ORAL ARGUMENT NOT YET SCHEDULED

Nos. 16-1019 and 16-1027 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MADISON GAS AND ELECTRIC COMPANY, et al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

BRIEF OF PETITIONER NRG POWER MARKETING LLC

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INITIAL BRIEF: November 2, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The following information is provided pursuant to D.C. Circuit Rule 28(a)(1).

A. Parties and Amici

1. Parties Before the Federal Energy Regulatory Commission

The following is a list of all parties, intervenors, participants, and *amici* who appeared before the Federal Energy Regulatory Commission in the underlying administrative proceedings:

Alliant Energy Corporate Services, Inc.
Ameren Energy Marketing Company
Ameren Services Company
American Electric Power Service Corporation
American Municipal Power, Inc.
American Public Power Association
Arkansas Electric Cooperative Corporation
Bayou Cove Peaking Power LLC
Big Cajun I Peaking Power LLC
Calpine Corporation
Citizens Against Rate Excess
Citizens Utility Board of Illinois
Citizens Utility Board of Wisconsin
Coalition of Midwest Transmission Customers
Comverge, Inc.
Constellation Energy Commodities Group, Inc.
Constellation New Energy, Inc.
Consumers Energy Company
Conway Corporation
Cottonwood Energy Company LP
Dairyland Power Cooperative

Detroit Edison Company
Dominion Resources Services, Inc.
Duke Energy Indiana, Inc.
Dynegy Midwest Generation, LLC
Dynegy Power Marketing, LLC
Edison Mission Energy
Electric Power Supply Association
EnergyConnect, Inc.
EnerNOC, Inc.
Entergy Arkansas, Inc.
Entergy Gulf States Louisiana, LLC
Entergy Louisiana, LLC
Entergy Mississippi, Inc.
Entergy New Orleans, Inc.
Entergy Services, Inc.
Entergy Texas, Inc.
Environmental Law & Policy Center
Exelon Corporation
FirstEnergy Solutions Corp.
GenOn Energy Management, LLC
GenOn Wholesale Generation, LP
Great Lakes Utilities
Great River Energy
Hoosier Energy Rural Electric Cooperative, Inc.
Illinois Industrial Energy Consumers
Illinois Municipal Electric Agency
Indiana Municipal Power Agency
Indiana Office of Utility Consumer Counselor
Indiana Utility Regulatory Commission
Indianapolis Power & Light Company
Interstate Power and Light Company
Invenergy Wind Development LLC
Invenergy Thermal Development LLC
Iowa Office of Consumer Advocate
J.P. Morgan Ventures Energy Corporation
Louisiana Energy and Power Authority
Louisiana Generating LLC
LS Power Associates, L.P.

Madison Gas & Electric Company
Manitoba Hydro
Michigan Public Power Agency
Michigan South Central Power Agency
MidAmerican Energy Company
Midwest Independent System Transmission Operator, Inc.
Midwest Municipal Transmission Group
Midwest TDUs
Minnesota Department of Commerce
Minnesota Public Utilities Commission
Mississippi Delta Energy Agency
Missouri Joint Municipal Electric Utility Commission
Missouri Office of the Public Counsel
Missouri River Energy Services
Monitoring Analytics, LLC
Montana Consumer Counsel
National Rural Electric Cooperative Association
NextEra Energy Resources, LLC
NRG Power Marketing LLC
NRG Sterlington Power LLC
Organization of MISO States
Otter Tail Power Company
PJM Interconnection, L.L.C.
PJM Power Providers
Potomac Economics, Ltd.
PPL EnergyPlus, LLC
Retail Energy Supply Association
South Mississippi Electric Power Association
Southern Illinois Power Cooperative
Southern Indiana Gas & Electric Company d/b/a Vectren Energy Delivery of Indiana, Inc.
Southern Minnesota Municipal Power Agency
Southwestern Electric Cooperative, Inc.
The Clarksdale Public Utilities Commission
The Detroit Edison Company
The Municipal Energy Agency of Mississippi
The Public Service Commission of Yazoo City
Union Power Partners, L.P.

Upper Peninsula Power Company
Wisconsin Electric Power Company
Wisconsin Industrial Energy Group
Wisconsin Power and Light Company
Wisconsin Public Service Corporation
Wolverine Power Supply Cooperative, Inc.
WPPI Energy
Xcel Energy Inc.

2. Parties Before the Court

The following is a list of all parties, intervenors, and *amici* who have appeared in this Court in these consolidated cases:

Petitioners in No. 16-1019
Madison Gas and Electric Company
Midwest Municipal Transmission Group
Missouri Joint Municipal Electric Utility Commission
Missouri River Energy Services
WPPI Energy

Petitioner in No. 16-1027
NRG Power Marketing LLC

Respondent
Federal Energy Regulatory Commission

Intervenors for Petitioners in No. 16-1019
American Public Power Association
City of North Little Rock, Arkansas
Coalition of MISO Transmission Customers
Conway Corporation
Great Lakes Utilities
Municipal Energy Agency of Nebraska
National Rural Electric Cooperative Association
Southern Minnesota Municipal Power Agency

Intervenors for Respondent in No. 16-1019
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
Midcontinent Independent System Operator, Inc.
Midwest Municipal Transmission Group
Minnesota Department of Commerce
Missouri Joint Municipal Electric Utility Commission
Missouri River Energy Services
Montana Consumer Counsel
Organization of MISO States, Inc.
Southern Illinois Power Cooperative, Inc.
WPPI Energy

Intervenors for Respondent in No. 16-1027
American Municipal Power, Inc.
American Public Power Association
City of North Little Rock, Arkansas
Coalition of Midwest Transmission Customers
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
Midcontinent Independent System Operator, Inc.
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
Organization of MISO States, Inc.
Southern Illinois Power Cooperative, Inc.
Southern Minnesota Municipal Power Agency
WPPI Energy

B. Rulings Under Review

The orders of the Commission under review are:

(1) *Midwest Indep. Transmission Sys. Operator, Inc.*, Order on Resource Adequacy Proposal, Docket No. EL11-4081-000, 139 FERC ¶ 61,199 (2012); and

(2) *Midwest Indep. Transmission Sys. Operator, Inc.*, Order on Reh'g, Docket No. EL11-4081-000, 153 FERC ¶ 61,229 (2015).

C. Related Cases

These cases have not previously been before this Court or any other court. Counsel are not aware of any related cases pending in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioner NRG Power Marketing LLC ("NRG Power") makes the following disclosures:

NRG Power is a Delaware limited liability company with its principal offices in Princeton, New Jersey. It engages in electric power marketing by placing market bids and entering into bilateral contracts on behalf of generating facilities for the supply and purchase of energy throughout the United States. NRG Power is a wholly owned subsidiary of NRG Energy, Inc. ("NRG Energy"), whose shares are publicly traded (NYSE: NRG). As of the date of this filing, T. Rowe Price Group, Inc. (NASDAQ: TROW), through T. Rowe Price Associates, Inc., has a 10% or greater ownership interest in NRG Energy. No other publicly held company has a 10% or greater ownership interest in NRG Energy.

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Commission or FERC	Respondent Federal Energy Regulatory Commission.
March 2008 Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,283, *reh'g granted in part and denied in part*, 125 FERC ¶ 61,061 (2008).
MISO	Midcontinent (formerly Midwestern) Independent Transmission System Operator, Inc.
Mkt. Monitor Comments	Mot. To Intervene Out of Time & Comments of MISO's Indep. Mkt. Monitor, R.61, JA___.
MOPR	Minimum Offer Price Rule.
NRG Power	Petitioner NRG Power Marketing LLC.
NYISO I	*N.Y. Indep. Sys. Operator, Inc.*, 103 FERC ¶ 61,201 (2003).
NYISO II	*N.Y. Indep. Sys. Operator, Inc.*, 105 FERC ¶ 61,108 (2003).
Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, Order on Resource Adequacy Proposal, 139 FERC ¶ 61,199, R.102, JA___ (2012).
PJM I	*PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 (2006).
PJM II	*PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,318 (2007).
ISO New Eng. I	*ISO New Eng. Inc.*, 146 FERC ¶ 61,038 (2014).

