UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

MOTION FOR LEAVE TO ANSWER AND ANSWER OF PJM INTERCONNECTION, L.L.C.

PJM Interconnection, L.L.C. ("PJM"), pursuant to the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure 212 and 213,[1] submits this Motion for Leave to Answer and Answer in response to the various protests submitted on January 20, 2023.[2] The issue in this proceeding is clear. The Commission's primary statutory duty is to ensure that rates produced pursuant to the PJM Open Access Transmission Tariff ("Tariff") are just and reasonable.[3] Here, absent Commission action, PJM would be required to finalize the 2024/2025 Base Residual Auction ("BRA") results by using an input to the wholesale rate that would contravene the Commission's statutory duty to ensure just and reasonable rates. Specifically, the Locational Deliverability Area Reliability Requirement[4] that would be used for the Delmarva Power & Light South ("DPL-S") Locational Deliverability Area ("LDA") would not provide an accurate reflection of the actual reliability needs of the area based on the actual participation of Planned Generation Capacity Resources in the 2024/2025 BRA.

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[1] 18 C.F.R. §§ 385.212 and 385.213.

[2] PJM's answer is limited to providing the Commission with additional information in response to certain arguments raised in the various protests. The lack of a response to other arguments in this answer should not be viewed as conceding, but rather simply to promote administrative economy by avoiding repetition where appropriate.

[3] *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *certiorari denied*, 567 U.S. 934 (2012) (the Commission's mandate under the Federal Power Act is to ensure that rates charged by electricity wholesalers are just and reasonable).

[4] Terms not otherwise defined herein shall have the same meaning as set forth in the Open Access Transmission Tariff ("Tariff") and Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. ("Operating Agreement").

While PJM's December 23 Filings[5] certainly attracted a large number of naysayers, not a single protester attempts to justify that the previously posted Locational Deliverability Area Reliability Requirement for Delmarva Power & Light South ("DPL-S") is an accurate input that should be used for the 2024/2025 BRA. Instead, the protests attempt to characterize a punitive and incorrect price signal as an acceptable input to the final capacity price by arguing that it is "a function of making assumptions to forecast future market conditions."[6] Additionally, the protesters cloak their flawed assertions of retroactivity claiming that the factually invalid Locational Deliverability Area Reliability Requirement Reliability Requirement should form the basis for an inviolate rate outcome.

However, there can be no settled expectations when no capacity rate for the 2024/2025 BRA has been established and no capacity commitments have been awarded.[7] While offers for capacity have been submitted, the submission of such offers do not and cannot as a matter of law justify an unjust and unreasonable rate that does not even go into effect until June 1, 2024.[8] The filed rate doctrine and rule against retroactive ratemaking provides protection for an entitlement to a particular rate by preventing retroactive changes to such rates. It does not prevent prospective changes to such rates filed pursuant to either section 205 or 206 of the FPA. Further, the fact that

[5] *PJM Interconnection, L.L.C.*, Proposed Amendment to the Locational Deliverability Area Reliability Requirement, Docket No. ER23-729-000 (Dec. 23, 2022); *PJM Interconnection, L.L.C.,* Complaint Alleging that the Locational Deliverability Area Reliability Requirement is Unjust and Unreasonable as Applied in a Particular Locational Deliverability Area in the 2024/2025 Base Residual, Docket No. EL23-19-000 (Dec. 23, 2022) (together, the "December 23 Filings").

[6] *PJM Interconnection, L.L.C.*, Protest of the PJM Power Providers Group, Docket Nos. ER23-729-000 and EL23-19-000, at 32 (Jan. 20, 2023) ("P3 Protest").

[7] *See, e.g.*, *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29 (2014) ("There is a difference between upsetting the expectations of market participants, which might be the case here, and retroactive ratemaking.").

[8] *ISO New England Inc.*, 145 FERC ¶ 61,095, at P 28 (2013) ("The changes would apply only prospectively and after notice. To the extent that the revisions might upset the expectations of market participants (which is distinguishable from retroactive ratemaking), we are not persuaded that their reliance on the current definition outweighs the benefits expected to result from the change, i.e., helping to ensure that reserve requirements are met and system reliability is protected.").

inputs to the wholesale rate, or in this case, the Locational Deliverability Area Reliability Requirement, was required to be posted by a certain date does not serve to bar a prospective change for an input to the wholesale rate.[9] PJM's capacity market, known as the Reliability Pricing Model ("RPM"), is a complex formula rate with inputs from both PJM and Market Participants that are capable of being prospectively changed when it or its elements are unjust and unreasonable.

None of the cases relating to the filed rate doctrine or rule against retroactive ratemaking cited by the protesters are on point or addressed a similar circumstance that is presented in PJM's December 23 Filings. The protesters turn the Commission's responsibilities in this case on their head and seek to effectively straitjacket the Commission's ability to carry out its responsibilities as directed by Congress. To simply countenance an unjust and unreasonable rate when brought to the Commission's attention pursuant to sections 205 and 206 of the Federal Power Act ("FPA") (and before any rate has been finalized and imposed on customers) would effectively void Congress' mandate that the Commission ensure just and reasonable rates.

There are no special provisions under the FPA for the administration of wholesale markets - just that the resulting rates must be just and reasonable.[10] Indeed, the *Atlantic City* case cited by the PJM Power Providers ("P3") witness Kelliher as a "stinging and embarrassing court defeat" arose from ignoring the plain language of the statute.[11] The protesters encourage the Commission to do just that - by disregarding any potentially unjust and unreasonable outcomes by advancing

[9] *See, e.g.*, *Cal. Indep. Sys. Operator Corp.*, 178 FERC ¶ 61,180, at P 81 (2022) ("Although the FPA does not entitle parties to more than 60-days' notice of a proposed Tariff change, from a business perspective, it is reasonable to expect market participants would contemplate that settled practices could be changed, and plan accordingly.").

[10] 16 U.S.C. §§ 824d, 824e.

[11] *See Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) (Commission "attempting to deny the utility petitioners the very statutory rights given to them by Congress"). It is noted that the *Atlantic City* case is actually the genesis for the addition of section 9.2 to the PJM Tariff upon which PJM relies, and which specifies PJM's authority for filing rate changes under the Tariff under these circumstances to prevent harm.

flawed retroactive ratemaking arguments.[12] Indeed, formula rates may be changed prospectively even when the inputs are in.[13]

In short, the protesters efforts to "defend" wholesale markets bet all of their marbles on forcing the Commission to accept an inaccurate and overstated Locational Deliverability Area Reliability Requirement that they themselves do not defend. However, the notion that market sanctity requires citizens of three states to pay a capacity rate that is approximately four times higher than it should be by requiring the use an invalid Locational Deliverability Area Reliability Requirement posted prior to the commencement of the 2024/2025 BRA would effectively neuter the Commission's broad authority that Congress delegated under sections 205 and 206 of the FPA. Such flawed arguments should be rejected as it would create a dangerous precedent that will limit the Commission's authority to carry out its statutory responsibilities to the public to ensure just and reasonable rates.

I. MOTION FOR LEAVE TO ANSWER

The Commission's rules provide that a party may answer protests where the decisional authority permits the answer for good cause shown. The Commission has accepted responses to protests when doing so will ensure a more accurate and complete record or will assist the Commission in its deliberative process by clarifying the issues.[14] All of these criteria are met.

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[12] *See*, *e.g.*, P3 Protest at 32.

[13] By way of example, a transmission formula rate like those found in the same Tariff may be changed prospectively pursuant to Sections 205 and 206 of the Federal Power Act, even after the inputs have been collected and the resulting rate generated and implemented. *See Pub. Citizen, Inc. v. Midcontinent Inde. Sys. Operator, Inc.*, 171 FERC ¶ 61,090, at P 22 (2020) (accepting change to formula rate effective June 2020, but directing any true-up from 2019 to reflect the formula in effect as of 2019).

