ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 15-1453 and 15-1455 (consolidated)

PJM POWER PROVIDERS GROUP, *et al*.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

Anand R. Viswanathan
Attorney

For Respondent Federal Energy Regulatory Commission
Washington, D.C. 20426

Final Brief: September 20, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

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

B. Rulings Under Review

1. *PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,183 (Nov. 28, 2014) ("Initial Order"), R. 57, JA 703-49; and

2. *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,035 (Oct. 15, 2015) ("Rehearing Order"), R. 69, JA 798-823.

C. Related Cases

This case has not been before this Court or any other court. In another case pending before this Court, PJM Power Providers Group, which also is a petitioner in this case (No. 15-1453), challenges other Commission orders concerning market rules in the same capacity market. *NRG Power Marketing, LLC v. FERC*, Nos. 15-1452 & 15-1454. In addition, another petition seeks review of Commission orders approving further changes to the capacity market. *Advanced Energy Management Alliance, et al. v. FERC*, Nos. 16-1234, *et al.* (D.C. Cir. filed July 8, 2016).

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

September 20, 2016

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

---

* Cases chiefly relied upon are marked with an asterisk.

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES: **PAGE**

STATUTES:

Administrative Procedure Act

Federal Power Act

GLOSSARY

Br.	Brief of Petitioners PJM Power Providers Group, PSEG Power LLC, PSEG Energy Resources & Trade LLC, and Public Service Electric and Gas Company
Commission or FERC	Federal Energy Regulatory Commission
Initial Order	*PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,183 (Nov. 28, 2014), R. 57, JA 703-49
JA	Joint Appendix
P	Paragraph in a Commission order
PJM	PJM Interconnection, LLC
Power Providers	Petitioners PJM Power Providers Group, PSEG Power LLC, PSEG Energy Resources & Trade LLC, and Public Service Electric and Gas Company
R.	Item in the certified index to the record
Rehearing Order	*PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,035 (Oct. 15, 2015), R. 69, JA 798-823

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

Nos. 15-1453 and 15-1455 (consolidated)

PJM POWER PROVIDERS GROUP, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF ISSUES

This appeal concerns the price of electric capacity in the wholesale electricity market for the broad mid-Atlantic region. Capacity, here, refers to the ability to produce electricity when needed. PJM Interconnection, LLC ("PJM") operates this regional market, which covers all or parts of thirteen states and the District of Columbia. ("PJM" is not an acronym coined for this brief; rather, it takes its name from the home states—Pennsylvania, New Jersey, and Maryland—of the first utilities to pool their excess capacity.)

PJM determines the price of capacity through an auction mechanism. This involves estimating the cost of new entry, which is the revenue a hypothetical new generator would need to recoup its costs. That estimate—in particular two components of that estimate, *i.e.*, construction labor costs and the cost of capital—is the focus of this appeal.

The Federal Energy Regulatory Commission ("FERC" or "Commission") approved PJM's revised estimate of the cost of new entry, among other things. Some parties found the revised estimate too low; others found it too high; still others, just right. Petitioners PJM Power Providers Group and the PSEG Companies (collectively, "Power Providers"), who fall in the first camp, argue that the Commission failed to adequately respond to their objections to PJM's estimates for the two challenged components of the cost of new entry. They also argue that the Commission's approval of those estimates was not supported by substantial record evidence.

The issues presented for review are:

1. Whether the Commission's approval of PJM's estimates for the cost of new entry was supported by substantial evidence; and

2. Whether the Commission reasonably addressed Power Providers' objections to those estimates.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are reproduced in the Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Section 201 of the Federal Power Act 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. 16 U.S.C. §§ 824(a)-(b); *see generally New York v. FERC*, 535 U.S. 1 (2002) (discussing statutory framework and FERC jurisdiction). Under Section 205 of the Federal Power Act, all rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to assure that they are just and reasonable, and not unduly discriminatory or preferential. 16 U.S.C. §§ 824d(a), (b), (e); *see also Wis. Pub. Power, Inc. v. FERC*, 493 F.3d 239, 254 (D.C. Cir. 2007) ("[Federal Power Act] section 205 allows utilities to file changes to their rates at any time and requires FERC to approve them as long as the new rates are 'just and reasonable.'").

II. FACTUAL BACKGROUND

A. PJM's Periodic Review of Its Capacity Market Demand Curve

PJM is a non-profit entity, known as a regional transmission organization, that FERC has charged with overseeing the electricity grid in all or parts of thirteen mid-Atlantic states and the District of Columbia. *Hughes v. Talen Energy Mktg.*,

LLC, 136 S. Ct. 1288, 1292-93 (2016). To meet its customers' anticipated future demand for electricity, PJM uses auctions to secure commitments from market participants to provide sufficient capacity. *See id*. at 1293; *see also PJM Interconnection, L.L.C.*, 149 FERC ¶ 61,183 at P 3, JA 705 (2014) ("Initial Order"); *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,062 at P 3 (2012). Capacity simply refers to the ability to produce electricity when necessary. *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009); *see also NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165, 168 (2010) ("In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself."). PJM conducts "base residual auctions" three years in advance of when the capacity will be needed and annual "incremental auctions" during the three-year period between base residual auctions. *See N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 84 (3d Cir. 2014); Initial Order P 3, JA 705. The price and available quantity of capacity at auction is set by the intersection of a "demand curve" predetermined by PJM and the total amount of capacity offered by sellers (*i.e*., the supply curve). Initial Order P 4, JA 706; *see also TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013).

Every three years, PJM reviews the demand curve and certain key inputs to the curve, including the cost of new entry for a hypothetical new power plant, as

required in its Commission-approved tariff. PJM Proposed Revisions to Open Access Transmission Tariff at 1, FERC Docket No. ER14-2940 (Sept. 25, 2014), R. 1, JA 1 ("PJM Filing"); *PJM Interconnection*, 138 FERC ¶ 61,062 at P 4. It does so by making a variety of estimates and projections with the assistance of an independent consultant, the Brattle Group. *See, e.g.*, Initial Order PP 4, 59, 95, JA 706, 723, 734 (noting that cost of new entry is determined in part by estimating construction labor costs and future costs for borrowing and equity); *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,035 at PP 3-4, JA 798-99 (2015) ("Rehearing Order"); PJM Filing at 23, JA 23 ("The [cost of new entry] in each case was developed using a financial model that includes estimates of the likely debt cost, required internal rate of return, income taxes, and the project's economic life.").