ISO New Eng. II	*ISO New Eng. Inc.*, 147 FERC ¶ 61,173 (2014).
Reh'g Order	*Midwest Indep. Transmission Sys. Operator, Inc.*, Order on Reh'g, 153 FERC ¶ 61,229 (2015), R.210, JA___.

INTRODUCTION

This case arises out of two orders issued by the Federal Energy Regulatory Commission concerning the electric grid managed by the Midcontinent Independent System Operator, Inc. ("MISO"). The orders under review addressed MISO's proposal to promote reliable operation of the electric grid by creating an annual auction of electric capacity and establishing rules for that auction. Although MISO submitted its proposal in July 2011, the Commission did not issue its final order until November 2015, more than four years later. In its orders, the Commission approved some aspects of MISO's proposal and rejected others.

The Commission's decisions unfairly skewed the playing field in MISO's capacity auction in favor of load-serving entities that buy electric capacity and against independent generators, like NRG Power, that sell capacity. Three of the Commission's decisions are particularly problematic. First, it approved requiring sellers to participate in the auction while letting buyers "opt out" at will. Second, it refused to entertain any proposals to restrain buyers from unfairly suppressing prices in the auction by subsidizing uneconomic new generation, rejecting even MISO's modest proposal in that area and making MISO's the only

capacity market in the Nation with no such protections. Third, it allowed MISO to use a so-called "vertical demand curve" to set prices in the auction, even though Commission precedent makes clear that vertical demand curves produce inaccurate and wildly unstable prices (and even though, just a month after issuing its rehearing order in this case, the Commission would order another system operator to cease all use of vertical demand curves).

The Commission's decisions are devastating for independent generators—those that are not part of a vertically integrated public utility and therefore must sell their electric capacity on the open market—and will, over the long term, also harm consumers. While each of the Commission's decisions is troubling on its own, together they all but guarantee that independent generators will not receive just and reasonable rates in the MISO-administered auctions. MISO's auction will clear at or near a price of $0, meaning that independent generators will have little prospect of recovering even their fixed costs, let alone a reasonable return on their investments. That will ultimately hurt consumers, as the failure to compensate independent generators will discourage new entry and lead to higher prices and more energy shortages. This Court

should reverse the orders below, or at a minimum vacate them and require the Commission to provide a reasoned explanation for its decisions.

JURISDICTION

This Court has jurisdiction under 16 U.S.C. § 825*l*(b). MISO filed proposed tariff changes with the Commission under section 205(d) of the Federal Power Act, 16 U.S.C. § 824d(d). *See* MISO Tariff Filing, R.1. NRG Power intervened and protested MISO's filing, as did numerous other parties. *See* Mot. for Leave To Intervene & Protest of NRG Cos., R.57. The Commission conditionally accepted MISO's filing on June 11, 2012. *See Midwest Indep. Transmission Sys. Operator, Inc.*, Order on Resource Adequacy Proposal, 139 FERC ¶ 61,199 (2012), R.102, JA___ ("Order"). NRG Power timely sought rehearing on July 11, 2012. *See* Request for Reh'g of NRG Cos., R.111. On November 20, 2015, the Commission denied rehearing. *See Midwest Indep. Transmission Sys. Operator, Inc.*, Order on Reh'g, 153 FERC ¶ 61,229 (2015), R.210, JA___ ("Reh'g Order"). NRG Power filed a timely petition for review on January 19, 2016, under § 825*l*(b).

ISSUES PRESENTED

Whether the Commission violated the Federal Power Act and acted arbitrarily, capriciously, or otherwise not in accordance with law by approving a structure for MISO's capacity market that will prevent independent generators from receiving just and reasonable rates, in particular by:

1. Making participation in the auction mandatory for sellers of capacity but optional for buyers;

2. Rejecting MISO's determination that it was appropriate to mitigate buyers' ability to suppress prices in the capacity auction; and

3. Approving MISO's use of a vertical demand curve to set auction prices.

STATUTES AND REGULATIONS

The relevant statutes are reprinted in the addendum.

STATEMENT OF FACTS

A. MISO's Resource-Adequacy Rules

MISO is a nonprofit corporation responsible for managing the electricity transmission grid in a vast region of the country. Its territory includes all or part of 15 states in the South and Midwest, plus the Canadian province of Manitoba. *See MISO Transmission Owners v. FERC*, 819 F.3d 329, 331 (7th Cir. 2016); *About Us*, MISO ENERGY, https://goo.gl/s0R9Zp.

MISO was created as part of a turn-of-the-century push to promote competition in energy markets. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1364–66 (D.C. Cir. 2004). Historically, electric utilities had been vertically integrated monopolies controlling generation, transmission, and distribution of electricity within their territory. *See Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 536 (2008). Following Congress's lead, the Commission has sought to promote greater competition by, among other things, encouraging utilities to transfer control of their transmission facilities to regional organizations managed by "independent system operators" like MISO. *Id.* at 536–37. System operators "operate transmission facilities in a nondiscriminatory manner" and also "per-

form other functions, such as running auction markets for electricity sales." *Id.* at 537.

Under section 205 of the Federal Power Act, MISO must file with the Commission a compilation of its rates and rules, known as a "tariff." *Id.* at 531; *see* 16 U.S.C. § 824d(c). The provisions of the tariff must be "just and reasonable," *id.* § 824d(a), and not unduly discriminatory, *id.* § 824d(b). If MISO wants to make changes to its tariff, it must file the changes with the Commission at least 60 days in advance. *Id.* § 824d(d). The Commission can disapprove the changes only if it concludes that they have not been shown to be just and reasonable. *Id.* § 824d(e); *see Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002).

This case concerns MISO's rules for achieving "resource adequacy." The Commission conditionally approved MISO's resource-adequacy rules in March 2008. *See generally Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,283 ("March 2008 Order"), *reh'g granted in part and denied in part*, 125 FERC ¶ 61,061 (2008). It has revisited them several times since then, including in the orders below.

In basic terms, resource adequacy means ensuring the availability of an adequate supply of generation "capacity" to support safe and reli-

able operation of the power grid. *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 526 (D.C. Cir. 2010). Capacity is "not electricity itself but the ability to produce it when necessary." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 479 (D.C. Cir. 2009). This Court has described capacity as akin to a "call option" under which purchasers have "the option of buying a specified quantity of power" when needed. *Me. Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 467 (D.C. Cir. 2008), *rev'd in part on other grounds sub nom. NRG Power Mktg. LLC v. Me. Pub. Utils. Comm'n*, 558 U.S. 165 (2010).

To help ensure that the regional electric grid can operate reliably even during peak periods of electricity demand, MISO requires each load-serving entity (that is, each entity responsible for delivering power to retail customers) within its jurisdiction to procure at least a certain amount of capacity. That amount is called a "resource-adequacy requirement." To calculate resource-adequacy requirements, MISO starts with forecast electricity demand, then adds a "planning reserve margin" set by MISO or state regulators. *See* Order at PP 2–3, JA___; *see also* March 2008 Order at PP 11–12, 69–70, 90.

MISO's approach to resource adequacy has differed from that taken by other independent system operators—such as ISO New England, which is responsible for the grid in six New England states; PJM Interconnection, which is responsible for the grid in all or parts of 13 mid-Atlantic and Midwestern states and the District of Columbia; and New York ISO, which is responsible for the grid in New York State. Those system operators run mandatory, centralized, annual capacity auctions in which load-serving entities must participate to meet their resource-adequacy obligations. *See, e.g.*, *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 205–06 (D.C. Cir. 2011) (describing ISO New England's forward-capacity auction).

By contrast, when MISO established its resource-adequacy rules, it did "not propose to establish a centralized capacity market." March 2008 Order at P 365. To assist entities in meeting their obligations, MISO ran a small, monthly capacity auction that was "voluntary for both buyers and sellers of capacity." *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,060 at P 18, 36 (2008). But it expected load-serving entities to meet their resource-adequacy obligations primarily through "ownership [of generation resources] or bilateral con-

tracts for capacity" rather than through a central auction. March 2008 Order at PP 376–77. The clearing price in the monthly capacity auction "consistently remained close to zero, even in months with very little surplus capacity." Request for Reh'g of MISO Indep. Mkt. Monitor at 5, R.115, JA___.

