

including EPSA's protest,⁴ to those filings.⁵ As discussed in greater detail below, nothing in the PJM Answer, the IMM Answer or the supporting comments even begins to remedy the fatal flaws in the December 23 Filings. In particular, none of these pleadings establishes how PJM's proposal to change the Reliability Pricing Model ("RPM") rules governing the Base Residual Auction ("BRA") for the 2024/2025 Delivery Year (the "2024/2025 BRA") after the posting of auction parameters and after the closing of the auction window can be reconciled with the filed rate doctrine and the corollary prohibition against retroactive ratemaking. Similarly, neither PJM nor any other party has demonstrated that PJM's proposed revisions to the definition of the Locational Deliverability Area Reliability Requirement is just and reasonable, whether applied to the 2024/2025 BRA or on a going-forward basis.

⁴ Protest of the Electric Power Supply Association, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "EPSA Protest").

⁵ Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C., Docket Nos. ER23-729-000, *et al.* (filed Feb. 2, 2023) (the "PJM Answer"); Answer and Motion for Leave to Answer of the Independent Market Monitor for PJM, Docket Nos. ER23-729-000, *et al.* (filed Feb. 3, 2023) (the "IMM Answer"); Motion for Leave to Answer and Answer of Public Interest Organizations, Docket Nos. ER23-729-000, *et al.* (filed Feb. 6, 2023) (the "PIO Answer"). EPSA is entitled to answer comments in support of the December 23 Filings as a matter of right under Rule 213(a)(3) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(3) (2022), because those comments do not represent, in form or substance, "protest[s], [] answer[s], [] motion[s] for oral argument, or [] request[s] for rehearing" to which answers are not permitted without leave under Rule 213(a)(2). See 18 C.F.R. § 385.213(a)(3) (2022) ("An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section."). EPSA respectfully requests leave to answer the PJM Answer, the IMM Answer, the PIO Answer and any other pleadings deemed to be protests or answers pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212, 385.213 (2022). Although Rule 213 does not allow for answers to protests or answers as a matter of right, the Commission regularly accepts otherwise impermissible answers where, as here, they will assist the Commission's understanding of the record and its decision-making. See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,033 (2023); *N.Y. Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,028 at P 15 (2023); *ISO New England Inc.*, 181 FERC ¶ 61,260 at P 11 (2022); *PJM Interconnection, L.L.C.*, 181 FERC ¶ 61,162 at P 29 (2022). EPSA has deliberately limited the scope of this answer as much as possible. Its decision not to address particular assertions or arguments should not be construed as acceptance of, or agreement with, such arguments or assertions.

I. ANSWER

Rather than engage the serious objections to PJM's proposal in any meaningful way, PJM and its supporters largely rehash arguments made in the December 23 Filings, focusing primarily on assertions that the clearing prices produced by the RPM rules in effect when the 2024/2025 BRA was held would be too high.⁶ Even then, some of PJM's supporters are forced to concede that PJM's after-the-fact intervention "creates a highly concerning precedent"⁷ Significantly, while load interests generally supported PJM's proposal to establish a one-way ratchet that would let it adjust prices downward, but never

⁶ See, e.g., PIO Answer at 7 (arguing that there would be "severe economic harm" from capacity prices); Protest of Public Citizen, Inc. at 1, Docket Nos. ER23-729-000, *et al.* (filed Jan. 19, 2023) (the "Public Citizen Protest") (noting that "PJM estimates prices are four times higher than they should be"); Comments of American Municipal Power, Inc. at 3, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "AMP Comments") (stating that, "in the absence of Commission acceptance of PJM's proposal, DEMEC will pay a Locational Reliability Charge that is unjust, unreasonable, and unduly discriminatory"); Comments in Support of PJM's Proposed Reforms to Locational Deliverability Area Reliability Requirement Calculations at 1, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "NJBPU Comments") (arguing that, "[u]nless the Commission approves the PJM filing, consumers in Delaware and adjoining areas will experience substantially higher capacity prices"); Comments of the Pennsylvania Public Utility Commission to PJM's 2024/2025 Base Residual Auction Modification Filings at 3, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "PA PUC Comments") (arguing that "the increased price does not provide benefit"); Comments in Support of PJM's Proposal to Address the Locational Deliverability Area Reliability Requirement, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "Delmarva Zone Parties Comments") (arguing that "[c]learing the BRA at a high price under such circumstances would result in unjust and unreasonable rates"); Comments of Old Dominion Electric Cooperative at 7, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (arguing that the 2024/2025 BRA clearing prices would be "artificially inflated"); Motions to Intervene and Initial Comments of the Maryland Office of People's Counsel at 3, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (claiming that "Commission approval of PJM's proposed remedy is necessary to avoid or, at least mitigate, a major increase in power costs to the electric consumers"); Motion to Intervene and Comments of the Organization of PJM States at 3-4, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (supporting the Delmarva Zone Parties Comments).