[14] The Commission regularly allows answers in such cases. See, e.g., *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,165, at P 24 (2012) (accepting answers to a protest because "they have provided information that assisted [the Commission] in [its] decision-making process"); *Cal. Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,241, at P 16 (2009) ("[w]e will accept the answers and responses to the requests for rehearing because they provide information that assisted us in our decision-making process"); *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,031, at P 10 (2003) (accepting answer because "it will not delay the proceeding, will assist the Commission in understanding the issues raised, and will [e]nsure a complete record upon which the Commission may act"); *KN Wattenberg Transmission*

Therefore, PJM respectfully requests that the Commission grant its Motion because the Answer will help clarify the record and contribute to an understanding of the issues.

II. ANSWER

As the Commission is well aware, as an independent regional transmission operator, PJM has no financial interest in the auction results from its wholesale markets. However, as the administrator of the wholesale markets, PJM does have a strong interest in producing just and reasonable outcomes for all Market Participants. Thus, contrary to the unfounded assertions made by the Electric Power Supply Association that "PJM has repeatedly signaled that its focus is on reducing prices for load,"[15] PJM has independently supported issues championed by both supply and load interests where appropriate. For instance, PJM agrees with the many of the supplier comments that the existing Market Seller Offer Cap rules do not permit Capacity Market Sellers to reflect the cost of risk associated with incurring Non-Performance Charges, as well as the opportunity cost of foregone bonus performance payments. Indeed, PJM requested rehearing[16] of the Commission's recent Market Seller Offer Cap order[17] and submitted a separate brief in support of the petitions for review on appeal.

PJM did not submit similar emergency filings on issues raised by some of the suppliers for a simple and obvious reason. Namely, matters such as the Market Seller Offer Cap and the

LLC, 94 FERC ¶ 61,189, at 6 (2001) (finding good cause to accept an answer to a request for rehearing "in order to insure a complete record in this proceeding"); *Tex. E. Transmission, LP*, 131 FERC ¶ 61,164, at P 1, n.3 (2010) (accepting answer to a request for rehearing that aided the Commission's decision-making); *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,153, at P 18 (2009) (accepting answers that aided the Commission's decision-making).

[15] *PJM Interconnection, L.L.C.*, Protest of the Electric Power Supply Association, Docket Nos. ER23-729-000 and EL23-19-000, at 27 (Jan. 20, 2023) ("EPSA Protest").

[16] *PJM Interconnection L.L.C.*, Request for Clarification and Rehearing, Docket Nos. EL19-47-002 and ER21-2444-001 (Oct. 4, 2021).

[17] *See Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,212 (2021) (granting complaint by IMM); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137 (2021) (establishing replacement Market Seller Offer Cap), *order on reh'g*, 178 FERC ¶ 61,121 (2022) ("MSOC Rehearing Order").

Capacity Interconnection Rights issues raised by the suppliers are already in front of the Commission or recently decided by the Commission. Here, the limited issue that PJM discovered during the most recent BRA auction process (*i.e.*, significant amount of Planned Generation Capacity Resources in the DLP-S locational deliverability area that did not offer into the 2024/2025 BRA) is not one that has ever been presented to the Commission. If the recently discovered issue had already been in front of the Commission, PJM would not have needed to submit these emergency filings. However, that was not the case. Thus, the fact that PJM's filings here raise a newly discovered issue related to an incorrect input, before the capacity auction results are completed, is entirely distinguishable from the other issues raised by the protestors. In short, PJM's filings to prospectively correct the Locational Deliverability Area Reliability Requirements, so that the demand curve is representative of the actual reliability needs of a Locational Deliverability Area ("LDA"), should not and cannot be viewed as "one-sided."

PJM did not take lightly the decision to delay the outcome of the 2024/2025 BRA and fully understands the need for market certainty as soon as possible. However, given the potential magnitude of excess overpayments for capacity in DPL-S resulting from an incorrect Locational Deliverability Area Reliability Requirement that simply does not reflect the actual reliability requirements of the area, PJM could not sit idly by and finalize the auction results without first giving the Commission an opportunity to decide how the 2024/2025 BRA should be completed. To that end, PJM did not, and could not, unilaterally "act swiftly and decisively to modify clearing prices that it arbitrarily deems to be too high."[18] Rather, it is the Commission that must decide whether a potential clearing price based on an inaccurate Locational Deliverability Area Reliability

[18] *PJM Interconnection, L.L.C.*, Protest of LS Power Development, LLC, Docket Nos. ER23-729-000 and EL23-19-000, at 4 (Jan. 20, 2023).

Requirement for the DPL-S LDA produces a just and reasonable rate. Given that no protester even attempted to defend DPL-S' Locational Deliverability Area Reliability Requirement as the correct input,[19] PJM submits that finalizing the 2024/2025 BRA with this invalid auction input does not produce a just and reasonable rate for the reasons provided in PJM's December 23 Filings.

A. PJM Remains in Full Compliance with the Tariff

Neither the delay of the completion of the 2024/2025 BRA nor the fact that no auction results have been posted violates the PJM Tariff. As the protesters concede, the Tariff does not specify a deadline to complete the auction or a deadline to post final auction results.[20] Rather, the relevant Tariff provisions states that "*[a]fter conducting the Reliability Pricing Model Auctions*, PJM will post the results of each auction as soon thereafter as possible."[21] In other words, the Tariff requires PJM to post "the results of each auction as soon thereafter as possible[,]" but only "[a]fter conducting the Reliability Pricing Model Auctions." Here, PJM has not completed the conduct of the 2024/2025 BRA, so the requirement to post "as soon thereafter as possible" has not been triggered.

While the term "conducting" is not explicitly defined in the Tariff, it refers to the process of clearing and finalizing the auction results.[22] Notably, no protester cited to a Tariff requirement that PJM must complete the 2024/2025 BRA by a specific deadline because there is no specific Tariff deadline for when PJM must complete the conduct of the BRA. For the 2024/2025 BRA,

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[19] While EPSA and Constellation suggest that the prices in DPL-S should be high given growing penetration of Intermittent Resources and the upcoming retirement of Indian River 4 Generating Station, no defense is provided to justify the use of an incorrect Locational Deliverability Area Reliability Requirement for DPL-S. *See* EPSA Protest at 27-28; *PJM Interconnection, L.L.C.*, Comments of Constellation Energy Generation, LLC, Docket Nos. ER23-729-000 and EL23-19-000, at 8-9 (Jan. 20, 2023) ("Comments of Constellation Energy Generation").

[20] *See* EPSA Protest at 11.

[21] Tariff, Attachment DD, section 5.11(e) (emphasis added).

[22] *See* Tariff, Attachment DD, section 5.12.

under the circumstances described in the December 23 Filings (an overstated and inaccurate Locational Deliverability Area Reliability Requirement in a small LDA due to Planned Generation Capacity Resources not participating in the auction), PJM has not completed the auction clearing process or finalized any auction results. In fact, it would be inappropriate for PJM to complete the process of conducting the 2024/2025 BRA without giving the Commission an opportunity to prospectively correct an invalid input for the DPL-S LDA before the results of the 2024/2025 BRA is completed and finalized. Thus, while PJM made preliminary price calculations based on the offers submitted during the auction window to represent that the DPL-S clearing price could be approximately four times higher than it otherwise might be, these calculations have not been completed or finalized (and are not required to be by a specified Tariff deadline). PJM suspended the auction clearing before it was completed so that the Commission has an opportunity to make a determination on the merits of PJM's proposal to update the Locational Deliverability Area Reliability Requirement used in the optimization algorithm. Consequently, the conduct of the 2024/2025 very much remains open pending Commission action on PJM's December 23 Filings. Based on the foregoing, PJM is not required to post any auction results at this time, because the process of conducting the 2024/2025 BRA has not been completed.

