No. 23-___

In the Supreme Court of the United States

PUBLIC UTILITIES COMMISSION OF OHIO,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should courts apply the same deferential standard of review that they apply to rules that become effective by order of the Federal Energy Regulatory Commission to rules that lack majority support and instead take effect by operation of law?

LIST OF PARTIES

The petitioner is the Public Utilities Commission of Ohio.

The respondent is the Federal Energy Regulatory Commission.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *PJM Power Providers Grp. v. FERC*, Nos. 21-3068 & 21-3243, 88 F.4th 250 (3d Cir. Dec. 1, 2023).

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INTRODUCTION

Courts review agency reasoning, not just agency action. That principle has been settled for over eighty years. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943). It is equally well settled that a collective body acts only through a majority. *See Fed. Trade Comm'n v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967). But what happens when there is no majority and no agency reasoning? Under normal circumstances, the absence of a majority would mean that the agency did not act. *See id.* And the absence of any reasoning would mean that the agency failed to sufficiently justify its purported action. The action would therefore be arbitrary and capricious. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983).

This case does not involve normal circumstances. Congress has modified the majority-action requirement *and* the agency-reasoning requirement with respect to rules that are submitted to the Federal Energy Regulatory Commission and that the Commission then reviews. The Commission is composed of five members, three of whom are required to make a quorum. 42 U.S.C. §7171(b)(1), (e). If the Commission is lacking its full complement of Commissioners, four Commissioners would satisfy the quorum requirement but could fail to agree about whether to approve a new rule.

If that happens, Congress has said that the rule takes effect by operation of law. 16 U.S.C. §824d(d). It has also said that dissatisfied parties may appeal in that situation. *Id.* §824d(g). Congress has said nothing, however, about how courts should handle such

appeals. All it has said is that when the Commission deadlocks in a two-to-two vote or lacks a quorum, each Commissioner must provide the Commissioner's views about whether the rule should have been approved. §824d(g)(1)(B).

The Third Circuit in this case needed to fill the gap that Congress left. But the standard of review that the Third Circuit chose to apply did not fit. Faced with a rule that was approved by operation of law, the Third Circuit asked whether FERC's inaction was arbitrary and capricious. Pet.App.34a–37a. FERC, however, did not act. Congress did. *See* §824d(d). And the deferential standard that the Third Circuit applied does not work when there is no agency reasoning to which a court can defer. The Third Circuit charged ahead anyway. It elevated the views of two FERC Commissioners and treated those views as controlling—even though the same number of Commissioners held opposing views. *See* Pet.App.34a.

The Third Circuit's decision upsets the delicate balance of power between Congress, administrative agencies, and the courts. By applying a deferential standard of review where no deference was warranted, the Third Circuit expanded FERC's authority and diminished its accountability. Requiring an agency to offer a defensible justification for its actions, the agency-reasoning requirement provides an important check on an agency's power. The Third Circuit swept that check away.

In doing so, it created a conflict with this Court's decision in *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016). The Court in that case held that lower courts had erred when they deferred to an agency action that was supported by "almost no

reasons at all." *Id.* at 224. But that is almost exactly what the Third Circuit did here; it applied a deferential standard of review even though there was no FERC majority reasoning or explanation to which it could properly defer.

The stakes of getting the standard of review right are incredibly high. As Congress has recognized, "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. §824(a). Half of FERC's confirmed Commissioners at the time concluded, however, that the rule at issue in this case will disrupt the nation's electricity market and could threaten the reliability of the power grid. *See* Pet.App.194a; Pet.App.240a–41a. The Third Circuit failed to consider their views.

The problems with the Third Circuit's standard of review extend beyond this case. Although this is the first case in which a court was called upon to review a rule that took effect in the face of FERC's inaction, it will not be the last. The Court should address the appropriate standard of review now— before uncertainty about how to review FERC rules that are approved by operation of law, and without any supporting reasoning, spreads.

The "inexorable presence of the administrative state," *Freytag v. Comm'r*, 501 U.S. 868, 885 (1991), does not translate into inexorable judicial deference. Doubly so when the administrative state is equally divided over how to regulate the power grid for 13 States.

Congress drew a distinction between tariffs that FERC approves and those that take effect by operation of law. The Court should review this case to

decide whether, in a case that dramatically affects the nation's power supply, the Third Circuit improperly ignored that distinction.

