* and subsequent cases). Again, the Commission's evaluation of PJM's Reliability Market seeks to balance those interests by ensuring that market forces operate properly to generate price signals that encourage economic investments in capacity-deficient areas. *See, e.g.*, First Rehearing Order P 3, JA 105; Reliability Settlement Order P 68. Similarly, in revising the mitigation process under the Minimum Price Rule, the Commission considered both the prevention of price suppression and the administrative burden on capacity suppliers, finding that the unit-specific review "appropriately balances the need to protect against uneconomic entry while also minimizing any burden placed on resources choosing to procure or build capacity under long-standing business models." Second Rehearing Order P 23, JA 190; *see infra* Part II.D.

The Commission also strikes a jurisdictional balance between the need to regulate capacity markets to ensure reliability of regional networks and states' rights to regulate generation directly. *See, e.g., Muns. of Groton v. FERC*, 587 F.2d 1296, 1302 (D.C. Cir. 1978) (upholding Commission's jurisdiction to review capacity deficiency charges); *Connecticut*, 569 F.3d at 482 (holding that capacity requirement affected wholesale prices but did not directly regulate construction of generation). Here, the Commission reasonably concluded that the revised

Minimum Price Rule "serves to reconcile the tension that has arisen between policies enacted by states and localities that seek to construct specific resources, and our statutory obligation to ensure the justness and reasonableness of the prices determined in the Reliability Market." First Rehearing Order P 4, JA 106.

Moreover, the Commission often must balance the divergent interests of various states. This responsibility is particularly salient in the context of multistate arrangements such as regional transmission organizations, as FERC "is perhaps in the best position to reach the most equitable result and to act in the public interest, rather than to be controlled by the necessarily parochial concerns of the States." *Miss. Indus. v. FERC*, 808 F.2d 1525, 1549 (D.C. Cir.) (internal quotation marks and citation omitted), *vacated and remanded in part on other grounds*, 822 F.2d 1103 (D.C. Cir. 1987); *cf. Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 390 (1988) (Brennan, J., dissenting) ("[I]t makes a great deal of sense to read the [Federal Power Act] as allowing FERC to exercise jurisdiction over the allocation of costs among interstate pool members because otherwise every state commission would have a parochial incentive to claim that the costs must be imposed on the utilities located in other States. A neutral federal mediator is needed."). For instance, in the case of PJM's Reliability Market, which spans 13 states and the District of Columbia, the Commission considered the arguments of New Jersey and Maryland in favor of maintaining a state-mandate exemption from

the Minimum Price Rule and the concerns of Pennsylvania (and other states) that such an exemption would allow individual states to make regulatory choices that affect market prices for participants in multiple states. *See infra* Part II.C.1.

Given its responsibilities for considering all of the inconsistent and often conflicting interests in addressing the "intensely practical difficulties" of regional electricity markets, "the Commission must be given the latitude to balance the competing considerations and decide on the best resolution." *Blumenthal*, 552 F.3d at 885. As explained in the following sections, the Commission carefully considered the complex and disputed issues surrounding the Minimum Price Rule and approved reasonably balanced revisions to that mechanism.

II. THE COMMISSION REASONABLY APPROVED PJM'S PROPOSED REMOVAL OF THE STATE EXEMPTION, CHANGES TO TREATMENT OF SELF-SUPPLY, AND EXEMPTION OF CERTAIN TECHNOLOGIES [RESPONDING TO PETITIONERS]

New Jersey, Maryland, and the Load Petitioners argue that the Commission, in revising the Minimum Price Rule to apply to state-mandated resources and self-supply, unreasonably expanded the scope of the Minimum Price Rule, encroaching upon states' ability to regulate generation resources and imposing an unreasonable burden and investment risk on load-serving entities. New Jersey also contends that, with the exemption of solar and wind technologies (as well as other, already-excluded resources), the Minimum Price Rule is unduly discriminatory toward natural gas-fired units. More broadly, New Jersey contends that the Commission

exceeded its jurisdiction under the Federal Power Act and changed the purpose and function of the Reliability Market.

On each point, however, the Commission fully explained its reasoning and based its determinations on preventing the distortive effect of uneconomic entry into the Reliability Market.

A. In Regulating Wholesale Regional Markets, The Commission Appropriately Focuses On Preventing Artificial Suppression Of Market Prices

In considering PJM's proposed revisions to the Minimum Price Rule, the Commission properly focused on protecting the integrity of price signals produced by the Reliability Market. The purpose of that mechanism is to secure sufficient capacity to ensure system reliability at just and reasonable prices, while using Auction results to produce price signals to elicit new entry when and where it is needed. *See* First Rehearing Order PP 2-3, JA 105-06; *see also* Tariff Order P 193, JA 81 (Reliability Market relies on competition between existing resources and competitive new entry to secure capacity at a least cost rate); First Rehearing Order P 90, JA 130; *Connecticut*, 569 F.3d at 481 ("the purpose of the Forward Market is only to locate the price at which market incentives will be sufficient to meet" expected peak demand).

In this Auction context, "price-taking" refers to an offer that — whether through cost efficiency or through anticompetitive bidding at a below-cost level —

is lower than the price determined by the Auction (i.e., the price that the resource will receive for providing capacity). When an offer "clears" in an Auction — i.e., is equal to or less than the highest-priced resource that is needed as determined by the demand curve — that demonstrates that the resource is needed by the market. Tariff Order P 175, JA 76. For that reason, allowing an offer that does not reflect its costs to clear could distort the signals that the Reliability Market is designed to produce as to whether and where resources are needed, and at what incremental cost new investment is justified.

The Reliability Market is mitigated to prevent the exercise of supplier market power to drive up the clearing price. *See generally* Reliability Settlement Order P 33; *supra* pp. 15-16. The Minimum Price Rule is the parallel to that mitigation: just as it is necessary to prevent artificial inflation of Auction prices, the Minimum Price Rule is necessary to prevent artificial depression of those prices. *See* First Rehearing Order P 24, JA 111-12; Tariff Order P 141, JA 67. But while the rationale for the Minimum Price Rule is to prevent exercise of buyer-side market power, the Rule is focused, not on attempting to ferret out which capacity resources might have incentives to depress prices, but rather on the offers themselves, and their potential effects on the market. *See*, *e.g.*, Tariff Order P 143, JA 68.

Accordingly, the "very purpose" of the Minimum Price Rule "is to hinder . . . uneconomic entry, i.e., to ensure that an offer that may be the result of buyer market power does not clear at its artificially low level, thereby injecting uneconomic supply into the market." *Id.* P 104, JA 57. *See generally N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at PP 100-06 (2008) (explaining that uneconomic entry occurs when a buyer of capacity builds or contracts for a small amount of the total capacity it needs at a price that exceeds the expected market price, then bids that capacity into the market at a low price in order to depress the market clearing price for capacity, thereby lowering its total costs for capacity). Because uneconomic entry means that an offer does not reflect the resource's actual incremental fixed costs, it does not elicit competitive entry. *Cf.* Initial Reliability Order P 35 ("investors will not finance generation additions . . . if market revenues are inadequate to recover costs").

All that said, it is important to understand the narrow scope of the Minimum Price Rule — while all available capacity must be offered into the Auction, only a limited subset of those resources are subject to the Rule. First, the Rule applies only to new (planned) capacity, not to existing resources (including resources that are not yet in operation but that already cleared as planned resources in a previous Auction). *See* Tariff Order PP 174-76, JA 76. Second, the Rule applies to a new resource only until that resource clears in one Auction; once it clears, it will not be

mitigated in future Auctions. *See id.* P 176, JA 76 (adopting the one-Auction clearing standard); *see also id.* P 175, JA 76 ("once a new resource has cleared in one auction at the offer price floor, the resource has demonstrated that it is needed by the market and it is therefore economic"). *See infra* Part III.C (addressing Power Providers' objections that one-Auction clearing is not sufficient to prevent price suppression).

In addition, the Rule applies only to new gas-fired resources, so other technologies that load-serving entities choose to diversify their generation resources, or that states choose to promote or require for their own policy reasons, are not affected. *See* First Rehearing Order P 4, JA 106; *see also infra* Part II.E (addressing New Jersey's objection that limitation to gas-fired resources is unduly discriminatory). Furthermore, under the Rule, mitigation — that is, substitution of an adjusted offer based on the cost of new entry benchmark — applies only to resources that are unable to justify their lower-than-competitive offers. Tariff Order P 104, JA 57 ("[B]ecause a resource that justifies its costs with the [Market Monitor] will be allowed to bid its actual competitive costs, *only offers that are demonstrated to be uneconomic* will be mitigated.") (emphasis added). *See infra* Part II.D.2 (discussing unit-specific review process).

Finally, the Commission has repeatedly noted that load-serving entities can avoid any risk of mitigation by forgoing the Reliability Market entirely, if they

choose to supply their capacity needs using the Fixed Resource Requirement instead. Tariff Order P 192, JA 81 (Fixed Resource Requirement under PJM's tariff offers "an alternative for those load serving entities that wish to bring new generation resources into the PJM capacity market without risk of being mitigated"); *see also* First Rehearing Order P 160, JA 151 (fixed option "is the alternative for load serving entities that wish to secure their own capacity resources outside of a competitive market"); Reliability Settlement Order PP 17, 36. A load-serving entity "may elect this alternative if it demonstrates the capacity to satisfy the entire capacity obligation for all load, including load growth, in the applicable Fixed Resource Requirement service area" for a fixed term. Reliability Settlement Order P 36.

Several Petitioners argue that the fixed option is not a viable alternative for all states or load-serving entities. *See* NJ Br. 33; MD Br. 11-14; Load Br. 22-24. Of course, the Commission did not suggest that it is. In particular, the Commission recognized that the fixed option "does not provide the necessary flexibility to load serving entities seeking both to build new rate-based capacity to serve load and to offer their surplus capacity into the [Reliability Market] option as price-takers." Tariff Order P 192, JA 81; *see also id.* P 195 n.98, JA 82 (option "does not (and should not) give the participating . . . entities an opportunity to defray the costs of new resources that they do not need by offering them into the . . . auctions").

Neither the fixed option nor, for that matter, the Minimum Price Rule was intended to be used for that purpose. *Id.* "PJM's tariff provides this alternative method of satisfying resource requirements while preserving wholesale market prices, and states and distribution companies can make this choice based on their individual circumstances." First Rehearing Order P 100, JA 133 ("this is an individual determination to be made by each state and distribution company"). Though it may not be a desirable or appropriate option for every entity, it is an alternative to the Auction-based pricing of the Reliability Market.

