UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	**)** **)**	**Docket No. ER19-105-___**

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 rehearing of the Commission's January 20, 2022 order on remand,[4] which eliminated the use of a 10% adder in the modeled energy market offers of the Reference Resource used to establish the Variable Resource Requirement ("VRR") Curve, the demand curve used in the PJM Interconnection, L.L.C's ("PJM") Reliability Pricing Model ("RPM") capacity market. As detailed herein, rehearing of the January 2022 Order is required because the Commission acted arbitrarily and capriciously and otherwise failed to comply with its obligations under the FPA and the Administrative Procedure Act (the "APA").[5] It is important to note that, in remanding the issue of the 10% adder, the U.S. Court of Appeals for the District of Columbia Circuit did not

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1 16 U.S.C. § 825*l*(a) (2018).

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 MW 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. This pleading represents 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.*, 178 FERC ¶ 61,020 (2022) (the "January 2022 Order").

5 5 U.S.C. §§ 551, *et seq.* (2018).

direct that the 10% adder be removed from the EAS offset and Net CONE calculations. The Court had the ability to do this, however, instead it simply remanded for "reassessment of the 10% adder without vacatur."[6] Unfortunately, the Commission arbitrarily and capriciously reversed its prior decision without seriously considering the arguments and evidence in this proceeding supporting the 10% adder.

I.

STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[7] P3 hereby identifies each issue on which it seeks rehearing of the January 2022 Order, and provides representative precedent in support of its position on each of those issues:

1. The January 2022 Order is arbitrary and capricious because it failed to respond meaningfully to arguments put forward by PJM and P3 that the 10% adder is needed to account for market and pricing uncertainties and ignored contrary evidence demonstrating that market participants regularly use an adder in their cost-based offers. *See, e.g., Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("*Genuine Parts*"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("*PPL Wallingford*"); *Tenneco Gas v. FERC*, 969 F2d 1187, 1214 (D.C. Cir. 1992) ("*Tenneco*").

2. The January 2022 Order failed to reflect reasoned decision-making because the Commission's decision to reject the adder in its entirety was illogical and not supported by substantial evidence. *See, e.g.,* 5 U.S.C. § 706(2)(E) (2018); 16 U.S.C. § 825l(b) (2018); *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("*Allentown*"); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) ("*Baltimore Gas*"). Moreover, in taking this action, the Commission utterly failed to address arguments raised by P3, in violation of the APA. *See, e.g., NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("*NorAm*").

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6 *Delaware Div. of Pub. Advocate v. FERC*, 3 F.4th 461, 469 (D.C. Cir. 2021).

7 18 C.F.R. § 385.713(c)(2) (2021).

3. The January 2022 Order was arbitrary and capricious and not the product of reasoned decision-making, because the Commission failed to account for the importance of regulatory stability. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); *Rail Splitter Wind Farm, LLC v. Ameren Servs. Co.*, 142 FERC ¶ 61,047 at P 31 (2013) ("*Rail Splitter*"), *on reh'g*, 146 FERC ¶ 61,017 (2014).

4. The Commission's failure to provide meaningful responses to serious objections raised by dissenting Commissioner Danly[8] renders the January 2022 Order arbitrary and capricious. *See, e.g.*, *American Gas Ass'n v. FERC*, 593 F.3d 14, 19-21 (D.C. Cir. 2010) ("*AGA*").

II.

REQUEST FOR REHEARING

Rehearing of the January 2022 Order is required because the Commission failed to engage in reasoned decision-making, in violation of its obligations under the FPA and the APA.

A. The Commission's Decision to Remove the 10% Adder Is Unjust and Unreasonable and Arbitrary and Capricious and Fails to Reflect Reasoned Decision-Making Because the Commission Did Not Provide a Meaningful Response to Arguments and Evidence That Showed the 10% Adder is Just and Reasonable.