OPINIONS BELOW

The Third Circuit's opinion is published at 88 F.4th 250 and is reproduced at Pet.App.1a. The views of the individual members of the Federal Energy Regulatory Commission are reproduced at Pet.App.47a, Pet.App.188a, and Pet.App.200a.

JURISDICTIONAL STATEMENT

The Third Circuit entered judgment on Dec. 1, 2023. This Court granted the Public Utilities Commission of Ohio's motion for an extension of time to file a petition for a writ of certiorari on Feb. 12, 2024. This Court has jurisdiction over the Third Circuit's judgment under 28 U.S.C. §1254(1). The Third Circuit had jurisdiction to review the Federal Energy Regulatory Commission's inaction under 16 U.S.C. §824d(g).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are listed in the petition appendix at Pet.App.254a–262a.

STATEMENT

I. FERC is responsible for ensuring that wholesale electricity is sold at just and reasonable rates.

When Congress adopted the Federal Power Act, it declared "that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest." 16 U.S.C. §824(a). Under the Act, FERC has the exclusive power to

regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §824(b)(1). Congress has charged FERC with ensuring that rates charged for the sale or transmission of wholesale electricity, along with "all rules and regulations affecting or pertaining to such rates or charges," are "just and reasonable." 16 U.S.C. §824d(a). And it has declared that any "rate or charge that is not just and reasonable is … unlawful." *Id.*

The interstate market for electricity has changed significantly since 1935, when Congress first passed the Federal Power Act. *See New York v. FERC*, 535 U.S. 1, 5 (2002); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266–69 (2016). Gone are the vertically integrated regional monopolies that tightly controlled the generation, transmission, and distribution of electricity. *Elec. Power Supply Ass'n*, 577 U.S. at 267. In their place, a competitive market has emerged that is made up of a variety of independent power plants whose "electricity flows not through 'the local power networks of the past,' but instead through an interconnected 'grid' of near-nationwide scope." *Id.* (quoting *New York*, 535 U.S. at 7). It is now "possible for a 'customer in Vermont to purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma.'" *New York*, 535 U.S. at 8 (quoting *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000) (alteration accepted)).

To help manage the grid (or, more accurately, grids) through which electricity flows, "FERC encouraged the creation of nonprofit entities to manage wholesale markets on a regional basis." *Elec. Power Supply Ass'n*, 577 U.S. at 267. These entities are

responsible for providing electricity generators "with access to transmission lines and ensuring that the network conducts electricity reliably." *Id.* at 268. One such entity is PJM Interconnection, LLC ("PJM"). PJM "oversees the electricity grid in all or parts of 13 mid-Atlantic and Midwestern States and the District of Columbia." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016). PJM does so, in part, by holding a "capacity auction," which is designed to "ensure the availability of an adequate supply of power at some point far in the future." *Id.*

The Court has summarized the structure of the capacity auction as follows:

> Owners of capacity to produce electricity in three years' time bid to sell that capacity to PJM at proposed rates. PJM accepts bids, beginning with the lowest proposed rate, until it has purchased enough capacity to satisfy projected demand. No matter what rate they listed in their original bids, all accepted capacity sellers receive the highest accepted rate, which is called the "clearing price."

Id. at 155–56. Organizations that deliver electricity to retail consumers (often called "load serving entities"), must then "purchase from PJM, at the clearing price, enough electricity to satisfy" the amount of retail demand assigned to them. *Id.* at 155–56.

In addition to setting the price of wholesale electricity, the capacity auction sends an important market signal. A high clearing price signals that more capacity is needed and encourages new generators to enter the market. *Id.* at 156. A low price, by comparison,

"discourages new entry and encourages retirement of existing high-cost generators." *Id.*

II. Congress amended the Federal Power Act to permit parties to appeal the approval of tariffs that lack majority support and that instead take effect by operation of law.

Although PJM conducts the capacity auction, FERC "extensively regulates" the auction "to ensure that it efficiently balances supply and demand, producing a just and reasonable" price for electricity. *Id.* at 157. The process by which it does so has several steps. PJM goes first. It establishes the rules, sometimes known as tariffs, by which the auction process takes place. *See* 16 U.S.C. §824d(d).

