Nos. 21-3068 & 21-3205
(consolidated with Nos. 21-3243 & 22-1158)

In the

United States Court of Appeals

for the

Third Circuit

PJM POWER PROVIDERS GROUP and
ELECTRIC POWER SUPPLY ASSOCIATION,
Petitioners,

– v. –

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On petition for review of orders of the
Federal Energy Regulatory Commission

REPLY IN SUPPORT OF PETITIONERS' MOTION TO STRIKE

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INTRODUCTION

Our motion demonstrated that, in the words of Commissioner Danly, the brief filed by the FERC Solicitor in this case "is not what it purports to be." Danly Statement, Dkt. 201-1, at 1. Indeed, because "the brief filed does not represent the position of the Commission" (*id.* at 1-2)—that is, a position adopted by a majority vote of the Commissioners—it is beyond the statutory power of the Solicitor to file or the Chairman to authorize. And if the statute did permit such a unilateral exercise of the Executive Power by the Chairman, that structure would likely be unconstitutional.

The Solicitor and the Respondent-Intervenors offer little in the way of justification for the Chairman's actions. Nothing in the Federal Power Act (including 16 U.S.C. § 824d(g)(1)(A)) permits the Solicitor to advocate—at the Chairman's direction—for positions that the Commission considered but failed to adopt by majority vote. Nor is there anything procedurally improper about this motion; it immediately followed Commissioner Danly's statement, which exposed for the first time the unlawfulness of the actions taken here.

Because the Solicitor's brief was filed without statutory authority, it is a nullity. The Court should therefore strike it.

ARGUMENT

I. Petitioners' motion is procedurally proper.

The procedural objections raised by the Solicitor and Respondent-Intervenors lack all merit.

a. Bafflingly, Respondent-Intervenors open (at 6-7) by suggesting that there is no such thing as a motion to strike *at all*. But while "[t]he Third Circuit's rules do not have" a provision specifically authorizing motions to strike (*id.* at 6), specific authorization is not necessary. This Court routinely entertains motions to strike appellate briefs made under Rule 27. *See, e.g.*, *Bradford v. Bolles*, 645 F. App'x 157, 160-61 (3d Cir. 2016). Indeed, it has granted such motions. *See, e.g.*, *Acuna v. Attorney General of the United States*, 619 F. App'x 83, 87 n.6 (3d Cir. 2015) ("[W]e grant the Government's motion to strike [Petitioner's] supplemental brief."); *USX Corp. v. Liberty Mut. Ins. Co.*, 444 F.3d 192, 202 (3d Cir. 2006); *McCray v. Corry Mfg. Co.*, 61 F.3d 224, 226 n.2 (3d Cir. 1995).

In fact, Respondent-Intervenors' own authority belies their argument. In *Custom Vehicles, Inc. v. Forest River, Inc*, Judge Easterbrook decried the practice of filing "pointless" motions to strike. 464 F.3d 725, 728 (7th Cir. 2006) (Easterbrook, J., in chambers). While his analysis began by noting that "[o]ne can search the Federal Rules of Appellate Procedure in vain without finding any provision for a 'motion to strike' whole documents," he

continued to explain that "[m]otions may be proper despite the lack of a specific rule." *Id.* at 726-727. As an example, Judge Easterbrook observed that "the court sometimes strikes entire briefs … because they so substantially violate the Rules of Appellate Procedure that it would not be worth judicial time to work through them." *Id.*

This is precisely the type of order that movants seek here. Because the Solicitor's brief is filed in excess of statutory authority, it "is a mere nullity." *Dixon v. United States*, 381 U.S. 68, 74 (1965) (quotation marks omitted). Just as this Court strikes briefs that contain improper argumentation, it should therefore strike the Solicitor's Brief. *See USX Corp.*, 444 F.3d at 202.

b. Nor was the Motion to Strike untimely. Respondent-Intervenors (at 7-8) and the Solicitor (at 16-17) argue that the appropriate place for movants' challenges was in their reply briefs. But these contentions misunderstand the import of Commissioner Danly's statement.

