UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

REQUEST FOR REHEARING

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the Electric Power Supply Association ("EPSA"),[3] the NRG Companies,[4] LS Power Development, LLC and Vistra Corp. (collectively, "Petitioners") respectfully request rehearing of the Commission's February 21, 2023, order in the above-captioned proceedings.[5] In allowing PJM Interconnection, L.L.C. ("PJM")[6] to change the rules for the Base Residual Auction ("BRA") for the 2024/2025 Delivery Year (the "2024/2025 BRA") after the offer window closed, the Commission violated the filed rate doctrine and the corollary prohibition against retroactive ratemaking. The

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1 16 U.S.C. § 825*l* (2018).

2 18 C.F.R. § 385.713 (2022).

3 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.

4 For purposes of this proceeding, the "NRG Companies" are: NRG Power Marketing LLC, Direct Energy Business Marketing, LLC and Midwest Generation, LLC.

5 *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109 (2023) (the "February 21 Order").

6 Capitalized terms used and not otherwise defined herein have the meaning given them in the PJM Open Access Transmission Tariff (the "Tariff").

Commission also failed to engage in reasoned decision-making by ignoring arguments and evidence that did not support its desired outcome and failing to reconcile its action with precedent.

At bottom, as dissenting Commissioner Danly observed, the February 21 Order represents "a misguided attempt to protect consumers . . . [that] will cause more harm to consumers than had the majority left the auction results in place."[7] The competitive wholesale markets historically fostered and promoted by the Commission provide enormous benefits to consumers,[8] but "those benefits become costs when the markets cease functioning because market participants – and investors – have lost confidence in them."[9] In accepting PJM's December 23, 2022 filing,[10] the Commission missed an opportunity to recommit itself to these markets and to protect consumers from the inefficiency and uncompetitive pricing that will follow inevitably from dysfunctional markets or from a slide back to the "bad old days . . . [when], [a]s the Supreme Court observed,

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[7] February 21 Order, 182 FERC ¶ 61,109, Dissenting Statement at P 4 (the "Danly Statement") (Danly, Comm'r, dissenting).

[8] *See, e.g.*, *Demand Response Comp. in Organized Wholesale Energy Mkts.*, Order No. 745, 134 FERC ¶ 61,187 at P 8 (2011) ("Effective wholesale competition protects customers by, among other things, providing more supply options, encouraging new entry and innovation, and spurring deployment of new technologies."), *on reh'g*, Order No. 745- A, 137 FERC ¶ 61,215 (2011); *Regional Transmission Orgs.*, Order No. 2000, 89 FERC ¶ 61,285, FERC Stats. & Regs. ¶ 31,089 at 30,993 (1999) ("Competition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service."), *on reh'g*, Order No. 2000-A, 90 FERC ¶ 61,201, FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001). *See also, e.g.*, PJM, *PJM Value Proposition* (stating that PJM's markets have produced annual savings of $3.2-4 billion), https://www.pjm.com/about-pjm/~/media/about-pjm/pjm-value-proposition.ashx.

[9] Danly Statement at P 4.

[10] 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 "December 23 Filing").

with blithe understatement, 'competition among utilities was not prevalent.'"[11]

The importance of a functional PJM capacity market has been underscored since the issuance of the February 21 Order by a PJM report warning of "increasing reliability risks" as resources retire faster than they are replaced[12] and emphasizing the need for "PJM markets [to] effectively correct imbalances . . . by incentivizing investment in new or expanded resources."[13] While the forum contemplated by the February 21 Order[14] and an expedited stakeholder process being initiated by PJM[15] based on that report may offer some hope of improvement, the biggest things the Commission could do to support the PJM capacity market and to ensure that it incentivizes needed investments would be to grant rehearing of the February 21 Order and to stop issuing orders like the February 21 Order that undermine confidence in the markets the Commission regulates. As it stands, however, the effectiveness of any new market mechanisms arising out of the expedited PJM stakeholder process or the Commission's forum will be undermined by the legitimate perception, engendered by the December 23 Filing and the February 21 Order, that PJM and the Commission are willing to "change the score after the game so that [their] favorite team wins."[16]

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[11] *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004) (quoting *New York v. FERC*, 535 U.S. 1, 5 (2002)).

[12] PJM, *Energy Transition in PJM: Resource Retirements, Replacements & Risks* at 1 (Feb. 24, 2023), https://www.pjm.com/-/media/library/reports-notices/special-reports/2023/energy-transition-in-pjm-resource-retirements-replacements-and-risks.ashx.

[13] *Id.* at 3.

[14] *See* February 21 Order, 182 FERC ¶ 61,109 at P 180.

[15] *See* Letter from Mark Takahashi to PJM Stakeholders (Feb. 24, 2023), https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20230224-board-letter-re-initiation-of-the-critical-issue-fast-path-process-to-address-resource-adequacy-issues.ashx.

[16] Danly Statement at P 33.

I. BACKGROUND

In the December 23 Filing, PJM proposed to modify the definition of the term "Locational Deliverability Area Reliability Requirement" to allow PJM to adjust this value during the auction process to exclude Planned Generation Capacity Resources that did not offer into the applicable RPM Auction.[17] Specifically, PJM proposed to modify this definition as follows:

> "Locational Deliverability Area Reliability Requirement" shall mean the projected internal capacity in the Locational Deliverability Area plus the Capacity Emergency Transfer Objective for the Delivery Year, as determined by the Office of the Interconnection in connection with preparation of the Regional Transmission Expansion Plan, less the minimum internal resources required for all FRR Entities in such Locational Deliverability Area [("LDA")]. Notwithstanding the foregoing, 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

[17] December 23 Filing, Transmittal Letter at 1. The December 23 Filing was submitted pursuant to Section 205 of the FPA, 16 U.S.C. § 824d (2018). In parallel with that filing, PJM also submitted a filing pursuant to Section 206 of the FPA, 16 U.S.C. § 824e (2018), in order "to provide the Commission with the ability to make modifications to PJM's proposed tariff remedy, if it so chooses . . . ." 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 Commission dismissed the FPA Section 206 filing as moot in light of its acceptance of the December 23 Filing. *See* February 21 Order, 182 FERC ¶ 61,109 at P 181.

> Year) for that LDA due to the cumulative addition of such Planned Generation Capacity Resources.[18]

In support of the proposed change, PJM stated that, in clearing the 2024/2025 BRA, it realized that "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 Locational Deliverability Area Reliability Requirement."[19] According to PJM, this meant that the previously posted Locational Deliverability Reliability Requirement for the Delmarva Power & Light South ("DPL-S") LDA "was overstated for the 2024/2025 BRA."[20] PJM stated that using the previously posted value would result in the clearing price:

> for the DPL-S LDA (and the revenues received by the Capacity Market Sellers in this small LDA) [being] 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 Locational Deliverability Area Reliability Requirement given that they did not offer into the BRA.[21]

Petitioners[22] and a broad cross section of stakeholders, including the Public

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18 December 23 Filing, Attachment A, Revisions to the PJM Open Access Transmission Tariff (Marked/Redline Format).

19 December 23 Filing, Transmittal Letter at 2.

20 *Id.*

21 *Id.*

22 *See* Protest of the Electric Power Supply Association, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "EPSA Protest"); Protest and Request for Privileged Treatment, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "NRG Protest"); Protest of LS Power Development, Docket Nos. EL23-19-000, *et al.* (filed Jan. 20, 2023) (the "LS Power Protest"); Protest of Vistra Corp., Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "Vistra Protest").

Utilities Commission of Ohio's Office of the Federal Energy Advocate,[23] renewables developers,[24] and others,[25] strongly opposed the December 23 Filing, arguing, among other things, that granting the requested relief would violate the filed rate doctrine and undermine confidence in PJM's capacity market and Commission-jurisdictional markets more broadly. The NRG Companies also provided an affidavit from NRG Energy, Inc.'s ("NRG's") Vice President of Trading, Joseph A. Holtman, demonstrating that NRG and its affiliates had made irrevocable economic decisions in reliance on the posted DPL-S Locational Deliverability Area Reliability Requirement and the market rules set forth in the Tariff.[26] Even supporters of the changes proposed in the December 23 Filing were compelled to admit that it "create[d] a highly concerning precedent . . . ."[27]

In the February 21 Order, the Commission accepted the December 23 Filing, finding that the "proposed Tariff revisions will help ensure a competitive outcome for capacity auctions by more closely aligning the [Locational Deliverability Area] Reliability

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[23] *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).

[24] *See, e.g.*, Protest and Comments of the American Clean Power Association, Solar Energy Industries Association, and Advanced Energy United, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "Clean Energy Associations Protest"); Protest of Pine Gate Renewables, LLC, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "Pine Gate Protest"); Motion to Intervene and Protest of Leeward Renewable Energy, LLC and Leeward Renewable Energy Development, LLC, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "Leeward Protest").

[25] *See, e.g.*, Protest of The PJM Power Providers Group, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (the "P3 Protest").

[26] *See* NRG Protest, Attachment A, Affidavit of Joseph A. Holtman (the "Holtman Affidavit").

[27] 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). *See also, e.g.*, Comments in Support of PJM's Proposal to Address the Locational Deliverability Area Reliability Requirement at 4, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023) (comments of the "Delmarva Zone Parties" acknowledging that the submittal of the December 23 Filing[] "occurred in the midst of an auction clearing, which is certainly not preferred").

Requirement with actual reliability needs."[28] The Commission found the filed rate doctrine inapplicable because, at the time PJM filed the December 23 Filing, "no capacity commitments had yet been secured, no transaction had yet been consummated, meaning that neither PJM nor any supplier had the attendant rights or obligations, no capacity had been delivered pursuant to such commitments, and no charges had been billed or collected."[29]

II. REQUEST FOR REHEARING

A. The February 21 Order Violates the Filed Rate Doctrine and the Prohibition Against Retroactive Ratemaking

While acknowledging that the auction rules are "the rate on file,"[30] the Commission erroneously concluded that PJM's changes to the DPL-S Locational Deliverability Area Reliability Requirement long after that value was finalized in accordance with those rules did not violate the filed rate doctrine or the corollary prohibition against retroactive ratemaking.[31] In truth, as Commissioner Danly put it, "[t]he filed rate violation in this case is straightforward":[32] under the filed rate doctrine and the prohibition against retroactive ratemaking, the Commission "has no power to alter a rate retroactively,"[33] and that is

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28 February 21 Order, 182 FERC ¶ 61,109 at P 149.

29 *Id.* at P 167.

30 *Id.* at P 165.

31 *See id.* at PP 163-73.

32 Danly Statement at P 5 (internal citation omitted).

33 *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) ("*Hall*"). *See also, e.g.*, *Oklahoma Gas & Elec. Co. v. FERC*, 11 F.4th 821, 829 (D.C. Cir. 2021) ("*OG&E*") (explaining the filed rate doctrine is "shorthand for the interconnected statutory requirements that bind regulated entities to charge only the rates filed with FERC and to change their rates only prospectively"); *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 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.*

exactly what the Commission did in the February 21 Order.

