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

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

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RESPONDENT-INTERVENORS' RESPONSE TO MOTION TO STRIKE FERC BRIEF

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INTRODUCTION

P3 and EPSA's ("Petitioners") motion to strike is both procedurally improper and substantively wrong. Procedurally, Petitioners should have advanced their arguments in their reply brief.

Substantively, Petitioners' motion is predicated upon the same false premise as their merits argument: that the Commission itself has made no "institutional decision[]" regarding the Section 205 filing because the Commissioners deadlocked. Mot. at 5; P3 Reply Br. 10 ("FERC has issued no orders *at all* in this proceeding"); EPSA Reply Br.1 (stating that Section 205(g) does not change rule that "only a majority of a multi-member commission can act on behalf of body as a whole"). If the Commission really had made no institutional decision, then there would be no final agency action and this Court would have no jurisdiction. *See Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1168-1170 (D.C. Cir. 2016). But Section 205(g), 16 U.S.C. § 824d(g), deems the deadlocked vote *to be agency action* for purposes of judicial review. And not just agency action in the abstract: rather, it deemed the deadlocked vote to be "*an order issued by the Commission* accepting the change" for purposes of rehearing and judicial review. 16 U.S.C. § 824d(g)(1)(A) (emphasis added). In

conducting that review, Section 205(g) allows the Court to refer to the joint statement by the two Commissioners who voted in favor of the proposed change as a basis to sustain it: that statement provides the reasons why there was "an order by the Commission accepting the change." 16 U.S.C. § 824d(g)(1)(A), (B).

Thus, Petitioners are wrong to argue that the Commission's brief "did not in fact accurately reflect the view of the Commission as a legal entity." Mot. at 1. The brief defended an "order issued by the Commission" by explaining the reasoning that led to the issuance of that order, as articulated in the Joint Statement. Congress made the decision that, under Section 205, a tie vote results in an order accepting the change, rather than an order rejecting the change.

Nothing in the Department of Energy Organization Act bears on the specific situation at issue here: a Section 205 filing that results in a deadlocked vote. Of course, the Commission generally makes "official legal policy and positions by a majority vote." Mot. at 1. But that rule is what led to the holding in *Public Citizen*, finding no agency action—and thus no jurisdiction—when the Commission deadlocked on a Section 205 filing. Congress passed Section 205(g) to address that specific scenario

by changing the rules that govern it. It would be illogical for Congress to have made a tie vote by the Commission on a proposed tariff change under Section 205 judicially reviewable as "an order issued by the Commission accepting the change," 16 U.S.C. § 824d(g)(1)(A), but then deny the Commission itself any ability to defend the merits of that order.

Petitioners also rehash their meritless Appointments Clause argument in a new form. The Chairman has not "unilaterally set the agency's litigation position." Mot. at 2. The agency's litigation position is consistent with, and defends, the "order issued by the Commission," which Petitioners challenge in this Court. And the agency's brief explains the rationale of the two Commissioners who voted for that order, which Congress directed to be placed in the agency record, and on which the Court can rely to sustain that order. The motion to strike should be denied.

BACKGROUND

This case concerns the Commission's order accepting PJM Interconnection L.L.C.'s ("PJM") tariff revision—which the briefs refer to as "the Focused MOPR"—submitted by PJM pursuant to Section 205(d). *See* 16 U.S.C. § 824d(d). If the Commission does not act on a tariff

revision under Section 205(d) within a specified time period, the revision takes effect without any agency action. *See Pub. Citizen*, 839 F.3d at 1168-1170.

In 2018, Congress amended the Federal Power Act to facilitate judicial review when the Commission fails to act on a tariff revision due to a deadlocked vote or lack of quorum. In those circumstances, the new provision, Section 205(g), states that FERC's failure to act "shall be considered to be an order … accepting the [tariff] change" for purposes of rehearing and judicial review. 16 U.S.C. § 824d(g)(1)(A). Section 205(g) also requires each Commissioner to "add to the record of the Commission" a written statement explaining their votes. 16 U.S.C. § 824d(g)(1)(B). These statements allow the court to conduct a meaningful review on the merits of the "order … accepting the change." 16 U.S.C. § 824d(g)(1)(A). *See* S. Rep. No. 115-278, at 4 (2018) (provision intended to "compile an adequate administrative record of the proceeding for a court to review").