B. The Commission's Regulation Of Wholesale Regional Markets Is Within Its Statutory Jurisdiction And Does Not Interfere With State Policy Choices Concerning Generation

Under the Federal Power Act, the Commission has broad authority over rules "affecting" wholesale rates (FPA §§ 205(a), 206(a), 16 U.S.C. §§ 824d(a), 824e(a)), while states retain authority over "facilities used for . . . generation" (FPA § 201(a)-(b), 16 U.S.C. § 824(a)-(b)). *See also supra* pp. 6-7. The D.C. Circuit has repeatedly upheld the Commission's regulation of capacity markets, including charges, requirements, and market rules, as practices "affecting" rates within the Commission's jurisdiction.

In *Municipalities of Groton*, the court upheld the Commission's jurisdiction to review deficiency charges. 587 F.2d at 1302. Even though the purpose of the

charge was to motivate development of new capacity resources, it was "sufficient for jurisdictional purposes" that the charge affected wholesale rates. *Id.*

Similarly, the court in *Maine* upheld the Commission's jurisdiction to review New England's capacity market, concluding that the litigation over that mechanism was "fundamentally a dispute over the *rates* that will be paid to suppliers of capacity." 520 F.3d at 479. *See also id.* ("the Forward Market is designed to address pricing issues, which fall comfortably within FERC's statutory authority" over wholesale sales).

The court affirmed the Commission's jurisdiction over the New England capacity market yet again in *Connecticut*, holding that "[w]here capacity decisions about an interconnected bulk power system affect FERC jurisdictional transmission rates for that system without directly implicating generation facilities, they come within the Commission's authority." 569 F.3d at 484; *see also id.* at 482 ("we see no direct regulation of generation facilities in violation" of the statute). *Cf. Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822, 828 (2006) ("[I]n drawing the jurisdictional lines [between federal and state regulatory responsibilities], some practical accommodation is necessary.").

Nevertheless, New Jersey argues that the Commission exceeded its jurisdiction in approving PJM's revisions to the Minimum Price Rule because the orders "go beyond protecting the wholesale rates" against the effects of

uneconomic entry and "seek[] to prevent the entry itself." NJ Br. 24. New Jersey contends that *Connecticut* is distinguishable because the capacity requirement in that case did not circumscribe load-serving entities' choices of resources, as New Jersey claims that PJM's Minimum Price Rule does. NJ Br. 25-27. In that case, however, the court upheld the Commission's ability to approve cost outcomes that are affected by those choices. *See* 569 F.3d at 481 (state ratepayers "will appropriately bear the costs of [states'] decision[s]" about resources). Similarly, here the Commission explained that its orders are "merely regulating the wholesale prices charged in the capacity market." First Rehearing Order P 206, JA 164. Load-serving entities remain "free to contract with any generator they choose to supply power. The [Minimum Price Rule] *affects only the price* that such a generator will be permitted to bid into the capacity market, which may affect the ultimate wholesale price to be paid to all resources . . . ." *Id.* (emphasis added). *See also infra* Part II.C.1. Accordingly, the Commission acted within its well-established jurisdiction.

C. The Commission Reasonably Determined That Eliminating The Exemption For State-Mandated Resources Was Just And Reasonable

Under the Reliability Market rules that the Commission approved in 2006, any planned resource developed in response to a state regulatory or legislative mandate to address a projected capacity shortfall could be exempted from the

Minimum Price Rule, if PJM determined that certain administrative requirements were met. *See* Tariff Order P 124, JA 61-62. In the tariff revisions at issue here, the Commission agreed with PJM's proposal to eliminate that exemption. *See id.* P 139, JA 66. The Commission emphasized, however, that states and utilities retained the right to seek individual exemptions from the Commission. *See* First Rehearing Order PP 88, 91, 99, JA 129, 130, 133.

New Jersey and Maryland object, as they did before the Commission, to the removal of the automatic exemption. NJ Br. 9-27; MD Br. 4-11. As discussed below, the Commission fully addressed their arguments and explained its rationale for removing the exemption that it had previously approved.

1. The Commission Properly Focused On The Potential Depressive Effect Of The State Exemption On Market Prices

In approving PJM's elimination of the state exemption, the Commission emphasized that only *uneconomic* bids would be prevented from entering the Reliability Market Auction. First, the Minimum Price Rule, as modified, "sets forth reasonable procedures for establishing a bid floor for a new generating unit," and further provides a review process for a generating unit to seek a different bid level by showing that its costs are lower than those in the default bid. Tariff Order P 141, JA 67. Accordingly, any resource developed under a state mandate has the same opportunity as any other resource to justify a lower bid based on its costs.

As discussed *supra* in Part II.A, the purpose of the Minimum Price Rule — and, therefore, the Commission's focus in considering whether any aspect of that Rule is just and reasonable — is to ensure "that the wholesale capacity market prices remain at just and reasonable levels." Tariff Order P 141, JA 67. The Commission reaffirmed its finding in previous orders that "uneconomic entry can produce unjust and unreasonable wholesale rates by artificially depressing capacity prices, and therefore the deterrence of uneconomic entry falls within our jurisdiction." *Id.*; *see also id.* P 143, JA 68. Turning its focus to the prospect that substantial state-subsidized resources could bid into the Reliability Market at uneconomic levels, invoking the exemption to avoid mitigation, the Commission concluded that the exemption could undermine the purpose of the Reliability Market. First Rehearing Order P 96, JA 132 ("permitting a state exemption generally would be inconsistent with the rationale and basis for the [Minimum Price Rule]"); *see also id.* P 97, JA 132 (Commission agreed with PJM's Market Monitor that "that permitting a state exemption may in fact, over the long run, result in less investment in capacity and demand-side resources and the need in the future for additional subsidies from the state.") (citing Comments of the Independent Market Monitor at 2, 8-9 (filed Mar. 4, 2011), R. 173, JA 2003, 2004, 2010-11).

Moreover, contrary to the State Petitioners' claims, the Minimum Price Rule "does not interfere with states or localities that for policy reasons seek to provide assistance for new generation entry if they believe such expenditures are appropriate for their state." *See* Tariff Order P 141, JA 67; *accord* First Rehearing Order P 89, JA 130; Tariff Order P 194, JA 81. It does prevent subsidized resources from artificially depressing Auction prices — but the Commission found there is "no valid state interest" in ensuring that uneconomic resources can submit below-cost offers into PJM's capacity Auction. *See* Tariff Order P 142, JA 67-68.

That conclusion is entirely consistent with precedent. For instance, in *Connecticut*, the D.C. Circuit explained that, while state and municipal authorities retained their role "as regulators of generation facilities without direct interference from the Commission," such local regulatory choices could have consequences in New England's FERC-regulated Forward Capacity Market. 569 F.3d at 481 ("those choices affect the pool of bidders in the Forward Market, which in turn affects the market clearing price for capacity"). The court noted that state and local regulators surely had the right to forbid new entrants from providing new capacity, to require retirement of existing units, or to limit new construction to favored technologies, but that it was "quite natural" for the market to impose costs on those choices: "if consumer-constituents of state commissions prefer to forbid

the construction of new power plants, they will appropriately bear the costs of that decision, including paying more for system reliability from older and less efficient units." *Id.* It follows that the same is true of state and local regulatory actions to provide incentives for capacity development — states remain free to regulate generation as they see fit, but any new capacity that is offered into the Reliability Market will be subject to the Minimum Price Rule and will be mitigated if its bid does not reflect its costs.

Furthermore, state interests are not uniform. The Commission paid particular attention to the arguments of another state in PJM's region, the Pennsylvania Public Utility Commission ("Pennsylvania"), which argued that, if state-sponsored uneconomic entry were exempt from mitigation, "the actions of a single state could have the effect of preventing other states from participating in wholesale markets." Tariff Order P 143, JA 68; *see also id.* P 137 & n.74, JA 65-66; First Rehearing Order P 96, JA 132 (agreeing with Pennsylvania's argument that the state-mandate exemption "may have adversely affected other states that wanted to rely on prices in the capacity market to incent entry as opposed to relying on state funding"); *accord id.* P 97, JA 132. Accordingly, the Commission appropriately balanced the differing interests of multiple states whose constituent ratepayers are served through a single interstate market.

The Commission acknowledged that the Reliability Market is not a comprehensive model for resource choices, as it "has no feature to explicitly recognize" (in determining competitive pricing levels) policy objectives such as promoting environmental or technological goals, or reliability concerns beyond a three-year forecast. First Rehearing Order P 90, JA 130. The Commission noted that PJM market participants could work to revise the market rules to take such other objectives into account. *Id.* ("If PJM market participants agree that [the Reliability Market] should account for resource attributes that reflect broader objectives than three-year forward reliability, then PJM and its stakeholders should begin a process to consider how to incorporate these features into [the] market design."). *Cf. Blumenthal*, 552 F.2d at 884 (upholding capacity mechanism notwithstanding "imperfections").

Such revisions would enable *all* capacity resource suppliers "to receive a non-discriminatory market clearing price that reflects these values in addition to reliability." First Rehearing Order P 90, JA 130. But the Commission concluded that maintaining an exemption that would enable individual states to promote resources entering the Auction with artificially low bids would undermine the economic purpose of the Reliability Market itself: "allowing selected new projects to bid into [the Reliability Market] as price-takers because they are state-mandated would undermine the objective of [the Reliability Market] to procure the least-cost,

competitively-priced combination of resources necessary to meet the region's reliability objectives on a three-year forward basis." *Id.*

Of course, as Pennsylvania and others pointed out, states could institute forms of procuring capacity that would complement the Reliability Market or could opt out of the Reliability Market entirely by opting for the Fixed Resource Requirement alternative. Tariff Order P 141 n.76, JA 67. In addition, the Commission repeatedly emphasized that removing the state-mandate exemption from the Minimum Price Rule "in no way impairs the ability of a state to request an exemption for reliability reasons under [Federal Power Act] section 206." *Id.* P 139 n.75, JA 66; *see also id.* P 143, JA 68; First Rehearing Order P 88, JA 129; *id.* P 91, JA 130 ("States can file under section 206, or participate in filings by generators, if they believe that the [Minimum Price Rule] interferes with a legitimate state objective.").

2. The Commission Fully Explained Its Finding That The State Exemption Should Be Eliminated

New Jersey and Maryland argue that the Commission, having initially ruled that an exemption from the Minimum Price Rule for state-mandated resources was just and reasonable, could not reasonably find such an exemption to be unjust and unreasonable now. NJ Br. 13, 16-18; MD Br. 9-10. The Commission admitted that its view of the state exemption had changed. In accepting the Reliability Settlement in 2006, the Commission found the exemption for state-mandated

projects reasonable (over the objection of some power providers) "because it enables states to meet their responsibilities to ensure local reliability." Reliability Settlement Order P 104. By 2011, however, the Commission found that "mounting evidence of risk from what was previously only a theoretical weakness in the [Minimum Price] rules that could allow uneconomic entry has caused us to reexamine our acceptance of the existing state exemption." Tariff Order P 139, JA 66; *see also id.* P 108, JA 58 (finding that "parties have presented ample evidence that circumstances have changed — that recent efforts have brought to the fore what were previously unrecognized, or, if recognized, only theoretical, weaknesses in the current [Minimum Price Rule]").