⁷ PA PUC Comments at 1. See also, e.g., Delmarva Zone Parties Comments at 4 (noting that the submittal of the December 23 Filings "occurred in the midst of an auction clearing, which is certainly not preferred"); Comments of the Independent Market Monitor for PJM at 6, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "IMM Comments") (putting forward an alternative approach that "would avoid the arbitrary determination of materiality"); AMP Comments at 5-7 (raising concerns regarding the one percent threshold set forth in the proposed definition of the Locational Deliverability Area Reliability Requirement).

upward, parties opposing the December 23 Filings included not only conventional and renewable suppliers and developers but also parties on the load side. In particular, the Public Utilities Commission of Ohio's Office of the Federal Energy Advocate (the "Ohio FEA") correctly warned that "PJM's proposal to retroactively adjust pricing mechanisms [is] to the detriment of bidders in the affected [Locational Deliverability Area ("LDA")] but also to the potential detriment of all bidders in PJM auctions if those auctions produce results different from PJM's expectations."⁸

A. No Party Has Identified a Legal Basis for Granting the Retroactive Relief Requested in the December 23 Filings

The PJM Answer continues to insist that the relief requested in the December 23 Filings is permissible because "PJM has not completed the auction clearing process or finalized any auction results."⁹ In the next breath, however, PJM acknowledges that it "made preliminary price calculations based on the offers submitted during the auction window"¹⁰ In short, PJM did not like the results when it cleared the 2024/2025 BRA under the existing rules and then sought to change those rules. PJM's refusal to "finalize" auction results not to its liking is precisely the problem here, and PJM cannot be permitted so easily to sidestep the application of the strictures of the filed rate doctrine and the prohibition against retroactive ratemaking.

⁸ See Comments of the Public Utilities Commission of Ohio's Office of the Federal Energy Advocate, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "Ohio FEA Comments").

⁹ PJM Answer at 8. See also NJBPU Comments at 7 (asserting that PJM "has yet to run its optimization algorithm, formally clear auction results, and award capacity commitments").

¹⁰ PJM Answer at 8.

While EPSA will spare the Commission a full reprise of its earlier demonstration that the relief PJM requests is retroactive,¹¹ it is telling that PJM, in its lengthy answer, did not even attempt to respond to EPSA's observation that Section 5.10(vi)(A) of Attachment DD to the Tariff expressly provides that PJM must determine the Locational Deliverability Area Reliability Requirement prior to the BRA and that the Locational Deliverability Area Reliability Requirement will then be used to establish the Variable Resource Requirement Curve that "will be used for such Base Residual Auction."¹² Ignoring this requirement, PJM now states that its "updated reliability requirement would only be used for clearing the auction,"¹³ thus confirming that there is a tariff violation and retroactive action at issue here.

PJM makes various arguments meant to demonstrate that it is not engaging in retroactive ratemaking. These arguments are unavailing. First, PJM's assertion that the Locational Deliverability Area Reliability Requirement is subject to change at this time because it is "just an input to the wholesale rate"¹⁴ makes little sense. The whole point of the December 23 Filings is that the change to the Locational Deliverability Area Reliability Requirement will have a material and significant impact on how PJM clears the BRA and the resulting prices. In fact, the PJM Answer itself cites Commission precedent standing for the proposition that "the rate on file with the Commission is the Tariff describing the

¹¹ See EPSA Protest at 5-16.

¹² Tariff, Attachment DD, § 5.10(vi)(A). See *also* EPSA Protest at 9-10 (discussing same).

¹³ PJM Answer at 13.

¹⁴ *Id.*

Auction procedures, not the prices that may change over time,”¹⁵ and there is no basis to allow PJM to modify those procedures after the fact.

