

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

**PJM Interconnection, L.L.C.**

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**Docket No. ER21-2582-000**

**MOTION TO STRIKE OF THE PJM POWER PROVIDERS GROUP**

Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules and Regulations,<sup>1</sup> the PJM Power Providers Group (“P3”)<sup>2</sup> requests that the Commission strike from the record in this proceeding the Written Testimony of Dr. Kathleen Spees and Dr. Samuel A. Newell (“Spees/Newell Testimony”) submitted as Attachment A to the Comments of Natural Resource Defense Council, Sustainable FERC Project, Sierra Club, and Union of Concerned Scientists (“Environmental Advocate Comments”). The Spees/Newell Testimony relies on confidential market information that parties in this adversarial proceeding cannot examine or challenge. That confidential PJM information was obtained by the Brattle Group for use in work with certain state commissions. Due process demands that the Commission either (1) exclude the unanswerable Spees/Newell Testimony from this proceeding or (2) set this proceeding for a hearing that provides for discovery subject to appropriate nondisclosure safeguards.

The Spees/Newell Testimony acknowledges its reliance on confidential offer information in the following passage, where the affiants explain why they disagree with the analysis submitted

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<sup>1</sup> 18 C.F.R. § 385.212 (2021).

<sup>2</sup> P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. (“PJM”) region. Combined, P3 members own over 67,000 MWs of generation assets and produce enough power to supply over 50 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit [www.p3powergroup.com](http://www.p3powergroup.com). The comments contained herein represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

by Dr. Cramton on behalf of PJM, which concluded “that capacity prices are similar with or without MOPR-Ex”:

**Impacts of MOPR-Ex on Prices:** Another difference is that Professor Cramton’s simulations indicate that capacity prices are similar with or without MOPR-Ex, while we estimate that MOPR-Ex would cause approximately \$26/MW-day and \$25/MW-day increases in capacity prices in 2025 and 2030 respectively. This difference is explained by our different modeling approaches. *Our approach utilizes an upward-sloping supply curve based on actual PJM capacity auction offer data* (for 2025) and a more moderate but still upward-sloping longer-term supply curve (for 2030).<sup>55</sup> Because we have used *detailed present market data* to support this analysis, our approach provides the most robust estimate of near-term and medium-term MOPR-Ex cost impacts. By Comparison [sic], Professor Cramton’s model focuses on an even longer-term multi-decade timeframe over which the capacity supply curve becomes even more moderated (close to flat in the very long term relevant for his study), which explains [h]is finding that prices are similar with or without MOPR-Ex.

<sup>55</sup> In our 2025 analysis, *we used historical capacity auction offer data provided to the NJ BPU for the purposes of conducted [sic] this analysis*; we updated these offer data to account for known entry and exit as well as the effects of MOPR-Ex. In our 2030 analysis, *we accounted for long-term supply elasticity by adjusting existing generation resources’ offer prices* consistent with net going-forward fixed and operating costs, minus net energy and ancillary services revenues. This higher offer price accounts for the logic that an existing resource may remain in the market for a few years (i.e., the “short term”) at low capacity prices, but will eventually exit if they are unable to recover their costs for the foreseeable future (i.e., the “long term”). *See additional detail in Attachment A, Appendix A.*<sup>3</sup>

This approach is unacceptable because capacity market participants cannot obtain the confidential offer price information of their competitors. Rather, market participants trust PJM and the Market Monitor to process that confidential *offer price* information under the existing market rules, after which PJM publicly releases the *clearing price* information that market participants then use to develop their offers in future auctions.