The relevant tariff language could not have been clearer, and the facts are no less clear-cut. Under the Tariff, PJM was required to calculate and post the Locational Deliverability Area Reliability Requirements prior to 2024/2025 BRA.[34] The Tariff further required that the VRR Curves incorporating this and other posted auction parameters "be used for such Base Residual Auction."[35] The Tariff, as in effect when the Locational Deliverability Area Reliability Requirements for the 2024/2025 BRA were calculated and posted and through the offer period, allowed for no after-the-fact adjustments to the Locational Deliverability Area Reliability Requirements used to clear the auction.[36]

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) (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"); *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).

[34] *See* Tariff, Attachment DD, § 5.10(vi)(B) (stating that "the Locational Deliverability Area Reliability Requirement for each Locational Deliverability Area for which a Variable Resource Requirement [("VRR")] Curve has been established for such Base Residual Auction . . . prior to the conduct of the Base Residual Auction for the first Delivery Year in which the new values will be applied"); *id.*, § 5.11(a) (providing that "PJM will post the following information for a Delivery Year prior to conducting the Base Residual Auction for such Delivery Year: . . . The Locational Deliverability Area Reliability Requirement and the Variable Resource Requirement Curve for each Locational Deliverability Area for which a separate Variable Resource Requirement Curve has been established for such Base Residual Auction").

[35] *Id.*, § 5.10(vi)(A).

[36] PJM argued that the Tariff "already requires PJM to adjust the Locational Deliverability Area Reliability Requirement after the bidding window closes (but before the conclusion of the auction) . . . 'to reflect Price Responsive Demand with a PRD Reservation Price equal to or less than the applicable Base Residual Auction clearing price.'" December 23 Filing, Transmittal Letter at 23-24 (quoting Tarff, Attachment DD, § 5.11(e)). The Commission wisely chose not to endorse this reasoning. As Petitioners previously explained, this argument is misleading in that the only

Despite the fact that these values were already final, PJM proposed, in the December 23 Filing, to revise the DPL-S Locational Deliverability Area Reliability Requirement, and the Commission, in the February 21 Order, accepted PJM's proposal. By allowing PJM to change a value fixed and finalized in the past, the Commission altered the filed rate retroactively.

It is no answer for the Commission to claim that the change to the DPL-S Locational Deliverability Area Reliability Requirement is not "genuinely retroactive."[37] As Commissioner Danly stated:

> [I]f an event has already happened, it is in the past. If it has yet to happen, it is in the future. The event in the PJM tariff that must happen "prior" to the auction—establishing the Local Deliverability Area Reliability Requirement—already happened, as did the running of the auction.[38]

The unsupported suggestion that there is some meaningful and relevant distinction between "'genuine' and 'disingenuous' retroactivity"[39] not only fails to rescue the Commission's legal position; it also fails to satisfy the requirements of reasoned decision-making inasmuch it is "illogical on its own terms,"[40] represents an unacknowledged and unexplained departure from Commission filed rate precedent,[41] and fails to grapple with

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adjustments made pursuant to cited tariff provision are for purposes of posting auction results. *See* EPSA Protest at 13-14; NRG Protest at 13 & n.44. *See also* EPSA Protest, Attachment A, Affidavit of Paul M. Sotkiewicz, Ph.D., ¶¶ 39-45 (the "Sotkiewicz Affidavit").

37 February 21 Order, 182 FERC ¶ 61,109 at P 169.

38 Danly Statement at P 15.

39 February 21 Order, 182 FERC ¶ 61,109 at P 169.

40 *GameFly, Inc. v. Postal Regul. Comm'n*, 704 F.3d 145, 148 (D.C. Cir. 2013) ("*GameFly*") (citation omitted).

41 *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*") (holding that an agency must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy" (emphasis in original)); *West Deptford Energy, LLC v. FERC*,

serious objections raised by Petitioners and other protestors[42] and dissenting Commissioner Danly.[43]

Rather than engage with the clear language of the Tariff and the facts before it, the Commission attempted to distort the facts in a way that, ultimately, only serves to highlight the frailty of its legal position. Responding to arguments that PJM's proposal would retroactively change the DPL-S Locational Deliverability Area Reliability Requirement, the Commission stated:

> Simply because one section of the Tariff requires PJM to take a particular action at one stage of the auction process, such as posting the [Locational Deliverability Area] Reliability Requirement by a particular date, does not preclude PJM from prospectively updating the manner in which that [Locational Deliverability Area] Reliability Requirement is incorporated into a later phase of the auction process pursuant to a separate section of the Tariff that requires PJM to consider the auction inputs and calculate a clearing result to minimize the cost of satisfying the reliability requirement.[44]

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766 F.3d 10, 20 (D.C. Cir. 2014) ("*West Deptford*") ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently,' and Commission cases are no exception . . . ." (internal citation omitted)).

[42] *See, e.g.*, *American Clean Power Ass'n v. FERC*, 54 F.4th 722, 728 (D.C. Cir. 2022) ("*ACPA*") (reversing order in which "FERC acted arbitrarily and capriciously by failing to meaningfully respond to Petitioner's arguments" below); *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2015) ("*NEPGA*") (same); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) ("It is well established that the Commission must 'respond meaningfully to the arguments raised before it.'" (quoting *Public Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005))).

[43] *See American Gas Ass'n v. FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010) ("*AGA*") ("[W]hile FERC is not required to agree with arguments raised by a dissenting Commissioner . . . , it must, at a minimum, acknowledge and consider them." (citing *Chamber of Commerce v. SEC*, 412 F.3d 133, 137-38 (D.C. Cir. 2005))). *See also, e.g.*, *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 639 (D.C. Cir. 2017) (finding error where a multi-member board "failed to respond to key points raised by the dissent"); *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C.Cir.1988) (stating the Commission "has no alternative but to confront the questions raised by the [commissioner's] dissent").

[44] February 21 Order, 182 FERC ¶ 61,109 at P 171 (internal citations omitted).

But this is a gross distortion of the facts. PJM did not change "the manner in which that [Locational Deliverability Area] Reliability Requirement [was] incorporated into a later phase of the auction process . . . ."[45] Rather, it changed – or, in the words of the February 21 Order, made an "adjustment" to[46] – the DPL-S Locational Deliverability Area Reliability Requirement itself and did so long after that value became final under the terms of the Tariff as then in effect. That PJM was changing this value, not merely the way this value is used, is clear from the tariff language pursuant to which it acted, which states that PJM may "exclude from the Locational Deliverability Area Reliability Requirement" certain resources' capacity.[47] It is also evident from the fact that this new language is included in the definition of the term "Locational Deliverability Area Reliability Requirement." When one accurately characterizes what occurred, the filed rate violation is both obvious and glaring: The Tariff required PJM to take a particular action at one stage of the auction process, namely, calculating and posting the Locational Deliverability Area Reliability Requirement by a particular date, and PJM changed that Locational Deliverability Area Reliability Requirement at a later stage of the auction process, even though the Tariff, as in effect when this value was calculated and posted, did not allow for any such changes.

Moreover, and as Petitioners previously explained,[48] PJM's proposal violates Section 5.10(a)(vi) of Attachment DD to the Tariff, which clearly states that PJM "shall

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45 *Id.*

46 *Id.* at P 157.

47 December 23 Filing, Attachment A, Revisions to the PJM Open Access Transmission Tariff, (Marked/Redline Format).

48 *See* EPSA Protest at 6-11; NRG Protest at 5-8.

determine the PJM Region Reliability Requirement and the Locational Deliverability Area Reliability Requirement for each Locational Deliverability Area . . . ***prior*** to the conduct of the Base Residual Auction . . . ."[49] Similarly, the Tariff also requires that "[t]he parameters of the [VRR] 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,"[50] and as Commissioner Danly pointed out, "[n]o one disputes that the Locational Deliverability Area Reliability Requirement 'is an anchor point of the [VRR] Curve.'"[51] Not only did the Commission completely fail to address Petitioners' and Commissioner Danly's arguments on this point,[52] but what little reasoning it offered is completely illogical.[53] The Commission does not even attempt to reconcile its view that the posted auction parameters are separate from the values that PJM must actually apply in clearing the auction with the actual Tariff language, which makes clear that the Locational Deliverability Area Reliability Requirement must be determined ***prior*** to the conduct of the BRA, and makes clear the resulting VRR Curves "will be used for such Base Residual Auction."[54] And, to be clear, "determine" is commonly understood to mean "to fix conclusively or authoritatively,"[55] as distinct from "make a guess and change it later if you

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49 Tariff, Attachment DD, § 5.10(a)(vi)(B) (emphases added).

50 *Id.*, § 5.10(a)(vi)(A).

51 Danly Statement at P 6 (footnote omitted).

52 *See, e.g.*, *ACPA,* 54 F.4th at 728; *NEPGA*, 881 F.3d at 211; *TransCanada*, 811 F.3d at 12.

53 *See, e.g., Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) ("*Baltimore Gas*") (agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made" (citations omitted)).

54 Tariff, Attachment DD, § 5.10(a)(vi)(A).

55 *Merriam-Webster Dictionary* (definition of "determine"), https://www.merriam-webster.com/dictionary/determine.

feel like it," as the Commission seems to suggest.

It is also well established that the filed rate doctrine is not limited to charges.[56] Indeed, the February 21 Order acknowledged that "for the purposes of the filed rate doctrine, the rate on file with the Commission is the BRA procedures."[57] Notwithstanding this acknowledgement, the Commission then turned around and claimed that "a change to those procedures is not retroactive for the purposes of the filed rate doctrine if the capacity supply obligations and the corresponding rights and obligations—including the right to a particular capacity price—have not yet actually been awarded."[58] These two statements are inherently contradictory, and the February 21 Order failed to explain why, if the filed rate sets forth the procedures governing the BRA, there is no filed rate violation until such time as there is an actual capacity award. The best the Commission can offer is that the auction rules "exist[] 'to secure commitments of Capacity Resources' and the price that suppliers will receive in exchange . . . ."[59] That is akin to claiming that there is nothing retroactive about changing election eligibility rules, after voting has concluded, to exclude the votes of all left-handed individuals, on the theory that election rules exist for the purpose of determining who won the vote and the winner has not yet been declared.

To be clear, it makes no difference that PJM's retroactive change to the DPL-S Locational Deliverability Area Reliability Requirement for the 2024/2025 BRA was

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56 *See, e.g., American Tel. & Tel. Co. v. Central Off. Tel., Inc.*, 524 U.S. 214, 223 (1998) (finding the filed rate doctrine to apply in a case that "'does not involve rates or ratesetting'"); *OG&E*, 11 F.4th at 830 (stating that "[n]on-rate terms within the tariff may not be changed retroactively"); *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 668 (7th Cir. 2005) (explaining that the filed rate doctrine "also applies to non-rate provisions of a tariff").

57 February 21 Order, 182 FERC ¶ 61,109 at P 165 (footnote omitted).

58 *Id.* at P 167.

59 *Id.*

implemented through prospective application of the tariff revisions proposed in the December 23 Filing. That does not make the change "prospective in nature" or mean it is not "genuinely retroactive."[60] To be sure, for future RPM Auctions, after the 2024/2025 BRA, the new provisions will provide notice of potential retroactive adjustments to the Locational Deliverability Area Reliability Requirement, and those adjustments will thereby qualify for the "notice" exception to the filed rate doctrine and the prohibition against retroactive ratemaking.[61] But there can be no colorable claim that market participants had any such notice, much less that the adjustment was "foreordained,"[62] with respect to the Locational Deliverability Area Reliability Requirements for the 2024/2025 BRA.