The cost of new entry approximates the revenue that a generator would need to recover its total costs—*i.e.*, the higher the cost of new entry, the more revenue a generator would need to receive to recoup its costs. *See* Initial Order P 8, JA 707 ("[Cost of new entry] . . . . represents the first-year total net revenue (net of variable operating costs) that a representative new generation resource would need in order to recover its capital investment and fixed costs, given reasonable expectations about future cost recovery over its economic life."). It is therefore intended to ensure that the demand curve procures enough capacity to meet

expected future demand. PJM Filing, Attachment D, "Cost of New Entry Estimates for Combustion Turbine and Combined Cycle Plants in PJM" at iii, JA 121 ("Brattle Cost of New Entry Report") ("Accurate estimates of [cost of new entry] . . . provide the benchmark prices that define the administratively-determined demand curve for capacity . . . . Without accurate [net cost of new entry] estimates, the [demand] curves cannot be expected to procure the target amounts of capacity needed to satisfy PJM's resource adequacy requirements."); *see also TC Ravenswood*, 741 F.3d at 114-15; *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 473 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg. v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

B. PJM's 2014 Demand Curve Filing

The Commission's orders accepting PJM's latest review of the demand curve and cost of new entry are the subject of Power Providers' appeal to this Court. On September 25, 2014, PJM submitted to the Commission proposed changes to the demand curve and cost of new entry, among other changes. As support for these changes, PJM also submitted sworn affidavits from its chief economist (Dr. Paul M. Sotkiewicz), a Brattle Group economist (Dr. Samuel A. Newell), and a Sargent and Lundy consultant retained by Brattle (Christopher D. Ungate), as well as two reports prepared by Brattle on the cost of new entry in PJM

and on PJM's demand curve. *See* PJM Filing at 1-3, JA 1-3. Most of PJM's proposed changes are not at issue in this appeal.

PJM relied on Brattle's work to support its overall proposed estimates for cost of new entry, but departed from Brattle's recommendations on several issues, including the estimate of labor costs, which is a component of the cost of new entry. Initial Order P 95, JA 734. For labor costs, PJM instead adopted a lower estimate sponsored by PJM's Independent Market Monitor ("Market Monitor") in connection with its preparation of its annual State of the Market Report. *Id*. P 96, JA 734; PJM Filing at 3, 28, JA 3, 28. PJM adopted Brattle's recommended 8.0 percent cost of capital, another component of the cost of new entry that approximates future costs for borrowing and equity. *See* Initial Order PP 59-60, JA 723-24.

Several parties, including Power Providers, protested at least some aspects of PJM's proposal. While Power Providers generally supported the proposed revisions to the demand curve, they challenged PJM's estimates of labor costs and the cost of capital, among other things, as too low. *See id*. PP 28, 63, 98, JA 714, 724-25, 735. They asked the Commission to adopt, instead, the higher estimate of labor costs developed by Brattle and Sargent and Lundy. *See* PJM Power Providers Group Motion to Intervene, Comments and Limited Protest, FERC Docket No. ER14-2940 (Oct. 16, 2014), R. 45, JA 394 ("Power Providers

Protest"). Power Providers also recommended a higher cost of capital (10.80%) based on an analysis prepared by a consulting firm, the PA Consulting Group, and asked the Commission to set the issue for hearing. *Id*., JA 390.

Other parties, however, supported PJM's estimates of labor costs or the cost of capital. For example, the PJM Load Group, a coalition that includes several state consumer advocacy groups,[1] embraced PJM's proposal to adopt the Market Monitor's lower estimate of labor costs instead of the Brattle estimate; however, it protested PJM's proposed 8.0 percent cost of capital as *too high*, recommending that it be set at 7.0 percent, and also protested PJM's proposal to change the demand curve. PJM Load Group Protest at 9, 12, 15, JA 492, 495, 498; *see also* Comments of Public Utilities Commission of Ohio at 4, 7-8, FERC Docket No. ER14-2940 (Oct. 16, 2014), R. 41, JA 516, 519-20 (noting that PJM's proposal "strikes an appropriate balance between reliability and price and should be adopted by the Commission," with one minor revision). PJM's Market Monitor supported the entirety of PJM's proposal. Comments of the Independent Market Monitor for PJM at 1-2, FERC Docket No. ER14-2940 (Oct. 17, 2014), R. 47, JA 522-23.

[1] The PJM Load Group includes entities such as the Consumer Advocate Division of West Virginia, the Division of the Public Advocate for Delaware, and the Pennsylvania Office of Consumer Advocate, among others. Protest of PJM Load Group at 1, FERC Docket No. ER14-2940 (Oct. 16, 2014), R. 42, JA 484 ("PJM Load Group Protest").

In response to the various protests and comments filed with the Commission, PJM submitted an answer and three more supporting expert affidavits. *See* PJM Answer to Protests and Comments, FERC Docket No. ER14-2940 (Nov. 6, 2014), R. 51, JA 533-686 ("PJM Answer").

III. THE CHALLENGED ORDERS

The Commission accepted as just and reasonable nearly all of PJM's proposed cost input revisions, but rejected its proposal to set a minimum local net cost of new entry. *See* Initial Order PP 2, 127, JA 705, 743. As relevant to this appeal, Power Providers sought rehearing of the Commission's acceptance of PJM's estimates of labor costs and the cost of capital, which the Commission denied. *See* Rehearing Order PP 41, 54, 70, 75, JA 810, 814, 818-20.

On labor costs, the Commission found that PJM reasonably adopted the Market Monitor's estimate, instead of Brattle's, after considering both estimates in the PJM stakeholder process. *See id*. P 76, JA 820; Initial Order PP 96, 107, JA 734, 737. It concluded that the inputs to the Market Monitor's estimate (including labor hours and hourly wage rates) were well-supported in the record and consistent with publicly available data and PJM's prior studies of the cost of new entry. Rehearing Order PP 75-76, JA 820; Initial Order PP 104-07, JA 736-37. The Commission also explained that it disagreed with Power Providers' alternative estimate of total labor hours because that estimate was based on smaller

construction projects and thus ignored economies of scale from building larger power plants in PJM. Rehearing Order P 77, JA 820-21.

On the cost of capital, the Commission concluded that Brattle's methodology for calculating the proposed 8.0 percent cost of capital was well-supported, transparent, and reasonable. Initial Order PP 76-81, JA 728-30. It also found that the assumptions behind that cost of capital represented "an appropriate balance of the interests among investors and consumers." Rehearing Order P 58, JA 815. According to the Commission, PJM's evidence was verifiable and its proposal reflected "the market's required compensation for the specific, systemic operating risks attributable to merchant generation, and the willingness of borrowers to bear these risks." *Id*. P 57, JA 814-15; *see also* Initial Order PP 78-79, JA 728-30.

The Commission also found PJM's demand curve revisions just and reasonable. Initial Order P 52, JA 721. As to those findings, Power Providers did not seek rehearing before the Commission and do not seek this Court's review.

SUMMARY OF ARGUMENT

The Commission addressed many complex, highly technical matters in the orders under review. Now before this Court, however, are just two narrow, discrete parts of those orders. Unhappy with the Commission's resolution of those two matters, and favoring a higher estimated cost of new entry (and higher

resulting wholesale capacity charges), Power Providers now challenge whether the record supports the Commission's findings. It does.

At issue are two inputs to the estimated cost of new entry—labor costs and the cost of capital. The cost of new entry, as noted *supra*, influences the shape of the capacity market demand curve, which ultimately sets the price of capacity available in the PJM wholesale market. Power Providers consider the estimates approved by the Commission for these inputs too low; meanwhile, a group including various state consumer advocates argued before the Commission that they were too high.

In finding PJM's proposal just and reasonable, the Commission considered extensive evidence, including affidavits and reports by experts, in support of PJM's multiple revisions to its demand curve and to the cost of new entry. The Commission provided a detailed explanation of why it approved the methodology and assumptions of PJM's experts. It explained its reasonable conclusion that the approved rate represents an appropriate balance of the competing interests between investors and consumers. And, it reasonably explained why it was not persuaded by the work of Power Providers' expert witnesses. Those Commission findings are owed deference.

