ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the Third Circuit

Nos. 21-3068, 21-3205, 21-3243
(consolidated)

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW
OF ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

RESPONSE OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION OPPOSING PETITIONERS' MOTION TO STRIKE

MATTHEW R. CHRISTIANSEN
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

JARED B. FISH
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, DC 20426

SEPTEMBER 19, 2022

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES: **PAGE**

TABLE OF AUTHORITIES

STATUTES: **PAGE**

COMMISSIONER SECTION 205(g) STATEMENT:

In the United States Court of Appeals for the Third Circuit

Nos. 21-3068, 21-3205, 21-3243
(consolidated)

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW
OF ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

RESPONSE OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION OPPOSING PETITIONERS' MOTION TO STRIKE

INTRODUCTION

The Generators'[1] Motion to Strike, filed on September 7, 2022, fails to acknowledge, much less grapple with, Congress' specific statutory directive designed to address the exact circumstance in this appeal. As Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") has explained, starting in the first pages of its July 22 answering brief, its position in this Court, defending the

[1] The Generators are Petitioners PJM Power Providers Group ("P3") and Electric Power Supply Association ("Association).

lawfulness of the PJM-filed rate change (the Focused MOPR), flows directly from the Federal Power Act's text: agency inaction resulting from a 2-2 Commissioner deadlock "shall be considered to be an order issued by the Commission accepting the [rate] change[.]" Federal Power Act Section 205(g)(1)(A), 16 U.S.C. §824d(g)(1)(A).

In filing its answering brief—and this responsive pleading—the Commission has, at all times, been faithful to that statutory text. Congress decreed that there be meaningful judicial review when the agency deadlocks and cannot issue a majority-voted order. The Commission, through its lawyers, has followed Congress' instructions by defending what Congress defines to be an "order issued by the Commission" in such circumstance: one that "accepts" the filed rate change for purposes of judicial review. Not surprisingly, the agency's answering brief, here and in a second case that presents a judicially reviewable agency deadlock, defends the filed rate's lawfulness. It does so, after recognizing all Commissioner statements,[2] on the basis of the

[2] *See* FERC Br. 24–31 (describing statements). In addition, the Commission filed with its July 22 answering brief a Supplemental Appendix providing the full text of the statements from all four voting Commissioners.

Commissioner statement or statements—whether authored by the Chairman or not—that defends the filed rate. In fact, as discussed *infra* p.7, in that second pending appeal the Commission takes the *opposite* position to that of the Chairman because, there too, it is defending the filed rate's lawfulness in court.

The Court should deny the Motion to Strike.

ARGUMENT

I. The Generators' Motion to Strike ignores Congress' text

A. Section 205(g)(1)(A) prescribes that agency *in*action due to a 2-2 deadlock is an institutional order of FERC

In the typical case, "[a]ctions of the Commission shall be determined by a majority vote of the [Commissioners] present." 42 U.S.C. §7171(e). But this is not the typical case. Where, as here, the Commission deadlocks 2-2 on a rate filing, Congress has prescribed that such event *is* agency action *accepting* the rate filing. Section 205(g)(1)(A) provides that "the failure to issue an order accepting or denying the [rate] change by the Commission *shall be considered to be an order issued by the Commission* accepting the change[.]" 16 U.S.C. §824d(g)(1)(A) (emphasis added); FERC Br. 2, 23–24, 46–47, 50–51, 93.

The Generators do not cite—let alone discuss—Section 205(g)(1)(A). Only by ignoring Congress' specific definition of agency action in the peculiar context of 2-2 deadlocks can the Generators declare the absence of a "valid" order "of the Commission" for FERC's lawyers to defend. *See* Generators' Motion to Strike ("Mot.") at 5 (cleaned up).

