

ORAL ARGUMENT NOT YET SCHEDULED

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

MARYLAND PUBLIC SERVICE COMMISSION AND
NEW JERSEY BOARD OF PUBLIC UTILITIES, Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent.

No. 09-1296

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

BRIEF OF INTERVENORS SUPPORTING FERC

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CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

A. PARTIES AND AMICI

All parties and intervenors appearing before this Court and in the underlying proceeding before the Federal Energy Regulatory Commission (“FERC” or “Commission”) are listed in the Petitioners’ Brief.

B. RULINGS UNDER REVIEW

1. Order Dismissing Complaint, *Maryland Public Service Commission v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276 (Sept. 19, 2008) (“Dismissal Order”), JA____-__; and

2. Order Denying Rehearing and Request for Oral Argument, *Maryland Public Service Commission v. PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,274 (June 18, 2009) (“Rehearing Order”), JA____-__.

C. RELATED CASES

As stated in FERC’s Brief for Respondent, the instant petition seeks review of FERC’s dismissal of a Complaint filed by the Maryland Public Service Commission (“MPSC”) and the New Jersey Board of Public Utilities (“NJBPU”) (together, the Petitioners) and others challenging the rates produced in the transitional auctions for electric capacity held by PJM Interconnection, L.L.C. (“PJM”) in 2007 and 2008 under the Reliability Pricing Model (“RPM”) rules set forth in PJM’s Open Access Transmission Tariff. Several of the parties in this

case—Petitioner NJBPU, Petitioner-Intervenor Maryland Office of People’s Counsel, Petitioner-Intervenor PJM Industrial Customer Coalition, and Respondent Intervenor PSEG Companies—previously challenged FERC’s orders approving the auction rules at issue here in consolidated petitions for review before this Court. *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *order on reh’g*, 119 FERC ¶ 61,318, *reh’g denied*, 121 FERC ¶ 61,173 (2007) (collectively, the “RPM Orders”), *aff’d sub nom. Pub. Serv. Elec. & Gas Co. v. FERC*, 324 Fed. App. 1 (D.C. Cir. 2009) (“PSEG”). However, after full briefing, Petitioner NJBPU, Petitioner-Intervenor Maryland Office of People’s Counsel, and Petitioner-Intervenor PJM Industrial Customer Coalition withdrew their petitions for review. *See Order Granting Motion To Withdraw Petitions For Review*, Nos. 07-1414 and 08-1008. (D.C. Cir. Mar. 4, 2009).

In addition, because this case concerns a complaint against auction-based rates filed by third-party state regulatory commissions acting *parens patriae*, the Court’s consideration of this petition for review may be related to the proceedings on remand from *NRG Power Marketing, LLC v. Maine Public Utilities Commission*, 130 S. Ct. 693 (2010) (“*NRG Power*”), now scheduled for argument on Sept. 20, 2010 in D.C. Cir. Nos. 06-1403, *et al.* *NRG Power* holds that third-party challenges to contract rates under section 206 of the Federal Power Act (“FPA”), 16 U.S.C. § 824e (“FPA § 206”), are governed by the stringent *Mobile-*

Sierra public interest standard, rather than “ordinary” just-and-reasonable standard. One of the questions on remand from *NRG Power* is whether auction-based rates for electric capacity, like the ones at issue here, are contract rates subject to the *Mobile-Sierra* standard.

Counsel are not aware of any other petitions for review of the same FERC orders pending in this or any other court.

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On behalf of all signatory intervenors in support of FERC.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 the Federal Rules of Appellate Procedure and Circuit Rule 26.1, undersigned counsel for intervenors supporting respondent hereby certify as follows:

Allegheny Energy Supply Company, LLC is a wholly-owned subsidiary of Allegheny Energy, Inc., a publicly-held energy and utility holding company. No publicly-held company currently owns more than 10% of Allegheny Energy, Inc. On February 11, 2010, Allegheny Energy, Inc. and FirstEnergy Corp., which is also a publicly-held energy and utility holding company, announced a definitive agreement to merge in a stock-for-stock transaction and those companies are currently seeking the federal and state approvals necessary to consummate that transaction.

The Constellation Parties include the following subsidiaries of Constellation Energy Group, Inc., a publicly-held energy and utility holding company: Constellation Energy Commodities Group, Inc., Calvert Cliffs Nuclear Power Plant, Inc., Constellation Generation Group, LLC, Constellation NewEnergy, Inc., Constellation Power Source Generation, Inc., and Handsome Lake Energy, LLC. Électricité de France, S.A., a publicly-traded French energy company, owns 49.9 percent of Calvert Cliffs Nuclear Power Plant, Inc.

The Dayton Power and Light Company is an affiliate of DPL Energy, Inc. and a subsidiary of DPL Inc., a publicly-held energy and utility holding company. No publicly-held company owns more than 10% of DPL Inc.

Dominion Resources Services, Inc. is a wholly-owned subsidiary of Dominion Resources, Inc., a publicly-held energy and utility holding company. No publicly-held company owns more than 10% of Dominion Resources, Inc.

Duke Energy Ohio, Inc. is a wholly-owned direct subsidiary of Cinergy Corp., which is a wholly-owned direct subsidiary of Duke Energy Corporation, a publicly-held energy and utility holding company. No publicly-held company owns more than 10% of Duke Energy Corporation.

Edison Mission Energy is a wholly owned subsidiary of Mission Energy Holding Company, which is a wholly owned subsidiary of Edison Mission Group, Inc., which are wholly owned subsidiaries of Edison International, a publicly held energy and utility holding company.

