No. 23-1069

In the Supreme Court of the United States

PUBLIC UTILITIES COMMISSION OF OHIO, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Under the Federal Power Act, 16 U.S.C. 791a *et seq.*, the Federal Energy Regulatory Commission (FERC or Commission) has authority to reject a rate change proposed by an electric utility on the ground that the change would result in a rate that is not "just and reasonable." 16 U.S.C. 824d(a); see 16 U.S.C. 824d(e). Rejection of the proposed change requires a majority vote of the members of the Commission. 42 U.S.C. 7171(e). If the members of the Commission deadlock two-to-two over whether to accept or reject the proposed change (as a result of a vacancy or recusal), the Commission's "failure to issue an order accepting or denying the change * * * shall be considered to be an order issued by the Commission accepting the change" for purposes of agency rehearing. 16 U.S.C. 824d(g)(1)(A); see 16 U.S.C. 825*l*(a). If the deadlock persists, an aggrieved party may seek judicial review of that constructive order under the Federal Power Act's general judicial review provision. 16 U.S.C. 824d(g)(2); see 16 U.S.C. 825*l*(b). The question presented is as follows:

Whether a court of appeals is required to determine the justness and reasonableness of a utility's proposed electric rate *de novo* when reviewing FERC's constructive acceptance of a rate under 16 U.S.C. 824d(e) and (g).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 88 F.4th 250. The views of the Commissioners of the Federal Energy Regulatory Commission (Pet. App. 47a-253a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2023. On February 12, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 29, 2024. The petition was filed on March 28, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Power Act (FPA or Act), 16 U.S.C. 791a *et seq.*, entrusts the Federal Energy Regulatory

Commission (FERC or Commission) with regulating the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). Under Section 205(a) of the Act, "[a]ll 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." 16 U.S.C. 824d(a); see *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 264-265 (2016) (*EPSA*). To facilitate the Commission's enforcement of that requirement, each regulated utility must "file with the Commission" its rates in a publicly available document called a tariff. 16 U.S.C. 824d(c).

Section 205 of the Act further provides that a utility wishing to alter its rates, or "any rule, regulation, or contract relating thereto," must give 60 days' notice to the Commission and file new rate 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." 16 U.S.C. 824d(d). On its own initiative or on the complaint of an interested party, the Commission may review the proposed change and, if it determines that the result would not be just and reasonable, reject the change. See 16 U.S.C. 824d(e). "Actions of the Commission" are "determined by a majority vote of the members." 42 U.S.C. 7171(e); see 42 U.S.C. 7171(b)(1) ("The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate.").

"[A]ll rates are [thus] established initially by the" utility and "are subject to being modified by the Commission upon a finding that they are unlawful." *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S.

332, 341 (1956) (discussing parallel provisions of the Natural Gas Act, 15 U.S.C. 717 *et seq.*). If the Commission does not affirmatively act on the rate filing, the change goes into effect by operation of law upon expiration of the 60-day notice period. 16 U.S.C. 824d(d); see *Advanced Energy United, Inc.* v. *FERC*, 82 F.4th 1095, 1100 (D.C. Cir. 2023).

A party "aggrieved by an order issued by the Commission" in a rate-change proceeding under Section 205 "may obtain a review of such order" in the D.C. Circuit or the regional circuit in which the utility is located or has its principal place of business. 16 U.S.C. 825*l*(b). This Court has explained that the reviewing court may set aside the Commission's order if it determines that the order "is arbitrary and capricious." *EPSA*, 577 U.S. at 276; see *id.* at 291-292. But the court "may not substitute [its] own judgment for that of the Commission," *id.* at 292, and any "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive," 16 U.S.C. 825*l*(b).

b. In *Public Citizen, Inc.* v. *FERC*, 839 F.3d 1165 (2016), the D.C. Circuit held that judicial review was not available when a rate change took effect by operation of law because the members of the Commission were equally divided and thus unable to affirmatively approve or reject the proposed change. The court found that because a majority of the members had not voted to either approve or reject the change, there was no final agency action to review, and that administrative notices indicating that the rate change had taken effect by operation of law in the absence of any agency action were "not reviewable orders under the FPA." *Id.* at 1170.