The Generators' position is irreconcilable with Congress' intent. *First*, the whole point of enacting Section 205(g) in 2018 was to override *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016). *See* FERC Br. 44–46, 56, 59. There, the court held that no Commission order existed for it to review because agency inaction due to a 2-2 deadlock did not constitute agency action under Section 7171(e). *Pub. Citizen*, 839 F.3d at 1169. Accordingly, the court dismissed the petition for review without addressing the merits. *Id*. at 1167.

The Generators' claims on appeal—reiterated in their Motion to Strike—assume the *Public Citizen*-era statutory context, *see* Mot. 5–6, and they ignore the legislation Congress enacted in direct response to the court's decision. To avoid a *Public Citizen*-like scenario repeating itself, Congress was explicit that agency inaction due to a 2-2 tie *is* "an

order issued by the Commission" subject to meaningful, on-the-merits judicial review. *See* §824d(g)(1)(A), (g)(2); FERC Br. 45–46, 49, 51, 57. And given the conflict between Section 7171(e) and Section 205(g), the latter statutory provision controls under the settled canon that specific provisions prevail over more general ones. *See* FERC Br. 54–55 (quoting *Superior Oil Co. v. Andrus*, 656 F.2d 33, 36 (3d Cir. 1981)).

Second, the Generators gain no traction by observing that agencies' "institutional decisions" are generally majority-voted orders. Mot. 5–6 (cleaned up). As noted above, that is generally true. But this is no ordinary case. Congress codified FERC's institutional decision in this circumstance to be something quite different. Indeed, it is Congress—not the FERC Chairman, another Commissioner, or FERC's lawyers—that has directed the institutional determination here: the Commissioners' "failure to issue an order … shall be considered to be an order issued by the Commission accepting the [rate] change[.]" §824d(g)(1)(A); FERC Br. 54, 68. Accordingly, the Generators' citation to authorities for the proposition that the Commission "speaks through, and only through, its orders" (Mot. 9 (cleaned up)), is beside the point: here, the Commission *has* spoken through its "order," as Congress

defined that term in Section 205(g), via its judicially reviewable acceptance of the Focused MOPR.

B. The Commission's merits brief defends the FERC "order"

According to the Generators, FERC's brief cannot be "for FERC" because, they allege, it elevates the joint view of two Commissioners (that of Chairman Glick and Commissioner Clements, accepting the Focused MOPR) over the divergent views of two other Commissioners (those of Commissioners Christie and Danly, rejecting the Focused MOPR). *See* Mot. 6. But it was Congress—not the Chairman—that determined that a 2-2 deadlock "shall be considered to be an order issued by the Commission *accepting the [rate] change* …." §824d(g)(1)(A) (emphasis added); FERC Br. 47, 51–52. That acceptance by the Commission is the "order" that Respondent FERC's brief defends on appeal, with reference to the Commissioners' Section 205(g)(1)(B) statements that support that outcome. FERC Br. 50–52, 93 (discussing §824d(g)(1)(B)). The Commission's brief in this case simply defends the agency's action as Congress defined it using the record that supports that decision.

A similar case also involving a 2-2 split provides a complete answer to the Generators' contention that FERC's Chairman has acted improperly or in a manner that elevates his views over those of his colleagues on the Commission. *See* Mot. 7, 19. In that matter, now pending before the D.C. Circuit, the Commission's lawyers are taking a legal position contrary to that of the Chairman—for the same reasons described above. *See Advanced Energy Econ. v. FERC*, No. 22-1018 (D.C. Cir.). In *Advanced Energy Economy*, the Chairman voted to reject what became the filed rate. *See Ala. Power Co.*, "Statement of Chairman Glick," FERC Dkt. Nos. ER21-1111, *et al.*, P 4 (Oct. 20, 2021), *available at* https://tinyurl.com/yr63zb2p. Heeding Congress' instruction, the Commission's lawyers are, in that appeal, defending the filed rate's lawfulness, relying on the statements of the Commissioners that supported that outcome. These facts illustrate that nothing in the Commission's approach to Section 205(g) proceedings supports the Generators' suggestion that, unless the Court expunges FERC's brief here, the Chairman might order FERC's lawyers to defend his own dissenting view in the future—even in the context of a majority-voted order. *See* Mot. 18.