In February 2009, the Commission directed MISO to come up with a "more robust and permanent" solution to ensuring resource adequacy and encouraged it to look to other regions for guidance. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 126 FERC ¶ 61,144 at P 47 (2009). In response, in July 2011, MISO proposed several "changes to [its] existing resource adequacy construct," including the establishment of a new, annual capacity auction. Order at P 6, JA___. MISO filed its proposed changes with the Commission under section 205 of the Federal Power Act. *See id.* at P 37, JA___. As relevant to this appeal, MISO proposed (1) a Minimum Offer Price Rule (often referred to below as a "MOPR") aimed at preventing buyers from exercising market power to artificially suppress prices in the annual auction; (2) mandatory auction participation for most sellers but not for most buyers; and (3) a vertical, rather than sloped, demand curve to set prices in the auction. *See id.* at

P 6, JA___. (Each of those aspects of MISO's proposal is explained in more detail below.)

NRG Power intervened and challenged certain aspects of MISO's proposal. *See* Mot. for Leave To Intervene & Protest of NRG Cos., R.57. It argued (1) that MISO's proposal to mitigate buyers' market power was appropriate, but that the proposed Minimum Offer Price Rule would be ineffective and needed to be strengthened; (2) that MISO's proposal to let buyers opt out of the auction at will, while making the auction mandatory for sellers, would disadvantage sellers and facilitate "gaming" of the auction; and (3) that MISO's proposal to use a vertical demand curve was unreasonable and contrary to Commission precedent recognizing the benefits of sloped demand curves. NRG Power explained that without changes, MISO's auction rules would make it all but impossible for independent generators to receive just and reasonable prices, *i.e.*, prices that would allow them to recover their fixed costs plus a fair return on their investment.

Numerous other parties intervened and raised concerns similar to NRG Power's. Notably, those parties included MISO's independent market monitor, Potomac Economics. The independent market monitor

is a neutral entity retained by MISO to impartially evaluate the performance of MISO's energy markets without interference from MISO or any other source. *See Independent Market Monitor*, MISO ENERGY, https://goo.gl/mI2Yw2. The independent market monitor argued that the Commission should require MISO to adopt both a sloped demand curve and effective measures to mitigate "buyer-side" market power. *See* Mot. To Intervene Out of Time & Comments of MISO's Indep. Mkt. Monitor, R.61 ("Mkt. Monitor Comments"). Similar arguments were made by a coalition of suppliers in the MISO region. *See* Capacity Suppliers' Mot. To Intervene & Protest, R.60.

B. The Commission's Orders Below

On June 11, 2012, nearly a year after MISO submitted its filing, the Commission "conditionally accepted" that filing; that is, it accepted some of the changes MISO proposed to make to its resource-adequacy rules, while requiring it to withdraw or modify others. Order at P 1, JA___. NRG Power and several other parties requested rehearing. NRG Power's rehearing request focused on the Commission's handling of three issues: (1) mandatory auction participation; (2) buyer-side mitigation rules; and (3) the shape of the demand curve.

More than a year later, in August 2013, the Commission ordered additional briefing on the second issue. *See* Order Initiating Briefing Procedures, R.136, JA___. NRG Power and other parties submitted briefs in response. *See, e.g.*, Initial Br. of NRG Cos., R.167; Reply Br. of NRG Cos., R.182. NRG Power argued that the Commission should reverse its stance on the Minimum Offer Price Rule; it also argued that the focus of the briefing order was too narrow and that the other two issues raised in NRG Power's rehearing request were equally fundamental.

Another two years went by before the Commission denied rehearing. During that time, the Commission ignored multiple parties' requests that it expedite its decision. *See* Mot. of Exelon Corp. et al. for Expedited Action, R.189 (filed Aug. 25, 2014); Mot. of Great River Energy for Expedited Action, R.204 (filed June 23, 2015). The Commission finally denied rehearing on November 20, 2015, almost three-and-a-half years after MISO's initial filing. *See* Reh'g Order at P 1, JA___. Below, we summarize the Commission's decisions in each of the three areas at issue in this appeal.

1. Mandatory Auction Participation

MISO proposed making auction participation mandatory for all *suppliers* with more than 50 megawatts of capacity. *See* Order at P 252, JA___. But it proposed that participation be mandatory only for those *buyers* that were "resource-deficient," *i.e.*, load-serving entities that failed to fulfill their capacity needs through self-supply or bilateral contracting. *See* Order at PP 18–19, JA___–___. For all other buyers, MISO proposed that they be allowed to "opt out" of any given auction, for all or part of their capacity needs, by submitting a "fixed resource adequacy plan" showing that they had satisfied the opted-out portion of their needs outside the auction. *Id.* The Commission accepted MISO's proposal to make supplier participation mandatory, but it rejected even the limited corresponding requirement that MISO sought to impose on resource-deficient buyers. *See id.* at PP 36, 40–42, 260, ___, ___–___, ___; Reh'g Order at PP 36, 47, 127–29, JA___, ___, ___–___.

The Commission claimed that MISO had "not justified the need for a mandatory auction." *Id.* at P 40, JA___. It directed MISO to instead "address resource deficiencies" by imposing special deficiency charges on load-serving entities that did not meet their resource-

adequacy requirements. *Id.* It did not, however, explain how MISO's proposal, which was consistent with the approach taken in the other organized capacity markets, would have caused any harm.

The Commission also refused to "restrict the ability of parties to fulfill a portion of their capacity obligation through the opt-out and fulfill the remainder through the market" or to "opt[] out some years and participat[e] in the auction in others." *Id.* at P 42, JA___. While acknowledging arguments that "such activities could enable gaming strategies that use buyer-market power but evade mitigation," the Commission stated, in line with its position on buyer-side mitigation, that it did "not believe . . . that such gaming is likely since utilities own the vast majority of capacity within MISO and therefore they would not benefit from lower prices in the voluntary capacity auctions." *Id.*; *see also* Reh'g Order at P 127, JA___ (reiterating that "market manipulation was unlikely").

2. Buyer-Side Mitigation Rules

All of the other organized capacity markets (*i.e.*, those in New England, the PJM region, and New York) have rules aimed at preventing buyers from exercising market power to artificially suppress prices

in capacity auctions. One common way for a buyer to suppress prices is by subsidizing the construction of an "uneconomic" new generating resource, that is, a resource that would not be able to charge enough in a competitive market to recover its startup costs. The new resource's capacity is then offered into the auction at a low price that does not reflect the resource's true costs, thereby driving down the auction-clearing price and reducing the prices paid to all sellers who participate in the auction.

The concern that buyers may artificially suppress prices is a well-recognized one. As the Commission explained in an earlier order:

> Entities with buyer-side market power can artificially lower the capacity price, sometimes substantially, by subsidizing new investment that is then offered into the market at prices below its full entry costs. The result is that new resources enter the market even though the market clearing price is lower than their true cost of entry. The cost of the subsidized new resource is higher than the market price, which on first impression would seem to be financially harmful to buyers. But buyers as a whole may benefit from the subsidized resource because the lower market price may reduce the total bill for acquiring existing capacity, and this bill reduction may outweigh the net cost of the new resource.

ISO New England, Inc., 135 FERC ¶ 61,029 at P 158 (2011).

In its filing under section 205, MISO proposed to establish a Minimum Offer Price Rule to prevent buyers from artificially suppressing

prices in the capacity auction. *See* Order at PP 44–48, JA___. The proposed rule would have been triggered if the independent market monitor determined that a market participant was "attempting to depress the auction clearing price" by "constructing a new [generating] resource and submitting anticompetitive . . . offers from [that] resource" that did not reflect the resource's true cost. *Id.* at PP 44, 45, 47, JA___–___. If the market monitor made such a finding, and if certain other conditions were met, then it could seek an order from the Commission directing MISO to raise the resource's offer in the auction to the minimum offer price, which would better reflect the resource's real cost. *Id.* at P 47, JA___. MISO explained that this rule was needed "to prevent potentially destructive market behaviors that could inappropriately suppress capacity prices." *Id.* at P 44, JA___ (quoting MISO Tariff Filing, R.1, at 17).