The Commission's decision to reverse its prior acceptance of the 10% adder fails to reflect reasoned decision-making. In its initial filing proposing the adder, PJM explained that its energy market rules provide for a 10% adder "to account for uncertainties in the determination of these energy market participation costs," and that it would, therefore, be appropriate to incorporate the same adder "into the cost-based energy market offer assumed for the Reference Resource in the EAS estimating method's Peak-Hour Dispatch rules," because "[t]hese same uncertainties, e.g., assumptions regarding the applicable gas index hub, Day-ahead versus intra-day gas arrangements,

[8] *See* Dissent of Commissioner Danly, at PP 3, 4, and 9, Docket No. ER19-105-005 (the "Danly Dissent").

and assigned Locational Marginal Pricing, would confront the Reference Resource if it were preparing an energy market offer."[9] Nowhere does the January 2022 Order disagree with the assertion that market participants, including the Reference Resource, would face uncertainty in preparing cost-based offers. Nonetheless, the order states that such uncertainty, "*without evidence regarding whether, how often, or to what extent a CT resource like the Reference Resource would actually utilize the allowed 10% adder in the energy market*, is not sufficient to demonstrate that including the 10% adder for purposes of the E&AS Offset calculation is just and reasonable."[10]

The blatant problem with the Commission's holding is that it completely ignores the fact that P3 provided evidence on this very point. On October 22, 2021, P3 filed comments in this proceeding regarding the need and use of the 10% adder.[11] In those comments, P3 agreed that the 10% adder gives resource owners, even in the context where they are mitigated to their costs, the ability to represent in their offers certain costs that are difficult to estimate.[12] P3 also highlighted the State of the Market report prepared by PJM's Independent Market Monitor ("IMM"), which shows that market participants regularly use the 10% adder in part or in full.[13] In fact, the IMM's 2020 State of the Market Report shows that gas-fired units, which would include CTs like the Reference Resource, "used at least some of the 10% adder more than 70% of the time in both 2019 and 2020," and that "gas-fired units used all or more of the 10% adder more than 61% of the time

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9 *PJM Interconnection, L.L.C.*, Periodic Review of Variable Resource Requirement Curve Shape and Key Parameters, Docket No. ER19-105-000, October 12, 2018, at pp. 22-23.

10 January 2022 Order at P 11 (emphasis added).

11 *PJM Interconnection, L.L.C.*, PJM Power Providers Group Comments in Response to Public Interest and Customer Organizations' Motion for Expedited Order on Remand., Docket Nos: ER19-105-000, *et al*. October 22, 2021 ("P3 Comments").

12 *See* P3 Comments at p. 3.

13 *Id.* at p. 4.

in both 2019 and 2020."[14] In its Motion for Leave to Answer and Answer filed on November 12, 2021, PJM noted that it did not support the removal of the 10% adder and agreed that "there is already sufficient and compelling data from the Market Monitor's state of the market report that continues to support the inclusion of a cost adder."[15]

The January 2022 Order was therefore blatantly wrong to claim that there was no "*evidence regarding whether, how often, or to what extent a CT resource like the Reference Resource would actually utilize the allowed 10% adder in the energy market . . . .*"[16] Indeed, Commissioner Danly observed in his dissent that "[t]here was more than sufficient record evidence to approve the 10% adder in the first place, even if our order failed to 'further grappl[e] with the contrary evidence."[17] Commissioner Danly further noted that the "failure was in our own orders because the evidence, as recounted in this order, was extensive."[18] The APA does not permit the Commission to so ignore evidence contrary to its desired outcome.[19]

Separately, in the January 2022 Order, the Commission acknowledged that "both P3 and the IMM's data suggest that some natural gas units do make use of at least a portion of the 10% adder in their daily energy market offers," but nonetheless claimed that "these data do not justify

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[14] *Id.* at p. 6.

[15] *PJM Interconnection, L.L.C.*, Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C., Docket Nos: ER19-105-000, *et al*. November 12, 2021, at p. 2 ("PJM Answer").

[16] January 2022 Order at P 11 (emphasis added).

[17] Danly Dissent at P 3.

