UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	**)**	**Docket No.**	**ER18-988-000**
	)		**EL14-48-000**

REQUEST FOR REHEARING AND CLARIFICATION OF THE PJM POWER PROVIDERS GROUP AND EXELON CORPORATION

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[1] the PJM Power Providers Group ("P3")[2] and Exelon Corporation ("Exelon") respectfully submit this Request for Rehearing and Clarification of the Commission's Order Rejecting Tariff Revisions and Terminating Section 206 Proceeding issued May 8, 2018.[3] In that order, the Commission (1) rejected PJM Interconnection, L.L.C.'s ("PJM") proposed amendments to the Incremental Auction ("IA") rules contained in the PJM Open Access Transmission Tariff ("Tariff") and Reliability Assurance Agreement Among Load Serving Entities in the PJM Region ("2018 PJM IA Filing") to address a persistent pattern of low IA clearing prices and Base Residual Auction ("BRA") Sell Offers that have little or no reasonable expectation of physical delivery, and (2) terminated its existing Section 206 proceeding (the "Section 206 Proceeding"). As discussed below, P3 and Exelon respectfully

[1] 18 C.F.R. § 385.212 (2018); 18 C.F.R. § 385.713 (2018).
[2] P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. ("PJM") region. Combined, P3 members own over 84,000 MWs of generation assets, produce enough power to supply over 20 million homes and employ over 40,000 people in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.
[3] *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,101 (2018) ("2018 PJM IA Order").

request rehearing and clarification of the 2018 PJM IA Order. Specifically, P3 and Exelon request rehearing of the 2018 PJM IA Order's termination of the Section 206 Proceeding. To the extent the Commission found aspects of PJM's proposal to be unjust and unreasonable, the Commission should have only rejected the proposal. The Commission erred by terminating the Section 206 Proceeding without adequate justification and in the face of substantial evidence supporting the need for amendments to PJM's tariff to address the issue of speculative bidding in the IAs. P3 and Exelon also request clarification of the Commission's rejection of PJM's section 205 filing with respect to the circumstances under which the Commission would accept a PJM proposal to address speculative bidding in a future filing.

I. INTRODUCTION

Submission of BRA Sell Offers with little or no reasonable expectation of delivery, or "speculative" bidding, in the PJM IAs is not a novel or unfamiliar issue to PJM, stakeholders, the Independent Market Monitor for PJM ("IMM"), and the Commission. It is a well-documented occurrence on which the IMM has issued multiple reports detailing the problem and the reliability implications. It is also a long-discussed issue among PJM stakeholders, who have dedicated significant time with PJM over the years to develop tariff amendments to address it. The Commission has considered the issue in filings since at least 2014[4] and instituted the Section 206 Proceeding, as discussed below.

PJM's 2014 filing was intended to reform the Reliability Pricing Model ("RPM") market rules to prevent sellers in RPM's three-year forward auction from submitting speculative offers that can undermine long-term reliability.[5] PJM observed that resources were being replaced at increasing rates and IA clearing prices were consistently at low levels that could encourage BRA

[4] PJM Interconnection, L.L.C., Docket No. ER14-1461-000 (filed March 10, 2014) ("2014 PJM IA Filing").
[5] *Id.* at 1.

sellers to submit offers with no reasonable expectation that the resource will be available in the Delivery Year.[6] PJM also explained that speculative offers are incompatible with the fundamental resource adequacy objectives of RPM and damaging to long-term reliability objectives by providing an artificially inflated indication of physically deliverable supply that suppresses capacity prices.[7]

The Commission rejected the proposed tariff revisions, but agreed that PJM raised an important reliability issue.[8] The Commission recognized that "PJM's existing tariff provisions may be unjust and unreasonable in that they fail to promote long-term reliability in its capacity market by possibly permitting speculative sell offers to be submitted into PJM's capacity market auctions."[9] Accordingly, the Commission initiated the Section 206 Proceeding, ordering a technical conference and comment procedure to "facilitate the development of a just and reasonable solution."[10]

During the period between issuance of the Commission's 2014 PJM IA Order and PJM's filing of the revised proposal in Docket No. ER18-988, no events occurred that changed the need for tariff amendments to address the issue of speculative bidding in the IAs. PJM and the IMM continued to communicate to the Commission the importance of amending the PJM Tariff to eliminate the current loopholes that allow or even incent speculative bidding.[11] Additional

