No. 23-1069

IN THE
Supreme Court of the United States

PUBLIC UTILITIES COMMISSION OF OHIO,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT-INTERVENORS

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's deemed approval of tariff changes under 16 U.S.C. § 824*d*(g) should be reviewed under the familiar arbitrary-and-capricious standard, with Commissioner statements providing the reasoned basis for the agency's deemed action.

CORPORATE DISCLOSURE STATEMENTS

American Municipal Power, Inc. is a non-profit Ohio corporation organized in 1971. American Municipal Power has 132 members, including 131 member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland, and the Delaware Municipal Electric Corporation, a joint action agency with eight members. American Municipal Power provides wholesale energy supply and related services to its members. American Municipal Power issues no stock, has no parent corporation, and is not owned in whole or in part by any publicly held corporation.

Buckeye Power, Inc. is a non-profit generation and transmission cooperative, owned and governed by its member distribution cooperatives, which are in turn each (predominantly Ohio) non-profit cooperatives owned by their retail member-consumers. Buckeye Power, Inc. has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in Buckeye Power, Inc.

Constellation Energy Corporation is a publicly traded company. No publicly traded company owns 10 percent or more of its stock; however, Vanguard, which is not publicly traded, owns more than 10 percent of its stock. Through Constellation Energy Generation, LLC, Constellation Energy Corporation owns in whole or in part 18 nuclear generation units in the PJM region, providing more than 18,000 MW of zero-emissions capacity. Several of these nuclear units in Illinois and New Jersey receive support through state programs.

Constellation Energy Generation, LLC is a wholly owned subsidiary of Constellation Energy Corporation, a publicly traded company. No publicly traded company owns 10 percent or more of Constellation Energy Corporation's stock; however, Vanguard, which is not publicly traded, owns more than 10 percent of its stock. Constellation Energy Generation, LLC, directly or indirectly, owns in whole or in part 18 nuclear generation units in the PJM region, providing more than 18,000 MW of zero-emissions capacity. Several of these nuclear units in Illinois and New Jersey receive support through state programs.

Natural Resources Defense Council, Inc. ("NRDC") is a national non-profit corporation with members in all fifty United States dedicated to safeguarding the Earth, including by achieving energy solutions that accelerate the use of renewable energy and ensure that clean energy is affordable and accessible to all. NRDC has no parent companies, subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in NRDC.

Old Dominion Electric Cooperative is a not-for-profit power supply electric cooperative, organized and operating under the laws of Virginia. Old Dominion Electric Cooperative supplies capacity and energy to its eleven electric distribution cooperative members, all of which are in turn each non-profit cooperatives. Old Dominion Electric Cooperative has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in Old Dominion Electric Cooperative.

PJM Interconnection, L.L.C. ("PJM") is a limited liability company ("L.L.C.") organized and existing under the laws of the State of Delaware. PJM is a regional transmission organization ("RTO") for all or portions of Delaware, the District of Columbia, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, and West Virginia. PJM is authorized by Respondent Federal Energy Regulatory Commission ("FERC") to administer an Open Access Transmission Tariff ("Tariff"), provide transmission service under the Tariff on the electric transmission facilities under PJM's control, operate an energy and other markets, and otherwise conduct the day-to-day operations of the bulk power system of a multi-state electric control area. PJM was approved by FERC first as an independent system operator and then as an RTO. *See Pennsylvania-New Jersey-Maryland Interconnection*, 81 FERC ¶ 61,257 (1997), *reh'g denied*, 92 FERC ¶ 61,282 (2000), *modified sub nom. Atl. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002); *PJM Interconnection, L.L.C.*, 101 FERC ¶ 61,345 (2002).

PJM has no parent companies. Under Delaware law, the members of an L.L.C. have an "interest" in the L.L.C. *See* Del. Code Ann. tit. 6, § 18-701 (2021). PJM members do not purchase their interests or otherwise provide capital to obtain their interests. Rather, the PJM members' interests are determined pursuant to a formula that considers various attributes of the member, and the interests are used only for the limited purposes of: (i) determining the amount of working capital contribution for which a member may be responsible in

the event financing cannot be obtained;* and (ii) dividing assets in the event of liquidation. PJM is not operated to produce a profit, has never made any distributions to members, and does not intend to do so (absent dissolution). In addition, "interest" as defined above does not enter into governance of PJM and there are no individual entities that have a 10% or greater voting interest in the conduct of any PJM affairs.

Sierra Club is a national organization with more than 60 chapters; consistent with Sierra Club's purpose to explore, enjoy, and protect the wild places of the earth, the organization advocates for wholesale market designs and rules that facilitate fair participation by renewable energy resources, demand-side management, and storage and against rules that increase consumer cost for the benefit of fossil fuel generation. Sierra Club has no parent companies, subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in Sierra Club.

