

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

Rush Solar Project II, LLC

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Docket No. ER24-1266-001

**REQUEST FOR REHEARING OF  
PJM INTERCONNECTION, L.L.C.**

Pursuant to section 313 of the Federal Power Act (“FPA”), 16 U.S.C. § 825*l*, and Federal Energy Regulatory Commission (“FERC” or “Commission”) Rule 713, 18 C.F.R. § 385.713, PJM Interconnection, L.L.C. (“PJM”) submits this Request for Rehearing of the Commission’s April 5, 2024 order<sup>1</sup> granting the February 15, 2024 Petition of Rush Solar Project II, LLC (“Rush Solar”) for Prospective Waiver and Expedited Action.<sup>2</sup> For the reasons detailed below, PJM respectfully requests that the Commission grant PJM’s Request for Rehearing and deny Rush Solar’s Waiver Request.

**I. BACKGROUND**

A detailed background of this proceeding is found in PJM’s March 25, 2024 motion to intervene and protest.<sup>3</sup> As explained in that filing, Rush Solar has proposed, subject to the requirements of Tariff, Part VII, to develop a 210-megawatt solar generating facility to be located in Rush and Fayette Counties, Indiana, and assigned PJM Queue No. AG1-224 (“Rush Project”).<sup>4</sup> Rush Solar’s obligations under Tariff, Part VII include compliance with

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<sup>1</sup> *Rush Solar Project II, LLC*, 187 FERC ¶ 61,013 (2024) (“April 5 Order”).

<sup>2</sup> *Rush Solar Project II, LLC*, Request of Rush Solar Project II, LLC for Prospective Tariff Waiver and Expedited Action, Docket No. ER24-1266-000 (Feb. 15, 2024) (“Waiver Request”). Capitalized terms not defined herein have the meaning set forth in PJM’s Open Access Transmission Tariff (“Tariff”).

<sup>3</sup> *Rush Solar Project II, LLC*, Motion to Intervene Out of Time and Protest of PJM Interconnection, L.L.C. to Petition of Rush Solar Project II, LLC for Waiver and Expedited Action, Docket No. ER24-1266-000 (Mar. 25, 2024) (“Protest”).

<sup>4</sup> Protest at 1.

PJM’s Site Control provisions. The Rush Project is being studied in the Phase I System Impact Study as part of Transition Cycle #1.<sup>5</sup> PJM’s classification of the Rush Project as eligible for Transition Cycle #1 was the result of the information provided by Rush Solar and relied upon by PJM in implementing the transition process and the restudy to determine shared network upgrade impacts under PJM’s new interconnection rules.<sup>6</sup>

With respect to Transition Cycle #1 projects, such as the Rush Project, the Tariff provides that “Project Developers at Decision Point I may make only ‘expressly allowed’ modifications to New Services Requests.”<sup>7</sup> The Tariff also directs that a Project Developer may make modifications to its Project Site only if both of these criteria are satisfied: “(a) the Project Developer satisfied the requirements for Site Control for both the initial Site proposed in the New Service Request Application and the newly proposed Site; and (b) *the initial Site and the proposed Site are adjacent parcels*.”<sup>8</sup>

Rush Solar requested waiver of the second part of this requirement.<sup>9</sup> Rush Solar asserts that it initially planned to develop its project in Rush County, Indiana, but because of a local moratorium on solar facility permit applications enacted on July 17, 2023, after it “retracted its then pending application,” Rush Solar determined that the original Site was no longer viable.<sup>10</sup> In its February 2024 Waiver Request, Rush Solar indicated that it had

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<sup>5</sup> Protest at 2.

<sup>6</sup> Tariff, Part VII, Subpart B, sections 303 and 304.

<sup>7</sup> Protest at 2; Tariff, Part VII, Subpart D, section 309(B)(1).

<sup>8</sup> Tariff, Part VII, Subpart D, section 309(B)(5) (emphasis added).

<sup>9</sup> Waiver Request at 8 (seeking relief from Tariff, Part VII, Subpart D, section 309(B)(5)(b)).

<sup>10</sup> Waiver Request at 2-3, 6-7. *See also id.* at 9 (explaining that Rush Solar understood the July 2023 Rush County moratorium meant that the original Site in Rush County was no longer a viable site).

identified an alternative site in Dearborn County, Indiana, approximately 26 miles from the Rush County site,<sup>11</sup> a matter not disclosed to PJM until November 2023.<sup>12</sup>

PJM protested the Waiver Request, demonstrating the Waiver Request does not satisfy the Commission's standards for granting tariff waivers, and that the requested relief is directly contrary to the Tariff's Commission-approved Site Control requirements.<sup>13</sup> PJM proved that the Waiver Request failed to satisfy the Commission criteria for granting a waiver request, showing that: (1) Rush Solar not only failed to demonstrate it met the good faith prong, but instead revealed through its actions and omissions that it intended to remain in the interconnection queue despite its full knowledge that the Rush Project was nonviable as proposed;<sup>14</sup> (2) the Waiver Request was not limited in scope, as its grant could encourage other Project Developers to attempt similar circumvention of the adjacent parcel requirement any time that a new, perhaps better situated or cheaper, parcel of land becomes available that shares similar electrical interconnection features;<sup>15</sup> (3) rather than identifying a concrete problem to be solved, the Waiver Request merely attempts to protect against a potential roadblock that may or may not materialize;<sup>16</sup> and (4) granting the Waiver Request would not only be contrary to efficient queue administration, but would also result in direct

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<sup>11</sup> Waiver Request at 7.