FERC takes its turn next. It reviews PJM's tariffs to see whether those tariffs are just and reasonable. A tariff takes effect by operation of law sixty days after PJM submits it to FERC unless FERC "otherwise orders." *Id.* FERC may, however, choose to hold a hearing on the lawfulness of the tariff. §824d(e). If FERC determines after such a hearing that the tariff is just and reasonable, FERC may approve the tariff. *See* §824d(e); *see also Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9–10 (D.C. Cir. 2002). If FERC determines that the tariff is *not* just and reasonable, it has the power to establish a just and reasonable replacement tariff. §824e(a). A party that is dissatisfied with an order finding that a tariff is just and reasonable or an order establishing a replacement tariff may seek rehearing and, if unsuccessful, may appeal FERC's order. 16 U.S.C. §825l(a), (b).

It is also possible that FERC may fail to reach a decision. FERC is composed of five Commissioners, with three Commissioners required to constitute a

quorum. 42 U.S.C. §7171(b)(1), (e). But FERC does not always have a full complement of Commissioners. *See* Pet.App.24a–25a; *see also Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168 (D.C. Cir. 2016). And if FERC has only four Commissioners, it is possible for those Commissioners to disagree and deadlock two-to-two over whether a tariff is just and reasonable. And that deadlock means the tariff takes effect by operation of law. 16 U.S.C. §824d(d).

Because FERC acts only "by a majority vote of the members present," *see* 42 U.S.C. §7171(e), a deadlocked vote would ordinarily mean that the Agency did not act, and its failure to act would be unreviewable. *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131–33 (D.C. Cir. 2007). That, at least, is what the D.C. Circuit held in 2016. FERC had deadlocked over whether to approve a tariff established by the entity that administers New England's capacity auction, and that tariff had taken effect by operation of law. *See Public Citizen*, 839 F.3d at 1167–68; *see also* 16 U.S.C. §824d(d). Parties that had objected to the tariff appealed, but the D.C. Circuit held that because the Commissioners had deadlocked there was no agency action from which to appeal. *Public Citizen*, 839 F.3d at 1170. The D.C. Circuit reasoned that if Congress had wanted to allow parties to appeal even when FERC failed to act, then it needed to say so explicitly. *Id.* at 1171.

Congress proceeded to do just that. It amended §824d in response to the D.C. Circuit's decision. Now, the Federal Power Act explicitly states that if FERC fails to act, either because the Commissioners "are divided two against two" or because "the Commission lacks a quorum," the failure to issue an order accepting or denying a tariff "shall be considered to be an

order issued by the Commission accepting" the tariff and a party that fails to obtain rehearing may appeal. 16 U.S.C. §824d(g). The Act as amended also now requires each Commissioner to "add to the record of the Commission a written statement explaining the views of the Commissioner with respect to" the tariff. §824d(g)(1)(B).

III. PJM has long sought to prevent parties from exercising buyer-side market power that distorts capacity auction results.

To help protect the accuracy and transparency of the capacity auction it oversees, PJM has adopted a tariff, known as the Minimum Offer Price Rule. (That rule is often referred to as the "MOPR." For clarity's sake, however, this brief will refer to it as the Minimum Price Rule, the Rule, or just the tariff.) The Minimum Price Rule was designed to combat improper exercises of buyer-side market power, also known as monopsony. Without the Rule, there was a risk that entities that buy *and* sell energy in the capacity market could manipulate the clearing price by making an offer to sell electricity into the market at an artificially low price. *See* Pet.App.19a. That, in turn, would benefit them by depressing the cost they must pay to purchase capacity. In addition to affecting the clearing price, such an exercise of buyer-side market power would distort the market signals that the capacity auction sends and make it unclear when new generation capacity is needed or when existing capacity should be retired. *See id.*

Although the Minimum Price Rule has gone through several revisions, some form of the Rule has been in place since 2006. *See id.* The 2006 version of the Minimum Price Rule applied to new market

entrants, but excluded nuclear, coal, and hydroelectric resources. As is most relevant here, however, it also excluded state-mandated generation capacity. *Id.*

The latter exclusion soon proved problematic. One difficulty that PJM has historically faced when structuring its capacity auctions has been deciding how to account for state policies and state subsidies that affect the mix of generation sources. Not long after PJM adopted the first version of the Minimum Price Rule, several States adopted policies that required new generation resources in those States to offer their capacity into the market at a price that was low enough to ensure that the bid would clear. Pet.App.20a.

