UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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PJM Interconnection, L.L.C.	)	**Docket No. ER23-729-001**
	)	

REQUEST FOR REHEARING OF THE PJM POWER PROVIDERS GROUP

Pursuant to Section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[2] the PJM Power Providers Group ("P3")[3] respectfully requests rehearing of the Commission's February 21, 2023 order in the above-captioned proceeding ("Order"),[4] accepting PJM Interconnection, L.L.C.'s ("PJM") proposed changes to the PJM Open Access Transmission Tariff ("Tariff").[5] As discussed below, the Commission must grant rehearing to remedy numerous errors that render the Order arbitrary and capricious and contrary to law.

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[1] 16 U.S.C. § 825*l* (2022).

[2] 18 C.F.R. § 385.713 (2022).

[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 83,000 MWs of generation assets and produce enough power to supply over 63 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.

[4] *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109 (2023).

[5] PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT, OATT Open Access Transmission Tariff (0.0.0).

I.

BACKGROUND

PJM's forward capacity market, the Reliability Pricing Model ("RPM"), consists of a highly structured process, with specific procedural steps and substantive requirements and limitations, described in detail in PJM's Tariff.[6] In the normal course, PJM conducts an annual Base Residual Auction ("BRA") to obtain commitments to supply capacity during a Delivery Year three years in the future, with follow-on Incremental Auctions in between the BRA and the Delivery Year.[7] The price signals produced by the RPM auctions are intended, in part, to attract investment in the new and existing generation resources that are needed to support electric reliability in the PJM region.[8]

The product procured through those auctions is the Capacity Performance product, which adjusts each capacity resource's capacity revenue based on its performance during emergency conditions.[9] Most, but not all, generation resources are required to offer into all RPM auctions, unless they qualify for an exemption.[10] That requirement is commonly referred to as the RPM "must-offer obligation."[11] However, the Tariff exempts the following types of resources from the RPM must-offer obligation: Planned Generation Capacity Resources, Intermittent Resources, Capacity Storage Resources, Demand Resources, Energy Efficiency Resources, and Hybrid

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6 *See* Tariff, Attach. DD.

7 *Id.* § 5.4.

8 *See, e.g.*, *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157, at P 112 (2016); *see also* Shanker Affidavit at 36 ("PJM adopted this design with an eye to creating a 'correct' representation of the future and presumably a balancing of the risks described above and the related constructive price signals to market participants.").

9 Tariff, Attach. DD § 5.5A (capacity resource types).

10 *Id.* § 6.6A(a).

11 P3, Protest, at Attach. B (Shanker Affidavit) at 16-17, 36, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023) ("P3 Protest"); *see also* Tariff, Attach. DD § 6.6A(a) (referring to the "must-offer requirement").

Resources consisting exclusively of components that, in isolation, would be Intermittent Resources or Capacity Storage Resources.[12]

The Tariff sets forth the mechanics of the auction process in detailed terms. Among other things, PJM is required to (1) develop the parameters that will be used in each BRA, (2) publish information about those parameters, (3) obtain and review Sell Offers from Market Sellers based on those auction parameters, and (4) compute the auction clearing prices based on those parameters and conduct a market power review of the results.[13] PJM develops a demand curve for the BRA based on the auction planning parameters that it develops and posts in advance of the BRA, and PJM develops a supply curve for the BRA based on the sell offers it receives upon opening the offer window. PJM develops supply and demand curves for the PJM region as a whole, as well as for sub-zones known as Locational Deliverability Areas ("LDA") when certain conditions are satisfied. One of the important parameters used to develop the demand curve for an LDA is the LDA Reliability Requirement, which represents the amount of local generation and imports needed to serve that LDA's load, based on PJM's calculation of the Capacity Export Transfer Objective ("CETO") for that particular LDA.[14]

The clearing prices produced by those supply and demand curves are calculated by an optimization algorithm, the rules of which are set forth in the Tariff.[15] Resources whose sell offers are at or below the price the optimization algorithm produces for their geographic location "clear" in the BRA, meaning they are obligated to provide capacity in the Delivery Year for that BRA. The price a resource receives for its capacity is the Capacity Resource Clearing Price

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[12] Tariff, Attach. DD § 6.6A(c).

[13] *Id.* §§ 5.11. 5.12, and 6.2.

[14] Shanker Affidavit at 10-13.

[15] Tariff, Attach. DD §§ 5.12 and. 5.14.

(also referred to herein as the "clearing price") that the optimization algorithm produced for the resource's geographic location.[16] However, the resource's capacity revenues can also be adjusted upward or downward based on how well it performs, *i.e.*, the extent to which it satisfies its capacity commitment, during certain emergency conditions that may occur during the Delivery Year. In any event, a resource that clears in a BRA does not receive payments for its capacity commitment until the Delivery Year.

PJM's rights and obligations concerning its review of the clearing prices produced by the optimization algorithm are explicitly spelled out in the Tariff.[17] PJM has extremely limited ability to adjust those results. The Tariff expressly describes the narrow circumstances under which PJM can use the optimization algorithm to recompute the clearing prices and the equally narrow circumstances under which the results produced by the auction may be considered non-final.[18] The Tariff also sets forth a precise timeline for the auction process and requires that, after an auction is conducted, PJM must post the results "as soon thereafter as possible."[19]

Although BRAs are typically conducted three years in advance of the corresponding Delivery Year, PJM's RPM auction schedule has been compressed in recent years.[20] PJM conducted the BRA for the 2023/2024 Delivery Year in June of 2022 ("June 2022 BRA"). In

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16 *See* Tariff, § I.1 Definitions C-D (32.2.0) (defining Capacity Resource Clearing Price as "the price calculated for a Capacity Resource that offered and cleared in a [BRA] or Incremental Auction, in accordance with Tariff, Attachment DD, section 5"); Tariff, Attach. DD § 5.14 ("The Capacity Resource Clearing Price for each LDA will be the marginal value of system capacity for the PJM Region, without considering locational constraints, adjusted as necessary by any applicable Locational Price Adders, Annual Resource Price Adders, Extended Summer Resource Price Adders, Limited Resource Price Decrements, Sub-Annual Resource Price Decrements, Base Capacity Demand Resource Price Decrements, and Base Capacity Resource Price Decrements, *all as determined by the Office of the Interconnection based on the optimization algorithm*.") (emphasis added).

17 *See, e.g., id.* § 6.2 (permitting PJM to recompute the optimization algorithm to clear the auction with Market Seller Offer Caps in place); *id.* at § 15 (allowing PJM to review each LDA that has a Locational Price Adder).

18 *Id.* § 6.2.

19 *Id.* § 5.11(e).

20 *See PJM Interconnection, LLC*, 178 FERC ¶ 61,122 at P 13 (2022).

July of 2022, PJM published multiple analyses of the June 2022 BRA as part of its process for developing the planning parameters for the BRA associated with the 2024/2025 Delivery Year, scheduled for December 2022 ("December 2022 BRA"). Among the analyses PJM published in July 2022 was a sensitivity study ("July 2022 Sensitivity Study")[21] which showed that, if 260 MW of generation resources that were expected to participate in the BRA did not end up participating, the clearing price for the DPL-South LDA would reach the cap of $431.26 per MW-day.[22] PJM publicly posted the auction planning parameters for the December 2022 BRA, including the LDA Reliability Requirement for the DPL-South LDA, in August 2022.

Based on PJM's planning parameters for the December 2022 BRA, between August 2022 and December 2022, market participants made commercial decisions about how and, for resources without RPM must-offer obligations, whether they would participate in the December 2022 BRA.

On December 7, 2022, PJM opened the December 2022 BRA and announced, consistent with the Tariff, that Sell Offers and Price Responsive Demand ("PRD") offers were due on December 13 and the results would be posted on December 20.[23] On December 21, 2022, PJM announced that, due to "a narrow set of circumstances" impacting the DPL-South LDA, PJM would withhold the final results of the auction and make emergency filings under sections 205

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[21] *See* PJM, 2023/2024 Auction Information, BRA Scenario Analysis, *previously available at* https://pjm.com/markets-and-operations/rpm (Excel spread sheet labeled "2023-2024-bra-scenario-analysis.xlsx" created July 1, 2022 by Josh Bruno). PJM has removed the July 2022 Sensitivity Study from its website, but P3 submitted a .pdf copy of that document into the record of this proceeding. *See* P3 Protest, Attach. C; *see also id.* at n.23; P3 Answer at 5-6 (filed Feb. 9, 2023).

[22] Shanker Affidavit at 22-23.

