

ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 16-1027

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NRG POWER MARKETING LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**BRIEF OF INTERVENORS
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with Rule 28(a)(1) of the Circuit Rules of this Court, the undersigned hereby certify as follows:

A. Parties and Amici

1. Parties Before the Federal Energy Regulatory Commission

The parties who appeared before the Federal Energy Regulatory Commission in the underlying administrative proceedings are identified in Petitioner's Rule 28(a)(1) certificate.

2. Parties Before the Court

The following is a list of all parties, movant-intervenors, and amici who have appeared in this Court in this case:

American Municipal Power, Inc.
American Public Power Association
Coalition of MISO Transmission Customers
Conway Corporation
Federal Energy Regulatory Commission
Great Lakes Utilities
Hoosier Energy Rural Electric Cooperative, Inc.
Indiana Office of Utility Consumer Counselor
Indiana Utility Regulatory Commission
Madison Gas and Electric Company
Michigan Citizens Against Rate Excess
Midcontinent Independent System Operator, Inc.
Midwest Municipal Transmission Group
Missouri Joint Municipal Electric Utility Commission
Missouri River Energy Services
Municipal Energy Agency of Nebraska
National Rural Electric Cooperative Association
NRG Power Marketing, LLC

Organization of MISO States, Inc.
Southern Illinois Power Cooperative
Southern Minnesota Municipal Power Agency
The City of North Little Rock, Arkansas
The Iowa Office of Consumer Advocate
The Minnesota Department of Commerce
The Montana Consumer Counsel
WPPI Energy

B. Rulings Under Review

1. *Midwest Independent Transmission System Operator, Inc.*, Order on Resource Adequacy Proposal, 139 FERC ¶61,199 (June 11, 2012), R.102; and
2. *Midwest Independent Transmission System Operator, Inc.*, Order on Rehearing, 153 FERC ¶61,229 (Nov. 20, 2015), R.210.

C. Related Cases

Intervenors adopt the statement of related cases provided in Respondent's Rule 28(a)(1) certificate.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1 of this Court, Intervenor American Municipal Power, Inc., American Public Power Association, Coalition of MISO Transmission Customers, Conway Corporation, Great Lakes Utilities, Hoosier Energy Rural Electric Cooperative, Inc., Indiana Office of Utility Consumer Counselor, Indiana Utility Regulatory Commission, Iowa Office of Consumer Advocate, Madison Gas and Electric Company, Michigan Citizens Against Rate Excess, Midwest Municipal Transmission Group, Minnesota Department of Commerce, Missouri Joint Municipal Electric Utility Commission, Missouri River Energy Services, Montana Consumer Counsel, Municipal Energy Agency of Nebraska, National Rural Electric Cooperative Association, the City of North Little Rock, Arkansas, Organization of MISO States, Inc., Southern Illinois Power Cooperative, Southern Minnesota Municipal Power Agency, and WPPI Energy hereby submit the following disclosure statements. Each of the undersigned counsel submits the disclosure statement(s) with regard to the intervenor(s) they represent.

American Municipal Power, Inc. (“AMP”) is an Ohio nonprofit corporation organized in 1971 as American Municipal Power-Ohio, Inc. (the name was changed to American Municipal Power, Inc. in 2009). It is a membership organization composed of municipalities that own and operate electric utility

systems. AMP's members are located in Ohio, West Virginia, Pennsylvania, Michigan, Virginia, Kentucky, Indiana, and Maryland; an association of municipalities in Delaware also is a member.

AMP has issued term debt in the form of notes payable and bonds for the financing of its own assets and assets developed on behalf of specific members or groups of members. In connection with financing undertaken by the electric systems of certain members, AMP has issued tax-exempt debt securities for municipal projects.

AMPO, Inc. is a for-profit subsidiary that provides natural gas and electric aggregation consulting services to municipalities. It has no securities outstanding.

AMP does not have a parent corporation, and there is no publicly held corporation that holds ten percent or more of its stock.

The American Public Power Association ("APPA") has no parent corporation or publicly traded stock. APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally owned electric utilities in the United States. APPA was created in 1940 as a nonprofit, nonpartisan organization. Its purpose is to advance the public policy interests of its members and their consumers and to provide services to its members to ensure adequate, reliable electric power at a reasonable cost, consistent

with good environmental stewardship. APPA is a trade association under Circuit Rule 26.1(b).

Coalition of MISO Transmission Customers (“CMTC”) is a continuing ad hoc association of large industrial and commercial end-users of electricity in the Midwest operated for the purposes of representing the interests of industrial energy consumers before regulatory and legislative bodies. CMTC does not issue securities to the public and is not owned by any publicly held company.

Conway Corporation is a non-profit corporation which operates, under lease, the electric utility system of the City of Conway, Arkansas. The electric utility system leased by Conway includes ownership interests and/or rights to the output of multiple generating facilities. Conway has no parent corporation and does not issue stock. Accordingly, no publicly held corporation owns ten percent or more of the stock of Conway.

Great Lakes Utilities (“GLU”) is a municipal electric company formed under Section 66.0825 of the Wisconsin Statutes for the purpose of developing bulk power supplies to benefit its contracting members. GLU is not a nongovernmental corporate party nor does it issue any stock, thus it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

Hoosier Energy Rural Electric Cooperative, Inc. (“Hoosier”) is a non-profit electric generation and transmission cooperative organized pursuant to Indiana law. Hoosier has no parent corporation, and issues no stock. Accordingly, no publicly held corporation owns ten percent or more of Hoosier stock.

The Indiana Office of Utility Consumer Counselor (“IN OUCC”) is a state agency established under Indiana Code 8-1-1.1-2 to represent the interests of Indiana ratepayers, consumers and the public, including appeals from the orders of the Federal Energy Regulatory Commission. Because the IN OUCC is not a nongovernmental corporate party and does not issue any stock, it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

The Indiana Utility Regulatory Commission (“IURC”) is a state agency established under Indiana Code 8-1-1-2 with regulatory authority over public utilities in the State of Indiana. Because the IURC is not a nongovernmental corporate party and does not issue any stock, it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

The Iowa Office of Consumer Advocate (“IA OCA”) is a division of the Iowa Department of Justice established under Iowa Code Chapter 475A to represent the interests of Iowa ratepayers, consumers and the public, including

appeals from the orders of the Federal Energy Regulatory Commission. Because the IA OCA is not a nongovernmental corporate party and does not issue any stock, it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

Madison Gas and Electric Company (“MGE”) is a public utility organized under the laws of the State of Wisconsin, and is the primary subsidiary of MGE Energy, Inc., an investor-owned public utility holding company headquartered in the state capital of Madison, Wisconsin. No publicly held company owns ten percent or more of the stock of MGE Energy, Inc.