[6] *Id*. at 2.
[7] *Id*. at 2, 7.
[8] *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,108, at PP 2, 67-68 (2014), *rehearing pending* ("2014 PJM IA Order").
[9] *Id*. P 1.
[10] *Id*. P 74.
[11] Request for Deferral of Action in the Proceedings of PJM Interconnection, L.L.C. under ER14-1461, et. al. (Aug. 18, 2014); Report and Request for Continued Deferral of Action in the Replacement Capacity Proceeding of PJM Interconnection, L.L.C, Docket No. ER14-1461, et. al (Oct. 29, 2015); Further Report and Request for Continued Deferral of Action in the Replacement Capacity Proceeding of PJM Interconnection, L.L.C. under ER14-1461, et. al. (Nov. 23, 2016); Motion to Lodge of the Independent Market Monitor for PJM, Docket No. ER14-1461 et al. (Jan. 23, 2018) (attaching Monitoring Analytics LLC, "Analysis of Replacement Capacity for RPM Commitments: June 1, 2007 to June 1, 2017") ("2018 IMM Report"); *see also* Monitoring Analytics LLC, "Analysis of Replacement Capacity for RPM Commitments: June 1, 2007 to June 1 2011," (Dec. 11, 2012);

evidence accumulated to support PJM's filing and the need for development of just and reasonable market rules through the Section 206 Proceeding. The PJM IMM continued to file reports on this issue in the Section 206 Proceeding, with each of the reports highlighting the high level of replacement of Demand Resources ("DR") and expressing concern for the speculative nature of this behavior and its impact on reliability.

Then, after working with its stakeholders to develop a solution addressing this concern, in March 2018, PJM made its section 205 tariff filing in the instant proceeding proposing revised amendments to the PJM Tariff designed to address the longstanding issue that the current market rules allow Capacity Market Sellers to take on a speculative commitment in the BRA knowing that they will be able to replace the commitment in the IAs at a profit.[12] The 2018 PJM IA Filing represented a strong commitment among PJM stakeholders and a rare level of consensus on the need to find a solution to this longstanding issue. The proposal addressed the same speculative bidding issue for which the Commission had opened a section 206 investigation in the 2014 PJM IA Order and which remained open pending proceedings to develop a just and reasonable solution.

Thus it came as a sudden and inexplicable reversal for the Commission not only to reject PJM's section 205 filing, but also to terminate the Section 206 Proceeding in the 2018 PJM IA Order. In its prior order, the Commission had made clear that the Section 206 Proceeding was

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Monitoring Analytics LLC, "Analysis of Replacement Capacity for RPM Commitments: June 1, 2007 to June 1 2013," (Sept. 12, 2013); Monitoring Analytics LLC, "Analysis of Replacement Capacity for RPM Commitments: June 1, 2007 to June 1 2016," (Dec. 27, 2016) ("2016 IMM Report").

[12] 2018 PJM IA Filing at 2, 6 ("Historically, the clearing prices of IAs have been consistently and significantly lower than the clearing prices of the relevant BRA, as shown below. This pattern of low IA prices relative to the BRA price has two significant adverse impacts. First, it creates an environment in which Sell Offers in the BRA can be made with a high level of confidence that commitments can be replaced in an associated IA with little likelihood of economic loss and a high likelihood of profit. Such expectations may act to encourage BRA Sell Offers that have little or no reasonable expectation of physical delivery. Second, while load in PJM receives the proceeds of a release of excess capacity commitments in an IA, the load continues to pay the original BRA commitment at the BRA clearing price for the entire annual Delivery Year period.…In fact, the Capacity Resource may not even physically exist because it may have retired, canceled, or delayed its in-service date, or worse, potentially had very little expectation of physical delivery when it was initially offered in the BRA.").

necessary because the existing PJM Tariff may be unjust and unreasonable in that it fails to promote long-term reliability in its capacity market by possibly permitting speculative sell offers to be submitted in the IAs.[13] The results of the recent BRA underscore concerns that the Commission's order encourages market participants to offer without serious expectation of delivery. It seems more than mere coincidence that in the 2021/2022 BRA conducted only a few days after the issuance of the Commission's order, the total Unforced Capacity of DR offered into the 2021/2022 BRA increased by 20.7% from the amount of DR that offered into the 2020/2021 BRA.[14]

As discussed below, the Commission has failed to articulate a reasoned explanation supported by substantial evidence in the record to justify its decision to terminate the Section 206 Proceeding. The Commission disregards substantial record evidence supporting the occurrence of speculative bidding in the IAs. Termination of the Section 206 Proceeding also violates the Commission's statutory obligation to ensure just and reasonable rates by leaving unjust and unreasonable provisions in effect. Furthermore, the Commission's decision contradicts its own precedent and is inconsistent with the purpose of RPM. Accordingly, P3 and Exelon request rehearing of the 2018 PJM IA Order.

P3 and Exelon also request clarification of the Commission's rejection of PJM's section 205 filing with respect to the circumstances under which the Commission would accept a PJM proposal to address speculative bidding in a future filing.

[13] 2014 PJM IA Order at P 2.
[14] *See* 2021/2022 RPM Base Residual Auction Results at 8, *available at* http://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx.

II. STATEMENT OF ERRORS

In accordance with Rule 713(c)(1) of the Commission's Rules of Practice and Procedure,[15] the Commission has committed the following errors in the 2018 PJM IA Order:

1. The Commission's decision is arbitrary and capricious in that it fails to articulate a reasoned explanation supported by substantial evidence in the record to justify its termination of the Section 206 Proceeding.

2. The Commission erred by disregarding substantial record evidence supporting the occurrence of speculative bidding in the IAs and renders a decision that is inconsistent with the record in the proceeding.