[23] *See* https://insidelines.pjm.com/pjm-capacity-auction-for-2024-2025-delivery-year-opens/ (announcing that the December 2022 BRA "bidding window will close on Dec. 13, and results will be reported on Dec. 20"); *see also* PJM Interconnection, L.L.C., Proposed Amendment to the Locational Deliverability Area Reliability Requirement Filed Pursuant to section 205 of the Federal Power Act, Request for Waiver of Notice Requirement, and Request for Extended Comment Period of 28 Days, Dkt. No. ER23-729-000, at 8 (filed Dec. 23, 2022) ("PJM 205 Filing").

and 206 of the FPA.[24] PJM later indicated that it would "release[]" auction outcomes that it described as "indicative" and "preliminary."[25] However, based on stakeholder feedback, PJM later announced that it would not "post indicative results."[26] On December 23, PJM submitted the two filings at issue in these proceedings, one pursuant to FPA section 205 and one pursuant to FPA section 206, proposing Tariff changes to the rules applicable to the December 2022 BRA and future BRAs.[27]

Numerous parties protested PJM's proposed Tariff changes and argued, among other things, that it was not supported by substantial evidence, would not address the concern that PJM identified, would constitute a blatant violation of the filed rate doctrine and rule against retroactive ratemaking, and would completely undermine confidence in the PJM market and the markets of other RTOs/ISOs. For its part, P3 provided expert affidavits from former FERC Chairman Joseph T. Kelliher ("Kelliher Affidavit") and Dr. Roy J. Shanker ("Shanker Affidavit") in support of those arguments and in rebuttal to PJM's unsupported claims regarding the merits and legality of its proposal.[28]

On February 21, 2023, the Commission accepted PJM's proposal to change the rules applicable to the December 2022 BRA under section 205 of the FPA.[29] Among other things, the Commission concluded that the filed rate doctrine and rule against retroactive ratemaking do not

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[24] *See* https://insidelines.pjm.com/pjm-updates-members-on-2024-2025-capacity-auction-results; Shanker Affidavit at 9.

[25] https://insidelines.pjm.com/pjm-updates-members-on-2024-2025-capacity-auction-results.

[26] *Id.*

[27] *See* PJM 205 Filing; PJM Interconnection, L.L.C., Section 206 Filing Alleging that the Locational Deliverability Area Reliability Requirement is Unjust and Unreasonable as Applied in a Particular Locational Deliverability Area in the 2024/2025 Base Residual Auction And Requesting that the Commission Establish a Refund Effective Date of December 23, 2022, and Request for an Extended Comment Period of 28 Days, Dkt. No. EL23-19-000 (filed Dec. 23, 2022) ("PJM Complaint").

[28] *See* P3 Protest at Attachments A & B.

[29] The Commission also dismissed as moot PJM's companion FPA section 206 filing.

stand in the way of accepting PJM's proposal because those legal principles apply only where a transaction has been "consummated," which the Commission concluded has not yet occurred for the December 2022 BRA.[30] That Order is the subject of this request for rehearing.

II.

<u>SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES</u>

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[31] P3 hereby identifies each issue on which it seeks rehearing of the February Order, and provides representative precedent in support of its position on each of those issues:

1. The Order violated the filed rate doctrine, the rule against retroactive ratemaking, and the underlying provisions of the FPA, by changing the rules of the December 2022 BRA, and the clearing prices produced by those rules, after PJM had conducted that BRA. 16 U.S.C. § 824d; *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939); *Nantahala Power & Light Co. v. Thornburg ("Nantahala")*, 476 U.S. 953, 966-67 (1986); *Oklahoma Gas & Electric Co. v. FERC ("Oklahoma Gas")*, 11 F.4th 821, 829-32 (D.C. Cir. 2021); *Old Dominion Electric Cooperative v. FERC ("ODEC")*, 892 F.3d 1223, 1230-32 (D.C. Cir. 2018).

2. The Order's conclusion that accepting PJM's proposed Tariff change does not run afoul of the filed rate doctrine and rule against retroactive ratemaking is not supported by reasoned decision-making and therefore violates the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A); *Michigan v. EPA*, 576 U.S. 743, 750 (2015); *FCC v. Fox Television Studios, Inc.* ("*Fox*"), 556 U.S. 502, 515 (2009); *Allentown Mack Sales and Service, Inc. v. NLRB ("Allentown")*, 522 U.S. 359, 374-75 (1998); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983); *Missouri Public Service Commission v. FERC*, 337 F.3d 1066, 1070-75 (D.C. Cir. 2003); *Electric Consumers Resource Council v. FERC*, 747 F.2d 1511, 1514 (D.C. Cir. 1984).

3. The Order's determination that PJM's proposed Tariff change is just and reasonable is not supported by substantial evidence and therefore violates the APA. 5 U.S.C. § 706(2)(A); *Michigan v. EPA*, 576 U.S. at 750; *Fox*, 556 U.S. at 515; *Allentown*, 522 U.S. at 374-75; *Missouri Public Service Commission v.*

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30 *See* Order, 182 FERC ¶ 61,109 at P 167.

31 18 C.F.R. § 385.713(c)(2).

FERC, 337 F.3d at 1070-75; *Electric Consumers Resource Council v. FERC*, 747 F.2d at 1514.

4. The Order's conclusion that PJM's proposed Tariff change is just and reasonable does not pass muster under the APA because the Commission's rationale is inadequately explained, inconsistent with precedent and economic theory, and fails to address contrary arguments and evidence presented to it. 5 U.S.C. § 706(2)(A); *Michigan v. EPA*, 576 U.S. at 750; *Fox*, 556 U.S. at 515; *Allentown*, 522 U.S. at 374-75; *Missouri Public Service Commission v. FERC*, 337 F.3d at 1070-75; *Electric Consumers Resource Council v. FERC*, 747 F.2d at 1514.

III.

REQUEST FOR REHEARING

A. The Order Violates the Filed Rate Doctrine and Rule Against Retroactive Ratemaking by Changing the Rules of the December 2022 BRA, and the Resulting Rate for DPL-South, After the BRA Had Been Conducted

The Order represents one of the most egregious and consequential violations of the filed rate doctrine and rule against retroactive ratemaking in the Commission's history. The Order blows through the well-established boundaries set by judicial precedent, and then goes miles beyond those boundaries by establishing a novel, unprecedented legal interpretation that effectively reads the filed rate doctrine and rule against retroactive ratemaking out of existence in the context of wholesale electricity markets administered by RTOs/ISOs—tilting the FPA significantly in favor of RTOs/ISOs and against market participants and customers. Under the Order's interpretation of the filed rate doctrine, it does not apply until a capacity transaction is "consummated," *i.e.*, until a capacity commitment has been fully satisfied and financially settled in the delivery year,[32] despite the fact that sellers (and other market participants) are required to follow the filed rate—and make investments necessary to satisfy their capacity commitments—in the long period in between auction and transaction "consummation." The Order's outlandish

[32] Although the Order does not define the term "consummated" or "consummation," it describes that term in this particular context to mean capacity has been "delivered" pursuant to auction commitments and "charges [have] been billed or collected." Order, 182 FERC ¶ 61,109 at P 167.

legal theory produces a result that is blatantly unlawful, dreadful as a matter of regulatory policy, and threatens to unwind the Commission's commitment to competitive wholesale markets over the past two decades.[33]

The filed rate doctrine "bind[s] regulated entities to charge only the rates filed with FERC and to change their rates only prospectively."[34] As a result, the Commission "has no authority under the [FPA] to allow retroactive change in the [filed] rates."[35] Further, "[a]s the statutory terms make clear, the filed rate is not limited to 'rates' *per se*, but also extends to matters directly affecting rates."[36] The filed rate doctrine thus applies with equal force to both the "rates" and the "non-rate terms" set forth in a tariff:[37] "[t]he [FPA] provides no grounds for distinguishing rate and non-rate terms, but rather binds parties to the terms in the filed rate."[38] The filed rate doctrine applies with equal strength in the context of competitive wholesale markets and the non-rate terms set forth in RTO/ISO tariffs, including PJM's.[39]

The Commission's Order in this proceeding pays lip service to the filed rate doctrine and rule against retroactive ratemaking, but then quickly veers off the rails by contriving a novel, tortuous, and internally inconsistent legal theory for why those principles do not prevent PJM from changing the rules of a BRA, and the resulting clearing prices, after PJM has conducted the BRA pursuant to those rules. The Commission's legal theory guts the filed rate doctrine and rule

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[33] *See* Kelliher Affidavit at 24-30.

[34] *Oklahoma Gas*, 11 F.4th at 829.

[35] *Id.* (quoting *Old Dominion*, 892 F.3d at 1230) (internal quotations omitted).

[36] *See id.* at 829-30 (quoting *Nantahala*, 476 U.S. at 966-67) (internal quotations and alteration omitted).

[37] *See id.* (citing *Nantahala*, 476 U.S. at 966-67); *accord* 16 U.S.C. § 824d(d).

[38] *Oklahoma Gas*, 11 F.4th at 830.

[39] *See Old Dominion*, 892 F.3d at 1230.

against retroactive ratemaking.[40] The Order's acceptance of PJM's Tariff change in this proceeding based on that theory violates the both the FPA and the APA.

The Order asserts that the filed rate doctrine and rule against retroactive ratemaking do not apply in this scenario because "no capacity commitments have yet been secured, no transaction had yet been consummated, meaning that neither PJM nor any supplier had the attendant rights or obligations, no capacity had been delivered pursuant to such commitments, and no charges had been billed or collected."[41] The Order thus concluded that a change to "the BRA procedures" is "not retroactive for purposes of the filed rate doctrine if the capacity supply obligations and the corresponding rights and obligations—including the right to a particular capacity price—have not yet actually been awarded."[42] This interpretation of the filed rate doctrine and rule against retroactive ratemaking—*i.e.*, that it does not apply until and unless a transaction has been "consummated" through financial settlement[43]—is erroneous for several reasons.

