

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

PJM Interconnection, L.L.C.

)

Docket No. ER21-2582-001

**EMERGENCY REQUEST FOR REHEARING
OF THE PJM POWER PROVIDERS GROUP**

Pursuant to Federal Power Act (“FPA”) sections 205(g) and 313(a),¹ and Rule 713 of the Commission’s Rules of Practice and Procedure,² the PJM Power Providers Group (“P3”)³ respectfully requests rehearing of the Notice of Filing Taking Effect by Operation of Law issued in this proceeding on September 29, 2021 (“Notice”).⁴ The Notice states that the Commission failed to act in response to the July 30, 2021 filing by PJM Interconnection, L.L.C. (“PJM”),⁵ “because the Commissioners are divided two against two as to the lawfulness of the change.”⁶ As a result, the Commission announced that the tariff sheets filed with “PJM’s proposal became effective by operation of law” on September 29, 2021.⁷

ARGUMENT

The Notice is unlawful, and PJM’s proposed tariff revisions cannot be allowed to take effect. PJM’s revisions entirely subvert PJM’s capacity market Minimum Offer Price Rule

¹ 16 U.S.C. §§ 824d(g), 825l(a) (2020).

² 18 C.F.R. § 385.713 (2021).

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 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. 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.

⁴ *PJM Interconnection, L.L.C.*, Notice of Filing Taking Effect by Operation of Law, Docket No. ER21-2582-000 (Sept. 29. 2021) (“Notice”).

⁵ PJM Interconnection, L.L.C., Revisions to Application of Minimum Offer Price Rule, Docket No. ER21-2582-000 (July 30. 2021) (“PJM Filing” or “Narrow MOPR Proposal”).

⁶ Notice at 1.

⁷ *Id.*

(“MOPR”) and directly conflict with the remedial rate fixed by the Commission under FPA section 206⁸ in its recent Expanded MOPR Orders.⁹ Those orders established essential protections against market power and undue discrimination. The Commission has expressly held the PJM capacity market *must* have viable rules to prevent the exercise of market power and to mitigate artificial price suppression caused by out-of-market subsidies. PJM’s Narrow MOPR revisions not only defy the remedial rate set by the Commission in the Expanded MOPR Orders, but also flatly contravene more than a decade of unambiguous Commission determinations affirmed by reviewing courts that uneconomic entry enabled by out-of-market subsidies undermines market confidence and ultimately hurts consumers.¹⁰ PJM may not circumvent express Commission directives under FPA section 206 through the simple expedient of submitting a filing under FPA section 205.¹¹ Nor may one half of an equally divided Commission, through its non-action, override a duly-enacted Commission directive under FPA section 206.

⁸ 16 U.S.C. § 824e (2020).

⁹ See *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (“June 2018 Order”), *order establishing just & reasonable rate*, 169 FERC ¶ 61,239 (2019) (“December 2019 Order”), *order on reh’g & clarification*, 171 FERC ¶ 61,034 (denying rehearing of June 2018 Order), *order on reh’g & clarification*, 171 FERC ¶ 61,035 (denying rehearing of December 19 Order), *order on reh’g & compliance*, 173 FERC ¶ 61,061 (2020) (“October 2020 Rehearing Order”), *order on compliance & clarification*, 174 FERC ¶ 61,036, *order vacating footnote*, 174 FERC ¶ 61,109 (2021) (collectively, the “Expanded MOPR Orders”), *appeals pending sub nom. Ill. Com. Comm’n v. FERC*, Nos. 20-1645, *et al.* (7th Cir. Apr. 20, 2020).

¹⁰ See, e.g., *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011) (“2011 MOPR Order”), *reh’g denied*, 137 FERC ¶ 61,145 (2011) (“2011 MOPR Rehearing Order”) (collectively, “2011 MOPR Orders”), *aff’d sub nom. N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 96-97 (3d Cir. 2014) (“*NJBPU*”) (adopting *Conn. Dep’t of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009)); *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 21 & n.32 (2018); *ISO New England, Inc.*, 135 FERC ¶ 61,029, at P 170 (2011) (“2011 ISO-NE MOPR Order”), *reh’g denied*, 138 FERC ¶ 61,027 (2012), *aff’d sub nom. New Eng. Power Generators Ass’n v. FERC*, 757 F.3d 283, 293-295 (D.C. Cir. 2014) (“*NEPGA*”); *N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211, at P 110 (2008) (rejecting exemption of New York City because that “would lead to artificially depressed capacity prices” and “caus[e] existing generators to be under-compensated”), *order on reh’g*, 124 FERC ¶ 61,301 at P 29 (2008) (rejecting limitation of buyer-side controls to “net buyers” because “all uneconomic entry has the effect of depressing prices below the competitive level.”), *pet’n for rev. voluntarily dismissed sub nom. Astoria Generating Co., L.P. v. FERC*, No. 08-1369, 2014 WL 6725262 (D.C. Cir. Nov. 17, 2014); see also December 2019 Order at P 7 & nn.19-24 (collecting cases); June 2018 Order at PP 67-69 & nn.111-116 (same).