Power Providers see it differently. They argue that the Commission did not say enough and reached the wrong result. In doing so, they rely largely on: (1) the

personal experience of one of their expert witnesses in the construction industry; (2) that witness's alternative hypothetical calculations (which were disputed by PJM's experts); (3) unsupported claims that PJM's evidence "lacked probative value"; and (4) vague and ill-defined alternative "approaches" offered by another group of experts.

The Commission considered these arguments and meaningfully explained why it disagreed with them. Although Power Providers present an alternative they prefer (*i.e.*, higher costs), an intervenor's preference for a different result does not make the Commission's conclusion unjust and unreasonable; nor does it undo the substantial evidence supporting that conclusion. *See FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782-84 (2016).

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard and upholds FERC's factual findings if supported by substantial evidence. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010) (citing 5 U.S.C. § 706(2)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Murray Energy Corp. v. FERC*, 629 F.3d 231, 235 (D.C. Cir. 2011).

The Supreme Court emphasized recently—on review of the Commission's valuation of certain resources in wholesale markets at one level, rather than another—that a court "may not substitute [its] own judgment for that of the Commission." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. That is, a court "is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives," but rather must affirm the agency's finding so long as it examined the relevant data and articulated a rational connection between the facts found and the choice made. *Id*.; *see also Sacramento*, 616 F.3d at 528; *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision.").

"And nowhere is that more true than in a technical area like electricity rate design." *Elec. Power Supply Ass'n*, 136 S. Ct. at 782. Here, courts accord great deference to the Commission's decisions because the Federal Power Act's "statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition . . . ." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968) ("[T]his Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to

set aside any rate selected by the Commission which is within a 'zone of reasonableness.'") (quoting *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942)); *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009).

This Court also defers to the Commission's resolution of factual disputes between expert witnesses. *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 551 (D.C. Cir. 2010); *see also Sacramento*, 616 F.3d at 530 ("[E]ven if [petitioner's expert's] testimony arguably could have supported a different conclusion . . . , that would not mean FERC's conclusion lacked substantial evidence.").

II. FERC'S ACCEPTANCE OF PJM'S PROPOSED LABOR COST ESTIMATES WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

The Supreme Court's recent decision in *Electric Power Supply Association* is instructive when reviewing under the substantial evidence standard a Commission decision involving "both technical understanding and policy judgment." 136 S. Ct. at 784. There, the Court held that the Commission engaged in reasoned decisionmaking by addressing "seriously and carefully" a highly technical rate design issue (*i.e.*, the appropriate compensation for demand response resources in organized wholesale markets), providing reasons in support of its position, and responding to alternatives. *Id.* "All of that together is enough. . . . It is not our job to render that judgment, on which reasonable minds can differ." *Id.*

The Commission's careful consideration of the evidence offered by PJM similarly warrants deference here. As the Commission recognized, PJM provided extensive support for its proposed cost of new entry and, in particular, for the labor cost component of cost of new entry. *See* Initial Order PP 104-07, JA 736-37.

A. The Commission Gave A Detailed Explanation For Its Approval of the Labor Cost Estimates Prepared By PJM's Experts

The Commission's reasoning here, like that upheld in *Electric Power Supply Association*, is based in part on its reliance on evidence offered by experts. *See Elec. Power Supply Ass'n*, 136 S. Ct. 782 (approving FERC's reliance on "an eminent regulatory economist's views"); *see also Transmission Agency of N. Cal.*, 628 F.3d at 551 (noting the court's deference to the Commission's resolution of factual disputes between expert witnesses.); *Md. Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 (D.C. Cir. 2011) (upholding FERC determination that rates were just and reasonable in part because FERC reached its conclusion after reviewing "analytical reports from expert consultants retained by the states, PJM's Market Monitor . . . , and an independent consulting group hired by PJM"). PJM and its chief economist, Dr. Sotkiewicz, adopted the Market Monitor's estimate of labor costs, which came from an analysis by an independent consulting firm (Pasteris Energy). *See* Initial Order P 96, JA 734; Rehearing Order P 76, JA 820; PJM Filing at 28, JA 28; *see also New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 299 (D.C. Cir. 2014) (underscoring the reasonableness of FERC's decision

because both the New England transmission system operator and its internal market monitor agreed with it); *N.J. Bd. of Pub. Utils.*, 744 F.3d at 91 n.15 (noting intervenor's description of PJM's Independent Market Monitor as "a neutral entity that monitors compliance with PJM's market rules"). Pasteris Energy retained a power plant design and engineering firm, Stantec Consulting Services ("Stantec"), which provided the labor cost estimate, including a projection of the number of labor hours required to construct a new combustion turbine plant (360,000 hours). PJM Filing at 28, JA 28; *id*. Attachment C, Affidavit of Dr. Paul M. Sotkiewicz PP 36, 38 & n.21 ("Sotkiewicz Aff."), JA 73. Power Providers challenge the Commission's adoption of Stantec's labor hours estimate as lacking substantial evidence. Br. 35.

The Commission, however, reasonably explained the record basis for its adoption of Stantec's hours estimate. *See, e.g*., Initial Order PP 107-08, JA 737; Rehearing Order PP 76, 78, JA 820-21. It found, for example, that PJM's proposal "reflects its careful review of the Market Monitor's labor cost estimates, including a comparison against prior labor cost estimates and public data on labor costs, and represents a reasonable alternative estimate for construction labor costs." Initial Order P 107, JA 737; *see also id*. P 108, JA 737 ("Dr. Sotkiewicz notes that the values closely track data from the U.S. Bureau of Labor Statistics Quarterly Census of Employment and Wages associated with utility construction wages, the

same data PJM uses to adjust the labor portion of costs."); Rehearing Order PP 76, 78, JA 820-21 ("As PJM noted in its answer, Brattle's estimate and that sponsored by PJM's witness, Dr. Sotkiewicz (368,000 hours versus 360,000 hours) were not widely divergent."); *see also* Sotkiewicz Aff. P 39, JA 73-74 (noting the consistency of Stantec's estimate with CH2M Hill's 2011 estimate of 361,088 labor hours); PJM Answer at 41, JA 576 (referencing Brattle's estimate of 368,000 hours).

Evidence of similar estimates by multiple independent experts—confirmed by publicly available data—is substantial, and sufficient to uphold the Commission's finding that PJM's chosen estimate of labor hours was well-supported in the record. *See, e.g.*, *Sacramento*, 616 F.3d at 529-30 (concluding that the record before the Commission, including testimony by two different expert witnesses, "contained evidence adequate to support the Commission's finding"); *Fla. Gas Transmission*, 604 F.3d at 645 ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision."); *see also Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1239 (D.C. Cir. 2005) (deference to Commission's approval of a revised demand curve, and to its "predictive judgment that the new rate design will result in 'more good than harm,'" was based in part "on the understanding that the Commission will monitor its experiment and review it accordingly"). Power

Providers' claimed lack of record support for the Market Monitor's hours estimate is without merit. Br. 36.

