ORAL ARGUMENT NOT YET SCHEDULED

Nos. 20-1079, 20-1080, 20-1081

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

NEW JERSEY BOARD OF PUBLIC UTILITIES,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., ET AL.,
Intervenors for Respondent.

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

BRIEF OF INTERVENORS CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LINDEN VFT, LLC, NEW YORK POWER AUTHORITY, HUDSON TRANSMISSION PARTNERS, LLC, AND NEW YORK INDEPENDENT SYSTEM OPERATOR, INC. IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Intervenors Consolidated Edison Company of New York, Inc., Linden VFT, LLC, New York Power Authority, Hudson Transmission Partners, LLC, and New York Independent System Operator, Inc. state as follows:

A. Parties, Intervenors, And Amici Curiae

All parties, intervenors, and amici curiae appearing in this Court are listed in the Petitioner's Opening Brief. As reflected in the official service lists of the Federal Energy Regulatory Commission ("FERC"), the parties, intervenors, and amici curiae who appeared before FERC in the underlying administrative proceedings (Nos. EL17-84, EL17-90, and EL18-54) are as follows:

American Electric Power Service Corporation
American Municipal Power, Inc.
Astoria Generating Company, L.P.
Brookfield Energy Marketing LP
Central Hudson Gas & Electric Corporation
City of New York, New York
Consolidated Edison Company of New York, Inc.
Consolidated Edison Energy, Inc
CPV Valley, LLC
Danskammer Energy, LLC
Delaware Public Service Commission
Direct Energy
Direct Energy Business Marketing, LLC
Direct Energy Business, LLC
Division of Rate Counsel
Maryland Public Service Commission
Monitoring Analytics, LLC
Neptune Regional Transmission System LLC
New Jersey Board of Public Utilities
New York Independent System Operator, Inc.
New York Power Authority
New York State Electric & Gas Corporation
New York State Public Service Commission
New York Transmission Owners
Niagara Mohawk d/b/a National Grid
North Carolina Electric Membership Corporation
NRG Power Marketing LLC
Orange and Rockland Utilities, Inc.

Dominion Energy Services, Inc.
Duke Energy Corporation
Exelon Corporation
FirstEnergy Service Company
GenOn Energy Management, LLC
Helix Ravenswood, LLC
Hudson Transmission Partners, LLC
Illinois Commerce Commission
Independent Power Producers of New York, Inc.
ITC Lake Erie Connector, LLC
Linden VFT, LLC
Long Island Lighting Company d/b/a LIPA
Long Island Power Authority
Organization of PJM States, Inc.
Pennsylvania Public Utility Commission
PJM Interconnection, L.L.C.
PJM Transmission Owners
PPL Electric Utilities Corporation
PSEG Services Corporation
Public Citizen, Inc.
Public Power Association of New Jersey
Public Service Electric and Gas Company
Rensselaer Generating LLC
Retail Energy Supply Association
Rochester Gas and Electric Corporation
Rockland Electric Company
Roseton Generating LLC

B. Rulings Under Review

References to the rulings at issue appear in FERC's brief.

C. Related Cases

These appeals have not previously been before this Court or any other court. Intervenors are unaware of any other "related cases" as defined by D.C. Circuit Rule 28(a)(1)(C). The appeals consolidated under Case No. 15-1183, however, involve cost allocations for the Bergen-Linden Corridor transmission-upgrade project—the project mainly at issue in these appeals—as well as many of the same parties.

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, Intervenors, through their undersigned counsel of record, make the following disclosures:

1. Intervenor Consolidated Edison Company of New York, Inc. ("ConEd") is a regulated public utility, incorporated in the State of New York, engaged in the transmission, distribution, and wholesale and retail sale of electric power throughout the five boroughs of New York City and in the County of Westchester, as well as the retail sale of steam and gas in parts of New York City. ConEd has outstanding shares and debt securities held by the public and is a subsidiary of Consolidated Edison, Inc., which also has outstanding shares and debt held by the public.

ConEd is also affiliated with Orange & Rockland Utilities, Inc., a subsidiary of Consolidated Edison, Inc., which also has outstanding debt securities held by the public. No other publicly held company has a 10% or greater ownership interest in ConEd.

2. Intervenor Linden VFT, LLC ("Linden") owns and operates a variable frequency transformer merchant transmission line between the New York Independent System Operator, Inc. and the PJM Interconnection, L.L.C. Linden is owned 85% by Linden VFT Holding, LLC and 15% by Power Holding LLC. No other entities have any other ownership interest in Linden. Linden VFT Holding,

LLC is owned 100% by Power Holding LLC, which is owned 100% by General Electric Company. General Electric Company is a publicly held corporation. General Electric Company has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

3. Intervenor New York Power Authority ("NYPA") is a corporate municipal instrumentality and a political subdivision of the State of New York, organized under the laws of the State of New York, and operating pursuant to Title I of Article 5 of the New York Public Authorities Law. NYPA generates, transmits, and sells electric power, principally at wholesale. NYPA's customers include various public corporations located within the metropolitan area of New York City, as well as businesses and municipal and rural electric cooperative customers located throughout the State of New York. NYPA is also a transmission owner member of the New York Independent System Operator, Inc. Since January 2017, NYPA has operated the New York Canal Corporation, a public authority governed by the New York Public Authorities Law, as a subsidiary. NYPA has no other companies, subsidiaries, or affiliates.

4. Intervenor Hudson Transmission Partners, LLC ("Hudson") developed and constructed, and owns and operates, the Hudson Transmission Project—an approximately eight-mile underground and underwater electric transmission facility that runs from northern New Jersey to New York City. APG Asset Management and

California State Teachers Retirement System each indirectly have a 10% or more ownership interest in Hudson through an investment managed by Argo Infrastructure Partners. No other company has a 10% or more ownership interest in Hudson.

5. Intervenor New York Independent System Operator, Inc. ("NYISO") is a not-for-profit corporation organized and existing under the laws of New York. Although NYISO does not own or control any electric power generation facilities, it possesses operational control over certain electric transmission facilities in New York State and issues commitment and dispatch instructions to electric power generation facilities. NYISO is the independent body responsible for providing open access transmission service, maintaining reliability, and administering competitive wholesale electricity markets in New York State. NYISO also engages in planning for the high-voltage transmission system in New York, and oversees the allocation of costs for certain transmission projects planned through the NYISO's processes.

NYISO is not a publicly held company. It does not have a parent company, and no publicly held company has a 10% or greater ownership in it.

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GLOSSARY

Bergen	The Bergen-Linden Corridor, a series of subprojects intended to resolve short-circuit issues on Public Service Electric & Gas Company's transmission system
ConEd	Intervenor Consolidated Edison Company of New York, Inc.
FERC or Commission	Respondent Federal Energy Regulatory Commission
Hudson	Intervenor Hudson Transmission Partners, LLC
Linden	Intervenor Linden VFT, LLC
Merchant Facility	Merchant transmission facility
New Jersey	Petitioner New Jersey Board of Public Utilities
NYISO	Intervenor New York Independent System Operator, Inc.
NYPA	Intervenor New York Power Authority
PJM	PJM Interconnection, L.L.C.
PJM Tariff	PJM Interconnection, L.L.C.'s Open Access Transmission Tariff, https://www.pjm.com/directory/mergedtariffs/oatt.pdf
PSE&G	Public Service Electric & Gas Company, a utility that provides electric service in New Jersey
Regional Plan	PJM Interconnection, L.L.C.'s Regional Transmission Expansion Plan
Solution-Based DFAX	Solution-Based Distribution Factor Analysis, a method that PJM Interconnection, L.L.C. uses to allocate costs of projects in its Regional Transmission Expansion Plan

INTRODUCTION

This case concerns measures that Intervenors Consolidated Edison Company of New York, Inc. ("ConEd"), Linden VFT, LLC ("Linden"), Hudson Transmission Partners, LLC ("Hudson"), and New York Power Authority ("NYPA," Hudson's customer) took, with the Federal Energy Regulatory Commission's ("FERC") permission, to limit their future exposure to costs for the Bergen-Linden Corridor ("Bergen") transmission-upgrade project that they believed should not have been allocated to them in the first place. Bergen was undertaken primarily to fix short-circuit issues in the northern New Jersey territory of Public Service Electric & Gas Co. ("PSE&G") and was required regardless of whether ConEd, Linden, Hudson, and NYPA took power from PJM Interconnection, L.L.C. ("PJM"). Yet ConEd, Linden, and Hudson (and, indirectly, NYPA) were allocated the lion's share of the costs. Their challenge to the assessments they have paid under those cost allocations is pending before this Court in the appeals consolidated under Case No. 15-1183.