Michigan Citizens Against Rate Excess (“MICH-CARE”) is a Michigan non-profit corporation organized to protect Michigan’s residential ratepayers from unreasonable and unnecessary utility rates. MICH-CARE was organized for the purpose of intervening in proceedings at the state and federal level on behalf of residential utility ratepayers. MICH-CARE has no parent corporation and does not issue stock. Accordingly, no publicly held corporation owns ten percent or more of the stock of MICH-CARE.

The Midwest Municipal Transmission Group (“MMTG”) is a trade association as defined by D.C. Circuit Rule 26.1(b) comprised of municipally-owned electric utilities, the Iowa Association of Municipal Utilities, the Central Minnesota Municipal Power Agency, and the Minnesota Municipal Utilities

Association. MMTG and its members have no parent corporations or publicly held stock. No corporate disclosure is required for the purposes of Rule 26.1 of the Federal Rule of Appellate Procedure for MMTG.

The Minnesota Department of Commerce (“Department”) is a state agency charged with the duty to advocate for all ratepayers regarding the public interest for state, regional, and national levels pursuant to Minn. Stat. §216A.07. subd. 3a. The Department is an arm of Minnesota’s Executive Branch and is one of the Energy Policy Agencies in the State of Minnesota responsible for enforcing state statutes and policies regarding evaluation of public utilities. Because the Department is not a non-governmental entity and has no parent corporation and does not issue stock, it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

Missouri Joint Municipal Electric Utility Commission (“MJMEUC”) is a joint action agency and a political subdivision of the State of Missouri authorized by legislation to construct, operate, and maintain jointly owned transmission and generation facilities for the production and transmission of electric power for its members, to purchase and sell electric power and energy, and to enter into agreements with any person for transmission of electric power. MJMEUC is not a nongovernmental corporate party nor does it issue any stock, thus it is not subject

to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

Missouri River Energy Services (“MRES”) is a municipal joint action agency formed under Chapter 28E of the Iowa Code. It is comprised of sixty full-member, and eighteen associate-member, municipal utilities located in the States of Iowa, Minnesota, North Dakota, and South Dakota. MRES is not a nongovernmental corporate party nor does it issue any stock, thus it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

The Montana Consumer Counsel (“MCC”) is a state agency established by Article XIII, Section 2, of the Constitution of Montana, and by that provision given the duty of representing consumer interests before the public service commission or successor agencies. The Montana Consumer Counsel is also authorized by Section 69-2-202, MCA, to represent the interests of Montana consumers in proceedings in state and federal courts and administrative agencies. Because MCC is not a nongovernmental corporate party and does not issue any stock, it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

Municipal Energy Agency of Nebraska (“MEAN”) is a political subdivision of the State of Nebraska. MEAN provides power supply and related energy

services to more than sixty municipalities and one public power district in four states (Nebraska, Colorado, Iowa, and Wyoming). MEAN was created in 1981 under the Nebraska Municipal Cooperative Financing Act, giving it the authorization to generate, transmit or distribute wholesale electric power and energy. MEAN is not a nongovernmental corporate party nor does it issue any stock, thus it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

The National Rural Electric Cooperative Association (“NRECA”) is the national service organization for more than nine-hundred not-for-profit rural electric utilities that provide electric energy to approximately forty-two million people in forty-seven states, or approximately thirteen percent of electric customers. NRECA does not have any parent companies, and no publicly-held company has a ten percent or greater ownership interest in NRECA. NRECA does not issue stock.

The City of North Little Rock, Arkansas is an Arkansas municipal corporation of the first class located in Pulaski County, Arkansas. North Little Rock owns and operates an electric utility distribution system as a department of city government, the North Little Rock Electric Department. North Little Rock is not a nongovernmental corporate party nor does it issue any stock, thus it is not

subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

The Organization of MISO States, Inc. (“OMS”) is a Non-Profit Domestic Corporation (incorporated under the Indiana Nonprofit Corporation Act of 1991), a self-governed, member-based organization of representatives from entities with regulatory jurisdiction over utilities participating in the Midcontinent Independent System Operator, Inc. The purpose of OMS is to promote the public interest and social welfare by providing means for its members to act in concert when deemed to be in the common interest of their affected publics. OMS does not issue securities to the public and is not owned by any publicly held company.

Southern Illinois Power Cooperative (“SIPC”) is a non-profit electric generation and transmission cooperative organized pursuant to Illinois law. SIPC has no parent corporation, and issues no stock. Accordingly, no publicly held corporation owns ten percent or more of SIPC stock.

Southern Minnesota Municipal Power Agency (“SMMPA”) is a joint action agency comprised of eighteen member municipalities in Minnesota which own and operate municipal electric systems. SMMPA is a non-profit political subdivision of the state of Minnesota organized under Chapter 453 of the Minnesota Statutes. SMMPA is not a nongovernmental corporate party nor does it issue any stock, thus

it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

WPPI Energy (“WPPI”) is a municipal electric company formed pursuant to Section 66.0825 of the Wisconsin Statutes. WPPI provides bulk power and other services to its fifty-one members (fifty municipal electric systems, which are not nongovernmental entities, and one not-for-profit, consumer-owned cooperative), each of which operates a distribution utility and sells electricity at retail to the residences, businesses, and industries connected to its distribution system. WPPI is not a nongovernmental corporate party nor does it issue any stock, thus it is not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure.

