UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Old Dominion Electric Cooperative and Direct Energy Business, LLC on behalf of itself and its affiliate, Direct Energy Business Marketing, LLC and American Municipal Power, Inc.,	)	
Complainants,	)	**Docket No. EL17-32-____**
v.	)	
PJM Interconnection, L.L.C.,	)	
Respondent.	)	
Advanced Energy Management Alliance,	)	
Complainant,	)	
v.	)	**Docket No. EL17-36-____**
PJM Interconnection, L.L.C.,	)	
Respondent.	)	

(Not consolidated)

REQUEST FOR REHEARING

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the PJM Power Providers Group ("P3")[3] respectfully requests

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1 16 U.S.C. § 825*l*(a) (2012).

2 18 C.F.R. § 385.713 (2017).

3 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 84,000 MWs of generation assets, produce enough power to supply over 20 million homes and employ over 40,000 people in the PJM region covering 13

rehearing of the Commission's February 23, 2018 order[4] addressing two separate complaints[5] challenging PJM's Reliability Pricing Model ("RPM")[6] rules relating to the participation of Seasonal Resources. As explained in detail herein, the February 23 Order is arbitrary and capricious because the Commission failed to meaningfully address serious concerns raised by various parties, including PJM and P3, that the Complaints should have been summarily rejected as impermissible collateral attacks on the Commission's orders accepting PJM's Capacity Performance construct.[7]

I.

STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[8] P3 hereby identifies each issue on which it seeks rehearing of the February 23 Order, and provides representative precedent in support of its position on each of those issues:

1. The February 23 Order is arbitrary and capricious because the Commission failed to provide a meaningful response to arguments of P3, PJM and others regarding

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states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

4 *Old Dominion Elec. Coop. v. PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,160 (2018) (the "February 23 Order").

5 Complaint Requesting Fast-Track Processing of Old Dominion Electric Cooperative and Direct Energy Business, LLC on behalf of itself and its affiliate, Direct Energy Business Marketing, LLC and American Municipal Power, Inc., Docket No. EL17-32-000 (filed Dec. 23, 2016); Complaint and Motion for Consolidation by Advanced Energy Management Alliance, Docket No. EL17-36-000 (filed Jan. 5, 2017) (together, the "Complaints").

6 This and other capitalized terms not otherwise defined herein have the meaning set forth in PJM's Open Access Transmission Tariff (the "Tariff").

7 *See generally PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (the "CP Initial Order"), *on reh'g*, 152 FERC ¶ 61,064 (2015), *on reh'g*, 155 FERC ¶ 61,157 (2016) (the "CP Rehearing Order," and together with the CP Order, the "CP Orders"), *aff'd sub nom. Advanced Energy Management Alliance, v. FERC*, 860 F.3d 656, 669 (D.C. Cir. 2017) ("*AEMA*").

8 18 C.F.R. § 385.713(c)(2) (2017).

the Complaints. In particular, the Commission failed adequately to explain why the Complaints do not represent improper collateral attacks on the CP Orders. *See, e.g., Public Utils. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) ("*CPUC*"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("*PPL Wallingford*"); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) ("*Moraine*").

2. The holding in the February 23 Order that "the complainants have raised important issues as to whether certain aspects of the construct are performing as well as expected"[9] did not reflect reasoned decision-making because it was unsupported by substantial evidence, and departed, without reasoned explanation, from the Commission's CP Orders. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("*Fox*"); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("*Allentown*"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018) ("*NEPGA*"); *Williams Gas Processing – Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) ("*Williams Gas*"); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) ("*PG&E*"). Accordingly, this statement does not justify the Commission's refusal to summarily reject the Complaints.

II.

BACKGROUND

A. The Commission's CP Orders

On December 12, 2014, PJM submitted separate filings in Docket Nos. ER15-623-000 and EL15-29-000 proposing to modify the Tariff and the Reliability Assurance Agreement among Load Serving Entities, respectively, in order to better ensure that committed capacity resources perform when called upon to meet the PJM region's reliability needs.[10] A core element of this Capacity Performance construct was the replacement of various different capacity

[9] February 23 Order, 162 FERC ¶ 61,160 at P 56.

