

182 FERC ¶ 61,109
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

PJM Interconnection, L.L.C.

Docket Nos. ER23-729-000
EL23-19-000

ORDER ON PROPOSED TARIFF REVISIONS AND DISMISSING COMPLAINT

(Issued February 21, 2023)

1. On December 23, 2022, pursuant to section 205 of the Federal Power Act (FPA)¹ and Part 35 of the Commission's Rules of Practice and Procedure,² PJM Interconnection, L.L.C. (PJM) filed proposed revisions to the PJM Open Access Transmission Tariff (Tariff) 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.³ On December 23, 2022, pursuant to section 206 of the FPA,⁴ PJM also filed a complaint alleging that the LDA Reliability Requirement, absent the changes proposed in the concurrent FPA section 205 filing, results in an unjust and unreasonable auction outcome. As discussed below, we accept PJM's FPA section 205 proposal, effective December 24, 2022, as requested, and dismiss PJM's complaint as moot.

I. Background

2. PJM conducts capacity auctions on a forward basis to ensure that sufficient capacity is available to provide reliable energy to its customers during periods of peak

¹ 16 U.S.C. § 824d.

² 18 C.F.R. pt. 35 (2021).

³ PJM Interconnection, L.L.C., Intra-PJM Tariffs, OATT Definitions L - M - N (35.0.0) and OATT, Attach. DD 5.12, Conduct of RPM Auctions (22.0.0).

⁴ 16 U.S.C. § 824e.

demand.⁵ These auctions include an annual Base Residual Auction (BRA) and three Incremental Auctions for each delivery year (collectively referred to as “capacity auctions”).⁶ Each auction is cleared using a supply curve consisting of the supply offers submitted by sellers and administratively determined demand curves.⁷ PJM uses an optimization algorithm to evaluate auction inputs and determine the supply offers that clear an auction and receive capacity commitments at the clearing price.⁸

3. PJM establishes demand curves for the PJM region as a whole, as well as for Locational Deliverability Areas (LDA) if certain criteria are met.⁹ PJM calculates the demand curves for LDAs using the LDA Reliability Requirement.¹⁰ The LDA Reliability Requirement is the projected internal capacity in the LDA plus the Capacity Emergency Transfer Objective (CETO) for the delivery year less the minimum internal resources required for all Fixed Resource Requirement entities¹¹ in such LDA.¹² CETO is defined

⁵ PJM, Intra-PJM Tariffs, Attach. DD 1, Introduction (1.0.0); PJM ER23-729-000 Transmittal at 6.

⁶ PJM, Intra-PJM Tariffs, Attach. DD § 5.4, Reliability Pricing Model Auctions (7.0.0). These auctions are currently running on a compressed schedule.

⁷ PJM, Intra-PJM Tariffs, Attach. DD § 5.10 Auction Clearing Requirements (30.0.0).

⁸ PJM, Intra-PJM Tariffs, Attach. DD § 5.12 Conduct of RPM Auctions (20.0.0).

⁹ PJM determines which LDAs to model in each auction by, inter alia, comparing the import limit of an LDA (also known as the Capacity Emergency Transfer Limit) to the amount of capacity that needs to be imported into an LDA to remain within a loss of load expectation of one event in 25 years when the area is experiencing a localized capacity emergency (also known as the Capacity Emergency Transfer Objective or CETO). *See also* PJM, Intra-PJM Tariffs, Attach DD § 5.10(a)(ii) Variable Resource Requirement Curve (30.0.0).

¹⁰ PJM, Intra-PJM Tariffs, Attach DD § 5.10(a)(ii)(C) Variable Resource Requirement Curve (30.0.0). PJM uses a region-wide reliability requirement for the region as a whole.

¹¹ The Fixed Resource Requirement (FRR) Alternative provides an alternative means for an eligible load-serving entity to satisfy its capacity obligations outside of the capacity auctions. *See* PJM, Intra-PJM Tariffs, Reliability Assurance Agreement (RAA) Schedule 8.1 Fixed Resource Requirement Alternative (3.0.0).

¹² PJM, Intra-PJM Tariffs, § I.1 L-M-N, OATT Definitions (32.2.0) (defining

as “the amount of electric energy that a given area must be able to import in order to remain within a loss of load expectation of one event in 25 years when the area is experiencing a localized capacity emergency, as determined in accordance with the PJM Manuals.”¹³ PJM Manual 20 specifies that CETO shall be modeled including any “planned generation resource” that has an executed Interconnection Service Agreement (ISA).¹⁴ PJM Manual 14B clarifies that units without an ISA that have cleared in a prior BRA are also included.¹⁵

4. The Tariff requires PJM to determine the LDA Reliability Requirement for each LDA for which a demand curve has been established on or before February 1 prior to conducting the relevant BRA.¹⁶ However, a number of capacity auctions have been delayed and the auctions are now running on compressed schedules.¹⁷ The instant filing concerns the BRA for delivery year 2024/2025 (2024/2025 BRA). For this auction, PJM was required to post the planning parameters on August 29, 2022.¹⁸ The auction bidding

Locational Deliverability Area Reliability Requirement).

¹³ PJM, Intra-PJM Tariffs, RAA Article 1 – Definitions (36.0.0).

¹⁴ PJM Manual 20: PJM Resource Adequacy Analysis, § 4.3 Modeling Specifics, Revision 12 (Aug. 25, 2021), <https://www.pjm.com/-/media/documents/manuals/m20.ashx>.

¹⁵ PJM Manual 14B: PJM Region Transmission Planning Process, C.2.6 CETO/CETL as an Input to RPM, Revision 51 (Dec. 15, 2021), <https://www.pjm.com/-/media/documents/manuals/m14b.ashx>.

¹⁶ PJM, Intra-PJM Tariffs, Attach DD § 5.10(a)(vi)(B) Process for Establishing Parameters of Variable Resource Requirement Curve (30.0.0).

¹⁷ See, e.g., *PJM Interconnection, L.L.C.*, 177 FERC ¶ 61,209 (2021); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137 (2021); *PJM Interconnection, L.L.C.*, 177 FERC ¶ 61,050 (2021); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,061 (2020); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 168 FERC ¶ 61,051 (2019); *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,153 (2018).

¹⁸ PJM Auction Schedule, <https://www.pjm.com/markets-and-operations/rpm.aspx> (accessed on January 6, 2023).

window opened December 7, 2022, and closed December 13, 2022. PJM was scheduled to post the auction results on December 20, 2022 but has not yet done so.¹⁹

II. Filings

A. ER23-729-000 FPA Section 205 Filing

5. In this filing, PJM proposes to change the way Planned Generation Capacity Resources²⁰ are factored into LDA Reliability Requirement. Specifically, PJM proposes changes that would allow PJM, during the auction process, to exclude Planned Generation Capacity Resources from the calculation of the LDA Reliability Requirement if the addition of such resources materially increases the LDA Reliability Requirement and such resources do not participate in the relevant capacity auction.²¹ PJM argues this change is necessary to have an accurate LDA Reliability Requirement in clearing the auctions. PJM states that the current auction rules do not allow PJM to update the LDA Reliability Requirement during the auction process, which can result in prices that do not reflect the actual reliability needs of small LDAs.²²

1. Calculation of LDA Reliability Requirements

6. PJM explains that, in its basic form, the LDA Reliability Requirement is expressed formulaically as: internal projected capacity (expressed in Unforced Capacity²³) + CETO

¹⁹ *Id.*

²⁰ The Reliability Assurance Agreement defines a Planned Generation Capacity Resources as a Generation Capacity Resource, or additional megawatts to increase the size of a Generation Capacity Resource, participating in the generation interconnection process for which, inter alia, Interconnection Service is scheduled to commence on or before the first day of the delivery year for which such resource is to be committed in a capacity and an Interconnection Service Agreement has been executed prior to any Incremental Auction for such delivery year in which such resource plans to participate. PJM, Intra-PJM Tariffs, RAA, Article 1 – Definitions (36.0.0).

²¹ PJM ER23-729-000 Transmittal at 1.

²² *Id.* at 2.

²³ The Reliability Assurance Agreement defines Unforced Capacity as “installed capacity rated at summer conditions that is not on average experiencing a forced outage or forced derating, calculated for each Capacity Resource on the 12-month period from October to September without regard to the ownership of or the contractual rights to the capacity of the unit.” PJM, Intra-PJM Tariffs, RAA, Article 1 – Definitions (36.0.0).

for the LDA.²⁴ PJM states that Planned Generation Capacity Resources are included in the LDA Reliability Requirement as internal projected capacity.²⁵ PJM further explains that the PJM Manuals state that any “planned generation resource” with an executed ISA is modeled for CETO (i.e., the planned resource is assumed to offer into the relevant auction).²⁶ Therefore, PJM states, for a given capacity auction, PJM calculates CETO including all resources with an executed ISA that specifies a commercial operation date that falls on or before the first day of the relevant delivery year.

7. PJM states that the increase in projected internal capacity is generally offset entirely by the corresponding decrease to the CETO value. However, PJM states that is not the case when the “reliability value” of a given resource or resources used to calculate CETO is lower than the projected internal “capacity value.”²⁷ PJM identifies two instances when this can happen. First, PJM explains that when a large Planned Generation Capacity Resource is added to a relatively small LDA, the load in that LDA becomes more dependent on the resource. PJM clarifies that although the resource provides a large amount of internal capacity towards the LDA’s requirements, the possibility of the resource experiencing a forced outage also significantly increases the LDA’s reliability risk. Second, PJM states that Intermittent Resources²⁸ can have a lower capacity value for an LDA than the regional transmission organization (RTO)-wide average if the resource’s production does not align with the LDA’s needs. As an example, PJM states that a proportionately large quantity of solar resources has a relatively lower capacity value in near winter-peaking LDAs.

²⁴ PJM ER23-729-000 Transmittal at 12-13 (citing PJM, Intra-PJM Tariffs, Definitions L-M-N (definition of Locational Deliverability Area Reliability Requirement)).

²⁵ *Id.* at 13.

²⁶ *Id.* (citing *PJM Manual 18: PJM Capacity Mkt.*, PJM Interconnection, L.L.C., at 28 n.7 (Sept. 21, 2022), <https://www.pjm.com/-/media/documents/manuals/m18.ashx>; *PJM Manual 20: PJM Resource Adequacy Analysis*, PJM Interconnection, L.L.C., at 32 (Aug. 25, 2021), <https://www.pjm.com/-/media/documents/manuals/m20.ashx>).

²⁷ *Id.* at 14. Projected internal capacity value is based on a class average forced outage rate, for generation resources, or Effective Load Carrying Capability, for solar resources, derived from the PJM region. *Id.*

²⁸ The Tariff defines an Intermittent Resource as a Generation Capacity Resource with output that can vary as a function of its energy source, such as wind, solar, run of river hydroelectric power and other renewable resources. PJM, Intra-PJM Tariffs, Common Service Provisions § I.1 (Definitions – I – J – K) (14.0.0).

8. PJM therefore states that if certain Planned Generation Capacity Resources are modeled in the CETO but do not offer into the auction as anticipated, the LDA Reliability Requirement is overstated. PJM explains that it realized this flaw in the Tariff in attempting to clear the 2024/2025 BRA. PJM explains that a significant amount of Planned Generation Capacity Resources in the Delmarva Power & Light - South LDA (Delmarva) that were expected to participate in the 2024/2025 BRA based on their in-service dates chose not to do so.²⁹ PJM states that these resources were included in the calculation of the LDA Reliability Requirement for Delmarva, and, as a result, Delmarva's LDA Reliability Requirement increased by approximately 12% from the prior year.³⁰ However, PJM contends that these planned resources should not have been included in the LDA Reliability Requirement because they did not offer into the auction, and are therefore not expected to be physically available to serve as capacity in the 2024/2025 delivery year.³¹

9. PJM explains that, should PJM complete the 2024/2025 BRA under the current rules, the clearing price for Delmarva would be more than four times higher than if the planned resources that did not offer were excluded from the LDA Reliability Requirement.³² PJM indicates that this increased price would not reflect the actual reliability needs of Delmarva and would force load-serving entities in the LDA to procure more capacity than is needed to meet the area's actual reliability needs.³³

10. PJM proposes several Tariff revisions to correct this problem. First, PJM proposes to modify the definition of LDA Reliability Requirement to state that, effective with the 2024/2025 delivery year, PJM shall exclude, from the calculation of LDA Reliability Requirement, any Planned Generation Capacity Resources that do not participate in the relevant auction if including them would increase the LDA Reliability Requirement by more than one percent.³⁴ PJM explains that for a BRA, this increase is measured relative to the LDA Reliability Requirement used from the prior year's BRA. PJM states that, for

²⁹ PJM ER23-729-000 Transmittal at 2.

³⁰ *Id.* at 2, 11.

³¹ *Id.* at 16. PJM clarifies that the LDA Reliability Requirement is only unreasonable because the Planned Generation Capacity Resources did not actually offer. Had the resources offered in the auction as expected, PJM explains, the increased LDA Reliability Requirement would have been correct. *Id.* at 18.

³² *Id.* at 2.

³³ *Id.* at 3.

³⁴ *Id.* at 20-21.

Incremental Auctions, the LDA Reliability Requirement would be compared with that used in the prior relevant capacity auction associated with the same delivery year. PJM states that it is reasonable to use a one percent materiality threshold because “it is the cumulative addition of sufficiently large Planned Generation Capacity Resources in a small LDA that causes the identified issue.”³⁵ PJM also argues that using a percentage avoids having to define a megawatt (MW) value for what constitutes a “small” LDA.³⁶ PJM further proposes changes to Tariff, Attachment DD, section 5.12 to require PJM to consider the most updated LDA Reliability Requirement in the optimization algorithm when evaluating the sell offers and other inputs during the auction process.³⁷

2. Effective Date

11. PJM requests waiver of the Commission’s 60-day prior notice requirement to allow the proposed revisions to become effective one day after the date of its FPA section 205 filing, on December 24, 2022.³⁸ PJM states good cause exists to grant waiver because the proposed changes would reduce charges that load-serving entities would otherwise have to pay.³⁹

12. PJM argues that the Commission may accept PJM’s proposed Tariff revisions effective for the most recent auction (i.e., 2024/2025 BRA) because the auction has not concluded.⁴⁰ PJM explains that, while the deadline for submitting sell offers has passed, PJM has not yet awarded any capacity commitments. PJM further explains that the Tariff describes the auction process after the offer window closes and requires PJM “to evaluate the Sell Offers and other inputs to such auction to determine the Sell Offers that clear

³⁵ *Id.* at 20.

³⁶ *Id.* at 20-21.

³⁷ *Id.* at 21.

³⁸ *Id.* at 5; 18 C.F.R. § 35.3(a)(1) (2021).

³⁹ PJM ER23-729-000 Transmittal at 5 (citing *Cent. Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338, *order on reh’g*, 61 FERC ¶ 61,089 (1992) (*Cent. Hudson*) (“We will generally grant waiver of the 60-day prior notice requirement in the following instances: . . . (2) filings that reduce rates and charges—such as rate decreases or new services that provide the customer of a utility with an opportunity to reduce its purchases of other, more expensive service from the same utility.”)).

⁴⁰ *Id.* at 3 (citing PJM, Intra-PJM Tariffs, Attach. DD § 5.12 Conduct of RPM Auctions).

such auction.”⁴¹ PJM argues that the auction is not closed until PJM has cleared the auction and awarded capacity commitments. PJM further contends that the Tariff requirement for PJM to post the auction results “as soon . . . as possible” “implicitly acknowledges that there is an auction process where PJM produces a supply curve based on all of the valid Sell Offers and validates initial solutions before finalizing the auction results.”⁴²

13. PJM argues that its proposal is consistent with the filed rate doctrine and the rule against retroactive ratemaking for several reasons.⁴³ First, PJM states that the proposed Tariff changes do “not violate any specific deadline or date contained within the text of the Tariff.”⁴⁴ PJM argues that the Tariff only requires PJM to post the auction results as soon as possible and does not provide a specific deadline.⁴⁵ PJM concludes that this provision is “acknowledgement that additional process is necessary before the full effectuation of the filed-rate via validation and finalization of the results and the awarding of capacity commitments to Capacity Market Sellers.”⁴⁶

14. Second, citing *PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,208 (2020), PJM argues that the Commission has previously granted waiver of a planning parameter posting deadline in Tariff, section 5.10 during the auction process. PJM states that, in that case, the Commission found that the waiver request was prospective because PJM sought waiver of “its future obligation to clear the Second Incremental Auction using the updated PJM Region Peak Load Forecast it posted before February 1, 2020” and instead, PJM sought to clear the auction in July 2020 “using an updated forecast that reflects the significant economic impact of COVID-19.”⁴⁷ PJM states that the proposed Tariff changes will similarly only impact future actions not yet taken in the auction process—

⁴¹ *Id.*

⁴² *Id.* at 22.

⁴³ *Id.* at 24.

⁴⁴ *Id.* at 24, 25 (citing *Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821 (D.C. Cir. 2021) (*Okla. Gas*)).

⁴⁵ *Id.* at 26.

⁴⁶ *Id.* at 26-27.

⁴⁷ *Id.* at 27 (citing *PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,208 (2020) (Planning Parameter Order)).

namely, clearing the 2024/2025 BRA using a correct LDA Reliability Requirement.⁴⁸ PJM clarifies that it is not proposing any modifications to activities or deadlines which have already passed, but instead proposes to prospectively include an additional factor to be considered in the optimization algorithm when evaluating the auction inputs before the 2024/2025 BRA results are determined.⁴⁹ PJM notes that, absent this change, PJM would be forced to use a “materially inaccurate” LDA Reliability Requirement in clearing the 2024/2025 BRA.⁵⁰ PJM contends that this would result in an unjust and unreasonable outcome inconsistent with the Commission’s statutory duty to ensure just and reasonable rates.

15. Third, PJM contends that the Tariff changes effectuate an existing Tariff provision providing prior notice to customers that PJM may seek Commission approval of Tariff modifications where “imminent severe economic harm to electric consumers requires a prompt section 205 filing.”⁵¹ PJM contends that the Commission has previously acknowledged that this provision gives PJM the authority to make emergency filings with the Commission and that PJM may apply for waiver of the Commission’s 60-day prior notice requirement “under such circumstances.”⁵² PJM states that it is filing the proposed Tariff revisions pursuant to this Tariff provision, section 9.2(b), “given the ‘imminent severe economic harm’” to Delmarva customers if the auction is cleared under the “outdated” LDA Reliability Requirement.⁵³ PJM further explains that the Commission has previously found Tariff section 9.2(b) gives PJM “the ability to respond to emergency circumstances” in declining to require PJM to implement a “circuit breaker” to cap excessive charges during shortage pricing conditions.⁵⁴ PJM states the Commission further cited Tariff section 9.2(b) in finding that “PJM has authority to act if it determines that an emergency requires the suspension of shortage pricing to address imminent harm to reliability or consumers,” and “[i]n its role as an RTO, PJM has a responsibility to

⁴⁸ *Id.* at 24.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

⁵¹ *Id.* at 24 (citing PJM, Intra-PJM Tariffs, § I.9.2(b) Rights of the Transmission Provider).

⁵² *Id.* at 28-29 (citing *PJM Interconnection, L.L.C.*, 141 FERC ¶ 61,096, at P 11 (2012) (Shortage Pricing Order)).

⁵³ *Id.* at 29.

⁵⁴ *Id.* at 28 (citing *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,057 at P 232 (2012)).

determine when/if such an emergency filing should be made with the Commission and can apply for a waiver of the Commission's 60-day prior notice requirement under such circumstances."⁵⁵ PJM argues that Tariff section 9.2(b) was intended for this type of circumstance and would have no meaning if it could not be applied here.

16. Fourth, PJM argues that, because no capacity awards have been made or final results posted, there is not a final rate for the 2024/2025 BRA for which any entity has an entitlement or settled expectation at this time.⁵⁶

17. PJM states that some stakeholders may object to the requested effective date because the Tariff requires the LDA Reliability Requirement to be posted in advance of the auction.⁵⁷ However, PJM states that the Tariff also requires PJM to adjust the LDA Reliability Requirement to reflect any Price Responsive Demand⁵⁸ which clears the auction.⁵⁹ PJM therefore argues that participants do not have an expectation that the LDA Reliability Requirement posted in advance of the auction will remain the same through the auction process.

⁵⁵ *Id.* at 28-29 (citing Shortage Pricing Order, 141 FERC ¶ 61,096 at P 11).

⁵⁶ *Id.* at 24.

⁵⁷ *Id.* at 23.

⁵⁸ The RAA defines Price Responsive Demand (PRD) as “end-use customer load registered by a PRD Provider pursuant to Reliability Assurance Agreement, Schedule 6.1 that have, as set forth in more detail in the PJM Manuals, the metering capability to record electricity consumption at an interval of one hour or less, Supervisory Control capable of curtailing such load (consistent with applicable RERRA requirements) at each PRD Substation identified in the relevant PRD Plan or PRD registration in response to a Maximum Generation Emergency declared by the Office of the Interconnection (prior to 2022/Delivery Year) or a Performance Assessment Interval that triggers a PRD performance assessment (effective with 2022/2023 Delivery Year), and a retail rate structure, or equivalent contractual arrangement, capable of changing retail rates as frequently as an hourly basis, that is linked to or based upon changes in real-time Locational Marginal Prices at a PRD Substation level and that results in a predictable automated response to varying wholesale electricity prices.” PJM, Intra-PJM Tariffs, RAA, Article 1 – Definitions (36.0.0).

⁵⁹ PJM ER23-729-000 Transmittal at 23 (citing PJM, Intra-PJM Tariffs, Attach. DD § 5.11(e) Posting of Information Relevant to the RPM Auctions).

18. PJM acknowledges that sellers have submitted offers based on the planning parameters that have been posted.⁶⁰ However, PJM argues that it is the actions of the sellers who chose not to participate in the auction, rather than the posted planning parameters, that created the unjust and unreasonable mismatch between prices and actual reliability conditions in Delmarva. Therefore, PJM argues, “there was no specific planning parameter reliance let alone a capacity award that would trigger application of the filed-rate doctrine.”⁶¹

19. Finally, PJM argues that Tariff, Attachment DD, section 5.11(e) states that capacity auction results may be subject to change by the Commission when there are errors.⁶² PJM argues that the 2024/2025 BRA results would be in error absent the proposed Tariff changes because PJM would not be able to clear the auction in a way that minimizes the cost of satisfying reliability requirements as required by the Tariff.⁶³ PJM acknowledges that this provision is focused on PJM’s ability, rather than the Commission’s, to correct errors but argues that the provision still puts market participants “on notice of the Commission’s inherent FPA section 206 authority to correct anomalous results before the market closes and capacity awards are made.”⁶⁴ PJM also states that this provision explicitly provides that the initially posted auction results may be reviewed by the Commission, and thus, participants were on notice that the Commission may correct an error to the initial posting of auction results and change any such initial results to ensure just and reasonable rates. PJM states that it “does not have the ability to correct this situation, but the Commission can by accepting PJM’s proposed correction and directing PJM to finalize the results on that basis.”⁶⁵ PJM states that, given that the Tariff, Attachment DD, section 5.11(e) places market participants on notice of potential changes to fix errors after the initial auction results are posted, “the Tariff surely also

⁶⁰ *Id.* at 24-25.

⁶¹ *Id.* at 25 (citing PJM, Intra-PJM Tariffs, Attach. DD § 5.11(e) Posting of Information Relevant to the RPM Auctions (“If PJM discovers a potential error in the initial posting of auction results for a particular Reliability Pricing Model Auction, it shall notify Market Participants as soon as possible after it is found” and that the deadlines for correcting such an error “shall not apply if the referenced auction results are under publicly noticed review by the FERC.”)).

⁶² *Id.* at 30.

⁶³ *Id.* at 31 (citing PJM, Intra-PJM Tariffs, Attach. DD § 5.12(a) Conduct of RPM Auctions).

⁶⁴ *Id.* at 30.

⁶⁵ *Id.* at 31.

allows the Commission to prospectively fix such errors prior to the completion of the auction and the actual awarding of capacity obligations,” which PJM states is “precisely what PJM is proposing through this filing.”⁶⁶

B. Complaint

20. Concurrently with its FPA section 205 filing, PJM filed a complaint pursuant to FPA section 206, alleging that the existing LDA Reliability Requirement, absent PJM’s proposed Tariff revisions, would result in an unjust and unreasonable auction outcome that would be inconsistent with actual market fundamentals because the LDA Reliability Requirement does not reflect the actual supply and demand of the Delmarva LDA.⁶⁷ PJM notes that, under the existing Tariff, load in the Delmarva LDA would pay over \$100 million in excess of what is necessary for capacity for the 2024/2025 delivery year.⁶⁸ PJM explains that its FPA section 206 complaint filing contains identical proposed Tariff amendments as its FPA section 205 filing, but that the complaint filing gives the Commission the ability to direct different Tariff reforms, should the Commission choose to do so.⁶⁹ PJM states that should PJM’s FPA section 205 filing be accepted, PJM places parties on notice that it would consider this FPA section 206 filing to be moot and withdrawn.⁷⁰

21. PJM also states that it believes that the LDA Reliability Requirement issue is narrow enough to be addressed without reopening the offer window, but states “that in the unlikely event that PJM is required to take this extraordinary step in the future due to an issue with more significant impacts, it may be necessary to consider potentially restarting the BRA including reopening the bidding window.”⁷¹ PJM also notes that, if the Commission has concerns with updating the rules of the auction while the auction is

⁶⁶ *Id.* at 31.

⁶⁷ PJM EL23-19 Transmittal at 1-2.

⁶⁸ *Id.* at 34.

⁶⁹ *Id.* at 6 (citing *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017)).

⁷⁰ *Id.* at 2 n.4, 36.

⁷¹ *Id.* at 31.

in progress, it can direct PJM to restart the 2024/2025 BRA with the amended rules described in this filing under the Commission's FPA section 206 authority.⁷²

22. PJM requests that the Commission set a refund effective date of December 23, 2022, the date of filing.⁷³ PJM states that the proposed refund effective date is significant because the complaint was filed prior to the posting of any BRA results associated with the 2024/2025 delivery year, and as such, provides notice to market participants that any indicative auction results that may be posted for this BRA are subject to change based on a revised LDA Reliability Requirement.

III. Notice and Responsive Pleadings

23. Notice of PJM's filings were published in the *Federal Register*, 88 Fed. Reg. 70 (Jan. 3, 2023), with interventions and protests due on or before January 20, 2022. Notices of intervention and timely motions to intervene were filed by the entities listed in Attachment A. Sierra Club filed a motion to intervene out of time.

24. Timely comments were filed by the following parties: American Clean Power Association, Solar Energy Industries Association, and Advanced Energy United (collectively, the Clean Energy Associations); American Municipal Power, Inc. (AMP); Constellation Energy Generation, LLC (Constellation); the Delaware Public Service Commission, the Delaware Division of the Public Advocate, the Delaware Municipal Electric Corporation, the Maryland Public Service Commission, and the Virginia State Corporation Commission (collectively, the Delmarva Load Parties); Electric Power Supply Association (EPSA); Freepoint Solar LLC (Freepoint); Invenergy Wind Development North America LLC, Invenergy Solar Development North America LLC and Invenergy Thermal Development LLC (Invenergy); Buckeye Power, Inc. and East Kentucky Power Cooperative, Inc. (collectively, Joint Electric Cooperatives); Leeward Renewable Energy, LLC and Leeward Renewable Energy Development, LLC (Leeward); Lotus Infrastructure, LLC (Lotus); LS Power Development, LLC (LS Power); Maryland Office of People's Counsel (Maryland People's Counsel); Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM (Market Monitor); New Jersey Board of Public Utilities (New Jersey Board); NRG Power Marketing, LLC and Midwest Generation, LLC (NRG); Organization of PJM States, Inc. (OPSI); Old Dominion Electric Cooperative (ODEC); Public Utilities Commission of Ohio's Federal Energy Advocate (Ohio FEA); Pennsylvania Public Utility Commission (Pennsylvania Commission); Pine Gate Renewables, LLC (Pine Gate); PJM Power Providers Group (P3); Public Citizen, Inc. (Public Citizen); Public Service Electric and Gas Company,

⁷² *Id.* at 31 n.42.

⁷³ *Id.* at 32-33.

PSEG Power LLC, and PSEG Energy Resources & Trade LLC (collectively, PSEG); Vistra Corp. (Vistra).

25. On February 2, 2023, PJM filed an answer. On February 3, 2023, the Market Monitor filed an answer. On February 6, 2023, ODEC, Sierra Club and Natural Resources Defense Council (Sierra/NRDC), and Constellation filed answers. On February 8, 2023, PJM filed an additional limited answer. On February 9, 2023, EPSA and P3 filed answers. On February 16, 2023, the Market Monitor filed an additional answer. On February 17, 2023, Leeward filed an answer.

IV. Comments

A. PJM's Proposal to Modify LDA Reliability Requirements

1. Comments

26. Several parties support PJM's proposed revisions.⁷⁴ The Delmarva Load Parties urge the Commission to accept PJM's filing as an appropriate and timely remedy that is consistent with the filed rate doctrine and the rule against retroactive ratemaking.⁷⁵ The Market Monitor supports the application of PJM's solution to the 2024/2025 BRA. The Market Monitor states that PJM is correct that, without a modification consistent with PJM's proposed rule change, the capacity prices in Delmarva would be significantly greater than the efficient and competitive level because the supply and demand fundamentals in the model do not reflect reality.⁷⁶

27. Although the Market Monitor supports PJM's proposal for the 2024/2025 BRA, for future auctions, the Market Monitor would prefer the Commission to require all planned resources to commit to a must offer requirement by a defined date prior to the posting of auction parameters by PJM.⁷⁷ ODEC contends that PJM's proposal is narrowly tailored to address the problem detailed in PJM's filing regarding the 2024/2025 BRA and also applicable beyond the immediate BRA, so it should provide PJM and

⁷⁴ Delmarva Load Parties Comments at 4; Maryland People's Counsel Comments at 4; New Jersey Board Comments at 2; Pennsylvania Commission Comments at 3-4; ODEC Comments at 2, 8; OPSI Comments at 3.