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* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY OF TERMS

Act	Federal Power Act, 16 U.S.C. §791 <i>et seq.</i>
auction mandate	A requirement that utilities still needing capacity resources fill that deficiency only in the Operator's (as defined below) centralized capacity auction.
capacity	The instantaneous rate at which electric energy can be delivered, received, or transferred; for bulk electric system purposes, typically measured in megawatts (MW).
demand curve (vertical or sloped)	A curve that plots the per-megawatt value of capacity against the quantity of capacity that buyers are required to hold. When the requirement quantity is based on technical reliability criteria independent of price, the curve is said to be "vertical." When the requirement quantity varies with price, it is referred to as "sloped."
energy	An amount of electricity that is produced, purchased, consumed, sold, or transmitted over a period of time; for bulk electric system purposes, typically measured in megawatt-hours (MWh).
FERC	Federal Energy Regulatory Commission, the Respondent herein.
First Order	The first of the two orders that are the subject of NRG's petition for review: <i>Midwest Independent Transmission System Operator, Inc.</i> , 139 FERC ¶61,199 (June 11, 2012) (R.102 ¹).
Intervenors	The parties joining this brief, as listed on and inside its cover.

¹ Consistent with the deferred appendix method being used in this case, the record-citation format for the initial version of this brief, pending compilation of the Joint Appendix, is "R.x:y," where x indicates the Record Item No. in the Certified Index to the Record, and y indicates the *external* page number within that item (e.g., counting a cover page as page 1), citing to the FERC-generated PDF document, where available.

load	End-use electricity consumers, or their electricity usage.
merchant	An entity that owns a generating plant (or the rights to its output), but is not a utility.
Midcontinent	The region in which Operator (as defined below) operates the transmission system and administers centralized markets, roughly corresponding to the watershed of the Missouri and Mississippi Rivers.
NRG	Petitioner NRG Power Marketing LLC.
offer floor	The “Minimum Offer Price Rule,” filed by Operator, and referenced in the Orders by the acronym “MOPR.” It would have administratively determined a minimum offering price for certain new resources offered into the Operator’s capacity auction.
Operator	The regional transmission system operator, now named Midcontinent Independent System Operator and formerly named Midwest Independent Transmission System Operator, that filed the tariff changes addressed by the FERC Orders being reviewed herein. Operator’s recent name change reflects a southward geographic expansion, and drops the word “Transmission,” emphasizing that it operates markets. FERC’s Orders refer to Operator by the acronym “MISO.”
Orders	First Order and Rehearing Order (as identified above and below), collectively.
Prior Order	<i>Midwest Indep. Transmission Sys. Operator, Inc.</i> , 137 FERC ¶61,213 (2011). The Prior Order addressed a related prior FERC Docket (No. ER08-394), and predated the Orders now under review.
Rehearing Order	The second of the two Orders that are under review: <i>Midwest Independent Transmission System Operator, Inc.</i> , 153 FERC ¶61,229 (Nov. 20, 2015) (R.210).
reserve margin	The difference between a required level of capacity holdings and forecast load.

resource adequacy	The planned availability of sufficient capacity from electrical generation and demand-reduction resources to enable reliable service to forecasted peak load.
self-supply	Capacity resources that Midcontinent utilities hold through either unit ownership or contractual purchases (as distinguished from resources procured from other suppliers within the Operator-administered centralized capacity auction) and use to meet their utility service obligations.
utility	An entity that serves retail electric load, or wholesale electric load of members that serve retail load (whether or not it qualifies as a FERC-jurisdictional “public utility” under Act §201(e)), and is obliged to satisfy resource adequacy requirements under Operator’s tariff. We use the term synonymously with “Load Serving Entities” as defined in Operator’s tariff, and referenced at R.1:5 <i>et seq.</i>

STATUTES AND REGULATIONS

Pertinent statutory provisions appear in the addendum to FERC's Brief.

STATEMENT OF FACTS

Intervenors adopt FERC's Statement of Facts, as supplemented below.

FERC jurisdiction generally extends only to matters not subject to state regulation¹ and excludes electric generation facilities.² States retain substantial authority over key resource adequacy decisions, including additions of new capacity, retirement of existing capacity, and balancing environmental, economic, and other considerations in constituting the generation fleet. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

Midcontinent states are predominantly traditionally regulated, with extensive, long-range resource planning, and vertically-integrated electric utilities that are legally obliged to ensure reliable, safe, and reasonably-priced service.³ Midcontinent state commissions regulate utility resource planning and performance to assure that utilities meet reliability and resource adequacy obligations.⁴ They do so with an eye to the decades-long horizons of generator

¹ 16 U.S.C. §824(a).

² 16 U.S.C. §824(b)(1).

³ R.34:3-4; R.24:3-4, 7.

⁴ R.24:4.

asset lives, while considering factors, ranging far beyond short-term wholesale prices, that are not readily reduced to an administrative offer floor.⁵ These include economic development, fuel sourcing and diversity, tax incentives, resource technology types, and location.⁶

FERC found, correctly, that “the vast majority of capacity in [Operator’s region] has been acquired by [utilities] either through ownership or through long-term contracts,”⁷ and that the Midcontinent’s “extensive use of bilateral contracts and cost-of-service regulation” differentiates it from other regions.⁸ This difference grew over the course of the proceedings below, as Operator’s footprint expanded southward into traditionally-regulated, obligation-to-serve areas of Arkansas, Kentucky, Louisiana, Mississippi, and Texas.⁹

SUMMARY OF ARGUMENT

Shortly before this proceeding began, FERC: (1) made participation in the Operator’s residual electric capacity auction entirely voluntary; (2) left all

⁵ *Id.*

⁶ *Id.*

⁷ Rehearing Order, P 106 (R.210:51-52). *See also, e.g., id.* P 140 (R.210:64-65) (“most [utilities] will continue to obtain most of their supplies outside the auction”).

⁸ First Order, P 38 (R.102:15).

⁹ *See* Rehearing Order, P 119 (R.210:56).

generators free to offer their excess capacity therein at low prices; and

(3) approved Operator's traditional reserve margin approach.

In filing to change the first two features, the burden was on Operator to demonstrate those changes were just and reasonable, which required showing that they usefully addressed market design needs. *See* Part I. Operator thereafter acquiesced in FERC's decision to instead retain Operator's prior rules—leaving NRG as the remaining proponent of the filed auction mandate and offer floor, responsible for establishing the need for measures NRG had previously portrayed as pointless. *See* Part II. FERC's determination that this burden was not carried was well explained and has ample record support. *See* Part III. NRG fails to justify these proposals by claiming discriminatorily asymmetrical treatment of merchants and utilities. *See* Part IV.

As to the third feature, NRG challenges FERC's continued acceptance of Operator's traditional approach to setting reserve margins. The record amply supports FERC's decision that NRG had not met the statutorily-applicable further burden to demonstrate that the existing approach was unjust and unreasonable. *See* Part V.