The D.C. Circuit acknowledged in *Public Citizen* that it had previously held that judicial review is available when the Federal Election Commission (FEC) fails to pursue an investigation of alleged violations of the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 *et seq.*, because the members of the FEC have deadlocked over whether there is probable cause to believe such a violation occurred. See 839 F.3d at 1170 (discussing *FEC* v. *National Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992)). In that context, the court has stated that Commissioners who vote against pursuing the investigation should "provide a statement of their reasons for so voting." *National Republican Senatorial Comm.*, 966 F.2d at 1476. "Since those Commissioners constitute a controlling group for purposes of the decision [not to investigate]," the court has reasoned that "their rationale necessarily states the agency's reasons for acting as it did." *Ibid.* The court has thus concluded that it can provide "meaningful" judicial review by evaluating those reasons and "accord[ing] [them] deference" as "the [FEC's] rationale." *Ibid.*

In *Public Citizen*, however, the D.C. Circuit declined to extend that precedent to deadlocked votes among FERC Commissioners. It explained that "FECA's text explicitly permits review of probable-cause deadlocks as agency action." 839 F.3d at 1170. Because there was no "similar congressional indication in the FPA or FERC's enabling statute," the court concluded that "the FEC approach should not be imported" to the FERC context. *Id.* at 1171.

c. In 2018, following the decision in *Public Citizen*, Congress amended Section 205 of the FPA to expressly provide for judicial review when members of the

Commission divide equally over whether to approve or reject a tariff modification. See America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, Tit. III, § 3006, 132 Stat. 3868-3869 (16 U.S.C. 824d(g)). Under the amended version of the Act, "if the Commission permits the 60-day period * * * to expire without issuing an order accepting or denying the change because the Commissioners are divided two against two as to the lawfulness of the change," that failure to act "shall be considered to be an order issued by the Commission accepting the change for purposes of" the Act's review provisions. 16 U.S.C. 824d(g)(1)(A). In that circumstance, "each Commissioner shall add to the record * * * a written statement explaining the views of the Commissioner with respect to the change." 16 U.S.C. 824d(g)(1)(B). Any person aggrieved by the Commission's constructive approval may seek rehearing by the Commission, and if the Commission remains equally divided on the rehearing request, the person may then seek judicial review under the Act's ordinary judicial review provision. 16 U.S.C. 824d(g)(2) (citing 16 U.S.C. 825*l*(b)).

2. This case involves a modification to the tariff governing the market for electricity-generating capacity run by intervenor respondent PJM Interconnection, L.L.C. (PJM). PJM proposed the tariff modification in 2021, and it took effect after members of the Commission deadlocked two-to-two over the change. See Pet. App. 22a, 24a-25a.

a. Historically, because utilities were "vertically integrated monopolies," the Commission employed "cost-based rate-setting" to ensure just and reasonable rates. *EPSA*, 577 U.S. at 267; see *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 532

(2008). Those rates took the form of "dollar prices [a seller] wanted to charge for units of electricity." *Public Citizen, Inc.* v. *FERC*, 7 F.4th 1177, 1184 (D.C. Cir. 2021).

A variety of reforms in the late 20th century caused the Commission to modify its approach to tariff regulation. Pet. App. 16a. As part of those reforms, the Commission encouraged "the creation of nonprofit entities to manage wholesale markets on a regional basis." *EPSA*, 577 U.S. at 267. PJM is one such market operator, spanning 13 States and the District of Columbia. Pet. App. 17a. One of PJM's core functions is to ensure that the region maintains an adequate energy supply. To accomplish that function, PJM conducts "capacity" auctions through which it obtains capacity commitments. *Ibid.* Capacity is not electricity itself but the ability to produce electricity when needed in the future. See *Advanced Energy Mgmt. Alliance* v. *FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017) (per curiam). A capacity commitment is the promise "to produce electricity or forgo the consumption of electricity when required." *Ibid.*

