

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

<b>Calpine Bethlehem, LLC</b>	)	<b>Docket No. ER10-2051-010</b>
<b>Calpine Mid-Atlantic Generation, LLC</b>	)	<b>Docket No. ER10-2043-010</b>
<b>Calpine Mid Merit, LLC</b>	)	<b>Docket No. ER10-2041-010</b>
<b>Calpine Mid-Merit II, LLC</b>	)	<b>Docket No. ER18-1321-003</b>
<b>Calpine New Jersey Generation, LLC</b>	)	<b>Docket No. ER10-2040-010</b>
<b>Calpine Vineland Solar, LLC</b>	)	<b>Docket No. ER10-2036-011</b>
<b>Zion Energy LLC</b>	)	<b>Docket No. ER10-2044-010</b>
<b>Carroll County Energy, LLC</b>	)	<b>Docket No. ER17-1609-003</b>
<b>LQA, LLC</b>	)	<b>Docket No. ER16-733-007</b>
<b>Tenaska Pennsylvania Partners, LLC</b>	)	<b>Docket No. ER18-1960-003</b>
<b>Tenaska Power Services Co.</b>	)	<b>Docket No. ER10-1632-018</b>
<b>Tenaska Virginia Partners, L.P.</b>	)	<b>Docket No. ER10-1626-012</b>
<b>Moxie Freedom LLC</b>	)	<b>Docket No. ER20-2276-000</b>
<b>NRG Power Marketing LLC</b>	)	<b>Docket No. ER10-2265-017</b>
<b>Indian River Power LLC</b>	)	<b>Docket No. ER10-3223-009</b>
<b>Midwest Generation, LLC</b>	)	<b>Docket No. ER10-2355-010</b>
<b>NRG Chalk Point CT LLC</b>	)	<b>Docket No. ER16-10-003</b>
<b>Vienna Power LLC</b>	)	<b>Docket No. ER10-2947-015</b>
<b>Talen Energy Marketing, LLC</b>	)	<b>Docket No. ER15-2013-011</b>
<b>Brandon Shores LLC</b>	)	<b>Docket No. ER12-2510-010</b>
<b>Brunner Island, LLC</b>	)	<b>Docket No. ER15-2014-007</b>
<b>Camden Plant Holding, L.L.C.</b>	)	<b>Docket No. ER10-2435-018</b>
<b>Elmwood Park Power, LLC</b>	)	<b>Docket No. ER10-2442-015</b>
<b>H.A. Wagner LLC</b>	)	<b>Docket No. ER12-2512-010</b>
<b>LMBE Project Company LLC</b>	)	<b>Docket No. ER19-481-003</b>
<b>Martins Creek LLC</b>	)	<b>Docket No. ER15-2018-006</b>
<b>Montour, LLC</b>	)	<b>Docket No. ER15-2022-006</b>
<b>Newark Bay Cogeneration Partnership, L.P.</b>	)	<b>Docket No. ER10-2444-017</b>
<b>Pedricktown Cogeneration Company LP</b>	)	<b>Docket No. ER10-2446-013</b>
<b>Susquehanna Nuclear, LLC</b>	)	<b>Docket No. ER15-2026-006</b>
<b>York Generation Company LLC</b>	)	<b>Docket No. ER10-2449-015</b>

**(Not consolidated)**

**MOTION TO INTERVENE OUT-OF-TIME,  
MOTION FOR LEAVE TO ANSWER, AND ANSWER  
OF THE PJM POWER PROVIDERS GROUP  
AND THE ELECTRIC POWER SUPPLY ASSOCIATION**

Pursuant to Rules 212, 213 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),<sup>1</sup> the PJM Power Providers Group (“P3”) and the Electric Power Supply Association (“EPSA”) respectfully move to intervene out of time, request leave to answer, and answer the protests (collectively, the “IMM Protests”)<sup>2</sup> of the Independent Market Monitor (the “IMM”) for PJM Interconnection, L.L.C. (“PJM”) to the updated market power analyses submitted by various members of P3 and/or EPSA in above-captioned proceedings. As discussed below, the IMM Protests, as well as substantively identical protests filed in other market-based rate proceedings, relate solely to the IMM’s long held grievances with certain PJM market rules and have nothing whatsoever to do with whether any individual seller continues to satisfy the Commission’s market-based rate standards. The Commission should not allow the IMM to divert these market-based rate proceedings toward issues that are properly presented to the Commission through complaints filed pursuant to Section 206 of the Federal Power Act (the “FPA”)<sup>3</sup> and Rule 206 of the Commission’s Rules of

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<sup>1</sup> 18 C.F.R. §§ 385.212, 385.213, 385.214 (2019).