Various stakeholders, including NRG Power and the independent market monitor, argued that MISO's proposed rule did not go far enough. They agreed with MISO that a Minimum Offer Price Rule was needed to combat artificial price suppression in the capacity auction. But they explained that MISO's proposed rule contained several flaws

that would make it ineffective. One significant flaw was that the rule would not be triggered absent proof that the party making the anticompetitive offer actually *intended* to suppress prices, a limitation that the Commission had deemed inappropriate in other regions. *See, e.g.*, Mkt. Monitor Comments at 12–13, JA___–___. These stakeholders asked the Commission to require MISO to strengthen its proposed rule, including by removing the intent requirement.

The Commission agreed that MISO's proposed rule "would not likely be effective in deterring suppression of prices through the exercise of buyer market power" and that the rule's flaws would create opportunities for market participants to "suppress the price in the capacity auction through uneconomic entry." Order at P 68, JA___. The Commission noted in particular that MISO's proposal to apply mitigation only when there was proof that a party *intended* to suppress prices was inconsistent with prior Commission orders holding "that it is not reasonable for buyer-side mitigation to depend on the intent of the seller because an artificially low offer price can unreasonably suppress market prices *regardless of the seller's intent*." *Id.* at P 69, JA___ (emphasis added).

Yet instead of requiring MISO to revise its proposal to make it more effective, the Commission ordered MISO not to adopt *any* mitigation measures, even the feeble ones it had proposed. *See id.* at P 70, JA___. The Commission declared that it was unnecessary for MISO to make any effort to prevent buyers from suppressing capacity-auction prices by subsidizing uneconomic entry. It suggested that buyers in the MISO region were "generally unlikely to benefit" from lower prices in the capacity auction because "the vast majority of capacity within MISO" was owned by vertically integrated utilities. *Id.* at P 66, JA___. In other words, the load-serving entities owned their own generating resources and could meet their capacity needs through "self-supply." The Commission concluded that there was little "incentive to exercise buyer market power in MISO's capacity market" because "most [load-serving entities] in MISO [would] have little need to purchase capacity from MISO's capacity auction." *Id.* at P 67, JA___. The Commission therefore conditioned its approval under section 205 "upon MISO modifying its resource adequacy proposal to remove the MOPR provisions." *Id.* at P 70, JA___.

Several parties, including NRG Power and the independent market monitor, sought rehearing of the Commission's decision to reject MISO's proposed Minimum Offer Price Rule and not to allow any mitigation of buyers' market power. In ordering additional briefing on that issue, the Commission acknowledged evidence that "approximately one-fourth of the generation in MISO is merchant or non-utility affiliated" (*i.e.*, independent generators) and that "a large share of the capacity requirements in MISO are satisfied via bilateral purchases" from such independent generators rather than through self-supply. Order Initiating Briefing Procedures at P 3, R.136, JA___ (internal quotation marks omitted).

When the Commission finally issued its rehearing order, however, it stood by its conclusion that buyer-side mitigation was "not needed at this time for the MISO capacity market." *See* Reh'g Order at P 105, JA___–___. The Commission did not deny that without effective mitigation measures, buyers would have the *ability* to exercise market power to suppress capacity-auction prices. It simply opined that they would "lack[] the *incentive*" to do so. *Id.* (emphasis added). It also acknowledged that many buyers in the MISO region met their capacity needs

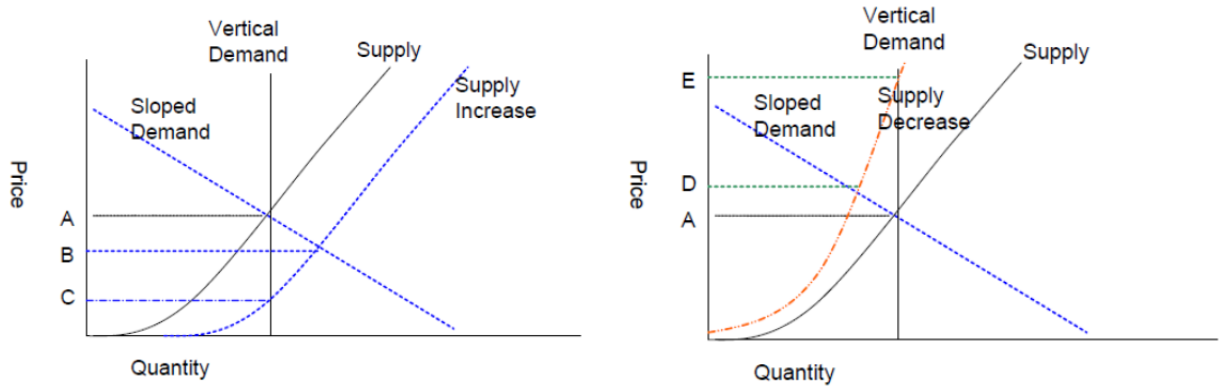
through bilateral contracts with independent generators (and not just through self-supply) and that suppressing auction prices could also suppress contract prices; but it concluded that even the prospect of suppressing both auction and contract prices would not sufficiently incentivize buyers to subsidize uneconomic entry. *See id.* at 107–08, JA___.

While the Commission found that buyer-side mitigation was "unnecessary," it did not find, in either its initial order or its rehearing order, that any harm would flow from putting in place prophylactic mitigation measures to address the supposedly "unlikely" circumstance in which a load-serving entity (or a State acting for load interests generally) did behave in a way that could artificially suppress prices. And because it barred MISO from adopting *any* mitigation measures, the Commission declined to address "how to improve [MISO's proposal] to make it more effective." *Id.* at P 118, JA___.

3. Shape of the Demand Curve

The Commission also refused to order MISO to implement a "sloped demand curve," instead allowing it to use a (somewhat oxymoronic) "vertical demand curve." *See* Order at P 245, JA___. The following graphs, borrowed from a previous Commission order, *see PJM Inter-*

connection, L.L.C., 119 FERC ¶ 61,318 at PP 103–05 (2007) ("*PJM II*"), help to show what those terms mean.



A capacity auction sets prices by comparing (1) a supply curve, which is constructed using suppliers' offers into the auction to indicate how much capacity suppliers would sell at different price levels; and (2) a demand curve, which is administratively determined by the system operator to indicate how much capacity buyers should purchase at different price levels. The point at which the two curves intersect determines the auction-clearing price. The supply curve will be upward-sloping (as in the example above), reflecting the basic economic principle that as the price of a good rises, rational suppliers will offer to sell more of it. The slope of the demand curve is determined by the system operator and reflects assumptions about the value to consumers of additional capacity at any point on the curve. A downward-sloping demand

curve assumes that buyers value additional capacity, including capacity in excess of the minimum system requirement, but that each additional unit of capacity has diminishing value. On the other hand, a vertical demand curve places no value whatsoever on additional capacity beyond the minimum requirement.

When an independent system operator uses a vertical demand curve to set prices, small changes in supply will produce large swings in price, as the graph above illustrates. With a sloped demand curve, an increase in supply (indicated by the supply curve shifting to the right) causes a more moderate drop in price from A to B, whereas with a vertical demand curve, the same increase in supply causes a much larger drop from A to C. A decrease in supply (indicated by the supply curve shifting to the left) produces the opposite effect: with a sloped demand curve, the price rises moderately from A to D, whereas with a vertical demand curve, the price soars from A to E.

In its initial order below, the Commission acknowledged that it had "approved use of downward sloping demand curves in" other markets, but emphasized that "there is not a single just and reasonable method for satisfying capacity obligations." Order at P 245, JA___. It

also pointed to its having "approved use of a vertical demand curve in [ISO New England]." *Id.* It thus concluded that it would "accept this aspect of MISO's proposal because it is consistent with tariff provisions previously approved by the Commission." *Id.*

In requests for rehearing, NRG Power and others pointed out that the Commission's acceptance of a vertical demand curve clashed with its prior acknowledgment that sloped demand curves reduce price volatility and produce prices that more accurately reflect the real value of marginal capacity. While not disagreeing with those propositions, the Commission continued to insist that it saw "no basis . . . to conclude that sloped demand curves are the only reasonable option." Reh'g Order at P 161, JA___. It also concluded that because "[load-serving entities] in MISO rely heavily on long-term power purchase agreements [*i.e.*, bilateral contracts] and owned resources [*i.e.*, self-supply] for their capacity needs," a sloped demand curve was "not essential to ensure just and reasonable compensation" for independent generators. *Id.* at P 158, JA___.

