ORAL ARGUMENT NOT YET SCHEDULED

No. 21-3205
(consolidated with No. 21-3068 & 21-3243)

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PJM POWER PROVIDERS GROUP, ET AL.,
Petitioners,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Review of Orders of the Federal Energy Regulatory Commission

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BRIEF OF AMICI CURIAE STATES OF MARYLAND AND DELAWARE, AND THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

Amici Curiae, the States of Maryland and Delaware, and the District of Columbia (the Amici States) file this brief in support of FERC and its approval by operation of law of PJM Interconnection's tariff revisions to its minimum offer price rule (the Focused MOPR), Notice of Filing Taking Effect by Operation of Law, PJM Interconnection, LLC, Docket No. ER21-2582 (2021) because it accords proper respect to the energy policies of states in the PJM Interconnection (PJM) region.

The undersigned Attorneys General broadly represent the interests of the citizens of the Amici States and defend the laws the Amici States have enacted and the policies embodied in them. The Amici States have each chosen to adopt laws supporting the development and use of clean and renewable energy resources to protect their residents from the worst effects of climate change.

In Maryland, the legislature has enacted a series of increasingly stringent targets for reducing carbon emissions and generating electricity from renewable sources. In 2019, the Maryland legislature passed the Clean Energy Jobs Act (the CEJA), which took effect October 1, 2019. Maryland Clean Energy Jobs Act of 2019, 2019 Md. Laws ch.

757 (S.B. 516). The CEJA requires the state to move towards 50% renewable energy generation by 2030, and 14.5% of that generation must come from solar power. *Id.* The legislative intent is to move Maryland toward 100% renewable energy generation by 2040. *Id.* Those goals were further updated in 2022 when the legislature passed the Climate Solutions Now Act, which requires the state to reduce greenhouse gas emissions 60% below 2006 levels by 2031 and to achieve net-zero greenhouse gas emissions by 2045. Climate Solutions Now Act of 2022, 2022 Md. Laws, ch. 38, §§ 3-4.

In 2021, Delaware adopted a renewable portfolio standard (RPS) requiring regulated utilities to purchase 40% of their energy from renewable sources by 2035, increasing the previous goal of 25% renewable energy by 2025 and nearly tripling the requirement for the purchase of solar energy, from 3.5% by 2025 to 10% by 2035. Del. Code Ann. tit. 26, § 354. The RPS applies to the state's investor-owned utilities, retail electric suppliers, municipal utilities, and rural electric cooperatives, with certain exemptions and opt-outs. *Id.* § 363. Finally, the District of Columbia's (the District) 2018 Clean Energy Omnibus Amendment doubled the District's RPS from requiring 50% of retail sales

to be renewable energy to requiring 100% of retail sales to be renewable by 2032. D.C. Code § 34-1432. Just recently, the District's Council unanimously passed, and the Mayor signed into law, the Climate Commitment Act of 2021, D.C. Act 24-527, that would make the entire city carbon neutral by 2045—five years earlier than its previous commitment to reach this goal by 2050. The legislation would, for the first time, codify the District's aggressive greenhouse gas reduction goals and include accelerated interim commitments, such as achieving a 60% reduction in carbon emissions by 2030.

The Amici States are located within the service territory governed by PJM's wholesale market rules, and load-serving entities within Amici States participate in PJM's capacity market. Generation owners determine whether to maintain or retire resources based on the market clearing price set at PJM's capacity auction. The application of a MOPR directly affects these determinations, which in turn affect the development and use of clean energy resources, as well as the prices customers in Amici States pay for electricity.

If a generation resource clears the capacity auction, the generator is paid for its availability to provide capacity three years in the future; if

it does not, it must decide whether to remain in operation or retire based on an economic picture that excludes compensation for its future availability. If a proposed facility fails to clear, the question is whether to proceed with construction knowing that it will not be compensated for future availability. This market structure benefits generation owners by compensating them for a service that would otherwise be uncommodified–their future availability to meet demand.

A properly designed capacity market sends price signals to potential market participants and should reflect expected future market conditions. This in turn benefits retail customers in Amici States by incentivizing the efficient construction and retirement of resources to meet demand, creating a market-based system that ensures adequate supply to meet customer demand for electricity at the lowest cost. And, as discussed below, it is essential that the capacity market accommodate state clean-energy policies by respecting Amici States' prerogatives to determine the use and development of their chosen generation resources.

ARGUMENT

I. THE FOCUSED MOPR RESPECTS STATES' AUTHORITY TO REGULATE WITHIN THE SPHERE RESERVED TO THEM UNDER THE FPA.

The Federal Power Act (FPA) reserves to the states the authority to control "facilities used for the generation of electric energy," 16 U.S.C. § 824(b)(1), including the authority to determine the need for new facilities and generation and resource portfolios used to generate electricity, while granting FERC exclusive jurisdiction over the rates, terms, and conditions of service for the transmission and sale of wholesale electricity in interstate commerce. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *New York v. FERC*, 535 U.S. 1 (2002) (citing FERC Order No. 888 at 31,782, n.544); *see also FERC v. Elec. Power Supply Ass'n* (*EPSA*), 577 U.S. 260, 264–66 (2016).