Moreover, the Commission fully explained the significance of PJM's consideration of transparent, publicly available data (from the U.S. Bureau of Labor Statistics) in PJM's independent review of the Market Monitor's proposed estimates. It noted, for instance, that valid, transparent data is an important factor in developing appropriate labor cost estimates; PJM's estimates were thus deemed reasonable because they "rel[ied] on, to the greatest extent possible, publicly available data . . . ." Initial Order P 106, JA 736-37; *see also* Rehearing Order P 69, JA 818; *Sacramento*, 616 F.3d at 541-42 (Court "'properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions,'" where the Commission "reflected on the competing interests at stake to explain why it struck the balance it did") (quoting *Tenn. Gas Pipeline Co. v. FERC*, 400 F.3d 23, 27 (D.C. Cir. 2005)). The Commission also found "convincing" PJM's use of Bureau of Labor Statistics data to confirm the Market Monitor's estimates because PJM uses the same data source to update the cost of new entry. *See* Initial Order P 108, JA 737 ("That the data source is the same as, and will be consistent with, that used to make periodic adjustments to [cost of new entry] values is a convincing justification for using the data in this case."). Based on this thoughtful review of PJM's evidence, the Commission reasonably

concluded that PJM's adoption of the Market Monitor's proposed labor cost estimates was just and reasonable. *See id*. PP 104-06, JA 736-37; Rehearing Order PP 76, 78, JA 820-21; *see also Fla. Gas Transmission*, 604 F.3d at 645.

B. Power Providers' Expert Testimony Does Not Compel Upsetting the Commission's Decision

Notwithstanding this substantial evidence supporting PJM's estimate of labor costs, Power Providers ask this Court to set it aside out of respect for their expert witness's years of experience in the construction field. *See, e.g.*, Br. 52 ("At a minimum, Mr. Uniszkiewicz's evidence was entitled to much more weight given his relative expertise and experience regarding construction related matters."); *id*. 49-53. This turns the substantial evidence standard on its head.

It is well established that this Court's inquiry into FERC decisions under the substantial evidence standard "'is not whether record evidence supports [petitioner's] version of events, but whether it supports FERC's.'" *Fla. Mun. Power Agency v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010) (quoting *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003)); *see also Elec. Power Supply Ass'n*, 136 S. Ct. at 782; *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954-55 (D.C. Cir. 2005) (FERC's orders do not lack substantial evidence "simply because petitioners offered some contradictory evidence") (internal quotation marks omitted). Power Providers' mere perception of a "disparity in the experience and expertise" of their witness as compared to that of PJM's chief

economist does not support their bald assertion that "witness credibility issues were clearly present." *See* Br. 52-53. Nor does it outweigh this Court's traditional deference to the Commission's resolution of fact disputes between expert witnesses. *See, e.g.*, *Transmission Agency of N. Cal.*, 628 F.3d at 551; *Sacramento*, 616 F.3d at 530.

In any event, the Commission fulfilled its obligation to respond meaningfully both to Power Providers' claim that PJM's estimate was too low and to the testimony of their expert witness, Robert H. Uniszkiewicz. *See Transmission Agency of N. Cal.*, 628 F.3d at 552 (finding that the Commission's overall explanation "sufficed because it provided reasonable responses to petitioners' objections that were neither summary nor dismissive," and that "a point-by-point rebuttal is not necessarily required"). Mr. Uniszkiewicz offered an alternative hypothetical calculation of labor hours to argue that Sargent and Lundy actually used a labor-hours figure much higher than the 368,000 hours figure that PJM's expert stated Sargent and Lundy used, and therefore much higher than the 360,000 hours figure sponsored by the Market Monitor. Br. 46-47.

Yet, two principals of the Brattle Group (Johannes Pfeifenberger and Dr. Bin Zhou)—which retained Sargent and Lundy to assist on preparing the cost of new entry report for PJM—confirmed in an affidavit the 368,000 labor-hours value

used by the Sargent and Lundy consultant (Christopher Ungate).[2] The Commission accepted Brattle's representation as to the work performed by Sargent and Lundy. *See* Rehearing Order P 78 & n.62, JA 821 (citing PJM Answer at 41, JA 576, which cites Pfeifenberger/Zhou Aff. at 23, JA 639). Power Providers offer no support for their suggestion that the Commission should not have done so, beyond a few irrelevant references to "hearsay." Br. 46-47; *see Larson v. U.S. Dept. of Homeland Sec*., 726 F.3d 170, 178 (D.C. Cir. 2013) ("[T]here is no absolute bar against the admission of hearsay evidence in agency proceedings. To the contrary, 'it is well-settled not only that hearsay can be considered by an administrative agency but that it can constitute substantial evidence.'") (quoting *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002)) (internal citations omitted).

Nor was this the sole reason for the Commission's disagreement with the claim that PJM understated the labor hours, as Power Providers suggest. *See* Br. 47. The Commission also described why it did not find persuasive Mr. Uniszkiewicz's alternative calculation of labor hours. Specifically, it disagreed with his calculation for building a large power plant (396 megawatts) because he "ignore[d] the economies of scale in building larger plants with less proportionate

[2] *See* PJM Answer, Attachment B, Affidavit of Johannes P. Pfeifenberger and Bin Zhou at 23, FERC Docket No. ER14-2940 (Nov. 6, 2014), R. 51, JA 639 ("Pfeifenberger/Zhou Aff."); PJM Filing, Attachment D, Affidavit of Dr. Samuel A. Newell and Mr. Christopher Ungate at 3, JA 87 ("Newell/Ungate Aff.").

quantities of labor," and reached his estimate by simply extrapolating from the number of hours associated with three relatively smaller projects (89, 133, and 178 megawatts) completed by one of Power Providers' affiliates. Rehearing Order P 77, JA 820-21; *see also* Power Providers Protest, Affidavit of Robert H. Uniszkiewicz P 12, JA 457-58 ("Uniszkiewicz Aff."). When Dr. Sotkiewicz criticized that approach, Mr. Uniszkiewicz asserted—relying only on his "extensive experience"—that economies of scale were not relevant. *See* Reply Comments of PJM Power Providers Group, Responsive Affidavit of Robert H. Uniszkiewicz P 7, JA 701 ("Uniszkiewicz Resp. Aff.") ("[B]ased on my extensive experience . . . I do not believe that there would be significant economies of scale . . . ."); PJM Answer, Attachment C, Answering Affidavit of Dr. Paul M. Sotkiewicz P 9, JA 684-85 ("Sotkiewicz Answering Aff."); PJM Answer at 41-42, JA 576-77. This was insufficient.

Federal courts, in a variety of contexts, discount these kinds of conclusory assertions unsupported by record evidence, even when made by purported "experts." *See, e.g.*, *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 816 F.3d 788, 805 (Fed. Cir. 2016) ("No reasonable jury could find testimony by a single expert about his personal experience" as evidence probative of nonobviousness of a patent); *Robinson v. Wash. Metro. Area Transit Auth.*, 774 F.3d 33, 39 (D.C. Cir. 2014) (an expert's personal opinions or unsupported assertions were insufficient to establish

an issue relevant to a negligence action); *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1154 (9th Cir. 2012) (no abuse of discretion in district court's rejection of plaintiffs' witness declaration where the witness offered "unsupported assertions" and plaintiffs offered no data forming the basis for the witness's assumptions or conclusions). The Commission thus reasonably could conclude that Mr. Uniszkiewicz's testimony on this issue was not persuasive. *See* Rehearing Order P 77, JA 820-21.

