

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

PJM Interconnection, L.L.C.

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Docket No. ER23-729-002

**PETITION UNDER RULE 207 OF PJM INTERCONNECTION, L.L.C.  
FOR ORDER CONFIRMING 2024/2025 DELIVERY YEAR  
CAPACITY COMMITMENT RULES,  
REQUEST FOR ORDER BY MAY 6, 2024, AND  
REQUEST FOR SHORTENED 10-DAY COMMENT PERIOD**

In light of the United States Court of Appeals for the Third Circuit opinion in *PJM Power Providers Grp. v. FERC*,<sup>1</sup> PJM Interconnection, L.L.C. (“PJM”), pursuant to Rule 207(a)(5) of the Federal Energy Regulatory Commission’s (“Commission”) procedural rules, 18 C.F.R. § 385.207(a)(5), respectfully petitions the Commission to issue an order **by May 6, 2024**, confirming that the Open Access Transmission Tariff (“Tariff”) provisions governing the conduct of the Base Residual Auction for the 2024/2025 Delivery Year are those in effect prior to Commission’s orders in this proceeding (i.e., without the market rule change allowing the exclusion of Planned Generation Capacity Resources from the Locational Deliverability Area Reliability Requirement if the addition of such resources would materially increase the reliability requirement and such resources do not participate in the RPM Auction (the “revised LDA Reliability Requirement”)),<sup>2</sup> and that the capacity commitments that would result from applying those Tariff provisions for the 2024/2025 Base Residual Auction are binding and effective for the 2024/2025 Delivery Year. To the extent the Commission makes such confirmations, PJM also respectfully requests the

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<sup>1</sup> *PJM Power Providers Grp. v. FERC*, Nos. 23-1778, et al., 2024 U.S. App. LEXIS 5963 (3d Cir. Mar. 12, 2024) (“*PJM Power Providers*”). On March 28, 2024, the court issued the mandate. *See PJM Power Providers Grp. v. FERC*, Nos. 23-1778, et al. (3d Cir. Mar. 28, 2024) (certified judgment together with a copy of the opinion issued, in lieu of a formal mandate to be treated in all respects as a mandate).

<sup>2</sup> *See PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109, *reh’g denied*, 184 FERC ¶ 61,055 (2023), *vacated in part, PJM Power Providers*, 2024 U.S. App. LEXIS 5963.

Commission authorize PJM to re-run the Third Incremental Auction for the 2024/2025 Delivery Year. Re-conducting this Third Incremental Auction is critical, as it would allow:

- (1) PJM to adjust each applicable Reliability Requirement (to that used to re-calculate the 2024/2025 Base Residual Auction) and to correspondingly procure or sell capacity so that an appropriate amount of capacity is committed for the upcoming Delivery Year; and
- (2) Capacity Market Sellers to adjust their Buy Bids and Sell Offers to align their newly determined capacity commitments with their respective capacity capabilities and obligations.

In this petition, PJM outlines its proposal with regard to the Base Residual Auction and the Third Incremental Auction for the 2024/2025 Delivery Year in light of the *PJM Power Providers* court's ruling. Given that the next Delivery Year starts on June 1, 2024, ***PJM respectfully requests an order by May 6, 2024.*** An order by that date will allow for orderly conduct of the updated Base Residual Auction and Third Incremental Auction associated with the 2024/2025 Delivery Year, allowing sellers to finalize capacity commitments as soon as practicable before the Delivery Year. To the extent the Commission wishes to put this petition out for comment, PJM proposes a shortened 10-day comment period, in recognition of the need for these steps to be taken and capacity commitments to be finalized prior to the June 1, 2024 start of the 2024/2025 Delivery Year.

## **BACKGROUND**

On February 23, 2023, the Commission accepted, effective December 24, 2022, Tariff revisions “to exclude planned generation capacity resources from the calculation of the Locational Deliverability Area Reliability Requirement (LDA Reliability Requirement) if the addition of such resources materially increases the reliability requirement and such

resources do not participate in the capacity auction.”<sup>3</sup> PJM proposed, and the Commission accepted, that these revisions should apply to the conduct of the 2024/2025 Base Residual Auction.<sup>4</sup> The Commission held that applying these Tariff revisions “to the 2024/2025 [Base Residual Auction] would not violate the filed rate doctrine or constitute retroactive ratemaking.”<sup>5</sup> On rehearing, the Commission stood by its determination that application of the revised LDA Reliability Requirement to the 2024/2025 Base Residual Auction was not a retroactive change to the auction rules.<sup>6</sup>

On review, the *PJM Power Providers* court held that application of the revised LDA Reliability Requirement determination rules to the 2024/2025 Delivery Year “is retroactive” in violation of the filed rate doctrine and “therefore vacate[d] only the portion of FERC’s orders that allows PJM to apply the Tariff Amendment to the 2024/25 [Base Residual Auction].”<sup>7</sup> The court did not remand the matter to the Commission.