3. The Commission's reliance on other reforms to justify termination of the Section 206 Proceeding is speculative and unsupported by substantial evidence.

4. The Commission departed without reasoned explanation from its 2014 order in which it found a section 206 investigation was warranted.

5. The Commission's decision to terminate the Section 206 Proceeding violates the Commission's statutory obligation to ensure just and reasonable rates.

6. The Commission's decision contradicts its own precedent and is inconsistent with the purpose of RPM.

III. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[16] P3 and Exelon hereby identify the issues on which they seek rehearing of the 2018 PJM IA Order, and provide representative precedent in support of their position.

1. Whether the Commission's decision to terminate the Section 206 Proceeding is arbitrary and capricious in that it fails to articulate a reasoned explanation supported by substantial evidence in the record to justify its termination of the Section 206 Proceeding. *Ne. Util. Serv. Co. v. FERC*, 993 F.2d 937, 944 (1st Cir. 1993) (reasoned decision making requires "a reasoned explanation supported by a stated connection between the facts found and the choice made") (citation omitted); *Motor Vehicle*

[15] 18 C.F.R. § 385.713(c)(1) (2018).
[16] 18 C.F.R. § 385.713(c)(2) (2018).

Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

2. Whether the Commission erred by disregarding substantial record evidence supporting the occurrence of speculative bidding in the IAs and renders a decision that is inconsistent with the record in the proceeding. 5 U.S.C. § 706(2)(E) ("The reviewing court shall … hold unlawful and set aside … findings … found to be … unsupported by substantial evidence"); *Natural Res. Def. Council, Inc. v. US EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (agency action is "arbitrary and capricious" if it "ignores important arguments or evidence"); *Cosmopolitan Broad. Corp. v. FCC*, 581 F.2d 917, 930 (D.C. Cir. 1978) (agency cannot ignore evidence placed before it); *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) (reviewing court cannot "uphold a regulatory decision that is not supported by substantial evidence on the record as a whole").

3. Whether the Commission's reliance on other reforms to justify its termination of the Section 206 Proceeding is speculative and unsupported by record evidence. *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (court does "not defer to an agency's conclusory or unsupported suppositions" and "may not uphold agency action based on speculation" rather than evidence).

4. Whether the Commission departed without reasoned explanation from its 2014 order in which is found a Section 206 Proceeding was warranted. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009) ("when … [agency's] new policy rests upon factual findings that contradict those which underlay its prior policy … a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy"); *PG&E Gas Transmission v. FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003) (an agency's "failure to come to terms with its own precedent reflects the absence of a reasoned decision-making process").

5. Whether the Commission's decision to terminate the Section 206 Proceeding violates the Commission's statutory obligation to ensure just and reasonable rates. 16 U.S.C. §§ 824d, 824e. *Arkansas Pub. Serv. Comm'n v. FERC*, 2018 WL 2450427 (D.C. Cir. 2018) ("Under the Federal Power Act, FERC is required to ensure that electric rates are "just and reasonable"); *Pacific Gas and Elec. Co., v. FERC*, 306 F.3d 1112, 1118 (D.C. Cir. 2002) (FERC's review must be "sufficient to ensure that the ISO's rates will be just and reasonable under § 205 of the Federal Power Act"); *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988) ("Once [FERC determines a rate is unjust], the *Commission* is required to reach a further determination: the just and reasonable rate to be fixed in place of either an unlawful proposed or existing rate").

6. Whether the Commission's decision contradicts its own precedent and is inconsistent with the purpose of RPM. *Fox*, 556 U.S. at 515-16; *PG&E*, 315 F.3d 383 at 390.

IV. REQUEST FOR REHEARING

a. The Commission's decision to terminate the Section 206 Proceeding is arbitrary and capricious in that it fails to articulate a reasoned explanation supported by substantial evidence in the record to justify its termination of the Section 206 Proceeding.

The Commission based its decision to terminate the Section 206 Proceeding on two assumptions: 1) that PJM's evidence regarding the frequency with which resources replace their capacity may not necessarily indicate speculative behavior, but instead might reflect efficient profit-seeking behavior by DR, and 2) that other reforms implemented by PJM should reduce the likelihood of speculation.[17] As discussed below, neither assumption is well-founded, and neither constitutes reasoned regulatory decisions grounded in record evidence. With respect to the first assumption, the Commission disregards substantial record evidence supporting the occurrence of speculative bidding in the IAs and renders a decision that is inconsistent with the record in the proceeding. With respect to the second assumption, the Commission's reliance on other reforms to justify its termination of the Section 206 Proceeding is speculative and unsupported by record evidence. As such, rehearing should be granted, and the Commission's decision on this matter reversed.

i. The Commission disregards substantial record evidence supporting the occurrence of speculative bidding in the IAs and renders a decision that is inconsistent with the record in the proceeding.

The Commission concludes in the 2018 PJM IA Order that "PJM has not supported its position that speculative behavior is, in fact, occurring" and that "the replacement rates PJM cites do not necessarily indicate speculative behavior."[18] The Commission relies on this conclusion to determine that the Section 206 Proceeding is unnecessary and should be terminated.