To be sure, Petitioners have consistently rejected any construction of the Federal Power Act that would allow "the views of a single Commissioner to stand in for action by the Commission as a whole and thus gain the force of law." EPSA Br. 27; *accord, e.g.*, PJM Reply Br. 9-12. But there was insufficient evidence that the brief captioned as "For Respondent Federal Energy

Regulatory Commission" was not what it purported to be until Commissioner Danly gave the world a peek behind the curtains at FERC.

There is a clear reason for this distinction: The FERC Commissioners' deadlock does not, *by itself*, mean that the Solicitor lacked authority to file a brief in this Court on behalf of the Federal Energy Regulatory Commission as an institution. One or both of the dissenting commissioners could have agreed to authorize that action, rendering the Solicitor's Brief one properly filed on behalf of the Commission, even if the Commissioners had deadlocked on the earlier orders.

Absent express evidence, then, Petitioners were not about to make a most serious accusation—that it "is untrue as a matter of fact" that the Solicitor's Brief "was filed 'for Respondent Federal Energy Regulatory Commission'" (Danly Statement at 2). Petitioners could not be sure until Commissioner Danly revealed, for the first time, that the brief was filed without agreement from either of the dissenting Commissioners. *See* Danly Statement at 1-2 ("I write to make everyone aware that the brief filed by the FERC Solicitor's Office on July 22, 2022 is not what it purports to be.").

Because Commissioner Danly filed his statement late in the afternoon on the same day Petitioners' reply briefs were due, Petitioners had no mean-

ingful chance to incorporate this new information into their reply briefs. Instead, Petitioners filed the motion to strike soon thereafter.[1]

II. The Solicitor and Respondent-Intervenors offer no convincing justification for the Chairman's actions.

The Solicitor and Respondent-Intervenors fare no better on the merits.

a. The DOE Organization Act specifies that FERC acts only by majority vote and limits the Chairman's authority to circumscribed, administrative tasks. 42 U.S.C. § 7171(c), (e). Both the Solicitor (at 3-9) and Respondent-Intervenors (at 8-12) argue that Section 205(g) of the Federal Power Act authorizes the Chairman to direct the adoption of legal and policy positions that have never received the support of a majority of the Commission. But nothing in the text supports their position.

Section 205(g) provides that, in the event of a deadlock, "the failure to issue an order accepting or denying [a] change by the Commission shall be considered to be an order issued by the Commission accepting the change *for purposes of section 825l(a)*," which sets out the agency rehearing process. 16 U.S.C. § 824d(g)(1) (emphasis added); *see id.* § 825*l*(a). This italicized

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[1] Even if, contrary to fact, Petitioners could have incorporated this argument into their reply briefs, the Solicitor and Respondent-Intervenors surely would have complained about the lack of opportunity to respond. By filing a motion, Petitioners ensured all parties a clear opportunity to be heard.

language—which is curiously omitted from both responses—makes clear that Section 205(g) simply renders deemed orders subject to requests for rehearing and to eventual judicial review—not that it transmutes them into majority-voted Commission orders for *all* purposes.

All parties agree that the purpose of Section 205(g) is to enable appeals from deadlocked FERC decisions, overruling the D.C. Circuit's decision in *Public Citizen, Inc. v. FERC*, 839 F.3d 1165 (D.C. Cir. 2016). *See* FERC Resp. 4-5; Respondent-Intervenors Resp. 4.[2] But the deemed existence of a Commission order for the limited purpose of judicial review hardly constitutes an independent source of authority for the Chairman to unilaterally adopt positions without a Commission majority. The statute states only the *result* when Commissioners deadlock—it permits judicial review. But because that result obtains by operation of law, rather than by action

[2] Both the Solicitor (at 4) and Respondent-Intervenors (at 8-9) incorrectly conflate Petitioners' merits arguments with their arguments in this motion. Even assuming, *arguendo*, that a reviewing court could consider the reasoning of the Commissioners who voted to accept the change on the merits, it is not at all clear that the Commission has by plurality *adopted* those reasons, which in other cases may be contradictory. The Solicitor need not affirmatively advocate these unadopted positions in order to allow the Court to consider those Commissioners' statements. Motion 10-11. Nor is there any merit to the suggestions that Petitioners disagree about the proper scope of a deadlocked order under Section 205(g) simply because they filed separate briefs.

of the Commission, the statute does not suggest that FERC's counsel may advocate for the substantive propriety of that result.