¹¹ See P3 Protest at 37-40 & nn.138-143 (listing cases).

The Notice not only perverts the proper interaction between FPA section 205 and 206, but also falls far short of the Commission’s duty under section 10 of the Administrative Procedure Act (“APA”)¹² to explain a radical departure from Commission precedent¹³ or respond to the legitimate objections of protestors in this proceeding.¹⁴ The Notice cannot satisfy the Commission’s duties under the APA because it says *nothing at all* and is therefore arbitrary and capricious *per se*.

The Commission, PJM and all parties in this proceeding are operating in dangerous and uncharted waters. The Commission’s experience with FPA section 205(g) is limited to a proceeding concerning the Inventoried Energy Program in ISO New England (“ISO-NE”). In that proceeding, two of four Commissioners were recused and the Commission was initially unable to form a quorum to vote on either ISO-NE’s filing or on rehearing; however, the Commission requested and was granted a voluntary remand of the petition for review filed in that case when the confirmation of a new Commissioner made it possible to form a quorum and accept the filing.¹⁵ In that proceeding, the rehearing and judicial review procedures established in FPA section 205(g) allowed all parties to preserve their administrative and appellate rights under the relevant statutory deadlines until the Commission was able to form a quorum. This case is different in that there is a quorum to vote on the matter; however, the Commission lacks a majority of commissioners to support the filing. The lack of a quorum is not the reason for the triggering of section 205(g) – it is lack of agreement among the Commissioners. Unlike the Inventoried Energy Program case, there is much less certainty in this case regarding how this Commission would be able to resolve this matter if a voluntary remand is sought.

¹² 5 U.S.C. § 706(2) (2020).

¹³ See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁴ See, e.g., *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011).

¹⁵ See *ISO New England Inc.*, 171 FERC ¶ 61,235, at P 1 (2020) (recounting the procedural history).

P3 previously warned that it was “imperative that the Commission issue an order addressing the PJM Filing, rather than allowing it to go into effect by operation of law” and that the “manifest defects” in the PJM Filing made this proceeding a “worst-case scenario” for testing the provisions of Section 205(g).¹⁶ Allowing the PJM Filing to go into effect by operation of law is hardly a legally “durable” or “sustainable” outcome. It only creates enormous regulatory uncertainty, damages the Commission’s own legitimacy, and “raises the basis for claims of ‘regulatory hubris’ to an entirely new level.”¹⁷ The regulatory uncertainty that the Notice has unleashed will not be limited to this proceeding, but will instead effect Commission proceedings for years to come if it is not corrected.

There is, however, a clear path back to regular order: the Commission should grant rehearing, reject the PJM Filing, and simultaneously direct PJM to work with its stakeholders to develop MOPR revisions that do not suffer from the numerous flaws in the PJM Filing that are preventing a majority of commissioners from supporting it. As part of this effort, PJM should not only address any objections to the replacement rate set by the Expanded MOPR Orders, but it can also take account of the interaction between the MOPR and other recent Commission actions impacting PJM’s markets.¹⁸ It is not reasonable to ignore these other significant policy changes¹⁹

¹⁶ See P3 Protest at 99.

¹⁷ *Id.*

¹⁸ See *Indep. Mkt. Monitor for PJM, et al. v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137 (2021) (“MSOC Replacement Rate Order”). See also, *Am. Mun. Power v. FERC*, No. 20-1372 (D.C. Cir. Aug. 23, 2021) (voluntarily remanding PJM Interconnection, L.L.C., 171 FERC ¶ 61,153 (May 21, 2020) (“May 21, 2020 ORDC Order”), order on reh’g, 173 FERC ¶ 61,123 (Nov. 3, 2020) (“November 3, 2020 Rehearing Order”); PJM Interconnection, L.L.C., 173 FERC ¶ 61,134 (Nov. 12, 2020) (“November 12, 2020 Compliance Order”), order on reh’g, 174 FERC ¶ 61,180 (Mar. 9, 2021) (“March 9, 2021 Compliance Rehearing Order”) (collectively, the “ORDC Orders”).

