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PUBLIC VERSION
PRIVILEGED MATERIAL HAS BEEN REMOVED

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

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| **PJM Interconnection, L.L.C.** | **)** | **Docket No. ER23-729-000** |
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. EL23-19-000** |
| | | **(Not consolidated)** |

# PROTEST AND REQUEST FOR PRIVILEGED TREATMENT

Pursuant to Rule 211 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC")[1] and in accordance with the Commission's December 27, 2022 notice in the above-captioned proceedings,[2] NRG Power Marketing LLC ("NRG-PML"), Direct Energy Business Marketing, LLC ("DEBM") and Midwest Generation, LLC ("Midwest Gen" and collectively with NRG-PML and DEBM, the "NRG Companies") protest the December 23, 2022 filings by PJM Interconnection, L.L.C. ("PJM") in the above-captioned proceedings.[3] As discussed herein, the Commission must summarily reject the December 23 Filings.

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1 18 C.F.R. § 385.211 (2022).

2 *See* Combined Notice of Filings #1, Docket Nos. EG23-49-000, *et al.* (Dec. 27, 2022) (unreported).

3 Proposed Amendment to the Locational Deliverability Area Reliability Requirement Filed Pursuant to Section 205 of the Federal Power Act, Request for Waiver of Notice Requirement, and Request for an Extended Comment Period of 28 Days, Docket No. ER23-729-000 (filed Dec. 23, 2022) (the "Section 205 Filing"); Section 206 Filing Alleging that the Locational Deliverability Area Reliability Requirement is Unjust and Unreasonable as Applied in a Particular Locational Deliverability Area in the 2024/2025 Base Residual Auction and Requesting that the Commission Establish a Refund Effective Date of December 23, 2022, and Request for an Extended Comment Period of 28 Days, Docket No. EL23-19-000 (filed Dec. 23, 2022) (the "Section 206 Filing" and together with the Section 206 Filing, the "December 23 Filings"). Capitalized terms used and not otherwise defined herein have the meaning given them in the December 23 Filings or, if not defined therein, in the PJM Open Access Transmission Tariff (the "Tariff"). Each of the NRG Companies timely moved to intervene in these proceedings. *See* (doc-less) Motion to Intervene of NRG Power Marketing LLC, Docket No. ER23-729-000 (filed Dec. 27, 2022); (doc-less) Motion to Intervene of NRG Power Marketing LLC, Docket No. EL23-19-000 (filed Dec. 27, 2022); (doc-less) Motion to Intervene of Direct Energy Business Marketing, LLC, *et al.*, Docket No. ER23-729-000 (filed

Through the December 23 Filings, PJM proposes to change the rules for the Base Residual Auction for the 2024/2025 Delivery Year (the "2024/2025 BRA") after the offer period has closed. As discussed herein and in the affidavit of Joseph A. Holtman, Vice President for Trading of NRG Energy, Inc. ("NRG"), provided in Attachment A hereto (the "Holtman Affidavit"), the NRG Companies and their affiliates made irreversible commercial decisions in reliance on the auction rules and the planning parameters posted thereunder. In doing so, they, like other market participants, relied on the unambiguous terms of the filed rate and past Commission and PJM statements making clear that market participants should be able to rely on posted planning parameters. In its determination to retroactively revise the auction results to avoid politically unpalatable results dictated by the rules in effect when the auction was conducted, PJM blithely ignores the substantial and actual reliance interests of the NRG Companies and other market participants and proposes to change the rules after-the-fact. Such action is unlawful, unjust, unreasonable, unwise and unfair. The Commission must act decisively to reject the December 23 Filings and thereby to restore at least some modicum of faith in the integrity of the auction process.

## I.

## BACKGROUND

### A. The December 23 Filings

In the December 23 Filings, PJM proposes to revise the Tariff to allow it to adjust the Locational Delivery Area ("LDA") Reliability Requirement during the auction clearing process to

Jan. 13, 2023); (doc-less) Motion to Intervene of Direct Energy Business Marketing, LLC, *et al.*, Docket No. EL23-19-000 (filed Jan. 13, 2023).

exclude Planned Generation Capacity Resources that did not offer into the applicable RPM Auction.[4] PJM described the issue prompting the December 23 Filings as follows:

> In conducting the 2024/2025 [BRA], a significant amount of Planned Generation Capacity Resources that were expected to participate in the auction based on the expected in-service date of the resources' Interconnection Service Agreements ("ISAs") did not offer in the auction despite being included in the [LDA] Reliability Requirement. As a result, as further explained below, the Locational Deliverability Area Reliability Requirement for one particular [LDA], Delmarva Power & Light South ("DPL-S"), was overstated for the 2024/2025 BRA.[5]

PJM claims that the revision proposed in the Section 205 Filing is "needed to allow the RPM Auctions to use an accurate [LDA] Reliability Requirement in clearing the auctions."[6] PJM also submitted the Section 206 Filing "to provide the Commission with the ability to make modifications to PJM's proposed tariff remedy, if it so chooses . . . ."[7]

**B. The NRG Companies**

Each of the NRG Companies is a direct or indirect wholly owned subsidiary of NRG. NRG is a Delaware corporation and an integrated wholesale power generation and retail electricity company. NRG's common stock is publicly traded on the New York Stock Exchange under the symbol "NRG."

As indicated in their timely motions to intervene in the above-captioned proceedings, each of NRG-PML and Midwest Gen owns or controls generation facilities in the PJM footprint, and NRG-PML, DEBM and their affiliated retail marketers actively engage in bilateral wholesale and

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4 *See* Section 205 Filing, Transmittal Letter at 1; Section 206 Filing at 1.

5 Section 205 Filing, Transmittal Letter at 2. *See also* Section 206 Filing at 2 (same).

6 Section 205 Filing, Transmittal Letter at 2.

7 Section 206 Filing at 2 n.4.

retail transactions in the PJM footprint.[8] Among other things, NRG-PML markets the output of various generation facilities owned by its affiliates. Of particular relevance here, NRG-PML markets the output of, and acts as the Capacity Market Seller for, four generating units located in the DPL-S LDA:

- Unit 8 ("Vienna 8") at the Vienna Generating Station in Vienna, Maryland, an approximately 153.0 MW (summer rating) oil-fired generating unit;
- Unit 10 ("Vienna 10") at the Vienna Generating Station, an approximately 14.3 MW (summer rating) oil-fired generating unit;
- Unit 4 ("Indian River 4") at the Indian River Power Plant in Millsboro, Delaware, an approximately 410.0 MW (summer rating) coal-fired generating unit; and
- Unit CT 10 ("Indian River CT10") at the Indian River Power Plant, an approximately 16.1 MW (summer rating) oil-fired generating unit.

NRG-PML offered the capacity of Vienna 8, Vienna 10 and Indian River CT10 into the 2024/2025 BRA. It did not offer the Indian River 4's capacity into the 2024/2025 BRA because this unit was going to be deactivated and is only continuing to operate subject to a reliability must-run ("RMR") rate schedule.[9]

DEBM and its affiliates are also active in competitive retail electricity markets within the DPL-S LDA. They market electricity in this region and others under various brands, including NRG Home, Direct Energy, Green Mountain Energy, Gateway Energy Services, Stream Energy and XOOM Energy. In connection with their retail marketing activities, these entities hold retail marketing licenses from the Delaware, Maryland and Virginia commissions.

[8] *See supra* note 3.

[9] *See* Reliability Must-Run Rate Schedule, Electric Rate Schedule FERC No. 3, Docket No. ER22-1539-000 (filed Apr. 1, 2022), *accepted & suspended*, *NRG Power Mktg. LLC*, 179 FERC ¶ 61,156 (2022).

## II.

## PROTEST

NRG is a member of the Electric Power Supply Association ("EPSA") and The PJM Power Providers Group ("P3"), and the NRG Companies strongly support the protests to the December 23 Filings being submitted concurrently by EPSA and P3. The NRG Companies are filing separately to emphasize their profound concerns, as entities that rely on the RPM Auction rules to inform commercial decisions, about the December 23 Filings and to make clear that there was actual reliance on those rules in the 2024/2025 BRA that PJM has completely ignored in proposing to change those rules after-the-fact.

### A. The Relief Requested by PJM for the 2024/2025 BRA Violates the Filed Rate Doctrine and the Prohibition Against Retroactive Ratemaking

Notwithstanding PJM's protestations to the contrary, granting the relief it requests as to the 2024/2025 BRA would represent a blatant and unlawful violation of the filed rate doctrine and the corollary prohibition against retroactive ratemaking. PJM claims that it is not "proposing any modifications to activities or deadlines associated with the 2024/2025 BRA that have already occurred or passed."[10] But this is simply untrue. PJM cannot dodge the strictures of the filed rate doctrine through prospective application of new tariff language that allows for retroactive modification of a key planning parameter, the LDA Reliability Requirement, long after the applicable deadline for posting planning parameters has passed and activities in reliance on the posted parameters have concluded.

Under the Tariff, PJM is required to post the LDA Reliability Requirements and other planning parameters "for a Delivery Year ***prior to conducting the Base Residual Auction for such***

[10] Section 205 Filing, Transmittal Letter at 4. *See also* Section 206 Filing at 4 (same).

***Delivery Year***."[11] More specifically, for the three Base Residual Auctions starting with the 2024/2025 BRA, PJM received Commission approval to post the planning parameters 100 days "prior to the relevant BRA."[12] With respect to the Reliability Requirement parameters, the Tariff expressly provides that PJM "shall determine the PJM Region Reliability Requirement and ***the [LDA] Reliability Requirement*** for each [LDA] for which a Variable Resource Requirement Curve has been established for such Base Residual Auction . . . ***prior to the conduct of the Base Residual Auction*** . . . ."[13]

In the Section 205 Filing, PJM proposes to revise the Tariff to allow it to adjust the LDA Reliability Requirements "during the auction process . . . ."[14] Specifically, PJM proposes to revise the definition of "Locational Deliverability Area Reliability Requirement" to provide that:

> effective with the 2024/2025 Delivery Year, during the auction process, the Office of Interconnection shall exclude from the Locational Deliverability Area Reliability Requirement any Planned Generation Capacity Resource in an LDA that does not participate in the relevant RPM Auction as projected internal capacity and in the Capacity Emergency Transfer Objective model where the Locational Deliverability Area Reliability Requirement for the Base Residual Auction increases by more than one percent over the reliability requirement used from the prior Delivery Year's Base Residual Auction (for Incremental Auctions the Locational Deliverability Area Reliability Requirement would be compared with the reliability requirement used in the prior relevant RPM Auction associated with the same Delivery Year) for that LDA due

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[11] *See* Tariff, Attachment DD, § 5.11(a) (emphasis added). *See also id.*, § 15.

[12] *See* Compliance Filing Concerning Certain Proposed Revised Pre-Auction Deadlines and Motion for a Shortened Comment Period of 7 Days and Request for Expediated Consideration, Docket No. EL19-58-010 (filed Jan. 21, 2022), *accepted*, *PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,122 (2022).

[13] Tariff, Attachment DD, § 5.10(vi)(B) (emphasis added). Similarly, the Tariff provides that "[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." *Id.*, § 5.10(vi)(A). Such parameters clearly include the Reliability Requirement, which is an anchor point of the Variable Resource Requirement Curve.

[14] *See* Section 205 Filing, Attachment B (revised definition of "Locational Deliverability Area Reliability Requirement"). *See also* Section 206 Filing at 20-21 (same).

> to the cumulative addition of such Planned Generation Capacity Resources.[15]

PJM insists that the proposed tariff revisions are "prospective and can be applied beginning with the current 2024/2025 BRA."[16] PJM is wrong.

There is nothing prospective about allowing PJM to modify an LDA Reliability Requirement that was final and that PJM was required to apply in clearing the auction under the rules in effect when PJM made its December 23 Filings. PJM cannot, through prospective application of a tariff provision allowing for retroactive adjustments, implement retroactive changes to the posted LDA Reliability Requirement. In fact, notwithstanding PJM's sleight of hand, it is hard to imagine a more clear-cut violation of the filed rate doctrine and the corollary prohibition against retroactive ratemaking than changing the rules for an auction after the offer period has come and gone. The courts have made clear that, under the filed rate doctrine, the Commission "has no power to alter a rate retroactively,"[17] and the Commission itself has recognized that the filed rate doctrine precludes the application of a methodology that "is not

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[15] Section 205 Filing, Attachment B (revisions to definition of "Locational Deliverability Area Reliability Requirement"). *See also id.* (conforming revisions to language of Section 5.12(a) of Attachment DD concerning the optimization algorithm used in clearing the Base Residual Auctions); *id.* (conforming revisions to language of Section 5.12(b) of Attachment DD concerning the optimization algorithm used in clearing the Incremental Offers).

[16] *See* Section 205 Filing, Transmittal Letter at 22; Section 206 Filing at 22.