To end their responsibility for those cost allocations going forward, ConEd, Linden, and Hudson relinquished the transmission rights on which the cost allocations were based, with FERC's approval. Petitioner New Jersey Board of Public Utilities ("New Jersey") insisted that ConEd, Linden, and Hudson should be required to continue paying regardless. FERC disagreed. New Jersey's challenges to FERC's orders are procedurally improper and fail on their own terms.

New Jersey argues that ConEd should continue to pay for Bergen because, according to New Jersey, power flows attributable to ConEd and the New York region caused the need for Bergen. That is false. As PJM has explained and FERC found, Bergen was necessary to address short-circuit issues on PSE&G's northern New Jersey network regardless of power flows to New York. New Jersey also has presented no evidence of ongoing benefits from Bergen that would justify continued cost responsibility for ConEd. In fact, it joined a settlement that expressly relieved ConEd of any such cost responsibility. New Jersey cannot now challenge that settlement. Furthermore, New Jersey offers no reason or evidence that would overcome the general rule that forecloses PJM from allocating the costs of Bergen (a transmission-upgrade project located in New Jersey) outside of its region to ConEd or other New York utilities or ratepayers.

New Jersey also contends that Linden improperly escaped direct cost allocations for Bergen by exploiting an alleged loophole in PJM's governing documents. This argument is jurisdictionally barred because New Jersey did not preserve it in its agency rehearing requests. It is also incorrect. Linden was allocated costs for Bergen because of firm transmission withdrawal rights it held. But it gave up those rights. And under provisions of PJM's governing documents that New Jersey does not, and cannot, challenge, the non-firm transmission withdrawal rights that Linden now holds do not carry the same direct cost allocations. Linden *does*

contribute to the costs of Bergen through the rate it pays for the firm point-to-point transmission service it takes from PJM, however, and New Jersey's bottom-line objection is that that rate is too low. The level of that rate is the subject of a separate FERC proceeding in which New Jersey is an active participant. FERC rightly did not concern itself with that rate in the orders challenged here.

Finally, New Jersey asserts that FERC failed to consider the "total effect" of all the measures that ConEd, Linden, Hudson, and NYPA took to limit their future liability for the costs of Bergen. That also is incorrect. FERC evaluated all the measures taken, individually and collectively, and determined that they did not result in New Jersey ratepayers receiving an unjust and unreasonable rate.

New Jersey's petitions for review should be denied.

ISSUES PRESENTED

I. Whether FERC reasonably concluded that ConEd could no longer be allocated costs for Bergen because of a FERC-approved settlement (which New Jersey joined) that expressly ended ConEd's cost responsibility when its transmission agreements with PJM expired, and because New Jersey failed to demonstrate that ConEd receives other benefits from Bergen that would justify continuing to allocate such costs to it.

II. Whether New Jersey is jurisdictionally barred from arguing that Linden receives benefits from Bergen without paying for them by pairing non-firm

transmission withdrawal rights with firm point-to-point transmission service because it did not raise that argument in its agency rehearing requests; whether FERC reasonably found that Linden pays for any benefits it receives from Bergen through the charges it incurs for firm point-to-point transmission service; and whether New Jersey failed to present any substantive argument as to Hudson, such that the petition in Case No. 20-1080 should be denied.

III. Whether FERC considered the overall effects of the measures ConEd, Linden, Hudson, and NYPA took to limit their future liability for Bergen cost allocations—individually and collectively—and reasonably determined that they did not result in New Jersey ratepayers receiving unjust and unreasonable charges for Bergen.

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in FERC's brief.

BACKGROUND

A. PJM And Its Regional Transmission Expansion Plan

PJM is the regional transmission organization and independent system operator that oversees the electric grid in a large portion of the Mid-Atlantic and Midwest regions. *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1293 (2016). PJM exercises operational control over electrical-transmission facilities that belong to its members, supervising and coordinating the movement of electricity

throughout its control area. *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018). PJM fulfills these responsibilities through rules set forth in its Open Access Transmission Tariff ("PJM Tariff")[1] and other governing documents. *Old Dominion*, 892 F.3d at 1228. Owners of transmission facilities within PJM, however, determine the rates applied by PJM. *See* PJM Tariff § 9.1; Comments of the PJM Transmission Owners 8 n.30, No. EL18-54 (Feb. 23, 2018) (R127, JA__) ("Transmission Owners Comments").

PJM and its member utilities regularly conduct planning processes to determine what transmission expansions and upgrades are necessary to ensure reliability of the grid and to meet regional electricity needs. The results are reflected in PJM's Regional Transmission Expansion Plan ("Regional Plan"). *See Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1256 (D.C. Cir. 2018). The obligation to build transmission upgrades and the costs to construct those upgrades generally default to the utility in which the upgraded facility is located. But because Regional Plan projects also may benefit other grid users, the PJM Tariff allows the costs of many projects to be spread among other utilities and users of PJM's network. *See* PJM Tariff, Schedule 12, § (a)(i). The cost allocations for certain Regional Plan projects have spawned several disputes before FERC and this Court.

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[1] https://www.pjm.com/directory/merged-tariffs/oatt.pdf

B. The Bergen-Linden Corridor Project

Underlying this case is Bergen, a collection of subprojects added to PJM's Regional Plan in 2013. Bergen includes major upgrades to nine electric substations throughout the northern New Jersey territory of PSE&G, a public utility that provides electric service in New Jersey. These upgrades were necessary to resolve major short-circuit issues on PSE&G's network. Short-circuit issues usually are resolved by upgrading circuit breakers, with the local utility (PSE&G) bearing the cost. But the short-circuits on PSE&G's network exceeded the capability of available circuit breakers. Accordingly, PJM approved a comprehensive upgrade to PSE&G's network—costing approximately $1.2 billion—to address these short-circuit issues. *N.J. Bd. of Pub. Utils. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,139, at PP 8-9, 25-26 (2018) (R143, JA__-__, __-__) ("Complaint Order").

Although PSE&G developed Bergen to upgrade *its* facilities in the heart of *its* territory, PSE&G was allocated only a tiny portion of the project costs. The overwhelming majority of the costs were shifted to ConEd, Linden, and Hudson (and, indirectly, NYPA), who held rights to transfer power from PJM to the adjacent New York region, where the electric grid is managed by Intervenor New York Independent System Operator, Inc. ("NYISO"). *See infra* at 7-13. That outcome resulted largely from PJM's application of a then-new cost-allocation method called Solution-Based Distribution Factor Analysis ("Solution-Based DFAX"). PJM

allocated approximately $920 million of the costs of Bergen using Solution-Based DFAX,[2] apportioning 10% to PSE&G and the other 90% to ConEd, Linden, Hudson, and NYPA before they took the measures to limit their future liability that are at issue here. Complaint Order ¶ 9 & nn.27-28 (JA__-__).