¹⁹ See Supplemental Protest of the PJM Power Providers Group at 3-8, Docket No. ER21-2582 (Sept. 2, 2021) (“P3 Supplemental Protest”). Compare, e.g., MSOC Replacement Rate Order, 176 FERC ¶ 61,137 at P 9 (Danly, Comm’r, dissenting) (“It is even more problematic that the majority adopts this overly aggressive remedy at the same time we are considering—and at least some of my colleagues have publicly advocated—proposals to eliminate or hollow-out the Minimum Offer Price Rule which protects the market from the unmitigated exercise of market power by state-sponsored or subsidized resources.”) with May 21, 2020 ORDC Order, 171 FERC ¶ 61,15 at

and thereby obscure the true “end result” or “total effect” of the Commission’s orders.²⁰ As P3 explained in its Protest and Supplemental Protest, it is not reasonable to move forward with lopsided MOPR modifications before the Base Residual Auction (“BRA”) for the 2023-2024 Delivery Year (“DY”). There is time to accomplish these integrated reforms in an orderly manner before the BRA for the 2025-2026 Delivery Year.²¹

P3 has waited a reasonable period of time for the Commission to issue the separate statements of Commissioners mandated by FPA section 205(g).²² In the absence of such statements—which, by definition, do not constitute a Commission order and do not represent the reasoning of the Commission as an institution—P3 seeks rehearing now as a necessary prerequisite to filing a petition for review under FPA sections 205(g) and 313(b).²³ P3 reserves the right to respond in a future pleading to any separate statements the Commissioners may issue, but P3 cannot allow the absence of such statements at this time to further erode the limited time available to seek rehearing of the Notice. Moreover, while neither FPA section 205(g) nor FPA section 313(a) impose any duty to request rehearing of the separate statements mandated by FPA section 205(g), the absence of such statements is a “reasonable ground” under FPA section 313(b) for failing to seek rehearing of whatever those statements may someday say.

P 27 (Glick, Comm’r, dissenting) (“I note that the implication of the Commission’s adoption of an E&AS offset is that, without such an offset reflecting the changes imposed by today’s order, capacity market inputs that depend on E&AS, including Net CONE, could well be unjust and unreasonable. Accordingly, it would seem that any offset would have to be in place before the next capacity auction if the results are to be deemed just and reasonable under the Commission’s own reasoning.”).

²⁰ *E.g.*, *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944); *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 664 (D.C. Cir. 2017); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987).

²¹ See P3 Protest at 52-53, 98 & n.340; P3 Supplemental Protest at 6, 8.

²² See 16 U.S.C. § 824d(g)(1)(B) (“[E]ach Commissioner *shall* add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change.”) (emphasis added).

²³ See 16 U.S.C. § 824d(g)(2); 16 U.S.C. § 825l(b).

STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

Pursuant to Rule 713(c) of the Commission's Rules of Practice and Procedure, P3 submits the following statement of issues and specifications of error:

1. The Notice is arbitrary and capricious *per se* because the Commission failed to explain its reversal of the Expanded MOPR Orders²⁴ and more than a decade of precedent requiring mitigation of the artificial price suppression caused by out-of-market subsidies.²⁵ *See* 5 U.S.C. § 706(2); *see, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 24 (D.C. Cir. 2014); *see also, e.g.,* P3 Protest at 13-14, 46-52.
2. The Notice is arbitrary and capricious *per se* because the Commission entirely failed to respond to facially legitimate objections raised by P3 in its Protest, Reply to Comments, and Supplemental Protest. *See* 5 U.S.C. § 706(2); *see, e.g., Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001).
3. The Notice unlawfully abdicates the Commission's statutory duty to prevent or mitigate the exercise of buyer or seller market power through out-of-market subsidies. *See, e.g., Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1296 (2016) ("*Hughes*") (citing 2011 MOPR Order and quoting 2011 MOPR Rehearing Order, 137 FERC ¶ 61,145 at P 3); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 100 (3d Cir. 2014) ("*NJBPU*")

²⁴ *See supra* note 9.

²⁵ *See supra* note 10.