First, it has no basis in the text of the FPA. Under section 205 of the FPA, from which the filed rate doctrine and rule against retroactive ratemaking are derived, the rate on file has the force and effect of law regardless of whether transactions are "consummated" pursuant to the filed rate.[44] Further, the FPA governs, and the filed rate doctrine adheres to, much more than just

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[40] To the extent the Order weighs equitable factors in deciding to accept PJM's proposal as just and reasonable, that analysis is irrelevant to the question of whether or not PJM's proposal is permissible under the filed rate doctrine. *See, e.g.*, *Oklahoma Gas*, 11 F.4th at 826 ("FERC has no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations.") (quoting *ODEC*, 892 F.3d at 1230) (internal quotations omitted). Further, even if the Order's interpretation of the filed rate doctrine were correct, which it is not, the Order's consideration of equitable factors also fails to pass muster under the Administrative Procedure Act, as explained below.

[41] Order, 182 FERC ¶ 61,109 at P 167.

[42] *Id.*

[43] *See supra* n.32.

[44] *See* 16 U.S.C. § 824d.

the rates and charges that ultimately end up being used in a "consummated" Commission-jurisdictional transaction.[45]

According to its plain language, FPA section 205 governs "[a]ll rates and charges made, *demanded*, or received" by a utility;[46] it requires a utility's filed rate to include "all rates and charges . . . and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services;"[47] and it prohibits a utility from changing "any such rate, charge, classification, or service," and "any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public."[48] Those statutory provisions, as the source of the filed rate doctrine, "bind" the utility "to the terms in the filed tariff," both the "rate and non-rate terms."[49]

Thus, as relevant here, the FPA requires PJM to follow its filed rate—including the non-rate terms therein—regardless of whether any transactions have, or ever will be, consummated pursuant to that filed rate.[50] Where the filed rate sets forth rules for procuring capacity from resources (or even merely obtaining offers from such resources), as is the case with the BRA

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[45] *See, e.g.*, *Oklahoma Gas*, 11 F.4th at 830.

[46] 16 U.S.C. § 824d(a).

[47] *Id.* § 824d(c).

[48] *Id.* § 824d(d).

[49] *Oklahoma Gas*, 11 F.4th at 829-30. As the courts have repeatedly explained, in no uncertain terms, the filed rate doctrine applies with equal force to "non-rate terms" of a tariff and to "matters directly affecting rates." *Id.* at 829 (quoting *Nantahala*, 475 U.S. at 966-67) (cleaned up).

[50] *See, e.g.*, *ODEC*, 892 F.3d at 1231-32 (explaining that, *prior to the transactions at issue in the proceeding*, "the filed rate on its face assured customers that, however the market might change, charges would be capped at $1,000 per megawatt-hour" and, therefore, customers "were on explicit notice that, although market forces might cause some variation within a range, the rates charged would never exceed the agreed-upon rate cap"); *id.* at 1232 ("To toss that cap aside after the fact just because it did exactly what a cap is supposed to do—serve as a firm ceiling on market prices—would retroactively rewrite the terms of the filed rate. The filed rate doctrine and rule against retroactive ratemaking flatly forbid such a result.").

procedures,[51] the filed rate doctrine requires PJM to strictly follow those rules and change them only prospectively. Yet, under the Order's novel interpretation of the filed rate doctrine, the doctrine (and the provisions of the Federal Power Act from which it flows) would apply only to "rates and charges" (*i.e.*, not to non-rate terms like BRA procedures) and only after a transaction based on those rates and charges has been "consummated" through financial settlement.[52] That interpretation cannot be squared with the text of the Federal Power Act[53] or the Commission's previous interpretations thereof.[54]

Second, the Commission's theory is based on a misinterpretation of legal precedent. The Order asserts that "[c]ourts have held that changes to a rate are impermissibly retroactive *only* where regulated entities or customers have already transacted pursuant to the rate—i.e., where purchases or sales have occurred."[55] Although the Order cites several cases in support of that assertion,[56] the Commission reads those cases for more than they are worth. To be clear, the cases cited by the Order do support the conclusion that a rate change is "impermissibly retroactive" if "regulated entities or customers have already transacted pursuant to that rate—i.e.,

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[51] *See* Order, 182 FERC ¶ 61,109 at P 165 ("As relevant here, for purposes of the filed rate doctrine, the rate on file with the Commission is the *BRA procedures*.") (emphasis added).

[52] *See id.* at P 167.

[53] *See* 16 U.S.C. § 824d (statutory text containing no reference to transaction consummation).

[54] *See, e.g.*, *Fox, 556 U.S.* at *515* ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.")*; Bittner v. U.S.*, 143 S.Ct. 713, 772 (2023) ("[C]ourts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court.") (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *cf. EDF Renewables, Inc. v. Sw. Power Pool, Inc.*, 181 FERC ¶ 61,140, at PP 75-84 (2022) (finding that Southwest Power Pool, Inc. violated the filed rate doctrine by failing to properly implement a process set forth in the tariff in advance of the transactions that would follow that process).

[55] Order, 182 FERC ¶ 61,109 at P 166 (emphasis added).

[56] *See id.* at P 166, n.449 (citing *ODEC*, 892 F.3d at 1226-27; *Cogentrix Energy Power Mgmt., LLC v. FERC*, 24 F.4th 677, 684 (D.C. Cir. 2022); *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004); *Associated Gas Distribs. v. FERC*, 898 F.2d 809, 810-11 (D.C. Cir. 1990); *City of Girard, Kan. v. FERC*, 790 F.2d 919, 924 (D.C. Cir. 1986)).

where purchases or sales have occurred."[57] Unfortunately, that is not the conclusion the Commission drew from those cases; the Commission went much further, concluding that those cases show that rate changes are impermissibly retroactive "*only*"[58] where a transaction has already been consummated. None of the precedents the Order cites proscribes the filed rate doctrine and rule against retroactive ratemaking to *only* those circumstances.[59] Further, the Order's conclusion to the contrary ignores court precedent clearly explaining that the filed rate doctrine and rule against retroactive ratemaking applies before a transaction has actually occurred pursuant to the filed rate.[60]

Third, even assuming *arguendo* that the Commission were correct that the filed rate doctrine and rule against retroactive ratemaking apply only after a transaction is entered into or "consummated," the Commission erred in concluding that no binding commitments were made in the December 2022 BRA—*i.e.*, that no capacity commitments "and the corresponding rights and obligations" had been awarded—prior to PJM's proposal to change the rules for that BRA. As a legal matter, before PJM made its filing in this proceeding, PJM applied its BRA procedures and secured irrevocable capacity commitments through the December 2022 BRA.[61]

Selling capacity means committing to be available when called upon at a future date. In the context of the December 2022 BRA, PJM had solicited, and sellers had submitted, binding

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57 *See* Order, 182 FERC ¶ 61,109 at P 166.

58 *Id.* at P 166 (emphasis added).

59 *See ODEC*, 892 F.3d 1223; *Cogentrix Energy Power Mgmt., LLC v. FERC*, 24 F.4th 677; *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315; *Associated Gas Distribs. V. FERC*, 898 F.2d 809; *City of Girard v. FERC*, 790 F.2d 919.

60 *See, e.g.*, *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-21 (1939) (explaining that the filed rate doctrine binds both service provider and customer "with the force of law" and the customer was entitled to require service pursuant to the terms of the tariff, including "prior arrangements" that were necessary "[t]o facilitate the rendition of the service"); *see also ODEC*, 892 F.3d at 1231-32, *supra* n.50.

61 *See, e.g.*, *Fed Cetera, LLC v. Nat'l Credit Servs.*, 938 F.3d 466, 471-72 (3rd Cir. 2019) (explaining that "to consummate" an agreement can mean that "a contract has formed, not that a party started performance on a contract").

commitments to provide capacity for the 2024-2025 delivery year before PJM submitted its filing in this proceeding. As P3 and others have explained at length, prior to seeking the Tariff change at issue in this proceeding, PJM had fully conducted the BRA—*i.e.*, it followed all of the BRA procedures for determining the clearing prices, including publishing planning parameters in advance, taking sell offers based on those planning parameters, generating clearing prices based on those planning parameters and the sell offers received, and conducting the necessary market power review of the sell offers and clearing prices. The only aspect of the BRA procedures PJM had not satisfied prior to commencing this proceeding was the requirement that, "[a]fter conducting the BRA," PJM must "post the results . . . as soon thereafter as possible."[62]

Thus, prior to the commencement of this proceeding, sellers made binding offers in the December 2022 BRA to provide capacity to PJM; the optimization algorithm identified the resources that were selected to provide capacity based on the supply and demand curves which, in turn, necessarily established the clearing prices for the BRA; and PJM had conducted its market power review of the sell offers and optimization algorithm results and identified no issues.