<sup>2</sup> Protest of the Independent Market Monitor for PJM, Docket Nos. ER10-2051-010, *et al.* (filed Aug. 31, 2020) (the “IMM ER10-2051 Protest”); Protest of the Independent Market Monitor for PJM, Docket No. ER17-1609-003 (filed Aug. 28, 2020); Protest of the Independent Market Monitor for PJM, Docket Nos. ER16-733-007, *et al.* (filed Aug. 31, 2020); Protest of the Independent Market Monitor for PJM, Docket No. ER20-2276-000 (filed Aug. 31, 2020); Protest of the Independent Market Monitor for PJM, Docket Nos. ER10-2265-017, *et al.* (filed Aug. 28, 2020); Protest of the Independent Market Monitor for PJM, ER15-2013-011, *et al.* (filed Aug. 28, 2020); Citations herein are to the IMM ER10-2051 Protest, but substantively identical statements can be found in each of the other IMM Protests.

<sup>3</sup> 16 U.S.C. § 824e (2018).

Practice and Procedure,<sup>4</sup> including issues that are already the subject of a pending Section 206 complaint filed by the IMM in Docket No. EL19-47-000.<sup>5</sup>

## I. COMMUNICATIONS

P3 and EPSA respectfully request that all correspondence, pleadings, and other documents related to these proceedings be addressed to the following persons:

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## II. IDENTITY OF P3 AND EPSA

### A. P3

P3 is a non-profit organization that supports the development of properly designed and well-functioning markets in the PJM region. Combined, P3 members own approximately 67,000 megawatts of generation assets, produce enough power to supply over 50 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit

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<sup>4</sup> 18 C.F.R. § 385.206 (2019).

<sup>5</sup> See Complaint of the Independent Market Monitor for PJM, Docket No. EL19-47-000 (filed Feb. 21, 2019) (the “EL19-47 Complaint”).

www.p3powergroup.com. The comments contained in this filing represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

## **B. EPSA**

EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

## **III. BACKGROUND**

In each of the above-captioned proceedings, sellers have submitted updated market power analyses for the Northeast region in accordance with the Commission's triennial filing schedule. In each case, the market-based rate sellers relied on the Commission's rebuttable presumption that, for regional transmission organization ("RTO")/independent system operator ("ISO") markets, like PJM, "the existing Commission-approved RTO/ISO mitigation is sufficient to address market power concerns in the RTO/ISO market, including mitigation applicable to RTO/ISO submarkets."<sup>6</sup> The Commission originally adopted this presumption in 2008, when it issued Order No. 697-A. Last year, in Order No. 861, the Commission reaffirmed this policy and revised its market-based rate regulations to provide that "[i]n lieu of submitting the indicative market power screens," sellers in RTO/ISO markets "may state that they are relying on Commission-approved market monitoring and mitigation to address potential horizontal market

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<sup>6</sup> *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697-A, 123 FERC ¶ 61,055 at P 5, *on reh'g*, Order No. 697-B, 125 FERC ¶ 61,326 (2008), *on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), clarified, 131 FERC ¶ 61,021 (2010), *aff'd sub nom. Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011). *See also id.* at P 111 ("[W]e adopt a rebuttable presumption that the existing mitigation is sufficient to address any market power concerns.").

power Sellers may have in those markets.”<sup>7</sup> Market-based rate sellers, including the P3 and EPSA members whose triennial filings are at issue in these proceedings, rely on this Commission-approved presumption and believe that the overall parameters to mitigation are well-grounded.

The IMM’s multiple protests are focused exclusively on alleged “deficiencies in PJM’s market power mitigation rules.”<sup>8</sup> Relying on its own past reports on the PJM markets and the IMM’s pending EL19-47 Complaint, the IMM alleges that the PJM capacity market “is not competitive”<sup>9</sup> and argues that “the Commission should authorize participation in the PJM capacity market at market based rates only on the condition that market sellers offer their resources in the PJM Capacity Market at or below the competitive capacity offer.”<sup>10</sup> The IMM also points to alleged flaws in PJM’s energy market mitigation scheme and argues that the Commission should therefore condition authorization to sell energy into the PJM markets on sellers “offer[ing] their units in the PJM energy market at or below the defined cost-based offer, and . . . submit[ting] operating parameters that are at least as flexible as the defined unit specific parameter limits in the PJM energy market.”<sup>11</sup>

