

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

PJM Interconnection, L.L.C.

)

Docket No. ER23-729-002

MOTION FOR LEAVE TO ANSWER AND ANSWER

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission”),¹ the Electric Power Supply Association (“EPSA”),² The PJM Power Providers Group (“P3”)³ and the NRG Companies⁴ respectfully move for leave to answer⁵ and answer protests⁶ to the petition of PJM Interconnection, L.L.C. (“PJM”)⁷ requesting confirmation that PJM should reinstate the results of the Base Residual Auction for the 2024/2025

¹ 18 C.F.R. §§ 385.212, 385.213 (2023).

² This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

³ The comments contained herein represent the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

⁴ For purposes of this filing, the “NRG Companies” are NRG Business Marketing LLC (f/k/a Direct Energy Business Marketing, LLC) (“NBM”) and Midwest Generation, LLC. An affiliate of the NRG Companies, NRG Power Marketing LLC, also intervened in this proceeding. That entity has since been merged with, and into, NBM and, therefore, no longer exists as a separate entity.

⁵ Although the Commission’s Rules of Practice and Procedure do not allow for answers to protests or answers as a matter of right, the Commission regularly accepts otherwise impermissible answers where, as here, they will assist the Commission’s understanding of the record and its decision-making. *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,033 at P 51, *on reh’g*, 182 FERC ¶ 62,180, *on reh’g*, 184 FERC ¶ 61,022 (2023); *New York Indep. Sys. Operator, Inc.*, 182 FERC ¶ 61,028 at P 15 (2023); *ISO New England Inc.*, 181 FERC ¶ 61,260 at P 11 (2022); *PJM Interconnection, L.L.C.*, 181 FERC ¶ 61,162 at P 29 (2022), *on reh’g*, 184 FERC ¶ 61,006 (2023).

⁶ *See* Protest of American Municipal Power, Inc., Delaware Division of the Public Advocate, Delaware Energy Users Group, Delaware Municipal Electric Corporation, Delaware Public Service Commission, Maryland Office of People’s Counsel, and Old Dominion Electric Cooperative, Docket No. ER23-729-002 (filed Apr. 11, 2024) (the “Load Parties Protest”); Maryland Public Service Commission Protest and Motion to Reopen the Record in Docket No. EL23-19 and Consolidate Proceedings, Docket Nos. ER23-729-000, *et al.* (filed Apr. 11, 2024) (the “Maryland PSC Protest”).

⁷ Petition Under Rule 207 of PJM Interconnection, L.L.C. for Order Confirming 2024/2025 Delivery Year Capacity Commitment Rules, Request for Order by May 6, 2024, and Request for Shortened 10-Day Comment Period, Docket No. ER23-729-002 (filed Mar. 29, 2024) (the “Petition”).

Delivery Year (the “2024/2025 BRA”) determined using the auction rules in effect prior to the tariff revisions that took effect on December 24, 2022, and authorization to rerun the Third Incremental Auction for the 2024/2025 Delivery Year. Notwithstanding protestors’ assertions to the contrary, reinstatement of the properly calculated results of the 2024/2025 BRA is not only appropriate, it is compelled by the decision of the Court of Appeals for the Third Circuit (the “Third Circuit”) vacating the relevant portions of the Commission’s orders in this proceeding⁸ and the circumstances of this case. The Third Circuit was crystal clear in holding that the Commission’s attempt to change the rules after the 2024/2025 BRA was conducted violated the filed rate doctrine and that holding leaves no room for the Commission to leave this violation unremedied.

To be sure, as protestors assert, the Commission enjoys “broad remedial discretion in fashioning a remedy in response to a court decision.”⁹ But, as protestors’ own words concede, that begins with the premise that the Commission will be “*fashioning a remedy*,”¹⁰ while protestors are in fact requesting the very opposite – that the Commission leave its legal error unremedied. As the Commission has recognized, its authority in this regard “emanates from an understanding that an ‘agency, like a court, can undo what is wrongfully done by virtue of its order’”¹¹ It is, in fact, black letter law that “when the Commission commits legal error, the proper remedy is

⁸ *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109, *on reh’g*, 184 FERC ¶ 61,055 (2023), *rev’d & vacated in part sub nom. PJM Power Providers Grp. v. FERC*, 96 F.4th 390 (3d Cir. 2024) (“*PJM Power Providers*”). Capitalized terms not defined herein have the meaning set forth in PJM’s Open Access Transmission Tariff.

⁹ Load Parties Protest at 5 (footnote omitted). *See also, e.g.*, Maryland PSC Protest at 3-4.

¹⁰ Load Parties Protest at 5 (emphasis added).

¹¹ *ISO New England Inc.*, 161 FERC ¶ 61,031 at P 30 (2017) (“*ISO-NE*”) (quoting *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 361 (D.C. Cir. 2017) and *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965)).

one that puts the parties in the position they would have been in had the error not been made.”¹² As the Commission has explained, that “authority is not only contemplated by the [Federal Power Act (the “FPA”)], but necessary in order to give effect to judicial review.”¹³ In this case, the legal error was allowing PJM to depart from the filed rate in its calculation of the clearing price for the 2024/2025 BRA, and the proper remedy – and the only one that gives effect to judicial review – is clear and straightforward: require PJM to reinstate the clearing price determined in accordance with the filed rate. Any other action (or inaction) would leave the Commission’s legal error unremedied.

It bears emphasis that the Commission’s broad remedial powers on remand arise under Section 309 of the FPA,¹⁴ which empowers the Commission “to perform any and all acts . . . necessary or appropriate to carry out the provisions of this chapter.”¹⁵ In the remand setting, Section 309 has been construed as granting the Commission “authority . . . to remedy its errors”¹⁶ Whatever the breadth of the Commission’s discretion, it does not extend to actions that leave Commission errors unremedied and that would evade the requirements of provisions of the FPA, including those embodied in the filed rate doctrine.¹⁷

¹² *Public Utils. Comm’n of Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993).