Second, PJM claims that “when evaluating the filed rate doctrine and the rule against retroactive ratemaking, courts have focused on preventing consumers from being retroactively charged a rate that is higher than what they may have expected to pay under the filed rate for the service that was provided.”¹⁶ Even the most cursory review of relevant precedent demonstrates that PJM is woefully mistaken that the filed rate doctrine and rule against retroactive ratemaking operate as some kind of one-way ratchet. In fact, some of the seminal decisions of the U.S. Supreme Court addressing the filed rate doctrine involved customers seeking lower rates.¹⁷

Third, PJM’s reference to the supposedly unjust and unreasonable clearing prices that would result from the existing RPM rules¹⁸ does nothing to justify the relief requested in the December 23 Filings. While insisting that the Locational Deliverability Area Reliability Requirement must be changed, both PJM and the IMM have emphasized that there was no exercise of market power or anticompetitive behavior by sellers in the

¹⁵ *Public Citizen, Inc. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,042 at P 89 (2019) (quoted in PJM Answer at 23 n.65).

¹⁶ PJM Answer at 16.

¹⁷ See, e.g., *American Tel. & Tel. Co. v. Central Off. Tel., Inc.*, 524 U.S. 214, 222 (1998) (“AT&T”) (“even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff”); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) (“*Maislin*”) (rejecting argument by the Interstate Commerce Commission that “the carrier should not receive a windfall, i.e., the higher filed rate”); *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162-63 (1922) (finding that the filed rate doctrine barred recovery for antitrust damages against carriers who colluded to set artificially high shipment rate); *Louisville & N.R. Co. v. Maxwell*, 237 U.S. 94, 98-100 (1915) (carrier permitted to charge customer filed rate that was higher than rate quoted to customer).

¹⁸ See, e.g., PJM Answer at 3.

2024/2025 BRA.¹⁹ Moreover, the IMM’s assertion that “[t]he standard is whether the prices that PJM ultimately posts are a result of the actual supply of and demand for capacity,”²⁰ is unsupported and unsupportable. There is nothing in the Tariff, much less the FPA, that would justify such a backward-looking standard. To the contrary, the Tariff makes clear that the RPM auctions are to be conducted three years ahead of the relevant Delivery Year based on necessarily imperfect forecasts and other equally imperfect modeling assumptions by PJM. Thus, and as further explained in the affidavit of Paul M. Sotkiewicz, Ph.D., formerly the Chief Economist at PJM,²¹ accompanying the EPSC Protest, the results of the 2024/2025 BRA that PJM now seeks to avoid were predictable and consistent with PJM’s existing rules and its reliability modeling, which considers all existing generation resources and resources expected to be in service regardless of whether such generation resources have an RPM commitment.²² While PJM has not

¹⁹ See IMM Comments at 5 (stating that “[m]arket offers were competitive”); IMM Answer at 3 (same); PJM Answer at 14 (noting that “Market [P]articipants offered competitively or were constrained to competitive offers by the market power mitigation rules” (quoting IMM Comments at 5)). In this respect, the IMM Comments, IMM Answer, and PJM Answer make clear that there is no basis for claims by Public Citizen, Inc. that there was market manipulation in the 2024/2025 BRA. See Public Citizen Protest at 1.

²⁰ IMM Answer at 3. See also *id.* at 4 (same). In contrast to the IMM’s support here for modification of the Locational Deliverability Area Reliability Requirement used in the 2024/2025 BRA, the IMM in another ongoing proceeding recognized that PJM has improperly calculated the Accredited Unforced Capacity of certain resources, but nonetheless stated that it “does not support modifying the results of *prior auctions*,” and insisted that the issue should only be corrected “for the **2025/2026 Delivery Year** and subsequent delivery years.” Comments of the Independent Market Monitor for PJM at 2, Docket No. EL23-13-000 (filed Jan. 13, 2023) (emphases added).

²¹ See EPSC Protest, Attachment A, Affidavit of Paul M. Sotkiewicz, Ph.D. (the “Sotkiewicz Affidavit”).