The IMM Protests, as well as substantively identical protests to triennial filings by sellers that are not members of P3 or EPSA, are substantively identical and set forth generic objections to alleged flaws in the PJM market rules. These protests thus potentially impact all market

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<sup>7</sup> 18 C.F.R. § 35.37(c)(5) (2019) (emphasis added). *See also Refinements to Horizontal Market Power Analysis for Sellers in Certain Regional Transmission Organization and Independent System Operator Markets*, Order No. 861, 168 FERC ¶ 61,040 at P 9 (2019) (“Order No. 861”), *on reh’g*, Order No. 861-A, 170 FERC ¶ 61,106 (2020).

<sup>8</sup> IMM ER10-2051 Protest at 2.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.*

sellers in the PJM footprint. Therefore, P3 and EPSA are submitting this single response to the IMM Protests filed to date, and reserve the right to replicate this answer in future protests from the IMM of this generic nature.

#### **IV. MOTION TO INTERVENE OUT-OF-TIME**

P3 and EPSA respectfully move for leave to intervene out-of-time in these proceedings for the limited purpose of responding to generic market rules issues raised in the IMM Protests. As discussed below, good cause exists to grant leave for P3 and EPSA to intervene out-of-time, because this request is consistent with the requirements of Rule 214(d) of the Commission's Rules of Practice and Procedure<sup>12</sup> and with Commission precedent granting motions to intervene out-of-time in similar circumstances.<sup>13</sup>

At the outset, in light of the IMM's challenge to the PJM market rules, P3 and EPSA, as organizations whose members own tens of thousands of megawatts of generation facilities in the PJM market, plainly have direct and substantial interests in these proceedings that cannot be adequately represented by any other person. P3 and EPSA also have good cause for not having filed timely motions to intervene. The comment dates in these sub-dockets were August 28, 2020 and August 31, 2020.<sup>14</sup> Until the IMM filed those protests on the applicable comment dates, P3 and EPSA had no inkling that anyone would attempt to inject generic issues about the

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<sup>12</sup> 18 C.F.R. § 385.214(d) (2019).

<sup>13</sup> See, e.g., *PJM Interconnection, L.L.C.*, 164 FERC ¶ 61,173 at PP 11-12 (2018); *Public Serv. Comm'n of Wisc. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 at PP 68-69 (2016) ("PSCW"); *Public Serv. Co. of N.H. v. New Hampshire Elec. Coop.*, 84 FERC ¶ 61,129 at 61,678 (1998); *Public Serv. Elec. & Gas Co.*, 63 FERC ¶ 61,200 at 62,548 (1993) ("PSE&G"); *Pennsylvania Elec. Co.*, 60 FERC ¶ 61,034 at 61,123 (1992).

<sup>14</sup> See Errata Notice, Docket Nos. ER10-2131-023, *et al.* (July 7, 2020) (unreported); Errata Notice, Docket Nos. ER10-1511-008, *et al.* (July 7, 2020) (unreported); Errata Notice, Docket Nos. ER10-1586-016, *et al.* (July 7, 2020) (unreported); Combined Notice of Filings #2, Docket Nos. EG20-200-000, *et al.* (June 30, 2020) (unreported); Combined Notice of Filings #1, Docket Nos. ER10-2739-026, *et al.* (June 30, 2020) (unreported).

PJM market rules into these proceedings. Naturally, P3 and EPSA are (and were) aware that, in adopting its rebuttable presumption regarding RTO/ISO mitigation, the Commission indicated that intervenors would be allowed to challenge that presumption in individual market-based rate proceedings.<sup>15</sup> Even assuming *arguendo* that the Commission was issuing an open invitation for the IMM and others to use protests in individual market-based rate proceedings as an alternative to filing Section 206 complaints, it is inconceivable that the Commission intended that parties, such as P3 and EPSA, with an interest in RTO/ISO market rules be forced to file prophylactic motions to intervene in each and every market-based rate docket, just in case an intervenor chose to raise issues concerning those rules. Such a requirement would be absurd and would impose an unreasonable administrative burden on all concerned.