PJM's annual capacity auctions are based upon a forecast of electricity demand three years in the future, a share of which is assigned to each "load serving entity"—the organizations that deliver electricity to retail consumers. Pet. App. 18a; see *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016). Utilities that own, or intend to build, power plants are obligated to offer to sell their future capacity at proposed rates. See *Advanced Energy*, 860 F.3d at 665. After all offers are submitted, PJM begins accepting offers—from lowest price to highest—until it has purchased enough capacity to satisfy projected demand. *Hughes*, 578 U.S. at

155-156. No matter what price is listed in their original offers, all capacity sellers receive the highest accepted price, termed the "clearing price." Pet. App. 18a. Load-serving entities then must purchase from PJM, at the clearing price, their assigned share of the region's projected demand. *Ibid.*; see *Hughes,* 578 U.S. at 156.

b. Some capacity-auction participants are both buyers and sellers. For example, a load-serving entity that owns a generator must offer that generation capacity into the auction for it to help satisfy the entity's share of PJM's capacity obligation. If the load-serving entity's total obligation is greater than the capacity of its generator, it must purchase additional capacity from the auction. See *New Jersey Bd. of Pub. Utils.* v. *FERC*, 744 F.3d 74, 85 (3d Cir. 2014) (*New Jersey*). A load-serving entity that buys more capacity than it offers into the auction thus has an incentive to keep prices as low as possible. That net buyer might direct its generator to offer its capacity at a below-cost price, which would push out higher-priced capacity from being selected in the auction and result in a lower overall clearing price. The company could make up any loss associated with the below-cost offer by paying less for the additional capacity it must purchase from the auction. *Ibid.* Capacity auctions are thus theoretically vulnerable to the exercise of monopsony power. Pet. App. 19a; see *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) ("a monopsony is to the buy side of the market what a monopoly is to the sell side").

To address that threat, PJM's capacity auctions employ a "Minimum Offer Price Rule" (MOPR), which requires certain generators to bid capacity into the auction at or above a price specified by PJM, unless those generators can prove that their actual costs fall below

the MOPR price. See *Hughes*, 578 U.S. at 157. The first iteration of the MOPR, developed in 2006, applied only to new market entrants, and excluded nuclear, coal, and hydroelectric resources. Pet. App. 19a; *New Jersey*, 744 F.3d at 86-87. The 2006 MOPR also included an exception for any facility being developed pursuant to a state mandate aimed at resolving a projected capacity shortfall in the State. *Ibid.*

In 2011, in response to a complaint brought by certain electricity generators, PJM proposed, and the Commission approved, tariff revisions that eliminated the MOPR exemptions for state-mandated resources, but added an exemption for wind and solar resources. The result was that only new natural gas facilities were subject to mitigation. Pet. App. 20a-21a; see *New Jersey*, 744 F.3d at 98-100, 106-107 (upholding approval of relevant portions of 2011 MOPR).

In 2019, in response to another complaint from power suppliers, the Commission ordered PJM to extend the MOPR to mitigate capacity offers from both new and existing resources that receive, or are eligible to receive, a state subsidy. The goal of this expansion "was to 'protect PJM's capacity market from the price-suppressive effects of resources receiving'" revenues outside of the wholesale markets. Pet. App. 22a (quoting *Calpine Corp.* v. *PJM Interconnection, L.L.*C., 169 FERC ¶ 61,239, at ¶ 5 (2019)).