Union of Concerned Scientists ("UCS") is a science-based environmental nonprofit organization whose member scientists provide technical analyses and advocate for the maximization of renewable energy resources and non-generation supply such as demand response in ways that keep electrical energy reliable and affordable to all. UCS has no parent companies,

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* Under the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., the amount of capital contributions received from all PJM members combined is capped at $5,200,000. Because PJM has financed its working capital requirements, there have been no member contributions to date, and none are expected.

subsidiaries, or affiliates and has not issued shares or other securities to the public. No publicly held corporation owns any stock in UCS.

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INTRODUCTION

The Court should deny the Petition, which involves neither a circuit split nor a matter of ongoing national importance. Petitioner concedes that its Petition "does not involve a formal circuit split." Pet. 22. Courts have applied Section 205(g) of the Federal Power Act, 16 U.S.C. § 824*d*(g), on only two occasions since it was enacted in 2018, and there is no conflict or tension between those decisions. Nor does the Petition raise any question of ongoing national importance: it concerns the standard for judicial review in rare cases in which the Federal Energy Regulatory Commission ("FERC") deadlocks or lacks a quorum to act, allowing a utility's tariff changes to take effect by operation of law. In the Federal Power Act's nearly 90-year history, such circumstances have occurred only a handful of times. That is enough to deny review.

Moreover, the Third Circuit's decision was correct in conducting arbitrary-and-capricious review of FERC's decision, just as it always does. Congress determined that, in the unusual circumstances in which a tariff takes effect because of a lack of quorum or deadlock, FERC should be deemed to have issued an order accepting the utility's tariff changes and such order should be subject to judicial review. *See* 16 U.S.C. § 824*d*(g). The statute provides for judicial review under "section 825*l*(b)"—the same provision that governs judicial review of all other FERC actions. *Id.* The statute further directs the Commissioners to each submit a statement of reasons explaining their views with respect to the tariff change that "shall be add[ed] to the record" and that serve as the basis for judicial review. *Id.* § 824*d*(g)(1)(B).

Petitioners' contention that the court should instead engage in *de novo* review of the record and reach its own decision in the first instance as to whether the tariff change is just and reasonable—effectively standing in as a phantom fifth commissioner—is unworkable. It would require generalist courts to set federal energy policy. Such an approach is inconsistent with this Court's longstanding recognition that courts may not in the first instance decide whether a utility tariff is just and reasonable, *see Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951), and are limited to reviewing the reasoning supplied by the agency itself. *See SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

Accordingly, the Third Circuit correctly reviewed the agency action using the same standard of review courts always use: it asked whether the agency's action approving the tariff change was arbitrary and capricious in light of the record, which here included statements by the Commissioners explaining their views of the tariff change. And, based on the 86-page joint statement of the Commissioners supporting the change, it found that FERC's action approving the change was not arbitrary and capricious.

The Court should deny the Petition.

STATEMENT OF THE CASE

A. Under the Federal Power Act, a Tariff Change Becomes Effective by Operation of Law Unless FERC Acts on It Within 60 Days.

Under Section 205(d) of the Federal Power Act ("FPA"), 16 U.S.C. § 824*d*(d), a public utility may change "any … charge, classification, or service … after sixty

days' notice to the Commission and to the public." 16 U.S.C. § 824*d*(d). Thus, each public utility possesses "the right in the first instance to change its rates as it will." *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113 (1958). FERC, in turn, may investigate whether the tariff change is just and reasonable, suspend the proposed change, and set the matter for hearing. It can also reject the proposed change as unjust and unreasonable. But unless FERC affirmatively acts within 60 days on a filing, the utility's proposed change "become[s] effective by operation of law pursuant to … Section 205." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168 (D.C. Cir. 2016); 16 U.S.C. § 824*d*(d).

Prior to Section 205(g)'s enactment, the D.C. Circuit held that no court had jurisdiction to review cases in which a tariff change became effective due to operation of law, including as a result of a deadlocked vote. *Pub. Citizen*, 839 F.3d at 1170. The court explained that, when a rate filing goes into effect by operation of law under FPA Section 205(d), there is no agency action. *Id.* Accordingly, there is nothing for the court to review. *Id.*

B. Congress Amended the Federal Power Act in 2018 to Enable Judicial Review When There Is a Deadlocked Vote or Lack of Quorum.

In 2018, Congress amended the FPA to enable judicial review in the unusual circumstance where a tariff change takes effect by operation of law due to a lack of quorum or deadlock. In those circumstances only, Congress directed that FERC's failure to act on a tariff filing "shall be considered to be an order issued by the

Commission accepting the change" for purposes of judicial review. 16 U.S.C. § 824*d*(g)(1)(A), (2).

Congress further directed that any such review should proceed under the FPA's judicial review provision, 16 U.S.C. § 825*l*(b), which is applicable to all Commission orders. *Id.* § 824*d*(g)(2). Under that provision, "the Commission shall file with the court [of appeals] the record upon which the order complained of was entered," and the court will then "affirm, modify, or set aside such order in whole or in part." *Id.* § 825*l*(b). The statute provides that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." *Id.* As to the law and the application of law to the facts, judicial review under Section 825*l*(b) review applies the familiar arbitrary-and-capricious standard. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016) (applying "'arbitrary and capricious' standard" of review); *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 532 (2008) ("[The Court] afford[s] great deference to the Commission in its rate decisions."); *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 663 (D.C. Cir. 1996) ("[T]he Court reads [§ 825*l*(b)] implicitly as providing review on arbitrary and capricious grounds.").

