UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	)	**Docket Nos. ER23-729-000**
	)	**EL23-19-000**
	)	
	)	**(Not Consolidated)**

MOTION FOR LEAVE TO ANSWER
AND ANSWER OF THE PJM POWER PROVIDERS GROUP

Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure,[1] The PJM Power Providers Group ("P3")[2] submits this motion for leave to answer and answer ("Answer") to the answers that PJM Interconnection, L.L.C. ("PJM") and Monitoring Analytics, LLC ("IMM") filed in the above-captioned dockets on February 2, 2023 and February 6, 2023, respectively.

I. MOTION FOR LEAVE TO ANSWER

Pursuant to Rule 212,[3] P3 seeks leave to answer PJM's and the IMM's answers. Although Rule 213(a)(2) prohibits an answer to an answer unless otherwise directed by the decisional authority,[4] the Commission has accepted answers such as this one where the answer clarifies the record or provides information that assists the Commission in its decision-making

[1] 18 C.F.R. §§ 385.212, 385.213 (2022).

[2] 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 member with respect to any issue.

[3] 18 C.F.R. § 385.212 (2022).

[4] *Id.* § 385.213(a)(2).

process.[5] P3's Answer satisfies this standard because it clarifies the issues properly before the Commission and corrects certain inaccuracies contained in PJM's and the IMM's answers. Accordingly, P3 submits that there is good cause for the Commission to accept this Answer.

II. ANSWER

A. PJM's Decision to Ignore Most of the Facts and Legal Arguments Presented by the Numerous and Diverse Protesters in these Proceedings Exacerbates PJM's Failure to Satisfy its Statutory Burdens

The list of material facts and arguments that PJM has ignored in its answer is staggering. Among other things, PJM has ignored arguments concerning the specific steps PJM has or has not taken in conducting the December 2022 BRA, its failure to satisfy its statutory burdens, the economic rationality of the existing Tariff producing a high price for the generation-short Delmarva Power & Light – South ("DPL-South") zone in the December 2022 BRA, and the adverse impacts its proposal in these proceedings will have on the integrity of the PJM (and other Commission-jurisdictional) markets.[6] Furthermore, PJM ignored compelling record evidence that strongly undermines its position, including evidence that PJM should have foreseen this particular outcome.

[5] *See, e.g.*, *Wis. Pub. Serv. Corp.*, 181 FERC ¶ 61,270, at P 23 (2022); *FirstLight Hydro Generating Co.*, 162 FERC ¶ 61,049, at P 11 n.11 (2018); *Equitrans L.P.*, 134 FERC ¶ 61,250, at P 6 (2011).

[6] *Compare* Protest of the PJM Power Providers Group, at 9-14, 16-17, 18-20, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) ("P3 Protest") (explaining the Tariff-required steps for conducting the BRA); *id.* at 30-45 (explaining that PJM has not provided sufficient evidence to satisfy its burdens of proof under the FPA and APA); Protest of Elect. Power Supply Ass'n, at 17, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) ("EPSA Protest") (similar); Protest of Am. Clean Power Ass'n, et al., at 3-18, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) ("ACP Protest") (similar); Protest of Freepoint Solar LLC, at 7-8, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) ("Freepoint Solar Protest") (similar); P3 Protest at 21-22, 40-41, Attach. B at 18-25, 35 (explaining that the result the existing Tariff rules have produced for DPL-South, as identified by PJM, is economically rational); EPSA Protest, Attach. A at 28-43 (similar); P3 Protest at 25-26 (explaining, with supporting affidavit of Chairman Kelliher, the adverse impacts PJM's proposal would have on market integrity); ACP Protest at 3-4 (similar); EPSA Protest at 17-21 (similar); Freepoint Solar Protest at 13-14 (similar); Protest of Leeward Renewable Energy, LLC, et al., at 6-7, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) (similar); and Protest of Pine Gate Renewables, LLC, at 10-11, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) (similar) *with* Answer of PJM Interconnection, L.L.C., Docket Nos. ER23-729 & EL23-19 (filed Dec. 23, 2023) ("PJM Answer") (failing to address any of the previous topics).

These examples are not exhaustive, but merely illustrative. Each of those failures should be fatal to PJM's Federal Power Act ("FPA") section 205 and 206 filings in these proceedings. Rather than restate the many facts and arguments that PJM has ignored, which have already been presented in detail in the various protests submitted in these proceedings, P3 highlights four specific voids in PJM's answer that perhaps best elucidate the shell-game PJM is attempting to play with the Commission.