c. This case arises from PJM's 2021 proposal to adopt further revisions to its MOPR. In that filing, PJM explained that, since 2018, States had continued to provide public subsidies and incentives to encourage the use of renewable and nuclear resources for electric generation. See Pet. App. 22a-23a. Applying the MOPR to those state-supported generating facilities prevented

them from submitting bids that reflected their actual costs and revenues, making them less likely to be selected in the capacity auctions. *Ibid.* That, in turn, caused the market to effectively ignore existing capacity and send price signals that the construction of new resources was needed, when in fact it was not. *Id.* at 23a; see *Hughes*, 578 U.S. at 156 ("A high clearing price in the capacity auction encourages new generators to enter the market."). PJM explained that, as a result, PJM consumers would pay higher capacity prices, for more capacity than needed. Pet. App. 23a. Accordingly, PJM proposed a limited MOPR that would apply only where a resource: (1) has the ability and incentive to suppress capacity clearing prices, and (2) receives state subsidies under a state program that is likely preempted by the FPA. *Id.* at 24a; see *Hughes*, 578 U.S. at 163 (finding that federal law preempted a state program guaranteeing generators a state-established price, distinct from the federally approved clearing price, so long as they bid into and cleared the PJM capacity auction).

When PJM filed that proposed change in 2021, FERC had four sitting Commissioners. Pet. App. 24a. The Commissioners deadlocked two-to-two over whether to reject the new tariff. *Ibid.* Accordingly, the Commission issued a secretarial notice stating that the new 2021 MOPR was taking effect by operation of law. *Ibid.*; see pp. 4-5, *supra*.

As required by Section 205(g), 16 U.S.C. 824d(g), Chairman Glick and Commissioner Clements filed a joint statement explaining why they believed that PJM's filing was just and reasonable under the Federal Power Act and had thus voted to accept the tariff modification. Pet. App. 47a-187a (Joint Statement). They acknowledged that a more limited MOPR marked a

change in Commission policy, but found that record evidence supported such a change. See, *e.g.*, *id.* at 84a-85a. They explained that "[b]y returning the focus of PJM's MOPR to the problem of buyer-side market power," the revised rule "end[s] the prior efforts to hermetically seal PJM's capacity market from the effects of state policies" and thus "addresses the core problems of over-mitigation" inherent in the earlier MOPR. *Id.* at 76a. In their view, the revised MOPR appropriately recognized that a State's exercise of authority reserved to it under the FPA should not be treated as presumptively anti-competitive conduct. See *id.* at 77a, 92a, 124a; see also 16 U.S.C. 824(b)(1) (Commission "shall not have jurisdiction, except as specifically provided in [the Act], over facilities used for the generation of electric energy").

Commissioners Christie and Danly filed separate statements explaining why they had voted to reject the modification. Pet. App. 188a-199a, 200a-253a. Commissioner Christie agreed that the existing MOPR was "unsustainable" and therefore "need[ed] to be replaced or significantly modified." *Id.* at 188a-189a. But he believed that PJM's proposal had created "a confusing and inefficient administrative process," *id.* at 194a (emphasis omitted), and that it would fail adequately to guard against potential exercises of market power. See *id.* at 194a-195a. Commissioner Danly, meanwhile, expressed his view that any state subsidy results in wholesale market price suppression which must be addressed through MOPR-imposed price mitigation. *Id.* at 213a-215a, 231a. He also believed that the proposed MOPR was inadequate to prevent the exercise of buyer-side market power. *Id.* at 230a-232a.

Several parties sought administrative rehearing of the constructive order accepting PJM's rate filing by operation of Section 205(g), but the Commission again divided two-to-two on the rehearing requests. Pet. App. 25a.

3. Petitioner Public Utilities Commission of Ohio, together with the Pennsylvania Public Utility Commission and two electric generator associations, filed petitions with the Third Circuit for review of the deadlock order. The court of appeals denied the petitions in a unanimous decision. Pet. App. 1a-46a.