ConEd, Linden, Hudson, and NYPA challenged the justness and reasonableness of the cost allocations produced by Solution-Based DFAX and sought refunds of millions of dollars. *See* Opening Brief 26-54, *Consol. Edison Co. of N.Y., Inc. v. FERC*, No. 15-1183 (D.C. Cir. filed Mar. 5, 2021); Reply Brief 4-25, *Consol. Edison Co. of N.Y., Inc. v. FERC*, No. 15-1183 (D.C. Cir. filed Aug. 30, 2021). But FERC upheld those cost allocations, in the orders that are the subject of the appeals consolidated under Case No. 15-1183.

C. ConEd's, Linden's, Hudson's, And NYPA's Measures To End Their Future Cost Responsibility

The costs allocated to ConEd, Linden, Hudson, and NYPA were based on specific rights they held that required them to contribute to the costs of Regional Plan projects.[3] After FERC rejected their challenges to the justness and

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[2] The costs of some Bergen subprojects were only partially allocated using Solution-Based DFAX. *See* FERC-Br. 9-10, 18.

[3] No Bergen costs were allocated to NYISO in PJM's regional planning process and NYISO did not voluntarily agree to pay any Bergen costs.

reasonableness of these cost allocations, they relinquished those specific rights to terminate their future liability for the cost allocations.

1. ConEd

ConEd is a public utility that provides electric service in New York City and Westchester County, New York. Several decades ago, ConEd and PSE&G considered building additional facilities to increase their transmission capacity into New York City and northern New Jersey, respectively. As an alternative to building these facilities, ConEd and PSE&G entered into long-term contracts under which ConEd agreed to supply 1,000 megawatts of electricity from generators outside of New York City into northern New Jersey, and PSE&G agreed to supply 1,000 megawatts of electricity into New York City. (This is called a wheeling arrangement or "wheel.") *PJM Interconnection, L.L.C.*, 132 FERC ¶ 61,221, at PP 2-6 (2010).

Later, NYISO and PJM assumed operational control of ConEd's and PSE&G's transmission systems. Over the years there were several disputes among various parties and stakeholders, which ultimately were resolved in a global 2009 settlement that ConEd, PSE&G, NYISO, PJM, and New Jersey (among others) joined. *See id.* at PP 12-14, 16.

Under the 2009 settlement, the transmission agreements would continue with some modifications, and ConEd would be allocated a share of the costs of Regional Plan projects based on 900 megawatts of transmission service until the transmission

agreements expired. *Id.* at P 13 & n.28.[4] Those transmission agreements expired by their own terms on April 30, 2017. Answer of Consol. Edison Co. of N.Y., Inc. 4, No. EL18-54 (Feb. 23, 2018) (R113, JA__) ("ConEd Answer"). Although ConEd had the option to renew the agreements, it notified PJM over a year in advance that it would not exercise that option. *Id.*; *see* PJM Tariff § 2.2. As a result, under the express terms of the settlement, ConEd had no further responsibility to share in the costs of Bergen and other Regional Plan projects. *See* Settlement Agreement ¶ 20, *PJM Interconnection, L.L.C.*, No. ER08-858 (Feb. 23, 2009) (JA__) ("ConEd shall have no liability [for such costs] after the termination of[] said term of service."); *accord* New-Jersey-Br. 7. The costs that had been allocated to ConEd were reallocated, vastly increasing the costs allocated to Linden, Hudson, and NYPA. *See* PJM Tariff, Schedule 12, § (b)(xi)(B); Complaint Order ¶ 9 (JA__).

2. Linden

Linden owns and operates a merchant transmission facility ("Merchant Facility")—*i.e.*, a transmission line and associated equipment. Linden and other Merchant Facilities transfer electricity between two regions but neither generate it nor supply it to end users. Linden's facility runs between Linden, New Jersey (in PJM's control area) and Staten Island, New York (in NYISO's control area), and

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[4] ConEd was the only New York party that agreed to pay a share of PJM's Regional Plan project costs in the settlement. *PJM Interconnection*, 132 FERC ¶ 61,221, at P 13.

operates in both directions. Linden periodically sells its customers the right to use its facility. *Linden VFT, LLC*, 119 FERC ¶ 61,066, at PP 2-9 (2007).

As explained further below, Linden obtained 330 megawatts of firm transmission withdrawal rights when it interconnected with PJM. Under the PJM Tariff, firm transmission withdrawal rights make the holder liable for direct allocations of Regional Plan project costs, whereas non-firm transmission withdrawal rights do not. *See PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,161, at P 80 (2009) ("Opinion No. 503") (Merchant Facilities "can avoid these costs if instead of opting for Firm Transmission Withdrawal Rights, they opt only for Non-Firm Transmission Withdrawal Rights"); *infra* at 28-29. Linden paid those cost allocations without complaint before 2014, when they soared due to Bergen and certain other Regional Plan projects. Compl. 7, No. EL17-90 (Sept. 18, 2017) (R5, JA__) ("Linden Compl."). While it was challenging those cost allocations before FERC, Linden repeatedly warned that the annual charges it was being forced to pay—which roughly equaled its entire annual revenue—were "unsustainable" and "threaten[ed] [its] financial viability." *Id.*, Ex. A ¶ 6 (JA__); *see id.* (annual charges for Bergen were expected to reduce Linden's annual net income "by approximately $18 million per year resulting in a loss of $12 million per year starting in 2018").

When FERC nonetheless upheld the cost allocations, *see supra* at 7, Linden had no choice but to give up its firm transmission withdrawal rights. Linden

therefore sought to amend its interconnection agreement with PJM to convert those firm rights to non-firm. PSE&G refused to execute the amended agreement, however, and Linden ultimately filed a complaint under Federal Power Act section 206, 16 U.S.C. § 824e(a), asking FERC to allow the conversion. Linden Compl. 3-5 (JA__-__). FERC granted that complaint in part. It recognized that converting Linden's firm transmission withdrawal rights to non-firm "imposes no additional obligation on PJM and, in fact, is less burdensome." *Linden VFT, LLC v. Pub. Serv. Elec. & Gas Co.*, 161 FERC ¶ 61,264, at P 25 (2017) (R56, JA__) ("Linden Order"). Since there was no "operational or reliability basis" for forcing Linden to keep its firm transmission withdrawal rights, *id.* at P 24 (JA__), FERC found Linden's interconnection agreement to be "unjust and unreasonable insofar as it [did] not permit Linden to convert its Firm [rights] to Non-Firm," *id.* at P 23 (JA__).

Linden converted its firm transmission withdrawal rights to non-firm effective December 31, 2017. Under Schedule 12 of the PJM Tariff and Opinion No. 503, this ended Linden's ongoing responsibility to share directly in the costs of Bergen and other relevant Regional Plan projects. Linden continues to contribute to the costs of Regional Plan projects, including Bergen, indirectly through the rate it pays for firm point-to-point transmission service—a separate service Linden takes from PJM. The justness and reasonableness of those new charges is at issue in FERC

Docket No. ER19-2105, in which New Jersey is an active participant. *See infra* at 32-33.

3. Hudson And NYPA

Hudson also owns and operates a Merchant Facility, which runs between Ridgefield, New Jersey (in PJM's control area), and the west side of Manhattan (in NYISO's control area). Hudson has a long-term contract with NYPA, a state-owned utility that generates, transmits, and sells electricity in New York, which uses Hudson's facility to bring electricity from PJM into New York City. NYPA is, by contract, responsible for any Regional Plan project costs allocated to Hudson. *See* Complaint Order P 1 & n.1 (JA__).