SUMMARY OF ARGUMENT

I. The Commission acted arbitrarily, capriciously, and contrary to law by approving an auction that is mandatory for sellers of capacity but optional for buyers. *First*, the Commission exceeded its statutory authority when it rejected MISO's proposal to make auction participation mandatory for resource-deficient buyers. The only reason the Commission gave for rejecting that proposal was that it did not see the "need" for a mandatory deficiency auction; but a perceived lack of necessity does not make a proposed tariff change unjust or unreasonable. *Second*, the Commission failed to address how such an asymmetric auction structure would affect independent generators' ability to receive just and reasonable prices in the bilateral market. It did not respond to the legitimate concern that buyers will have little incentive to negotiate bilateral contracts at prices above the expected auction prices knowing that the auction is mandatory for sellers.

II. The Commission also acted arbitrarily, capriciously, and contrary to law when it overrode MISO's decision to adopt prophylactic measures aimed at limiting buyers' ability to artificially suppress prices in the capacity auction, even though similar rules have been adopted

and approved by the Commission in every other organized capacity market. *First*, the Commission again exceeded its authority by rejecting MISO's proposal solely because it did not believe MISO had proven that prophylactic measures were strictly necessary. *Second*, while the Commission relied on its belief that buyers would lack "incentives" to suppress auction prices, that focus on incentives was incompatible with the Commission's acknowledgment that certain actions by buyers can improperly suppress auction prices regardless of the buyers' intent. *Third*, the Commission failed to recognize that buyers would, in fact, have incentives to suppress auction prices because by doing so, they could also suppress bilateral contract prices. *Fourth*, the Commission relied on the same flawed reasoning about buyers' supposed incentives to dismiss concerns about other ways in which buyers could artificially suppress auction prices.

III. Finally, the Commission acted arbitrarily, capriciously, and contrary to law by allowing MISO to use a vertical demand curve. In a series of orders issued over many years, the Commission has repeatedly recognized that sloped demand curves produce more accurate and stable prices than vertical demand curves. Indeed, sloped demand curves are

so clearly superior that the Commission recently concluded it was unjust and unreasonable for another system operator, ISO New England, to continue using vertical demand curves. The Commission did not explain how it could be just and reasonable for MISO to reject a sloped demand curve in favor of the wildly fluctuating, inaccurate prices produced by a vertical demand curve.

STANDING

NRG Power's standing is self-evident. It operates within MISO's capacity markets and participates in the MISO-administered capacity auctions that are directly affected by the orders on review. It participated fully in the proceedings before the agency and has exhausted its administrative remedies. If the Commission's errors are not corrected, they will distort the markets and impose financial burdens on NRG Power. A favorable decision of this Court would redress those injuries.

STANDARD OF REVIEW

The Commission's orders must be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The orders are not in accordance with law if they are inconsistent with the Commission's duty under the Federal Power Act to approve proposed changes to MISO's tariff if and only if

those changes are not unjust, unreasonable, or unduly discriminatory. *See* 16 U.S.C. § 824d; *Atl. City Elec. Co.*, 295 F.3d at 10. The orders are arbitrary and capricious if they fail to articulate a "rational connection between the facts found and the choice made," *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 639 (D.C. Cir. 2010); depart from precedent without a reasoned explanation, *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014); fail to "consider an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); or fail to "respond meaningfully to objections raised by a party," *PSEG*, 665 F.3d at 208 (internal quotation mark omitted).

ARGUMENT

Independent generators are entitled, as both a statutory and a constitutional matter, to just and reasonable compensation for their power. That means they must have a reasonable opportunity to recover their fixed costs and a fair rate of return on their investments. *See* 16 U.S.C. § 824d(a); *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692–93 (1923). Indeed, the Commission has acknowledged that "in a competitive market, [it] is responsible . . . for assuring that [generators are] provided the *opportunity* to recover [their] costs." *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005); *see also, e.g.*, *Price Formation in Energy and Ancillary Servs. Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 153 FERC ¶ 61,221 at P 2 (2015) (the "goals of proper price formation" include "ensur[ing] that all suppliers have an opportunity to recover their costs"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,196 at P 49 (2003) ("[W]e believe that competitive prices over the long run should recover both the fixed and variable costs of efficient generating units[,] and we fear investors may decline to invest in

needed generation . . . if they do not see a reasonable expectation of recovering their costs.").

Yet in the orders below, the Commission gave its blessing to a capacity-market structure that will deny independent generators in the MISO region a reasonable opportunity to recover their costs, much less a fair return on their investments. At every turn, the Commission's orders improperly favor buyers over sellers, including by (1) approving an auction that is mandatory for sellers but optional for buyers; (2) rejecting any buyer-side mitigation rules, even though MISO and its independent market monitor agreed that such rules were warranted; and (3) allowing MISO to use a vertical demand curve, which the Commission has recognized produces less accurate and less stable prices than a sloped demand curve.

Each of those rulings is problematic on its own. Combined, they ensure that MISO's annual capacity auction, like its old monthly auctions, will produce "a long string of very low or zero auction prices, and no meaningful signals to the market." Aff. of Roy J. Shanker Ph.D. on Behalf of Capacity Suppliers at 5, R.60 Att. A, JA___. Those results violate the Federal Power Act, as they deny independent generators like

NRG Power any reasonable opportunity for cost recovery and thus deprive them of the just and reasonable rates required by section 205(a). A capacity auction that consistently clears at or near zero is also unduly discriminatory, in violation of section 205(b), because it denies just and reasonable rates only to independent generators and not to similarly situated generators that happen to be owned by vertically integrated utilities. The latter are guaranteed full cost recovery by their state regulators, so—unlike independent generators—they are not dependent on a fundamentally broken capacity auction.

I. The Commission acted arbitrarily, capriciously, and contrary to law by making the auction mandatory for sellers but not for buyers.

The Commission's orders create a dramatic imbalance in MISO's capacity market by making the annual auction mandatory for sellers with over 50 megawatts of capacity, *see* Order at P 260, JA___, but optional for buyers. The Commission rejected MISO's modest proposal to make the auction mandatory for resource-deficient buyers. *See* Order at P 40, JA___; Reh'g Order at P 36, JA___–___. It then compounded the asymmetry between buyers and sellers by approving a sweeping opt-out mechanism that lets buyers toggle in and out of the auction year by

year, for some or all of their capacity needs. *See* Order at P 42, JA___; Reh'g Order at P 128, JA___.

The Commission's decisions regarding mandatory auction participation were wrong in several respects.

First, the Commission exceeded its authority under section 205 of the Federal Power Act when it rejected MISO's proposal to make the auction mandatory for resource-deficient buyers solely on the ground that it saw "no need" for a mandatory auction. Reh'g Order at P 46, JA___; *see id.* (concluding that the MISO region "does not require a forward mandatory capacity market to produce just and reasonable rates"); Order at P 40, JA___ ("MISO has not justified the need for a mandatory auction. For this reason, we reject MISO's proposal for a mandatory auction for deficiencies.").

The Commission's role under section 205 is "essentially passive and reactive." *Atl. City Elec. Co.*, 295 F.3d at 10 (quoting *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (Scalia, J.)). Public utilities, including regional transmission organizations like MISO, are entitled to amend their tariffs under section 205, and the Commission can reject the amendments "only if it finds that the changes

proposed by the public utility are not 'just and reasonable.'" *Id.* at 9 (quoting 16 U.S.C. § 824d(e)). Section 205 does not impose a "needs" test; that is, it does not require the utility to prove that the changes to its tariff are necessary, only that they are just and reasonable.