The Generators also warn that failure to strike FERC's brief would free the Chairman to tell FERC's lawyers which arguments to make or waive, irrespective of the agency's administrative actions. *Id*. at 11–12. But as discussed above, the Commission has taken a principled position that implements the statutory scheme Congress enacted in Section 205(g). That approach applies whether or not the Chairman supports the particular outcome in question. Moreover, the Generators' professed concern has nothing to do with deadlocked votes specifically; it would presumably apply to all Commission orders—including majority-voted ones. In fact, it would apply whenever lawyers defend *any* agency action. Yet the Generators indicate that their concerns do not apply in the context of majority-voted orders. *See id*. at 4.

In any event, 80 years ago the Supreme Court established a doctrine that allows courts to consider whether an agency's litigating position coheres with its administrative decision: *SEC v. Chenery*, 318 U.S. 80, 87 (1943). The Court is perfectly capable of assessing the persuasiveness of the Commission's arguments on appeal; it need not *ex ante* blind itself to them.

* * *

With the statute and facts properly understood, the Generators' constitutional argument (Mot. 13–19) is meritless. Their contention that the Chairman overstepped his constitutional authority rests on a fallacy: that the Chairman violated, among other things, "FERC's organic statute" by "direct[ing]" agency lawyers to file the July 22 answering brief. *See* Mot. 13. They are wrong. The agency's lawyers filed a brief consistent with, not violative of, the governing statute. The Generators' constitutional claim is really a disguised disagreement with Congress' explicit instruction that agency inaction due to a 2-2 deadlock "shall be considered to be an order issued by the Commission accepting the [rate] change[.]" §824d(g)(1)(A).[3]

C. The purpose of Section 205(g)(1)(A) is to ensure meaningful, on-the-merits judicial review

The Generators' failure to mention Section 205(g)(1)(A) is not surprising in at least one respect: in their separate reply briefs, the Association and P3 disagree on its meaning.

[3] The Generators nowhere claim that Congress lacked the constitutional power to direct, as it did, that a 2-2 deadlock constitutes a Commission order accepting the filed rate.

Section 205(g)(1)(A) provides that "failure to issue an order accepting or denying the [rate] change by the Commission" due to a 2-2 deadlock "shall be considered to be an order issued by the Commission accepting the change *for purposes of section [313](a) of this title*." §824d(g)(1)(A) (emphasis added). In its reply brief, the Association argues that the italicized phrase means "'for purposes of [judicial review].'" Ass'n Reply Br. 10 (brackets in original; quoting §824d(g)(1)(A)). The Association thus appears to agree with the Commission that an "order" as defined by Section 205(g)(1)(A) is a judicially reviewable order. *See* FERC Br. 47–48.

P3 thinks differently. In its reply brief, P3 argues that an "order" under Section 205(g)(1)(A) is an order only for the narrow purpose of "preserving parties' procedural rights" and allowing "parties to seek rehearing under [Federal Power Act] section 313(a)[.]" P3 Reply Br. 13–15. Thus, P3 suggests, an "order … for the purposes of section [313](a)" is not a Commission order for purposes of judicial review. *See id*. at 15–16.

P3 "slices the salami too thinly." *Cf. Allegheny Def. Project v. FERC*, 964 F.3d 1, 12 (D.C. Cir. 2020) (en banc). As our merits brief explains, the core purpose of Federal Power Act Section 313(a), 16 U.S.C.

§825*l*(a), is to establish the condition precedent to securing on-the-merits judicial consideration of a Commission order. *See* FERC Br. 47–48. Thus, the D.C. Circuit (sitting en banc) had no difficulty concluding that the Natural Gas Act analog to Section 313(a) "speaks directly to federal court jurisdiction to review Commission orders." *Allegheny*, 964 F.3d at 12.[4] Section 313(a)'s legal force is not restricted to mere conferral of a procedural right to seek agency rehearing.