Hudson and NYPA paid approximately $650 million to build Hudson's facility, as well as approximately $320 million for upgrades to PJM's transmission system to accommodate Hudson's interconnection. *See* Answer of Hudson Transmission Partners, LLC 19-20, No. EL17-84 (Oct. 30, 2017) (R44, JA__) ("Hudson Answer"). Hudson obtained 320 megawatts of firm transmission withdrawal rights from PJM, and Hudson and NYPA were directly allocated costs for Regional Plan projects based on such rights. (Hudson also obtained 353 megawatts of non-firm transmission withdrawal rights.) *Id.* at 6-7 (JA__-__).

Due to the skyrocketing cost allocations for Bergen—which were projected to result in annual charges that were over four times the annual revenue generated from

Hudson's facility—Hudson and NYPA's operation of the facility also became untenable. Protest of the N.Y. Power Auth. 24-26, *PJM Interconnection, L.L.C.*, No. ER17-950 (Mar. 16, 2017).[5] Like Linden, Hudson proposed to amend its interconnection agreement with PJM to convert its firm transmission withdrawal rights to non-firm, but PSE&G refused to execute the amended agreement. FERC then initiated its own section 206 proceeding "to examine the justness and reasonableness of [Hudson] being unable to convert its Firm Transmission Withdrawal Rights to Non-Firm." *PJM Interconnection, L.L.C.*, 160 FERC ¶ 61,056, at P 2 (2017) (R1, JA__). FERC ultimately granted Hudson the same relief it granted Linden. *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,262, at P 41 (2017) (R57, JA__) ("Hudson Order"). Hudson (on behalf of NYPA) accordingly converted its firm transmission withdrawal rights to non-firm effective December 15, 2017.

D. New Jersey's Challenges

New Jersey intervened in both the Linden complaint proceeding (FERC Docket No. EL17-90) and in the Hudson complaint proceeding initiated by FERC (FERC Docket No. EL17-84) with respect to the conversion of firm transmission withdrawal rights to non-firm rights. In these proceedings, New Jersey objected to

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[5] https://elibrary.ferc.gov/eLibrary/filedownload?fileid=01E8D4A2-66E2-5005-8110-C31FAFC91712

the conversion of Linden's and Hudson's firm transmission withdrawal rights to non-firm because of the effect such conversion would have on the cost allocations for Bergen and other Regional Plan projects. *See* Comments of the N.J. Bd. of Pub. Utils. 4-7, No. EL17-84 (Oct. 10, 2017) (R35, JA__-__); Comments of the N.J. Bd. of Pub. Utils. 1-3, No. EL17-90 (Oct. 19, 2017) (R40, JA__-__). FERC responded to these objections, explaining that the PJM Tariff allocates costs for Regional Plan projects to a Merchant Facility only to the extent it holds firm transmission withdrawal rights. Linden Order PP 31-32 (JA__-__); Hudson Order PP 49-50 (JA__-__). Because New Jersey did not challenge the justness and reasonableness of the relevant Tariff provisions, its cost-allocation argument did "not provide a basis for precluding" Linden and Hudson from converting their firm transmission withdrawal rights to non-firm. Linden Order P 31 (JA__); *accord* Hudson Order P 49 (JA__-__).

New Jersey also filed its own section 206 complaint before FERC (FERC Docket No. EL18-54). Compl. of the N.J. Bd. of Pub. Utils., No. EL18-54 (Dec. 22, 2017) (R58, JA__-__) ("New Jersey Compl."). New Jersey alleged that, although Bergen "was constructed to alleviate reliability issues in northern New Jersey, ... those reliability issues were driven significantly by [power] transfers to New York." *Id.* ¶ 89 (JA__). New Jersey's core claim was that ConEd, Linden, Hudson, and NYPA continued to receive benefits from Bergen but, by taking the measures

discussed above they had "shift[ed] allocation of their costs ... back onto PJM, most significantly New Jersey ratepayers." *Id.* ¶ 117 (JA__). Thus, New Jersey alleged, its ratepayers were left paying unjust, unreasonable, and unduly discriminatory rates. *Id.* at 2 (JA__). Numerous parties submitted comments opposing New Jersey's complaint. Many comments—including those from PJM itself—explained that the premise of New Jersey's claim—*i.e.*, that the reliability issues Bergen would resolve were "driven" by power flows to New York—was factually wrong. Based on these comments and the record as a whole—and as described further below and in FERC's brief—FERC denied New Jersey's complaint. *See* Complaint Order P 50 (JA__).

SUMMARY OF ARGUMENT

New Jersey offers no sound reason why PJM should be required to continue allocating costs to ConEd, Linden, Hudson, and NYPA after they, with FERC's consent, gave up the rights on which their cost allocations were based. Many of the reasons New Jersey offers are procedurally improper, and all are meritless.

I. New Jersey's argument starts from the premise that ConEd, the other Intervenors, and the New York region benefit from Bergen because power flows attributable to New York contributed to the need for Bergen. As PJM has explained and FERC found, that premise is factually incorrect. It is also completely irrelevant to the issues respecting ConEd. The 2009 settlement that New Jersey joined expressly relieved ConEd of further cost responsibility for Bergen and other

Regional Plan projects once its transmission agreements expired. The PJM Tariff likewise recognizes, consistent with the settlement, that ConEd's cost responsibility ended when its transmission agreements ended. New Jersey cannot now challenge the terms of that settlement.

Moreover, New Jersey presented no evidence of ongoing benefits that would support continued cost allocations to ConEd. New Jersey is barred procedurally from challenging FERC's determination in a separate proceeding that a temporary operating protocol established by PJM and NYISO after ConEd's transmission agreements expired did not justify continued cost allocations to ConEd. And the Joint Operating Agreement between PJM and NYISO, as well as basic cost-allocation principles, curb PJM's ability to shift the costs of Bergen outside of the PJM region. New Jersey offers no arguments or evidence that would support such cost shifting to New York here.

II. New Jersey argues that Linden is unlawfully avoiding cost allocations for Bergen by pairing non-firm transmission withdrawal rights and firm point-to-point transmission service. Notably, New Jersey does not raise a similar argument with respect to Hudson, and has thus forfeited any such argument. And because New Jersey does not otherwise challenge FERC's orders allowing Hudson to convert its firm transmission withdrawal rights to non-firm, the petition in Case No. 20-1080 should be denied.

With respect to Linden, New Jersey's argument is jurisdictionally barred because New Jersey failed to raise this argument in any of its agency rehearing requests. Even if the argument were properly presented, it is wrong. New Jersey does not, and could not, challenge FERC's determination in Opinion No. 503 that Linden's current non-firm transmission withdrawal rights do not carry direct cost allocations for Regional Plan projects. And Linden *does* contribute indirectly to the cost of Bergen and other Regional Plan projects through the rate it pays PJM for firm point-to-point transmission service. New Jersey's true objection is that the point-to-point rate is too low, but it does not and cannot challenge that rate here. However, that rate is being addressed in a separate FERC proceeding in which New Jersey is an active participant.

III. The record and FERC's orders refute New Jersey's cursory argument that FERC failed to examine the "total effect" of the measures that ConEd, Linden, Hudson, and NYPA took to limit their cost responsibility for Bergen. FERC evaluated each measure, individually and collectively, and found—contrary to what New Jersey says—that those measures did not result in New Jersey ratepayers receiving an unjust and unreasonable rate.

New Jersey's petitions for review should be denied.

STANDARD OF REVIEW

FERC's brief (at 33-35) adequately explains the applicable standard of review.