[17] *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981). *See also Old Dominion Elec. Coop. v. FERC*, 892 F.3d at 1223, 1232 (D.C. Cir. 2018) ("*ODEC*") (finding a petitioner's requested relief would "retroactively rewrite the terms of the filed rate" and holding that "[t]he filed rate doctrine and rule against retroactive rulemaking flatly forbid such a result"); *Louisiana Pub. Serv. Comm'n v. FERC*, 761 F.3d 540, 556 (D.C. Cir. 2014) (stating that "the absence of retroactive relief is a function of the filed-rate doctrine"); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 700 (D.C. Cir. 1995) ("*OXY*") (holding that a new methodology for valuing petroleum shipments "could not have been imposed retroactively without violating the filed rate doctrine"); *East Tenn. Natural Gas Co v. FERC*, 863 F.2d 932, 941 (D.C. Cir. 1988) (stating that "[r]etroactive changes in rates violate the filed rate doctrine, by allowing the collection of rates other than the ones that were on file at the time of purchase"); *Public Serv. Co. of N.H. v. FERC*, 600 F.2d 944, 958 (D.C. Cir. 1979) (stating that "only prospective ratemaking is allowed").

consistent with the Tariff in effect at the time" of the relevant actions.[18] Among other things, that means the Commission "may not accept a rate filed under FPA § 205 that would violate those doctrines."[19]

PJM argues that the Section 205 Filing is "entirely consistent with the filed-rate doctrine and the rule against retroactive ratemaking" because it:

> (i) does not violate any specific deadline or date contained within the text of the Tariff; (ii) effectuates 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;" (iii) will only impact future actions not yet taken in the auction process – namely, the inclusion of the correct [LDA] Reliability Requirement in the optimization algorithm used in conducting the 2024/2025 BRA; and (iv) because no capacity awards have been made or final results posted, there is not a final rate for which any entity has an entitlement or settled expectation at this time.[20]

Once again, PJM is wrong. As discussed above, at least where the 2024/2025 BRA is concerned, the Section 205 Filing plainly ***does*** "violate a specific deadline"[21] by purporting to authorize PJM to make adjustments to an otherwise final planning parameter in a manner not authorized under

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[18] *Midwest Indep. Transmission Sys. Operator, Inc.*, 153 FERC ¶ 61,101 at P 40 (2015) ("*MISO*"), *on reh'g*, 155 FERC ¶ 61,174 (2016), *aff'd sub nom. MISO Transmission Owners v. FERC*, 860 F.3d 837 (6th Cir. 2017). *Cf. also, e.g.*, *AEP Appalachian Transmission Co.*, 164 FERC ¶ 61,180 at P 18 (2018) (finding "that retroactive approval of the formula rate change results in a violation of the filed rate doctrine and the prohibition against retroactive ratemaking"); *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"); *Texas E. Transmission Corp.*, 72 FERC ¶ 61,152 at 61,766-67 (1995) ("Under the filed rate doctrine, final rates approved by the Commission cannot be changed retroactively."), *aff'd sub nom. Texas E. Transmission Corp. v. FERC*, 102 F.3d 174 (5th Cir. 1996); *Tennessee Gas Pipeline Co.*, 54 FERC ¶ 61,204 at 61,603 (1991) ("The filed rate doctrine prohibits the Commission from imposing a rate different from that on file at the time gas is sold or service is made available.").

[19] *Cogentrix Power Mgmt., LLC v. FERC*, 24 F.4th 677, 682 (D.C. Cir.).

[20] Section 205 Filing, Transmittal Letter at 24 (internal citation omitted; quoting Tariff, § 9.2(b)).

[21] *Id.*

the Tariff as it was in effect when that planning parameter became final and the auction was conducted.

PJM's reliance on Section 9.2(b) of the Tariff represents an unavailing attempt to shoehorn the Section 205 Filing into the notice exception to the filed rate doctrine and the prohibition against retroactive ratemaking, under which "a rate adjustment may take effect prior to a section 205 filing . . . when parties have notice that a rate is tentative and may be later adjusted with retroactive effect . . . ."[22] As the Court of Appeals has explained:

> 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.[23]

There is nothing in Section 9.2(b) or any other provision of the Tariff that even remotely resembles such 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 "foreordained."[24] This provision merely authorizes PJM to make tariff filings under Section 205 of the Federal Power Act (the "FPA")[25] with less than seven days' notice to stakeholders to prevent "imminent severe economic harm . . . ."[26] While this provision excuses PJM from otherwise applicable requirements for seven

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[22] *Consolidated Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003) ("*Con Edison*") (citing *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999)). The other recognized exception is for circumstances in which the parties "have agreed to make a rate effective retroactively." *Id.* That exception is plainly inapposite here.

[23] *ODEC*, 892 F.3d at 1231.

[24] *Id.*

[25] 16 U.S.C. § 824d (2018).

[26] Section 205 Filing, Transmittal Letter at 24 (quoting Tariff, § 9.2(b)). *See also* Section 206 Filing at 24 (same).

days' notice to, and consultation with, stakeholders in advance of an FPA Section 205 filing, it hardly "warn[ed]"[27] the NRG Companies or other participants in the 2024/2025 BRA that the LDA Reliability Requirements were subject to revision after the offer period for the auction closed.

Similarly nonsensical is PJM's contention that the proposed change will "only impact future actions not yet taken in the auction process . . . ."[28] Prospective modification of otherwise final planning parameters, long after the deadline for posting those parameters has passed and after the offer period has closed, plainly impacts actions that PJM has already taken in the auction process, as well as actions market participants have taken in, and in connection with, that process. A fundamental purpose of the filed rate doctrine, as well as the corollary prohibition against retroactive ratemaking, is to "ensure predictability."[29] As the courts have recognized, "[t]his kind of post hoc tinkering . . . undermine[s] the predictability which the doctrine seeks to protect."[30]

Perhaps most absurd of all is PJM's claim that there is no filed rate doctrine problem, because "no capacity awards have been made or final results posted . . . ."[31] As an initial matter, even if the 2024/2025 BRA can, in any meaningful sense, be said to remain open, it is only because PJM has, without seeking, much less obtaining, waiver from the Commission, disobeyed the tariff requirement that, "[a]fter conducting the Reliability Pricing Model Auctions, [PJM] . . . post the results of each auction as soon thereafter as possible . . . ."[32] The 2024/2025 BRA was

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27 *ODEC*, 892 F.3d at 1231.

28 Section 205 Filing, Transmittal Letter at 24. *See also* Section 206 Filing at 24 (same).

29 *OXY*, 64 F.3d at 699. *See also, e.g.*, *Consolidated Edison*, 347 F.3d at 969 ("By authorizing only prospective rate changes, these doctrines ensure rate predictability . . . ." (citing *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 793 (D.C. Cir. 1990) ("*Columbia*")).

30 *Public Util. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990).

31 Section 205 Filing, Transmittal Letter at 24. *See also* Section 206 Filing at 24 (same).

32 Tariff, Attachment DD, § 5.11(e).

"conduct[ed]"[33] starting on December 7, 2022 and ending on December 13, 2022, when the offer period closed.[34] Absent waiver, PJM was, and remains, obligated under its Tariff to post the final results of the 2024/2025 BRA "as soon . . . as possible"[35] after December 13, 2022.

It is true enough that the tariff language leaves PJM some flexibility, and PJM was not necessarily required to post the final auction results by December 20, 2022, as contemplated by the auction schedule,[36] or within some specific number of days after the 2024/2025 BRA concluded. But while the phrase "as soon as possible" may be somewhat flexible, it nonetheless "[b]y its nature, . . . suggests urgency"[37] and requires that "the reason for any delay be examined."[38] Nothing in Section 5.11(e) of Attachment DD to the Tariff or any other provision of the Tariff or any of PJM's other governing documents even hints at the idea 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 RPM Auction under the rules in effect when it was conducted – *i.e.*, during the offer period – and it is against that backdrop that the reason for the delay must be examined. There is certainly nothing in the Tariff to suggest that "as soon as possible" can be construed to mean "as soon as possible after PJM gets the auction

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33 *Id.*

34 *See* PJM, *Auction Schedule* ("Auction Schedule"), https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/rpm-auction-schedule.ashx. A copy of the Auction Schedule is also provided in Exhibit B to the Holtman Affidavit.

35 Tariff, Attachment DD, § 5.11(e).

36 *See* Auction Schedule.

37 *United States v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 764 (6th Cir. 2016) ("*Brookdale*"). *Cf. also D.D. ex rel. V.D v. New York City 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").

38 *Brookdale*, 838 F.3d at 763.

rules modified to yield its preferred auction results."[39] PJM had obviously performed the mechanical and ministerial exercise of clearing the 2024/2025 BRA under the existing rules before it made the December 23 Filings; otherwise, it could not have described the DPL-S LDA clearing price as being "more than four times what the clearing price should be" with its proposed adjustment.[40] It was, therefore, entirely "possible" for PJM to post the final results of the 2024/2025 BRA on or before December 23, 2022, and there is no legitimate reason for PJM's continued delay in doing so. Consistent with the Commission's longstanding recognition that a regulated entity should not be allowed "to benefit from its own wrongdoing,"[41] the Commission must reject PJM's claim that the 2024/2025 BRA remains open due to its own failure to abide by the Tariff.

In any event, even if there were some colorable basis for saying that the 2024/2025 BRA remains open, adjusting the LDA Reliability Requirements for that auction at this point would still violate the filed rate doctrine and the prohibition against retroactive ratemaking. The issue is not whether the auction is open or closed; it is what "the filed rates in existence at the time" 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.[42] The filed rates – the capacity market rules – in effect at the time of the relevant actions allowed for no

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[39] While 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 . . . ." Tariff, Attachment DD, § 5.11(e). Even if PJM's dissatisfaction with the results of the 2024/2025 BRA could be considered a "potential error" (and it cannot), there has been no initial posting of the results of the 2024/2025 BRA here.

[40] Section 205 Filing, Transmittal Letter at 2. See also Section 206 Filing at 3.

[41] *Columbia Gas Transmission Corp.*, 47 FERC ¶ 61,324 at 62,135 (1989).

[42] *MISO*, 153 FERC ¶ 61,101 at P 40.

adjustment to an LDA Reliability Requirement during the clearing process of the sort contemplated by the December 23 Filings.

PJM dismisses claims that "Market Participants should be able to rely on the [LDA] Reliability Requirements that are posted" on the grounds that such claims fail:

> to consider the fact that the Tariff already requires PJM to adjust the [LDA] Reliability Requirement *after* the bidding window closes . . . to make "any adjustments to the PJM Region or LDA Reliability Requirements to reflect Price Responsive Demand with a PRD Reservation Price equal to or less than the applicable Base Residual Auction clearing price."[43]

The cited Tariff provision relates solely to the posting of the RPM Auction results, and, as PJM must know, this provision does not authorize post-auction adjustments of any kind to the Reliability Requirements that are actually used to clear the auction.[44]

Even crediting PJM's misleading claim that the cited tariff provision authorizes one type of post-auction adjustments to the Reliability Requirements used to clear the RPM Auctions, however, that provision would hardly have put market participants on notice that other types of post-auction adjustments might be made. To the contrary, an allowance for this one type of post-auction adjustment would only reinforce expectations that other post-auction adjustments – including adjustments of the sort proposed in the December 23 Filings – would ***not*** be made. As the Supreme Court put it in discussing "the "interpretive canon, *expressio unius est exclusio alterius*, 'expressing one item of [an] associated group or series excludes another left

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[43] Section 205 Filing, Transmittal Letter at 23 (quoting Tariff, § 5.11(e); emphasis in original).

[44] Rather, 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. *See* PJM, *PJM Manual 18: PJM Capacity Market*, § 2.4.4 (Sept. 21, 2022), https://www.pjm.com/-/media/documents/manuals/m18.ashx. *See also* Tariff, § 5.10(a) ("Price Responsive Demand from any applicable approved PRD Plan, including any associated PRD Reservation Prices, shall be reflected in the derivation of the Variable Resource Requirement Curves, in accordance with the methodology specified in the PJM Manuals.").

unmentioned'":[45] "If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health."[46] In the same way, the only significance of a rule allowing for one kind of post-auction adjustment would be to confirm that other kinds of post-auction adjustments are not allowed. It would certainly not lead any reasonable market participant to anticipate other types of post-auction adjustments, any more than the signs at the zoo would prompt a reasonable person to send get-well cards to the elephant, lion and hippo.

The bottom line is that the rules in effect when the 2024/2025 BRA was conducted required that PJM determine the LDA Reliability Requirement "prior to the conduct of the Base Residual Auction"[47] and use the demand curve calculated using that Reliability Requirement "for such Base Residual Auction."[48] That being the case, the filed rate doctrine demands "strict adherence" to the filed rate[49] in effect when the 2024/2025 BRA was conducted, and the Commission has 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."[50]

### B. Market Participants Relied on the Rules Implicated by the December 23 Filings and PJM Ignores Commission Precedent Recognizing the Importance of Rule Stability Associated with Effects on the Broader Marketplace

As discussed above, PJM's proposal to adjust the DPL-S LDA Reliability Requirement for the 2024/2025 BRA blatantly violates the filed rate doctrine and the prohibition against retroactive

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45 *NLRB v. SW General, Inc.*, 580 U.S. 288, 302 (2017) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002)).

46 *Id.*

47 Tariff, Attachment DD, § 5.10(vi)(B).

48 *Id.*, § 5.10(vi)(A).

49 *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132 (1990).

50 *ODEC*, 892 F.3d at 1230 (citation omitted).

ratemaking and must be rejected. More broadly, the remedy proposed in the December 23 Filings, even applied prospectively to future RPM Auctions after the 2024/2025 BRA, runs counter to the spirit of the filed rate doctrine and is irreconcilable with Commission precedent recognizing that market participants rely on, and should be able to rely on, the posted planning parameters for RPM Auctions. Consistent with that Commission precedent and as discussed in the Holtman Affidavit, NRG did, in fact, rely on the posted planning parameters for the 2024/2025 BRA, including the DPL-S LDA Reliability Requirement that PJM now proposes to retroactively adjust.