To be sure, PJM does not take the position that the term "as soon as possible" means it can delay posting final results indefinitely. Rather, PJM intends to promptly post the 2024/2025 BRA results after the auction is cleared and finalized (*i.e.*, after conducting the auction). As PJM made clear in the December 23 Filings, PJM is suspending the completion of the 2024/2025 pending Commission action on those filings. In the meantime, because the auction has not been completed, PJM is not required to post final results for the 2024/2025 BRA.

B. PJM's Section 205 Filing was Appropriately Submitted in Accordance with Tariff, Section 9.2(b) Given the Imminent Severe Economic Harm That Could Result from the Application of an Incorrect Locational Deliverability Area Reliability Requirement.

Tariff, Section 9.2(b) describes the "Rights of the Transmission Provider," and explicitly states that:

> PJM may file with less than a full 7 day advance consultation in circumstances where imminent harm to system reliability or imminent severe economic harm to electric consumers requires a prompt Section 205 filing; provided that PJM shall provide as much advance notice and consultation with the Transmission Owners and the PJM Members Committee as is practicable in such circumstances, and no such emergency filing shall be made with less than 24 hours advance notice.

PJM submitted the section 205 filing pursuant to Tariff, section 9.2(b) given the "imminent severe economic harm to electric consumers" in the DPL-S zone should load could incur capacity costs that are approximately four times the amount that the load should pay if the Locational Deliverability Area Reliability Requirement accurately reflects the reliability needs of the LDA based on actual participation seen in the auction. Here, the economic harm to electric consumers is both imminent and severe. More particularly, the economic harm is imminent because should the Commission reject the December 23 Filings, PJM will be required to complete the conduct of the 2024/2025 BRA and post auction results as soon as possible. Likewise, the economic harm of such an outcome is severe because electric consumers in DPL-S would be required to unnecessarily pay higher capacity costs of approximately four times higher than they otherwise have to pay if the correct Locational Deliverability Area Reliability Requirement for DPL-S is used as an input for the 2024/2025 BRA. This type of imminent severe economic harm is precisely what the Tariff allows PJM to fix *before* the auction results are finalized. Otherwise, severe

economic harm would have already resulted (and would no longer be imminent) if PJM cannot fix the identified issue prior to the results being finalized.

Constellation attempts to argue that it is not unusual for an LDA's clearing price to increase fourfold from prior BRA clearing prices so that this alone is insufficient to demonstrate imminent severe economic harm as required under Tariff, section 9.2(b).[23] What Constellation omits, however, is that there was no economic harm to electric consumers from the prior BRA clearing prices because prior results appropriately reflected the actual supply and demand fundamentals. By contrast, the economic harm to electric consumers in DPL-S for completing and finalizing the 2024/2025 BRA with an incorrect Locational Deliverability Area Reliability Requirement that does *not* reflect actual supply and demand fundamentals is that such consumers would have to pay approximately four times what they otherwise should pay for capacity. Therefore, comparing prior clearing prices in various LDAs to the potential 2024/2025 clearing price for DPL-S is like comparing apples and oranges as prior auction prices are simply irrelevant. As PJM noted in the December 23 Filings, the identified issue here has never occurred prior to the auction process for the 2024/2025 BRA.

C. PJM's Proposed Revisions are Prospective and Do Not Violate Either the Filed Rate Doctrine or the Rule Against Retroactive Rulemaking.

The filed rate doctrine generally "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."[24] This doctrine is rooted in the language of the Federal Power Act: section 205(c) of the FPA, which requires utilities to file rate schedules with the Commission; and section 206(a) of the FPA, which allows the Commission to fix rates and charges. Together, these statutory provisions require the open and

[23] Comments of Constellation Energy Generation at 9-10.

[24] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

transparent filing of rates, limiting a public utility to charge only those rates that are on file, and broadly proscribing their retroactive adjustment, commonly referred to as the "filed rate doctrine."[25] Courts have explained that the filed rate doctrine serves two primary purposes.[26] First, it prevents regulated companies from engaging in price discrimination between customers.[27] Second, it preserves the exclusive role of the Commission's "primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."[28]

Derived from the filed rate doctrine is the "rule against retroactive ratemaking," which focuses on how the current rate is determined. Specifically, under the rule against retroactive ratemaking, "even charges that are imposed prospectively, and therefore satisfy the filed rate doctrine, are improper if they are based on the [utility's] losses in a prior period."[29] In other words, "a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle."[30]

1. *There Can Be No Violation Of Rule Against Retroactive Ratemaking When No Rate Has Been Established From The 2024/2025 Base Residual Auction.*

As previously noted, PJM has not completed the auction so no prices (*i.e.*, rates) have been established from the recent BRA and no Capacity Resources have been awarded any capacity commitments for the 2024/2025 Delivery Year. Because no rate has yet been established for the

[25] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018).

[26] 64 Am. Jur. 2d Public Utilities § 52.

[27] Courts of appeals have described the doctrine as intending "to prevent discriminatory rate payments." *Cities Serv. Gas Co. v. FPC*, 424 F.2d 411, 417 (10th Cir.1969), *cert. denied*, 400 U.S. 801 (1970).

[28] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 577-78 (quoting *City of Cleveland v. FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-63 (1986).

[29] *Pub. Util. Comm'n of State of California v. FERC*, 988 F.2d 154, 161 (D.C. Cir. 1993)

[30] *City of Piqua, Ohio v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (Internal quotation marks omitted.).

2024/2025 BRA, there necessarily can be no rate to change (retroactive or not) at this time. At this point in time, no unit owner has received a capacity award, been required to take on a capacity obligation in the Delivery Year or received an entitlement to a stream of capacity revenues during the Delivery Year. In short, the rule against retroactive ratemaking and the filed rate doctrine are simply inapplicable here because there is no rate to change and no rate change is being proposed – let alone a proposal to retroactively charge customers for "losses in a prior period"[31] or to "to recoup past losses."[32] Further, the purpose of conducting the Reliability Pricing Model ("RPM") Auctions in advance of the Delivery Year is to provide a rate that investors can rely on in investing capital for a resource to become in-service by the start of the Delivery Year. Given that the 2024/2025 BRA has not been completed and no results have been announced, there is no rate that any investors could validly have relied on.

2. <u>There Can Be No Violation Of The Filed Rate Doctrine When PJM Is Not Proposing To Retroactively Amend Any Rate Or Non-Rate Term.</u>

Having demonstrated that PJM's proposal makes no change to any rate, PJM now turns to the protesters' argument that the filed rate doctrine also applies to non-rate terms within the Tariff that also may not be changed retroactively.[33] The answer is simple: the December 23 Filings do not propose any retroactive changes to non-rate terms. As protesters noted, PJM already posted the Locational Deliverability Area Reliability Requirement in compliance with Tariff, Attachment DD, section 5.11(a). But what appears to be lost in the protests is that PJM is not proposing to change or update a non-rate term (*i.e.*, requirement to post Locational Deliverability Area Reliability Requirement prior to conducting the BRA pursuant to Tariff, Attachment DD, section

[31] *Pub. Util. Comm'n of State of California v. FERC*, 988 F.2d 154, 161 (D.C. Cir. 1993).

[32] *City of Piqua, Ohio v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979).