[18] *Id.*

[19] *See, e.g., Genuine Parts*, 890 F.3d at 312 (stating that "an agency cannot ignore evidence that undercuts its judgment . . . [or] minimize such evidence without adequate explanation"); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) (finding that an agency may not rely on a "clipped view of the record" to support its conclusion); *Green v. Shalala*, 51 F.3d 96, 102 (7th Cir. 1995) (concluding that, where the agency "did not grapple with significant record evidence in [its] decision," that decision "is not supported by substantial evidence" (citation omitted)); *Tenneco*, 969 F.2d at 1214 (finding that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence").

the inclusion of the 10% adder in every market interval of the year as an upward adjustment of costs in the determination of the E&AS Offset (i.e., annual net revenue in energy and ancillary services markets) in the capacity market."[20] The Commission then proceeded to eliminate the 10% adder in *all* instances. As P3 pointed out, this decision was overly broad, illogical, and not properly substantiated by record evidence[21] because it effectively assumes "resources never use the ten percent adder."[22] Similarly, Commissioner Danly highlighted the Commission's all or nothing approach by aptly observing "since not all generators will include the adder every time, we jettison it."[23] As P3 also argued, "[c]learly, the data demonstrates that it is more accurate to assume that resources use the ten percent adder, and less accurate to assume that resources use a zero percent adder. If the choice is between always or never including the ten percent adder, this is clear evidence that always using the ten percent adder is more representative of how resources actually behave."[24] Nonetheless, the January 2022 Order completely failed to respond to P3's arguments.[25]

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20 January 2022 Order at P 17 (footnote omitted).

21 *See* 5 U.S.C. § 706(2)(E) (2018) (providing agency decisions shall be held unlawful if they are "unsupported by substantial evidence"); 16 U.S.C. § 825l(b) (2018) (providing that Commission findings of fact will be conclusive "if supported by substantial evidence"); *Allentown*, 522 U.S. at 374 (the process by which an agency arrives at a particular "result must be logical and rational"); *Baltimore Gas*, 462 U.S. at 105 (agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made") (citations omitted).

22 P3 Comments at p. 10.

23 Danly Dissent at P 3.

24 P3 Comments at p. 10.

25 *See, e.g., PPL Wallingford*, 419 F.3d at 1198 (requiring the Commission to "respond meaningfully" to concerns raised by parties); *NorAm*, 148 F.3d at 1165 (reversing order where the Commission "not only failed to provide an adequate response to [petitioner's] argument, it failed to take seriously its responsibility to respond at all").

B. The Commission Arbitrarily and Capriciously Failed to Account for the Importance of Regulatory Stability.

The Commission has long "emphasized that it considers stability and regulatory certainty an important issue in its decision-making process,"[26] and has stated that it will "strive[] to provide regulatory certainty through consistent approaches and actions."[27] Nonetheless, the January 2022 Order evinces no such concerns. To the contrary, the Commission's removal of the 10% adder in the January 2022 Order undoes established Commission policy and creates substantial regulatory uncertainty, as clearly explained and emphasized by Commissioner Danly in his dissent.[28]

In designing market rules, the Commission must remain cognizant of its primary statutory mission "to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices"[29] that depends on voluntary, private investment of billions of dollars in supply resources that are needed for system reliability and are made in reliance on Commission-regulated market structures.[30] That mission is being undercut by the Commission's recent orders. The cumulative effect of the January 2022 Order and other recent Commission actions will have a profound effect on reliability and ultimately increase costs to ratepayers. As Commissioner Danly notes, "critical last-minute rule changes - such as slashing the demand curve by up to 10% - create regulatory

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26 *Rail Splitter*, 142 FERC ¶ 61,047 at P 31. *See also Nevada Power Co. v. Duke Energy Trading & Mktg., L.L.C.*, 99 FERC ¶ 61,047 at 61,190 ("Competitive power markets simply cannot attract the capital needed to build adequate generating infrastructure without regulatory certainty . . . ."), *on reh'g*, 100 FERC ¶ 61,273 (2002).

27 FERC, *About FERC*, https://ferc.gov/what-ferc.

28 *See* Danly Dissent at PP 1, 5, 9 and n.7.