The Commission order at issue in this case was issued pursuant to Section 205(g). PJM's proposed tariff revision resulted in a deadlocked vote at the Commission. The Commission issued a notice stating that the revised tariff became effective by operation of law (the "Acceptance

Order"). Under Section 205(g), that notice is deemed to be an "order issued by the Commission accepting the change." 16 U.S.C. § 824d(g)(1)(A). Chairman Glick and Commissioner Clements jointly issued an 86-page statement (R.125, the "Joint Statement," JA37-124) providing their reasoning for accepting PJM's tariff filing.

Petitioners filed an opening brief arguing that Section 205(g) requires automatic vacatur of the Commission's Acceptance Order based on the view that the Acceptance Order was not supported by any reasoning (an outcome that would, under Petitioners theory, necessarily result from any order issued under Section 205(g)). Petitioners also argued that, on the merits, the Focused MOPR is unjust and unreasonable. The Commission's brief responded to both claims, defending its Acceptance Order by asserting an interpretation of Section 205(g) consistent with that of the PJM Intervenors and arguing that, on the merits, PJM's tariff change was just and reasonable. Petitioners have now moved to strike the Commission's brief.

ARGUMENT

Petitioners' motion is both procedurally improper and substantively flawed. Procedurally, Petitioners point to no rule that permits their

motion, and they do not approach the stringent standard that applies to motions to strike when they are authorized by rule. Substantively, Petitioners' motion is built on the same foundational error as their brief. It begins with the erroneous premise that the Commission, as an entity, has taken no position regarding PJM's tariff revision. From that premise, Petitioners claim that multiple problems follow: first, that the Chairman and Commission counsel have exceeded their statutory authority by directing the Solicitor to file a brief defending the Commission's Acceptance Order on the merits; and second, that the Commission's defense of the Acceptance Order raises constitutional concerns. Petitioners' starting premise is unsound because the Commission has acted: it issued a judicially reviewable "order" pursuant to Section 205(g), and Commission counsel is duty-bound to defend that Commission action.

I. Petitioners' Motion to Strike is Procedurally Improper.

"One can search the Federal Rules of Appellate Procedure in vain without finding any provision for a 'motion to strike' whole documents." *Custom Vehicles, Inc. v. Forest River, Inc.*, 464 F.3d 725, 726–27 (7th Cir. 2006). The Third Circuit's rules do not have such a provision, either. And

where a rule permitting a motion to strike does exist—in the Federal Circuit, for example—the bar is high: "[a] motion to strike all or part of a brief, except to strike scandalous matter, is prohibited as long as the party seeking to strike has the right to file a responsive brief in which the objection could be made." Fed. Cir. Rule 27(e).

Petitioners cannot meet that standard: they could have addressed the propriety of the Commission's brief in their reply brief. They did not. Petitioners point to Commissioner Danly's recent statement filed at the same time as their reply brief, but that statement did not "reveal[ ]" anything that was not already known to Petitioners. Mot at 1. Commissioner Danly had already issued a dissent prior to the commencement of appellate litigation, and Petitioners' briefs advanced the same flawed understanding of Section 205(g) underlying the present motion.

Moreover, if Petitioners objected to the Commission's participation in this appeal or wished to impose limits on it, the time to stake out that position passed long ago. Petitioners consented to FERC filing a 24,000-word response brief a full 60 days after Petitioners' brief—consent that is inconsistent with the objection now raised.

This Court should deny the motion as procedurally improper.

II. Petitioners' Arguments Based on the DOE Act Are Meritless.

Section 205(g) directly governs the situation at hand: a deadlocked vote on a utility's tariff revision filed pursuant to Section 205(d). Yet Petitioners ignore the text of that provision—never once quoting it. The text of Section 205(g) dispenses with the arguments raised by Petitioners.

1. Petitioners move to strike the Commission's brief on the ground that it is not statutorily authorized, purportedly because the Commission as a body took no action authorizing the brief. Mot. 5-8. Their argument hinges on the Department of Energy Organization Act's ("DOE Act") majority-vote provision, which states that "[a]ctions of the Commission shall be determined by a majority vote of the members present." *Id.* at 5. To be sure, where that provision applies, no minority coalition of Commissioners can issue an order on behalf of the Commission. "[A]n agency's authority runs to it as 'an entity apart from its members, and it is its institutional decisions—none other—that bear legal significance.'" *Pub. Citizen*, 839 F.3d at 1169 (quoting *Pub. Serv. Comm'n of N.Y. v. Fed. Power Comm'n*, 543 F.2d 757, 776 (D.C. Cir. 1974)).