This conclusion is reinforced by the other context in which Section 205(g) applies: when FERC fails to issue an order because "the Commission lacks a quorum." 16 U.S.C. § 824d(g)(1). If the Commission were inquorate, but all active Commissioners voted to reject a proposed change, Section 205(g) nonetheless deems the Commission inaction an order *accepting* the change for purposes of judicial review. But the *only* reasoning in the Commissioners' statements would be *opposed* to the proposed change.

According to the Solicitor and Respondent-Intervenors, the Chairman would be within his power to instruct the Solicitor to concoct his own arguments, reasoning, and legal positions—that the Solicitor could claim as the position of the Commission itself, warranting *deference*—despite the fact that *no* Commissioner had ever agreed. This absurd result is an inescapable consequence of the Solicitor's approach here, which is reason enough to reject his interpretation. *See, e.g.*, *Vooys v. Bentley*, 901 F.3d 172, 192 (3d Cir. 2018) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations … are available.") (cleaned up).

This example also illustrates the wisdom of Commissioner Danly's alternative to the Chairman's unilateral action: "[T]he Commission's lawyers

could have instead filed a brief that explained the statute's operation and appended the … statements, declining to … advance a merits argument." Danly Statement at 2-3. If FERC were inquorate and a change were deemed accepted over the votes of two or fewer Commissioners, Commissioner Danly's approach would have the Solicitor present those Commissioners' statements, without advocacy, and defend the *procedures* that resulted in the statutorily-mandated outcome. *Id.*

This approach is far more sensible than requiring the Solicitor to advance—and demand deference—to positions never adopted by a Commission majority. Indeed, in the example of an inquorate Commission, the Solicitor and Respondent-Intervenors would apparently claim deference to positions never advanced by even a *single* Commissioner. That would be manifestly improper.

If FERC appropriately restrained itself to defending the *procedural* regularity of the actions it undertook that would hardly, as FERC (at 14-15) and Respondent-Intervenors (at 11-12) claim, be anathema to the adversarial process. FERC would maintain an "interest" in the litigation (Respondent-Intervenors Resp. 11): It would present the Commissioners' individual views and defend the *procedural* validity of the agency's proceedings. For

the same reason, an "actual controversy" would exist to allow judicial review—FERC would plainly maintain an interest in upholding the procedural validity of its actions. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975).

And, as this case well proves, the rate proponent and other impacted parties will have vested interests ensuring adversarial presentation of the full range of issues. Indeed, even now, Respondent-Intervenors—not content to let the Solicitor defend his action alone—insist on being heard on the motion to strike.

b. Next, the Solicitor seeks (at 7-8) to downplay the unprecedented power that the Chairman now claims. It points to an ongoing D.C. Circuit matter in which it claims "the Commission's lawyers are … defending the filed rate's lawfulness," notwithstanding that the Chairman voted against that outcome. *Id.* at 7. But in that case, the only substantive filing FERC has yet presented is a motion for summary disposition on untimeliness grounds—a point on which all four eligible Commissioners *agreed*. *See* P3 Reply 6 n.2. The merits deadlock has yet to be presented, and so the Solicitor's assurances that the Chairman will direct him to fully and fairly present the views of the other Commissioners have not been put to the test.

In any event, that the Chairman may deign to present opposing views in *some* cases does nothing to alleviate the statutory and constitutional problems with his exercise of the unilateral authority to make that choice

in the first place. A recent opinion from the Office of Legal Counsel provides a useful parallel. *See Authority of a Majority of the FDIC Board to Present Items for Vote and Decision*, 46 Op. O.L.C. ___ (July 29, 2022) (slip op.). There, the Chairperson sought to use her administrative authority as Chair to prohibit a majority of the FDIC Board from placing an item on a meeting agenda. *Id.* at 1. OLC concluded that neither the agency's organic statute nor general principles of corporate common law permitted the Chair to stretch her administrative authority into the realm of substantive policy-making reserved for the agency as a whole. *Id.* at 5-6; *accord Div. of Power & Responsibilities Between the Chairperson of the Chem. Safety & Hazard Investigation Bd. & the Bd. as a Whole*, 24 Op. O.L.C. 102 (2000). Just so here.

c. Finally, Respondent-Intervenors' attempt to allay the constitutional concerns that Chairman Glick's actions have raised rings hollow.