ARGUMENT

I. FERC may reject filings it finds unsupported.

NRG contends that FERC cannot reject tariff changes filed under Federal Power Act (“Act”) §205¹⁰ unless it finds them unjust, and that FERC “flipped” this burden in rejecting as unnecessary Operator’s proposed auction mandate and offer floor.¹¹ But FERC’s inquiry into need was a proper application of the statutory burden of proof.

FERC properly rejects §205 filings upon finding that the filer failed to carry its burden of proof.¹² The statutory burden is not superfluous. FERC may reject filings it finds *unjustified*, without having to find them definitively *unjust*. Indeed, §205(e) expressly provides for refunds where FERC finds a rate increase “not justified”; it does not tie refunds to a finding of “unjustness,” as NRG’s theory would imply.

Operator’s proposals to confine deficiency-filling to the auction and bar low-priced auction offers would have constrained Midcontinent markets, implicating

¹⁰ 16 U.S.C. §824d.

¹¹ NRG Br. at 20, 31-32, 36-37.

¹² See *City of Winnfield v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984) (“*Winnfield*”) (filer “had the burden of proving that its proposed new method ... was just and reasonable—a burden it was not able to sustain”); see also FERC Br. at 13, 19 (FERC approved Operator proposals for which that burden was carried, and rejected those for which it was not); NRG Br. at 32-33 (any party seeking a tariff change must establish that “the requested change would be just and reasonable”).

FERC's policy that those seeking to constrain markets must show substantial need.¹³ As demonstrated in Parts III–IV *infra*, this showing was not made.

Perhaps recognizing that failure, NRG tries to reverse the applicable burden. It demands that FERC prove that an auction mandate and offer floor would cause harm.¹⁴ But the salient question is whether those measures were justified, and it was eminently reasonable for FERC to demand that the justification include a showing of need.

Just months before issuing the First Order, FERC had re-affirmed the voluntary, residual nature of the Operator's capacity auction, after years of litigation.¹⁵ FERC had explained that it reviews Operator-proposed market mitigation rules "to ensure that they balance the *need* for efficiency and competitiveness in the market with the *need* to protect against the potential exercise of market power,"¹⁶ and found further constraints on buyers "not ... *necessary*."¹⁷

¹³ See *Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶61,213, P 24 (2011) ("Prior Order").

¹⁴ NRG Br. at 20, 36-37.

¹⁵ See Prior Order.

¹⁶ *Id.* P 24 (emphasis added).

¹⁷ *Id.* PP 119-20 (emphasis added). NRG had by then intervened in that prior docket, R.57, but elected not to challenge its outcome.

Earlier, FERC had held that over-mitigation can create risk that “keeps capacity out of the market over the long-term.”¹⁸

This Court likewise presumes that unsupported constraints on market offers distort prices and investment decisions, and has reversed FERC for adopting them without good cause.¹⁹ More generally, it is well established that FERC should consider relevant antitrust principles,²⁰ and those principles reject unjustified restraints on trade or prices.²¹

Before FERC, the parties understood that Operator’s proposals would not be found justified unless shown to be needed. The Operator and its Market Monitor recognized that FERC “never imposed mitigation requirements where market power is unlikely to be exercised.”²² NRG itself called for examination of whether regional conditions “necessitate[d]” changes to the region’s existing voluntary

¹⁸ *Midwest Indep. Transmission Sys. Operator, Inc.*, 115 FERC ¶61,158, P 12 (2006) (subsequent history omitted).

¹⁹ *See Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005).

²⁰ *See, e.g., Gulf States Utils. Co. v. FPC*, 411 U.S. 747 (1973).

²¹ *See, e.g., Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (low prices “benefit consumers,” and cannot be considered predatory if above a seller-specific level likely measured by seller’s incremental costs); *Nat’l Soc’y of Prof. Engineers v. United States*, 435 U.S. 679, 695 (1978) (competition restraints “must be justified”).

²² R.44:37 (quoting prior joint pleading).

capacity market construct.²³ As FERC explained, multiple parties urged that the proposed auction mandate and offer floor be rejected as “unnecessary,” meaning not justified because potentially harmful and not shown to be beneficial.²⁴ For example, state regulators emphasized that state-supervised resource planning and the Midcontinent’s obligation-to-serve model conflicted with those proposals and rendered them “unnecessary,” and that a benefits showing was essential because those proposals would entail “clear costs.”²⁵ Experts testified that those proposals could prevent beneficial resources from being built (degrading the generation fleet) or counted (making consumers double-pay).²⁶ Calling those proposals “prophylactic”²⁷ measures to “mitigate buyers’ market power”²⁸ does not make them costless.²⁹

FERC’s insistence on a need showing is further justified by FERC’s finding that Midcontinent utilities, operating within the Midcontinent’s state-supervised

²³ R.57:10.

²⁴ See First Order, PP 20-22 (R.102:10-11). Contrary to NRG’s caricature, Br. at 33, FERC evaluated need without demanding the proposals be “essential.” The two terms differ. *McCulloch v. Maryland*, 17 U.S. 316, 414 (1819) (differentiating “necessary, very necessary, absolutely or indispensably necessary”).

²⁵ R.24:2, 3-4, 5, 8.

²⁶ R.156:57; R.168:94.

²⁷ NRG Br. at 40.

²⁸ *Id.* at 10.

²⁹ See R.156:53-54; R.168:93-94.

approach to capacity procurement, “have historically procured sufficient capacity to meet their needs,”³⁰ and enjoy ample capacity supplies.³¹ Accordingly, FERC was “not persuaded that a mandatory centralized capacity auction construct is necessary to ensure resource adequacy.”³² FERC also found that the Midcontinent lacks any history or genuine threat of price suppression.³³ Accordingly, FERC reasonably reached the same conclusion as expert testimony it considered: “if it ain’t broke, don’t fix it.”³⁴

FERC thus stood on solid ground in declining, without a showing of need, to prop up offer prices or confine deficiency procurement to the auction.³⁵

II. Operator’s and NRG’s evolving stances reinforced the propriety of FERC’s insistence on a showing that the market constraints initially filed by Operator were needed.

As shown above, the fact that Operator initially filed for an auction mandate and offer floor did not obviate FERC’s responsibility to consider their necessity. FERC’s insistence on a need showing was doubly appropriate given Operator’s and NRG’s evolving positions.