## ARGUMENT

A federal court may vacate a Commission tariff order, but doing so “‘leave[s] in effect the [tariff revisions] filed under the Commission’s authority pending the Commission’s redetermination of a reasonable rate’ on remand from the court.”<sup>8</sup> Here, a reasonable means to effect the *PJM Power Providers* court’s opinion would be for the Commission to confirm that PJM should update the Base Residual Auction results by

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<sup>3</sup> *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109, at P 2.

<sup>4</sup> *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109, at P 178.

<sup>5</sup> *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109, at P 167.

<sup>6</sup> See *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,055, at PP 55-75.

<sup>7</sup> *PJM Power Providers*, 2024 U.S. App. LEXIS 5963, at \*23.

<sup>8</sup> *ISO-New England Inc.*, 161 FERC ¶ 61,031, at P 26 (2017) (quoting *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 144 (1982)).

applying the Tariff provisions that were in effect in December 2022. To that end, it would also be appropriate for the Commission to direct PJM to submit a compliance filing that removes the language in Tariff, Attachment DD, sections 5.12(a) and 5.12(b), as well as the definition of Locational Deliverability Area Reliability Requirement, that requires PJM to utilize a revised LDA Reliability Requirement based on actual participation of Planned Generation Capacity Resources in the relevant Base Residual Auction and Incremental Auction for the 2024/2025 Delivery Year.

When tasked with addressing its own legal error, the Commission is permitted “great deference in . . . its selection of a remedy, for ‘the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies, and sanctions.’”<sup>9</sup> The Commission is afforded this broad deference “even in the face of an undoubted statutory violation, unless the statute itself mandates a particular remedy.”<sup>10</sup> As the courts and the Commission have often held, “when the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made.”<sup>11</sup>

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<sup>9</sup> *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

<sup>10</sup> *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000).

<sup>11</sup> *Pub. Utils. Comm’n of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993); see also *Panhandle E. Pipe Line Co. v. FERC*, 907 F.2d 185, 189 (D.C. Cir. 1990); *Office of Consumers’ Counsel, Ohio v. FERC*, 826 F.2d 1136, 1139 (D.C. Cir. 1987); *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057, at P 21 (2016) (finding that the Commission has a “general policy of ensuring that the parties harmed by our legal error are put in the same position in which they would have been had the Commission not erred”).

**A. The Commission Should Exercise Its Broad Remedial Authority to Correct its Legal Error and Confirm that PJM Should Re-Calculate the 2024/2025 Base Residual Auction Results Under the Status Quo Ante Rules and Direct PJM to Re-Run the 2024/2025 Third Incremental Auction.**

Here, as the *PJM Power Providers* court held, the Commission’s legal error was to allow the revised LDA Reliability Requirement to be applied in the conduct of the 2024/2025 Base Residual Auction. Accordingly, the Commission should exercise its broad remedial authority to put the parties in the position they would have been absent that error.<sup>12</sup> To that end, PJM requests that the Commission confirm that a proper course of action is for PJM to re-calculate the auction results without the revised LDA Reliability Requirement, i.e., under the status quo ante auction rules and parameters.

However, simply re-calculating the Base Residual Auction alone would not be a reasonable or complete remedy. Indeed, a reasonable remedy would also include authorizing PJM to re-run the Third Incremental Auction. Holding a new Third Incremental Auction would allow sellers to adjust their newly established capacity commitments to account for any change in circumstances since they submitted their Sell Offers in December 2022.

While PJM can re-calculate the 2024/2025 Base Residual Auction based on the previously posted parameters and previously submitted Sell Offers, the same is not true for the Third Incremental Auction. The Third Incremental Auction is designed to provide an opportunity for (1) PJM to adjust the demand for capacity (i.e., the Reliability Requirements), either procuring more capacity or selling capacity, and (2) Market

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<sup>12</sup> See *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017) (Federal Power Act “section 309 [16 U.S.C. § 825h] affords the agency broad authority to ‘remedy its errors’ and correct unjust situations.” (quoting *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016))).