### 1. PJM's Proposal is Irreconcilable with Commission Precedent Regarding Reliance on Auction Rules and Posted Planning Parameters

The Commission previously rejected an attempt by PJM to "[c]hang[e] the rules governing an already-commenced auction," holding that such a "significant step . . . affects both the outcome of that particular auction as well as parties' confidence in the rules governing future proceedings."[51] In reaching that conclusion, the Commission found concerns about the proposed change to be particularly acute because, as in this case, PJM was acting "in order to avoid the outcome that the already-commenced auction would have produced."[52] That holding is in perfect accord with the Commission's longstanding policy of not re-running auctions. That PJM has refused to finish clearing the 2024/2025 BRA does not distinguish this auction in any way that would justify a different result here. As in the cases involving proposals to re-run completed auctions, the NRG Companies and other market participants "cannot effectively revisit their economic decisions" or "retroactively alter their conduct."[53] Moreover, there is no allegation,

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[51] *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072 at P 33 (2019).

[52] *Id.*

[53] *New York Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000), *on reh'g*, 97 FERC ¶ 61,154 (2001). *See also, e.g.*, *Independent Market 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); *California Indep. Sys. Operator Corp.*,

much less evidence, that the "anomaly" prompting the December 23 Filings[54] involved any exercise of market power or market manipulation, and, in such circumstances, the Commission has stressed that adjusting clearing prices "would do far more harm to wholesale electricity markets than is justifiable or appropriate" and "would be fundamentally unfair to market participants."[55] The Commission has adhered to this rule even where, unlike here, the applicable auction rules were not followed and declining to re-run the auction effectively entails ratifying a filed rate violation.[56] In this case, there is no such tension between the filed rate doctrine and the Commission's precedent on re-running auctions: both compel the Commission to reject PJM's after-the-fact attempt to manipulate the results of the 2024/2025 BRA.

Taking a contrary approach here would be particularly unjustified given the expected, actual and entirely desirable reliance on the posted planning parameters. The Commission has long recognized that, "once the RPM auction parameters are posted, parties rely on those parameters to make commitments and determinations."[57] Indeed, in a 2009 order, the Commission agreed with PJM that it would "be disruptive to the market to change the [load] forecast only one

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151 FERC ¶ 61,247 at n.46 (2015); *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 at P 141 (2012) ("*Astoria II*"), *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. New York Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,244 at P 132 (2012) ("*Astoria I*"); *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).

54 Section 205 Filing, Transmittal Letter at 9. *See also* Section 206 Filing at 10 (same).

55 *Bangor Hydro*, 97 FERC ¶ 61,339 at 62,590.

56 *See Astoria I*, 139 FERC ¶ 61,244 at P 132 (2012) (declining to require the New York Independent System Operator, Inc. "to re-run the auctions occurring in the past based on such improperly-determined offer floors," because doing so "would create market uncertainty for market participants and require resolving complex questions"). *See also, e.g.*, *Astoria II*, 140 FERC ¶ 61,189 at P 141 (same).

57 *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 141 (2008) ("*Duquesne*"). *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at P 198 (2009) ("*PJM*") ("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.").

month before the auction."[58] Yet, in the December 23 Filings, PJM seeks to change a similarly critical planning parameter after the auction.

Importantly, while prospective application of PJM's proposal to RPM Auctions after the 2024/2025 BRA may not run afoul of the filed rate doctrine inasmuch market participants will be on notice that the LDA Reliability Requirements are subject to change,[59] that does not make PJM's proposal just and reasonable as so applied. To the contrary, it would still be irreconcilable with the Commission's prior holdings that market participants should be able to rely on posted auction parameters and auction rules. Accordingly, the Commission should reject the December 23 Filings outright.

### 2. There Was Substantial and Actual Reliance on the Posted Auction Parameters and the Auction Rules in this Case

PJM concedes, as it must, that "Capacity Market Sellers have submitted bids into the auction based on the planning parameters."[60] Nonetheless, it claims "there was no specific planning parameter reliance" in this case.[61] That is simply not true. In fact, as PJM has acknowledged in the past, market participants rely on posted planning parameters in making a number of important economic decisions, separate and apart from offering decisions, around the RPM Auctions.[62] As the Commission has put it, "market participants will make business decisions

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58 *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at P 200.

59 *See Columbia*, 895 F.2d at 797 (explaining that notice "changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision").

60 Section 205 Filing, Transmittal Letter at 24. *See also* Section 206 Filing at 24 (same).

61 Section 205 Filing, Transmittal Letter at 25. *See also* Section 206 Filing at 24 (same).

62 *See, e.g.*, Answer of PJM Interconnection, L.L.C. to Protests and Comments at 33, Docket No. ER09-412-000 (filed Feb. 2, 2009) (the "ER09-412 Answer") ("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.").

and enter into binding contracts, including financial hedges and bilateral arrangements, based on [posted] auction parameters."[63] PJM's claim that there was "no specific planning parameter reliance"[64] is, like so much else in the December 23 Filings, just plain wrong.

Notwithstanding PJM's claims to the contrary, there was, in point of fact, "specific planning parameter reliance"[65] in this case. Mr. Holtman confirms that NRG makes any number of important economic decisions based on posted planning parameters for RPM Auctions[66] and that it did, in fact, do just that with respect to the posted planning parameters for the 2024/2025 BRA.[67] As he explains, the posted planning parameters and, more specifically, the posted DPL-S LDA Reliability Requirement and Capacity Emergency Transfer Limit strongly suggested that the DPL-S LDA would clear at or near the cap of $426.17/MW-day in the 2024/2025 BRA.[68] That was certainly NRG's expectation based on the posted parameters, and PJM's December 23 Filings confirm that this expectation was entirely reasonable.[69]

Mr. Holtman describes how NRG's expectation that the DPL-S LDA would clear at or near the cap of $426.17/MW-day was reflected in its commercial activities around the auction. On the generation side of the business, Mr. Holtman describes an indicative bid that NRG received from

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63 *Duquesne*, 122 FERC ¶ 61,039 at P 92.

64 Section 205 Filing, Transmittal Letter at 25. *See also* Section 206 Filing at 34 (same).

65 Section 205 Filing, Transmittal Letter at 25. *See also* Section 206 Filing at 24 (same).

66 *See* Holtman Affidavit, ¶ 10.

67 *See id.*, ¶¶ 20-24.

68 *See id.*, ¶¶ 15-19. Mr. Holtman states that "the posted planning parameters for the 2024/2025 BRA necessarily meant that the DPL-S LDA would clear at the price cap of $426.17/MW-day absent a significant increase in supply." *Id.*, ¶ 15. That being the case, PJM's characterization of its proposed remedy as being directed to a "circumstance that was recently discovered during the auction process," Section 205 Filing, Transmittal Letter at 5, seems more than a little dubious.

69 PJM does not give the actual clearing price, but indicates that it is "more than four times" what it would be if its proposed adjustment were made. Section 205 Filing, Transmittal Letter at 2.

a wholesale customer to purchase capacity in the DPL-S LDA for the 2024/2025 Delivery Year bilaterally at a price substantially higher than the adjusted clearing price contemplated by the December 23 Filings in early December.[70] As an initial matter, the bid price illustrates that, like NRG, this sophisticated customer expected the DPL-S LDA clearing price in the 2024/2025 BRA to be substantially higher than the clearing price in the 2023/2024 BRA ($69.96/MW-day). Nonetheless, because NRG reasonably expected the DPL-S LDA to clear even higher in the 2024/2025 BRA, it declined the offer.[71]

On the retail side of the business, NRG priced offers for retail sales to commercial and industrial customers in the DPL-S LDA assuming a capacity price for the 2024/2025 Delivery Year that reflected its expectations about the DPL-S clearing price based on the posted planning parameters.[72] That pricing almost certainly resulting in NRG losing some opportunities, but it reflected NRG's reasonable expectations about the 2024/2025 BRA.[73] NRG factored that same capacity price into its response to a request for proposals ("RFP") issued by the State of Delaware for 70 MW of retail capacity and energy over a four-year term (including the 2024/2025 Delivery Year).[74] NRG lost the RFP.[75]

As indicated above, it is true enough that the same reliance concerns would not be presented if PJM's proposal were only applied prospectively to RPM Auctions after the 2024/2025 BRA, because the NRG Companies and other market participants would know that the LDA Reliability

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70 *See* Holtman Affidavit, ¶ 22.

71 *See id.*

72 *See id.*, ¶ 20.

73 *See id.*

74 *See id.*, ¶ 21.

75 *See id.*

Requirements were subject to post-auction adjustment. But, as Mr. Holtman discusses, the knowledge that the posted LDA Reliability Requirements will be subject to adjustment will defeat the purpose of posting the planning parameters in the first place and will chill beneficial bilateral contracting and hedging activities around the RPM Auction. As Mr. Holtman explains, there is no "workable or meaningful" way for market participants to price the risk that PJM will apply a one-way ratchet that, as illustrated by the magnitude of the price swing contemplated for the 2024/2025 BRA, could result in a large reduction in the clearing price.[76] Such a result would be irreconcilable with the Commission's prior holding – as well as PJM's prior recognition – that "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."[77]

### C. Granting the Relief PJM Requests Would be Extremely Bad Regulatory Policy

In its haste to avoid a politically unpalatable auction outcome, PJM has proposed an ill-conceived remedy that will chill beneficial bilateral contracting and hedging activity and undermine the ability of the capacity market to help preserve reliability. Whatever the perceived short-term benefit to consumers, this remedy will ultimately do consumers, including consumers in the DPL-S LDA, far more harm than good. At a very high level, as Mr. Holtman observes, PJM's willingness to seek changes to the capacity auction rules after the auction has been conducted "sends a clear and exceptionally troubling message to market participants, including owners of existing capacity and prospective developers of new capacity, and and investors."[78] The

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[76] *Id.*, ¶ 32.

[77] *PJM*, 126 FERC ¶ 61,275 at P 198. *See also* ER09-412 Answer at 33 (same).

[78] Holtman Affidavit, ¶ 34.

unambiguous message is that PJM market participants cannot rely on the rules set forth in the Tariff and other governing documents.[79] Absent decisive Commission action to restore some measure of confidence in the integrity of those rules, just the fact of the December 23 Filings will undermine the PJM capacity market's ability to perform its intended function of "produc[ing] a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates."[80]

Acceptance of PJM's proposal would also put the Commission in the dubious role of "pick[ing] winners and losers,"[81] and doing so in a particularly irrational and perverse manner. As Mr. Holtman explains, the "losers" under PJM's proposal would include NRG and other market participants that "relied on the posted parameters and the auction rules and made prudent decisions about bilateral contracting and hedging consistent with such reliance."[82] These entities will be "punished for having made reasonable, prudent business decisions, while market participants and others who took no such steps with receive a windfall."[83] Even if the fatal legal infirmities in the December 23 Filings could be ignored, such an outcome would be indefensible as a matter of regulatory policy.

The remedy proposed in the December 23 Filings is also fundamentally inconsistent with the way PJM sets the planning parameters and would seriously threaten the ability of the capacity market to send the price signals needed to maintain reliability. PJM's remedy leaps to the conclusion that lack of participation in the capacity auction is an affirmative demonstration that a

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79 *See id.*

80 *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21 (2018) ("*ISO-NE*") (footnotes omitted).

81 *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1026 (D.C. Cir. 2018) (expressing doubt as to whether it is appropriate for the Commission to "pick winners and losers").

82 Holtman Affidavit, ¶ 27.

83 *Id.*

resource will not be in service by the time of the delivery year despite an ISA and in-service date that indicate otherwise. As PJM has consistently recognized, the set of resources anticipated to be in the LDA at the time of the delivery year is fundamental to the determination of the Reliability Requirement. PJM's proposed remedy makes no effort to discern whether a resource in fact does not intend to be in-service at the onset of the delivery year. If the resource were to come on-line by the delivery year despite its lack of participation in the BRA, PJM and market participants may face the very reliability issues PJM's current methodology is intended to address.

The conflict between the remedy proposed in the December 23 Filings and PJM's longstanding approach to calculating Reliability Requirements is evident from an examination of the operation of PJM's proposal on the clearing price for the DPL-S LDA in the 2024/2025 BRA. When NRG asked PJM for an explanation of the large jump in the DPL-S LDA Reliability Requirement from the 2023/2024 BRA to the 2024/2025 BRA, PJM pointed to "historical winter forced outages levels and an expected increase in the penetration of solar resources . . . ."[84] PJM echoed that statement in the December 23 Filings, describing how planned resources, particularly intermittent resources like solar-powered resources, in a small LDA can have the effect of increasing the LDA Reliability Requirement more than they decrease the Capacity Emergency Transfer Objective.[85] As indicated in the December 23 Filings, this expectation reflected a modeling assumption that all planned resources with executed ISAs specifying commercial operation dates on or before the first day of the 2024/2025 Delivery Year would be in service during that Delivery Year.[86]

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84 *Id.*, Exhibit C (e-mail from PJM).

85 *See* Section 205 Filing, Transmittal Letter at 13-16; Section 206 Filing at 12-15.

86 *See* Section 205 Filing, Transmittal Letter at 13; Section 206 Filing at 18.