³⁰ Rehearing Order, P 50 (R.210:25).

³¹ *Id.*; *see also* R.156:47.

³² Rehearing Order, P 50 (R.210:25).

³³ *Id.* P 49 (R.210:24-25).

³⁴ R.156:58.

³⁵ *See* Rehearing Order, PP 6, 43, 49-50, 105-06, 115, 118 (R.210:6-7, 24-25, 51-52, 54, 55).

The July 2011 Operator filing that opened this case was meant only to “supplement” just-approved resource adequacy rules—under which utilities procured capacity principally through self-supply and advance bilateral contracting, with Operator’s auction playing a voluntary, residual role.³⁶ FERC found that instead of supplementing that reasonable construct, the auction mandate and offer floor would have negatively “transform[ed]” it,³⁷ impeding Midcontinent utilities’ state-supervised development of “resource plans based on their specific region.”³⁸ FERC also found that the Operator’s offer floor would have been easily circumvented and ineffective.³⁹ Rather than seek rehearing, Operator accepted FERC’s expert assessment that neither measure was needed.⁴⁰ That acquiescence aligned with Operator’s prior, second submission, which offered no affirmative support for those filing elements, nor for NRG’s more extreme proposals.⁴¹

NRG seemed to agree that as filed, Operator’s auction mandate and offer floor were pointless. Far from supporting those proposals,⁴² NRG initially denied

³⁶ *Id.* P 43 (R.210:22) (paraphrasing R.1:6).

³⁷ First Order, PP 39-40 (R.102:16).

³⁸ *Id.*

³⁹ *See id.* PP 68-69 (R.102:26-27).

⁴⁰ R.114:4.

⁴¹ R.72:38-46.

⁴² Regrettably, NRG misstates the record in claiming that its Protest “argued . . . that MISO’s proposal to mitigate buyers’ market power was appropriate.” NRG Br.

their existence. NRG maintained that Operator's proposal failed to "incorporate *any type* of buyer-side mitigation rules,"⁴³ and characterized Operator's proposal as "allowing entities to 'opt out' of the capacity market."⁴⁴ NRG did not seek rehearing of FERC's finding that Operator's offer floor would have been ineffective, and maintained that Operator's filing could not produce reasonable results without radical alteration.⁴⁵ NRG was therefore in no position to maintain that Operator's proposals were worthwhile.

Nonetheless, in requesting rehearing, NRG pivoted to championing proposals it had previously treated as non-existent. FERC therefore re-examined whether Operator's original proposals fit the Midcontinent's resource adequacy construct. By November 2015, when FERC denied rehearing, Operator had accepted and complied with FERC's prior orders,⁴⁶ and the disconnect separating Operator's earlier proposals from the Midcontinent's focus on utility self-supply had widened.⁴⁷ Fulfilling its responsive §205 role in a judicially-endorsed,⁴⁸

at 10 (purporting to describe R.57).

⁴³ R.57:15 (emphasis added).

⁴⁴ R.57:18.

⁴⁵ See Part III.A, *infra*.

⁴⁶ Rehearing Order, P 45 (R.210:23).

⁴⁷ See page 2, *supra*.

⁴⁸ See Rehearing Order, P 39 (R.210:20).

administratively-efficient manner, FERC compared Operator's initially-proposed auction mandate and offer floor to Operator's considered intent, and confirmed that Operator acquiesced in dropping those proposals.⁴⁹

These positional evolutions, combined with FERC's unchallenged determination that Operator's offer floor was vacuous, have significant legal implications. The only auction mandate and offer floor that have been preserved for judicial review are those filed by Operator.⁵⁰ Yet Operator is no longer supporting them; NRG has replaced Operator as their standard-bearer.

While Operator's having initially filed may technically have relieved NRG of an obligation to show that the pre-existing absence of any mandate or floor was *unreasonable*,⁵¹ NRG became responsible for establishing before FERC that the filed proposals were just and reasonable. Faced with proposals abandoned by their

⁴⁹ See *id.* P 44 (R.210:22-23); see also FERC Br. at 23 (NRG failed to contest this finding).

⁵⁰ Arguments not raised in opening briefs are waived. *Xcel Energy Servs. v. FERC*, 510 F.3d 314, 318 (D.C. Cir. 2007). NRG's brief argues that FERC erred in "reject[ing] MISO's modest proposal" for a limited auction mandate, Br. at 30, and in "overriding MISO's decision," *id.* at 35, but not that FERC erred in rejecting the more sweeping proposals NRG presented below.

⁵¹ Had Operator never filed to adopt its auction mandate or offer floor, FERC approval thereof would have required an Act §206, 16 U.S.C. §824e, predicate finding that the existing absence of any mandate or floor was *unreasonable*. See *Winnfield*, 744 F.2d at 875. FERC rejected that finding. Rehearing Order, P 44 (R.210:22-23). Thus, Operator's preference as a §205 filer, though not dispositive in designing markets, has legal significance.

filing sponsor, and supported by a new proponent that had previously treated them as pointless, FERC reasonably asked whether they had been shown to be needed.

As summarized below, FERC reasonably found to the contrary.

III. FERC’s determination that the proposed auction mandate and offer floor were unjustified was reasoned and factually supported.

Ample record evidence supports FERC’s decision to reject the Operator proposals that NRG belatedly supports. FERC’s decision was neither arbitrary nor capricious, as it rationally connected to that evidence.⁵² It must therefore be affirmed, whether or not it was “the best one possible.”⁵³

A. FERC articulated reasonable responses to NRG’s arguments.

Despite four opportunities,⁵⁴ NRG failed to show that FERC was unreasonable in finding the auction mandate and offer floor originally filed by Operator to be unjustified.

Strike One: Far from supporting Operator’s offer floor and auction mandate, NRG initially treated them as nullities.⁵⁵ NRG instead touted cherry-picked elements of northeastern capacity markets.⁵⁶

⁵² See *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016) (“*EPSA*”).

⁵³ *Id.*

⁵⁴ According extra process, FERC invited two rounds of supplemental briefing.

⁵⁵ See notes 43-44, *supra*.

⁵⁶ R.57:7-23.