To aid judicial review by providing the reviewing court with the basis for the order deemed to issue under Section 205(g), Section 205(g)(1)(B) requires that "each Commissioner shall 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. § 824*d*(g)(1)(B) (emphasis added).

Congress did not create this mechanism for enabling judicial review of non-majority agency action from scratch. Rather, on multiple previous occasions, the D.C. Circuit had interpreted other existing statutory schemes permitting judicial review of agency decisions resulting from deadlock by calling for individual Commissioner statements to enable such review.

For example, the D.C. Circuit concluded that under the Federal Election Campaign Act ("FECA"), the Federal Election Commission ("FEC") engages in a final and reviewable agency action when it dismisses a complaint to investigate campaign finance violations after deadlocking over probable cause. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*"). Because the FECA clearly authorized review of deadlock decisions, the court directed the commissioners who voted to dismiss the complaint to "provide a statement of their reasons for so voting" in order "to make judicial review a meaningful exercise." *NRSC*, 966 F.2d at 1476. These commissioners "constitute a controlling group for purposes of the decision[and] their rationale necessarily states the agency's reasons for acting as it did." *Id.* The D.C. Circuit also took a similar approach in an FCC case involving deadlock. *Radio-Television News Dirs. Ass'n v. FCC*, 184 F.3d 872, 875, 878 (D.C. Cir. 1999) (noting that the court had previously held that "the commissioners voting against repeal were obliged to submit a statement of reasons to the court in order to facilitate judicial review" and looking to "the

joint statement of [the] Commissioners … supporting retention of the rules as the opinion of the agency").

When the D.C. Circuit first faced a petition to review a deadlocked vote by FERC, prior to the passage of Section 205(g), it was unable to follow the same course. *See Public Citizen*, 839 F.3d at 1170-71. Unlike the "FECA's text," the FPA did not then "explicitly permit[] review of … deadlocks as agency action." *Id.* at 1170. The court recognized that the result could seem unfair: a party aggrieved by a tariff change was unable to obtain any judicial review merely because the agency had been unable to act. But, the court held, "it lies with Congress … to provide the remedy." *Id.* at 1174.

Congress subsequently did so in 2018 when it amended the FPA to add Section 205(g), which explicitly allows for judicial review when a tariff change takes effect due to deadlock or lack of quorum. It treated such a circumstance as "an order issued by the Commission accepting the change" for purposes of judicial review. 16 U.S.C. § 824*d*(g)(1)(A). It directed that such review occur under the same procedures and standards as other FERC decisions, and required that the Commissioners add statements explaining their views of the change to the record to enable judicial review of the order's rationale. *See id.* § 824*d*(g)(1)(B).

C. FERC Deadlocked on a Tariff Filing, Resulting in a Reviewable Order Approving the Change Under Section 205(g).

1. This case involves tariff changes governing the capacity market run by PJM Interconnection, L.L.C. ("PJM"), which is a public utility under the FPA and the

grid operator for a region covering thirteen states and the District of Columbia. Pet. App. 17a. "'Capacity' is not electricity itself but the ability to produce it when necessary." *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 82 (3d Cir. 2014) ("*NJBPU*") (quotation marks omitted). The capacity market pays participants for a commitment to produce electricity when called upon by PJM, thereby ensuring that "there are enough … generators connected to the transmission grid for the system to function at peak" times. *Id.*; Pet. App. 17a.

PJM operates a capacity auction, which proceeds as follows:

- PJM predicts electricity demand three years in the future and seeks to procure capacity to meet that demand. Pet. App. 18a.
- Capacity sellers propose an amount of capacity they will offer to PJM and the price at which they will offer that capacity. Pet. App. 18a; *Hughes v. Talen Energy Mktg. LLC*, 578 U.S. 150, 155-56 (2016).
- PJM accepts offers, beginning with the lowest-price offer and continuing in order of price, until it has purchased enough capacity to satisfy projected demand. Pet. App. 18a.
- All accepted capacity sellers receive the highest accepted price, which is called the "clearing price." Pet. App. 18a.
- Load-serving entities—which supply electricity to retail customers—then must purchase enough capacity from PJM at the

clearing price "to satisfy their PJM-assigned share of overall projected demand." Pet. App. 18a.

"FERC extensively regulates the structure of the PJM capacity auction to ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price." *Hughes*, 578 U.S. at 157. The capacity auction rules are set forth in PJM's tariff on file with FERC. *PJM Power Providers Group v. FERC*, 96 F.4th 390, 395 (3d Cir. 2024).