PJM's proposed remedy, however, rests on an entirely different assumption, as it implicitly assumes that the "increase in solar penetration"[87] and other new entry in the DPL-S LDA expected when the LDA Reliability Requirement was posted will not occur to the extent the planned resources were not offered into the 2024/2025 BRA. Other than PJM's desire for a lower clearing price, that assumption is the only rational explanation for PJM's proposal to adjust the LDA Reliability Requirement to exclude such resources. It bears emphasis that, while PJM insists that it would be inappropriate to engage in "speculation" about whether a resource will be "offered into the RPM auctions" or be "in-service by the Delivery Year,"[88] the reality is that PJM is doing just that through its assumptions about planned resources: first, PJM assumes that ***all*** of the planned resources with executed ISAs will be in-service by the Delivery Year and then it whipsaws to the contrary assumption that ***none*** of the planned resources not offered will be in-service by the Delivery Year. Importantly, the latter speculation, which is the logical foundation for the December 23 Filings, is unsupported and threatens to undermine reliability in the DPL-S LDA. As Mr. Holtman states, NRG's experience is that capacity revenues "are a small part of the pie for renewable resources, and developers will often move forward with projects even where they are getting no capacity revenues."[89] Consequently, one cannot validly infer from these resources' decision not to offer into the 2024/2025 BRA that they will not come online by the 2024/2025 Delivery Year, and PJM has offered no other evidence to support the proposition that an "increase in solar penetration" in the DPL-S LDA is not still to be "expected."[90]

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87 Holtman Affidavit, Exhibit C (e-mail from PJM).

88 *See* Section 205 Filing, Transmittal Letter at 13; Section 206 Filing at 18.

89 Holtman Affidavit, ¶ 30.

90 *Id.*, Exhibit C (e-mail from PJM).

PJM's unsupported assumption is extremely troubling from a reliability perspective in that PJM is proposing to truncate a price signal that may still be needed. As Mr. Holtman discusses, this price signal will have very real implications for existing facilities and new entrants.[91] That is, of course, exactly what one would expect, because, as the Commission has held, a capacity market should "provide price signals that guide the orderly entry and exit of capacity resources . . . ."[92] For its part, NRG has previously received, and acted on, such price signals with respect to generation in this same LDA, when it decided to permanently deactivate Indian River 4 after that unit's capacity failed to clear the Base Residual Auction for the 2022/2023 Delivery Year.[93] In that case, the unit was subsequently determined by PJM to be needed to address a local transmission issue, and NRG agreed to keep it in service under an RMR arrangement.[94] As Commissioner Danly has repeatedly stated: "RMR agreements are a product of market failure and themselves cause markets to fail."[95] While some allowance may be made for RMR arrangements, like that for Indian River 4, needed for local transmission issues not necessarily captured in zonal clearing prices, it is hard to imagine a more abject market failure – and market administrator failure – than the sort of RMR arrangements that will be needed to preserve resource adequacy because PJM has improperly truncated price signals as it proposes to do here.

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91 *See* Holtman Affidavit, ¶¶ 28-31.

92 *ISO-NE*, 162 FERC ¶ 61,205 at P 21.

93 *See* Reliability Must-Run Rate Schedule, Electric Rate Schedule FERC No. 3, Transmittal Letter at 5, Docket No. ER22-1539-000 (filed Apr. 1, 2022), *accepted & suspended*, *NRG Power Mktg. LLC*, 179 FERC ¶ 61,156 (2022).

94 *See supra* note 9.

95 *KES Kingsburg, L.P.*, 175 FERC ¶ 61,255, Concurring Statement at P 1 (2021) (Danly, Comm'r, concurring). *See also, e.g.*, *Greenleaf Energy Unit 2, LLC*, 172 FERC ¶ 61,111, Concurring Statement at P 2 (2020) (Danly, Comm'r, concurring) (same).

## III.

## REQUEST FOR PRIVILEGED TREATMENT

The NRG Companies respectfully request privileged treatment of portions of the Holtman Affidavit thereto pursuant to 388.112 of the Commission's regulations.[96] The relevant portions of the Holtman Affidavit contain highly sensitive and confidential commercial information relating to the business activities of the NRG Companies and their affiliates. Public disclosure of this information could harm their negotiating positions in future transactions and potentially also have adverse impacts on competition. The information for which confidential treatment is requested is not generally available to the public and is exempt from the mandatory public disclosure requirements of the Freedom of Information Act ("FOIA").[97]

In accordance with Section 388.112(b)(2)(i) of the Commission's regulations,[98] the NRG Companies have provided in Attachment B a proposed protective order pursuant to which other parties will have access to the non-public materials. The proposed protective order is a modified version of the Commission's Model Protective Order incorporating provisions, consistent with those in protective orders employed in other Commission proceedings,[99] which provide additional protection for "Highly Sensitive Privileged Materials."[100] Notwithstanding the proposed

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96 18 C.F.R. § 388.112 (2022).

97 5 U.S.C. § 552 (2018). *See also Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2364-66 (2019) (rejecting the "substantial competitive harm" requirement articulated in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), and stating that, "where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential'" and thus exempt from disclosure under FOIA).

98 18 C.F.R. § 388.112(b)(2)(i) (2022).

99 *See, e.g.*, *Astoria Generating Co., L.P. v. New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,155 (2011).

100 Specifically, the NRG Companies have modified the Model Protective Order by (1) adding a new subparagraph (ii) to paragraph 3.E in order to specify which Reviewing Representatives may have access

protective order, the non-public materials should be treated as privileged materials reviewable by Commission Staff. The non-public materials are marked "**CONTAINS HIGHLY SENSITIVE PRIVILEGED INFORMATION**"[101] and "**DO NOT RELEASE**." In addition, in accordance with the Commission's notice on labelling of non-public information,[102] each page of the non-public version of this filing is marked "**CUI//PRIV,**" and blue highlighting is used to identify the privileged information.

to Highly Sensitive Privileged Materials; (2) amending paragraph 3 to include defined terms "Competitive Duties" (new paragraph 3.F) and "Competitive Duty Personnel" (new paragraph 3.G); and (3) attaching a separate "Non-Disclosure Certificate for Competitive Duty Personnel" and expanding the definition of "Non-Disclosure Certificate" in Section 3.D accordingly. The only other changes to the Model Protective Order are non-substantive.

[101] All of the privileged materials submitted in this filing have been designated as "Highly Sensitive Privileged Materials."

[102] *See* Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff (June 14, 2018) (unreported).

## IV.

## CONCLUSION

**WHEREFORE**, the NRG Companies respectfully request that the Commission summarily reject the December 23 Filings.

Respectfully submitted,

**NRG POWER MARKETING LLC**
**DIRECT ENERGY BUSINESS MARKETING, LLC**
**MIDWEST GENERATION, LLC**

By: */s/ David G. Tewksbury*

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Dated: January 20, 2023

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document on each person designated on the official service lists compiled by the Secretary of the Federal Energy Regulatory Commission in these proceedings.

Dated at Washington D.C., this 20th day of January, 2023.

*/s/ David G. Tewksbury*
David G. Tewksbury

# Attachment A

# The Holtman Affidavit

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

| | | |
|---|---|---|
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. ER23-729-000** |
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. EL23-19-000** |
| | | **(Not consolidated)** |

# AFFIDAVIT OF JOSEPH A. HOLTMAN

1. My name is Joseph A. Holtman. My business address is 804 Carnegie Center, Princeton, New Jersey, 08540.

2. I am the Vice President of Trading with NRG Energy, Inc. ("NRG"). In this capacity, I am responsible for NRG's wholesale and retail electricity supply activities. This includes oversight over trading and hedging activities around NRG's generation assets and NRG's extensive retail marketing business.

3. I am submitting this affidavit in support of certain of NRG subsidiaries' protest to a filing in which PJM Interconnection, L.L.C. ("PJM")[1] proposes to adjust the Locational Delivery Area ("LDA") Reliability Requirement for Delmarva Power & Light South ("DPL-S"), which was posted in advance of the Base Residual Auction for the 2024/2025 Delivery Year (the "2024/2025 BRA"). In support of NRG's protest, I discuss NRG's expectations arising out of the posted LDA Reliability Requirement and other planning parameters and actions NRG took in reliance on the posted planning parameters and the Tariff. I also describe the implications of NRG's proposal for future business activity conducted by entities like NRG around the RPM Auctions.

[1] Capitalized terms used and not otherwise defined herein have the meanings given such terms in the PJM Open Access Transmission Tariff (the "Tariff").

## I. BACKGROUND

### A. NRG

4. NRG is a Delaware corporation and an integrated wholesale power generation and retail electricity company. NRG's common stock is publicly traded on the New York Stock Exchange under the symbol "NRG."

5. Through various subsidiaries, NRG owns or controls generation in the PJM footprint and generation in adjacent markets that can be imported into the PJM market and actively participates in the organized markets administered by PJM, including the PJM capacity market. Through various other subsidiaries, NRG is also an active retail power marketer in the PJM region, and engages in wholesale transactions to support its retail power marketing activities. NRG's subsidiaries conduct their retail marketing activities in this region under the brand names NRG Home, Direct Energy, Green Mountain Energy, Gateway Energy Services, Stream Energy and XOOM Energy and pursuant to retail marketing licenses issued by applicable state commissions.

6. NRG's generation assets in PJM footprint include generating units located in the DPL-S LDA, as well as other assets located external to the DPL-S LDA. Within the DPL-S LDA, an indirect subsidiary of NRG, Vienna Power LLC, has owned since 2001 and operates the Vienna Generating Station in Vienna, Maryland, and another indirect subsidiary of NRG, Indian River Power LLC, has owned since 2001 and operates the Indian River Power Plant in Millsboro, Delaware. The Vienna Generating Station is currently comprised of Unit 8 ("Vienna 8"), an approximately 153.0 MW (summer rating) oil-fired generating unit, and Unit 10 (Vienna 10"), an approximately 14.3 MW (summer rating) oil-fired generating unit. The Indian River Power Plant is currently comprised of Unit 4 ("Indian River 4"), an approximately 410.0 MW (summer rating) coal-fired generating unit, and Unit CT 10

("Indian River CT10") at the Indian River Power Plant, an approximately 16.1 MW (summer rating) oil-fired generating unit.

7. Another NRG subsidiary, NRG Power Marketing LLC ("NRG-PML") markets the output of the Vienna Generating Station and the Indian River Generating Station. NRG-PML offered the capacity of Vienna 8, Vienna 10 and Indian River CT10 into the 2024/2025 BRA. The capacity of Indian River 4 was not offered, because that unit is subject to a reliability must-run ("RMR") rate schedule on file with FERC.[2]

**B. The 2024/2025 BRA**

8. The Tariff specifies various deadlines for the conduct of Base Residual Auctions and other RPM Auctions built around the contemplated three-year forward period. Due to delays in conducting several auctions, the forward period for various RPM Auctions, including the 2024/2025 BRA, has been compressed, and the 2024/2025 BRA was, therefore, conducted on an adjusted schedule approved by FERC.

9. Under the FERC-approved schedule for the 2024/2025 BRA, there were specific dates for various pre-auction activities, the auction, and the posting of the auction results.[3] The pre-auction activities commenced on July 10, 2022 with the various deadlines applicable to PJM, the Independent Market Monitor and generators. The schedule continued with deadlines for numerous other pre-auction activities, including the August 29, 2022 deadline for PJM's posting of planning parameters. It further provided for the 2024/2025 BRA

[2] NRG filed a notice of its intent to permanently deactivate Indian River 4 effective June 1, 2022, after its capacity failed to clear the Base Residual Auction for the 2022/2023 Delivery Year. PJM determined that Indian River 4 was needed to address a local reliability issue, and NRG agreed to continue operating it under an RMR rate schedule through December 2026.

[3] The full schedule is provided in Exhibit A and also available on PJM's website (https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/rpm-auction-schedule.ashx).

auction window to open on December 7, 2022 and to close on December 13, 2022. Under the FERC-approved schedule, PJM was to post the auction results on December 20, 2022.

## II. NRG Took Specific Actions in Reliance on the Posted Planning Parameters for the 2024/2025 BRA

10. As both a generation owner and a retail marketer, NRG makes a number of important economic decisions based on the posted planning parameters for each Base Residual Auction. For example, as a generation owner, NRG makes decisions about whether to sell its resources' capacity through centralized auctions or bilaterally and/or enter into financial hedging arrangements. Similarly, as a retail marketer, NRG makes decisions about the pricing of retail sales and power purchase contracts to support retail sales, as well as financial hedging arrangements.

11. In making commercial decisions, NRG, like other market participants, is guided by expectations about clearing prices in the upcoming auction. Those expectations, in turn, are largely based on the posted planning parameters.

12. The auction price effectively acts as the "benchmark" in these commercial decisions. For example, a generation owner's decisions about whether to sell its capacity bilaterally will necessarily turn on its expectations about the price at which it could sell the same capacity in an RPM Auction. Just to take a hypothetical example, a generator is unlikely to enter into a bilateral sale of capacity for a given Delivery Year at $80/MW-day if it has a high degree of confidence – say 75% – that it can sell the same capacity in the Base Residual Auction for $120/MW-day, as the probabilistically adjusted auction price ($90/MW-day) is higher than the bilateral price.

13. Similarly, a retail marketer looks to the expected auction clearing price as a cost associated with its retail sales and prices that expectation into its offers to make retail sales, whether

those are offers made generally available to a particular class of customers, such as commercial and industrial ("C&I") customers, or customer-specific offers made in response to a request for proposals ("RFP") or bilateral discussions.

