

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

PJM Interconnection, L.L.C.

)

Docket No. ER11-3322-001

**ANSWER OF
PJM INTERCONNECTION, L.L.C.
TO PROTESTS AND COMMENTS**

PJM Interconnection, L.L.C. (“PJM”), pursuant to Rule 213 of the Commission’s rules, 18 C.F.R. § 385.213, hereby answers¹ the protests and comments filed in this proceeding in response to PJM’s filing on January 5, 2012 (“Compliance Filing”) to comply with the Commission’s order of November 4, 2011.²

As shown below, contrary to the protestors’³ claims, PJM’s proposed transition mechanism reasonably protects curtailment service providers’ (“CSPs”) reasonable reliance expectations based on prior market rules by mitigating any losses they might incur due to the Commission-approved change in the metric for determining demand response (“DR”) capacity resource performance for the transition delivery years (the three years for which Base Residual Auctions (“BRAs”) were conducted prior to the

¹ PJM seeks leave to answer these comments and protests to assist the Commission’s decision-making process and clarify the issues. The Commission regularly allows answers in such cases. *See PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,031, at P 10 (2003) (accepting answers because “it will not delay the proceeding, will assist the Commission in understanding the issues raised, and will insure [sic] a complete record upon which the Commission may act.”).

² *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,108 (2011) (“November 4 Order”).

³ Protest of Comverge to Compliance Filing by PJM, Docket No. ER11-3322-000 (Jan. 17, 2012) (“Comverge Protest”); Protest EnerNoc, Inc., Docket No. ER11-3322-001 (Jan. 17, 2012) (“EnerNOC Protest”); Protest of Energy Curtailment Specialists, Inc. to Compliance Filing of PJM Interconnection, L.L.C., Docket No.

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effective date of the new measurement criterion based on peak load contribution (“PLC”). Unlike the proposals of the protesters, PJM’s transition mechanism complies with the Commission’s order without creating a sweeping and potentially troublesome precedent that could hamstring the Commission’s efforts to timely implement just and reasonable market rule changes. Moreover, the alternatives and modifications to PJM’s transition proposal that the protesting CSPs advocate are either unjustified, or outside the scope of compliance with the November 4 Order, or both. The Commission, therefore, should accept the Compliance Filing without conditions or modifications.

ANSWER

1. PJM’s Transition Proposal Fully Complies With The November 4 Order.

Paragraph 81 of the November 4 Order conditioned the Commission’s acceptance of PJM’s proposed tariff revisions “on PJM submitting an interim mitigation measure that applies . . . from the 2012-13 delivery year through the 2014-15 delivery year.” The purpose of the transitional mechanism is to “protect[] the reasonable reliance expectations of DR suppliers . . . who may have *previously* committed resources” in RPM auctions that were held before PJM changed the performance measurement criterion for DR capacity resources.⁴ The Commission explained that the transitional mechanism should “help mitigate any burdens placed on DR suppliers by PJM’s filing.”⁵

To provide such protection, PJM’s Compliance Filing establishes a two-pronged transition mechanism. First, any CSP that elects to participate in the transitional program

ER11-3322-001 (Jan. 17, 2012) (“ECS”) (“ECS Protest”) (When referred to collectively, Comverge, EnerNOC, and ECS are the “Protesting CSPs.”)

⁴ November 4 Order at P 81 (emphasis added).

and which chooses to purchase capacity resources in an incremental auction to replace DR capacity that it previously cleared in the BRA will be compensated if it must pay more in the incremental auction for replacement capacity than the price at which its DR capacity cleared in the BRA. Second, similar protection from losses will be provided to any participating CSP which cleared DR capacity in a BRA for a transition year, and which had already put into place contractual obligations to demand resources (end users) for the same year which it cannot avoid, even if they purchase replacement capacity in the incremental auctions.

a. Protesting CSPs’ Own Conduct Confirms the Merit of PJM’s Transition Proposal.

The Commission’s directive to PJM to address the reasonable reliance interests of CSPs focused on DR providers’ *existing* commitments, not on permitting them to lock in future commitments under the now superseded measurement and verification rules. The Commission thus required PJM to present a transition mechanism that will “protect[] the reasonable reliance expectations of DR suppliers . . . who may have previously committed resources” in RPM auctions that were held *before* PJM changed the performance measurement criterion for DR capacity resources.⁶

EnerNOC and Comverge confirm that PJM’s transition proposal properly addresses these past commitments. Both CSPs state that they and their competitors are *currently* engaged in negotiating contracts with end-use customers for the demand response resources they require to meet their commitments for the upcoming 2012/2013

⁵ *Id.* at P 82.

⁶ *Id.* at P 81.

delivery year.⁷ This activity affirms that, as CSPs and end users in the PJM region develop their business arrangements even for the first of the three transition years, they are aware of, and in position to adapt their commercial relationships to, PJM's newly approved capacity DR performance criterion.

RPM provides a ready mechanism to address past commitments. Indeed, the incremental auctions were expressly designed to address changes in circumstances between a Base Residual Auction and the start of the associated delivery year by enabling market participants to "buy out" a previously cleared position. Thus, PJM's proposal, which relies primarily on the tools of RPM, provides a reasonable mechanism for recognizing the clarification to PJM's measurement and verification that will be in effect for the upcoming delivery years. Thus, if a CSP finds itself unable to contract now for sufficient resources to meet a previously cleared commitment of DR capacity for any of the transition years, the remaining incremental auctions are a ready means of reducing that commitment to conform to the resources the CSP is able to sign up. Provided it delivers the required notice to PJM regarding participation in the transition program PJM proposes, if the CSP has to pay more to purchase replacement capacity in an incremental auction than the price at which its BRA commitment previously cleared, it will be made whole for its loss.