Specifically, under 16 U.S.C. §824d(a)-(b), FERC has jurisdiction over "[a]ll rates and charges . . . by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges"; those rates and charges must be "just and

reasonable" and not "undu[ly] preferen[tial]." FERC also has the authority, on its own initiative or in response to a third-party complaint, to investigate existing rates. If it finds that an existing rate, or a rule, regulation or practice affecting such rate, is "unjust, unreasonable, unduly discriminatory, or preferential," it must set a new lawful rate.

Neither authority can overstep its regulatory sphere. In *Hughes v. Talen Energy Marketing, LLC*, the Supreme Court held that a state regulation which effectively ordered a distribution utility to pay a specific generator a set price for its capacity, regardless of the amount that the generator might receive from the FERC-approved capacity auction, was preempted by the FPA. 578 U.S. 150 (2016). That type of policy, which targeted a wholesale rate and tethered the state's support for a resource to the payments received from a FERC-jurisdictional wholesale market, overstepped the bounds of state authority. *Id.* at 165-66.

However, the respective spheres of federal and state authority are not "hermetically sealed" from one another. *EPSA*, 577 U.S. at 281. State regulation that indirectly impacts wholesale rates without targeting the wholesale market is permissible under the FPA. In *Coalition for Competitive Electricity v. Zibelman*, for example, the Second

Circuit held that the New York Public Service Commission's Zero Emissions Credit program was not preempted under the FPA even though it could have an incidental effect on wholesale electricity rates. 906 F.3d 41 (2d Cir. 2018). The court found the regulations were permissible under the FPA because they were not intended to influence wholesale rates and their effects on wholesale rates were incidental to their actual goal. *Id.* at 53-54. Similarly, in *Electric Power Supply Association v. Star*, the Seventh Circuit held that Illinois's Zero Emissions Credit program was not preempted under the FPA, even though the program would indirectly affect wholesale electricity rates. 904 F.3d 518, 523-24 (7th Cir. 2018).

As the *Zibelman* and *Star* courts acknowledged, states may regulate how electricity is produced within their borders even if those efforts have an incidental effect on wholesale markets. That principle acknowledges the reality that decisions about generation will inevitably affect wholesale rates, just as wholesale rates will inevitably affect retail rates. FERC's wholesale markets cannot discriminate against resources simply because they benefit from state policies. Doing so interferes in an area of traditional state control, without clear authorization, and would

be akin to the targeting which the *Hughes* court found irreconcilable with the FPA's division of authority between state and federal regulators.

The Focused MOPR is appropriate because it respects state authority to determine how electricity will be generated for use within their borders even though doing so may have an incidental effect on wholesale rates. It avoids undermining the purpose of state programs seeking to incentivize clean energy and in that way allows states to exercise their authority under the FPA to create programs like those in *Zibelman* and *Star*, consistent with Hughes. As Commissioners Glick and Clements explained, preserving state authority to implement these types of programs properly respects those decisions and is "essential to the cooperative federalism regime that Congress made the foundation of the FPA." Statement of Chairman Glick and Commissioner Clements, 11-12 PJM Interconnection, LLC, Docket No. ER21-2582, Accession No. 20211019-4001 (Glick and Clements Statement).

II. THE FOCUSED MOPR TREATS STATE POLICIES EVENHANDEDLY.

The Focused MOPR is just and reasonable and not unduly discriminatory. Contrary to the assertions of some of the petitioners, the Focused MOPR does not establish a regime through which states can

externalize the costs of their policy preferences outside of their borders, and in any event, it would not be FERC's role to police such externalities. Furthermore, the Focused MOPR remedied the Expanded MOPR's potential for imposing unjustifiable costs on customers within Amici States, which have exercised their unquestioned authority under the FPA to determine their generation resources.

It is simply an unavoidable reality that one state's policy choices will often have indirect effects on another state. The Focused MOPR wisely abandons the Expanded MOPR's "idealized vision of markets free from the influence of public policies," and recognizes that "it is impossible to mitigate our way to [the] creation" of such markets. *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC 61,137 (2017) (Bay, Chairman, concurring at 2). In other words, the Focused MOPR is appropriately neutral in allowing state-supported resources to place competitive bids in the capacity market,

Indeed, and ironically, it was the Expanded MOPR's exemption of certain subsidies, but not others, that had the effect of selectively disadvantaging some states' policy goals. For decades, various states have provided lucrative tax breaks and incentives for the development,

extraction, and use of fossil fuels in electricity generation. Pennsylvania, for example, imposes no severance tax on the production of natural gas, in effect subsidizing the development and use of gas for electricity generation in the state. *See* Anne Kolesnikoff and Cassarah Brown, *State Oil and Gas Severance Taxes*, National Conference of State Legislatures (September 6, 2018), **https://www.ncsl.org/research/energy/oil-and-gas-severance-taxes.aspx.** And federal subsidies for fossil fuel development provide an additional significant boost to those resources. *See* Glick and Clements Statement at 33 pp. 57 n.123 (detailing disproportionate share of federal subsidies bestowed upon fossil fuel industry).