<sup>12</sup> Protest at Attachment B.

<sup>13</sup> Protest at 2-4, 5-11. PJM also requested leave to submit the Protest out of time, stating that good cause existed for granting this relief. *Id.* at 4-5.

<sup>14</sup> Protest at 7-9.

<sup>15</sup> Protest at 9-10.

<sup>16</sup> Protest at 10.

harm and impose costs on other Project Developers in Transition Cycle #1 that have complied with the applicable Tariff requirements.<sup>17</sup>

PJM further demonstrated that the Site Control provisions, including the adjacency provision, were a critical part of PJM's June 14, 2022 filing to reform its interconnection procedures.<sup>18</sup> PJM stated that the Site Control, readiness and other requirements of the June 14 Filing are necessary to reduce the number of speculative or non-ready projects in a Cycle.<sup>19</sup> PJM further explained that allowing a project that lacks adequate Site Control to remain in a given Cycle will tie up headroom on the Transmission System and harm other Project Developers that have done their due diligence to procure the necessary land to build their facilities in conformance with the Tariff.<sup>20</sup> PJM also stated that the adjacency requirement is a just and reasonable means of ensuring that a Project Developer can satisfy the Site Control elements and has the actual land necessary to construct its project.<sup>21</sup>

Furthermore, PJM explained that the Commission accepted the proposed Site Control requirements, stating in its order accepting the June 14 Filing that it found "PJM's

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<sup>17</sup> Protest at 10-11. PJM pointed out that the Commission has routinely recognized that efficient queue administration is in the public interest. Protest at 10 n.37 (citing *PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,075, at P 38 (2021); *Midcontinent Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,161, at P 24 (2021) (granting waiver in part on the basis that no other projects in the interconnection queue will be impacted or restudied as a result)).

<sup>18</sup> Protest at 2 (citing *PJM Interconnection, L.L.C.*, Tariff Revisions for Interconnection Process Reform, Request for Commission Action by October 3, 2022, and Request for 30-Day Comment Period, Docket No. ER22-2110-000 (June 14, 2022) ("June 14 Filing"). The Commission accepted the June 14 Filing subject to certain minor compliance requirements in an order issued on November 29, 2022. *PJM Interconnection, L.L.C.*, 181 FERC ¶ 61,162 (2022) ("November 2022 Order"), *order on reh'g*, 184 FERC ¶ 61,006 (2023), *appeal dismissed*, *Lee Cnty. Generating Station, LLC v. FERC*, 2023 U.S. App. LEXIS 28606 (D.C. Cir. Oct. 26, 2023), *appeal pending*, Petition for Review, *Hecate Energy LLC v. FERC*, Nos. 23-1089, et al. (D.C. Cir. Mar. 31, 2023)).

<sup>19</sup> Protest at 3 (citing June 14 Filing at 28, 31).

<sup>20</sup> Protest at 3 (citing June 14 Filing at 46-47).

<sup>21</sup> Protest at 3 (citing *PJM Interconnection, L.L.C.*, Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C., Docket No. ER22-2110-000, at 19 (Aug. 2, 2022)).

proposed site control requirements to be just and reasonable” and that “more stringent site control requirements may help reduce the number of speculative, duplicative, and non-ready projects entering the interconnection queue.”<sup>22</sup> As PJM noted, the Commission specifically rejected challenges to the adjacency requirement, stating that “limiting a project developer’s site change to an adjacent parcel over which it demonstrates site control will prevent gaming of the site control requirements.”<sup>23</sup> The Commission added that the adjacency requirement “will help ensure that projects entering the queue obtain site control for the site they actually intend to use while also providing some flexibility for a site change to an adjacent parcel.”<sup>24</sup> Thus, it is clear that the Commission recognized the purpose and importance of the adjacency requirement and specifically approved it for that reason.

The Commission in the April 5 Order granted the Waiver Request, erroneously finding that Rush Solar had satisfied each of the Commission’s four prongs for authorizing such a request.<sup>25</sup> Commissioner Christie strongly dissented from the majority, noting that “[j]ust over 16 months ago, this Commission approved PJM’s tariff revisions to create a first-ready, first-served clustered cycle interconnection process, recognizing that the ‘more stringent’ site control requirements – of which the adjacency requirement at issue in this waiver request *is part* – were just and reasonable.”<sup>26</sup> Commissioner Christie astutely

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<sup>22</sup> Protest at 3 (citing November 2022 Order at P 99). The Commission also found that the burden of the site control requirements “will be outweighed by the benefits associated with decreasing the number of speculative interconnection requests.” *Id.*

<sup>23</sup> Protest at 4 (citing November 2022 Order at P 103).

<sup>24</sup> Protest at 4 (citing November 2022 Order at P 103).

