A case decided by the Third Circuit on Dec. 1 is important for two reasons. It clarifies a puzzling procedural rule applying to the Federal Energy Regulatory Commission (FERC). And it upholds an important policy shift regarding renewable energy by the country's largest grid operator. Since you're probably more interested in the second point than the first one —unless you're a real administrative law geek— let's start with that one.

The grid operator is PJM, which serves about 50 million in mid-Atlantic and Midwest states. Based on a FERC decision to establish competitive electricity markets, PJM runs auctions for power, which determine on a daily basis how much electricity is sold, where, and at what price. These are called "energy markets." PJM believes, however, that these markets do not provide investors strong enough signals about the need for more generators.

To address that problem, PJM has created a construct called a "capacity market," in which generators are paid for guaranteeing to provide a certain amount of power on demand. In 2019, PJM rejiggered the capacity market to counter the "unfair" advantage that renewable generators got from state incentives. In 2021, PJM changed its mind. The Third Circuit opinion upheld PJM's policy shift. That should open the door to more renewable energy in a key part of the country.

That brings me to the intriguing procedural wrinkle in the case. When PJM submitted its new policy to FERC for review, four FERC commissioners participated, and they split equally. The result was that FERC was unable to make a decision, allowing PJM's policy to go into effect by default. Normally, FERC's failure to decide wouldn't be subject to judicial review. But a recent law says that courts should review FERC's failure to act, just as it reviews FERC decisions.

The procedural issue is this: How do you assess the reasons for the Commission's inaction when the commissioners themselves totally disagreed? The Third Circuit came up with a very reasonable answer: You looks to see whether commissioners who favored PJM made a reasonable argument for letting PJM's policy go into effect. It is as if, in case of a tie, the half of the Commission approving of a utility request were empowered to speak for the whole Commission. This is a bit weird, given that there were just as many commissioners on the other side. But it seems like the most sensible way to implement Congress's directive that courts exercise judicial review of FERC's failure to reach a decision.