In particular, New Jersey had enacted legislation in early 2011 directing the New Jersey Board of Public Utilities to provide incentives for development of new generation resources; the Board then selected (through a bidding process) parties who committed to build 2,000 megawatts of new generation that would seek to clear in the PJM Auction, while agreements with the state's distribution companies would guarantee the generators a specified revenue stream regardless of the Auction price. In late 2010, the Maryland Public Service Commission had proposed requiring Maryland utilities to enter into long-term contracts for new generation that similarly would guarantee payment of the difference between the

Auction price and the contract price. *See* Tariff Order P 2 & n.5, JA 27-28 (citing state statutes); *see also* Joint Pet. Br. 12-13.[8]

Thus, the actual prospect of thousands of megawatts of new generation, developed under arrangements that would explicitly subsidize the resources regardless of the Auction price, potentially being offered into the Reliability Market at a zero bid brought into focus the distortive effect — no longer "theoretical" — that the state exemption could have on market prices for all capacity. *See* Tariff Order P 139, JA 66. The Commission's understanding of the state exemption's potential market effects was not locked in place upon its initial approval of the Reliability Market, nor was the Commission required to cite changed circumstances to revisit its analysis of that exemption. *See Elec. Consumers*, 407 F.3d at 1239 (court's deference to the Commission on complex market rate design "is based on the understanding that the Commission will monitor its experiment and review it accordingly"); *cf. Motor Vehicle Mfrs. Ass'n*, 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.'") (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)); *Nat'l Ass'n of*

[8] Intervenor CPV Power Development, Inc., in its brief (at 2-3) supporting State Petitioners, notes that it won such contracts for a new gas-fired plant in New Jersey and another in Maryland, and that both projects successfully cleared the 2012 Auction.

Broadcasters v. FCC, 740 F.2d 1190, 1207 (D.C. Cir. 1984) ("reform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.") (internal citation omitted).

Contrary to the State Petitioners' claims (*see* NJ Br. 29; MD Br. 5-7), the Commission did not base its decision on findings about any state's improper intent — nor, as Maryland contends (MD Br. 8), did it disregard Maryland's proffered evidence of benign purpose. *See* First Rehearing Order P 3, JA 105-06 ("Our intent is not to pass judgment on state and local policies and objectives with regard to the development of new capacity resources. . . . We are forced to act, however, when subsidized entry supported by one state's or locality's policies has the *effect* of disrupting the competitive price signals that PJM's [Reliability Market] is designed to produce . . . ."); *see also* Tariff Order PP 125-26, JA 62 (noting that both the eliminated exemption and the rejected replacement had required evaluation of a state's intent); *cf. ISO New Eng., Inc.*, 135 FERC ¶ 61,029 at P 170 (2011) ("[O]ur primary concern stems not from the state policies themselves, but from the accompanying price constructs that result in offers into the capacity market from these resources that are not reflective of their actual costs. . . . . [Out-of-market] capacity suppresses prices regardless of intent . . . .").

It is "axiomatic that an agency is free to change its mind so long as it supplies a reasoned analysis showing that prior policies and standards are being

deliberately changed, not casually ignored." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 667 (D.C. Cir. 2009) (internal quotation marks and citations omitted); *see also Greater Bos. Television*, 444 F.2d at 852 ("if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute"). Though the State Petitioners disagree with the Commission's reexamination of the state exemption, the extensive discussions in both the Tariff and First Rehearing Orders remove any doubt as to the Commission's deliberation.

Nor did the Commission act without substantial evidence, as State Petitioners argue. *See* NJ Br. 13; MD Br. 4-5. In addition to voluminous submissions by interested parties (including, as noted above, specific economic points raised by PJM's Market Monitor and by Pennsylvania), the Commission based its policy judgment on its substantive expertise and decades of experience with energy markets, and in particular on its continuing oversight of novel and complex market designs in regional electricity markets. *See, e.g., Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 689 (D.C. Cir. 2000) (affirming FERC's landmark open-access rulemaking, where FERC had relied "upon extensive commentary as well as its own experiences" with the electric transmission industry), *aff'd*, *New York*, 535 U.S. 1; *cf. United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1146 (D.C. Cir. 1996) (FERC's "experience with the [natural

gas] industry provides substantial evidence" supporting policy judgment); *Cal. Trout v. FERC*, 572 F.3d 1003, 1023 (9th Cir. 2009) ("An agency's learned expertise with certain types of decisions gives it the ability to make the sort of informed policy choices that [courts] cannot.").

Given the Commission's longstanding expertise in rate design and its growing experience with capacity markets in different regions, its informed expectations of market dynamics are beyond mere speculation. *See Pub. Serv. Elec. & Gas*, 324 F. App'x at 2 (noting "FERC's purpose, based on past experience, to enhance stability and predictability in the electricity capacity market"); *Blumenthal*, 552 F.3d at 884-85 (court defers to Commission's expertise when addressing practical complexities of electricity market); *Elec. Consumers*, 407 F.3d at 1238-39 (deferring to Commission's policy judgment in formulating rate design); *cf.* Reliability Rehearing Order P 191 ("In approving new rate design initiatives, the Commission must rely on economic theory and evidence as to how rate designs will perform.").

3. The Commission's Approval Of PJM's Proposal To Remove The State Exemption Followed Statutory Procedures And Standards

In its 2011 filing, pursuant to Federal Power Act § 205, 16 U.S.C. § 824d, PJM proposed to eliminate the state exemption and replace it with a provision allowing sellers to seek an exception on state policy grounds from the Minimum

Price Rule through a later complaint filing (under FPA § 206, 16 U.S.C. § 824e) with the Commission. *See* Tariff Filing at 14-16, JA 404-06; Tariff Order P 125, JA 62. (P3, in its complaint filing here, asked the Commission to eliminate the exemption without replacement. Complaint at 53, JA 251.)

On appeal, New Jersey argues that the Commission could not eliminate the state exemption under the just and reasonable standard in FPA section 205. NJ Br. 18-21. New Jersey contends (at 19) that the revision must meet a higher standard because it altered the Reliability Settlement, and claims (at 20) that the Commission's separation of PJM's proposed removal of the exemption from its proposed replacement is "sophistry."

First, the Commission had already modified provisions of the Reliability Settlement, "both when proposed by PJM and on the Commission's own motion." First Rehearing Order P 101, JA 133 (citing previous orders). In fact, the Commission modified the Settlement even as it accepted it. *See* Reliability Settlement Order P 57 (accepting Settlement "subject to conditions"). Indeed, "[b]ecause of the need to modify the Settlement," Commission determined that it could *not* apply the standard for approving a contested settlement as a package, as New Jersey wrongly suggests that it did (NJ Br. 19 & n.10). *See* Reliability Settlement Order P 57. The Commission therefore ruled on each contested provision under the just and reasonable standard. *See id.* P 58.

As to New Jersey's skepticism regarding the Commission's distinction between PJM's proposals: under the FPA, form matters. *See, e.g.*, *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9-10 (D.C. Cir. 2002) (utilities, and regional collections of utilities, have statutory rights to file unilateral rate changes under FPA section 205, to which "the Commission plays 'an essentially passive and reactive' role") (citation omitted); *see also supra* pp. 6-7 (describing statutory filing mechanisms). PJM filed to eliminate the existing state-mandate exemption, and the Commission "accepted that portion of PJM's filing," agreeing that the existing provision "improperly required PJM to assess the adequacy of state administrative processes and determine whether an offer was legitimately intended to address a projected capacity shortfall — a task that PJM is not well-suited to perform . . . ." First Rehearing Order P 93, JA 131. Thus, the Commission found PJM's proposal to eliminate the provision just and reasonable. *Id.*; *see also id.* P 96, JA 132 (finding that "having no specific state exemption in PJM's tariff is just and reasonable").

The Commission rejected PJM's proposed replacement mechanism, however, finding it unjust and unreasonable because it established parameters for a Federal Power Act section 206 complaint filing that would seek a state-mandate exception — a tariff constraint on a statutory right. *See id.* P 94, JA 131. The Commission noted that "states and generating resources retain their statutory right

to file complaints under section 206 unencumbered by the parameters proposed by PJM." *Id.*

For those reasons, the Commission distinguished between the "two separate proposals by PJM under section 205," and "accepted one and rejected the other" (under section 205) without modifying either (as it could do pursuant to section 206). First Rehearing Order P 95, JA 131. *See generally N. Penn Gas Co.*, 707 F.2d at 768 (explaining, as to analogous provisions of the Natural Gas Act, that the two sections "differ as to the allocation of the burden of proof and the event which triggers initiation of the rate-review proceedings"); *Atl. City Elec.*, 295 F.3d at 9-10 (same, as to Federal Power Act). Nevertheless, the Commission went on to conclude that its decision to eliminate the state exemption would also have satisfied the requirements of section 206, as the exemption "created a loophole permitting uneconomic entry affecting the wholesale price," which the Commission found unjust and unreasonable. First Rehearing Order P 96, JA 131-32; *see supra* Part II.C.1.

D. The Commission Reasonably Determined That Resources Designated As Self-Supply Are Subject To The Minimum Price Rule

In the challenged orders, the Commission made clear that resources bidding into the Auction as planned generation are subject to the Minimum Price Rule even

if they are designated as self-supply. Tariff Order P 191, JA 80.[9] The Commission explained that allowing planned self-supply capacity to clear the Auction automatically — which is effectively the same as an exemption allowing self-supply to offer at zero — would pose an unacceptable risk of price suppression. First Rehearing Order P 205, JA 163; Second Rehearing Order P 19, JA 188. The Commission determined that requiring self-supply to bid at cost into the Reliability Market, while providing flexibility to account for self-supply business models in the unit-specific review process for mitigation, appropriately balances the need to prevent artificial price suppression in the capacity market with the concerns of load-serving entities that choose to build their own capacity. Second Rehearing Order P 19, JA 188.