Respondent-Intervenors' only substantive defense of the constitutionality of Chairman Glick's actions is to claim (at 15) that he is, in fact, "under the direct control of the President." There are several problems with this claim. For one, it disregards the limitations the statutory scheme places on the President's ability to appoint a replacement Chairman. The Appointments Clause was designed to ensure that the President has lesser officers to "assist the supreme Magistrate in discharging the duties of his trust." 30

Writings of George Washington 334 (J. Fitzpatrick ed. 1939). When the President must select a replacement from among other Commissioners with for-cause removal protection, there is an intolerable risk that he will be "reduce[d] … to a cajoler-in-chief." *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 502 (2010).

And even if the Chairman *were* removable by the President at will, Respondent-Intervenors' reading would not alleviate the constitutional issues present here. There can be no question that adopting policies and legal positions on behalf of the agency is part of the Executive Power. *See* Motion 15-16.[3] That Executive Power can only be exercised by a Principal Officer, who in turn must be confirmed by the Senate. U.S. Const. Art. II, § 2, cl. 2; *see United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021). This essential procedure can be avoided "only for inferior officers." *Id.* But the statute here does not provide for Senate confirmation of the Chairman, over and above his confirmation to serve as a FERC Commissioner generally; rather, the President unilaterally "designate[s]" one of the existing Commissioners as Chairman. 42 U.S.C. § 7171(b)(1).

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[3] To be sure, "statements of agency counsel in litigation" do not "establish 'rules' that bind an entire agency prospectively." *Heckler v. Chaney*, 470 U.S. 821, 836 n.5 (1985). But the Solicitor can claim—as he has done here—deference to individual Commissioners' positions, which can unquestionably affect whether an agency action is ultimately upheld. *See* Danly Statement at 1; Motion 11-12; Solicitor Br. 33-34.

If the office of Chairman carried with it additional, unilateral Executive Power—as Respondent-Intervenors' position contemplates—the President's "designat[ion]" of a Commissioner to that role, without additional Senate confirmation, would therefore violate the Appointments Clause. *Arthrex*, 141 S. Ct. at 1979.[4] The designation of the Chairman by the President thus does nothing to avoid the lurking constitutional issues.

CONCLUSION

The Court should strike the Solicitor's Brief and preclude the Solicitor's Office from advocating its content at oral argument.

[4] Recent practice confirms that the Senate has no role in designation of the FERC Chairman. When Chairman Glick last faced a Senate confirmation hearing in 2017, Kevin McIntyre was "slated to be designated as the Commission's Chairman upon confirmation." *Hearing Before the S. Comm. on Energy & Natural Resources*, 115th Cong. 285 (Sept. 7, 2017).

Dated: September 26, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 27, the undersigned counsel for Petitioner certifies that this brief:

(i) complies with Rule 27(d)(2)(c) because it contains 2,597 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e)(1); and

(ii) complies with Rule 26(d)(1) and the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 365 and is set in New Century Schoolbook in a size equal to 14-point font.

(iii) complies with L.A.R. 31.1(c) because the PDF file of this brief has been scanned with Windows Security Antivirus Version 1.363.1825.0, and no virus was detected.

Dated: September 26, 2022 /s/ *Paul W. Hughes*

L.A.R. 28.3(d) CERTIFICATE

Pursuant to L.A.R. 28.3(d), the undersigned counsel for Petitioner certifies that Paul W. Hughes is a member of the bar of this Court.

Dated: September 26, 2022 /s/ *Paul W. Hughes*

CERTIFICATE OF SERVICE

I hereby certify that that on September 26, 2022, I filed the foregoing brief via the Court's CM/ECF system, which effected service on all registered parties to this case.

Dated: September 26, 2022 /s/ *Paul W. Hughes*