Other power generators complained to FERC about the effect that state-mandated resources were having on the capacity auction. *See id.* PJM responded by removing from the Minimum Price Rule the exception for state-mandated resources. FERC approved the changes. *See PJM Power Providers Group v. PJM Interconnection, LLC*, 135 F.E.R.C. ¶ 61,022 (2011). Although FERC recognized "the rights of states to pursue legitimate policy interests," it determined that it could not allow States to pursue those interests in a way that resulted in "uneconomic entry" into the capacity market that would "have the effect of preventing other states from participating in wholesale markets." *Id.* at ¶143.

The Third Circuit upheld FERC's approval of PJM's revised Minimum Price Rule. It held that the tariff's exclusion of new state-supported resources "ensures that the new resource is economical—*i.e.*, that it is needed by the market—and ensures that its sponsor cannot exercise market power by introducing a new resource into the auction at a price that does

not reflect its costs and that has the effect of lowering the auction clearing price." *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 97 (3d. Cir. 2014). States remained free to require or subsidize new generation resources; they simply could not use those resources to directly affect the capacity auction's clearing price. *See id.*

In 2019, in response to a complaint, FERC required PJM to extend the Minimum Price Rule to then-existing resources for the first time. *See* Pet.App.21a–22a. The purpose of the extension, FERC explained, was to "protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price." Pet.App.22a (quotation omitted). Dozens of parties sought to overturn the 2019 revision to the Minimum Price Rule. *Id.* They filed challenges to the rule that were consolidated in the Seventh Circuit. Those challenges have been held in abeyance pending the outcome of this case. *Id.*

IV. FERC deadlocked over a revised version of the Minimum Price Rule that treats state-subsidized sources of electricity the same as market-rate sources.

In face of strong opposition to the 2019 version of the Minimum Price Rule, PJM, in 2021, proposed to change the Rule yet again. It proposed to replace the challenged 2019 rule with the version of the Minimum Price Rule that is at issue here. That version, which took effect by operation of law in 2021, applies to only those generation resources that reflected an improper exercise of buyer-side market power. *See*

Pet.App.24a. It applies only "(1) where a capacity resource has the ability and incentive to exercise buyer-side market power, and (2) where a capacity resource receives state subsidies under a state program that is likely preempted by the Federal Power Act." *Id.* (quotation omitted). Under this current version of the Rule, States are now free to adopt policies "regarding generation resource mix" as long as those policies do not "directly interfere with the auction clearing outcomes." *Id.* (quotation omitted); *see also Hughes*, 578 U.S. at 166.

At the time that PJM proposed the revised 2021 Minimum Price Rule, FERC had only four confirmed Commissioners. Pet.App.24a. While two of the Commissioners would have approved PJM's revised tariff, two others would have held that it was unreasonable and unlawful. *Compare* Pet.App.47a *with* Pet.App.188a and Pet.App.200a.

Commissioner Danly, who would not have approved PJM's proposed tariff, emphasized the negative consequences of allowing the tariff to take effect. He wrote that there were at least two problems with the narrow scope of the revised Minimum Price Rule. *First*, it would allow parties to exercise buyer-side market power. Pet.App.229a–40a. By allowing state subsidies to distort the clearing price, PJM's tariff would "undermine the capacity market and result in unlawful rates." Pet.App.240a. *Second*, PJM's tariff would undermine the reliability of the country's electric grid. Pet.App.240a–46a. A basic purpose of the capacity markets, Commissioner Danly argued, is ensuring resource adequacy by sending price signals. Specifically, it sends price signals that are intended to procure the correct quantity and type of generation to meet system demand and ensure system reliability.

Id. The consequence of sending the wrong signals, Commissioner Danly wrote, is significant. "When it comes to capacity markets, rate design has profound practical implications: if we get the rates wrong, the electric system will be unreliable." Pet.App.240a. The proposed tariff, Commissioner Danly concluded, would permit unmitigated state subsidies to suppress prices and would therefore distort the market's price signals. As a result, "the market will fail to send the price signals necessary both to induce new, required generation to enter the market and to retain needed, existing generation." Pet.App.241a.