EnerNOC and Comverge's revelations about the current status of their contracts with end-use providers of demand response also affirm PJM's expectation⁸ of little

⁷ Comverge Protest at 5; EnerNOC Protest at 5, 25 (prospect that unavoidable contracts already exist is a "unicorn"), 27 (now is the "peak period" for new DR resource registrations).

⁸ See Compliance Filing of PJM Interconnection, L.L.C., Docket No. ER11-3322-001, at 13-15 (Jan. 5, 2012) ("January 5 Transmittal").

likelihood that a CSP already has entered into unavoidable contractual obligations to end users which may be unable, under the PLC performance criterion, to provide all the capacity the CSP previously cleared in the BRA for a transition year. The CSPs have neither described nor provided any specific contractual terms that prevent them from avoiding liability to their end use customers in the event the CSPs elect to reduce or eliminate their BRA commitments in the incremental auctions. Nevertheless, PJM has proposed an option for confidential review of such contract terms if, in fact, any CSP determines that it is subject to such terms.⁹ PJM continues to believe that the incremental auctions (which, as PJM has previously noted, several CSPs already have

⁹ EnerNOC's and its allies' inability to show that any of them actually entered into any contract after the date of PJM's filing in reliance on the previously effective capacity performance rules also undercuts EnerNOC's opposition to PJM's proposal to provide make-whole payments only with respect to unavoidable contractual obligations that CSPs entered into on or before April 7, 2011 (PJM's filing date). In any event, all PJM's proposal does is recognize that when any such contract was created, the CSPs (and their customers) were clearly on notice as of the date of PJM's filing that the practice of relying on load reductions in excess of PLC for DR capacity performance was subject to imminent change. Therefore, if the Protesting CSPs made any binding business arrangements in reliance on that approach after that date, they clearly did so at their own risk. Moreover, the Commission has held that a section 205 filing to amend a tariff provision is sufficient of itself to end any reasonable reliance on the then-effective terms of service. *PJM Interconnection, L.L.C.*, 112 FERC ¶ 61,031, at P 38 (2005). Accordingly, at the very least, as of the date of PJM's filing in this docket, any "reasonable" reliance on the then-effective tariff rules would require including in contracts a regulatory-out clause to address the possibility that the rules would change. Similarly, as of that date at the very latest, any reasonable participant in an RPM auction would have taken into account the impending rule change in determining whether and how to bid. Therefore, the Commission should accept PJM's proposal to provide make-whole compensation only with respect to qualifying, unavoidable contractual obligations that CSPs entered into on or before April 7, 2011.

employed) will be sufficient to mitigate or eliminate any losses that CSPs may face during the transition period due to implementation of the PLC performance standard.¹⁰

2. The Protests Represent Untimely Requests For Rehearing Of The Commission's November 4 Order Rather Than Protests To The Merits Of PJM's Compliance Filing.

Though they argue vociferously that PJM's transition proposal falls short of what Paragraph 81 requires, the Protesting CSPs' proposed remedies establish that what they really seek is to overturn the November 4 Order's acceptance of PJM's proposed tariff changes. For example, rather than asking the Commission to prescribe a different transition mechanism, EnerNOC advocates "additional guidance as to what [the Commission] intended" and "leaving current settlement practices in place for the upcoming delivery year."¹¹ In the alternative, EnerNOC proposes not a different protection scheme for the transition period, but reverting to "the settlement practices that were in effect in PJM prior to 2009."¹² ECS similarly proposes to revert for the entire transition period to the ambiguous rules that the November 4 Order replaced, even though it also requests that the Commission require PJM to submit a new, albeit undescribed,

¹⁰ Also without merit is EnerNOC's ancillary claim that PJM's proposal to insulate CSPs from losses in the event an incremental auction clearing price exceeds the BRA clearing price will create an incentive for suppliers of capacity "even without explicit collusion, to inflate supply offers in the incremental auctions or to maintain high bid prices for previously uncleared supply, especially in zones where they can be reasonably assured of being the dominant supplier." EnerNOC Protest at 26-27. Offer caps apply to all dominant suppliers in incremental auctions, and the Independent Market Monitor's monitoring of all RPM auctions provides further protection from such manipulation.

¹¹ *Id.* at 4-5. Though the currently effective performance criterion is, in fact, the PLC standard approved in the November 4 Order and "currently in effect," it is clear that EnerNOC (like the other Protesting CSPs) in fact advocates reinstating unlimited GLD performance measurement, as employed prior to November 7, 2011, the effective date of the tariff revisions PJM filed in this docket.

transition mechanism.¹³ For its part, Comverge asks the Commission to reinstate “the market rules ... that were in effect prior to PJM’s April 7, 2011 filing” for the 2012/2013 delivery year, and to require modified versions of the pre-filing GLD measurement approach for the subsequent transition years.¹⁴

The common theme of these proposed remedies is that they contravene the November 4 Order’s *acceptance* of PJM’s new DR capacity performance standard, effective November 7, 2011. CSPs have argued before for delays in the effective date of PJM’s tariff revisions,¹⁵ but the Commission expressly rejected those efforts when it accepted the rule change to become effective November 7, 2011.¹⁶ The Protesting CSPs’ proposed remedies effectively would reverse that decision and modify the effective date of PJM’s tariff changes, albeit under the thin, semantic veil of reinstating the prior rules for some or all of the transition period to which Paragraph 81 refers. To properly pursue such a result required the Protesting CSPs to request rehearing of the Commission’s order placing the new rules in effect. None did that. Therefore, their proposals to reinstate previously effective market rules are improper collateral attacks on the now-final, November 4 Order, and the Commission should reject them.¹⁷

¹² *Id.* at 5.