Allowing P3 and EPSA to intervene will not result in any disruption of this proceeding or prejudice the existing parties to this proceeding. P3 and EPSA agree to accept the record as it stands, and P3 and EPSA only seek to intervene for the limited purpose of responding to the IMM Protests. As a result, P3's and EPSA's "involvement as . . . part[ies] in this case will not cause undue delay or prejudice or otherwise hinder [the Commission's] ability to resolve the issues raised."<sup>16</sup>

## V. ANSWER

The Commission should dismiss the IMM Protests, as well as substantively identical protests filed by the IMM in other market-based rate proceedings. The IMM's concerns are generic in nature and are not properly addressed in the market-based rate authority proceedings of individual companies. The IMM has already raised these concerns in the PJM stakeholder process and in the pending EL19-47 Complaint. The IMM may very well be dissatisfied with

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<sup>15</sup> See Order No. 861, 168 FERC ¶ 61,040 at P 21; Order No. 697-A, 123 FERC ¶ 61,055 at P 111.

<sup>16</sup> *PSE&G*, 63 FERC ¶ 61,200 at 62,548 (footnote omitted).

the responsiveness of PJM or the Commission to its concerns, but that does not justify injecting these generic issues into individual market-based rate proceedings. The Commission should direct the IMM to raise generic issues through generic means, such as Section 206 complaints, and, where it has already done so, to await Commission action, just like any other Section 206 complainant must do. As the Commission observed when the IMM attempted to raise similarly generic market issues in a proceeding under Section 203 of the FPA,<sup>17</sup> these sorts of proceedings do not provide “the appropriate venue for raising or addressing general concerns regarding market design.”<sup>18</sup>

More broadly, the Commission should admonish the IMM not to misuse protests in individual market-based rate proceedings as a Trojan Horse to sneak past the substantive and procedural requirements set forth in Section 206 of the FPA and Rule 206 of the Commission’s Rules of Practice and Procedure. It should also remind the IMM, as it recently made clear to the market monitor for the Midcontinent Independent System Operator, Inc., that Order No. 861 did not represent any sort of “policy change” regarding RTO/ISO mitigation or otherwise call into question the ongoing justness and reasonableness of existing RTO/ISO mitigation measures.<sup>19</sup> To the contrary, in that rule, the Commission rejected claims that “it was necessary to initiate a formal review of the effectiveness of RTO/ISO monitoring and mitigation practices concurrent with the final rule, noting that the Commission has previously accepted each RTO’s/ISO’s market monitoring and mitigation provisions as just and reasonable.”<sup>20</sup>

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<sup>17</sup> 16 U.S.C. § 824b (2018).

<sup>18</sup> *PSEG Fossil LLC*, 172 FERC ¶ 61,195 at P 51 (2020) (“*PSEG Fossil*”). See also *id.* at P 52 (stating that the IMM’s “arguments . . . are based on general concerns about PJM’s market design that are not specific to the Proposed Transaction, and that are outside the scope of our review of the Proposed Transaction”).

<sup>19</sup> *Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,170 at P 38 (2020) (“*MISO*”).

<sup>20</sup> *Id.*



**A. Section 206 Proceedings are the Proper Means to Pursue Changes to PJM Market Rules.**

It is certainly true, as the IMM states, that Order No. 861 allows intervenors in market-based rate proceedings to attempt to rebut the Commission’s presumption of RTO/ISO mitigation.<sup>21</sup> In so stating, the Commission was reassuring would-be “challengers to a market-based rate filing” that they will not “have to lodge their objections with the relevant RTO/ISO tariff in a different proceeding.”<sup>22</sup> That is a far cry, however, from telling would-be complainants, like the IMM, that protests in market-based rate proceedings can or should be used instead of Section 206 complaints to challenge RTO/ISO mitigation measures before the Commission, particularly where doing so would let them dodge the substantive requirements for complaints set forth in Section 206 of the FPA<sup>23</sup> or the procedural requirements for complaints set forth in Rule 206 of the Commission’s Rules of Practice and Procedure.<sup>24</sup>

While the IMM’s concerns about the PJM market rules are undoubtedly sincere, the IMM is certainly not approaching these proceedings as a “challenger[] to a market-based rate filing”<sup>25</sup> in the sense envisioned by Order No. 861. Rather, as evidenced by both the substance of the IMM Protests and the fact that the IMM has filed substantively identical protests in at least 45 market-based rate proceedings,<sup>26</sup> the IMM is exclusively concerned with perceived flaws in the

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<sup>21</sup> See IMM ER10-2051 Protest at 2-3 (citing Order No. 861, 168 FERC ¶ 61,040 at P 21). See also Order No. 697-A, 123 FERC ¶ 61,055 at P 111 (stating that “intervenors may challenge the effectiveness of th[e RTO/ISO] mitigation”).