²² See *id.*, ¶ 48. See also *id.*, ¶¶ 104-108 (discussing scenarios prepared by PJM analyzing the 2023/2024 BRA). As noted by The PJM Power Providers Group (“P3”), PJM appears to have removed PJM’s scenarios analyzing the 2023/2024 BRA referred to in the Sotkiewicz Affidavit, which had also been relied on by P3’s expert witness, Roy J. Shanker, Ph.D. See Protest of The PJM Power Providers Group at 7 n.23, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023)

demonstrated that its existing rules are unjust or unreasonable, the fact is that, even if PJM had been able to do so, retroactive relief would be barred because “[a]pplication of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results.”²³

Finally, PJM erroneously claims that “[n]either the filed rate doctrine nor the rule against retroactive ratemaking bars the Commission from its broad statutory authority under section 309 of the [Federal Power Act (the “FPA”)].”²⁴ Under Section 309 of the FPA, the Commission has the “power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the FPA].”²⁵ Importantly, however, this provision “merely augment[s] existing powers conferred upon the [Commission] by Congress, [it] do[es] not confer independent authority to act.”²⁶ Thus, the Commission’s

(the “P3 Protest”). See also Motion to Intervene and Limited Protest of Lotus Infrastructure, LLC at 9-10 & n.36, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (stating that the auction results were predictable in light of PJM’s scenarios and noting that the PJM scenarios appeared to have been removed). Even though the PJM Answer discusses those scenarios, see PJM Answer at 27-28, it has not explained why they were removed.

²³ *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998). See also, e.g., *AT&T*, 524 U.S. at 222 (“[E]ven if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff.”); *Maislin*, 497 U.S. at 129 (requiring application of filed rate even though the agency found that allowing carrier to charge filed rate was an “unreasonable” practice); *id.* at 132 (“strict adherence to the filed rate has never been justified on the ground that the carrier is equitably entitled to that rate, but rather that such adherence, despite its harsh consequences in some cases, is necessary to enforcement of the Act”).

²⁴ PJM Answer at 23.

²⁵ 16 U.S.C. § 825h (2018).

²⁶ *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972) (“*NEPCO*”). *NEPCO* interpreted both Section 309 of the FPA, 16 U.S.C. § 825h (2018), and Section 16 of the Natural Gas Act, 15 U.S.C. § 717o (2018). Because the language of these sections is “identical,” *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 606 (3d Cir. 1977), EPSC is following the “established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes.” *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

authority under Section 309 extends only to actions that “conform[] with the purposes and policies of Congress and do[] not contravene any terms of the [FPA].”²⁷ The “filed rate doctrine rests on two provisions [of the FPA]: section 205(c), which requires utilities to file rate schedules with the Commission, and section 206(a), which allows the Commission to fix rates and charges, but only prospectively.”²⁸ That being the case, the Commission cannot rely on Section 309 to bypass the limitations of the filed rate doctrine.

B. PJM Improperly Attempts to Downplay Market Participants’ Reliance on Posted Auction Parameters and the Harm to the Market

PJM now argues that “the posting of the Locational Deliverability Area Reliability Requirement prior to the conduct of the BRA is intended to provide transparency to Market Participants and are [*sic*] for informational purposes only” and that “any Market Participants that claim to have made irreversible business decisions based on the posted Locational Deliverability Area Reliability Requirement did so by attempting to predict the clearing price for the 2024/2025 BRA, but did so at their own risk.”²⁹ Along the same lines, the IMM takes the position that “there is no reason to believe that [sellers’] offers were affected by the overstated demand.”³⁰ This is plainly untrue as, even from the inception of the RPM market, PJM expressly emphasized the importance of the posted parameters to market participants’ decisions and actions:

The PJM Tariff requires a number of crucial parameters to be posted by February 1[, three months ahead of the BRA], including peak load and other parameters affected by the peak load forecast such as the Capacity Emergency Transfer

²⁷ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

²⁸ *Towns of Concord, Norwood, & Wellesley, Mass. v. FERC*, 955 F.2d 67, 71-72 (D.C. Cir. 1992).

²⁹ PJM Answer at 20.

³⁰ IMM Answer at 3.