<sup>25</sup> April 5 Order at PP 27-30. The Commission also granted PJM’s motion to intervene out-of-time, “given its interest in the proceeding, the early state of the proceeding, and the absence of undue prejudice or delay.” *Id.* at P 25. Nothing in the April 5 Order restricted PJM’s rights as a party to the Docket No. ER24-1266 in any way, and PJM is a full party to this proceeding.

<sup>26</sup> April 5 Order, dissent op. (Commissioner Christie) at P 1.

highlighted the Commission’s unexplained and unsupported about-face, stating “[y]et, today, faced with the first waiver request pertaining to site control requirements at Decision Point I of PJM’s Transition Cycle 1 that I am aware of, the majority seemingly abandons these findings by granting the waiver request at issue here.”<sup>27</sup> After pointing out that “PJM – the entity which must manage the queue and whose proposal to add the revised site control requirements was lauded by this Commission” protested the Waiver Request, Commissioner Christie stated “not only [was he] persuaded by PJM’s protest,” but that the “order fails to adequately support the majority’s finding to grant this request.”<sup>28</sup>

## **II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS**

Consistent with Rules 203(a)(7) and 713(c) of the Commission’s regulations, 18 C.F.R. §§ 385.203(a)(7), 385.713(c), PJM provides the following Statement of Issues and Specification of Errors, including representative Commission and court precedent:

1. The Commission erred in finding that Rush Solar met the good faith requirement. In reaching that conclusion, the Commission ignored the fact that the Rush Project is not ready to move forward under a configuration that complies with PJM’s Site Control requirements and without making a modification that would violate the Tariff. The Commission further ignored evidence submitted by PJM that Rush Solar withheld information about the moratorium when it submitted its Site Control evidence, waiting until PJM had concluded the transition sorting process, classified the Rush Project as

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<sup>27</sup> April 5 Order, dissent op. (Commissioner Christie) at P 1.

<sup>28</sup> April 5 Order, dissent op. (Commissioner Christie) at P 2. Commissioner Christie cited to and quoted from PJM’s showings that Waiver Request was unjustified and contrary to the Commission’s approval of the June 14 Filing. *Id.* n.3

a Transition Cycle #1 project, and nearly completed the applicable restudy process. *Motor Vehicle Manufacturers Ass’n v. FERC*, 463 U.S. 29, 46, (1983) (“*Motor Vehicle Manufacturers*”); *American Clean Power Ass’n v. FERC*, 54 F.4th 722, 726, 728 (D.C. Cir. 2022) (“*ACPA*”); *New Eng. Power Generators Ass’n v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018) (“*NEPGA*”); *Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018) (“*Ameren Services*”); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198-99 (D.C. Cir. 2005) (“*PPL Wallingford*”); *Canadian Ass’n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) (“*CAPP*”).

2. The Commission also erred by concluding the Waiver Request is limited in scope. In reaching this erroneous conclusion, the Commission ignored PJM’s showing that Rush Solar’s Waiver Request is not limited in scope. To the contrary, the Commission’s grant of the first waiver request of PJM’s new interconnection process and Site Control requirements, a request that fails to meet any of the waiver criteria, will signal to the development community that they can easily get around the new process and its requirements. *See Motor Vehicle Manufacturers*, 463 U.S. at 42; *ACPA*, 54 F.4th at 726, 728; *NEPGA*, 881 F.3d at 210; *Ameren Services*, 880 F.3d at 581; *PPL Wallingford*, 419 F.3d at 1198, 1200; *CAPP*, 254 F.3d at 299.
3. The Commission further erred in determining that the Waiver Request resolves a concrete problem and rejecting PJM’s demonstration that Rush Solar is trying to protect its project against unfavorable land use restrictions. *See Motor Vehicle Manufacturers*, 463 U.S. at 42; *ACPA*, 54 F.4th at 726,

728; *NEPGA*, 881 F.3d at 210; *Ameren Services*, 880 F.3d at 581; *PPL Wallingford*, 419 F.3d at 1198, 1200; *CAPP*, 254 F.3d at 299.

4. The Commission also erred in determining that granting the Waiver Request would not harm third parties. The Commission failed to meaningfully respond to PJM's showing that granting Rush Solar's Waiver Request would harm other Project Developers and that the request failed to satisfy the Commission's criteria for granting a waiver request. To the extent the Commission engaged PJM's arguments and proffered evidence at all, the Commission failed to articulate a rational connection between the record evidence and the conclusions reached, thereby failing the test of reasoned decision making. *See Motor Vehicle Manufacturers*, 463 U.S. at 42; *ACPA*, 54 F.4th at 726, 728; *NEPGA*, 881 F.3d at 210; *Ameren Services*, 880 F.3d at 581; *PPL Wallingford*, 419 F.3d at 1198, 1200; *CAPP*, 254 F.3d at 299. The Commission's disregard of this potential harm to third parties is arbitrary and capricious. *ACPA*, 54 F.4th at 726, 728; *NEPGA*, 881 F.3d at 210; *Ameren Services*, 880 F.3d at 581; *PPL Wallingford*, 419 F.3d at 1198, 1200; *CAPP*, 254 F.3d at 299.
5. The Commission erred in granting the Waiver Request by failing to provide a meaningful response to PJM's showing that allowing the waiver would undermine PJM's recently implemented Tariff reforms, and by failing to justify the Commission's departure from its reasoning in the November 2022 Order. The failure to meaningfully respond to PJM's argument or adequately justify its decision to ignore the findings in the November 2022



Order renders the April 5 Order arbitrary, capricious and inconsistent with reasoned decision making. *See Motor Vehicle Manufacturers*, 463 U.S. at 41; *ACPA*, 54 F.4th at 726, 728; *NEPGA*, 881 F.3d at 210; *Ameren Services*, 880 F.3d at 581; *PPL Wallingford*, 419 F.3d at 1198, 1200; *CAPP*, 254 F.3d at 299; *see also Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 969 (D.C. Cir. 2005).