The court of appeals first addressed the applicable standard of review. The court observed that when Congress amended Section 205 to authorize judicial review in circumstances where the Commissioners deadlock two-to-two, it specified that such review should be conducted under the Act's pre-existing judicial review provision, Section 313(b) (16 U.S.C. 825*l*(b)). Pet. App. 30a. Section 205(g) thus "did not alter" the "familiar standards" set forth in the FPA and Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Pet. App. 29a. That is, the Commission's factual findings, "if supported by substantial evidence, [are] conclusive." *Id*. at 28a (quoting 16 U.S.C. 825*l*(b)). And the Commission's actions may be set aside if they are "arbitrary, capricious, an abuse of discretion, * * * or 'in excess of statutory jurisdiction.'" *Ibid*. (quoting 5 U.S.C. 706(2)).

The court of appeals explained that for purposes of applying those standards, the Commissioner statements required by Section 205(g)(1)(B) (16 U.S.C. 824d(g)(1)(B)) "illuminate the agency's reasons for inaction." Pet. App. 34a. The court thus held that it should examine "the entire record [to] ensure that the Commissioners who did not find the 2021 MOPR

unlawful 'engaged in decision-making that was reasoned, principled, and based upon the record.'" *Id.* at 34a-35a (brackets and citation omitted). The court explained that such an approach was consistent with the approach the D.C. Circuit has followed in the context of FECA's similar provision that authorizes review when a party is "aggrieved 'by a failure of the [Federal Election] Commission to act.'" *Id.* at 35a (quoting 52 U.S.C. 30109(a)(8)(A)).

Applying the ordinary FPA standards of review here, the court of appeals found that "the rationale set forth in the Joint Statement for approving the 2021 MOPR was neither arbitrary nor capricious and was supported by substantial evidence in the record." Pet. App. 37a. The court observed that the Joint Statement "acknowledged that the 2021 MOPR reflects a change in policy," *id.* at 40a, "identified specific changed circumstances" that warranted the shift, *id.* at 41a, and pointed to record evidence indicating that the 2021 MOPR would better reflect actual supply and demand, while providing generators a sufficient opportunity to recover their costs, see *id.* at 40a. And the court further determined that the "arguments set forth in the other Commissioners' statements" did not require a different conclusion. *Id.* at 37a.

ARGUMENT

Petitioner renews its contention (Pet. 15-22) that the court of appeals should have determined for itself, *de novo*, whether PJM's proposed tariff would be unjust or unreasonable, rather than applying the ordinary standards of review applicable in other FPA challenges. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this

Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. a. Section 205(g) of the Act provides that when the members of the Commission deadlock two-to-two about whether to reject a tariff modification, that failure to act "shall be considered to be an order * * * accepting the change" and (if the Commission declines a rehearing request) is subject to "appeal under [16 U.S.C.] 825*l*(b)," the Act's standard judicial-review provision. 16 U.S.C. 824d(g)(1)(A) and (2).

By the time Congress enacted that provision in 2018, it was well-established that when a party appeals an order of the Commission under Section 825*l*(b), the reviewing court may set aside an order that it finds to be "arbitrary and capricious," but "may not substitute [its] own judgment for that of the Commission," *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 291-292 (2016). Moreover, the Act itself provides that a court must accept any "finding of the Commission as to the facts, if supported by substantial evidence, [as] conclusive." 16 U.S.C. 825*l*(b).

Nothing in Section 205(g)—or any other provision of the statute—indicates that Congress intended to displace those established standards. Because there is thus no "clear expression * * * of Congress's intent to repeal some portion of [16 U.S.C. 825*l*(b)] or to abrogate [this Court's] decisions" interpreting it, *Forest Grove Sch. Dist.* v. *T.A.*, 557 U.S. 230, 240 (2009), the court of appeals correctly recognized that the pre-existing standards of review continue to apply. See Pet. App. 29a ("FERC urges, and we agree, that [Section] 205(g) did not alter these familiar standards."). And because Congress declared Commission inaction due to a deadlock to be "an order accepting * * * the change," 16

U.S.C. 824d(g)(1)(A), the proper focus in applying those standards are the statutorily required Commissioner statements that explain why the tariff filing can reasonably be found to be acceptable (*i.e.*, just and reasonable). See Pet. App. 34a (reviewing court "must ensure that the Commissioners" who voted in favor of the filing "engaged in 'decisionmaking that was reasoned, principled, and based upon the record'") (brackets and citation omitted).

b. The statutory history of Section 205(g) reinforces that conclusion.

