

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-1091

AFFIRMED ENERGY, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

MONITORING ANALYTICS, LLC, AND
PJM INTERCONNECTION, LLC,
Intervenors

Argued October 6, 2025
Decided February 10, 2026

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

* * *

Before: HENDERSON and PAN, *Circuit Judges*, and
GINSBURG, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge*
HENDERSON.

Opinion dissenting in part filed by *Circuit Judge*
PAN.

KAREN LECRAFT HENDERSON, *Circuit Judge*: The issue presented by petitioner Affirmed Energy LLC (Affirmed) is whether the Federal Energy Regulatory Commission (FERC) permissibly approved a tariff amendment prohibiting companies from bidding Energy Efficient Resources (EERs) in capacity auctions. The auctions are run by PJM Interconnection LLC (PJM), the entity responsible for managing the electrical grid in portions of thirteen States and the District of Columbia. At the auctions, PJM purchases commitments to supply electrical capacity to its grid. With FERC's permission, PJM allowed providers of EERs, which continuously reduce electrical consumption, to bid EER projects at its auctions. In other words, EERs could treat their resources as commitments to *supply* electricity, rather than to *reduce* electrical consumption, and could bid those commitments at the auctions. If PJM accepted an EER provider's bid, PJM permitted that provider to bid the same project at up to three more auctions. PJM permitted this action in part to offset a four-year lag between when EER projects became operational and when PJM's statistical model, known as a load forecast, could capture those projects' effects on energy consumption. Although PJM had since 2009 allowed providers to bid EERs at its auctions, it proposed to sunset that permission in 2024, explaining that its updated load forecast fixed the four-year lag. FERC accepted the proposed tariff amendment. It found that the amendment would reduce costs for end-use customers without compromising grid reliability. One EER provider, Affirmed, now petitions for review of FERC's orders.

Affirmed contends that FERC violated the filed-rate doctrine by retroactively divesting it of the right to participate in at least two more capacity auctions. It also argues that FERC's orders were arbitrary and

capricious because FERC uncritically accepted PJM's updated load forecast, overlooked reliance interests based on the existing tariff and ignored that tariff's substantial benefits. We disagree with both claims. FERC's orders were not impermissibly retroactive under our caselaw because the amendment applied solely to future capacity auctions. FERC critically reviewed PJM's updated forecast and explained why the forecast was fit for its intended purpose. And it acknowledged that its decision might upset reliance interests and reduce incentives to invest in EERs but it explained that those costs were outweighed by other considerations.

I. Background

A. PJM's Electrical Grid

In the 1935 Federal Power Act (FPA), the Congress charged FERC (then, the Federal Power Commission) with superintending the interstate sale of electricity. Federal Power Act of 1935, ch. 687, pt. II, 48 Stat. 838, 847 (codified as amended at 16 U.S.C. § 824 *et seq.*). Under that authority, FERC oversees entities, known as Regional Transmission Organizations (RTOs), which manage the electrical grid in their respective regions. *Pub. Citizen, Inc. v. FERC*, 7 F.4th 1177, 1186 (D.C. Cir. 2021). RTOs carry out several key responsibilities, which include “operating the grid in particular geographic areas, ... balancing supply and demand, and ensuring a reliable transmission system.” *Id.* PJM is an RTO. Off. of Pub. Participation, Fed. Energy Regul. Comm’n, *An Introductory Guide for Participation in PJM Processes* 2 (2025). To discharge its responsibilities, PJM hosts capacity auctions at least once each year. See *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 537 (2008). At the auctions, PJM purchases commitments to supply its grid

with electrical capacity for a future delivery year, usually more than three years ahead. *See* PJM, *2025/2026 Base Residual Auction Report* 1, 4 (2024).

The capacity auctions work in this way: Providers bid the price they will accept in exchange for their promise to supply electricity. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016). PJM uses those bids, in conjunction with its estimate of demand, to set a “clearing price” for the auction. *PJM Power Providers Grp. v. FERC*, 96 F.4th 390, 395 (3d Cir. 2024). Any provider who submits a bid below (*i.e.*, “clears”) the clearing price will receive that price in exchange for its commitment to provide electricity. *Talen Energy Mktg.*, 578 U.S. at 155-56. PJM continues to purchase capacity commitments until it satisfies projected demand (known as the reliability requirement). *Id.*

EERs—including efficient light bulbs and appliances—have posed a unique problem for capacity auctions. The reason is simple: EERs reduce the amount of capacity that PJM must procure at each auction. For example, if a consumer installs a more efficient refrigerator, he will, all else being equal, consume less electricity. *Use of Energy Explained*, U.S. Energy Info. Admin. (Jan. 12, 2024), <https://www.eia.gov/energyexplained/use-of-energy/efficiency-and-conservation.php> [<https://perma.cc/5G9P-SL4N>]. And the difference between his old and new consumption constitutes electricity that PJM no longer needs to procure at auction. For many years, however, PJM could not capture the effects of EERs in the statistical model it uses to predict demand—its “load forecast.” J.A. 120, Gledhill Aff. ¶¶ 16-17. To account for EERs at all, then, PJM needed to do so at its capacity auctions, by permitting EER providers to bid their projects as commitments to provide electricity.

Since 2009, PJM has allowed EER providers to participate in its auctions. *See PJM Interconnection, L.L.C., Order Accepting Tariff Provisions in Part*, 126 FERC ¶ 61,275, PP 120, 131 (2009) (2009 Order). Central to Affirmed's petition are two tariff provisions that FERC approved in 2009. First, Section L.1 of PJM's tariff defines eligible EERs. Its definition encompasses only projects that continuously reduce electrical consumption and that are not already reflected in the load forecast:

An Energy Efficiency Resource is a project ... designed to achieve a continuous ... reduction in electric energy consumption at the end-use customer's retail site that is not reflected in the peak load forecast prepared for the Delivery Year for which the Energy Efficiency Resource is proposed... .

J.A. 60. Second, Section L.4 establishes the time frame in which an EER provider can bid a particular project:

An Energy Efficiency Resource that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction... .

J.A. 61. In other words, Section L.4 permits EER providers to bid an EER project in up to four consecutive auctions—the initial auction at which the project clears and three more. PJM chose this four-auction time frame in part to match the four-year lag in its load forecast. 2009 Order, 126 FERC ¶ 61,275, P 132. With FERC's permission, PJM added these provisions to its tariff on file with FERC, as well as to its contracts with providers in its region.

The four-year lag did not remain for long. In 2016, PJM deployed a model that, in theory, fixed the lag. To achieve this goal, PJM incorporated “end-use intensity values,” which it obtained from the Energy Information Administration (EIA), a statistical entity within the U.S. Department of Energy. J.A. 118, 120-21, Gledhill Aff. ¶¶ 6-7, 18. End-use intensity measures a technology’s “relative use over time” and it has two critical features. J.A. 121, Gledhill Aff. ¶ 20. The first is “saturation,” or the proportion of all homes and commercial floorspaces with the technology. J.A. 121, Gledhill Aff. ¶ 20. The second is “efficiency,” or the reduction in electrical usage the technology produces. J.A. 121, Gledhill Aff. ¶ 20. With these forward-looking data available, PJM concluded, it could capture the effects of EERs without the lag.

This development posed an issue for grid reliability. Because PJM accounted for EERs both in its load forecast and at its auctions, PJM wound up double counting their effects on electrical consumption. To illustrate: Assume that EER projects reduce the number of megawatts (MW) that end-use customers consume by 20 in a given delivery year. If PJM forecasted a demand of 100 MW for that year, its projection would account for those 20 MW of energy efficiency. In other words, but-for its updated modeling, PJM would have forecasted demand for 120 MW. Assume further that PJM purchased commitments from EER providers to provide 20 MW of capacity for the same delivery year. In this hypothetical, PJM would purchase only 80 MW of actual capacity compared to its reliability requirement of 100 MW. Thus, by double counting the effects of EERs, PJM risked obtaining less capacity than it needed.