[33] *See Oklahoma Gas & Elec. Co. v. FERC*, 11 F.4th 821, 830 (D.C. Cir. 2021).

5.11(a)). Indeed, it would be unnecessary to repost an updated Locational Deliverability Area Reliability Requirement for DPL-S given that this updated reliability requirement would only be used for clearing the auction and is informed by offers that have already been submitted during the bidding window. Therefore, PJM is not proposing to change (retroactively or not) the posting requirement in Tariff, Attachment DD, section 5.11(a).

Instead, PJM is proposing to prospectively update the Locational Deliverability Area Reliability Requirement, informed by offers that have been submitted during the auction window, for purposes of completing the optimization algorithm in completing the auction clearing. Because there is no specific Tariff deadline to complete the auction clearing, PJM has not completed the conduct of the 2024/2025 BRA pending a Commission order on the December 23 Filings. As a result, PJM's proposal to use an updated Locational Deliverability Area Reliability Requirement for purposes of completing the auction and awarding capacity commitments is prospective and does not run afoul of the filed rate doctrine. Furthermore, the Locational Deliverability Area Reliability Requirement is unquestionably just an input to the wholesale rate (*i.e.*, final BRA clearing price) and in this context, the Commission has held that the filed rate doctrine does not attach when updating "inputs to the wholesale rate," which "are not the ultimate rate under section 205 until . . . after the auction has cleared."[34]

Arguments that Market Participants should be allowed to adjust their Sell Offers based on an updated Locational Deliverability Area Reliability Requirement are simply unpersuasive. The auction results are dependent on not only the demand, but what resources actually offer into the auction, so any prediction of anticipated clearing prices based on a posted Locational

[34] *ISO New England Inc.,* 165 FERC ¶ 61,088, at P 24 (2018) (Internal quotation marks omitted).

Deliverability Area Reliability Requirement is not guaranteed. Market Participants that choose to make business decisions based on such speculation do so at their own risk.

In any event, the purpose of a single clearing price market is to motivate Market Sellers to submit offers based on resource's marginal costs (not inclusive of a profit margin). Therefore, any updates to the Locational Deliverability Area Reliability Requirement should not impact a resource's offer in the RPM Auctions. As the Independent Market Monitor for PJM ("Market Monitor") observed, for the 2024/2025 BRA, "Market [P]articipants offered competitively or were constrained to competitive offers by the market power mitigation rules, and there is no reason to believe that their offers were affected by the overstated demand."[35] As a result, under these circumstances, the auction bidding window for the 2024/2025 BRA need not be reopened for Capacity Market Sellers to adjust their offers based on an updated Locational Deliverability Area Reliability Requirement. The benefit of a single clearing price is that it provides an efficient investment in new generation based on the clearing price.[36] Thus, it is ultimately the clearing price, rather than the Locational Deliverability Area Reliability Requirement, that should inform Market Participants' participation decision in the RPM Auctions.

Allowing Capacity Market Sellers to adjust their offers based on an updated Locational Deliverability Area Reliability Requirement is also plainly unworkable because changed circumstances (such as project financing or permitting) may cause some Capacity Market Sellers that previously did not offer a resource to submit a Sell Offer, or vice versa. As a result, if the bidding window was reopened to allow Capacity Market Sellers to adjust Sell Offers, it is possible

[35] *PJM Interconnection, L.L.C.*, Comments of the Independent Market Monitor of PJM, Docket Nos. ER23-729-000 and EL23-19-000, at 5 (Jan. 20, 2023) ("Market Monitor's Comments").

[36] Professor Ross Baldick, Single Clearing Price in Electricity Markets (Feb. 18, 2009), http://www.cramton.umd.edu/papers2005-2009/baldick-single-price-auction.pdf.

that additional changes would be needed to further update the Locational Deliverability Area Reliability Requirement based on the auction participation from such a subsequent bidding window. This in turn could result in a circular effect of constantly having to update the Locational Deliverability Area Reliability Requirement to give Market Participants an opportunity to adjust their Sell Offers based on revised reliability requirements. Such an outcome would clearly be unworkable and would paralyze the conduct of the auctions.

3. The Filed Rate Doctrine And Rule Against Retroactive Ratemaking Are Designed To Prevent Retroactive Increases Of Rates For Power That Consumers Already Consumed.

While courts that have considered the filed rate doctrine and the rule against retroactive ratemaking have generally proclaimed that a regulated entity cannot charge a rate for its services other than those filed with the Commission, a closer examination of the relevant case law on both the filed rate doctrine and the rule against retroactive ratemaking reveals a general prohibition for retroactively charging consumers a rate that is higher from what was the approved rate at the time the services were consumed by customers.[37] Thus, it is notable that several courts have specified that these rules "prevent[] the Commission itself from imposing a rate *increase* for [power] already sold."[38] In other words, "the doctrine bars the Commission from imposing after-the-fact *increases*, such as surcharges . . . ."[39] In fact, the DC Circuit explicitly clarified that FPA "§ 206(b) *authorizes only retroactive refunds (rate decreases)*, not retroactive rate increases"[40] because this "provision

[37] *See e.g., Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821 (D.C. Cir. 2021) (utility seeking to recover costs of expanding transmission despite); *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018) (utility seeking to recover gas procurement costs); *Pub. Util. Comm'n of State of California v. FERC*, 988 F.2d 154 (D.C. Cir. 1993) (gas utility seeking to recover costs); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990) (utility seeking to retroactively charge for purchased gas); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (gas producers seeking to recover costs).

[38] *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (emphasis added),

[39] *Pub. Util. Comm'n of State of California v. FERC*, 988 F.2d 154, 160 (D.C. Cir. 1993) (emphasis added).

[40] *City of Anaheim v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009) (emphasis added).

permits FERC-ordered refunds '*of any amounts paid . . . in excess of* those which would have been paid under the just and reasonable rate.'"[41] Additionally, the appellate court explained that both the filed rate doctrine and the rule against retroactive ratemaking "are designed to allow *purchasers* of [power] to know the consequences of purchasing decisions they make."[42]

Thus, it is clear that when evaluating the filed rate doctrine and the rule against retroactive ratemaking, courts have focused on preventing consumers from being retroactively charged a rate that is higher than what they may have expected to pay under the filed rate for the service that was provided. In fact, all of the appellate and Supreme Court cases advanced by the protestors involve fact patterns where the utility sought to either retroactively increase rates or retroactively amend non-rate terms (*i.e.*, tariff imposed deadlines or other rules) to collect additional revenue from customers for power already sold.[43] As a result, the fact that PJM's proposal only serves to prospectively prevent an unjust and unreasonable rate that would otherwise cost consumers in DPL-S more than four times what they should otherwise pay is significant because no rate increase is being proposed here (nor can a change be proposed given the fact that no rate for capacity has been set for the 2024/2025 Delivery Year).

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[41] *Id*.

[42] *Pub. Util. Comm'n of State of California v. FERC*, 988 F.2d 154, 163-64 (D.C. Cir. 1993) (emphasis added).

[43] *See e.g., Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821 (D.C. Cir. 2021) (utility seeking to recover costs of expanding transmission despite); *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018) (utility seeking to recover gas procurement costs); *Pub. Util. Comm'n of State of California v. FERC*, 988 F.2d 154 (D.C. Cir. 1993) (gas utility seeking to recover costs); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990) (utility seeking to retroactively charge for purchased gas); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (gas producers seeking to recover costs). The sole case cited in the protesters' briefs that was brought by customer interests is inapposite to the issue at hand, because the court's review in *Towns* was limited to whether "the Commission had any discretion to withhold refunds when it discovers that a utility has imposed charges not in conformity with its rate schedules." *Towns of Concord, Norwood, and Wellesley, Mass. v. FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992) ("Towns"). In *Towns*, the court held that the FPA "reveals no statutory command mandating refunds when the rate charged exceeds that filed" and simply deferred to the Commission's discretion in declining to issue refunds. *Id*.