Power Providers also argue that the Commission addressed neither Mr. Uniszkiewicz's other hypothetical alternative calculation (of Sargent and Lundy's "implied wage rate"), Br. 48, nor his objections to the wage rates proposed by Dr. Sotkiewicz, Br. 53-56. Both these claims, however, miss the mark—the Commission both adequately explained its reasons for accepting PJM's proposed wage rates and meaningfully responded to criticisms. It found that PJM's wage rates included overtime pay typical for the construction industry, were verified by data reported by the U.S. Bureau of Labor Statistics, and were consistent with the data "used to make periodic adjustments" to the cost of new entry. *See* Initial Order PP 105, 108, JA 736-37; Rehearing Order P 75, JA 820; *see also Fla. Mun. Power Agency*, 602 F.3d at 461 ("Merely pointing to some contradictory evidence is insufficient because 'the question the court must answer . . . is not whether

record evidence supports Florida Municipal's version of events, but whether it support FERC's.'") (brackets omitted).

Although Power Providers' expert disputed PJM's expert's wage rate estimate, the Commission weighed the evidence and reasonably resolved the dispute by accepting PJM's estimate. *See* Initial Order P 102, JA 736; Rehearing Order P 75, JA 820; *see also Fla. Mun. Power Agency*, 602 F.3d at 464 ("FERC's reasoned explanation and weighing of the evidence, particularly between disputing expert witnesses, is entitled to deference."); *E. Niagara Pub. Power All. & Pub. Power Coal. v. FERC*, 558 F.3d 564, 567 (D.C. Cir. 2009) (finding "no room to overturn [FERC's] reasoned and reasonable determination" of "a difficult valuation question," which required "predictive and inherently speculative" judgment); *Elec. Consumers Res. Council*, 407 F.3d at 1241-42 (deferring to Commission's "policy choice" because the Commission provided "a reasonable explanation" for its choice of a revised demand curve design "despite the proposed alternatives"). Mr. Uniszkiewicz criticized one aspect of Dr. Sotkiewicz's methodology—again based solely on his personal experience—but otherwise agreed with Dr. Sotkiewicz's wage rate calculation. *See* Uniszkiewicz Aff. P 10, JA 456 ("*Although I am in general agreement with Dr. Sotkiewicz's calculation of wage rates* for [cost of new entry] Area 1 based upon prevailing wages in New Jersey for a 40 hour work week, I disagree with Dr. Sotkiewicz's apparent

assumption that the work on the reference unit will be performed within a 40 hour work week.") (emphasis added); Br. 54 ("Mr. Uniszkiewicz, *who again was relying upon his personal experience in the construction industry*, contended that Dr. Sotkiewicz's recommended wage rates were too low by approximately 8% to 10%.") (emphasis added). As described previously, however, Mr. Uniszkiewicz's personal experience is not a sufficient basis to overcome the substantial empirical evidence offered by Dr. Sotkiewicz that the Commission reasonably accepted. *See, e.g.*, *Apple*, 816 F.3d at 805; *Robinson*, 774 F.3d at 39; *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1154.

Dr. Sotkiewicz also pointed out an error in Mr. Uniszkiewicz's initial affidavit (*i.e.*, his assumption that Dr. Sotkiewicz's calculation did not reflect overtime pay). *See* Sotkiewicz Answering Aff. P 8, JA 683-84. Faced with that error, Mr. Uniszkiewicz simply responded with a new, equivocal criticism of Dr. Sotkiewicz's methodology. *See* Uniszkiewicz Resp. Aff. P 4, JA 699 ("Based upon the additional explanation supplied in the Answering Affidavit, the *apparent flaw* in [Dr. Sotkiewicz's] analysis *seems to relate to* the aggregated data he is using.") (emphasis added). Dr. Sotkiewicz's affidavit, by contrast, provided a detailed explanation of the methodology and empirical data he used to validate PJM's proposed wage rates. Sotkiewicz Aff. P 41 & n.28, JA 74-75; *see also* Sotkiewicz Answering Aff. PP 4-6, JA 683. On this record, it was reasonable for

the Commission to adopt Dr. Sotkiewicz's findings. *See* Initial Order PP 102, 105, 108, JA 736-37; Rehearing Order P 75, JA 820.

Ultimately, the Commission responded meaningfully to the claim underlying both of Mr. Uniszkiewicz's alternative calculations ("implied labor hours" and "implied wage rate")—*i.e.*, that PJM's estimate of the labor hours component of the cost of new entry was too low—and concluded that the evidence offered by PJM's experts was more persuasive than Mr. Uniszkiewicz's testimony. Br. 46-49; Rehearing Order PP 75-78, JA 820-21; *see Sacramento*, 616 F.3d at 530 ("[E]ven if [petitioner's expert's] testimony arguably could have supported a different conclusion . . . that would not mean FERC's conclusion lacked substantial evidence. We must 'defer[] to the Commission's resolution of factual disputes between expert witnesses.'"); *Fla. Mun. Power Agency*, 602 F.3d at 464. Although Power Providers may be disappointed by that decision, they cannot use this Court as a forum to relitigate the appropriate calculation of the labor cost inputs to the cost of new entry. *See Fla. Mun. Power Agency*, 602 F.3d at 463 ("This proceeding is not an opportunity for [petitioner] to relitigate" an issue that FERC adequately explained and resolved).

C. Power Providers Have Not Shown That the Evidence Upon Which the Commission Relied Lacked Probative Value

Power Providers also raise several challenges to the Commission's acceptance of PJM's proposed cost of new entry, grounded in their view that a

portion of PJM's evidence either was not properly in the record or otherwise lacked probative value. *See, e.g.*, Br. 36-37, 40-46, 53. None of these challenges has any merit.

First, Power Providers have shown no basis to challenge to Dr. Sotkiewicz's reliance on the labor hours estimates by Stantec and CH2M Hill due to a purported lack of personal knowledge or particular expertise on how those estimates were prepared—PJM and Dr. Sotkiewicz were entitled to rely upon the work of other experts and consultants, and Power Providers offer no legal authority to the contrary. *See* Br. 36-37, 45.

Second, their attempt to prevent the Commission from relying upon CH2M Hill's 2011 labor hours estimate is premised on their incorrect statement that the Commission "previously found" that estimate "had not been shown to be just and reasonable." Br. 44 (capitalization omitted). In fact, the Commission made no determination as to CH2M Hill's estimate in the order cited by Power Providers. Instead, it set for hearing "a number of material issues of disputed fact as to the proper calculation of the [gross cost of new entry] values," which included "costs for material, labor and equipment." *PJM Interconnection*, 138 FERC ¶ 61,062 at P 41. There was no ultimate finding as to the accuracy of CH2M Hill's estimate because, as Power Providers concede (Br. 45), that proceeding was resolved by settlement. *See PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,079 (2013).