To counteract that risk, PJM introduced an “add-back” mechanism. For each MW attributable to EERs

that “cleared” at auction, PJM added one MW to its reliability requirement. In other words, if PJM predicted that it needed to obtain 100 MW for a given delivery year and it obtained 20 of those MW from EERs at auction, PJM would shift its reliability requirement from 100 MW to 120 MW. In this way, PJM ensured that EER providers’ participation did not prevent it from purchasing enough capacity.

Although the addback promoted grid reliability, the reliability came at a price: The addback required the utilities and, ultimately, end-use customers within PJM’s region to shoulder the costs of capacity payments for EERs without benefiting from a corresponding reduction in the reliability requirement. As PJM put it, the addback was “at odds with the notion that resources being paid capacity rates should actually provide capacity.” J.A. 34-35. Accordingly, in September 2024, PJM proposed to “prospectively sunset” EERs’ auction eligibility, beginning with July 2025’s auction for the 2026/27 delivery year. J.A. 1. PJM submitted a filing under section 205 of the FPA, seeking permission to amend Section L of the tariff to reflect that change. The proposed amendment stated that no EERs would “qualify” for the auctions “beginning with the 2026/2027 Delivery Year.” J.A. 59.

Given its updated load forecast, PJM explained in an accompanying letter, it had determined that EER participation raised costs for consumers without incrementally reducing the reliability requirement. It observed that capacity payments for EERs had proven increasingly onerous, cresting at \$144 million for the 2025/26 delivery year alone. And it noted that its decision was backed by a supermajority of its stakeholders and was the product of nearly one year’s deliberation.

To support its filing, PJM submitted an affidavit from one of its managers. The manager provided a detailed overview of PJM's load forecast, as well as its plan to exclude EERs from the auctions. For example, he identified the source of PJM's data underlying its load forecast. PJM acquires publicly available data from the EIA, he noted, comprising both historical energy usage (from the EIA's Form EIA-861M) and prospective energy usage (from its Annual Energy Outlook). PJM then supplements those data with information obtained from outside vendors. In recent years, he observed, PJM has acquired supplemental data on "behind-the-meter solar and electric vehicle charging trends." J.A. 118, Gledhill Aff. ¶ 7. He also discussed how the load forecast functioned. PJM ran regression models for different sectors, he explained—residential, commercial and industrial. It finetuned those models on the basis of variables affecting electrical consumption, like historical weather patterns, peak shaving, behind-the-meter storage and data-center activity. In its load forecast for 2024, for example, PJM produced "377 forecast scenarios for every hour" of the year based on variability in weather alone. J.A. 120, Gledhill Aff. ¶ 15.

The manager also explained that PJM met with stakeholders and outside consultants to refine its load forecast. One meeting with a third-party consultant, Itron, Inc., led to a publicly available report on PJM's forecast. The manager also pointed out that various PJM stakeholder groups, including its Load Analysis Subcommittee and Planning Committee, meet periodically to evaluate and provide input on the forecast.

Finally, the manager supplied two pieces of evidence that the load forecast did, in fact, capture EERs. First, for delivery year 2023/24, PJM's predicted peak load was lower than its actual peak load. Second, and relatedly, a

recent short-term forecast had exceeded an older, long-term forecast for the 2024/25 delivery year. If the load forecast had in fact failed to capture EERs, the manager opined, both results should have flipped. The long-term forecast would be *higher* than the short-term forecast and actual peak load because the latter two metrics are more accurate and, hence, more likely to capture EERs. These patterns confirmed, in the manager's view, that the forecast captured EERs accurately. He acknowledged that the forecast was "not so granular as to track" any individual EER project but he concluded that it could "reasonably capture[]" the EERs' aggregate effects on electrical consumption. J.A. 125, Gledhill Aff. ¶ 35.

On the basis of its letter and its manager's affidavit, PJM requested that FERC approve its amendment.

B. Affirmed's Claim

Affirmed does not sell or manufacture EERs itself. Instead, Affirmed "contracts with manufacturers, retailers, and distributors" of EERs "in exchange for the contractual rights to the capacity reductions from those energy efficient products." Pet'r's Br. add. 10, Abram Decl. ¶ 6. Affirmed then "aggregates the expected future energy capacity reductions from those products" and participates in capacity auctions, offering "commitments to reduce energy consumption" in exchange for capacity payments in PJM's region. Pet'r's Br. add. 9-10, Abram Decl. ¶¶ 4-7. It then passes along a portion of those payments to EER manufacturers and retailers. Stated simply, Affirmed's business model runs on capacity payments. If EERs are excluded from the auctions, Affirmed will be left without a material source of revenue. Affirmed bid projects at the 2023/24 and 2024/25 delivery-year auctions. Its bids cleared at each auction.

Under Section L.4 of the tariff, then, Affirmed planned to bid those projects in at least the 2026/27 and 2027/28 delivery-year auctions.

In response to PJM’s filing seeking the above-described tariff amendment, Affirmed submitted a protest.¹ In it, Affirmed highlighted several “deficiencies” in PJM’s proposal that, it asserted, warranted FERC’s rejection. J.A. 162. Among other things, Affirmed criticized PJM’s updated load forecast, challenging PJM’s evidence that the model accurately captured EERs. And it contended that PJM’s proposal would, if approved, retroactively divest it of the right to participate in the 2026/27 and 2027/28 delivery-year auctions.

FERC approved PJM’s amendment. *PJM Interconnection, L.L.C.*, Order Accepting Tariff Revisions, 189 FERC ¶ 61,095, P 1 (2024) (Order). FERC determined that the amendment reduced costs for consumers without compromising PJM’s grid reliability and was therefore just and reasonable under FPA section 205. *Id.* P 63; 16 U.S.C. § 824d(a). And it noted that Section L.4’s *raison d’être*—the four-year lag in the load forecast—no longer existed. Order, 189 FERC ¶ 61,095, P 62. Thus, FERC allowed PJM to exclude EERs from its auctions, starting with the July 2025 auction.

FERC also addressed the protestors’ arguments. Order, 189 FERC ¶ 61,095, P 64. In response to the argument that FERC’s order operated retroactively, FERC concluded that its order applied wholly prospectively, beginning with the July 2025 auction for the

¹ A protest is distinct from a petition for rehearing. Anyone can protest a tariff filing. 18 C.F.R. § 385.211(a)(1). A petition for rehearing, among other things, preserves arguments for judicial review. 16 U.S.C. § 825l(b).

2026/27 delivery year. *Id.* P 71. And although its decision could upset providers' expectations, as some protestors had contended, FERC believed that the benefits of its decision outweighed those costs. *Id.* P 72. PJM would continue to honor existing capacity commitments, FERC pointed out, and the record lacked evidence about the extent to which PJM's proposal would undercut sunk investments. *Id.*

In response to other arguments, FERC conceded that PJM's forecast might not perfectly capture the EERs' effects on demand. Order, 189 FERC ¶ 61,095, P 69. But it determined that the forecast would "reasonably" capture those effects. *Id.* It found the forecast reliable because PJM incorporated publicly available data widely relied on in the industry and refined its forecast through meetings with outside consultants and stakeholders. *Id.*

Finally, FERC rejected the argument that the benefits of EER participation were necessary to achieve just and reasonable rates. Order, 189 FERC ¶ 61,095, P 70. FERC recognized that capacity payments might "increase incentives to invest" in EERs. *Id.* But it did not view those incentives as "necessary to ensure just and reasonable rates," particularly because PJM would continue to account for EERs in its load forecast and, hence, its reliability requirement. *Id.*

One month after FERC accepted the amendment, Affirmed moved for a stay and petitioned for rehearing. *See* 5 U.S.C. § 705; 16 U.S.C. § 825*l*. In its motion, Affirmed argued that FERC's order posed an existential threat to its operations, leaving it saddled with \$50 million in sunk investments and forcing it to cease operations once it met its obligations for the 2025/26 delivery year.