Therefore, not only is there no precedent on the filed rate doctrine or rule against retroactive ratemaking bearing facts that resemble anything close to the circumstances presented here and what PJM is proposing, the December 23 Filings would not increase costs to customers. Additionally, the proposed revisions also do not undermine either of the two primary purposes served by the filed rate doctrine. Namely, Load Serving Entities in the DPL-S will all be charged the same rate as other Load Serving Entities in the LDA based on the final results from 2024/2025 BRA. Additionally, PJM's December 23 Filings preserves the Commission's role to ensure just and reasonable rates, and in fact, urge the Commission to satisfy its statutory obligation to ensure just and reasonable rates.

D. Protesters' Reliance and Settled Expectation Arguments are Unpersuasive.

Having demonstrated that the proposed revisions are prospective and do not violate the filed rate doctrine or the rule against retroactive ratemaking, PJM next turns to the protesters arguments pertaining to reliance and settled expectations based on the previously posted Locational Deliverability Area Reliability Requirement. The Commission has previously explained that there is a difference between upsetting the expectations of Market Participants and retroactive ratemaking.[44] In prior cases where protestors asserted that the proposed Tariff revisions would disrupt settled expectations mid-course and harm Market Participants who relied on the existing Tariff in calculating prices and entering into contracts, the Commission has considered a "balancing of interests" or "balancing of equities" in determining the appropriate outcome.[45] Thus, "[w]here filed rate doctrine and prohibition against retroactive ratemaking concerns do not apply,

[44] *See ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29 (2014), *reh'g denied*, 150 FERC ¶ 61,129 (2015).

[45] *See id.* (explaining that the Commission accepted proposed tariff revisions after conducting a balancing of interests and determining that proposal's benefits, which included preventing consumers from paying "for non-existent capacity or [the possibility of] fac[ing] a multi-year capacity shortfall," outweighed "market participants' reliance upon the existing FCM rules."); *see also ISO New England Inc.*, 145 FERC ¶ 61,095, at P 29 (2013) (noting the Commission has used this balancing test to accept or reject proposed tariff revisions).

the Commission has in some cases considered disruptions to parties' settled expectations in determining whether a proposal is just and reasonable."[46]

For example, the Commission previously accepted ISO New England, Inc.'s ("ISO-NE") proposed revision to allow non-commercial capacity resources to file with the Commission a request for a one-year deferral of their Capacity Supply Obligation[47] under certain circumstances *and allowed these revisions to become effective for capacity auctions that already occurred*.[48] In accepting these changes, the Commission reasoned:

> [t]he benefits expected to result from the proposed Tariff revisions, including preventing consumers from having to pay for non-existent capacity or possibly face a multi-year capacity shortfall, outweigh market participants' reliance upon the existing [capacity market] rules that do not include a provision allowing a capacity resource to seek a one-year deferral of its Capacity Supply Obligation under certain, limited circumstances.[49]

Similarly, the Commission also accepted ISO-NE's proposed revisions to expand the definition of what constitutes a "Shortage Event"[50] to include any deficiency of thirty-minute operating reserves for thirty or more minutes, as well as modifications specific to import-constrained capacity zones.[51] In accepting these changes to the definition of Shortage Event *even for capacity auctions that were already completed*, the Commission reasoned:

> Contrary to the tenor of Protestors' arguments, the earlier effective date would not violate the principles underlying the rule against retroactive ratemaking. The changes would apply only prospectively

[46] *ISO New England Inc*., 176 FERC ¶ 61,125, at P 127 (2021).

[47] A Capacity Supply Obligation is an obligation to provide capacity from a resource, or a portion thereof, to satisfy a portion of the Installed Capacity Requirement. A Capacity Supply Obligation is acquired through a Forward Capacity Auction, a reconfiguration auction, or a Capacity Supply Obligation Bilateral. ISO New England Inc.'s Tariff section I.2.

[48] *ISO New England Inc*., 148 FERC ¶ 61,185, at P 29 (2014).

[49] *Id*.

[50] ISO New England, Inc.'s Shortage Event is similar to PJM's Performance Assessment Interval where committed capacity resources may be assessed Non-Performance Charges when such event is triggered.

[51] *ISO New England Inc.,* 145 FERC ¶ 61,095, at P 1 (2013).

> and after notice. To the extent that the revisions might upset the expectations of market participants (which is distinguishable from retroactive ratemaking), we are not persuaded that their reliance on the current definition outweighs the benefits expected to result from the change, i.e., helping to ensure that reserve requirements are met and system reliability is protected.[52]

In balancing the interest and equities of ISO-NE's proposed changes, the Commission found that the benefits of ensuring that reserve requirements were met and system reliability is protected, outweighed any settled expectations or market participants who relied on the previously existing definition of Shortage Event.[53]

A couple of themes can be gained from these two cases. First, the Commission has established through its past precedent that proposed changes with 60 days' notice as required by FPA section 205 constitute a prospective change and do not necessarily violate the filed rate doctrine or the rule against retroactive ratemaking *even after the capacity auction was long completed*.[54] Second, in conducting the "balancing of interests" or "balancing of equities" tests, the Commission has focused on "preventing consumers from having to pay for non-existent capacity"[55] and protecting consumers by "ensuring that reserve requirements are met and system reliability is protected"[56] and found these consumer interests outweigh any settled expectations or reliance arguments from market sellers.

Here, PJM's December 23 Filings pass the Commission's "balancing of interests" and "balancing of equities" tests. More particularly, PJM's proposed revisions would allow for the use of a corrected input (*i.e.*, accurate Locational Deliverability Area Reliability Requirement) to the

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[52] *Id*. at P 28.

[53] *Id*. at P 29.

[54] *ISO New England Inc*., 176 FERC ¶ 61,125, at P 128 (2021).

[55] *ISO New England Inc*., 148 FERC ¶ 61,185, P 29 (2014).

[56] *ISO New England Inc.,* 145 FERC ¶ 61,095, at P 29 (2013).

final capacity rate for the DPL-S LDA. As noted above, it is telling that no protester argued that the previously posted 2024/2025 Locational Deliverability Area Reliability Requirement for DPL-S is correct on the merits. As the Market Monitor explains, customers "would be required to buy more capacity than required for reliability and at a price that does not reflect the actual reliability requirement."[57] The proposed update will serve to establish a just and reasonable capacity rate for the 2024/2025 BRA and prevent consumers from having to pay unnecessarily high capacity prices that do not reflect actual supply and demand fundamentals. Further, using an input that is, based on this record, demonstrated to be incorrect to clear the 2024/2025 BRA would undermine the very purpose of the capacity market as it would result in significant over procurement of capacity at an unreasonable cost (approximately four times greater than necessary). Thus, the benefit of PJM's proposed revisions significantly outweigh any potential disruptions to Capacity Market Sellers' settled expectations and any harm caused by reliance on the previously posted Locational Deliverability Area Reliability Requirement.

Specifically, the posting of the Locational Deliverability Area Reliability Requirement prior to the conduct of the BRA is intended to provide transparency to Market Participants and are for informational purposes only. Nothing in the posted Locational Deliverability Area Reliability Requirement should impact a Market Participant's offer into the RPM Auctions given the underlying reason for a single clearing price market, which is to incent Market Sellers to submit the marginal cost of the resources. Further, any Market Participants that claim to have made irreversible business decisions based on the posted Locational Deliverability Area Reliability Requirement did so by attempting to predict the clearing price for the 2024/2025 BRA, but did so at their own risk. That is because as the clearing price depends not just on the demand that is

[57] Market Monitor's Comments at 4.

represented by the Locational Deliverability Area Reliability Requirement, but also the supply (and associated offers) that participate in the auctions. Simply put, updating a previously posted Locational Deliverability Area Reliability Requirement does not disrupt any settled expectation, because there is no guarantee of what the final BRA clearing price will be based upon the information made available prior to the auction.