Participants to replace Capacity Resources committed in prior auctions that since have been determined to be unavailable or reduced Unforced Capacity values resulting from final updates of force outage rates for the year at issue.

Here, the load forecast for the 2024/2025 Delivery Year did change between the Base Residual Auction and the Third Incremental Auction necessitating PJM to procure a revised quantity of capacity based on the updated Base Residual Auction results.<sup>13</sup> Moreover, re-calculating the 2024/2025 Base Residual Auction results under the status quo ante rules will alter the committed capacity level for a number of Capacity Resources, either increasing or decreasing the megawatts of committed capacity. Indeed, there may be certain planned Capacity Resources that did not previously clear the Base Residual Auction that clear in the updated Base Residual Auction, but may not be able to meet the Capacity Performance requirements given how close to the Delivery Year the updated capacity commitments results would be issued.

The unique facts here present another wrinkle that requires an updated Third Incremental Auction to iron out. Under the vacated rules, some Capacity Resources may have cleared at a lower level than under the status quo ante rules, and some Market Participants may have sold such uncommitted capacity through bilateral transactions.<sup>14</sup> And, some of that bilaterally sold capacity may now clear as committed capacity under the re-calculated auction results, causing some capacity megawatts to be double committed. Market Participants in such situations should be afforded the opportunity to sell out of such

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<sup>13</sup> See *Configuration of 3rd Incremental Auction for 2024/2025 Delivery Year*, PJM Interconnection, L.L.C. (Mar. 11, 2024), <https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2024-2025/2024-2025-3ia-planning-parameters.ashx>.

<sup>14</sup> See *Tariff*, Attachment DD, section 4.6 (bilateral capacity transaction rules).

a double commitment that occurred through no fault of their own. In short, Capacity Market Sellers may want to submit new Buy Bids and Sell Offers into a new Third Incremental Auction to adjust their capacity commitments to a level the seller believes its Capacity Resources can provide. Thus, some of the Buy Bids and/or Sell Offers submitted in the 2024/2025 Third Incremental Auction would need to be updated to avoid Capacity Resources being over committed or to offer capacity that is now uncommitted.

Thus, authorizing PJM to hold a new Third Incremental Auction for the 2024/2025 Delivery Year would be a just and reasonable component of an appropriate remedy in this circumstance.<sup>15</sup> The Federal Power Act provides the Commission with the authority to choose from an “expansive range” of remedies<sup>16</sup> and “broad authority to ‘remedy its errors and correct unjust situations.’”<sup>17</sup> Moreover, the fact that a Third Incremental Auction has occurred does not deprive the Commission of statutory authority to authorize PJM to conduct a new one, as “[t]he filed rate doctrine has never been construed as requiring [the Commission] to close its eyes to changes in circumstances that render a rate that was once just and reasonable but no longer comports with the new reality. [The Commission] has ‘broad authority to fashion equitable remedies in a variety of settings.’”<sup>18</sup> PJM therefore requests the Commission authorize PJM to re-conduct the Third Incremental Auction.

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<sup>15</sup> 16 U.S.C. § 825h. See, e.g., *Ark. Pub. Serv. Comm’n v. FERC*, 891 F.3d 377, 383-384 (D.C. Cir. 2018) (“The filed rate doctrine has never been construed as requiring FERC to close its eyes to changes in circumstances that render a rate that was once just and reasonable but no longer comports with the new reality. FERC has ‘broad authority to fashion equitable remedies in a variety of settings.’” (quoting *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984))).

<sup>16</sup> *Verso Inc. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018) (The Commission has an “expansive range” of remedies “afforded by [the Commission’s] [FPA] Section 309 remedial power”).

<sup>17</sup> *TNA Merchant Projects v. FERC*, 857 F.3d at 359 (quoting *Xcel Energy Servs. Inc.*, 815 F.3d at 956).

<sup>18</sup> *Ark. Pub. Serv. Comm’n v. FERC*, 891 F.3d at 383-384 (quoting *Columbia Gas Transmission Corp.*, 750 F.2d at 109).