In January 2025, FERC denied Affirmed’s rehearing petition by failing to decide it within 30 days. *PJM Interconnection, L.L.C.*, Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, 190 FERC ¶ 62,005 (2025). It stated that it would address the substance of Affirmed’s rehearing petition and stay motion in a future order. *Id.*

The following month, FERC issued an order explaining its rationale. *PJM Interconnection, L.L.C.*, Order Addressing Arguments Raised on Rehearing and Denying Stay, 190 FERC ¶ 61,081, P 1 (2025) (Rehearing Order). FERC elaborated on its rationale for concluding, among other things, that PJM’s load forecast captured the effects of EERs, *id.* PP 31-34, and that the benefits of its decision outweighed the harm to existing reliance interests, *id.* PP 36-38. It noted that Section L.1 of the tariff put providers on notice that improvements to the forecast might render their projects ineligible for the auctions, which, in turn, diminished the providers’ reasonable reliance interests. *Id.* P 38.

Affirmed filed petitions for review of all three orders. PJM moved to intervene, as did the Independent Market Monitor on PJM’s behalf, and we granted both motions.

II. Analysis

We have jurisdiction of Affirmed’s petition, 16 U.S.C. § 825l(b), and we review *de novo* the claim that FERC violated the filed-rate doctrine, *SFPP, L.P. v. FERC*, 967 F.3d 788, 802 (D.C. Cir. 2020) (per curiam). We review Affirmed’s remaining claims under the Administrative Procedure Act’s arbitrary-and-capricious standard. 5 U.S.C. § 706(2)(a). Under that standard, we will uphold an agency’s decision if it is “reasonable and reasonably explained.” *FCC v. Prometheus Radio*

Project, 592 U.S. 414, 423 (2021). An agency’s decision is arbitrary and capricious if the agency entirely fails to consider an important aspect of the problem before it or ignores the reasonable reliance interests of regulated parties. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30-32 (2020). An agency’s decision is also arbitrary and capricious if it merely rubberstamps a regulated party’s analysis. *Susquehanna Int’l Grp., LLP v. Sec. & Exch. Comm’n*, 866 F.3d 442, 447 (D.C. Cir. 2017).

In its petition, Affirmed contends that FERC’s orders violated the filed-rate doctrine by retroactively divesting Affirmed of the right to participate in at least two more capacity auctions. Affirmed also asserts that FERC’s orders were arbitrary and capricious for three reasons: First, FERC impermissibly rubberstamped PJM’s load forecast instead of critically reviewing PJM’s analysis or conducting its own; second, FERC unreasonably discounted the benefits of EER participation; and third, FERC failed to consider the EERs’ reliance interests. We consider each argument in turn.

A.

Affirmed contends that FERC’s orders violate the filed-rate doctrine. It asserts that it obtained the right under Section L.4 to bid at the 2026/27 and 2027/28 delivery-year auctions when its bids cleared at the 2023/24 and 2024/25 delivery-year auctions. And FERC’s orders, it maintains, retroactively divested it of that tariff-based right. It bases its argument on the Supreme Court’s decision in *Landgraf v. USI Film Products*, which deemed retroactive laws that “attach[] new legal consequences to events completed before their enactment,” or which “take[] away or impair[] vested rights

acquired under existing laws.” 511 U.S. 244, 269-70 (1994) (citation modified).

We interpret tariff provisions according to their “plain meaning.” *Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821, 827 (D.C. Cir. 2021). We do not doubt that under Section L.4’s plain meaning, Affirmed obtained permission to bid at up to four consecutive auctions. Our only concern is whether FERC properly approved PJM’s revocation of that permission.

The answer to that question lies in the filed-rate doctrine or its corollary, the rule against retroactive rate-making. The filed-rate doctrine prohibits a utility from charging “any rate other than the one on file with the Commission.” *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018) (quoting *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014)). And the rule against retroactive ratemaking prohibits a utility from “set[ting] rates to recoup past losses” and FERC from “prescrib[ing] rates on that principle.” *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (quoting *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975)); *accord Pub. Serv. Co. of N.H. v. FERC*, 600 F.2d 944, 958 (D.C. Cir. 1979) (“A rate designed to recoup past losses is retroactive and illegal.”). The bar on retroactive ratemaking is a “corollary” of the filed-rate doctrine, precluding FERC “from doing indirectly what it cannot do directly”—that is, allowing a utility to collect a rate other than the filed rate. *SFPP, L.P.*, 967 F.3d at 801-02 (quotations omitted). These rules are “not limited to rates *per se* but also extend[] to matters directly affecting rates.” *Okla. Gas & Elec. Co.*, 11 F.4th at 829 (citation modified).

In the domain of interstate electricity, we have based these rules on the FPA’s text. Section 205 of the FPA requires utilities to file tariffs with FERC

“reflecting the rates they charge and the related rules.” *Cent. Hudson Gas & Elec. Corp. v. FERC*, 138 F.4th 531, 533 (D.C. Cir. 2025) (citing *Hecate Energy Greene Cnty. 3 LLC v. FERC*, 72 F.4th 1307, 1309-10 (D.C. Cir. 2023)); 16 U.S.C. § 824d(c). And section 206 empowers FERC, with exceptions not relevant to this petition, to “fix rates and charges, but only prospectively.” *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 72 (D.C. Cir. 1992); 16 U.S.C. § 824e(a).

Affirmed characterizes its filed-rate claim as a challenge to retroactive ratemaking. Because neither PJM nor FERC has attempted to impose something other than the rate on file, we agree that Affirmed’s claim is best conceptualized as one of retroactivity, to the extent that these rules diverge in practice. *See Associated Gas Distribs. v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (mem.) (per curiam) (Williams, J., concurring in the denial of rehearing and rehearing en banc).

Our precedent makes clear that FERC’s orders were not impermissibly retroactive. We have upheld an agency’s authority to impose a new auction rule, even if that rule divested regulated parties of a permission they had obtained under an earlier regime. *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997). In *DIRECTV*, we considered whether the Federal Communications Commission (FCC) retroactively divested petitioners of the right to acquire satellite channels surrendered by another party. *Id.* at 825-26. The FCC had granted permits to several applicants to construct satellites. Those permits came subject to certain requirements, including an obligation to begin operating within six years of receiving the permit. *Id.* at 822 (quoting 47 C.F.R. § 100.19(a)). By order, the FCC afforded the permittees a “reservation[],” granting them the “first right” to

a pro-rata share of any channel of a surrendered or cancelled permit. *Id.* (quotation omitted). When the FCC canceled one permit, however, it decided to auction off the permittee's fifty-one channels instead. *Id.* at 823.