1. The Commission Reasonably Found That Guaranteeing Self-Supply To Clear Would Pose An Unacceptable Risk Of Price Suppression

The Load Petitioners argue that self-supply should be guaranteed to clear the Auction automatically. *See* Load Br. 10-20. The Commission found, however,

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[9] PJM proposed a clarification of its tariff, stating that it never intended to exempt self-supply from mitigation, but that a provision concerning calculation of the supply curve was ambiguous; P3 construed the tariff as exempting self-supply and argued that it should be eliminated. *See id.* PP 184-85, JA 78. The Commission agreed with PJM and accepted its clarification. *Id.* PP 191-92, JA 80-81. The Commission noted that, "even if this did constitute a change," it agreed that self-supply should be subject to the Minimum Price Rule. *Id.* P 192, JA 81.

that effectively exempting self-supply capacity from the Minimum Price Rule could undermine the purpose of the Reliability Market. *See* First Rehearing Order P 205, JA 163 (allowing "a blanket, across-the-board . . . exemption for resources designated as self-supply would allow for an unacceptable opportunity to exercise buyer market power and thus could inhibit competitive investment"); *accord* Second Rehearing Order P 19, JA 188. Rather, "planned generation designated by a load-serving entity as self-supply should be classified as a capacity resource and be subject to an offer floor based on its entry costs until it clears in the base residual auction." Tariff Order P 192, JA 81.

For a competitive market to function as intended — "i.e., to ensure that capacity prices will elicit new entry when new capacity is needed" — bids into the capacity auction "must accurately reflect avoidable net costs." First Rehearing Order P 205, JA 163 (citing Reliability Rehearing Order P 165). But new self-supply resources "may not generally have the incentive to bid their true avoidable net costs," either because (for contracted resources) their revenues have already been determined or because (for owned resources) the load may, if it is a net buyer of capacity in the Auction, have an incentive to bid its capacity lower to reduce the auction price. First Rehearing Order P 205, JA 163-64; *id.* n.108, JA 164 (citing Reliability Rehearing Order P 165), and *Devon Power LLC*, 115 FERC ¶ 61,340 at P 113 (2006).

The Commission also found that even guaranteeing that self-supply would clear with mitigated bids (i.e., offers raised to the Minimum Price Rule floor) could distort price signals. *See* Second Rehearing Order P 28, JA 193 ("Simply receiving an adjusted unit-specific floor does not mean that the market requires that unit at the adjusted floor bid."). Moreover, assuring every unit with a mitigated offer floor that it will clear the market could result in PJM rejecting an offer from a less expensive unit that otherwise would have cleared. *Id.* For that reason, the Commission determined that allowing new self-supply "to compete as a price-taker" in the Reliability Market would "impermissibly shift[] the investment costs of self-supply to competitive supply by suppressing market clearing prices," with the outcome of impeding entry of competitive supply and driving out private investment so that only self-supply investment would occur. Tariff Order P 195, JA 81-82. As a result, long-term investment risk would shift from private investors to captive customers. *Id.*, JA 82.

Load Petitioners claim that the Commission's application of the Minimum Price Rule will prevent load-serving entities from building self-supply, or will force such entities to pay twice for the same capacity. Load Br. 17-19, 24-27. But the Minimum Price Rule does not prevent *economic* investments from being designated as self-supply. *See* Tariff Order P 194, JA 81 ("Clarifying that the [Minimum Price Rule] applies to new self-supply . . . does not prevent rate-based

investments that are economic by market-based [Reliability Market] standards from being designated as capacity resources."). Only uneconomic resources — those that bid at less than their actual incremental fixed cost of capacity — will be mitigated. Therefore, the Commission reasonably determined that load-serving entities who participate in PJM's Reliability Market should bear the costs of their own uneconomic choices. *Cf. Connecticut*, 569 F.3d at 481.

Furthermore, load-serving entities have an option to forgo the competition-based Reliability Market and obtain their required capacity through long-term bilateral contracts, under the Fixed Resource Requirement alternative. Tariff Order PP 193, 195, JA 81; First Rehearing Order P 160, JA 151; *see supra* Part II.A. But if they choose to participate in the Reliability Market, they "elect to participate in a three-year forward wholesale capacity market that relies on competition between existing resources (including self-supply) and competitive new entry to secure needed resources at the least cost rate." Tariff Order P 193, JA 81. To "protect the integrity" of that market, new self-supply resources seeking to participate in that market "must compete with other planned generation on the same competitive basis." *Id.*

2. The Commission Reasonably Addressed The Concerns Of Load-Serving Entities That Self-Supply Might Not Clear By Allowing Self-Supply Bids To Account For Business Considerations In The Mitigation Process

While the Commission determined that new self-supply capacity must bid competitively in the Reliability Market, it nevertheless recognized that self-supply may have "certain [cost] advantages associated with long-standing and well-recognized business models" of load-serving entities that affect self-supply bid levels but do not reflect anticompetitive behavior. First Rehearing Order P 208, JA 165; Second Rehearing Order P 19, JA 188. The Commission agreed with Load Petitioners, as well as PJM, that the Minimum Price Rule is not intended "to unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models." First Rehearing Order P 208, JA 165.

Rather than a blanket exemption from the Minimum Price Rule, however, the Commission concluded that case-by-case consideration of such factors through the unit-specific review process proposed by PJM "is the most appropriate means" of handling new self-supply. First Rehearing Order P 204, JA163; *see also id.* P 209, JA 165 (finding proposal just and reasonable). Among other changes to that review process, therefore, the Commission modified the applicable standard in that review "to acknowledge the individualized facts and circumstances that may warrant consideration." *Id.* P 160 n.87, JA 152. To recognize the important role of self-supply in capacity procurement, the Commission ruled that "certain

advantages associated with long-standing and well-recognized business models should not be deemed automatically suspect" in determining whether a resource's Auction bid properly reflects its net costs. *Id.* P 208, JA 165; *accord id.* P 5, JA 106. Rejecting arguments by other parties seeking to exclude consideration of business factors that could lower self-supply bids, the Commission noted that sell offers must be "consistent with" the competitive cost of new entry — not necessarily equal to that cost, nor unable to account for cost advantages or out-of-market revenues. *Id.* P 244, JA 175.

The Load Petitioners contend that, having declared that certain advantages of self-supply should not be considered automatically suspect, the Commission nevertheless did just that, by finding offers that are below the benchmark presumptively uncompetitive and subject to mitigation. *See* Load Br. 20. But Load Petitioners misunderstand the mitigation process that the Commission approved. The benchmark acts as a screen that triggers potential mitigation of a lower offer, but each such resource has the opportunity to justify its offer based on its actual costs, in an individualized review by the independent Market Monitor. *See* Second Rehearing Order P 26, JA 192 ("[A] self-supplied resource will have the same opportunity as any other resource subject to the [Minimum Price Rule] to demonstrate that its offer is reasonably based on the costs of the resource and the

revenues that the resource would expect to receive under competitive terms.").[10] With respect to that review, the Commission unambiguously directed that "certain advantages associated with long-standing and well-recognized business models should not be deemed 'automatically suspect'" in the course of that individualized consideration (i.e., "when determining whether a particular sell offer accurately reflects a resource's net costs"). *Id.* P 19, JA 188; *accord* First Rehearing Order P 208, JA 165.

The Load Petitioners further contend that the unit-specific review process is burdensome. *See* Load Br. 20. The Commission, however, concluded that the burden of supporting a resource's offer based on costs was a reasonable one. Second Rehearing Order P 26, JA 192 ("We do not find that requiring a self-supply unit seeking a unit-specific price floor to submit cost justification information unfairly burdens such resources, and we continue to find such a process reasonable.").

Nevertheless, Load Petitioners object that the mitigation review is uncertain and subjective. Load Br. 20-21, 26-27. The Commission acknowledged that "this process will not guarantee that all resources designated as self-supply will clear in the auction." First Rehearing Order P 209, JA 165. The Commission determined,

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[10] *See also id.* (noting that the Rule also applies only "if the relevant resource is a new-entry combustion turbine or combined cycle generating plant in a capacity constrained Locational Deliverability Area"); *see generally supra* p. 38.

however, that its ruling "appropriately balances the need to protect against uneconomic entry while also mitigating parties' concerns about having to pay twice for capacity as a result of failing to clear in the [Reliability Market]." *Id.* *See also* Second Rehearing Order P 19, JA 188 (rejecting competitive suppliers' argument that unit-specific review process is too broad, in that it allows consideration of out-of-market factors, and load petitioners' argument that process is too narrow, emphasizing prevention of price suppression at the expense of allowing self-supply).

E. The Commission Reasonably Determined That Exempting Wind And Solar Resources From The Minimum Price Rule Was Not Unduly Discriminatory As To Other Types Of Resources

PJM's Reliability Market has, from its inception, treated different types of generation resources differently under the Minimum Price Rule. In the Tariff Order, the Commission noted that the existing Rule allowed nuclear, coal, and hydroelectric resources to bid zero-price offers into the Auction. Tariff Order P 144, JA 68; *see also* Reliability Settlement Order P 103 n.75. The Commission accepted PJM's proposal, among other changes, to add wind and solar facilities to the zero-price exemption. *See* Tariff Order P 152, JA 70. As a result, the Minimum Price Rule applies only to planned generation resources using natural gas-fired (combustion turbine or combined cycle) technologies. *See id.* PP 6 n.13, 153, JA 29, 70.

New Jersey (joined by Hess Corporation) and Intervenor CPV Power argue that applying the Rule only to gas-fired generation is unduly discriminatory. *See* NJ Br. 14-15, 27-29; and CPV Br. 3-4. But different treatment of types of resources "does not amount to undue discrimination under the [Federal Power Act] when the classes are not similarly situated." First Rehearing Order P 109, JA 135. *See, e.g.*, *Sacramento Mun. Util. Dist. v. FERC*, 474 F.3d 797, 802 (D.C. Cir. 2007); *Sw. Elec. Coop. v. FERC*, 347 F.3d 975, 981 (D.C. Cir. 2003); *see also Cities of Newark*, 763 F.2d at 546 ("differences in rates are justified where they are predicated upon factual differences") (citing cases). The Commission reasonably concluded that gas-fired resources are not similarly situated, for purposes of the Minimum Price Rule, to other technologies.

First, the Commission explained that gas-fired resources are not similarly situated to the various exempted resources for purposes of preventing price suppression because no other resource is similarly useful to price-suppression efforts. *See* Tariff Order P 153, JA 70. Because gas-fired facilities require the least development time, such resources are best-suited to respond expeditiously to capacity needs — but also are particularly efficient for suppressing capacity prices. *See id.* The Commission explained that the investment costs of developing gas-fired facilities, for purposes of determining the cost of new entry benchmark for price screening and mitigation in the Reliability Market, can be drawn from

sources around the country and do not vary significantly. *See id.* P 154, JA 70. Furthermore, a gas-fired facility can be constructed within the three-year timeframe between a forward capacity auction and delivery of the committed capacity. For that reason, such a resource "does not need to undertake most of its construction until after it clears in its first auction," so its net incremental costs at the time of that auction are "near its full construction costs." *Id.* P 155, JA 71. That short timeframe also allows gas-fired resources to "test the market" by offering bids at the level needed to make construction financially viable and, if such bids do not clear, re-assessing or abandoning their plans. *See id.*

By contrast, resources with longer lead times than gas-fired facilities have a greater cost variance than gas-fired plants and lack the flexibility to test the market in advance. The Commission agreed with PJM's explanation that developers of such longer-term projects make investment decisions based on several years of observed auctions and energy market prices, and must begin construction (thus incurring substantial sunk costs) in advance of entering the capacity auction for the first time. *See id.* Because of that necessarily sunk investment, such longer-term projects have much lower incremental costs and would have a minimum price floor substantially below full construction cost. *See id.* In addition, the Commission noted the difficulty of determining a reference value for some exempted resources,

such as nuclear and coal, that have not been widely constructed in recent years. *Id.* P 154, JA 70.