First, PJM's answer fails to explain what specific steps PJM has or has not taken in connection with the December 2022 Base Residual Auction ("BRA") to produce the clearing prices—including the clearing price for the DPL-South Locational Deliverability Area ("LDA")—at issue in these proceedings. That includes the steps taken with regard to the clearing prices produced by the existing Tariff provisions, as well as the alternative clearing price for DPL-South that PJM has calculated using a method that it admits is inconsistent with the existing Tariff. The Commission should be troubled by, and should reject, PJM's blatant attempt to treat the December 2022 BRA as a black-box by concealing the steps PJM has taken.

The BRA is anything but a black-box. As P3 explained in its protest, the BRA consists of a precisely structured process, for which each of the required steps is expressly prescribed in the Tariff. Because those steps are part of the filed rate, understanding them is critical to ascertaining (1) whether PJM is in compliance with its Tariff, (2) whether PJM's proposal in these proceedings would violate the filed rate doctrine, and (3) whether PJM has carried its statutory burdens. Accordingly, P3 took pains to explain those steps in detail in its protest.

In its answer, PJM is entirely silent on the specific steps PJM took prior to submitting its December 23, 2022 filings in these dockets. Rather than identify the specific steps it has taken and explain how they are consistent with the Tariff, PJM instead pins its hopes on the

Commission being satisfied with generic statements about "the auction clearing process" and "preliminary price calculations" and "suspend[ing] the auction clearing before it was completed." PJM attempts to further cover its tracks by arguing that it has not finished "conducting" the December 2022 BRA because it "has not completed the auction clearing process or finalized any auction results."[7] When it comes to whether, how, or to what extent PJM has complied with its Tariff, those statements are meaningless. PJM has identified no specific Tariff-based steps that PJM is required to take, but has not yet taken, to conduct the December 2022 BRA. Further, as PJM explicitly concedes in its answer, PJM has already applied its market power mitigation rules to the December 2022 BRA and determined that the offers were competitive.[8] So, too, for the IMM.[9] Those determinations by PJM and the IMM confirm that PJM has fully conducted the BRA. The fact that PJM has not identified a single specific step, or referenced a single specific Tariff provision, that remains to be satisfied in "conducting" the December 2022 BRA is fatal to PJM's position. Either PJM has taken all of the steps set forth in the Tariff for "conducting" the December 2022 BRA, in which case it has violated its Tariff by not posting the results "as soon thereafter as possible," or PJM has failed to take all of those steps without identifying which ones it has or has not taken, in which case PJM has failed to provide sufficient evidence to carry its statutory burdens under the FPA and APA. In either case, the Commission must reject PJM's proposal to retroactively change the rules of the December 2022 BRA.

[7] PJM Answer at 7-8.

[8] *Id.* at 14.

[9] *See* Answer of Monitoring Analytics, LLC, at 3, Docket Nos. ER23-729 & EL23-19 (filed Feb. 6, 2023) ("IMM Answer").

Second, in arguing that the clearing price the existing Tariff produced for DPL-South was not foreseeable, PJM has egregiously ignored record evidence demonstrating that the result was not only foreseeable but that PJM, in fact, foresaw it and discussed it with at least one stakeholder well in advance of the December 2022 BRA. As explained in P3's protest, PJM's July 2022 sensitivity study ("July 2022 Sensitivity Study") showed that if as little as 260 MW were removed (the equivalent of failing to show up) in the DLP-South LDA the price would clear at the $431.26 per MW-day price cap. The writing was clearly on the wall at that point.

Based on PJM's figures, there were approximately 613 MW of Planned Generation Capacity Resources in the DPL-South LDA that could have participated in the December 2022 BRA—all of which are being developed under trying economic and supply chain conditions, and none of which are required to offer into the BRA—and, based on PJM's position in these proceedings, at least one of those was large enough to have a material impact on the DPL-South clearing price. Further, approximately 100 MW of existing resources had the option to not offer into the auction.[10] Given these conditions, and almost no change in the import capability into DPL-South,[11] it was eminently reasonable to expect that the scenario identified in the July 2022 Sensitivity Study could manifest in the December 2022 BRA. In fact, at least one stakeholder reached out to PJM to confirm the validity of that expectation. As NRG Power Marketing LLC ("NRG") demonstrated in its protest in these proceedings—with evidence in the form of an email exchange with PJM on this topic—an NRG employee contacted PJM in November 2022 to confirm the validity of the twelve percent increase in the DPL-South LDA Reliability Requirement for the December 2022 BRA relative to the July 2022 BRA, and PJM responded

[10] *See* P3 Protest, Attach. B, at 19.