14. In accordance with the FERC-approved schedule for the 2024/2025 BRA, PJM posted the planning parameters for the 2024/2025 BRA on August 29, 2022, and posted updated planning parameters on October 24. 2022.[4] The following chart from the posting of the updated parameters compares the planning parameters for the 2024/2025 BRA with those for the Base Residual Auction for the 2023/2024 Delivery Year (the "2023/2024 BRA"):[5]

| | 2023/2024 BRA | | 2024/2025 BRA | | Delta | | | |
|---|---|---|---|---|---|---|---|---|
| LDA | Reliability Requirement (UCAP MW) | CETL (MW) | Reliability Requirement (UCAP MW) | CETL (MW) | Reliability Requirement (UCAP MW) | CETL (MW) | Reliability Requirement (Percent) | CETL (Percent) |
| MAAC | 63,819.0 | 6,381.0 | 64,850.0 | 5,408.0 | 1,031.0 | -973.0 | 2% | -15% |
| EMAAC | 35,590.0 | 8,704.0 | 36,715.0 | 7,961.0 | 1,125.0 | -743.0 | 3% | -9% |
| SWMAAC | 14,329.0 | 8,389.0 | 14,299.0 | 7,947.0 | -30.0 | -442.0 | 0% | -5% |
| PS | 11,217.0 | 9,022.0 | 12,356.0 | 8,709.0 | 1,139.0 | -313.0 | 10% | -3% |
| PS NORTH | 5,768.0 | 4,349.0 | 6,234.0 | 4,255.0 | 466.0 | -94.0 | 8% | -2% |
| DPL SOUTH | 3,141.0 | 2,008.0 | 3,514.0 | 2,009.0 | 373.0 | 1.0 | 12% | 0% |
| PEPCO | 7,163.0 | 7,160.0 | 7,151.0 | 7,033.0 | -12.0 | -127.0 | 0% | -2% |
| ATSI | 14,649.0 | 10,213.0 | 14,434.0 | 10,465.0 | -215.0 | 252.0 | -1% | 2% |
| ATSI-Cleveland | 5,363.0 | 4,728.0 | 5,374.0 | 4,941.0 | 11.0 | 213.0 | 0% | 5% |
| COMED | 24,077.0 | 5,781.0 | 23,859.0 | 4,640.0 | -218.0 | -1,141.0 | -1% | -20% |
| BGE | 7,522.0 | 5,615.0 | 7,514.0 | 5,397.0 | -8.0 | -218.0 | 0% | -4% |
| PL | 10,251.0 | 4,916.0 | 10,214.0 | 4,337.0 | -37.0 | -579.0 | 0% | -12% |
| DAYTON | 3,924.0 | 4,022.0 | 3,922.0 | 3,918.0 | -2.0 | -104.0 | 0% | -3% |
| DEOK | 6,847.0 | 5,632.0 | 6,881.0 | 4,999.0 | 34.0 | -633.0 | 0% | -11% |

15. As indicated by the chart, the LDA Reliability Requirement for the DPL-S LDA increased by 373 MW, or 12%, from 3,141 MW for the Base Residual Auction for the 2023/2024 Base Residual Auction (the "2023/2024 BRA") to 3,514 MW for the 2024/2025 BRA. At the same time, the import limit into the DPL-S LDA (*i.e.*, the Capacity Emergency Transfer

[4] As indicated in the October 24, 2022 stakeholder notice provided in Exhibit B, the updated parameters "reflect[ed] the inclusion of Fixed Resource Requirement (FRR) Capacity Plans and updated Reliability Requirements, CETOs and CETLs for a few LDAs related to data adjustments involving Behind The Meter generation." These updates did not change the LDA Reliability Requirement for the DPL-S LDA.

[5] This chart is taken from a PJM report available at https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2024-2025/2024-2025-planning-period-parameters-for-base-residual-auction-pdf.ashx.

Limit ("CETL")) remained essentially unchanged – 2,009 MW (2024/2025 BRA) versus 2,008 MW (2023/2024 BRA). The combination of a 3,514 MW reliability requirement and a 2,009 MW import limit means that approximately 1,505 MW of capacity must be procured from resources within the DPL-S LDA to meet the reliability requirement. 1,324 MW of capacity cleared in the 2023/2024 BRA.[6] Consequently, the posted planning parameters for the 2024/2025 BRA necessarily meant that the DPL-S LDA would clear at the price cap of $426.17/MW-day absent a significant increase in supply. That is a natural consequence of the fact that the demand curve (or Variable Resource Reliability ("VRR") curve) remains at the cap of 150% of Net CONE ($284.11/MW-day[7]) until the capacity cleared approaches the reliability requirement at which point the demand curve begins to slope downward. For example, if only 1,324 MW cleared against a VRR curve incorporating the posted planning parameters, that would be on the horizontal portion of the curve, and the clearing price would, therefore, be $426.17/MW-day.

16. There is no question that, as PJM highlights in its filings, a clearing price at or around $426.17/MW-day would represent a large increase from the 2023/2024 BRA clearing price of $69.96/MW-day.[8] That being the case, NRG did not take the posted parameters at face value. Instead, NRG contacted PJM to confirm that the parameters were correct and to get a better understanding of the reason for the 12% jump in the LDA Reliability Requirement.

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[6] PJM, *2023/2024 RPM Base Residual Auction Results* at 15, Table 4 (June 21, 2022) (the "2023/2024 BRA Results Report"), https://pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2023-2024/2023-2024-base-residual-auction-report.ashx.

[7] *See id.* at 6, Table 3.

[8] Proposed Amendment to the Locational Deliverability Area Reliability Requirement Filed Pursuant to section 205 of the Federal Power Act, Request for Waiver of Notice Requirement, and Request for an Extended Comment Period of 28 Days at 3, Docket No. ER23-729-000 (filed Dec. 23, 2022) (the "Section 205 Filing").

On November 8, 2022, NRG's Senior Director of Regulatory Affairs, Neal Fitch, sent an e-mail (provided in Exhibit C) to PJM inquiring about the validity of the parameters. PJM replied, insisting that its posted parameters were correct, and explaining that:

> Due to historical winter forced outages levels and an expected increase in the penetration of solar resources, DPL-South shows an increase in winter loss of load risk, which results in an increase in the 2024 BRA DPL-South reliability requirement relative to the 2023 BRA. While for areas with loss of load risk fully concentrated in the summer season it may be reasonable to use changes in the summer peak load forecast as a guide to determine changes in the reliability requirement, that is not the case for zones/LDAs with non-negligible winter loss of load risk such as DPL-South.

17. All else being equal, meaning all existing DPL-S capacity that cleared the 2023/2024 BRA were to clear the 2024/2025 BRA, a significant increase in cleared capacity (approximately 180 MW) in the DPL-S LDA would be required for the 2024/2025 BRA to clear below the cap. As shown in Table 2A of 2023/2024 BRA Results Report, released about two months before the posting of the planning parameters for the 2024/2025 BRA, a total of 95.3 MW of all new generation capacity offered, of which 85.7 MW cleared the 2024/2025 BRA in *all of EMAAC* and a total of 113.1 MW of new generation capacity offered, of which 103.5 MW cleared in in *all of MAAC*. MAAC includes EMAAC, and EMAAC includes DPL-S.

18. As the DPL-S LDA is just a subset of the larger MAAC and EMAAC LDAs, it is hard to see how a reasonable person familiar with conditions in the DPL-S LDA could reasonably expect that new supply offered into the 2024/2025 BRA would be sufficient to cause the DPL-S LDA to clear significantly below the cap. To NRG's knowledge – and consistent with what we saw in the interconnection queue and PJM's explanation for the increased reliability requirement – the bulk of the new supply that could reasonably be expected to be online in time for the 2024/2025 Delivery Year is solar-powered generation. Solar- and

wind-powered resources receive relatively little capacity credit, and capacity revenues are typically not a major driver for the development of such resources. As a result, a very large amount of capacity from planned solar-powered resources would have needed to have been offered into and cleared the 2024/2025 BRA in the DPL-S LDA to produce a clearing price significantly below the cap.

19. Based on the straightforward math of the demand curve and NRG's experience and analysis, NRG's reasonable expectation based on the posted planning parameters was that the DPL-S LDA would clear at or near the price cap of $426.17/MW-day. As discussed below, NRG made a number of important economic decisions based on this expectation, which followed directly from the posted planning parameters.

20. Beginning November 8, 2022, for example, our traders began to price offers for retail sales to C&I customers in the DPL-S LDA incorporating a capacity price of [redacted] for the 2024/2025 Delivery Year. There is no precise way to determine how many C&I customers we may have lost, either to other retail marketers or to default service, as a result of such pricing, but we undoubtedly lost some customers. [redacted]

21. The same capacity price expectation ([redacted]) was incorporated into our response, submitted on November 18, 2022, later in November, to an RFP issued by the State of Delaware for approximately 70 MW of capacity and energy over a four-year term. Given the expectation of a high clearing price, NRG also floated the idea of a capacity cost passthrough mechanism, but the State was not amenable to such an arrangement. The State of Delaware is currently supplied under a four-year contract which expires shortly after the 2022/2023 Delivery Year. Its most recent RFP extends into the 2024/2025 Delivery Year.

Our offer into the State of Delaware RPF was not successful. NRG thereby lost the business of a large customer.

22. On December 2, 2022, NRG was contacted by a wholesale customer in the DPL-S LDA, looking to *purchase* capacity from NRG, which owns and operates capacity resources in the LDA. This customer made an indicative bid to purchase [redacted] of capacity for the 2024/2025 Delivery Year at a price of [redacted]. The customer's bid clearly indicates that, like NRG, it was expecting the DPL-S LDA to clear at a significantly higher price than it did in the previous Base Residual Auction. In my view, that expectation must be based on the posted parameters, because there is no other variable that could explain such a bid after the DPL-S LDA cleared at $69.96/MW-day in the 2023/2024 BRA.[9] Given our expectation that the DPL-S LDA would clear higher, we turned down this bid, and instead elected to receive the clearing price in the 2024/2025 BRA to be held during the December 7-13, 2022 offer period. While PJM may think it can alter the course of a capacity auction by changing the rules upon which market participants relied, it cannot turn back the clock and give those same participants an opportunity to make hedging and trading decisions anew to best position themselves for the future.

23. The indicative bid described above was consistent with what we were seeing in the market in advance of the auction. We also witnessed other counterparty behavior consistent with the expectation of substantially higher clearing prices for the DPL-S LDA, including bilateral bids well above the price of the previous clearing price. In my view, such behavior must have been informed by expectations about the updated parameters. The parameters were the one fundamental variable that changed from the 2023/2024 BRA to the 2024/2025

[9] *See* 2023/2024 BRA Results Report at 15, Table 4.

BRA in a way that would explain the higher bids. The influential driver of higher bid/offer behavior witnessed on the bilateral market clearly was reliance upon higher capacity clearing prices driven by the updated parameters.

24. Among other things, we also entered into financial capacity transactions in the EMAAC LDA. To the extent the post-auction adjustments PJM proposes to make for the DPL-S LDA impact EMAAC prices (as EMAAC is the immediate parent LDA to DPL-S), it could impact the economics of these transactions.

25. The timeline below summarizes the applicable 2024/2025 BRA deadlines and the business decisions NRG made leading up to the auction based on the posted planning parameters.

| Date | Deadline/Action |
|---|---|
| Aug. 29, 2022 | Planning parameters posted. |
| Oct. 24, 2022 | Updated planning parameters posted. |
| Nov. 8, 2022 | NRG e-mail exchange with PJM regarding 12% jump in DPL-S LDA Reliability Requirement. |
| Nov. 8, 2022 | NRG traders instructed to incorporate expected capacity price into C&I offers. |
| Nov. 18, 2022 | NRG responds to Delaware RFP with price incorporating same expected capacity price. |
| Dec. 2, 2022 | NRG receives and declines offer to purchase [redacted] of DPL-S capacity at price of [redacted]. |
| Dec. 7, 2022 | Auction window opened. |
| Dec. 13, 2022 | Auction window closed. |

26. For each piece of business NRG conducted related to capacity costs for the 2024/25 Delivery Year in DPL-S in the lead-up to the BRA, NRG relied upon an expectation, based on the posted parameters, that the auction would result in much higher prices. This led to concrete decisions that I and our team made, which in turn caused NRG not to sell capacity that it had available, and which caused NRG not to be successful in winning retail business. Obviously, NRG cannot go back in time and revisit the economic decisions described above.

27. PJM's proposal would have FERC creating distinct classes of winners and losers. As discussed herein, NRG 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. These include not only PJM market participants, like NRG, but wholesale and retail customers who entered into fixed-rate contracts that locked-in reasonable expectations about the clearing price in the DPL-S LDA. Take for example, the wholesale customer that approached NRG about purchasing capacity in the DPL-S LDA for [redacted]. This customer was acting reasonably and prudently in seeking to purchase capacity bilaterally at a price [redacted] the potential clearing price in the 2024/2025 BRA. Nonetheless, to the extent this customer was successful in finding another seller, it is now locked into a contract price substantially higher than the clearing price with PJM's proposed adjustment. If the Commission makes the mistake of accepting PJM's proposal, entities like NRG and this customer will be punished for having made reasonable, prudent business decisions, while market participants and others who took no such steps will receive a windfall. Such an outcome is, to say the least, perverse from a regulatory policy perspective.

## III. PJM's Proposed Adjustments Will Have Severe Cost Impacts on Existing and Planned Resources in the DPL-S LDA

28. PJM proposes to adjust the DPL-S LDA Reliability Requirement to exclude planned resources with interconnection agreements that did not offer into the 2024/2025 BRA. While it does not state the precise magnitude of this adjustment, PJM indicates that the

adjusted price would be less than one fourth of the clearing price without it.[10] Working from a clearing price at the cap of $426.17/MW-day, PJM's statement implies clearing price at or below $106.54/MW-day.