The Electric Power Supply Association (“EPSA”) is a national trade association that represents competitive power suppliers and is incorporated under the laws of the District of Columbia. There is no parent corporation or any publicly-held corporation that owns 10 percent or more of EPSA’s stock. EPSA’s members include 21 companies, along with numerous associate and supporting

members and state and regional partners that represent the competitive power industry in their respective regions.

Exelon Corp. is a publicly held energy and utility holding company. No publicly traded company owns 10% or more of Exelon Corp.

International Power plc is a publicly-held energy company. It is a member of the PJM Power Providers Group trade association, but has not separately intervened.

Liberty Electric Power, LLC (“Liberty”), a Delaware limited liability company, is a wholly owned subsidiary of Liberty Electric PA 2, LLC (“Liberty Electric”), a Delaware limited liability company. Liberty Electric is indirectly owned by LEP Holdings, LLC (“LEP Holdings”). LEP Holdings is owned by Liberty Electric Generation Holdings, LLC, which is not a publicly-held company.

Mirant Energy Trading, LLC, Mirant Mid-Atlantic, LLC, Mirant Chalk Point, LLC and Mirant Potomac River, LLC are each indirect wholly-owned subsidiaries of Mirant Corporation, a publicly-held, publicly-traded company. No other parents, affiliates or subsidiaries of Mirant Energy Trading, LLC, Mirant Kendall, LLC, or Mirant Canal, LLC are publicly-held or publicly-traded. No publicly traded company currently owns 10% or more of Mirant Corporation. On April 11, 2010, RRI Energy, Inc. and Mirant Corp. announced an agreement to

merge in a stock-for-stock transaction and those companies are currently seeking the federal and state approvals necessary to consummate that transaction.

NextEra Energy Generators are indirect wholly-owned subsidiaries of NextEra Energy, Inc. (f/k/a FPL Group, Inc.), a publicly-held energy and utility holding company. The following subsidiaries of NextEra Energy, Inc. have issued publicly-held securities: FPL Group Capital 2 Inc., FPL Group Capital Trust I, FPL Group Capital Trust II, FPL Group Capital Trust III, FPL Group Trust I, FPL Group Trust II, FPL Recovery Funding LLC, ESI Tractebel Acquisition Corp., and ESI Tractebel Funding Corp. No other parents, affiliates or subsidiaries of NextEra Energy Generators are publicly-held or publicly-traded. No publicly-held company has a 10% or greater ownership interest in NextEra Energy, Inc.

NRG Energy Inc. is a publicly held energy and utility holding company. No publicly-held company has a 10% or greater ownership interest in NRG Energy Inc. NRG Energy Inc. is a member of the PJM Power Providers Group trade association, but has not separately intervened.

The PHI Companies include Pepco Holdings, Inc., a publicly-held energy and utility holding company, and its subsidiaries Pepco Energy Services, Inc., Potomac Electric Power Company, Conectiv Energy Supply, Inc., Atlantic City Electric Company, and Delmarva Power & Light Company. No publicly-held company has a 10% or greater ownership interest in Pepco Holdings, Inc.

PJM Power Providers Group (“P3 Group”) is a 501(c)(6) non-profit corporation composed of suppliers of energy, capacity, and other services within the PJM Interconnection, L.L.C. (“PJM”) power market. P3 Group does not know, and is not in a position to know, which (if any) of its publicly held members could potentially find their stock or equity value substantially affected by the outcome of this proceeding. Members of the P3 Group include: Conectiv Energy, Constellation Energy Group, Inc., DPL Energy, Inc., Edison Mission Group, Exelon Corp., International Power plc, Mirant Energy Trading, LLC, NextEra Energy Resources, LLC, NRG Energy Inc., PPL Electric Utilities Corporation, and Public Service Enterprise Group Incorporated. The corporate disclosure statements for publicly-held members of the PJM Power Providers Group are made separately herein.

The PPL Companies are PPL Electric Utilities Corporation, Lower Mount Bethel Energy, LLC, PPL Bruner Island, LLC, PPL EnergyPlus, LLC, PPL Holtwood, LLC, PPL Martins Creek, LLC, PPL Montour, LLC, PPL Susquehanna, LLC and PPL University Park, LLC. Each of the PPL Companies is a direct or indirect subsidiary of PPL Corporation, a publicly-held energy and utility holding company. No other publicly held company has a 10% or greater ownership interest in the PPL Companies, or in PPL Corporation.

The PSEG Companies include Public Service Enterprise Group Incorporated, a publicly-held energy and utility holding company, and its wholly-owned subsidiaries PSEG Energy Resources & Trade LLC, PSEG Power, LLC, and PSE&G. No other publicly held company has a 10% or greater ownership interest in the PSEG Companies.

RRI Energy, Inc. (“RRI”) is a publicly-held energy company and does not have any parent corporation. Based on a review of filings made by investors with the Securities and Exchange Commission, as of March 31, 2010, only one investor, Orbis Investment Management Limited and Orbis Asset Management Limited (together, “Orbis”) owns more than 10 percent of RRI’s voting securities. On April 1, 2010, Orbis filed a Schedule 13G with the Securities and Exchange Commission to disclose a 12.2 percent beneficial ownership interest in RRI. On April 11, 2010, RRI and Mirant Corp. announced an agreement to merge in a stock-for-stock transaction and those companies are currently seeking the federal and state approvals necessary to consummate that transaction.

All of the foregoing commercial entities and trade associations are, or represent the interests of, suppliers who sell energy, capacity, and ancillary services within the service territory of the transmission system operated by PJM. All capacity suppliers within the PJM footprint have a direct financial interest in the outcome of this proceeding because Petitioners seek to change the prices

established for capacity in the PJM Reliability Pricing Model transition auctions held in 2007 and 2008.