[17] 2018 PJM IA Order at PP 44-45.
[18] *Id*. PP 42, 44.

Yet substantial record evidence demonstrates that Capacity Market Sellers are indeed engaging in speculative bidding by submitting BRA Sell Offers that have little or no reasonable expectation of physical delivery. The Commission errs by failing to acknowledge this evidence.

This evidence includes years of IMM data filed as IMM reports in the Section 206 Proceeding demonstrating a glaring difference in the buy-out rate for certain types of resources (such as DR) as compared to other resource categories. Citing the most recent IMM report filed in January 2018, PJM demonstrated that between 2012 and 2017, DR averaged a replacement rate of 34.7%, the highest of any resource type.[19] This compared to 4.7% for internal in-service generation.[20] The Commission provides no response to this data in its order.

Nor does the Commission acknowledge or respond to the IMM's explanation of why DR bidding in the IAs reflects speculation:

> "Curtailment Service Providers (CSPs) have routinely offered Planned DR in BRAs without having identified the specific customers, evaluated their capabilities at the sites of their operation, evaluated the willingness of the customers to develop such capabilities, or determined that the site was not already committed to another party. This has meant acceptance of DR in Base Residual Auctions that reflects only a CSP's speculation about whether or not it could sign up actual customers. There is no reason to expect that the Planned DR offered in a BRA, under the DR rules as currently applied, represents DR expected to be physically available in the delivery year. The evidence shows that DR providers, including CSPs and individual customers, do regularly and persistently purchase replacement capacity for a substantial portion of their BRA commitments for DR at a significant discount to the initial sale price."[21]

The IMM goes on to explain that "[t]he risks to the markets associated with the sale of DR without any supporting information on the plausibility of the underlying assets include the risk that multiple CSPs could be assuming that they will win the same customers and the risk that sellers are taking speculative positions with a low probability of fulfilling them."[22]

[19] 2018 PJM IA Filing at 8.
[20] *Id.*
[21] 2018 IMM Report at 52.
[22] *Id.*

The Commission likewise does not respond to evidence provided by the IMM in its 2016 report. There, the IMM found high levels of replacement by certain resources, particularly DR, and noted:

> "The lack of a specific requirement that all capacity resources be demonstrably physical assets when offered into PJM capacity auctions continues to provide strong incentives to offer speculative paper capacity. The pattern of [Incremental Auction] prices being substantially lower than [Base Residual Auction ("BRA")] prices, exacerbated by PJM's preannounced sales of capacity at low prices in IAs, continues. The pattern of consistently extraordinarily high levels of replacement by [Demand Resource ("DR")] providers and very high levels of replacement by capacity imports and planned internal generation continues."[23]

The IMM then recommended that the compliance process ordered in the Section 206 Proceeding be implemented without further delay.[24]

The Commission's brief discussion of PJM's extensive body of evidence is speculative and conclusory. In response to the evidence provided by PJM, including data from the IMM reports, the Commission merely states: "However, the replacement rates PJM cites *do not necessarily* indicate speculative behavior. They *may* instead reflect the ability of resources, particularly Demand Resources, to relieve their capacity obligations while efficiently and profitably following economic signals."[25] Assuming for the sake of argument that simple arbitrage is the motivation, the Commission provides no explanation of why other Capacity Resources would not buy-out at similar levels. The Commission concludes that "there is no need for the Commission's further consideration of the solutions to address potential speculative behavior in the Base Residual Auctions and Incremental Auctions in the FPA section 206 proceeding…"[26] The Commission provides no citations or evidence to support their assumption that DR is "profitably following economic signals" or the Commission's apparent conclusion

[23] 2016 IMM Report at 46.
[24] *Id.*
[25] 2018 PJM IA Order at P 44 (emphasis added).
[26] *Id.* P 46.

that no speculative behavior is occurring or could occur in future. The 2018 PJM IA Order simply disregards this extensive body of evidence, including the IMM's statements of concern regarding reliability, in violation of the Commission's obligation to address "all the material issues of fact, law or discretion presented on the record."[27] The Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[28] In doing so, it cannot ignore relevant and probative evidence placed before it.[29] Nor can it rely on conclusory supposition in place of reasoned evaluation of evidence.[30] Here, the Commission fails to meet its legal standard and its decision to terminate the section 206 proceeding must be set aside.

ii. *The Commission's reliance on other reforms to justify its termination of the Section 206 Proceeding is speculative and unsupported by record evidence.*

The Commission's second reason for terminating the Section 206 proceeding is the notion that "in recent years, PJM has implemented reforms that reduce the likelihood of speculative offers."[31] Specifically, the Commission mentions DR Enhancements,[32] which are requirements for DR to provide certain information before the BRA, and the PJM Capacity