The identified issue, and proposed remedy, in the December 23, 2022 Filings is entirely distinguishable from the one ISO-NE case where the Commission found that equitable considerations weighed against accepting the changes.[58] In that proceeding, market sellers submitted their de-list bids with the expectation that the economic life of an existing capacity resource would be calculated based on the tariff rules at the time of the submittal. Specifically, under the then effective tariff rules, the economic life calculation assumed that an existing capacity resource that earned positive cash flows in the earlier years would continue to operate and sustain negative cash flows in later years as long as its overall cumulative cash flows remained positive.[59] However, ISO-NE proposed to modify the economic life calculation to reflect that a competitive resource facing years of continual losses will seek to exit the Forward Capacity Market ("FCM") before incurring those losses that reduce its cumulative profits.[60] In rejecting that proposal, the Commission found that the potential disruptions to market participants' settled expectations and harm caused by reliance on existing economic life calculation outweighed the benefit of updating the economic life calculation.[61] ISO-NE's proposal in this case would be akin to PJM proposing changes to how the unit-specific Market Seller Offer Cap is calculated after the deadline for Market

[58] *ISO New England Inc*., 170 FERC ¶ 61,187, at P 15 (2020).

[59] *Id.* at P 4.

[60] *Id.* at P 5.

[61] *Id.* at P 17.

Sellers to submit unit-specific Market Seller Offer Cap. Clearly, such a proposal would create severe disruptions to any settled expectations and cause harm to those who relied on the rules prior to the unit-specific deadline as it would limit the price that Capacity Market Sellers can offer resources into the RPM Auctions after they already submitted unit-specific offer caps for review and approval under a different set of rules. However, what PJM is proposing in the December 23 Filings is far more limited, has a much smaller impact on the overall market, and allows an updated input (*i.e.*, Locational Delivery Area Reliability Requirement) to be used in the auction clearing that is reflective of the actual reliability needs in the LDA.

Likewise, the Commission's order in *Maryland Public Service Commission* cited by certain protesters is also unavailing.[62] In that case, the Commission denied a complaint submitted by a group of capacity buyers who alleged that PJM's capacity auction results for four previously conducted BRAs should be re-determined.[63] In dismissing that complaint, the Commission explained that "changing a rate already determined in accordance with existing tariff provisions on which parties have relied would defeat the purpose of the forward binding commitment and undo the incentives for new capacity resources."[64] Clearly, the circumstances presented in PJM's December 23 Filings are completely different from the *Maryland Public Service Commission* case given that no rate from the 2024/2025 BRA has been determined or announced so no parties could have relied on such a nonexistent rate. Similarly, the *Public Citizen v. MISO* case cited by EPSA

[62] *Maryland Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276 (2008), *reh'g denied*, *Maryland Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,274 (2009).

[63] *Id*.

[64] *Id*. at P 6.

is also taken out of context as there, the Commission was simply explaining that it did not need to review and approve auction results before they became final.[65]

In sum, the Commission has the authority and ability to "require or approve changes in rates or market designs that may in some ways be counter to investor expectations in order to ensure that rates are just and reasonable."[66] Here, the Commission can and should accept PJM's December 23 Filings, because the benefits of PJM's proposal (*i.e.*, reflecting actual supply and demand fundaments to ensure just and reasonable rates) are great while there can be little, if any, settled expectations or harm caused by relying on a previously posted Locational Deliverability Area Reliability Requirement. This is the appropriate approach to the balancing test that the Commission applies when addressing broad claims of settled expectations of the parties.

E. The Commission Has Broad Statutory Authority to Ensure Just and Reasonable Rates under Section 309 of the Federal Power Act.

As clearly explained by the courts, the filed rate doctrine rests on two provisions of the FPA: section 205(c), which allows utilities to file rate schedules with the Commission, and section 206(a), which allows the Commission to fix rates and charges.[67] In other words, the filed rate doctrine and rule against retroactive ratemaking apply only to retroactive rates arising under sections 205 and 206 of the FPA. Neither the filed rate doctrine nor the rule against retroactive ratemaking bars the Commission from its broad statutory authority under section 309 of the FPA.

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[65] *Pub. Citizen, Inc. v. Midcontinent Inde. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 at P 89 (2019) (rejecting Public Citizen's argument that the Commission must review electric market clearing prices before the rate goes into effect to determine if the rate is just and reasonable "because, in the market-based rate context, the rate on file with the Commission is the Tariff describing the Auction procedures, not the prices that may change over time").

[66] *PJM Interconnection, L.L.C.,* 179 FERC ¶ 61,161, at P 23 (2022)

[67] *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 71-72 (D.C. Cir. 1992).

In particular, under FPA section 309(h), the Commission is vested with "broad remedial power" to perform "'any and all acts' 'necessary or appropriate' to carry out the FPA's statutory ends."[68]

In fact, the Commission itself explained that "courts have recognized that section 309 of the FPA provides the Commission with broad remedial authority, *including the ability to act retroactively to correct unjust situations* and to ensure that what 'should have been done' is done."[69] Further, in stating that "[i]t is long-established that the primary aim [of the FPA] is the protection of consumers from excessive rates and charges,"[70] the DC Circuit explained that section 309 "vests the Commission with broad remedial authority . . . [and] unquestionably gives [the Commission] the authority, in fashioning remedies, to consider equitable principles."[71] Courts have thus "endorsed FERC's authority under Section 309 to recoup erroneous refunds, to order refunds where the rate paid exceeds the filed rate, and to imply a refund protection where the Commission erred in accepting a tariff revision that lacked such a commitment."[72] Therefore, as noted in PJM's December 23 Filing,[73] along with sections 205 and/or 206 of the FPA, section 309 of the FPA vests broad authority with the Commission to ensure that the final capacity rate associated with the 2024/2025 BRA is just and reasonable, should the Commission elect to invoke section 309 of the FPA in this proceeding.

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[68] *Ameren Illinois Co. v. FERC*, No. 20-1277, 2023 WL 363887, at *1-2 (D.C. Cir. 2023).

[69] *Black Oak Energy, LLC*, 167 FERC ¶ 61,250, at P 16 (2019).

[70] *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016)

[71] *Id*. at 954-55.

[72] *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018) (citations omitted).

[73] *See PJM Interconnection, L.L.C.,* Complaint Alleging that the Locational Deliverability Area Reliability Requirement is Unjust and Unreasonable as Applied in a Particular Locational Deliverability Area in the 2024/2025 Base Residual, Docket No. EL23-19-000, at 42 (Dec. 23, 2022).

F. Identified Issues Could Not Have been Reasonably Foreseen Prior to the Close of the 2024/2025 Offer Window.

Various protesters attempt to lay blame on PJM for not discovering the identified issue prior to the start of the 2024/2025 BRA. In essence, the protesters claim that PJM should have foreseen the identified issues prior to the start of the 2024/2025 BRA because Capacity Market Sellers provide notices of intent to participate prior the each auction and based on PJM's own sensitivity analysis. Each of the reasons provided are flawed and unpersuasive.

1. Certifications For Buyer Side Market Power And Conditioned State Support Do Not Commit Market Sellers To Offer Such Resources Into The RPM Auctions.