Respectfully submitted,

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FERC Rule of Practice and Procedure 713(c), 18 C.F.R. § 385.713(c)

SUPPLEMENTAL ADDENDA

Brief for Petitioners, <i>Pub. Serv. Elec. & Gas Co. v. FERC</i> , D.C. Cir. Nos. 07-1414 and 08-1008 (July 21, 2008)	Addendum A
Reply Brief for Petitioners, <i>Pub. Serv. Elec. & Gas Co. v. FERC</i> , D.C. Cir. Nos. 07-1414 and 08-1008 (Oct. 30, 2008)	Addendum B
The Brattle Group, <i>Review of PJM's Reliability Pricing Model (RPM)</i> , Attachment A to Informational Filing in <i>PJM Interconnection, L.L.C.</i> , Docket Nos. ER05-1410-000, <i>et al.</i> (June 30, 2008)	Addendum C

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<i>*City of Anaheim v. FERC</i> , 558 F.3d 521 (D.C. Cir. 2009)	6
<i>Conn. Valley Elec. Co. v. FERC</i> , 208 F.3d 1037 (D.C. Cir. 2000)	10 n.4
<i>Consol. Edison Co. v. FERC</i> , 347 F.3d 964 (D.C. Cir. 2003).....	4, 10
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<i>*Sacramento Mun. Util. Dist. v. FERC</i> , 428 F.3d 294 (D.C. Cir. 2005).....	6

*Authorities upon which we chiefly rely are marked with an asterisk.

<i>SEC v. Chenery Corp.</i> , 318 U.S. 80 (1943).....	19 n.7
* <i>Towns of Concord v. FERC</i> , 955 F.2d 67 (D.C. Cir. 1992)	4, 10 n.4, 12
<i>United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.</i> , 350 U.S. 332 (1956)	19
* <i>Wabash Valley Power Ass’n v. FERC</i> , 268 F.3d 1105 (D.C. Cir. 2001)	11, 16

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*Authorities upon which we chiefly rely are marked with an asterisk.

Reply Brief for Petitioners, *Pub. Serv. Elec. & Gas Co. v. FERC*,
D.C. Cir. Nos. 07-1414 and 08-1008 (Oct. 30, 2008)5

*The Brattle Group, *Review of PJM’s Reliability Pricing Model (RPM)*,
Attachment A to Informational Filing in *PJM Interconnection, L.L.C.*,
Docket Nos. ER05-1410-000, *et al.* (June 30, 2008)16, 17

*Authorities upon which we chiefly rely are marked with an asterisk.

GLOSSARY

Brattle Report	<i>Review of PJM's Reliability Pricing Model (RPM)</i> , a report by the Brattle Group, filed by PJM in Docket Nos. ER05-1410-000, <i>et al.</i> (June 30, 2008), appended hereto as Addendum C.
Commission	Federal Energy Regulatory Commission, the Respondent.
Dismissal Order	<i>Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.</i> , 124 FERC ¶ 61,276 (2008), JA____-__.
Electric Capacity	The ability to generate or transmit electric energy. “In a capacity market, in contrast to a wholesale energy market, an electricity provider purchases from a generator an option to buy a quantity of energy, rather than purchasing the energy itself. To maintain the reliability of the grid, electricity providers generally purchase more capacity, <i>i.e.</i> , rights to acquire energy, than necessary to meet their customers’ anticipated demand.” <i>NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n</i> , 130 S. Ct. 693, 697 (2010).
FERC	Federal Energy Regulatory Commission, the Respondent.
FPA	Federal Power Act, 16 U.S.C. §§ 791a-825r.
MDPSC	Maryland Public Service Commission, a Petitioner.
NJBPU	New Jersey Board of Public Utilities, a Petitioner.
PJM	PJM Interconnection, L.L.C., a Commission-approved Regional Transmission Organization covering most of the Mid-Atlantic region between New York and North Carolina, and stretching west through Ohio to include portions of Illinois.
Rehearing Order	<i>Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.</i> , 127 FERC ¶ 61,274 (2009), JA____-__.
RPM	Reliability Pricing Model, a system of capacity auctions governed by Attachment DD of PJM’s Open Access Transmission Tariff, approved and affirmed in the RPM Orders.

- RPM Buyers The Petitioners and Petitioner-Intervenors, plus a number of additional entities that joined in Petitioners' Complaint, but chose not to pursue judicial review.
- RPM Orders *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *order on reh'g*, 119 FERC ¶ 61,318, *reh'g denied*, 121 FERC ¶ 61,173 (2007), *aff'd sub nom. Pub. Serv. Elec. & Gas Co. v. FERC*, 324 Fed. Appx. 1 (D.C. Cir. 2009).

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BRIEF OF INTERVENORS SUPPORTING FERC

QUESTIONS PRESENTED

Petitioners Maryland Public Service Commission (“MDPSC”) and New Jersey Board of Public Utilities (“NJBPU”) seek to abrogate the rates established through intensely-supervised electric capacity auctions and replace the auction results after-the-fact with poorly-supported rates of their own devising. Respondent Federal Energy Regulatory Commission (“FERC” or “Commission”) dismissed the Complaint as a collateral attack that requested retroactive relief in violation of the Federal Power Act (“FPA”) and, in addition, denied the Complaint on the merits. The questions presented are:

1. Whether the Complaint is an untimely collateral attack on final ratemaking orders that violates FPA § 313(b), 16 U.S.C. § 8251(b).