Section 205(g) changes none of this. In enacting that provision, Congress required parties to adhere to the rehearing and judicial review procedures set forth in Sections 313(a) and 313(b). *See* §824d(g)(1)–(2) (incorporating by reference Section 313(b), §825*l*(b), which vests in the court of appeals "jurisdiction … to affirm, modify, or set aside [an] order" "issued by the Commission"); FERC Br. 48–49. And, lest there be any doubt, the congressional record explicates Congress' express intent that Section 205(g) guarantee what *Public Citizen* held to be otherwise

[4] *Allegheny* concerned the Natural Gas Act. But "'[b]ecause the [Natural Gas Act] is modeled substantively after the [Federal Power Act], they are interpreted similarly.'" *Allegheny*, 964 F.3d at 16 (quoting *City of Clarksville v. FERC*, 888 F.3d 477, 484 (D.C. Cir. 2018)); *accord* FERC Br. 36 n.4. The Natural Gas Act analog to Federal Power Act Section 313(a), 16 U.S.C. §825*l*(a), is Section 19(a), 15 U.S.C. §717r(a).

absent—meaningful judicial review of a Commission's default acceptance of the filed rate due to a 2-2 split. *See* FERC Br. 45–46, 50–51, 56, 59. Thus, in providing that agency inaction due to a deadlocked vote "shall be considered to be an order issued by the Commission accepting the [rate] change for purposes of section [313](a)," Congress intended such an order to be subject to judicial review just like a majority-voted order: on the merits.

II. The Generators' proposed compromise is inconsistent with the adversarial process underlying appellate review

The Generators purport to offer a compromise. They invite the Commission's lawyers to "confine [themselves]" to "fil[ing] a brief that describes in detail the proceedings below." Mot. 9–10. Meanwhile, the Generators would press on with their own merits arguments. This unequal posture, the Generators assure the Court, suffices for the Court to decide the issues in dispute. *See id*. at 9.

The Supreme Court says otherwise. "In our adversarial system of adjudication, [the courts] follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). "[I]n both civil and criminal cases, in the first instance and on appeal, [the

courts] rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id*. (cleaned up). The Generators' Motion to Strike is irreconcilable with this core precept. Instead of having the "part***ies*** … frame the issues," the Generators seek to reserve that privilege for themselves, crippling Respondent FERC's ability to defend its order.

The Generators nevertheless argue that this lopsided and prejudicial arrangement allows the Court to decide the case as it would any other. *See* Mot. 9 (arguing that the Court could, under their formulation, still decide whether the Focused MOPR "should be set aside"). Yet such an outcome is alien to our adversarial system. "[C]ourts normally decide only questions presented by the part***ies***," who "are responsible for advancing the facts and argument entitling them to relief." *Sineneng-Smith*, 140 S. Ct. at 1579 (emphasis added; cleaned up). It would disserve the judicial process if the Court were presented with only one side's arguments. The upshot of the Generators' Motion is substantial injury to two of the three primary players on appeal: the Court and Respondent FERC. The Commission's right to defend its

order, and the benefit to the Court of a true contest on the issues, should not be sacrificed so breezily.

The Generators attempt to shore up this unequal arrangement by suggesting that the adversarial process is vindicated by the participation of intervenors supporting the Commission. *See* Mot. 10. But it goes without saying that the named Respondent is entitled to mount a defense to a lawsuit filed *against it*; the Commission need not delegate the defense of its actions to a third party, which may have very different institutional interests even if it supports the same ultimate outcome. This conclusion is also compelled by the statutory text. Congress provided that an agency deadlock constitutes an "order issued by the Commission," and prescribed a process for judicial review of such agency order. §824d(g)(1)(A), (g)(2). There is simply no textual (or logical) basis to reason that Congress intended to deprive the Commission of the ability to defend its own order on judicial review. *Contra* Mot. 10.