Tellingly, nowhere in the February 21 Order does the Commission claim this change is eligible for the "notice" exception or allege that market participants had agreed to the retroactive change.[63] By its silence on these points, the Commission implicitly conceded that, as Commissioner Danly stated, neither of the two judicially recognized "exception[s] to the filed rate doctrine and rule against retroactive ratemaking applies . . . ."[64] With no judicially recognized exception available to it, the Commission

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60 *Id.* at P 169.

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

62 *Id.*

63 As Commissioner Danly noted, any such claim would have been unsupportable. *See* Danly Statement at P 7 ("There is nothing in the PJM tariff providing notice that th[e] provision [relating to the calculation and posting of the Locational Deliverability Area Reliability Requirement] is tentative or subject to later adjustment . . . ." (internal citation omitted)).

64 *Id.* at n.18. The courts have recognized two exceptions pursuant to "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, or when they have agreed to make a

made one up. Under this newly concocted exception, the filed rate doctrine and the prohibition against retroactive ratemaking are inapplicable because, at the time PJM submitted the December 23 Filing, "no capacity commitments had yet been secured, no transaction had yet been consummated, meaning that neither PJM nor any supplier had the attendant rights or obligations, no capacity had been delivered pursuant to such commitments, and no charges had been billed or collected."[65] But this purported exception finds no support in the extensive body of filed rate doctrine precedent or the Tariff.

As Commissioner Danly noted, the Commission "cites a lot of cases on various points related to the filed rate doctrine, and not one of them supports its new interpretation that filed auction rules can be freely changed up until contracts 'have actually been awarded.'"[66] In particular, the February 21 Order cited – or, to be more precise, miscited – various cases for the proposition that the courts "have held that changes to a rate are impermissibly retroactive ***only*** where regulated entities or customers have already transacted pursuant to the rate . . . ."[67] But not a single one of the cases cited actually supports the proposition for which it is cited: namely, that these are the ***only***

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rate effective retroactively." *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 notice exception, in turn, has been construed as applying in just two circumstances: (1) "when a tariff has a formula for calculating a rate, which clearly states that charges will derive from application of the formula"; and (2) "when a court invalidates a filed rate as unlawful, requiring the Commission to consider making retroactive changes to the rate." P3 Protest, Attachment A, Affidavit of the Hon. Joseph T. Kelliher on behalf of The PJM Power Providers Group, ¶¶ 13-15 (the "Kelliher Affidavit"). *See also OG&E*, 11 F.4th at 830-31.

65 February 21 Order, 182 FERC ¶ 61,109 at P 167.

66 Danly Statement at P 13.

67 February 21 Order, 182 FERC ¶ 61,109 at P 166 (emphasis added). *See also id.* at n.449 (citing cases).

circumstances in which after-the-fact rate changes are impermissibly retroactive.[68]

It is true enough that the fact patterns presented in the cases cited in the February 21 Order involved entities that had "already transacted pursuant to the rate . . . ."[69] But the holdings in these cases, as well as other filed rate doctrine precedent, were not limited to their facts in any way that would justify the Commission's proposed exception to the filed rate doctrine and the prohibition against retroactive ratemaking. To the contrary, those cases articulated a clear rule that applies equally regardless of whether the entities involved have already transacted or not. The *ODEC* court, for instance, made crystal clear that "[t]he filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations."[70] It rejected the proposed rate change at issue in that case on the grounds that it would have done exactly what the February 21 Order has allowed PJM to do here: "retroactively rewrite the terms of the filed rate."[71] And, as any first-year law student knows, absent language expressly limiting a decision to the particular facts presented, "[a] holding . . . can extend through its logic beyond the specific facts of [a] particular case."[72]

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68 *Id.* at P 166 (emphasis added).

69 *Id.* (emphasis added). *See also id.* at n.449 (citing cases).

70 *ODEC*, 892 F.3d at 1230.

71 *Id.* at 1232. *See also, e.g.*, *Hall*, 453 U.S. at 578 (holding that under the filed rate doctrine, the Commission "has no power to alter a rate retroactively"); *Associated Gas Distribs. v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (holding that "a regulated entity may not charge, or be forced by the Commission to charge, a rate different from the one on file with the Commission for a particular good or service").

72 *Los Angeles Cnty., Cal. v. Humphries*, 562 U.S. 29, 38 (2010) ("*Humphries*"). *See also Smith v. People of the State of Cal.*, 361 U.S. 147, 161-62 (1959) ("I am no friend of deciding a

Rather than responding to Commissioner Danly's serious and well-reasoned objections to the majority's newly imagined exception to the filed rate doctrine and the prohibition against retroactive ratemaking, as reasoned decision-making required,[73] the Commission attempted to shift the burden onto Commissioner Danly and protestors. Specifically, the Commission attempted to justify this purported exception on the grounds that "[p]rotestors point to no precedent in which a change to a rate or non-rate term has been determined to be retroactive before a transaction has been made pursuant to it."[74] This, however, is just another dodge that fails to engage meaningfully with the objections to the Commission's approach. The Commission is the one positing a new exception to the filed rate doctrine, and, as such, the Commission is the one that must reconcile that new exception with over a century's worth of precedent.[75] The onus is not on Commissioner Danly, Petitioners or any other party to find precedent expressly rejecting an exception that the Commission only just invented.

Aside from the Commission's misapprehension as to the respective burdens here, its assertion has the problem of being factually incorrect. The Commission itself has, in fact, found proposed deviations from filed rates "to be retroactive before a transaction has been made pursuant to it,"[76] and, indeed, consistent with the fact that the filed rate

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case beyond what the immediate controversy requires . . . . On the other hand, a case before this Court is not just a case. Inevitably its disposition carries implications and gives directions beyond its particular facts." (Frankfurter, J., concurring)).

[73] *See, e.g.*, *AGA*, 593 F.3d at 19-21.

[74] February 21 Order, 182 FERC ¶ 61,109 at P 166.

[75] *See Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("*Maxwell*") (articulating what has come to be known as the filed rate doctrine). *See also* Danly Statement at P 2 (referring to "upwards of 100 years of court precedent" (quoting Kelliher Affidavit, ¶ 46)).

[76] February 21 Order, 182 FERC ¶ 61,109 at P 166.

doctrine does not just apply to charges, in the absence of any "transaction"[77] at all. In denying waivers of reporting deadlines in two pipelines' tariffs, for example, the Commission found the requested relief to be "retroactive in nature and thus prohibited by the filed rate doctrine."[78] Similarly, the Commission denied waiver on the same grounds of a deadline in a transmission provider's generator interconnection procedures, where no relevant transaction had been agreed or consummated.[79] Here, again, the Commission has failed to satisfy the requirements of reasoned decision-making by failing to acknowledge or justify the departure from its own precedent.[80]

B. The Commission Failed to Properly Weigh the Costs and Benefits of Permitting PJM's Proposal to Have Retroactive Effect to the 2024/2025 BRA

The February 21 Order found that "the benefits of accepting the proposed Tariff revisions effective December 24, 2022, as requested, outweigh any reliance or expectation as to the [Locational Deliverability Area] Reliability Requirement posted in August 2022."[81] As an initial matter, the Commission's assessment of the relative benefits and costs of applying PJM's new rule with retroactive effect is entirely irrelevant, because "the filed rate doctrine and the rule against retroactive ratemaking leave the Commission *no discretion* to waive the operation of a filed rate or to retroactively change or adjust a

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77 *Id.*

78 *TransCameron Pipeline, LLC*, 180 FERC ¶ 61,011 at P 5 (2022) ("*TransCameron*"). *See also Rover Pipeline LLC*, 180 FERC ¶ 61,033 at P 5 (2022) (same).

79 *See Salt Creek Solar, LLC*, 180 FERC ¶ 61,116 at P 38 (2022) ("*Salt Creek*") (finding the requested relief to be "retroactive in nature and . . . prohibited by the filed rate doctrine"). In particular, the parties had not yet entered into any generator interconnection agreement. While the parties had entered into an interconnection study agreement, such an agreement does not establish the rates, terms or conditions of any transaction for a Commission-jurisdictional service.

80 *See, e.g.*, *Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

81 February 21 Order, 182 FERC ¶ 61,109 at P 173.

rate for good cause or for any other equitable considerations."[82] As has been the case since the Supreme Court first articulated the filed rate doctrine over a century ago, this "undeniably strict" rule "may work hardship"[83] and have "harsh effects"[84] in some circumstances. Nonetheless, it remains the rule and the Commission is not at liberty to evade or ignore this rule, no matter how heartfelt its belief that the resulting clearing prices would be "unnecessarily high."[85]

Even assuming *arguendo* that the filed rate doctrine did not tie the Commission's hands and that it was free to engage in a balancing of the equities, however, there is no evidence that the Commission actually "weigh[ed] the totality of the evidence before [it]"[86] in any meaningful sense. Rather, the February 21 Order reveals that the Commission only considered evidence on one side of the scale, fixating on the possibility that, without the adjustment proposed by PJM, customers would be "required to pay four times more for capacity under the existing Tariff than under the proposed revisions"[87] and paying no mind to countervailing considerations.

Despite paying lip service to "settled expectations concerns,"[88] it is plain that the Commission did not, in fact recognize, much less accord any discernable weight to, the serious harm of allowing PJM's after-the-fact change to the DPL-S Locational

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82 Danly Statement at P 5 (quoting *ODEC*, 892 F.3d at 1230 (emphasis in original)). *See also, e.g.*, *OG&E*, 11 F.4th at 825-26 ("Once a tariff is filed, the Commission has no statutory authority to provide equitable exceptions or retroactive modifications to the tariff.").

83 *Maxwell*, 237 U.S. at 97.

84 *Maislin Inds., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990).

85 February 21 Order, 182 FERC ¶ 61,109 at P 178.

86 *Id.* at P 179.

87 *Id.* at P 178 (footnote omitted).

88 *Id.* at P 177.

Deliverability Area Reliability Requirement. First, rather than engage with the evidence concerning concrete and substantial reliance on the posted Locational Deliverability Area Reliability Requirement, the Commission simply declared that it was "not persuaded that market participants' purported reliance on a single input, with no knowledge of the final capacity price, in making commercial transactions results in a detrimental reliance concern."[89] Indeed, nowhere in the February 21 Order does the Commission engage with the evidence offered by the NRG Companies concerning their reasonable expectations about the clearing price based on the posted value and the market rules then in effect and the important economic decisions made on the basis of those expectations.[90] Nor does the Commission consider evidence showing that ESAI Power, a market research and consulting firm, had similarly predicted, in a published report, that the auction price would reach the cap.[91] Moreover, Petitioners and others also submitted evidence showing that PJM's own analysis of the prior 2023/2024 BRA demonstrated that a clearing price at the market cap was entirely predictable given anticipated conditions.[92] The Commission thus failed to engage in reasoned decision-making, because its suggestion that market participants would not have relied on the posted Locational Deliverability Area Reliability Requirement, reflected a "clipped view of the record . . . ."[93]

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89 *Id.*

90 *See* Holtman Affidavit, ¶¶ 15-27.

91 *See* LS Power Protest at 3-4 & nn.12-13.