[11] *See id.*

that the figure was legitimate and accurately reflected DPL-South's "increase in winter loss of load risk."[12] Amazingly, PJM's answer entirely ignores that evidence.

Furthermore, PJM's argument that the July 2022 Sensitivity Study is "irrelevant" is belied by PJM's own conduct. As P3 noted in its Protest, it appears that PJM removed the July 2022 Sensitivity Study from its website on or about January 20, 2023—*i.e.*, the deadline for comments and protests in these proceedings.[13] PJM did not address this fact in its answer and, as of the date of this Answer, PJM has not reposted the July 2022 Sensitivity Study to its website. Aside from the troubling implications that conduct has for PJM's candor in these proceedings, PJM's conduct undercuts its own argument about the usefulness of the July 2022 Sensitivity Study. If the July 2022 Sensitivity Study were truly "irrelevant," then why would PJM remove it from the website on or about the date that protesters were likely to direct the Commission to that document? If it were truly "irrelevant," it would not be worth concealing.

Third, PJM chose not to address P3's argument that the language set forth in section 5.11(e) which would permit PJM to follow a process to "post modified results" and "corrected results" does not apply in this situation.[14] In so doing, PJM appears to have jettisoned its argument that this case involves the type of "error" contemplated by section 5.11(e). As P3 explained, the "error" provision in section 5.11(e) and the market power review process described in section 6.2(c) are the only two mechanisms in the Tariff that permit PJM to revise the clearing prices produced by the BRA. As PJM now concedes, neither of those mechanisms apply to this case.

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[12] *See* Protest of NRG Power Marketing LLC, Direct Energy Business Marketing, LLC, and Midwest Generation, LLC, at Exh. C, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) ("NRG Protest").

[13] *See* P3 Protest at n.23. P3 provided the relevant portion of the July 2022 Sensitivity Study as an attachment to its Protest. *Id.* at Attach. C.

[14] *See id.* at 11-14.

Fourth, PJM's answer is completely silent on the issue of whether PJM has satisfied its burden, under FPA section 206, to demonstrate that the existing Tariff is unjust and unreasonable. PJM cannot carry its burden of proof with silence. The closest PJM's answer comes to this issue is its dumbfounding assertion that "not a single protester attempts to justify that the previously posted [LDA] Reliability Requirement for [DPL-South] is an accurate input that should be used for the 2024/2025 BRA."[15] That assertion flips the burden of proof under the FPA. As a matter of law, whether the Tariff can be changed under FPA section 206 depends on whether PJM demonstrates that the existing Tariff is flawed—which it has not done—not whether or how protesters defend the existing Tariff. In any event, multiple protesters, including P3, explained at length the reasons why the existing Tariff is just and reasonable despite PJM's ephemeral arguments to the contrary.[16] The protesters' arguments and evidence in support of the existing Tariff raise the bar for PJM to prove that the existing Tariff is unjust and unreasonable.[17] PJM's failure to meaningfully respond to the numerous arguments and record evidence in support of the existing Tariff and the clearing prices is fatal to PJM's FPA section 206 filing.

In sum, PJM's answer digs its hole even deeper. As P3 and others have ably demonstrated with record evidence, PJM has violated its Tariff by failing to post the auction results as soon as possible after conducting the December 2022 BRA and has fallen well short of meeting its statutory burdens under the FPA and APA in these proceedings. PJM's decision to ignore the compelling record evidence protesters have presented in these proceedings further

[15] PJM Answer at 2.

[16] *See, e.g.*, P3 Protest at § II.C.ii; EPSA Protest at 28-43.

[17] *See, e.g.*, *Sw. Power Pool, Inc.*, 180 FERC ¶ 61,192, at P 52 (2022) (finding that, after protesters provide probative evidence weighing against a proposed tariff change under FPA section 205, the proponents of the tariff change "could not prevail by resting solely on their prima facie evidence").

undermines PJM's filings and represents grounds for rejecting PJM's FPA section 205 and section 206 filings.