<sup>22</sup> Order No. 861, 168 FERC ¶ 61,040 at P 21 (footnote omitted).

<sup>23</sup> 16 U.S.C. § 824e (2018).

<sup>24</sup> 18 C.F.R. § 385.206 (2019).

<sup>25</sup> Order No. 861, 168 FERC ¶ 61,040 at P 21.

<sup>26</sup> See *supra* note 2 (citations to the IMM Protests); Protest of the Independent Market Monitor for PJM, Docket Nos. ER10-3078-005, *et al.* (filed Aug. 28, 2020); Protest of the Independent Market Monitor for PJM, Docket No. ER16-2278-003 (filed Aug. 31, 2020); Protest of the Independent Market Monitor for PJM, Docket No. ER18-1106-002 (filed Aug. 28, 2020); Protest of the Independent Market Monitor for PJM, Docket No. ER10-1556-009 (filed Aug. 28, 2020); Protest of the Independent Market

PJM market rules, not whether selected market-based rate sellers satisfy the Commission’s market-based rate tests. Allowing the IMM to pursue its concerns in this fashion flies in the face of the Commission’s repeated admonishments that “[i]ntervenor-proposed changes to PJM’s existing tariff must be made through a complaint under section 206 of the FPA and not through protests to a section 205 filing.”<sup>27</sup>

The IMM Protests also misread the Commission’s statements regarding the rebuttable presumption as establishing a standard of perfection for RTO/ISO mitigation that finds no support in Order No. 861 or any other Commission order. The Commission has never suggested that the rebuttable presumption will be withdrawn merely because RTO/ISO mitigation rules may be deemed imperfect at any given point in time, much less because the IMM may be dissatisfied with those rules at any given point in time.<sup>28</sup>

Rather, the Commission adopted this rebuttable presumption against the backdrop of its longstanding acceptance that market rules “should be continually evaluated and changes made when necessary.”<sup>29</sup> Indeed, when the Commission reaffirmed the presumption and allowed sellers to rely on it in lieu of submitting indicative screens in Order 861, the EL19-47 Complaint

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Monitor for PJM, Docket No. ER18-2264-004 (filed Aug. 31, 2020); Protest of the Independent Market Monitor for PJM, Docket Nos. ER17-1438-002, *et al.* (filed Aug. 28, 2020); Protest of the Independent Market Monitor for PJM, Docket Nos. ER11-4393-008, *et al.* (filed Aug. 31, 2020); Protest of the Independent Market Monitor for PJM, Docket Nos. ER13-1485-011, *et al.* (filed Aug. 31, 2020).

<sup>27</sup> *PJM Interconnection, L.L.C.*, 145 FERC ¶ 61,035 at P 19 (2013) (citing *Otter Tail Power Co.*, 137 FERC ¶ 61,255 at P 23 (2011)). *Cf. California Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,199 at n.120 (2019) (“The Commission has long held that a complaint should not be submitted as part of a motion to intervene or protest . . .”).

<sup>28</sup> *See* IMM ER10-2051 Protest at 6 (insisting that proposed restrictions on the sellers’ based rate authorization “be removed only when the market power mitigation rules in the PJM Capacity Market and the PJM energy market are modified consistent with the explicit recommendations of the [IMM]” (citation omitted)).

<sup>29</sup> *Maryland Pub. Serv. Comm’n v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276 at P 24 (2008) (footnote omitted), *on reh’g*, 127 FERC ¶ 61,274 (2009), *aff’d sub nom. Maryland Pub. Serv. Comm’n v. FERC*, 632 F.3d 1283 (D.C. Cir. 2011).

was already pending and the Commission acknowledged that the IMM’s “quarterly State of the Market reports contain a comprehensive listing of market power concerns.”<sup>30</sup> Moreover, the Commission made a point of noting that it had “previously accepted each RTO’s/ISO’s market monitoring and mitigation provisions as just and reasonable.”<sup>31</sup>