⁷⁵ Delmarva Load Parties Comments at 1-5.

⁷⁶ Market Monitor Comment at 2.

⁷⁷ *Id.* at 5.

market participants with certainty and protection against unrealistic LDA Reliability Requirements in future capacity auctions.⁷⁸

28. AMP supports PJM's proposal for the 2024/2025 BRA but argues that "it is possible that PJM's proposal will fall short of preventing similarly unjust, unreasonable, and unduly discriminatory results in future auctions."⁷⁹ Ohio FEA states that while it has concerns with PJM's proposal, to the extent the Commission determines an adjustment should be made, it should apply only to the 2024/2025 BRA.⁸⁰

29. Several parties argue that PJM's FPA section 205 filing has not been shown to be just and reasonable.⁸¹ Specifically, commenters argue that PJM has not justified focusing its solution on Planned Generation Capacity Resources that fail to offer in the BRA. For example, EPSA argues that PJM arbitrarily proposes to modify the LDA Reliability Requirement in circumstances where planned resources do not submit offers, but not where they offer but do not clear in the relevant BRA, even though the effect is functionally the same from a reliability perspective.⁸² Similarly, Freepoint argues that PJM does not address the situation where a planned resource is removed from the offer stack and rejected as mitigated.⁸³

30. NRG states that it asked PJM for an explanation of the large jump in the Delmarva LDA Reliability Requirement from the 2023/2024 BRA to the 2024/2025 BRA, and PJM pointed to "historical winter forced outages levels and an expected increase in the penetration of solar resources"⁸⁴ NRG argues that PJM's proposed remedy, however, implicitly assumes that the "increase in solar penetration" and other new entry in Delmarva will not occur to the extent these planned resources were not offered into the

⁷⁸ ODEC Comments at 8.

⁷⁹ AMP Comments at 4.

⁸⁰ Ohio FEA Comments at 4.

⁸¹ Constellation Protest at 16; EPSA Protest at 19-20; Invenergy Protest at 7; Leeward Protest at 11; P3 Protest at 30; Vistra Protest at 3, 10.

⁸² EPSA Protest at 24; *see also* Constellation Protest at 7; Freepoint Comments at 8.

⁸³ Freepoint Comments at 8.

⁸⁴ NRG Protest at 22 (citing NRG Holtman Aff. ¶ 27; NRG Aff. Ex. C).

2024/2025 BRA.⁸⁵ NRG explains that, under its current approach, PJM assumes that all of the planned resources with executed ISAs will be in-service by the delivery year, while under its instant proposal PJM assumes that none of the planned resources not offered will be in-service by the delivery year.⁸⁶ NRG argues that the latter speculation is unsupported and threatens to undermine reliability. NRG states that PJM is proposing to truncate a price signal that may still be needed to ensure reliability.⁸⁷

31. Similarly, EPSA argues that PJM fails to consider that planned and existing Intermittent Resources are exempt from the must-offer obligation, so the capacity offered into a capacity auction is not necessarily an accurate indicator of CETO or the LDA Reliability Requirement.⁸⁸ EPSA explains that the LDA Reliability Requirement and CETO are calculated based on projected internal capacity and not capacity commitments, and therefore account for the fact that resources that are in service and available to produce energy will affect reliability outcomes regardless of whether they have a capacity commitment.⁸⁹ EPSA further argues that the MW of Intermittent Resources offering into capacity auctions has decreased as the penetration of such resources has increased, suggesting that even resources that will be online in time for the 2024/2025 delivery year may have chosen not to accept a capacity commitment.⁹⁰ P3 similarly argues that PJM has not provided an explanation for why its proposed solution only applies to Planned Generation Capacity Resources, or why it is not unduly discriminatory to adjust the LDA Reliability Requirement for Planned Resources that do not offer but not for other resources exempt from the must offer obligation.⁹¹

32. Leeward contends that PJM's proposal as it applies to future auctions is overbroad and would allow PJM to unilaterally make an after-the-fact determination that an auction outcome is unjust and unreasonable, based upon an arbitrary and non-transparent

⁸⁵ *Id.* at 23 (citing NRG Aff. Ex. C).

⁸⁶ *Id.* (citing PJM ER23-729-000 Transmittal at 13; PJM EL23-19-000 Transmittal at 18); *see also* EPSA Protest at 21-26 (citing EPSA Sotkiewicz Aff. ¶¶ 48-50).

⁸⁷ *Id.* at 24 (citing NRG Holtman Aff. ¶¶ 28-31; *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 21 (2018)).

⁸⁸ EPSA Protest at 21-26 (citing EPSA Sotkiewicz Aff. ¶¶ 48-50); *see also* P3 Protest at 40.

⁸⁹ *Id.* at 22.

⁹⁰ *Id.* at 23-25.

⁹¹ P3 Protest at 40.

assessment.⁹² NRG argues that PJM's proposal defeats the purpose of posting planning parameters in advance of the auction and will chill beneficial bilateral contracting and hedging activities around the capacity auction.⁹³ NRG argues that there is no "workable or meaningful" way for market participants to price the risk that PJM will modify the LDA Reliability Requirement after offers have been submitted in a way which could result in a large reduction in the clearing price.⁹⁴

33. P3 contends that, although PJM asserts that the LDA Reliability Requirement will be more accurate under PJM's proposal, PJM ignores the fact that it will necessarily render sell offers less accurate, because they will be based on the initial LDA Reliability Requirement, which PJM describes in the instant filings as "inaccurate."⁹⁵ Given this, P3 argues that PJM should provide evidence that its proposed solution will reflect supply and demand dynamics.⁹⁶

34. EPSA argues that PJM's proposal is unjust and unreasonable because it fails to strike a balance between reducing prices for load and ensuring suppliers needed for reliability receive adequate compensation.⁹⁷ EPSA argues that this is evidenced by the market failing to send the necessary price signals for the replacement of the Indian River 4 Generating Station, which is now under a Reliability Must Run agreement after seeking to retire after failing to clear prior BRAs.⁹⁸ EPSA contends that PJM has also overlooked other serious reliability issues, such as that Intermittent Resources do not help small LDAs satisfy their reliability objectives because of the high correlation in outages when

⁹² Leeward Protest at 6, 11; *see also* Clean Energy Associations Protest at 3.

⁹³ NRG Protest at 20.

⁹⁴ *Id.*

⁹⁵ P3 Protest at 41-42 (citing PJM ER23-729-000 Transmittal at 20-22).

⁹⁶ *Id.* at 42.

⁹⁷ EPSA Protest at 27.

⁹⁸ *Id.* *See, e.g., NRG Power Mktg. LLC*, 179 FERC ¶ 61,156 (2022) (*NRG*) (accepting Reliability Must Run rate schedule for filing, suspending it for a nominal period, to be effective June 1, 2022, subject to refund, and establishing hearing and settlement procedures).

they are most needed and that resources cannot adequately reflect their risks in their capacity offers.⁹⁹

35. Some commenters argue PJM has not sufficiently justified the proposed materiality threshold as just and reasonable.¹⁰⁰ P3 argues that PJM has not explained how it arrived at the one percent threshold.¹⁰¹ Constellation states that PJM has failed to demonstrate that a year-over-year change in the LDA Reliability Requirement is a just and reasonable trigger to modify the auction inputs.¹⁰² Constellation and P3 also argue that PJM has not explained how often the materiality threshold will trigger, but assert that it may be triggered often.¹⁰³ Constellation contends that PJM has not explained whether an LDA Reliability Requirement could increase under circumstances unrelated to Planned Generation Capacity Resource entry and argues that, if so, a more surgical trigger may be warranted.¹⁰⁴ P3 argues that PJM has not explained how the threshold would impact reliability and clearing prices.¹⁰⁵ P3 contends that PJM has provided no concrete evidence concerning the rate impact on Delmarva—much less the other LDAs—either for the 204/2025 BRA or future auctions.¹⁰⁶

2. Answers

36. PJM reiterates that its proposal represents a just and reasonable approach to reflect actual participation of Planned Generation Capacity Resources in the LDA Reliability Requirement so that the requirement is representative of the actual reliability needs of the LDA.¹⁰⁷ PJM states that P3 erroneously asserts that PJM's proposal does not address the

⁹⁹ EPSA Protest at 27.

¹⁰⁰ Constellation Protest at 16; EPSA Protest at 25-26; Freepoint Comments at 8; Invenergy Protest at 7; P3 Protest at 40-41; Vistra Protest at 11.

¹⁰¹ P3 Protest at 40-41.

¹⁰² Constellation Protest at 16-18.

¹⁰³ P3 Protest 40-4; Constellation Protest at 17.

¹⁰⁴ Constellation Protest at 17.

¹⁰⁵ P3 Protest at 40-41.

¹⁰⁶ *Id.* at 41.

¹⁰⁷ PJM February 2 Answer at 28.

identified issue because it does not consider Intermittent Resources.¹⁰⁸ PJM clarifies that Planned Generation Capacity Resources can include Intermittent Resources and so Intermittent Resources that do not offer into the capacity auctions will be excluded from the calculation of the LDA Reliability Requirement as well.

37. PJM also disagrees with protesters' arguments that the proposal is flawed because it excludes only resources that do not participate in the capacity auctions from the LDA Reliability Requirement and includes resources that do not clear.¹⁰⁹ PJM explains that load cannot rely on resources that do not participate in the capacity auctions as capacity for the relevant delivery year. PJM states that such resources are appropriately excluded from the LDA Reliability Requirement because, even if such resources were in-service by the start of the delivery year, there is no need for CETO to account for the potential of those resources having forced outages (for thermal resources) or not aligning output with the riskiest hours of the year (for Intermittent Resources) since load is not depending on them as capacity resources. PJM further argues that it is appropriate to focus on resources that did not participate in the auction, rather than resources that do not clear the auction, because any resources that participated would necessarily have cleared the auction due to the overstated LDA Reliability Requirement.¹¹⁰

38. PJM also continues to argue that its proposed materiality threshold is just and reasonable.¹¹¹ PJM contends that it is not necessary to apply PJM's proposed solution in every LDA because the impact of Planned Generation Capacity Resources not being offered into the capacity auctions is immaterial in large LDAs and does not require updating the Locational Deliverability Area Reliability Requirement. In response to protesters' argument that the trigger should be higher so it only narrowly targets Delmarva, PJM argues that a one percent threshold is prudent in the event future updates are necessary in other LDAs.¹¹² PJM notes that Delmarva is the only LDA with an LDA Reliability Requirement that increased by more than one percent for the 2024/2025 BRA relative to the 2023/2024 BRA and, as a result, the proposed revision would only apply to Delmarva with respect to the 2024/2025 BRA. However, PJM states that the one percent materiality threshold also prevents anomalies that could significantly impact prices in the future. PJM states that it only has to propose a just and reasonable materiality threshold

¹⁰⁸ *Id.* at 28-29 (citing PJM, Intra-PJM Tariffs, § I.1 Definitions I-J-K (14.0.0)).

¹⁰⁹ *Id.* at 29.

¹¹⁰ *Id.* at 30.

¹¹¹ *Id.*

¹¹² *Id.* at 31 (citing Constellation Protest at 20).

and that the Commission “is not required to choose the best solution, only a reasonable one.”¹¹³

39. The Market Monitor contends that the policy objections to PJM’s filings are “hyperbolic and misplaced.”¹¹⁴ The Market Monitor argues that PJM’s proposal is not subjective or arbitrary but would instead apply an objective rule to ensure the prices resulting from the BRA reflect actual supply and demand.¹¹⁵ The Market Monitor argues that if the prices are correct, the market incentives are correct and consistent with reliability needs.¹¹⁶

B. Filed Rate Doctrine

1. Comments in Support of PJM’s FPA Section 205 Proposal

40. Some parties agree with PJM that modifying the 2024/2025 BRA results at this stage would not violate the filed rate doctrine.¹¹⁷ Certain commenters agree with PJM that the proposed changes are prospective because PJM has not yet completed the 2024/2025 BRA.¹¹⁸ The Delmarva Load Parties note that PJM is still in the process of evaluating the sell offers and other inputs to the 2024/2025 BRA and has not made any capacity awards for the relevant delivery year or posted final results for the auction.¹¹⁹ Accordingly, the Delmarva Load Parties argue that it is appropriate for PJM to

¹¹³ *Id.* (citing *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103, at P 59 (2014); *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.”)).

¹¹⁴ Market Monitor February 3 Answer at 1.

¹¹⁵ *Id.* at 1-2.

¹¹⁶ *Id.* at 4.

¹¹⁷ Delmarva Load Parties Comments at 5; New Jersey Board Comments at 2; Pennsylvania Commission Comments at 3.

¹¹⁸ Delmarva Load Parties Comments at 5 n. 13; New Jersey Board Comments at 2, 5.

¹¹⁹ Delmarva Load Parties Comments at 5 n. 13.

prospectively revise its optimization algorithm to ensure correct price signals and avoid anomalous results. New Jersey Board similarly notes that capacity sellers have submitted offers, but argues that PJM has yet to accept, reject, or otherwise act on them.¹²⁰ New Jersey Board states that the only formal action PJM has completed in the 2024/2025 BRA is the publication of the initial auction parameters, but that PJM has yet to “run its optimization algorithm, formally clear results, and award capacity commitments.”¹²¹

41. New Jersey Board asserts that the lack of any completed transaction or sale of capacity in the 2024/2025 BRA also logically precludes the possibility that a Tariff amendment implemented now and applied to the auction could constitute a retroactive change.¹²² New Jersey Board explains that both the U.S. Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) have made clear, the filed rate doctrine prohibits “a regulated seller of [power] . . . from collecting a rate other than the one filed with the Commission . . . for [power] *already sold*.”¹²³ Therefore, New Jersey Board avers that the filed rate doctrine is not implicated when tariff changes will only apply to yet-to-be concluded sales of energy or capacity because, by definition, changes to a yet-to-be-determined wholesale rate cannot be retroactive, nor can rules be retroactively applied to a transaction that has not yet occurred.

42. New Jersey Board also argues that existing Commission precedent indicates that tariff changes that occur after a transaction is initiated but prior to its completion can validly apply, and generally do apply, to that transaction.¹²⁴ Specifically, in the interconnection context, New Jersey Board argues that the almost “unbroken Commission practice” has been to hold that “interconnection agreements filed after the designated effective date of an amended tariff are governed by the amended tariff,” rather than the version of the tariff that was in effect while the agreement was being negotiated.¹²⁵ New Jersey Board adds that the D.C. Circuit also held that a Commission decision to depart from that precedent and apply the version of a tariff that was in effect

¹²⁰ New Jersey Board Comments at 6-7.

¹²¹ *Id.* (citing PJM ER23-729-000 Transmittal at 3-4).

¹²² *Id.* at 7.

¹²³ *Id.* (citing *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018) (*Old Dominion*) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (*Arkla*)) (emphasis added)).

¹²⁴ *Id.* at 8.

¹²⁵ *Id.* (citing *W. Deptford Energy LLC v. FERC*, 766 F.3d 10, 19-22 (D.C. Cir. 2014) (*West Deptford*)).

when a project entered the interconnection queue was arbitrary and capricious. New Jersey Board contends that by analogy, the version of the Tariff that governs the actual clearing of the 2024/2025 BRA should be the version in effect at the time PJM concludes the auction by calculating and publishing the formal clearing result, not when the auction process began or when capacity market sellers entered into the BRA's equivalents of sales negotiations by submitting their offers.

43. Pennsylvania Commission argues that the Commission should generally avoid changing rules while offers are outstanding, but that such changes are appropriate where, as here, (1) the tariff change is shown to be appropriate and uncontroversial if the rule were solely to be applied to future auctions, and (2) the additional costs to customers if the change were not to occur provides no benefit to those customers.¹²⁶

44. ODEC states that it supports PJM's actions to prevent "imminent severe economic harm to electric consumers" as its Tariff permits.¹²⁷ ODEC states that the level of the estimated price increase presents imminent severe economic harm to Delmarva customers.

2. Protests

a. General

45. Protestors argue that PJM's proposal is barred by the filed rate doctrine and the rule against retroactive ratemaking.¹²⁸ EPSA and Constellation argue that even if the existing rules would produce an unjust and unreasonable result, the filed rate doctrine does not provide the Commission with discretion to waive the filed rate or retroactively change or adjust a rate for good cause or for any other equitable consideration.¹²⁹

¹²⁶ Pennsylvania Commission Comments at 3.

¹²⁷ ODEC Comments at 10 (citing PJM ER23-729-000 Transmittal at 28 (citing PJM, Intra-PJM Tariffs, § 9.2(b) Rights of the Transmission Provider)).

¹²⁸ *Vistra Protest* at 2-3 (citing *Old Dominion*, 892 F.3d at 1230 (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990) (*Columbia Gas*)); *Vistra Protest* at 6, 9. *See also* Clean Energy Associations Protest at 2, 5; Constellation Protest at 12; EPSA Protest at 5-16; Leeward Protest at 7; NRG Protest at 5; P3 Protest at 14-15.

¹²⁹ EPSA Protest at 16 (citing *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990); *Old Dominion*, 892 F.3d at 1226). *See also* Constellation Protest at 12 (citing *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 168 n.12 (D.C. Cir. 1993) (*Pub. Utils. Comm'n of Cal.*); *Old Dominion*, 892 F.3d at 1230 (citing

46. Protestors also disagree that applying PJM’s proposal to the 2024/2025 BRA can be considered prospective.¹³⁰ Several parties disagree with PJM that the proposed changes would only impact actions not yet taken in the 2024/2025 BRA because the Tariff requires that the LDA Reliability Requirement be established before PJM clears the auction.¹³¹ EPSA argues that the Tariff requires that the previously established parameters be used to determine the demand curves used to clear the auction.¹³² P3 argues that, whether the auction remains ongoing is irrelevant to the filed rate doctrine because PJM’s requested relief would require back-tracking to modify already-established auction parameters.¹³³ NRG argues that PJM proposes to prospectively apply new Tariff language that allows for retroactive modification of a key planning parameter, the LDA Reliability Requirement, after the applicable deadline for posting planning parameters has passed and activities in reliance on the posted parameters have concluded.¹³⁴ NRG avers that the fundamental purpose of the filed rate doctrine, as well as the corollary prohibition against retroactive ratemaking, is to “ensure predictability”¹³⁵ and, as the courts have recognized, “[t]his kind of post hoc tinkering . . . undermine[s] the predictability which the doctrine seeks to protect.”¹³⁶

47. Several parties argue the Planning Parameter Order is not relevant to the instant proceeding because PJM requested that waiver before the auction window opened.¹³⁷

Columbia Gas, 895 F.2d at 794-97))).

¹³⁰ Invenergy Protest at 2, 4.

¹³¹ EPSA Protest at 12-13; NRG Protest at 5; Vistra Protest at 3.

¹³² EPSA Protest at 10-11 (citing PJM, Intra-PJM Tariffs, Attach. DD, § 5.10(vi)(A) Auction Clearing Requirements).

¹³³ P3 Protest at 18-19.

¹³⁴ NRG Protest at 5.

¹³⁵ *Id.* at 10 (citing *OXY USA, Inc. v. FERC*, 64 F.3d 679, 699 (1995); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (*Consol. Edison*) (“By authorizing only prospective rate changes, these doctrines ensure rate predictability” (citing *Columbia Gas*, 895 F.2d at 793))).

¹³⁶ *Id.* (citing *Pub. Util. Comm’n of Cal.*, 894 F.2d at 1383).

¹³⁷ Lotus Protest at 8 (citing PJM Interconnection, L.L.C., Request for Waiver, Docket No. ER20-1870-000, at 2 (filed May 20, 2020)); Vistra Protest at 8 (citing Planning Parameters Order, 171 FERC ¶ 61,208); *see also* Freepoint Comments at 6

Vistra maintains that the instant circumstances, where auction results have been developed based on Commission-approved Tariff provisions, are not similar to the unforeseeable and dramatic economic consequences of the COVID-19 pandemic.¹³⁸ Vistra argues that the instant scenario is not unique or dramatic, noting that the Market Monitor's analysis of the 2023/2024 BRA highlighted that at least 30% of intermittent and storage resources did not offer into the 2023/2024 BRA.¹³⁹

48. Several parties also note that the Commission previously denied a request for waiver to modify the auction rules after the offer window had closed.¹⁴⁰ Vistra explains that the Commission, in denying the waiver, explained its reluctance to alter the rules of the auction after it had begun:

Changing the rules governing an *already-commenced* auction is a significant step that affects both the outcome of that particular auction as well as parties' confidence in the rules governing future proceedings. That is particularly so here, where the record indicates that PJM proposed the waiver in order to avoid the outcome that the already-commenced auction would have produced.¹⁴¹

49. Freepoint argues that in *Oklahoma Gas*, the D.C. Circuit agreed with the Commission's determination that the one-year billing requirement was part of the filed rate and therefore could not be waived retroactively.¹⁴² Similarly, Freepoint asserts, the Tariff definition of LDA Reliability Requirement that PJM seeks to change was effective

(Planning Parameters Order, 171 FERC ¶ 61,208).

¹³⁸ Vistra Protest at 8.

¹³⁹ *Id.* (citing The Independent Market Monitor for PJM, Analysis of the 2023/2024 RPM Base Residual Auction (Oct. 28, 2022) at P 31. https://www.monitoringanalytics.com/reports/Reports/2022/IMM_Analysis_of_the_2023_2024_RPM_Base_Residual_Auction_20221028.pdf).

¹⁴⁰ Lotus Protest at 8 (citing PJM Interconnection, L.L.C., Request for Waiver, Docket No. ER18-2068, at 2 (filed Jul. 26, 2018)); NRG Protest at 15 (*PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072, at P 33 (2019) (*GreenHat*); Vistra Protest at 3.

¹⁴¹ Vistra Protest at 3 (citing *GreenHat*, 166 FERC ¶ 61,072 at P 33 (emphasis in original)).

¹⁴² Freepoint Comments at 5 (citing *Okla. Gas*, 11 F.4th 824-25, 827).

for the 2024/2025 BRA that commenced on December 7, 2022, and, therefore, cannot be waived or changed retroactively.

50. Parties also argue that PJM's choice to postpone posting BRA results does not mean that the auction was not completed.¹⁴³ Several parties assert that the auction is completed because PJM's filings make clear that PJM has already determined the 2024/2025 BRA results and, because it took issue with those results, has simply delayed posting them.¹⁴⁴ P3 argues that the Tariff provides no mechanism by which PJM can validly obtain "preliminary auction data" or "preliminary price calculations" of the type PJM describes in its filing.¹⁴⁵ EPSA argues that PJM must have already initially cleared the auction because that is the only way it could have identified what PJM views as an "anomalous auction result."¹⁴⁶ Constellation argues that posting the results of an auction to formalize the results is a ministerial activity that is not sufficient to undo an already-run auction.¹⁴⁷ Clean Energy Associations assert that PJM is overtly attempting to "skirt" the filed rate doctrine and rule against retroactive ratemaking by withholding auction results in order to create a window of opportunity to change its market rules under the guise of a prospective FPA section 205 filing.¹⁴⁸ EPSA argues that the lack of final auction results does not mean that participants did not rely on existing market rules or parameters posted prior to the auction.¹⁴⁹

¹⁴³ Clean Energy Associations at 6; EPSA Protest at 13; Freepoint Comments at 5; Invenergy Protest at 4; NRG Protest at 10 (citing PJM, Intra-PJM Tariffs, Attach. DD, § 5.11(e) Posting of Information Relevant to the RPM Auctions); P3 Protest at 20; Pine Gate Protest at 6-7.

¹⁴⁴ EPSA Protest at 8; Invenergy Protest at 4; NRG Protest at 12 (citing PJM ER23-729-000 Transmittal at 2; PJM EL23-19-000 Transmittal at 3); P3 Protest at 20.

¹⁴⁵ P3 Protest at 20 (citing PJM ER23-729-000 Transmittal at 2-3).

¹⁴⁶ EPSA Protest at 8 (citing PJM ER23-729-000 Transmittal at 9); *see also* Leeward Protest at 8.

¹⁴⁷ Constellation Protest at 13 (citing *ISO New England Inc.*, 180 FERC ¶ 61,036, at PP 14-15 (2022) (rejecting attempts to change auction rules after the RTO ran the auction but before the Commission completed the process for confirming that ISO New England Inc. (ISO-NE) followed its auction rules)); *see also* P3 Protest at 10.

¹⁴⁸ Clean Energy Associations Protest at 5.

¹⁴⁹ EPSA Protest at 13.

51. Vistra states that artificially dividing the auction into two segments by saying that the proposed amendment prospectively applies to results that PJM has not finalized and released, but does not apply to the offers and auction administration that occurred prior to finalizing the results would create the exact kind of harm and uncertainty that the filed rate doctrine and rule against retroactive ratemaking were designed to avoid.¹⁵⁰

52. NRG notes the Commission's longstanding policy of not re-running auctions.¹⁵¹ NRG asserts that should PJM's proposal be approved, it and other market participants "cannot effectively revisit their economic decisions" or "retroactively alter their conduct."¹⁵² P3 argues that approving PJM's proposed rate change for the 2024/2025 BRA would also be counter to the Commission's "entire catalog of precedent" on forward capacity market deadlines.¹⁵³ Several parties also argue that the filed rate

¹⁵⁰ Vistra Protest at 10 (citing *Qwest Corp. v. Koppendrayner*, 436 F.3d 859, 864 (8th Cir. 2006) ("The purpose of the rule against retroactivity, and the closely related filed rate doctrine, is to ensure predictability."); *Pub. Utils. Comm'n of Cal.*, 988 F.2d at 163 ("Predictability is an underlying purpose of both the filed rate doctrine and the rule against retroactive ratemaking."); *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1992) (*Towns of Concord*) (citing *Elec. Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) ("necessary predictability" for industry participants prior to when, rather than after, their business decisions are made is the "whole purpose" of the filed rate doctrine))).

¹⁵¹ NRG Protest at 15.

¹⁵² *Id.* (citing *N.Y. Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073, at 61,307 (2000), *on reh'g*, 97 FERC ¶ 61,154 (2001); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137, at P 77 (2021), *on reh'g*, 178 FERC ¶ 61,022 (2022); *Cal. Indep. Sys. Operator Corp.*, 151 FERC ¶ 61,247, at n.46 (2015); *Astoria Generating Co. L.P. v. N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at P 141 (2012), *on reh'g*, 151 FERC ¶ 61,044, *on reh'g*, 153 FERC ¶ 61,274 (2015); *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 63 (2009); *Astoria Generating Co. v. N.Y. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244, at P 132 (2012); *Bangor Hydro-Elec. Co. v. ISO New England Inc.*, 97 FERC ¶ 61,339, at 62,589-91 (2001) (*Bangor Hydro*), *on reh'g*, 98 FERC ¶ 61,298 (2002)).

¹⁵³ P3 Protest at 18 (citing *ISO New England Inc.*, 176 FERC ¶ 61,176, at P 12 (2021) ("the filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly on file with the appropriate federal regulatory authority. The corollary rule against retroactive ratemaking prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods.")).

doctrine applies to the rules governing the auction, rather than just to the clearing prices, and so the rules cannot be changed after running the auction without violating the filed rate doctrine.¹⁵⁴ EPSA notes that the Tariff requires PJM to determine and post the LDA Reliability Requirements in advance of the auction.¹⁵⁵ P3 similarly argues the filed rate includes the existing optimization algorithm, the auction parameters used as inputs, and the resulting clearing prices.¹⁵⁶ P3 argues that sellers relied on these rate and non-rate terms, and they cannot be retroactively changed without violating the filed rate doctrine.

53. Clean Energy Associations aver that PJM is proposing a new definition of LDA Reliability Requirement to apply before the alleged close of the 2024/2025 BRA, even though a materially different definition of LDA Reliability Requirement was in effect at the opening of the 2024/2025 BRA, which violates the filed rate doctrine.¹⁵⁷ NRG opines that the issue is not whether the auction is open or closed; it is whether “the filed rates in existence at the time” when the relevant action occurred – i.e., when pre-auction actions were undertaken in reliance on the posted parameters or, at latest, when the auction was conducted – allowed for this adjustment.¹⁵⁸ Pine Gate argues that market participants

¹⁵⁴ EPSA Protest at 15 (citing *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 at P 89 (2019) (“We also find that Public Citizen is incorrect in identifying the result of each Auction as the ‘filed rate’ 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.”); *Bangor Hydro*, 97 FERC ¶ 61,339 at 62,589-90 (“[T]he clearing prices that were calculated for the period in question were the result of a formula that was prescribed by the market rules and applied as intended by them, and therefore the clearing prices comply with ISO-NE’s tariff.”); *Black Oak Energy, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,261, at P 32 (2008) (noting that market rules “are the filed rate”); *ALLETE, Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 119 FERC ¶ 61,142 at P 36 (2007); *ISO New England Inc.*, 90 FERC ¶ 61,141, at 61,425 (2000)). See also NRG Protest at 12-13; P3 Protest at 16; Pine Gate Protest at 5; LS Power Protest at 2-3.