B. PJM's Argument Concerning the Filed Rate Doctrine and Rule Against Retroactive Ratemaking Misinterprets Judicial Precedent and Erroneously Characterizes the Reliability Pricing Model as a Transmission Formula Rate

PJM argues that "the rule against retroactive ratemaking and the filed rate doctrine are simply inapplicable here because there is no rate to change and no rate change is being proposed."[18] PJM's theory appears to be that the filed rate doctrine is not implicated in the context of the December 2022 BRA (or any other wholesale market, for that matter) until and unless PJM announces the clearing price produced by the rules in the Tariff. In other words, in its attempt to get around the bedrock precept that the filed rate doctrine applies to both rate and non-rate terms of a tariff, PJM appears to argue that there is no such thing as a "non-rate term" in the context of a wholesale market design tariff.[19] A century's worth of Article III judges are rolling over in their graves in response to PJM's argument.[20] More importantly, the argument would be poorly received by the present-day D.C. Circuit, which has repeatedly found that the

[18] PJM Answer at 12.

[19] Although PJM's answer later appears to concede that there are non-rate terms in the BRA rules, PJM's argument for why it is not retroactively changing those non-rate terms is non-sensical. *See* PJM Answer at 12-13. PJM argues that it is "not proposing to change (retroactively or not) the posting" of the LDA Reliability Requirement for DPL-South, but rather is "proposing to prospectively update" that LDA Reliability Requirement "for purposes of completing the optimization algorithm in completing the auction clearing." The relevant point, which PJM completely misses, is that it is seeking to change the LDA Reliability Requirement used in the optimization algorithm to determine the December 2022 BRA clearing prices. The LDA Reliability Requirement to be used is a non-rate term of the filed rate. Because PJM has already run the December 2022 BRA using the optimization algorithm and other Tariff rules that constitute the BRA, it cannot now change the LDA Reliability Requirement or any other non-rate terms of the Tariff applicable to that BRA.

[20] *See, e.g.*, *Oklahoma Gas & Elect. Co. v. FERC ("Oklahoma Gas")*, 11 F.4th 821, 829 (D.C. Cir. 2021) ("As the statutory terms make clear, the filed rate is not limited to rates per se, but also extends to matters directly affecting rates.") (cleaned up) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986)); *accord N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90-91 (1963) (citing *Dayton-Goose Creek R. Co. v. U.S.*, 263 U.S. 456, 478 (1924)).

filed rate doctrine applies to non-rate provisions of Regional Transmission Organization tariffs—specifically including PJM's Tariff.[21]

In a move that is internally inconsistent with its above argument that the filed rate doctrine is inapplicable because there is no "rate," PJM also appears to argue that it can bypass the filed rate doctrine and rule against retroactive ratemaking because the RPM "is a complex formula rate" like a transmission formula rate.[22] PJM does not present this as an alternative argument; rather, PJM confoundingly treats it as part-and-parcel with its argument that the filed rate doctrine does not apply because there is no "rate." In any event, PJM errs in characterizing the RPM as a transmission formula rate. PJM's motivation for half-heartedly advancing that notion is obvious: courts have found that transmission formula rates can facilitate certain changes that would otherwise be impermissibly retroactive. But the RPM is a far cry from a transmission formula rate for several reasons.

First, the RPM is not a "formula;" it is a set of rules (*i.e.*, non-rate terms) that PJM must follow to produce a rate.

Second, even if the RPM could be considered a "formula," it does not provide the same type of notice to customers that the "inputs" to (or "outputs" of) the formula might change after the formula has been applied. For one thing, transmission formula rates are relatively simple mathematical operations plainly described in a utility's transmission tariff. The RPM rules are nothing like that type of formula. No customer sees the pluses, minuses, and equal signs (and other mathematical operations) used in the BRA. The BRA's mathematical operations are

[21] *See Oklahoma Gas*, 11 F.4th at 829-30 (finding billing limitations in Southwest Power Pool Inc.'s tariff to be "[n]on-rate terms within the tariff that may not be changed retroactively"); *Old Dominion Elect. Coop. v. FERC ("ODEC")*, 892 F.3d 1223, 1231-32 (applying the filed rate doctrine and rule against retroactive ratemaking to a tariff provision establishing cap on offers in PJM's energy market).