Certain protesters argue that PJM should have been able to know whether Planned Generation Capacity Resources would have offered into the 2024/2025 BRA based on the certifications made for purposes of the Minimum Offer Price Rule ("MOPR"), which are submitted well in advance of the auction.[74] While it is true that all Capacity Market Sellers are required to "certify to the Office of Interconnection for each Generation Capacity Resource the Capacity Market Seller intends to offer into the RPM Auction,"[75] this requirement exists for the sole purpose of determining whether a Generation Capacity Resource is receiving a state subsidy and therefore whether it could potentially be subject to the Minimum Offer Price Rule. In fact, a Capacity Market Seller is not precluded from offering into the auction even if it does not make a MOPR certification by the relevant deadline. Instead, the resource that was not the subject of a certification would simply be subject to the MOPR and required to offer above the relevant floor price.[76] More importantly, even if a Capacity Market Seller submitted a certification that it

[74] *PJM Interconnection, L.L.C.*, Protest of the Clean Energy Associations, Docket Nos. ER23-729-000 and EL23-19-000, at 15 (Jan. 20, 2023).

[75] Tariff, Attachment DD, section 5.14(h-2)(1)(A).

[76] *See* Tariff, Attachment DD, section 5.14(h-2)(1)(C).

intended to offer a resource into the auction, such Capacity Market Seller is not bound to actually offer into the auction. An intent to offer is different from a commitment to offer, so Capacity Market Sellers cannot be bound to offer into the RPM Auction simply because they certified that they intended to offer into the auction, particularly given that the capacity must offer requirement only applies to Existing Generation Capacity Resources and not Planned Generation Capacity Resources.[77]

2. Notice Of Intent To Offer From Planned Generation Capacity Resources Do Not Commit Market Sellers To Offer Such Resources Into The Rpm Auctions.

Protesters also argue that PJM solicits a notice of intent to offer from Capacity Market Sellers of Planned Generation Capacity Resources prior to the RPM Auctions so PJM could have known which resources would not be participating in the auction prior to 2024/2025 BRA.[78] Like the MOPR certifications discussed above, a notice of intent to offer is not binding and does not commit a Capacity Market Seller to offer a Planned Generation Capacity Resource into the auction. More importantly, the notice of intent to offer is requested by PJM only for Planned Generation Capacity Resources that have not executed an Interconnection Service Agreement prior to the auction (but has either an executed Facilities Study Agreement or System Impact Study Agreement). Additionally there is no Tariff requirement for Market Participants to provide this notification so any notice of intent to offer cannot be binding. The sole reason this information is requested is because only resources with executed Interconnection Service Agreements are automatically modeled in PJM's "Capacity Exchange" software. As a result, this notice of intent allows other new resources that also qualify as Planned Generation Capacity Resources to be

[77] See Tariff, Attachment DD, section 6.6(a).

[78] *PJM Interconnection, L.L.C.*, Comments of Invenergy, Docket Nos. ER23-729-000 and EL23-19-000, at 6-7 (Jan. 20, 2023).

modeled in "Capacity Exchange" so that they can be offered into the RPM Auctions. In short, the solicitation for the notice of intent to offer is requested from a limited pool of Planned Generation Capacity Resources, and the mere intent to offer does not commit a resource to offer.

3. PJM's Sensitivity Analysis For The 2023/2024 BRA Provides No Basis For Predicting How Capacity Market Sellers Would Actually Offer In The 2024/2025 Base Residual Auction.

P3 and its expert, Dr. Roy Shanker, among others, argue that the recently identified issue could have been predicted by PJM given its own sensitivity analysis.[79] This argument is flawed because PJM could not foresee whether Capacity Market Sellers would have offered their Planned Generation Capacity Resources into the 2024/2025 BRA prior to any offer window opening. As noted above, the capacity market's must offer rules do not apply to Planned Generation Capacity Resources, so it is only until after the offer window closes that PJM will know with any certainty whether such resources were offered or not into the auction.

As a result, PJM's analysis where one scenario showed that that price could reach the cap in DPL-S is irrelevant to the issue identified in the December 23 Filings. The nine scenario assumptions in PJM's sensitivity analysis studied the impacts from changes in capacity supply, which could have resulted in any number of reasons. In other words, the analysis was not focused on the potential for an incorrect Locational Deliverability Area Reliability Requirement where Planned Generation Capacity Resources that were modeled in the studies did not offer into the auction. At the end of the day, no study could have predicted what Capacity Market Sellers would have offered (or not offered) into the RPM Auctions until the bidding window closes. Thus, PJM could not have predicted how many Planned Generation Capacity Resources would have actually offered into the 2024/2025 BRA irrespective of any sensitivity analysis that was conducted with

[79] P3 Protest at 7; *see also id.* at 38-40 ("Shanker Affidavit").

various scenarios. In short, the large quantity of Planned Generation Capacity Resources that were modeled within a small LDA that did not participate was unprecedented and could not have reasonably be foreseen prior to the close of the auction window.

G. PJM's Proposal to Address the Identified Gap in the Tariff Is Just and Reasonable

As thoroughly explained in PJM's December 23 Filings, the Locational Deliverability Area Reliability Requirement used in the RPM Auctions would not accurately reflect the actual reliability needs of the LDA (in this case DPL-S) where Planned Generation Capacity Resources have an outsized impact to the reliability needs in a small LDA and such resources do not participate in the RPM Auction. The use of a flawed Locational Deliverability Area Reliability Requirement would produce a VRR Curve that provides improper market signals (*i.e.*, signaling the need for additional capacity to account for potential forced outages associated with an outsized resource for a small LDA). PJM's proposed solution represents a just and reasonable approach to reflect the actual participation of Planned Generation Capacity Resources in the Locational Deliverability Area Reliability Requirement so that it produces a VRR Curve that is representative of the actual reliability needs of the LDA.

1. PJM's Proposal To Exclude Planned Generation Capacity Resources That Did Not Offer From An Updated Locational Deliverability Area Reliability Requirement Is Just And Reasonable.

P3 erroneously asserts that PJM's proposal to exclude only Planned Generation Capacity Resources when updating the Locational Deliverability Area Reliability Requirement does not address the identified issue because Intermittent Resources were omitted from this exclusion.[80] To the contrary, an Intermittent Resource is defined in the Tariff as "a *Generation Capacity Resource* with output that can vary as a function of its energy source, such as wind, solar, run of river

[80] P3 Protest at 39.

hydroelectric power and other renewable resources."[81] In turn, the Planned Generation Capacity Resource is defined as "a Generation Capacity Resource" that has not cleared an RPM Auction and meets certain milestones.[82] Therefore, new Intermittent Capacity Resources that do not offer into the RPM Auctions are clearly included in PJM's proposal of excluding Planned Generation Capacity Resources that do not offer from the updated Locational Deliverability Area Reliability Requirement. As such, PJM's proposal does address the issue identified in the December 23 Filings.

Moreover, arguments that PJM's proposal is flawed because it focuses on resources that participated in the auction are also unpersuasive. Planned Generation Capacity Resources that do not participate in the auction necessarily means that the load would not rely on such resources as capacity for the relevant Delivery Year. As a result, such resources are appropriately excluded from the Locational Deliverability Area Reliability Requirement if they did not participate in the auction because even if such resources were in-service by the start of the Delivery Year, there is no need to model the reduced reliability of such thermal resources (from risk of forced outages) or Intermittent Resources (from misalignment of output with the riskiest hours of the year) since load is not depending on them as capacity resources. This means that should such resource be on an outage or there is a misalignment of output with the riskiest hours, the Capacity Emergency Transfer Objective does not need to be adjusted to account for those resources that did not participate in the RPM Auction to meet a loss of load expectation.