ARGUMENT

I. FERC CORRECTLY FOUND THAT THERE WAS NO BASIS TO CONTINUE ALLOCATING COSTS FOR BERGEN TO CONED AFTER ITS TRANSMISSION AGREEMENTS EXPIRED

New Jersey purports to ground its arguments in the cost-causation principle, under which the cost allocations for a transmission-upgrade project like Bergen must be "roughly commensurate" with the benefits of the project. *Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1256 (D.C. Cir. 2018) (citation omitted). New Jersey first argues (at 30-40) that FERC improperly departed from that principle when it determined that ConEd—a utility in New York—was no longer responsible to contribute to the costs of Bergen after its transmission agreements with PJM expired. FERC did no such thing, as its orders show.

A. New Jersey's Principal Factual Premise Is Incorrect

The factual premise underpinning New Jersey's claim has no support in the record. FERC rejected that premise, and its finding is supported by substantial evidence. In New Jersey's view, ConEd (along with the other Intervenors and the New York region at large) must continue to bear the costs of Bergen because "power flows to New York contributed to the reliability issues that necessitated [Bergen]."

New-Jersey-Br. 36; *see id.* at 1 (claiming that Bergen "was built, in substantial part, to serve New York"). But that is not true, as PJM stated and FERC found in the proceeding below.

Responding to New Jersey's complaint, PJM explained: "[I]t is not correct that '[t]he facts reveal that *transfers to New York* contributed to reliability issues in northern New Jersey, which were to be resolved by [Bergen.]'" Answer of PJM Interconnection, L.L.C. 5, No. EL18-54 (Feb. 23, 2018) (R129, JA__) ("PJM Answer") (first alteration in original) (quoting New Jersey Compl. ¶ 137 (JA__)). Rather, "the reliability issues that drove the need for [Bergen] ... relate[d] to short circuit issues that are a consequence of the physical configuration of the generating facilities and transmission system in and around northern New Jersey." *Id.* Thus, PJM told FERC, "the need for [Bergen] and its scope does not change as a result of any change in flows to New York and [Bergen] would be needed ... even if there were no flows on the transmission facilities interconnecting New York and New Jersey." *Id.* FERC recited this evidence and adopted it as a basis for denying New Jersey's complaint. Complaint Order PP 25, 54 & n.85 (JA__-__, __-___). New Jersey cites nothing in the record to refute it.

Just as New Jersey failed to show that ConEd (and New York) caused the need for Bergen, it also failed to show that ConEd—which is no longer a customer of PJM—receives any ongoing benefits from Bergen that would support continued cost

allocations. The only benefit New Jersey has even arguably alluded to is the generalized benefit that comes from interconnecting the PJM and NYISO systems. FERC addressed that benefit, however, and reasonably found that it did not support continued cost allocations for Bergen to ConEd (or NYISO). *See infra* at 22-24.

B. FERC Correctly Found That The 2009 Settlement And The PJM Tariff Required ConEd's Liability For Regional Plan Project Costs To End When Its Transmission Service Ended

In addition to being factually mistaken, New Jersey's argument completely mischaracterizes why ConEd was relieved of its responsibility to contribute to the costs of Bergen and other Regional Plan projects. New Jersey claims that ConEd "volunteer[ed]" to contribute to those costs pursuant to the 2009 settlement and then "withdrew its assent when it saw the costs of [Bergen]." New-Jersey-Br. 2. But here again, New Jersey's argument ignores the facts.

ConEd previously was responsible for Regional Plan project costs because the 2009 settlement "required ConEd to bear cost responsibility for [Regional Plan] costs in PJM *during the term of ConEd's service*," *i.e.*, while its transmission agreements were in force. *N.Y. Indep. Sys. Operator, Inc.*, 161 FERC ¶ 61,033, at P 50 (2017) ("Joint Operating Agreement Order") (emphasis added); *see N.J. Bd. of Pub. Utils. v. PJM Interconnection, L.L.C.*, 170 FERC ¶ 61,180, at P 13 & n.26 (2020) (R190, JA__-__) ("Complaint Rehearing Order"); FERC-Br. 36. Far from "reneg[ing]" on these agreements, New-Jersey-Br. 40, ConEd abided by them.

ConEd merely decided—as was its right under the 2009 settlement and the PJM Tariff—not to renew those agreements, which were set to (and did) automatically expire on April 30, 2017. ConEd Answer 4, 8 (JA__, __). FERC correctly found, under the express terms of the settlement and the PJM Tariff, that ConEd's responsibility to contribute to the costs of Bergen and other Regional Plan projects ended when ConEd ceased being a transmission customer of PJM. *See* Complaint Order P 56 (JA__-__); *see also* PJM Tariff, Schedule 12, § (b)(xi)(B) (requiring costs allocated to ConEd to be reallocated upon the "termination of service under the ConEd Service Agreements").

None of this could have been a surprise to New Jersey. New Jersey "actively participated" in the "extensive negotiations" that led to the 2009 settlement, and "joined ConEd, PJM, NYISO and PSE&G" in signing the settlement. New Jersey Compl. ¶¶ 33-34 (JA__). PJM and New Jersey knew that ConEd's obligation to contribute to the costs of Bergen would continue beyond April 30, 2017 only if ConEd elected to renew its transmission agreements—which it did not. If New Jersey had any concerns about these contractual provisions, it should have addressed them during the settlement negotiations or in comments to FERC; it should not have agreed to the 2009 settlement. Having entered into the settlement, New Jersey is bound by it. New Jersey's claims against ConEd cannot succeed because they are barred by the settlement and constitute an impermissible collateral attack on FERC's

order approving the settlement, which is final and not subject to this Court's review. *See Pac. Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-25 (D.C. Cir. 2008); FERC-Br. 38-39.

C. FERC Correctly Found That The Joint Operating Agreement Between PJM And NYISO Provides No Basis To Allocate Bergen Costs To ConEd Or New York

Even if the 2009 settlement, the PJM Tariff, and FERC's orders approving them were not dispositive (which they are), FERC correctly found that there is no other basis upon which to continue allocating costs to ConEd (or New York generally) for Bergen and other Regional Plan projects. FERC examined the impact of the transmission agreements' expiration, the benefits that might continue to accrue to ConEd notwithstanding that expiration, and the cost-allocation impacts in a separate proceeding in which New Jersey was actively involved.

In that proceeding, New Jersey asserted that a temporary operating protocol instituted by PJM and NYISO after the expiration of ConEd's transmission agreements showed that ConEd (and New York generally) continued to receive benefits from Bergen, and the PJM network broadly, without paying for them. *See* Protest of the N.J. Bd. of Pub. Utils. 4-5, *N.Y. Indep. Sys. Operator, Inc.*, No. ER17-905 (Feb. 21, 2017).[6] FERC found, however, that the protocol was

[6] https://elibrary.ferc.gov/eLibrary/filedownload?fileid=01E7FE50-66E2-5005-8110-C31FAFC91712

developed by PJM and NYISO to "address short-term reliability issues on [PSE&G]'s system, not ConEd's system," *N.Y. Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,208, at P 33 (2019), and did not—unlike the transmission agreements to which ConEd was a party—"entitle ConEd to firm transmission service" that would justify allocating further costs to ConEd, *id.* at P 21; *see id.* at P 33. Although New Jersey sought rehearing in that proceeding, it declined to seek judicial review, and it cannot now seek to resurrect its earlier challenge. *See Pac. Gas & Elec. Co.*, 533 F.3d at 824-25; FERC-Br. 38-39.