As discussed above, pp. 3-5, *supra*, Congress enacted Section 205(g) in response to the D.C. Circuit's decision in *Public Citizen, Inc.* v. *FERC*, 839 F.3d 1165 (2016). There, the D.C. Circuit acknowledged that it had previously reviewed deadlocked decisions of the FEC. *Id.* at 1170-1171 (discussing *FEC* v. *National Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992)). In that context, the court had treated the views of the FEC members who favored inaction as "stat[ing] the agency's reasons for acting as it did" (since their votes had resulted in the FEC taking no action), and showed the same deference to those reasons as it would have to majority decision of the FEC. *National Republican Senatorial Comm.*, 966 F.2d at 1476.* But in *Public Citizen*, the D.C. Circuit concluded that it was unable to

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* Petitioner asserts (Pet. 26) that "[a]t least some members of the D.C. Circuit have questioned whether it is appropriate to apply the Administrative Procedure Act's standard of review to *any* Federal Election Commission decision." That is incorrect. The questions petitioner identifies have focused on whether FEC "nonenforcement decisions" specifically are "'committed to agency discretion by law.'" *End Citizens United PAC* v. *FEC*, 90 F.4th 1172, 1178 n.3 (D.C. Cir. 2024) (quoting 5 U.S.C. 701(a)(2)).

engage in any judicial review at all because the FPA, unlike FECA, did not provide for review of agency inaction caused by a deadlocked vote. See *Public Citizen*, 839 F.3d at 1171. In the absence of any "congressional indication in the FPA" calling for a FECA-style review of deadlocks, the court concluded, "the FEC approach should not be imported here." *Ibid.*

In adopting Section 205(g), "Congress filled that gap." Pet. App. 35a; see S. Rep. No. 278, 115th Cong., 2d Sess. 3 (2018) (discussing *Public Citizen* and the D.C. Circuit's suggestion of a possible congressional response). The amendment not only provided for judicial review of FERC deadlocks, but also expressly required FERC members to explain their views in writing—closely tracking the approach used by the D.C. Circuit in the FEC context. See 16 U.S.C. 824d(g)(1)(B) and (2); *National Republican Senatorial Comm.*, 966 F.2d at 1476. That history indicates that Congress intended courts reviewing FERC deadlocks to show deference to the views of the controlling members of FERC comparable to the deference the D.C. Circuit has long shown to the controlling members of the FEC. See Pet. App. 35a. Unless the written views of the FERC members who support acceptance of a tariff modification are arbitrary, capricious, or unsupported by substantial evidence in the record, therefore, a reviewing court may not set aside the Commission order entered under Section 205(g).

2. Petitioner's contrary arguments (Pet. 15-23) lack merit.

a. Petitioner contends (Pet. 16-21) that when a majority of the Commissioners cannot agree on whether to accept or reject a tariff modification, the Commission is legally incapable of supplying any reasons for its

decision that a court could then review. But if that were true, a reviewing court would have to treat every order entered pursuant to Section 205(g) as "lack[ing] *any* agency rationale," which would "'inevitably' lead [the court] to find such an order arbitrary and capricious." Pet. App. 31a-32a (citation and footnote omitted).