Upon a Commission order granting such authorization, PJM would quickly post the schedule for reopening the Third Incremental Auction window,<sup>19</sup> allowing participants to submit new offers based on the changed circumstances. PJM would not need to redo any must-offer exceptions, unit-specific offer caps, or other pre-auction activities because re-calculating the Base Residual Auction would not affect any of those determinations.

**B. To the Extent the Commission Believes Authorizing a New Third Incremental Auction Is Beyond Its “Broad” and “Expansive” Remedial Authority, the Commission Should Find that Re-Running the Third Incremental Auction Is Permissible Under the Tariff.**

In the event the Commission believes that allowing PJM to re-run the Third Incremental Auction is beyond the scope of its authority to remediate the legal error in this proceeding, PJM requests confirmation that PJM has the authority to re-conduct such auction under Tariff, Attachment DD, section 5.11(e). That provision provides that, to the extent PJM discovers an “error” in the initial auction results, PJM will notify stakeholders of such error, and authorizes PJM to post modified results.<sup>20</sup> Here, shortly after the *PJM Power Providers* opinion was issued, PJM emailed stakeholders such a notification of error on March 18, 2024, before the close of the fifth business day after posting the initial Third Incremental Auction results. Thus, Market Participants have been on notice, pursuant to the Tariff, that the results of that auction are not final and may be subject to change, avoiding any filed rate doctrine concerns.<sup>21</sup>

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<sup>19</sup> While the 2024/2025 Incremental Auction is referred to as the “Third Incremental Auction,” it is actually the only Incremental Auction that was conducted for the 2024/2025 Delivery Year given the abbreviated auction schedule, which eliminated the First and Second Incremental Auctions for this Delivery Year.

<sup>20</sup> Tariff, Attachment DD, section 5.11(e).

<sup>21</sup> See, e.g., *Pub. Utils. Comm’n of Cal.*, 988 F.2d at 165 (no violation of the filed rate doctrine when parties have sufficient notice of possible changes).



Moreover, capacity commitments for the 2024/2025 Delivery Year, broadly, have been under review by the Commission and the courts since before PJM posted the results of the 2024/2025 Base Residual Auction conducted under the vacated rules. As such, the Tariff provides that deadlines causing the Third Incremental Auction results to be deemed “final” do not apply<sup>22</sup> so such results are not yet final and may be modified in accordance with the filed rate specified in Tariff, Attachment DD, section 5.11(e).<sup>23</sup> Accordingly, PJM may permissibly re-run the Third Incremental Auction upon Commission authorization. Further, to the extent the Commission deems necessary, PJM requests that the Commission, in response to this pleading, publicly notice that the Third Incremental Auction results are “under publicly noticed review” until PJM re-runs the Third Incremental Auction.

**C. PJM Intends to Provide—on an Informational Basis Only—the Aggregate Results of the Re-Calculated 2024/2025 Base Residual Auction to Give Market Participants as Much Time as Practicable to Prepare for a Possible Change in Capacity Commitment Levels and Any New Third Incremental Auction.**

Given the impending start of the 2024/2025 Delivery Year, PJM is planning to post—on an informational basis only—the aggregate results of the re-calculated 2024/2025 Base Residual Auction, based on the parameters posted in advance of that auction and all submitted Sell Offers. Upon Commission confirmation, those posted results would be finalized and become the effective capacity commitments for the 2024/2025 Delivery Year. In the meantime, posting these informational-only values will provide transparency, allowing Capacity Market Sellers to infer whether each of their Capacity Resources would

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<sup>22</sup> Tariff, Attachment DD, section 5.11(e) (“[T]he deadlines set forth above [resulting in the auction results to be deemed final] shall not apply if the referenced auction results are under publicly noticed review by the [Commission].”).

<sup>23</sup> See Tariff, Attachment DD, section 5.11(e) (“After this initial notification, if PJM determines it is necessary to post modified results, it shall provide notification of its intent to do so”).

have fewer or greater megawatts committed as capacity than under current commitments. PJM is proactively providing such transparency to give Market Participants as much time as possible to evaluate and take any steps necessary and possible to adjust their commitments.