[22] *See* PJM Answer at 3-4, n.13.

conducted by a computer, using untold lines of code, that only PJM has access to. The existence of that type of "formula" on a PJM computer cannot suffice for providing customers the type of "legally required notice to even first-line purchasers in the wholesale markets, such as load-serving entities, let alone to the downstream retail customers,"[23] that the BRA results would change in the manner PJM has proposed.

Furthermore, transmission formula rates are accompanied by protocols that prescribe a specific process by which the inputs to the formula will be updated as the transmission owner's costs-of-service change. Those updates represent objective cost-of-service reconciliations—*i.e.*, they increase or decrease rates based on actually incurred costs generally derived from a transmission owner's FERC Form No. 1 filings—and they are made pursuant to a formal true-up process codified in the tariff. These foreordained changes are designed to ensure that the cost-of-service rates are updated on a rolling basis, because transmission service is being provided on a continuous basis. In contrast, the changes PJM is proposing for its BRA results are neither objective nor "foreordained." Contrary to PJM's position, the Tariff does not contemplate any updates to or reconciliation involving the LDA Reliability Requirements used as parameters in the December 2022 BRA. As evidenced by PJM's filings in these proceedings, PJM is requesting license—unsupported by the existing Tariff—to change BRA results well after the BRA was conducted, based on PJM's subjective assessment that prices should be lower in a particular zone. It is patently unreasonable to consider any market participant to have been on notice that the rules of the BRA, or any of the BRA's inputs or outputs, were subject to change after PJM commenced the BRA, much less after PJM had conducted the BRA as in this case.

[23] *ODEC*, 892 F.3d at 1231.

C. PJM Misconstrues the Filed Rate Doctrine and Rule Against Retroactive Ratemaking as Flexible, Equitable Tools that Are Designed to Avoid Only Rate Increases for Services Rendered in the Past

PJM appears to argue that the filed rate doctrine and the rule against retroactive ratemaking apply only in cases involving "retroactive *increases* of rates for power that consumers *already consumed*."[24] That argument is flawed on two counts.

First, the filed rate doctrine and rule against retroactive ratemaking apply with equal force to rate increases and rate decreases.[25] The filed rate doctrine and rule against retroactive ratemaking are not equitable tools that the Commission can toggle on and off depending on the nature of the financial impacts at issue.[26] As the courts have explained, the filed rate doctrine "bind[s] regulated entities to charge only the rates filed with FERC and to change their rates only prospectively. When it applies, the filed rate doctrine is a nearly impenetrable shield and does not yield, no matter how compelling the equities."[27] PJM's argument that the filed rate doctrine only applies to rate increases flies in the face of judicial precedent.[28] Further, it completely ignores the fact that the filed rate doctrine and rule against retroactive ratemaking apply to changes in non-rate terms. Changes in non-rate terms might or might not correlate with rate increases or decreases, depending on various circumstances, and, in any event, the courts have

[24] PJM Answer at 15.

[25] *See, e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (explaining that the rule against retroactive ratemaking "bars the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.") (emphasis added); *ODEC*, 892 F.3d at 1227 ("[T]he rule against retroactive ratemaking prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods.") (internal quotations omitted) (quoting *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992).

[26] *See Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (explaining that the filed rate doctrine is "undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress").

[27] *Oklahoma Gas*, 11 F.4th at 829-30 (internal quotations omitted) (quoting *ODEC*, 892 F.3d at 1230).

[28] *See supra* n.25.

not made application of the filed rate doctrine and rule against retroactive ratemaking to non-rate terms contingent on the identification of a corresponding rate increase.

Second, for the same reasons described above, the filed rate doctrine and rule against retroactive ratemaking apply regardless of whether power has already been consumed. The filed rate doctrine applies to a tariff as soon as the tariff becomes effective, in compliance with the FPA.[29] PJM has identified no precedent for the proposition that the filed rate doctrine and rule against retroactive ratemaking adhere to a tariff only after, and to the extent that, customers have purchased power pursuant to that tariff. Nor can PJM convincingly make that case, because doing so would contradict a long line of judicial precedent to the contrary.[30]

D. PJM's Interpretation of FPA Section 309 Contravenes the Statute and Judicial Precedent

PJM argues that FPA section 309 empowers the Commission to override the filed rate doctrine and rule against retroactive ratemaking.[31] Unfortunately for PJM, the courts have emphatically disagreed with that proposition.[32] FPA section 309 "permits FERC to advance

[29] *See, e.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. at 577 (explaining that one of the principles underlying the filed rate doctrine is that customers have a right to the rate on file); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995) (explaining that and the purpose of those principles is not only to prevent unjust discrimination but also to "ensure predictability" by allowing customers to rely on duly filed tariffs as the only lawful charge).