2. Whether Petitioners request retroactive rate reductions that violate FPA § 206, 16 U.S.C. § 824e, because auction-based rates created in conformity with rules approved under FPA § 205, 16 U.S.C. § 824d, become final when an auction ends.

3. Whether Petitioners failed under FPA § 206 to prove that existing rules and rates are unreasonable or to submit reasonable alternatives.

4. Whether the Complaint is subject to *Mobile-Sierra* review.

STATEMENT OF FACTS

We adopt FERC's Introduction and Statement of Facts as augmented by Respondent-Intervenor PJM. *See* FERC Br. at 1-25; PJM Br. at ___-___.

SUMMARY OF ARGUMENT

Petitioners' Complaint is twice-barred. Petitioners attack alleged faults in the PJM tariff provisions that govern Reliability Pricing Model ("RPM") auctions. Because Petitioners raised these same challenges on direct review of the orders approving the auction rules, but withdrew that petition, this second case is an impermissible collateral attack on final FERC orders. In addition, Petitioners mounted their current challenge *after* the auctions were held. Consistent with prior cases involving auction-based rates, FERC correctly held that auction participants'

obligations to provide or purchase capacity at the auction rates became final when the auctions ended. And absent a violation of the auction rules, FERC had no authority under FPA § 206 to retroactively change the rates set by auction.

FERC also correctly found, based on substantial evidence, that Petitioners failed to satisfy either of their dual burdens under FPA § 206. First, Petitioners speculative allegations failed to prove the transition auctions were unjust or unreasonable. FERC correctly found that stronger evidence from independent sources demonstrated that the transition auction rules and rates were just and reasonable. Second, FERC correctly found Petitioners' retroactive rate reduction proposal would inflict tremendous damage on the PJM market because auction participants relied on the auctions to arrange their commercial affairs. Contrary to Petitioners' spurious claims, the suppliers' reliance on PJM's transition auctions is both self-evident and amply-supported.

Moreover, in stark contrast to the substantial evidence FERC cited, Petitioners failed to show that reduced rates would have retained marginal suppliers or attracted new entry. PJM's capacity auctions successfully reversed the region's growing reliability problem. And at this point, several of the forward time periods governed by the auctions at issue have already concluded. Capacity suppliers fully performed their obligations and Petitioners have not offered any valid basis for retroactively reducing the prices paid for this performance.

Finally, the Supreme Court recently clarified that *Mobile-Sierra* public interest review governs third-party challenges to contract rates (which the auction results are). *Mobile-Sierra* thus applies here and requires Petitioners to meet a higher burden.

STANDARD OF REVIEW

Petitioners erroneously claim this Court is required to engage in “a thorough, probing, in-depth review” of FERC’s orders. Pet. Br. at 22 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971)). That “hard look” mode of review is long-discarded. This case concerns whether an auction complied with tariff rules, whether those rules are just and reasonable, and, if not, whether a remedy is required. It is well-settled that “FERC’s interpretation of tariffs receive[s] *Chevron*-like deference,” *Consol. Edison Co. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003) (“*Con Ed I*”), meaning “substantial deference.” *Idaho Power Co. v. FERC*, 312 F.3d 454, 461 (D.C. Cir. 2002). Moreover, judicial “review is particularly deferential when a challenge ‘relates to the fashioning of remedies’ where ‘[a]gency discretion is often at its zenith.’” *Consol. Edison Co. v. FERC*, 510 F.3d 333, 339 (D.C. Cir. 2007) (“*Con Ed II*”) (quoting *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)).

ARGUMENT

I. PETITIONERS' COMPLAINT IS AN IMPERMISSIBLE COLLATERAL ATTACK ON FINAL RATEMAKING ORDERS

The auction rules challenged here were approved by FERC, *see PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006), *order on reh'g*, 119 FERC ¶ 61,318, *reh'g denied*, 121 FERC ¶ 61,173 (2007) (collectively, the “RPM Orders”), and affirmed by this Court, *see Pub. Serv. Elec. & Gas Co. v. FERC*, 324 Fed. Appx. 1 (D.C. Cir. 2009) (“PSEG”). Petitioners claim “the issues raised in that earlier appeal are unrelated to any of the issues raised by the Petition in this case.” Pet. Br. at vii. The briefs submitted by Petitioner NJBPU and its allies in PSEG Nos. 07-1414 and 08-1008 belie this claim. *Compare* Pet. Br. in PSEG at 14-22 (July 21, 2008) (contending PJM’s auction rules do not adequately mitigate market power), *id.* at 34-38 (contending FERC cannot rely on pre-approved auction rules, but must review and approve auction results), *and* Reply Pet. Rep. Br. in PSEG at 16-18 (Oct. 30, 2008) (“Market Power Mitigation Alone Cannot Ensure Just and Reasonable Rates”),¹ *with* Pet. Br. Parts VIII.B-D at 23-38 (repeating those arguments). After full briefing, however, NJBPU and its allies abruptly withdrew. *See* Order Granting Motion To Withdraw Petitions For Review, PSEG Nos. 07-1414 and 08-1008 (D.C. Cir. Mar. 4, 2009).

¹ The PSEG briefs cited above are attached as Addenda A and B to assist review.

Reflecting this history, several parties objected below that the Complaint is an impermissible collateral attack on final FERC orders. *See* Dismissal Order at PP 11, 13, JA____, _____. While not using the phrase “collateral attack,” FERC agreed, finding that “each of the[] elements of RPM [challenged below] was part of the RPM Settlement and was explicitly incorporated into the RPM provisions of PJM’s tariff . . . accepted by the Commission.” *Id.* at P 25 & n.38, JA____; *see* FERC Br. at 36. FERC also held that Petitioners “had every opportunity to raise objections to the transition auction mechanism during the initial RPM process.” Rehearing Order at P 37, JA_____.