¹⁵⁵ EPSA Protest at 15; P3 Protest at 15-16.

¹⁵⁶ P3 Protest at 15-16.

¹⁵⁷ Clean Energy Associations Protest at 6-7 (citing *West Deptford*, 766 F.3d at 12).

¹⁵⁸ NRG Protest at 12; see also Invenergy Comments at 2; EPSA Protest at 15 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,101, at P 40 (2015), *on reh’g*, 155 FERC ¶ 61,174 (2016), *aff’d sub nom. MISO Transmission Owners v. FERC*, 860 F.3d 837 (6th Cir. 2017); *AEP Appalachian Transmission Co.*, 164 FERC ¶ 61,180, at P 18 (2018) (finding “that retroactive approval of the formula rate change

were entitled to notice of prospective changes to the Tariff at the time the auction window closed.¹⁵⁹ Constellation states that market participants could expect PJM to check the results of the auction algorithms prior to posting results but should not expect PJM to modify those algorithms prior to posting results, which is what PJM proposes to do in the instant filings.¹⁶⁰

54. Clean Energy Associations state that the courts recognized two circumstances in which rate adjustment may take effect prior to a FPA section 205 filing: (1) when parties are aware that a rate is tentative and may be later adjusted with retroactive effect; or (2) when they have agreed to make a rate effective retroactively, neither of those circumstances are present here.¹⁶¹ Specifically, Clean Energy Associations argue that market participants had no notice that the 2024/2025 BRA would be subject to the market rules that PJM now seeks to implement.¹⁶²

55. Protesters argue that allowing PJM to change the auction rules after the offers have been submitted would set a dangerous precedent and undermine confidence in the

results in a violation of the filed rate doctrine and the prohibition against retroactive ratemaking”); *Midcontinent Indep. Transmission Sys. Operator, Inc.*, 161 FERC ¶ 61,020, at PP 7-8 (2017) (finding that filed rate doctrine barred application of true-up mechanism that had been accepted effective January 1, 2017, and rejecting argument that “because the true-up for the 2016 rate year will not be calculated until June 1, 2017, and will not actually affect customers' rates until January 1, 2018, it is a ‘forward-looking rate mechanism’”); *Haviland Holdings, Inc. v. Pub. Serv. Co. of N.M.*, 107 FERC ¶ 61,034, at P 17 (2004) (finding that “the events subject to [a] complaint occurred prior to the . . . effective date of [a final rule]” and that procedures required by that rule “are not relevant to the Commission’s determination on the issues in this proceeding”)).

¹⁵⁹ Pine Gate Protest at 7; *see also* Freepoint Comments at 5-6.

¹⁶⁰ Constellation Protest at 13.

¹⁶¹ Clean Energy Associations Protest at 7 (citing *Exxon Co. U.S.A. v. FERC*, 182 F.3d 30, 49 (D. C. Cir. 1999) (noting that “the rule against retroactive ratemaking does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service”) (internal quotation marks omitted); *Holyoke Gas & Elec. Dep’t v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992) (finding the Commission’s decision to make the rate change effective prior to the effective date proper because the parties had contracted to make the rate retroactive and a waiver was not against the public interest)); *see also* Pine Gate Protest at 5-6.

¹⁶² Clean Energy Associations Protest at 7.

market rules broadly.¹⁶³ Clean Energy Associations argue that PJM's refusal to release the results of the 2024/2025 BRA materially undermines market participants' need for transparency and price predictability and that accepting PJM's proposal would set a precedent that any RTO can alter auction results if the RTO disagrees with the outcome.¹⁶⁴ Leeward states that PJM's proposal would deter potential sellers from participating in the capacity market, thereby harming the competitive process and raising costs to consumers.¹⁶⁵ P3 argues that adopting PJM's interpretation of the filed rate doctrine would create "terrible" precedent with ripple effects beyond PJM.¹⁶⁶ Vistra argues that the Commission should remain mindful that accepting PJM's filing would have far reaching implications in every market for years to come with increased costs and reduced reliability associated with "profound regulatory uncertainty."¹⁶⁷

b. Existing Tariff Provisions

56. Several parties take issue with PJM's claim that its proposal is consistent with the filed rate doctrine and the rule against retroactive ratemaking because it will not violate any existing Tariff deadlines. EPSA argues that under Tariff, Attachment DD, sections 5.10 and 5.11, PJM is required to determine and post certain information ahead of the BRA, such as the LDA Reliability Requirement, and that the LDA Reliability Requirement cannot now be changed without violating the Tariff.¹⁶⁸

¹⁶³ *Id.* at 3, 19; Constellation Protest at 4; Freepoint Comments at 9; Invenergy Protest at 2; Lotus Protest at 10; Ohio FEA Comments at 4; NRG Protest at 20; Pine Gate Protest at 2; PSEG Protest at 2, 6; EPSA Protest at 19-20 (citing *PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,153, at P 322 (2020) (2020 Reserves Order) (rejecting requests for an offset be applied to a previously-run BRA, finding that "even if we were to recalculate the VRR curve and other capacity auction parameters based on a new E&AS Offset, there is no way to accurately determine how market participants would have offered in those BRAs based on the new parameters.")).

¹⁶⁴ Clean Energy Associations Protest at 4 (citing *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,057, at P 36 (2012)).

¹⁶⁵ Leeward Protest at 6; *see also* Pine Gate Protest at 10 (arguing development in Delmarva will be stifled).

¹⁶⁶ P3 Protest at 25-27.

¹⁶⁷ Vistra Protest at 3.

¹⁶⁸ EPSA Protest at 6-10.

57. Protesters also argue that PJM is in violation of its Tariff requirement to post the auction results as soon as possible.¹⁶⁹ Several parties contend that PJM has made a choice to withhold auction results, even though it is possible to post them, because PJM wishes to change the outcome.¹⁷⁰ P3 argues that, even if the auction results contained an error, PJM was still obligated to post them.¹⁷¹ Clean Energy Associations argue that the Tariff does not allow PJM to use the interim period between when the auction runs and when PJM posts results as an opportunity to make changes to its market rules.¹⁷² EPSA contends the plain language of the Tariff is that PJM must post the final results promptly after clearing the auction under the rules set forth in the Tariff and compiling the relevant data.¹⁷³

i. Attachment DD, section 5.11(e)

58. Protestors disagree with PJM's argument that its proposal is consistent with the filed rate doctrine and the rule against retroactive ratemaking because Tariff, Attachment DD, section 5.11(e) provides notice to market participants that the auction results would be subject to change.¹⁷⁴ NRG states that nothing in Tariff, Attachment DD, section 5.11(e) or any other Tariff provision suggests that the tasks to be completed between the closing of the auction window and the posting of auction results include anything but the mechanical and ministerial exercise of clearing the auction under the rules in effect when

¹⁶⁹ *Id.* at 11, 11 n. 34; Leeward Protest at 7; P3 Protest at 2; Pine Gate Protest at 7-8; Clean Energy Associations Protest at 7-8 (citing PJM, Intra-PJM Tariffs, Attach. DD, § 5.11(e) Posting of Information Relevant to the RPM Auctions (“After conducting the Reliability Pricing Model Auctions, PJM will post the results of each auction as soon thereafter as possible”)); NRG Protest at 11 (citing *U.S. v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 764 (6th Cir. 2016); *D.D. ex rel. V.D v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 514 (2d Cir. 2006) (explaining that “just because the as-soon-as-possible-requirement is flexible does not mean it lacks a breaking point”))

¹⁷⁰ Clean Energy Associations Protest at 6; Leeward Protest at 8; P3 Protest at 14; Vistra Protest at 2 (citing PJM ER23-729-000 Transmittal at 2-3; PJM EL23-19-000 Transmittal at 4, 9-10).

¹⁷¹ P3 Protest at 12.

¹⁷² Clean Energy Associations Protest at 7.

¹⁷³ EPSA Protest at 11.

¹⁷⁴ Clean Energy Associations Protest at 8; Invenergy Protest at 6; Vistra Protest at 7.

it was conducted – i.e., during the offer period.¹⁷⁵ Clean Energy Associations contend that the Commission should expressly find that Tariff, Attachment DD, section 5.11(e) does not provide notice that PJM could make major changes to the BRA input assumptions after offers have been submitted and the auction run and cannot be construed as allowing PJM to delay posting auction results until PJM receives Commission approval to make changes that PJM believes will result in a more desirable outcome.¹⁷⁶

59. Protesters contend that PJM’s argument here fails as the existing LDA Reliability Requirement does not represent an error in calculating auction results under the current Tariff rules, but rather the instant proposal is a change to those rules in order to alter the auction outcome.¹⁷⁷ Leeward notes that PJM has not alleged that an error has occurred and contends that PJM cannot do so because the auction results are the result of the rules in the filed Tariff.¹⁷⁸ Clean Energy Associations contend that such an interpretation would also allow PJM to unilaterally alter auction results whenever it disagrees with a particular outcome, despite that auction result being the product of the processes set forth in PJM’s filed rate, which the Commission has approved.¹⁷⁹ EPSA argues that even if the 2024/2025 BRA results are the result of an error, the courts have found that the filed rate doctrine prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections.¹⁸⁰ Additionally, P3 states that even if PJM identifies an “error” in the clearing prices and the auction results are under publicly noticed FERC review, those conditions would only suspend the specific 5:00 p.m. deadlines listed in Tariff, Attachment DD, section 5.11(e), which P3 notes PJM has not

¹⁷⁵ NRG Protest at 11.

¹⁷⁶ Clean Energy Associations Protest at 8, 10.

¹⁷⁷ Clean Energy Associations Protest at 8; Constellation Protest at 14; EPSA Protest at 16; Invenergy Protest at 6; P3 Protest at 12; Pine Gate Protest at 8; Vistra Protest at 7.

¹⁷⁸ Leeward Protest at 8-9.

¹⁷⁹ Clean Energy Associations Protest at 10 (citing *Monterey MA, LLC v. PJM Interconnection, L.L.C.*, 165 FERC ¶ 61,201, at P 45 (2018) (“[T]ariffs must have a reasonable construction and should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results.”) (quoting *Penn Cent. Co. v. Gen. Mills, Inc.*, 439 F.2d 1338, 1341 (8th Cir. 1971))).

¹⁸⁰ EPSA Protest at 16 (citing *Town of Norwood, Mass. v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995) (“The retroactive ratemaking doctrine prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections.”)).

been relieved of via public notice by the Commission that it is reviewing the auction results pursuant to that section.¹⁸¹

60. NRG states that while Tariff, Attachment DD, section 5.11(e) provides for deadlines set forth therein not to apply when auction results “are under publicly noticed review by FERC,” the predicate for this suspension is that PJM has identified “a potential error in the initial posting of auction results,” and even if PJM’s dissatisfaction with the results of the 2024/2025 BRA could be considered a “potential error,” which NRG argues it cannot, there has been no initial posting of the results of the 2024/2025 BRA.¹⁸²

61. NRG contends that Tariff, Attachment DD, section 5.11(e) relates solely to the posting of the auction results and does not authorize post-auction adjustments of any kind to the LDA Reliability Requirements that are used to clear the auction.¹⁸³ Rather, NRG contends that the Reliability Requirements used to clear the auction are adjusted to account for Price Responsive Demand before the auction, and those adjustments are reflected in the posted planning parameters.¹⁸⁴

62. EPSA similarly disagrees with PJM’s argument that its proposal satisfies the filed rate doctrine simply because the Tariff requires PJM to adjust the LDA Reliability Requirement to reflect price responsive demand.¹⁸⁵ EPSA argues that because Price Responsive Demand is reflected on the load side, rather than an offer on the supply side, any such modification to the LDA Reliability Requirement would not alter the auction clearing price. EPSA and NRG also argue that just because Tariff, Attachment DD, section 5.11(e) gives notice of one specific, limited adjustment, it does not mean that PJM can make after-the-fact changes to any and all other aspects of the LDA Reliability Requirement.¹⁸⁶ NRG argues that, to the contrary, it suggests no other changes are allowed and notes that the U.S. Supreme Court has said that the “interpretive canon,

¹⁸¹ P3 Protest at 13, 13 n.52.

¹⁸² NRG Protest at 12 n. 39 (citing PJM, Intra-PJM Tariffs, Attach. DD, § 5.11(e) Posting of Information Relevant to the RPM Auctions).

¹⁸³ *Id.* at 13.

¹⁸⁴ *Id.* at 13 n. 44 (citing PJM, PJM Manual 18: PJM Capacity Market, § 2.4.4 (Sept. 21, 2022), <https://www.pjm.com/-/media/documents/manuals/-/m18.ashx>; PJM, Intra-PJM Tariffs, Attach. DD § 5.10(a) Auction Clearing Requirements); *see also* P3 Protest at 22-23; EPSA Protest at 14 (citing EPSA Sotkiewicz Aff. ¶¶ 43-45).

¹⁸⁵ EPSA Protest at 14.

¹⁸⁶ *Id.* (citing EPSA Sotkiewicz Aff. ¶¶ 43-45); NRG Protest at 13.

expressio unius est exclusio alterius, ‘expressing one item of [an] associated group or series excludes another left unmentioned.’”¹⁸⁷ Pine Gate states that the permissible changes for Price Responsive Demand are generally known in advance, limited in scope, and made based on objective criteria.¹⁸⁸

ii. Tariff, section 9.2(b)

63. Protesters disagree with PJM’s argument that its proposal is consistent with the filed rate doctrine and the rule against retroactive ratemaking because Tariff, section 9.2(b) provides notice to market participants that auction results would be subject to change if PJM deemed them unreasonable.¹⁸⁹ EPSA notes Tariff, section 9.2(b) does not say anything about the effectiveness of any proposed changes in a filing, nor speak to the filed rate doctrine.¹⁹⁰ P3 contends that PJM’s argument misinterprets the provision at issue and misunderstands the “boundaries of the statutory requirements that comprise the filed rate doctrine.”¹⁹¹

64. NRG asserts that there is nothing in Tariff, section 9.2(b) or any other provision of the Tariff that constitutes a formula or that could otherwise be said to make PJM’s after-the-fact adjustment to the LDA Reliability Requirement for the 2024/2025 BRA prospective.¹⁹² NRG states that this provision did not provide market participants in the

¹⁸⁷ NRG Protest at 13-14 (citing *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 302 (2017) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002))).

¹⁸⁸ Pine Gate Protest at 6.

¹⁸⁹ Clean Energy Associations Protest at 11; Leeward Protest at 9; P3 Protest at 21-22; Vistra Protest at 7.

¹⁹⁰ EPSA Protest at 12.

¹⁹¹ P3 Protest at 22 (citing *Okla. Gas*, 11 F.4th at 831).

¹⁹² NRG Protest at 9 (citing *Old Dominion*, 892 F.3d at 1231 (“When the very terms of the filed rate warn customers, at the time they contract for service, that the price charged will fluctuate based on an identified formula with specified cost drivers, then the rate is allowed to change when fluctuations in those cost drivers occur. That, after all, is how formulae work. And that comports with the filed rate doctrine because the rate changes are foreordained, not retroactive.”))).

2024/2025 BRA with notice that the LDA Reliability Requirements were subject to revision after the offer period for the auction closed.¹⁹³

65. P3 argues that severe economic harm is irrelevant to the filed rate doctrine's requirements for notice.¹⁹⁴ Other parties contend that PJM has not met its burden under Tariff, section 9.2(b) to demonstrate imminent harm to reliability or imminent severe economic harm.¹⁹⁵ Constellation avers that it not unusual in PJM's capacity market for an LDA's clearing prices to differ at a fourfold basis among prior BRA clearing prices in response to supply and demand fundamentals, especially in a small, constrained LDA.¹⁹⁶ Constellation states that Tariff, section 9.2(b) requires more than a showing of a price increase to justify an FPA section 205 filing, arguing that PJM's filing contains no explanation of specific harm, how the harm is imminent, or why the harm is severe as compared to typical or expected auction clearing price fluctuations.¹⁹⁷ Constellation also contends that PJM should not be allowed to avoid the notice standard in its Tariff if its own inaction renders the economic harm "imminent."¹⁹⁸ Vistra contends that PJM has not established or provided evidence of how significant any potential price increases will actually be for electric consumers or whether any such impact would be unjust and unreasonable.¹⁹⁹ Vistra states that the Commission has not previously made a determination of imminent economic harm in any substantially similar situation with respect to Tariff, section 9.2(b), and that it should not do so here.

66. Clean Energy Associations argues that even assuming arguendo that the high price in the 2024/2025 BRA in Delmarva would constitute "imminent severe economic harm to

¹⁹³ *Id.* at 9-10 (citing *Old Dominion*, 892 F.3d at 1231).

¹⁹⁴ P3 Protest at 23-24 (citing *Old Dominion*, 892 F.3d at 1230 (citing *Columbia Gas*, 895 F.2d at 794-797; *West Deptford*, 766 F.3d at 12; *Arkla*, 453 U.S. at 578)).

¹⁹⁵ Vistra Protest at 7, 13; *see also* Constellation Protest at 5-6; P3 Protest at 23-24 (arguing a properly applied Tariff that produces an economically rational result cannot be characterized as imminent severe economic harm).

¹⁹⁶ For example, Constellation states that in the 2021/2022 BRA, the highest-clearing LDA had a clearing price of approximately \$204/MW-day, while the RTO-wide clearing price in the 2022/23 BRA was four times lower at approximately \$50/MW-day. Constellation Protest at 9.

¹⁹⁷ *Id.* at 6.

¹⁹⁸ *Id.* at 6-7.

¹⁹⁹ Vistra Protest at 13.

electric consumers,” this section only allows PJM to submit a filing to change the Tariff prospectively after limited consultation with its stakeholders.²⁰⁰ P3 and EPSA similarly argue that Tariff, section 9.2 only provides notice that PJM may make FPA section 205 filings with prospective-only application.²⁰¹

67. Pine Gate also states that PJM is incorrect in its assertion “that the Commission’s previous application of [section 9.2] to shortage pricing events in PJM is applicable here.”²⁰² Pine Gate asserts that capacity markets are different from energy markets in that capacity auctions occur months or years in advance of the delivery year, and that PJM holds Incremental Auctions that are designed to address precisely this type of discrepancy in auction results. Pine Gates argues that this calls into question whether the harm to consumers would be imminent or severe by the time the of the 2024/2025 delivery year.

c. Settled Expectations

68. Several protestors argue that market participants made irrevocable business decisions based on the existing Tariff and the published planning parameters.²⁰³ Clean Energy Associations state that market participants made business decisions to participate in the 2024/2025 BRA and post the requisite collateral based on the existing Tariff that is on file with the Commission.²⁰⁴ Some parties contend that sellers and customers both anticipated the high clearing price in Delmarva based on the planning parameters, including the LDA Reliability Requirement, and made decisions accordingly.²⁰⁵ EPSA argues that when 2024/2025 BRA market activities started, market participants had settled expectations as to the rules going forward and the demand for capacity. EPSA argues that allowing PJM to change the parameters as part of the market clearing algorithm would upset settled expectations because participants would not have the ability to change their offers in response.²⁰⁶ EPSA contends that the Commission has

²⁰⁰ Clean Energy Associations Protest at 11.

²⁰¹ EPSA Protest at 12; P3 Protest at 23-24.

²⁰² Pine Gate Protest at 9.

²⁰³ Invenergy Protest at 1-5; EPSA Protest at 13; Leeward Protest at 6; Lotus Protest at 10; NRG Protest at 2; Vistra Protest at 9, 14.

²⁰⁴ Clean Energy Associations Protest at 7; *see also* Pine Gate Protest at 6.

²⁰⁵ LS Power Protest at 3-4; *see also* NRG Protest at 18-19 (citing NRG, Hotlman Aff. ¶¶ 15-19).

²⁰⁶ EPSA Protest at 19-20 (citing 2020 Reserves Order, 171 FERC ¶ 61,153 at P 322 (rejecting requests an offset be applied to a previously-run BRA, finding that “even if

recognized that it is not possible to know the impact on the offers of market participants if auction parameters are changed after the fact.²⁰⁷

69. Several protestors argue that sellers must be able to rely on the posted parameters to make business decisions in future auctions.²⁰⁸ Invenergy argues that offering into the auction represents a serious commitment that could easily represent millions of dollars in potential revenue or penalties.²⁰⁹ Certain commenters note that PJM has previously argued that posting the auction parameters in advance is critical to allowing sellers to make decisions regarding bilateral contracts, capacity imports or exports, and capacity market participation.²¹⁰ EPSA argues that the Commission has also recognized that planning parameter information allows participants to develop offers, engage in bilateral contracting, and make decisions at various BRA milestones.²¹¹ With respect to bilateral contracting, EPSA argues that both sides of bilateral transactions have settled expectations based on the planning parameters and undermining those expectations

we were to re-calculate the VRR curve and other capacity auction parameters based on a new E&AS Offset, there is no way to accurately determine how market participants would have offered in those BRAs based on the new parameters.”)); EPSA Protest, Attach. A, Sotkiewicz Aff. ¶¶ 29-31.

²⁰⁷ *Id.* at 20 (citing 2020 Reserves Order, 171 FERC ¶ 61,153 at P 322).

²⁰⁸ *See e.g.* Vistra Protest at 6.

²⁰⁹ Invenergy Protest at 5.

²¹⁰ LS Power Protest at 3 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 198 (2009)); NRG Protest at 17 (citing PJM, Answer, Docket No. ER09-412-000, at 33 (filed Feb. 2, 2009) (“PJM’s posting of the fundamental auction parameters on February 1 is an important precondition for parties to make decisions regarding bilateral contracts, capacity imports or export, and the manner in which they participate in the Base Residual Auction.”)); EPSA Protest at 18 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 198 (2009)).

²¹¹ EPSA Protest at 10 (citing *PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,122, at P 15 (2022)); *see also* NRG Protest at 16-17 (citing *Duquesne Light Co.*, 122 FERC ¶ 61,039, at PP 92, 141 (2008); *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at PP 198, 200 (2009) (“PJM’s posting of the fundamental auction parameters . . . is an important precondition for parties to make decisions regarding bilateral contracts, capacity imports or export, and the manner in which they participate in the Base Residual Auction.”)).

makes bilateral contracting much riskier, if not impossible.²¹² Leeward argues that market participants rely on PJM's planning parameters to evaluate their commercial risk, and that under the instant proposal, sellers could be forced to commit to capacity market offers that were not designed around the final planning parameters.²¹³

70. Vistra contends that allowing PJM to change the rules of auctions after offers have been submitted, even prospectively, severely compromises market participants' ability to make thoughtful investment decisions.²¹⁴ Vistra contends that it is unjust and unreasonable and unduly discriminatory and preferential to change the rules after market participants have reasonably relied upon the rules in effect at that time.²¹⁵ Vistra also argues that PJM's requested outcome would allow filed rates to be amended at any time up until auction results are posted, invoices are printed, or a ministerial act confirms terms and conditions, but after market participants have made economic decisions and transacted accordingly.²¹⁶

71. Vistra argues that in one recent instance, the Commission did require that market participants have the opportunity to modify certain types of early offers in response to rule changes made prior to the auction process, however, the rule changes were early in the auction process.²¹⁷ Vistra states such timing is not the case here and allowing market participants to reoffer at this point could not fully resolve the harm, given the business decisions that have already been made in advance of the 2024/2025 BRA.²¹⁸

72. P3 argues that the Commission has previously denied requests to rerun RTO auctions in order to provide remedial relief in FPA section 206 complaint proceedings or in response to judicial remands, on the grounds that doing so would "undermine confidence in markets."²¹⁹ P3 also argues that the Commission has emphasized that

²¹² *Id.* at 20; EPSA Protest, Attach. A, Sotkiewicz Aff. ¶¶ 29-31.

²¹³ Leeward Protest at 6.

²¹⁴ Vistra Protest at 6.

²¹⁵ *Id.* at 14.

²¹⁶ *Id.* at 2.

²¹⁷ *Id.* at 14 (citing *ISO New England Inc.*, 175 FERC ¶ 61,172, at P 63 (2021)).

²¹⁸ *Id.* at 14-15.

²¹⁹ P3 Protest at 25 (citing *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,237, at P 10 (2019) (noting the Commission "generally does not order a remedy that requires re-running a market because market participants participate in the market with the

abiding by market rules is necessary to enable an RTO to effectively administer wholesale markets.²²⁰ P3 states that, consistent with that principle, the Commission has generally disfavored rerunning markets because the harm outweighs the benefit—even in instances where, unlike here, an RTO has committed an error implementing its existing tariff.²²¹ P3 contends that it is indisputable that rerunning auctions creates regulatory risk going forward and dissuades investors from investing capital in a market where the results of auctions are constantly subject to later change and that the Commission has previously denied such remedial relief in the name of regulatory uncertainty.²²² P3 also contends that the Commission also has a longstanding policy of disfavoring “last minute” FPA section 205 tariff changes even where, unlike here, those changes would be prospective, because those changes would upset settled expectations and reliance on current RTO tariff provisions.²²³

73. P3 contends that if the rules of a particular BRA can be changed after the auction, it significantly increases the risk of any capital deployed in the market, which translates into higher offer prices reflecting the resulting risk premiums, and could make it difficult

expectation that that rules in place and the outcomes will not change after the results are set); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at P 59 (2017); *Astoria Generating Co. LP v. N.Y. Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189, at P 141 (2012); *PPL EnergyPlus v. N.Y. Indep. Sys. Operator Corp.*, 115 FERC ¶ 61,383, at P 30 (2006); *Cal. Indep. Sys. Operator Corp.*, 120 FERC § 61,271, at P 24 (2007); *N.Y. Indep. Sys. Operator, Inc.*, 113 FERC ¶ 61,340, at P 17 (2005); *Pac. Gas Transmission Co.*, 82 FERC ¶ 61,227, at 61,875 (1998) (holding that despite a finding of violation “the public interest in market stability outweighs the need for reposting”); *Pan-Alberta Gas (U.S.) Inc. v. Pac. Gas & Elec. Co.*, 72 FERC ¶ 61,092, at 61,505 (1995) (finding that despite a violation in capacity allocation, setting aside a transaction would “cause a disruption in the market.”)); P3, Kelliher Aff. 25).

²²⁰ *Id.* at 26 (citing *GenOn Energy Mgmt., LLC v. ISO New England Inc.*, 152 FERC ¶ 61,044, at P 50 (2015); *Ne. Utils. Serv. Co.*, 135 FERC ¶ 61,123, at P 13 (2011) (emphasizing it is important to abide by RTO market rules to enable effective administration of RTO markets); P3 Kelliher Aff. 26).

²²¹ *Id.* (citing *Bangor Hydro*, 97 FERC ¶ 61,339 at 62,590, *reh’g denied*, 98 FERC ¶ 61,298 (2002); P3 Kelliher Aff. 26).

²²² *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 162 FERC ¶ 61,173, at P 19 (2018); *PJM Interconnection, LLC*, 161 FERC ¶ 61,252 at P 58 (2017); P3 Kelliher Aff. 27).

²²³ *Id.* at 26-27 (citing *ISO New England, Inc.*, 132 FERC ¶ 61,136, at P 22 (2010); P3 Kelliher Aff. 27-28).

for resource owners and investors to deploy the capital needed to develop and maintain the resource fleet required to serve the demands of consumers in the PJM region.²²⁴

3. Answers

a. General

74. PJM argues that the submission of offers does not and cannot as a matter of law justify an unjust and unreasonable rate that does not go into effect until June 1, 2024 (i.e., the beginning for the 2024/2025 delivery year).²²⁵ PJM argues that the rule against retroactive ratemaking and the filed rate doctrine are inapplicable here because there is no rate to change nor proposal to retroactively charge customers based on past losses.²²⁶ PJM further argues that its filings do not propose to retroactively change non-rate terms either, because PJM proposes to leave the requirement to post the LDA Reliability Requirement in advance of the auction unchanged.²²⁷ PJM argues instead that it proposes to prospectively update that publicly posted value when clearing the auction.²²⁸

75. EPSA disagrees, arguing that PJM acknowledges it has made preliminary price calculations, which according to EPSA, means that PJM has cleared the auction.²²⁹ EPSA contends that PJM's refusal to finalize the results cannot be used to avoid the filed rate doctrine and notes that PJM did not respond to protestors arguing that the Tariff requires PJM to determine the LDA Reliability Requirement in advance of the BRA and then use that value to clear the auction.²³⁰ EPSA contends PJM's proposal to use the updated LDA Reliability Requirement for the auction is a violation of the Tariff.

²²⁴ *Id.* at 24.

²²⁵ PJM February 2 Answer at 2. The Market Monitor states it supports PJM's comments on the legal questions related to the filed rate doctrine. Market Monitor February 3 Answer at 1.

²²⁶ *Id.* at 12 (citing *Pub. Util. Comm'n of Cal.*, 988 F.2d at 161; *City of Piqua, Ohio v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (*City of Piqua*)).

²²⁷ *Id.* (citing *Okla. Gas*, 11 F.4th at 830 (D.C. Cir. 2021)).

²²⁸ *Id.* at 13.

²²⁹ EPSA Answer at 4 (citing PJM February 2 Answer at 8).

²³⁰ *Id.* at 5 (citing PJM, Intra-PJM Tariffs, Attach. DD § 5.10(vi)(A) Auction Clearing Requirements).