Strike Two: NRG's truncated request for rehearing claimed that FERC had "deviat[ed] from precedent" by not replicating selected aspects of northeastern regions' designs, but failed again to address the Midcontinent's specific characteristics.⁵⁷

Strikes Three and Four: In two rounds of supplemental briefing,⁵⁸ NRG principally argued that the Operator-proposed auction mandate and offer floor would "do[] little,"⁵⁹ and advocated sweeping changes: making all load bid in multi-year forward auctions, with a moving reserve target⁶⁰ and "iron-clad"⁶¹ offer floors. NRG cast those changes as "critical elements" of its alternative,⁶² and threatened that absent drastic change, the region would be short of capacity "during 2016."⁶³ Now, with NRG having abandoned on appeal those other, purportedly inter-related and essential elements, its speculative fears provide no basis to find beneficial the Operator-filed versions of an auction mandate and offer floor.

⁵⁷ R.111:5-15.

⁵⁸ R.167; R.182.

⁵⁹ R.182:11.

⁶⁰ *See* Part V, *infra*.

⁶¹ R.182:11.

⁶² *Id.*

⁶³ R.182:13.

FERC engaged these arguments. After thorough consideration, FERC differentiated the Midcontinent from northeastern, retail-choice-oriented regions selectively cited by NRG, and adhered to its longstanding, and continuing, policy of “reject[ing] a one-size-fits-all approach to resource adequacy in the various [regions].”⁶⁴ FERC explained those differences clearly.

First, FERC found that Midcontinent utilities’ vertical integration obviates the price suppression incentives cited by NRG, by enabling “longer-term commitments to generation resources.”⁶⁵

Second, FERC found that Midcontinent state regulators “play[] a critical role ... in ensuring the adequacy and cost-effectiveness of electric service,”⁶⁶ and decided to keep Operator’s capacity auction voluntary so as not to “impinge on state resource planning.”⁶⁷ FERC thus appropriately considered the Act’s

⁶⁴ First Order, P 38 (R.102:15), *aff’d*, Rehearing Order, P 117 (R.210:55) (FERC “give[s] regions substantial discretion to design their resource adequacy constructs based on their conditions and stakeholder preferences”); *N.Y. State Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 158 FERC ¶61,137, concurrence at 3 (2017) (Bay, Comm’r) (reviewing “wide variation among the eastern market[s]” offer floors, and emphasizing need to harmonize any such floors with federal-state jurisdictional relationships); *ISO New England Inc.*, 158 FERC ¶61,138, concurrence at 2 (2017) (Bay, Comm’r) (same).

⁶⁵ Rehearing Order, PP 108, 111 (R.210:52-53).

⁶⁶ *Consumers Energy Co.*, 150 FERC ¶61,125, P 45 n.78 (2015) (referenced in Rehearing Order, P 155 n.297 (R.210:70)).

⁶⁷ First Order, P 41 (R.102:16).

distinction between federal and state jurisdiction and its express preservation of states' jurisdiction over generation facilities and resource decisions.⁶⁸

Third, FERC found that in the Midcontinent, capacity market revenue “is not necessary . . . to finance needed new generation,” because most market participants make long-term supply arrangements “continually as they negotiate bilateral arrangements and develop owned-resources,” and only minor, residual activity remains when the auction arrives.⁶⁹ The capacity market construct that NRG supported before FERC was a centralized years-forward market in which unbuilt resources would compete for commitments that would help fund construction.⁷⁰ In contrast, the Midcontinent's residual auction runs mere months before the relevant summer peak, by which time building new resources to fulfill auction purchases is generally impossible.⁷¹ NRG did not seek rehearing of FERC's decision to keep the Midcontinent's auction horizon short, and that uncontested decision confirms this auction's fundamental difference from NRG's ideal.

Fourth, FERC found that residual auction prices would have, at most, a “mute[d]” influence on the Midcontinent's longer-term commitment prices.⁷² That

⁶⁸ See 16 U.S.C. §§824(a), 824(b)(1).

⁶⁹ Rehearing Order, P 138 (R.210:64).

⁷⁰ See R.182:11 (advocating “[a] three-year forward commitment of resources”).

⁷¹ See Rehearing Order, PP 139, 146 (R.210:64, 67); R.176:33.

⁷² Rehearing Order, P 107 (R.210:52).

finding defeats NRG's reliance on California and New York cases as establishing a supposed "critical interdependence" between those differently-timed, different-duration prices.⁷³ Moreover, those states had then replaced stable retail load-serving relationships with retail choice, departing from the long-term commitments characteristic of the Midcontinent.⁷⁴ The California case involved a dysfunctional energy market, which FERC remedied by eliminating a centralized market mandate and encouraging long-term bilateral contracting⁷⁵—the opposite of what NRG has advocated.

B. FERC's responses have ample record support.

As FERC articulated a reasoned basis to distinguish the Midcontinent from retail-choice-oriented regions, its decision must stand if "supported by substantial evidence."⁷⁶ It is supported, abundantly.

Below, we paraphrase and tabulate NRG's main arguments, FERC's main responses thereto, and examples of the underlying record evidence. The examples focus on expert affidavits and reports, which FERC referenced both indirectly (by

⁷³ NRG Br. at 43 (citing *N.Y. Indep. Sys. Operator, Inc.*, 103 FERC ¶61,201 (2003); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶61,418 (2001) ("*San Diego*") (subsequent history omitted)).

⁷⁴ See *Consol. Edison Co.*, 84 FERC ¶61,287 (1998); *San Diego* at 62,557.

⁷⁵ See *id.* at 62,545-46. California had no centralized capacity market. See *id.*

⁷⁶ Act §313(b), 16 U.S.C. § 825l(b); see also *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) ("*S.C.*") ("substantial" requires more than a scintilla, but not a preponderance).

reciting at length, and relying upon, associated pleadings⁷⁷) and directly.⁷⁸

Additionally, the record overflows with pleadings, by state regulators and diverse others, elucidating flaws in positions NRG now espouses.⁷⁹ Those pleadings include a detailed showing that the lion's share of Midcontinent capacity, whether merchant or utility, is funded through long-term arrangements outside the auction.⁸⁰ FERC expressly relied on that showing, and noted that it was uncontested.⁸¹ FERC's other key factual determinations were similarly well-supported.

⁷⁷ See Rehearing Order, PP 46, 73-84, 100-120 (R.210:23-24, 33-41, 48-56).