[10] *See* Reforms to the Reliability Pricing Market ("RPM") and Related Rules in the PJM Open Access Transmission Tariff ("Tariff") and Reliability Assurance Agreement Among Load Serving Entities ("RAA"), Docket No. ER15-623-000 (filed Dec. 12, 2014) (the "ER15-623 Filing"); PJM Interconnection, L.L.C., Revisions to the Operating Agreement and Open Access Transmission Tariff, Docket No. EL15-29-000 (filed Dec. 12, 2014).

products with a single new product – the Capacity Performance Resource product – "capable of sustained, predictable operation that allows the resource to be available to provide energy and reserves whenever PJM determines an emergency condition exists."[11] At the same time, recognizing that "not all Capacity Resources will be able to perform as Capacity Performance Resources in the near term," PJM proposed to phase in the new product and allow sales of a Base Capacity Resource product, including the pre-Capacity Performance seasonal products, for the 2018/2019 and 2019/2020 Delivery Years.[12] As the Commission explained, this transitional arrangement provided an "opportunity for resources to invest in, and sufficient time to build, improvements necessary to meet the operational and performance requirements expected of Capacity Performance Resources."[13] PJM emphasized, however, that the fundamental "goal of the changes proposed in this filing is to ensure that all Capacity Resources perform when needed to ensure reliability through a shift to a 100 percent Capacity Performance Resource model by the 2020/2021 Delivery Year."[14]

PJM also recognized that "movement to only Capacity Performance Resources could have an impact on resources such as Intermittent Resources or Capacity Storage Resources which may not be capable of sustained, predictable operation and be able to provide energy during both summer and winter emergency conditions."[15] Accordingly, "to encourage such resources' continued participation in PJM's capacity market," PJM proposed to allow suppliers

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11 ER15-623 Filing, Transmittal Letter at 22.

12 *Id.* at 26.

13 CP Initial Order, 151 FERC ¶ 61,208 at P 214.

14 ER15-623 Filing, Transmittal Letter at 27.

15 *Id.* at 33.

to aggregate their Capacity Storage Resources, Intermittent Resources, Demand Resources, or Energy Efficiency Resources to submit offers as Capacity Performance Resources.[16]

The Commission accepted PJM's proposals, finding that PJM's transition mechanisms were appropriate, and "that implementing the transition over five years will allow resources to make gradual improvements and reduce the burdens such improvements may impose."[17] On rehearing, the Commission rejected proposals that PJM be required to permit Seasonal Resources to "continue to participate in PJM's capacity market on a stand-alone basis because they provide quantifiable reliability benefits."[18] Responding to claims that requiring year-round performance was unduly discriminatory, the Commission held that:

> PJM is treating all resources identically in this respect. The rehearing requesters are in effect asking for special treatment for certain resources, permitting them to provide a lesser quality of service for the same price. We cannot find unreasonable PJM's conclusion that non-year-round resources do not provide equivalent service as year-round resources. Permitting non-year-round resources to continue participating could result in a loss of reliability during the fall, winter and spring when PJM will not have as many resources to respond to emergencies, such as a polar vortex.[19]

The Commission further found that PJM had "provided reasonable accommodation[s] to permit greater participation in the capacity market by such resource types, including a reasonable transition period and the ability to participate in aggregated offers."[20]

In proceedings challenging the CP Orders before the Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"), the Commission explained that it had "properly approved

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16 *Id.*

17 CP Initial Order, 151 FERC ¶ 61,208 at P 253.

18 CP Rehearing Order, 155 FERC ¶ 61,157 at P 58.

19 *Id.* at P 59.

20 *Id.*

PJM's requirement that Capacity Performance Resources be able to perform in emergency conditions throughout the year, and found that allowing certain types of resources to submit aggregated offers was a reasonable accommodation for the inherent limitations of those resources."[21] The D.C. Circuit upheld the Commission's orders, finding that "[t]he year-round capacity commitment is at the core of what PJM expects of capacity resources and the essential attribute of its revised market rules."[22] The D.C. Circuit further held that the Commission had properly concluded, based on record evidence, that "allowing non-year-round resources to meet only a seasonal capacity standard would threaten annual capacity reliability."[23]

B. The Complaints And The February 23 Order

The Complaints alleged that "the result of moving to a 100 percent annual Capacity Performance requirement will be rates that are unjust, unreasonable, and unduly discriminatory,"[24] and urged the Commission to "take action to prevent the loss of participation by certain Seasonal Resources in [RPM Auctions]. . . ."[25] Accordingly, complainants in both cases asked the Commission to require PJM to extend the retention of the Base Capacity Resource product, and to direct PJM to further revise its rules to expand the participation by Seasonal Resources in the RPM auctions.[26]

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21 Brief of Respondent at 17, *Advanced Energy Management Alliance, v. FERC*, Nos. 16-1234, *et al.* (D.C. Cir. Nov. 23, 2016).