By demanding evidence of a "need" for a mandatory deficiency auction, the Commission effectively flipped the burden and required proof that a tariff *without* a mandatory auction would be *un*just and *un*-reasonable, rather than that a tariff *with* a mandatory auction would be just and reasonable. That was incorrect and unlawful because, as the Commission emphasized in defending other elements of MISO's proposal, the Commission's "preference" for a different approach "does not make MISO's proposal unjust and unreasonable." Order at P 196, JA___.

"In modifying a filed rate under § 205, it is not necessary to prove that the original rate is unjust or unreasonable; the new rate will take effect if the utility sustains the burden of proving that it is 'just and reasonable.'" *Sierra Pac. Power Co. v. FPC*, 223 F.2d 605, 607 (D.C. Cir. 1955) (quoting 16 U.S.C. § 824d(e)). Section 205 thus stands in stark contrast to section 206, which requires a party seeking to change

a filed rate to establish that not only that the requested change would be just and reasonable, but also that the change is necessary because the existing rate is *un*just or *un*reasonable. *See* 16 U.S.C. § 824e(b). Here, the Commission effectively imposed a section-206 burden in a section-205 proceeding.

"An order may not stand if the agency has misconceived the law." *Teva Pharm. USA, Inc. v. FDA*, 441 F.3d 1, 5 (D.C. Cir. 2006) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). Because the Commission's belief that a particular market rule is not essential does not render the rule unjust or unreasonable, a finding that a proposal is unneeded does not justify rejecting the proposal under section 205. And the Commission did not point to anything other than a perceived lack of necessity that could potentially have made the mandatory deficiency auction proposed by MISO unjust and unreasonable. The Commission's rejection of that proposal was therefore contrary to law.

Second, the Commission's decisions regarding mandatory auction participation were arbitrary and capricious because the Commission failed to grapple with how an asymmetric auction would affect the ability of independent generators to receive just and reasonable prices—not

only in the auction, but in the broader regional capacity market. It assumed that just and reasonable auction prices are not necessary to ensure that independent generators "remain viable" because, according to the Commission, those generators can always "sell [their] capacity as part of long-term bilateral contracts." Reh'g Order at P 110, JA___; *see also id.* at P 46, JA___–___ (concluding that "just and reasonable rates" would be assured by factors other than the structure of the auction, including "the terms of bilateral arrangements").

There is no basis for the Commission's apparent assumption that bilateral contracts at compensatory prices are available for the taking whenever an independent generator is not recovering its costs in the organized auction markets. To the contrary, it is precisely when an independent generator would most want such a bilateral contract—when auction prices are expected to be low—that buyers will be least likely to agree to one. A load-serving entity will have little or no incentive to enter into a bilateral contract at a just and reasonable rate when auction prices are expected to be low and the load-serving entity knows that the generator will be required to offer its capacity into the auction. Consequently, the option to enter into bilateral contracts does nothing to re-

lieve the Commission of its statutory duty to ensure that the auction produces just and reasonable rates.

II. The Commission acted arbitrarily, capriciously, and contrary to law by overriding MISO's decision that it was appropriate to mitigate buyers' ability to suppress prices.

MISO sought to adopt a Minimum Offer Price Rule aimed at mitigating buyers' ability to artificially suppress capacity-auction prices, similar to rules adopted in every other organized capacity market. *See* Order at PP 44–48, JA___–___. The Commission agreed with NRG Power and others that MISO's proposed rule had flaws that, if not remedied, would greatly limit its effectiveness at preventing artificial price suppression. *See id.* at P 68, JA___. Yet instead of requiring MISO to strengthen the proposed rule, the Commission concluded that it would be unjust and unreasonable for MISO to adopt *any* rules aimed at mitigating buyers' ability to suppress capacity-auction prices. *Id.* at PP 66, 70, JA___, ___. It therefore rejected the proposed Minimum Offer Price Rule, *see* Order at P 70, JA___, and declined even to "address arguments regarding how to improve the proposed [rule] to make it more effective," Reh'g Order at P 118, JA___.

The Commission erred in several respects.

First, the Commission exceeded its authority under section 205 when it rejected MISO's conclusion that buyer-side mitigation was appropriate simply because it believed such mitigation was unlikely to be needed. *See* Reh'g Order at P 105, JA___ (concluding that MISO's proposed Minimum Offer Price Rule was not "needed at this time" because the exercise of buyer-side market power was "unlikely" to be profitable in the MISO region); *id.* at P 106, JA___ (finding "that a MOPR is unnecessary"); *id.* at P 117, JA___ (finding that objecting parties had "not demonstrated that a MOPR is needed"); *id.* at P 118, JA___ ("[W]e find that it has not been demonstrated that a MOPR is needed in MISO.").

As explained above, section 205 does not permit the Commission to reject a proposed tariff amendment solely because the Commission believes the amendment to be unnecessary. Mitigation measures like a Minimum Offer Price Rule are prophylactic, yet they have been adopted and approved by the Commission in every other organized capacity market. Even assuming the Commission was right that such measures were not likely to be "needed at this time," Reh'g Order at P 105, JA___, that did not make MISO's decision to adopt those measures unjust or unreasonable—any more than it is unreasonable to get a flu shot even if

you are not likely to contract the flu. By their nature, prophylactic measures are often put in place to deal with circumstances, like the exercise of buyer-side market power, that may be thought unlikely but that would have serious consequences if they came to pass. By requiring MISO to prove that such measures were necessary, the Commission effectively required MISO to prove that a tariff without such measures would be unjust and unreasonable. That might have been the right standard if a party had filed a complaint under section 206 demanding the imposition of a Minimum Offer Price Rule, but it was not the appropriate standard under section 205. *See* pp. 31–33, *supra*.

Other than its belief that buyer-side mitigation measures were unnecessary, the Commission did not identify anything that could potentially have made such measures unjust or unreasonable. It did not find that the measures proposed by MISO (or the more effective versions of those measures suggested by NRG Power and others) would have been triggered absent buyer behavior that could lead to unjust and unreasonable price suppression. Nor did it find that having such measures in place would have led to unjust or unreasonable rates or any other adverse effect on the MISO capacity market. Absent such a

finding, the Commission's rejection of MISO's conclusion that buyer-side mitigation was appropriate was contrary to law.

Indeed, the Commission has had no similar reservations about approving prophylactic mitigation measures aimed at *supplier-side* market power in the absence of a demonstrated need. For example, the Commission recently found it "appropriate for [ISO New England] to propose measures to correct the structural deficiencies of its market *regardless of the likelihood that market participants will exploit these deficiencies*." *ISO New Eng. Inc.*, 155 FERC ¶ 61,029 at P 32 (2016) (emphasis added); *see also id.* at P 31 (finding it "irrelevant" whether the targeted conduct had ever "previously [been] used . . . to exercise market power"). There is no logical reason for the Commission to require a strict demonstration of need for measures intended to protect buyers but not for those intended to protect sellers.

The Commission's attempt to distinguish the MISO market from other regional energy markets that have adopted buyer-side mitigation measures on the basis of supposed regional differences also falls flat. The Commission stated that MISO is "largely [composed] of traditional obligation-to-serve utilities without restructured retail markets." Order

at P 111, JA___. But the Commission has approved buyer-side market-power mitigation like that proposed by MISO for the PJM Interconnection market, which includes a number of states that have not restructured their retail markets. *See NRG Energy, Inc.*, 141 FERC ¶ 61,207 at P 65 n.115 (2012) ("[W]hile some states within PJM have implemented retail choice, Indiana, Kentucky, North Carolina, Tennessee, Virginia, and West Virginia have not.").

Moreover, the Commission did not say that buyer-side market power would *never* be a concern in the MISO region. Rather, it spoke in generalities, asserting that buyers in MISO are "generally unlikely to benefit from exercising [such] market power," Order at P 66, JA___, and that the market structure "greatly diminished" buyers' incentives to do so, Reh'g Order at P 107, JA___. Even if that were true, that the exercise of buyer-side market power to suppress prices might be a rare event does not make mitigation measures unjust and unreasonable (or the absence of such measures just and reasonable). The Federal Power Act makes "unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted." *FPC v. Texaco Inc.*, 417 U.S. 380, 399 (1974).