Several permittees filed petitions, contending that the FCC's new auction rule was impermissibly retroactive. Like *Affirmed*, they argued that the FCC's new auction rule "divest[ed] them each of [a] right" "that they had been given in the [earlier] order." *DIRECTV*, 110 F.3d at 825. We analyzed the permittees' claim there, as *Affirmed* asks us to do here, under the Supreme Court's decision in *Landgraf*, which deems retroactive those laws that "impair rights a party possessed when he acted." 511 U.S. at 280. Still, we rejected the permittees' arguments. We recognized that the permittees "may reasonably have expected that, under the" first order, "they would receive a pro rata portion of any channels the [FCC] reclaimed." *DIRECTV*, 110 F.3d at 826. But that order did not, we concluded, foreclose it from taking a different approach moving forward. Indeed, the FCC's order "was itself entirely prospective: it set forth what the FCC intended to do if a certain condition were to arise, which it later did." *Id.* In view of these circumstances, we concluded that the new auction rule was not retroactive.²

² The partial dissent distinguishes *DIRECTV* principally on the ground that the FCC had "never implemented" its binding order. Partial Dissenting Op. 14. In our view, that distinction does not matter. An agency's progress towards implementing a guarantee says very little about whether that guarantee existed in the first place—or, more relevant here, whether a subsequent decision retroactively erased that guarantee. Rather, an agency's progress speaks to, if anything, the existence and strength of any reliance interests—an issue we have consistently analyzed under other doctrines, including secondary retroactivity, *e.g.*, *Bd. of Cnty. Comm'rs*

DIRECTV is no outlier. We have iterated its basic holding in similar contexts. In *National Cable & Telecommunications Ass’n v. FCC*, for example, the FCC banned exclusivity contracts between cable operators and multiple-dwelling units. 567 F.3d 659, 661-62 (D.C. Cir. 2009) (NCTA). It also prohibited cable companies from enforcing existing exclusivity contracts. *Id.* at 662. Petitioners argued that the FCC’s decision to outlaw existing exclusivity contracts operated retroactively. *Id.* at 670. We rejected that assertion, however, concluding that the decision was not retroactive because it did “not render[] past actions illegal or otherwise sanctionable,” even if it “impaired the future value of past bargains.” *Id.*

Similarly, in *Mobile Relay Associates v. FCC*, we upheld the FCC’s rebanding decision, in which it reconfigured a portion of the radio band. 457 F.3d 1, 3 (D.C. Cir. 2006). One petitioner argued that the FCC retroactively impaired the right it had obtained at auction to operate a licensed radio system in the future. *Id.* at 10. The petitioner equated the FCC’s decision with selling a “10-year timber” lease, “collecting the ten years of rent in advance, and then, one year into the ten-year term,” prohibiting timber extraction. Pet’r’s Br. at 31-32, *Mobile Relay Assocs.*, 457 F.3d 1 (No. 04-1413). We declined to set aside the decision as retroactive, holding that its effects were “purely prospective” even if they unsettled the petitioner’s reliance interests. *Mobile Relay Assocs.*, 457 F.3d at 11. We also observed that an order “is not retroactive” if it “alters the future effect”

of Weld Cnty. v. Env’t Prot. Agency, 72 F.4th 284, 295-96 (D.C. Cir. 2023), and the Administrative Procedure Act’s arbitrary-and-capricious standard, *e.g.*, *MediNatura, Inc. v. Food & Drug Admin.*, 998 F.3d 931, 940-41 (D.C. Cir. 2021).

but “not the past legal consequences of an action.” *Id.* (citation modified).³

Consistent with this understanding of retroactivity, we see nothing impermissibly retroactive about FERC’s decision. Affirmed reasonably expected that it would be allowed to bid in at least two more auctions. But that expectation did not transform FERC’s forward-looking orders into retroactive ratemaking. An order that merely “upsets expectations based on prior law is not retroactive.” *NCTA*, 567 F.3d at 670 (quoting *Mobile Relay Assocs.*, 457 F.3d at 11). Nor is an order that simply “alters the future effect” of a party’s conduct. *Mobile Relay Assocs.*, 457 F.3d at 11. FERC’s orders undoubtedly altered Affirmed’s eligibility for future auctions—a “future effect,” as *Mobile Relay* put it. *Id.* But that is all they did. They did not strip Affirmed of its “past eligibility.” *Ass’n of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 864 (D.C. Cir. 1992). They did not force Affirmed to return the “payments [it] had received” from earlier auctions.⁴ *Id.* And they did not

³ There is nothing unique about the broadcast or communications fields that would preclude us from applying these cases to define retroactivity. Many of our foundational cases in this context drew guidance from FCC precedent in defining retroactivity. *E.g.*, *City of Piqua*, 610 F.2d at 954 (quoting *Nader*, 520 F.2d at 202); *Pub. Serv. Co.*, 600 F.2d at 957 (same). And we have observed that, as a general matter, courts apply the filed-rate doctrine “across the spectrum of regulated utilities.” *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007) (quotation omitted).

⁴ This is one of the reasons that we find unpersuasive the partial dissent’s reliance on *Arkema Inc. v. Environmental Protection Agency*, 618 F.3d 1 (D.C. Cir. 2010). The *Arkema* Court made clear that the agency’s 2010 rule was retroactive because it allowed the agency to undo transactions that were completed in 2008 and 2009. 618 F.3d at 7, 10. Laws that nullify past transactions are quintessentially retroactive. See *Landgraf*, 511 U.S. at 268-69, 280. Here,

render Affirmed’s “past actions illegal or otherwise sanctionable.” *NCTA*, 567 F.3d at 670. They were therefore not retroactive.

Fortifying this conclusion, Section L.4 is “itself entirely prospective.” *DIRECTV*, 110 F.3d at 826. The provision “set forth what [PJM] intended to do” once a provider’s bid cleared at an auction. *Id.* But the occurrence of that condition did not create regulatory gridlock—not even, as Affirmed claims, for two more capacity auctions. *Id.* “To conclude otherwise would hamstring” FERC in exercising its statutory prerogative to accept just and reasonable tariffs. *Mobile Relay Assocs.*, 457 F.3d at 11. Because FERC’s orders are not retroactive under our caselaw, they do not violate the rule against retroactive ratemaking.

The partial dissent challenges our reliance on FCC caselaw in defining retroactivity, contending that it is crucial to pay careful attention to the underlying statute—here, the FPA. Partial Dissenting Op. 13, 17. We agree: The critical question is whether FERC violated the FPA’s rule permitting only prospective changes to the filed rate.⁵ But to answer that question, it is first necessary to define “retroactivity,” which is why we draw guidance from caselaw on that matter.

Moreover, we cannot help but point out that the partial dissent’s precedent of choice, *Arkema Inc. v. Environmental Protection Agency*, 618 F.3d 1 (D.C. Cir.

by contrast, Affirmed will keep all of the payments it received from the 2023/24 and 2024/25 delivery-year auctions. *See* Order, 189 FERC ¶ 61,095, P 72.

⁵ No one—not Affirmed, not us and not the partial dissent—has identified a more specific, text-based rule that FERC could have violated here.

2010), has nothing to do with either the FPA or the filed-rate doctrine. *See* Partial Dissenting Op. 17-18. *Arkema* instead involved an Environmental Protection Agency (EPA) rulemaking; the effective bar on retroactivity there arose from the Clean Air Act, 42 U.S.C. § 7671f, together with the Supreme Court’s “clear statement” rule from *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). *Arkema*, 618 F.3d at 7. Why those sources should be more analogous to the FPA than the FCC sources eludes us.

At bottom, we agree with the partial dissent that it can be difficult to parse “the difference between a ‘past entitlement’ and a mere ‘expectation.’” Partial Dissenting Op. 12. Despite our dissenting colleague’s undeniable thoroughness and eloquence, however, we remain convinced that this petition calls for nothing more than a straightforward application of precedent.

B.