92 *See* Sotkiewicz Affidavit, ¶¶ 48, 104-108; Holtman Affidavit, ¶¶ 15-19; P3 Protest, Affidavit of Roy J. Shanker Ph.D. on behalf of The PJM Power Providers Group, ¶ 39; 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).

93 *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) ("*Lakeland*"). *See also Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("*Genuine Parts*") (making clear that "an agency cannot ignore evidence that undercuts its judgment . . . [or] minimize such

Second, in finding that the benefits of PJM's proposal outweigh any "detrimental reliance concern,"[94] the Commission also failed to consider the fact that NRG contacted PJM regarding the posted DPL-S Locational Deliverability Area Reliability Requirement, and PJM expressly confirmed the accuracy of the posted value.[95] The Commission now attempts to spin this issue as a matter of PJM "having provided NRG a different explanation for the increase in [the Locational Deliverability] Area Reliability Requirement," and brushes it off as "not relevant to the question of whether PJM's instant proposal is just and reasonable."[96] But this completely misses the point. The issue is not whether PJM's explanations were consistent. It is that PJM effectively induced to NRG to detrimentally rely on the posted parameters and then changed them after NRG had relied on them. The Commission's failure to consider this factor, when weighing the "disruption to settled expectations" in this case,[97] "entirely failed to consider an important aspect of the problem"[98] and thus failed to satisfy the requirements of reasoned decision-making.

Third, and perhaps most importantly, the Commission's alleged "weighing [of] the

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evidence without adequate explanation"); *Tenneco Gas v. FERC*, 969 F2d 1187, 1214 (D.C. Cir. 1992) ("*Tenneco*") (finding that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence"); *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB*, 802 F.2d 969, 975 (7th Cir. 1986) ("*International Union*") (agency may not "confine[] its attention to evidence that support[s] its conclusion and . . . ignore[] any contrary evidence").

94 February 21 Order, 182 FERC ¶ 61,109 at P 177.

95 *See* Holtman Affidavit, ¶ 16 & Exhibit C.

96 February 21 Order, 182 FERC ¶ 61,109 at P 153.

97 *Id.* at P 178.

98 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

totality of the evidence"[99] failed to account for the "untold economic harm [from] undermining all FERC-jurisdictional markets," much less to weigh this harm against any benefit from avoiding "a high clearing price in one zone, in one auction."[100] As the Commission itself has previously recognized, "[c]hanging the rules governing an already-commenced auction is a significant step that affects both the outcome of that particular auction as well as parties' confidence in the rules governing future proceedings," particularly when "PJM proposed the [change] in order to avoid the outcome that the already-commenced auction would have produced."[101] This concern is even more acute here, because the ultimate purpose of a capacity market is "to produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates."[102] Petitioners and others warned of the profound harm to the PJM capacity market, in particular, and Commission-jurisdictional markets, in general, of allowing PJM's after-the-fact changes to the rules for the 2024/2025 BRA.[103] Ultimately, as Commissioner Danly astutely noted, the February 21 Order casts doubt on the finality of any rate that is not numerically fixed, including not only market rules but also traditional formula rates, because the message is that "any part of the formula apparently can be deemed an 'input' subject to retroactive revision."[104]

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99 February 21 Order, 182 FERC ¶ 61,109 at P 178.

100 Danly Statement at P 27.

101 *PJM Interconnection, L.L.C.*, 166 FERC ¶ 61,072 at P 33 (2019). *Cf. ISO New England Inc.*, 132 FERC ¶ 61,136 at P 29 (2010) (rejecting proposed auction rule changes proposed in advance of an auction because market participants "had a reasonable expectation that the current [market] settlement rules would remain in effect for the upcoming . . . auction").

102 *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21 (2018).

103 *See, e.g.*, EPSA Protest at 28; NRG Protest at 21; Holtman Affidavit, ¶¶ 32-34; Vistra Protest at 1-4; P3 Protest at 15; Clean Energy Associations Protest at 3-4; Pine Gate Protest at 4.

104 Danly Statement at P 3.

In the February 21 Order, the Commission failed to fulfill its obligations under the Administrative Procedure Act (the "APA")[105] to substantively address the serious concerns of Petitioners[106] and Commissioner Danly,[107] as well as the supporting evidence provided by Petitioners and others,[108] in its alleged weighing of the record. In fact, there is no sign in the February 21 Order that the Commission gave any thought at all to the long-term ramifications of its action. It is thus hardly surprising that the Commission would conclude that "the balance of the interests here weighs heavily in favor of accepting PJM's proposal effective December 24, 2022,"[109] when it completely ignored all of the factors on the other side of the scale. This utterly inadequate weighing of the supposed costs and benefits does not even come close to satisfying the demands of the APA.[110]

C. The Commission Erred in Finding PJM's December 23 Filing to be Just and Reasonable

Even as applied prospectively to future RPM Auctions not yet commenced, PJM's proposal was not shown to be just and reasonable and the Commission erred in concluding otherwise.

1. The Post-Auction Adjustments Authorized by the Tariff Revisions Are Fundamentally at Odds with the Modeling Used to Set the Reliability Requirements

Under the tariff revisions accepted in the February 21 Order, PJM will exclude

105 5 U.S.C. §§ 551-559 (2018).

106 *See, e.g.*, *ACPA,* 54 F.4th at 728.

107 *See, e.g.*, *id*.; *AGA*, 593 F.3d at 20.

108 *See, e.g.*, *Genuine Parts*, 890 F.3d at 312.

109 February 21 Order, 182 FERC ¶ 61,109 at P 177.

110 *See State Farm*, 463 U.S. at 43 (agency rule is arbitrary and capricious if agency "entirely failed to consider an important aspect of the problem").

planned resources that do not submit offers into the BRA from the Locational Deliverability Area Reliability Requirement if including them would increase the Locational Deliverability Area Reliability Requirement by more than one percent. As an initial matter, each BRA is ordinarily held three years in advance of the applicable Delivery Year, meaning that PJM has to rely on forecasted data to conduct each BRA, where such forecasts involve a multitude of variables other than the amount of planned resources affecting the Locational Deliverability Area Reliability Requirement.[111] Such forecasts are, by their nature, necessarily imprecise,[112] but neither the December 23 Filing nor the February 21 Order explained why it is necessary or appropriate for PJM to modify just one forecasted variable – *i.e.*, planned resources – in the course of conducting an auction and then to make modifications only in one direction.[113]

Moreover, and as EPSA's expert witness, Paul M. Sotkiewicz, Ph.D., explained, PJM's proposed adjustments are fundamentally at odds with the way PJM calculates the Local Deliverability Area Reliability Requirement.[114] As indicated in the February 21 Order, the Locational Deliverability Area Reliability Requirement is modeled on the basis of projected capacity within the applicable LDA, where such projected capacity includes existing resources and any planned resources that have executed Interconnection

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111 *See, e.g.*, Tariff, Attachment DD, § 5.10 (describing various factors that PJM must consider in establishing the VRR Curves); *id.*, § 5.11 (describing information that PJM is required to post in advance of each BRA).

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

113 *See, e.g.*, EPSA Protest at 18; P3 Protest at 32-34.

114 *See* Sotkiewicz Affidavit, ¶¶ 46-72.

Service Agreements ("ISAs") with a commercial operation date on or prior to the start of the relevant Delivery Year.[115] Notably, for purposes of this modeling exercise, a planned resource will be included as long as it is expected to be present in the LDA during the Delivery Year (based on its having an executed ISA), regardless of whether it is required or expected to participate in the applicable RPM Auction.[116] By contrast, the adjustment to the Locational Deliverability Area Reliability Requirement is based solely on participation in the RPM Auction, regardless of whether the planned resource is expected to be present in the LDA during the Delivery Year. On its face, authorizing such an exercise in "subtracting apples from oranges" does not satisfy the requirements of reasoned decision-making.[117]

Dr. Sotkiewicz described a number of serious problems that flow from PJM's making an apple-based adjustment to an orange-based auction parameter. PJM will only exclude planned resources that do not submit offers into the RPM Auctions from the Locational Deliverability Area Reliability Requirement, while existing resources that do not submit offers would continue to be included.[118] In so doing, PJM ignores the fact that intermittent resources are not required to participate in the Reliability Pricing Model ("RPM") market and have increasingly chosen not to submit offers into the RPM

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115 *See* February 21 Order, 182 FERC ¶ 61,109 at P 6.

116 *See* Sotkiewicz Affidavit, ¶ 50.

117 *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998) ("*MCI*"). *See also id.* ("If the Commission simply subtracted one quantity from another, logically independent quantity, its action was unreasoned.").

118 *See* Sotkiewicz Affidavit, ¶¶ 54-56.

Auctions.[119] That does not mean, however, that these resources will not actually be in operation by the start of the relevant Delivery Year[120] and thereby be functionally equivalent to an existing resource that either did not participate or did not clear in the RPM Auction. Similarly, these adjustments would arbitrarily exclude from a Locational Deliverability Area Reliability Requirement the capacity of planned resources that did not submit offers into the RPM Auctions but continue to include the capacity of planned resources whose offers did not clear, even though they are functionally the same "from a reliability perspective . . . ."[121]

Neither PJM nor any other party disputed the accuracy of Dr. Sotkiewicz's testimony or the other record evidence demonstrating that offers are not necessarily indicative of whether a planned resource will be in operation by a particular Delivery Year. Rather than grapple with this evidence, the Commission justified its acceptance of the December 23 Order with a series of illogical and internally inconsistent claims to the effect that:

- Planned resources that do not offer and those that submit offers but do not clear are not "functionally similar" because "[c]apacity offers signal that the resource intends to be available to serve as capacity in the relevant delivery year at a price equal to or above their capacity supply offer, even if they do not actually clear in the BRA," and because "the Tariff defines [Locational Deliverability Area] Reliability Requirement as projected internal capacity plus CETO, and these resources will serve as capacity if they clear in the

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119 *See id.*, ¶¶ 57-60. *See also* Holtman Affidavit, ¶ 30 ("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.").

120 *See* Sotkiewicz Affidavit, ¶ 60; Holtman Affidavit, ¶ 30.

121 Sotkiewicz Affidavit, ¶ 66.

BRA."[122]

- There is no need to account for existing resources that do not submit offers, because "planned and existing resources are not similarly situated with respect to determining reliability needs in a given delivery year because planned resources have not yet achieved commercial operation" and such planned resources face risks "that make it more likely that they will be unavailable to provide capacity in some or all of the relevant delivery year, in contrast to existing resources."[123]

- Even though some of the planned resources that do not submit offers could become operational by the time of the relevant Delivery Year, it is appropriate to exclude them from the Locational Deliverability Area Reliability Requirement because "these resources will not have capacity commitments" and "even if such resources were in service by the start of the delivery year, there is no need to model the increased reliability risk since load is not depending on them as capacity resources."[124]

Taken individually, each of these claims is illogical. For example, it defies reason to acknowledge that a capacity offer signals an intent to provide capacity "at a price equal to or above [the] capacity supply offer" and then to assert that the intent to provide capacity remains when the offer "do[es] not actually clear in the BRA,"[125] because, by definition, the failure to clear means the clearing price was below – not "equal to or above"[126] – the offer price. On top of being individually illogical, these claims, when read together, are so hopelessly inconsistent with each other that one can only guess that, in its eagerness to accept the December 23 Filing, the Commission could not be bothered to keep its story straight.