¹³ ECS Protest at 7.

¹⁴ Comverge Protest at 21.

¹⁵ *See, e.g.*, Comverge Protest at 5 (advocating that the Commission reject the compliance filing and “require further compliance documentation from PJM within 180 days of the date of the next Commission order in this case”).

¹⁶ November 4 Order at P 82.

¹⁷ *See, e.g.*, *ISO New England Inc.*, 132 FERC ¶ 61,098, at P 12 (2010) (“The Commission has held that requests to alter a compliance filing in a manner that differs from the order requiring the compliance filing constitute a collateral attack on the order requiring the compliance filing”) (citing *Cal. Indep. Sys. Operator* (continued...))

3. Contrary To The Protesting CSPs, The Commission’s Reference To “Reasonable Reliance Expectations” Cannot Reasonably Be Construed To Entitle CSPs To Damages For Breach Of Contract.

a. Damages Principles Are Inapposite in This Proceeding.

The Protesting CSPs rely largely on their claim that, when the Commission directed PJM to propose a transitional approach “that protects the reasonable reliance expectations of DR suppliers through the 2014-2015 delivery year,”¹⁸ it brought into play, in EnerNOC’s words, “well established economic principles in commercial law.”¹⁹ But the principles EnerNOC cites (and on which its brethren likewise rely, albeit with many fewer words) are remedies for breach of contract.²⁰ This proceeding does not involve a breach of contract. This case is about PJM’s changes to its tariff pursuant to section 205 of the Federal Power Act. Damages are not available under the Federal Power Act, even in complaint actions, much less in section 205 proceedings.²¹

Corp., 119 FERC ¶ 61,240, at P 13 (2007) (the Commission rejected protests to a compliance filing as a collateral attack, explaining that the protests should have been raised on rehearing)).

¹⁸ November 4 Order at P 81.

¹⁹ EnerNOC Protest at 20.

²⁰ *Id.* at 20-24 (describing “expectation interest” and “reliance interest”); *see generally Restatement of the Law, Second, Contracts*, § 344, A.L.I. (1981) (describing the three remedies for breach of contract: expectation interest, reliance interest, and restitution).

²¹ *See, e.g., Bachofer v. Calpine Corp.*, 134 FERC ¶ 61,100, at P 9 (2011) (footnote & citations omitted) (“Monetary damages are . . . beyond the scope of the Commission’s authority under Part II of the Federal Power Act.”); *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Elec. & Gas Co.*, 103 FERC ¶ 63,047, at P 31 (2003) (“It is well-settled that the Federal Power Act does not confer on the Commission the authority to award damages or reparations for breach of contract”) (citations omitted), *opinion and order on initial decision*, Opinion No. 476, 108 FERC ¶ 61,120 (2004); *LSP-Cottage Grove, L.P. v. N. Natural Gas Co.*, 111 FERC ¶ 61,108, at P 45 (2005) (finding that monetary damages and other contractual remedies are a matter of state law); *Owens-Corning Fiberglas Corp.* (continued...)

The Protesting CSPs' remarkably bold suggestion that they are entitled to contract damages here would have enormously adverse implications to the Commission's regulation of the electric industry. Accepting the CSPs' contention that they are entitled, because of PJM's change to its tariff pursuant to section 205 of the FPA, to be made whole for all of their costs of doing business, *including "expected" profits*, would hamstring the Commission in countless ways. For example, a tariff's credit standards could not be tightened without compensating anyone that created a business or committed to financing arrangements "expecting" that less stringent credit criteria would remain in place. Flaws or inefficiencies in market rules could not be remedied without making whole any market participant that "expected" to continue profiting from the identified defect. Costs of service could not be reallocated because of the "expectation" of continuing lower rates of those whose cost burden would be increased. The Commission's regulation of the industry would grind to a halt as any tariff change would implicate "reliance" claims under contract damages principles.

Such consequences merely underscore that the Protesting CSPs' claims of "reasonable reliance" damages are entirely inconsistent with Commission precedent, and, indeed, do not even conform with the principles of contract law on which they rely. The Commission recently rejected claims of a similar nature in *Northern Natural Gas Co.*, 135 FERC ¶ 61,024 (2011), finding that expectations that a tariff will remain unchanged are unreasonable. In *Northern*, a group of pipeline customers opposed a pipeline's proposal to remove from its tariff a provision that permitted a customer to reduce its firm

v. Transcon. Gas Pipe Line Corp., 49 FERC ¶ 61,282, at 62,064 (1989) ("The Commission has no authority to award damages for a breach of contract") (citation omitted).

transportation quantities when a large industrial end user connected directly to the pipeline, bypassing the customer's distribution system. The customers argued that the disputed provision had been a part of the tariff for many years and they had relied on it to protect them from the consequences of bypass arrangements. The Commission found these contentions immaterial:

Customers that have operated for a time under such a tariff do not thereby bar the pipeline from rescinding such a provision under usual NGA section 4 procedures. Nor do reliance theories of contract law bar a pipeline from filing to remove such a voluntary tariff clause. . . . *Even if some of NMDG/MRGTF's members assumed that the tariff language at issue would not be subject to change, such reliance was unreasonable. Northern always has a right to propose an amendment to its tariff pursuant to section 4 of the NGA.*²²

Like the pipeline in *Northern*, PJM always has had the right to modify the DR capacity performance terms of its tariff. Like the pipeline's customers in *Northern*, therefore, the Opposing CSPs could not *reasonably* have expected that the GLD measurement provisions of PJM's tariff that were in effect when they cleared capacity offers in a past BRA would not be changed in any respect prior to the time for them to fulfill their capacity obligation.

Moreover, on the relatively few occasions when the Commission has considered reliance interests in its decisions, it consistently has balanced any such reliance against other relevant considerations. For example, when the Commission is presented with a request to approve a transportation service agreement that does not conform to the *pro forma* service agreement stated in an interstate pipeline's tariff, it will consider, as relevant here:

(1) whether the shipper reasonably relied to its detriment on the legality of the provision when it entered into the contract such that it will now suffer irreparable harm if the provision were removed; (2) the remedies currently available to the shipper to return itself to the position it would have been in if it had known when the contract was originally executed that the provision was illegal; (3) whether other shippers are harmed by a continuation of the provision[.]²³

Here, the Protesting CSPs do not approach meeting these criteria. They have offered no evidence of any irreparable harm if their purported reliance expectations are not recognized. They have ample means, through the RPM incremental auctions, to reduce or eliminate their BRA commitments, very likely at a profit, and thus put themselves in the position they supposedly would have been in had they known PJM would change the measurement rules. Finally, continuing to allow prior performance measurements would be harmful to others in that it would denigrate the system reserve margin during times of peak demand.²⁴

Nothing indicates that the Commission's reference to "the reasonable reliance expectations of DR suppliers through the 2014-2015 delivery year"²⁵ intended anything other than a similar, reasonable balancing of interests. The gist of the November 4 Order is the correction of a flawed market design, a correction that the Commission found was justified by reliability concerns. It hardly seems reasonable that the Commission intended to allow the market participants that stood most to benefit from the identified flaw to

²² *Id.* at PP 21, 24 (emphasis added).

²³ *Algonquin Gas Transmission, LLC*, 137 FERC ¶ 61,178, at P 16 (2011).

²⁴ *See* November 4 Order at P 67. Should this occur, PJM would be compelled to procure additional capacity in RPM, thereby imposing higher costs on consumers in the PJM region.

²⁵ November 4 Order at P 81.

continue to profit from it under the “transition” rubric. Instead, the November 4 Order can only fairly be read to anticipate that the required transition mechanism should protect the affected CSPs against losses on the commitments they made in the BRAs for the transition years before the DR capacity performance standard was changed in this proceeding. To do otherwise would make a mockery of the Commission’s stated goal of ensuring that meaningful measurement and verification protocols are in place to ensure that the benefits of demand response are being delivered to the system operator.²⁶

b. The Protesting CSPs’ Argument Is Inconsistent with the Legal Principles on Which They Purport to Rely.

Even assuming that the contract law remedies on which the Protesting CSPs rely were applicable, notwithstanding that the relevant rights and obligations are set forth in a tariff which the Commission can modify, their recitation of the relevant law is incomplete and inaccurate. EnerNOC and the other Protesting CSPs mistakenly omit any reference to the duty of a non-breaching party to mitigate its damages. The Commission has recognized this duty in the context of breach of Commission-approved settlement agreements,²⁷ and has observed that damages for a party injured by a breach are reduced by “any cost or other loss that he has avoided by not having to perform.”²⁸

²⁶ See *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, III FERC Stats. & Regs., Regs. Preambles ¶ 31,322, at PP 93-95 (2011).

²⁷ See *Colo. Interstate Gas Co.*, 32 FERC ¶ 63,033, at 65,147-48 (1985).

²⁸ *Id.* at 65,147, quoting *Restatement of the Law, Second, Contracts*, § 347, A.L.I. (1981) (emphasis added). See also *id.*, § 350(1) (“damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation”).

Of course, this proceeding, as noted, does not involve breach of a settlement or any other contract; so the foregoing principles are no more applicable than are the legal remedies on which the Protesting CSPs rely. The point, instead, is that even if EnerNOC's analysis had any bearing on this case, it is incomplete in that it ignores the duty of an injured party to mitigate its damages.

The Commission needs to ensure a fair balance between any cognizable, reasonable reliance interests of the affected CSPs and the interests of the other PJM market participants who will foot the bill for any transition payments that CSPs may receive. Moreover, the Commission needs to avoid allowing unsupported claims of some right to indeterminate, "expected" revenue streams under flawed market rules to limit its flexibility to put into effect tariff changes to improve the operation of markets under its jurisdiction.