Next, Affirmed argues that FERC’s orders are arbitrary and capricious because FERC failed to critically evaluate PJM’s load forecast. Because that forecast provided the basis of PJM’s filing, Affirmed asserts, FERC had to—but did not—either critically review PJM’s analysis or conduct its own.

If an agency relies on a regulated party’s analysis to justify its decision, it must either critically review that analysis or perform its own. *Susquehanna Int’l Grp.*, 866 F.3d at 447.

“[U]nquestioning reliance” on the submission does not suffice. *Bloomberg L.P. v. Sec. & Exch. Comm’n*, 45 F.4th 462, 473 (D.C. Cir. 2022) (quoting *Susquehanna Int’l Grp.*, 866 F.3d at 447). Nor may an agency “simply summarize[]” the party’s argument “in broad strokes”

and then “announce” that it is persuaded. *In re NTE Conn., LLC*, 26 F.4th 980, 988 (D.C. Cir. 2022). Instead, if the agency decides not to perform its own analysis, it must “adopt” the party’s submission and “explain[] why” it finds the submission “persuasive.” *Cboe Futures Exch., LLC v. Sec. & Exch. Comm’n*, 77 F.4th 971, 979 (D.C. Cir. 2023) (citation modified).

Here, FERC critically reviewed PJM’s load forecast and explained why it found the submission persuasive. FERC acknowledged that there would “inevitably” be some daylight between PJM’s load forecast and the actual effects of EERs on electrical consumption. Order, 189 FERC ¶ 61,095, P 69. But it determined that the forecast could reasonably capture those effects, for several reasons.⁶

First, the forecast uses reliable data. Order, 189 FERC ¶ 61,095, P 69; Rehearing Order, 190 FERC ¶ 61,081, P 32. As FERC explained, the forecast incorporates data from multiple sources, including “publicly available data” from the EIA, a unit within the U.S. Department of Energy, whose data are widely used in the industry. Order, 189 FERC ¶ 61,095, P 69; *accord* Rehearing Order, 190 FERC ¶ 61,081, PP 32-33. PJM then supplements the EIA data with data acquired from other sources. Order, 189 FERC ¶ 61,095, P 69; Rehearing Order, 190 FERC ¶ 61,081, PP 32-33. These additional data encompass variables like historical weather patterns, behind-the-meter battery use, electric-vehicle charging, solar-energy use and data-center activity. *See*

⁶ For some of its discussion, FERC incorporated by reference portions of the manager’s affidavit, as it was entitled to do. *Christian Broad. Network, Inc. v. Copyright Royalty Tribunal*, 720 F.2d 1295, 1306 (D.C. Cir. 1983); *see Colo. Interstate Gas Co. v. Fed. Power Comm’n*, 324 U.S. 581, 595 (1945).

Rehearing Order, 190 FERC ¶ 61,081, P 32 nn.83-84 (citing, *inter alia*, Gledhill Aff. ¶¶ 10, 13-15). The reliability of these data, FERC determined, weighed in favor of finding the forecast reliable. Order, 189 FERC ¶ 61,095, P 69; Rehearing Order, 190 FERC ¶ 61,081, P 32.

Second, the forecast employs a plausible mechanism to capture EERs without the four-year lag. PJM incorporates end-use intensity values, FERC explained, which track a technology's use over time and its efficiency. Rehearing Order, 190 FERC ¶ 61,081, P 32 & n.85 (citing Gledhill Aff. ¶¶ 16-23). In other words, the values project "growing efficiency," meaning the greater the impact of an EER project, the "lower the end-use intensity." J.A. 121, Gledhill Aff. ¶¶ 20-21. FERC recognized that these values helped close the gap between the date EER projects become operational and when the projects are reflected in the forecast. Order, 189 FERC ¶ 61,095, PP 62, 65; Rehearing Order, 190 FERC ¶ 61,081, P 32.

Third, PJM refines its model on the basis of feedback from shareholders and outside consultants. Order, 189 FERC ¶ 61,095, P 69 & n.163 (citing Gledhill Aff. ¶¶ 6-11). Various groups within PJM periodically review the load forecast, including its Load Analysis Subcommittee and Planning Committee. J.A. 119, Gledhill Aff. ¶ 10. PJM also commissioned a publicly available report from outside consultant Itron, Inc. J.A. 119, Gledhill Aff. ¶ 11. And after Itron published its report, it met with the Load Analysis Subcommittee to evaluate the forecast. J.A. 119, Gledhill Aff. ¶ 11. In FERC's view, these expert consultations also weighed in favor of crediting the forecast. Order, 189 FERC ¶ 61,095, P 69; Rehearing Order, 190 FERC ¶ 61,081, P 32.

Fourth, other metrics confirmed that the forecast did not significantly underestimate the effects of EERs. Rehearing Order, 190 FERC ¶ 61,081, P 33 & n.91 (citing Gledhill Aff. ¶¶ 33-34). The relationship between recent load forecasts on the one hand and the observed load and short-term forecast on the other corroborated the load forecast's reliability, FERC concluded. *Id.* P 33 n.91 (citing Gledhill Aff. ¶¶ 33-34). As PJM's manager had explained, those relationships would have flipped if the model had seriously underestimated the effects of EERs. J.A. 124-25, Gledhill Aff. ¶¶ 33-34. Weighing all of this evidence, FERC determined that "PJM's improved load forecast reasonably accounts for energy efficiency measures." Rehearing Order, 190 FERC ¶ 61,081, P 31.

We believe FERC met its duty to critically review PJM's submission. It carefully described the submission and explained why the submission was suitable for its intended purpose. Far from "rubberstamp[ing]" PJM's analysis, FERC fully explained why it "found [that] evidence persuasive." *In re NTE Conn.*, 26 F.4th at 988. Measured against our deferential standard of review, FERC's analysis was, we believe, more than satisfactory.

Affirmed, however, emphasizes that FERC did not have access to the statistical methodology underlying PJM's load forecast and so it questions FERC's ability to evaluate accurately the forecast. Affirmed mistakes the level of granularity that our caselaw imposes. "There is no support" for the assertion that an "untested" and "uncorroborated" affidavit "cannot constitute substantial evidence." *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002); *see also Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 745 F.2d 677, 683-84 (D.C. Cir. 1984)

(“When the arbitrary or capricious standard is performing that function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test...”). Tellingly, it cites no precedent in which we have required a regulated party to disclose an underlying statistical model before the agency can adopt the party’s analysis. And Affirmed’s objection is especially inapt where, as here, PJM has commissioned a publicly available report on its methodology and has provided a detailed affidavit discussing how that methodology works. *See Am. Whitewater v. FERC*, 125 F.4th 1139, 1153 (D.C. Cir. 2025) (“Absent evidence to the contrary, FERC was entitled to rely on representations by parties who were uniquely in a position to know the relevant information.” (citation modified)).

Affirmed also contends that FERC failed to grapple with several aspects of the EIA’s data that rendered the data unsuitable for the load forecast. For example, Affirmed alleges that the EIA fails to account for certain kinds of EERs, overestimates energy consumption and has warned against using its analyses as a forecast. Even if Affirmed is right on the facts, the EIA data were, as FERC noted, just “one input” for a model that, on the whole, it found reliable. Rehearing Order, 190 FERC ¶ 61,081, P 33. And it acknowledged that the load forecast might not perfectly capture EERs’ expected effects. Order, 189 FERC ¶ 61,095, P 69. But because load forecasting is “inherently uncertain” and PJM’s proposal cut costs without sacrificing reliability, FERC concluded that PJM had adequately supported its proposal. Rehearing Order, 190 FERC ¶ 61,081, PP 33-34. We find nothing unreasoned in that explanation.