Commissioner Christie also would not have approved PJM's revised tariff. He characterized the new Minimum Price Rule as "the flawed and rushed result of an 'expedited' stakeholder process." Pet.App.189a. And while Commissioner Christie recognized the challenge of designing an effective Minimum Price Rule, he stated that "the PJM [Minimum Price Rule] Proposal comes nowhere close to meeting the standard required for approval." Pet.App.194a. Commissioner Christie flatly declared that the approval of PJM's proposed tariff "forfeits any remaining credibility to the claim that the PJM capacity market is based on actual competition or is run for the benefit of consumers." *Id.* The current version of the Minimum Price Rule was so flawed, Commissioner Christie suggested, that it would be better not to have any rule at all. Pet.App.189a.

PJM's proposed tariff took effect despite these strenuous objections from two FERC Commissioners. Because two other Commissioners would have approved the revised version of the Minimum Price Rule, the Commission deadlocked, and the proposed tariff

took effect by operation of law under 16 U.S.C. §824d(d).

V. The Third Circuit deferred to the views of only the two supporting Commissioners and held that the approval of the tariff was not arbitrary and capricious.

Many of the parties that objected to PJM's proposed tariff, including the Public Utilities Commission of Ohio, sought rehearing. *See* Pet.App.25a. And when rehearing was denied, they appealed to the Third Circuit Court of Appeals, as specifically authorized by 16 U.S.C. §824d(g). *See* Pet.App.1a.

The Third Circuit largely brushed aside the appealing parties' concerns—along with the concerns of the two dissenting Commissioners. Instead of weighing the views of all four Commissioners equally, the Court of Appeals deferred to the joint statement of the two Commissioners who would have approved PJM's tariff. *See* Pet.App.34a–35a. It treated that statement as representing the views of FERC as a body and asked whether the reasoning of those two Commissioners was arbitrary and capricious. *See id.* It held that it was not. Pet.App.37a.

In so holding, the Third Circuit relied heavily on the deferential standard of review that it chose to apply. It emphasized the two Commissioners' "expertise in evaluating complex market conditions," and limited its review "to ensuring that the Commission has made a principled and reasoned decision supported by the evidentiary record." Pet.App.45a (quotations omitted). Because it could not conclude "on this record" that the views of the two Commissioners who would have approved the revised Minimum Price Rule were arbitrary and capricious, the Third Circuit rejected

the challenges to PJM's tariff. Pet.App.45a–46a. Missing from the Third Circuit's analysis was any careful consideration of the opposite—and equally valid—views of Commissioners Danly and Christie. *See generally*, Pet.App.1a–46a.

REASONS FOR GRANTING THE WRIT

The four confirmed FERC Commissioners did not agree in this case about whether PJM's proposed tariff was just and reasonable. *Compare* Pet.App.47a *with* Pet.App.188a and Pet.App.200a. But what they all *did* agree about was the importance of ensuring a transparent, competitive, and well-functioning market for electricity. *See* Pet.App.56a–58a, Pet.App.197a, and Pet.App.221a. By failing to consider equally the views of all the Commissioners, the Third Circuit's decision threatens that market. Only this Court has the power to set things straight. It is easiest to see why by first explaining how the Third Circuit erred. That is where this petition begins. The Petition then turns to the reasons why the Court should grant certiorari in this case and why it should correct the Third Circuit's errors.

I. The Third Circuit improperly deferred to the views of only two FERC Commissioners.

It is by now axiomatic that the "grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *see also Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29, 43 (1983). The Third Circuit departed from *Chenery*'s core holding in ways that Congress never intended. Congress amended the Federal

Power Act in 2018 and allowed parties to appeal a tariff that fails to garner majority support in front of FERC and is therefore approved, not by a vote of the Commission, but by operation of law. *See* 16 U.S.C. §824d(g). But Congress said nothing about the standard courts should apply when reviewing such an order.

The Third Circuit held that the Administrative Procedure Act's traditional "arbitrary and capricious" review applies to such appeals. As part of that review, the Third Circuit gave controlling weight to the opinions of only two FERC Commissioners. In doing so, it exceeded the scope of the relevant statute and turned settled principles of administrative law and judicial review on their head.

A. When Congress amended the Federal Power Act to allow parties to appeal FERC inaction, it did not change the requirement that the agency act by a majority.

This case implicates two long-standing administrative law principles. The first is the "'almost universally accepted common-law rule'" that "only a 'majority of a collective body is empowered to act for the body.'" *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016) (quoting *Fed. Trade Comm'n v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967)). Congress has explicitly imposed the same requirement on FERC. It has required that FERC act only with a quorum of at least three members and "by a majority vote of the members present." *See* 42 U.S.C. §7171(e).