2. At issue in this case is a capacity market rule known as the Minimum Offer Price Rule ("MOPR"), which sets floor prices below which certain types of generators are not permitted to offer in the auction. Ordinarily, competitive pressures lead generators to offer as low as they can. However, "[b]ecause some participants both buy and sell capacity in the auction, the auctions are theoretically vulnerable to manipulation by exercise of monopsony," or buyer-side, market power. Pet. App. 19a (emphasis omitted). "That is, net-buyers—those who buy more capacity than they sell—could artificially depress prices by selling capacity below its true cost, skewing the market signals produced by the auction." *Id.*

To thwart the potential exercise of buyer-side market power, the MOPR requires generators who have such power "to bid capacity into the auction at or above a price specified by PJM, unless those generators can prove that their actual costs fall below the [specified] price." *Hughes*, 578 U.S. at 157. This administratively determined offer floor "prevents an uneconomically low capacity offer from a net buyer from depressing the

capacity price below the competitive level…." Pet. App. 51a.

The MOPR was implemented in 2006. Since then, PJM and FERC have periodically refined the rule to "balanc[e] the need to mitigate the exercise of buyer-side market power against the harms that can come from over-mitigation." Pet. App. 51a-52a, 68a-75a (reviewing history). If the MOPR is applied too broadly and captures suppliers not exercising buyer-side market power, it will interfere with competition and result in unnecessary price increases for customers. *Id.* at 56a-58a.

Until 2019, FERC struck the balance by applying the MOPR *only* to new natural gas plants, which PJM and FERC considered to be the resource type most likely to be used to exercise buyer-side market power. *See NJBPU*, 744 F.3d at 106. Other plants were free to submit offers as low as they wished. *Id.* at 90, 106; *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 152 (2011), *aff'd*, *NJBPU*, 744 F.3d 74.

During that same period, states within the PJM region increasingly sought to promote energy policy goals through support for certain types of generation—particularly renewable and nuclear. State programs supporting renewable-energy generation became widespread in the early 2000s, and by 2018 Illinois and New Jersey had each adopted programs to preserve certain existing nuclear power plants. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 521-22 (7th Cir. 2018); N.J. Stat. Ann. 48:3-87.3 *et seq.*

State programs supporting certain types of generation are not an exercise of buyer-side market power. They pursue legitimate policy goals, not market price manipulation. Under the FPA, states regulate generation facilities and electricity production. *Hughes*, 578 U.S. at 154; 16 U.S.C. § 824(b). This reserved authority encompasses deciding "questions of need … and other related state concerns," *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 194, 205 (1983), including whether to adopt programs to "diversify their generation mix to meet environmental goals," *S. Cal. Edison Co.*, 70 FERC ¶ 61,215, at 61,676, *reh'g denied*, 71 FERC ¶ 61,269 (1995); *accord, e.g., Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 54-56 (2d Cir. 2018).

3. Nevertheless, in December 2019, FERC instituted a dramatic policy shift that aimed to counteract the indirect effect of these state policies on the capacity market. *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239, at PP 37-39 (2019) ("the 2019 MOPR"). By a 2-1 vote, FERC for the first time applied the MOPR to *all* "new and existing capacity resources that receive, or are entitled to receive, a State Subsidy…." *Id.* at PP 37, 50, 67. FERC acknowledged that this "expanded MOPR does not focus on buyer-side market power mitigation, but rather addresses the impact of State Subsidies on the market." *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035, at P 45 (2020) (Order on Rehearing). Under the "expanded MOPR," any capacity supplier receiving compensation pursuant to a state program would now be subjected to an offer floor that

hypothesized the minimum amount the supplier would need from the capacity market if it were *not* receiving such state support. By raising their offer prices, the 2019 MOPR made it more difficult for suppliers receiving state-directed compensation to successfully sell their capacity in the auction.

Many parties contested the 2019 MOPR. More than forty parties filed for rehearing and/or clarification, and over twenty parties filed petitions for review, which were consolidated before the U.S. Court of Appeals for the Seventh Circuit and remain in abeyance pending final resolution of this case. *See Ill. Com. Comm'n v. FERC*, No. 20-1645 (7th Cir.).

4. In 2021, PJM submitted a revised tariff under FPA Section 205 to replace the 2019 MOPR with a further revised rule ("the 2021 MOPR"). Although PJM was under no obligation to show that its existing tariff was unjust and unreasonable, it nevertheless provided a lengthy discussion and extensive evidence explaining its rationale for revisiting the MOPR. *See* Ct. App. JA171-434. PJM offered a four-fold rationale.

First, "PJM acknowledged that, over the previous three years, state investments in renewable and nuclear resources had proliferated." Pet. App. 22a-23a. Thus, the 2019 MOPR had not discouraged state support.

Second, against the backdrop of those state programs, the 2019 MOPR distorted the economics of the capacity market. The 2019 MOPR had the effect of rejecting offers from state-supported generation in favor of other capacity supply, by mandating that state-supported generation submit minimum offers that in

many cases were higher than the market price. But state-supported generation continued to operate and provide power to the grid. As a result, the 2019 MOPR sent the wrong signals: it called for the market to deliver additional capacity, when additional capacity was not really needed. Pet. App. 23a, 60a-61a, 87a-88a.