Finally, Affirmed highlights that FERC framed many of its observations in the third person—“PJM

described,” or “PJM explained.” Pet’r’s Br. 45 (citation modified). In Affirmed’s view, this language calls into question whether FERC in fact adopted PJM’s submission as its own or simply summarized PJM’s arguments. We disagree. FERC most probably employed the third person as acknowledging that PJM carried the burden of showing its proposal was just and reasonable. *See* 16 U.S.C. § 824d(e); *City of Winnfield v. FERC*, 744 F.2d 871, 877 (D.C. Cir. 1984). Its analysis confirms that understanding. In describing the evidence supporting the forecast, FERC stated, “We also ... find that PJM has met its burden to show that its proposal will result in just and reasonable rates” and that the “forecast reasonably accounts for” EERs. Rehearing Order, 190 FERC ¶ 61,081, P 31; *accord id.* P 33.

C.

Affirmed also asserts that FERC failed to consider an important aspect of the problem before it—namely, the benefits of EER participation. Affirmed maintains that EER providers use the revenue they receive from capacity auctions to further incentivize the production and sale of EERs. The loss of that revenue, Affirmed says, will diminish EER growth as a matter of “economics 101.” Pet’r’s Br. 48. Yet, it contends, FERC entirely ignored this consequence of its decision.

It is well settled that an agency’s action is arbitrary and capricious if it “entirely fail[s] to consider an important aspect of the problem” before it. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Ohio v. EPA*, 603 U.S. 279, 293 (2024) (“An agency cannot simply ignore an important aspect of the problem.” (citation modified)). The agency may, however, recognize a problem but conclude that the problem is mitigated, or its costs outweighed,

by other considerations. *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1217 (D.C. Cir. 2004).

We conclude that FERC has met this standard. FERC acknowledged that its decision could reduce the incentives to invest in EER projects. It also noted that “providing capacity payments” for EERs “may increase incentives to invest” in EERs but that those incentives were not “necessary to ensure just and reasonable rates in PJM.” Order, 189 FERC ¶ 61,095, P 70. PJM would continue to capture EERs “on the demand side,” FERC emphasized, thereby reducing both the resource requirement and the corresponding capacity payments. *Id.* FERC was thus aware of and considered any blunting of incentives. *Baystate Franklin Med. Ctr. v. Azar*, 950 F.3d 84, 91 (D.C. Cir. 2020). But FERC properly “face[d] the trade-off” inherent in its decision and determined that “the trade-off was worth it.” *Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin.*, 956 F.2d 321, 323-24 (D.C. Cir. 1992) (emphasis omitted). In so doing, it balanced conflicting factors as it is sometimes required to do in enforcing the FPA. *See Belmont Mun. Light Dep’t v. FERC*, 38 F.4th 173, 184 (D.C. Cir. 2022).

In a variation on the same theme, Affirmed maintains that FERC’s response was internally inconsistent. *See World Shipping Council v. Fed. Mar. Comm’n*, 152 F.4th 215, 221 (D.C. Cir. 2025) (An agency’s decision is unreasoned if it is “internally inconsistent.” (quotation omitted)). Affirmed highlights three statements that, in its view, are inconsistent. First, FERC disclaimed reliance on PJM’s theory that there was *no* relationship between capacity payments and EER investment. Second, FERC recognized that capacity payments might incentivize investment in EERs. Third, FERC determined that the amendment would not undercut grid reliability.

These statements are not inconsistent. In the first, FERC meant to quell any fears that it had adopted PJM's position that there was *no* relationship between the proliferation of EERs and capacity payments. Order, 189 FERC ¶ 61,095, P 27. PJM had, after all, argued that "the proliferation of energy efficiency projects in the PJM Region is *entirely unrelated to capacity payments*." J.A. 38 (emphasis added). Picking up on that theme, protestors argued that PJM's proposal unfairly imposed a "strict causation standard" on them alone. Order, 189 FERC ¶ 61,095, P 27. For example, one protestor contended that PJM required it to "somehow demonstrate" that it "caused" a customer to purchase an EER product and that its receipt of capacity payments was "the reason" for the purchase.⁷ Protest of Advanced Energy Management Alliance, FERC Dkt. ER 24-2995, at 18 (Sep. 27, 2024). FERC rejected that implication. Instead, it clarified that its decision did "not depend on [PJM's] assertions [about] the link between capacity market payments and [EER] investments." Order, 189 FERC ¶ 61,095, P 66 n.149. In other words, FERC declined to accept PJM's hardline stance that there was no relationship at all between capacity payments and EER investment. That position, however, is perfectly consistent with FERC's comment that capacity payments might incentivize EER investment.

The third statement is also consistent with FERC's other positions. FERC recognized the potential incentive effect of capacity payments for EERs. But it does not follow that removing that incentive would

⁷ Because only Affirmed petitioned for rehearing, we of course do not review the substance of the other protestors' arguments. 16 U.S.C. § 825l(a). We consider those arguments only to contextualize the statements that Affirmed alleges are inconsistent.

necessarily outweigh the benefits of the tariff amendment or render the grid unreliable. As Affirmed itself points out, FERC believed the amendment would not undermine grid reliability. There is no statement in the orders to the contrary. FERC iterated time and again that the amendment would lower costs without compromising grid reliability. *See, e.g.*, Order, 189 FERC ¶ 61,095, PP 63, 72; Rehearing Order, 190 FERC ¶ 61,081, P 34. Affirmed might disagree with FERC’s prediction but its disagreement does not render FERC’s orders internally inconsistent.

Affirmed also contends that FERC failed to recognize and explain its change of position from 2009. At the time, FERC opined that EERs were a “critical part” of the energy market. 2009 Order, 126 FERC ¶ 61,275, P 130. Now, by sanctioning PJM’s attempt to exclude EER providers, FERC has, Affirmed argues, done a *volte face*. We reject this contention as well. Without opining on the merits of the claim, we note that Affirmed did not include the claim in its request for rehearing and so it is forfeit. *See* 16 U.S.C. § 825*l*; *Ameren Servs. Co. v. FERC*, 893 F.3d 786, 793 (D.C. Cir. 2018) (discussing the FPA’s “unusually strict exhaustion requirement” (citation modified)).

D.

Finally, Affirmed argues that FERC overlooked its reliance interests. Providers like Affirmed structured their business models around capacity payments, it asserts. And Affirmed had invested \$50 million in EERs that it planned to bid at the 2026/27 and 2027/28 delivery-year auctions. In Affirmed’s view, FERC failed to contend with the fact that its decision erased Affirmed’s existing investments and its business model.

The governing legal principles are not in dispute. An agency is not precluded from changing its position. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). But when it does, it must “assess whether there [are] reliance interests, determine whether they [are] significant, and weigh any such interests against competing policy concerns.” *Regents*, 591 U.S. at 33. Put another way, an agency must be “cognizant” of the reliance interests its decision might upset and “explain[] its good reasons” for moving forward anyway. *MediNatura, Inc. v. Food & Drug Admin.*, 998 F.3d 931, 943 (D.C. Cir. 2021) (citation modified). It falls to the agency to decide whether any reliance interests are outweighed by other factors. *Regents*, 591 U.S. at 32.

Viewed through this lens, FERC’s decision was reasonable and, hence, permissible. FERC recognized the reliance interests at stake, weighed their significance and reasonably concluded that any harm to those interests was outweighed by other considerations. *See Cap. Power Corp. v. FERC*, 156 F.4th 644, 650 (D.C. Cir. 2025).