[81] Tariff, Definitions I-J-K (emphasis added.)

[82] *See* RAA Definitions, Planned Generation Capacity Resource.

Removing resources that did not participate in the auction from the Locational Deliverability Area Reliability Requirement, rather than those that cleared the auction, is also the appropriate focus because resources that participated would necessarily have cleared the auction. This is because when an LDA's Locational Deliverability Area Reliability Requirement is overstated due to Planned Generation Capacity Resources that did not participate in the auction, any resources that do offer would in all likelihood clear the auction. Therefore, PJM's proposal to excluded Planned Generation Capacity Resources that do not participate in the RPM Auctions accomplishes the objective of correctly reflecting the actual reliability needs of a LDA in an updated Locational Deliverability Area Reliability Requirement. This approach has the added benefit of removing such Planned Generation Capacity Resources from the Locational Deliverability Area Reliability Requirement *prior* to clearing the auction.

2. PJM's Proposed Materiality Threshold Is Just And Reasonable.

Contrary to the protesters contention that applying a one percent materiality threshold as a trigger for the proposed revision is arbitrary, using one percent as the standard is reasonable, because it is the cumulative addition of sufficiently large Planned Generation Capacity Resources in a small LDA that causes the identified issue. Thus, because the identified issue is more prevalent in a small LDA, it is in those small LDAs that is targeted by a one percent change in Locational Deliverability Area Reliability Requirement, which would be more easily triggered by a one percent threshold. It is not necessarily to apply PJM's proposed solution in every LDA because in larger LDAs, impacts from Planned Generation Capacity Resources not being offered into the RPM Auctions is immaterial, and does not require updating the Locational Deliverability Area Reliability Requirement. Thus, PJM's proposed trigger is a reasonable and targeted means to

address the identified issue in small LDAs without having to arbitrarily define a MW value for what constitutes a small LDA.

While certain protesters suggest this trigger should be higher so it narrowly targets only DPL-S,[83] PJM believes it is prudent to propose a one percent threshold in the event future updates are necessary in other LDAs. To be clear, DPL-S is the only LDA with a Locational Deliverability Area Reliability Requirement that increased by more than one percent for the 2024/2025 BRA. As a result, the proposed revision would only be applied to DPL-S for the 2024/2025 BRA. However, the one percent materiality threshold works to avoid anomalies that could significantly impact prices in the future. PJM only needs to propose a just and reasonable materiality threshold, which it did in the December 23 Filings.[84] The Commission "is not required to choose the best solution, only a reasonable one."[85]

3. The Market Monitor's "Preferred Approach" May Be A Viable Alterative That Could Potentially Be Applied To Future RPM Auctions After The 2024/2025 Base Residual Auction.

PJM maintains that the proposal advanced in the December 23 Filings are just and reasonable. Indeed, the Market Monitor agreed that "it would successfully address the issue with the current auction results in an effective and efficient way and permit the posting of final auction results quickly."[86] Moreover, it is the only workable proposal that can prospectively remedy the identified issue beginning with the 2024/2025 BRA.

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[83] Comments of Constellation Energy Generation at 20.

[84] *See PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103, at P 59 (2014).

[85] *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007) ("FERC is not required to choose the best solution, only a reasonable one."); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) ("FERC has interpreted its authority to review rates under the FPA as limited to an inquiry into whether the rates proposed by a utility are reasonable—and not to extend to determining whether a proposed rate schedule is more or less reasonable than alternative rate designs.")

[86] Market Monitor's Comments at 5.

Nonetheless, PJM acknowledges that the Market Monitor's "preferred approach," which was also proposed by certain other protesters, could be considered for future RPM Auctions. Specifically, requiring all Planned Generation Capacity Resources to commit to a must offer requirement by a defined date prior to the posting of auction parameters is a possible alternative solution, but it should not be applied for the 2024/2025 BRA as it would require restarting the entire auction process. Given that the 2024/2025 Delivery Year begins in less than one and a half years, it would not be prudent to further delay this auction. In fact, even the Market Monitor makes clear that it "supports the immediate implementation of PJM's solution to clearing the 24/25 Base Residual Auction" and only asks the Commission to consider this approach for future auctions.[87] As such, the Commission should accept PJM's section 205 filing consistent with its long-standing section 205 standard of review so that PJM can complete the auction under the proposed rules for the 2024/2025 BRA. Meanwhile, PJM can further explore the merits of the Market Monitor's proposal through the stakeholder process and submit a subsequent section 205 filing as appropriate.

H. The 2025/2026 BRA Does Not Need to Be Delayed

Leeward Renewable Energy, LLC and Leeward Renewable Energy Development, LLC ("Leeward") argue that the 2025/2026 BRA should be delayed until the 2024/2025 BRA is completed and finalized.[88] A speedy resolution of the December 23 Filings will not require a delay of the 2025/2026 BRA (as well as potentially additional BRAs beyond just the 2025/2026 BRA). The RPM Auctions have been delayed through a variety of regulatory proceedings, so the 2025/2026 BRA that is set to commence on June 14, 2023 is already one year behind schedule.

[87] Market Monitor's Comments at 6.

[88] *PJM Interconnection, L.L.C.*, Protest of Leeward, Docket Nos. ER23-729-000 and EL23-19-000, at 11 (Jan. 20, 2023) ("Leeward Protest").

While it may not be ideal to begin pre-auction activities prior to the completion of the 2024/2025 BRA, the pre-auction activities for the 2025/2026 BRA can proceed as currently scheduled.

There is only a limited amount of Planned Generation Capacity Resources that were offered into the 2024/2025 BRA, and would be subject to the must offer requirement as an Existing Generation Capacity Resource if those resources clear the 2024/2025 BRA. That is because a majority Planned Generation Capacity Resources, including Leeward's "portfolio of 24 renewable energy facilities across nine states totaling approximately 2,500 megawatts"[89] are Intermittent Resources that would not be subject to the capacity market must offer requirement in the first place. For the few resources that may be subject to the must offer requirement, if they clear the 2024/2025 BRA for the first time, Capacity Market Sellers of such resources could request a unit-specific offer cap prior to the existing deadline (February 14, 2023). In the event those resources did not actually clear the auction, then Capacity Market Sellers of such resources would be treated as a Planned Generation Capacity resource, and not be subject to the must offer requirement. Likewise, Capacity Market Sellers that may consider deactivating a resource and request an exception from the must offer requirement could submit a request prior to the existing deadline. In the event Capacity Market Sellers changes their mind on deactivating based on the 2024/2025 BRA results, they can simply withdraw the deactivation notice, and continue to participate in the 2025/2026 BRA given that a must offer request does not bind a Capacity Market Seller to deactivate a resource, and later prohibit such resource's participation in the RPM Auctions.

PJM urges the Commission to promptly resolve the issued identified in the December 23 Filings so that the 2024/2025 BRA can be completed and subsequent auctions do not need to be further

[89] Leeward Protest at 3.

delayed. Notwithstanding, the Commission may need to consider delaying subsequent BRAs in the event PJM's proposed revisions, or an alternative remedy, is not accepted by February 22, 2023.

III. CONCLUSION

For the reasons provided herein, the Commission should accept PJM's section 205 filing. In the alternative, should the Commission prefer a different solution, it can grant PJM's section 206 filing and direct PJM to submit a compliance filing with the Commission's preferred solution so that the changes can be prospectively applied to the 2024/2025 BRA.

Respectfully submitted,

/s/ Chenchao Lu

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On behalf of
PJM Interconnection, L.L.C.

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 Audubon, PA this 2nd day of February 2023.

/s/ Chenchao Lu
Chenchao Lu