[30] *See, e.g.*, *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) ("*Once filed* with a federal agency, such tariffs are the equivalent of a federal regulation.") (emphasis added) (internal quotations and citations omitted); *accord Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (explaining that the obligations set forth in a common carrier tariff bound "both carriers and shippers with the force of law" to perform pursuant to the terms of the tariff, including terms that dictated "prior arrangements . . . required" to "facilitate the rendition of service"); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014) (applying filed rate doctrine in the context of PJM's interconnection rule provisions establishing the interconnection customer's eventual cost responsibility for network upgrades necessitated by its interconnection request).

[31] *See* PJM Answer at 23 ("Neither the filed rate doctrine nor the rule against retroactive ratemaking bars the Commission from its broad statutory authority under section 309 of the FPA.").

[32] See *Verso Corp. v. FERC ("Verso")*, 898 F.3d 1, 11 (D.C. Cir. 2018); *TNA Merchant Projects, Inc. v. FERC ("TNA Merchant Projects")*, 857 F.3d 354, 359 (D.C. Cir. 2017); *Niagara Mohawk Power Corp. v. FPC ("Niagara Mohawk")*, 379 F.2d 153, 158 (D.C. Cir. 1967).

remedies not expressly provided by the FPA, as long as they are consistent with the [FPA]."[33] "Obviously, any actions that FERC takes under § 309 must conform with the purposes and policies of Congress and cannot contravene any terms of the [FPA]. Thus, § 309 cannot be used to supersede specific statutory strictures[.]"[34] The filed rate doctrine and the rule against retroactive ratemaking are quintessential strictures of the FPA, manifesting Congress's purpose and policy of providing customers with certainty and transparency with respect to their Commission-jurisdictional rates. PJM's interpretation of section 309 would read the filed rate doctrine and the rule against retroactive ratemaking out of existence. The Commission has no option but to reject that interpretation.

E. PJM's Flawed Conception of the Filed Rate Doctrine and Rule Against Retroactive Ratemaking Would Permit Retroactive Tariff Changes Without Limitation as Long as the Tariff Filing or Complaint Is Filed Before the Resulting Rate Is Charged and the Corresponding Service Is Provided

As should be clear to the Commission, PJM's varied and tenuous interpretations of the filed rate doctrine and the rule against retroactive ratemaking amount to throwing spaghetti at the wall in the hope that something might stick. Were the Commission to accept any of those arguments, it would essentially render the filed rate doctrine and rule against retroactive ratemaking inoperative in the context of wholesale market design tariffs. As former Chairman Kelliher has explained in these proceedings, such a result would be exceptionally bad regulatory policy and would ultimately subject the Commission to a humiliating defeat in court. Because that judicial resolution will take time, accepting PJM's interpretation of the filed rate doctrine and rule against retroactive ratemaking would, in the meantime, do significant harm to all Commission-jurisdictional markets (not just the PJM market).

[33] *Verso*, 898 F.3d at 11.

[34] *TNA Merchant Projects*, 857 F.3d at 359 (cleaned up) (quoting *Niagara Mohawk*, 379 F.2d at 158).

The net result of PJM's misguided legal theory is that, in the context of a market design tariff, the filed rate doctrine and rule against retroactive ratemaking are relevant only to the rates produced by those tariffs, and only after the service provided in return for those rates has been provided. Under that theory, the filed rate doctrine and rule against retroactive ratemaking do not apply to non-rate terms of a market design tariff, nor do they apply to rates set by such a tariff that are to be charged for a service that has not yet been provided. In the world PJM's legal theory would create, the rules and rates set forth in a market design tariff could be changed retroactively any time up until a service is provided and a tariff-dictated rate is paid for that service—regardless of the actions taken pursuant to, or in reliance on, those rules or rates. More specifically, based on the facts of this case, the implication would be that BRA results would not be final until at least three years after the BRA is conducted—and perhaps even longer given that the funds associated with a seller's capacity supply obligations are disbursed and collected throughout the Delivery Year. A Commission order adopting PJM's position would invite complaints, for years after each BRA and Incremental Auction, challenging any number of auction parameters involving forecasts or assumptions that do not turn out to be exactly accurate based on the decisions market participants make regarding their participation in that auction. In short, PJM's position would open Pandora's Box. The Commission should leave it closed.