The DOE Act's majority-vote provision, however, does not apply in the specific circumstances here. Section 205(g) carves out an exception to the DOE Act's general mandate for determining institutional "actions" and prescribes a more specific rule for cases of deadlock or lack of quorum. Section 205(g)(1)(A), enacted after the general provisions of the DOE Act on which Petitioners rely, states that in the case of deadlock, Commission inaction on a Section 205 filing shall be considered "an order *issued by the Commission* accepting the change" (emphasis added). It is black-letter law that "[a] specific provision controls over one of a more general application." *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991). That is especially so where, as here, the more specific provision is also more recent. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Section 205(g) controls.

In this case, then, when two Commissioners voted to accept PJM's tariff revisions and two voted to reject it, the Commission "as an entity" took a "legal … position[]," Mot. at 4, on the tariff change: it issued an order accepting it. *See* PJM Br. 25-26. The Commissioners that voted to accept the tariff change, moreover, provided the Commission's reasoning for doing so as part of the "record of the Commission." 16 U.S.C.

§ 824d(g)(1)(B). Petitioners nonetheless maintain that the Commission's order accepting the Focused MOPR cannot represent the "the view of the Commission as a body" because two of the four Commissioners disagreed with that outcome. Mot. at 6-7. But dissents from a *Commission* action are just that—dissents. The Commission frequently issues orders over dissents and defends those actions in court. So too here. Indeed, as in other cases, if the Court wishes to consider those dissents, it can do so, as they too are part of the "record of the Commission."

2. In light of the Commission's action in this case, the Chairman and Commission counsel's conduct thus far has not only been proper—it was required by the DOE Act. As Petitioners detail, the Chairman is "responsible on behalf of the Commission for the executive and administrative operation of the Commission." 42 U.S.C. § 7171(c). Under that provision, it is the Chairman's responsibility to defend the action that the Commission took: the issuance of an order accepting the Focused MOPR. And that is precisely what the Chairman and Commission counsel have done and continue to do. Commission counsel has "appear[ed] for" and "represent[ed] the Commission" by defending that Commission action. *Id.* § 7171(i). Counsel has done so by defending the

rationale for the Commission's order accepting the change, which is articulated in the explanatory statement required by Section 205(g). The text, context, and legislative history of Section 205(g) all anticipate this practice by Commission counsel. *See* PJM Br. 32-40. And that rationale, as Section 205(g)(1)(B) anticipates, avoids having the Court itself fashion possible reasons to sustain the Commission's order. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Petitioners nevertheless assert that the Commission's brief should be "confine[d]" to "describ[ing]" the "proceedings below" and the "statements from each Commissioner," rather than defending the Commission's order. Mot. at 4, 9-10. Such a role for the Commission's lawyers would be entirely without precedent: Petitioners cite no prior instance in which agency counsel was transformed from zealous advocate in defense of agency action into a neutral, passive, and effectively mute participant. Indeed, as a general matter, parties without an interest in the outcome of a case cannot participate. Even amici must have an interest in the case, Fed. R. App. P. 29(b)(1) and (c)(3), and cannot be mere "impartial individual[s]." *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002).

By contrast, Section 205(g) is modeled on the D.C. Circuit's well-established scheme for enabling review of deadlock orders. *See* PJM Br. 34-37. The Commission's participation in this case is consistent with agency counsel's actions in those analogous deadlock cases. *See, e.g.*, Brief for Appellee the Federal Election Commission at 2, *Citizens for Resp. & Ethics in Washington v. Fed. Election Comm'n*, 993 F.3d 880 (D.C. Cir. 2021) (No 19-5161) (brief filed by FEC General Counsel defending the statement of "the Commissioners who voted not to proceed" as "thoroughly explained."). Congress cannot have intended that the Commission's action in this situation be subject to judicial review while also precluding the Commission from presenting any substantive defense of that action.

At bottom, if there were no "institutional decision[]" attributable to the Commission, Mot. at 5, then there is no agency action at all, and there is nothing for this Court to review. *See Public Citizen*, 839 F.3d 1169-72.[1]

[1] As we explained in our brief, *see* PJM Br. 74-76, the Supreme Court has held that is not the underlying *rate* that a court reviews, but the Commission's *order*. *See Burlington Northern, Inc. v. United States*, 459 U.S. 131, 141 (1982) (recognizing the generally applicable "proposition" that "federal court['s] authority to reject … rate orders for whatever reason extends to the orders alone, and not to the rates themselves"). The

Petitioners cannot have it both ways: they cannot claim jurisdiction in this Court, while simultaneously refusing to acknowledge that the agency has taken any institutional action.

