No. 23A_____

In the Supreme Court of the United States

PUBLIC UTILITIES COMMISSION OF OHIO,

Applicant,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*

Respondents.

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

APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE THIRD CIRCUIT:

Pursuant to Supreme Court Rules 13.5, 22, and 30, the Public Utilities Commission of Ohio respectfully requests a 29-day extension of time, to and including March 29, 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 Third Circuit in this case. The opinion of the court of appeals (App. 1a-50a) is reported at 88 F.4th 250, and is styled *PJM Power Providers Group v. Federal Energy Regulatory Commission*. The court of appeals entered its judgment on Dec. 1, 2023. Unless extended, the time for filing a petition for a writ of certiorari will expire on February 29, 2024. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The Federal Energy Regulatory Commission does not oppose this request.

1. The requested extension relates to a question about review of deadlocked agency action. When an agency deadlocks over a decision, basic agency law suggests a few things. First, the deadlock is not agency action at all, given the background rule that agencies only act through majority vote. *F.T.C. v. Flotill Prod., Inc*., 389 U.S. 179, 183 (1967); *see* 42 U.S.C. §7171(e) (majority vote provision for FERC). That in turn means the courts would have no role to review the result of the agency deadlock. *See, e.g.*, *Sprint Nextel Corp. v. F.C.C.*, 508 F.3d 1129, 1132 (D.C. Cir. 2007); *cf.* 5 U.S.C. §702. Second, a deadlocked vote produces no agency rationale. And the bedrock rule that courts cannot uphold agency action on any ground other than that of the agency itself, *Calcutt v. Fed. Deposit Ins. Corp*., 598 U.S. 623, 629 (2023); *Sec. & Exch. Comm'n v. Chenery Corp*., 318 U.S. 80, 88 (1943), would mean automatic

reversal of the deadlocked decision. But what if Congress tells courts that a deadlock is agency action that is reviewable in court? Should a court faced with that command pick one side of the deadlock and credit the views of those agency members? Or should it equally weigh the views that gained an equal share of the vote? The Petition the Public Utilities Commission of Ohio intends to file asks the Court to resolve that question, as the Federal Power Act makes deadlocked FERC decisions the law of the land and tells courts to review those decisions. 16 U.S.C. §824d(g), §824l.

2. The background to this dispute about deadlocked agency action arose as follows. The Federal Power Act gives a federal agency—the Federal Energy Regulatory Commission—"exclusive authority to regulate 'the sale of electric energy at wholesale in interstate commerce.'" *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016) (quoting 16 U.S.C. §824(b)(1)). The Act also charges FERC with "responsibility for ensuring that '[a]ll rates and charges … subject to the jurisdiction of the Commission . . . [are] just and reasonable.'" *Id.* (quoting 16 U.S.C. §824d(a)). In today's power industry, one aspect of FERC efforts to ensure "just and reasonable" rates is its oversight of capacity auctions. Capacity auctions are a market-driven mechanism to set the price of power supplied to a network of electricity-distribution systems in the future (capacity auctions are not the mechanism for setting the price for power delivery in the short term, such as that day.)

More specifically, this case is about the rules that will govern capacity auctions for PJM Interconnection, an entity that "oversees the electricity grid in all or parts of 13 mid-Atlantic and Midwestern States and the District of Columbia." *Id.* at 155.

One rule for these capacity auctions involves the question of how to modify—"mitigate" in the lingo—the auction prices of state-subsidized power producers. The rule at issue here (formally a tariff) represents one view of how to resolve "a years-long battle over whether, and to what extent, state-subsidized energy resources should be subject to price mitigation in interstate capacity auctions." *PJM Power Providers Grp. v. FERC*, 88 F.4th 250, 257 (3d Cir. 2023) (decision below). In short, how should FERC handle the state-to-state market-distorting effects that one State's subsidy for electricity generation have on sister States and their residents.

PJM proposed a rule for capacity auctions that would generally allow state-subsidized power producers to bid into the capacity auction without any modification to their bid price. When FERC voted on the proposed rule, it lacked a full five commissioners, and the remaining four deadlocked 2-2 on adopting the rule. The two commissioners who would have approved the rule, viewed its change as appropriately adjusting for a power market in which "a proliferation of state policies" aimed to "'address externalities that are neither accounted for nor compensated in PJM's wholesale markets.'" *PJM*, 88 F.4th at 272 (quoting joint statement of two commissioners). The two commissioners who would have rejected the rule pointed out that it "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" and wrongly eliminated "all mitigation of the price-suppressive effects of state subsidies." *Id.* at 272 n.130 (quoting separate statements of the opposing commissioners).

In the end FERC approved the new rule, and the reason why is the heart of Ohio's anticipated certiorari petition. If FERC had deadlocked 2-2 in 2014, it would have approved the rule, but a court would have been powerless to review that decision. *See, e.g.*, *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1172 (D.C. Cir. 2016). But in 2018, Congress amended the Federal Power Act to permit review. That amendment tells courts to treat a deadlocked vote on a proposed rule as "an order issued by the Commission … for purposes of" the Act's provisions authorizing judicial review. 16 U.S.C. §824d(g)(1)(A); *see* 16 U.S.C. §825l(a), (b).

Multiple petitioners, including the Public Utilities Commission of Ohio, challenged the new rule in the Third Circuit. That Court concluded, first, that the views of the commissioners who supported the new rule would be treated as the agency's official view. *PJM*, 88 F.4th at 269. The Court further concluded that the new rule "was neither arbitrary nor capricious and was supported by substantial evidence" despite two commissioners reasoning that the rule flunked the Federal Power Act's command that an approved tariff be "just and reasonable." *Id.* at 270; *id.* at 272 n.130.

Those conclusions should be reviewed in this Court. Whatever the merits of deferring to agency decision-making generally, this Court should review whether Congress directed federal courts to defer to one of two equally weighted views of an agency's commissioners. *Cf. Michigan v. E.P.A.*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring). The deadlock vote of FERC here is not a one-off. The Federal Election Commission and the Federal Communications Commission have also deadlocked over

important votes. *See, e.g.*, *Democratic Cong. Campaign Comm.* v. *Fed. Election Comm'n*, 831 F.2d 1131 (D.C. Cir. 1987); *Nextel*, 508 F.3d 1129. So the question about how courts should handle review of deadlocked agency action matters beyond the already important questions about energy policy resolved by deadlocked votes of the FERC.

3. Good cause supports the extension. Counsel of Record for the Public Utilities Commission of Ohio has only recently been assigned to this case. He both needs to get up to speed on the case and also to coordinate with other possible petitioners. In the Third Circuit, six separate entities petitioned for review. Outside of this case, but overlapping with the time to seek certiorari, Counsel of Record for the Public Utilities Commission of Ohio has multiple other obligations, including supervising or conducting all the work in this Court for the Ohio Attorney General, filing merits and certiorari briefs before the Ohio Supreme Court, and handling litigation in the Sixth Circuit. Among other things, those obligations include co-counseling with arguing counsel in *Ohio v. EPA*, No. 23A349 (oral argument Feb. 21, 2024), and traveling for the argument and argument preparation for that case.

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The Public Utilities Commission of Ohio respectfully requests that the Court extend the time in which to petition for a writ of certiorari until March 29, 2024.

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