The second principle is that courts must review only the reasons that an administrative agency gives for its actions—and may not consider other,

alternative justifications that the agency could have offered but did not. *Chenery*, 318 U.S. at 87; *State Farm,* 463 U.S. at 43. "A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'" *INS v. Ventura*, 537 U.S. 12, 16 (2002) (*per curium*) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

Congress has not disturbed either rule with respect to FERC. True, it has stated that proposed tariffs are approved by operation of law if FERC fails to disapprove of them. 16 U.S.C. §824d(d). But all that means is that tariffs take effect when FERC fails to act, either because it lacks a quorum or because a majority of the Commissioners cannot agree. *See id.* Such approvals happen by order of Congress, *not* by order of the Commission. *See Public Citizen*, 839 F.3d at 1169–71.

Congress did not change the rule that agencies act only by a majority of their members when it amended the Federal Power Act in 2018. As amended, the Act now states that tariffs that take effect by operation of law "shall be considered to be an order issued by the Commission accepting the change for purposes of" the statutes that permit rehearing and appeals of FERC orders. *See* 16 U.S.C. §824d(g)(1)(A) and (2) (citing 16 U.S.C. §825l(a) and 825l(b) respectively). Congress has stated, in other words, that parties may appeal even when FERC does *not* act. It did not say, however, that FERC inaction constitutes a final order of the Commission for any other purpose. Most significantly, Congress did not amend the statute that says that FERC acts only by majority vote. *See* 42 U.S.C. §7171(e). Nor did it legislatively overrule *Chenery*'s requirement that courts review only the reasons that

an agency offers for its decisions. *See* 16 U.S.C. §824d(g).

Other changes that Congress made when it amended the statute confirm that tariffs that take effect by operation of law are not orders of the Commission. In addition to allowing parties to appeal, Congress required "each Commissioner" to "add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change." 16 U.S.C. §824d(g)(1)(B). The language that it chose to use distinguishes FERC "orders" from Commissioner "views." *Compare* §824d(d) *with* §824d(g)(1)(B). When Congress uses different words in the same statute, courts "usually presume [the] differences in language" signal "differences in meaning." *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 279 (2018) (quotation omitted); *see also Sackett v. Env't Prot. Agency*, 598 U.S. 651, 719 (2023) (Kavanaugh, J., concurring in judgment); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012) (presumption of consistent usage). And, by focusing on the views of "*each* Commissioner" rather than the Commission as a whole, Congress distinguished between tariffs that take effect by operation of law and Commission "[a]ctions" that are "determined by a majority vote of the members present." *Compare* 16 U.S.C. §824d(g)(1)(B) (emphasis added) *with* 42 U.S.C. §7171(e). Congress focused on individuals in the first instance and FERC as a collective body in the second. Taken together, the Federal Power Act now indicates that when parties appeal a tariff under 16 U.S.C. §824d(g), what they

are appealing is the tariff itself and not an action by FERC.

B. Courts cannot defer to FERC's views if those views are not held by a majority of Commissioners.

The Third Circuit failed to respect the distinction that Congress drew. It treated the views of the two individual Commissioners who would have approved PJM's tariff as the views of FERC as a whole. It then applied the Administrative Procedure Act, and asked whether the views of those two Commissioners were arbitrary and capricious. Pet.App.34a–35a, 37a. It erred. Badly.

The Administrative Procedure Act cannot apply in the absence of agency action and, more importantly, agency rationale. The Act directs courts to "hold unlawful and set aside" those agency actions that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). "Judicial review under that standard is deferential." *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021). But a reasoned agency action is a prerequisite for the Administrative Procedure Act's deferential arbitrary and capricious standard of review. When there is no reasoning, there is nothing to which a court can defer. *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1131–33 (D.C. Cir. 2007).

Reasoned agency decision-making is particularly important in cases where an agency changes position or policy. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016); *see also Nat'l Cable &*

Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005). And while an agency that changes its position "need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate," it, at a minimum, must "display awareness that it *is* changing position," and "show that there are good reasons for the new policy." *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009). A court cannot decide whether an agency had *good* reasons for changing its position if the agency did not provide any reasons at all.