It is hard to understand how the Commission can assert, in one breath, that only

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122 February 21 Order, 182 FERC ¶ 61,109 at P 151.

123 *Id.* at P 154.

124 *Id.* at P 152.

125 *Id.* at P 151.

126 *Id.*

planned resources that submitted offers should be included in the Locational Deliverability Area Reliability Requirement, on the theory that their offers signal their "inten[t] to be available to serve as capacity in the relevant delivery year,"[127] and then claim, in the next breath, that existing resources should be included even when they did not offer.[128] Under the Commission's logic, an existing resource's decision not to offer signals an intent ***not*** to be available to serve as capacity in the relevant delivery year,[129] and such a resource's capacity should, under the Commission's logic, be excluded from the Locational Deliverability Area Reliability Requirement, along with that of planned resources that did not offer.

In the same vein, the Commission also claimed that planned resources are unlike existing resources because planned resources have not achieved commercial operation and thus are likely to "be unavailable to provide capacity in some or all of the relevant delivery year, in contrast to existing resources."[130] But this focus on commercial operation is a "complete non sequitur"[131] because, under the Commission's logic, any resource, whether planned or existing, that does not submit an offer has indicated that it is not available to provide capacity.[132]

While acknowledging that planned resources that did not submit offers may in fact

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127 *Id.*

128 *See id.* at P 154.

129 *Id.* at P 151.

130 *See id.* at P 154.

131 *Tennessee Gas Pipeline Co. v. FERC*, 824 F.2d 78, 84 (D.C. Cir. 1987) ("*Tennessee Gas*").

132 *See* February 21 Order, 182 FERC ¶ 61,109 at P 151.

achieve commercial operation by the time of the relevant Delivery Year,[133] the Commission claimed that these resources should not be included in the Locational Deliverability Area Reliability Requirement because "these resources will not have capacity commitments" and "load is not depending on them as capacity resources."[134] But this completely overlooks the fact that, just a few sentences earlier, the Commission found the resource's decision whether to offer to be the determinative factor, regardless of whether the resource assumes a capacity commitment.[135] At the same time, the Commission completely failed to address the fact that a planned resource that does not submit an offer and is now operational is indistinguishable from an existing resource that did not submit an offer. In either case, these resources will be physically present but will lack capacity commitments. Nonetheless, under the tariff revisions accepted in the February 21 Order, the existing resource would be deemed to impact the Locational Deliverability Area Reliability Requirement, but the planned resource that is now operational would not.[136]

As is clear from the foregoing, the February 21 Order is "internally inconsistent"[137]

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133 *See id.* at P 154.

134 *Id.* at P 152.

135 *See id.* at P 151.

136 *See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("*Allentown*") (the process by which an agency arrives at a particular "result must be logical and rational"); *Baltimore Gas*, 462 U.S. at 105 (agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made" (citations omitted)).

137 *Business Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011) ("*Business Roundtable*"). *See also, e.g., Air Transp. Ass'n of Am. v. Dep't of Transp.*, 119 F.3d 38, 43 (D.C. Cir. 1997) (vacating decision that was "internally inconsistent"); *Air Line Pilots Ass'n v. FAA*, 3 F.3d 449, 453 (D.C. Cir. 1993) (finding agency decision to be "internally inconsistent and therefore unreasonable and impermissible under *Chevron*").

and "illogical on its own terms . . . ."[138] Equally important, even if these contortions could justify the Commission's desired result (and they do not), the Commission has still failed to address the fundamental point raised by Dr. Sotkiewicz: that PJM's modeling calculates the Locational Deliverability Area Reliability Requirement based solely on whether resources are anticipated to be physically present, without consideration of RPM participation or commitments.[139] As Dr. Sotkiewicz stated, PJM's proposal turns this modeling practice on its head by adjusting the Locational Deliverability Area Reliability Requirement based solely on the offers of planned resources, thereby assuming that "resources that do not offer in the BRA will not be physically available," even though "resources without must-offer requirements increasingly choose to not offer into the BRAs but are physically available."[140] The Commission utterly failed to address these arguments[141] and also failed to identify any record evidence supporting PJM's assumption

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138 *GameFly*, 704 F.3d at 148 (citation omitted). *See also, e.g., State Farm*, 463 U.S. at 43 (agency decision cannot be "so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); *Chamber of Commerce of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360, 382 (5th Cir. 2018) ("Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action."); *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 566 (D.C. Cir. 1997) (finding "seemingly illogical decision" to be arbitrary and capricious).

139 *See* Sotkiewicz Affidavit, ¶¶ 48-49.

140 *Id.*, ¶ 12. *See also* P3 Protest at 33-34 (explaining that "planned resources and existing intermittent resources, storage resources, energy efficiency resources, and demand response resources all have the free option under the Tariff not to participate in a BRA" and "there are many reasons why such resources would exercise that option," and that it is therefore a "forecasting error" that "is the real issue").

141 *See, e.g., PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("*PPL Wallingford*") (requiring the Commission to "respond meaningfully" to concerns raised by parties); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("*NorAm*") (reversing order in which the Commission "not only failed to provide an adequate response to [petitioner's] argument, it failed to take seriously its responsibility to respond at all"); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) (stating that an agency must "engage the arguments raised before it – that it conduct a process of *reasoned* decisionmaking" (emphasis in original)).

that planned resources that do not submit offers will not be operational during the relevant Delivery Year.[142]

2. The Commission Arbitrarily and Capriciously Ignored the Impact of PJM's Proposal on Bilateral Contracting and Hedging

The Commission also failed to address Petitioners' concerns that it is not just and reasonable to adopt a Locational Deliverability Area Reliability Requirement that is subject to change well after it has been posted.[143] As Dr. Sotkiewicz explained, the RPM rules provide for posting of the auction parameters in order to allow market participants to make commercial decisions, such as whether to enter into bilateral contracts or submit offers into the BRAs and how any such offers should be structured.[144] By contrast, a rule allowing PJM to modify the Locational Deliverability Area Reliability Requirement during the running of the BRA is bad market design because it "introduces unnecessary uncertainty for all market participants, but in an asymmetric way" and "makes hedging and risk mitigation harder for all parties in the capacity market."[145] In fact, Mr. Holtman testified that the prospect of such adjustments would cause the posted planning parameters to "have little or no value in future RPM auctions."[146]

The Commission blithely shrugged off these concerns, asserting that "in future

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142 *See* 16 U.S.C. § 825l(b) (2018); *Illinois Com. Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("*ICC*") (explaining that a reviewing court cannot "uphold a regulatory decision that is not supported by substantial evidence on the record as a whole"); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) ("*PG&E*") (the Commission's orders must be "based upon substantial evidence in the record" (citation omitted)).

143 *See, e.g.*, EPSA Protest at 18-21; NRG Protest at 15-17; *id.* at 20-24; LS Power Protest at 3-4; Vistra Protest at 14-15.

144 See Sotkiewicz Affidavit, ¶¶ 17, 25, 27-29.

145 *Id.*, ¶ 32.

146 Holtman Affidavit, ¶ 32.

years entities can account for the potential for adjustments to the [Locational Deliverability Area] Reliability Requirement in carrying out their business decisions and commercial transactions."[147] But this summary conclusion is not based on record evidence, and the Commission nowhere explained how market participants are supposed to account for changes like that in this case, which would result in a clearing price being 75 percent lower than the previously expected price.[148] As Mr. Holtman testified, there is no discounting of the projected clearing price 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 [Locational Deliverability Area] Reliability Requirement."[149]

In addition, notwithstanding the Commission's attempt to downplay the Locational Deliverability Area Reliability Requirement as a "single input,"[150] this input is posted precisely for the purpose of allowing market participants to make decisions regarding their bilateral transactions and other commercial decisions.[151] Moreover, as the auction parameter representing "how much capacity the area needs to buy,"[152] this "single

147 February 21 Order, 182 FERC ¶ 61,109 at P 157 (footnote omitted).

148 *See* 16 U.S.C. § 825l(b) (2018); *ICC*, 576 F.3d at 477 (decision must be "supported by substantial evidence on the record as a whole"); *PG&E*, 373 F.3d at 1319 (order must be "based upon substantial evidence in the record" (citation omitted)).

149 Holtman Affidavit, ¶ 32.

150 February 21 Order, 182 FERC ¶ 61,109 at P 177.

151 *See PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275 at P 198 (2009) (PJM stating that the "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"). *See also* Answer of PJM Interconnection, L.L.C. to Protests and Comments at 33, Docket No. ER09-412-000 (filed Feb. 2, 2009) (same).

152 Danly Statement at n.17.

input"[153] is particularly critical to those decisions.[154] The February 21 Order utterly failed to consider that, consistent with the Commission's directive that "[i]deally, the market should encourage [load-serving entities] to engage in long-term bilateral contracting to support needed investment,"[155] PJM's RPM design was intended to "create an incentive for longer-term bilateral contracts, thus enabling more effective hedging for customers."[156] The February 21 Order is thus arbitrary and capricious because, in assessing the justness and reasonableness of PJM's proposal, the Commission "entirely failed to consider an important aspect of the problem . . . ."[157]

3. The Commission's Acceptance of the One Percent Materiality Threshold Was Arbitrary and Capricious

Petitioners argued that the proposed materiality threshold for adjusting a Locational Deliverability Area Reliability Requirement, that this value have increased by more than one percent from the prior BRA, was arbitrary and unexplained.[158] As Dr. Sotkiewicz explained, PJM "provided no empirical evidence, data or analytical support for its choice of a one percent threshold . . . ."[159]

Rather than engage with these arguments as reasoned decision-making

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153 February 21 Order, 182 FERC ¶ 61,109 at P 177.

154 *See* Danly Statement at n.17 ("Calling [the Locational Deliverability Area Reliability Requirement] a 'single input' is like calling the particular car I am purchasing a 'single input' in determining the price I pay for the car."). *See also* Holtman Affidavit, ¶¶ 15-19 (describing how the posted Locational Deliverability Area Reliability Requirement for the DPL-S LDA informed NRG's expectations about the clearing price in the 2024/2025 BRA).

155 *PJM Interconnection, L.L.C.*, 107 FERC ¶ 61,112 at P 20 (2004) (footnote omitted).

156 *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 at P 57 (2006) (PJM's explanation of the role of RPM).

157 *State Farm*, 463 U.S. at 43.

158 *See* EPSA Protest at 25-26; Sotkiewicz Affidavit, ¶ 37; Vistra Protest at 11-12.

159 Sotkiewicz Affidavit, ¶ 37.

requires[160] and supporting its decision with substantial evidence,[161] the Commission found this threshold appropriate on the grounds that the issue identified in the December 23 Filing typically arises in small LDAs and "the one percent threshold avoids having to arbitrarily define what constitutes a 'small' LDA."[162] That is, however, no answer at all. Even if the adoption of one arbitrary value avoids having to arbitrarily set a second value, that does not make the first value just and reasonable or the product of reasoned decision-making. Neither PJM nor the Commission explained why one percent defines an LDA that is appropriately "small," as opposed to, for example, a 0.5 percent or a two percent threshold. By the Commission's logic, a driver's guess that Exit 15 is the correct exit should be regarded as reasoned, because that guess avoids the need for guesswork at subsequent exits. Like the Commission's justification for the one percent threshold, that would plainly be "illogical on its own terms . . . ."[163]

4. The February 21 Order Failed to Address Long-Term Harm to the RPM Market and Consumers

In accepting the tariff revisions proposed in the December 23 Filing, even as applied prospectively to RPM Auctions not yet commenced, the Commission utterly failed to consider supplier interests or the long-term harm that post-posting adjustments to the Locational Deliverability Area Reliability Requirement will have on PJM's capacity market and, ultimately, on the consumers that the Commission ostensibly wishes to protect.