Objective (“CETO”). . . . ***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.***³¹

The Commission itself similarly found that “several market parameters are critically dependent on the load forecast being available to market participants and the IMM three months prior to the auction” and that it would “be disruptive to the market to change the forecast only one month before the auction.”³² It would be a blatant violation of the Commission’s obligations under the Administrative Procedure Act for the Commission to now reverse course and find that there is no reliance on the posted auction parameters.³³

Not surprisingly, the PJM Answer completely fails to address the record evidence demonstrating actual and substantial reliance on the posted planning parameters for the 2024/2025 BRA of exactly the sort that it and the Commission have previously

³¹ Answer of PJM Interconnection, L.L.C. to Protests and Comments at 33-34, Docket No. ER09-412-000 (filed Feb. 2, 2009) (emphasis added). See also *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at P 198 (2009) (“*PJM*”) (noting that PJM had asserted that its “posting of the fundamental auction parameters on February 1 is an important precondition for parties to make decisions regarding bilateral contracts, capacity imports or export, and the manner in which they participate in the Base Residual Auction”). While the PIO Answer suggests that “market participants’ high level of interest in knowing exact auction parameters reveals a desire to benefit from strategic offer behavior,” PIO Answer at 12, PJM’s statements make clear that the posting of auction parameters is designed specifically to permit market participants to make legitimate and prudent commercial decisions.

³² *PJM*, 126 FERC ¶ 61,275 at P 200. See also *Duquesne Light Co.*, 122 FERC ¶ 61,039 at P 92 (2008) (noting “the necessary reliance that market participants place on these published forecasts” and that “market participants will make business decisions and enter into binding contracts, including financial hedges and bilateral arrangements, based on these auction parameters”).

³³ See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (stating that an agency departing from its own precedent must “display awareness that it is changing position” and “show that there are good reasons for the new policy”); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) (explaining that “[i]t is textbook administrative law that an agency must ‘provide[] a reasoned explanation for departing from precedent or treating similar situations differently’” (citation omitted)).

recognized. In particular, unrebutted record evidence demonstrates that NRG Energy, Inc. (“NRG”) contacted PJM regarding the posted parameters for the Delmarva Power & Light South (“DPL-S”) LDA, and that, after PJM confirmed the accuracy of those parameters, NRG and its affiliates took a number of significant actions in direct reliance on those parameters.³⁴ Based on those parameters, NRG, like others, anticipated that the DPL-S LDA would clear at or near the maximum rate,³⁵ and made commercial decisions that cannot now be undone.³⁶ PJM’s assertion that “the clearing price depends not just on the demand that is represented by the Locational Deliverability Area Reliability Requirement, but also the supply (and associated offers) that participate in the auctions”³⁷ is simply a non-sequitur: the fact that the behavior of other suppliers cannot be predicted does not mean that PJM is free to tinker with whatever else it wants.

PJM’s attempt to downplay the importance of the posted auction parameters and its characterization of actions taken in reliance on those parameters as being undertaken at sellers’ “own risk,”³⁸ is, in fact, yet another example of the persistent bias in favor of

³⁴ See *generally* Protest and Request for Privileged Treatment, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the “NRG Protest”).

³⁵ See Protest of LS Power Development at 3-4, Docket Nos. EL23-19-000, *et al.* (filed Jan. 20, 2023) (discussing analysis by ESAI Energy). Remarkably, even in the face of evidence concerning NRG’s communications with PJM and published predictions regarding the DPL-S clearing price, PJM continues to characterize its filings as “rais[ing] a newly discovered issue . . .” PJM Answer at 6.

³⁶ The NRG Protest showed that customers also expected that the clearing price for DPL-S in the 2024/2025 BRA would be substantially higher than in the prior BRA. See NRG Protest at 18-19 (describing indicative bid from a customer). This indicates that buyers, as well as sellers, would have entered into commercial arrangements in reliance on the posted parameters and would have their expectations be disrupted by PJM’s proposal in the December 23 Filings.

³⁷ PJM Answer at 20-21.

³⁸ *Id.* at 14, 20.

load interests PJM denies having.³⁹ Nothing in the PJM Answer demonstrates why it would be just and reasonable to define the Locational Deliverability Area Reliability Requirement in a way that is divorced from PJM's underlying reliability modeling practices.⁴⁰ Moreover, and as Dr. Sotkiewicz explained, PJM's proposal creates uncertainty by allowing the Locational Deliverability Area Reliability Requirement to be subject to change in the auction itself, thereby providing little (if any) ability for market participants to make plans ahead of the auction.⁴¹ Thus, the Ohio FEA correctly expressed concern that:

Uncertainty in the single auction at issue here is problematic; creating the possibility of spreading the uncertainty in the future is a disservice to the entirety of the PJM wholesale electricity marketplace. What PJM posits as a narrowly constructed change to its tariff to correct a problem could be anything but.⁴²

In its answer, PJM also makes no effort to address this and similar concerns about uncertainty, including, in particular, concerns expressed by renewable developers that warned that acceptance of PJM's proposal would cause "investors [to] lose confidence in projected capacity market revenues and the integrity of PJM's capacity market more generally."⁴³

³⁹ See *id.* at 5-6.