Reasonable mitigation of any losses CSPs might realize from the rule change approved in this proceeding is precisely what PJM's transition proposal contemplates. The best and most cost-efficient means of mitigating any losses the Protesting CSPs might incur due to the change to PJM's prior, ambiguous market rules is to buy out their BRA commitments in incremental auctions. That will eliminate their obligations entirely, and, if past incremental auction clearing prices are any indication, will most likely provide profits to the CSPs to offset any harm they otherwise may have suffered.

4. Even Assuming *Arguendo* That Damages Principles Applied, The Protesting CSPs' Failure To Document Any Of Their Claimed Injuries Is Fatal To Their Position.

The Opposing CSPs vigorously oppose PJM's transition proposal, and complain that their businesses involve a large spectrum of costs related to, *inter alia*, recruiting and training personnel, and "sales, business development, operations, finance, accounting,

account management, regulatory, legal, etc.”²⁹ Their implication is that their “reasonable reliance expectations” put PJM stakeholders on the hook to pay them their entire cost of doing business throughout the next three RPM delivery years.

Wholly aside from the lack of any Commission precedent supporting their “damages” position, the Protesting CSPs’ efforts also must be rejected for the more mundane reason of failure of proof: *none of them provides any probative evidence of any costs they have actually incurred in reliance on the now-terminated measurement practice, and which they cannot avoid by modifying their capacity market commitments*. Indeed, the CSPs have not even established how much of their business is comprised of activity in the PJM capacity market, as opposed to the PJM energy market and/or markets outside PJM altogether. Nor do they reconcile their claims that they must be compensated for “expectations” regarding future profits under the superseded PJM market rules with their own observations that they are *currently negotiating* contracts with demand response resources for the 2012/2013 delivery year. That the Protesting CSPs do not yet have in place contracts with end users even for 2012/2013 clearly suggests they have sufficient flexibility in their business arrangements to adapt to PJM’s new DR capacity performance standard in every year of the Commission’s defined transition period. Moreover, they have not even established that they face liability to their end use customers that is not excused through “regulatory out” provisions in their undisclosed contracts.

Therefore, even if legal principles governing measurement of damages for breach of contract were applicable here (though they are not), they cannot and do not overcome

²⁹ Comverge Protest at 14. See also EnerNOC Protest at 8-9; ECS Protest at 5-7.

the Protesting CSPs' failure to demonstrate that PJM's proposal to protect them from losses on their previously cleared capacity market commitments will not compensate them fairly during the transition period.

5. Intervenors' Proposed Alternative Transition Mechanisms Are Beyond The Scope Of Compliance With The November 4 Order, And/Or Otherwise Without Merit.

a. The Commission Has Already Rejected Reinstatement of the Pre-April 7 and Pre-2009 Capacity DR Measurement Rules.

ECS advocates reinstating for the entire transition period the measurement rules as they stood prior to PJM's April 7, 2011 filing in this docket. EnerNOC and Converge join in urging reinstatement of the same rules for the 2012/2013 delivery year. As noted above, such proposals are untimely collateral attacks on the November 4 Order.³⁰ To continue properly pursuing such relief, the Protesting CSPs had to request rehearing of the Commission's order, but they did not. Therefore, they are barred from seeking such remedies in this compliance proceeding.

b. ECS's Attempt to Replace PJM's Approved Tariff Revisions with the Pre-2009 DR Capacity Measurement Rules Is Untenable.

In addition to proposing improper alternative remedies for the transition period the Commission identified in the November 4 Order, ECS argues that the Commission now should restore the pre-2009 provision for adding back end-use customers' load reductions in excess of their PLCs for the *post-transition* delivery year 2015/2016 and

³⁰ The Commission explicitly rejected requests to postpone the effectiveness of PJM's changes for three years, stating that "PJM's tariff revisions are appropriate for its *current* capacity procurement mechanism and help to meet a reasonable reliability need." November 4 Order at P 82 (emphasis added). Similarly, when opponents of PJM's filing argued that PJM should change its add-back rules, the
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thereafter.³¹ But the Commission has accepted the tariff revisions PJM filed in this docket, and those revisions became effective on November 7, 2011. Accordingly, the currently effective rules governing DR capacity performance measurement can be changed only if PJM proposes a change pursuant to section 205 of the FPA, or the Commission orders a change in accordance with section 206 of the Act. ECS's proposal not only clearly exceeds the scope of this compliance proceeding, but also runs afoul of the FPA's procedures.

6. PJM ICC Fails To Justify Its Proposed Modifications To PJM's Transition Proposal.

The PJM Industrial Customer Coalition ("PJM ICC") suggests that PJM's transition proposal should be replaced with the alternative proposal that PJM ICC suggested earlier in this proceeding: allow CSPs to rely on GLD measurement per PJM's pre-filing rules, but "with the caveat that a customer's GLD curtailment cannot exceed the customer's PLC."³² As a variation on this alternative, PJM ICC offers that its proposal could be applied as stated for the first transition delivery year, and then progressively tightened in each subsequent transition year, with PJM's approved PLC performance metric becoming fully applicable in the 2015/2016 delivery year.³³

There are several flaws in PJM ICC's proposal. First, PJM ICC establishes no rationale for substituting its alternative for PJM's transition proposal. PJM ICC does not

Commission determined that such proposals were outside the scope of this proceeding. *Id.* at P 70.

³¹ ECS Protest at 6-7.

³² Comments of the PJM Industrial Customer Coalition, Docket No. ER11-3322-000, at 4 (Jan. 17, 2012) ("PJM ICC Comments").