Market participants, including P3 and its members, are constrained to rely on publicly available information in this proceeding. It is grossly unfair for hired witnesses of certain

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<sup>3</sup> Spees/Newell Testimony at 31-32 & n.55 (emphasis added).

intervenors in this adversarial proceeding<sup>4</sup> to use confidential offer price information that those witnesses are uniquely able to access only because of their consulting relationships with entities such as PJM or state regulators on other matters.<sup>5</sup> Absent hearing procedures that provide for discovery with appropriate nondisclosure safeguards, adverse parties in this proceeding are denied due process because they have no access to the confidential offer price information used in the Spees/Newell Testimony and therefore have no way to examine or challenge the application of that confidential information—or, as the Supreme Court has put it, no opportunity to “parry its effect”—in this proceeding.<sup>6</sup>

P3 realizes that the Commission is able to obtain and review confidential offer information, but Commission orders cannot be based on secret evidence. Any Commission order “must be able to demonstrate that it has made a reasoned decision based upon substantial evidence *in the*

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<sup>4</sup> P3 realizes that the confidential information at issue was originally used to compile a report to the New Jersey Board of Public Utilities. P3 does not concede the use of confidential information there was necessary or appropriate, and it would only compound that error to allow one-sided use of confidential information in this adversarial proceeding.

<sup>5</sup> This other work includes, for example, the quadrennial update of PJM’s Variable Resource Requirement (VRR) curve. We leave it to the Commission, its Office of Enforcement, PJM, and the PJM Market Monitor to determine whether the use of confidential offer information to assist an intervenor in this proceeding, who does not have any ability under the tariff or other laws to access confidential information, violates applicable rules or compromises the Brattle Group’s past or future work for PJM.

<sup>6</sup> *E.g.*, *S. Cal. Edison Co. v. FERC*, 717 F.3d 177, 187 (D.C. Cir. 2013) (quoting *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202 (D.C. Cir. 1989) (“We read *Ohio Bell* as establishing two prerequisites for use of official evidence. First, the information noticed must be appropriate for official notice. Second, the agency must follow proper procedures in using the information, disclosing it to the parties and affording them a suitable opportunity to contradict it or ‘parry its effect.’”) (quoting *Oh. Bell Telephone Co. v. Pub. Utils. Comm’n of Oh.*, 301 U.S. 292, 302 (1937)); *see* 5 U.S.C. § 556(e) (“When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.”).

*record.*”<sup>7</sup> Determinations that depend on evidence outside the record that litigants cannot examine or rebut cannot be sustained on judicial review.<sup>8</sup>

Moreover, the manner in which confidential offer information was subjectively adjusted to draw the conclusions presented in the Spees/Newell Testimony was not reliably discernable until the missing attachment and appendix referenced in that testimony was filed with the Commission in an erratum late on August 27, 2021, thus requiring P3 to revise this motion and preventing P3 from filing that day. Now that the absence of this information has been cured, the Commission should be permissive in allowing P3 and other parties to respond if the Commission does not exclude it.

Finally, P3 underscores that exclusion of the Spees/Newell Testimony would also mean the exclusion of evidence that supports P3’s own arguments in this case. For example, the Spees/Newell Testimony agrees with P3’s position about the mechanics of price suppression under a weakened MOPR, stating that “[w]hen applied to policy resources, the mechanics of the MOPR

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<sup>7</sup> *Del. Div. of Pub. Advoc. v. FERC*, 3 F.4th 461, 465 (D.C. Cir. 2021) (emphasis added) (quoting *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994); accord, e.g., *El Paso Nat. Gas Co. v. FERC*, 966 F.3d 842, 858 (D.C. Cir. 2020) (“FERC’s findings must be supported by substantial evidence in the record.”) (citing *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1311 (D.C. Cir. 1991); *Duke Energy Carolinas, LLC v. FERC*, 883 F.3d 923, 926 (D.C. Cir. 2018) (quoting *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 25 (D.C. Cir. 2015)); *Idaho Power Co. v. FERC*, 801 F.3d 1055, 1059 (9th Cir. 2015) (“FERC did not conduct the Trailblazer analysis. Nor did it refer to its own regulations or otherwise resolve ‘that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.’ 18 C.F.R. § 385.602(h)(2).”)).