Because Petitioners voluntarily surrendered their chance to contest PJM’s capacity auction rules on direct review, FPA § 313(b) compels dismissal here. *See Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (D.C. Cir. 2005).

II. PETITIONERS REQUEST RETROACTIVE REDUCTION OF A FILED RATE IN VIOLATION OF FPA § 206

“On its face, § 206(a) prohibits retroactive adjustment of rates.” *City of Anaheim v. FERC*, 558 F.3d 521, 523 (D.C. Cir. 2009). As the Supreme Court has explained,

[T]he Commission itself has no power to alter a rate retroactively. When the Commission finds a rate unreasonable, it “shall determine the just and reasonable rate . . . to be *thereafter* observed and in force.” This rule bars “the Commission’s retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.”

Ark. La. Gas Co. v. Hall, 453 U.S. 571, 578 (1981) (footnote and citations omitted).² Petitioners’ Complaint violates FPA § 206 in several ways and Petitioners’ attempts to escape the statutory bar against retroactive ratemaking fail.

A. *Auction-Based Rates Created Through Lawful Operation Of Tariff Rules Are Final When Auctions End*

Petitioners attempt to draw a distinction between their challenge against PJM’s transition auction rules *per se* and the rates created by adherence to those rules. FERC properly rejected that argument as a distinction without a difference, holding that “[t]he prices and obligations set in those auctions became set as of the date of the auctions, and PJM and the capacity resource providers had every right to rely on those prices and obligations in making their decisions, including any capacity commitments and investment decisions.” Dismissal Order at P 28, JA____. Moreover, FERC’s “determination not to revise auction-determined rates and service obligations is not only consistent with the FPA, and the structure of RPM, but is in accord with Commission precedent in dealing with other challenges to rates determined through bidding procedures” *Id.* at P 32 & nn.46-49,

² *Ark. La. Gas* construed 15 U.S.C. § 717d, the Natural Gas Act counterpart of FPA § 206. Because the “relevant provisions of the two statutes are in all material respects substantially identical,” this brief follows the “established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes.” *Ark. La. Gas*, 453 U.S. at 577 n.7 (internal quotations and citation omitted).

JA____ (citing several FERC cases, including those affirmed in *Con Ed II*, 510 F.3d at 340, 342). Those cases uniformly hold that “prices created by operation of the tariff provisions must govern.” Rehearing Order at P 35, JA____-____. And as FERC now explains (Br. at 34-35), its approach to auction-based rates here accords with this Court’s analogous precedent concerning formula rates.

The question whether PJM’s auction results become final when an auction closes was squarely addressed months before the Complaint in *Duquesne Light Co.*, 122 FERC ¶ 61,039 (2008). In *Duquesne*, FERC rejected a utility’s claim that it should be released from the obligation to pay for capacity procured in PJM’s capacity auctions after its proposed withdrawal from PJM because the “obligation to pay the generators is fixed at the time of the auction.” *Id.* at P 89; *accord id.* at P 86 (“Duquesne’s obligations to pay . . . became set at such time as Duquesne’s loads were included by PJM in its auction parameters.”). FERC relied on *Duquesne* below for the proposition that ““market participants will make business decisions and enter into binding contracts, including financial hedges and bilateral arrangements, based on these auction parameters.”” Rehearing Order at P 25 & n.27 (quoting *Duquesne* at P 92). Together, *Duquesne* and the other cases discussed by FERC below destroy Petitioners’ claim that FERC arbitrarily and

capriciously dismissed the Complaint.³ This Court should affirm FERC’s central holding below, consistent with *Duquesne*, that auction-based rates set through lawful compliance with auction rules become final when auctions end.

B. Petitioners Failed To Show, Or Even Allege, A Tariff Violation

The principal reason FERC gave for dismissing the Complaint, in addition to denying it, was that “no party violated PJM’s tariff and the prices determined during the auctions were in accord with the tariff provisions governing the auctions.” Dismissal Order at P 23, JA____; *accord id.* at PP 25, 31, JA____, ____; Rehearing Order at PP 1, 6, 10, 21, JA____, ____, ____, ____). Petitioners repeatedly, and wrongly, argue this was not a sufficient reason to dismiss their Complaint. *See* Pet. Br. at 27-31. Indeed, only two weeks before the Complaint was filed, FERC dismissed an earlier complaint against PJM by Petitioner MDPSC because MDPSC sought retroactive relief without establishing, or even alleging, a tariff violation. *See Md. Pub. Serv. Comm’n v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169 at PP 53, 57 (2008) (“*MDPSC I*”).

³ Petitioners themselves have used *Duquesne* to argue the polar opposite of their position here. Two months before the instant Complaint, Petitioners successfully barred PJM from changing certain auction parameters weeks *before* an auction was held by arguing that participants had already relied on those parameters to make binding commercial commitments. *See* RPM Buyers’ Protest, *PJM Interconnection, L.L.C.*, Docket No. ER08-516, at 12 & nn.39-41 (Mar. 6, 2008) (quoting *Duquesne* at PP 86, 92).