76. Regarding whether the 2024/2025 BRA is “complete,” P3 argues that PJM has not identified any specific Tariff-based steps that PJM is required to take, but has not yet taken, to conduct the 2024/2025 BRA.²³¹ P3 argues that the fact that PJM and the Market Monitor have already applied their market power mitigation rules and determined the offers were competitive further confirms that PJM fully conducted the BRA.²³² Leeward contends that, because the auction is complete, PJM must satisfy the *Mobile-Sierra*²³³ “public interest” standard of review because the auction is akin to a freely-negotiated contract.²³⁴

77. The Market Monitor argues that P3 and EPSA misunderstand the auction clearing process.²³⁵ The Market Monitor explains that PJM can run the auction software multiple times before approving final results. The Market Monitor further explains that, with respect to the 2024/2025 BRA, PJM ran the auction software to ensure compliance with the Tariff and discovered an issue. Because PJM did not approve and post the results, the Market Monitor contends the auction is not cleared and there is no final rate. The Market Monitor also argues that neither of PJM’s filings request retroactive effective dates and therefore neither implicates the filed rate doctrine.²³⁶

78. PJM argues that the LDA Reliability Requirement is an input to the wholesale rate and the Commission has held that the filed rate doctrine does not attach when updating inputs until after the auction has cleared.²³⁷ PJM also notes that formula rates may be

²³¹ P3 Answer at 4.

²³² P3 Answer at 4*Id.* (citing PJM February 2 Answer at 7-8; Market Monitor February 3 Answer at 3).

²³³ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (Mobile); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (Sierra).

²³⁴ Leeward Answer at 4-6 (citing to *Devon Power LLC*, 137 FERC ¶ 61,073 (2011), *petition denied*, *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 371 (D.C. Cir. 2013)).

²³⁵ Market Monitor February 16 Answer at 2, 5.

²³⁶ *Id.* at 3.

²³⁷ PJM February 2 Answer at 13 (citing *ISO New England Inc.*, 165 FERC ¶ 61,088, at P 24 (2018)).

changed prospectively even after the inputs have been collected and the resulting rate generated and implemented.²³⁸

79. EPISA contends that PJM's argument that the LDA Reliability Requirement is subject to change because it is "just an input to the wholesale rate" does not make sense.²³⁹ EPISA explains that PJM has cited precedent acknowledging that the rate on file is the Tariff describing the auction rules.²⁴⁰ EPISA further argues that the "supposedly unjust and unreasonable clearing prices" in Delmarva do not justify the relief requested by PJM.²⁴¹ EPISA argues that even if PJM had been able to demonstrate that its existing rules are unjust and unreasonable, retroactive relief would be barred because "[a]pplication of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results."²⁴²

80. PJM also argues that the filed rate doctrine and rule against retroactive ratemaking are designed to prevent retroactive increases of rates for power that has already been consumed.²⁴³ PJM contends that the courts have clarified that FPA section 206 authorizes retroactive rate decreases but not increases.²⁴⁴ Further, PJM states that the courts have found that the filed rate doctrine and rule against retroactive ratemaking are designed to allow purchasers of power to know the consequences of purchasing decisions.²⁴⁵ PJM contends that none of the filed rate doctrine precedent bears on the

²³⁸ *Id.* at 4 (citing *Pub. Citizen, Inc. v. Midcontinent Indep. 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)).

²³⁹ EPISA Answer at 5 (citing PJM February 2 Answer at 13).

²⁴⁰ *Id.* at 5-6 (citing PJM February 2 Answer at 23 n.65 (citing *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 at P 89, (2019))).

²⁴¹ *Id.* at 6.

²⁴² *Id.* at 8 (citing *Marcus v. AT&T Corp.*, 138 F.3d at 46, 58 (2d Cir. 1998)).

²⁴³ PJM February 2 Answer at 15 (citing *Okla. Gas*, 11 F.4th 821 ; *Old Dominion*, 892 F.3d 1223 ; *Pub. Util. Comm'n of Cal.*, 988 F.2d 154; *Columbia Gas*, 895 F.2d 791; *Arkla*, 453 U.S. 571).

²⁴⁴ *Id.* (citing *City of Anaheim, Cal. v. FERC*, 558 F.3d 521, 524 (D.C. Cir. 2009)).

²⁴⁵ *Id.* at 16 (citing *Pub. Util. Comm'n of Cal.*, 988 F.2d at 163-64).

instant proposal, in which PJM proposes to prospectively prevent an unjust and unreasonable rate.

81. EPSA disagrees that the filed rate doctrine is only used to reduce rates for consumers.²⁴⁶ On the contrary, EPSA contends, some of the seminal decisions of the U.S. Supreme Court addressing the filed rate doctrine involved customers seeking lower rates.²⁴⁷

82. PJM further argues that the proposed revisions do not undermine either of the two primary purposes of the filed rate doctrine: to prevent regulated companies from engaging in price discrimination between customers and to preserve the exclusive role of the Commission's primary jurisdiction over reasonableness of rates and the need to ensure regulated companies only charge the rates on file.²⁴⁸ Specifically, PJM argues, load in Delmarva will all be charged the same rate and the filings preserve the Commission's role to ensure just and reasonable rates.

83. PJM further argues the Commission has broad statutory authority to ensure just and reasonable rates under FPA section 309,²⁴⁹ and neither the filed rate doctrine nor the rule against retroactive ratemaking bars the Commission from exercising that authority.²⁵⁰ PJM explains the courts have found that the Commission can consider equities in remedies under FPA section 309.²⁵¹

²⁴⁶ EPSA Answer at 6.

²⁴⁷ *Id.* (citing *Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 222 (1998) (“even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff”); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (rejecting argument by the Interstate Commerce Commission that “the carrier should not receive a windfall, i.e., the higher filed rate”); *Keogh v. Chi. & N.W. Ry. Co.*, 260 U.S. 156, 162-63 (1922) (finding that the filed rate doctrine barred recovery for antitrust damages against carriers who colluded to set artificially high shipment rate); *Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94, 98-100 (1915) (carrier permitted to charge customer filed rate that was higher than rate quoted to customer)).

²⁴⁸ PJM February 2 Answer at 11, 17.

²⁴⁹ 16 U.S.C. § 825h.

²⁵⁰ PJM February 2 Answer at 23.

²⁵¹ *Id.* at 24 (citing *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952, t 954-55

84. EPSA and P3 disagree with PJM, arguing that the Commission's authority under FPA section 309 is limited to actions that “conform with the purposes[] and policies of Congress and do[] not contravene any terms of the [FPA].”²⁵² Because the FPA does not allow PJM to retroactively modify rates, EPSA argues, the Commission cannot do so under FPA section 309 either.

85. Constellation argues that New Jersey Board's analogy between the capacity auction and filing an interconnection agreement is misplaced. Constellation argues that there is no Commission precedent for the proposition that an auction is only complete once the results are posted and capacity commitments are awarded, and on the contrary, the Commission has indicated that posting auction results is a ministerial activity that is not sufficient to undo an already-run auction.²⁵³ Constellation notes that PJM has also taken this position, arguing that “posting of the auction results is a ministerial act that informs market participants of the results already determined” by the approved capacity market rules in place when PJM conducted the auction.²⁵⁴ Constellation further contends that it is illogical to equate the process of negotiating an interconnection agreement with the process of PJM unilaterally administering a capacity auction, and that, in contrast to interconnection agreement-related cases cited by the New Jersey Board, here there is no question about which Tariff provisions were effective during the events in question, rendering the analogy inapplicable.²⁵⁵

86. P3 contends that PJM appears to argue in its answer that there is no such thing as a “non-rate term” in the context of a wholesale market design tariff, which is inconsistent with judicial precedent.²⁵⁶ P3 also argues that PJM's argument that the filed rate doctrine

(D.C. Cir. 2016)).

²⁵² EPSA Answer at 8-9 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967)); P3 Answer at 12-13 (citing *Verso Corp. v. FERC*, 898 F.3d 1, 11 (D.C. Cir. 2018); *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967)).

²⁵³ Constellation Answer at 5-6 (citing *ISO New England Inc.*, 180 FERC ¶ 61,036, at PP 14-15 (2022)) (rejecting attempts to change auction rules after the RTO ran the auction but before the Commission completed the process for confirming that the RTO followed its auction rules)).

²⁵⁴ *Id.* 6 (citing PJM, Answer, Docket No. EL14-55-000, at 20 (filed Oct. 22, 2014)).

²⁵⁵ *Id.* at 6-7.

²⁵⁶ P3 Answer at 8-9 (citing *Okla. Gas*, 11 F.4th at 829 (“As the statutory terms make clear, the filed rate is not limited to rates per se, but also extends to matters directly

and rule against retroactive ratemaking only apply to rate increases is inconsistent with judicial precedent. P3 contends that the filed rate doctrine and rule against retroactive ratemaking apply with equal force to rate increases and rate decreases.²⁵⁷ P3 also argues that the filed rate doctrine and rule against retroactive ratemaking apply regardless of whether power has already been consumed.²⁵⁸

87. P3 contends that PJM's "flawed" interpretation of the filed rate doctrine would mean that the rules and rates set forth in a market design tariff could be changed retroactively any time up until a service is provided and a tariff-dictated rate is paid for that service, which would invite numerous complaints challenging any number of auction parameters that do not turn out to be exactly accurate.²⁵⁹

affecting rates.") (cleaned up) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986)); accord *N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 90-91 (1963) (citing *Dayton-Goose Creek R. Co. v. U.S.*, 263 U.S. 456, 478 (1924)); *Okla. Gas*, 11 F.4th at 829-30 (finding billing limitations in Southwest Power Pool Inc.'s tariff to be "[n]on-rate terms within the tariff that may not be changed retroactively"); *Old Dominion*, 892 F.3d at 1231-32 (applying the filed rate doctrine and rule against retroactive ratemaking to a tariff provision establishing cap on offers in PJM's energy market)).

²⁵⁷ *Id.* at 11 (citing *Arkla*, 453 U.S. at 578 (explaining that the rule against retroactive ratemaking "bars the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate."); *Old Dominion*, 892 F.3d at 1227 ("[T]he rule against retroactive ratemaking prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods.") (internal quotations omitted) (quoting *Towns of Concord*, 955 F.2d at 71 n.2; *Okla. Gas*, 11 F.4th at 829-30 (internal quotations omitted) (quoting *Old Dominion*, 892 F.3d at 1230))).

²⁵⁸ *Id.* at 12 (citing *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 839 (9th Cir. 2004) ("Once filed with a federal agency, such tariffs are the equivalent of a federal regulation.") (internal quotations and citations omitted); accord *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (explaining that the obligations set forth in a common carrier tariff bound "both carriers and shippers with the force of law" to perform pursuant to the terms of the tariff, including terms that dictated "prior arrangements . . . required" to "facilitate the rendition of service"); *West Deptford*, 766 F.3d 10 (applying filed rate doctrine in the context of PJM's interconnection rule provisions establishing the interconnection customer's eventual cost responsibility for network upgrades necessitated by its interconnection request)).

²⁵⁹ *Id.* at 14.

88. Constellation asserts that granting PJM's proposal will undermine confidence in PJM's market construct over the long-term, incenting market participants to leave the markets prematurely and leading to increased consumer costs or potential reliability issues.²⁶⁰ Constellation argues that the Commission has declined to disrupt settled expectations in the past because of the harm to third parties, even if doing so might produce more efficient outcomes.²⁶¹ Constellation notes that commenters have filed sworn statements in these proceedings demonstrating that they made commercial decisions based on existing auction parameters and the current Tariff.²⁶²

b. Existing Tariff Provisions

89. PJM states that it is in full compliance with the Tariff because the Tariff requires PJM to post results as soon as possible upon completion of the auction.²⁶³ PJM clarifies that it has performed only preliminary price calculations for the 2024/25 BRA but suspended auction clearing before it was completed.²⁶⁴

i. Attachment DD, section 5.11(e)

90. P3 argues that PJM fails to address its arguments that Tariff, Attachment DD, section 5.11(e) is not applicable to the instant filings.²⁶⁵ P3 contends that, in failing to respond, PJM appears to have "jettisoned" its argument that this case involves the type of "error" contemplated by the Tariff. The Market Monitor contends this argument is not

²⁶⁰ Constellation Answer at 2 (citing *Coal. of MISO Transmission Customers v. Midcontinent Indep. Sys. Operator, Inc.*, 181 FERC ¶ 61,005, at P 65 (2022) (rejecting proposal because, "while the proposed mechanism could provide price relief to a small subset of load and potentially provide modest reliability benefits to the [RTO] system, we agree with [commenters] that such a mechanism would otherwise undermine [the RTO's] capacity construct"))).

²⁶¹ *Id.* at 4 (citing *GreenHat*, 166 FERC ¶ 61,072 at P 33).

²⁶² *Id.* at 3-4.

²⁶³ PJM February 2 Answer at 7.

²⁶⁴ *Id.* at 8.

²⁶⁵ P3 Answer at 6.

relevant to the 2024/2025 BRA because no results have been posted, so whether the Tariff allows PJM to modify posted results is not at issue in these filings.²⁶⁶

ii. Tariff, section 9.2(b)

91. In response to arguments that Tariff, section 9.2(b) does not apply, PJM disagrees with Constellation's argument that it is not unusual for an LDA's clearing price to increase fourfold from prior BRA clearing prices, and this result is not sufficient to demonstrate imminent severe economic harm.²⁶⁷ PJM argues that this argument is irrelevant because those prior BRA clearing prices appropriately reflected actual supply and demand fundamentals, which is not the case for Delmarva in the 2024/2025 BRA.

92. Sierra/NRDC and ODEC argue that, PJM has sufficiently demonstrated that both severe and imminent economic harm to support the application of Tariff, section 9.2(b).²⁶⁸ Sierra/NRDC further argues that Tariff, section 9.2(b) provides sufficient notice that the auction rules would be modified in these circumstances.²⁶⁹ ODEC argues that the cost increase could be between \$85 million and \$144 million, if PJM is measuring the four times increase against the prior year's clearing price or if Delmarva cleared at the market cap, respectively.²⁷⁰ Sierra/NRDC state that average wages for workers in the Delmarva Peninsula, where Delmarva is located, are significantly lower than the U.S. average and that the five-year average poverty rate increased by 0.8% from 2006 to 2019, while the national rate decreased.²⁷¹ Sierra/NRDC further argues that low-income populations have disproportionately high energy burdens, twice that of average income households and three times greater than higher income households, because they often use less-efficient appliances or live in older dwellings in need of repair.²⁷² Sierra/NRDC explain that high energy burdens and costs can force choices between energy, health, food, and housing which can lead to a wide range of adverse outcomes.

²⁶⁶ Market Monitor February 16 Answer at 2.

²⁶⁷ PJM February 2 Answer at 10.

²⁶⁸ Sierra/NRDC Answer at 4; ODEC Answer at 4.

²⁶⁹ Sierra/NRDC Answer at 13.

²⁷⁰ ODEC Answer at 3.

²⁷¹ Sierra/NRDC Answer at 4.

²⁷² *Id.* at 5-7 (citing Delaware Energy Efficiency Advisory Council, Delaware Division of Energy & Climate, *Scope of Work: Low-Income Advisory Comm.*, at 3 (2017)).

Sierra/NRDC estimates that Delmarva customers will have to pay a total of \$175 million more than if PJM's proposal were to be accepted, or roughly one half of one week's gross income for every wage earner in the region, if the market clears at the cap.²⁷³

c. Settled Expectations

93. PJM contends that sellers should not need to adjust their sell offers for the 2024/2025 BRA based on an updated LDA Reliability Requirement because the auction results are a product of both the demand and the supply offers. PJM argues that “any prediction of anticipated clearing prices based on a posted Locational Deliverability Area Reliability Requirement is not guaranteed.”²⁷⁴ PJM contends that sellers that chose to make business decisions based on anticipated prices did so at their own risk. PJM also contends that because 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.²⁷⁵

94. PJM argues that 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.²⁷⁶ PJM further notes that the Commission has recognized a difference between upsetting the expectations of market participants and retroactive ratemaking.²⁷⁷ PJM continues that, in 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.²⁷⁸ In these instances, PJM argues, the Commission has found that

²⁷³ *Id.* at 8.

²⁷⁴ PJM February 2 Answer at 13-14.

²⁷⁵ *Id.* at 12.

²⁷⁶ *Id.* at 2 (citing *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.”)).

²⁷⁷ *Id.* at 17 (citing *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29 (2014), *reh'g denied*, 150 FERC ¶ 61,129 (2015)).

²⁷⁸ *Id.* (citing *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29 (2014), *reh'g denied*, 150 FERC ¶ 61,129 (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

proposed changes with 60 days of prior notice constitute a prospective change and do not necessarily violate the filed rate doctrine even after the capacity auction is completed.²⁷⁹ PJM further contends that, 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”²⁸⁰ and protecting consumers by “ensuring that reserve requirements are met and system reliability is protected”²⁸¹ and found these consumer interests outweigh any settled expectations or reliance arguments from market sellers. PJM notes that, in these cited cases, the Commission accepted such revisions to be effective for capacity auctions that were already completed.²⁸² PJM contends that the instant filings similarly pass the balancing test because “[n]othing in the posted Locational Deliverability Area Reliability Requirement should impact a Market Participant’s offer into the [capacity auctions]”²⁸³ PJM explains that the LDA Reliability Requirement is posted to provide transparency and for informational purposes only.

95. EPSA disagrees and contends that PJM has previously emphasized the importance of the posted parameters to market participants’ decisions and actions.²⁸⁴ Specifically, EPSA states that PJM has previously stated that “PJM’s posting of the fundamental auction parameters on February 1 is an important precondition for parties to make decisions regarding bilateral contracts, capacity imports or export, and the manner in which they participate in the Base Residual Auction.”²⁸⁵ EPSA contends that the

FERC ¶ 61,095, at P 29 (2013) (noting the Commission has used this balancing test to accept or reject proposed tariff revisions)).

²⁷⁹ *Id.* (citing *ISO New England Inc.*, 176 FERC ¶ 61,125, at P 128 (2021)).

²⁸⁰ *Id.* (citing *ISO New England Inc.*, 148 FERC ¶ 61,185, P 29 (2014)).

²⁸¹ *Id.* (citing *ISO New England Inc.*, 145 FERC ¶ 61,095, at P 29 (2013)).

²⁸² *Id.* at 18-19 (citing *ISO New England Inc.*, 148 FERC ¶ 61,185, P 29 (2014); *ISO New England Inc.*, 145 FERC ¶ 61,095, at P 28 (2013)).

²⁸³ *Id.* at 19-20.

²⁸⁴ EPSA Answer at 9.

²⁸⁵ *Id.* at 9-10 (quoting PJM, Answer, Docket No. ER09-412-000, at 33-34 (filed Feb. 2, 2009); citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 198 (2009) (noting that PJM had asserted that its “posting of the fundamental auction parameters on February 1 is an important precondition for parties to make decisions regarding bilateral contracts, capacity imports or export, and the manner in which they participate in the

Commission has made similar findings²⁸⁶ and that it would be a violation of the Commission's obligations under the Administrative Procedure Act for the Commission to reverse course and find there is no reliance on auction parameters.²⁸⁷ EPSA further argues that PJM's argument that the clearing price depends actions of suppliers is a non-sequitur and does not mean that PJM can modify other aspects of the clearing price.²⁸⁸

96. PJM further argues that the instant proposal is "entirely distinguishable from the ISO-NE case in which the Commission found that equitable considerations weighed against accepting the changes."²⁸⁹ PJM explains that its proposal is much narrower. PJM also argues that the circumstances presented in PJM's filings are completely different from the *Maryland Public Service Commission* case cited by certain protestors because no rate from the 2024/2025 BRA has been determined or announced so no parties could have relied on such a nonexistent rate.²⁹⁰ Regarding the *Public Citizen v. MISO* case cited by EPSA, PJM contends that this case is 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.²⁹¹

Base Residual Auction").

²⁸⁶ *Id.* at 10 (citing *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 200 (2009)).

²⁸⁷ *Id.* (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating that an agency departing from its own precedent must "display awareness that it is changing position" and "show that there are good reasons for the new policy"); *West Deptford*, 766 F.3d 10, 20 (explaining that "[i]t is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently'")).

²⁸⁸ *Id.* at 11.

²⁸⁹ PJM February 2 Answer at 21 (citing *ISO New England Inc.*, 170 FERC ¶ 61,187, at P 15 (2020)).

²⁹⁰ *Id.* at 22 (citing *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276 (2008), *reh'g denied*, 127 FERC ¶ 61,274 (2009)).

²⁹¹ *Id.* at 22-23 (citing *Pub. Citizen, Inc. v. Midcontinent Indep. 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

97. Constellation also argues that the Commission has previously asserted that “equitable considerations weigh[] against” accepting tariff changes where parties submit auction bids “under one set of expectations, and [the RTO] then propose[s] to consider those . . . bids under different expectations—in essence, changing the market rules after parties had already made their decisions in reasonable reliance on the then-applicable Tariff provisions.”²⁹² Constellation further notes the Commission has found that changing auction rules after commercial decisions would erode confidence in markets.²⁹³

C. PJM’s Existing Tariff

1. Comments

a. General

98. With respect to PJM’s arguments in its FPA section 206 filing, several commenters agree with PJM that the auction results will not be just and reasonable absent a correction to the LDA Reliability Requirement because the results do not otherwise reflect supply and demand fundamentals in Delmarva.²⁹⁴ Parties argue that the price increase resulting from the originally posted LDA Reliability Requirement is not just and reasonable because it will not serve any useful purpose or offer any benefit to load, such as increased reliability.²⁹⁵ ODEC states that when there are no discernable benefits from increased prices, the rates cannot possibly satisfy the requirement that customers receive benefits that are at least roughly commensurate with costs.²⁹⁶

99. Parties also argue the current Tariff rules are not just and reasonable because they would result in overstating the LDA Reliability Requirement for Delmarva and therefore

the prices that may change over time”).

²⁹² Constellation Answer at 4-5 (citing *ISO New England Inc.*, 175 FERC ¶ 61,195, at P 131 (2021)).

²⁹³ *Id.* at 3 (citing *ISO New England Inc.*, 170 FERC ¶ 61,187, at P 17 (2020)).

²⁹⁴ Delmarva Load Parties Comments at 4; Market Monitor Comments at 1; Maryland People’s Counsel Comments at 4; New Jersey Board Comments at 1; ODEC Comments at 6-7; OPSI Comments at 3; Pennsylvania Commission Comments at 3-4.

²⁹⁵ Market Monitor Comments at 1; ODEC Comments at 6-7; Pennsylvania Commission Comments at 3-4.

²⁹⁶ ODEC Comments at 7 (citing *Ill. Com. Comm’n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009)).

require load in Delmarva to buy more capacity than required for reliability at a price that does not reflect the reliability needs.²⁹⁷ New Jersey Board contends the price is excessive because the model incorrectly perceives a capacity shortage.²⁹⁸ ODEC argues that the preliminary Delmarva clearing prices are artificially increased.²⁹⁹

100. New Jersey Board avers that several factors have contributed to the problem with the LDA Reliability Requirement, including the shortened time period between the BRA and the delivery year, which provides less time for generators to reach commercial operation, as well as the effects of the COVID-19 pandemic and supply chain disruptions.³⁰⁰ Maryland People's Counsel contends that clearing the 2024/2025 BRA using the initial LDA Reliability Requirement will result in the average Delmarva customer paying an incremental average increase of approximately \$24/MWh for the 2024/2025 delivery year, or \$24/month. Maryland People's Counsel explains this is about 25% of PJM's reported average all-in wholesale power cost for 2022.³⁰¹ Maryland People's Counsel argues that the combination of the 2024/2025 BRA results, absent PJM's remedy, and the "excessive" rate requested by NRG for the Indian River Unit 4 Reliability Must Run contract would "magnify the very adverse rate consequences" for electric consumers in Delmarva.³⁰²

101. Other parties contend that high prices in Delmarva are just and reasonable. Constellation argues that unusually high prices in Delmarva are consistent with past auction results and with a region that needs to incent new supply.³⁰³ P3 argues that PJM

²⁹⁷ Delmarva Load Parties Comments at 4; Market Monitor Comments at 1, 4; New Jersey Board Comments at 1-3; ODEC Comments at 7-8.

²⁹⁸ New Jersey Board Comments at 2 (citing PJM ER23-729-000 Transmittal at 2-3).

²⁹⁹ ODEC Comments at 6-7.

³⁰⁰ New Jersey Board Comments at 4; *see also* Pennsylvania Commission Comments at 2 (arguing the short lead time between the auction and the delivery year may deter planned generation from offering).

³⁰¹ Maryland People's Counsel Comments at 3 at n. 1. Maryland People's Counsel states this number assumes a customer consuming 1,000 kilowatt-hours in a month.

³⁰² *Id.* at 7-8 (citing *NRG*, 179 FERC ¶ 61,156).

³⁰³ Constellation Protest at 8-10.

has not explained why a high price signal in an LDA that is short on generation and where generation has struggled to be built in a timely manner is unwarranted.³⁰⁴

102. Some parties argue that PJM has not demonstrated that the existing Tariff is unjust and unreasonable.³⁰⁵ Several parties also contend that the LDA Reliability Requirement result was not the result of an error, unforeseeable anomaly, or unjust or unreasonable Tariff provision.³⁰⁶ Vistra contends that no change in circumstance has occurred since the Commission accepted the existing Tariff provisions as just and reasonable and that a price increase is not sufficient to demonstrate the auction results are unjust and unreasonable.³⁰⁷ EPSA argues that PJM has not demonstrated anything unjust and unreasonable about establishing the LDA Reliability Requirement in advance of the auction based on the information available to PJM at that time, even if the information turns out to be inaccurate.³⁰⁸ To the contrary, EPSA argues it is reasonable for the LDA Reliability Requirement to be firmly established so that parties can make decisions regarding bilateral contracts and the manner in which they participate in the BRA.³⁰⁹ P3

³⁰⁴ P3 Protest at 45.

³⁰⁵ Vistra Protest at 3, 10; *see also* Clean Energy Associations Protest at 2, 11; Freepoint Protest at 7-8; Leeward Protest at 11 (urging the Commission to direct PJM to clear the 2024/2025 BRA consistent with the as-filed Tariff); Lotus Protest at 3; P3 Protest at 43-44 (arguing PJM has not attempted to demonstrate that any part of the Tariff is not just and reasonable).

³⁰⁶ Vistra Protest at 5, 10-11; Clean Energy Associations Protest at 12.

³⁰⁷ Vistra Protest at 5, 10-11.

³⁰⁸ EPSA Protest at 18 (citing *Cf. Joint Consumer Representatives v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,187, at P 32 (2015) (rejecting complaint regarding PJM's failure to update its load forecasts based on updated model where "PJM complied with its [Tariff] by developing its 2015 PJM Peak Load Forecast according to its manuals and posting it prior to February 1, 2015" and finding that "there will inevitably be some difference between PJM's load forecast and the amount of capacity that PJM ultimately needs in a given Delivery Year"))).

³⁰⁹ EPSA Protest at 18-19 (citing *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 92 (2008); *Md. Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,274, at P 25 (2009) ("[W]e conclude that Duquesne's [capacity market] liability extends to all auctions in which its load forecasts are included. We also agree with PJM that these obligations are set at the time that PJM establishes its [capacity] auction parameters. This conclusion is warranted given the necessary reliance that market participants place on these published forecasts"))).

contends that making assumptions to forecast future market conditions is inherent to PJM's model.³¹⁰ Freepoint contends that the only evidence presented by PJM to support that its Tariff is unjust and unreasonable is the auction outcome in one "small LDA," Delmarva, and argues that PJM does not present any testimony or supporting documentation that reflects an "endemic" problem with the existing Tariff.³¹¹

103. P3 argues that the auction results cannot be too preliminary to implicate the filed rate doctrine while also being final enough to be unjust and unreasonable.³¹² P3 contends that, if the results are in fact preliminary, then PJM must describe the process it used to calculate the results, how that method relates to the existing Tariff, and "why those preliminary results impeach the Tariff despite the fact that they were not produced by strictly following the Tariff."³¹³

104. Vistra states that PJM has not articulated a standard that would govern when the Commission should take the extraordinary action of changing market rules after the auction process has been completed, and, therefore, accepting these filings could create a slippery slope for other auctions.³¹⁴

b. Planned Generation Capacity Resource Offers in Delmarva were Foreseeable

105. Several protestors argued PJM knew, or should have known, that some or all of the Planned Generation Capacity Resources in question would not offer into the capacity market, and therefore the last-minute nature of PJM's filings is not justified. Several parties note that the market participants were able to forecast the high clearing prices in Delmarva with public information, and PJM should have been able to do so too.³¹⁵

³¹⁰ P3 Protest at 32-33 (citing P3 Shanker Aff. 11 (citing *PJM Generation Adequacy Analysis: Tech. Methods Capacity Adequacy Plan. Dep't* dated October 2003 available at <https://www.pjm.com/-/media/planning/res-adeq/20040621-white-paper-sections12.ashx>)).

³¹¹ Freepoint Comments at 7-8.

³¹² P3 Protest at 44.

³¹³ *Id.* at 44.

³¹⁴ Vistra Protest at 3-4.

³¹⁵ NRG Protest at 18 n. 68 (citing NRG Hotlman Aff. ¶ 15).

106. Parties also argue that PJM had access to additional sources of information. First, parties argue that all resources, including Planned Generation Capacity Resources, were required to declare their intention to participate in the 2024/2025 BRA before the planning parameters were posted as part of the minimum offer price rule (MOPR)³¹⁶ process.³¹⁷ Second, parties argue that PJM's auction schedule lists a deadline for resources to provide notice of their intent to offer into the auction, also in advance of posting the planning parameters.³¹⁸ Leeward argues that their failure to provide such notice was an "unmistakable indication" that these resources would not participate in the auction.³¹⁹ Third, parties argue that all market sellers are required to receive provisional approval from PJM for a capacity modification request to add a new resource to their portfolio.³²⁰ Lotus explains that these requests cannot be created once the auction begins.³²¹ Lotus contends that any resource that did not submit a capacity modification request essentially provided notice that they did not intend to offer.