First, FERC acknowledged that its decision might undermine existing reliance interests. It noted that providers might have expected that their EERs would be eligible for four years when deciding to invest. Order, 189 FERC ¶ 61,095, P 72. But in its view, several factors diminished the gravity of those reliance interests. The tariff did not grant providers an entitlement that PJM could not change moving forward. *Id.* The tariff also did not guarantee that any EER would *clear* at the auction and thus generate revenue for the provider. *Id.* And Section L.1 tempered the reliance interests, FERC explained, because it expressly tied eligibility to PJM’s load forecast and thereby put EER providers on notice that EERs’ eligibility might end. Rehearing Order, 190

FERC ¶ 61,081, P 38. In addition, PJM intended to honor existing capacity obligations, it noted, ensuring that providers received some return on their investments. Order, 189 FERC ¶ 61,095, P 72. Finally, FERC concluded that the record did not disclose the extent to which providers had already recouped their investments. *Id.* FERC emphasized, for example, that Affirmed did not disclose how much, if not all, of its \$50 million outlay it had already recovered. Rehearing Order, 190 FERC ¶ 61,081, P 51.

Having appraised the reliance interests at stake, FERC explained why its decision was nonetheless reasonable. FERC determined that PJM's proposal would produce "a more efficient capacity market" by reducing the reliability requirement and, hence, the capacity payments ultimately borne by consumers. Order, 189 FERC ¶ 61,095, P 72. And it would do this without compromising grid reliability. *Id.* FERC concluded that these benefits "outweigh[ed] the possible harm" its decision might cause. *Id.* It highlighted several considerations that diminished the weight of the reliance interests. *See MediNatura*, 998 F.3d at 942-43 (analyzing factors that diminished or overcame reliance interests). And it underscored that PJM would continue to honor existing capacity commitments, which meant that providers' investments would not be rendered worthless. Where, as here, the agency has recognized and reasonably balanced the reliance interests at stake, we do not replace its judgment with our own. *Regents*, 591 U.S. at 32; *see NCTA*, 567 F.3d at 671.

Affirmed contends that FERC missed the mark when it weighed the amendment's prospectiveness, as well as the lack of any clearing guarantee, in appraising its reliance interests. In Affirmed's view, these points did not answer its argument that it had reasonably relied

on Section L.4 for the right to participate in at least two more capacity auctions. Affirmed misconceives FERC's analysis. FERC expressly acknowledged that providers like Affirmed may have expected that their EERs would be eligible for four consecutive capacity auctions. Order, 189 FERC ¶ 61,095, P 72. It considered the amendment's prospective nature and the lack of any clearing guarantee for a different reason—"to properly define the scope of the reliance interests at stake." Rehearing Order, 190 FERC ¶ 61,081, P 37. In FERC's view, these factors diminished the interests' significance, permitting it to conclude that they were outweighed by other considerations.

Affirmed also maintains that FERC unreasonably discounted its \$50 million investment in EER projects that it intended to bid at the 2026/27 and 2027/28 delivery-year auctions. It repeatedly highlighted those sunk investments before the agency, Affirmed asserts, but FERC nonetheless faulted it for failing to show the extent to which FERC's decision would thwart its expectations, or how much of the \$50 million it had already recouped. FERC permissibly counted that lack of evidence against Affirmed. Once it had determined that PJM showed the amendment was just and reasonable—a determination that Affirmed has not challenged—FERC reasonably faulted Affirmed for failing to respond with persuasive rebuttal evidence. *Evergy Kan. Cent., Inc. v. FERC*, 77 F.4th 1050, 1056 (D.C. Cir. 2023). It noted that the record did not reflect the degree to which the amendment would thwart existing investments. Order, 189 FERC ¶ 61,095, P 72. It did not dispute that Affirmed had invested in EERs but it observed that Affirmed had not stated whether it had already recouped its investment. Rehearing Order, 190 FERC ¶ 61,081, P 51. Recoupment was no remote

possibility: EER providers received more than \$140 million in capacity payments for the 2025/26 delivery year alone. *Id.* P 50 n.163. And the projects that Affirmed planned to bid at the 2026/27 and 2027/28 delivery-year auctions had already cleared at least one auction, generating some revenue for Affirmed. FERC permissibly weighed this lack of evidence when considering the reliance interests at stake.

* * *

For the foregoing reasons, the petition for review is denied.

So ordered.

PAN, *Circuit Judge*, dissenting in part:

PJM Interconnection, LLC (“PJM”) is a regional transmission organization that manages the wholesale market for electricity in the Mid-Atlantic and Midwestern regions of the United States. PJM conducts auctions to ensure adequate electricity capacity to meet demand. Its auction procedures are governed by a tariff that the Federal Energy Regulatory Commission (“FERC” or the “Commission”) must approve.

In 2009, PJM amended its tariff to authorize suppliers of Energy Efficiency Resources (“EERs”) to participate in its capacity auctions. To incentivize EER bidding, the tariff guaranteed that if an EER “cleared” an auction (*i.e.*, if the bid were accepted), it could also be offered in the next three auctions. Although previously cleared EERs were not assured of clearance in the subsequent auctions, the opportunity for the EER providers to participate was valuable: So long as the subsequent bids were low enough, the EERs would “clear” those auctions too and thus would generate additional payments to the providers. EER providers factored that possibility into their pricing of energy-efficiency projects and into their bidding strategies in auctions.

Under the multi-year eligibility rule, the clearing of an EER in a PJM capacity auction was a legally significant event: The initial clearance conferred on the EER’s purveyor an entitlement to participate in the next three auctions. That entitlement was protected by the filed-rate doctrine, which constrains PJM’s ability to change its tariff, and the retroactivity doctrine, which prohibits FERC from altering the legal consequences arising out of a past action.

Affirmed Energy, LLC (“Affirmed”) is a provider of EERs in PJM’s region. Affirmed’s EERs cleared PJM’s

auctions for the 2023/24 and 2024/25 delivery years. It therefore was entitled to bid those EERs in the 2026/27 and 2027/28 delivery-year auctions. But before that could happen, PJM amended its tariff in 2024 to bar EERs from all auctions, effectively changing the filed rate on which Affirmed relied, and retroactively stripping Affirmed of an entitlement that the tariff had conferred. Because I disagree with my colleagues' conclusion that the 2024 tariff amendment did not retroactively alter Affirmed's eligibility to bid its EERs in specific future auctions, I respectfully dissent from Section II.A of the court's opinion. I join the court's holding that the 2024 amendment was not otherwise arbitrary and capricious.

I. Background

The Federal Power Act ("FPA" or the "Act") grants FERC the authority to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). The Act charges the Commission with ensuring that electricity rates—including all "rules and regulations affecting or pertaining to such rates"—are "just and reasonable" and not "undu[ly] prejudic[ial]." *Id.* § 824d(a)-(b). Regulated entities that manage the transmission and sale of electricity must file with FERC "schedules showing all rates and charges for any transmission or sale ... and the classifications, practices, and regulations affecting such rates and charges." *Id.* § 824d(c). FERC must publish those proposed rates and regulations. *Id.* Once filed, a rate cannot be changed without following notice-and-comment procedures. *Id.* § 824d(d) ("[N]o change shall be made ... in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public.");

id. § 824d(e) (allowing third parties to submit protests challenging proposed rates and rules). FERC may change unjust and unreasonable rates and rules, but it may do so only prospectively. *Id.* § 824e(a); *see also Okla. Gas & Elec. Co. v. FERC*, 11 F.4th 821, 829 (D.C. Cir. 2021) (“FERC has no authority under the Act to allow retroactive change in the filed rates.” (cleaned up)).