### **III. REQUEST FOR REHEARING**

#### **A. The Commission Erred in Granting Rush Solar’s Waiver Request.**

Commission precedent provides that an applicant seeking a waiver must satisfy all four prongs of the Commission’s established test.<sup>29</sup> In the April 5 Order, the Commission erred in granting Rush Solar’s Waiver Request because the Commission failed to exercise a reasoned decision making process in finding that Rush Solar satisfied the four-pronged test for waiver requests. As detailed below, the April 5 Order runs afoul of reasoned decision making because the Commission failed to meaningfully engage the arguments and evidence presented by PJM and reached conclusions that lack record support. Consequently, the April 5 Order is arbitrary and capricious and not the product of reasoned decision making with respect to each of the four prongs of the test. Therefore, PJM respectfully requests that the Commission grant rehearing of the April 5 Order and deny the Waiver Request of the Tariff’s adjacent parcel Site Control requirement.

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<sup>29</sup> *See Cleco Cajun LLC*, 183 FERC ¶ 61,211, at P 35 (2023) (stating that finding that the waiver request would result in undesirable consequences made it unnecessary to respond to the applicant’s claims regarding the other three waiver request criteria); *CPV Shore, LLC*, 168 FERC ¶ 61,048, at P 22 (2019) (stating that “[t]he Commission uses the satisfaction of all four criteria as a guide to when it may be appropriate to grant waiver” and that if it “identifies a criterion that by itself makes waiver inappropriate, it need not continue to analyze other criteria before it denies waiver”).

1. *The Commission erred in finding that the Waiver Request satisfied the good faith prong under the Commission's waiver request standards.*

Under the Commission's waiver request standard, the first question is whether the applicant acted in good faith. In the April 5 Order, the Commission erred in finding that Rush Solar acted in good faith. The Commission's finding overlooks concrete evidence that does not support such a finding. As explained in PJM's Protest and reflected in the accompanying evidence, Rush Solar provided Site Control evidence that was no longer accurate and withheld material information pertaining to Site Control in order to maintain the project's queue position despite full knowledge that it was not viable.<sup>30</sup> Moreover, PJM also explained that Rush Solar neglected to serve PJM with a copy of its Waiver Request.<sup>31</sup> Therefore, the Commission's finding that Rush Solar met the first prong of the waiver request standard is not the result of reasoned decision making and, therefore, is arbitrary and capricious.

As PJM's Protest explained, the Rush Project was being studied as part of Transition Cycle #1.<sup>32</sup> PJM determined that the Rush Project would be placed into Transition Cycle #1 pursuant to PJM Tariff, Part VII, Subpart B, section 303, which sets forth a transition sorting process that began on July 10, 2023 (i.e., PJM's Transition Date),<sup>33</sup>

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<sup>30</sup> Protest at 7-8, Attachment A.

<sup>31</sup> Protest at 4 n.15.

<sup>32</sup> Protest at 1-2.

<sup>33</sup> *PJM Interconnection, L.L.C.*, Notification of Occurrence of Transition Date of PJM Interconnection, L.L.C., Docket Nos. ER22-2110-000, -001 (July 11, 2023).

and concluded on September 8, 2023, i.e., 60 calendar days after the Transition Date.<sup>34</sup>

PJM Tariff, Part VII, Subpart B, section 303, provides in relevant part:

*Within 60 calendar days of the Transition Date, a Project Developer that submitted a valid Interconnection Request to Transmission Provider during the period April 1, 2018 through September 30, 2020 (the AE1 through AG1 New Services Queues) and who has not been tendered an Interconnection Service Agreement or Wholesale Market Participation Agreement under Tariff, Part VI, and whose New Service Request has not been withdrawn, shall:*

[...]

2. *Demonstrate Site Control* over the Site for the purpose of constructing a Generating Facility or Merchant Transmission Facility through a deed, lease, or option for 100 percent of the Generation Facility Site including the location of the high-voltage side of the Generating Facility's main power transformer(s) for at least a one-year term beginning from the Transition Date, consistent with the requirements of Tariff, Part VII, Subpart B, section 302.
3. *In the event the Project Developer fails to satisfy the requirements of subsections 303(A)(1) and (2) above, its New Service Request shall be deemed terminated and withdrawn. The New Service Request of a Project Developer that satisfies that the requirements of subsections 303(A)(1) and (2) above shall maintain its existing priority.*<sup>35</sup>

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<sup>34</sup> Tariff, Part VII, Subpart B, section 303; *see* PJM Interconnection, L.L.C., *Expedited Process / TC1 Classification* (accessed May 3, 2024), <https://www.pjm.com/planning/service-requests/fast-lane-tc1-classification>.