F. The IMM Invents a New Standard that Does Not Exist in the FPA or PJM's Tariff and Fails to Appreciate the Impact that Planning Parameters Have on Commercial Activities

The IMM argues that the legal standard the Commission should apply in these proceedings is "whether the prices that PJM ultimately posts are a result of the actual supply of

and demand for capacity in DPL-[South]."[35] That standard is found nowhere in the Tariff or the FPA, and the Commission should reject the IMM's proposition.

The applicable legal standard for PJM's Tariff—including the results of the December 2022 BRA—is the "just and reasonable" standard set forth in FPA section 205. As P3 has explained, the existing BRA rules that PJM has applied to the December 2022 BRA have been found to be just and reasonable, and both the IMM and PJM have noted that all offers in that auction were competitive. To date, that has passed muster with the Commission. Adopting the IMM's new standard would require the Commission to analyze and determine—for every capacity auction, and perhaps even every energy market transaction—whether the price posted by PJM is the result of "the actual" supply and demand. In other words, each price would need to be analyzed *ex post* to determine whether the "actual" supply and demand perfectly matched the *ex ante* supply and demand parameters established based on forecasts or assumptions. This logic would extend to incremental auctions, which, in some cases, change the supply and demand dynamics that existed when the BRA was initially run. That exercise would be highly burdensome to the Commission, PJM, and the PJM stakeholders. Furthermore, the legal standard contemplated by the IMM likely is unworkable, because "actual" supply and demand is necessarily and inextricably intertwined with the *ex ante* assumptions that determine "actual" supply and demand behavior in an auction. Accordingly, the Commission should resist the IMM's invitation to adopt such a legal standard in these proceedings.

Additionally, the IMM argues that, if Tariff changes that alter the planning parameters for the BRA become effective, those parameters do not need to be recalculated and the auction does not need to be rerun based on the revised parameters. The IMM states that "[m]arket

[35] *See* IMM Answer at 3.

participants offered competitively or were constrained to competitive offers by the market power mitigation rules, and *there is no reason to believe that their offers were affected by the overstated demand*."[36] However, the IMM completely ignores the testimony of NRG's witness, Joseph A. Holtman, the Vice President of Trading for NRG, who details the strong relationship between the posting of BRA planning parameters and a myriad of commercial activities based specifically on the exact data contained in those posted parameters.[37] Moreover, PJM's Tariff expressly provides sellers the flexibility to craft their offers, and, for some resources, their decision about whether to participate in the BRA, based on their commercial judgment as informed by the planning parameters. For example, PJM's current Market Seller Offer Cap is the cap under which suppliers are free to exercise their commercial judgement in establishing their BRA offers, and generators without RPM must-offer obligations (such as new and intermittent generation resources) may elect to not offer at all based on the planning parameters. Simply because suppliers offered competitively based on one set of planning parameters does not mean that those same suppliers would offer at all, or at the same level, under revised parameters. The IMM's comments do not recognize this reality.

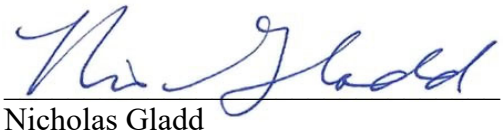
[36] IMM Answer at 3 (emphasis added).

[37] *See* NRG Protest, Attach. A at 4-11.

III. CONCLUSION

For the foregoing reasons, P3 requests that the Commission accept this answer and reject PJM's FPA section 205 and 206 filings in these proceedings.

Respectfully submitted,



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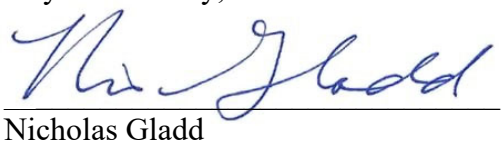
February 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding, in accordance with Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2022).

Dated at Portland, Maine, this 9th day of February, 2023.



Nicholas Gladd