29. Such a reduction in the clearing price will have profound consequences for entities, like NRG, that own resources in the DPL-S LDA, as well as for entities that are developing resources in this LDA. An accepted and desirable function of a capacity market is to guide entry and exit decisions that, in turn, ensure resource adequacy.[11] Particularly bearing that function in mind, PJM must be cautious and thoughtful about rules changes and other actions that undervalue capacity that may be needed for reliability, as that can lead to premature retirements and discourage needed new entry. A rushed intervention to tamp down prices may appear beneficial to consumers in the short run, but in the longer run, it may result in those same consumers facing higher costs where the price signals are being muted rather than being allowed to signal the need for (i) more capacity in a particular zone or (ii) existing capacity to remain in service and make investments to allow their continued operation.

30. In the specific case of the DPL-S LDA, PJM told us that the driver for the 12% jump in the LDA Reliability Requirement—in other words the need for additional capacity in the LDA—was "an expected increase in solar penetration…." PJM's proposed adjustment would exclude from the LDA Reliability Requirement any of the new solar-powered resources that did not offer into the 2024/BRA. That implicitly assumes that, because a

[10] Section 205 Filing, Transmittal Letter at 2 (asserting that the clearing price for the DPL-S LDA "would be more than four times what the clearing price should be if the Planned Generation Capacity Resources that did not offer in the auction are excluded from the [LDA] Reliability Requirement").

[11] *See ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21 (2018) (stating that a capacity market should "provide price signals that guide the orderly entry and exit of capacity resources").

large amount of planned solar resources' capacity was not offered into the 2024/2025 BRA, the increase in solar penetration in the 2024/2025 Delivery Year is no longer expected. That assumption does not make sense. In NRG's experience, capacity revenues are a small part of the pie for renewable resources, and developers will often move forward with projects even where they are getting no capacity revenues. Particularly when the benefits of such revenues are weighed against the burdens of taking on a capacity commitment and the lost opportunity of receiving capacity performance bonuses, a developer in the DPL-S LDA may very well prefer not to offer its capacity into a Base Residual Auction even as it moves forward on its project.

31. The upshot is that there is no reason to assume that the increase in solar penetration will not occur just because solar developers did not offer into the 2024/2025 BRA. Yet the adjusted clearing price will discourage entry of, and encourage exit by, the resources needed to maintain system reliability in the face of increased solar penetration that was, and, from everything we see, continues to be, "expected."

## IV. PJM's Filings Undermine Confidence in the Integrity of the Capacity Markets and, Indeed, the Broader PJM Markets

32. The substance of PJM's proposal obviously undermines confidence in the PJM-administered capacity market, and just the fact of those filings sends an exceedingly negative message about the integrity of that market and the broader PJM markets. If PJM's proposal is accepted, market participants in potentially affected LDAs, like DPL-S, will be unable to rely on the posted planning parameters to make important economic decisions around the RPM Auctions. For example, while NRG could discount the likelihood of the DPL-S LDA clearing at the $426.17/MW-day by pricing capacity at a lower figure, there is no corresponding discount that could, in any workable or meaningful way, capture a

potential swing of the magnitude that would result from PJM's proposed after-the-fact adjustment to the LDA Reliability Requirement. That means that the posted planning parameters will have little or no value in future RPM Auctions.

33. As a retail marketer, NRG wants to be able to offer its customers the level of price certainty they may desire. Published planning parameters for uncleared auctions are a key input into our assessment of the cost to serve long-term fixed contracts. If and to the extent those planning parameters cannot be relied upon, NRG will incorporate a risk premium into the contract pricing. In such case it is not just NRG, but the retail customer, that will be hurt by the massive uncertainty PJM has injected into the market.

34. It is also worth noting that just the fact of PJM's willingness to try to change the rules regarding the clearing price sends a clear message that market participants cannot rely on the rules set forth in the Tariff and other governing documents. And in fact, since PJM announced its intention to try to change the rules, capacity market trading has become illiquid with little to no trading activity. Further, a market participants inability to rely on the rules is particularly troubling when, as seems likely, PJM's interventions will only operate in the same direction as this one: to reduce clearing prices. That sends a clear and exceptionally troubling message to market participants, including owners of existing capacity and prospective developers of new capacity, and investors.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

35. This concludes my affidavit.

Document Accession #: 20230120-5259 Filed Date: 01/20/2023

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

| | | |
|---|---|---|
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. ER23-729-000** |
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. EL23-19-000** |
| | | **(Not consolidated)** |

## AFFIDAVIT

The undersigned, being duly sworn, states that he has read the foregoing Affidavit of Joseph A. Holtman, knows the contents thereof, and that the same is true as stated, to the best of his knowledge and belief.

Joseph A. Holtman

Subscribed and sworn to before me

this _____ day of January 2023

Notary Public
for the State of _____

My Commission expires: _____

Eileen Blondek
State of New Jersey
Notary Public
Commission No. 50043995
My Commission Expires 8/15/2026

# Exhibit A

# 2024/2025 BRA Schedule

## The 24/25 BRA activity dates based on EL19-58-010 - ER19-1486-00 (Consolidated) filed by PJM and approved by the FERC on 2/18/2022

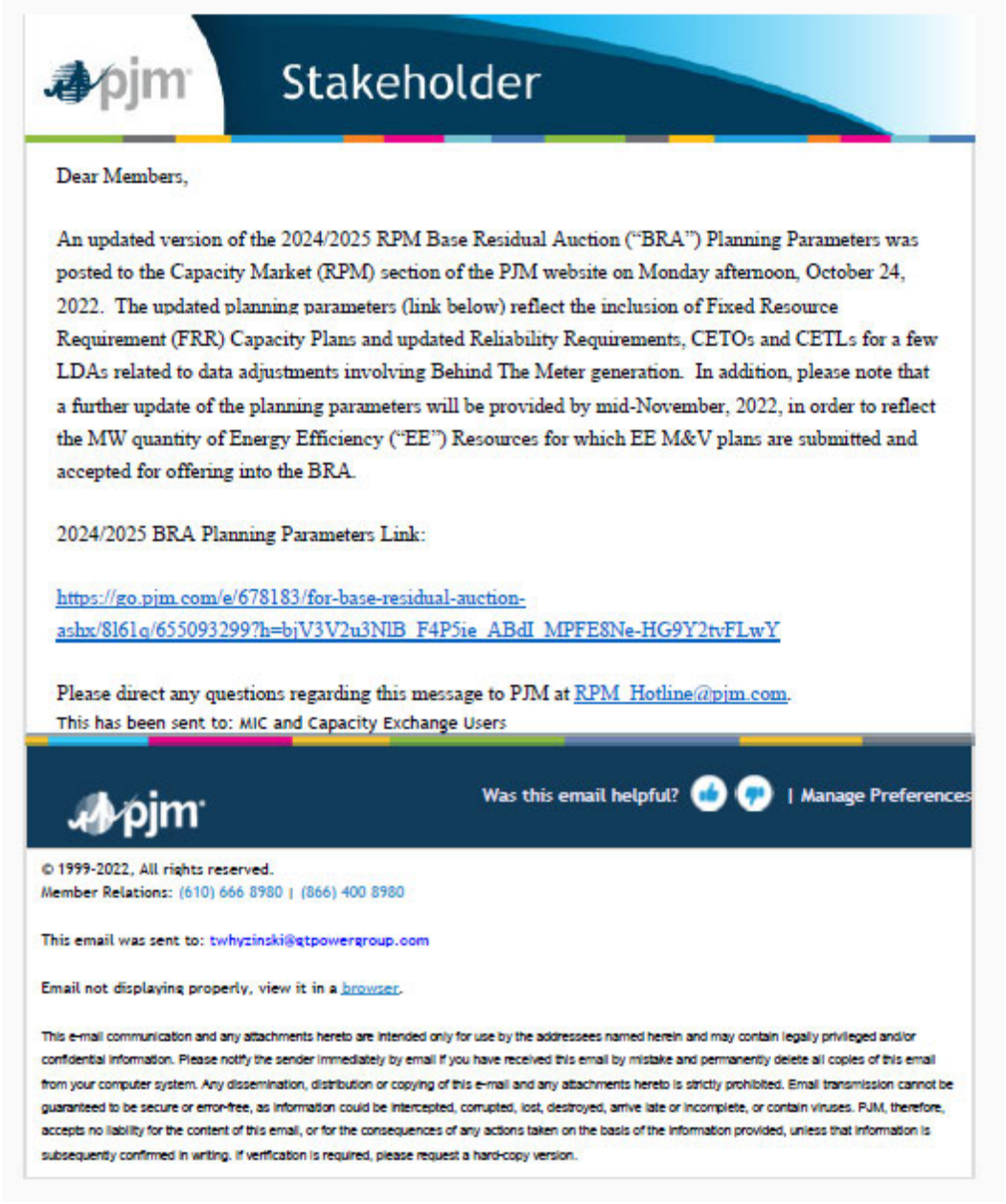
****All Auctions will open at 12:01 AM EPT**
****All Auctions will close at 5:00 PM EPT**
****All Results will be posted no earlier than 4:00 PM EPT**
The provisions of the OATT shall govern in the event of any conflict between this timeline and provisions of the Tariff.

| Delivery Year | Auction | Activity Type | Activity | Date | Responsible Party |
|---|---|---|---|---|---|
| 2024/2025 | BRA | Must Offer | Last day for Capacity Market Sellers to request preliminary must-offer exception for the reason specified under OATT Attachment M-Appendix § II.C.4.A | N/A | GEN |
| 2024/2025 | BRA | Sell Offer Caps | IMM posts preliminary unit specific historical EAS offset | 7/10/22, Sun | IMM |
| 2024/2025 | BRA | MOPR | Last day for a Capacity Market Seller to certify if subject to State Conditioned Support and/or Buyer Side Market Power | 7/10/22, Sun | GEN |
| 2024/2025 | BRA | MOPR | PJM posts preliminary MOPR screen prices | 7/10/22, Sun | PJM |
| 2024/2025 | BRA | Sell Offer Caps | PJM posts gross ACR for seller offer cap | 7/10/22, Sun | PJM |
| 2024/2025 | BRA | Winter CIRs | PJM solicits requests for Winter CIRs | 7/15/22, Fri | PJM |
| 2024/2025 | BRA | Demand Resource | PJM posts the Zones and sub-Zones, if any, for which end-use customer site-specific information shall be required for DR sell offers under the conditions specified in RAA Schedule 6 subsection A-1(1)(c)(iv). | 7/25/22, Mon | PJM |
| 2024/2025 | BRA | Winter CIRs | Last day for Seller request for Winter CIRs | 7/25/22, Mon | GEN |
| 2024/2025 | BRA | MOPR | PJM/IMM notifies Capacity Market Seller of bases for inquiry and initiation of fact specific review | 7/25/22, Mon | PJM/IMM |
| 2024/2025 | BRA | Sell Offer Caps | IMM post final unit specific EAS offset | 7/25/22, Mon | IMM |
| 2024/2025 | BRA | Must Offer | Last day for Capacity Market Sellers to request to remove a resource from Capacity Resource status and must-offer exception for the reason specified under OATT Attachment M-Appendix § II.C.4.A (Deactivation) | 7/25/22, Mon | GEN |
| 2024/2025 | BRA | Planned Generation | Last day for Planned Generation Owners to Provide Notification of Intent to Offer | 8/4/22, Thu | GEN |
| 2024/2025 | BRA | FRR | Last day for first time election of FRR Alternative starting with DY due | 8/8/22, Mon | FRR |
| 2024/2025 | BRA | MOPR | Last day for Capacity Market Seller resource-specific MOPR exception request | 8/9/22, Tue | GEN |
| 2024/2025 | BRA | EFORd | Last day for Capacity Market Sellers to submit request for alternate max EFORd | 8/9/22, Tue | GEN |
| 2024/2025 | BRA | Sell Offer Caps | Last day for Capacity Market Sellers to submit seller offer cap data | 8/9/22, Tue | GEN |
| 2024/2025 | BRA | Must Offer | Last day for Capacity Market Sellers to request must-offer exception for any reason other than the reason specified under OATT Attachment M-Appendix § II.C.4.A | 8/9/22, Tue | GEN |
| 2024/2025 | BRA | PRD | Last day to submit PRD Plan for BRA | 8/12/22, Fri | PRD |
| 2024/2025 | BRA | Planning Parameters | Post Planning Parameters | 8/29/22, Mon | PJM |
| 2024/2025 | BRA | MOPR | IMM provides participant with determination on resource-specific MOPR exception request | 9/8/22, Thu | IMM |
| 2024/2025 | BRA | EFORd | IMM provides participant with determination on alternate max EFORd request | 9/8/22, Thu | IMM |
| 2024/2025 | BRA | Sell Offer Caps | IMM provides participant with determination of offer cap | 9/8/22, Thu | IMM |
| 2024/2025 | BRA | Must Offer | IMM provides participant with determination on must offer exception and removal of Capacity Resource status | 9/8/22, Thu | IMM |
| 2024/2025 | BRA | PSA | Last day for Seller Peak-Shaving Adjustment Plans | 9/16/22, Fri | PSA |
| 2024/2025 | BRA | Sell Offer Caps | Last day for Capacity Market Sellers to notify PJM/IMM of agreement with IMM determination of offer cap | 9/18/22, Sun | GEN |
| 2024/2025 | BRA | Must Offer | Last day for Capacity Market Sellers to notify PJM/IMM of agreement with IMM determination of its request to remove a resource from Capacity Resource status or must offer exception | 9/18/22, Sun | GEN |
| 2024/2025 | BRA | EFORd | Last day for Capacity Market Sellers to notify PJM/IMM of agreement with IMM determination of alternate max EFORd | 9/18/22, Sun | GEN |
| 2024/2025 | BRA | MOPR | PJM notifies participant/IMM with determination on resource-specific MOPR exception request | 10/3/22, Mon | PJM |
| 2024/2025 | BRA | EFORd | PJM notifies participant/IMM of determination on alternate max EFORd | 10/3/22, Mon | PJM |
| 2024/2025 | BRA | Sell Offer Caps | PJM notifies participant/IMM of determination on proposed offer cap | 10/3/22, Mon | PJM |
| 2024/2025 | BRA | Must Offer | PJM notifies participant/IMM of its determination on must offer exception and removal of Capacity Resource status | 10/3/22, Mon | PJM |
| 2024/2025 | BRA | Must Offer | Last day for Capacity Market Sellers to notify PJM/IMM whether it intends to exclude from its Sell Offer some or all capacity from its generation resource on the basis of an identified exception to the RPM Must Offer Obligation | 10/3/22, Mon | GEN |
| 2024/2025 | BRA | FRR | Last day for FRR termination of election | 10/7/22, Fri | FRR |
| 2024/2025 | BRA | FRR | Last day for election of FRR Alternative starting with DY due | 10/7/22, Fri | FRR |
| 2024/2025 | BRA | MOPR | Participant provides commitment on MOPR price to be used | 10/8/22, Sat | GEN |
| 2024/2025 | BRA | FRR | Last day for Initial/Updated EE M&V Plan for FRR Capacity Plan | 10/8/22, Sat | FRR |
| 2024/2025 | BRA | FRR | Last day for DR Pre-registration Required for FRR Capacity Plan | 10/8/22, Sat | FRR |
| 2024/2025 | BRA | FRR | Last day for DR Plan Template and Officer Certification for FRR Capacity Plan | 10/19/22, Wed | FRR |
| 2024/2025 | BRA | ICTR/QTU | Last day for ICTR/QTU Certification of Increase in Import Capability due | 10/23/22, Sun | QTU |
| 2024/2025 | BRA | Demand Resource | DR Pre-registration Window opens | 10/24/22, Mon | DR |
| 2024/2025 | BRA | FRR | Last day for submission of FRR Capacity Plan due | 11/7/22, Mon | FRR |
| 2024/2025 | BRA | Energy Efficiency | Last day for Initial/Updated EE M&V Plan Due for RPM | 11/7/22, Mon | EE |
| 2024/2025 | BRA | Demand Resource | Last day for DR Sell Offer Plan and Officer Certification Required | 11/7/22, Mon | DR |
| 2024/2025 | BRA | Demand Resource | DR Pre-registration Window closes | 11/7/22, Mon | DR |
| 2024/2025 | BRA | Demand Resource | DR Setup Window opens | 11/8/22, Tue | DR |