22 *AEMA*, 860 F.3d at 669.

23 *Id.* at 670.

24 February 23 Order, 162 FERC ¶ 61,160 at P 15.

25 *Id.* at P 5.

26 *See id.* at PP 6, 16.

In response, PJM, P3 and others pointed out that "the Complaints represent a collateral attack on the Commission's earlier orders on PJM's capacity market . . . ."[27] P3 further explained that the complainants had not presented any new evidence or circumstances that would justify re-litigating issues that had already been addressed in the Capacity Performance proceeding.[28]

In the February 23 Order, the Commission "reject[ed] PJM's request that we summarily dismiss the complaints as collateral attacks on the Capacity Performance orders."[29] The only explanation for this decision was the following brief paragraph:

> Section 206 of the [FPA] recognizes that a rate previously found just and reasonable may be found unjust and unreasonable in a later proceeding. Capacity Performance has now been in effect for two years, and the complainants have raised important issues as to whether certain aspects of the construct are performing as well as expected. In particular, complainants present analyses prepared by PJM which call into question the assumption that permitting any stand-alone participation by Seasonal Resources would negatively impact reliability in non-summer months.[30]

The February 23 Order further noted that, in a separate proceeding in Docket No. ER17-367, the Commission had accepted PJM's Tariff modifications that were intended "to enhance the ability of Capacity Storage Resources, Intermittent Resources, Demand Resources, Energy Efficiency Resources, and Environmentally-Limited Resources to effectively aggregate their capacity and continue to participate in the RPM market . . . ."[31]

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[27] *Id.* at P 28 (footnote omitted). *See also id.* at P 32 (describing arguments by other protestors); Protest of the PJM Providers Group at 10-15, Docket Nos. EL17-32-000, *et al.* (filed Jan. 25, 2017) (the "P3 Protest").

[28] *See* P3 Protest at 15-19.

[29] February 23 Order, 162 FERC ¶ 61,160 at P 55.

[30] *Id.* at P 56 (citations omitted).

[31] *Id.* at P 4. *See PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,159 (2018) (the "ER17-367 Order").

III.

REQUEST FOR REHEARING

A. The February 23 Order Is Arbitrary And Capricious Because The Commission Failed To Meaningfully Respond To Arguments That The Complaints Should Have Been Summarily Dismissed As Impermissible Collateral Attacks

The courts of appeals have described the collateral attack doctrine as preventing parties from "'relitigat[ing] the merits of the previous administrative proceedings.'"[32] For its part, the Commission has consistently refused to entertain collateral attacks on its prior decisions absent a demonstrated unforeseen change in circumstances,[33] because "[c]ollateral attacks on final orders and relitigation of applicable precedent by parties that were active in the earlier cases thwart the finality and repose that are essential to administrative efficiency and are strongly discouraged."[34]

In this case, PJM, P3 and others pointed out that the arguments raised in the Complaints had been previously addressed in the Capacity Performance proceeding, and argued, therefore, that the Complaints should be summarily dismissed as impermissible collateral attacks.[35] The Commission rejected those requests, without any reasoned explanation or substantial new evidence, and is thereby forcing P3 and others to expend time, energy and resources to relitigate the same issues that were fully considered and resolved in the CP Orders. The only justifications

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[32] *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006) (citation omitted) (internal quotation marks and citations omitted, alteration in original).

[33] *See, e.g.*, *City of Nephi v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998) (rejecting challenge to a particular aspect of the Commission's decision that had become final as an impermissible collateral attack); *Demand Response Supporters v. New York Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,151 at P 16 (2016) (rejecting arguments as an impermissible "collateral attack on Order No. 745, *et al.*, which addressed this same line of argument" (citation omitted)); *Midcontinent Indep. Sys. Operator, Inc.*, 155 FERC ¶ 61,134 at P 54 (2016) (rejecting argument as an impermissible collateral attack where the Commission had already addressed similar arguments in a prior order).

[34] *Entergy Nuclear Operations, Inc. v. Consolidated Edison Co. of New York, Inc.*, 112 FERC ¶ 61,117 at P 12 (2005) (citation omitted).