Moreover, the Commission found that the particular technologies that PJM proposed to exempt in its tariff revisions are unlikely to be employed for price suppression. Wind and solar facilities are "a poor choice" for price suppression because both are characterized by intermittent energy output, such that their capacity value for Reliability Market purposes is "only a fraction of the nameplate capacity" (that is, the maximum potential output). Tariff Order P 153, JA 70; First Rehearing Order P 110, JA 136; *see also id.* P 109, JA 135-36 ("wind and solar resources have different characteristics than [gas-fired facilities]"). The Commission did not, as New Jersey suggests (*see* NJ Br. 28), base its rationale on the generally smaller size of wind and solar facilities, but rather on the low amount of capacity, relative to their size, that such facilities — due to their variable output — are able to commit in the Reliability Market.

Accordingly, the Commission reasonably found that the types of resources exempted from the Minimum Price Rule, affording fewer reliability benefits, are not similarly situated to the affected gas-fired facilities — and, based on those facts, concluded that the Rule is not unduly discriminatory. *See* Tariff Order P 155, JA 71; *see also* First Rehearing Order P 109, JA 135-36 ("we continue to find PJM's proposal to exempt certain resource types from [the Minimum Price

Rule] to be a pragmatic and reasonable approach"). The Commission further pointed out that its focus, in determining that only certain types of resources are subject to the Minimum Price Rule, is "on those factors that could contribute to price suppression," and that "the attributes of [gas-fired] resources" — the short lead time and predictable costs — "could trigger the concern for which the [Rule] exists, while other resources would not." First Rehearing Order P 111, JA 136. That focus is well within the Commission's discretion under the Federal Power Act. *See supra* Part II.A; *cf. Cities of Newark*, 763 F.2d at 547 ("the notion of undue discrimination itself gives rise to flexibility in interpretation by the Commission"). And, again, the "trigger" only subjects the affected offers to mitigation that affords an opportunity for individualized review. *See* First Rehearing Order P 111, JA 136. Any resource whose sell offer falls beneath the conduct screen threshold and triggers mitigation under the Minimum Price Rule has the opportunity, in the unit-specific review process, to justify its offer based on its costs.

III. THE COMMISSION REASONABLY DECLINED TO ADOPT POWER PROVIDERS' ALTERNATIVE PROPOSALS [RESPONDING TO CROSS-PETITIONERS]

Power Providers also urge the Court to alter the Commission's careful balance, but claim that the Commission's orders weigh too heavily in favor of the interests of the Load Petitioners and State Petitioners. The Commission's orders

do not grant all the requests of any party, including PJM. Instead, the modified Minimum Price Rule strikes a reasoned balance between the need to prevent buyer-side market power, the risk of deterring economic entry to the Reliability Market, and the administrative burdens of this complex Rule. The Court should deny Power Providers' invitation to disturb this balance.

Power Providers' challenges concern the conduct screen threshold that triggers the Minimum Price Rule, the minimum mitigation period, and Power Providers' own proposed no-subsidy exemption. In each case, Power Providers have not demonstrated that the Commission must adopt their preferred conditions. The Commission here acted under Federal Power Act sections 205 and/or 206, 16 U.S.C. §§ 824d, 824e. Under FPA section 205, once the Commission determined that PJM satisfied its initial burden of demonstrating that its proposal is just and reasonable, the burden shifted to the challengers, including Power Providers, to demonstrate that PJM's proposal was unreasonable. *See, e.g., Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 549 (D.C. Cir. 2010). Where the Commission acted under FPA section 206, as it did in setting the mitigation period, the Commission first made a showing that the existing provisions are unjust and unreasonable, and then that its own replacement proposal is just and reasonable. As explained below, the Commission-approved revisions to the Minimum Price Rule, on this record at this time, fall well within the "zone of reasonableness"

(*Permian Basin*, 390 U.S. at 767), and Power Providers have not demonstrated otherwise.

A. The Commission Reasonably Accepted PJM's Proposal To Set The Mitigation Threshold At 90 Percent Of Net New Entry Cost

The changes to the conduct screen threshold under the Minimum Price Rule reflect a considered, reasonable balance of competing interests and factors. A sell offer that is lower than the conduct screen threshold is subject to mitigation, except that sellers may seek to justify an offer falling below the threshold through the unit-specific cost review process. *See, e.g.*, Tariff Order P 52, JA 43. Prior to PJM's proposed revisions at issue here, the conduct screen threshold was set at 80 percent of estimated net new entry costs. *Id*. PJM proposed to increase the threshold to 90 percent (*id*. P 53, JA 44), while P3, in its complaint, proposed to increase the threshold to 100 percent (*id*. P 54, JA 45). Still others, including New Jersey and CPV Power, urged the Commission to retain, or even lower, the existing conduct screen threshold. *See* Tariff Order PP 68-69, JA 48.

Weighing these competing proposals, the Commission determined that raising the threshold from 80 percent to 90 percent — but not the 100 percent Power Providers advocate[11] — "strikes a reasonable balance between protecting against unreasonable market power" and, on the other side, "recognizing the

[11] PJM recently proposed to increase the conduct screen threshold to 100 percent of net new entry cost. *See supra* p. 23.

imperfection of administrative estimates and the burden of the cost justification process." Tariff Order P 70, JA 48; *see also id*. P 66, JA 47; First Rehearing Order PP 44, 47, JA 117, 118. The Commission alone bears the statutory responsibility to weigh competing interests, as it did here, to achieve a reasonable outcome, and its judgment merits this Court's deferential review. The "electricity market presents 'intensely practical difficulties' demanding a solution from FERC, and the Commission must be given the latitude to balance the competing considerations . . . ." *Blumenthal*, 552 F.3d at 885 (internal citation omitted) (deferring to agency's "imperfect" solution to complex issue because "Congress has entrusted the regulation of the electricity industry to FERC").

Power Providers unremarkably assert that the Commission got this balance wrong, with the result of suppressing prices. Br. 32-39. But Power Providers place much, if not all, reliance on the first half of the equation — preventing uneconomic, uncompetitive entry to the detriment of their competing interests. Contrary to Power Providers' argument (Br. 35, 37), the Commission answered their concerns. And Power Providers fail even to address the other side of the equation: the Commission's reliance on the imperfection inherent in estimating net entry costs and the administrative burdens placed on sellers by the unit-specific cost review process. *See* Br. 27-28, 33-39.

Setting the conduct screen threshold at 90 percent of the estimated net entry cost does not endorse buyer market power. First Rehearing Order P 47, JA 118. Power Providers dismiss the Commission's holding as "bare disagreement" (Br. 35), but the Commission offered two reasons why it "disagree[s] that any bid falling below 100 percent of the benchmark must *per se* be recognized as uncompetitive, or that, by setting the conduct screen at something less than 100 percent, the Commission is endorsing the acceptance of some permissible level of buyer market power." First Rehearing Order P 47, JA 118. First, the Commission explained that "some resources will have legitimately lower costs than the threshold." *Id*. When a unit has legitimately lower costs, prices may indeed fall, but there is no buyer market power. Power Provider's argument that the threshold results in an absolute "10 percent discount" (Br. 34) fails entirely to recognize the basic fact that some resources legitimately have lower costs than the estimated net entry cost. Indeed, neither Power Providers, PPL, nor EPSA (PPL/EPSA Int. Br. 12-14) challenges, on brief, the Commission's finding that some resources have legitimately lower costs, and any argument on reply would come "one brief too late." *Ghana v. Holland*, 226 F.3d 175, 180 (3d Cir. 2000) (citing cases and rules).

Second, and perhaps more important, Power Providers unreasonably presume that the estimated net cost of new entry is a precise number below which

buyer market power necessarily occurs, and do not challenge the Commission's and PJM's contrary conclusions. The conduct screen benchmark is simply an administrative estimate of new entry costs, which no party can claim is perfect or infallible. *See* P3 Rehearing Request at 10, R. 215, JA 2563 (acknowledging imperfect estimates). The Commission explained that cost estimation is inherently imprecise. Tariff Order P 70, JA 48; *see also id*. P 68, JA 48 ("estimating project costs is a complex process and . . . the PJM-determined estimates are, like all estimates, imperfect"); First Rehearing Order P 44, JA 117. Other parties before the Commission, including CPV Power, argued that the inherent imperfection of estimates, and particularly the "variance of project costs by location," warrant maintaining an 80 percent threshold. Tariff Order P 68, JA 48. Even PJM concurs that its own estimates are necessarily imperfect. Tariff Filing at 11, JA 401; *see* Tariff Order P 70, JA 48. And Power Providers' own challenges to the details of calculating estimated revenues for purposes of determining net entry costs, addressed *infra* in Part III.B, buttress the Commission's reasoning.

Continuing its analysis, the Commission reasonably weighed a strict 100 percent adherence to imperfectly estimated net new entry costs, understanding that some resources have legitimately lower costs, against the burden on sellers associated with the unit-specific cost review process. As the Commission explained, first in the Tariff Order and then in the First Rehearing Order, the unit-

specific cost review process burdens sellers "by having to provide data to justify a generator-specific lower threshold." Tariff Order P 66, JA 47; *see also id*. P 70, JA 48; First Rehearing Order P 47, JA 118 (process "is not costless to the resources making the sell offer"). The required data include cost support documentation, ranging from environmental permits to financing documents and models, and revenue documentation, such as forecasts of competitive electricity prices in PJM. *See* First Rehearing Order PP 216-17 nn.112-13, JA 167-68 (describing documentation requirements).

Although the Commission first relied on the burden of the cost review process in the Tariff Order, Power Providers failed to challenge the Commission's reasoning on rehearing before the agency, as statutorily required to confer jurisdiction on this Court. Under section 313(b) of the FPA, 16 U.S.C. § 825*l*(b), no objection to the Commission's orders is properly subject to judicial review unless it has "been urged before the Commission in the application for rehearing." The statute also requires that the rehearing "set forth specifically the ground or grounds upon which such application is based." 16 U.S.C. § 825*l*(a). Failure to object, or to object "with specificity," on rehearing is a jurisdictional bar. *Ind. Util. Regulatory Comm'n v. FERC*, 668 F.3d 735, 738-39 (D.C. Cir. 2012); *Cities of Newark*, 763 F.2d at 543-44 (recognizing jurisdictional bar). This directive "enables the Commission to correct its own errors, which might obviate judicial

review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005) (citations omitted). P3's rehearing request (at 13, JA2566) argued broadly that "very little harm can flow from setting the benchmark too high," and quoted testimony noting, *inter alia*, that over-mitigation may increase "administrative costs." The statute demands more than such generalities, and Power Providers' specific argument before this Court, that administrative costs must be quantified, was not raised before the Commission at all.