It is not just the Administrative Procedure Act that demands reasoned agency decision-making. The administrative law principles that the Court discussed in *Chenery* do as well. *Chenery* established the principle that an agency's action must be "measured by what the [agency] did, not by what it might have done." 318 U.S. 93–94. That is why courts have consistently vacated or remanded unreasoned agency actions. *See, e.g., Citizens Awareness Network v. United States Nuclear Regulatory Comm'n*, 59 F.3d 284, 292 (1st Cir. 1995); *CBS Corp. v. FCC*, 663 F.3d 122, 138, 151–52 (3d Cir. 2011); *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1346 (D.C. Cir. 2014). The courts have done so because when an agency has failed to "provide even [a] minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law." *Encino Motorcars*, 579 U.S. at 221.

The Third Circuit was right that it could not follow suit and that it could not dismiss the appeal on the basis that there was no agency reasoning. *See* Pet.App.31a–34a. Congress has explicitly instructed that tariffs may take effect by operation of law *without* any reasoning. 16 U.S.C. §824d(d). And it has further

allowed affected parties to appeal tariffs that become effective in that way and not through final FERC action. §824d(g). Remanding the case to FERC because PJM's tariff took effect without any action or reasoning from the Commission would have rendered Congress's instructions meaningless. *See* Pet.App.33a–34a.

What, then, should the Third Circuit have done? It should not have attempted to apply the Administrative Procedure Act at all. *Chenery* noted that when an agency provides a reasoned decision for its action, a reviewing court may not set that action aside simply because the "court might have made a different determination were it empowered to do so." 318 U.S. at 94. In so doing, it implicitly recognized that if an agency is going to receive deferential review of its action, it must first provide a *reason* for that action. *See id.* *Chenery* recognized, in other words, that a reasoned decision "is the coin with which [an] agency pays" for deference. *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 959 (2007).

But FERC made no payment here, and it cannot get deference for free. Without an agency decision to review, there was nothing to which the Third Circuit could apply the Administrative Procedure Act's deferential standard. The Third Circuit should have therefore applied the Federal Power Act directly. It should have determined in the first instance whether PJM's tariff was "just and reasonable." *See* 16 U.S.C. §824d(a). And while the Third Circuit could have *considered* the views that individual Commissioners offered under §824d(g)(1)(B), it was wrong to *defer* to those views; they were the views of "each Commissioner," not reasons or action of the Commission. So

while the Commissioners' views may have been entitled to respect in terms of their "power to persuade," *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the lack of a majority vote "liberat[ed]" the Third Circuit to decide this case based on its "independent judgment." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring in judgment).

II. The question presented is worthy of this Court's review.

The above shows that the Third Circuit erred. And it is true that "'error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.'" *Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020) (Sotomayor, J., dissenting from the grant of stay) (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* §5.12(c)(3), p. 5–45-45 (11th ed. 2019)). There are nevertheless two reasons why this case presents an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(c). *First*, the Third Circuit's decision conflicts with this Court's precedent. *Second*, while this case does not involve a formal circuit split, the importance of the question presented to the proper functioning of the country's energy markets means that the Court should not wait for a split to develop.

A. The Third Circuit's decision conflicts with this Court's decision in *Encino Motorcars*.

The Third Circuit's decision, deferring to the views of only two FERC Commissioners, conflicts with this Court's decision in *Encino Motorcars*. The Court in that case reversed a Ninth Circuit decision that had

deferred to an agency decision that was not sufficiently supported by a reasoned explanation. The Ninth Circuit, the Court held, erred. 579 U.S. at 222. Rather than defer to an unreasoned decision, the Ninth Circuit should have interpreted the relevant statute "in the first instance." *See id.* at 224. The Court therefore reversed and remanded so that the Ninth Circuit could do just that. *Id.*

The Third Circuit should have done the same. It should have applied the Federal Power Act *de novo* and should have asked "in the first instance," *see id.*, whether PJM's tariff was "just and reasonable," *see* 16 U.S.C. §824d(a). It did not. Like the Ninth Circuit in *Encino Motorcars*, the Third Circuit applied a deferential standard of review even though there was no agency decision to which it could properly defer.