Petitioners well understand that “[t]he Commission does not have authority to order retroactive relief unless [1] a party violates its tariff by charging a rate other than the filed rate, [2] parties agree to such relief, or [3] parties have notice that a rate is tentative and may be later adjusted with retroactive effect.” Answer of the RPM Buyers at 22 n.41 (July 28, 2008), JA____ (quoting *MDPSC I* at P 51 (quoting *Con Ed I*, 347 F.3d at 969)). No party ever agreed to change the PJM auction results retroactively, and Petitioners have wisely abandoned their argument that the RPM Orders included an “express promise” of retroactive relief, Request for Rehearing at 18 & n.57, JA____, an argument FERC squarely rejected. *See* Dismissal Order at P 27, JA____; Rehearing Order at P 37, JA____. Hence, FERC’s only remaining statutory basis for granting retroactive relief would have been to correct a violation of the filed rate. *See Con Ed I*, 347 F.3d at 972-75.⁴

Petitioners’ fatally concede that a tariff violation was “never the gravamen of [their] complaint,” Pet. Br. at 28; *accord id.* at 15, but caveat this concession in footnotes falsely claiming they did allege a tariff violation. *See id.* 15 n.3; *id.* at 28 n.5. Petitioners’ Complaint, at 46 & n.115, JA____, conjectured that PJM’s Market Monitor misestimated certain offsets for the last quarter of 2007, and that

⁴ In any event, FERC retains “remedial discretion” to decline refunds “even in the face of an undoubted statutory violation.” *Con Ed II*, 510 F.3d at 339 (quoting *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000)); *accord Towns of Concord*, 955 F.2d at 73, 76.

this forecast, although corrected before the one capacity auction that employed it, somehow increased the auction price outcomes. Petitioners later characterized this “apparent error” as a “tariff violation” in a footnote to the background section of their Rehearing Request, at 8 n.19, JA____. But Petitioners did not specify this contention on rehearing as required by FERC regulations, *see* 18 C.F.R. § 385.713(c)(2), or otherwise discuss it. This Court thus has no jurisdiction to consider it under FPA § 313(b). *See Wabash Valley Power Ass’n v. FERC*, 268 F.3d 1105, 1114 (D.C. Cir. 2001); *Cal. Dep’t of Water Res. v. FERC*, 306 F.3d 1121, 1126 (D.C. Cir. 2002) (“[Petitioner’s] footnote does not properly present, and thus does not preserve, the issue the intervenors wish to argue.”); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279-80 (D.C. Cir. 1997) (“The Commission need not sift pleadings and documents to identify arguments that are not stated with clarity by a petitioner.”) (internal quotations and citation omitted).

C. FERC’s Duty To Oversee Markets Cannot Obviate The Prohibition Against Retroactive Ratemaking

Petitioners broadly claim FERC’s refusal to permit retroactive modification of the transition auction rules “neglected” the agency’s statutory obligation to ensure that rates charged under those rules are just and reasonable, Pet. Br. at 27, because “no prospective rules changes can address the transitional period deficiencies,” *id.* at 32. They stress that FERC has a continuing “statutory duty to ‘engage in an active ongoing review’” of energy markets. *Id.* at 36-37 (quoting

California ex rel. Lockyer v. FERC, 383 F.3d 1006, 1017 (9th Cir. 2004); *see id.* at 17, 36 (quoting other cases for the same proposition). Petitioners further contend that this duty obliges FERC to change PJM’s auction results retroactively if the “end result” of the auction produces an excessive rate. *See* Pet. Br. at 17, 27, 36 (citing, *inter alia*, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)). Petitioners’ analysis misreads governing precedent.

No one quarrels with the proposition that FERC has a duty to oversee markets and to change rates *prospectively* if the “end result” of a rate methodology is unjust or unreasonable. It is long-settled, however, that “the right to a reasonable rate is the right to the rate which the Commission files or fixes.” *Ark. La. Gas*, 453 U.S. at 577 (quoting *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)), and *none* of the cases Petitioners cite even remotely purport to challenge the ironclad rule that FPA § 206 bars retroactive ratemaking. *See, e.g., Hope Natural Gas*, 320 U.S. at 618 (“[T]he Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those ‘to be thereafter observed and in force.’”). Petitioners’ dissatisfaction with the law on the ground that “prospective changes . . . provide no remedy,” Pet Br. at 32, is a complaint best addressed to Congress, not FERC or this Court. *See Towns of Concord*, 955 F.2d at 73 (rejecting a similar *ubi jus, ibi remedium* argument).

III. PETITIONERS' COMPLAINT MANIFESTLY FAILED TO MEET THE TWIN BURDENS UNDER FPA § 206

A complainant under FPA § 206 must carry two burdens: first, it must demonstrate that an existing rate is not just and reasonable; second, it must establish that a proposed replacement rate is just and reasonable. *See Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009) (citing *Atl. City Elec. Co v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002)); Rehearing Order at P 17 n.18, JA ____ (citing FERC cases). Failing to meet either burden is fatal.⁵ And FERC correctly found that Petitioners failed on both counts.

A. The Auction Rules And Rates Are Just And Reasonable

The Complaint alleged a wide variety of defects in PJM's transition auction rules. *See* Dismissal Order at PP 12, 25, JA____, _____. On review, these contentions narrow to one—that the transition auctions were tainted by an *opportunity* to exercise market power because, unlike post-transition auctions, existing suppliers were not constrained by competition with potential new suppliers. *See* Pet. Br. at 18-19, 32-33.

⁵ Petitioners wrongly claim *Blumenthal* is not binding and that they are not required to prove that their proposed rates are reasonable because “the FPA’s clear language” places that burden on FERC. Pet Br. at 48-49; *accord id.* at 50 n.6. It is black-letter law in all FERC rate proceedings “that the proponent of change bears the burden.” *Pub. Serv. Comm’n v. FERC*, 866 F.2d 487, 488 (D.C. Cir. 1989).