Even if the Court reaches this argument, Power Providers cite no precedent in support of their claim that administrative costs must be quantified in this context. Power Providers' only answer, again offered for the first time before this Court, that similar data is already required of some resources as part of a separate procedure (Br. 36), falls short. Though they broadly assert that the "the review mechanism is already there," Power Providers acknowledge that this separate procedure applies only to "existing units with significant capital reinvestment." Br. 36. And Power Providers do not take into account the additional burden of providing data — even if similar — twice. Moreover, elsewhere, Power Providers appear to agree with the Commission's concerns, characterizing the unit-specific review process as "lengthy and cumbersome." Br. 57; *see also* PPL/EPSA Int. Br. 12 (noting the "time and effort associated with" the process).

The Commission agrees with PJM, and thus the Power Providers, that an 80 percent threshold is unreasonable (Tariff Order P 67, JA 47), but Power Providers, who acknowledge that "the new rule is a distinct improvement" (Br. 34), have not demonstrated that 90 percent is necessarily unreasonable at this time. Power Providers (Br. 38-39) and supporting intervenors (PPL/EPSA Int. Br. 15), like Load Petitioners from an opposing perspective (Load Br. 28-29), accuse the Commission of exclusively, and improperly, protecting a narrow class of competitors. PPL and EPSA, in particular, simply complain about the potential for price decreases resulting from *any* increase in supply — without regard to whether such new entry is economic. PPL/EPSA Int. Br. 13-14. But the Commission's job is not to protect incumbent market participants from increased competition. *See, e.g.*, *FPC v. Conway*, 426 U.S. 271, 279 (1976) (discussing role of anticompetitive and antitrust concerns in the Federal Power Act) (citing cases). Indeed, the Commission's statutory responsibility is to protect the broader public interest. *See* FPA § 201(a), 16 U.S.C. § 824(a); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) ("purpose of the power given the Commission . . . is the protection of the public interest, as distinguished from the private interests of the utilities").

Consistent with these responsibilities, the Commission's balancing here favors neither market incumbents nor new entrants, but reasonably prevents uneconomic entry while not unduly burdening new entrants, and while continuing

to ensure the reliable operation of the PJM transmission system. *See Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 541 (D.C. Cir. 2010) ("This court properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions.") (quotation omitted). Where, as here, the Commission's decision involves the balancing of competing interests, a "reviewing court may not supplant the Commission's balance . . . with one more nearly to its liking." *Cities of Newark*, 763 F.2d at 546 (quotation omitted).

B. The Commission Reasonably Approved PJM's Proposals To Update Revenue Estimates Used To Calculate Net New Entry Costs

Addressing the calculation of the conduct screen threshold, Power Providers challenge PJM's proposed methodology for calculating the revenues used to offset the gross cost of new entry in determining the net entry cost. Br. 39-49. Specifically, Power Providers fault the time and location aspects of the revenue reference values, claiming the selected values overstate revenues, and therefore understate net entry costs and the threshold price.

Prior to the update proposed here, PJM's tariff did not specify a method for estimating energy and ancillary services revenues. Tariff Order P 32, JA 36; Tariff Filing at 6, 9, JA 396, 399. In this case, PJM proposed to update the reference values used to calculate those revenues based on the existing Variable Resource

Requirement Curve guidelines,[12] which are also used for the demand curve in the Reliability Market. Tariff Order PP 32-33, JA 36-37. Using these guidelines, PJM will calculate the energy revenues that a new entry plant would have earned had it been in service in PJM for the three most recent years, using the real-time energy prices and fuel prices in effect during those three years. Tariff Filing at 9, JA 399. PJM proposed to reflect locational differences using a zonal approach, rather than the precise (i.e., nodal) location of the actual resource. *Id*. at 10, JA 400; *see* First Rehearing Order P 30, JA 113. Specifically, PJM proposed to base the revenue estimate for a given resource on the zone, within the PJM region (or area) where the resource is located, that has the highest energy revenue estimate. Tariff Filing at 10, JA 400.

As an initial matter, Power Providers err in claiming that the Commission has inappropriately applied the burden of proof under section 205 of the Federal Power Act, 16 U.S.C. § 824d. Br. 46-47. Acting under this provision, the Commission "properly placed the initial burden of showing that the tariff proposal [wa]s just and reasonable on [PJM] . . . [t]hen, after finding that [PJM] had established that it was 'just and reasonable' . . . [,] simply found that [Power

[12] PJM also proposed to update the values used to calculate the gross cost of new entry using the Variable Resource Requirement Curve. *See* Tariff Order P 30, JA 36. Power Providers do not challenge this part of the net cost of new entry calculation.

Providers] had failed to controvert that conclusion." *Transmission Agency of N. Cal*, 628 F.3d at 549. That is, Power Providers did not demonstrate, as discussed below and required by the statute, that PJM's proposal would not be just and reasonable. *Id*. Power Providers fail to acknowledge the shifting burden under FPA section 205, and likewise err in suggesting that the Commission is actually applying the FPA section 206 standard. *See N. Penn Gas*, 707 F.2d at 768 (discussing burden allocation under analogous provisions of the Natural Gas Act). The decision in *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004), on which Power Providers rely (Br. 47), also does not support their claim. In that case, the D.C. Circuit explained that the Commission need not find a provision unjust and unreasonable under FPA section 206, where that provision had been "conditionally" approved and remained pending in a hearing under FPA section 205. 373 F.3d at 1368. *Midwest ISO Transmission Owners* does not address or eliminate the shifting burden under FPA section 205.

The Commission generally approved PJM's proposal to update its existing Minimum Price Rule reference values, including the time and location aspects of the revenue estimate, as "consistent with its existing Variable Resource Requirement Curve guidelines." Tariff Order P 43, JA 40; *see also* First Rehearing Order P 30, JA 113 (location); *see also id*. P 31, JA 113 (real-time prices). Indeed, the Commission had previously found, in 2009, that the Minimum Price Rule

values "should be updated to be in line with the Variable Resource Requirement Curve values." Tariff Order P 45, JA 41 (citing *PJM Interconnection, LLC*, 126 FERC ¶ 61,275 at P 192 (2009)).

With regard to the location aspect of the estimate in particular, the Commission agreed with PJM that using the highest price in the area where the reference resource is located "is a reasonable screen." Tariff Order P 47, JA 41. Prices may vary by zones, and there are multiple zones within each cost of new entry area. *See* Tariff Filing at 10, JA 400. To reflect this, PJM proposed that instead of basing the "energy revenue estimate on the zone where the generic 'Reference Resource' is assumed to be built, PJM will base it on the zone within each [cost of new entry] Area that has the highest energy revenue estimate." *Id*.; *see also id*. Tariff, Att. DD, § 5.14(h)(3), JA 421.

PJM explained that this is necessary to ensure that revenues are not overestimated, thereby decreasing the conduct screen threshold and causing the screen to be triggered by a resource that, by happenstance, is located in a zone with higher prices than the reference resource. Tariff Filing at 10, JA 400 ("This approach ensures that the sell offer of a new entrant will not fail the . . . screen merely because it is located in a zone with higher [prices] than the zone in which the hypothetical reference resource was assumed to be built."). The Commission agreed with PJM that the screen should not be triggered where a resource

reasonably is using the "historical energy and ancillary services revenues" for the relevant area. Tariff Order P 47, JA 41; *see also* PJM Answer at 26 (filed Mar. 21, 2011), R. 186, JA 2282 (same). On brief, Power Providers contend that PJM seeks to "prevent the . . . threshold from being triggered" (Br. 45), but they do not acknowledge or even reference the Commission's finding in the Tariff Order that it would not be reasonable to trigger the threshold where revenues are estimated based upon the zone in which the resource is located. Tariff Order P 47, JA 41.

Rather than focus on the Commission's substantive discussion in the Tariff Order, Power Providers now argue that PJM's proposal must fail because it is not precisely the same as the Variable Resource Requirement Curve guidelines. Br. 48. Power Providers are correct that the Commission characterized the revenue estimate as "consistent" with the Curve guidelines (Tariff Order P 43, JA 40), but it did not rely on the methodologies being the same and, in fact, expressly recognized and approved PJM's "adjustment" to the methodology to address resource location. Br. 48 (quoting Tariff Filing at 10, JA 400); *see* Tariff Order PP 46-47, JA 41. In any event, the Commission first explained that the revenue estimate methodology is consistent with the Curve guidelines in the Tariff Order. Tariff Order P 43, JA 40. Power Providers did not raise this argument on rehearing

before the Commission, as required by FPA section 313(b), 16 U.S.C. § 825*l*(b), and have now waived the opportunity to do so. *See supra* pp. 74-75.

Finally, the Commission addressed and found unreasonable Power Providers' alternative proposal to use nodal, rather than zonal, prices. Tariff Order P 47, JA 41. The Commission determined that the "use of nodal" prices, as advocated by Power Providers, could inappropriately "trigger the market power screen." *Id*. Power Providers' proposal would subject a new entrant located at a higher priced node to an overstated threshold if the reference resource happens to be located at a lower priced node. *Id*.

Power Providers argue at length that the Commission is required to consider additional, alternative approaches (Br. 46-47 (citing cases)), but this is irrelevant since the Commission in fact responded, even if not in great detail, to Power Providers' arguments. *See, e.g*., *Greater Bos. Television*, 444 F.2d at 851 (court will uphold findings of "less than ideal clarity, if the agency's path may reasonably be discerned"). And, in any event, as the Commission explained, even if other "approaches might have also been reasonable" (First Rehearing Order P 30, JA 113), that is not sufficient to support a finding that PJM's proposal is unjust and unreasonable. *See, e.g*., *Exxon Mobil Corp. v. FERC*, 315 F.3d 306, 309 (D.C. Cir. 2003) (if the filing utility "carries this burden [to show that its proposal is just and reasonable], the Commission must approve the change even if other rates would

also be just and reasonable.") (citing *W. Res., Inc. v. FERC*, 9 F.3d 1568, 1578-79 (D.C. Cir. 1993)).