<sup>35</sup> Tariff, Part VII, Subpart B, sections 303(A)(2) and 303(A)(3) (emphasis added).

Based on the Site Control evidence provided by Rush Solar in accordance with section 303 of the Tariff, the Rush Project retained its existing priority, and PJM proceeded to perform the additional restudy required by the Tariff.<sup>36</sup>

In its Protest, PJM explained that on August 31, 2023, Rush Solar provided PJM with its Site plan and related parcel information for the locations in Rush and Fayette Counties during the transition sorting process in order to satisfy the Tariff's Site Control requirements. At the time Rush Solar provided PJM with its Site plan and related parcel information, Rush Solar had already retracted its permit application, and Rush and Fayette Counties had imposed their respective moratoriums. In fact, Rush Solar itself asserted it knew the initial Site was not viable once the moratoriums were introduced in July 2023.<sup>37</sup> As a result, Rush County submitted evidence of Site Control despite full knowledge that the Rush Project, as proposed, was not viable. As noted above, in addition to submitting Site Control evidence that was no longer accurate, Rush Solar withheld information regarding the moratoriums and their impact on its Site Control for the project until November 2023.<sup>38</sup> At this time, PJM had not only completed the transition sorting process but had nearly concluded the restudy to identify shared network upgrade impacts for all projects that were in the transition sorting process.

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<sup>36</sup> Tariff, Part VII, Subpart B, section 304(A)(1).

<sup>37</sup> Waiver Request at 9 (“It negotiated and secured lease agreements with numerous landowners for the Project’s current site which, *until the recent actions of Rush County, was a viable site for the Project.*”) (emphasis added); *see also id.* (“It investigated moving the Project’s site to an adjacent parcel, but this was not a viable option, because the adjacent parcel is located in Fayette County, Indiana, and is also subject to a moratorium on permit applications for new solar facilities that is also expected to extend into 2025, rendering the adjacent parcel *no more viable than the Project’s current site.*”) (emphasis added).

<sup>38</sup> Protest at 7.

Notwithstanding the foregoing evidence, the Commission erroneously found that Rush Solar acted in good faith. The Commission’s finding overlooks substantial record evidence that does not support such a finding. Specifically, the record in this proceeding includes the following evidence in support of PJM’s position that Rush Solar did not act in good faith:

- “At a public hearing on that application held by the Rush County Board of Zoning Appeals on July 5, 2023, Rush Solar heard certain community concerns focusing on land use issues and the Project’s potential to impact County agricultural land. After hearing these concerns, *Rush Solar retracted its then-pending application* and intended to address these issues... and then submit[] a revised application for the Special Exception.”<sup>39</sup>
- On July 10, 2023, PJM began processing queue projects under its transition rules, thus establishing the Transition Date.<sup>40</sup>
- On July 17, 2023, the Rush County Board of Commissioners imposed the Rush County Moratorium barring permit applications through at least January 2025.<sup>41</sup>
- On July 18, 2023, Fayette County imposed a moratorium similar to Rush County.<sup>42</sup>
- *On August 31, 2023, Rush Solar submitted Site Control evidence purporting to satisfy PJM Tariff, Part VII, Subpart B, section 303, notwithstanding its having retracted its permit application and the imposition of moratoriums by Rush and Fayette Counties that Rush Solar realized rendered its Project Site non-viable.*<sup>43</sup>

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<sup>39</sup> Waiver Request at 6-7.

<sup>40</sup> *See supra* note 33.

<sup>41</sup> Waiver Request at 2 n.4.

<sup>42</sup> Waiver Request at 3 n.6.

<sup>43</sup> Protest at 7-8, Attachment A. *See also supra* note 37.

- On September 8, 2023, PJM’s transition sorting process closed, and PJM posted the results indicating the classification of 773 projects, including the Rush Project, in the Expedited Process or Transition Cycle No. 1.<sup>44</sup>
- *On November 22, 2023, Rush Solar first provided PJM with documentation regarding the moratoriums.*<sup>45</sup>
- On December 14, 2023, PJM posted the completed transition sort retool study results for AG1-224.<sup>46</sup>

In reaching the erroneous good faith determination, the April 5 Order not only overlooked and failed to meaningfully engage this evidence but also failed to fully appreciate the timing of Rush Solar’s actions. The April 5 Order stated, “[o]nce [Rush Solar] determined that the adjacent Site was not a viable option for reasons similar to that for the current Site, Rush Solar pursued the Alternate Site.”<sup>47</sup> As noted above, however, Rush Solar asserted the Site became unviable when the July 17 and 18, 2023 moratoriums became effective.<sup>48</sup> PJM respectfully urges the Commission to view Rush Solar’s actions against the timing of PJM’s transition sorting process, *which began on July 10, 2023*, as well as Rush Solar’s submission of non-viable Site Control evidence approximately *one week before PJM’s transition sorting process ended*. Furthermore, Rush Solar withheld from PJM information regarding the moratoriums and their impact on Site control until November 22, 2023, when PJM had nearly finished the transition sort retool study. Thus, the record demonstrates that Rush Solar’s actions were designed to preserve the queue

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<sup>44</sup> See *supra* note 34.