³³ *Id.* at 4-5.

demonstrate that PJM's transition mechanism is unreasonable or not in compliance with the November 4 Order. Instead, PJM ICC premises its proposal on the Protesting CSPs' defective "contract damages" interpretation of paragraph 81 of the Commission's order.³⁴

Second, PJM ICC's alternative, by definition, would postpone the effectiveness of PJM's approved tariff revisions. As noted, however, the Commission already has rejected any additional delay in making PJM's revisions effective.³⁵ The ICC should have advanced this request through a timely request for rehearing, rather than at the compliance stage of this proceeding.

Finally, PJM ICC's alternative contradicts one of its own guiding principles for the transition mechanism, i.e., that it should not exacerbate reliability issues associated with DR capacity performance.³⁶ PJM ICC essentially concurs with the Commission's determination that exploitation of the ambiguity of PJM's pre-filing rules threatens PJM's ability to ensure system resource adequacy.³⁷ Yet, PJM ICC's alternative is a half-measure that would not eliminate the reliability issue that the approved tariff revisions are intended to eliminate.³⁸ Thus, PJM ICC has failed to support its proposal to substitute its alternative for PJM's proposed transition mechanism.

³⁴ *Id.* at 3.

³⁵ November 4 Order at P 82.

³⁶ PJM ICC Comments at 5.

³⁷ Transcript of Technical Conference, Docket No. ER11-3322-000, at 109-110 (July 29, 2011) ("Transcript").

³⁸ PJM's representative Mr. Bresler explained at the July 29, 2011, technical conference that the ICC approach would not eliminate the problem that PJM's tariff revisions corrected, but would reduce the extent of crediting "over-performance" in excess of PLC by some customers to offset other end users' under-performance or failure to perform. Transcript at 130-31. Therefore, PJM ICC's proposal likewise does not fully resolve the distortion of PJM's capacity
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7. Viridity’s Complaint Regarding Accommodation Of Load Growth Is Outside The Scope Of This Compliance Proceeding.

Revisiting a theme it pursued earlier in the proceeding, Viridity Energy, Inc. (Viridity”) protests the absence from the Compliance Filing “of a plan for addressing legitimate, verifiable, and documented load growth” under the PLC performance metric.³⁹ In the November 4 Order, the Commission held that load growth should be addressed in “any review” by PJM stakeholders of DR capacity measurement and verification.⁴⁰ The Commission imposed no compliance obligation on PJM with respect to this matter. PJM and stakeholders are addressing this issue in ongoing stakeholder reviews of DR capacity measurement and verification, as the Commission suggested. Viridity’s request that the Commission instead now direct PJM to address load growth in this proceeding is another collateral attack on the November 4 Order and is outside the scope of this compliance portion of the proceeding.

8. The Commission Should Reject Converge’s Claim That PJM Has Not Adequately Complied With Paragraph 73 Of The November 4 Order.

Paragraph 69 of the November 4 Order directed PJM to provide with its compliance filing an explanation of how aggregation of DR will be implemented under the approved clarification of PJM’s market rules, including how penalties will be assessed in instances of under-performance by aggregated customers. Paragraph 73 of the order stated that “[a]s determined previously,” PJM’s compliance filing should explain

market that occurs when DR providers are able to commit capacity to PJM in excess of the amounts the end users whose demand response the CSPs aggregate can actually deliver when needed.

³⁹ Protest of Viridity Energy, Inc., Docket No. ER11-3322-001, at 2 (Jan. 17, 2012) (“Viridity Protest”).

⁴⁰ November 4 Order at P 86.

how the benefits of diversification among load response capabilities and performance will continue under PJM's approved clarification of the DR capacity performance rules. In the Compliance Filing, PJM explained how aggregation will be implemented under the new rules, including how penalties will be assessed relative to aggregated DR resources, complying with the Commission's directives.

Comverge contends that PJM did not fully comply with Paragraph 73, purportedly because "PJM does not describe any of the economic benefits of aggregation and how those benefits are preserved, [and] Comverge believes that the 'beneficial effects of aggregation' will be substantially reduced, if not lost, under PJM's proposal."⁴¹ Contrary to Comverge's assertion, however, the Compliance Filing explains that aggregation will remain economically viable, and will continue to benefit from diversification of load and load response capability among end-use customers, under the new performance standard.⁴² Comverge's claim is implicitly founded on the notion that Paragraph 73 obligated PJM to show that there must be precisely the same extent of aggregation under the new rules as occurred in the past. The November 4 Order, however, directed no such showing. In any event, there is ample evidence in this record, upon which the Commission properly relied when it reached its decision, that aggregation is and will remain viable and beneficial when undertaken in conformance with the PLC performance criterion.⁴³ The Commission therefore should reject Comverge's protest regarding PJM's compliance with Paragraph 73 of the Commission's order.

⁴¹ Comverge Protest at 6.

⁴² January 5 Transmittal at 5-7.

⁴³ *See, e.g.*, Transcript at 18-20, 66; 194-95, 197-98; 70-71, 88-90, 126-27; 142-44; 33-34, 127, 149-50 (representatives of EC/Johnson, CNE, PJM and the
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9. Other Parties' Proposed Modifications To PJM's Transition Proposal Are Unjustified.

a. Constellation.