Power Providers also challenge the Commission's approval of PJM's proposal to use real-time prices, and not prices from the day-ahead market, in estimating revenues for purposes of calculating the net entry cost. Br. 39-44. In approving PJM's proposal as reasonable, the Commission explained that using real-time prices to estimate revenues is consistent with the Variable Resource Requirement Curve guidelines used to develop the Reliability Market demand curve. Tariff Order P 46, JA 41; First Rehearing Order P 31, JA 114. Thus, the Commission agreed with PJM (*see* PJM Answer at 26, JA 2282), that it is reasonable to use consistent methodologies to estimate revenues for the Reliability Market demand curve and the Minimum Price Rule. First Rehearing Order P 31, JA 114.

Having found PJM's proposal to be just and reasonable, the Commission next explained that Power Providers had not persuaded the Commission otherwise. *Id.*; *see supra* p. 69 (discussing shifting burden of proof). Courts have characterized this as a "heavy burden," *Transmission Agency of N. Cal.*, 628 F.3d at 549; merely pointing to "some contradictory evidence" is insufficient. *Fla. Mun. Power Agency*, 315 F.3d at 368. As the Commission explained, "other methodologies could be used to estimate energy and ancillary services

revenues . . . based upon the actual unit commitment process," but this does not render the Commission's approval of real-time prices unreasonable at this time. First Rehearing Order P 31, JA 114. *See OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (a "just and reasonable" rate "need not be the only reasonable methodology, or even the most accurate").

And, finally, while the Commission explained that it lacked a record, or "specific proposal" to allow it to approve "an appropriate mix of day-ahead and real-time prices," it specifically acknowledged that "PJM may wish to examine" such a possibility in its then-upcoming stakeholder process. First Rehearing Order P 31, JA 114. Following that process, PJM in fact proposed to modify its revenue estimating methodology to reflect consideration of day-ahead pricing, along with other reforms to the Minimum Price Rule, and the Commission approved that change, effective January 31, 2012. *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,062, PP 17, 144 (2012); *see also id*. P 67 (noting support of P3, PSEG and EPSA, among others, for this change); *see supra* p. 22 (discussing 2012 changes). Accordingly, Power Providers' challenge to the sole use of the real-time process in calculating revenue estimates applies only to the 2011 Auction, and is moot as to later Auctions.[13] *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),*

[13] The Commission also questions whether Power Providers have standing to pursue their challenge to the use of real-time pricing, inasmuch as Power Providers' brief does not address whether they were harmed by the use of such

Inc., 528 U.S. 167, 189 (2000). Far from demonstrating any error in this proceeding, the Commission's 2012 approval of a change to the revenue estimating process merely reflects the evolving nature of PJM's capacity market. *See infra* note 14 (an agency decision is not arbitrary simply because it is not followed in a later proceeding).

C. The Commission Reasonably Required Each New Resource To Demonstrate That It Is Needed, By Clearing One Auction Near The Net New Entry Cost, In Order To Avoid Mitigation In Future Auctions

Prior to the Commission's action here, the Minimum Price Rule contained a loophole: it applied only to the first delivery year a resource could be offered in the Reliability Market, allowing a resource simply to sit out its first eligible Auction and escape mitigation thereafter. First Rehearing Order P 125, JA 139. The Commission, agreeing with PJM that this is unjust and unreasonable, closed the loophole and required application of the Rule until a resource demonstrates that it is needed by clearing an Auction near its net entry cost. Tariff Order PP 175-76, JA 76. Mindful of the purpose of the Reliability Market, ensuring sufficient capacity to allow reliable operation of PJM's transmission system (*id*. P 4, JA 28), the Commission refused to potentially discourage economic entry by extending the Rule to a second or third Auction year after a resource demonstrates

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pricing in the 2011 Auction, and does not acknowledge the 2012 change in revenue estimating.

it is needed by the market. *Id*. PP 175-76, JA 76; First Rehearing Order PP 114-15, 130-31, 133, JA 137, 141-42. *See also supra* pp. 36, 38 (explaining that clearing an Auction shows that a resource is economic).

The Commission faced a range of proposals concerning how long the Minimum Price Rule should apply to new resources that clear an Auction by passing the conduct screen threshold. At one end of the spectrum, PJM proposed a three-Auction minimum and P3 proposed a two-Auction requirement like that in the New York regional market. Tariff Order PP 159-60, JA 72. At the other end, several intervenors and the Market Monitor argued that once is enough, with some, like the Market Monitor, offering various additional conditions. *Id*. PP 164, 167-71, JA 74-75.

Examining potential market conditions in detail, the Commission determined that a resource that clears the Auction once, near its net new entry cost (i.e., by passing the 90 percent threshold), is in fact an economic resource that need not be subject to future mitigation. *Id*. P 175 ("We agree with the [Market Monitor] that once a new resource has cleared in one auction at the offer price floor, the resource has demonstrated that it is needed by the market and it is therefore economic."), JA 76.

The Commission's orders recognize that "predicting future market conditions is necessarily uncertain." First Rehearing Order P 130, JA 141. Power

Providers assert that, under the Commission's rule, a resource could clear during a year of anomalous higher prices, even though such a resource would not be economic in the long-term. *See id*. As the Commission explained, that is "only one of many possibilities." *Id*. Under another example offered by the Commission, prices could rise above the net new entry cost in one or more years (thus encouraging new entry), then fall below that mark as the result of increased supply due to new entry, and then once again rise as demand growth exceeds the added supply. *Id*. Likewise, the Commission also pointed out that the one-year rule, "at least in theory," could apply to a resource for a number of years when the market has a sufficient supply of low-cost capacity. *Id*. P 127, JA 140. Moreover, even if prices did rise for only one year, a seller reasonably could have believed that "the higher prices will continue and its investment would be a legitimate response to the prices it perceives." *Id*. P 130, JA 141. Power Providers make no attempt to demonstrate that the Commission's analysis of potential market outcomes and behavior is inaccurate.

The Commission also examined and rejected both PJM's and P3's duration proposals, finding each could "inefficiently discourage the entry of new capacity that is economic." Tariff Order P 175, JA 76 (PJM proposal); First Rehearing Order P 131, JA 141 (finding that P3 proposal, by denying revenues to resources that clear once, but not a second or subsequent year, where the "average capacity

price over time approximated" the net new entry cost, "could discourage economic entry"). The Commission reasonably responded to Power Providers' *arguments* on rehearing; it is not required to reiterate or address each *case* on which a party relies. *See Sacramento*, 474 F.3d at 803 (upholding Commission orders where "FERC did fail to cite [the prior decision, but] it responded to [the] argument" on which it was based).

Nonetheless, the Commission in fact noted that, in the decision on which Power Providers rely, *New York Independent System Operator, Inc*., 133 FERC ¶ 61,178 at P 51 (2009), *reh'g denied*, 136 FERC ¶ 61,077 (2011), *appeal docketed sub nom. TC Ravenswood, LLC v. FERC*, No. 11-1305 (filed D.C. Cir. Aug. 25, 2011), the Commission found, as it did here, that "any resource that is not clearing in the market is uneconomic." Tariff Order P 160 n.87, JA 73. More important, however, Power Providers misunderstand or misstate that decision. Power Providers rely (Br. 53) upon the New York system operator's proposed minimum three-year mitigation period. But the Commission expressly rejected any minimum (133 FERC ¶ 61,178 at P 51), and allowed resources to become permanently exempt from mitigation after clearing the market for one year (12 monthly auctions in the New York market). *See id*. ("we reject [the] proposed minimum period of mitigation of 6 capability periods (approximately 3 years) . . . . [A] specified minimum period of mitigation is not needed"). And, in any event, to

the extent the rules differ, adopting different rates or rules in different markets is not a "change in course" (Br. 54 (citing cases)), but merely reflects the regional nature of Regional Transmission Organizations. PJM and New York previously used different auction periods and mitigation durations, and they will continue to do so.[14]

The Commission thus reasonably relied upon its own analysis in adopting the one-year rule. Acting under FPA section 206, 16 U.S.C. § 824e, the Commission was not required to adopt the entirety of any one party's proposal, including the Market Monitor's proposal. *See* First Rehearing Order P 125, JA 139 (agreeing with the Market Monitor as to the "appropriate duration"); Tariff Order P 177, JA 77 (declining to adopt Market Monitor's additional proposal). Power Providers suggest that the Commission only satisfies the substantial evidence standard when it selects, in its entirety, one of the options offered by the parties. Br. 51. This is false, as the Commission may of course invoke its own expertise, as it did here in predicting potential market outcomes under the various proposals.

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[14] The Court should reject Power Providers' invitation (*see* Br. 54-56) to "reach out to examine a decision made after the one actually under review . . . [because] [a]n agency's decision is not arbitrary and capricious merely because it is not followed in a later adjudication." *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404, 406 (D.C. Cir. 2005) (quoting *MacLeod v. ICC*, 54 F.3d 888, 892 (D.C. Cir. 1995)). Nevertheless, *Astoria Generating Co. v. New York Independent System Operator, Inc.*, 140 FERC ¶ 61,189 (2012), is pending on rehearing before the Commission, and the decision is distinguished in the same manner as *New York Independent System Operator, Inc.*, 133 FERC ¶ 61,178.

See Tariff Order PP 174-76, JA 76 ; First Rehearing Order PP 122-33, JA 138-42. Courts ordinarily review the Commission's technical rate findings and predictive judgments about proposed remedies with great deference. *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994); *Sacramento*, 616 F.3d at 541. Such deference is warranted here.

D. The Commission Reasonably Declined To Adopt Power Providers' Proposed No-Subsidy Exemption

Both in its complaint and in response to PJM's Proposal, P3 advocated an exemption from mitigation under the Minimum Price Rule for any resource able to verify that it will not receive out-of-market subsidies or preferential treatment by state regulators, including selective inclusion of costs in the rate base of load-serving entities or financing through tax-preferred bonds.[15] Br. 56; P3 Complaint at 34-36, JA 232-34; First Rehearing Order P 67, JA 123. Though the Commission agreed with Power Providers' goal — exempting from the Minimum Price Rule resources not receiving a subsidy — it rejected Power Providers' proposed verification method in favor of the revised cost justification process. *See* Tariff Order P 123, JA 61; First Rehearing Order P 75, JA 125. Power Providers, as the proponents of change, have not demonstrated that the Minimum Price Rule or the

[15] PJM recently proposed to adopt a no-subsidy exemption as part of a package of reforms that includes narrowing the classes of resources subject to the Rule and eliminating the cost justification process. *See supra* p.23.

revised unit-specific review process is unreasonable in the absence of the no-subsidy exemption, nor have they provided the Commission with an adequate record demonstrating that the proposed exemption itself is just and reasonable.

In the Tariff Order, the Commission declined to adopt P3's no-subsidy exemption because "[a]ll parties have the opportunity to avoid mitigation by making a cost demonstration" in the unit-specific review process. Tariff Order P 123, JA 61. The Commission had already found the existing cost review process, as modified in the Tariff Order, just and reasonable, thus rendering P3's proposed replacement "unnecessary." *Id*.