107. Fourth, parties note that Planned Generation Capacity Resources are not subject to a must offer requirement and so had no obligation to offer into the 2024/2025 BRA.³²²

³¹⁶ See PJM, Intra-PJM Tariffs, Attach. DD § 5.14 Clearing Prices and Charges (34.3.0).

³¹⁷ Lotus Protest at 3-5 (citing PJM, Intra-PJM Tariff, Tariff, Attach. DD § 5.14(h-1)(1)(C) Clearing Prices and Charges); see also PSEG Protest at 8; Invenegy Protest at 6 (citing PJM, Intra-PJM Tariff, Tariff Attach. DD, § 5.14(h-2) Clearing Prices and Charges); Clean Energy Associations Protest at 15 (citing PJM, Intra-PJM Tariffs, Attach. DD, § 5.14 (h-2)(1)(A) Clearing Prices and Charges); Freepoint Comments at 12.

³¹⁸ Clean Energy Associations Protest at 15 (citing Tariff, Attach. DD, § 5.14 (h-2)(1) (A) Clearing Prices and Charges); Constellation Protest at 6-7, 15; Freepoint Comments at 12; Invenegy Protest at 6 (citing PJM Auction Schedule, available at: <https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/rpm-auction-schedule.ashx>); Leeward Protest at 4 (citing PJM, Intra-PJM Tariffs, Attach. DD, § 5.14 Clearing Prices and Charges); Lotus Protest at 6; PSEG Protest at 8.

³¹⁹ Leeward Protest at 4 (citing PJM, Intra-PJM Tariffs, Attach. DD, § 5.14 Clearing Prices and Charges).

³²⁰ Lotus Protest at 6; Freepoint Comments at 12.

³²¹ Lotus Protest at 6.

³²² Clean Energy Associations Protest at 12-13; Freepoint Protest at 14; Vistra Protest at 9; P3 Protest at 36-37 (citing PJM, Intra-PJM Tariffs, Attach. DD § 6.6A(c) Offer Requirement for Capacity Performance Resources (exempting Intermittent

Clean Energy Associations disagree with PJM's characterization that it was the failure of certain resources to offer into the 2024/2025 BRA, rather than the posted LDA Reliability Requirement, which renders the auction results unjust and unreasonable.³²³ Clean Energy Associations assert that there are many valid reasons why Planned Capacity Generation Resources with signed ISAs might not participate in a capacity auction, including concern regarding non-performance penalties.³²⁴ Clean Energy Associations state that PJM itself acknowledges that such resources need to "gauge whether the resource will be in-service by the Delivery Year and whether to take on the risks associated with being a committed capacity resource."³²⁵ Several parties also argue that PJM's interconnection queue backlog should have suggested that Planned Generation Capacity Resources may have trouble meeting deadlines.³²⁶ PSEG believes PJM had, or should have had, the information as to the current status of planned resources through its responsibilities to administer the queue.³²⁷ PSEG argues that, to the extent that the project developers experienced changes or delays with respect to the in-service dates of their projects, they would have been required to notify PJM, and in some circumstances, to obtain PJM's approval for the changes or delayed in-service dates.³²⁸ Similarly, P3 argues that PJM has information about the development milestones of all resources seeking to interconnect to the PJM-operated transmission system.³²⁹ Clean Energy Associations note that, as a result of interconnection queue backlogs, many projects have faced

Resources from the must-offer requirement); *id.* § 5.6.1; P3 Shanker Aff. 14-15).

³²³ Clean Energy Associations Protest at 13.

³²⁴ *Id.* at 13-15; *see also* Freepoint Protest at 14-15.

³²⁵ Clean Energy Associations Protest at 13 (citing PJM ER23-729-000 Transmittal at 18).

³²⁶ Leeward Protest at 4-5; P3 Protest at 36-37; Clean Energy Associations Protest at 14).

³²⁷ PSEG Protest at 7.

³²⁸ *Id.* (citing PJM, Intra-PJM Tariffs, Part IX.B App. 2, § 3 Modification of Facilities (PJM to study whether a planned modification would constitute a material modification); PJM, Intra-PJM Tariffs, Part VI, Attach. P, App. 2, § 3.4 Suspension (relating to the developer's right to request the suspension of work by the interconnected transmission owner associated with the construction and installation of interconnection facilities)).

³²⁹ P3 Protest at 37 (citing PJM, Intra-PJM Tariffs, Attach. DD § 5.11A Posting of Information Relevant to the RPM Auctions).

challenges in timing and finalizing necessary steps for construction.³³⁰ Additionally, P3 contends that PJM is well aware of the supply chain disruptions caused by the COVID-19 pandemic, U.S. trade policies, and general economic downturn, all of which are affecting generation project timelines.³³¹

108. Freepoint states that planned resources must post and allocate collateral in their e-credit account in order to participate in the capacity auction and PJM would have known if that had been done.³³² Lotus argues that neither the Tariff nor the Manuals required that PJM calculate CETO using planned resources with signed ISAs, and PJM had discretion to adjust the calculation of LDA Reliability Requirement before the Tariff required it be posted. However, Lotus contends that, even if PJM did not feel it had that discretion, PJM need not have waited until clearing the auction to seek a remedy from the Commission. Similarly, Freepoint asserts that PJM is not required to include Planned Generation Capacity Resources in their modeling according to the Tariff.³³³

109. Finally, parties argue that PJM should have known that Delmarva was at risk of a capacity shortfall based on prior auction data and reports.³³⁴ Lotus states that PJM should have been able to calculate that the LDA Reliability Requirement in Delmarva increased by more than the available existing capacity.³³⁵ Clean Energy Association argue that, if not for PJM taking out-of-market action with its Reliability Must Run contract keeping the 411.9 MW Indian River 4 generating unit online, Delmarva may have been short in

³³⁰ Clean Energy Associations Protest at 14 (citing SEIA, Impact of the Auxin Solar Tariff Petition 6-7 (Apr. 26, 2022), https://www.seia.org/sites/default/files/2022-04/FINAL%20Auxin%20Impact%20Analysis%202022-04-26_0.pdf).

³³¹ P3 Protest at 37 (citing PJM ER23-729-000 Transmittal at 27).

³³² Freepoint Comments at 12.

³³³ *Id.* at 13.

³³⁴ Constellation Protest at 5-7; Invenergy Protest at 6; Lotus Protest at 9; Leeward Protest at 4 (citing PJM, 2023/2024 RPM Base Residual Auction Results, at 14, available at <https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2023-2024/2023-2024-base-residual-auction-report.ashx>; Clean Energy Associations Protest at 15-16 (PJM, 2023/2024 RPM Base Residual Auction Results 14, <https://pjm.com/-/media/markets-ops/-rpm/rpm-auction-info/2023-2024/2023-2024-base-residual-auction-report.ashx>).

³³⁵ Lotus Protest at 9 (citing Monitoring Analytics, “Analysis of the 2023/2024 RPM Base Residual Auction,” (Oct. 28, 2022), available at: http://www.monitoringanalytics.com/reports/Reports/2022/IMM_Analysis_of_the_20232024_RPM_Base_Residual_Auction_20221028.pdf).

the last BRA.³³⁶ Clean Energy Associations contends that PJM has known for years that Delmarva is also transmission-constrained, but no additional transmission capacity has been built due to flaws in the current transmission planning process.³³⁷ Leeward argues that PJM cannot rely on the Manuals, which are mere “guidance documents,” and ignore other information available to PJM that indicated that Delmarva could fall short.³³⁸

110. Some protesters argue that, based on some or all of the above factors, PJM had ample opportunity to modify the Tariff rules in advance of the 2024/2025 BRA.³³⁹ Invenergy asserts that PJM could have delayed the opening of the auction window to make its proposed rate change, or otherwise revised its modeling parameters before the auction window closed.³⁴⁰ Vistra argues it was readily evident that inclusion or exclusion of a relatively larger Planned Generation Capacity Resource in a relatively smaller LDA could have a foreseeable, and potentially significant, impact on the auction clearing price for that LDA.³⁴¹ Vistra contends that the Delmarva clearing price is the predictable product of the Commission-approved Tariff, and that it cannot be the responsibility of market participants to mitigate PJM’s failure to anticipate a foreseeable event.³⁴²

2. Answers

111. Sierra/NRDC argue that capacity prices are unjust and unreasonable when they are in excess of the level needed for reliability and are not connected to supply and demand

³³⁶ Clean Energy Associations Protest at 16 (citing PJM, Comments, Docket No. ER22-1539-000, at 1 (filed May 6, 2022) (noting PJM’s conclusion that “certain transmission constraints related to the deactivation of this unit would adversely affect the reliability of the Transmission System, absent upgrades to the system”); *see also* Constellation Protest at 8 (citing *NRG*, 179 FERC ¶ 61,156).

³³⁷ Clean Energy Associations Protest at 16 n. 54.

³³⁸ Leeward Protest at 10.

³³⁹ Clean Energy Associations Protest at 17; Freepoint Comments at 12; Invenergy Comments at 6; Pine Gate Protest at 8; Vistra Protest at 9.

³⁴⁰ Invenergy Protest at 6.

³⁴¹ Vistra Protest at 9 (citing PJM EL23-19-000 Transmittal at 16-17; PJM ER23-729-000 Transmittal at 13-15); *see also* Pine Gate Protest at 9; P3 Protest at 36-37.

³⁴² Vistra Protest at 8-9.

fundamentals.³⁴³ PJM contends that, though some parties have argued the Delmarva price should be high, no party has justified the use of an incorrect LDA Reliability Requirement for Delmarva.³⁴⁴

112. Constellation argues that PJM misunderstands its statutory burden in claiming no commentor has successfully defended the Delmarva LDA Reliability Requirement value; PJM bears the burden of showing how its proposal is just and reasonable.³⁴⁵ P3 also argues that multiple protestors justified the existing Tariff as just and reasonable³⁴⁶ and that these arguments and evidence in support of the existing Tariff raise the bar for PJM to prove that the existing Tariff is unjust and unreasonable.³⁴⁷ The Market Monitor disagrees, arguing that PJM is not required to show that its existing Tariff is unjust and unreasonable under FPA section 205.³⁴⁸ The Market Monitor further argues that once PJM has satisfied its burden under FPA section 205, the protestors have the burden to demonstrate the proposal is not just and reasonable.

113. Constellation contends that PJM wrongly asserts that Delmarva was the only LDA in the 2024/2025 BRA that met its proposed materiality threshold, and that the posted parameters on PJM's website show four additional LDAs that would exceed the threshold.³⁴⁹ Constellation states that this fact further undermines PJM's claim that its proposal is narrowly tailored.³⁵⁰

³⁴³ Sierra/NRDC Answer at 9.

³⁴⁴ PJM February 2 Answer at 7.

³⁴⁵ Constellation Answer at 8-9; P3 Answer at 7; *see also* EPSA Answer at 13.

³⁴⁶ P3 Answer at 7 (citing P3 Protest at § II.C.ii; EPSA Protest at 28-43); *see also* ESPA Answer at 14.

³⁴⁷ *Id.* at 7 (citing *Sw. Power Pool, Inc.*, 180 FERC ¶ 61,192, at P 52 (2022) (finding that, after protestors provide probative evidence weighing against a proposed tariff change under FPA section 205, the proponents of the tariff change “could not prevail by resting solely on their prima facie evidence”)).

³⁴⁸ Market Monitor February 16 Answer at 2-3.

³⁴⁹ Constellation Answer at 9.

³⁵⁰ *Id.* at 9.

114. PJM states that Delmarva is, in fact, the only LDA with an increase in LDA Reliability Requirement greater than one percent in the 2024/2025 BRA.³⁵¹ PJM explains that Constellation's answer refers to the August 29, 2022 values, but that PJM updated several LDA Reliability Requirement values on October 24, 2022, to account for behind the meter generation and Fixed Resource Requirement capacity plans. PJM further explains that PJM updated the planning parameters excel spreadsheet posted on its website but failed to update the planning parameters report.³⁵² PJM clarifies that it used the October 24, 2022 LDA Reliability Requirement values in "the conduct of the 2024/2025 BRA."³⁵³

115. PJM also argues it could not have reasonably foreseen the auction results prior to the close of the offer window.³⁵⁴ PJM explains that certifications for the MOPR and notices of intent to offer are not binding on whether resources offer into the auction.³⁵⁵ PJM also argues that the results of the prior auction and accompanying analyses suggesting Delmarva may go short did not have bearing on whether sellers would offer into the 2024/2025 BRA.³⁵⁶ The Market Monitor argues that whether the auction results were foreseeable is irrelevant because the results are not just and reasonable either way.³⁵⁷ The Market Monitor argues that the standard is whether the prices that PJM ultimately posts are a result of the actual supply of and demand for capacity in Delmarva and PJM's proposal meets that standard.³⁵⁸

116. EPSA disagrees with the Market Monitor, arguing there is nothing in the Tariff or the FPA that would justify this standard.³⁵⁹ EPSA contends that the Tariff makes clear that auctions are to be conducted in advance, based on necessarily imperfect forecasts and

³⁵¹ PJM February 8 Answer at 2.

³⁵² *Id.* at 2-3.

³⁵³ *Id.* at 3.

³⁵⁴ PJM February 2 Answer at 25.

³⁵⁵ *Id.* at 25-27.

³⁵⁶ *Id.* at 27.

³⁵⁷ Market Monitor February 3 Answer at 3; Market Monitor February 16 Answer at 2.

³⁵⁸ *Id.*

³⁵⁹ EPSA Answer at 7; *see also* P3 Answer at 14-15.

assumptions. EPSA argues that there is nothing in the Tariff that would justify the Market Monitor's new standard that auction results are only just and reasonable if they reflect the actual supply and demand. P3 contends that, if the Market Monitor were correct about the standard, each price would need to be analyzed *ex post* to determine whether the "actual" supply and demand perfectly matched the *ex ante* supply and demand parameters established based on forecasts or assumptions, which would be highly burdensome to stakeholder and the Commission.³⁶⁰

117. The Market Monitor responds that the appropriate standard for determining whether rates in a competitive auction are just and reasonable is whether they reflect supply and demand.³⁶¹ The Market Monitor explains that, if the results do reflect supply and demand, they can be deemed competitive and efficient. The Market Monitor further contends that this standard "is at the core of the Commission's policy of regulation through competition"³⁶² and that the Commission has a longstanding policy of relying on competition to ensure just and reasonable prices.³⁶³

³⁶⁰ P3 Answer at 15.

³⁶¹ Market Monitor February 16 Answer at 3.

³⁶² *Id.* at 4 (citing *EDF Trading N. Am., LLC*, 181 FERC ¶ 61,221 (2022) ("These standards allow for a presumption of just and reasonable tariff rates based on a 90-day liquidity review period. The purpose of the demonstration using these index liquidity standards is to determine whether a hub is a reliable measure of the market forces of supply and demand in the area.") (citing *El Paso Elec. Co.*, 148 FERC ¶ 61,051, at P 7 (2014); *Idaho Power Co.*, 121 FERC ¶ 61,181, at P 27 (2007); *PacifiCorp*, 95 FERC ¶ 61,145, at 61,463 (2001); *Pinnacle W. Energy Corp.*, 92 FERC ¶ 61,248, at 61,791 (2000)); *Midcontinent Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,141, at P 277 (2022) ("The UCAP/ISAC ratio also prevents the need to modify its LOLE model and convert Reserve Requirements and Local Clearing Requirements into SAC terms, and maintains an appropriate supply and demand balance in the Auction. We agree with MISO and Potomac Economics that the proposed ratio is reasonable.")).

³⁶³ *Id.* (citing *Regional Transmission Organizations*, Order No. 2000, FERC Stats. & Regs. ¶31,089, mimeo at 144– 145324 (1999) ("The Commission has a responsibility under FPA sections 205 and 206 to ensure that rates for wholesale power sales are just and reasonable, and has found that market-based rates can be just and reasonable where the seller has no market power. The Commission has determined that to show a lack of market power, the seller and its affiliates must not have, or must have adequately mitigated, market power in the generation and transmission of electric energy, and cannot erect other barriers to entry by potential competitors" (citing *Heartland Energy Services, Inc.*, 68 FERC ¶61,233 at 62,060 (1994); *Louisville Gas & Electric Company*, 62 FERC

118. Constellation notes that commenters argue that the high price produced by the preliminary auction results provides no real benefit to consumers, but Constellation argues this highlights that PJM's proposal only shifts price in one direction, which could further erode confidence in the market.³⁶⁴ In response to ODEC's comments that the 2024/2025 BRA results are unjust and unreasonable because load does not benefit from the increased clearing price, Constellation argues that transmission cost causation principles do not apply here.³⁶⁵ Constellation clarifies that transmission costs are allocated consistently with causation because there is no transmission market, but, the instant proceeding involves whether to alter the results of an auction after it has closed.³⁶⁶

119. P3 disputes PJM's statement that it could not have reasonably foreseen the auction results, noting that PJM's July 2022 sensitivity study showed that if as little as 260 MW were removed from the Delmarva LDA, which P3 argues is the equivalent of failing to offer, the price would clear at the \$431.26/MW-day price cap.³⁶⁷

¶61,016 at 61,143-44 (1993); *Louisiana Energy and Power Authority v. FERC*, 141 F.3d 364 (D.C. Cir. 1998) (court upholds Commission's use of market-based rate authority)), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶31,092 (2000), *aff'd sub nom.* Pub. Util. Dist. No. 1 of Snohomish County, Washington v. FERC, 272 F.3d 607 (D.C. Cir. 2001); *Public Citizen, Inc. v. FERC*, 7 F.4th 1177, 1193 (2021) (“Market-based rate regulation is based on the premise that, ‘[i]n a competitive market, where neither buyer nor seller has significant market power, * * * the terms of their voluntary exchange are reasonable, and * * * [the] price’ they negotiate will be ‘close to marginal cost, such that the seller makes only a normal return on its investment.’ ... On that understanding, we have held that the Commission can rationally allow markets to set ‘just and reasonable’ prices as long as the Commission takes the necessary steps to ensure that market participants cannot wield anticompetitive market power.”)).

³⁶⁴ Constellation Answer at 5.

³⁶⁵ *Id.* at 7 (citing ODEC Comments at 8 (citing *Ill. Com. Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009))).

³⁶⁶ *Id.*

³⁶⁷ P3 Answer at 5. Note that the actual price cap for Delmarva in the 2024/2025 BRA is \$426.17. See P3 Shanker Aff. 24 n. 28.

D. Alternative Solutions

1. Comments

120. Several parties request that the Commission not adopt the relief requested by PJM, if the Commission determines that PJM's existing Tariff is unjust and unreasonable.³⁶⁸ Some protestors argue that, should the Commission allow PJM to change the rules at this stage of the auction, PJM must allow participants to modify their capacity supply offers.³⁶⁹ Clean Energy Associations request that if the Commission determines that PJM's existing Tariff is unjust and unreasonable, the Commission order a full re-run of the 2024/2025 BRA that incorporates accurate modeling assumptions.³⁷⁰ The Market Monitor, however, argues that the 2024/2025 BRA does not need to be rerun (i.e., PJM does not need to re-open the offer window) because there is no reason to believe offers were affected by the overstated demand.³⁷¹

121. LS Power argues that, should the Commission restart the auction process, the Commission must also correct two other capacity market rules it argues are unjust and unreasonable. Specifically, LS Power states PJM has acknowledged that its capacity accreditation approach for Capacity Interconnection Rights is flawed, and that this issue is pending before the Commission in Docket No. EL23-13-000.³⁷² Second, LS Power argues it was unjust and unreasonable for the Market Monitor to mitigate sellers to offer caps which used a low expected Capacity Performance penalty risk, as demonstrated by

³⁶⁸ See, e.g. Clean Energy Associations Protest at 2.

³⁶⁹ LS Power Protest at 7; EPSA Protest at 30 (citing *ISO New England Inc.*, 175 FERC ¶ 61,172, at P 63 (2021)).

³⁷⁰ Clean Energy Associations Protest at 2-3, 18 (citing *Black Oak Energy, LLC*, 167 FERC ¶ 61,250, at P 28 (2019) (stating “in making such remedial determinations, the Commission's authority is at its ‘zenith’”) (citing *La. Pub. Serv. Comm'n v. FERC*, 866 F.3d 426, 429 (D.C. Cir. 2017) (“[T]he breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily ... to the fashioning of policies, remedies and sanctions.”); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (“[W]e observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions.”))).

³⁷¹ Market Monitor Comments at 5.

³⁷² LS Power Protest at 4-5 (citing Roy Shanker, PhD, Complaint, Docket No. EL23-13-000 (filed Nov. 30, 2022)).

the high volume of penalties in the wake of Winter Storm Elliot.³⁷³ LS Power contends that it is not reasonable to only correct flaws which result in lower prices but ignore those that result in higher prices.³⁷⁴

122. ODEC urges the Commission not to allow modifications to PJM's proposal, such as resubmission of offers, which could delay providing a remedy to the unjust and unreasonable clearing prices.³⁷⁵

123. Several parties proposed alternative ways for PJM to ensure LDA Reliability Requirement is more accurate. Vistra argues that, if the Commission finds changes are required, the Commission could direct PJM, for future auctions, to amend the Tariff to require planned generation to notify PJM of its intent to participate in the auction in advance of the auction so that PJM can adjust the posted LDA Reliability Requirement accordingly.³⁷⁶ The Market Monitor recommends that, going forward, the Commission direct PJM to modify its Tariff to require all planned resources to commit to a must offer requirement by a defined date prior to the posting of auction parameters by PJM.³⁷⁷ EPSA suggests requiring planned resources to commit whether they will be in service for the relevant delivery year ahead of the Third Incremental Auction, at which point PJM would then adjust the LDA Reliability Requirement based on the resources that will actually be in service during the delivery year, at the same time as it makes adjustments to account for changes in the load forecast.³⁷⁸ Alternatively, EPSA notes PJM could require all resources without a must-offer requirement to make a binding commitment to

³⁷³ *Id.* at 5-7 (citing *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,212 (2021) (granting complaint by the Market Monitor); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137 (2021) (establishing replacement market seller offer cap), *on reh'g*, 178 FERC ¶ 61,121 (2022)); *see also* Invenergy Protest at 5 (referencing PJM, Intra-PJM Tariffs, Attach. DD § 10A).

³⁷⁴ LS Power Protest at 7.

³⁷⁵ ODEC Comments at 9.

³⁷⁶ Vistra Protest at 11-12; *see also* Ohio FEA Comments at 5; P3 Protest at 3-4, 9-10.

³⁷⁷ Market Monitor Comments at 5.

³⁷⁸ EPSA Protest at 26.

offer or not offer into the BRA and all subsequent Incremental Auctions for that delivery year prior to PJM posting the planning parameters.³⁷⁹

124. Constellation contends that, assuming *arguendo* that a year-over-year increase in an LDA Reliability Requirement is an appropriate trigger to authorize PJM to modify the LDA Reliability Requirement after the offer window is closed, any relief ordered by the Commission with respect to the 2024/2025 BRA for Delmarva should adopt the highest threshold possible to remedy the issue while avoiding unanticipated and inappropriate changes in market outcomes in other LDAs.³⁸⁰

125. The Market Monitor also requests the Commission direct PJM to develop a different way of calculating effective load carrying capacity (ELCC), which is used to accredit wind, solar, and storage capacity.³⁸¹ The Market Monitor argues that PJM's current approach is to use the aggregate ELCC value in calculating the internal capacity for LDA Reliability Requirement, which leads to the mismatch between internal capacity and CETO at issue here. The Market Monitor states one potential solution is to require the use of the lower of the LDA ELCC and the PJM default ELCC when calculating the capacity value of the resource, in order to match the capacity value in CETO.

126. Others argue that PJM should propose revisions to the PJM Business Practice Manuals rather than to the Tariff.³⁸² Freepoint suggests one such revision could be a binding deadline for market participants to notify PJM of their intent to offer before the parameters are finalized.³⁸³

127. Some parties also requested the Commission direct additional process to consider this issue. PSEG requests that, if the Commission accepts PJM's proposal, it do so only for the 2024/2025 BRA, and then initiate an FPA section 206 proceeding to address the underlying problems raised in PJM's filings, as well as direct PJM to propose Tariff revisions to ensure PJM promptly informs market participants about any issues that could impact auction results, establish a framework for evaluating when an issue arises that could impact the validity of an auction, and prevent PJM from delaying posting auction

³⁷⁹ *Id.*; EPSA Protest, Attach. A, Sotkiewicz Aff. ¶¶ 124-127.

³⁸⁰ Constellation Protest at 5.

³⁸¹ Market Monitor Comments at 5.

³⁸² Freepoint Comments at 13; Leeward Protest at 9; *see also* Clean Energy Associations Protest at 17 (citing PJM Manual 20 § 4.3 (13) (Modeling Specifics) (Aug. 25, 2021), <https://www.pjm.com/-/media/documents/manuals/m20.ashx>).

³⁸³ Freepoint Comments at 13.

results when an identified issue does not materially impact the outcome of the auction.³⁸⁴ AMP urges the Commission to convene a technical conference focused on additional changes to PJM's capacity construct, including: (1) expansion of PJM's proposal to address planned resources that do not participate in the BRA to all instances, not just those resulting in a 1% year-over-year ("material") increase in the LDA Reliability Requirement, and (2) consideration of whether insufficiently small LDA sizing in PJM contributes to inefficient capacity auction results, warranting a reevaluation of PJM's zonal capacity construct structure.³⁸⁵

128. Public Citizen requests that the Commission set the 2024/2025 BRA results for hearing and establish a refund effective date, per 16 USC § 824e, and determine as part of that hearing whether market participants in Delmarva engaged in intentional capacity withholding.³⁸⁶ Public Citizen also argues that PJM should be required to file future capacity auction results as a stand-alone rate filing under FPA section 205 of the Federal Power Act to ensure rates cannot go into effect until they have been noticed for comment.³⁸⁷

129. Some parties request that the Commission direct PJM to work with stakeholders to identify whether an issue exists in administering the BRA and develop an appropriate long-term, prospective solution for future auctions, if any change is needed.³⁸⁸ EPSA requests the Commission direct PJM to conduct a stakeholder process or should initiate its own further proceedings to allow for the development of a replacement rate that will allow market participants to rely on posted auction parameters prospectively.³⁸⁹ Although Constellation opposes PJM's proposal, Constellation argues that, should the Commission find PJM's Tariff unjust and unreasonable, accepting PJM's proposal for the 2024/2025 BRA and directing PJM to develop a more comprehensive solution through an expedited stakeholder process would be consistent with prior Commission precedent to avoid unnecessary auction delays.³⁹⁰

³⁸⁴ PSEG Protest at 3.

³⁸⁵ AMP Comments at 4-5.

³⁸⁶ Public Citizen Protest at 1.

³⁸⁷ *Id.* at 2 (citing *ISO New England, Inc.*, 119 FERC ¶ 61,239 (2007)).

³⁸⁸ Constellation Protest at 19-20; EPSA Protest at 21; Leeward Protest at 11; Vistra Protest at 11-12.

³⁸⁹ EPSA Protest at 21.

³⁹⁰ Constellation Protest at 18-19 (citing *PJM Interconnection, L.L.C.*, 174 FERC ¶

130. Lotus argues the Commission should find that the exiting Tariff already includes sufficient mechanism for planned resources to communicate whether they intend to offer into the auction or not.³⁹¹

131. Others request further Commission process. Invenergy argues that the Commission must require PJM to provide an additional explanation of how its proposed changes to the method of calculating LDA Reliability Requirements are reasonable and should direct PJM to undertake a more comprehensive reassessment of its capacity market rules, including capacity market offer caps.³⁹² Constellation suggests a paper hearing seeking more information regarding PJM's proposed year-over-year LDA Reliability Requirement trigger, justification for the one percent materiality threshold, and why other potential solutions would not be appropriate.³⁹³ Constellation argues that the Commission has ordered similar narrow briefing in the context of other proceedings in which the Commission found certain Tariff provisions to be unjust and unreasonable. Constellation states that in these situations the Commission ordered a paper hearing to develop a record on the replacement rate and directed PJM to run its capacity auction under the prior mechanism.³⁹⁴

61,212, at PP 72-74 (2021) (concluding that it is “an appropriate and equitable exercise of [the Commission’s] discretion not to further delay the upcoming auction while the Commission determines the just and reasonable replacement rate”); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 115 (2006) (accepting tariff provision to give discretion to the market monitor but allocating nine months for PJM to develop objective criteria to serve as the long-term solution); *Cal. Indep. Sys. Operator Corp.*, 116 FERC ¶ 61,274, at P 1402 (2006) (explaining that “[a]lthough additional features could enhance [the proposal], we find that these additional enhancements do not outweigh the need to implement without further delay the numerous benefits that the [proposed] tariff provides.”); *Sw. Power Pool, Inc.*, 114 FERC ¶ 61,289, at PP 2, 3 (2006) (explaining that “[w]e recognize that the implementation of organized markets is to some extent an iterative process that requires modifications to tariff provisions”), *on reh’g*, 116 FERC ¶ 61,289, at P 54 (2006)).

³⁹¹ Lotus Protest at 3.

³⁹² Invenergy Protest at 5-7.