<sup>45</sup> Protest at 7-8, Attachment B.

<sup>46</sup> See PJM Interconnection, L.L.C., *AG1-224 Transition Sort Retool Results – Reprioritized to Transition Cycle #1* (Dec. 14, 2023), <https://pjm.com/-/media/planning/services-requests/tc1/AG1-224.ashx>.

<sup>47</sup> April 5 Order at P 27.

<sup>48</sup> See *supra* note 37.

position for a project that lacked viable Site Control. These delays and strategic omissions undercut Rush Solar's claims that it has been acting in good faith.<sup>49</sup>

Moreover, PJM's Protest explained that Rush Solar did not provide a courtesy copy or otherwise notify any member of PJM's Law Department at the time the Waiver Request was filed.<sup>50</sup> The failure to serve PJM, coupled with Rush Solar's questionable candor toward PJM when providing Site Control information during the transition sorting process, also militates against a finding that Rush Solar acted in good faith.

PJM further stated that Rush Solar's inability to develop the project on its initial Site and desire to potentially switch Sites is the kind of equivocation that PJM is trying to avoid by limiting the types of modifications to projects that may be made at Decision Point I.<sup>51</sup> Finally, PJM stated that granting the Waiver Request would allow Rush Solar to jump past Decision I without meeting the Decision Point I requirements.<sup>52</sup>

Based on the foregoing, the Commission erred in finding Rush Solar acted in good faith. The April 5 Order does not meaningfully engage PJM's arguments or the evidence presented and makes no attempt to set forth a rational connection between the record evidence and a finding that Rush Solar acted in good faith. The Commission simply reiterated the steps Rush Solar claims it has taken, without addressing in a meaningful way

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<sup>49</sup> Protest at 7-8, Attachments B and C.

<sup>50</sup> Specifically, Rush Solar did not serve PJM with a copy of its Waiver Request and only notified PJM's engineers of the Waiver Request after it was filed. *See* Protest, Attachment C. Further, the title of the Waiver Request provides no indication that Rush Solar seeks a waiver of the PJM Tariff. This failure to provide notice not only calls into question Rush Solar's good faith communications with PJM, but harms PJM and other interested parties, who were not provided with adequate notice of the Waiver Request's attempt to undermine PJM's reformed interconnection process from the outset.

<sup>51</sup> Protest at 8.

<sup>52</sup> Protest at 8.

PJM's claims and evidence demonstrating Rush Solar's lack of good faith. The cursory response is therefore arbitrary, capricious and inconsistent with reasoned decision making.<sup>53</sup>

2. *The Commission also erred in its determination that the Waiver Request is of limited scope.*

With respect to the second prong, PJM argued that because the proposed Alternative Site is 26 miles from Rush Solar's initial site, the two sites are not in any manner adjacent to one another.<sup>54</sup> PJM explained that granting the Waiver Request would incentivize Project Developers to attempt to circumvent the adjacency requirement whenever a new, perhaps better situated or cheaper, parcel of land became available.<sup>55</sup> The April 5 Order does not provide a meaningful response to these claims, but instead only states the Commission "disagree[s] with PJM's assertion that granting the waiver will incentivize other project developers to circumvent the adjacent parcel requirement."<sup>56</sup> This

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<sup>53</sup> See *Motor Vehicle Manufacturers*, 463 U.S. at 41, 43 (stating an agency decision "may be set aside if found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" and indicating that the agency must examine the data and provide a satisfactory explanation for its determinations); *ACPA*, 54 F.4th at 726, 728 (remanding decision after finding that the Commission acted arbitrarily and capriciously by failing to respond to petitioner's assertions and arguments; also stating that "the Administrative Procedure Act requires more than a conclusory explanation for an agency action"); *NEPGA*, 881 F.3d at 210 (remanding FERC orders and stating that an agency must examine the relevant data and provide a satisfactory explanation for its decisions and respond meaningfully to the argument that are raised); *Ameren Services*, 880 F.3d at 581 (remanding decision, and stating that a failure to respond to a contention that was raised appropriately "makes FERC's decision arbitrary and capricious" (citation omitted)); *PPL Wallingford*, 419 F.3d at 1198, 1200 (stating FERC has the obligation to respond meaningfully to an intervenor's objections, and rejecting FERC orders that "contained no response" to arguments raised by petitioner below and "did not address PPL's evidence at all"); *CAPP*, 254 F.3d at 299 (reversing and remand decision, indicating that the Commission's failure to respond meaningfully to party's argument "renders its decision . . . arbitrary and capricious" and "[u]nless the Commission answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned."),

<sup>54</sup> Protest at 9.

<sup>55</sup> Protest at 9.

<sup>56</sup> April 5 Order at P 28.



terse explanation fails the test of reasoned decision making,<sup>57</sup> further showing the Commission should grant rehearing of the April 5 Order.