To be sure, *Encino Motorcars* involved a different type of deference. The Court in that case asked whether an agency was entitled to deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), when it did not give adequate reasons for its decision. *See Encino Motorcars*, 579 U.S. at 220–22. Even though this case does not involve *Chevron*, the Administrative Procedure Act's "arbitrary and capricious" standard is a form of deference nonetheless. *Prometheus Radio Project*, 592 U.S. at 423 (referring to arbitrary and capricious review as a "deferential" standard). And the specific type of deference is ultimately irrelevant to the question of whether a court should defer to an unreasoned decision at all. (The Court need not decide whether Congress could require deference in such a situation because it has not done so here. Nothing in 16 U.S.C. §824d(g) suggests that Congress intended to displace settled principles of agency review when it amended that statute.)

B. The Court should not wait for a circuit split to develop.

The Third Circuit's decision is also in tension with decisions from other circuits. As discussed above, courts throughout the country have consistently held that agency actions that are unsupported by a reasoned justification are arbitrary and capricious and remanded those actions for further agency consideration. *See* above at 20. But while the Third Circuit's decision might conflict with the general administrative law principles that those cases discuss, this case does not involve a true circuit split. The difference in outcome between this case and those from other circuits is explained by 16 U.S.C. §824d(g), which permits parties to appeal tariffs that take effect without FERC action or reasoning. It is the statute, not the Third Circuit's decision, that creates the conflict here, and no other court has interpreted or applied the appeal provision of the statute since Congress amended it in 2018.

The Court should not wait for a split to develop over the proper application of §824d(g), however. One of the only things on which a majority of FERC Commissioners agreed was that a well-functioning market is needed to ensure a reliable supply of electricity. *See* Pet.App.122a–123a; Pet.App240a–246a. But the standard of review that the Third Circuit applied strips courts of the ability to ensure that the market continues to function properly. If courts defer to unreasoned decisions, it deprives consumers and market participants of any meaningful review of the rules that govern the market. Such a deferential standard of review is *least* appropriate, however, in cases like this one, where FERC's Commissioners cannot agree. Such cases are the ones that are the *most* likely to

involve controversial issues and that are the *most* in need of careful, searching review.

Things will also only get worse if a split does develop. At that point, the stringency of review under §824d(g) will depend on where an affected party chooses to challenge a tariff that took effect by operation of law. Challenging parties will have an incentive to forum shop and seek out a court that will apply a more favorable standard of review.

The Third Circuit defended its decision to apply the Administrative Procedure Act's deferential standard of review, despite FERC's inaction, on the basis that such review was consistent with the D.C. Circuit's decisions applying an arbitrary and capricious standard to deadlocked decisions of the Federal Election Commission. *See* Pet.App.35a n.112. For at least four reasons, the D.C. Circuit precedent that the Third Circuit cited is of little relevance here.

First, when the Federal Election Commission declines to act, its indecision maintains the status quo. *See* 52 U.S.C. §30106(c) ("[T]he affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any [enforcement or other authoritative] action."). There is therefore less harm in applying an overly deferential standard; even if the standard is wrong, it is unlikely to result in any meaningful disruptions.

Second, the statutes that govern FERC and the Federal Election Commission are different. What the statutes that govern the Federal Election Commission permit is of little relevance when determining what is allowed under the statutes that govern FERC. *Compare* 52 U.S.C. §30109(a)(8)(C) *with* 16 U.S.C. §824d(g).

Third, it is not at all clear that the D.C. Circuit decisions that the Third Circuit cited were correct. There is good reason to conclude that they were not. Among other things, the rule that requires deference to the views of less than a majority of Federal Election Commission members is judicially created; it has no statutory roots. And the D.C. Circuit decisions that created that rule made no mention of the principle that agencies act only through a majority. *See Democratic Congressional Campaign Committee v. Fed. Election Comm'n*, 831 F.2d 1131 (D.C. Cir. 1987); *Fed. Election Comm'n v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992). Nor did they discuss in any detail *Chenery, State Farm*, and the related rule that courts review only the reasons that an agency offered for its decision. *See id.*

Fourth, the cases the Third Circuit cited rest on a shaky foundation. At least some members of the D.C. Circuit have questioned whether it is appropriate to apply the Administrative Procedure Act's standard of review to *any* Federal Election Commission decision. *Cf. End Citizens United PAC v. Fed. Election Comm'n*, 90 F.4th 1172, 1177 n.3 (D.C. Cir. 2024). Just because the D.C. Circuit may have taken a wrong turn does not mean that other courts need to follow.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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