It was thus inappropriate, in this section 205 proceeding, for the Commission to second-guess MISO's determination that buyer-side mitigation was a prudent prophylactic measure and to substitute the Commission's conclusion that buyer-side mitigation was not likely to be "needed at this time." Reh'g Order at P 105, JA___. Even if that conclusion were right, it would not have undercut the justness or reasonableness of MISO's proposal.

Second, even if section 205 allowed the Commission to bar a utility like MISO from adopting reasonable prophylactic measures on the ground that they were "not needed," the Commission's conclusion that buyer-side mitigation measures were unnecessary was arbitrary and capricious because it focused on the wrong question—whether load-serving entities would have an "incentive" to suppress auction prices.

The Commission claimed that most capacity in MISO, unlike in other regions, is not purchased in the capacity auction but is either self-supplied (*i.e.*, the load-serving entities own their own generation resources) or purchased under long-term bilateral contracts between load-serving entities and independent generators. *See* Order at P 66, JA___; Reh'g Order at P 105, JA___. It therefore assumed that load-serving

entities would "not significantly benefit from lower prices in" the capacity auction, Order at P 66, JA___, so they would "lack[] the incentive to suppress auction prices," Reh'g Order at P 105, JA___.

The Commission's focus on whether buyers in the MISO region have incentives to suppress prices in the capacity auction is fundamentally misguided. As the Commission recognized elsewhere in the same orders, "an artificially low offer price can unreasonably suppress market prices *regardless of the seller's intent*." Order at P 69, JA___. That acknowledgment was consistent with Commission precedent making clear that well-intentioned but uneconomic investment is just as dangerous as uneconomic investment that is intended to suppress prices. *See, e.g.*, *ISO New Eng.*, 135 FERC ¶ 61,029 at P 170 (agreeing "that [out-of-market] capacity suppresses prices regardless of intent"). But if unjust and unreasonable price suppression can occur without the *intent* to suppress prices, then it can occur without the *incentive* to suppress prices—and the need for mitigation measures cannot depend solely on buyers' perceived incentives.

After all, a buyer who has neither the incentive nor the intent to suppress prices may nonetheless make uneconomic investments for oth-

er reasons. For example, the buyer might be pursuing public policy goals unrelated to price suppression. *See id.* at P 170 & n.116. Or the buyer might just be acting irrationally, misjudging the market and mistaking the level of need for its investment. Indeed, one of the benefits of a well-functioning capacity market is precisely that it can provide market participants with appropriate price signals to help them avoid making irrational, uneconomic investments. Regardless of intent—and thus, regardless of incentives—such uneconomic investments will tend to suppress capacity prices. It is just and reasonable for a system operator like MISO to adopt prophylactic rules to mitigate such artificial price suppression.

Third, the Commission's reasoning is also arbitrary and capricious because it fails to account for the fact that suppressing *auction* prices will tend also to suppress *bilateral contract* prices negotiated outside the auction, which enhances buyers' incentives to suppress auction prices.

The Commission itself has previously recognized that prices in a central capacity auction will "provide participants with the appropriate baseline upon which to base long-term bilateral contracts." *N.Y. Indep.*

Sys. Operator, Inc., 103 FERC ¶ 61,201 at P 75 (2003) ("*NYISO I*"); *see also San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 95 FERC ¶ 61,418, at 62,547 (2001) (noting a "critical interdependence" between prices in organized markets and bilateral markets). MISO's independent market monitor has similarly stated that auction prices "should be the *primary driver* of forward capacity prices" in the bilateral market. MISO Indep. Mkt. Monitor, *2011 State of the Market Report* 15 (June 2012), https://goo.gl/x5QtpN (emphasis added). If, as those statements indicate, suppressing auction prices will also suppress bilateral prices, then buyers will have a strong incentive to suppress auction prices regardless of the volume of capacity bought and sold in the auction itself.

The Commission did not respond meaningfully to those concerns or distinguish its own precedent regarding the link between auction prices and bilateral-contract prices. It simply declared that "[a] substantial amount of uneconomic capacity over many years would be needed in order to [suppress auction prices enough to] have a significant effect on bilateral contract prices," so buyers still would not have sufficient incentives to suppress auction prices. Reh'g Order at P 108,

JA___. But it cited no record evidence for that proposition. Indeed, as discussed below, in a market with a vertical demand curve, tiny investments in uneconomic capacity can significantly depress clearing prices. *See* p. 49, *infra*.

Moreover, even if auction prices will not have an instantaneous effect on contract prices, the Commission cited no evidence that market participants would not use auction prices as a "baseline," *NYISO I* at P 75, when negotiating contract prices. That "baseline" effect is heightened by the fact that the capacity auction approved by the Commission is mandatory for sellers but optional for buyers, which gives buyers no incentive to negotiate bilateral contracts at prices above what they expect to pay the same suppliers in the auction. *See* pp. 33–34, *supra*.

Fourth, the Commission relied on the same flawed reasoning about buyers' supposed incentives to justify its failure to address another way in which buyers could exercise market power—namely, selective use of the opt-out mechanism. As NRG Power explained, a load-serving entity's opting to satisfy some its capacity needs outside the auction "has exactly the same impact" on auction prices as if the entity subsidized the same amount of uneconomic new entry. Initial Br. of NRG

Cos. 9–10, R.167, JA___–___. The Commission did not disagree. On the contrary, it acknowledged that without sensible restrictions the opt-out could allow load-serving entities to "use buyer-market power but evade mitigation," Order at P 42, JA___. Nonetheless, the Commission approved the opt-out without any mitigation measures based on its belief that load-serving entities "do not have an incentive to exercise market power in the MISO region." Reh'g Order at P 127, JA___; *accord* Order at P 42, JA___ ("[W]e do not believe . . . that such gaming is likely since utilities . . . would not benefit from lower prices in the voluntary capacity auction."). As explained above, that belief was irrational, arbitrary, and capricious.

III. The Commission acted arbitrarily, capriciously, and contrary to law by refusing to require MISO to adopt a sloped demand curve.

The Commission also improperly allowed MISO to use a vertical demand curve, even though it had recognized the superiority of sloped demand curves in other capacity markets. *See* Order at P 245, JA___; Reh'g Order at P 154. Its main ground for doing so was that "there is not a single just and reasonable rate" and MISO's vertical demand curve was "consistent with tariff provisions previously approved by the

Commission"—notably, ISO New England's demand curve, which at one time was vertical. Order at P 245; *see also* Reh'g Order at PP 159, 161 (stating that the Commission "has provided substantial flexibility to regions in determining their capacity construct demand curves" and finding "no basis . . . to conclude that sloped demand curves are the only reasonable option.").

The Commission failed to provide a reasoned explanation of how its decision was consistent with its prior orders approving the use of sloped demand curves in other markets, including ISO New England. In those orders, the Commission recognized that sloped demand curves have clear advantages over vertical demand curves, including producing prices that are more accurate and less volatile. *See NYISO I* at PP 13–17, *reh'g denied*, 105 FERC ¶ 61,108 (2003) ("*NYISO II*"), *aff'd*, *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at PP 75–78 (2006) ("*PJM I*"), *on reh'g*, *PJM II* at PP 99–117, *aff'd*, *Pub. Serv. Elec. & Gas Co. v. FERC*, 324 F. App'x 1 (2009); *ISO New Eng. Inc.*, 146 FERC ¶ 61,038 at P 30 & n.41 (2014) ("*ISO New Eng. I*"); *ISO New Eng. Inc.*, 147 FERC ¶ 61,173 at P 29 (2014) ("*ISO New Eng. II*").

"It is textbook administrative law that an agency must 'provide a reasoned explanation for departing from precedent or treating similar situations differently.'" *West Deptford*, 766 F.3d at 20 (quoting *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995)). Yet the Commission offered no reasoned explanation for departing from its precedent regarding the advantages of sloped demand curves. In its prior orders, the Commission did not merely find that sloped and vertical demand curves are both acceptable alternatives. Rather, it found that sloped curves are clearly superior to vertical curves in terms of their ability to produce just and reasonable prices.