[27] *See 5* U.S.C. § 557(c); 5 U.S.C. § 706(2)(A).
[28] *State Farm*, 463 U.S. at 43 (internal quotation marks omitted*); see also, e.g.*, *Ne. Util. Serv. Co.*, 993 F.2d at 944 (reasoned decision making requires "a reasoned explanation supported by a stated connection between the facts found and the choice made") (citation omitted); *Ass'n of Oil Pipelines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996) (the Commission's orders must articulate "'a rational connection between the facts found and the choice made'") (citations omitted).
[29] *Natural Res. Def. Council, Inc. v. US EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987) (Agency action is "arbitrary and capricious" if it "ignores important arguments or evidence."); *Cosmopolitan Broad. Corp. v. FCC*, 581 F.2d 917, 930 (D.C. Cir. 1978); *N.E. Power Generators Association, Inc. v. FERC*, 881 F.3d 202, 212 (D.C. Cir. 2018) ("FERC's complex mandate doesn't relieve it of the requirements of reasoned decisionmaking.").
[30] *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (court does "not defer to an agency's conclusory or unsupported suppositions" and "may not uphold agency action based on speculation" rather than evidence); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) ; *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1072–75 (D.C. Cir. 2003) (vacating and remanding Commission orders because it found, among other things, that the Commission had failed to articulate the actual reasons for its decision, and the reasons it did cite were "speculative," unsupported by record evidence, and did not support its decision).
[31] 2018 PJM IA Order at P 45.
[32] *Id*. (*citing PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,150 (2014) ("DR Enhancements")).

Performance construct, which, the Commission asserts, "create[s] significant economic risk to any would-be speculators who retain a capacity commitment into a given Delivery Year."[33] Neither limits speculation. The Commission's reliance on these reforms is misguided and unsupported by the record.

First, regarding DR Enhancements, these enhanced qualification criteria have been in place for a number of years and, by design, do not ensure that DR offers are based on actual DR resources in existence at the time of the BRA. The reforms were implemented in 2014 and require DR providers to file Sell Offer Plans explaining how the DR providers will obtain the physical resources to back their capacity commitments by the Delivery Year. In fact, in its filing proposing the DR Enhancements, PJM acknowledged explicitly that a separate IA filing would be necessary to address speculation.[34] The IMM has agreed, arguing that "the DR plan enhancements did not go far enough to ensure that DR offers are based on physical assets at the time of the offer and therefore did not address the issue of speculative offers that are replaced in incremental auctions."[35] The Commission makes a similar error in relying on informational requirements for planned generation as a reason for not being concerned with speculation in the IAs. Again, an informational requirement does not eliminate the incentive for speculation.

The Commission's reliance on the Capacity Performance construct to prevent speculation is equally flawed. While the Commission asserts that Capacity Performance non-performance penalties "create significant economic risk to any would-be speculators who retain a capacity commitment into a given Delivery Year,"[36] this observation entirely misses the point. Capacity Performance penalties do not provide a disincentive to a speculator that intends to buy out of its

[33] *Id.*
[34] *See PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,150 at P 13 (2014).
[35] 2018 IMM Report at 51.
[36] 2018 PJM IA Order at P 45.

BRA positions in an IA at a profit. That speculator will not face any non-performance penalties, because it will no longer have a capacity commitment. As the IMM has explained, "[r]eplacement capacity can be used to fulfill a Capacity Resource commitment and *avoid* deficiency and penalty charges" [emphasis added].[37]

The tariff revisions developed by stakeholders and submitted in the PJM IA Filing were the result of PJM's determination that it needed to develop market rules to more narrowly address speculation that continued to exist *after* implementing the DR Enhancements and Capacity Performance and observing several IAs conducted under those reforms. The Commission provides no rationale or evidentiary support for why these reforms eliminate the potential for or the occurrence of speculative bidding. The Commission also fails to reconcile its assumption with record evidence, such as the IMM Reports, to the contrary. The reforms that the Commission cites have been in existence for years. Despite this fact, both PJM and IMM continue to provide volumes of evidence of speculative behavior, and PJM made a 205 filing designed to address the issue.

The Commission also relies on the assumption that improvements to load forecasting will reduce the likelihood of speculative offers. This is a false assumption. There will always be uncertainty three years forward, and entities will seek to take advantage of the opportunity to speculate so long as the PJM rules permit it. It is noteworthy that PJM's proposal was viewed by stakeholders, PJM, and the IMM as needed notwithstanding a number of load forecasting improvements that PJM already implemented in 2015/2016.[38] Furthermore, there is only so far that improved load forecasting can go before it raises the concern of cutting too close and not procuring sufficient capacity. The just and reasonable response is to make changes to the Tariff

[37] 2018 IMM Report at 1 (*citing* "PJM Manual 18: PJM Capacity Market," Revision 38 (July 27, 2017) at 184; OATT Attachment DD (Reliability Pricing Model) § 8.1).
[38] 2018 PJM IA Order at P 45.

to remove the ability and incentive for market participants to speculate, not to assume that future load forecasting changes will take care of the issue.

For these reasons, the Commission erred by terminating the Section 206 Proceeding. Its reasons for doing so are speculative and unsupported by record evidence.[39]

b. The Commission departed without reasoned explanation from its 2014 PJM IA Order in which it found a section 206 investigation was warranted.