Resources using these subsidized fuels can bid into the market at a rate reflective of those lower costs, yet proponents of a broader MOPR have never suggested that they should be subject to mitigation. *Id.* at n.121 (collecting orders exempting policies from the Expanded MOPR). While state policies may influence the outcome of the capacity market, that alone does not mean that state-supported resources must be mitigated—indeed, attempting to do so can introduce undue discrimination. Instead, the Commission must balance the impact on the

market from the participation of those resources against the risks of over-mitigation, which could include "impaired functioning of PJM's capacity market and undue costs on consumers wrought by the Expanded MOPR." Glick and Clements Statement at 35 pp. 60 (describing some of the risks)

A rule that targets state-supported resources, as the Expanded MOPR did, would adversely affect Amici States. In the long run, the Expanded MOPR could send inaccurate price signals incentivizing the construction of unneeded capacity because it fails to take into account the resources that are already being constructed under our many state policies. *See NextEra Energy Res. v. FERC*, 898 F.3d 14, 20 (D.C. Cir. 2018) (finding that a capacity market that does not reflect actual resource deployment "would lead the market to procure redundant capacity"). Customers in Amici States would then essentially be forced to pay twice: first for the capacity that was being installed as a matter of state policy and again for the resources that FERC had deemed—through the operation of the Expanded MOPR—suitable to participate in the market. Compounding that injury, the Expanded MOPR's exclusion of lower-priced resources supported by state subsidies would result in a higher

clearing price, so that customers would not only pay for redundant resources, but do so at an artificially inflated price.

That injury is not a speculative matter. In the lone capacity auction conducted under the Expanded MOPR, for example, Exelon's share of a nuclear facility in Illinois failed to clear after being subjected to the Expanded MOPR due to its participation in a Zero-Emissions Credit Program. *See* Comments of Exelon Corporation and the PSEG Companies, 12, PJM Interconnection, LLC, Docket No. ER21-2582, Accession No. 20210820-5176. Not only did this raise the market clearing price but retail customers in Illinois would ultimately pay to both keep the facility on-line and for the additional, unneeded capacity that supplanted the facility from the market. In total, this situation was expected to cost customers an additional $90 million. PJM Interconnection, LLC, Scenario Analysis for Base Residual Auction (July 6, 2021). The Focused MOPR, by contrast, runs little risk of creating such a disconnect.

By declining to apply the Expanded MOPR's rules to state-supported resources, the Focused MOPR "return[s] the MOPR to its original purpose by focusing on prohibiting and mitigating the exercise

of buyer-side market power," PJM Transmittal Letter at 1, thus allowing PJM's capacity market to function competitively, while ensuring resource adequacy. *See also* Brief for Respondent Federal Energy Regulatory Commission at 102-103 ("[T]he exercise of buyer-side market power occurs where (1) an entity that sells capacity into the capacity market (2) also has an interest in lowering the cost of purchasing capacity from the market, and (3) is incentivized to suppress capacity prices through an uneconomically low capacity offer."). The Focused MOPR is triggered by the exercise of buyer-side power and the conditioning of benefits on particular bidding behavior in the wholesale market. It otherwise avoids picking winners and losers from state policies and allows bids to reflect the realities of resource deployment, whether that deployment occurs purely from market forces or is influenced by state policy priorities.

CONCLUSION

For the foregoing reasons, the Amici States support FERC's request for relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) and the briefing format and schedule this Court approved on April 18, 2022 (No. 21-3068, Doc. No. 127) because this brief contains 2440 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in New Century Schoolbook 14-point font using Microsoft Word. I further certify that, pursuant to Circuit Rule 31.1(c), the text of the electronic brief is identical to the text in paper copies sent to the Court, and that the electronic brief was scanned for viruses using Foxit Phantom and that no viruses were detected. Finally, pursuant to Third Circuit Local Appellate Rule 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ *Michael E. Rowan*

Michael E. Rowan

CERTIFICATE OF SERVICE

I certify that, on this 12th day of August, 2022, the Brief of Amici Curiae States of Maryland and Delaware, and the District of Columbia, in Support of Respondent was filed electronically and served on counsel of record who are registered CM/ECF users.

/s/ Michael E. Rowan

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