Third, and relatedly, the 2019 MOPR would unnecessarily increase costs to customers to the tune of $1.0-$2.6 billion per year. Pet. App. 23a, 88a-90a. For example, in Illinois, a nuclear plant that received compensation under a state program was subjected to the 2019 MOPR and failed to sell its capacity for 2022-23. Even though the nuclear plant remains in operation, and in practice provides capacity to the system, Illinois customers are forced to pay other generators for capacity as though the nuclear plant had disappeared. In all, in that single year, Illinois customers paid $90 million more as a result of the 2019 MOPR, for capacity that was not actually needed. *Id.* at 92a. Worse, these unnecessary consumer costs would grow over time as states support additional renewable, nuclear, and other preferred power generation resources that the 2019 MOPR would effectively prevent from successfully selling their capacity in the auction. *See id.* at 91a-92a.

Fourth, the impact of the 2019 MOPR on state policy initiatives and customer costs led states and major utilities to reconsider their participation in PJM's capacity market. Pet. App. 98a-99a. For example, before PJM's May 2021 capacity auction, a major utility serving Virginia removed its entire load and generation fleet from the capacity market, citing concerns about the impacts of the 2019 MOPR. Ct. App. JA182-83. Multiple

states, including New Jersey, Maryland, and Illinois, also began reconsidering their participation in PJM's capacity market. Ct. App. JA183. These actions threatened the viability of the market. *Id.*

PJM's filing explained that, in departing from the 2019 MOPR, it sought to return to the rule's original purpose, which was to counter attempted exercises of buyer-side market power. Pet. App. 24a. PJM's filing proposed a revised test to do so.

5. After receiving multiple rounds of comments from numerous parties, the four voting FERC commissioners deadlocked in a 2-2 vote regarding PJM's filing. Because tariff revisions become effective after sixty days "[u]nless the Commission otherwise orders," 16 U.S.C. § 824*d*(d), the Secretary issued a notice stating that PJM's filing became effective by operation of law. Ct. App. JA36. Under Section 205(g), the Commission's deadlock vote "shall be considered to be an order issued by the Commission accepting the change" for purposes of judicial review. 16 U.S.C. § 824*d*(g)(1)(A), (2).

As required by FPA Section 205(g), the Commissioners filed statements explaining their reasons for voting for or against the PJM filing. Chairman Glick and Commissioner Clements issued an 86-page joint statement thoroughly explaining why the 2021 MOPR is "just and reasonable and not unduly discriminatory or preferential, consistent with the requirements of section 205 of the Federal Power Act." Pet. App. 47a-187a. Commissioners Christie and Danly each issued statements explaining their dissenting views. *Id.* at 188a-199a (Christie); *id.* at 200a-253a (Danly).

Several parties moved for rehearing, and after the thirty-day statutory period elapsed, 16 U.S.C. § 825*l*(a), the Secretary issued a notice that those requests were denied as a matter of law. Various parties petitioned for review.

D. Proceedings in the Court of Appeals.

The Third Circuit affirmed FERC's order accepting PJM's tariff change, holding that "our review of FERC 'action,' whether actual or constructive, proceeds under the deferential standards set forth in the FPA and the Administrative Procedure Act." Pet. App. 11a. The court rejected Petitioner's argument "that we must review 'on a de novo basis, whether the tariff change is just and reasonable…." *Id.* at 30a.

As the court explained, "Prior to its [amendment in 2018], the plain text of the FPA did not convey Congress's intent to allow our review of rate filings enacted by operation of law pursuant to § 205(d). Congress addressed this deficiency with § 205(g), which unambiguously instructed that we construe FERC's inaction as an affirmative order '*for purposes of*' … the very provision setting forth a party's right to seek the Commission's rehearing of an order by majority vote, which in turn provides the basis for judicial review." Pet. App. 29a-30a (footnote omitted). Therefore, the court continued, "the standard of review set forth in the FPA applies to FERC orders issued by operation of law pursuant to § 205(d)." *Id.* at 30a (footnote omitted).

The court held that Petitioner's contrary reading—that the court should decide *de novo* whether the proposed tariff change is just and reasonable—

"contradicts the well-settled administrative law principle, reflected in both the FPA and APA, that 'a court is not to substitute its judgment for that of the agency.'" Pet. App. 30a (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

After determining that the ordinary standard of review applied, the court next considered "what constitutes evidence of the agency's reasoning for the purposes of § 205(g)." Pet. App. 31a. It held that "our review properly encompasses the Commissioners' mandatory statements setting forth their reasons for approving or denying the filing." *Id.* at 11a. As the court elaborated, "the statements of the deadlocked Commissioners do more than record each person's individual rationale for affirming or rejecting the rate filing. Collectively, they illuminate the agency's reasons for inaction, which Congress instructed us to construe as an affirmative order." *Id.* at 34a. The court pointed to the FEC cases, in which the D.C. Circuit looked to Commissioner statements to discern the basis for agency deadlock, as analogous precedent. *Id.* at 35a.