In the proceedings actually at issue here, FERC correctly found that other provisions of the Joint Operating Agreement between PJM and NYISO barred further imposition of Bergen's costs on ConEd (and New York). As FERC recognized, the Joint Operating Agreement states that, unless an interregional project is approved by both PJM and NYISO—and Bergen was not—"neither the NYISO Region nor the PJM Region shall be responsible for compensating another region or each other for required upgrades or for any other consequences in another planning region associated with regional or interregional transmission facilities." Complaint Order P 54 & n.86 (JA__); *see* Complaint Rehearing Order P 15 (JA__). In addition, while FERC observed that neighboring systems like PJM and NYISO may share mutual benefits simply by virtue of their interconnection, the Joint Operating Agreement "specifically states that PJM and NYISO shall not charge one another

for such [mutual benefits].” Complaint Order P 55 (JA__) (alteration in original) (citation omitted). New Jersey does not mention these provisions, instead wrongly suggesting (at 35 n.15) that FERC did not rely on the Joint Operating Agreement as a basis for its decisions.

D. FERC Correctly Found That Order No. 1000 Precludes PJM From Allocating Costs For Bergen To ConEd When It Did Not Agree To Assume Them

New Jersey argues (at 34-40) that FERC inappropriately relied on a general cost-allocation principle—Principle 4—codified in FERC’s Order No. 1000. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051 (2011) (“Order No. 1000”). As shown above, however, FERC did not merely cite Principle 4 and stop there. FERC considered the arguments New Jersey presented and correctly applied Principle 4 in this proceeding.

Principle 4 provides that “[t]he allocation method for the cost of a transmission facility selected in a regional transmission plan must allocate costs *solely* within that transmission planning region unless another entity outside the region or another transmission planning region voluntarily agrees to assume a portion of those costs.” *Id.* at P 657 (emphasis added) (citation omitted); *accord* Complaint Order P 54 (JA__). Because (1) Bergen was selected by PJM in its regional planning process, (2) NYISO was not involved in that process and did not

voluntarily agree to assume cost responsibility for Bergen, and (3) ConEd did not voluntarily agree to assume cost responsibility for Bergen after its transmission agreements expired, FERC correctly found that Principle 4 prohibited further cost allocations to ConEd or other New York utilities or ratepayers.

New Jersey discounts Principle 4, suggesting that FERC's reliance on it conflicts with the cost-causation principle. But this Court has already held otherwise. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 88-89 (D.C. Cir. 2014) (holding that, even if Principle 4 "may lead to some beneficiaries escaping cost responsibility," "'feasibility concerns'" also "'play a role,'" and FERC "'is not bound to reject any rate mechanism that tracks the cost-causation principle less than perfectly'" (citation omitted)); FERC-Br. 43-44. New Jersey has presented no evidence or argument that would justify a modification or reversal of Principle 4. And the cost-allocation limitations reflected in Principle 4 apply with particular force in this case, because NYISO had no notice that Bergen costs might be allocated to New York involuntarily, and therefore had no reason to participate in the PJM planning processes that led to the approval of Bergen.

Furthermore, to support a claimed violation of the cost-causation principle, New Jersey needed to present evidence to FERC that it and the ratepayers it represents are not receiving benefits that are "roughly commensurate" with the costs

they are allocated. *Old Dominion*, 898 F.3d at 1256 (citation omitted). New Jersey failed to make that required showing.

II. FERC CORRECTLY FOUND THAT LINDEN COULD NOT BE DIRECTLY ALLOCATED COSTS FOR BERGEN AFTER GIVING UP ITS FIRM TRANSMISSION WITHDRAWAL RIGHTS

New Jersey next takes aim at Linden, arguing that "FERC's decision to allow Linden to avoid cost allocations for [Bergen]" was "arbitrary" because FERC "did not grapple with the interaction between firm Point-to-Point service and non-firm Withdrawal Rights." New-Jersey-Br. 41; *see id.* at 41-49. This argument is both procedurally barred and substantively wrong.

A. The Court Lacks Jurisdiction Over New Jersey's Challenge To Linden's Cost Allocations Because New Jersey Did Not Raise This Argument On Rehearing Before FERC, And New Jersey Makes No Argument As To Hudson

This Court has no jurisdiction to address New Jersey's challenge to Linden's cost allocations because New Jersey did not advance its current argument in any of the rehearing requests it submitted to FERC. *See* FERC-Br. 52-56 & n.3. New Jersey attempts (at 15-18, 42-43) to piggyback on arguments raised by *other* parties—PJM's Independent Market Monitor and PJM's Transmission Owners in particular. But under settled law, "[i]t is not enough that some party before the Commission raised the argument and that the Commission considered it; instead, the party petitioning for judicial review must itself have requested rehearing, and made the same objections it seeks to raise in court." *New England Power Generators*

Ass'n v. FERC, 879 F.3d 1192, 1198 (D.C. Cir. 2018). Because New Jersey did not press its current argument in its agency rehearing requests, this Court cannot consider that argument. *Id.*; *see* 16 U.S.C. § 825*l*(b) ("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 ....").

This jurisdictional bar applies at least equally to Hudson. But as to Hudson, this Court need not get even that far. New Jersey makes only fleeting references to Hudson in its argument (at 43, 46-47) and addresses (at 41-49) only the effect of Linden's pairing of non-firm transmission withdrawal rights with firm point-to-point transmission service—an argument that does not apply to Hudson. Any argument as to Hudson is forfeited. *See, e.g.*, *United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 929 F.3d 721, 728 (D.C. Cir. 2019); FERC-Br. 48. Moreover, while New Jersey nominally seeks judicial review of FERC's orders allowing Hudson to convert its firm transmission withdrawal rights to non-firm (in Case No. 20-1080), New Jersey mentions them only in passing (at 17) and identifies no basis to set them aside. The petition for review in Case No. 20-1080 should be denied.

B. New Jersey's Challenge To Linden's Cost Allocations Is Meritless

New Jersey argues that Linden has "exposed a loophole in the PJM Tariff"—through which Linden ostensibly receives benefits from Bergen and other Regional Plan projects without having to pay for them—that FERC supposedly failed to

consider. New-Jersey-Br. 18. But there is no loophole, and FERC correctly recognized as much. In reality, New Jersey is seeking to impose additional costs on Linden that no other entity receiving the same service and benefits from PJM would have to pay.

Under the PJM Tariff, a Merchant Facility like Linden (or Hudson) must hold transmission withdrawal rights and either it or its customer(s) must obtain point-to-point transmission service from PJM to the Merchant Facility. Transmission withdrawal rights and point-to-point transmission service are distinct and carry different costs.

Transmission withdrawal rights allow a Merchant Facility to withdraw power from PJM. *See* Opinion No. 503, 129 FERC ¶ 61,161, at PP 4-5 & n.7; PJM Tariff § 232.1. To obtain transmission withdrawal rights, a Merchant Facility must initially pay the "but for" costs of interconnecting with PJM—*i.e.*, "the costs of network upgrades which, based on the interconnection process, are needed to ensure that PJM can reliably" serve the Merchant Facility. Opinion No. 503, 129 FERC ¶ 61,161, at P 4; *see id.* at P 48; PJM Tariff §§ 212.1, 217.1. These costs can be substantial. For example, Hudson and NYPA paid *approximately $320 million* in "but for" costs to interconnect the Hudson facility with PJM. *See* Hudson Answer 20 (JA__).