³⁹³ Constellation Protest at 19-20.

³⁹⁴ *Id.* at 20 (citing *PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,212, at PP 72-73 (2021)).

2. Answers

132. PJM argues that the 2024/2025 BRA does not need to be rerun with a new offer window because the capacity market is designed to motivate sellers to offer based on marginal costs, so modifications to the LDA Reliability Requirement should not impact a resource's offer.³⁹⁵ PJM contends that, regardless, it is not workable to allow sellers to update their offers because changed circumstances may cause some sellers to make different decisions about whether to offer.³⁹⁶ PJM explains that any changes in offers will result in more updates to LDA Reliability Requirement, which would then trigger reoffering, in a circular cycle that "would paralyze the conduct of the auctions."³⁹⁷

133. The Market Monitor also reiterates that there is no reason to believe that sellers' offers were affected by the overstated capacity demand included in Delmarva's LDA Reliability Requirement.³⁹⁸ The Market Monitor argues that competitive market offers in a rerun auction would be the same. The Market Monitor contends that market participants are not entitled to confirmation of their assumptions about the supply that will actually offer in a given auction, and that relying on the auction parameters in formulating offers is not consistent with competitive behavior in a competitive market. Rather, the Market Monitor contends that competitive offers are a function of sellers' marginal cost of providing capacity. Sierra/NRDC notes that, in light of the Market Monitor's statements that the capacity auction was competitive, it is not clear what purpose rerunning the auction with a new offer window would serve "other than facilitating strategic offer behavior."³⁹⁹

134. EPSA disagrees, arguing that not all sellers are subject to the must offer requirement and those that are not may choose not to offer into the 2024/2025 BRA based on the changes to the LDA Reliability Requirement and expected clearing price.⁴⁰⁰ The Market Monitor responds that EPSA fails to explain why new offers are needed to

³⁹⁵ PJM February 2 Answer at 14.

³⁹⁶ *Id.* at 14-15.

³⁹⁷ *Id.* at 15.

³⁹⁸ Market Monitor February 3 Answer at 3.

³⁹⁹ Sierra/NRDC Answer at 11.

⁴⁰⁰ EPSA Answer at 15.

ensure offers are competitive.⁴⁰¹ The Market Monitor also argues the EPSA does not address concerns that allowing new offers could result in offers that are not competitive.

135. PJM states that the Market Monitor's preferred approach to create a must offer requirement for planned resources may be a viable alternative that could potentially be applied to future capacity auctions after the 2024/2025 BRA.⁴⁰² PJM clarifies that this solution should not be applied to the 2024/2025 BRA because it would require restarting the auction process but that PJM can explore the merits of the proposal through the stakeholder process.⁴⁰³ ODEC similarly argues that any further changes to PJM's proposal or additional process should be in addition to granting PJM's request to implement its proposal for the 2024/2025 BRA.⁴⁰⁴

136. Sierra/NRDC similarly argue against taking action beyond PJM's FPA section 205 proposal in these dockets without further process.⁴⁰⁵ With respect to proposals to require planned generation to notify PJM of its intent to participate in the auction, Sierra/NRDC argue further investigation is needed to explore if this would enable anti-competitive offers. Sierra/NRDC oppose both the Market Monitor's proposal to change the ELCC calculation methodology and LS Power's proposal to change the Market Monitor's mitigation of seller offer caps, stating that these proposals are unrelated to the instant filings and still under consideration in the PJM stakeholder process.⁴⁰⁶ Sierra/NRDC further asserts that the Market Monitor's proposal to use the lower of a generating resource's LDA ELCC and the PJM default ELCC in calculating the LDA Reliability Requirement would understate the resource adequacy value of such generating resources in LDAs that are not transmission constrained, and undermine the reliability benefits that RTOs bring by operating systems for a large region.⁴⁰⁷

137. P3 states the Market Monitor's contention that there is no reason to believe offers were affected by overstated demand ignores testimony to the contrary.⁴⁰⁸ P3 argues that

⁴⁰¹ Market Monitor February 16 Answer at 5.

⁴⁰² PJM February 2 Answer at 31.

⁴⁰³ *Id.* at 32.

⁴⁰⁴ ODEC Answer at 5-6; *see also* Sierra/NRDC Answer at 10.

⁴⁰⁵ Sierra/NRDC Answer at 11-12.

⁴⁰⁶ *Id.* at 10-11.

⁴⁰⁷ *Id.* at 12.

⁴⁰⁸ P3 Answer at 16 (citing NRG Protest, Attach. A, Holtman Aff. 4-11); *see also*

the Tariff expressly provides sellers flexibility to craft their offers and, for some resources, their decision about whether to participate in the BRA, based on their commercial judgement as informed by the planning parameters.⁴⁰⁹ P3 argues that simply because suppliers offered competitively based on one set of planning parameters does not mean that those same suppliers would offer at all, or at the same level, under revised parameters.

E. Timing Concerns

1. Comments

138. Vistra contends that granting PJM's filings will further exacerbate existing issues with delays in the BRA.⁴¹⁰ Vistra argues that running auctions on a less than 12-month cycle for a delivery period of less than three years in the future has undermined the predictability of a market whose primary feature is to provide predictable investment signals and incent development of new generation when and where needed. Vistra also states that pre-auction activities for the next auction are ongoing, noting that January 30, 2023 is the deadline for auction participants to submit must-offer exceptions. Vistra states that auction participants will have to make decisions regarding risk and retirement before they know the outcome of the prior auction or the Commission's determination in the instant proceeding. Vistra asserts that this could result in the premature retirement of resources because the asset owner does not have the data upon which to make an informed decision with respect to offer price or potential risk.

139. Leeward argues that the 2025/2026 BRA, for which pre-auction activities began on January 15, 2023, should be delayed until the 2024/2025 BRA results are released.⁴¹¹ Leeward states that all capacity resources that plan to participate in the BRA are required to provide PJM with notice of intent to participate 120 days prior to the auction and, without the results of the 2024/2025 BRA, market participants do not know whether they are considered a new or existing resource or whether they have a capacity commitment before entering the 2025/2026 BRA.⁴¹² Leeward contends that auction elements such as the Market Seller Offer Cap and the must offer requirement for existing resources require

EPSA Answer at 10-11.

⁴⁰⁹ *Id.* at 16.

⁴¹⁰ Vistra Protest at 15-16.

⁴¹¹ Leeward Protest 11.

⁴¹² *Id.* at 11-12 (citing PJM, Intra-PJM Tariffs, Attach. DD § 5.14 Clearing Prices and Charges).

resources to know if they are classified as planned or existing resources prior to the opening of the auction and can have a material impact on how a seller formulates offers and participates in the BRA.⁴¹³

140. Delmarva Load Parties contend that avoiding further delays in the BRA timeline is particularly critical as PJM stakeholders seek to reestablish the three-year forward procurement of capacity resources that has already been delayed by various proceedings before the Commission.⁴¹⁴ New Jersey Board states that prolonged delays in fixing this market dysfunction will only leave market participants without final capacity market results, and lead to damaging uncertainty for market participants on both the supply and demand side.⁴¹⁵

141. The Ohio FEA explains that Ohio's regulated electric distribution utilities rely upon a competitive auction process to procure generation service for non-shopping customers.⁴¹⁶ Ohio FEA explains that, due to Commission orders modifying the PJM capacity rules, the Public Utilities Commission of Ohio has had to significantly modify and truncate the default service auction schedules, which deprived Ohio ratepayers of the benefits associated with staggering and laddering auction products of multiple durations.⁴¹⁷

142. Clean Energy Associations contend that PJM is retaining credit posted by capacity market sellers in order to participate in the 2024/2025 BRA, thereby financially harming market participants who cannot use their posted credit for other business purposes.⁴¹⁸

⁴¹³ *Id.* at 12.

⁴¹⁴ Delmarva Load Parties Comments at 5.

⁴¹⁵ New Jersey Board Comments at 2.

⁴¹⁶ Ohio FEA Comments at 5.

⁴¹⁷ *Id.* at 5-6.

⁴¹⁸ Clean Energy Associations Protest at 4 (citing PJM, Intra-PJM Tariffs, Attach. Q § VI.b Supplemental Credit Requirements for Screened Transactions; *see also* Leeward Protest at 6-7.

143. The Market Monitor argues that re-opening the 2024/2025 BRA auction window would be inefficient and further delay auction results unnecessarily at a time when the auction has already been significantly delayed.⁴¹⁹

2. Answers

144. PJM argues that the 2025/2026 BRA does not need to be delayed because only a limited amount of planned generation was offered into the 2024/2025 BRA and would be subject to the must offer requirement as an existing resource if it cleared.⁴²⁰ PJM notes Leeward's portfolio of renewable energy facilities would not be subject to the must offer requirement regardless of whether they cleared the 2024/2025 BRA.⁴²¹ With respect to capacity market sellers who change their mind on deactivating based on the 2024/2025 BRA results, PJM states that sellers can simply withdraw the deactivation notice and continue to participate in the 2025/2026 BRA.

145. Sierra/NRDC agree with the Market Monitor that restarting the 2024/2025 BRA with a new offer window would be unnecessary and cause further delay to an already-delayed auction.⁴²²

V. Discussion

A. Procedural Matters

146. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2021), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which they were filed.

147. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2021), we grant Sierra Club's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

148. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2021), prohibits an answer to a protest or answer unless otherwise

⁴¹⁹ Market Monitor Comments at 5.

⁴²⁰ PJM February 2 Answer at 32-33.

⁴²¹ *Id.* at 33.

⁴²² Sierra/NRDC Answer at 11.

ordered by the decisional authority. We accept the answers filed by PJM, the Market Monitor, Constellation, ODEC, Sierra/NRDC, P3, EPSA, and Leeward because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

149. As discussed below, we find PJM's proposed Tariff revisions to be just and reasonable and therefore accept them, to become effective December 24, 2022, as requested. We find that PJM's proposed Tariff revisions will help ensure a competitive outcome for capacity auctions by more closely aligning the LDA Reliability Requirement with actual reliability needs. We find that it is appropriate for PJM to consider an additional factor in the optimization algorithm – whether Planned Generation Capacity Resources that do not participate in the auction would materially increase the LDA Reliability Requirement and exclude such resources from the LDA Reliability Requirement if the resulting change exceeds the materiality threshold. As discussed below, we dismiss the related FPA section 206 complaint as moot.

1. Tariff Revisions

150. We accept PJM's proposed Tariff revisions as just and reasonable. The proposed revisions will enable PJM, under specific circumstances, to revise the LDA Reliability Requirement to incorporate updated information regarding which Planned Generation Capacity Resources are offering into the BRA. We agree with PJM that this will help ensure that load-serving entities are charged for capacity based on an LDA Reliability Requirement that reflects actual reliability needs in a manner consistent with supply and demand fundamentals. Such an outcome is consistent with the goals of the PJM capacity market, which are to secure sufficient capacity in the delivery year and send a long-term price signal to ensure the reliability of PJM's system.⁴²³ In other words, PJM's proposal will help meet the capacity market's underlying goals by setting clearing prices that are based on accurate reliability assessments.

151. Protesters argue that PJM's proposal is arbitrary because it does not address circumstances where Planned Generation Capacity Resources offer but either do not clear or are mitigated. We disagree that these circumstances are functionally similar. Capacity

⁴²³ See PJM, Intra-PJM Tariffs, Attach. DD, Introduction (1.0.0) (“[T]he Reliability Pricing Model provides: [. . .] (b) a competitive auction mechanism to secure the forward commitment of additional Capacity Resources and Qualifying Transmission Upgrades as necessary to satisfy the portion of LSEs’ Unforced Capacity Obligations not satisfied through Self-Supply, in order to ensure the reliability of the PJM Region for future Delivery Years; (c) long-term pricing signals for the development of Capacity Resources, including demand resources and planned generation resources, to ensure the reliability of the PJM Region”).

offers signal that the resource intends to be available to serve as capacity in the relevant delivery year at a price equal to or above their capacity supply offer, even if they do not actually clear in the BRA. It is therefore appropriate for those resources to be included in the calculation of the LDA Reliability Requirement; the Tariff defines LDA Reliability Requirement as projected internal capacity plus CETO, and these resources will serve as capacity if they clear in the BRA.

152. By contrast, once the materiality threshold is satisfied for a given LDA, under its proposal PJM will remove only Planned Generation Capacity Resources that do not offer in the BRA or Incremental Auction, as such resources cannot reasonably be assumed to be available to serve as capacity in the relevant delivery year. Planned Generation Capacity Resources that offer but do not clear are distinguishable from those that do not offer. While it is true that some of the Planned Generation Capacity Resources that do not offer could become operational during the delivery year, these resources will not have capacity commitments. As PJM explains, such resources are appropriately excluded from the LDA 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 increased reliability risk since load is not depending on them as capacity resources.⁴²⁴

153. We disagree with NRG that PJM's proposal will prevent the market from sending a price signal that additional capacity is needed. As the Market Monitor notes, the prices resulting from PJM's proposal will accurately reflect supply and demand and, if the prices are accurate, the market incentives will be correct and consistent with reliability needs.⁴²⁵ With regard to PJM having provided NRG a different explanation for the increase in LDA Reliability Requirement, that argument is not relevant to the question of whether PJM's instant proposal is just and reasonable. We note that there are many factors that can impact the calculation of LDA Reliability Requirements, and PJM proposes to change only one of those factors. As a result, our finding here is limited to the analysis of whether it is just and reasonable for PJM to remove Planned Generation Capacity Resources that do not offer in the auctions from the most up to date LDA Reliability Requirements once the materiality threshold is crossed. We need only determine, under FPA section 205, whether the proposed filing is just and reasonable; the Commission is not obligated to consider whether the proposal is more or less reasonable than other alternatives.⁴²⁶

⁴²⁴ See PJM February 2 Answer at 29.

⁴²⁵ See Market Monitor February 3 Answer at 4.

⁴²⁶ See, e.g., *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (when determining whether a rate was just and reasonable, the Commission properly did

154. We also disagree that PJM’s proposal is unduly discriminatory or preferential because the proposed revisions to the LDA Reliability Requirement are limited to Planned Generation Capacity Resources, rather than all resources that are exempt from the must-offer requirement. We find that planned and existing resources are not similarly situated with respect to determining reliability needs in a given delivery year because planned resources have not yet achieved commercial operation. As such, they face construction and other risks that make it more likely that they will be unavailable to provide capacity in some or all of the relevant delivery year, in contrast to existing resources. We also note that, as PJM clarified in its answer, PJM’s proposal does not improperly exclude planned Intermittent Resources, because a new Intermittent Resource is considered a Generation Capacity Resource pursuant to the Tariff.⁴²⁷ As a result, PJM’s proposal will remove any Planned Generation Capacity Resource that does not offer into the auction from the LDA Reliability Requirement, regardless of whether it is an Intermittent Resource.

155. We further disagree with Leeward that PJM’s proposal would result in LDA Reliability Requirement modifications based on “arbitrary” or “non-transparent” assessments. We find that the proposed Tariff provisions clearly explain the limited circumstances under which PJM will modify the LDA Reliability Requirement. We find that the provisions are neither arbitrary nor non-transparent since PJM’s materiality threshold places an objective and transparent limit on when PJM can modify the LDA Reliability Requirement after the auction window opens.

156. NRG argues that market sellers rely on posted parameters for bilateral contracting and hedging activities and that accepting PJM’s proposed Tariff revisions would be irreconcilable with the Commission’s prior holdings that market participants should be able to rely on posted auction parameters and auction rules.⁴²⁸ Vistra contends that allowing PJM to change the rules of auctions after offers have been submitted, even prospectively, severely compromises market participants’ ability to make thoughtful investment decisions.⁴²⁹ However, we find that the fact that some market participants have, in the past, incorporated the LDA Reliability Requirement in their business

not consider “whether a proposed rate schedule is more or less reasonable than alternative rate designs”).

⁴²⁷ See PJM February 2 Answer at 28-29 (citing PJM, Intra-PJM Tariffs, Definitions I-J-K).

⁴²⁸ NRG Protest at 15-20 (citing *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 92 (2008)).

⁴²⁹ Vistra Protest at 6.

decisions and commercial transactions outside of the PJM-administered capacity market does not render PJM's proposal unjust and unreasonable.

157. Just as with other uncertain factors that may influence auction prices, such as the choices of other market participants, in future years entities can account for the potential for adjustments to the LDA Reliability Requirement in carrying out their business decisions and commercial transactions.⁴³⁰

158. NRG and P3 argue that capacity offers should be allowed to reflect any changes in the LDA Reliability Requirement. We disagree. Fundamentally, changes to the LDA Reliability Requirement affect the shape of the capacity market demand curves, and no party has suggested that the shape of the demand curve impacts their costs. Rather, we agree with PJM, the Market Monitor, and commenters that capacity market offers should be dictated by capacity resource costs and not by expectations of demand. Inputs to the capacity price, including the actions and offers of other sellers, as well as changes to the LDA Reliability Requirement, can impact the final auction clearing price.

159. We reject EPSA's argument that PJM's proposal fails to strike a balance between reducing prices for load and ensuring suppliers needed for reliability receive adequate compensation. As discussed above, PJM's proposal should improve price signals relative to the existing methodology because the proposal will, once a materiality threshold is satisfied, remove Planned Generation Capacity Resources that do not offer and so are not likely to be available to serve as capacity in the relevant delivery year. In this circumstance, the price for such an LDA will be reduced, but it will provide price signals that reflect actual reliability needs. We will not opine on the Indian River Reliability Must Run agreement, which is the subject of another pending proceeding and not at issue here, or EPSA's arguments that PJM has overlooked other reliability issues. These arguments are outside the scope of this FPA section 205 filing.

160. We also find that the proposed one percent materiality threshold is just and reasonable, because, as PJM explains, it is typically the cumulative addition of sufficiently large Planned Generation Capacity Resources in a small LDA that can trigger the issue identified in the instant filing. We agree with PJM that the one percent threshold avoids having to arbitrarily define what constitutes a "small" LDA.⁴³¹ We disagree that the threshold should be higher as to more narrowly target Delmarva and the specific situation in the 2024/2025 BRA. As PJM explains in its answer, its proposal already targets smaller LDAs, because the threshold is a percentage, and small LDAs would more easily trigger a one percent threshold as compared to larger LDAs, where

⁴³⁰ See *infra* P 160. As discussed in section B.3 below, we also determine that applying PJM's proposed changes to the 2024/2025 BRA is just and reasonable.

⁴³¹ PJM ER23-729-000 Transmittal at 19-20.

impacts from Planned Generation Capacity Resources not being offered into the auctions are more likely to be immaterial and not impact the LDA Reliability Requirement.⁴³² We find that PJM's proposed one percent threshold achieves its stated purpose by enabling PJM to revise the LDA Reliability Requirement in the event that enough Planned Generation Capacity Resources that are expected to offer in that LDA do not, such that the LDA's Reliability Requirement is materially increased as compared to the prior delivery year.

161. We disagree with protestors that PJM has failed to demonstrate that a year-over-year change in LDA Reliability Requirement is a reasonable trigger for PJM to update the value. It is true that there are several factors that can impact the LDA Reliability Requirement, but PJM's proposal specifies that PJM will only modify the LDA Reliability Requirement where the increase is "due to the cumulative addition of such Planned Generation Capacity Resources" that do not participate in the relevant auction.⁴³³ Therefore, we disagree with protestors that PJM's proposal is not clear, or that additional information is needed, and instead, we find that PJM's proposal is narrowly targeted to the identified issue.

162. Finally, we grant PJM's request for waiver of the Commission's 60-day prior notice requirement to allow an effective date of December 24, 2022.⁴³⁴

2. Filed Rate Doctrine

163. The filed rate doctrine "ensure[s] rate predictability and prevent[s] discriminatory or extortionate pricing"⁴³⁵ by "bind[ing] regulated entities to charge only the rates filed

⁴³² We also note that PJM states that Delmarva is the only LDA with an LDA Reliability Requirement that increased more than one percent for the 2024/2025 BRA. PJM February 2 Answer at 31.

⁴³³ PJM ER23-729-000 Transmittal at 21.

⁴³⁴ 18 C.F.R. § 35.11.

⁴³⁵ *Old Dominion*, 892 F.3d at 1230. The filed rate doctrine as originally developed under the Interstate Commerce Act required only that the railroad or trucking firm must post and abide by the rate on file. *Maislin Indus., US, Inc. v. Primary Steel, Inc.*, 497 US 116, 126 (1990) ("In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike.") (quoting *Ariz. Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 384 (1932)).

with FERC.”⁴³⁶ “The considerations underlying the doctrine . . . are preservation of the agency’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.”⁴³⁷ The corollary rule against retroactive ratemaking “prohibits the Commission from adjusting current rates to make up for a utility’s over-or-under-collection in prior periods.”⁴³⁸ While, the courts have over the years emphasized different purposes of the filed rate doctrine—primary jurisdiction,⁴³⁹ predictability,⁴⁴⁰ consumer protection,⁴⁴¹ equity⁴⁴²—they have consistently held that those purposes are secured by the “cardinal principal of ratemaking,” which prohibits a public utility from

⁴³⁶ *Okla. Gas*, 11 F.4th at 829.

⁴³⁷ *Arkla*, 453 U.S. at 577-78 (1981); *see also Cogentrix Energy Power Mgmt., LLC v. FERC*, 24 F.4th 677, 683 (D.C. Cir. 2022) (“the filed rate doctrine and the rule against retroactive ratemaking play an important role in helping the Commission fulfill its statutory responsibility to ensure that regulated entities charge only rates that are just and reasonable”).

⁴³⁸ *Towns of Concord*, 955 F.2d at 71 n.2.

⁴³⁹ *Arkla*, 453 U.S. at 577-78 (1981) (“The considerations underlying the doctrine . . . are preservation of the agency’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.”) (quoting *City of Cleveland v. FPC*, 174 U.S. App. D.C. 1, 10, 525 F.2d 845, 854 (1976)).

⁴⁴⁰ *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (“Providing the necessary predictability is the whole purpose of the well-established ‘filed rate’ doctrine, which ‘forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.’”).

⁴⁴¹ *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816-17 (D.C. Cir. 1998) (the filed rate doctrine “ensure[s] that customers can rely on a pipeline’s compliance with its tariff in conducting their own business activities.”) (quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 577 (D.C.Cir.1990)).

⁴⁴² *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) (“by preventing discriminatory pricing, [the filed rate doctrine and rule against retroactive ratemaking] promotes[s] equity.”) (citing to *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999)).

changing the rates collected for services rendered.⁴⁴³ As discussed below, we find that applying PJM's proposed Tariff revisions to the 2024/2025 BRA, as contemplated by PJM's filing, does not violate the filed rate doctrine or the rule against retroactive ratemaking.

164. PJM's capacity market provides "a competitive auction mechanism to secure the forward commitment of additional Capacity Resources . . . in order to ensure the reliability of the PJM Region for future Delivery Years."⁴⁴⁴ As part of the capacity auction, PJM is required to conduct a BRA for each delivery year "to secure commitments of Capacity Resources as needed to satisfy" the capacity obligations to meet future peak demand as set forth in the Tariff.⁴⁴⁵ At this stage of the auction process, no capacity commitments have been secured, no Capacity Clearing Price⁴⁴⁶ has been established, and the rate that will be charged for the delivery year (June 1, 2024 – May 31, 2025) has yet to be determined.

165. As relevant here, for the purposes of the filed rate doctrine, the rate on file with the Commission is the BRA procedures.⁴⁴⁷ Those rules for conducting the auction stand in

⁴⁴³ *City of Piqua*, 610 F.2d at 954.

⁴⁴⁴ PJM, Intra-PJM Tariffs, Attach. DD, § 1(b) Introduction (1.0.0).

⁴⁴⁵ PJM, Intra-PJM Tariffs, Attach. DD, § 5.4(a) Reliability Pricing Model Auctions (7.0.0).

⁴⁴⁶ Capacity Resource Clearing Price is defined as "the price calculated for a Capacity Resource that offered and cleared in a Base Residual Auction or Incremental Auction, in accordance with Tariff, Attachment DD, section 5." PJM, Intra-PJM Tariffs, I.1 Definitions C-D (32.2.0).

⁴⁴⁷ *See West Deptford*, 766 F.3d 10, 22 (explaining that, in the analogous context of formula rates, that the "'formula itself is the filed rate that provides sufficient notice to ratepayers,'" not the outputs of that formula) (quoting *Pub. Utils. Comm'n v. FERC*, 254 F.3d 250, 254 n.3 (D.C. Cir. 2001)); *Pub. Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042, at P 89 (2019) (finding that, in the market-based rate context, the "filed rate" is "the Tariff describing the Auction procedures, not the prices that may change over time."); *Black Oak Energy, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,261, at P 32 (2008) ("the ISO has the authority, and is required, to correct all prices that do not reflect operation of the ISO market rules (which are the filed rate)"); *NRG Power Mktg., Inc.*, 91 FERC ¶ 61,346, 62,165 (2000) (explaining that "the 'filed rate' for the NYISO energy market is not a static number but rather a formula rate" that is calculated consistent with "market rules provid[ing] that the market clearing prices paid to sellers and charged to buyers will be calculated using Locational Based Marginal

for a stated (i.e., numerical) rate. The filed rate doctrine thus applies to those rules as it would a stated rate, requiring that the rules be on file with the Commission and that changes apply only prospectively. But the fact that the relevant rules must be on file with the Commission does not resolve the question before us, namely whether PJM's proposed change to those rules is retroactive and, therefore, inconsistent with FPA section 205(c) and FPA section 206(a).⁴⁴⁸

166. Courts have held that changes to a rate are impermissibly retroactive only where regulated entities or customers have already transacted pursuant to the rate – i.e., where purchases or sales have occurred.⁴⁴⁹ Protestors point to no precedent in which a change to a rate or non-rate term has been determined to be retroactive before a transaction has been made pursuant to it.

167. We find that, at the time PJM filed its proposed Tariff revisions, applying those revisions to the 2024/2025 BRA would not violate the filed rate doctrine or constitute retroactive ratemaking.⁴⁵⁰ At that time, no capacity commitments had yet been secured,

Pricing.”).

⁴⁴⁸ *Towns of Concord*, 955 F.2d 67, 71–72 (“Whatever the justification, it is generally agreed that with respect to the Federal Power Act, the filed rate doctrine rests on two provisions: section 205(c) . . . and section 206(a). . . . Together, these provisions prohibit ‘a regulated seller of power from collecting a rate other than the one filed with the Commission and prevent the Commission itself from imposing a rate increase for power already sold.’”) (quoting *Arkla*, 453 U.S. at 578) (cleaned up).

⁴⁴⁹ *Old Dominion*, 892 F.3d 1223, 1226–27 (At bottom, that doctrine means that “a regulated seller of [power]” is prohibited “*from collecting* a rate other than the one filed with the Commission,” and “the Commission itself” cannot retroactively “impos[e] a rate increase for [power] *already sold*.”) (quoting *Arkla*, 453 U.S. 571) (emphasis added); *Cogentrix Energy Power Mgmt., LLC v. FERC*, 24 F.4th at 684 (“Cogentrix and Vistra are attempting to collect additional rates ‘for a service that has already been rendered,’ which would be a violation of the rule against retroactive ratemaking.”); *Pac. Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1320 (D.C. Cir. 2004) (imposition of additional charges on customers “allocated on the basis of their prior purchases” violates the filed rate doctrine); *Associated Gas Distribs. v. FERC*, 898 F.2d 809, 810-11 (D.C. Cir. 1990) (Williams, J., concurring) (“It is for purposes of this doctrine [retroactive ratemaking doctrine] that a court must ask whether the costs are past.”); *City of Girard, Kan. v. FERC*, 790 F.2d 919, 924 (D.C. Cir. 1986) (“utility may not set rates to recoup past losses”).

⁴⁵⁰ Planning Parameters Order, 171 FERC ¶ 61,208 at P 15 (finding prospective PJM's future obligation to clear an auction using an updated peak load forecast that

no transaction had yet been consummated, meaning that neither PJM nor any supplier had the attendant rights or obligations, no capacity had been delivered pursuant to such commitments, and no charges had been billed or collected. As PJM explains in its Transmittal, at that point in the 2024/2025 BRA process, no capacity seller had received a capacity award or been required to take on a capacity obligation, nor can any capacity seller know the price that they would ultimately receive from PJM in exchange for that obligation, should they secure it.⁴⁵¹ We conclude that, in these circumstances, where the rate on file with the Commission—i.e., the BRA procedures—exists “to secure commitments of Capacity Resources” and the price that suppliers will receive in exchange,⁴⁵² a change to those procedures is not retroactive for the purposes of the filed rate doctrine if the capacity supply obligations and the corresponding rights and obligations—including the right to a particular capacity price—have not yet actually been awarded. To accept PJM’s section 205 proposal and apply it to the 2024/2025 BRA we need not determine the precise point in time at which a change to those procedures would be retroactive. Here we decide only that changes are not retroactive if applied before capacity supply obligations and the corresponding rights and obligations have been awarded.⁴⁵³

168. That interpretation gives effect, in the context of auction procedures, such as those governing the BRA, to the long line of U.S. Supreme Court and D.C. Circuit cases on the filed rate doctrine. As those cases make clear, the filed rate doctrine and the rule against retroactive ratemaking exist to collectively ensure that the Commission has the opportunity to review a public utility’s rates before they are charged to the customer and that, once charged, neither the Commission nor the public utility can change those rates, even to address over- or under-recovery of costs during a prior period.⁴⁵⁴ Where, as here,

reflects the significant economic impact of the COVID-19 pandemic).

