

No. 23A-___

In the Supreme Court of the United States

ELECTRIC POWER SUPPLY ASSOCIATION, THE PJM POWER PROVIDERS GROUP,
CALPINE CORPORATION, LS POWER ASSOCIATES, L.P., and
TALEN ENERGY MARKETING, LLC,

Applicants,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE AND CIRCUIT JUSTICE FOR
THE DISTRICT OF COLUMBIA CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicants Electric Power Supply Association, The PJM Power Providers Group, Calpine Corporation, LS Power Associates, L.P., and Talen Energy Marketing, LLC, respectfully request a 60-day extension of time, to and including January 12, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

The D.C. Circuit's judgment was issued on August 15, 2023. Unless extended, the time to file a petition for a writ of certiorari will expire on November 13, 2023. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). A copy of the lower court's opinion is attached as Exhibit A.

1. This case is about the limits on the authority of the Federal Energy Regu-

latory Commission (FERC) with respect to FERC-regulated markets for electrical energy and related products under the Federal Power Act (FPA). Section 205 of the FPA “gives a utility the right to file rates and terms for services rendered with its assets.” *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (citing 16 U.S.C. § 824d). FERC may review rate changes, “but it can reject them only if it finds that the changes proposed by the public utility are not ‘just and reasonable.’” *Id.* (quoting 16 U.S.C. § 824d(e)). Section 205 thus forms an integral part of the FPA’s overall statutory scheme, “under which all rates are established initially by the [public utilities],” but “are subject to being modified by [FERC] upon a finding that they are unlawful.” *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* 350 U.S. 332, 341 (1956).

The proceedings below involve the regional market for capacity administered by an entity called PJM Interconnection. “Capacity’ is not electricity itself but the ability to produce it when necessary. It amounts to a kind of call option.” *Connecticut Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). Pursuant to a FERC-approved tariff, PJM’s market is organized via “a yearly auction in which electricity suppliers submit offers to be available to provide capacity during a one-year period, three years in the future.” *Delaware Div. of Public Advocate v. FERC*, 3 F.4th 461 (D.C. Cir. 2021).

In 2021, FERC approved a change to PJM’s market design that would, in effect, permit a generator’s offer to supply capacity to be overridden under certain circumstances by third parties—either PJM Interconnection itself or the Independent Market Monitor. Applicant and others challenged this agency action in the D.C. Circuit, on grounds including that the new structure violates generators’ “right to file rates

and terms” under Section 205, subject only to FERC’s just-and-reasonable review. *Atlantic City Elec. Co.*, 295 F.3d at 9. The D.C. Circuit rejected this argument and upheld FERC’s action, holding that “capacity market offers are [not] ‘rates’ within the meaning of Section 205.” Ex. A, at 30.

The petition for certiorari will demonstrate that the Court’s review is warranted to decide whether capacity market offers—and, by extension, any offer by a public utility into one of the many auction-based markets overseen by FERC—are “rates” for purposes of utilities’ “right to set their rates in the first instance” under Section 205 of the Federal Power Act. Ex. A, at 30 (quotation marks omitted); *see also* 16 U.S.C. § 824d(a) (Section 205, applying to “[a]ll rates and charges made, demanded, or received by any public utility”). An offer to sell capacity at a specific price is, on its face, a “rate[] ... demanded” by the generator (*ibid.*), and this Court’s precedents are in accord with this understanding. *See Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 155-156 (2016) (“Owners of capacity to produce electricity in three years’ time bid to sell that capacity to PJM at proposed rates.”). Moreover, this question is of critical importance to the preservation of the FPA’s regulatory scheme, in which utilities, not a government agency or any other third party, are empowered to set their own rates in the first instance.

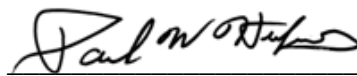
2. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Undersigned counsel has, and has had, several other matters with proximate due dates, including: an opposition brief to a motion to dismiss in *Vanda Pharmaceuticals Inc. v. United States*, No. 23-629C (Fed. Ct. Cl.), filed September 28, 2023; an opening/response brief in *Benton v. Telecom Network Specialists*, Nos. B318867 and B321869 (Cal. Ct. App.), filed October 6, 2023; oral argument in

Elec. Power Supply Assn. v. FERC, No. 22-3176 (6th Cir.), held on October 19, 2023; an opening brief in *Astellas Pharma, Inc. v. Sandoz*, No. 23-1878 (Fed. Cir.), filed October 27, 2023; a reply brief in *Vanda Pharmaceuticals Inc. v. Ctrs. for Medicare and Medicaid Servs.*, No. 23-1457 (4th Cir.), filed October 30, 2023; a complaint in *Albany Med Health Sys. v. Health Res. & Servs. Admin*, No. 23-cv-3252 (D.D.C.), filed October 31, 2023; a conditional cross-petition in *Dutra v. Jackson*, No. 23-377 (U.S.), due November 13, 2023; a motion to dismiss in *Real v. Yuga Labs, Inc.*, No. 22-cv-8909 (C.D. Cal.), due November 30, 2023; a petition for certiorari in *Martinez v. Jenneiahn*, No. 23A368 (U.S.), due December 5, 2023; an intervenor brief in *N.Y. State Pub. Serv. Comm'n v. FERC*, No. 23-1192 (D.C. Cir.), due December 8, 2023, and a brief in opposition in *Dutra v. Jackson*, No. 23-377 (U.S.), due December 13, 2023.

For the foregoing reasons, the application for a 60-day extension of time, to and including January 12, 2024, within which to file a petition for a writ of certiorari in this case should be granted.

November 1, 2023

Respectfully submitted.



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