Finally, the court considered the merits. "Reviewing the petitions accordingly," it held, "FERC's acceptance of PJM's tariff was not arbitrary or capricious and was supported by substantial evidence in the record." Pet. App. at 11a. As the court found, "[t]he eighty-six-page Joint Statement … identified reasons" why PJM's filing was "just and reasonable" and "identified specific changed circumstances to support these conclusions." *Id.* at 40a-41a.

The court additionally noted that the PJM filing concerned an "issue[] of rate design" that "involve[s] policy judgments that lie at the core of the regulatory mission": "How best to protect the integrity of the capacity market, in view of the diverse and legitimate interests of its myriad stakeholders and the innumerable factors that influence price." Pet. App. 38a (internal quotation marks omitted). The court declined to second-guess the policy determinations supported by the Joint Statement.

REASONS FOR DENYING THE PETITION

This case satisfies none of the traditional criteria for certiorari. As Petitioner admits, the decision below does not conflict with that of any other court. Nor is any issue of national importance presented—the case involves the interpretation of a narrow statutory provision that is triggered only under unusual circumstances and has been applied only twice since its enactment in 2018. Thus, the petition is at bottom a plea for what Petitioner believes to be error correction. However, on the merits, the Third Circuit was correct.

A. There Is No Conflict Among the Circuits or With this Court's Decisions.

1. Petitioner concedes that "this case does not involve a true circuit split." Pet. 24. Only one other case (which Petitioner fails to mention) has ever involved Section 205(g), and the D.C. Circuit's decision in that case is fully consistent with the Third Circuit's analysis below. *See Advanced Energy United, Inc. v. FERC*, 82 F.4th 1095 (D.C. Cir. 2023). In *Advanced Energy United*, the D.C. Circuit recognized—like the Third

Circuit below—that Congress enacted Section 205(g) to enable judicial review when a tariff takes effect due to deadlock or lack of quorum. *Id.* at 1101. The D.C. Circuit explained that such circumstances result in an "'order' for purposes of judicial review," *id.* at 1109, and that Commissioner statements regarding the proposed tariff change become part of the agency record for review, *id.* at 1101. The D.C. Circuit's decision ultimately turned on the date on which FERC's "order" approving the tariff filing was issued, and thus the timeliness of the petitioner's rehearing application. Consequently, the D.C. Circuit did not address how it would treat the Commissioner statements in reviewing the merits.

That only the Third Circuit has considered whether to apply the arbitrary-and-capricious standard to an order issued under Section 205(g) is reason enough to deny the petition. This Court's "ordinary practice" is to "deny[] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam).

2. Petitioner nevertheless asserts that the underlying "decision is … in tension with decisions from other circuits." Pet. 24. Yet Petitioner identifies no such decisions, other than those applying the familiar rule that an unreasoned agency decision must be remanded. *Id.* at 24, 20 (citing cases). But in Section 205(g), Congress directed the Commissioners to include statements in the record explaining their views of the tariff change precisely so that the reviewing court would have a robust record to evaluate the basis for FERC's "order … accepting the change." 16 U.S.C.

§ 824*d*(g)(1)(A). And it did so against the background of uniform circuit precedent holding that in similar circumstances, where Congress authorizes judicial review of a decision that results from a non-majority vote of an agency's governing body, a court must evaluate the decision based on the views of the members that supported it. *See supra* at 5-6.

Petitioner contends that when agencies take action by majority vote, courts have declined to treat Commissioner statements as indicative of the agency's reasoning. But that does not show any tension, let alone conflict, with the result here, which involves agency action that emerges from a deadlocked vote. The approach taken by the Third Circuit follows directly from the statute Congress wrote to govern these unusual circumstances, as Petitioner admits. *See* Pet. 24 ("The difference in outcome between this case and those from other circuits is explained by 16 U.S.C. § 824*d*(g)…. It is the statute, not the Third Circuit's decision, that creates the conflict here.").

3. The Third Circuit's opinion also creates no conflict with this Court's decision in *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211 (2016), despite Petitioner's claims to the contrary. Pet. 22-23. As Petitioner concedes, "*Encino Motorcars* involved a different type of deference," *id.* at 23, a different agency, and a different statute. *Encino Motorcars* concerned whether an agency could receive *Chevron* deference when it changed its interpretation of the statute without a reasoned explanation. That has nothing at all to do with the question here, which is whether a court should apply arbitrary-and-capricious review to an agency rate-

making decision, relying on Commissioner statements that Congress required be added to the record to provide the reasoning for an order arising from a deadlocked vote.

The only relevant connection between the cases is this Court's longstanding requirement that agencies provide "reasoned explanation[s]" before "chang[ing] their existing policies." 579 U.S. at 221. Here, the two Commissioners who supported the Commission's order accepting the tariff filing submitted an 86-page joint statement explaining their reasoning, and Section 205(g)(1)(B) makes that joint statement a part of the record on review.