The capacity sellers who were selected through that process were bound by the Tariff to keep up their end of the bargain, regardless of whether or when PJM "post[ed]" the auction results. The Tariff does not permit sellers to back out at that point—even if they do not like the results of the BRA. In other words, once a resource's sell offer is cleared by the optimization algorithm and it passes PJM's market power review, the resource is "obligated" to provide capacity pursuant to the terms contained in the Tariff.[63] That is the quintessence of a "capacity

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[62] Tariff, Attach. DD § 5.11(e); *see also* P3 Protest at 10-14.

[63] *See, e.g.*, *New England Power Generators Ass'n v. ISO New England Inc.*, 172 FERC ¶ 61,005, at n.12 ("[A] resource 'clears' when the Capacity Clearing Price is greater than or equal to the price specified in the offer.").

commitment." The fact that, under the Tariff, sellers were bound to their capacity commitments before PJM commenced this proceeding entirely contradicts the Order's conclusion "no capacity commitments" had been made based on the filed rate. The Commission's decision to let PJM change the rules and the BRA clearing prices on which those capacity commitments were made, after those commitments had been made, represents a blatant filed rate doctrine violation. In addition, the Commission's failure to address the arguments and evidence indicating that PJM had fully conducted the BRA in securing those capacity commitments—and, at the same time, violated the filed rate by calculating "preliminary" or "indicative" clearing prices not contemplated by the Tariff—amounts to an equally blatant violation of the APA.

The Commission's attempt to suspend the filed rate doctrine's application to the PJM capacity market until financial settlement occurs, several years in the future, is particularly egregious given the asymmetries that flow from the Commission's approach. Despite the Commission's perplexing statement that the filed rate doctrine does not apply because "no rights and obligations have been awarded," the Commission clearly believes that sellers are obligated to follow the filed rate prior to a transaction being consummated. As the Order explained, sellers are not permitted to resubmit sell offers in order to reflect the changes in the LDA Reliability Requirements for the December 2022 BRA, despite the fact that the Commission believes that "no rights and obligations have been awarded."[64] Furthermore, as a practical matter, in order to satisfy capacity commitments in the 2024/2025 delivery year, resource owners that cleared the December 2022 BRA will need to make significant investments in their resources—to the tune of millions of dollars in many cases—based on the "rights and obligations" conferred through the BRA.

[64] Order, 182 FERC ¶ 61,109 at PP 158, 167.

In other words, under the framework adopted in the Order, capacity sellers have no right to rely on the capacity market rules in PJM's filed rate until financial settlement is complete, but in the meantime capacity sellers are obligated to comply with those capacity market rules and invest millions of dollars in reliance on those rules. And, conversely, the Order gives PJM the right to hold sellers and customers to the filed rate regardless of whether a transaction has taken place, while also permitting PJM to retroactively alter the rate and non-rate terms of the filed rate any time up until the point that a transaction is "consummated"—which the Commission describes as the point at which capacity has been delivered and all charges have been billed and collected.[65] Each of these two asymmetries, whereby (1) sellers and customers would have all of the filed rate's burdens but none of its benefits and (2) the utility would have all of the filed rate's benefits but none of its burdens, are antithetical to purpose of the filed rate doctrine.[66] The Commission's failure to recognize this asymmetry, much less attempt to explain how it is consistent with the FPA, renders the Order arbitrary and capricious.[67]

The Order's novel interpretation of the filed rate doctrine and rule against retroactive ratemaking would eviscerate those legal principles in the context of all RTO/ISO markets, not just PJM's. Any RTO/ISO, including PJM, could change its terms of service at any time—even after that service has been rendered, *e.g.*, after a capacity auction has been administered—as long as the RTO/ISO has not yet "consummated" a transaction involving that service through financial settlement, which in the capacity market context is typically several years in the future.

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65 *See supra* n.32.

66 *Compare Oklahoma Gas*, 11 F.4th at 829 (explaining that the filed rate doctrine binds utilities follow their filed rates) *with ODEC*, 892 F.3d at 1230 (explaining that the filed rate doctrine and rule against retroactive ratemaking protect customers of the utility by "ensuring rate predictability and preventing discriminatory or extortionate pricing").

67 *See, e.g.*, *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. at 105 (agency must have "considered the relevant factors and articulated a rational connection between the facts found and the choice made").

The problematic implications of such a regulatory framework cannot be overstated. For example, under the Commission's theory, PJM could fundamentally alter the nature of the performance requirements applicable to Capacity Performance resources after a seller commits a resource to being a Capacity Performance resource for a Delivery Year, as long as PJM completes the bait-and-switch before it financially settles the resource's capacity transactions for that Delivery Year—which might occur as much as four years after the resource owner made its capacity commitment.

Such a legal framework would render RTO/ISO market rules inherently unpredictable, undermining both the purpose of the filed rate doctrine and confidence in the RTO/ISO markets.[68] The Commission has built its regulatory framework for the wholesale markets on the principle that market integrity and rate certainty will foster investor confidence and attract the investments needed to maintain reliable service at just and reasonable rates. As Chairman Kelliher explained in response to PJM's filing in this proceeding, a Commission decision accepting PJM's proposal would be at odds with Commission and court precedent supporting that principle and would undermine investor confidence in not only the PJM market, but all RTO/ISO markets.[69] Reading the filed rate doctrine and rule against retroactive ratemaking out of the RTO/ISO markets, as the Order effectively does, is fundamentally inconsistent with the Commission's long-held commitment to harnessing competitive market forces to attract the investment needed in the generation sector to maintain reliability at just and reasonable rates. As

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[68] Further, the version of the filed rate doctrine adopted by the Order would also have significant implications beyond RTO/ISO markets. The same legal principles adopted by the Order would apply to any public utility with a rate on file, not just the RTOs/ISOs. As a result, the Order's novel and asymmetrical understanding of the filed rate doctrine would disadvantage customers taking service under any public utility's filed rate, by exposing customers to the possibility that the utility could retroactively change the terms of service in the time between when the customer signs up for that service and when the transaction for that service has been financially settled.

[69] *See* Kelliher Affidavit at 4, 23-25.

P3 has explained in this proceeding, that "is not a legacy this Commission should welcome." The Commission's failure to meaningfully address that concern in the Order not only welcomes that legacy, it does so by sticking its head in the sand. On rehearing, the Commission must reverse course and continue its heretofore admirable commitment to competitive markets.

In short, the Order's novel interpretation of the filed rate doctrine is unsupported by the text and structure of the Federal Power Act, completely at odds with a long line of controlling judicial precedent, and inconsistent with the very purpose of the filed rate doctrine and rule against retroactive ratemaking. The Commission's decision to accept PJM's proposal, as applied to the December 2022 BRA, on the basis of its flawed legal interpretation is contrary to law for two distinct reasons: (1) it directly contravenes the FPA and nearly a century of filed rate doctrine precedent, and (2) it does so based on a rationale that fails to satisfy the Commission's obligations under the APA.[70] The net result is a precedent that will broadly jeopardize the Commission's ability to ensure that rates remain just and reasonable and not unduly discriminatory on a going forward basis, in the PJM capacity market and beyond. The Commission must grant rehearing, correct the Order's erroneous interpretation of the filed rate doctrine and rule against retroactive ratemaking, and reject PJM's proposal.

B. The Order's Determination that PJM's Proposal Is Just and Reasonable Is Unlawful Under the Administrative Procedure Act

The APA requires the Commission to make a "reasoned decision based upon substantial evidence,"[71] and "articulate a satisfactory explanation for its action including a rational

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[70] *See, e.g.*, *Michigan v. EPA*, 576 U.S. at 750 ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. It follows that agency action is lawful only if it rests on a consideration of the relevant factors." (quoting *Allentown*, 522 U.S. at 374, and *State Farm*, 463 U.S. at 43) (internal quotations and citations omitted); *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d at 1070-75.

[71] *N. States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994) (internal quotations omitted); *see also* 5 U.S.C. § 706(2).

connection between the facts found and the choice made."[72] Further, Commission action is arbitrary and capricious, in violation of the APA, if the Commission "fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence before the agency."[73] The Commission's conclusion that PJM's proposal is just and reasonable falls short in all of those respects. The Order is not based on substantial evidence concerning the approved rate change, does not demonstrate reasoned decision making or articulate a rational connection between the record evidence and the decision to approve the rate change, and both ignores and misconstrues probative evidence and arguments concerning the merits of PJM's proposal. The Commission must grant rehearing to address these deficiencies.

1. The Order's Determination that PJM's Proposal Is Just and Reasonable Does not Rely on, or Otherwise Address, the Record Evidence and, in any Event, the Evidentiary Record Cannot Support the Order's Determination

In response to PJM's filings in this proceeding, P3 explained that the Commission could not accept PJM's proposal because PJM gave the Commission no solid evidence that its proposed Tariff change would produce just and reasonable rates and did not demonstrate a rational connection between its proposed Tariff change and the facts that gave rise to that proposal.[74] Rather than attempt to address that argument on its merits, the Commission opted to accept PJM's filing *without citing any record evidence whatsoever concerning the rates PJM's proposal would produce*. In other words, the majority's response to P3's protest was to sidestep

[72] *State Farm*, 463 U.S. at 43.