¹³ *ISO-NE*, 161 FERC ¶ 61,031 at P 31.

¹⁴ *See Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 956 (D.C. Cir. 2016) (“*Xcel*”).

¹⁵ 16 U.S. Code § 825h (2018).

¹⁶ *Xcel*, 815 F.3d at 956

¹⁷ *See PJM Power Providers*, 96 F.4th at 394 (describing the statutory provisions “known collectively as the ‘filed rate doctrine’” (quoting *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1226-27 (D.C. Cir. 2018))).

Through their pleas that the Commission “balance the equities”¹⁸ and set capacity rates at what are, in their view, “just and reasonable levels reflecting actual reliability needs,”¹⁹ protestors urge the Commission to double down on, rather than remedy, its prior legal error. As the Third Circuit made clear, “the filed rate doctrine ‘does not yield, no matter how compelling the equities.’”²⁰ Moreover, even assuming *arguendo* that some balancing of the equities were permissible under these circumstances, the equities weigh strongly in favor of requiring compliance with the filed rate in order to correct the Commission’s legal error. Indeed, even where, unlike here, correcting such an error would itself conflict with the filed rate doctrine, there is “a strong equitable presumption in favor of retroactivity that would make the parties whole.”²¹ And as the Third Circuit observed, even if enforcing the filed rate “could potentially produce a harsh result in this case,”²² it ultimately operates to the long-term benefit of consumers inasmuch as “predictability is important . . . because electricity markets depend on it.”²³

To be clear, notwithstanding protestors’ claims to the contrary, reinstatement of the 2024/2025 BRA clearing price calculated in accordance with the filed rate in no way conflicts with the Commission’s longstanding – and sound – policy of not rerunning auctions.²⁴ No matter how many times protestors characterize it as such, the fact remains that PJM is not proposing to “rerun”

¹⁸ Load Parties Protest at 5.

¹⁹ *Id.* (footnote omitted). *See also* Maryland PSC Comments at 1 (urging the Commission to “retain the results of . . . the completed [2024/2025] BRA . . . in lieu of adopting ratings that may be unjust and unreasonable”).

²⁰ *PJM Power Providers*, 96 F.4th at 401 (quoting *Oklahoma Gas & Elec. Co. v. FERC*, 11 F.4th 821, 829-30 (D.C. Cir. 2021)).

²¹ *Exxon Co., U.S.A. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999).

²² *PJM Power Providers*, 96 F.4th at 401.

²³ *Id.* at 402.

²⁴ *See* Load Parties Protest at 4; Maryland PSC Protest at 2.

the 2024/2025 BRA at all. The offer window for the 2024/2025 BRA closed before PJM even proposed to change the rules, and all that PJM would be doing here is reinstating the clearing price calculated under the correct rules – *i.e.*, the lawful and Commission-approved filed rate. More fundamentally, doing so in no way implicates the policies that animate the policy against rerunning auctions. This policy reflects the legitimate concern that market participants “cannot effectively revisit their economic decisions” or “retroactively alter their conduct.”²⁵ In this case, the relevant economic decisions had already been made and the relevant conduct had already occurred before PJM decided to change the results. Moreover, any reliance on the posted results of the 2024/2025 BRA in entering into other transactions would be unreasonable under these circumstances, because all affected stakeholders knew, or should have known, that the Commission’s orders accepting PJM’s proposal was subject to judicial review.²⁶

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should act expeditiously to confirm that PJM must reinstate the results of the 2024/2025 BRA determined in accordance with the filed rate – that is, the auction rules in effect prior to December 24, 2022.

²⁵ *New York Indep. Sys. Operator, Inc.*, 92 FERC ¶ 61,073 at 61,307 (2000), *on reh’g*, 97 FERC ¶ 61,154 (2001).

²⁶ Similarly, the possibility that higher capacity prices will be passed through by suppliers under Maryland’s Standard Offer Service program does not provide any basis for withholding a remedy for the filed rate violation identified by the Third Circuit. *See* Maryland PSC Comments at 3. The Maryland PSC adopted the mechanism that potentially allows such passthrough and if the passthrough of these particular costs is not what was “intended,” *id.*, that is the responsibility of the Maryland PSC. It is not the Commission’s job to provide an artificial regulatory hedge for Maryland’s retail customers.

Respectfully submitted,

**NRG BUSINESS MARKETING LLC
MIDWEST GENERATION, LLC**

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

Cortney Madea Slager
Assistant General Counsel, Regulatory
Jennifer S. Hsia
Managing Senior Counsel
NRG Energy, Inc.
804 Carnegie Center
Princeton, NJ 08540

Counsel for the **NRG Companies**

ELECTRIC POWER SUPPLY ASSOCIATION

By: /s/ Nancy Bagot
Nancy Bagot, Senior Vice President
Sharon Theodore, Vice President,
Regulatory Affairs
Electric Power Supply Association
1401 New York Avenue, NW, Ste. 950
Washington, DC 20005

On behalf of the **Electric Power
Supply Association**

THE PJM POWER PROVIDERS GROUP

By: /s/ Glen Thomas
Glen Thomas
Diane Slifer
GT Power Group
101 Lindenwood Drive, Ste. 225
Malvern, PA 19355

On behalf of **The PJM Power
Providers Group**

Dated: April 26, 2024

CERTIFICATE OF SERVICE

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

Dated at Washington DC, this 26th day of April 2024.

/s/ David G. Tewksbury
David G. Tewksbury