⁴⁰ See Sotkiewicz Affidavit, ¶¶ 73-95.

⁴¹ See *id.*, ¶¶ 32-38.

⁴² Ohio FEA Comments at 2.

⁴³ Protest of Pine Gate Renewables, LLC at 10, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023). See also Protest and Comments of the American Clean Power Association, Solar Energy Industries Association, and Advanced Energy United at 3, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) ("By giving PJM the ability to reverse engineer the capacity auction to achieve PJM's own desired outcome, the Section 205 Filing, if accepted, would undermine confidence in PJM's capacity market."); Motion to Intervene and Protest of Leeward Renewable Energy, LLC and Leeward Renewable Energy Development, LLC at 2, Docket Nos. ER23-729-

C. PJM’s Claims that No Party Defends the Previously Posted Parameters Mischaracterizes the Legal Standard and Misrepresents the Evidentiary Record

According to PJM, “not a single protester attempts to justify that the previously posted Locational Deliverability Area Reliability Requirement for [DPL-S] is an accurate input that should be used for the 2024/2025 BRA.”⁴⁴ As an initial matter, this assertion mischaracterizes the applicable legal standard. EPSA and other protesters do not bear the burden of demonstrating that the Locational Deliverability Area Reliability Requirement that PJM calculated in accordance with the applicable tariff and manual provisions was “just and reasonable.” Rather, it is PJM, as the proponent of a rate change under Section 205 of the FPA, that bears the burden of demonstrating that the proposed change is just and reasonable,⁴⁵ and, as the party challenging the existing rate under Section 206 of the FPA, that bears the burden of demonstrating that the existing rate is unjust and unreasonable.⁴⁶

000, *et al.* (filed Jan. 20, 2023) (arguing that the December 23 Filings “would undermine confidence in wholesale markets, and would result in financial risk and harm to Leeward and other Market Participants”).

⁴⁴ PJM Answer at 2. See *id.* at 4 (alleging that protesters “bet all of their marbles on forcing the Commission to accept an inaccurate and overstated Locational Deliverability Area Reliability Requirement that they themselves do not defend”); *id.* at 7 (claiming that “no protester even attempted to defend DPL-S’ Locational Deliverability Area Reliability Requirement as the correct input”).

⁴⁵ See 16 U.S.C. § 824d(e) (2018). See also *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014) (stating that that the filer under Section 206 “bears the burden of demonstrating that . . . [the] tariff is unjust and unreasonable”); *Emera Me. v. FERC*, 854 F.3d 9, 24 (D.C. Cir. 2017) (stating that “[t]he proponent of a rate change under section 206 . . . bears ‘the burden of proving that the existing rate is *unlawful*’” (quoting *Alabama Power Co. v. FERC*, 993 F.2d at 1557, 1571 (D.C. Cir. 1993); emphasis in original)).

⁴⁶ See 16 U.S.C. § 824e(b) (2018). See also *ISO New England Inc.*, 166 FERC ¶ 61,060 at P 19 (2019) (stating that, “as the proponent of the 205 filing, [the filer] will bear the burden of proof”); *Indicated SPP Transmission Owners v. Southwest Power Pool, Inc.*, 165 FERC ¶ 61,005 at P 10 (2018) (finding that the proponent of a rate change under Section 205 of the FPA “has the burden of proof to demonstrate that the rate is just and reasonable, and must ensure that there is a sufficient evidentiary record for the Commission to make a reasoned decision”).

Equally importantly and troublingly, PJM’s assertion is simply untrue. EPSA and others did, in point of fact, “defend DPL-S’ Locational Deliverability Area Reliability Requirement as the correct input.”⁴⁷ EPSA, for instance, explained why PJM’s claims that this parameter was “too high” were unfounded.⁴⁸ EPSA’s witness, Dr. Sotkiewicz, described, in some detail, how the calculation of the posted Locational Deliverability Area Reliability Requirement for the DPL-S LDA was in perfect accord with PJM’s well-established modeling approach.⁴⁹ Dr. Sotkiewicz further stated the posted parameter “cannot be deemed too high”⁵⁰ Others similarly defended the posted parameter as the product of “PJM’s long-standing method of calculating [Locational Deliverability Area] Reliability Requirements”⁵¹

⁴⁷ PJM Answer at 7.