[73] *Id.*

[74] P3 Protest at 31.

the record evidence altogether. In so doing, the Commission failed to satisfy its obligations under the APA.[75]

PJM's explanation for why its proposal in this proceeding in just and reasonable consists of two conclusory assertions. First, PJM asserted that, in the December 2022 BRA, the existing Tariff would produce a clearing price for the DPL-South LDA that is approximately four times the price that PJM's proposed Tariff change would produce. Second, PJM asserted that, as between those two vague outcomes, PJM's proposed Tariff change would more closely align the LDA Reliability Requirement with actual reliability needs both in the December 2022 BRA and in future BRAs.[76] Those assertions are unsupported, flawed, and ultimately insufficient to support a finding that PJM's proposal is just and reasonable and not unduly discriminatory.[77]

As an initial matter, evidence that the proposal produces a lower clearing price than that produced by the existing Tariff has little bearing on whether the proposed rate is just and reasonable and not unduly discriminatory. FPA section 205 requires PJM to demonstrate, and the Commission to determine, that the proposal is just and reasonable and not unduly discriminatory on its own merits. Just asserting that the proposed rate is qualitatively "better" than the existing rate, or quantitatively lower than the existing rate, is not sufficient to support a

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[75] *See, e.g.*, *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d at 1070 ("The Commission must articulate the critical facts upon which it relies, and when it finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to resolve unknowns and the public policies behind those assumptions.") (internal quotations omitted).

[76] *See* PJM Interconnection, L.L.C., Proposed Amendment to the Locational Deliverability Area Reliability Requirement Filed Pursuant to section 205 of the Federal Power Act, Request for Waiver of Notice Requirement, and Request for Extended Comment Period of 28 Days, Dkt. No. ER23-729-000, at 20 (filed Dec. 23, 2022) ("PJM 205 Filing") (explaining PJM's belief that the *ex ante* Tariff produced an LDA Reliability Requirement that is less accurate than PJM's proposal would produce). Although PJM stated in Docket No. EL23-19 that, absent a Tariff change, the "effect of the auction results would require load in the [DPL-South LDA] to be responsible for paying over one hundred million dollars in excess of what is necessary for capacity associated with the 2024/2025 Delivery Year," that more specific—yet also unsupported—assertion does not appear in the evidentiary record of this proceeding, *i.e.*, Docket No. ER23-729. *Compare* PJM 205 Filing *with* PJM Complaint.

[77] *Electricity Consumers Resource Council v. FERC*, 747 F.2d at 1517 ("[M]ere invocation of theory is insufficient substitute for substantial evidence and reasoned explanations.").

determination that the proposed rate is just and reasonable and not unduly discriminatory. But in asserting (without evidence) that its proposal is just and reasonable simply because it would produce a clearing price one-fourth the price produced by the *ex ante* Tariff, that is exactly how PJM attempted to carry its statutory burden in this proceeding. In essence, PJM's legal theory is that producing a clearing price for the DLP-South LDA that is one-fourth the clearing price produced by the *ex ante* Tariff automatically renders the proposal just and reasonable and not unduly discriminatory. The fact that PJM pinned its proposal entirely on that inadequately supported assertion highlights just how little record evidence there is in support of PJM's proposal.

Putting aside that mistake in PJM's theory, PJM's claim regarding the clearing price produced by its proposal is flawed for several reasons. For one thing, PJM provided no explanation of how it calculated the "indicative" or "preliminary" price (or perhaps prices). For all the Commission knows, based on the record anyway, PJM pulled its "indicative" results out of a hat. Nowhere in PJM's filings does PJM explain whether, or to what extent, it used the optimization algorithm set forth in the Tariff to generate the "indicative" clearing price(s). *In fact, PJM did not even demonstrate that it used the approach proposed in this proceeding in making its internal assessment that the DPL-South LDA should be one-fourth the price produced by the existing Tariff.*

Further, PJM did not even provide a rough approximation of the magnitude of the "indicative" price or the price produced by the *ex ante* Tariff. Were the prices $4 and $16? $20 and $80? $40 and $120? $100 and $400? And how did the two clearing prices compare to historical prices in the PJM region, including the DPL-South LDA, or to the December 2022

BRA prices for other parts of the PJM region?[78] PJM did not say. And, even if PJM had specifically identified the two prices—*i.e.,* actual and "indicative"—for the DPL-South LDA in the December 2022 BRA, PJM provided no explanation for why the data for one LDA in one auction would be sufficient to demonstrate that PJM's proposed Tariff change will produce just and reasonable results. Presumably, PJM could easily have calculated the impact that its proposal would have had on past BRAs and used that information to show its likely impact on the market over time. *That* could have been statistically significant evidence of the type that might support a determination of justness and reasonableness. Yet PJM chose not to present that evidence, and in the absence of such evidence, the Commission cannot simply assume evidence into the record.

In short, PJM's "indicative" price raised more questions than it answered. Unfortunately, the Commission declined to ask any of those questions itself, and ignored the protesters who did ask them. The Commission's failure to question PJM's "indicative" price is particularly troubling given that, as P3 and others have explained in this proceeding, PJM understood—months in advance—the exact market dynamics that gave rise to this proceeding, presented evidence to the market by publicly posting it on the PJM website, expressly confirmed the soundness of that evidence in response to an inquiry from a market participant, and then removed the evidence from the PJM website just before protests were due in this proceeding. In looking the other way, the Commission turned too far. The Commission's failure to require *any*

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[78] Although PJM noted, for "perspective," that "the clearing price for the DPL-S LDA from the 2023/2024 BRA was $69.95/MW-day," identifying a past price only provides "perspective" if there is a price to which it is being compared. Here, PJM provided no price to compare against the 2023/2024 BRA price for the DPL-South LDA, much less demonstrate that the prices lend themselves to an apples-to-apples comparison. On the other hand, protesters provided evidence demonstrating that a four-fold price increase is far from unprecedented in PJM. *See* Constellation Energy Generation, LLC, Comments, at 9-10 (filed Jan. 20, 2023) (providing historic BRA clearing prices to demonstrate precedent for fourfold price increases).

information about PJM's "indicative" results and how PJM generated them renders that "evidence" unreliable, at best, and intentionally misleading, at worst. Either way, the result is that PJM's sole piece of "evidence" is insufficient to support a finding that PJM's proposal is just and reasonable.

Perhaps recognizing the troubling vagueness of PJM's evidence, certain commenters tried to engineer more compelling evidence by calculating specific prices to match PJM's shadowy claims. Specifically, two parties—Old Dominion Electric Cooperative ("ODEC") and Maryland's Office of People's Counsel ("Maryland OPC")—used PJM's unsupported assertion of a four-fold difference in clearing price to calculate specific, theoretical dollar figures for the clearing price and consumer rate impacts in the DPL-South LDA.[79] But that evidence is even less valid than PJM's for two reasons.

First, it is the fruit of a poisonous tree. It directly relies on PJM's unsupported assertion regarding the four-fold increase. The above flaws in PJM's assertion necessarily flow through any attempt to calculate specific prices or economic impacts that are based on that assertion.

Second, in calculating the theoretical prices and consumer rate impacts, ODEC and Maryland OPC each used methods that are fundamentally unsound. ODEC generated a range of theoretical clearing prices simply by taking the DPL-South clearing price from the July 2022 BRA and multiplying it by four, to set a lower bound, and using the maximum allowable price for DPL-South based on the planning parameters for the December 2022 BRA, to set the upper bound. ODEC provided no explanation as to why the *July 2022* BRA clearing price for DPL-South, which was based on supply and demand dynamics specific to that BRA, is a valid starting point in calculating the lower bound of an estimated price in the *December 2022* BRA; nor did

[79] Answer of ODEC, at 3-4, Docket Nos. ER23-729 & EL23-19 (filed Feb. 6, 2023); Comments of Maryland OPC, at 3, n.1, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023).

ODEC explain why it is appropriate to set its lower and upper bounds using data from two separate BRAs (*i.e.*, a lower bound based on the July 2022 BRA results and an upper bound based on a December 2022 BRA parameter). Further, the "rough calculation" of consumer rate impacts that the Maryland OPC provided is even less useful than ODEC's calculations.[80] The Maryland OPC provided no explanation whatsoever for how it conducted the "rough calculation," which it mentioned in passing in a single footnote.[81]

In contrast to the feeble evidence in support of PJM's proposal, P3 and other parties provided reams of evidence, supported by affidavits from expert witnesses, demonstrating that PJM's proposal was unlawful. The Commission ignored numerous critical pieces of that evidence, including that (1) every variable on the demand side of a BRA, not just the LDA Reliability Requirement, is entirely based on forecasts and assumptions, which can be off in either direction (*i.e.*, too high or too low);[82] (2) PJM's proposal only requires *one* such variable to be adjusted, after it is too late for the supply-side of the market to respond, and only if the forecast was *too high*, ignoring situations where it might be *too low*; (3) the clearing price that the optimization algorithm produced under the existing Tariff rules (*i.e.*, the rules in place when PJM conducted the December 2022 BRA) was economically rational for the DPL-South LDA—and reflective of the LDA's reliability needs—because the DPL-South LDA is already short on generation and is experiencing difficulty making up that shortfall;[83] and (4) allowing PJM to bait-and-switch sellers by changing the parameters of a BRA after sellers have submitted their offers based on a different set of parameters is not sound market design, will undermine

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80 Comments of Maryland OPC, at 3, n.1, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023).