29 *National Ass'n for the Advancement of Colored People v. FPC*, 425 U.S. 662, 670 (1976) (footnote omitted).

30 *Independent Market Monitor for PJM v. PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,022, Concurring Statement at P 1 (2022) (Danly, Comm'r, concurring) (the "Danly EL19-47 Statement") ("Power markets simply cannot function when the rules constantly change, and for that, the blame lies squarely with the Commission.").

uncertainty that threatens reliability over time."[31] Moreover, Commissioner Danly properly recognized the impact of the Commission's actions on developers: "Imagine a developer attempting to finance a plant via a winning capacity offer in the PJM capacity market as the Commission changes fundamental auction rules and then indefinitely delays the auction itself while PJM and market participants sort out those rules. Lenders account for such risks by raising interest rates."[32]

Contrary to its statements in *Rail Splitter* and its underlying regulatory obligations, the January 2020 Order evinces no concern whatsoever for regulatory stability. Commissioner Danly highlights that the Commission has no answer for the argument that "a key part of ensuring just and reasonable rates is to take into account the profound cost for ratepayers created by regulatory uncertainty."[33] He also notes that PJM gave numerous reasons why the Commission should not require elimination of the 10% adder for the 2023/2024 Delivery Year, and noted that "[t]hese are not minor details, but fundamental changes we now require after critical auction deadlines have already passed."[34] Nonetheless, the Commission now tosses aside its prior findings regarding the 10% adder with little justification and even less supporting evidence. Accordingly, as Commissioner Danly aptly states, the January 2022 Order, combined with other recent actions has meant that "I am not certain it is possible for the Commission to make any more of a muddle of the PJM capacity market."[35] The Commission's January 2022 Order is therefore arbitrary and

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31 *See* Danly Dissent at P 9.

32 *Id.* at P 5.

33 *Id.* at n.7.

34 *Id.* at P 4.

35 *See* Danly Dissent at P 5.

capricious because it ignores the need for regulatory certainty and, therefore, entirely fails to consider "an important aspect of the problem."[36]

C. The Commission's Failure to Provide Meaningful Responses to Serious Objections Raised by Dissenting Commissioner Danly Renders its Order Arbitrary and Capricious.

As Commissioner Danly explained in his dissent, he disagreed with the January 2022 Order on both the merits and the process. Commissioner Danly noted, "PJM routinely has to delay capacity auctions to sort out which rules still apply and which rules are defunct, obsolete, or superseded. Power markets simply cannot function when the rules constantly change, and for that, the blame lies squarely with the Commission."[37] Moreover, the Commission's reversal of its prior decision was particularly disruptive in this case, as there was "more than sufficient record evidence to approve the 10% adder."[38] P3 shares Commissioner Danly's various and well-founded concerns about the merits and process of the January 2022 Order. Moreover, and on a more fundamental level, Commissioner Danly correctly observes that, through its recent actions, "the Commission creates unfettered regulatory risk and then sets it up so that sellers likely can only offer what the Independent Market Monitor tells them they can offer. This structure is not a market. It also is unsustainable."[39]

The Commission's failure to take the views of one of its members into account, in and of itself, renders the January 2022 Order arbitrary and capricious, because, where a dissenting

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36 *State Farm*, 463 U.S. at 43.

37 Danly Dissent at P 1.

38 *Id.* at P 3.

39 *Id.* at P 8.

commissioner has raised such serious objections, the Commission "must, at a minimum, acknowledge and consider them."[40]

III.

CONCLUSION

WHEREFORE, for the foregoing reasons, P3 respectfully requests that the Commission grant rehearing of the January 2022 Order as requested herein.

Respectfully submitted,

On behalf of the PJM Power Providers Group

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[40] *AGA*, 593 F.3d at 20. *See also Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988) ("We recognize that this case presents a difficult problem for the Commission, but we think it has no alternative but to confront the questions raised by the [commissioner's] dissent.").

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 18th day of February, 2022.

On behalf of the PJM Power Providers Group

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