[35] *See, e.g.*, P3 Protest at 11-13 (comparing arguments in the Complaints to arguments put forward by complainants in the Capacity Performance proceeding).

offered in the February 23 Order were that (1) "Capacity Performance has now been in effect for two years, and the complainants have raised important issues as to whether certain aspects of the construct are performing as well as expected"; and (2) analyses by PJM "call into question the assumption that permitting any stand-alone participation by Seasonal Resources would negatively impact reliability in non-summer months."[36] These vague throwaway responses fall far short of satisfying the Commission's obligation to provide a "reasoned response" to arguments raised before it.[37]

As an initial matter, the fact that "Capacity Performance has now been in effect for two years"[38] in no way justifies re-opening issues that were already fully litigated before the Commission. If the passage of time were a basis for avoiding the collateral attack doctrine, the doctrine would be meaningless as a party would simply need to wait some brief period before mounting its attack on a prior Commission order. Relying on the experience of the past two years as an excuse to upend the Capacity Performance rules is particularly indefensible. In the Capacity Performance proceeding, PJM expressly stated that a five-year transition period was necessary to accommodate "the investments and time resources . . . need[ed] to meet the operational and performance requirements established under PJM's proposal,"[39] and the

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[36] February 23 Order, 162 FERC ¶ 61,160 at P 56.

[37] *CPUC*, 462 F.3d at 1051. *See also, e.g.*, *NEPGA*, 881 F.3d 202, 211 (finding inadequate responses to arguments that "amounted to conclusory statements that dismissed [parties]' concerns without providing reasoned analysis"); *PPL Wallingford*, 419 F.3d at 1198 (requiring the Commission to "respond meaningfully" to concerns raised by parties); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (agency required to "answer[] objections that on their face seem legitimate") (citation omitted); *Moraine*, 906 F.2d at 9 (finding that the Commission failed to engage in reasoned decision-making where it "fail[ed] to respond to [petitioner's] arguments"); *Natural Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (stating that an agency ruling is "arbitrary and capricious" if the agency "ignores important arguments or evidence").

[38] February 23 Order, 162 FERC ¶ 61,160 at P 56.

[39] CP Initial Order, 151 FERC ¶ 61,208 at P 237.

Commission similarly recognized that the five-year transition period would "allow resources to make gradual improvements" to qualify as Capacity Performance Resources.[40] Accordingly, and as P3 pointed out, "[t]he very essence of the five-year [Capacity Performance] Transition Mechanism contemplated the phasing out of the Base Capacity Resource over the past two BRAs, culminating with its cessation in the 2020/2021 Delivery Year."[41] PJM further explained that it made little sense to assume that Seasonal Resource participation as Capacity Performance Resources was indicative of the level of participation that can be expected upon full implementation of Capacity Performance, particularly given the expanded opportunities for aggregation approved in the ER17-367 Order.[42] The Commission not only failed to provide a reasoned response to these arguments in the February 23 Order; it provided no response at all. Instead, the Commission simply set the matter for technical conference, thereby requiring parties to demonstrate that there is no need to reform the approved Capacity Performance rules, without giving those rules any opportunity to take effect in the first instance.

As discussed in Section III.B below, suggestions that Capacity Performance has somehow been unsatisfactory and that the complainants provided analyses supporting their arguments are not substantiated by the record. But even assuming, *arguendo*, that the Capacity Performance construct was not "performing as well as expected" or that PJM's analyses "call

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40 *Id.* at P 253.

41 P3 Protest at 16.

42 *See* February 23 Order, 162 FERC ¶ 61,160 at P 28 (noting PJM's statement that "72 percent of the offers for Base Capacity Resources were also offered as Capacity Performance Resources" and that "those resources that were offered only as Base Capacity Resources in the last two auctions will likely be offered as Capacity Performance Resources in the next auction, based on the existence of enhanced aggregation, and the fact that a disincentive to aggregate existed in the prior auctions based on the availability of the Base Capacity product itself" (footnote omitted)); *id.* at P 34 (P3 pointed out that "arguments that there has been little aggregation to this point ignore the fact that there is little incentive for a Seasonal Resource to aggregate as long as the Base Capacity Resource product remains" (footnote omitted)).