In its 2014 PJM IA Order, the Commission "agree[d] that PJM has identified a reliability issue that merits consideration" and therefore found "that PJM's existing tariff provisions may be unjust and unreasonable in that they fail to promote long-term reliability in its capacity market by possibly permitting speculative sell offers to be submitted into PJM's capacity market auctions."[40] The Commission instituted the Section 206 Proceeding to investigate whether PJM's tariff was unjust and unreasonable or unduly discriminatory or preferential and ordered staff to convene a technical conference to "facilitate the development of a just and reasonable solution."[41]

An agency is required to provide a reasoned explanation for its departure from prior precedent, or else its decision will be vacated as arbitrary and capricious.[42] This includes providing a reasoned explanation for refusal to investigate potentially unjust and unreasonable

[39] *Shooting Sports*, 716 F.3d at 214 (court does "not defer to an agency's conclusory or unsupported suppositions" and "may not uphold agency action based on speculation" rather than evidence).
[40] 2014 PJM IA Order at P 74.
[41] *Id.*
[42] *Huntington Hosp. v. Thompson*, 319 F.3d 74, 79 (2d Cir. 2003) ("While an agency is not locked into the first interpretation of a statute it embraces, it cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'"); *Mr. Sprout, Inc. v. U.S.*, 8 F.3d 118, 129 (2d Cir. 1993) ("When the Commission departs from its own settled precedent, as here, it must present a 'reasoned analysis' that justifies its change of interpretation so as to permit judicial review of its new policies."); An agency's "failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (internal quotation marks omitted); *PG&E*, 315 F.3d at 390 ("FERC's failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process"). Accordingly, agency action will be set aside as arbitrary and capricious if the agency fails to provide a reasoned explanation for its decision. *Fox*, 556 U.S. at 515-16.

market rules that permit speculative behavior. The Commission has failed to provide a reasoned explanation for its departure from its prior order.

c. The Commission's decision to terminate the section 206 proceeding violates the Commission's obligation to ensure just and reasonable rates.

In the 2014 PJM IA Filing, PJM expressed to the Commission the need for its tariff to be amended to prevent speculative bidding in the IAs and to ensure its just and reasonableness. In the face of this assertion regarding PJM's own tariff, the Commission had a duty to investigate and to ensure just and reasonable rates. The Commission appropriately instituted the Section 206 Proceeding.

As discussed above, nothing has changed since that proceeding was instituted to warrant termination of the proceeding. In the instant proceeding PJM asserted that "PJM's current market rules do not protect against, and may in fact incentivize, speculative behavior"[43] and provided substantial evidence to support that high levels of replacement in the IAs was still occurring. Having been presented with the allegation by PJM that its own tariff allows or incents speculative behavior and finding that such behavior may not be just and reasonable, the Commission is obligated to continue its 206 investigation until there is a just and reasonable result, even if the Commission rejects PJM's proposed solution. The Commission's fundamental obligation under the Federal Power Act is, after all, to set just and reasonable rates.[44] The termination of the proceeding is premature and leaves an existing tariff on file that may be unjust and unreasonable, in violation of the Commission's statutory duty.

[43] 2018 PJM IA Filing at 6.

[44] 16 U.S.C. § 824e. *See, e.g., Arkansas Pub. Serv. Comm'n v. FERC*, 2018 WL 2450427 (D.C. Cir. 2018) ("Under the Federal Power Act, FERC is required to ensure that electric rates are "just and reasonable."); *Pacific Gas and Elec. Co., v. FERC*, 306 F.3d 1112, 1118 (D.C. Cir. 2002) (Holding that FERC's "approach in the Orders on review fails to ensure that the CAISO's rates will be just and reasonable" and noting that "FERC acknowledges that it is required under § 205 to determine that the rate ultimately charged by an ISO is "just and reasonable.").

The Commission also erroneously imposes a burden on PJM to demonstrate that its own tariff is unjust and unreasonable by proving that speculative bidding is occurring, while failing to meet its own statutory burden to ensure just and reasonable rates. The Commission asserts that PJM has not supported its position that speculative behavior is occurring and relies on this conclusion in its decisions to reject PJM's filing and terminate the Section 206 Proceeding. As discussed above, PJM provides abundant evidence of speculative bidding (evidence which the Commission has found compelling in the past, as discussed above) and the Commission's action is arbitrary and capricious. Nonetheless, PJM does not have a burden to demonstrate that its own tariff is unjust and unreasonable. That would be the burden of a complainant if another party were to bring a section 206 complaint against PJM. Here, the Commission had already instituted a section 206 proceeding under which it is the Commission's burden to address an unjust and unreasonable rate by determining the just and reasonable one.[45] PJM's only burden was to demonstrate that its proposed section 205 tariff changes are just and reasonable and not unduly discriminatory or preferential; it is then up to the Commission to determine whether to accept or reject the proposed changes.[46] By arguing that PJM has not presented sufficient evidence to demonstrate speculative bidding and accordingly terminating the Section 206 Proceeding, the Commission is erroneously placing a burden on PJM that is inconsistent with statute and avoids its own statutory mandate to ensure just and reasonable rates.