The Commission's ratemaking obligations under the FPA require a "balancing of

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160 *See, e.g., PPL Wallingford*, 419 F.3d at 1198; *NorAm*, 148 F.3d at 1165.

161 *See, e.g.*, *Genuine Parts*, 890 F.3d at 312.

162 February 21 Order, 182 FERC ¶ 61,109 at P 160.

163 *GameFly*, 704 F.3d at 148 (citation omitted).

the investor and the consumer interests."[164] Nonetheless, there is no evidence in the February 21 Order that the Commission considered investor interests at all. Instead, PJM's proposal establishes a one-way ratchet under which suppliers are held to their supply commitments and associated performance obligations but clearing prices are subject to after-the-fact tinkering for the short-term benefit of consumers.[165] Nowhere in the February 21 Order did the Commission even recognize the one-sided nature of PJM's proposal, much less properly consider the impact of these types of after-the-fact adjustments on suppliers and investors.

In this respect, the Commission not only gave short shrift to the settled expectations of market participants with respect to the 2024/2025 BRA, as discussed above; it also failed to acknowledge, much less seriously consider, the detrimental impacts on the ability of market participants to rely on the posted auction parameters and auction rules going forward. PJM now has authority under its Tariff to manipulate auction results not to its liking, with the Locational Deliverability Area Reliability Requirement "a 'moving target' during [the] auction,"[166] and the Commission has also signaled that it will be receptive to future post-auction rules changes in furtherance of that same objective. To make matters worse, such changes can be effectuated "at least up until that point at

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164 *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 532 (2008) (quoting *FPC v. Hope Nat. Gas Co.,* 320 U.S. 591, 603 (1944) ("*Hope*")).

165 *See* Danly Statement at P 21 (noting that "[t]he absurdity of the majority's interpretation of time is fully exposed when we also recognize that it only applies to certain favored parties—in this case RTOs or ISOs: consider whether the majority would allow generator sellers to revise their capacity offers after the auction had been run but before results were posted like it allows PJM to change the reliability requirement").

166 *Id.* at P 35.

which the obligation is actually incurred,"[167] and may even be possible so long as "no capacity had been delivered pursuant to such commitments, and no charges had been billed or collected."[168] This holding is especially concerning in a forward capacity market that is intended to secure capacity commitments three years ahead, meaning that there will likely be changes in market conditions during that time that could be used as an excuse for later modifications to the rules and clearing prices.[169]

This will inevitably chill investment and deter participation in RPM Auctions by new resources and resources without must-offer obligations and encourage premature deactivation of other resources.[170] In fact, Dr. Sotkiewicz noted that the Indian River 4 facility in DPL-S ("Indian River") plans to retire because it failed to clear in prior BRAs, and is currently operating under a Reliability Must Run ("RMR") rate schedule,[171] while there has also been a precipitous decline in RPM participation by Intermittent Resources.[172] Dr. Sotkiewicz cautioned that increased uncertainty regarding the applicable auction parameters and market rules, such as that engendered by the February 21 Order, will only serve to further discourage resources from participating in the RPM, which is particularly concerning from a reliability perspective given the tightening supply in the DPL-S LDA.[173]

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167 February 21 Order, 182 FERC ¶ 61,109 at P 168.

168 *Id.* at P 167.

169 *See* Danly Statement at P 11.

170 *See* EPSA Protest at 20-21; Sotkiewicz Affidavit, ¶ 36 (explaining that "newly introduced uncertainty may cause Capacity Market Sellers simply not to offer at all if they believe the uncertainty creates additional risks that cannot possibly be mitigated").

171 *See* EPSA Protest at 27-28; Sotkiewicz Affidavit, ¶¶ 70-72.

172 *See* EPSA Protest at 23; Sotkiewicz Affidavit, ¶¶ 59-60.

173 *See* Sotkiewicz Affidavit, ¶¶ 38, 76-77.

Rather than tackling these issues,[174] the Commission summarily declared that PJM's proposal will result in a Locational Deliverability Area Reliability Requirement that "reflects actual reliability needs in a manner consistent with supply and demand fundamentals"[175] and "should improve price signals . . . ."[176] That is simply wrong. As discussed above, if planned resources that will be operational during the relevant Delivery Year are not offering into the BRAs,[177] the lack of an offer says nothing relevant about actual "supply and demand fundamentals,"[178] as those are reflected in the Reliability Requirements, or about the price needed to maintain reliability.

The February 21 Order failed to engage with the evidence proffered by Dr. Sotkiewicz regarding the supply issues in DPL-S.[179] The closest the order came was the Commission's statement that it would not "opine on the Indian River [RMR] agreement, which is the subject of another pending proceeding,"[180] but, as best Petitioners can tell, this statement was directed to unrelated arguments by another intervenor.[181] Dr. Sotkiewicz's testimony did not ask the Commission to opine, in any way, on the Indian River RMR agreement, as such, but instead cited Indian River's circumstances as

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174 *See, e.g.*, *AGA*, 593 F.3d at 20; *PPL Wallingford*, 419 F.3d at 1198.

175 February 21 Order, 182 FERC ¶ 61,109 at P 150.

176 *Id.* at P 159.

177 See Sotkiewicz Affidavit, ¶ 59 (explaining that "PJM data has shown the amount of wind and solar capacity offered into the BRA has declined by 40 and 8.5 percent, respectively, between the [BRA for the 2022/2023 Delivery Year] and the [BRA for the 2023/2024 Delivery Year] despite an increasing deployment of wind and solar resources" and that the amount of unoffered intermittent resources has more than doubled in that time).

178 February 21 Order, 182 FERC ¶ 61,109 at P 150.

179 *See* Sotkiewicz Affidavit, ¶¶ 90-95.

180 February 21 Order, 182 FERC ¶ 61,109 at P 159.

181 *See id.* at P 100 (stating that another party had made arguments regarding the rate under the Indian River RMR rate schedule).

evidence that "RPM in DPL-South is not attracting RPM commitments."[182]

Similarly, the Commission claimed that "EPSA's arguments that PJM has overlooked other reliability issues . . . are outside the scope of this FPA section 205 filing."[183] It is unclear what "reliability issues"[184] the Commission may have been referring to, unless it is questioning the relevance of EPSA's concerns that PJM's proposal "fail[ed] to consider PJM's underlying modeling assumptions, and thus [will] fail to send price signals necessary for reliability"[185] and "focuse[d] only on the immediate price impacts for customers, rather than attempting to ensure that prices appropriately reflect reliability needs and maintain confidence in its market construct . . . ."[186] But the Commission cannot possibly be saying that these are arguments are beyond the scope, as they go directly to the justness and reasonableness of the December 23 Filing.

In this regard, it is notable that the Commission's myopic focus on immediate rate impacts ignored not only suppliers' rights, but also the long-term interests of consumers in reliable supplies of electricity, consistent with the fact that "the principal purpose of [the FPA] was to encourage the orderly development of plentiful supplies of electricity . . . at reasonable prices."[187] By failing to engage with EPSA's serious concerns on these issues, the Commission arbitrarily and capriciously "failed to consider an important aspect

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182 Sotkiewicz Affidavit, ¶ 72. There was another party whose comments directly addressed the Indian River RMR agreement, alleging that the proposed rate was "excessive." Motions to Intervene and Initial Comments of the Maryland Office of People's Counsel at 7, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023).

183 February 21 Order, 182 FERC ¶ 61,109 at P 159.

184 *Id.*

185 EPSA Protest at 26.

186 *Id.* at 28.

187 *National Ass'n for the Advancement of Colored People v. FPC*, 425 U.S. 662, 669-70 (1976).

of the problem" and did not consider the impact on investment and market participation that could jeopardize reliability and raise prices over the long term.[188]

D. The Commission Arbitrarily and Capriciously Found that PJM Did Not Violate Its Tariff by Failing to Post the Final Auction Results

The Commission rejected arguments of Petitioners and others, including Commissioner Danly, that PJM violated its Tariff by delaying the posting of the final results of the 2024/2025 BRA,[189] which, according to PJM, left it free to modify the auction rules. The Commission swept aside these arguments in a single, conclusory paragraph, finding that "the Tariff does not impose a deadline on PJM to complete the process of conducting and administering the BRA" and only requires PJM "to post the auction results 'as soon thereafter as possible'—after 'conducting the Reliability Pricing Model Auctions.'"[190]

That single paragraph February 21 Order offered no hint of what the tariff language "as soon thereafter as possible"[191] is supposed to mean, and it is hard to imagine the Commission being so forgiving if PJM had held up posting of final results in order to propose a change expected to increase clearing prices. As the NRG Companies explained in their protest, this phrase "'[b]y its nature, . . . suggests urgency . . . .'"[192] Rather than engaging with this or similar arguments, the Commission offered yet another

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188 *State Farm*, 463 U.S. at 43.

189 The Tariff requires PJM to "post the results of each auction as soon thereafter as possible . . . ." Tariff, Attachment DD, § 5.11(e). While it is Petitioners' position that PJM violated its obligation under this provision of the Tariff by delaying the posting of the final results of the 2024/2025 BRA to give it time to modify the auction rules, Petitioners agreed with PJM's decision not to post "indicative results" of the BRA, something that is not contemplated by the Tariff.

190 February 21 Order, 182 FERC ¶ 61,109 at P 172.

191 Tariff, Attachment DD, § 5.11(e).

192 NRG Protest at 11 (quoting *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 838 F.3d 750, 764 (6th Cir. 2016)).

"complete non sequitur,"[193] stating that "PJM is an independent regional transmission operator with no financial interest in the capacity auction results, and is specifically vested with the right to file pursuant to section 205 to make changes relating to the terms and conditions of its Tariff . . . ."[194] PJM's alleged independence and its FPA Section 205 filing rights have no bearing whatsoever on the question of what "as soon thereafter as possible"[195] means or whether the delay in the posting of final BRA results was permitted by the Tariff. The Commission's non-responsive answer thus does not comport with the requirements of reasoned decision-making.[196]

As the NRG Companies indicated, the posting requirement cannot reasonably be construed to mean that PJM need only post the results "as soon as possible after PJM gets the auction rules modified to yield its preferred auction results."[197] Similarly, Commissioner Danly pointed out that this tariff language does not give PJM "license to change the Locational Deliverability Area Reliability Requirement any time PJM feels like it . . . ."[198] But one can only infer from what little the Commission said that that is exactly what it believed. Having put forth no limiting principle either on the timing or what PJM may seek to do, the Commission implied that PJM does, in fact, have leeway to "throw

193 *Tennessee Gas*, 824 F.2d at 84.