**D. PJM Respectfully Requests Commission Action by May 6, 2024, and a Shortened 10-Day Comment Period to Allow the Commission Action by that Date, While Providing Stakeholders Sufficient Time to Comment on This Petition.**

PJM respectfully requests that the Commission act as expeditiously as possible and grant the relief requested. Time is of the essence, as the 2024/2025 Delivery Year starts on June 1, 2024, i.e., in about two months. To that end, PJM also requests that the Commission establish a shortened 10-day comment period to allow parties a reasonable opportunity to submit their views on PJM's petition while providing the Commission sufficient time to *issue an order by May 6, 2024*.

PJM requests an order by that date so that it may conduct as orderly as possible a Third Incremental Auction given the circumstances. To do so, PJM believes that participants must have seven days from the date of the order to prepare and submit Sell Offers and Buy Bids. Thereafter, PJM believes that it can post the auction results within seven days of close of the submission window. Upon a Commission order authorizing PJM to hold a new Third Incremental Auction, PJM will quickly post the schedule.

**E. In the Event the Commission Does Not Issue an Order by May 6, 2024, There Is a Less Optimal, Alternative Option Under Which Capacity Resources with Increased Commitments Under the Updated Auction Results Could Be Relieved of Such Increased Capacity Commitments—But an Order by May 22, 2024 Is Required for This to Be Viable, as Capacity Commitments Must Be Finalized Before the Start of the Delivery Year.**

In the event the Commission is unable to issue an order by May 6, 2024, PJM requests that the Commission *not* direct PJM to re-run the Third Incremental Auction for the 2024/2025 Delivery Year because running an auction so close to start of the Delivery Year presents too much uncertainty on unsettled capacity commitments. Instead, PJM requests Commission authorization to relieve Capacity Market Sellers of any capacity commitments in excess of the level of capacity the seller reasonably believes that its Capacity Resource(s) would not be able to meet—but only to the extent that the updated Base Residual Auction results increased a Capacity Resource’s capacity commitment. In other words, only a Capacity Resource that is committed in the re-calculated Base Residual Auction to provide more megawatts than it is *now* capable of providing (due to either bilateral transactions or commitments from the February 2024 Third Incremental Auction of capacity not committed under the prior Base Residual Auction results) would be eligible to be relieved of such excess megawatts. PJM would require Capacity Market Sellers of such Capacity Resources to submit a request with the megawatt quantity to be relieved within seven days after the Commission issues an order directing this option. Given the relatively small quantity of Capacity Resources that are expected to have increased capacity commitment levels under the updated Base Residual Auction results, PJM does not believe that relieving those increased megawatts from those Capacity Resources without procuring replacement megawatts would pose a significant reliability risk. Such a remedy would be similar to the current ability for certain Capacity Market Sellers of

external resources to be relieved of their capacity commitments without having to procure replacement capacity.<sup>24</sup>

To be clear, the most optimal option in these circumstances would be to re-run the Third Incremental Auction based on newly submitted Sell Offers and Buy Bids. However, that option requires sufficient time to prepare for and perform the re-conducting of the Third Incremental Auction before the start of the Delivery Year. Similarly, while relieving capacity commitments may be an alternative option, even this option is only viable if PJM has at least one and a half weeks to update final capacity commitments before the start of the Delivery Year. Therefore, a Commission order no later than May 22, 2024, is required for this to be a viable alternative option.

Capacity commitments must be finalized before the June 1, 2024 start of the Delivery Year so that all Capacity Market Sellers know with certainty whether their Capacity Resource has a capacity commitment or not during the Delivery Year (and be potentially subject to Non-Performance Charges during Performance Assessment Intervals). Additionally, if final capacity commitments are not made before the start of the Delivery Year, PJM would be required to settle capacity revenues and charges based on existing auction results only to later resettle such credits and charges at a later date, which could also unnecessarily increase financial risk across the PJM membership. In short, the Commission should take all necessary steps to avoid requiring changes to capacity commitments once the 2024/2025 Delivery Year commences on June 1, 2024.

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<sup>24</sup> See Tariff, Attachment DD, section 5.5A(c)(i)(B).

## CONCLUSION

PJM asks that the Commission confirm, by May 6, 2024, that a proper course of action in response to the *PJM Power Providers* court's holding is for PJM to re-calculate the 2024/2025 Base Residual Auction results under the status quo ante auction rules and parameters, and for PJM to hold a new Third Incremental Auction for the 2024/2025 Delivery Year.

Respectfully submitted,

/s/ Ryan J. Collins

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

March 29, 2024

**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 29th day of March 2024.

/s/ Ryan J. Collins  
Ryan J. Collins

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