| | | | | | |
|---|---|---|---|---|---|
| 2024/2025 | BRA | Energy Efficiency | EE Setup Window Opens | 11/21/22, Mon | EE |
| 2024/2025 | BRA | Aggregation | Last day to submit request for aggregate resource | 11/23/22, Wed | GEN/DR/EE |
| 2024/2025 | BRA | Demand Resource | DR Setup Window closes | 12/4/22, Sun | DR |
| 2024/2025 | BRA | Energy Efficiency | EE Setup Window Closes | 12/4/22, Sun | EE |
| 2024/2025 | BRA | Auction | Auction window opens | 12/7/22, Wed | All |
| 2024/2025 | BRA | Auction | Auction window closes | 12/13/22, Tue | All |
| 2024/2025 | BRA | Auction | Auction results posted | 12/20/22, Tue | PJM |

# Exhibit B

# October 24 Notice



Stakeholder

Dear Members,

An updated version of the 2024/2025 RPM Base Residual Auction ("BRA") Planning Parameters was posted to the Capacity Market (RPM) section of the PJM website on Monday afternoon, October 24, 2022. The updated planning parameters (link below) reflect the inclusion of Fixed Resource Requirement (FRR) Capacity Plans and updated Reliability Requirements, CETOs and CETLs for a few LDAs related to data adjustments involving Behind The Meter generation. In addition, please note that a further update of the planning parameters will be provided by mid-November, 2022, in order to reflect the MW quantity of Energy Efficiency ("EE") Resources for which EE M&V plans are submitted and accepted for offering into the BRA.

2024/2025 BRA Planning Parameters Link:

https://go.pjm.com/e/678183/for-base-residual-auction-ashx/8l61q/655093299?h=bjV3V2u3NlB_F4P5ie_ABdI_MPFE8Ne-HG9Y2tvFLwY

Please direct any questions regarding this message to PJM at RPM_Hotline@pjm.com.
This has been sent to: MIC and Capacity Exchange Users

Was this email helpful? | Manage Preferences

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Member Relations: (610) 666 8980 | (866) 400 8980

This email was sent to: twhyzinski@gtpowergroup.com

Email not displaying properly, view it in a browser.

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# Exhibit C

# November 8, 2022 E-mail Exchange

**From:** Fitch, Neal <Neal.Fitch@nrg.com>
**Sent:** Tuesday, November 8, 2022 11:18 AM
**To:** Bachus, Tim D; RPM Hotline
**Cc:** Jardot, Gina
**Subject:** RE: 24/25 DPL-South Reliability Requirement

Thanks for the quick reply.

---

**From:** Bachus, Tim D <Tim.Bachus@pjm.com>
**Sent:** Tuesday, November 8, 2022 11:01 AM
**To:** Fitch, Neal <Neal.Fitch@nrg.com>; RPM Hotline <rpm_hotline@pjm.com>
**Cc:** Jardot, Gina <Gina.Jardot@nrg.com>
**Subject:** RE: 24/25 DPL-South Reliability Requirement

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good morning Neal,

Per our Resource Adequacy Planning team…Due to historical winter forced outages levels and an expected increase in the penetration of solar resources, DPL-South shows an increase in winter loss of load risk, which results in an increase in the 2024 BRA DPL-South reliability requirement relative to the 2023 BRA. While for areas with loss of load risk fully concentrated in the summer season it may be reasonable to use changes in the summer peak load forecast as a guide to determine changes in the reliability requirement, that is not the case for zones/LDAs with non-negligible winter loss of load risk such as DPL-South.

Hope this helps.
-Tim

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**From:** Fitch, Neal <Neal.Fitch@nrg.com>
**Sent:** Tuesday, November 8, 2022 9:53 AM
**To:** RPM Hotline <rpm_hotline@pjm.com>
**Cc:** Jardot, Gina <Gina.Jardot@nrg.com>
**Subject:** 24/25 DPL-South Reliability Requirement

⚠ **External Email! Think before clicking links or attachments.**

Contact the Support Center immediately if you click on a link or open an attachment that appears malicious.

Good morning. We're trying to get our arms around the increased reliability requirement published for DPL-South in the 24/25 Planning Period Parameters. The published values show an increase of ~12%.

**Table 2 – LDA Reliability Requirements and Capacity Import Limits for 2023/2024 and 2024/2025 BRAs**

| | 2023/2024 BRA | | 2024/2025 BRA | | Delta | | | |
|---|---|---|---|---|---|---|---|---|
| LDA | Reliability Requirement (UCAP MW) | CETL (MW) | Reliability Requirement (UCAP MW) | CETL (MW) | Reliability Requirement (UCAP MW) | CETL (MW) | Reliability Requirement (Percent) | CETL (Percent) |
| MAAC | 63,819.0 | 6,381.0 | 63,518.0 | 5,965.0 | -301.0 | -416.0 | 0% | -7% |
| EMAAC | 35,590.0 | 8,704.0 | 35,415.0 | 8,594.0 | -175.0 | -110.0 | 0% | -1% |
| SWMAAC | 14,329.0 | 8,389.0 | 14,299.0 | 7,947.0 | -30.0 | -442.0 | 0% | -5% |
| PS | 11,217.0 | 9,022.0 | 11,166.0 | 8,287.0 | -51.0 | -735.0 | 0% | -8% |
| PS NORTH | 5,768.0 | 4,349.0 | 5,715.0 | 4,253.0 | -53.0 | -96.0 | -1% | -2% |
| DPL SOUTH | 3,141.0 | 2,008.0 | 3,514.0 | 2,009.0 | 373.0 | 1.0 | 12% | 0% |
| PEPCO | 7,163.0 | 7,160.0 | 7,151.0 | 7,033.0 | -12.0 | -127.0 | 0% | -2% |
| ATSI | 14,649.0 | 10,213.0 | 14,434.0 | 10,465.0 | -215.0 | 252.0 | -1% | 2% |
| ATSI-Cleveland | 5,363.0 | 4,728.0 | 5,374.0 | 4,941.0 | 11.0 | 213.0 | 0% | 5% |
| COMED | 24,077.0 | 5,781.0 | 23,859.0 | 4,640.4 | -218.0 | -1,140.6 | -1% | -20% |
| BGE | 7,522.0 | 5,615.0 | 7,514.0 | 5,397.0 | -8.0 | -218.0 | 0% | -4% |
| PL | 10,251.0 | 4,916.0 | 10,214.0 | 4,337.0 | -37.0 | -579.0 | 0% | -12% |
| DAYTON | 3,924.0 | 4,022.0 | 3,922.0 | 3,918.0 | -2.0 | -104.0 | 0% | -3% |
| DEOK | 6,847.0 | 5,632.0 | 6,881.0 | 4,999.0 | 34.0 | -633.0 | 0% | -11% |

There is not a corresponding increase shown in the 2022 Load Forecast Report. (We acknowledge this is the whole of DPL, not the subzone, but would otherwise expect an increase in the overall zonal forecast.)

**Table B-10**

**SUMMER COINCIDENT PEAK LOAD (MW) FOR EACH PJM ZONE, LOCATIONAL DELIVERABILITY AREA AND RTO 2022 - 2037**

| | 2022 | 2023 | 2024 | 2025 | 2026 | 2027 | 2028 | 2029 | 2030 | 2031 | 2032 | 2033 | 2034 | 2035 | 2 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| AE | 2,398 | 2,400 | 2,399 | 2,391 | 2,397 | 2,399 | 2,412 | 2,424 | 2,434 | 2,444 | 2,450 | 2,460 | 2,475 | 2,494 | 2, |
| BGE | 6,235 | 6,204 | 6,211 | 6,198 | 6,206 | 6,202 | 6,208 | 6,212 | 6,202 | 6,170 | 6,148 | 6,129 | 6,120 | 6,142 | 6, |
| DPL | 3,757 | 3,762 | 3,787 | 3,786 | 3,796 | 3,793 | 3,802 | 3,812 | 3,809 | 3,768 | 3,727 | 3,702 | 3,678 | 3,682 | 3, |
| JCPL | 5,654 | 5,622 | 5,585 | 5,595 | 5,620 | 5,596 | 5,606 | 5,631 | 5,655 | 5,687 | 5,699 | 5,722 | 5,739 | 5,793 | 5, |
| METED | 2,850 | 2,850 | 2,859 | 2,866 | 2,890 | 2,895 | 2,899 | 2,911 | 2,936 | 2,955 | 2,972 | 2,984 | 2,993 | 3,018 | 3, |
| PECO | 8,121 | 8,110 | 8,131 | 8,116 | 8,123 | 8,100 | 8,112 | 8,129 | 8,153 | 8,167 | 8,158 | 8,164 | 8,166 | 8,207 | 8, |

Is the change due to a specific adjustment to the load forecast by the local utility or some other factor? Any insight is appreciated. Thank you.

**Neal A. Fitch**
Sr. Director, Regulatory Affairs
Neal.Fitch@nrg.com
Cell: (713) 302-1284

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you in error, please immediately alert the sender by reply e-mail and then delete this message, including any attachments. Any dissemination, distribution or othe
prohibited.

# Attachment B

# Proposed Protective Order

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

| | | |
|---|---|---|
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. ER23-729-000** |
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. EL23-19-000** |
| | | **(Not consolidated)** |

# PROTECTIVE ORDER

(Issued: _____)

1. Participants in this proceeding(s) may exchange documents or materials that are deemed to contain Privileged Material and/or Critical Energy/Electric Infrastructure Information ("CEII"), as those terms are defined herein. Accordingly, IT IS ORDERED THAT this Protective Order shall govern the use of all such material produced by, or on behalf of, any Participant in the above-captioned proceeding(s).

2. The Commission's regulations and its policy governing the labelling of controlled unclassified information ("CUI"), establish and distinguish the respective designations of Privileged Material and CEII. As to these designations, this Protective Order provides that a Participant:

A. may designate as Privileged Material any material which customarily is treated by that Participant as commercially sensitive or proprietary or material subject to a legal privilege, which is not otherwise available to the public, and which, if disclosed, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and

B. must designate as CEII, any material that meets the definition of that term as provided by 18 C.F.R. §§ 388.113(a), (c).