<sup>8</sup> See, e.g., *S. Cal. Edison Co.*, 717 F.3d at 179 (“[W]e grant the petition and remand in view of the Commission’s failure to comply with 5 U.S.C. § 556(e) when it updated the ROE with information outside the record.”); *Wash. Water Power Co. v. FERC*, 775 F.2d 305, 330-31 (D.C. Cir. 1985) (“Our above description of the Commission’s excursions in search of evidentiary support, some outside the record, and all constituting data of dubious probative value, demonstrate the tenuousness of the Commission’s conclusions on navigability.”); *Air Prod. & Chemicals, Inc. v. FERC*, 650 F.2d 687, 697 (5th Cir. 1981) (“Thus, an agency should either disclose the contents of what it relied upon or, in the case of publicly-available information, specify what is involved in sufficient detail to allow for meaningful adversarial comment and judicial review.”); see also, e.g., *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 664 (D.C. Cir. 1996) (remanding licensing order where a contributing agency, the Department of the Interior, based its conclusions on non-record evidence); *id.* (“Interior is quite open about its policy view that it prefers fishways to alternative escapement remedies. It is, of course, entitled to a good deal of deference concerning its policy choice. That does not mean that Interior is not obliged to show some reasonable support for its determination to insist on that requirement *in this case.*”).

are identical as compared to the application in the context of manipulative price suppression.”<sup>9</sup> The Spees/Newell Testimony accurately notes that Dr. Cramton’s affidavit concludes “that capacity prices are similar with or without MOPR-Ex”<sup>10</sup> and that Dr. Cramton’s affidavit, like their own, assumes that certain nuclear plants will clear in capacity auctions through 2030, notwithstanding contrary statements by the plants’ owner.<sup>11</sup>

The Spees/Newell Testimony also puts an approximate number on the amount of price suppression that would occur if the existing MOPR is repealed—“\$1.74 billion per year by 2025 and \$1.70 billion per year by 2030”—although those witnesses prefer to regard that amount as a cost imposed on consumers, rather than the necessary effect of states choosing to support preferred resources through out-of-market subsidies.<sup>12</sup> Indeed, the Spees/Newell Testimony explicitly contends that the price suppressing effect of abandoning the current MOPR is \$1.4 billion, as a distinct subset of the purported costs to consumers because, in their view, the wealth transfer is “partly offset by \$0.3 billion per year in increased costs that are incurred to keep uneconomic resources online.”<sup>13</sup> To investors of merchant capital, that \$1.4 billion is the margin of economic survival for many units required to maintain system reliability; to Brattle, this price suppression presents no problem at all.<sup>14</sup>

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<sup>9</sup> Spees/Newell Testimony at 13.

<sup>10</sup> *Id.* at 31-32 & n.55.

<sup>11</sup> *See id.* at 25. *Contra, e.g.*, “Lacking a lifeline, Exelon’s Illinois nuclear plants to retire in fall – CEO,” REUTERS (Aug. 4, 2021), <https://www.reuters.com/business/energy/lacking-lifeline-exelons-illinois-nuclear-plants-retire-fall-ceo-2021-08-04/>.

<sup>12</sup> Spees/Newell Testimony at 26; *id.* at 27 fig. 5.

<sup>13</sup> *Id.* at 30; *see id.* at 29-30 & fig. 7.

<sup>14</sup> The witnesses offer a problematic opinion in this regard, given their firm’s responsibility for developing PJM VRR Curve: “Overall, MOPR-Ex advocates aim to solve a problem that doesn’t exist. Their primary concern appears to be that as incumbent capacity resource owners, they no longer expect to earn a satisfactory return on their investments. While certainly a concern for incumbents, low capacity prices are not a problem from a societal or market design perspective.” *Id.* at 6.

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The Spees/Newell Testimony is tainted by the use of confidential PJM capacity offer information that other parties cannot discover, examine, or rebut. This includes, at a minimum, what the Spees/Newell testimony describes as its “robust estimate of near-term and medium-term MOPR-Ex cost impacts” for 2025 and 2030 that is explicitly “based on actual PJM capacity auction offer data” and potentially includes other “detailed present market data” the Spees/Newell testimony does not describe.<sup>15</sup> For the foregoing reasons, P3 requests that the Commission strike the Spees/Newell Testimony as well as all parts of the Environmental Advocate Comments that rely on the Spees/Newell Testimony.

Respectfully submitted,

On behalf of the PJM Power Providers Group

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August 30, 2021

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<sup>15</sup> *Id.* at 31-32.

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding in accordance with the requirements of Rule 2010 of the Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2020).

Dated at Washington, DC this 30th day of August, 2021.

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