A Merchant Facility also may be allocated costs for Regional Plan projects—but only to the extent it holds *firm* transmission withdrawal rights. *See* Opinion

No. 503, 129 FERC ¶ 61,161, at P 80; PJM Tariff, Schedule 12, § (b)(iii)(A)(3), (b)(x)(B)(2). "'PJM is required to provide reliable service up to the Firm Transmission Withdrawal Rights'" held by a Merchant Facility, whereas non-firm transmission withdrawal rights are subject to curtailment "whenever necessary to preserve reliability." Linden Order P 32 (JA__) (citation omitted). In order to provide the reliable service required for firm transmission withdrawal rights, "PJM must require the construction of [Regional Plan] upgrades." *Id.* (citation omitted). In an earlier proceeding, which culminated in Opinion No. 503, FERC concluded that Merchant Facilities "can avoid" the costs of Regional Plan projects "if instead of opting for Firm Transmission Withdrawal Rights, they opt only for Non-Firm Transmission Withdrawal Rights." *Id.* (quoting Opinion No. 503, 129 FERC ¶ 61,161, at P 80); *accord* Complaint Order P 56 (JA__).

As discussed above, Linden (and Hudson) initially held firm transmission withdrawal rights, but converted them to non-firm. *See supra* at 10-13. New Jersey does not contest their right to do so. Nor does it contest FERC's determination in Opinion No. 503 that non-firm transmission withdrawal rights do not come with direct cost allocations for Regional Plan projects. Nor, for that matter, could New Jersey contest that determination here, since it participated in the proceeding that culminated in Opinion No. 503, and did not seek rehearing or judicial review of that opinion.

Instead, New Jersey claims (at 41-49) that, because Linden takes firm point-to-point transmission service from PJM and supposedly receives the same benefits as it did before converting its firm transmission withdrawal rights to non-firm, Linden should continue to be directly allocated costs for Bergen and other Regional Plan projects. Like transmission withdrawal rights, point-to-point transmission service may be either firm or non-firm,[7] and may come with upfront "but for" costs. *See Neptune Reg'l Transmission Sys., LLC v. PJM Interconnection, L.L.C.*, 111 FERC ¶ 61,455, at P 27 (2005), *aff'd sub nom. Pub. Serv. Elec. & Gas Co. v. FERC*, 485 F.3d 1164 (D.C. Cir. 2007).[8] Unlike transmission withdrawal rights, however, point-to-point transmission service is purchased from PJM as needed, is paid for on an ongoing basis, and *never* comes with direct allocations of Regional Plan costs—for Linden or anyone else taking that service. In fact, Linden's customers have *always* purchased point-to-point transmission service without directly paying for Regional Plan projects; the only change is that Linden now purchases firm point-to-point transmission service for the benefit of its customers. *See* Answer of Linden

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[7] "Point-to-point Transmission Service" is "the reservation and transmission of capacity and energy on either a firm or non-firm basis from the Point(s) of Receipt to the Point(s) of Delivery." PJM Tariff § 1; *see id.* §§ 13.1-14.7.

[8] New Jersey's reliance (at 47) on *Neptune* is misplaced. As FERC said expressly, that decision concerns upfront "but for" costs—not costs for Regional Plan projects. *See Neptune*, 111 FERC ¶ 61,455, at P 25 (FERC's orders did "not address subsequent upgrade costs ... that may be imposed pursuant to PJM's regional transmission expansion plan").

VFT, LLC 10, No. EL18-54 (Mar. 12, 2018) (R136, JA__). But none of this means that Linden escapes Regional Plan project costs. It just pays those costs *indirectly*, as they are incorporated into the charges Linden pays for the firm point-to-point transmission service it takes from PJM.

Although New Jersey ignores that point, it was central to the underlying FERC proceedings. New Jersey contended that the PJM Tariff should be modified because it purportedly failed to allocate the costs of Regional Plan projects to Merchant Facilities that do not hold firm transmission withdrawal rights. New Jersey Compl. 2-3 (JA__); *see id.* ¶¶ 150-75 (JA__-__). PJM's Transmission Owners—who develop Regional Plan projects and control the relevant cost-allocation provisions of the PJM Tariff—explained why that was incorrect.

As the Transmission Owners explained, Merchant Facilities without firm transmission withdrawal rights "may not be obligated to pay Transmission Enhancement Charges"—*i.e.*, charges for Regional Plan projects—"based on their withdrawal rights," but they or their customers must still "pay for their fair share of projects constructed to maintain the reliability of [the point-to-point] transmission service" they take. Transmission Owners Comments 7 (JA__). Because the PJM Tariff already requires customers taking point-to-point transmission service to pay for Regional Plan projects through the charges for that service—which ultimately flow back to the Transmission Owners—"no modification" of the PJM Tariff was

"necessary." *Id.* at 8 (JA__); *see id.* at 6-9 (JA__-__) (detailing how Section 232.2 and Schedules 7, 8, and 12 operate in this context). Based on this and other evidence, FERC found that such "customers (e.g., Linden and Hudson) pay a share of Transmission Enhancement Charges as part of the embedded-cost transmission service rates applicable to such [point-to-point transmission] service." Complaint Order P 57 (JA__); *see* FERC-Br. 56-57.

Thus, it is simply false for New Jersey to say that Linden is exploiting a "loophole" in the PJM Tariff "by pairing firm Point-to-Point service with non-firm Withdrawal Rights." New-Jersey-Br. 28; *see* Transmission Owners Comments 7 (JA__) (rejecting New Jersey's argument "that there is a 'loophole'" in the PJM Tariff). Linden is not "enjoying the benefits of [Bergen] cost-free." New-Jersey-Br. 49. To the extent Linden receives benefits from Bergen and other Regional Plan projects because of its firm point-to-point transmission service, it pays for those benefits in the same manner as all customers taking the same service. In fact, in the wake of Linden converting its firm transmission withdrawal rights to non-firm, PJM's Transmission Owners revised the relevant rate for firm point-to-point transmission service for the first time since 2004—substantially increasing Linden's annual charges for that service. *See PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,095, at P 16 (2019), *modified*, 172 FERC ¶ 61,156 (2020).

FERC understood all of this. Not only is FERC aware that a Merchant Facility may pair non-firm transmission withdrawal rights with firm point-to-point transmission service, *see* Opinion No. 503, 129 FERC ¶ 61,161, at P 5 & n.7, but in its orders here, FERC recognized that Linden continues to pay for the benefits it receives from Bergen and other Regional Plan projects. *See* Complaint Order P 57 (JA__); FERC-Br. 56-57. FERC did not err in this respect.

C. New Jersey's Underlying Objections Have Been Or Are Being Resolved In Other FERC Proceedings

Because Linden contributes to the cost of Bergen and other Regional Plan projects through the rate it pays for point-to-point transmission service, New Jersey's main complaint boils down to the justness and reasonableness of that rate. New Jersey does not challenge the level of that rate here, however, *see* New-Jersey-Br. 25 n.13, and it has proffered no evidence showing that rate is unjust, unreasonable, or unduly discriminatory. Nor would this be the appropriate proceeding in which to make such a challenge. There is another proceeding pending before FERC in which the rate for point-to-point transmission service is actually at issue—and New Jersey is an active participant in that proceeding. *See PJM Interconnection*, 169 FERC ¶ 61,095, at PP 14, 49, 53-54, 57; FERC-Br. 56-57 & n.5.