into question" assumptions underlying the CP Orders, that would not establish adequate grounds for revisiting the Commission's determinations in the CP Orders or reforming the Capacity Performance rules. As the courts have made abundantly clear, "the proponent of a rate change under [Section] 206 . . . has the burden of proving that the existing rate is unlawful . . . ."[43] That burden is not satisfied simply because a rate may be not the "best" rate, or the rate most favored by the Commission. Instead, "Section 206 requires FERC to demonstrate that the *existing* rates are 'entirely outside the zone of reasonableness' before FERC imposes a new rate without the consent of the utility or Regional Transmission Organization that filed the proposal."[44] Consistent with the statutory limitations on its authority, the Commission should have dismissed the Complaints. Nonetheless, the Commission refused to do so here simply because it apparently questions whether Capacity Performance has lived up to some unspecified "ideal" standard.

B. The February 23 Order Fails To Reflect Reasoned Decisionmaking Because It Is Not Based On Substantial Record Evidence And Represents An Unexplained Departure From The Commission's Prior Orders

As discussed above, the February 23 Order claimed that Capacity Performance has not "perform[ed] as well as expected," and that analyses by PJM "call into question the assumption that permitting any stand-alone participation by Seasonal Resources would negatively impact

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[43] *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1571 (D.C. Cir. 1993) (citations omitted).

[44] *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 114 n.2 (D.C. Cir. 2017) (citation omitted) (emphasis in original). *See also, e.g.*, *Maine v. FERC*, 854 F.3d 9, 26 (D.C. Cir. 2017) (explaining that the Commission had not satisfied its burden under Section 206 in a case where the Commission "relied on its assumption that all [rates for return on equity ("ROE")] other than the one FERC identifies as the utility's just and reasonable ROE are *per se* unlawful in a section 206 proceeding," because "the zone of reasonableness creates a broad range of potentially lawful ROEs rather than a single just and reasonable ROE"); *City of Winnfield, La. v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984) (stating that, under Section 206, a public utility's "existing rates [must] be found to be entirely outside the zone of reasonableness before the agency can dictate their level or form").

reliability in non-summer months."[45] These statements are impermissibly vague and fail to establish any new or unforeseen circumstances that would warrant revisiting the Commission's holdings in the CP Orders. Notwithstanding the fact that it is "axiomatic that [a court] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review,"[46] nowhere in the February 23 Order does the Commission identify the shortfalls that it has purportedly observed in the Capacity Performance construct, much less pinpoint "substantial evidence in the record"[47] that would support such a finding. Such failure is particularly troubling given that, as the D.C. Circuit observed, "[t]he year-round capacity commitment is at the core of what PJM expects of capacity resources and the essential attribute of its revised market rules."[48] The Commission has provided no rationale or evidence that would support backing away from its prior conclusion that PJM properly required a year-round product, priced in a uniform and non-discriminatory manner.[49]

While the source of the Commission's dissatisfaction is not clear, it bears emphasis that to the extent that the performance of PJM's Capacity Performance construct has not lived up to expectations, the Commission should direct PJM to initiate a stakeholder proceeding that would address the RPM rules that are facilitating any specified market shortcomings, and to then file any appropriate modifications while maintaining the integrity of the core Capacity Performance

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45 February 23 Order, 162 FERC ¶ 61,160 at P 56.

46 *Williams Gas*, 373 F.3d at 1345. *See also, e.g.*, *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006) ("Nor can our Court fill in critical gaps in [an agency's] reasoning. We can only look to the [agency's] stated rationale. We cannot sustain its action on some other basis the [agency] did not mention.").

47 *See PG&E*, 373 F.3d at 1319 (quoting *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994)). *See also Moraine*, 906 F.2d at 9 (Commission failed to engage in reasoned decision-making where it failed to "articulate its decision based on evidence in the record").

48 *AMEA*, 860 F.3d at 669.

49 *See, e.g.*, CP Rehearing Order, 155 FERC ¶ 61,157 at P 59.

tenets. Such an examination is more appropriate than the action directed in the February 23 Order because, contrary to the Commission's suggestion, there is no evidence that the Capacity Performance construct has not worked as intended with respect to participation by Seasonal Resources. Indeed, the Commission expressly cited the fact that Seasonal Resources are not consistently available throughout the year as a reason to replace those products with an annual product and to "create[] the same expectations for all Capacity Performance Resources (i.e., the expectation that such resources will be available to provide energy and reserves when called upon), without regard to technology type."[50] Thus, the Commission clearly understood that participation by resources incapable of providing year-round performance would be reduced with the implementation of the Capacity Performance construct. The Commission further held that allowing resources "to submit aggregated offers is a reasonable accommodation to permit greater participation in the capacity market by those resource types that would generally lack incentives to offer as Capacity Performance Resources on a stand-alone basis, and will provide benefits to consumers through greater competition in the capacity market."[51] The February 23 Order fails to explain why the Commission should now reverse course and establish different performance expectations or otherwise make greater allowances to accommodate Seasonal Resources.