Although they concede that PJM's transition proposal "is fully compliant with" the November 4 Order,⁴⁴ Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc. (together, "Constellation") advocate several modifications to PJM's approach. Most of their suggestions relate to the reliance on incremental auctions as the primary avenue for mitigating CSPs' potential losses due to application of the new performance criterion during the transition years: Constellation proposes to require that CSPs participating in the transition mechanism submit bids equal to the BRA clearing price in the first two incremental auctions, and propose a cap on CSPs' bids in third incremental auctions equal to the capacity deficiency penalty rate.⁴⁵

These revisions to PJM's proposal are unjustified and unnecessary. The thrust of PJM's transition proposal is to permit CSPs to use market-based options to manage their portfolios and businesses as they deem best to adapt to implementation of the PLC metric for DR capacity performance, while merely protecting them from losses during the prescribed transition years. The bid restrictions that Constellation advocates are contrary to this purpose. As PJM has noted previously, clearing prices in incremental auctions

Independent Market Monitor for PJM explaining that many aggregators have always complied with PLC measurement of capacity performance and that aggregation can and will continue under PJM's tariff revisions).

⁴⁴ Comments of Constellation Energy Commodities Group, Inc. and Constellation NewEnergy, Inc., Docket No. ER11-3322-000, at 10 (Jan. 17, 2012) ("Constellation") ("Constellation Comments").

⁴⁵ *Id.* at 7-8. Capacity deficiency penalties are imposed when a market participant does not provide capacity at times of peak system demand commensurate with its prior, RPM and/or FRR commitments.

historically have been lower than BRA clearing prices. If this pattern prevails during the transition period, as PJM anticipates, CSPs will be able to reduce or eliminate, without losses – and, indeed, potentially with monetary gains – any BRA commitments they previously cleared which they believe are now unviable because of the PLC performance standard. This is an economically efficient outcome, one that is beneficial to all PJM market participants.

Constellation’s bid restrictions would artificially distort the incremental auction process. In particular, the proposed bid cap for third incremental auctions could be counter-productive. Such a cap could result in a CSP failing to purchase replacement capacity, and thus remaining committed to supply to PJM DR capacity that the CSP expects to be unable to perform in accordance with the PLC measurement criterion. Beyond that, the RPM rules and market monitoring provisions of PJM’s tariff already provide means of addressing any potential gaming of bids by CSPs in incremental auctions.

Constellation further proposes that PJM should define unviable BRA commitments by CSPs for which make-whole compensation may be available to exclude any end user committed at or below its PLC that the CSP expects to perform at less than committed level, and to make all claims of unviable commitments subject to audit and “certification” by PJM and the Independent Market Monitor (“IMM”). Again, Constellation fails to justify its suggestion. Neither PJM nor the IMM is in a position to judge the extent to which a CSP can assemble or has assembled a portfolio of DR resources that will enable it, under the PLC performance standard, to satisfy its BRA commitments. PJM thus properly proposes to leave to each CSP the assessment of

whether its BRA commitments will be viable under the new DR capacity performance metric.

Finally, Constellation advocates removing from the transition mechanism the provisions for make-whole payments based on CSPs' unavoidable contractual obligations. Constellation's rationale for this change is that CSPs and the DR resources with which they contract are unlikely, in Constellation's view, to invoke "regulatory change" provisions of their contracts despite the change in PJM's market rules.⁴⁶

Constellation's concerns do not withstand scrutiny. PJM has already observed that any CSP contract with a DR resource which includes a "regulatory change" provision will not qualify under the proposed "unavoidable contractual obligations" provisions.⁴⁷ Constellation also overlooks the Protesting CSPs' admissions that they have not yet consummated contracts with most of their clients/customers even for 2012/2013, the first of the transition delivery years. Thus, the record supports PJM's expectation that this aspect of its proposed transition mechanism is unlikely to come into play. Nevertheless, it seems a reasonable tool to have available pursuant to the directive of Paragraph 81 of the November 4 Order.

b. Monitoring Analytics.

Monitoring Analytics, in its capacity as the IMM for PJM, "generally supports" the January 5 Compliance Filing, but takes issue with, and advocates changes to, paragraph C of PJM's proposed transitional provision.⁴⁸ The IMM asserts that this

⁴⁶ Constellation Comments at 10.

⁴⁷ January 5 Transmittal at 13-14.

⁴⁸ Limited Protest of the Independent Market Monitor for PJM, Docket No. ER11-3322-001, at 1 (Jan. 17, 2012) ("IMM Protest"). The provision the IMM seeks to
(continued...)

provision, which offers make-whole compensation for CSPs that have previously cleared DR capacity in a BRA for a transition year, have unavoidable contractual obligations, and have not purchased replacement capacity in incremental auctions to buy out their BRA commitment in full, is inconsistent with the Commission’s directive to create a mechanism “that accounts for commitments previously made by CSPs.”⁴⁹ According to the IMM, such a mechanism does not require insulating CSPs from losses on their BRA commitments for the transition years, and will “introduce[] faulty incentives” for CSPs that have positions to unwind in the incremental auctions.⁵⁰ In the event the Commission accepts paragraph C, the IMM urges that CSPs’ participation in the transition mechanism “be conditioned on clearing an investigation of . . . their market conduct,” and on a review “to ensure that all reasonable efforts were made to unwind the positions and that losses were minimized.”⁵¹

Though PJM recognizes that protection from losses may distort market behavior, paragraph 81 of the November 4 Order requires some degree of loss mitigation for CSPs that have cleared DR capacity in a BRA for a transition year. PJM’s transition proposal strikes a reasonable balance among the competing affected interests in order to comply with the Commission’s stated concern that CSPs may have relied (albeit without justification, in PJM’s view) on unlimited GLD performance measurement when they cleared DR capacity for one or more of the transition delivery years.

modify is paragraph C of the proposed new Section 5.14A of Attachment DD to the Tariff.