81 *Id.*

82 *See* P3 Protest at 32-34; Shanker Affidavit at 24-29, 35-36.

83 *See id.* at 21-22, 41.

confidence in the market, and ultimately produce a "less liquid market" with "higher buy/sell spreads."[84]

In a feat of hubris, the Commission chose to accept PJM's proposal as just and reasonable without relying on the evidence submitted in support of PJM's proposal or addressing the contrary evidence described above. The Order's rationale for why PJM's proposal will produce just and reasonable rates consists of a few conclusory assertions sprinkled into the section of the Order that faintly address the merits of PJM's proposal—and the Order makes no reference to record evidence in support of those assertions.[85] Specifically, the Commission stated that (1) it "agree[d] with PJM" that the Tariff change "will help ensure that load-serving entities are charged for capacity based on an LDA Reliability Requirement that reflects actual reliability needs in a manner consistent with supply and demand fundamentals;"[86] (2) the outcome "is consistent with the goals of the PJM capacity market, which are to secure sufficient capacity in the delivery year and send a long-term price signal to ensure the reliability of PJM's system;"[87] (3) "the prices resulting from PJM's proposal will accurately reflect supply and demand;"[88] and (4) the one percent materiality threshold "enabl[es] PJM to revise the LDA Reliability Requirement in the event that enough Planned Generation Capacity Resources that are expected

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[84] *See* P3 Protest, Attach. B at 31-32.

[85] *See* Order, 182 FERC ¶ 61,109 at PP 150, 153, 159, 160. To be clear, although the Order spends more than three paragraphs defending its determination that PJM's proposal is just and reasonable, nearly all of the Commission's ink on this issue was spent rejecting protesters' arguments against PJM's proposal, rather than explaining how and why PJM's proposal will produce just and reasonable rates. As explained below, the Commission's rationale for rejecting protesters' arguments on this issue is also flawed in several respects, which represents a further violation of the Administrative Procedure Act. *See infra* § III.B.2.

[86] Order, 182 FERC ¶ 61,109 at P 150.

[87] *Id.* at P 150.

[88] *Id.* at P 153.

to offer in that LDA do not, such that the LDA's Reliability Requirement is materially increased as compared to the prior delivery year."[89]

The closest the Order comes to providing support for those assertions is citing statements from PJM and the IMM about "supply and demand fundamentals." Neither PJM nor the IMM supported their statements about "supply and demand fundamentals" with evidence concerning the rate impact of PJM's proposal—other than the claim that PJM's proposal would reduce the price for the DPL-South LDA by 75 percent in the December 2022 BRA. But, as explained above, the Commission did *not* rely on the suspect evidence concerning the price impact for the DPL-South LDA in the December 2022 BRA. Absent supporting evidence, PJM's and the IMM's statements about "supply and demand fundamentals" are merely conclusory "invocation[s] of theory."[90] By extension, so too is the Commission's regurgitation of those statements, which "is an insufficient substitute for substantial evidence and reasoned explanations."[91]

In sum, the Commission's attempt to invoke "supply and demand fundamentals" as a talisman in lieu of providing a reasoned explanation of how its determination is supported by evidence renders the Order unlawful.[92] So too with the Commission's failure to address the contrary evidence submitted by protesters.[93] Ultimately, because the evidence in the record

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[89] Order, 182 FERC ¶ 61,109 at P 160.

[90] *Electricity Consumers Resource Council*, 747 F.2d at 1517.

[91] *Id.*

[92] *Id.*

[93] *See State Farm*, 463 U.S. at 52.

cannot possibly support the Commission's determination, the Commission must grant rehearing to reject PJM's proposal in this proceeding.[94]

2. The Order's Rationale for Finding PJM's Proposal Just and Reasonable Is Not the Product of Reasoned Decision-Making

Even if one were to look past the Commission's failure to base its conclusion on substantial evidence, and its ignorance of contrary evidence, the anemic rationale the Commission provided in support of its conclusion contains several additional flaws that also render the Order unlawful under the APA.

a) The Order Misconstrues the Relationship Between Supply and Demand in a Competitive Market

The Order concludes that PJM's proposal is just and reasonable because "incorporate[ing] updated information regarding which Planned Generation Capacity Resources are offering into the BRA" will "help ensure that load-serving entities are charged for capacity based on an LDA Reliability Requirement that reflects actual reliability needs in a manner consistent with supply and demand fundamentals."[95] The Order further asserts that the proposal "will help meet the capacity market's underlying goals by setting clearing prices that are based on accurate reliability assessments."[96] Those aspects of the Commission's determination are based on a flawed understanding of supply and demand dynamics in a competitive market. The Commission's failure to properly explain its determination by meaningfully responding to the

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[94] *Electricity Consumers Resource Council*, 747 F.2d at 1517 (explaining that "mere economic theory may not take the place of record evidence and reasoned decision-making," and agency action will not be upheld if "the record lack[s] any meaningful evidence of a causal relationship between the rate and the theoretical design") (citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

[95] Order, 182 FERC ¶ 61,109 at P 150.

[96] *Id.*

arguments and evidence presented, with a rationale that is consistent with supply and demand fundamentals, renders the order arbitrary and capricious.

It is a bedrock principle of market economics that supply and demand are necessarily interrelated.[97] The Order ignores that reality and attempts to treat supply and demand as hermetically sealed off from each other in the context of the PJM capacity market. The Order's misunderstanding of the supply and demand fundamentals in the PJM capacity market was manifested in three specific ways.

First, the Order overstates the impact of improving a single demand-side auction parameter. The order presumes that "incorporat[ing] updated information" regarding the participation of planned resources will necessarily produce clearing prices, and charges for load-serving entities, that reflects "actual reliability needs in a manner consistent with supply and demand fundamentals."[98] But incorporating new information on the demand side of an auction is not helpful if that demand-side update happens in a vacuum. In order for the auction to produce an outcome that is "consistent with supply and demand fundamentals," the supply side must have the new demand-side information sufficiently in advance of the auction to impact supplier behavior. However, in approving PJM's proposal, the Commission endorsed an auction process that severed the relationship between supply and demand for the DPL-South LDA in the December 2022 BRA, and will similarly sever the relationship in future auctions any time PJM's original forecast of an LDA's Reliability Requirement ends up being less accurate than PJM

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97 *See, e.g.*, *Hughes v. Talen Energy Mktg, LLC*, 578 U.S. 150, 157 (2016) (explaining that the PJM capacity auctions are regulated to "ensure that [they] efficiently balance[] supply and demand") (citing *FERC v. Electric Power Supply Ass'n ("EPSA")*, 577 U.S. 260, 269 (2016)); *EPSA*, 577 U.S. at 269 (explaining, specifically in the context of the PJM market, that "[a]s in any market, when wholesale buyers' demand for electricity increases, the price they must pay rises correspondingly").

98 Order, 182 FERC ¶ 61,109 at P 150.

prefers after considering the decisions that planned resources made in the auction based on PJM's original demand-side forecast.

The only rationale the Commission provided for why such a construct is just and reasonable is that the demand side will be more accurate if updated in this manner.[99] But that is not enough for purposes of the Administrative Procedure Act.[100] Producing a more accurate demand side of the auction might produce better *demand* fundamentals, but it does not necessarily produce better "*supply and demand* fundamentals."[101] And there is no reason to expect that it will do so where the demand-side adjustment occurs after supply offers have been submitted, thereby necessarily rendering the auction's supply fundamentals *less* sound. That is exactly what PJM's proposal does, whenever it is triggered, including in the December 2022 BRA, by ensuring that supply offers are based on an LDA Reliability Requirement that, by definition, is materially different from the one on which those supply offers were based.

Further, the record shows that the resulting difference in clearing prices can be significant. PJM admits that the supply and demand dynamics under the *ex ante* Tariff produce prices that are significantly above the prices produced by the broken supply and demand dynamics under PJM's proposal (*e.g.*, a four-fold difference for the DPL-South LDA in the December 2022 BRA). The fact that the *ex ante* Tariff employed a method that had been found to be just and reasonable and had been in use for many years, paired with the record evidence showing that the supply and demand dynamics under the *ex ante* Tariff produced an economically rational result for the generation-short DPL-South LDA in the December 2022

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[99] *See* Order, 182 FERC ¶ 61,109 at P 149 ("PJM's proposed Tariff revisions will help ensure a competitive outcome for capacity auctions by more closely aligning the LDA Reliability Requirement with actual reliability needs.").

[100] *See, e.g.*, *Mo. Pub. Serv. Comm'n*, 337 F.3d at 1070; *Electricity Consumers Resource Council*, 747 F.2d at 1517.

[101] Order, 182 FERC ¶ 61,109 at P 150 (emphasis added).