⁴⁵¹ PJM February 2 Answer at 11-12. Indeed, under the Tariff, no charges are collected for the capacity services procured through the BRA until the delivery year in question (in this case, June 2024).

⁴⁵² PJM, Intra-PJM Tariffs, Attach. DD, § 5.4(a) Reliability Pricing Model Auctions (7.0.0).

⁴⁵³ Further, as explained below, *see infra* PP 173-179, that does not mean that any change to those procedures is permissible. The Commission puts great weight on the importance of not disturbing settled expectations and will permit a change under these circumstances only where it finds the change to be just and reasonable and not duly discriminatory or preferential, which includes a consideration of any effects on settled expectations.

⁴⁵⁴ *Arkla*, 453 U.S. 571.

the rate on file is a set of procedures for producing an obligation to supply power and the rate received in exchange for that obligation, we find that the requirements of FPA section 205(c) and 206(a) can be satisfied—meaning that a change in those procedures would not be retroactive—at least up until that point at which the obligation is actually incurred. Up until that point, a change in the relevant procedures can still be presented to the Commission under section 205(c) or required under section 206(a) before the end result of that process, namely the establishment of the rights and obligations that the process exists to determine.

169. We recognize that promoting predictability is one of the values that courts have identified as undergirding the filed rate doctrine and the rule against retroactive ratemaking.⁴⁵⁵ And, as discussed further below, we recognize the importance of regulatory stability and respecting settled expectations, even before rights and obligations have been actually awarded or adjudicated. But while ensuring predictability is important across the board, the “nearly impenetrable shield” created by the filed rate doctrine and its corollary rule against retroactive ratemaking comes into play *only* when a change would be genuinely retroactive. Where, as here, a change would be prospective in nature, the consequences for predictability and settled expectations are something for the Commission to weigh when determining whether that change would be just and reasonable and not unduly discriminatory or preferential.⁴⁵⁶

170. We also find that PJM can implement a Tariff amendment at this stage of the auction process despite market sellers’ submission of offers. Indeed, as the Commission

⁴⁵⁵ *Towns of Concord*, 955 F.2d at 75 (stating that these two principles allow “purchasers of gas to know in advance the consequences of the purchasing decision they make,” thereby “[p]roviding the necessary predictability”); *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1141 (D.C. Cir. 1987) (“Providing the necessary predictability is the whole purpose of the well-established ‘filed rate’ doctrine, which ‘forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.’”); *Columbia Gas*, 895 F.2d at 793 (stating that the purpose of the filed rate doctrine “is to maintain predictability in the rates that will be charged, and this purpose is accomplished by the guarantee that rate changes will only be made prospectively.”).

⁴⁵⁶ *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29 (2014); *ISO New England Inc. & New England Power Pool*, 145 FERC ¶ 61,095, 61,521, at P 28 (2013) (finding that “the earlier effective date would not violate the principles underlying the rule against retroactive ratemaking. 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.”).

has found in the capacity market context, “offers are not rates” but merely “request[s] to receive the market clearing price”⁴⁵⁷ Here, the capacity commitment and the market clearing price are the outcome of the auction process and represent the rights and obligations associated with the rate paid by load and received by sellers – a rate at a value that has not yet been established, pursuant to commitments that have not yet been secured.

171. We also find that PJM’s implementation of the Tariff amendments does not retroactively amend any rate or non-rate term of the Tariff. Simply because one section of the Tariff requires PJM to take a particular action at one stage of the auction process, such as posting the LDA Reliability Requirement by a particular date,⁴⁵⁸ does not preclude PJM from prospectively updating the manner in which that LDA Reliability Requirement is incorporated into a later phase of the auction process pursuant to a separate section of the Tariff that requires PJM to consider the auction inputs and calculate a clearing result to minimize the cost of satisfying the reliability requirement.⁴⁵⁹ Moreover, treating each input to the running of the auction, and process for establishing such input, as a distinct non-rate term would be inconsistent with Commission precedent recognizing that the rate on file is the set of market rules governing the capacity auction.⁴⁶⁰

172. We disagree with protesters that PJM violated the Tariff by failing to post the results of the auction. The Tariff does not impose a deadline on PJM to complete the process of conducting and administering the BRA. PJM is only required to post the auction results “as soon thereafter as possible”—after “conducting the Reliability Pricing Model Auctions.”⁴⁶¹ PJM is required to conduct a BRA for each delivery year “to secure commitments of Capacity Resources” and such commitments have neither been secured, nor have any rates been established for capacity commitments. PJM is an independent regional transmission operator with no financial interest in the capacity auction results,⁴⁶²

⁴⁵⁷ *Indep. Mkt. Monitor for PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,121, at PP 101-02 (2022).

⁴⁵⁸ PJM, Intra-PJM Tariffs, Attach. DD, § 5.10(a) Auction Clearing Requirements (30.0.0).

⁴⁵⁹ PJM, Intra-PJM Tariffs, Attach. DD, § 5.12(a) Conduct of RPM Auctions (20.0.0).

⁴⁶⁰ See cases cited *supra* note 462.

⁴⁶¹ PJM, Intra-PJM Tariffs, Attach. DD, § 5.11(e) Posting of Information Relevant to the RPM Auctions (17.0.0).

⁴⁶² See *Standardization of Generator Interconnection Agreements & Procs.*, Order

and is specifically vested with the right to file pursuant to section 205 to make changes relating to the terms and conditions of its Tariff—changes which the Commission retains the authority to review and reject as unjust, unreasonable, unduly discriminatory or preferential.⁴⁶³

3. Settled Expectations

173. Having found that applying the proposed Tariff revisions to the 2024/2025 BRA does not violate the filed rate doctrine, we next find that doing so is just and reasonable. In these particular circumstances, we disagree with protestors' arguments that the Commission should not permit PJM to apply the proposed Tariff revisions to the 2024/2025 BRA because it would upset parties' "settled expectations."⁴⁶⁴ As discussed below, we find that the benefits of accepting the proposed Tariff revisions effective December 24, 2022, as requested, outweigh any reliance or expectation as to the LDA Reliability Requirement posted in August 2022.

174. We recognize the importance of regulatory stability and respecting settled expectations, even before rights and obligations have been actually awarded or adjudicated. For that reason, the Commission may, depending on the facts and circumstances in a particular case, prevent public utilities from implementing changes—

No. 2003, 104 FERC ¶ 61,103, at P 827 (2003) (finding that "an RTO or ISO ... is less likely to act in an unduly discriminatory manner than a Transmission Provider that is a market participant.").

⁴⁶³ PJM, Intra-PJM Tariffs, Tariff, section 9.2(a) Rights of the Transmission Provider (1.1.0) ("PJM shall have the exclusive and unilateral right to file pursuant to Section 205 of the Federal Power Act and the FERC's rules and regulations thereunder to make changes in or relating to the terms and conditions of the PJM Tariff.").

⁴⁶⁴ See EPSA Protest at 19-20 (citing 2020 Reserves Order, 171 FERC ¶ 61,153 at P 322 (rejecting requests an offset be applied to a previously-run BRA, finding that "even if we were to re-calculate the VRR curve and other capacity auction parameters based on a new E&AS Offset, there is no way to accurately determine how market participants would have offered in those BRAs based on the new parameters.")); EPSA Protest, Attach. A, Sotkiewicz Aff. ¶¶ 29-31; see also LS Power Protest at 3-4 and NRG Protest at 18-19 (citing NRG, Hotlman Aff. ¶¶ 15-19) (contending that sellers and customers anticipated that the 2024/2025 BRA would produce a high clearing price in Delmarva based on the planning parameters, including the LDA Reliability Requirement, and made decisions accordingly).

even ones that may well lead to better results—on the basis that they would disrupt settled expectations.⁴⁶⁵

175. Specifically, the Commission will consider disruptions to parties’ “settled expectations” in determining whether a proposal is just and reasonable.⁴⁶⁶ In such cases, the Commission has considered a “balancing of interests” or “balancing of equities” in determining the appropriate outcome.⁴⁶⁷ Indeed, the Commission has rejected filings by PJM on the basis of settled expectations, even where the results created significant financial hardship.⁴⁶⁸ At the same time, the Commission has accepted Tariff revisions where the benefits outweigh any adverse effects on settled expectations.⁴⁶⁹

176. We do so here. First, we are not persuaded that “settled expectations” justify rejection of PJM’s filing as applied to the 2024/2025 BRA. As PJM points out, despite this proposal being filed after capacity offers were presented to PJM, resources offering competitively in the auction would not have taken the LDA Reliability Requirement into account in formulating their capacity offers.⁴⁷⁰ As we found above, competitive capacity offers are based on the seller’s cost of supplying capacity in the delivery year, and accordingly should not be affected by an input into the shape of the demand curve.⁴⁷¹ No

⁴⁶⁵ For example, the Commission rejected a PJM filing that might have otherwise resulted in a more efficient outcome, on the basis that granting the requested waiver would unduly disrupt settled expectations. *GreenHat*, 166 FERC ¶ 61,072 at P 34; *see also ISO New England Inc. & New England Power Pool Participants Comm.*, 132 FERC ¶ 61,136, at P 22 (2010) (rejecting revisions to formula used to calculate payments in Forward Reserve Market as “unnecessary” and upsetting expectations that load-serving entities have had based on current Tariff provisions “without any demonstrated benefit.”).

⁴⁶⁶ *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 26 (2014) (finding a difference between upsetting the expectations of market participants and retroactive ratemaking).

⁴⁶⁷ *Id.*

⁴⁶⁸ *GreenHat*, 166 FERC ¶ 61,072, at P 34 (2019).

⁴⁶⁹ *ISO New England & New England Power Pool*, 145 FERC ¶ 61,095, at PP 28, 30 (2013).

⁴⁷⁰ PJM February 2 Answer at 14; *see e.g.* Market Monitor Comments at 5 and Market Monitor February 3 Answer at 3.

⁴⁷¹ *See supra* at P 158.

party in the record has demonstrated that the LDA Reliability Requirement affects the fundamentals of such competitive offers.

177. Second, we reiterate that we carefully consider settled expectations concerns, especially claims that market participants relied on expected auction rules in order to engage in other market activity such as bilateral supply sales and retail hedging arrangements. We are not persuaded that market participants' purported reliance on a single input, with no knowledge of the final capacity price, in making commercial transactions results in a detrimental reliance concern. Nevertheless, even to the extent those claims have merit, we find that, on the record in this case, the balance of the interests here weighs heavily in favor of accepting PJM's proposal effective December 24, 2022.

178. That is because there are significant benefits that would result from applying the proposed Tariff revisions to the 2024/2025 BRA, in particular preventing consumers from being charged unnecessarily high capacity prices that do not reflect actual reliability needs or supply and demand fundamentals. As noted above, PJM estimates customers would be required to pay four times more for capacity under the existing Tariff than under the proposed revisions,⁴⁷² which PJM explains would result in load paying over \$100 million in excess of what is necessary for capacity for the 2024/2025 delivery year.⁴⁷³ Commenters contend this could result in a cost increase, with estimates ranging between \$85 and \$175 million,⁴⁷⁴ and potentially increase the electric bill of the average customer in Delmarva by \$24 per month for the delivery year.⁴⁷⁵ As discussed above, that exorbitant price increase would not be the result of supply and demand fundamentals—or an actual reliability need—meaning that there is no economic or reliability justification for those additional costs. Accordingly, weighing the totality of the evidence before us, we conclude that the benefits associated with accepting the Tariff revisions for the 2024/2025 BRA outweigh any disruption to settled expectations that may exist on this record.

179. Considering the important benefits expected to result here, this case is distinguishable from those where the Commission was reticent to disrupt settled

⁴⁷² See *supra* at P **Error! Reference source not found.**

⁴⁷³ See *supra* at P **Error! Reference source not found.** As noted, Sierra/NRDC provide a higher estimate: Suggesting that the customer impact would be \$175 million, which they contend would fall disproportionately on customers in an area where wage levels are significantly below the national average. Sierra/NRDC Answer at 4-8.

⁴⁷⁴ See *supra* at P **Error! Reference source not found.**

⁴⁷⁵ See *supra* at P **Error! Reference source not found.**

expectations, i.e., where the proposed tariff revisions were “unnecessary” and “without any demonstrated benefit.”⁴⁷⁶ Here, PJM supports the substance of the proposed Tariff revisions as necessary and beneficial, as explained in section B.1 above and reflected in the record evidence regarding the considerable customer impacts.⁴⁷⁷ Accordingly, we find it is appropriate to implement this proposal now rather than waiting until future auctions.

180. Notwithstanding our determination that PJM’s section 205 application is just and reasonable, we acknowledge that there have been continuing disputes and complaints about the operation of PJM’s capacity market from a wide spectrum of stakeholders throughout the thirteen states and the District of Columbia served by PJM. To consider these issues generally, outside the parameters and constraints of a particular proceeding, the Commission will convene a forum to examine the PJM capacity market and how best to ensure that it achieves its objective of ensuring resource adequacy at just and reasonable rates.⁴⁷⁸ We will provide details about this forum in the near future.

4. Complaint

181. PJM requests that the Commission dismiss its complaint as moot if the Commission accepts its FPA section 205 filing effective, as requested.⁴⁷⁹ Because we accept PJM’s FPA section 205 filing, we dismiss the complaint as moot and need not address any of the parties’ alternative proposals, or any of the requests regarding auction timing.

The Commission orders:

(A) PJM’s proposal is hereby accepted, effective December 24, 2022, as requested, as discussed in the body of this order.

(B) PJM’s complaint is hereby dismissed as moot, as discussed in the body of this order.

⁴⁷⁶ See *ISO New England*, 145 FERC ¶ 61,095, at P 30 (2014).

⁴⁷⁷ See *id.*

⁴⁷⁸ See, e.g. *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at P 5 (2015).

⁴⁷⁹ PJM EL23-19 Transmittal at 2 n. 4, 36.

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By the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Christie is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

Attachment A – Intervenor

Intervenors in both dockets marked with an asterisk.

Advanced Energy United*

AES Clean Energy Development, LLC*

American Clean Power Association*

American Electric Power Service Corporation on behalf of its affiliates Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Wheeling Power Company, and AEP Energy Partners, Inc.*

American Municipal Power, Inc.*

Backbone Mountain Windpower LLC, Chief Conemaugh Power II, LLC, Chief Keystone Power II, LLC, Meyersdale Windpower LLC, Mill Run Windpower LLC, Parkway Generation Keys Energy Center LLC, Parkway Generation Operating LLC, Parkway Generation Sewaren Urban Renewal Entity LLC, Somerset Windpower LLC, Walleye Power, LLC, and Waymart Wind Farm LLC*

Boston Energy Trading and Marketing LLC*

Buckeye Power, Inc.*

Caithness Energy, L.L.C.*

Calpine Corporation*

Constellation Energy Generation, LLC*

Cypress Creek Renewables, LLC on behalf of itself and its affiliates*

DC Public Service Commission*

Delaware Division of the Public Advocate*

Delaware Municipal Electric Corporation, Inc.*

Delaware Public Service Commission*

Direct Energy Business Marketing, LLC and Midwest Generation, LLC*

Dominion Energy Services, Inc. on behalf of Virginia Electric and Power Company d/b/a Dominion Energy Virginia*

Duke Energy Business Services LLC, on behalf of its franchised public utility affiliates Duke Energy Ohio, Inc., Duke Energy Kentucky, Inc., Duke Energy Indiana, LLC, Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, and Duke Energy Florida, LLC*

Duquesne Light Company*

East Kentucky Power Cooperative, Inc.*

EDF Renewables, Inc.*

EDP Renewables North America LLC*

Electric Power Supply Association*

Enel North America, Inc.*

Exelon Corporation and its affiliates*

FirstEnergy Service Company, as agent for its franchised public utility affiliates Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo

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Edison Company, Pennsylvania Power Company, Pennsylvania Electric Company, Metropolitan Edison Company, West Penn Power Company, Jersey Central Power & Light Company, Monongahela Power Company, The Potomac Edison Company, and Allegheny Energy Supply Company*

Freepoint Solar LLC*

H-P Energy Resources LLC*

Illinois Commerce Commission*

Invenergy Wind Development North America LLC, Invenergy Solar Development North America LLC and Invenergy Thermal Development LLC*

J-POWER USA Development Co., Ltd.*

Leeward Renewable Energy, LLC and Leeward Renewable Energy Development, LLC*
Lightsource Renewable Energy US, LLC*

Lightstone Marketing Inc. on behalf of itself and its affiliates, Darby Power, LLC, Gavin Power, LLC, Lawrenceburg Power, LLC and Waterford Power, LLC*

Lotus Infrastructure, LLC*

LS Power Development, LLC*

Maryland Office of People's Counsel*

Maryland Public Service Commission*

Modern Energy Resources, LLC*

Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor for PJM*

Natural Resource Defense Council and Sustainable FERC Project*

New Jersey Board of Public Utilities*

New Jersey Clean Energy Ventures Corporation*

New Jersey Division of Rate Counsel*

NJR Clean Energy Ventures Corporation*

North Carolina Electric Membership Corporation*

NRG Power Marketing, LLC and Midwest Generation, LLC*

Organization of PJM States, Inc.*

Old Dominion Electric Cooperative*

Orsted Wind Power North America LLC*

Palladium Energy, LLC*

Pennsylvania Public Utility Commission*

Pine Gate Renewables, LLC*

PJM Power Providers Group*

PPL Electric Utilities Corporation*

Public Citizen, Inc.*

Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy Resources & Trade LLC*

Public Utilities Commission of Ohio's Federal Energy Advocate*

Rockland Electric Company*

Shell Energy North America (US), L.P.*

Sierra Club*

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Solar Energy Industries Association*

Southern Maryland Electric Cooperative, Inc.*

Tangent Energy Solutions, Inc.*

The Retail Energy Supply Association (EL19-23-000)

Virginia State Corporation Commission (ER23-729-000)

Vistra Corp.*

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket Nos. ER23-729-000
EL23-19-000

(Issued February 21, 2023)

DANLY, Commissioner, *dissenting*:

1. I dissent from this facially unlawful order¹ approving a public utility's violation of its filed rate in order to reject a capacity auction result and manufacture a rate approximately four times lower.² That public utility, PJM Interconnection, L.L.C. (PJM), seeks to invalidate and reset 2024/2025 Base Residual Auction clearing prices in the zone covering southern Delaware. PJM also proposes a prospective Federal Power Act (FPA) section 205 rate change³ that would allow it to adjust fundamental auction parameters during the running of future auctions. I would:

- a) reject PJM's section 205 rate proposal for failing to meet the required showing that it is just and reasonable;
- b) reject PJM's illegal attempt to retroactively apply its rate proposal to the auction already run as a plain violation of the filed rate doctrine and the rule against retroactive ratemaking;⁴ and

¹ *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109 (2023) (Order).

² See PJM December 23, 2022 Transmittal Letter, at 2 (“should PJM complete the auction . . . PJM estimates that the clearing price . . . would be more than four times *what the clearing price should be*”) (emphasis added); *id.* at 9 (“the clearing price may be approximately four times what it should be”); see also NRG Marketing LLC, et al. January 20, 2023 Protest (NRG Protest), Att. A, Aff. of Joseph A. Holtman, at P 28 (“Working from a clearing price at the cap of \$426.17/MW-day, PJM’s statement implies [a] clearing price at or below \$106.54/MW-day.”); Order, 182 FERC ¶ 61,109 at P 92 (citing estimates of a rate reduction between \$85 and \$175 million).

³ 16 U.S.C. § 824d.

⁴ See *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981) (*Arkla*); *Mont.-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251-52 (1951) (*Mont.-Dakota*); *Ok. Gas & Elec. Co. v. FERC*, 11 F.4th 821, 829-31 (D.C. Cir. 2021) (*Oklahoma Gas*).

- c) require PJM to show cause pursuant to FPA section 206 as to how the Reliability Pricing Model and PJM's administration of it are just and reasonable.⁵

2. The majority does none of this. Instead, despite what former FERC Chairman Joseph T. Kelliher warns in the record, the majority “not only ignore[s] the limits that the FPA places upon it but also upwards of 100 years of court precedent” by approving a plainly retroactive rate change that will almost certainly be overturned by the appellate courts in “a stinging and embarrassing court defeat that would eclipse the debacle of *Atlantic City I* and *II*.”⁶

3. If anything, Chairman Kelliher understates the damage. The precedent that the majority's order sets will undermine confidence in all FERC-jurisdictional markets—not merely the PJM capacity market⁷—and the entire market-based rate regime. Formula rates are also now in jeopardy as any part of the formula apparently can be deemed an “input” subject to retroactive revision.

4. Taken at its word, the majority's order is a misguided attempt to protect consumers. This attempt, however, will cause more harm to consumers than had the majority left the auction results in place. Consumers reap the benefits of market efficiency and competitive pricing. Those benefits become costs when the markets cease functioning because market participants—and investors—have lost confidence in them.⁸

⁵ 16 U.S.C. § 824e.

⁶ PJM Power Providers Group January 20, 2023 Protest (P3 Protest), Att. A, Aff. of the Hon. Joseph T. Kelliher, at P 46 (citing *At. City Elec. Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City I*), *enforcing mandate*, 329 F.3d 856 (2003) (*Atlantic City II*)).

⁷ See The American Clean Power Association, et al. January 20, 2023 Protest and Comments (Clean Energy Associations Protest), at 4 (“if accepted, [PJM's filing] could set precedent that *any RTO* can alter capacity market auction results if the RTO disagrees with the outcome. Such precedent would undermine the ‘level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates.’”) (emphasis in original) (citations omitted).

⁸ See Pine Gate Renewables, LLC January 20, 2023 Protest (Pine Gate Renewables Protest), at 11 (“By accepting [PJM's filing], the Commission risks undermining investor confidence in the PJM capacity market, *driving up the cost of capital to develop new capacity in the PJM region, and ultimately producing rates that are not just and reasonable.*”) (emphasis added).

I. The Commission Has No Power to Accept a Retroactive Rate Change

5. The filed rate violation in this case is straightforward.⁹ “The filed rate doctrine and the rule against retroactive ratemaking leave the Commission *no discretion* to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations.”¹⁰ I am dismayed how the court’s repeated declaration that we have “no discretion” continues to be misinterpreted by my colleagues, but I will restate what I have explained in numerous dissents to the Commission’s issuance of unlawful retroactive waivers,¹¹

Unambiguous, uninterrupted and controlling judicial precedent holds that a utility can only charge the rate on file. This is called the filed rate doctrine.¹² It is a core tenet of utility regulation. The Commission also has no authority to permit utilities to charge rates other than those on file unless there is advance notice that the rate may change or the Commission has approved a tariff allowing the utility to charge different rates prospectively. This is called the rule against retroactive ratemaking.¹³ This rule is also a core tenet of utility regulation and is a necessary adjunct to the filed rate doctrine. There would be little point in having rates on file if rate changes can be retroactively applied. Both the filed rate

⁹ See *id.* at 5 (PJM’s filings “constitute a rather straightforward attempt to violate both the filed rate doctrine and rule against retroactive ratemaking.”)

¹⁰ *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990)) (emphasis added); see also *Arkla*, 453 U.S. at 578 (finding that “the Commission itself has no power to alter a rate retroactively”) (footnote omitted).

¹¹ See, e.g., *Cal. Indep. Sys. Operator Corp.*, 176 FERC ¶ 61,159 (2021) (Danly, Comm’r, dissenting at P 2).

¹² *Id.* (Danly, Comm’r, dissenting at P 2 & n.5) (citing *Waiver of Tariff Requirements*, 171 FERC ¶ 61,156, at P 5 & n.13 (2020) (Proposed Policy Statement) (citing *Arkla*, 453 U.S. at 577; *Mont.-Dakota*, 341 U.S. at 251-52)).

¹³ *Id.* (Danly, Comm’r, dissenting at P 2 & n.6) (citing Proposed Policy Statement, 171 FERC ¶ 61,156 at P 5 (citing *Arkla*, 453 U.S. at 578)).

doctrine and the rule against retroactive ratemaking also apply to non-rate terms and conditions in filed tariffs.¹⁴

6. The PJM tariff—the rate on file—includes scores of rules to run a Base Residual Auction to purchase capacity. One “key planning parameter” is the “[Locational Deliverability Area] Reliability Requirement,” which the tariff requires PJM to post with “other planning parameters ‘for a Delivery Year *prior to conducting the Base Residual Auction for such Delivery Year.*’”¹⁵

More specifically, for the three Base Residual Auctions starting with the 2024/2025 [Base Residual Auction], PJM received Commission approval to post the planning parameters 100 days “prior to the relevant [Base Residual Auction].” With respect to the Reliability Requirement parameters, the [PJM] Tariff expressly provides that PJM “shall determine the PJM Region Reliability Requirement and the [Locational Deliverability Area] Reliability Requirement for each [Locational Deliverability Area] for which a Variable Resource Requirement Curve has been established for such Base Residual Auction . . . *prior to the conduct of the Base Residual Auction . . .*”¹⁶

No one disputes that the Locational Deliverability Area Reliability Requirement “is an anchor point of the Variable Resource Requirement Curve.”¹⁷ This seems unassailable

¹⁴ *Id.* (Danly, Comm’r, dissenting at P 2 & n.7) (citing Proposed Policy Statement, 171 FERC ¶ 61,156 at P 6; *Oklahoma Gas*, 11 F.4th at 829-30 & n.3). *See generally* P3 Protest, Att. A, Aff. of the Hon. Joseph T. Kelliher, at PP 10-13 (Chairman Kelliher’s concise restatement of the law regarding the filed rate doctrine and rule against retroactive ratemaking).

¹⁵ NRG Protest at 5-6 (citing PJM Tariff, Att. DD, § 5.11(a); PJM Tariff, Att. DD, § 15) (emphasis in original).

¹⁶ *Id.* at 6 (citing *inter alia*, PJM Tariff, Attachment DD, § 5.10(vi)(B)) (emphasis in original); *see also id.* at 6, n.13 (citing PJM Tariff, Attachment DD, § 5.10(vi)(A) (“[t]he parameters of the Variable Resource Requirement Curve will be established prior to the conduct of the Base Residual Auction for a Delivery Year and will be used for such Base Residual Auction.”)).

¹⁷ *See id.* at 6, n.13; *but see* Order, 182 FERC ¶ 61,109 at P 177 (characterizing the Locational Deliverability Area Reliability Requirement as a “single input” in the tariff). This particular “single input” is how much capacity the area needs to buy. Calling it a “single input” is like calling the particular car I am purchasing a “single input” in

since the point of the capacity auction is to ensure sufficient supply in the Locational Deliverability Area to meet that Resource Requirement.

7. To recap and put the filed rate at issue in this case in simple terms that anyone can understand, the PJM tariff requires that it post the reliability requirement for each area *before* the auction. There is nothing in the PJM tariff providing notice that this provision is tentative or subject to later adjustment, nor any provision in the tariff that indicates any retroactive change to this rate provision will be permitted.¹⁸ The majority writes this requirement out of the tariff with retroactive effect. That is the filed rate violation. The majority's rationale to the contrary fails.

8. To put this case in context, imagine a game of blackjack at the only casino in the territory—the Federal Energy Regulatory Casino. Players win if the total of their cards is higher than the dealer's hand but not exceeding 21. The cards are dealt. Everyone places their bets. The dealer draws 17. Even though 17 is a predictable—and even likely—hand, the dealer announces it is “anomalous” and *makes up a new rule on the spot*: 17 is the new blackjack. No one is allowed to draw again or change their bets. The house wins, but most of the players are now losers—except, perhaps, those who never understood the rules in the first place. The house saves a bit of money on one hand, but no one ever plays blackjack at the Federal Energy Regulatory Casino again. That is *this* case. The only difference is that the capacity market is not a game but rather the mechanism by which we ensure sufficient generation resources are built and maintained to keep the lights on.

A. The Majority Distorts the Filed Rate

9. The majority correctly states that “for the purposes of the filed rate doctrine, the rate on file with the Commission is the [Base Residual Auction] procedures.”¹⁹ Then they go off the rails. Notwithstanding all the plain tariff provisions establishing the key Locational Deliverability Area Resource Requirement planning parameter “prior” to the Base Residual Auction—which seem to me to be about as clear as any tariff provisions can be—the majority announces that the filed rate is not fixed “if the capacity supply

determining the price I pay for a car.

¹⁸ Accordingly, neither recognized exception to the filed rate doctrine and rule against retroactive ratemaking applies to this provision. *See* Clean Energy Associations Protest at 7 (the two exceptions are “(1) when parties are aware that a rate is tentative and may be later adjusted with retroactive effect; or (2) when they have agreed to make a rate effective retroactively”) (citing *Exxon Co. U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999); *Holyoke Gas & Elec. Dep't v. FERC*, 954 F.2d 740, 744 (D.C. Cir. 1992)).