[45] 16 U.S.C. § 824e. *See, e.g. N.E. Power Generators Assoc., Inc. v. FERC*, 879 F.3d 1193, 1200 (D.C. Cir. 2018) ("Once the Commission finds that a rate is unjust and unreasonable, the Commission bears the burden of determining a new just and reasonable rate."); *Tenn. Gas Pipeline Co. v. FERC,* 860 F.2d 446, 454 (D.C. Cir. 1988) ("Once [FERC determines a rate is unjust], the *Commission* is required to reach a further determination: the just and reasonable rate to be fixed in place of either an unlawful proposed or existing rate.").
[46] 16 U.S.C. § 824d.

d. The Commission's decision contradicts its own precedent and is inconsistent with the purpose of RPM.

The 2018 PJM IA Order contains puzzling language that departs from the Commission's precedent regarding RPM and is inconsistent with the purpose of RPM. In the order, the Commission states that:

> "the replacement rates PJM cites do not necessarily indicate speculative behavior. They may instead reflect the ability of resources, particularly Demand Resources, to relieve their capacity obligations while efficiently and profitably following economic signals. For example, if a Demand Resource's going forward costs are higher than the clearing price in the applicable Incremental Auction, it would be efficient, as well as profitable, for the provider to buy back its capacity obligation, even if the provider was fully capable of providing its service."[47]

This statement suggests that resources may back out of their obligation whenever it is profitable for them to do so, which conflicts with the reliability basis for RPM and the need for physical capacity that will actually be available in the delivery year. In addition, nowhere in the order does the Commission acknowledge the reliability concerns with allowing resources to submit BRA Sell Offers that have little or no reasonable expectation of physical delivery and for Capacity Market Sellers to then buy out of their obligation whenever it is profitable for them to do so. Given that the fundamental purpose of the capacity market is reliability, this is a critical omission.

The purpose of RPM is to ensure reliability by procuring *physical* capacity three years' forward. Capacity is a physical product.[48] The Commission approved the RPM Settlement because it "address[ed] the Commission's concerns that appropriate price signals are available to

[47] 2018 PJM IA Order at P 44.

[48] *See, e.g., ISO New England Inc.*, 130 FERC ¶ 61,089 at P 29 (2010) (characterizing ISO-New England's Forward Capacity Market as "a physical rather than financial market."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,061 at P 19 (2008), *order on reh'g and compliance*, 126 FERC ¶ 61,143 (2009) (holding that power purchase agreements can only qualify as capacity resources if they are backed by actual, verifiable resources).

provide incentives to construct facilities necessary for regional reliability by assuring that the market value of resources used to meet the capacity requirements reflect actual deliverability and availability of the capacity resource within the specific region relying on that resource."[49] The BRA for procurement of capacity resources is held in advance of the delivery year, but that does not mean that resources forward-procured through the BRA do not need to reflect actual deliverability and availability. The goal of the three-year forward procurement is to procure physical capacity resources far enough in advance that planned resources can compete on an equal footing with existing resources, and still provide the physical potential for conversion to energy in the delivery year.[50] Indeed, the importance of ensuring physical delivery and availability was a major impetus behind the Capacity Performance reforms. The Commission was concerned by the large fraction of resources that had failed to perform when called upon during the 2014 Polar Vortex,[51] and, in approving Capacity Performance, explicitly granted PJM discretion to eliminate offers not only to reduce speculation but also to "reduce the likelihood that resources with Capacity Performance commitments reach the delivery year physically unprepared or incapable of performing reliably during critical periods."[52] Indeed, as PJM reduces its load forecast and the possibility of excess resources being procured in the BRA, it becomes even more important that the capacity resources that do clear in the BRA are deliverable.

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[49] *See PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331 at PP 14, 68 (2006), *order on reh'g and clarification and accepting compliance filing*, 119 FERC ¶ 61,318, *order denying reh'g*, 121 FERC ¶ 61,173 (2007). *See also PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,212, at P 72 (2011) (agreeing with PJM's efforts to ensure that "consumers in the PJM Region will pay only for capacity that is actually delivered and that Load Management resources comply with their commitment to provide such capacity, thus allowing PJM to obtain adequate supply to maintain reliability of the PJM system for the benefit of consumers.").

[50] *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 72 (2006) (finding a forward procurement period of, at the time, four years, to be a reasonable requirement for these reasons), *order denying reh'g and approving settlement subject to conditions*, 117 FERC ¶ 61,331 at PP 14, 68, *order on reh'g and clarification and accepting compliance filing*, 119 FERC ¶ 61,318, *order denying reh'g*, 121 FERC ¶ 61,173.

[51] *E.g.*, *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157, at PP 4, 24-25 (2015).

[52] *Id.* at 43.