BRA, cut against the Commission's conclusory assertion that updating the LDA Reliability Requirements in the manner PJM proposed will improve "supply and demand fundamentals." But the Commission completely ignored that evidence. The Commission's failure to adequately explain, based on the available evidence, exactly how PJM's proposal produces sound "supply and demand fundamentals" and results in just and reasonable rates renders the Order arbitrary and capricious.

Second, in addition to overstating the impact of improving a single demand-side parameter, the Order also fundamentally misconstrues the market dynamics on the supply-side of PJM's capacity auctions. In response to protesters' arguments that suppliers rely on the auction planning parameters posted in advance of a BRA and use those parameters to inform their auction behavior, the Commission asserted that "no party has suggested that the shape of the demand curve impacts their costs" and that "capacity market offers should be dictated by capacity resource costs and not by expectations of demand."[102] In other words, the Commission's position is that the sellers of a product should make decisions about whether to sell that product, and at what price, without regard for the market demand for that product. If the Commission is correct, why does the Tariff require PJM to develop a demand curve based on specified planning parameters that must be posted well in advance of the BRA? The obvious answer is that the Commission is wrong.

PJM's Tariff itself demonstrates just how antithetical the Commission's position is to the RPM as a market construct. For example, by the Tariff's own terms, sell offers that are below the market seller offer cap do not need to be cost-based. Although one would expect such offers to be cost-based in a competitive market, there is no requirement that they be cost-based.

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[102] Order, 182 FERC ¶ 61,109 at P 158.

Furthermore, as the Commission has recognized, sellers in the PJM capacity market rely heavily on demand-side conditions, including auction planning parameters, to inform their auction behavior.[103] As explained below, a seller's assessment of the risks associated with its resource is based on both objective and subjective elements, which are closely informed by the BRA planning parameters, and a seller's auction behavior can change based on the demand-side conditions reflected in those planning parameters.[104] The Order's failure to meaningfully engage with protesters' arguments, and Commission precedent, on this issue renders the Order arbitrary and capricious.

Even assuming *arguendo* that the Commission is correct that a change on the demand side of the BRA should not alter a seller's offer *price*, it is beyond dispute that demand-side conditions impact other aspects of seller behavior beyond the price the seller demands through its sell offer. For example, for resources that do *not* have an RPM must-offer obligation, a seller's expectation about the level of demand or the shape of the demand curve, and the potential clearing price it might produce based on the seller's assessment of supply conditions, can impact their decision about whether to offer into a particular BRA or not. In other words, for sellers that hold an option not to offer capacity to PJM, the demand-side conditions in an auction directly impact the value of that option, which in turn directly impacts their market behavior.

Furthermore, the demand side of a BRA also impacts the market behavior of resources that *do* have an RPM must-offer obligation. The Tariff contains provisions that permit resource owners to engage in bilateral capacity transactions, to transfer the rights and obligations

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[103] *See, e.g.*, *Duquesne Light Co.*, 122 FERC ¶ 61,039, at P 141 (2008) ("[O]nce the RPM auction parameters are posted, parties rely on those parameters to make commitments and determinations."); *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 198 (2009) ("PJM's posting of the fundamental auction parameters . . . is an important precondition for parties to make decisions regarding bilateral contracts, capacity imports or exports, and the manner in which they participate in the [BRA].").

[104] *Infra* p.32-24.

associated with a generation resource—including the obligation to offer such resource into the BRA and the right to keep the capacity revenues the resource earns through the BRA.[105] As NRG demonstrated in this proceeding, with incontrovertible evidence, the BRA planning parameters can and, in the context of the December 2022 BRA, did directly and materially impact at least one seller's decisions regarding whether to offer its capacity into the BRA or instead engage in a bilateral capacity transaction.[106] The Commission's response to this concern was that "in future years entities can account for the potential for adjustments to the LDA Reliability Requirement in carrying out their business decisions and commercial transactions."[107] That response is flawed in two critical respects: (1) stating that a seller can "account for potential adjustments" on the demand side of the market "in carrying out . . . business decisions and commercial transactions" is not the same as *explaining*, as required by the APA, how that type of accounting by sellers will produce sound supply fundamentals in the BRA itself; and (2) the response only addresses "future years," thereby failing to recognize that, for the December 2022 BRA, the supply side of the market has no ability to "account for the . . . adjustments to the LDA Reliability Requirement in carrying out . . . business decisions and commercial transactions."[108]

Third, the Commission's overly simplistic and unsupported assertion that demand-side changes are irrelevant to the supply-side of the market is fundamentally inconsistent with the very design of the RPM's Capacity Performance framework. The Capacity Performance market design is intended to tie a resource's capacity revenues not only to the BRA clearing price, but also to its real-time performance during emergency system conditions (*i.e.*, Performance

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[105] *See* Tariff, Attach. DD at § 4.6(a); *id.* § 3.1.

[106] *See* Protest of NRG, *et al.* at 18-19, Docket Nos. ER23-729 & EL23-19 (filed Jan. 20, 2023).

[107] Order, 182 FERC ¶ 61,109 at P 157.

[108] *Id.* at P 157.

Assessment Intervals) during the delivery year. The Capacity Performance framework imposes the risk that a resource will incur non-performance penalties in a delivery year, and it is up to sellers to subjectively assess that risk and price it into their BRA sell offers. Those risk assessments are based, in part, on the auction parameters PJM establishes in advance of the BRA and what those parameters mean for the supply and demand conditions in the delivery year. One of the specific mechanisms in the Tariff for translating those factors into BRA sell offers is the provision requiring sellers to come up with their own estimates of the number of Performance Assessment Intervals in the delivery year and incorporate into their sell offers the costs associated with any risks that are "quantifiable and reasonably-supported."[109] As a practical matter, PJM and the IMM are implementing the Tariff in a manner that effectively deprives sellers of that right, under the absurd theory that capacity commitments in PJM are risk-free. However, as a legal matter, and a matter of market design, the Tariff expressly ties auction behavior to estimates of Performance Assessment Intervals and other subjective factors.

Whether, and to what extent, Performance Assessment Intervals are likely to occur in the Delivery Year is directly relevant to the magnitude of the non-performance risk to which a resource will be exposed. And whether, and to what extent, Performance Assessment Intervals are likely to occur during a particular Delivery Year depends on several variables—including the region's weather, each LDA's Reliability Requirements, the transmission system's transfer capability (*i.e.*, CETO/CETL), and whether sufficient supply will be available to serve the load in a particular LDA, either from native resources or through imports.[110] A seller's assessment of

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[109] Tariff, Attach. DD § 6.8.

[110] *See, e.g.*, *Indep. Market Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137, at P 71 (2021) (describing the unavoidable subjectivity in predicting Performance Assessment Intervals and permitting sellers to base sell offers on their own estimates of expected Performance Assessment Intervals "based on their own expectations").

those factors can affect the seller's economic decisions in numerous ways. For example, if a seller expects an LDA to be oversupplied in a particular delivery year, the seller may elect to defer discretionary maintenance costs and, therefore, not include that cost in its capacity offer. Thus, by design, the Capacity Performance framework links sellers' capacity revenues with the ability for supply to meet demand not only in the BRA, but also in the Delivery Year. The Commission's conclusion in this proceeding that the supply side of the auction should not be impacted by changes on the demand side of the auction is fundamentally inconsistent with the supply and demand fundamentals that are baked into the Capacity Performance framework.

In sum, the Order's flimsy rationale for why PJM's proposal is just and reasonable is based on a flawed understanding of demand-side fundamentals, supply-side fundamentals, and the relationship between supply and demand. Those flaws are the result of the Commission's misinterpretation of economic principles, inadequately explained deviation from precedent, and its failure to meaningfully address arguments and evidence presented to it. The net result is a lack of reasoned decision-making in violation of the APA.[111]

b) The Order Fails to Explain How It Is Just and Reasonable and Not Unduly Discriminatory to Adjust LDA Reliability Requirements Mid-Auction Based on the Non-Participation of Certain Resources While Ignoring the Non-Participation of Other Resources

The Order also violates the Administrative Procedure Act by willfully ignoring an important aspect of the problem it purports to solve and failing to explain how the resulting rates

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[111] *See, e.g.*, *State Farm*, 463 U.S. at 48 (explaining that an agency action violates the APA where there are "no findings and no analysis . . . to justify the choice made, no indication of the basis on which the agency exercised its expert discretion") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (cleaned up); *see also Burlington Truck Lines v. United States*, 371 U.S. at 167 ("[U]nless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.") (quoting *New York v. United States*, 342 US. 882, 884 (1951) (internal quotations omitted) (emphasis in original)).

will be just and reasonable without addressing those aspects of the problem. The Commission determined that PJM's proposal is just and reasonable because it "closely align[s] the LDA Reliability Requirement with actual reliability needs," which it accomplishes by revising the LDA Reliability Requirement to exclude planned resources that PJM wrongly assumed would provide capacity to PJM through the BRA.[112] Several commenters, including P3, explained—and PJM itself recognized—that there are several factors that could render PJM's forecasted LDA Reliability Requirements either higher or lower than they would be if calculated with different assumptions. The Commission ignored some of those arguments and provided inadequate responses to others.