194 February 21 Order, 182 FERC ¶ 61,109 at P 172 (footnote omitted).

195 Tariff, Attachment DD, § 5.11(e).

196 *See, e.g., Judulang v. Holder*, 565 U.S. 42, 53 (2011) ("*Judulang*") (finding that agency "failed to exercise its discretion in a reasoned manner" by considering an irrelevant factor); *American Fed'n of Gov't Employees, AFL-CIO v. Fed. Lab. Relations Auth.*, 24 F.4th 666, 677 (D.C. Cir. 2022) (finding agency's "reasoning is a non sequitur" because it failed to consider "[t]he relevant question"); *American Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018) ("*American Rivers*") (finding Commission's analysis to be "woefully light on . . . reasoned analysis and heavy on unsubstantiated inferences and non sequiturs").

197 NRG Protest at 11-12 (footnote omitted).

198 Danly Statement at P 12 (footnote omitted).

out every other auction rule in the tariff,"[199] and thereby rendered the tariff language meaningless.[200] Again, that does not satisfy the requirements of reasoned decision-making.

E. The Commission's Refusal to Allow Market Participants to Re-Offer Was Arbitrary and Capricious

Petitioners and other protestors argued that, to the extent the Commission was going to grant the relief requested by PJM, it also needed to allow sellers an opportunity to modify their offers into the 2024/2025 BRA to account for the changed rules and auction parameters.[201] The Commission brushed such arguments aside, insisting:

> Fundamentally, changes to the [Locational Deliverability Area] Reliability Requirement affect the shape of the capacity market demand curves, and no party has suggested that the shape of the demand curve impacts their costs. Rather, we agree with PJM, the Market Monitor, and commenters that capacity market offers should be dictated by capacity resource costs and not by expectations of demand. Inputs to the capacity price, including the actions and offers of other sellers, as well as changes to the [Locational Deliverability Area] Reliability Requirement, can impact the final auction clearing price.[202]

This "dismissive treatment" of the arguments of Petitioners and others on this issue falls far short of what reasoned decision-making required.[203]

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199 *Id.*

200 *See Baltimore Gas*, 462 U.S. at 105 (agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made" (citations omitted)).

201 *See, e.g.*, EPSA Protest at 30-31; LS Power Protest at 7-8. *See also* Motion for Leave to Answer and Answer of the Electric Power Supply Association at 15-16, Docket Nos. ER23-729-000, *et al.* (filed Feb. 9, 2023) (the "EPSA Answer"); Protest and Comments of the American Clean Power Association, Solar Energy Industries Association, and Advanced Energy United at 18-20, Docket Nos. ER23-729-000, *et al.* (filed Jan. 20, 2023).

202 February 21 Order, 182 FERC ¶ 61,109 at P 158.

203 *NorAm*, 148 F.3d at 1165.

EPSA's arguments on this issue were supported by expert testimony from Dr. Sotkiewicz, who described a number of ways in which the Locational Deliverability Area Reliability Requirement value could be expected to inform a Capacity Market Seller's offer decisions.[204] For example, he explained, there are types of resources that are not subject to the must-offer requirement and that may have rethought their decision to offer at all based on the revised parameters.[205] The February 21 Order failed even to acknowledge, much less grapple with, Petitioners' arguments and evidence and that, alone, renders the order arbitrary and capricious reasoned decision-making.[206] Moreover, the Commission failed to support its decision with substantial evidence, as required by both the FPA and the APA.[207] It is well established that an agency may not take an "ostrich's approach," whereby it "confine[s] its attention to evidence that support[s] its conclusion and . . . ignore[s] any contrary evidence."[208]

Even assuming *arguendo* that offer decisions are exclusively "dictated by capacity resource costs and not by expectations of demand,"[209] the Commission entirely failed to

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204 *See* Sotkiewicz Affidavit, ¶ 27, 32-38.

205 *See id.*, ¶¶ 25, 27-29.

206 *See, e.g.*, *ACPA*, 54 F.4th at 728; *NEPGA*, 881 F.3d at 211.

207 *See* 5 U.S.C. § 706(2)(E) (2018); 16 U.S.C. § 825*l*(b) (2018).

208 *International Union*, 802 F.2d at 975. *See also, e.g., Genuine Parts*, 890 F.3d at 312 (making clear that "an agency cannot ignore evidence that undercuts its judgment . . . [or] minimize such evidence without adequate explanation"); *Tenneco*, 969 F2d at 1214 (finding that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence"); *Lakeland*, 347 F.3d at 963 (holding that the agency may not rely on a "clipped view of the record" to support its conclusion); *Green v. Shalala*, 51 F.3d 96, 102 (7th Cir. 1995) (holding that where the agency "did not grapple with significant record evidence in [its] decision," that decision "is not supported by substantial evidence" (citation omitted)); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (finding decision to be arbitrary and capricious where the agency "ostrich fashion, did not discuss the most substantial objections to its approach, though the objections were argued vigorously to it").

209 February 21 Order, 182 FERC ¶ 61,109 at P 158.

engage with objections to PJM's selectively reopening this single auction input without allowing reoffers that would account for other changes in circumstances, including changes that directly impact capacity resources' costs and offers.[210] For example, since the closing of the offer window for the 2024/2025 BRA, it has become abundantly clear that, notwithstanding prior claims to the contrary, the risk of Performance Assessment Intervals is very real and that risk imposes substantial costs on suppliers.[211] Yet, even as the Commission accepted a filing addressing what PJM claimed to be a "recently discovered" issue,[212] it rejected requests from suppliers for a corresponding opportunity to address changed circumstances impacting through new offers. That was arbitrary and capricious both because it was "illogical on its own terms"[213] and because it failed to grapple with serious objections to its approach.[214]

Admittedly, allowing market participants to reoffer would only mitigate, but not eliminate, the harm of allowing PJM's after-the-fact manipulation of the 2024/2025 BRA results. But, if the Commission was going to take the extreme (and unlawful) step of changing the auction rules after the fact, it had an obligation at least to mitigate the harm. To the extent the Commission's refusal to allow reoffers was, as Commissioner Danly suggested, informed by the Commission's longstanding policy against rerunning auctions, that refusal was misguided, because, as he observed, what the February 21 Order did

210 *See* EPSA Answer at 15-16.

211 *See* LS Power Protest at 5-8.

212 December 23 Filing, Transmittal Letter at 5.

213 *GameFly*, 704 F.3d at 148 (citation omitted).

214 *See, e.g.*, *ACPA*, 54 F.4th at 728; *NEPGA*, 881 F.3d at 211.

was "arguably worse: rather than rerun the auction, [it] simply reset the price."[215]

Commissioner Danly expressed concern that the same policy against rerunning auctions means that "if today's action is deemed unlawful by the courts, there will be no effective remedy."[216] In response to his request for input on this question, Petitioners respectfully submit that there will be no material legal or policy impediments to correcting the Commission's error on remand. As an initial matter, Section 309 of the FPA[217] gives the Commission broad power "to undo harms caused by its own mistaken or unlawful acts,"[218] and "to regard as being done that which should have been done . . . ."[219] And the filed rate doctrine and the prohibition against retroactive ratemaking are not violated "when a court invalidates a filed rate as unlawful, and FERC must make retroactive changes to the rates."[220]

Equally importantly, the policy considerations that animate the Commission's policy against rerunning auctions – a policy Petitioners support – would not be present where the Commission was only reinstating the clearing price for the 2024/2025 BRA, a price determined in accordance with the auction rules then in place, and not, in fact,

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215 Danly Statement at P 30.

216 *Id.* *See also id.* at P 37 ("The most disturbing aspect of this case is the damage it inflicts that probably cannot be remedied. As I discuss above, rerunning the auction or restoring the original prices likely would be as destabilizing as today's order.").

217 16 U.S.C. § 825h (2018).

218 *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 360 (D.C. Cir. 2017).

219 *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 955 (D.C. Cir. 2016) (quoting *Northern Natural Gas Co. v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986)). *See also id.* at 956 (finding claim by the Commission that "section 205 error of law is irremediable beyond prospective relief under section 206 [to be] irreconcilable with the authority Congress granted it in section 309 to remedy its errors").

220 *OG&E*, 11 F.4th at 831.

rerunning the auction.[221] The Commission's policy against rerunning auctions reflects the legitimate concern that market participants "cannot effectively revisit their economic decisions" or "retroactively alter their conduct."[222] In this case, the relevant economic decisions had already been made and the relevant conduct had already occurred when PJM decided to change the results. Resetting the clearing price to enforce the filed rate on which those decisions and that conduct were based would advance, rather than conflict with, the policy concerns underlying the Commission's practice of not rerunning auctions. Moreover, any reliance on the posted results of the 2024/2025 BRA in entering into other transactions would be unreasonable under these circumstances, because no stakeholder can reasonably ignore the likelihood of legal challenges to the February 21 Order. Stakeholders are also well aware of the magnitude of the potential clearing price change. For its part, EPSA publicly stated its intent to seek judicial review less than a

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[221] To the extent there are resources that did not clear at the reset clearing price but that would have cleared at the reinstated clearing price, some accommodation might need to be made for those unwilling or unable to assume a capacity commitment for whatever portion of the 2024/2025 Delivery Year might remain. As a practical matter, this would be an issue affecting a very small universe of resources, because PJM's report on the 2024/2025 BRA indicates that 1,448.9 MW was offered in the DPL-S LDA and 1,422 MW cleared. *See* PJM, Report at 7, Table 3 (Feb. 28, 2023), https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2024-2025/2024-2025-base-residual-auction-report.ashx.

[222] *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) ("The Commission generally does not order a remedy that requires rerunning a market because market participants participate in the market with the expectation that the rules in place and the market outcomes will not change after the results are set."), *on reh'g*, 178 FERC ¶ 61,022 (2022); *Astoria Generating Co. L.P. v. New York Indep. Sys. Operator, Inc.*, 140 FERC ¶ 61,189 at P 141 (2012) ("Re-running past auctions would create market uncertainty for market participants and require resolving complex questions."), *on reh'g*, 151 FERC ¶ 61,044, *on reh'g*, 153 FERC ¶ 61,274 (2015); *Maryland Pub. Serv. Comm'n v. PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,276 at P 26 (2008) ("Changing a rate and quantity already determined in accordance with existing tariff provisions on which parties have relied would defeat the purpose of the forward binding commitment, and undo the incentives for new capacity resources" (footnote omitted)), *on reh'g*, 127 FERC ¶ 61,274 at P 24-26 (2009).

day after the February 21 Order issued[223] and a full five days before PJM posted the 2024/2025 BRA results.[224] Moreover, no stakeholder can reasonably discount the likelihood that these challenges will be successful, particularly when a sitting FERC Commissioner described the majority as "know[ing] its decision will not withstand judicial review"[225] and a former FERC Chairman warned that accepting PJM's proposal would set the Commission up for a "stinging and embarrassing . . . defeat. . . ."[226]

III. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[227] Petitioners hereby identify the issues on which they seek rehearing and provide representative precedent in support of their positions on such issues:

1. The February 21 Order violated the filed rate doctrine and prohibition against retroactive ratemaking by permitting PJM to modify the DPL-S Locational Deliverability Area Reliability Requirement that was required under the Tariff to be finalized and fixed prior to the auction and to be incorporated into the VRR Curves used in the auction. *See, e.g., Hall*, 453 U.S. at 578; *OG&E*, 11 F.4th at 829; *ODEC*, 892 F.3d at 1232. The February 21 Order erroneously claimed that the Commission was free to accept PJM's proposal based on its finding that "the benefits of accepting the proposed Tariff revisions effective December 24, 2022, as requested, outweigh any reliance or expectation as to the [Locational Deliverability

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223 EPSA, *FERC Decision to Allow PJM Electricity Market Auction Rule Changes Undermines Reliability and Investment in Energy Future – Statement From EPSA President and CEO Todd Snitchler* (Feb. 22, 2023) ("EPSA and likely others will appeal this order and based on 100 years of precedent feel strongly that it will be overturned."), https://epsa.org/ferc-decision-to-allow-pjm-electricity-market-auction-rule-changes-undermines-reliability-and-investment-in-energy-future-statement-from-epsa-president-and-ceo-todd-snitchler/.