Nothing in that 2013 settlement or in the underlying 2012 order prevents Dr. Sotkiewicz from now relying upon CH2M Hill's 2011 work. He did so, as the Commission acknowledged, merely to confirm the reasonableness of the Market Monitor's estimates. *See, e.g.*, Rehearing Order P 76, JA 820 ("PJM explained in its filing that it adopted the Pasteris Report's labor estimate as credible . . . subject to its own independent review, including . . . its prior [cost of new entry] studies."); Initial Order P 106, JA 736-37 ("PJM also explains that it compared its proposed labor cost estimates against the values developed in its 2011 [cost of new entry] Study."); *see also* Sotkiewicz Aff. P 39, JA 73 ("The construction labor costs derived by Stantec for Pasteris Energy and the [Market Monitor] are consistent with the labor hours and labor costs . . . as derived in the 2011 [cost of new entry] study by CH2M Hill for the Brattle Group and PJM."). The Commission was not required to say more. Br. 45-46; *see also Transmission Agency of N. Cal.*, 628 F.3d at 552 (Commission's overall explanation "sufficed because it provided reasonable responses to petitioners' objections that were neither summary nor dismissive," and that "a point-by-point rebuttal is not necessarily required").

Third, Power Providers' claimed "lack of particularity" as to the source of one component of the labor cost estimate (*i.e.*, the Stantec estimate of labor hours), Br. 40-43, does not rebut the substantial evidence supporting the Commission's acceptance of the Market Monitor's estimate of overall labor costs. As the

Commission recognized, Dr. Sotkiewicz used other sources to validate the Market Monitor's estimate (which incorporated Stantec's hours estimate), including both publicly available data and the CH2M Hill estimate prepared for PJM's 2011 review of the cost of new entry. *See* Initial Order PP 107-08, JA 737; *see also* PJM Filing at 29-30, JA 29-30; Sotkiewicz Aff. PP 36-42, JA 73-75; Sotkiewicz Answering Aff. PP 4-6, JA 683.

The alleged lack of detail as to the Stantec report did not "severely hamper[]" Power Providers' ability to challenge the hours estimate, and the cases they cite for this claim lend them no support. Br. 42. Those cases involved failures by FERC to provide *any* detail behind a particular conclusion, a very different factual scenario than here. *See Keyspan-Ravenswood, LLC v. FERC*, 474 F.3d 804, 812 (D.C. Cir. 2007) (finding that "the Commission offered no reasons for rejecting Ravenswood's extensive economic analysis" concerning one of the Commission's conclusions); *Sithe/Indep. Power Partners, L.P. v. FERC*, 165 F.3d 944, 951 (D.C. Cir. 1999) (characterizing the Commission's reasoning as "cryptic" for adopting a conclusion purportedly based on an "independent analysis" while "offer[ing] no indication of what exactly its 'independent analysis' entailed or what issues it considered"); *City of Holyoke Gas & Elec. Dept. v. FERC*, 954 F.2d 740, 743 (D.C. Cir. 1992) (Commission failed to disclose both the data and assumptions for a calculation of a particular rate, denying the petitioner the ability to determine

whether that rate included any "double counting"); *see also Ohio Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 301 U.S. 292, 302 (1937) (Ohio Commission took an action without providing any explanation; "even now we do not know the particular or evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out.").

Here, by contrast, the Commission set forth a well-reasoned explanation for its adoption of the Market Monitor's overall estimate of labor costs that also included a reasonable description of the basis for the hours estimate. *See* Rehearing Order P 76, JA 820. That Power Providers find this explanation wanting does not make the Commission's conclusion unjust and unreasonable; nor does it undo the substantial evidence supporting that conclusion. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 782 ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'") (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *see also E. Niagara*, 558 F.3d at 567 ("[N]o room to overturn [FERC's] reasoned and reasonable determination" of "a difficult

valuation question," which required "predictive and inherently speculative" judgment); *N.J. Bd. of Pub. Utilities*, 744 F.3d at 109 ("[T]he fact that there may be a better, or more accurate, calculation [of cost of new entry] does not render PJM's proposal unjust or unreasonable, or FERC's approval of it arbitrary and capricious. . . . The relevant question here is whether PJM's proposed method is likely to provide a reasonably accurate forecast.") (internal quotation marks omitted).

D. Power Providers Offer No Evidence To Undermine the Stakeholder Process Through Which PJM Adopted the Market Monitor's Estimate of Labor Costs

Power Providers assert that PJM's adoption of the Market Monitor's labor cost estimates did not result from good faith negotiation during the stakeholder process. Br. 38-39. But the PJM Board of Managers' letter Power Providers cite, which merely confirmed the final determination, provides no support for their presumption that the process by which PJM adopted the Market Monitor's estimates was somehow tainted or not a good faith negotiation. *See* Br. 39 & n.7; *see also Pub. Serv. Comm'n of Wis. v. FERC*, 545 F.3d 1058, 1063 (D.C. Cir. 2008) (rejecting a claim that FERC erred by according weight to a non-consensus stakeholder process, in part because "petitioners do not offer any evidence of majority overreaching or assert the process was not open or did not allow for extensive participation") (internal marks omitted). In fact, some of the Power Providers struck a different tone before the Commission, commending PJM for its

management of the stakeholder process. *See* Motion to Intervene, Comments and Protest of the PSEG Companies at 9, FERC Docket No. ER14-2940 (Oct. 16, 2014), R. 46, JA 364 ("The PSEG Companies commend PJM for its leadership and the hard work of its staff in undertaking the complexity of issues presented by the triennial review . . . and in managing the sizeable and sometimes unwieldy stakeholder process . . . .").

The record indicates that PJM agreed with the Market Monitor's estimates after a thoughtful, good faith process in which its stakeholders were presented several credible alternative estimates, and the Commission found PJM's choice to be just and reasonable. *See* Initial Order PP 101, 104, JA 736; Rehearing Order PP 68, 76, JA 818, 820; PJM Answer at 36-37, JA 571-72 ("[S]takeholders were . . . presented with two facially credible [cost of new entry] estimates from two entities, PJM and the [Market Monitor], with no financial interest in the [cost of new entry] level," and "the stakeholders urged PJM and the [Market Monitor] to consult and determine if they could resolve any significant differences between the two . . . estimates. . . . [A]s a result of those consultations, they came to agreement on the construction labor component of the estimate."); *see also Pub. Serv. Comm'n of Wis.*, 545 F.3d at 1062-63 (upholding FERC approval of a regional policy, which FERC found to reflect a reasonable compromise among transmission providers).

III. FERC'S ACCEPTANCE OF PJM'S PROPOSED ESTIMATE OF THE COST OF CAPITAL WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

The Commission's "detailed explanation" for accepting PJM's proposed estimate of the cost of capital also satisfies the substantial evidence standard. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 782; *see also id*. ("A court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives. Rather, the court must uphold a rule if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'") (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). PJM's proposed cost of new entry was developed using Brattle's estimate of the "after-tax weighted-average cost of capital," which refers broadly to future costs for borrowing and equity.[3] Initial Order P 59, JA 723.