As P3 has explained at length in this proceeding, every aspect of the demand side of the auction—including the LDA Reliability Requirements—is based on forecasts, which necessarily require PJM to rely on assumptions. To determine an LDA's Reliability Requirement, PJM calculates the CETO for that LDA based on forecasts regarding the generation resources that PJM expects to exist in the LDA within the relevant planning horizon—e.g., by the relevant Delivery Year. To make those forecasts, PJM must make assumptions regarding which generation resources will exist by the Delivery Year and whether they will offer into the applicable BRA. PJM's proposal permits it to adjust the LDA Reliability Requirement when its assumption turns out to be inaccurate as a result of certain circumstances, but not others.

Specifically, PJM's Tariff change requires it to adjust the LDA Reliability Requirement when Planned Generation Capacity Resources that PJM assumed would offer into a BRA do not actually offer. As noted, PJM's reason for removing those resources from the LDA Reliability Requirement is that they will not be available to serve the LDA's reliability needs in the Delivery

[112] Order, 182 FERC ¶ 61,109 at PP 149-51.

Year. However, PJM's Tariff change does not permit it to adjust the LDA Reliability Requirement if it is based on other resources—including Planned Generation Capacity Resources and Existing Capacity Resources—that PJM assumes will serve the LDA's reliability needs by providing capacity, but for which that assumption proves inaccurate after PJM receives sell offers in the BRA. P3 and others highlighted two specific circumstances in which that would occur: (1) where planned resources offer into the BRA but do not clear, and (2) where existing resources that do not have an RPM must-offer obligation elect not to participate in the BRA. The Order missed the mark in its attempt to address each of those arguments.

With respect to planned resources that offer into a BRA but do not clear, protesters explained that—just as with planned resources that do not offer into a BRA—such resources will not provide capacity to serve the relevant LDA's reliability needs. Yet PJM will continue to assume otherwise for purposes of the LDA Reliability Requirement it uses to construct the demand side of the BRA. As a factual matter, in terms of their capacity contributions to an LDA (*i.e.*, their ability to serve an LDA's reliability needs), there is no basis to distinguish planned resources that choose not to offer into a BRA from those that choose to offer but do not clear. In both cases, the capacity market result is the same: the BRA planning parameters wrongly assumed that both would provide capacity in the Delivery Year. The Commission's attempt to distinguish such resources from one another, for purposes of revising the LDA Reliability Requirement, misses the mark.

The Commission found that "circumstances where Planned Generation Capacity Resources offer but either do not clear or are mitigated" is not "functionally similar" to circumstances where Planned Generation Capacity Resources do not participate in an auction, because the submission of a capacity offer "signal[s] that the resource intends to be available to

serve as capacity."[113] However, the Commission provided no explanation for why "intent" matters. Without such an explanation, there is no logical reason to believe that intent makes a difference. If I intend to clean the kitchen and offer to do so, but I don't get off the couch and do it before my spouse does, my intent did not help the kitchen get any cleaner. At the end of the day, I contributed the same amount to the cleanliness of our kitchen as the teen who didn't even offer to help. So, too, with providing capacity to serve an LDA's reliability needs. Intending to do it doesn't cut the mustard. Yet, in setting the demand side of a BRA, PJM's proposal assigns full reliability credit to Planned Generation Capacity Resources that "intend" to provide capacity but are not able to follow through on that in the BRA, while at the same time assigning no reliability credit to Planned Generation Capacity Resources chose not to offer into the BRA. The Commission's failure to meaningfully address this internal inconsistency in PJM's proposal renders the Order arbitrary and capricious.[114]

The Order's treatment of protesters' arguments concerning resources that do not have an RPM must-offer obligation and elect not to participate in a BRA is even worse. As P3 and others spent numerous pages explaining, the forecasting error that PJM believes renders its LDA Reliability Requirements inaccurate is caused not only by Planned Generation Capacity Resources, but also by existing resources that do not have an RPM must-offer obligation.[115] In response, the Commission stated that "planned and existing resources are not similarly situated with respect to determining reliability needs in a given delivery year because planned resources

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[113] Order, 182 FERC ¶ 61,109 at P 151.

[114] *See, e.g.*, *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d at 1070-75.

[115] *See, e.g.*, P3 Protest at 39-40 (explaining that "the Tariff exempts all Intermittent Resources, Capacity Storage Resources, Demand Resources, Energy Efficiency Resources, and Hybrid Resources consisting exclusively of components that in isolation would be Intermittent Resources or Capacity Storage Resources," and, "[a]s a result, PJM faces the same uncertainty in predicting whether those resources will participate in a particular BRA as is posed by Planned Generation Capacity Resources") (citing Tariff, Attach. DD § 6.6A(c), and Shanker Affidavit at 17, 36-37).

have not yet achieved commercial operation," and, therefore, planned resources "face construction and other risks that make it more likely that they will be unavailable to provide capacity in some or all of the relevant delivery year, unlike existing resources."[116]

That response is both flawed and beside the point. It is flawed because the assertion that existing resources have achieved commercial operation but planned resources have not is not necessarily true. As a legal matter, whether a resource qualifies as an existing resource depends on whether it has cleared in a previous capacity auction, not whether it has achieved commercial operation. It is entirely possible, and in fact is frequently the case, that a resource becomes an existing resource years before its commercial operation date and thus can offer into BRAs as an existing resource prior to achieving commercial operation. And, if such an existing resource does not have an RPM must-offer obligation, it is similarly situated to planned resources in all relevant respects. Both such classes of resources have no RPM must-offer obligation, have not yet reached commercial operation, and "face construction and other risks" that call into question whether they will be "unavailable to provide capacity in some or all of the relevant delivery year."[117]

Further, the Commission's response is beside the point because it focuses exclusively on the likelihood that a resource will exist in the delivery year. The Commission failed to understand that, for purposes of assessing the "reliability needs in a given delivery year,"[118] the question of whether a resource is likely to exist in the delivery year is only relevant if the resource obtains a capacity commitment through a PJM capacity auction. In the context of a BRA, if an existing resource declines to offer into the BRA, it is signaling that—at that point in

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116 Order, 182 FERC ¶ 61,109 at P 154.

117 *Id.*

118 *Id.*

time—it is unwilling to commit to providing capacity in the delivery year. If two resources, one planned and one existing, tell PJM that they are not willing to take on a capacity commitment, then the question of whether they will achieve commercial operation by the delivery year is irrelevant to whether they should be counted towards the reliability needs in that delivery year. Yet PJM's proposal assumes that one (*i.e.*, the existing resource) will contribute to the reliability needs, but the other (*i.e.*, the planned resource) will not. The Commission's Order provides no reasoned basis for that disparate treatment, much less any attempt to demonstrate the impacts that including existing resources in the LDA Reliability Requirements, and/or excluding planned resources from the LDA Reliability Requirements, will have on the demand side of the BRA and/or the ultimate BRA clearing prices.

In sum, the Commission's Order adopts a Tariff change that is *ultra vires* under the FPA, and the long line of judicial precedent on the filed rate doctrine and rule against retroactive ratemaking, and that violates the APA at every turn. The Order's misguided determination that PJM's proposal is just and reasonable is flawed in such a way that the Commission erroneously permitted PJM to implement Tariff changes that disconnect supply and demand through a mechanism that will not even address the concern PJM is targeting. As the Commission's Order recognizes, the PJM capacity market is already under duress.[119] Unfortunately, the Commission's action in this proceeding only makes things worse.

The Commission must promptly grant rehearing to correct these errors by rejecting PJM's proposal. Failure to do so would subject the December 2022 BRA results, the string of upcoming BRAs, and countless other RTO/ISO market operations and proceedings to the crippling uncertainty posed by the appellate litigation that will follow if the Order's

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[119] Order, 182 FERC ¶ 61,109 at P 180.

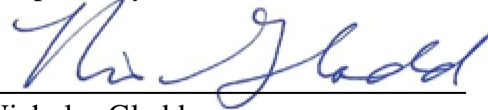
interpretation of the filed rate doctrine and rule against retroactive ratemaking is left to stand. That litigation is likely to span several years and is bound to have cascading effects—all of which are avoidable and unnecessary. Further, given the unprecedented nature of the Order's interpretation of a doctrinal linchpin of the FPA that has been established for nearly a century, the odds are that the extensive litigation process that follows will require the Commission to revisit this proceeding, and numerous others, to properly apply the long-settled statutory requirements of FPA section 205. The Commission should save itself, and the markets, all that trouble by properly applying the statute at this time.

IV.

CONCLUSION

For the foregoing reasons, P3 respectfully requests that the Commission grant rehearing of the Order and dismiss PJM's Section 205 filing in these proceedings, holding that (1) applying PJM's proposed Tariff changes to the December 2022 BRA would violate the filed rate doctrine and the rule against retroactive ratemaking, and (2) PJM has not satisfied its burdens under FPA Section 205, FPA Section 206, or Section 7(c) of the APA.

Respectfully submitted,



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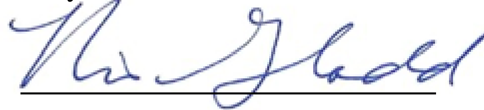
March 23, 2023

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 Boston, Massachusetts, this 23rd day of March, 2023.



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