The importance of physical delivery and availability of BRA resources, as well as the reliability concerns with speculative behavior exhibited in the IAs, have been well documented in this proceeding. In its 2018 Analysis of Replacement Capacity for RPM Commitments, the IMM stated: "Under the current DR rules, DR providers may not have identified customers, may not have clear plans for implementing DR measures and may not receive commitments from new customers until relatively close to the delivery year and well after the RPM BRA is run for that delivery year. This is not consistent with the definition of a capacity resource."[53] The IMM also explained the reliability concerns associated with the specific behavior demonstrated in the IMM's report and filed in this proceeding:

> "The risks to the markets associated with the sale of DR without any supporting information on the plausibility of the underlying assets include the risk that multiple CSPs could be assuming that they will win the same customers and the risk that sellers are taking speculative positions with a low probability of fulfilling them. The result in both cases is that the system is less reliable than it might otherwise be because the full amount of DR that cleared the RPM auction is not actually available, the price to other capacity resources has been suppressed by the sale of the speculative DR, new entry of other capacity resources could have been forestalled by the sale of speculative DR, and there may not be adequate replacement resources available with short notice prior to the delivery year."[54]

The 2018 PJM IA Order sends a clear signal to market participants that it is backing away from the core tenet of RPM that capacity must be physically deliverable. The signal has clearly been received by DR, as reflected by the dramatic increase in offers (20.7%) into the 2021/2022 BRA over those offered into the 2020/2021 BRA.[55]

[53] 2018 IMM Report at 52.
[54] *Id.*
[55] *See* 2021/2022 RPM Base Residual Auction Results at 8, *available at* http://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx.

V. REQUEST FOR CLARIFICATION

In addition to the Request for Rehearing discussed above, P3 and Exelon request clarification of the Commission's rejection of the PJM IA Filing with respect to the circumstances under which the Commission would accept a PJM proposal to address speculative bidding in a future filing. The Commission rejected PJM's filing based on one element of the proposal—the proposal to set the price for capacity PJM sells back to the market in the IAs at the BRA price.[56] The Commission stated in the order that: "Because PJM submitted the Incremental Auction Proposal as a package of reforms, we do not address other aspects of the proposal. Absence of discussion on other aspects of the proposal, however, is not an indication of how the Commission would rule on the merits of those issues if submitted separately from the Incremental Auction Proposal."[57]

What is not clear from the Commission's order is whether the Commission intended to communicate to PJM and PJM stakeholders that the remaining elements of PJM's proposal that were not rejected or other future proposals could be accepted by the Commission under its current view of the existence of speculative bidding in the IAs. As discussed above, the Commission erroneously terminated the Section 206 Proceeding in part because it believed that speculative bidding in the IAs is not occurring and is not a concern. The Commission's order could be read to indicate that the Commission would not approve amendments aimed at eliminating speculative bidding in the IAs because it believes PJM has not demonstrated that such behavior exists. This interpretation would be inconsistent with the Commission's role and the rights of parties under the Federal Power Act, and would forestall PJM's due exercise of its

[56] 2018 PJM IA Order at PP 38-43.
[57] *Id*. P 43.

section 205 rights.[58] Accordingly, we request that the Commission clarify that this was not its intention.

Furthermore, it is extremely helpful for RTOs/ISOs and stakeholders working to develop just and reasonable solutions to market issues in the era of the *NRG Power Marketing* decision[59] to receive some guidance from the Commission as to whether the package of reforms was rejected because it had one unjust and unreasonable element (as seems to be the case here), or whether other elements would also be viewed to be unjust and unreasonable. It is also consistent with the Commission's role as regulator and good practice for the Commission to provide guidance where possible.[60] The 2018 PJM IA Order may suit the Commission's purpose of regulatory efficiency by rejecting the entire filing based on one element of the filing, but may ultimately create inefficiencies if stakeholders need to propose tariff revisions in a piecemeal manner in the absence of any guidance as to which elements the Commission believes are just and reasonable. Thus, we request that the Commission clarify its view of the remaining elements of the proposal or provide additional guidance on how a just and reasonable solution could be reached.

VI. CONCLUSION

P3 and Exelon respectfully request that the Commission grant this Request for Rehearing and Clarification.

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[58] 16 U.S.C. § 824d. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, 113–14 (1958) (the public utility, "like the seller of an unregulated commodity, has the right ... to change its rates ... [at] will, unless it has undertaken by contract not to do so."); *City of Winnfield v. FERC*, 744 F.2d 871, 876 (D.C. Cir. 1984) (FERC plays "an essentially passive and reactive" role under section 205); *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) ("nothing in section 206 sanctions denying petitioners their right to unilaterally file rate and term changes…Nothing in this provision gives FERC the power to deny a utility the right to file changes in the first instance.").

[59] *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017).

[60] *E.g.*, *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities*, 132 FERC ¶ 61,014, at P 3 (2010).

Respectfully submitted,

On behalf of the PJM Power Providers Group

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Dated: June 7, 2018

Certificate of Service

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

Dated at Washington, D.C. this 7th day of June, 2018.

/s/ *Marianne Alvarez*

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Marianne Alvarez
Exelon Corporation