A. The Commission Fully Explained Its Approval of Brattle's Methodology

The Commission described Brattle's methodology for deriving the cost of capital to be "transparent and its assumptions . . . well-supported," and approved Brattle's use of a proxy group of eight energy companies that included publicly-traded independent power producers, previously-acquired merchant generation

[3] According to Brattle, the cost of capital "reflects the systemic financial market risks of the project's future cash flows as a merchant generating plant participating in the PJM markets." Brattle Cost of New Entry Report at 34, JA 159.

companies, and merchant generation divestitures. Initial Order PP 60, 76, 78-79, JA 724, 728-29; *see also* Rehearing Order P 57, JA 814-15. Brattle's cost of capital estimate (8.0 percent) included a 1.3 percent increase to account for higher risks associated with a merchant generation project as compared to "the average portfolio of independent power producers that have some long-term contracts and other hedges in place." Brattle Cost of New Entry Report at 34, 37, JA 159, 162; *see also* Initial Order P 60, JA 724 ("Brattle recommends an 8.0 percent [c]ost of [c]apital, which is above the individual estimates for the independent power producer . . . companies it examined . . . ."). That 1.3 percent increase was just and reasonable, according to the Commission, because the relatively higher risks faced by generic merchant projects within PJM were partially mitigated by their ability to arrange medium-term financial hedges. *See* Initial Order P 81, JA 730; Rehearing Order P 58, JA 815.

In so approving PJM's proposed cost of capital, the Commission highlighted the importance of balancing competing interests among investors and consumers when estimating the cost of new entry. *See* Rehearing Order P 58, JA 815 (explaining that the assumptions built into PJM's proposed cost of capital represented "an appropriate balance of the interests among investors and consumers."); Initial Order P 81, JA 730 ("We find these to be reasonable assumptions that balance the interests of investors and consumers when estimating

[cost of new entry] for a generic merchant plant in PJM."). Courts have recognized the balancing of these particular interests—consumer versus investor—as necessary to setting a just and reasonable rate. *See Morgan Stanley*, 554 U.S. at 532 ("We have repeatedly emphasized that the Commission is not bound to any one ratemaking formula. But FERC must choose a method that entails an appropriate 'balancing of the investor and the consumer interests.'") (internal citations omitted) (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)); *Wis. Pub. Power*, 493 F.3d at 262 ("[S]etting a just and reasonable rate necessarily 'involves a balancing of the investor and the consumer interests.'") (quoting *Hope*, 320 U.S. at 603); *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1116 (D.C. Cir. 2002) ("[T]he court may only set aside a rate that is outside a zone of reasonableness, bounded on one end by investor interest and the other by the public interest against excessive rates.").

Indeed, the Commission's role in balancing these competing interests while determining whether a rate is just and reasonable is particularly important where, as here, groups representing consumers (like the PJM Load Group, *see supra* n.1) advocated for a *lower* cost of capital while groups representing owners of generation assets (like Power Providers) sought a *higher* figure. *See, e.g.*, PJM Load Group Protest at 9, 12, 15, JA 492, 495, 498. The Commission thus fully addressed, and reasonably disagreed with, Power Providers' contention that PJM's

proposed cost of capital did not sufficiently reflect the purportedly higher risks associated with project-level financing. Br. 60-61; Rehearing Order PP 57-58, JA 814-15; *see also Transmission Agency of N. Cal.*, 628 F.3d at 552 (Commission's overall explanation "sufficed because it provided reasonable responses to petitioners' objections that were neither summary nor dismissive," and that "a point-by-point rebuttal is not necessarily required"); *Sacramento*, 616 F.3d at 541-42 (Court "'properly defers to policy determinations invoking the Commission's expertise in evaluating complex market conditions,'" where the Commission "reflected on the competing interests at stake to explain why it struck the balance it did") (quoting *Tenn. Gas Pipeline*, 400 F.3d at 27).

The existence of other possible just and reasonable rates, moreover, does not render a rate approved by the Commission unjust and unreasonable. *See, e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. at 767; *Me. Pub. Utils. Comm'n*, 520 F.3d at 471 ("The Commission correctly noted that there is not a single 'just and reasonable rate' but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone."); *Wis. Pub. Power*, 493 F.3d at 266 ("Merely because petitioners can conceive of a refund allocation method that they believe would be superior to the one FERC approved does not mean that FERC erred in concluding the latter was just and reasonable. Again, reasonableness is a zone, not a pinpoint."); *see also N.J. Bd. of Pub. Utils.*, 744

F.3d at 109. Here, the Commission accepted as just and reasonable a proposed cost of capital (8.0%) that was near the mid-point of Brattle's final range of cost of capital estimates for a generic merchant generator in PJM. *See* Initial Order P 81, JA 730; *see also id*. P 79, JA 729 (noting Brattle's final estimates ranged from 6.1% to 10.3%); Rehearing Order P 59, JA 815. Power Providers' preference for a higher rate does not negate the substantial evidence supporting the Commission's decision to approve the rate that PJM proposed. Nor was that decision rendered arbitrary, as they claim, from a lack of specific "findings" that "merchant generation risk" was the same as "project-level financing risk." *See* Br. 61. As described above, the Commission appropriately considered risk in evaluating PJM's proposed cost of capital.

B. The Commission Meaningfully Addressed Power Providers' Arguments Concerning Private Equity Returns

Power Providers contend that PJM's cost of capital should have reflected private equity returns. Br. 61-64. The Commission reasonably found otherwise.

First, the Commission concluded that Brattle's approach to calculating the cost of capital was "verifiable," consistent with its approval of the Market Monitor's estimate of labor costs. Rehearing Order P 57, JA 814-15. In doing so, it accepted Brattle's reasons for using objective, observable data, while excluding other data (*i.e.*, from private equity sources) not observable from the market. *See* Brattle Cost of New Entry Report at 35 n.27, JA 160 ("We do not include private

equity investors in our sample because their cost of equity cannot be observed in market data."); *see also* Initial Order P 76, JA 728 ("Brattle's methodology is transparent and its assumptions are well-supported.").

Second, the Commission also responded directly to Power Providers' claim that it should have considered private equity sources: it agreed with Brattle's testimony that such sources were a "poor proxy" for determining the cost of capital in this context because they included investments in many different industries unrelated to merchant generation. *See* Rehearing Order P 67, JA 818 ("[PJM Power Providers Group] next argues that the [Initial] Order adopted a cost of equity that . . . is unreasonably low due to the inclusion of publicly-traded [independent power producers] in the proxy group. . . . As the [Initial] Order found, however, private equity index funds' returns on equity are a poor proxy for determining the cost of capital for a merchant generation facility because these funds represent investments made in numerous industries (e.g., technology, pharmaceuticals, etc.)."); Initial Order PP 82, 91, JA 730, 733 (citing Pfeifenberger/Zhou Aff. at 14, 19, JA 630, 635); *see also* Pfeifenberger/Zhou Aff. at 13, JA 629 (noting that the "publicly-disclosed information on private-equity-sponsored" activity submitted by Power Providers was missing "critical information on the projects' cost of equity and the total financial leverage" employed by those firms, and that such information "cannot be found in the public

domain"); *Fla. Mun. Power Agency*, 602 F.3d at 464 ("FERC's reasoned explanation and weighing of the evidence, particularly between disputing expert witnesses, is entitled to deference.").

Power Providers, nevertheless, insist that the Commission should have considered private equity sources despite their inclusion of unrelated industries. For support, they cite a single case upholding the Commission's approval of a rate of return as consistent with "enterprises determined to be of comparable risk." Br. 64 (citing *Cities of Anaheim v. FERC*, 669 F.2d 799 (D.C. Cir. 1981)). But that single example provides no basis to require the Commission, in all instances, to consider the risk profiles of unrelated industries when determining whether a proposed cost of capital is just and reasonable under the Federal Power Act. *See, e.g.*, *Fla. Gas Transmission*, 604 F.3d at 645 ("[W]e do not ask whether record evidence could support the petitioner's view of the issue, but whether it supports the Commission's ultimate decision."); *N.J. Bd. of Pub. Utilities*, 744 F.3d at 109 ("[T]he fact that there may be a better, or more accurate, calculation [of cost of new entry] does not render PJM's proposal unjust or unreasonable, or FERC's approval of it arbitrary and capricious. . . . The relevant question here is whether PJM's proposed method is likely to provide a reasonably accurate forecast.") (internal marks omitted).