224 PJM, *PJM Capacity Auction Procures Adequate Resources: Results Indicate Supply Tightening in Some Areas* (Feb. 27, 2023), https://www.pjm.com/-/media/about-pjm/newsroom/2023-releases/20230227-pjm-capacity-auction-procures-adequate-resources.ashx.

225 Danly Statement at P 30.

226 Kelliher Affidavit at 30.

227 18 C.F.R. § 385.713(c)(2) (2022).

Area] Reliability Requirement posted in August 2022."[228] This holding ignored the fact that the Commission does not have the discretion to ignore the filed rate doctrine, even if it will result in substantial hardship. *See, e.g.*, *Maxwell*, 237 U.S. at 97.

2. The Commission's claim that the filed rate doctrine does not apply because PJM's proposed change to the Locational Deliverability Area Reliability Requirement is not "genuinely retroactive"[229] does not reflect reasoned decision-making. This assertion is illogical, cannot be squared with the Commission's recognition that the filed rate at issue consists of the rules governing the RPM Auctions, and ignores the plain language of the Tariff. *See, e.g., Baltimore Gas*, 462 U.S. at 105; *GameFly*, 704 F.3d at 148. Moreover, in concluding that the filed rate doctrine did not apply, the Commission failed to respond to arguments raised by Commissioner Danly and Petitioners, *see, e.g.*, *ACPA,* 54 F.4th at 728; *NEPGA*, 881 F.3d at 211; *TransCanada*, 811 F.3d at 12, and instead relied on assertions that misrepresented the applicable legal standard and precedent, while also deviating from the approach taken in prior Commission orders. *See, e.g., Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

3. The proposed changes do not satisfy the requirements for either of the two judicially recognized exceptions to the filed rate doctrine and the prohibition against retroactive ratemaking, *see Con Edison*, 347 F.3d at 969, and there is no legal basis for the Commission's newly concocted exception that is alleged to apply because, at the time PJM submitted the December 23 Filing, "no capacity commitments had yet been secured, no transaction had yet been consummated, meaning that neither PJM nor any supplier had the attendant rights or obligations, no capacity had been delivered pursuant to such commitments, and no charges had been billed or collected."[230] The holdings in cases cited by the Commission for the proposition that "changes to a rate are impermissibly retroactive only where regulated entities or customers have already transacted pursuant to the rate"[231] were not limited to their facts in any way that would support such an interpretation. *See, e.g.*, *Humphries*, 562 U.S. at 38. To the contrary, those cases make clear that, unless one of the two recognized exceptions applies, the Commission may not "retroactively rewrite the terms of the filed rate." *ODEC*, 892 F.3d at 1232. The Commission also arbitrarily and capriciously ignored its own precedent finding deviations from filed rates to be retroactive even where no transaction has been made and, indeed, in the absence of any transaction at all. *See, e.g.*, *TransCameron*, 180 FERC ¶ 61,011 at P 5;

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228 February 21 Order, 182 FERC ¶ 61,109 at P 173.

229 *Id.* at P 169,

230 *Id.* at P 167.

231 *Id.* at P 166.

Salt Creek, 180 FERC ¶ 61,116 at P 38. *See also, e.g., Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

4. Even assuming *arguendo* that the filed rate doctrine and the prohibition against retroactive ratemaking were inapplicable, there is no evidence that the Commission properly weighed the totality of the evidence before it with respect to the benefits of, and harm inflicted by, PJM's proposal. The Commission's conclusory assertion that suppliers would not have relied on the posted Locational Deliverability Area Reliability Requirement for purposes of making commercial decisions ignores record evidence regarding NRG's actual and substantial reliance, as well as other record evidence demonstrating that suppliers would reasonably have been expected to rely on this posted auction parameter. *See, e.g.*, *Genuine Parts*, 890 F.3d at 312; *Tenneco*, 969 F2d at 1214; *Lakeland*, 347 F.3d at 963. It also represented an unacknowledged and unexplained departure from Commission precedent recognizing that market participants should be able to rely, and do, in fact, rely on posted auction parameters. *See, e.g., Fox*, 556 U.S. at 515. Moreover, the Commission utterly failed to consider the long-term impacts of its order on market participants' confidence in the market and PJM's market rules, given PJM's and the Commission's now apparent willingness to modify the rules after-the-fact to achieve their desired auction results. *See State Farm*, 463 U.S. at 43.

5. Even setting aside the issues regarding the adjustment of the DPL-S Locational Deliverability Area Reliability Requirement for the 2024/2025 BRA, the Commission's finding that PJM's proposal was just and reasonable was arbitrary and capricious and not the product of reasoned decision-making. The February 21 Order fails to explain why it is appropriate to modify just one of the forecasted auction variables used by PJM. Moreover, as Dr. Sotkiewicz and others explained, PJM's apple-based adjustment of excluding resources that did not submit offers to an orange-based auction parameter that does not consider whether resources' capacity is offered into, or clears, an RPM Auction was fundamentally illogical. The Commission's approval of that adjustment was arbitrary and capricious, irrational, and not supported by substantial evidence. *See, e.g.*, *Allentown*, 522 U.S. at 374; *Baltimore Gas*, 462 U.S. at 105; *GameFly*, 704 F.3d at 148; *Business Roundtable*, 647 F.3d at 1153; *Tennessee Gas*, 824 F.2d at 84.

6. As Dr. Sotkiewicz explained, PJM's proposal to exclude planned resources that do not submit offers into the RPM Auctions is at odds with its underlying modeling of the Local Deliverability Area Reliability Requirement, which includes planned resources that are expected to be in service during the relevant Delivery Year, regardless of whether those resources are required or expected to participate in the applicable RPM Auction. Dr. Sotkiewicz also stated that PJM's proposal would arbitrarily treat planned resources differently than existing resources that do not submit offers into the RPM

Auctions, and that offers are not indicative of whether a planned resource can be expected to be in service during a Delivery Year given substantial evidence demonstrating that planned and existing resources without must-offer obligations are increasingly declining to participate in the RPM Auctions. In addition, PJM's proposal would arbitrarily exclude planned resources that do not submit offers into the RPM Auctions while including planned resources that submit offers but do not clear. Without refuting Petitioners' arguments and evidence, the Commission accepted PJM's proposal based on a number of illogical, internally inconsistent and irrelevant findings. *See, e.g., Allentown*, 522 U.S. at 374; *Baltimore Gas*, 462 U.S. at 105; *GameFly*, 704 F.3d at 148; *Business Roundtable*, 647 F.3d at 1153; *Tennessee Gas*, 824 F.2d at 84. The Commission also arbitrarily and capriciously failed to respond to serious objections to its approach, *see, e.g., PPL Wallingford*, 419 F.3d at 1198, and failed to support its decision with substantial evidence, *see, e.g., ICC*, 576 F.3d at 477.

7. In overlooking the impact of its decision on bilateral contracting and hedging, the Commission violated the requirements of reasoned decision-making by utterly ignoring "an important aspect of the problem. . . ." *State Farm*, 463 U.S. at 43. In this respect, the Commission not only overlooked Petitioners' arguments and testimony, but also neglected its obligation to support its decision with substantial evidence by failing to identify record evidence supporting its assertion that market participants would be able to account for potential changes to the Locational Deliverability Area Reliability Requirement in their commercial arrangements. *See, e.g.*, 5 U.S.C. § 706(2)(E) (2018); 16 U.S.C. § 825*l*(b) (2018); *ICC*, 576 F.3d at 477; *PG&E*, 373 F.3d at 1319; *International Union*, 802 F.2d at 975.

8. The February 21 Order does not reflect reasoned decision-making, because the Commission failed to respond meaningfully to arguments that PJM's one percent threshold for adjusting the Locational Deliverability Area Reliability Requirement is arbitrary or identify substantial evidence in the record to support that threshold. *See, e.g., Genuine Parts*, 890 F.3d at 312; *PPL Wallingford*, 419 F.3d at 1198. Moreover, the Commission's reasoning that "the one percent threshold avoids having to arbitrarily define what constitutes a 'small' LDA," February 21 Order, 182 FERC ¶ 61,109 at P 160, was illogical and failed to establish that one percent is a just and reasonable threshold. *See, e.g.*, *GameFly*, 704 F.3d at 148.

9. Rehearing of the February 21 Order is required because, in finding the December 23 Filing to be just and reasonable, the Commission failed to demonstrate that it had fulfilled its obligation under the FPA to consider investor, in addition to consumer, interests. *See, e.g., Hope*, 320 U.S. at 603. The Commission's refusal to grapple with Petitioners' arguments that PJM's proposal would deter market participation and investment to the detriment of reliability and consumers was also arbitrary and capricious.

See, e.g., *State Farm*, 463 U.S. at 43; *AGA*, 593 F.3d at 20; *PPL Wallingford*, 419 F.3d at 1198.

10. The Commission failed to engage in any meaningful way with arguments and evidence regarding supply issues in the DPL-S LDA and the reliability implications of its order, declaring, without explanation, such issues to be beyond the scope of these proceedings. That renders its order arbitrary and capricious and unsupported by substantial evidence. *See, e.g., Genuine Parts*, 890 F.3d at 312; *PPL Wallingford*, 419 F.3d at 1198.

11. The February 21 Order arbitrarily and capriciously rejected arguments by Petitioners and others that PJM had violated its obligations under the Tariff by delaying the posting of the final results of the 2024/2025 BRA in order to file modifications to the RPM rules. Rather than substantively addressing PJM's obligations under the Tariff, the Commission responded with a non-sequitur that effectively rendered the tariff requirement meaningless. *See, e.g., Judulang*, 565 U.S. at 53; *American Rivers*, 895 F.3d at 51; *Tennessee Gas*, 824 F.2d at 84.

12. The Commission's refusal to permit market participants to re-offer into the 2024/2025 BRA to account for the changed circumstances was arbitrary and capricious. The Commission failed to grapple with Petitioners' arguments and evidence, and also failed to support its decision with substantial evidence. *See, e.g.,* 5 U.S.C. § 706(2)(E) (2018); 16 U.S.C. § 825*l*(b) (2018); *ACPA*, 54 F.4th at 728; *NEPGA*, 881 F.3d at 211. For example, the Commission's finding that offers are determined solely by costs,[232] ignored the fact that expectations regarding costs and the risks of associated with a capacity obligation may have changed since offers were submitted and that resources not subject to the must-offer obligation may choose not to submit offers at all based on their expectations of the clearing price, which is based on demand.

[232] *See* February 21 Order, 182 FERC ¶ 61,109 at P 158.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that the Commission grant rehearing as requested herein.

Respectfully submitted,

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Dated: March 23, 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 23rd day of March 2023.

/s/ Stephanie S. Lim
Stephanie S. Lim