To the extent Petitioner objects that the joint statement reflects the views of the Commissioners and not the reasoning of the agency, *see* Pet. 23 (asserting there "was no agency decision to which" the court could "properly defer"), it is wrong: the two Commissioners who signed the joint statement, and whose votes were sufficient to bring about FERC's decision to approve the tariff filing, "constitute a controlling group for purposes of the decision[and] their rationale necessarily states the agency's reasons for acting as it did." *NRSC*, 966 F.2d at 1476; *see also Radio-Television News Directors Ass'n*, 184 F.3d at 880. Nothing in *Encino Motorcars* holds otherwise.

B. The Question Presented Is Not Sufficiently Important to Warrant This Court's Review.

Petitioner urges that, even though there is no split, the Petition should be granted because of the importance of the question presented. Not so. Section

205(g) was enacted to address the rare situation when the Commission deadlocks or lacks a quorum to review a utility's Section 205 filing, resulting in that filing taking effect by operation of law. 16 U.S.C. § 824*d*(g)(1); *id.* § 824*d*(d). Before 2018, "[i]n only a very few instances ha[d] a rate change under section 205 gone into effect because the Commission failed to act within 60 days. In fact, on only six occasions since 1977 when FERC was established ha[d] this occurred." S. Rep. No. 115-278, at 2 (2018). Since 2018, the statute has only been applied twice by any court, and Petitioner has not pointed to any interruption or harm that has resulted.

Moreover, if a party believes that a tariff filing should not have been approved, it can always file a complaint under Section 206 once the deadlock is resolved or a quorum is regained, and argue that the tariff is unjust and unreasonable. *See* 16 U.S.C. § 824*e*. The newly constituted Commission can also, on its motion, find the existing tariff unjust and unreasonable and impose a replacement. *Id.* Thus, a tariff change that is approved due to lack of quorum or deadlock remains subject to potential challenge in the future.

C. The Third Circuit Applied the Correct Standard in Reviewing the Tariff's Approval.

1. The Third Circuit's Decision Is Consistent With the Statute.

The Third Circuit correctly interpreted Section 205(g) to determine "the applicable standard and scope of judicial review" of a FERC order arising from deadlock or lack of quorum. Pet. App. 28a. Section 205(g)(1)(A) states that when a tariff changes takes

effect by operation of law due to deadlock or lack of quorum, that shall be considered "an *order issued by the Commission* accepting the change" (emphasis added), with appellate review available under 16 U.S.C. § 825*l*(b), the FPA's judicial review provision. That provision states: "the Commission shall file with the court [of appeals] the *record* upon which the order complained of was entered," and the court will then "affirm, modify, or set aside such order in whole or in part." 16 U.S.C. § 825*l*(b). Section 205(g)(1)(B) provides the basis on which review of the Commission's Acceptance Order shall occur: "each Commissioner shall add to *the record of the Commission* a written statement explaining the views of the Commissioner with respect to the change." *Id.* § 824*d*(g)(1)(B) (emphasis added).

The plain reading of the statute, therefore, is that a FERC order issued by operation of law due to a deadlock vote on a requested tariff change is an order reviewable by the Court of Appeals under the same standard of review that applies to any other FERC order. The Commissioner statements in support of approval, which Section 205(g) expressly requires to be included in the agency record, provide the rationale for the order. On review, the Court of Appeals can affirm, modify, or set aside the order based on that record. The Third Circuit thus correctly held that Congress "unambiguously instructed that [courts] construe FERC's inaction as an affirmative order" for judicial review, Pet. App. 29a, and that the court's review of an order due to FERC inaction "properly encompasses the entire record, including the four Commissioners' § 205(g)(1)(B) statements," *id.* at 37a.

The Third Circuit's interpretation of the plain text of Section 205(g) is bolstered by the canon of construction under which courts "assume that Congress is aware of existing law when it passes legislation," *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), specifically the D.C. Circuit's practice of treating Commissioner statements as the rationale for a deadlocked agency's action. *See supra* at 5-6. Congress acted shortly after *Public Citizen*, in which the D.C. Circuit held that FERC's deadlock did not constitute final agency action, and as such was not reviewable, and suggested that it "lies with Congress, not this Court, to provide the remedy" for any resulting "unfairness." *Pub. Citizen*, 839 F.3d at 1174. Congress took the court's suggestion. Section 205(g)'s Commissioner-statement requirement mirrors the Commissioner statements required by the D.C. Circuit's FEC and FCC cases, which provide the reasoning explaining the rationale for the agency action resulting from deadlock. *See NRSC*, 966 F.2d at 1476; *In re Radio-Television News Directors Ass'n*, 159 F.3d 636, 1998 WL 388796 (D.C. Cir. 1998) (per curiam) (unpublished table decision); *see supra* at 5-6.