As described above, the Commission meaningfully responded to Power Providers' claim that it should have considered private equity sources. Br. 64. It reasonably explained why it chose to adopt PJM's proposal over Power Providers' expert witnesses' suggested "approaches" for "tak[ing] account of the risk characteristics of the private equity investors." Br. 63 (citing Power Providers Protest, Affidavit of James A. Heidell and Mark Repsher at P 11, JA 437-38 ("Repsher/Heidell Aff.") (acknowledging that private equity firms "are not typically publicly-traded entities," and referencing sources of information on such firms, including: (1) a publication not in the record that purportedly reports cost of equity metrics associated with private equity firms; and (2) "certain state pension plans" that report individual returns "associated with their investments in certain companies" engaged in recent financing of new gas-fired merchant generation projects in PJM)). Power Providers' disappointment in the result does not trump the Commission's reasonable explanation for its conclusion; nor did that conclusion "turn[] the burden of persuasion in a [Federal Power Act] section 205 case on its head," Br. 62.

Finally, Power Providers are not entitled to a hearing. *See* Br. 63 ("At a minimum, this matter should have been set for hearing."). The Commission resolved the dispute on the relevance of private equity sources based on the record evidence, as described above, and thus was well within its discretion not to set this

issue for hearing. *See Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 114-15 (D.C. Cir. 2014) (no abuse of discretion in FERC's determination not to convene an evidentiary hearing to resolve a "narrow issue" that it was able to resolve on the written record).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

Max Minzner
General Counsel

Robert H. Solomon
Solicitor

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

Federal Energy Regulatory Commission
Washington, D.C. 20426
Tel: (202) 502-6537
Fax: (202) 273-0901
Anand.Viswanathan@ferc.gov

August 1, 2016
Final Brief: September 20, 2016

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2013, in 14-point Times New Roman) and contains 9,478 words, not including the cover page, the tables of contents and authorities, the glossary, the certificates of counsel, and the addendum.

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

September 20, 2016

ADDENDUM

STATUTES

TABLE OF CONTENTS

STATUTES: **PAGE**

Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

AMENDMENTS

1976—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: ''This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title].''

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

with the purposes of this subchapter, or other 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 reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.

(b) Alternative prescriptions

(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 811 of this title, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 811 of this title, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and prescribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 811 of this title or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this subchapter, or other 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 re-

spect 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 commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms ''affiliate'', ''associate company'', ''electric utility company'', ''holding company'', ''subsidiary company'', and ''exempt wholesale generator'' shall have the same meaning as when used in the Public Utility Holding Company Act of 2005 [42 U.S.C. 16451 et seq.].

(June 10, 1920, ch. 285, pt. II, § 201, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 847; amended Pub. L. 95–617, title II, § 204(b), Nov. 9, 1978, 92 Stat. 3140; Pub. L. 102–486, title VII, § 714, Oct. 24, 1992, 106 Stat. 2911; Pub. L. 109–58, title XII, §§ 1277(b)(1), 1291(c), 1295(a), Aug. 8, 2005, 119 Stat. 978, 985.)

REFERENCES IN TEXT

The Rural Electrification Act of 1936, referred to in subsec. (f), is act May 20, 1936, ch. 432, 49 Stat. 1363, as amended, which is classified generally to chapter 31 (§ 901 et seq.) of Title 7, Agriculture. For complete classification of this Act to the Code, see section 901 of Title 7 and Tables.

The Public Utility Holding Company Act of 2005, referred to in subsec. (g)(5), is subtitle F of title XII of Pub. L. 109–58, Aug. 8, 2005, 119 Stat. 972, which is classified principally to part D (§ 16451 et seq.) of subchapter XII of chapter 149 of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 15801 of Title 42 and Tables.

AMENDMENTS

2005—Subsec. (b)(2). Pub. L. 109–58, § 1295(a)(1), substituted ''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'' for ''The provisions of sections 824i, 824j, and 824k of this title'' and ''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'' for ''Compliance with any order of the Commission under the provisions of section 824i or 824j of this title''.

Subsec. (e). Pub. L. 109–58, § 1295(a)(2), substituted ''section 824e(e), 824e(f), 824i, 824j, 824j–1, 824k, 824*o*, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title'' for ''section 824i, 824j, or 824k of this title''.

Subsec. (f). Pub. L. 109–58, § 1291(c), which directed amendment of subsec. (f) by substituting ''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,'' for ''political subdivision of a state,'', was executed by making the substitution for ''political subdivision of a State,'' to reflect the probable intent of Congress.

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

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

(d) Authorization of capitalization not to exceed amount paid

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

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

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

(f) Public utility securities regulated by State not affected

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

(g) Guarantee or obligation on part of United States

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

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

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

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

TRANSFER OF FUNCTIONS

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

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

(a) Just and reasonable rates

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

(b) Preference or advantage unlawful

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

(c) Schedules

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

(d) Notice required for rate changes

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

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

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and de-

livering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

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

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

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

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

(i) subject to periodic fluctuations and

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

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

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

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

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

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

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

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

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

AMENDMENTS

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

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

STUDY OF ELECTRIC RATE INCREASES UNDER FEDERAL POWER ACT

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

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

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

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

PJM Power Providers Group, et al. v. FERC **Docket No. ER14-2940**
D.C. Cir. Nos. 15-1453 and 15-1455

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 20th day of September 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

Kenneth Richard Carretta
Cara Jill Lewis
PSEG Services Corporation
80 Park Plaza, T5G
Newark, NJ 07102-4194

Adrienne Elizabeth Clair
Thompson Coburn LLP
1909 K St., NW, Suite 600
Washington, DC 20006-1167

Ryan James Collins
Paul M. Flynn
Wright & Talisman, PC
1200 G St., NW, Suite 600
Washington, DC 20005-1200

John Nowell Estes III
John L. Shepherd Jr.
Paul Franklin Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Ave., NW
Washington, DC 20005

Dennis Lane
Stinson Leonard Street LLP
1775 Pennsylvania Ave., NW, Suite 800
Washington, DC 20006-4605

Carolyn Anne McIntosh
Office of the Attorney General, State of New Jersey
Dept. of Law & Public Safety
PO Box 45029
124 Halsey Street, 2nd Floor
Newark, NJ 07101

Gary James Newell
Jennings, Strouss & Salmon, PLC
1350 I St., NW, Suite 810
Washington, DC 20005

Jennifer Helene Tribulski
PJM Interconnection, LLC
Valley Forge Corporate Center
955 Jefferson Ave.
Norristown, PA 19403

Robert A. Weishaar Jr.
McNees, Wallace & Nurick
777 N. Capitol St., NE, Suite 401
Washington, DC 20002-0000

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

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel: (202) 502-6537
Fax: (202) 273-0901
Email: Anand.Viswanathan@ferc.gov