In its request for agency rehearing, P3 argued that the Commission erred because the unit-specific review process depends, in its view, on long-term predictions concerning costs, regulation, and "other untold contestable factors" that lack "absolute precision." P3 Rehearing Request at 25, JA 2578. P3 also argued, in a single paragraph (as opposed to the four pages it now devotes to the argument), that "there is no justification for mitigation absent the potential exercise of market power." *Id*. at 26, JA 2579.

As to P3's claim that the Commission is mitigating in the absence of market power, the Commission did "not disagree with the general proposition of exempting from [the Minimum Price Rule] resources shown to not be receiving a subsidy." First Rehearing Order P 75, JA 125. Rather, the Commission was

unconvinced that P3's proposed verification method would actually eliminate, with the certainty that Power Providers seem to presume, buyer-side market power. *See* Br. 31, 60. As the Commission explained, it was not "persuaded that determining what constitutes a 'subsidy' or a 'discriminatory payment,' as opposed to evaluating net costs, will be a less subjective and more precise means of preventing uneconomic entry." First Rehearing Order P 75, JA 125.[16]

Before this Court, Power Providers retort that the cost justification process is "plainly" more difficult to administer and subjective than its proposed no-subsidy exemption. Br. 57; *see also* Br. 60 (describing this as "self-evident"). But nowhere do Power Providers deny that defining and applying "subsidy" and "discriminatory payment" suffer from subjectivity and precision concerns, nor do they propose how to remedy the Commission's concern. *See* Br. 62. Indeed, Power Providers' argument seems to presume the very contention that the Commission questions: that the proposed verification process will necessarily succeed in eliminating buyer-side market power.

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[16] P3 claims that "at no point did P3 suggest replacing the net-costs benchmark with the No-Subsidy Off-Ramp." Br. 60. But, because P3 compared the cost justification process to its proposed no-subsidy exemption, the Commission reasonably understood P3, at least as an alternative, to be advocating the replacement of the cost justification process. *See* First Rehearing Order P 75, JA 125 (P3 "sought to replace any unit-specific review of net costs with" the no-subsidy exemption).

Even assuming that Power Providers adequately satisfied the Commission's concern — which they have not at this time — and that the no-subsidy exemption is a reasonable alternative to PJM's proposal, Power Providers' proposal still fails. What matters is that the Commission's choice — to rely on the revised cost justification process — is also a reasonable one, and Power Providers have not demonstrated otherwise. *See Dynamic Sec. Concepts*, 408 F. App'x at 630 ("While there may be evidence supporting petitioner's position, we must determine not whether record evidence supports [petitioner]'s version of events, but whether it supports [the agency]'s.") (citing *La. Pub. Serv. Comm'n*, 522 F.3d at 395 (internal quotation omitted).

CONCLUSION

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

Respectfully submitted,

David L. Morenoff
Acting General Counsel

Robert H. Solomon
Solicitor

/s/ Carol J. Banta
Carol J. Banta
Holly E. Cafer
Attorneys

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6433
Fax: (202) 273-0901
Email: Carol.Banta@ferc.gov

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CERTIFICATIONS

Word Count

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and this Court's Order dated July 23, 2012, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 21,616 words, not including the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum. (The word count is 21,996 with the glossary included.)

Identical Compliance of Briefs

I certify that the text of the electronically filed copy of the Brief of Respondent Federal Energy Regulatory Commission is identical to the text in the paper copies.

Virus Check

I certify that the electronic copy of this brief transmitted to the Court in PDF format has been scanned for computer viruses using McAfee VirusScan Enterprise v.8.8.0 and, according to the program, is free of viruses.

/s/ Carol J. Banta
Carol J. Banta
Attorney for Federal Energy
Regulatory Commission

April 2, 2013

ADDENDUM
Statutes

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applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(June 10, 1920, ch. 285, pt. I, § 33, as added Pub. L. 109–58, title II, § 241(c), Aug. 8, 2005, 119 Stat. 675.)

SUBCHAPTER II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

§ 824. Declaration of policy; application of subchapter

(a) Federal regulation of transmission and sale of electric energy

It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding subsection (f) of this section, the provisions of sections 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, and 824v of this title shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this chapter with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 824b(a)(2), 824e(e), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) Electric energy in interstate commerce

For the purpose of this subchapter, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) "Sale of electric energy at wholesale" defined

The term ''sale of electric energy at wholesale'' when used in this subchapter, means a sale of electric energy to any person for resale.

(e) "Public utility" defined

The term ''public utility'' when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f),[1] 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).

(f) United States, State, political subdivision of a State, or agency or instrumentality thereof exempt

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and records

(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A),

wherever located, if such examination is required for the effective discharge of the State

[1] So in original. Section 824e of this title does not contain a subsec. (f).

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

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

(d) Notice required for rate changes

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

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

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

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

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

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

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

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

ation, management, and control of all facilities for such generation, transmission, distribution, and sale; the capacity and output thereof and the relationship between the two; the cost of generation, transmission, and distribution; the rates, charges, and contracts in respect of the sale of electric energy and its service to residential, rural, commercial, and industrial consumers and other purchasers by private and public agencies; and the relation of any or all such facts to the development of navigation, industry, commerce, and the national defense. The Commission shall report to Congress the results of investigations made under authority of this section.

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

§ 825k. Publication and sale of reports

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

(June 10, 1920, ch. 285, pt. III, § 312, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 859.)

CODIFICATION

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

§ 825*l*. Review of orders

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

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

(b) Judicial review

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

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

(c) Stay of Commission's order

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

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

CODIFICATION

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

AMENDMENTS

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

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

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

CHANGE OF NAME

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

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

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

(b) Writs of mandamus

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

(c) Employment of attorneys

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

(d) Prohibitions on violators

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

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

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

(A) electric energy; or

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

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

CODIFICATION

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

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), Local Appellate Rule 25.1, and L.A.R. Misc. 113.4, I hereby certify that I have, this 2d day of April 2013, served the foregoing through the Court's CM/ECF system upon the following counsel:

Brian O. Lipman, Esq.
Office of Attorney General of New Jersey
124 Halsey Street
P.O. Box 45029
Newark, NJ 07102

Jennifer S. Hsia, Esq.
Office of Attorney General of New Jersey
124 Halsey Street
P.O. Box 45029
Newark, NJ 07102

Stefanie A. Brand, Esq.
Office of Public Defender
Division of the Ratepayer Advocate
31 Clinton Street
P.O. Box 46005
Newark, NJ 07102

Jeffrey A. Schwarz, Esq.
Spiegel & McDiarmid
1333 New Hampshire Ave. NW
Suite 200
Washington, DC 20036

Scott H. Strauss, Esq.
Spiegel & McDiarmid
1333 New Hampshire Ave. NW
Suite 200
Washington, DC 20036

Adrienne E. Clair
Stinson, Morrison & Hecker
1775 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006

Regina A. Iorii, Esq.
Department of Justice
820 North French Street
Carvel Office Building, 6th floor
Wilmington, DE 19801

Gregory T. D'Auria, I, Esq
Office of Attorney General of
Connecticut
55 Elm Street
P.O. Box 120
Hartford, CT 06106

Stuart A. Caplan, Esq.
SNR Denton US
1221 Avenue of the Americas
24th Floor
New York, NY 10020

Larry F. Eisenstat, Esq.
Dickstein Shapiro
1825 I Street, NW
Washington, DC 20006

Harvey L. Reiter, Esq.
Stinson, Morrison & Hecker
1150 18th Street, NW
Suite 800
Washington, DC 20036

Werner L. Margard, III, Esq.
Office of Attorney General of Ohio
Public Utilities Division
180 East Board Street
Columbus, OH 43266

Randall L. Speck, Esq.
Kaye Scholer
901 15th Street, NW
Washington, DC 20005

Ashley C. Parrish, Esq.
King & Spalding
Suite 200
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

David G. Tewksbury, Esq.
King & Spalding
Suite 200
1700 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

Gary J. Newell, Esq.
Thompson Coburn
1909 K Street, NW
Suite 600
Washington, DC 20006

Sandra Rizzo, Esq.
Bracewell & Guilliani
2000 K Street, NW
Suite 500
Washington, DC 20006

Charles H. Shoneman, Esq.
Bracewell & Guilliani
2000 K Street, NW
Suite 500
Washington, DC 20006

Robert A. Weishaar, Jr., Esq.
McNees, Wallace & Nurick
777 North Capitol Street, NE
Suite 401
Washington, DC 20002

Paula M. Carmody, Esq.
Maryland People's Counsel
6 St. Paul Street
Suite 2102
Baltimore, MD 21202

William F. Fields, Esq.
Maryland People's Counsel
6 St. Paul Street
Suite 2102
Baltimore, MD 21202

Christopher R. Jones, Esq.
Troutman Sanders
401 9th Street, NW
Suite 1000
Washington, DC 20004

Andrew D. Prins
Latham & Watkins
555 11th Street, N.W.
Suite 1000
Washington, DC 20004

Denise C. Goulet, Esq.
Miller, Balis & O'Neil
1015 15th Street, NW, 12th Floor
Washington, DC 20005

Jeffery W. Mayes, Esq.
Monitoring Analytics
2621 Van Buren Avenue
Suite 160
Eagleville, PA 19403

Paul M. Flynn, Esq.
Wright & Talisman
1200 G Street, NW
Suite 600
Washington, DC 20005

Adam M. Conrad, Esq.
King & Spalding
100 North Tryon Street
Suite 3900
Charlotte, NC 28202

John N. Estes, III, Esq.
Skadden, Arps, Slate, Meagher
& Flom
1440 New York, Avenue, NW
Washington, DC 20005

John L. Shepherd, Esq.
Skadden, Arps, Slate, Meagher
& Flom
1440 New York, Avenue, NW
Washington, DC 20005

Paul F. Wight, Esq.
Skadden, Arps, Slate, Meagher
& Flom
1440 New York, Avenue, NW
Washington, DC 20005

Richard P. Bress, Esq.
Latham 7 Watkins
555 11th Street, NW
Suite 1000
Washington, DC 20004

Robert C. Fallon, Esq.
Leonard, Street & Deinard
1350 I Street, NW
Suite 800
Washington, DC 20005

Jonathan W. Gottlieb, Esq.
Leonard, Street & Deinard
1350 I Street, NW
Suite 800
Washington, DC 20005

Tamara L. Linde, Esq.
Public Service Electric & Gas Company
80 Park Plaza
Newark, NJ 07101

Vilna W. Gaston, Esq.
Public Service Electric & Gas Company
Room T5G
80 Park Plaza
Newark, NJ 07101-0570

/s/ *Carol J. Banta*
Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6433
Fax: (202) 273-0901
Email: Carol.Banta@ferc.gov