⁴⁹ November 4 Order at P 81, quoted in IMM Protest at 2.

⁵⁰ *Id.* at 2-3.

⁵¹ *Id.* at 3.

10. PJM’s Compliance Tariff Revision Describing The Comparable Day Method For Measuring GLD Performance Is Appropriate.

Paragraph 79 of the November 4 Order directed PJM to include in the Tariff a list of the options available to DR resources for estimating comparison loads for GLD customers, along with references to the PJM Manuals where the calculation methods are prescribed. Accordingly, PJM included in the Compliance Filing revisions to the Reporting and Compliance portion of the Emergency Load Response Program to list and briefly describe each of the permissible methods for determining comparison loads for GLD participants. Included in this list was a description of the “comparable day” method for assessing comparison loads.

The Protesting CSPs challenge PJM’s compliance summary of “comparable day.” All note that the language of PJM’s compliance tariff differs somewhat from that of the current iteration of PJM’s Manual M-19, Attachment A, where the comparison load methodologies are described in detail.⁵² The Protesting CSPs assert that the Commission required only that PJM identify the existing methods for establishing comparison loads for GLD performance, but PJM has changed the definition of “comparable day” in the Tariff. Therefore, the CSPs claim, the definition of “comparable day” in PJM’s Compliance Filing is beyond the scope of compliance with the November 4 Order.

⁵² Specifically, the proposed Reporting and Compliance portion of the Emergency Load Response Program of the Tariff defines “comparable day” as follows: “A single weekday that is comparable to the event or test day and accurately represents what the customer’s load would have been absent the event or test.” Manual M-19, Attachment A states: “Comparable Day: The customer’s actual hourly loads on a non-interruption day judged to be similar in other respects to the interruption day. These loads may be adjusted for differences in weather conditions or, an average of the customer’s actual hourly loads on peak days.” PJM Interconnection, L.L.C., *PJM Manual 19: Load Forecasting and Analysis*, (continued...)

The Protesting CSPs all overlook, however, the explanation in PJM's January 5 transmittal that the compliance submission reflected impending changes to Manual M-19 which PJM deferred at the request of its Markets and Reliability Committee ("MRC") pending the outcome of this proceeding and a consultant's analysis.⁵³ Those manual revisions include modification of the "comparable day" method for determining comparison loads which conform to the summary description which PJM included in the Compliance Filing. Though not required, PJM presented the deferred Manual M-19 revisions to the MRC at its meeting on January 26, 2012, and the MRC will consider them further at its next meeting on February 23, 2012.⁵⁴ PJM plans to revise the manual prior to the February 27 start of the third incremental auction for the 2012/2013 delivery year.

PJM's approach is not contrary to the Commission's regulations or the Commission's directive in the November 4 Order. The November 4 Order directed PJM to list in the Tariff "the options available for estimating comparison loads and a reference to the manual in which the options are described."⁵⁵ The only manner in which PJM perhaps exceeded the literal requirements of the order is that, rather than merely *list* the available options and cross-reference the manual, PJM included a brief description of each option. While perhaps not required, PJM believed that a list without a short

Resource Adequacy Planning, 24 (Nov. 16, 2011), www.pjm.com/~media/documents/manuals/m.19.ashx.

⁵³ See January 5 Transmittal at 10 n.23.

⁵⁴ See PJM Interconnection, L.L.C., *Markets and Reliability Committee*, <http://www.pjm.com/committees-and-groups/committees/mrc.aspx#9> (last visited Jan. 30, 2012) (agenda and documents for January 26, 2012, meeting of MRC).

⁵⁵ November 4 Order at P 79.

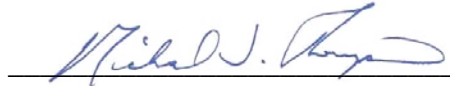
description would be an inadequate reference point for customers. By far the more important point, however, is that, insofar as the “comparable day” option is concerned, PJM merely anticipated an impending change to the relevant manual which it already has developed and which it has informed stakeholders (including the Protesting CSPs) that PJM will make.

The Protesting CSPs’ complaint about the wording of the compliance language thus exalts form over substance. Even if the Commission agreed with their argument and rejected the “comparable day” *description* filed on January 5 in favor of simply a *listed* reference to the “comparable day” methods that appear in the manual, PJM still would make the already-planned changes to the comparable day terms of Manual M-19. Therefore, the protests on this point are immaterial, and should be denied.

CONCLUSION

For the reasons stated in the Compliance Filing and this Answer, the Commission should accept PJM's Compliance Filing, to be effective, without conditions, on November 7, 2011.

Respectfully submitted,



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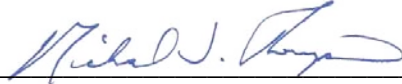
**Counsel for
PJM Interconnection, L.L.C.**

January 30, 2012

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 30th day of January, 2012.

A handwritten signature in blue ink, appearing to read "Michael J. Thompson", is written above a horizontal line.

**Attorney for
PJM Interconnection, L.L.C.**