As FERC has ably explained below and on brief, Petitioners “offered nothing other than suggestions and speculation” that “do not meet the burden of proof that a section 206 complainant must meet.” Rehearing Order at P 13, JA____. In contrast, FERC identified substantial evidence (and more) supporting its conclusion that the auction outcomes were competitive. *See* FERC Br. at 42-47; Dismissal Order at P 30, JA____; Rehearing Order at PP 13, 30, 33, JA____, _____, _____. This Court “defers to the Commission’s resolution of factual disputes between expert witnesses.” *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1236 (D.C. Cir. 2005), *quoted in Me. Pub. Utils. Comm’n v. FERC*, 520 F.3d 464, 475 (D.C. Cir. 2008) (“FERC was entitled to reject [Petitioner’s] evidence and to base its conclusion on different evidence in the record.”), *rev’d in part on other grounds, NRG Power Mktg., LLC v. Me. Pub. Utils. Comm’n*, 130 S. Ct. 693, 700 (2010). Petitioners’ substantial evidence arguments therefore miss the mark.

B. Petitioners’ Retroactive Ratemaking Methodology Is Unjust And Unreasonable

FERC explicitly held that the retroactive rate reductions Petitioners proposed threatened serious harm to the PJM market, summarizing its holding as follows:

RPM Buyers have failed to show that if the Commission did revise the rates as they suggest, a sufficient number of sellers would commit capacity to PJM to satisfy PJM’s reliability requirement. We cannot find that a replacement rate that may jeopardize PJM’s ability to provide reliable service is just and reasonable. . . . RPM Buyers’ proposal would undercut the very reliance on prices that RPM was

designed to produce, so as to induce capacity suppliers to enter PJM and stay in PJM, thus contradicting the purpose of RPM.

Rehearing Order at P 18, JA____. Indeed, because Petitioners desire more extreme rate reductions than they originally proposed, *see* Pet. Br. at 50 n.6, Petitioners themselves “do not concede that the[ir] rates are just and reasonable.” Rehearing Order at P 17, JA____ (quoting Complaint at 78, JA____).

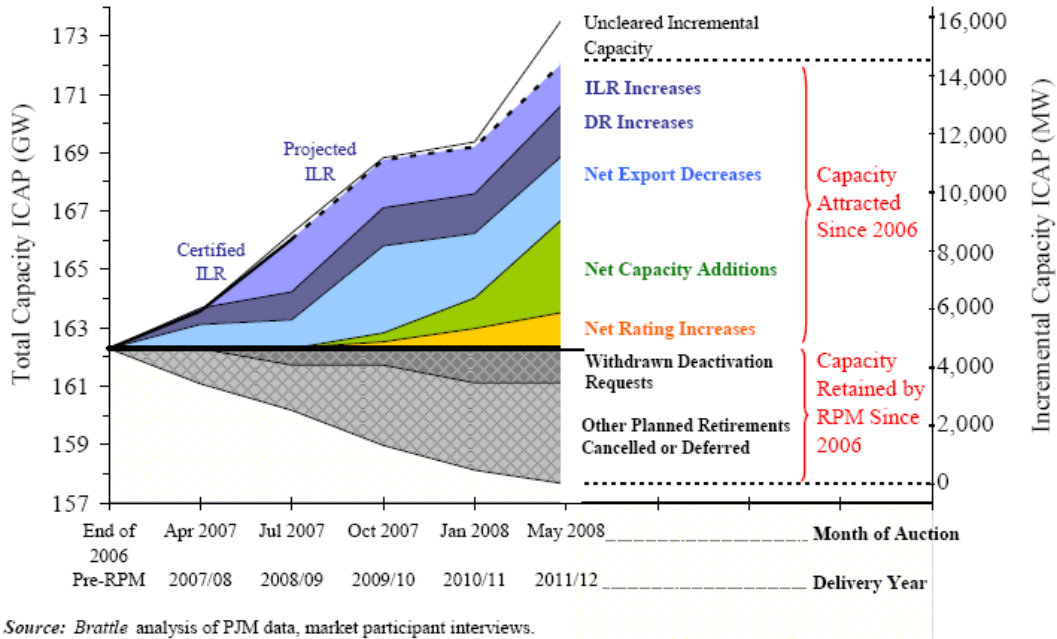
Petitioners attack FERC’s cogent reasoning by claiming there was no evidence showing actual reliance on the auction outcomes. *See* Pet. Br. at 38-47. In Petitioners’ view, absent a showing of actual reliance, auction outcomes remain squarely in the crosshairs of complainants seeking retroactive change. Petitioners effectively seek an asymmetric, unilateral option, allowing purchasers (but not suppliers) to escape their obligations for the short-run advantage of reducing prices whenever they can show a lack of actual reliance by any particular supplier. *But cf. Morgan Stanley Capital Group, Inc. v. Pub. Util. Dist. No. 1*, 128 S. Ct. 2733, 2747 (2008) (holding that same standard governs challenges by either buyers or sellers). In reality, however, this “option” will not be free. The prospect of such opportunistic behavior will necessarily add a risk premium to auction outcomes, levying a deadweight tax upon the market as a whole—and ultimately threatening reliability across the entire region. This is not in the public interest, and is precisely what FERC sought to avoid in dismissing the Complaint.