⁷⁸ See *id.* P 78 n.156 (R.210:36). Although NRG cites a contrary affidavit presented by another party, the appellate question is not whether NRG presented evidence *for* Operator's proposals, but whether FERC had a substantial evidentiary basis to reject them.

⁷⁹ See, e.g., R.24:9-12; R.28:10-11; R.34:7-8; R.38:12; R.44:37-44; R.46:4-7, 9-11; R.48:12-13; R.50:8, 47-52; R.64:4-9; R.68:7-8, 12-15, 24-25; R.70:7; R.79:6-7; R.80:2-3; R.148:18-23, 25-28, 37-47; R.150:6-9; R.151:3-6; R.152:26-44; R.153:6-7; R.154:13-25; R.155:1-2; R.156:15-24, 27-29; R.157:6-10; R.159:10-16; R.161:5-7; R.168:19-27, 31, 34-43, 63-66; R.171:3-4; R.172:14-16; R.174:6-7; R.177:5-7; R.179:6-11; R.180:5; R.181:4, 6-7; R.183:10-13; R.184:18-19; R.186.

⁸⁰ See R.168:21-34.

⁸¹ Rehearing Order, PP 105-06 (R.210:51-52).

NRG Argument	Rehearing Order	Expert Evidence
Auction prices must cover costs. Br.28.	The auction is residual; generators can lock in long-term forward contracts and have other revenue streams. PP 46, 138 (R.210:23-24, 64).	State-regulatory resource adequacy obligations ensure that utilities make forward commitments rather than awaiting the auction and risking locational shortages. R.156:44; R.168:81.
Unlike rate-base utilities, merchant generators must depend on the auction. Br.30.	Virtually all Midcontinent generation, including merchants', obtains long-term ownership or contractual commitments from utilities. PP 53, 138 (R.210:25-26, 64).	Needed new investment will be supported by utilities' entry into "long-term contracts with the new or [retrofitted] existing resources ... if such commitments are more economical than building their own resources." R.168:82.
Auction prices won't cover costs. Br.29-30.	In shortage years, auction prices may exceed costs. P 110 (R.210:53).	Prices in the residual auction may be "very high ... if other [utilities] are also attempting to purchase, or if very little capacity is offered." R.168:81.
Auction prices will vary. Br.48-49.	Varying prices appropriately reflect varying supply/demand balances. PP 110, 145 (R.210:53, 66).	Utilities procure the bulk of their capacity needs well before the auction, partly to avoid its price and supply risks. R.168:81.
When expected auction prices are low, bilateral contract prices will be low too. Br.34, 44.	Bilateral contracts will reflect <i>long-term</i> prospects, including above-cost auction prices in shortage years. PP 107-112 (R.210:52-54).	In forming capacity prices, auction prices pale against expectations over "many years," especially those of "ownership and bilateral purchase options." R.156:42.

NRG Argument	Rehearing Order	Expert Evidence
Buyers will suppress auction prices even if they procure their capacity elsewhere. Br.43.	For a predominantly self-supplying utility, suppressing auction prices is self-defeating, particularly as its immediate costs “would be substantial and any resulting [future savings] ... would need to be discounted.” PP 105-08, 112 (R.210:51-52, 53-54). NRG provided “no evidence” that such attempts would be profitable. P 108 (R.210:52).	Buyers cannot profitably suppress prices unless their “net purchases are large relative both to the buyer’s needs and to the relevant total market,” and any would-be price suppressor “must contemplate the substantial risks that other generation firms will react” in ways that will foil the strategy over “the many years of uneconomic capacity’s lifetime.” R.156:49.
Offer floors guard utilities from their own “irrational, uneconomic investments.” Br.42.	One year’s auction price does not fully measure whether a long-lived resource is economic. PP 112, 115 (R.210:53-54).	Offer floors imprecisely estimate long-term resources’ first-year costs, ⁸² and disregard the value of diversified resource portfolios. R.168:81. They raise rivals’ costs, injure competition and consumers, and distort resource procurement. R.156:52-53, 56.

In short, NRG had to justify grafting the initially-proposed auction mandate and offer floor onto the Midcontinent’s resource adequacy construct (thereby overturning FERC’s 2011 holding that such measures were not necessary), but failed. FERC’s conclusion—that the record did not justify those measures for this

⁸² See R.44:40-42 (quoting a report by the same economic experts that Operator relied on to frame its filing, see R.1:3).

region, “at this time”⁸³—stood on “such relevant evidence as a reasonable mind might accept as adequate,” requiring affirmance.⁸⁴

IV. Operator’s screen for seller market power does not compel narrowing buyers’ options.

NRG contends that FERC approved “an auction that is mandatory for sellers but optional for buyers” (Br. at 29) and wants to cure this purported asymmetry by specifying Operator’s annual months-ahead auction as the only place where utilities may fill any then-remaining capacity needs. As FERC found, NRG’s premise is both incorrect and disconnected from the remedy it seeks.

NRG’s erroneous premise. Participation in the Operator’s residual auction is *not* mandatory for suppliers, as FERC explained,⁸⁵ and as NRG conceded by complaining that Midcontinent generators sell capacity to neighboring regions.⁸⁶ Merchants have multiple ways to opt out of Operator’s residual auction. First, they may export their output to other regions.⁸⁷ Load lacks such mobility. Second, merchants may sell to Operator-area load through bilateral contracts separate from

⁸³ Rehearing Order, P 105 (R.210:51).

⁸⁴ *S.C.*, 762 F.3d at 54.

⁸⁵ *See* Rehearing Order, P 110 (R.210:53); Prior Order, P 20.

⁸⁶ R.167:11.

⁸⁷ *See generally New York v. FERC*, 535 U.S. 1 (2002) (affirming open access).

Operator's last-chance auction.⁸⁸ Third, even merchants who forego all earlier alternatives are not necessarily bound to the auction.⁸⁹

Operator's encouragement for merchants to participate in its auction does not stand alone. As FERC pointed out, utilities that remain capacity-deficient after the auction face a hefty multiplier penalty, not a "free pass."⁹⁰ Thus, NRG's claims of one-sidedness lack foundation.