The Commission has repeatedly recognized that a sloped demand curve "rests on a more rational economic basis than [a vertical] demand curve, as it more realistically reflects the economic value of capacity reserves." *NYISO I* at P 35. "Under a vertical demand curve, capacity above the [minimum requirement] is deemed to have no value." *PJM I* at P 76. That is wrong, because additional capacity above that level "is likely to provide additional reliability benefits, albeit at a declining level. This value is reflected in the positive (but declining) prices in the sloped demand curve . . . , but is not reflected in" prices set using a ver-

tical demand curve. *Id.*; *see also PJM II* at P 106 ("[T]he value of capacity does not plummet to zero simply when supply equals the [minimum requirement]. Capacity above [that level] still has value because it makes the system even more reliable . . . ."). Because a sloped demand curve "reflects the decreasing but still positive value of additional reserves (while [a] vertical demand curve does not)," it "is a substantial improvement over" a vertical curve. *NYISO I* at PP 35–36. The Commission has thus explained that "a downward-sloping demand curve provides a better indication of the incremental value of capacity at different capacity levels than [a] vertical demand curve." *PJM I* at P 76; *accord PJM II* at P 94. In other words, a "sloping demand curve is designed to replicate a true market," whereas a "vertical demand curve fails to reflect the value of incremental reliability." *PJM II* at P 99; *see also NYISO II* at P 35 (sloped demand curve "sends the right incentives to providers of" capacity).

Relatedly, the Commission has recognized that because a vertical demand curve incorrectly treats any capacity above the minimum amount required as worthless, it "results in extremely volatile pricing." *PJM II* at P 99. It causes capacity prices to "fluctuate widely," *NYISO*

II at P 28, when the supply of capacity "varies only slightly between a slight deficit . . . and a slight surplus," *PJM I* at P 75. "Even if the market does not clear at zero," the Commission has explained, "the extreme volatility [caused by a vertical demand curve] does not provide the right incentives." *NYISO I* at P 31. A sloped demand curve, on the other hand, "result[s] in less volatility" because "as supply varies over time, capacity prices under a sloping demand curve . . . change gradually, in contrast to the drastically changing prices that buyers must pay for varying amounts of capacity under" a vertical demand curve. *PJM II* at P 102; *see also ISO New Eng. I* at P 30 & n.41 (finding that sloped demand curve would "reduce price volatility and improve market efficiency"); *ISO New Eng. II* at P 29 (finding sloped demand curve to be "an important improvement" that "will address some of the challenges presented by the use of a vertical demand curve," including "price volatility").

The Commission has determined that the more accurate and stable prices produced by a sloped demand curve benefit both investors and consumers. It has explained that a "sloped demand curve will provide more stable and predictable capacity revenues to generators over time,

which will encourage more capacity to be built at more favorable terms than under the vertical demand curve." *PJM I* at P 78. That, in turn, "will result in a more reliable system and at a lower customer cost than the vertical demand curve." *Id.*; *see also id.* at P 75 ("The lower price volatility under the sloped demand curve would render capacity investments less risky, thereby encouraging greater investment and at a lower financing cost."); *NYISO I* at P 31 (a sloped demand curve "will help stabilize . . . prices and send better price signals to encourage the construction of generation before a shortage occurs," which will reduce the costs paid by customers and "help prevent future shortages").

Indeed, the Commission has felt so strongly about these clear benefits that it ordered ISO New England to speed up its planned switch from a vertical to a sloped demand curve. *See ISO New Eng. I* at P 30. That action in 2014 obviously undermined the Commission's reliance, in its initial order in this proceeding, on the fact that it had previously "approved use of a vertical demand curve in ISO [New England]." Order at P 245, JA___—so much so that on rehearing, the Commission was forced to insist that it was not relying "solely on previous approvals

of vertical demand curves for ISO [New England] to justify a vertical demand curve in MISO," Reh'g Order at P 161, JA___.

The Commission's understanding of the advantages of a sloped demand curve was confirmed when in December 2015, just a month after denying rehearing in this case, it concluded that ISO New England's continued use of vertical demand curves within sub-regional zones violated the Federal Power Act. *ISO New Eng.*, 153 FERC ¶ 61,338 at P 15 (2015). It explained that "[w]hen vertical demand curves are used, even small increases or decreases in supply can result in large changes in price," whereas a sloped demand curve would "ensure that the market produces accurate price signals." *Id.* at P 12. In light of "the general benefits of implementing zonal sloped demand curves," *id.* at P 14, the Commission held that ISO New England's delay in doing so rendered its tariff unjust and unreasonable, *id.* at P 15. It thus ordered ISO New England to revise its tariff to provide for zonal sloped demand curves. *Id.* at P 16.

The Commission's December 2015 decision is relevant here, even though it postdates the orders under review, because it is "part of a pattern of arguably inconsistent decision-making that began before the

challenged action." *AT&T Inc. v. FCC*, 452 F.3d 830, 839 (D.C. Cir. 2006). The Commission's holding that ISO New England's continued use of vertical demand curves was unjust and unreasonable confirms what was implicit in its prior orders: that the advantages of sloped demand curves are so dramatic and unambiguous that there can be no legitimate justification for using a vertical demand curve, and that doing so contravenes the Federal Power Act.

In the orders below, the Commission failed to justify departing from its earlier pronouncements regarding the superiority of sloped demand curves. It did not, and cannot, explain how it could be just and reasonable for MISO to use a vertical demand curve when, as the Commission's own precedent recognizes, a sloped demand curve would better reflect the true value of capacity sold in the auction *and* reduce the potential for wild price fluctuations that harm investors and consumers alike.

The Commission's attempt to justify its inaction by invoking the platitude that there can be more than one just and reasonable rate is inadequate given its repeated recognition that sloped demand curves are superior to vertical demand curves. "Different strokes for different

folks" is not a rational explanation for allowing a system operator to use such a plainly flawed approach. Just as it would have been unreasonable for a surgeon to have offered his patients only whiskey after the invention of modern anesthesia, it is unreasonable for the Commission to refuse to prescribe an established, tested, and clearly superior pricing mechanism and instead to allow MISO to employ a mechanism known to yield unstable and inaccurate prices.

* * *

The Commission took a lackadaisical view of the importance of ensuring that independent generators can recover just and reasonable compensation in MISO's capacity auction. It seems to view the auction as a poor relation that can be neglected because bilateral contracting and self-supply account for a larger portion of the regional capacity market. Yet the Commission made no finding that the auction would produce just and reasonable prices. Nor did it explain how the bilateral market could be relied on to provide just and reasonable prices given the disparate bargaining power created by a fundamentally broken auction that is mandatory for sellers but not for buyers, that lacks ade-

quate safeguards against artificial price suppression, and that relies on an outdated vertical demand curve.

CONCLUSION

The Court should reverse the Commission's orders and direct it to grant appropriate relief. In the alternative and at a minimum, the Court should require the Commission to meaningfully address petitioners' arguments and its own precedent and issue a reasoned decision.

Respectfully submitted,

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INITIAL BRIEF: November 2, 2016

CERTIFICATE OF COMPLIANCE

This brief complies with the length limitations set forth in Federal Rule of Appellate Procedure 32(a)(7) because it contains 10,319 words, as counted by Microsoft Word, excluding the items that may be excluded.

/s/ Ashley C. Parrish
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ADDENDUM

Administrative Procedure Act
5 U.S.C. § 706 ..... A-1

Federal Power Act
16 U.S.C. § 824d(a)–(e) A-2
16 U.S.C. § 824e(a)–(b) A-5
16 U.S.C. § 825*l* A-7

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses

(a) Just and reasonable rates

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and

keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings, five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may be order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may be further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable

shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

[Subsection (f) omitted.]

16 U.S.C. § 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practiced, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Refund effective date; preferential proceedings; statement of reasons for delay; burden of proof; scope of refund order; refund orders in cases of dilatory behavior; interest

Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 824d of this title and otherwise act as speedily as possible. If no final decision

is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: *Provided*, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

[Subsections (c) through (e) omitted]

16 U.S.C. § 825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall

have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

[Subsection (c) omitted.]

CERTIFICATE OF SERVICE

On November 2, 2016, I caused a copy of the foregoing document to be served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Ashley C. Parrish
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