⁴⁸ EPSA Protest at 21-23.

⁴⁹ See Sotkiewicz Affidavit, ¶¶ 48-69, 73-95. PJM insists that it is appropriate to exclude Planned Generation Capacity Resources that do not participate in the BRA from the Locational Deliverability Area Reliability Requirement even if those resources are in service during the relevant Delivery Year. See PJM Answer at 20-21. It fails, however, to address Dr. Sotkiewicz’s explanation that PJM reflects existing resources in the Locational Deliverability Area Reliability Requirement, even if those resources are not subject to the must-offer obligation and do not offer into the BRA and there is no basis for treating Planned Generation Capacity Resources differently. See Sotkiewicz Affidavit, ¶¶ 54-56. Similarly, PJM fails to address Dr. Sotkiewicz’s observation that PJM’s proposed solution would not modify the Locational Deliverability Area Reliability Requirement in circumstances where the modeled Planned Generation Capacity Resources offer but do not clear in a BRA, but not when those resources do not offer in the BRA. See *id.*, ¶¶ 62-66.

⁵⁰ See also Sotkiewicz Affidavit, ¶ 97.

⁵¹ P3 Protest at 32. See also Comments of Constellation Energy Generation, LLC at 8, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (“[A]nalyzing the actual factors that give rise to the prices in the DPL-S zone . . . , such outcomes are not anomalous but are instead consistent with the market characteristics of this LDA.”).

D. PJM Erroneously Argues that Market Participants Should Not be Permitted to Resubmit Their Offers Into the 2024/2025 BRA

While urging the Commission to reject the December 23 Filings outright, EPSA further argued that, to the extent the Commission accepts either of those filings, it should also permit sellers to resubmit their offers into the 2024/2025 BRA.⁵² PJM and the IMM now claim that there is no need to permit sellers to resubmit their offers because resources can be expected to submit offers based on their marginal costs, and “any updates to the Locational Deliverability Area Reliability Requirement should [therefore] not impact a resource’s offer in the RPM Auctions.”⁵³

As explained in Section I.B above, however, market participants can be expected to, and did in fact, make decisions based on the posted parameters. Moreover, and as Dr. Sotkiewicz explained, various types of resources are not subject to the must-offer requirement and may simply not want to submit offers into the BRA at all based on the revised parameters and expected clearing prices.⁵⁴ In fact, while insisting that sellers should not be permitted to re-submit their offers, PJM acknowledges that “[a]llowing Capacity Market Sellers to adjust their offers based on an updated Locational Deliverability Area Reliability Requirement is also plainly unworkable because changed circumstances (such as project financing or permitting) may cause some Capacity Market Sellers that previously did not offer a resource to submit a Sell Offer, or vice versa.”⁵⁵ But this is precisely why it is way too late to change the Locational Deliverability Area

⁵² See EPSA Protest at 30-31.

⁵³ PJM Answer at 14. See also IMM Answer at 3-4 (“Market offers in a rerun auction would be expected to be the same.”).

⁵⁴ See Sotkiewicz Affidavit, ¶¶ 25, 27-29.

⁵⁵ PJM Answer at 14.

Reliability Requirement for the 2024/2025 BRA in the first instance. Even assuming *arguendo* that PJM has, since the close of the offer period for the 2024/2025 BRA, identified a legitimate flaw in the way it has been calculating this planning parameter since the dawn of RPM, it cannot be allowed to selectively reopen this one element of the auction without accounting for other changed circumstances.

II. CONCLUSION

Wherefore, EPSA respectfully requests that the Commission accept this answer, reject the December 23 Filings, and otherwise take the EPSA Protest and this answer under consideration in issuing an order on the December 23 Filings.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

By: /s/ David G. Tewksbury
David G. Tewksbury
Stephanie S. Lim
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, NW
Washington, DC 20001

Nancy Bagot
Senior Vice President
Sharon Royka Theodore
Vice President, Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, Suite 950
Washington, DC 20005

On behalf of the
Electric Power Supply Association

Dated: February 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically 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 9th day of February 2023.

/s/ Stephanie S. Lim

Stephanie S. Lim