NRG's non sequitur. NRG simply assumes that FERC was obliged to impose symmetrical market mitigation on sellers and buyers. But FERC appropriately found that "there need not be symmetry between mitigation for buyers and sellers," citing differences in market power and its exercise.⁹¹ This Court has previously found that mitigating capacity-seller market power and buyer market power are not symmetrical issues. *TC Ravenswood, LLC v. FERC*, 705 F.3d 474, 478 (D.C. Cir. 2013). Far from demanding symmetry, the Act makes FERC a

⁸⁸ See R.1:88 ("Taking advantage of opportunities to sell at a higher price in a[nother] market ... shall not be deemed a form of withholding").

⁸⁹ The provision cited by NRG (Br. at 13) merely identifies withholding *potentially* subject to mitigation. Both an impact test and opportunities for market monitor and FERC discretion would apply, making mitigation conditional (even though such withholding is likely anti-competitive, as capacity for past periods is worthless). See R.72:44; *Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶61,172, PP 121-23 (2008) (describing impact tests).

⁹⁰ Rehearing Order, P 47 (R.210:24).

⁹¹ *Id.* P 114 (R.210:54).

consumer-protection agency, not a guarantor of seller revenues.⁹² Merchant generators stand outside of both traditional obligations to serve and traditional profitability regulation. In choosing to gamble on lucrative shortage prices, they have accepted the risk of low surplus capacity prices. FERC correctly found that the low auction prices NRG complains about were the natural and economically appropriate result of surplus.⁹³ FERC also found that the region is continuing to attract merchant entry,⁹⁴ and that the multiple available remuneration opportunities, including long-term bilateral contracts, provide sufficient incentives to attract generator investment.⁹⁵

Relatedly, NRG complains (Br. at 30) that low residual auction prices discriminate against merchants. But the market rules' actual distinction is between sellers who make an advance deal, and sellers who hold out for potentially higher auction revenues. As FERC found, merchant and utility generators encounter the same market rules, same prices, and same opportunity to make advance bilateral deals.⁹⁶ FERC found that most Midcontinent sellers utilize that opportunity.⁹⁷

⁹² FERC's "first and foremost duty is to protect consumers." *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1*, 554 U.S. 527, 551 (2008).

⁹³ Rehearing Order, P 51 (R.210:25).

⁹⁴ *Id.* P 145 (R.210:66-67).

⁹⁵ *Id.* PP 46, 52-53, 138, 145 (R.210:23-26, 64, 66-67).

⁹⁶ *See* Rehearing Order, PP 53, 112 (R.210:25-26, 53-54).

Record expert testimony substantiated that “[i]f merchant capacity is not contracted on a bilateral basis, it is because the owner has chosen ... to take its chances on getting a higher price later.”⁹⁸

V. NRG failed to carry its burden to prove that a traditional approach to reserve margins is unreasonable for the Midcontinent.

NRG’s final challenge to FERC’s Orders seeks to alter Operator’s filed and approved approach, under which Operator-determined reserve margins embody a one-outage-per-decade technical analysis.⁹⁹ NRG contends that a “sloped demand curve”—which makes the required margin rise and fall as auction prices fall and rise, unlike the “vertical,” price-independent reserve margin produced by the traditional approach—is so firmly embedded in FERC precedent that it was arbitrary not to impose one.¹⁰⁰ FERC’s Orders and Brief ably distinguish the decisions NRG cites, and explain that prices resulting from Operator’s approach appropriately reflect residual supply and demand.¹⁰¹ We merely emphasize three points.

⁹⁷ *See id.*

⁹⁸ R.168:91.

⁹⁹ *See* R.72:37-38.

¹⁰⁰ NRG Br. at 45-54.

¹⁰¹ *See* FERC Br. at 35-40 and the citations therein. Far from being contrary to precedent, Operator’s approach broadly resembles the one affirmed in *Municipalities of Groton v. FERC*, 587 F.2d 1296 (D.C. Cir. 1978) (tying

First, the “volatility” of which NRG complains—low auction prices when surplus residual supply meets scant residual demand, and high prices when the reverse occurs—contradicts NRG’s complaint elsewhere that auction prices will always be low.¹⁰²

Second, NRG’s proposal to make the required margin a price-dependent moving target clashes with the Midcontinent’s traditional state regulation, under which states commonly apply industry-accepted reliability criteria to regulate capacity procurement long before Operator conducts its auction.¹⁰³ Thus, NRG’s proposal contradicts the unchallenged provision that state-determined reserve margins may supersede Operator-determined ones.¹⁰⁴

Third, because Operator did not file NRG’s proposal, approving it would have required findings that the existing approach was unreasonable, whereas

capability responsibility to load, not to capacity prices, and enforcing that responsibility through deficiency penalties).

¹⁰² Compare NRG Br. at 29 (FERC’s Orders “ensure” low auction prices) *with id.* at 48-49 (they will produce “extremely volatile pricing”) (citation omitted).

¹⁰³ R.156:41-42, 47-48, 50.

¹⁰⁴ See R.1:9 (explaining the provision); Rehearing Order, P 155 (R.210:70-71) (citing the contradiction).

NRG's moving-target approach was reasonable.¹⁰⁵ As FERC explained, neither finding was justified.¹⁰⁶

CONCLUSION

The Court defers to FERC determinations involving policy judgments that lie at the core of its regulatory mission,¹⁰⁷ and must uphold FERC where its orders, read as a whole,¹⁰⁸ show that it has examined the relevant considerations and articulated a satisfactory, record-supported explanation for its choices.¹⁰⁹ Here, FERC properly found that Operator's proposed auction mandate and offer floor had not been proved just and reasonable, and that NRG had failed to demonstrate that Operator's traditional approach to reserve margins was unjust and unreasonable. FERC's findings that those burdens had not been carried were well-supported. Affirmance should follow.

¹⁰⁵ See *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 352-53 (D.C. Cir. 2014).

¹⁰⁶ See Rehearing Order, P 155 (R.210:70-71).

¹⁰⁷ *S.C.*, 762 F.3d at 54-55.

¹⁰⁸ See *Town of Norwood v. FERC*, 962 F.2d 20, 26 (D.C. Cir. 1992).

¹⁰⁹ See *EPSA*, 136 S. Ct. at 782.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because its textual portions, including headers, quotations, and footnotes, but excluding the (i) cover pages, (ii) certificates of counsel, (iii) tables of contents and authorities, (iv) glossary, and (v) signature block contain 4,962 words, as counted by the word count feature of Microsoft Word 2010, with which this brief was prepared.

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