3. For the purposes of this Protective Order, the listed terms are defined as follows:

A. "Participant": As defined at 18 C.F.R. § 385.102(b).

B. "Privileged Material":

i. Material (including depositions) provided by a Participant in response to discovery requests or filed with the Commission, and that is designated as Privileged Material by such Participant;

ii. Material that is privileged under federal, state, or foreign law, such as work-product privilege, attorney-client privilege, or governmental privilege, and that is designated as Privileged Material by such Participant;

iii. Any information contained in or obtained from such designated material;

iv. Any other material which is made subject to this Protective Order by the Presiding Administrative Law Judge ("Presiding Judge") or the Chief Administrative Law Judge ("Chief Judge") in the absence of the Presiding Judge or where no presiding judge is designated, the Federal Energy Regulatory Commission ("Commission"), any court, or other body having appropriate authority, or by agreement of the Participants (subject to approval by the relevant authority);

v. Notes of Privileged Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Privileged Material); or

vi. Copies of Privileged Material.

vii. Privileged Material does not include:

a. Any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be privileged by such agency or court;

b. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order; or

c. Any information or document labeled as "Non-Internet Public" by a Participant, in accordance with Paragraph 30 of FERC Order No. 630.

viii. Additional Subcategories of Privileged Material in Oil Pipeline Proceedings:

a. "Section 15(13) Privileged Material": Any materials, permitted to be produced by this Protective Order, concerning the nature, kind, quantity, destination or routing of any products tendered or delivered to a Participant for interstate transportation by or on behalf of a specific shipper, when the identity of the shipper is contained in or may be discerned from the material to be provided. This subcategory shall not apply if the shipper to whom such information pertains consents that the information be categorized as Privileged Material under the other provisions of this Protective Order or produced outside the scope of this Protective Order.

b. "Highly Confidential Privileged Material": A Participant may use this designation for those materials that are of such a commercially

sensitive nature among the Participants or of such a private, personal nature that the producing Participant is able to justify a heightened level of confidential protection with respect to those materials.

C. "Critical Energy/Electric Infrastructure Information" or "CEII": As defined at 18 C.F.R. §§ 388.113(a), (c).

D. "Non-Disclosure Certificate": The term "Non-Disclosure Certificate" means, as applicable:

i. The certificate attached to this Protective Order, by which individuals granted access to Privileged Material, including Highly Confidential Privileged Material, and/or CEII must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for this proceeding.

ii. The certificate attached to this Protective Order, by which Competitive Duty Personnel granted access to Privileged Material, excluding Highly Confidential Privileged Material, and/or CEII must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it.

All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for this proceeding.

E. "Reviewing Representative": A person who has signed a Non-Disclosure Certificate and who is:

i. For purposes of reviewing Privileged Materials not covered by Paragraph 3(B)(viii)(b), who is:

a. Commission Trial Staff designated as such in this proceeding;

b. An attorney who has made an appearance in this proceeding for a Participant;

c. An attorney, paralegal, or other employee associated for purposes of this case with an attorney who has made an appearance in this proceeding on behalf of a Participant;

d. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding;

e. A person designated as a Reviewing Representative by order of the Presiding Judge, the Chief Judge, or the Commission; or

f. An employee or other representative of a Participant appearing in this proceeding with significant responsibility for this docket.

ii. For purposes of reviewing Highly Sensitive Privileged Materials covered by Paragraph 3.B(viii)(b), who is:

a. A member or staff of any state or local utilities commission which is a Participant;

b. An outside attorney who has made an appearance in this proceeding for a Participant;

c. An attorney, paralegal, or other employee of the firm of the outside attorney described in Paragraph 3.E(ii)(b) working with such outside attorney for purposes of this case;

d. An outside expert or an employee of an outside expert retained by a Participant for the purpose of advising, preparing for or testifying in this proceeding who is working under the direction of an attorney described in Paragraph 3.E(ii)(b) or 3.E(ii)(c) and who is an unaffiliated expert (or employees thereof) not engaging in Competitive Duties or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Privileged Materials may present an unreasonable risk of harm;

e. If, after a good faith effort, parties fail to agree on designating a specifically-named inside employee(s) of a non-governmental Participant as a Reviewing Representative for the review of specific Highly Sensitive Privileged Material(s) or all Highly Sensitive Privileged Material(s), a party may request that the Presiding Judge, the Chief Judge, or the Commission so designate such a specifically-named inside employee(s) who, for example, is not directly involved in, or having direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or other activities or transactions of a type with respect to which the disclosure of Highly Sensitive Privileged Materials may present an unreasonable risk of harm; or

f. A person designated as a Reviewing Representative by order of the Presiding Judge, the Chief Judge, or the Commission specifically ruling on and indicating each such person by name.

F. "Competitive Duties": Involvement in, or direct or supervisory responsibilities over, the purchase, sale, or marketing of electricity (including transmission service) at retail or wholesale, the negotiation or development of participation or cost-sharing arrangements for transmission or generation facilities, or similar activities or transactions.

G. "Competitive Duty Personnel": Persons having Competitive Duties.

4. Privileged Material and/or CEII shall be made available under the terms of this Protective Order only to Participants and only to their Reviewing Representatives as provided in Paragraphs 6-10 of this Protective Order. The contents of Privileged Material, CEII or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this specific proceeding.

5. All Privileged Material and/or CEII must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to Paragraphs 7-9 of this Protective Order.

6. Privileged Material and/or CEII must be handled by each Participant and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 9 of this Protective Order. Privileged Material and/or CEII shall not be used except as necessary for the conduct of this proceeding, nor shall they (or the substance of their contents) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Privileged Material and/or CEII, but such copies automatically become Privileged Material and/or CEII. Reviewing Representatives may make notes of Privileged Material, which shall be treated as Notes of Privileged Material if they reflect the contents of Privileged Material.

7. If a Reviewing Representative's scope of employment includes any of the activities listed under this Paragraph 7, such Reviewing Representative may not use information contained in any Privileged Material and/or CEII obtained in this proceeding for a commercial purpose (e.g. to give a Participant or competitor of any Participant a commercial advantage):

A. Energy marketing;

B. Direct supervision of any employee or employees whose duties include energy marketing; or

C. The provision of consulting services to any person whose duties include energy marketing.

8. In the event that a Participant wishes to designate a person not described in Paragraph 3.E above as a Reviewing Representative, the Participant must seek agreement from the Participant providing the Privileged Material and/or CEII. If an agreement is reached, the designee shall be a Reviewing Representative pursuant to Paragraph 3.D of this Protective Order with respect to those materials. If no agreement is reached, the matter must be submitted to the Presiding Judge, the Chief Judge, or the Commission for resolution.

9. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Privileged Material and/or CEII pursuant to this Protective Order until three business days after that Reviewing Representative first has executed and served a Non-Disclosure Certificate. However, if an attorney qualified as a Reviewing Representative has executed a Non-Disclosure Certificate, any participating paralegal, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. Attorneys designated Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Order, and must take all reasonable precautions to ensure that Privileged Material and/or CEII are not disclosed to unauthorized persons. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for the proceeding.

10. Any Reviewing Representative may disclose Privileged Material and/or CEII to any other Reviewing Representative as long as both Reviewing Representatives have executed a Non-Disclosure Certificate. In the event any Reviewing Representative to whom Privileged Material and/or CEII are disclosed ceases to participate in this proceeding, or becomes employed or retained for a position that renders him or her ineligible to be a Reviewing Representative under Paragraph 3.E of this Protective Order, access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate for as long as the Protective Order is in effect.

11. All Privileged Material and/or CEII in this proceeding filed with the Commission, submitted to the Presiding Judge, or submitted to any Commission personnel, must comply with the Commission's Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff. Consistent with those requirements:

A. Documents that contain Privileged Material must include a top center header on each page of the document with the following text: "CUI//PRIV." Any corresponding electronic files must also include this text in the file name.

B. Documents that contain CEII must include a top center header on each page of the document with the following text: "CUI//CEII." Any corresponding electronic files must also include this text in the file name.

C. Documents that contain both Privileged Material and CEII must include a top center header on each page of the document with the following text: "CUI//CEII/PRIV." Any corresponding electronic files must also include this text in the file name.

D. The specific content on each page of the document that constitutes Privileged Material and/or CEII must also be clearly identified. For example, lines or individual words or numbers that include both Privileged Material and CEII shall be prefaced and end with "BEGIN CUI//CEII/PRIV" and "END CUI//CEII/PRIV".

12. The Secretary shall place any Privileged Material and/or CEII filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination concerning any claim of privilege or CEII status. The Commission retains the

right to make determinations with regard to any privilege or CEII claim, as well as the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to Commission Trial Staff, the notification procedures specified at 18 C.F.R. § 388.112 must be followed before making public any Privileged Material.

13. If any Participant desires to include, utilize, or refer to Privileged Material or information derived from Privileged Material in testimony or other exhibits during the hearing in this proceeding in a manner that might require disclosure of such materials to persons other than Reviewing Representatives, that Participant first must notify both counsel for the disclosing Participant and the Presiding Judge, and identify all such Privileged Material. Thereafter, use of such Privileged Material will be governed by procedures determined by the Presiding Judge.

14. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the production or use of Privileged Material and/or CEII on any appropriate ground.

15. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority, to find this Protective Order should not apply to all or any materials previously designated Privileged Material pursuant to this Protective Order. The Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

16. Each Participant governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority.

17. Subject to Paragraph 18, the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), or the Commission shall resolve any disputes arising under this Protective Order pertaining to Privileged Material according to the following procedures. Prior to presenting any such dispute to the Presiding Judge, the Chief Judge or the Commission, the Participants to the dispute shall employ good faith best efforts to resolve it.

A. Any Participant that contests the designation of material as Privileged Material shall notify the Participant that provided the Privileged Material by specifying in writing the material for which the designation is contested.

B. In any challenge to the designation of material as Privileged Material, the burden of proof shall be on the Participant seeking protection. If the Presiding Judge, the Chief Judge, or the Commission finds that the material at issue is not entitled to the designation, the procedures of Paragraph 18 shall apply.

C. The procedures described above shall not apply to material designated by a Participant as CEII. Material so designated shall remain subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's CEII Coordinator that such material need not retain that designation.

18. The designator will have five (5) days in which to respond to any pleading requesting disclosure of Privileged Material. Should the Presiding Judge, the Chief Judge, or the Commission, as appropriate, determine that the information should be made public, the Presiding Judge, the Chief Judge, or the Commission will provide notice to the designator no less than five (5) days prior to the date on which the material will become public. This Protective Order shall automatically cease to apply to such material on the sixth ($6^{th}$) calendar day after the notification is made unless the designator files a motion with the Presiding Judge, the Chief Judge, or the Commission, as appropriate, with supporting affidavits, demonstrating why the material should continue to be privileged. Should such a motion be filed, the material will remain confidential until such time as the interlocutory appeal or certified question has been addressed by the Motions Commissioner or Commission, as provided in the Commission's regulations, 18 C.F.R. §§ 385.714, .715. No Participant waives its rights to seek additional administrative or judicial remedies after a Presiding Judge or Chief Judge decision regarding Privileged Material or the Commission's denial of any appeal thereof or determination in response to any certified question. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Privileged Material and/or CEII in the files of the Commission.

19. Privileged Material and/or CEII shall remain available to Participants until the later of (1) the date an order terminating this proceeding no longer is subject to judicial review, or (2) the date any other Commission proceeding relating to the Privileged Material and/or CEII is concluded and no longer subject to judicial review. After this time, the Participant that produced the Privileged Material and/or CEII may request (in writing) that all other Participants return or destroy the Privileged Material and/or CEII. This request must be satisfied with within fifteen (15) days of the date the request is made. However, copies of filings, official transcripts and exhibits in this proceeding containing Privileged Material, or Notes of Privileged Material, may be retained if they are maintained in accordance with Paragraph 5 of this Protective Order. If requested, each Participant also must submit to the Participant making the request an affidavit stating that to the best of its knowledge it has satisfied the request to return or destroy the Privileged Material and/or CEII. To the extent Privileged Material and/or CEII are not returned or destroyed, they shall remain subject to this Protective Order.

20. Regardless of any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Judge, the Chief Judge, or the Commission. All CEII designations shall be subject to the "[d]uration of the CEII designation" provisions of 18 C.F.R. § 388.113(e).

21. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

Document Accession #: 20230120-5259 Filed Date: 01/20/2023

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

| | | |
|---|---|---|
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. ER23-729-000** |
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. EL23-19-000** |
| | | **(Not consolidated)** |

## NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Privileged Material and/or Critical Energy/Electric Infrastructure Information ("CEII") is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I further certify that my duties and responsibilities do not include "Competitive Duties" as described in the Protective Order. I understand that the contents of Privileged Material and/or CEII, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Title: _____

Representing: _____

Date: _____

Document Accession #: 20230120-5259 Filed Date: 01/20/2023

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

| | | |
|---|---|---|
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. ER23-729-000** |
| **PJM Interconnection, L.L.C.** | **)** | **Docket No. EL23-19-000** |
| | | **(Not consolidated)** |

## NON-DISCLOSURE CERTIFICATE FOR COMPETITIVE DUTY PERSONNEL

I hereby certify my understanding that access to Privileged Material and/or Critical Energy/Electric Infrastructure Information ("CEII") is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of Privileged Material and/or CEII, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Protective Order. I acknowledge that my duties and responsibilities include "Competitive Duties" as described in the Protective Order, and, as such, I understand that I shall neither have access to, nor disclose, the contents of the Privileged Materials that are marked "Highly Confidential Privileged Material," any notes or other memoranda, or any other form of information that copies or discloses Privileged Materials that are marked as "Highly Confidential Privileged Material." I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Title: _____

Representing: _____

Date: _____

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