PJM also argued that the Waiver Request is inconsistent with the Commission's recognition that more stringent Site Control requirements are necessary and "the adjacency requirement will 'help ensure that projects entering the queue obtain site control for the site they actually intend to use.'"<sup>58</sup> The Commission did not respond to this argument at all, and its silence renders the April 5 Order arbitrary, capricious and inconsistent with reasoned decision making.<sup>59</sup>

3. *The Commission further erred in determining that the Waiver Request addresses a concrete problem.*

With respect to the requirement that the Waiver Request addresses a concrete problem, PJM argued that the Waiver Request merely provides a hedge against a potential roadblock that may or may not materialize, and that challenges of this type are not unique to the Rush Solar project.<sup>60</sup> As such, there is no "concrete" problem solved by granting the Waiver Request. PJM also asserted that granting the Waiver Request would encourage other Project Developers to file similar waiver requests.<sup>61</sup> The Commission responded by stating it is "not persuaded by PJM's argument that Rush Solar is attempting to hedge against the potential roadblock of the Moratorium."<sup>62</sup>

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<sup>57</sup> *ACPA*, 54 F.4th at 726, 728; *NEPGA*, 881 F.3d at 210; *Ameren Services*, 880 F.3d at 581; *PPL Wallingford*, 419 F.3d at 1200; *CAPP*, 254 F.3d at 299.

<sup>58</sup> Protest at 9 (citing November 2022 Order at PP 99, 103).

<sup>59</sup> See *supra* note 53; see also *Motor Vehicle Manufacturers*, 463 U.S. at 42 (indicating agency changing its course "is obligated to supply a reasoned analysis for the change").

<sup>60</sup> Protest at 10.

<sup>61</sup> Protest at 10.

<sup>62</sup> April 5 Order at P 29.

This answer fails the test of reasoned decision making. Rush Solar argued that the requested waiver would “simply allow Rush Solar to change the Project site to the limited extent necessary” to account for “the possibility” that Rush County may not lift its solar permit moratorium in time for the Rush Project to proceed. What Rush Solar proposes is the very essence of equivocation – developing a fallback plan (use of the Dearborn County site) to be utilized in case its initial plan (use of the Rush County site) does not work. The April 5 Order utterly ignores this point. Moreover, the Commission ignored PJM’s statements that Rush Solar did not face any unique challenges and that granting the Waiver Request would simply encourage other such requests, further demonstrating that the April 5 Order is arbitrary, capricious and contrary to reasoned decision making.<sup>63</sup>

4. *The Commission further erred by ignoring PJM’s demonstration that granting the Waiver Request would harm third parties.*

With respect to the last prong for approval of the Waiver Request, PJM argued that granting the Waiver Request would be contrary to efficient queue administration, and would result in direct harm to other Project Developers in Transition Cycle #1 that have fully complied with all the requirements of Tariff, Part VII, section 309.<sup>64</sup> PJM further argued that allowing Rush Solar to skirt a requirement intended to ensure projects in the queue are viable and ready to proceed would be unjust, unreasonable, and unduly discriminatory.<sup>65</sup> The Commission did not meaningfully respond to PJM’s arguments, and

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<sup>63</sup> *Motor Vehicle Manufacturers*, 463 U.S. at 42.

<sup>64</sup> Protest at 10. PJM pointed out that the Commission has routinely recognized that efficient queue administration is in the public interest. *Id.* (citing *PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,075, at P 38 (2021) (denying request for waiver and finding notices of cancellation in the public interest); *Midcontinent Indep. Sys. Operator, Inc.*, 176 FERC ¶ 61,161, at P 24 (2021) (granting waiver in part on the basis that no other projects in the interconnection queue will be impacted or restudied as a result)).

<sup>65</sup> Protest at 10-11.

instead simply summarized the scope of the Waiver Request.<sup>66</sup> By failing to engage with PJM's demonstration that the Waiver Request will result in harm to third parties, the Commission's decision is arbitrary, capricious and contrary to reasoned decision making.<sup>67</sup>

In support of its findings regarding harm to third parties, the Commission states, "PJM does not cite to any Tariff provision that would permit or require PJM to re-run its Phase I studies."<sup>68</sup> This finding misses the point. Rush Solar is still required to interconnect at the same Point of Interconnection originally proposed, unless it meets the requirements to change its Point of Interconnection in accordance with Tariff, Part VII, section 309(B)(4).<sup>69</sup> The harm to other Project Developers results if the project passes through Phase I or moves into Phase II is later terminated for failing to meet Site Control or Point of Interconnection requirements. Withdrawal or termination later in the process may result in costs being shifted to other projects. If the Project Site specified by Rush Solar cannot be developed, PJM would expect Rush Solar to withdraw its project rather than place additional money at risk by remaining in the process through Phase II. This is how the phased process with additional readiness deposits, and thereby additional money, at risk is designed. By granting the Waiver Request, the Commission allows Rush Solar to circumvent the readiness requirements and potentially enter Phase II without meeting the requirements other project developers in the cycle have satisfied, which ultimately may harm those other project developers.

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<sup>66</sup> April 15 Order at P 30.

<sup>67</sup> *Motor Vehicle Manufacturers*, 463 U.S. at 42.

<sup>68</sup> April 5 Order at P 30.