As FERC explained, an “actual reliance” test would destroy “the larger purpose of the RPM program, which is to provide assurance to both suppliers and buyers, on a forward basis, as to what their capacity obligations, costs and revenues will be.” Rehearing Order at P 27, JA____. The entire auction “mechanism would be rendered ineffective if, after any particular auction, those expectations could be upset by a showing that one or more suppliers did not specifically rely on the auction results in its business planning.” *Id.* Furthermore, “this process would be extraordinarily time-consuming and litigious as each party would have to document its investments and lost opportunities.” *Id.*

In any event, FERC did establish reliance, citing expert evidence in the Brattle Report⁶ and testimony of PJM’s Market Monitor that PJM’s auction mechanism both (i) retained substantial amounts of capacity that would otherwise have been retired and (ii) attracted substantial amounts of new capacity. *See id.* at P 23 & n.25, JA____; Dismissal Order at P 24 & nn.34-36, JA____. The change in supplier behavior is strikingly clear in the Brattle Report figure below, which graphically displays the data on reliance FERC discussed in its orders:

⁶ The Brattle Report, filed by PJM in a related case, is attached as Addendum C.

Committed Additional Resources and RPM Retained Capacity in PJM



Answer of PJM Power Providers Group, Aff. of Robert B. Stoddard at ¶ 80 (July 10, 2008), JA_____.

The reality is that both suppliers and buyers have the opportunity to, and do, make commercial decisions before, during and after PJM’s capacity auctions—all of which would be undercut if auction prices were subject to retroactive challenge. It is self-evident that suppliers who “participated in the transitional auctions gave up the opportunity to use their capacity to make bilateral sales of capacity or to participate in other RTO capacity markets.” Dismissal Order at P 28, JA____; Rehearing Order at PP 24, JA____; *see also id.* at P 25 (quoting *Duquesne* at P 92). The auction outcomes also provided valuable price discovery that necessarily informed commercial decision-making. In fact, Maryland utilities acting under the

auspices of Petitioner MDPSC requested proposals—some after the auctions in dispute—to supply capacity and energy for some of the *same delivery periods* covered by the auctions. *See, e.g.*, Protest of Allegheny Energy Supply Co., LLC at 25-26 (July 11, 2008), JA____. Participants in this bilateral process necessarily relied on prior auction outcomes in deciding whether and how to transact.

At this point, moreover, suppliers already have fully performed their capacity obligations for the 2007-2008, 2008-2009, and 2009-2010 delivery years and the region has already benefited from the reliability that those obligations provided. FERC and this Court frown on attempts to impose alternative pricing regimes “after reliability is preserved.” *Con Ed II*, 510 F.3d at 338. Petitioners provide no explanation of how they would “unscramble the auction results,” *cf.* RPM Buyers’ Protest, *supra* note 3, at 24, and none is apparent.

IV. *THIRD-PARTY CHALLENGES TO AUCTION-BASED RATES ARE GOVERNED BY MOBILE-SIERRA*

Petitioners attack PJM’s transition auction rates under the “ordinary” just-and-reasonable standard. *Morgan Stanley*, 128 S. Ct. at 2740. FERC applied that standard in denying Petitioners’ Complaint on the merits. However, the Supreme Court’s recent decision in *NRG Power* indicates the Complaint is instead subject to the higher burden required under the *Mobile-Sierra* public interest standard because Petitioners are non-contracting third-party “state utility commissions . . . acting *parens patriae*.” 130 S. Ct. at 701. Unless this Court holds otherwise on

remand from *NRG Power* in Nos. 06-1403, *et al.* (scheduled for argument on Sept. 20, 2010), the rates established through PJM’s capacity auctions are contract rates subject to *Mobile-Sierra*. See U.C.C. § 2-328(1)-(2) (2009); *Restatement (Second) of Contracts* § 28(1)(a)-(b) (1981); 1 R. Lord, *Williston on Contracts* § 4:12, at 515-40 (4th ed. 2007). As such, the auction results are presumed just and reasonable and cannot be set aside unless “FERC concludes that the contract seriously harms the public interest.” *Morgan Stanley*, 128 S. Ct. at 2737.

The “animating purpose of the [*Mobile-Sierra*] doctrine” is the “promotion of ‘the stability of supply arrangements which all agree is essential to the health of the [energy] industry.’” *NRG Power*, 130 S. Ct. at 701 (quoting *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956)). Because nothing could be more adverse to this “animating purpose” than abrogating contracts created through auctions that conform with FERC-approved rules, *Mobile-Sierra* provides yet another reason for affirming the Commission’s dismissal of Petitioners’ Complaint. The Court thus should review Petitioners’ claims here under *Mobile-Sierra*,⁷ rendering Petitioners’ claims even more clearly meritless.

⁷ Neither the pleadings nor the orders below addressed *Mobile-Sierra*. However, *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), does not bar *Mobile-Sierra* review here because application of that standard is required by Supreme Court precedent. See *Morgan Stanley*, 128 S. Ct. at 2745.

CONCLUSION

For the reasons set forth above, the petition for review should be dismissed, or alternatively, denied.

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CERTIFICATE AS TO LENGTH OF BRIEF

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Circuit Rule 32(a)(2), and the briefing order issued by the Court on March 15, 2010, I hereby certify that the foregoing document contains less than 4,250 words, not including the tables of contents and authorities, glossary, and certificates of counsel.

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June 28, 2010

ADDENDUM

FERC Rule of Practice and Procedure 713, 18 C.F.R. § 385.713(c), provides as follows:

(c) Content of request. Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a), which are applicable to pleadings, and, in addition, include a separate section entitled “Statement of Issues,” listing each issue in a separately enumerated paragraph that includes representative Commission and court precedent on which the party is relying; any issue not so listed will be deemed waived; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.