New Jersey also repeatedly mentions the fact that Linden's customers were able to continue selling capacity into New York after Linden converted its firm transmission withdrawal rights to non-firm. *See* New-Jersey-Br. 11, 13-14, 18, 22,

42, 44, 47. PJM, however, gave "no assurances" that Linden's customers could sell capacity into New York after Linden "converted [its] interconnection service from Firm to Non-Firm [transmission withdrawal rights]." Limited Response of PJM Interconnection, L.L.C. 2, No. EL18-54 (Mar. 12, 2018) (R134, JA__). Nor could it have. As PJM and FERC recognized, that determination was for NYISO, the operator of the New York electric grid, to make. *See id.* ("Whether a resource qualifies as a NYISO capacity resource or not is a NYISO decision."); *accord* Complaint Order P 59 (JA__). The fact that *NYISO* is satisfied that Linden's service can count as capacity in New York does not show, as New Jersey insinuates (at 42-45), that *PJM* must treat Linden the same way it did before Linden converted its firm transmission withdrawal rights. And, in any event, NYISO's determination was contested before FERC in a separate proceeding—in which New Jersey participated—and FERC upheld it. *See Indep. Power Producers of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 169 FERC ¶ 61,209, at PP 10, 12 & n.31, 25, 40 (2019). Neither New Jersey nor any other party sought rehearing or judicial review, and New Jersey cannot now try to revisit NYISO's and FERC's decisions. *See Pac. Gas & Elec. Co.*, 533 F.3d at 824-25; FERC-Br. 54-55.

III. FERC CONSIDERED THE TOTAL EFFECT OF ITS ORDERS AND REASONABLY CONCLUDED THAT THEY DID NOT RESULT IN AN UNJUST AND UNREASONABLE RATE

New Jersey's cursory argument that FERC did not consider the "total effect" of its decisions is meritless. FERC did consider the effects of its decisions—individually and collectively—and reasonably determined that New Jersey ratepayers had not received an unjust and unreasonable rate.

New Jersey's argument (at 50) rests on the false premise that FERC "siloed" its analysis. The record—which New Jersey ignores—shows otherwise. FERC expressly relied on PJM's determination that Bergen "would be needed to address … short circuit issues [in New Jersey] even if there were no flows on the transmission facilities interconnecting New York and New Jersey." Complaint Order P 25 (JA__); *see id.* at P 54 n.85 (JA__); FERC-Br. 46. FERC also found that because Bergen "was planned by a single region, i.e., PJM, and without a voluntary commitment to share cost responsibility by the other region, i.e., NYISO, it is just and reasonable for the costs of the project to be allocated solely within that region, PJM." Complaint Order P 54 (JA__). As FERC recognized, it is not unjust and unreasonable for New Jersey ratepayers to pay for a project that was built in New Jersey to address reliability problems in New Jersey and was needed even if there were no power flows to New York. *See also* Complaint Rehearing Order P 15 (JA__). Thus, contrary to New Jersey's unsupported contentions, FERC did

reasonably determine that the "end result" of the actions it approved did not "add[] up" to an unjust or unreasonable outcome. New-Jersey-Br. 50 (alteration in original) (quoting *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1178 (D.C. Cir. 1987)).

FERC also reasonably determined that the individual measures that ConEd, Linden, Hudson, and NYPA took were permissible. With respect to ConEd, FERC analyzed the Joint Operating Agreement, the 2009 settlement—which New Jersey joined—and the relevant PJM Tariff provisions and determined that ConEd was not obligated to bear cost responsibility for Bergen after its transmission service from PJM ended. Joint Operating Agreement Order P 50; *see* Complaint Order PP 54-55 (JA__-__); FERC-Br. 36-42. With respect to Linden, Hudson, and NYPA, FERC analyzed the revised interconnection agreements and the relevant PJM Tariff provisions and determined that because Linden, Hudson, and NYPA now received a reduced quality of service, it was "appropriate[]" that they be relieved of further direct cost allocations for Bergen. Complaint Order P 56 (JA__); *see* FERC-Br. 48-57. In approving each of these actions, FERC fully addressed the issues before it and was not required to consider how the approved action might contribute to hypothetical "total effects" stemming from other anticipated actions by other parties. Thus, contrary to New Jersey's contention, FERC did not "fail[] to consider an important aspect of the problem." New-Jersey-Br. 41 (citation omitted).

Despite the comprehensiveness of FERC's analysis, New Jersey complains (at 50-51) that New Jersey ratepayers are "strand[ed] ... with an exceedingly disproportionate share of the costs of" Bergen while New York ratepayers received a "windfall." The record refutes this claim. FERC recognized that once ConEd's transmission agreements ended, ConEd was no longer a customer of PJM. FERC also recognized that Linden, Hudson, and NYPA would receive a reduced quality of service as a result of the challenged actions. Complaint Order P 56 (JA__). FERC ultimately found that it was not disproportionate for New Jersey ratepayers to pay for a project in New Jersey that "would be needed to address short circuit violations in northern New Jersey even if there were no flows on the transmission facilities interconnecting New York and New Jersey." *Id.* at P 54 n.85 (JA__) (quoting PJM Answer 5 (JA__)).

New Jersey also ignores the substantial "but for" costs that Hudson, NYPA, and Linden paid, as part of the interconnection process, to upgrade PJM's system. *See supra* at 28-29. FERC expressly acknowledged the "$320 million" that Hudson and NYPA paid "for network upgrades to the PJM system." Hudson Order P 26 (JA__); *see* FERC-Br. 57 n.5. FERC likewise acknowledged Linden's payment for "network upgrades necessary to support its [firm transmission withdrawal rights]." Linden Order P 6 (JA__); *see* FERC-Br. 57 n.5. These payments, which cannot be recovered, refute any contention that Linden, Hudson, and NYPA received a

"windfall" by relinquishing firm transmission withdrawal rights and accepting a lesser quality of service to avoid even more massive (and potentially ruinous) cost allocations.

Moreover, to the extent specific Intervenors—*e.g.*, Linden—may continue to benefit from Bergen, such benefits are paid for through the charges for point-to-point transmission service, which ultimately wind up in the pockets of PSE&G and other Transmission Owners within PJM. *See supra* at 31-32. And to the extent the New York transmission system as a whole benefits incidentally through interconnection with the PJM transmission system, those benefits are "mutual" and not chargeable against either system. *See supra* at 23-24; *see also, e.g.*, Complaint Order P 55 (JA__-__) (explaining the "mutual benefits" provision of the Joint Operating Agreement between PJM and NYISO).

Finally, New Jersey's request for an evidentiary hearing neither substitutes for identifying error in FERC's orders nor cures New Jersey's numerous procedural errors. New Jersey's arguments are nothing more than a jumble of improper collateral challenges, including to: (1) the non-renewal of the ConEd's transmission agreements that was permitted by the 2009 settlement, which New Jersey signed and did not challenge, *see supra* at 21-22; (2) Opinion No. 503's finding (at P 80) that "Merchant Transmission Facilities can avoid" direct cost allocations for Regional Plan projects if "they opt only for Non-Firm Transmission Withdrawal Rights," from

which New Jersey did not seek rehearing, *see supra* at 29-30; (3) Linden's customers' ability to sell capacity into New York, *see supra* at 33-34; and (4) the orders permitting Hudson to convert its firm transmission withdrawal rights to non-firm, which New Jersey mentions only in passing and in non-specific terms, *see supra* at 27.

This record bears no resemblance to *Jersey Central*, in which FERC refused to consider evidence that an unconstitutionally confiscatory rate threatened a utility's financial integrity. 810 F.2d at 1178; *cf. Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1074 (D.C. Cir. 2003) ("[I]n contrast to this case, … Jersey Central had submitted substantial evidence of its financial fragility ...."). Having identified no grounds to set aside any of the FERC orders contested here, New Jersey (at 50) has no "separate" claim that all those permissible orders can be set aside en masse because the end result is to require New Jersey ratepayers to pay for an in-state project needed to solve in-state problems. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.").

CONCLUSION

The petitions for review should be denied.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of D.C. Circuit Rule 32(e)(2)(B)(i) because it contains 8,988 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

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Dated: September 21, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2021, I filed the foregoing brief with the Clerk of the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

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