<sup>69</sup> Tariff, Part VII, Subpart D, section 309(B)(4) allows a Project Developer to change its Point of Interconnection at Decision Point under certain defined circumstances. The Point of Interconnection cannot be changed at Decision Point II or III. Tariff, Part VII, Subpart D, sections 311(B)(4)(d) and 313(C).

Further, including Rush Solar in the next study even though Rush Solar does not have proper Site Control will render the next study inaccurate (because Rush Solar may or may not locate its project where it currently says it will). It makes little sense for PJM and the relevant Transmission Owner to study a project that lacks Site Control and represents a waste of PJM's and the relevant Transmission Owner's resources.

Moreover, the fact the Rush Project was studied as part of the transition sorting process when it should not have been, means that it is taking up headroom on the system for a project that is not viable, which could have been made available to a project that meets PJM's Site Control and adjacency requirements. In addition, granting the Waiver Request can introduce uncertainty in Phases II and III, because it may not be clear which of two sites (Rush County or Dearborn County) should be used for conducting the Facilities Study.<sup>70</sup>

As Commissioner Christie states, what PJM has done is affirmatively state that permitting Rush Solar to ignore the adjacency requirement would delay the transition to Phase II for all projects.<sup>71</sup> The Commission's order, which ignores the cost shifts and harms to other Project Developers by effectively waving away these very real concerns, is therefore arbitrary, capricious, and contrary to reasoned decision making.

Finally, Commission precedent requires an applicant for waiver to satisfy all four prongs of the Commission's established test.<sup>72</sup> Thus, if the Commission finds on rehearing that Rush Solar fails to satisfy any of the four prongs, it must deny the Waiver Request.

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<sup>70</sup> See Tariff, Part VII, Subpart D, sections 310(A)(1)(d) and 312(A)(1)(d).

<sup>71</sup> April 5 Order, dissent op. (Commissioner Christie) at P 2 n.4.

<sup>72</sup> See *supra* note 29.

**B. The Commission Erred by Failing to Provide a Meaningful Response to PJM’s Showing That Granting the Waiver Request Would be Contrary to PJM’s Recently Implemented Tariff Reforms, and Failing to Justify the Commission’s Departure From its Reasoning in the November 2022 Order.**

In its Protest, PJM described its recent queue reform efforts, directly quoted from the Commission’s express approval of the Site Control and adjacency requirements in PJM’s reformed interconnection procedures, and noted that the requested relief is directly contrary to PJM’s revised interconnection procedures and the Commission’s approval of these provisions.<sup>73</sup>

The Commission failed to address these arguments and thus its findings – or lack thereof – are arbitrary, capricious and inconsistent with reasoned decision making. Court precedent requires that an agency must examine the relevant data and provide a satisfactory explanation for the determinations it makes.<sup>74</sup> Significantly, Commissioner Christie recognized these shortcomings, stating, “not only [was he] persuaded by PJM’s protest,” but the “order fails to adequately support the majority’s finding to grant this request.”<sup>75</sup> Commissioner Christie also noted that after approving PJM’s Site Control requirements in the November 2022 Order, the majority “abandons those findings” to grant the first waiver request of those requirements in an unsupported order.<sup>76</sup>

The failure to provide a meaningful response to the arguments raised by PJM is inconsistent with reasoned decision making, and renders the Commission’s decision

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<sup>73</sup> Protest at 2-4, 5-6, 9-11.

<sup>74</sup> See *Motor Vehicle Manufacturers*, 463 U.S. at 41, 43.

<sup>75</sup> April 5 Order, dissent op. (Commissioner Christie) at P 2. Commissioner Christie cited to and quoted from PJM’s showings that the Waiver Request was unjustified and contrary to the Commission’s approval of the June 14 Filing. *Id.* n.3

<sup>76</sup> April 5 Order, dissent op. (Commissioner Christie) at PP 1-2.

arbitrary and capricious.<sup>77</sup> Further, the Commission failed to justify its change in position from the November 2022 Order, which recognized the importance of the adjacency requirement, to the April 5 Order granting the Waiver Request.<sup>78</sup> Each of these failures renders the April 5 Order infirm. In order to comply with reasoned decision making and judicial precedent, the Commission should grant rehearing of the April 5 Order, and reject the Waiver Request.

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<sup>77</sup> *ACPA*, 54 F.4th at 726, 728; *NEPGA*, 881 F.3d at 210; *Ameren Services*, 880 F.3d at 581; *PPL Wallingford*, 419 F.3d at 1198, 1200; *CAPP*, 254 F.3d at 299.

<sup>78</sup> *Sw. Airlines Co. v. FERC*, 926 F.3d 851 at 858-859 (vacating and remanding decision below and stating that while the Commission depart from its prior line of policy, it must acknowledge it is doing so and provide a reasoned explanation for the change (citing *La. Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1303 (D.C. Cir. 2014)); *see also Motor Vehicle Manufacturers*, 463 U.S. at 42 (indicating agency changing its course “is obligated to supply a reasoned analysis for the change”).

#### IV. CONCLUSION

For the reasons stated above, the Commission should grant PJM's request for rehearing of the April 5 Order and deny the Waiver Request.

Respectfully submitted,

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## **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 6th day of May 2024.

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