¹⁹ Order, 182 FERC ¶ 61,109 at P 165 & n.447 (citing cases).

obligations and the corresponding rights and obligations—including the right to a particular capacity price—have not yet actually been awarded.”²⁰ They then double down on that point by “find[ing] that the requirements of FPA section 205(c) and 206(a) can be satisfied—meaning that a change in those procedures would not be retroactive—at least up until that point at which the obligation is actually incurred.”²¹

10. This determination promises to be nothing short of a revelation to all of the participants in every FERC-approved auction process. Until today the filed rate was all the rules in the tariffs that stakeholders in each region spent thousands of hours negotiating and that the Commission previously approved in lengthy orders, often after several rounds of litigation, compliance, and extensive settlement proceedings. Nope. None of those provisions are the filed rate until PJM or another Regional Transmission Organization (RTO) or Independent System Operator (ISO) decides it has poked around the “preliminary” auction results and found a price it likes enough to conclude the auction and declare the winners.²²

11. Worse yet, the majority signals that rates may not be final until *even later* by highlighting that “at the time PJM filed its proposed Tariff revisions . . . no capacity commitments had yet been secured, no transaction had yet been consummated, meaning that neither PJM nor any supplier had the attendant rights or obligations, *no capacity had been delivered pursuant to such commitments, and no charges had been billed or collected.*”²³ I struggle to understand what possible use a forward capacity market could have if auction rates are subject to change until “capacity has been delivered” and “charges . . . billed or collected.” A *forward* capacity auction establishes a clearing price based on seller offers. The clearing price tells the sellers whether their unit will be needed in three years. If the price is not final until after the three years, there is no such

²⁰ *Id.* P 167.

²¹ *Id.* P 168 (emphasis added).

²² See Clean Energy Associations Protest at 3 (“If [PJM’s filing] is accepted, market participants will lose confidence that future capacity market auction results will reflect competitive forces *as PJM will effectively have a unilateral right to administratively adjust auction results at its discretion on a post-hoc basis.*”) (emphasis added).

²³ Order, 182 FERC ¶ 61,109 at P 167 (emphasis added); see also *id.* P 168 (“the filed rate doctrine and the rule against retroactive ratemaking exist to collectively ensure that the Commission has the opportunity to review a public utility’s rates *before they are charged* to the customer and that, *once charged*, neither the Commission nor the public utility can change those rates.”) (emphasis added).

thing as a *forward* capacity auction except as an illusory exercise or sophisticated entrapment.

12. The biggest problem with the majority’s new interpretation of the tariff is that there is nothing in the tariff that supports it. The provision that “PJM is only required to post the auction results ‘as soon thereafter as possible’—after ‘conducting the Reliability Pricing Model Auctions’”²⁴ does not open a window for PJM to throw out every other auction rule in the tariff. A requirement not to delay posting auction results is not a license to change the Locational Deliverability Area Reliability Requirement any time PJM feels like it, and it is specious to so claim.²⁵ The fact that PJM has run numerous auctions by this point and never previously interpreted its tariff to allow it to change the rules up until winners were announced also suggests that no such right exists.

B. The Majority Distorts Precedent

13. The majority cites a lot of cases on various points related to the filed rate doctrine, and not one of them supports its new interpretation that filed auction rules can be freely changed up until contracts “have actually been awarded.” But of course they cannot, there are no such cases. The majority creates this new exception to the filed rate on its own initiative, despite having “no discretion” to do so.²⁶ And it is widely understood—including by every trinket seller on eBay—that auctions must have clear rules or chaos ensues.

14. Indeed, the Commission’s own precedent is to the contrary: “Changing the rules governing an *already-commenced* auction is a significant step that affects both the outcome of that particular auction as well as parties’ confidence in the rules governing future proceedings.”²⁷ In that case, the Commission denied PJM’s attempt to change the rules during an auction after the default of a large Financial Transmission Rights trader. The majority explains away its contrary precedent by asserting that it “may, depending on the facts and circumstances in a particular case, prevent public utilities from implementing changes—even ones that may well lead to better results—on the basis that

²⁴ *Id.* P 172 (citing PJM, Intra-PJM Tariffs, Tariff, Attach. DD, § 5.11(e) Posting of Information Relevant to the RPM Auctions (17.0.0)).

²⁵ See Electric Power Supply Association January 20, 2023 Protest, at 11-12 (EPSA Protest).

²⁶ *Old Dominion Elec. Coop., Inc. v. FERC*, 892 F.3d at 1230 (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d at 794-97).

²⁷ *Vistra Corp. January 20, 2023 Protest*, at 3 (quoting *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072, at P 33 (2019)) (emphasis in original).

they would disrupt settled expectations.”²⁸ As discussed further below, there is no “settled expectations” test to determine whether the rate on file must be honored.²⁹ If it is the rate on file, it is the rate on file. The end.

C. The Majority Distorts Time

15. Lacking any precedent for their new filed rate interpretation, the majority asserts that adjusting a key planning parameter after the auction has run is not “*genuinely retroactive*,”³⁰ and that “[t]o accept PJM’s section 205 proposal and apply it to the 2024/2025 BRA *we need not determine the precise point in time at which a change to those procedures would be retroactive.*”³¹ I do not know how to distinguish “genuine” and “disingenuous” retroactivity and I confess to no more than an enthusiastic layman’s understanding of general relativity,³² but even I know that if an event has already happened, it is in the past. If it has yet to happen, it is in the future. The event in the PJM tariff that must happen “prior” to the auction—establishing the Local Deliverability Area Reliability Requirement—already happened, as did the running of the auction. The majority, however, keeps its own time.³³

16. By way of another hypothetical that anyone can understand: If I eat cake contrary to my diet, I have broken my diet. I can change my diet, but I cannot change the fact that I ate cake. Even if I feel better believing cake was always on my diet, it is a lie. Either way, I gain weight.

17. The majority routinely engages in the same time jumping in the scores of cases where it grants retroactive waivers of tariff deadlines that already have passed.³⁴

²⁸ Order, 182 FERC ¶ 61,109 at P 174 & n.466 (citing cases).

²⁹ *See infra* PP 24-27.

³⁰ Order, 182 FERC ¶ 61,109 at P 169 (emphasis added).

³¹ *Id.* P 167 (emphasis added).

³² I still do not understand the mechanism behind apsidal precession.

³³ Like Billy Pilgrim in *Slaughterhouse-Five*, the majority has “come unstuck in time.” Vonnegut, Kurt, Jr., *Slaughterhouse-Five or The Children’s Crusade*, at 20 (New York: A Seymour Lawrence Book/Delacorte Press, 1969).

³⁴ *See, e.g., Borough of Chambersburg*, 179 FERC ¶ 61,014 (2022) (Danly, Comm’r, dissenting at P 3) (“I should not have to explain how time works, but by waiving an April 1, 2021 deadline that was not sought until March 22, 2022, the Commission is *retroactively* writing a mandatory notice deadline out of the PJM tariff”

Unfortunately, the parties that relied on the Local Deliverability Area Reliability Requirement back when it was established, submitting binding capacity offers and entering into bilateral transactions, do not have the same ability to go back in time and undo the actions they took.

18. How do we know parties acted in reliance on the posted auction parameters back when they had the opportunity to do so? *First*, because it is obvious. The bulk power markets are among the most sophisticated markets in the world with critical infrastructure and billions of dollars at stake, not the neighborhood bake sale. Do we really think sophisticated participants do not know how to hedge the strong likelihood of high prices in a small zone?

19. *Second*, because they told us so. Record evidence from one generator, for example, confirms that it “lost business because it reasonably priced capacity in its bilateral retail offers based on its reliance on the PJM tariff. Ironically, the losers would also include other entities that relied on the posted parameters and the auction rules and *made prudent decisions about bilateral contracting and hedging consistent with such reliance.*”³⁵ Unlike the Commission and PJM in today’s order, these parties cannot retroactively undo what they have already done.

20. There is no record evidence of any parties that *did not rely* on PJM’s posted auction planning parameters, and any party that lacks this basic level of market competency ought to reconsider its participation in the markets.³⁶ By resetting auction

with the effect that the deadline “was a nullity and . . . notice in the PJM tariff is fact, fiction, or aspiration depending upon the whims of the Federal Energy Regulatory Commission.”) (emphasis in original).

³⁵ NRG Protest, Att. A, Aff. of Joseph A. Holtman at P 27 (emphasis added); *see also id.* at PP 10-13 (explaining the basics of how bilateral contracting relies upon posted auction parameters); *see also* P3 Protest, Att. B, Aff. of Dr. Roy J. Shanker at PP 41-43 (“*Each party to the auction could or should have known these risks, and made their own independent assessment . . . and how it would impact their behavior*” and noting that “[v]arious parties who sell commercial forecasts of PJM markets and related intelligence specifically forecasts that [the southern Delaware area] would be materially short and prices would reach the cap”) (citations omitted) (emphasis in the original).

³⁶ *See* P3 Protest, Att. B, Aff. of Dr. Roy J. Shanker at PP 20-22 (recounting basic market design elements as they relate to planning forecasts, concluding that “[a]ll parties should have been aware of this”); *see id.* PP 33-40 (explaining market fundamentals in this auction in the small southern Delaware zone). Note that individual customers do not buy capacity in the auction; their *utilities* do. A utility should know how markets work and not pass unhedged costs onto “customers in an area where wage levels are significantly below the national average” or that utility is imprudent. Order, 182 FERC

results, the majority almost certainly awards an unexpected windfall to parties who failed to hedge—at the expense of parties who did.³⁷ So we are almost certainly rewarding the market participants that were the least capable back at the time the planning parameters were established (or, possibly, we are rewarding the participants taking the most risks). Again, the point is that none of these parties can go back in time—like PJM and the majority—to change their behavior.

21. The absurdity of the majority’s interpretation of time is fully exposed when we also recognize that it only applies to certain favored parties—in this case RTOs or ISOs: consider whether the majority would allow generator sellers to revise their capacity offers after the auction had been run but before results were posted like it allows PJM to change the reliability requirement.³⁸ Of course not.³⁹ Only the majority’s friends get to time travel.

D. The Majority Distorts Space

22. The majority not only attempts to distort time but space:

Simply because *one section of the Tariff* requires PJM to take a particular action at one stage of the auction process, such as posting the LDA Reliability Requirement by a particular date, does not preclude PJM from prospectively updating the manner in which that LDA Reliability Requirement is incorporated into a later phase of the auction process *pursuant to a separate section of the Tariff* that requires PJM to

¶ 61,109 at P 178, n.474.

³⁷ P3 Protest, Att. B, Aff. of Dr. Roy J. Shanker P 50 (explaining hedging basics and predicted activity going into the Base Residual Auction given the posted planning parameters in the southern Delaware zone).

³⁸ See EPSA Protest, Att. A, Aff. of Dr. Paul M. Sotkiewicz at P 22 (“By PJM’s logic [and the majority’s] of what prospective means, Capacity Market Sellers can request the Commission to allow them to change their decisions after offers have been submitted as long as they are changed prior to the announcement of the [Base Residual Auction or Incremental Auction results], and thus be considered ‘prospective.’”).

³⁹ See Order, 182 FERC ¶ 61,109 at P 176 (generators will not be allowed to change their offers after PJM changes the Locational Deliverability Area Reliability Requirement).

consider the auction inputs and calculate a clearing result to minimize the cost of satisfying the reliability requirement.⁴⁰

The argument here is that a set of provisions in one part of the tariff may no longer be part of the filed rate after new sections of the tariff have also started being applied. If that were the case, the tariff would say so. Absent an express provision permitting tariff provisions to be superseded in defined circumstances, the Commission must honor the entire rate on file, no matter where the section is placed in the tariff (space), or when it is operable (time).

E. The Majority Distorts the Principle that “Parts Comprise the Whole”

23. The majority next claims that “treating each input to the running of the auction, and process for establishing such input, as a distinct non-rate term would be inconsistent with Commission precedent recognizing that the rate on file is the set of market rules governing the capacity auction.”⁴¹ This is another distortion—this time of the basic principle that parts comprise the whole. “Inputs” that are part of the filed rate are not exempt from the filed rate doctrine. Again, there would have to be an express tariff provision identifying which “inputs” in the filed rate can be ignored.

F. The Majority Distorts “Settled Expectations”

24. After eviscerating the filed rate doctrine, the majority replaces it with a new test where the Commission will “consider disruptions to parties’ ‘settled expectations’ in determining whether a *proposal* is just and reasonable.”⁴² To be clear, the “proposal” in question is whether the Commission will change the filed rate with retroactive effect, specifically whether “‘settled expectations’ justify rejection of PJM’s filing as applied to the 2024/2025 [Base Residual Auction]”—the auction that already happened.⁴³ The majority concludes that once we do some “‘balancing of interests’ or ‘balancing of

⁴⁰ *Id.* P 171 (emphasis added) (citations omitted).

⁴¹ *Id.*; *see also id.* P 165 n.447 (listing cases). The cited cases merely stand for the proposition that for formula rates, the formula is the rate. None of these cases say that parts of the formula in the filed rate are not actually filed rates.

⁴² *Id.* P 175 (emphasis added).

⁴³ *Id.* P 176.

equities’ in determining the appropriate outcome,” it is clear that the auction must be reset.⁴⁴

25. There are many problems with this argument. I highlight three. *First*, the majority’s new “settled expectations” test is no substitute for the filed rate doctrine and rule against retroactive ratemaking that the majority leaves in tatters. To replace the filed rate doctrine would require legislation or overturning a century of binding judicial precedent.⁴⁵

26. *Second*, the new “settled expectations test” unfairly diminishes generators’—and all participants’—actual expectations, which are that the auction rules in the tariff will be followed.⁴⁶ The majority asserts that it “carefully consider[ed] settled expectations concerns, *especially claims that market participants relied on expected auction rules* in order to engage in other market activity such as bilateral supply sales and retail hedging arrangements.”⁴⁷ But the majority finds no “detrimental reliance concern” arising out of “market participants’ *purported reliance on a single input*” in the “expected auction rules.”⁴⁸ If substantial record evidence of parties entering into “bilateral supply sales and retail hedging arrangements”—all binding financial commitments—does not raise “detrimental reliance concern[s],”⁴⁹ what does? And why would anyone rely on a silly thing like the rules when entering into such arrangements?

27. *Third*, the new “settled expectations test” misapprehends the Commission’s role. The Commission is not a court of equity.⁵⁰ “As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.’”⁵¹ The Commission does not balance

⁴⁴ *Id.* P 175 (citation omitted).

⁴⁵ *See supra* P 2.

⁴⁶ *See supra* PP 19-20.

⁴⁷ Order, 182 FERC ¶ 61,109 at P 177 (emphasis added). These “claims” are supported by extensive record evidence.

⁴⁸ *Id.* (emphasis added).

⁴⁹ *Id.*

⁵⁰ *See* P3 Protest, Att. A, Aff. of the Hon. Joseph T. Kelliher at P 33.

⁵¹ *Atlantic City I*, 295 F.3d at 8 (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in *Atlantic City I*).

anything to determine the filed rate. It is a good thing, too, because the majority is not very good at it—entirely failing to appreciate the untold economic harm undermining all FERC-jurisdictional markets has versus a high clearing price in one zone, in one auction.

G. The Majority Distorts Markets

28. The majority intends to benefit consumers with this order. They extol the “significant benefits that would result from applying the proposed Tariff revisions [retroactively] to the 2024/2025 BRA, in particular preventing consumers from being charged unnecessarily high capacity prices that do not reflect actual reliability needs or supply and demand fundamentals.”⁵² This certainly sounds like a great thing. Except “saving consumers money” is an incomplete description of what the Commission is tasked to do. Our job is to ensure just and reasonable rates. And market rates are not just and reasonable if no one trusts the market.

29. There is overwhelming record evidence of the damage the majority’s retroactive change to the auction rules will impose.⁵³ But “[t]he one thing we do not do is re-run auctions,” even as a *remedy* when there are fundamental problems with how an auction was run.⁵⁴

30. Rerunning an auction is apparently too destabilizing to consider. Yet here the majority does something arguably worse: rather than rerun the auction, they simply reset the price. The majority knows its decision will not withstand judicial review, but they also know that the Commission does not rerun auctions as a form of relief. So if today’s action is deemed unlawful by the courts, there will be no effective remedy. In such

⁵² Order, 182 FERC ¶ 61,109 at P 178. There also is substantial record evidence that the auction results did reflect “actual reliability needs or supply and demand fundamentals.” *See, e.g.*, P3 Protest at 41 (citing P3 Protest, Att. B, Aff. of Dr. Roy J. Shanker at PP 24, 35); *see also* EPSA Protest, Att. A, Aff. of Dr. Paul M. Sotkiewicz at PP 73-75 (identifying reliability issues in southern Delaware).

⁵³ *See, e.g.*, P3 Protest, Att. A, Aff. of the Hon. Joseph T. Kelliher at PP 40-46; P3 Protest, Att. B, Aff. of Dr. Roy J. Shanker at PP 49-52; NRG Protest, Att. A, Aff. of Joseph A. Holtman at PP 28-34; EPSA Protest, Att. A, Aff. of Dr. Paul M. Sotkiewicz at PP 32-38.

⁵⁴ *Indep. Mkt. Monitor for PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,121 (2022) (Danly, Comm’r, dissenting at P 16) (citing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 (2017); *reh’g denied*, 169 FERC ¶ 61,237 (*passim*) (2019) (explaining decision declining to rerun auctions)); *see* P3 Protest, Att. A, Aff. of the Hon. Joseph T. Kelliher at P 43.

circumstances—where no auction outcome can be trusted—it would be better if we scrapped the markets altogether and returned to traditional cost-of-service ratemaking.

31. It appears the Commission is headed down that path whether it realizes it or not. In a concurrence I issued last week, I quoted P3—a coalition representing generators in PJM—about the current situation of the PJM market:

While capacity markets were established in PJM as a tool to ensure resource adequacy in future delivery years, a series of recent regulatory, policy and other changes counter any notion that the capacity market will send a signal to current investors seeking to invest at risk capital in assets that will deliver reliability at least cost. Changes to the Market Seller Offer Cap . . . have removed any independent judgement of asset owners to make decisions about the viability of their assets going forward. Changes to the Minimum Offer Price Rule . . . have effectively eliminated protections against the exercise of buyer market power, while the so-called protections against seller market power have gone to the extreme of having capacity offers effectively set by the PJM Independent Market Monitor. Other decisions related to the [Operating Reserves Demand Curves] and the removal of the 10% adder from capacity market offers have served to compound the problem. The proposed changes [in this proceeding] continue a pattern of complete devaluation and corruption of a market established to compensate investment in long-term capacity resources.⁵⁵

As of today, we can add to this list the resetting of prices after capacity auctions have been run.

32. In the same concurrence, I further warned that:

there appears to be an implicit but prevailing view shared by many consumers and regulators that “regulatory, policy and other changes”⁵⁶ to the PJM capacity market and mitigation construct are always justified if they lower prices, so much so

⁵⁵ *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,073 (2023) (Danly, Comm’r, concurring at P 3) (citing PJM Power Providers Group, Protest, Docket No. ER22-2984-000, at 4 (Oct. 21, 2022) (P3 Demand Curve Proceeding Protest)).

⁵⁶ P3 Demand Curve Proceeding Protest at 4.

that it appears to me that the only evidence that could be brought to bear that would finally convince them that prices are actually confiscatory would be the impending financial collapse of the entire existing generation fleet. It may come to this. However, for obvious reasons, generators generally are not in a position—and likely never will be—to publicly predict and support with data their own potential bankruptcies. Generators have investors.

We thus should carefully listen when groups like P3 routinely warn us about “a pattern of complete devaluation and corruption of a market established to compensate investment in long-term capacity resources.”⁵⁷ We should also remember that evidence of imminent collapse is not the required statutory showing. Under foundational precedent, regulated utilities are entitled to an opportunity to recover their prudently-incurred costs.⁵⁸

33. It is true that the filed rate doctrine can produce harsh results, particularly in an auction in a small area with less supply than it needs. But that is how markets work. The good is low rates in surplus conditions. The flip side is high rates in shortfall conditions. And there is a solution to “high” rates that does not involve the Commission taking the law into its own hands and interfering with markets. All that a public utility like PJM has to do is file a clear tariff revision that provides notice for when “anomalous”⁵⁹ market outcomes can be revisited before posting auction results.⁶⁰ The one thing we cannot do is change the score after the game so that our favorite team wins.

⁵⁷ *Id.*

⁵⁸ *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,073 (Danly, Comm’r, concurring at PP 4-5) (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)); *see also Mkt.-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, 123 FERC ¶ 61,055, at P 409, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *order on reh’g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh’g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011)).

⁵⁹ *See* Transmittal Letter at 9.

⁶⁰ No such clear notice currently is in the PJM tariff that would have prevented the allegedly “anomalous” outcome in this case, notwithstanding PJM’s claims to the

II. The Commission Should Reject PJM's Section 205 Filing

34. I further dissent on the majority's decision to accept the prospective application of PJM's proposal to adjust the Local Deliverability Area Reliability Requirement during the auction. By "prospective," I mean in the traditional sense of applying this rule change to future auctions—not the one already run. While the Commission "need only find that the [FPA section 205] proposal is just and reasonable, not that it is the only or even the most just and reasonable proposal,"⁶¹ PJM has failed that burden in this case.

35. I agree with the extensive analysis in the protests that PJM's proposal "would effectively make the Locational Deliverability Area Reliability Requirement a moving target, thereby disrupting the expectations of market participants."⁶² I am persuaded that a "moving target" during an auction is a bad idea.

36. While the Commission's role is not to determine whether a proposal is the "most just and reasonable," it is useful to know whether there are alternatives to the proposed rate that lack its infirmities. There is record evidence of such alternatives in this case. Rather than an "intervention into the middle of a Tariff approved process,"⁶³ PJM could "change the timeline on which *both* existing and planned Capacity Resources with options to offer into [the Base Residual Auction] must exercise that option."⁶⁴ This could be accomplished by changing the option deadline "from the actual [Base Residual Auction] to 30 days before the Planning Parameters are posted."⁶⁵ It thus appears that

contrary. *See id.* at 26 (citing PJM Tariff, § 9.2(b)). *But see* P3 Protest, Att. A, Aff. of the Hon. Joseph T. Kelliher at PP 20-23 (refuting PJM's notice claims).

⁶¹ *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,019, at P 31 (2019) (citing *Cities of Bethany*, 727 F.2d 1131, 1136 (D.C. Cir. 1984), *cert denied*, 469 U.S. 917 (1984) (describing the Commission's authority under section 205 of 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"))).

⁶² EPSA Protest at 19; *see also id.* at 17-27 (cataloguing the unjustness and unreasonableness of PJM's proposal).

⁶³ P3 Protest, Att. B, Aff. of Dr. Roy J. Shanker P 54.

⁶⁴ *Id.* P 9 (emphasis in the original).

⁶⁵ *Id.*; *see id.* PP 63-64 (explaining same).

solutions may be available that do not disrupt auction processes. I would reject PJM's proposal.⁶⁶

III. The Commission Should Pursue Remedies Against PJM

37. The most disturbing aspect of this case is the damage it inflicts that probably cannot be remedied. As I discuss above, rerunning the auction or restoring the original prices likely would be as destabilizing as today's order.⁶⁷ I am concerned about the long-term implications for the markets administered not only by PJM but in other regions. There is significant evidence—particularly increasing reliability risk throughout the country—that the FERC-jurisdictional power markets are sick and dying, and it is the Commission's fault.

38. The Commission announces it will convene a forum to review the health of the PJM capacity market.⁶⁸ I do not object to a forum, but when the house is burning down, consulting with the Homeowners Association is insufficient. You put out the fire. I would institute an FPA section 206 proceeding regarding the PJM capacity market, specifically investigating whether the existing PJM capacity construct is just and reasonable. I would target at least the following issues:

- Buyer-side manipulation of capacity market prices by offering below cost;
- Over-mitigation of sellers to the point that all offers are essentially set by the Independent Market Monitor;
- Elimination of any assessment of risk from seller offers;
- Changes to the demand curve to reduce prices when there is surplus supply and increase volatility as supply decreases; and

⁶⁶ I would also reject PJM's alternative section 206 proposal seeking to find the existing Locational Deliverability Area Reliability Requirement posting and timing requirements unjust and unreasonable and seeking as the replacement rate the same rate proposal as that sought under section 205. *See* Order, 182 FERC ¶ 61,109 at P 20 (discussing section 206 complaint).

⁶⁷ *See supra* PP 29-30. That does not mean it should not be considered, and to the extent any party seeks rehearing, I welcome arguments on appropriate relief in the event the Commission revisits this case on remand from a federal appellate court.

⁶⁸ Order, 182 FERC ¶ 61,109 at P 180.

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- Resetting auction prices after the auction is run.

39. I welcome additional feedback on potential topics, whether at the forum, in this proceeding, or elsewhere. I particularly welcome proposed solutions to identified problems.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket Nos. ER23-729-000
EL23-19-000

(Issued February 21, 2023)

CHRISTIE, Commissioner, *concurring*:

1. In no universe would the results of PJM's most recent capacity auction applicable to the Delmarva Power & Light South (DPL-S) Local Delivery Area (LDA) be considered just and reasonable.¹ Nor is this outcome merely a topic for academic debate. Real people — the consumers in the Delmarva zone — may pay in excess of \$100 million more than necessary because of this operational outcome.²

2. To illustrate further, in its section 205 filing, PJM stated:

Based on preliminary auction data, as a result of the confluence of events in this small LDA, should PJM complete the auction and award capacity commitments, PJM estimates that the clearing price for the DPL-S LDA (and the revenues received by the Capacity Market Sellers in this small LDA) *would be more than four times what the clearing price should be. . . .* To put that into perspective, the clearing price for the DLP-S LDA from the 2023/2024 BRA was \$69.95/MW-day. . . . Such an aberrant auction outcome must be avoided for the 2024/2025 BRA to ensure that the final auction results are just and reasonable rates and reflective of the actual reliability requirements in the affected LDA.³

¹ The procedural posture of these results is described at length in the order.

² PJM EL23-19 Transmittal at 34 (“The effect of the auction results would require the load in the particular LDA at issue to be responsible for paying over one hundred million dollars in excess of what is necessary for capacity associated with the 2024/2025 Delivery Year.”).

³ PJM ER23-729-000 Transmittal at 2-3 (emphasis added) (footnote omitted).

3. Using the “four-times” PJM estimate, Old Dominion Electric Cooperative (ODEC) noted:

To provide additional context with respect to the economic impact associated with PJM’s estimated four-fold increase in clearing price, ODEC calculated that, unless corrected, the excessive clearing price would result in cost increases to Delmarva Zone load of either *\$85 million or \$144 million* under two possible scenarios.⁴

4. Using the same “four-times” estimate, the Maryland Office of People’s Counsel (Maryland OPC) notes that without approval of PJM’s proposed remedy, electric consumers in this LDA would experience “a major increase in power costs.”⁵ Specifically, Maryland OPC calculates the average electric consumer of 1000 kilowatt-hours a month in the DLP-S LDA would experience an extraordinary electric bill increase of an average of \$24 a month.⁶

5. So what to do? PJM knows that the costs that will occur as a result of the confluence of events in this LDA are unjust and unreasonable and — *to its credit* — has stepped up and forthrightly proposed two controversial solutions: (i) an FPA section 205 filing or (ii) an FPA section 206 filing. The section 205 tariff revisions will apply to the 2024/2025 auction results and to auctions going forward; generally, the section 206 filing raises the question of whether the LDA Reliability Requirement is unjust and

⁴ ODEC February 6, 2023 Answer at 3 (emphasis in original); *see also id.* at 3-4 (explaining that ODEC performed these calculations using two scenarios: (i) ODEC assumed that the clearing price in DPL-S is four times the value for DPL-S from the 2023/2024 BRA results (i.e., \$280/MW-day) and (ii) ODEC assumed the clearing price in DPL-S is the Point (a) UCAP Price on the Variable Resource Requirement curve from the 2024/2025 Reliability Pricing Model BRA Planning Parameters maximum allowable value of \$426/MW-day.).

⁵ Maryland OPC January 20, 2023 Comments at 3.

⁶ *Id.* at n.1 (“[Maryland] OPC’s rough calculation of the cost impact of this change, absent PJM’s proposed remedy, is an incremental average increase of the electric bill of approximately \$24/MWh for the 24/25 Delivery Year, or \$24/month, for the average customer consuming 1,000 kilowatt-hours in a month and resident in the DPL South LDA (including Maryland’s eastern shore area). This increase (to occur for the period June 1, 2024 to May 31, 2025 (the 24/25 BRA Delivery Year)) is about 25% of PJM’s reported average all-in wholesale power cost reported for 2022.”).

unreasonable without the same tariff revisions that the section 205 filing proposes be made.⁷

6. In addition to the reasoning articulated at length in the order, I support approving PJM's section 205 filing because the auction results are so blatantly unjust and unreasonable that voting to allow those results to stand is unacceptable to me.⁸ But I think we need to do more. As I wrote in my concurrence just last week to PJM's Quadrennial Review filing,⁹ the elephant in the room must be addressed: Whether PJM's capacity market construct can still ensure sufficient power supplies to deliver reliability at just and reasonable rates. I further said in that concurrence that:

[T]his proceeding is not the proper proceeding for the Commission to undertake a review of the entire PJM capacity market construct in order to ask whether it is still fit for purpose, and, just as importantly, to consider alternatives to the entire construct. I believe, however, that such a review is both timely and compelling.¹⁰

7. While this proceeding is also not the proper one for such a comprehensive review, I am pleased that this order does announce that the Commission will conduct a forum on the PJM capacity market at a date, time and location to be announced soon.¹¹ This is a welcome step forward and will provide a forum to begin these unavoidable discussions on the future of the PJM capacity market construct.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner

⁷ However, the section 206 filing gives the Commission the ability to direct different Tariff reforms.

⁸ Because we are approving the section 205 filing, I agree we should dismiss PJM's concurrent section 206 filing.

⁹ *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,073 (2023) (Christie, Comm'r, concurring at P 2) (available at <https://www.ferc.gov/news-events/news/commissioner-christies-concurrence-pjms-quadrennial-review-er22-2984>).

¹⁰ *Id.* at P 4.

¹¹ *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109, at P 180 (2023).

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