Such an approach would "flip [Section] 205(d)[] * * * on its head": Whereas Congress provided there that a proposed tariff modification would take effect by operation of law unless the Commission acted to reject it, that understanding would "enabl[e] *any* aggrieved party to invalidate *any* rate change by operation of law simply by virtue of requesting judicial review." Pet. App. 33a. Moreover, it would deprive the statutorily required statements of the Commissioners' views—which are entered into the record only after the deadlock occurs—of any effect. As the court of appeals recognized, that would be "inconsistent with [the courts'] responsibility to avoid interpreting statutory provisions in ways that 'render statutory language a nullity and leave entire operative clauses with "no job to do."'" *Id.* at 32a (citation omitted). Instead, the proper course is to treat the views of the Commissioners who favored acceptance of the tariff modification as supplying "the agency's reasons for inaction," and to then review those views to ensure that they are "'reasoned, principled, and based upon the record,'" *id.* at 34a-35a (citation omitted)—comparable to the D.C. Circuit's longstanding practice in the FECA context. See *National Republican Senatorial Comm.*, 966 F.2d at 1476.

b. Petitioner additionally contends (Pet. 19) that when the Commission fails to achieve a majority, there is an "absence of agency action" and the reviewing court must therefore review "the tariff itself and not an action

by FERC." See Pet. 18-22. But that contention is inconsistent with the operative statutory text.

Section 205(g) expressly states that a Commission deadlock "shall be considered an order issued by the Commission accepting the change," 16 U.S.C. 824d(g)(1)(A), and that an aggrieved party may pursue judicial review "under [16 U.S.C.] 825*l*(b)" if the Commission does not agree to rehear the order. 16 U.S.C. 824d(g)(2). The judicial review provision, in turn, vests the courts of appeals with jurisdiction to review "such order." 16 U.S.C. 825*l*(b). Congress thus made clear that the reviewing court is not to evaluate the proposed tariff modification directly, but rather must apply the ordinary standards of administrative review to determine whether to "affirm, modify, or set aside [the Commission's] order." *Ibid.*; see pp. 13-14, *supra*.

c. Finally, petitioner argues (Pet. 22-23) that the decision below is inconsistent with this Court's decision in *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211 (2016). That is incorrect.

Encino Motorcars did not involve appeal of an agency order, but rather a suit between two private parties under the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* See 579 U.S. at 214. In that context, the Court declined to defer to a Department of Labor regulation that changed the agency's longstanding interpretation of the FLSA with "barely any explanation" and no acknowledgment of the "significant reliance interests involved." *Id.* at 222.

That decision has no bearing on the appropriate resolution of this case. The court of appeals here found, and petitioner does not contest, that the "Joint Statement acknowledged that the 2021 MOPR reflects a change in policy and identified reasons for finding the

change just and reasonable." Pet. App. 40a. Nothing in this Court's decision in *Encino Motorcars* suggests that the court of appeals erred here in considering the Joint Statement as reflecting the reasons for the Commission's action; the Court simply had no occasion in *Encino Motorcars* to address the proper standard of judicial review in cases of agency deadlock like this one.

3. Petitioner concedes (Pet. 24) that the decision below does not implicate any conflict among the circuits. And no other considerations warrant further review in this case.

Petitioner asserts (Pet. 24) that this Court's review is needed because the decision below "strips courts of the ability to ensure that the market continues to function properly." But Congress has charged the Commission, not the courts, with that role, and has determined that tariff modifications should take effect by operation of law unless a majority of the Commissioners conclude that the change is unjust and unreasonable, or unduly preferential. See 16 U.S.C. 824d(d).

Moreover, the question presented rarely arises. Since Section 205(g) was enacted in 2018, only two other appeals have involved similar circumstances. In one, the Commission's inaction stemmed from the lack of a quorum; once the Commission regained a quorum, it sought a voluntary remand and issued majority-voted orders that were subsequently reviewed on appeal. See *Belmont Mun. Light Dep't* v. *FERC*, 38 F.4th 173, 182 (D.C. Cir. 2022). In the other, a two-to-two deadlock permitted one aspect of a new market construct to go into effect by operation of law, and the subsequent appeal was resolved on the basis of other majority-voted orders issued in the same proceeding. See *Advanced*

Energy United, Inc. v. *FERC*, 82 F.4th 1095, 1110-1111 (D.C. Cir. 2023).

In short, petitioner offers no evidence that the decision below has caused or will cause a "dramatic[] affect[]" on "the nation's power supply." Pet. 4. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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