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[50] CP Initial Order, 151 FERC ¶ 61,208 at P 99. *See also id.* at P 53 (recognizing that certain resources would not qualify as Capacity Performance Resources because they "may not be capable of sustained, predictable operation and may not be able to provide energy during both summer and winter emergency conditions"); CP Rehearing Order, 155 FERC ¶ 61,157 at P 59 ("Permitting non-year- round resources to continue participating could result in a loss of reliability during the fall, winter and spring when PJM will not have as many resources to respond to emergencies, such as a polar vortex.").

[51] CP Rehearing Order, 155 FERC ¶ 61,157 at P 51.

Because the Commission may not "depart from a prior policy *sub silentio*,"[52] this failure alone requires that the Commission grant rehearing of the February 23 Order.

At the same time, there is also nothing new about the evidence provided by the complainants purporting to demonstrate that permitting offers of summer-only products would not harm reliability. As explained in detail in the P3 Protest and accompanying testimony of Dr. Roy J. Shanker, it was well understood at the time of the CP Orders that PJM is a summer-peaking system.[53] In fact, the CP Initial Order specifically noted that intervenors in that proceeding had argued that "PJM should be required to maintain a Base Capacity procurement allowance, given that PJM will remain a summer peaking system and given that there has been no asserted need for a single, annual capacity product."[54] Similarly, in response to the Complaints, PJM pointed out that "the fact that it has a summer-peaking system is also not a new fact, and has been part of PJM's planning process for years," but that "recent history shows that risk can and does occur in the winter, which should inform reliability determinations."[55] PJM further explained that claims regarding "the reliability benefit of summer-only resources are

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[52] *Fox*, 556 U.S. at 515. *See also, e.g.*, *NEPGA*, 881 F.3d at 213 (emphasizing that "the Commission must provide some analysis and explanation in its Orders regarding why it changed course"); *Williams Gas*, 475 F.3d at 322 (vacating Commission orders because the Commission "neither explained its action as consistent with precedent nor justified it as a reasoned and permissible shift in policy"); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) ("If an agency decides to change course, . . . we require it to supply a 'reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.'") (internal citations omitted).

[53] *See* P3 Protest at 17-19; *id.*, Affidavit of Dr. Roy J. Shanker at 18-19 (the "Shanker Affidavit").

[54] CP Initial Order, 151 FERC ¶ 61,208 at P 245.

[55] February 23 Order, 162 FERC ¶ 61,160 at P 29 (footnotes omitted).

demonstrably false,"[56] and that one of the complainants had "misinterpret[ed] the data that it relies on from PJM's studies . . . ."[57]

Not only did the Commission again arbitrarily and capriciously ignore PJM's and Dr. Shanker's arguments and explanations,[58] it also failed to identify "substantial evidence in the record"[59] that would support its assertion that reliability would not be harmed by stand-alone participation by Seasonal Resources. Accordingly, rehearing of the February 23 Order is required because the Commission failed to demonstrate that there is new evidence or changed circumstances that would render the prohibition against collateral attacks inapplicable in this case.[60]

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56 *Id.* at P 30.

57 *Id. See also* Shanker Affidavit at 18-26 (explaining that PJM data had been misinterpreted).

58 *See supra* note 37 (citing cases).

59 *See* supra note 47 (citing cases).

60 *Allentown*, 522 U.S. at 374 (Commission orders must reflect "logical and rational" decision-making); *State Farm*, 463 U.S. at 48 (the Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner" (citations omitted)).

IV.

CONCLUSION

WHEREFORE, P3 respectfully requests that the Commission grant rehearing of the February 23 Order and dismiss the Complaints as impermissible collateral attacks.

Respectfully submitted,

PJM POWER PROVIDERS GROUP

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Dated: March 26, 2018

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington D.C., this 26th day of March, 2018.

/s/ *Stephanie S. Lim*
Stephanie S. Lim