**B. The IMM Does Not Meets Its Burden Under Order No. 861.**

The Commission has made clear that, for RTO/ISO markets, a successful challenge to a seller’s market-based rate authorization requires showings “(1) that the Seller has market power and (2) that such market power is not addressed by existing Commission-approved RTO/ISO market monitoring and mitigation.”<sup>32</sup> Tellingly, the IMM disavows any interest in the first, threshold question of whether any of the sellers in these proceedings has market power, suggesting that there is no need to require the sellers to submit screens and stating that such screens “would serve no useful purpose . . . .”<sup>33</sup> But even if the IMM had successfully rebutted the presumption about RTO/ISO mitigation, that would only mean that the Commission would need to have sellers file indicative market power screens and otherwise determine whether sellers have market power that requires mitigation in the first instance.<sup>34</sup> This underscores that the IMM Protests have nothing to do with the purpose of these proceedings – determining whether the relevant sellers continue to satisfy the Commission’s market-based rate standards – and everything to do with the IMM’s generic concerns about the PJM market rules.

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<sup>30</sup> Order No. 861, 168 FERC ¶ 61,040 at P 22.

<sup>31</sup> *MISO*, 170 FERC ¶ 61,170 at P 38.

<sup>32</sup> Order No. 861, 168 FERC ¶ 61,040 at P 25 (emphasis added).

<sup>33</sup> IMM ER10-2051 Protest at 3.

<sup>34</sup> *See* Order No. 861, 168 FERC ¶ 61,040 at P 27 (indicating that, “to the extent intervenors/complainants successfully rebut the presumption as to the sufficiency of market monitoring and mitigation . . . the Commission retains authority to require the Seller to submit indicative screens or other evidence to help evaluate whether the Seller has market power”).

**C. Accepting the IMM Protests Would Discriminate Against the Affected Sellers.**

Further underscoring why filing protests in individual market-based rate proceedings is the wrong way to pursue generic market rules issues, addressing, or even entertaining, these generic issues in these proceedings raises serious equity issues, both for the targeted sellers and for other interested stakeholders. Indeed, the Commission recently rejected a similar request by the IMM in an FPA Section 203 proceeding, where the IMM “ha[d] not demonstrated that the Proposed Transaction will increase market power, and . . . relie[d] on existing perceived limitations of PJM’s market power mitigation as the basis for requesting these restrictions for [the buyer].”<sup>35</sup>

Piecemeal implementation of conditions directed at alleged market-wide issues on the sellers in these proceedings would entail exactly the sort of undue discrimination that the FPA forbids in that it would treat similarly situated sellers differently.<sup>36</sup> There can be no dispute that the sellers in these and other proceedings targeted by the IMM are similarly situated to other sellers lucky enough to be spared, including the transmission owners and their affiliates who filed their triennials for the Northeast region in December 2019 and Category 1 Sellers not required to submit triennials at all. As the Commission correctly noted in Order No. 697-A, “if existing mitigation is found to be inadequate for a particular seller, then it is likely to be insufficient for all similarly situated sellers.”<sup>37</sup> The IMM has not even hinted at how imposing conditions directed to the alleged flaws in the existing mitigation on some, but not all, sellers

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<sup>35</sup> *PSEG Fossil*, 172 FERC ¶ 61,195 at P 50.

<sup>36</sup> 16 U.S.C. §§ 824d, 824e (2018). *See Sebring Utils. Comm’n v. FERC*, 591 F.2d 1003, 1009 n.24 (5th Cir. 1979) (“[T]hose who are similarly entitled must be treated equally . . . .”); *Transwestern Pipeline Co.*, Opinion No. 238-A, 36 FERC ¶ 61,175 at 61,433 (1986) (“Undue discrimination is in essence an unjustified difference in treatment of similarly situated customers.” (citation omitted)), *aff’d sub nom. Transwestern Pipeline Co. v. FERC*, 820 F.2d 733 (5th Cir. 1987).

<sup>37</sup> Order No. 697-A, 123 FERC ¶ 61,055 at P 114.

could be reconciled with the statutory prohibition against undue discrimination, even if it were only to be on a temporary basis, until the rules have been modified to the IMM's satisfaction.

**VI. CONCLUSION**

**WHEREFORE**, for the foregoing reasons, P3 and EPSA respectfully request that the Commission (1) grant their motion to intervene out-of-time in the above-captioned proceedings; (2) accept this answer; and (3) reject the IMM Protests.

Respectfully submitted,

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Dated: September 15, 2020

**CERTIFICATE OF SERVICE**

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

Dated at Malvern, Pennsylvania, this 15<sup>th</sup> day of September, 2020.

\_On behalf of  
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