While the provision's text is sufficient support for the Third Circuit's interpretation, the legislative history bolsters the court's holding. The original bill that would become Section 205(g) passed the House and was referred to the Senate without a requirement that Commissioner statements be added to the record. Fair RATES Act, S. 186, 115th Cong., 1st Sess. (2017) (as introduced in Senate Jan. 23, 2017), https://www.congress.gov/bill/115th-congress/senate-bill/186/text/is. FERC's General Counsel testified

before Congress in October 2017, and observed that the proposal would "almost certainly" result in a remand because a reviewing court would have nothing to review. *Pending Legislation: Hearing on S. 186 et al., Before the Subcomm. on Energy of the S. Comm. on Energy and Natural Resources*, 115th Cong. 13 (2017). As the General Counsel noted, a reviewing court would have an order following FERC deadlock but would lack the "reasoning the agency employed" and thus "review would be impossible." *Id.*

Alerted to the problem, Senator Markey introduced a revised bill in June 2018 that addressed the General Counsel's concern. The amended bill added the requirement for Commissioner statements to be included in the record, thus enabling meaningful appellate review. *See* Fair RATES Act, S. 186, 115th Cong., 2d Sess. (2018) (as reported with amendment June 18, 2018), https://www.congress.gov/bill/115th-congress/senate-bill/186/text/rs. The accompanying Senate Report noted that the amendment was designed to "compile an adequate administrative record of the proceeding for a court to review." S. Rep. No. 115-278, at 4. A substantially similar version of Section 205(g) was ultimately passed into law as part of America's Water Infrastructure Act of 2018. *See* Pub. L. No. 115-270, 132 Stat. 3765.

This history confirms what the statutory text makes clear: the statements of the Commissioners who supported the tariff change serve as the agency reasoning for judicial review of a FERC order approving the change under Section 205(g).

Petitioner's reliance on traditional principles of administrative law is also of no moment. Traditionally, "a simple majority of a collective body is empowered to act for the body," but this principle falls "in the [face] of a contrary statutory provision." *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967). Here, Congress expressly provided that where FERC deadlocks on whether to approve or reject a proposed tariff change, the result is an order accepting a proposed tariff change, despite more general statutory language requiring majority action. And, as the Third Circuit recognized, this latter, "specific provision controls over one of more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991); Pet. App. 36a.

2. Petitioner's Position Is Misguided and Unworkable.

According to Petitioner, the Third Circuit "should not have attempted to apply the Administrative Procedure Act at all," but instead "should have determined in the first instance whether PJM's tariff was 'just and reasonable.'" Pet. 21. Petitioner, in other words, wants the Court of Appeals to be responsible for reviewing tariff provisions and acting as a fifth Commissioner, charged with casting the tie-breaking vote.

The Third Circuit was correct to reject Petitioner's plea for *de novo* judicial review of public utility tariffs, and moreover Petitioner does not even argue that the case would have come out differently under its novel approach. As the Third Circuit recognized, Section 205(g)'s express cross-reference to the FPA judicial review provision incorporated the "familiar standards"

governing review of Commission orders. Pet. App. 29a. Federal courts have determined uniformly that judicial review under 16 U.S.C. § 825*l*(b) brings with it the deferential standards of arbitrary-and-capricious review. Pet. App. 28a & nn.86-87 (and cases cited therein); *see also Bangor Hydro-Elec. Co.*, 78 F.3d at 663. Petitioner's plea for *de novo* review of the justness and reasonableness of utility rates would violate those standards. Pet. App. 30a; *FERC v. Elec. Power Supply Assn.*, 577 U.S. at 292 ("[A] [court] may not substitute [its] judgment for that of the Commission.").

Moreover, Petitioner offers no explanation of how a court could act as a fifth FERC Commissioner, or why it would be appropriate for a non-expert court to make the initial technical policy judgment about whether a proposed rate is just and reasonable. Ratemaking determinations are legislative in nature. *Minnesota Rate Cases*, 230 U.S. 352, 433 (1913) ("The rate-making power is a legislative power and necessarily implies a range of legislative discretion"); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989). As this Court has consistently held, courts lack the tools to determine, in the first instance, whether a rate is "just and reasonable" under Section 205. "The statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition," *Morgan Stanley Cap. Grp. Inc.*, 554 U.S. at 532, and "is a standard for the Commission to apply," *Montana-Dakota Utils. Co.*, 341 U.S. at 251-52. Indeed, that standard can be satisfied by a range of different approaches "within a zone of reasonableness." *In re Permian Basin Area Rate Cases*,

390 U.S. 747, 767 (1968) (internal quotation marks omitted).

The Petition's novel suggestion rests on the legally erroneous premise "that when parties appeal a tariff under 16 U.S.C. § 824*d*(g), what they are appealing is the tariff itself and not an action by FERC." Pet. 18-19. That is wrong. As the statute says, the court is reviewing the "order issued by the Commission accepting the change for purposes of" rehearing and judicial review. 16 U.S.C. § 824*d*(g)(1)(A). Such review results in a judicial decision "to affirm, modify, or set aside such order"—not the tariff. 16 U.S.C. § 825*l*(b). And in conducting that review, a court cannot come up with its own reasons to justify the agency's decision, but must limit itself to the reasons given by the agency's members, applying the relevant standard of review to those reasons that supported the decision being challenged. *See Chenery*, 318 U.S. at 94; *see also Radio-Television News Directors Ass'n*, 184 F.3d at 880. That is precisely what Section 205(g) provides, as the Third Circuit correctly held.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Respectfully submitted,

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