III. Petitioners' Constitutional Arguments Are Equally Meritless.

Petitioners rightly do not argue that FERC's structure is unconstitutional. Mot. 15. After all, Article II permits Congress to "give for-cause removal protections to a multimember body of experts." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 (2020) (citing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)). That description fits FERC to a tee.

Instead, Petitioners' constitutional argument stems from their mischaracterization of the Chairman's actions in this case: they assert that the Chairman has seized free rein to direct the Solicitor to take

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Court's conclusion in *Burlington Northern* followed from the text of the governing jurisdictional statute—not from the procedural posture or the remedy sought. *See id.* (quoting 28 U.S.C. § 2349, "[t]he Court of Appeals ... has jurisdiction to ... make a judgment determining the validity of, and enjoining ... the *order* of the agency" (emphasis and ellipsis in original) (quotation marks omitted)). The relevant text is the same, of course, in the Federal Power Act: pursuant to 16 U.S.C. § 825*l*(b), this Court has jurisdiction to "to affirm, modify, or set aside [the Commission's] *order* in whole or in part." (emphasis added).

whatever litigation positions the Chairman prefers, regardless of whatever action the Commission itself has taken. There is no constitutional violation for three reasons.

First, the Chairman wielded no unilateral authority here, nor has the Solicitor's Office taken a position contrary to the Commission's order. The Commission acted by issuing an order accepting PJM's Focused MOPR. And the Solicitor's office is defending that order, not carrying out the Chairman's whim.

None of that changes because the Commission's action occurred pursuant to deadlock. The Chairman's role in a Section 205(g) case is precisely the same as the Chairman's role under the DOE Act more generally: when the Commission acts pursuant to a deadlock vote, the Chairman has the ministerial responsibilities of carrying out the Commission's order accepting the tariff change. Nothing in Section 205(g)'s scheme vests the Chairman with additional authority. If the Chairman is in dissent on a deadlock vote—just as on any other vote—the Chairman must effectuate the Commission's action, *i.e.*, the order accepting the change, and direct the Solicitor's Office to defend the order.

Petitioners' "simple analogy" therefore could not be less analogous to the situation at hand. Mot. at 18. Their hypothetical contemplates that the Chairman, as lone dissenter, might dictate the position taken by the Solicitor. But in the case of a deadlock under Section 205(g), the Commission's policy is determined by those Commissioners who vote to accept the tariff change, regardless of which side the Chairman falls on. And the Commission's litigation position in its brief is consistent with that agency action.

Second, the facts in Petitioner's hypothetical would not create a *constitutional* problem in any event. The Chairman is "designated" by the President and serves in that role at the President's pleasure. 42 U.S.C. § 7171. To the extent the Chairman ever could wield authority above and beyond that of an ordinary Commissioner, as Petitioners hypothesize, that exercise would be under the direct control of the President and would pose no Article II problem. *See Seila L. LLC*, 140 S. Ct. at 2209 ("If the Director were removable at will by the President, the constitutional violation would disappear.").

Third, Petitioners overstate the significance of *litigation* positions as directed by the Chairman, conflating those with official agency action.

The "statements of agency counsel in litigation" should not "be taken to establish 'rules' that bind an entire agency prospectively." *Heckler v. Chaney*, 470 U.S. 821, 836 n.5 (1985). Thus, whatever authority over litigation positions the Chairman may wield, the Chairman cannot unilaterally set policy for the Commission within its statutory authority under the FPA. Only Commission action can do that.

In sum, the DOE Act's general provisions are constitutional, FPA Section 205(g) is constitutional, and the Commission has acted pursuant to those constitutional provisions here.

CONCLUSION

For the foregoing reasons, the motion to strike should be denied. In the alternative, the motion should be deferred until after arguments on the merits.

September 19, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this response complies with the type-volume limitation in Fed. R. App. P. 27 because it contains 3,135 words.

I further certify that this response 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 response has been prepared in Century Schoolbook 14-point font using Word for Microsoft 365.

I further certify that the electronic response was scanned for viruses using Microsoft Security Essentials and that no viruses were detected.

/s/ Matthew E. Price
Matthew E. Price

CERTIFICATE OF SERVICE

I certify that on September 19, 2022, I filed the foregoing response using the Court's CM/ECF system. Service will be effected by and through the Court's CM/ECF system.

/s/ Matthew E. Price
Matthew E. Price