Worse, the Generators' recruitment of intervenors to create adversity where none would otherwise exist under their Motion runs afoul of Article III's case or controversy requirement. It is axiomatic

"that an actual controversy must exist … at the date the action is initiated" for a court to assert jurisdiction over a matter. *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974) (cleaned up); *see also Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("[F]or federal-court adjudication, an actual controversy must be extant … at the time the complaint is filed." (cleaned up)). Yet the Generators' Motion to Strike is premised on the notion that FERC as an agency issued no decision—let alone took a position—on the Focused MOPR that could give rise to a controversy *with* Respondent FERC. *See* Mot. 5–7 (arguing that "FERC could not make an institutional decision on the [Focused MOPR]" (cleaned up)). Thus, under the Generators' theory of the case, "at the date the[ir] action [was] initiated"—i.e., when FERC was the only named opposing party—there was no case or controversy between the parties. *See DeFunis*, 416 U.S. at 319. *Cf. Planned Parenthood of Wisc., Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019) (distinguishing "the named party" from "the prospective intervenor"); *Doe v. Pub. Citizen*, 749 F.3d 246, 257 (4th Cir. 2014) (similar). The later participation of intervenors cannot retroactively manufacture adversity at the time of the appeal's inception.

III. The Motion to Strike is untimely

Finally, the Motion to Strike is untimely. The Generators had several opportunities to argue that the Commission should be deprived of the right to file a merits brief and present oral argument. They could have included the argument in their opening briefs or even before then.[5] At the very least, the Generators were obliged to raise the claim in their reply briefs—after FERC *had* filed a merits brief. *See*, *e.g.*, *Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield*, 890 F.3d 445, 455 (3d Cir. 2018) (argument waived where not addressed in the reply brief).

Accordingly, besides being prejudicial to Respondent FERC and legally baseless, the Generators' Motion to Strike is also untimely. And because it advances arguments the Generators could have raised earlier, the Motion constitutes an impermissible expansion of their

[5] The Generators, both before and during briefing, argued for expedited disposition. Now, by insisting on a decision whether Respondent FERC can represent itself at oral argument, their motion likely serves to delay the date of oral argument and ultimate decision. (The Court denied the Generators' initial motion for expedition, *see* Order, Nos. 21-3068, *et al*. (3d Cir.), Doc. No. 82 (Dec. 21, 2021), and the Generators' second similar motion is pending with the Court, *see* FERC Response, Nos. 21-3068, *et al*. (3d Cir.), Doc. No. 160 (Aug. 5, 2022).)

briefing word count under the briefing format and schedule this Court approved. *Cf. id*. The Court should deny the Motion to Strike on these bases alone.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Strike.

Respectfully submitted,

Matthew R. Christiansen
General Counsel

Robert H. Solomon
Solicitor

/s/ Jared B. Fish
Jared B. Fish
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel.: (202) 502-8101
E-mail: Jared.Fish@ferc.gov

September 19, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this pleading complies with the type-volume limitation in Fed. R. App. P. 27(d)(2)(a) because it contains 3,082 words, excluding the parts of the pleading exempted by Fed. R. App. P. 32(f).

I further certify that this pleading complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this pleading has been prepared in New Century Schoolbook 14-point font using Microsoft Word 365.

I further certify that, pursuant to Circuit Rule 31.1(c), this electronic pleading was scanned for viruses using VirusTotal and that no viruses were detected.

/s/ Jared B. Fish
Jared B. Fish
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel.: (202) 502-8101
E-mail: Jared.Fish@ferc.gov

September 19, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on September 19, 2022. Participants in the case will be served by the appellate CM/ECF system.

/s/ Jared B. Fish
Jared B. Fish
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel.: (202) 502-8101
E-mail: Jared.Fish@ferc.gov