- (same); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *see also*, e.g., P3 Protest at 3 & n.8, 13-14, 35-37, 50-51 & n.180; P3 Reply to Comments at 8-9.
4. The Notice unlawfully abdicates the Commission’s statutory duty to prevent one state or group of states from forcing the consumer-constituents in other states to underwrite the costs of out-of-market subsidies. *See, e.g., Hughes*, 136 S. Ct. at 1296 (citing 2011 MOPR Order and quoting 2011 MOPR Rehearing Order, 137 FERC ¶ 61,145 at P 3); *NJBPU*, 744 F.3d at 100 (same); S.R. 175, 134th Gen. Assemb. (Oh. 2021); *see also*, e.g., P3 Protest at 2 & n.179 (adopting the arguments in the EPSA Protest including its supporting affidavit), 3 & n.8, 13-14; 50-51 & nn.179-180; EPSA Protest 16-26; Affidavit of Collin Cain (“Cain Aff.”) at ¶¶ 40-48; P3 Reply to Comments at 6-8.
 5. The Notice arbitrarily and capriciously permits PJM to execute an impermissible collateral attack on the replacement rate established in the Expanded MOPR Orders²⁶ and the elimination of the state mandate exemption in the 2011 MOPR Orders.²⁷ *See, e.g., Midwest Indep. Transmission Sys. Operator, Inc.*, 133 FERC ¶ 61,221, at P 440 (2010); *Entergy Servs., Inc.*, 130 FERC ¶ 61,026, at P 38 n.48 (2010); *Cent. Vt. Pub. Serv. Corp.*, 123 FERC ¶ 61,128, at P 35 (2008); *Minn. Power & Light Co.*, 13 FERC ¶ 63,014, 65,030 (1980); *Cent. Kan. Power Co.*, 5 FERC ¶ 61,291 at 61,621 (1978); *see also, e.g.*, P3 Protest at 37-40 & nn. 140-143.
 6. The PJM Narrow MOPR Proposal is unjust, unreasonable, and unduly discriminatory in violation of FPA section 205.

²⁶ *See supra* note 9.

²⁷ *See supra* note 10.

- a. The Conditioned State Support (“CSS”) prong of the Narrow MOPR is unjust, unreasonable, and unduly discriminatory. *See, e.g., Hughes*, 136 S. Ct. at 1299 & n. 113; *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 646 (1990); *Elec. Power Supply Ass. v. Star*, 904 F.3d 518, 524 (7th Cir. 2018); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 253-54 (3d Cir. 2014); December 2019 Order, 169 FERC ¶ 61,239 at P 9; *see also, e.g., P3 Protest* at 53-67; *id.*, Attach. A, Affidavit of J. Arnold Quinn, Ph.D. (“Quinn Aff.”) at ¶¶ 31-32; *id.* Attach. B, Affidavit of Roy J. Shanker, Ph.D. (“Shanker Aff.”) at ¶ 48.
- b. The Buyer-Side Market Power (“BSMP”) prong of the Narrow MOPR is unjust, unreasonable, and unduly discriminatory. *See, e.g., New England Power Generators Ass’n, Inc. v. FERC*, 757 F.3d 283, 294 (D.C. Cir. 2014); *N.Y. Pub. Serv. Comm’n v. N.Y. Indep. Sys. Operator, Inc.*, 173 FERC ¶ 61,060 (2020); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,034, at P 47 (2020); December 2019 Order, 169 FERC ¶ 61,239 at P 216; *Consol. Edison Co. of N.Y., Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P79 (2015); *Astoria Generating Co., L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 at P 44 (2012); 2011 MOPR Order, 135 FERC ¶ 61,022 at PP 101, 106; *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 190 (2009); *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 73 Fed. Reg. 64,100 (Oct. 28, 2008), 125 FERC ¶ 61,071, at P 379 (2008); *see also, e.g., P3 Protest* at 67-80; Quinn Aff. at ¶¶ 38-40; P3 Reply to Comments at 6.

7. The PJM Narrow MOPR Proposal is not supported by substantial evidence. *See* 5 U.S.C. § 706(2)(E); 16 U.S.C. § 825l(b); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 4 (D.C. Cir. 2015); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at P 61 (2014); *Southwest Power Pool, Inc.*, 147 FERC ¶ 61,201, at P 141 (2014); *ISO New England Inc.*, 118 FERC ¶ 61,224, at P 11 (2007); *ISO New England Inc.*, 113 FERC ¶ 61,055, at P 28 (2005).
- a. PJM’s purported justifications for the Narrow MOPR—for example, stakeholder support, future Effective Load Carrying Capacity (“ELCC”) reforms, or potential withdrawals from PJM or its capacity market—lack merit. *See* P3 Protest at 80-89; *see, e.g.*, Quinn Aff. at ¶¶ 41-45; Shanker Aff. at ¶¶ 41-47.
 - b. The only economic analysis provided by PJM in support of the Narrow MOPR Proposal—the Affidavit of Peter Cramton—is fundamentally flawed and lacks any probative value. *See* P3 Protest at 89-93; *see, e.g.*, Quinn Aff. ¶¶ 18-23; Shanker Aff. ¶¶ 13-20, 49-59; Cain Aff. at 53-59; Reply Affidavit of Dr. Roy J. Shanker, Ph.D. *passim*.

Respectfully submitted,

On behalf of the PJM Power Providers Group

By: /s/ Glen Thomas

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October 4, 2021

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 4th day of October, 2021.

By: /s/ Diane Slifer
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