To carry out its statutory duties, FERC has tasked regional transmission organizations (“RTOs”) with coordinating the transmission of electricity and managing the wholesale markets within their respective regions. *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 267 (2016). PJM is one such RTO. At least once a year, PJM administers competitive auctions to procure capacity from electricity-generating suppliers. “Capacity is not actual electricity,” but rather “a commitment to produce electricity or forgo the consumption of electricity” in a future delivery year. *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 659 (D.C. Cir. 2017). Because capacity “auctions determine the wholesale rates of energy in interstate commerce, they are subject to Commission oversight.” *XO Energy MA, LP v. FERC*, 77 F.4th 710, 714 (D.C. Cir. 2023). PJM therefore must file with FERC a tariff that sets forth the governing rules for its capacity auctions. *Id.*; 16 U.S.C. § 824d(c).

In PJM’s capacity auctions, suppliers bid the price they are willing to accept in exchange for committing to provide electricity in a future delivery year. PJM accepts or “clears” bids starting with the lowest rate that is offered until it has procured enough capacity to meet its projected demand—commonly referred to as its projected “load.” All accepted bids receive the highest accepted rate, known as the “clearing price.” *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 156 (2016). PJM typically administers its auctions three years

before the target delivery year. In doing so, it relies on a “load forecast” model to predict “the amount of capacity that needs to be procured” for that delivery year. J.A. 118 (Gledhill Aff. ¶ 5).

In 2009, FERC approved a PJM tariff that authorized EER providers to bid the projected energy savings from their resources as capacity in PJM’s auctions. *PJM Interconnection, LLC*, 126 FERC ¶ 61,275 at P 130 (2009) (the “2009 Order”). Under that 2009 tariff, EERs played a unique role in PJM’s capacity market. Unlike power-generating suppliers that commit to producing electricity, EER suppliers—like Affirmed—commit to reducing energy consumption in PJM’s region.

Affirmed contracts with manufacturers, retailers, and distributors of energy-efficient products to provide per-unit compensation for each energy-efficient product that is sold. In exchange, the program partners give Affirmed “the contractual rights to the capacity reductions from those energy[-]efficient products.” Affirmed Add. 10 (Abram Decl. ¶ 6). Those capacity reductions comprise the EERs that Affirmed bids at a capacity auction. The payments that Affirmed makes to its program partners for the sale of energy-efficient products incentivize the partners to increase their sales of such products. If Affirmed’s EERs clear at the capacity auction, Affirmed receives the clearance price from PJM. The dollar amounts at issue are significant: In PJM’s auction for the 2024/25 delivery year, EER suppliers like Affirmed received more than \$100 million in revenue for cleared EER bids.

The instant petition for review concerns, in relevant part, Section L.4 of PJM’s 2009 tariff. Section L.4 provides that an EER that clears a capacity auction may be offered in the next three consecutive auctions:

[An] Energy Efficiency Resource that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction... .

J.A. 61.¹

In its 2009 Order approving PJM's tariff, FERC confirmed that "PJM's proposal would allow an [energy-efficient] resource to bid into the auction, and if it is accepted, to bid for an additional three consecutive years." 126 FERC ¶ 61,275 at P 131. FERC's approval of that provision rested on two policy considerations. First, as the majority explains, PJM adopted the multiple-auction rule to address the four-year lag between when consumers installed energy-efficient products and when PJM's load forecast model accounted for the corresponding reduction in energy demand. *Id.* at P 132. Second, FERC also approved the tariff provision to make it more likely that EER suppliers would receive additional payments for their positive contributions. Unlike power generators that produce electricity each year, energy-efficient products continuously reduce energy demand and capacity needs in PJM's region over time.

¹ Another provision of the 2009 tariff, Section L.1, defines an EER as follows:

An Energy Efficiency Resource is a project ... designed to achieve a continuous ... reduction in electric energy consumption at the end-use customer's retail site that is not reflected in the peak load forecast prepared for the Delivery Year for which the Energy Efficiency Resource is proposed, and that is fully implemented at all times during such Delivery Year, without any requirement of notice, dispatch, or operator intervention.

J.A. 60.

Consider, for example, a consumer who has installed an energy-efficient refrigerator in her home. That refrigerator will continuously reduce the homeowner’s energy consumption over multiple years and, as a result, will lower the expected energy demand that PJM’s capacity auction must meet. When FERC approved the participation of EERs in PJM’s auctions, it expressly acknowledged that “energy efficiency is a permanent reduction in load” *Id.* at P 136. Section L.4 was intended to “allow energy efficiency resources that clear in [an] auction to receive ... capacity payments for up to four consecutive Delivery Years.” *Id.* at P 121. That benefit to EER suppliers reflected FERC’s view that EER projects served “a critical part of efficient energy markets, and should be treated comparably to other types of resources, by being allowed to participate in base residual auctions and be paid the auction clearing price when they are accepted in the auction.” *Id.* at P 130.

Since 2014, Affirmed has bid its EERs in nearly thirty auctions. In preparation for the auctions, Affirmed “calculate[d] and aggregate[d] the expected future energy capacity reductions” from its energy-efficiency projects and, in turn, bid those capacity reductions in PJM’s auctions. Affirmed Add. 10 (Abram Decl. ¶ 7). PJM reviewed and approved Affirmed’s calculation “methodologies” to verify that its energy-efficiency projects had, in fact, reduced the expected capacity load. *Id.*; *see also* 2009 Order, 126 FERC ¶ 61,275 at P 121.

From 2022 to 2024, Affirmed invested \$50 million to incentivize the purchase and installation of energy-efficient products, and to acquire the contractual rights to the attendant capacity reductions. Affirmed then bid the energy savings from those products in PJM’s auctions for the 2023/24 and 2024/25 delivery years. Affirmed’s EERs cleared both auctions. As a result, the

operative tariff guaranteed Affirmed the opportunity to bid the continued energy savings from those EERs in PJM's 2025/26, 2026/27, and 2027/28 delivery-year auctions.

But before Affirmed could bid its EERs in the 2026/27 and 2027/28 delivery-year auctions, PJM changed course. In 2024, PJM proposed a tariff amendment that barred EERs from its capacity auctions altogether. Specifically, its 2024 amendment declared that “no Energy Efficiency Resources shall qualify to be offered into the [capacity] Auctions beginning with the 2026/2027 Delivery Year.” J.A. 94. The proposed amendment rendered Affirmed ineligible to bid its EERs in the 2026/27 and 2027/28 delivery-year auctions, even though its EERs had cleared the 2023/24 and 2024/25 delivery-year auctions.²

Affirmed submitted a protest opposing PJM's 2024 tariff amendment. In relevant part, Affirmed argued that because its EERs cleared the 2023/24 and 2024/25 delivery-year auctions, Affirmed had secured the right to bid its EERs in up to three additional consecutive capacity auctions, under the operative tariff. Affirmed objected that PJM's proposed tariff amendment would divest Affirmed of its entitlement to bid its EERs in the 2026/27 and 2027/28 delivery-year auctions. FERC nevertheless approved the 2024 tariff amendment as applied

² PJM justified the change by explaining that its improved load forecast model could now incorporate the expected energy savings from energy-efficient products. As the majority explains, PJM was entitled to change its policy regarding EERs, and its tariff amendment was not arbitrary and capricious. I focus here on the retroactive effects of the change on Affirmed's right to participate in future auctions after its EERs cleared the 2023/24 and 2024/25 delivery-year auctions.

to Affirmed’s previously cleared EERs, concluding that the original multi-year eligibility provision did not preclude PJM from implementing “forward-looking revisions to Energy Efficiency Resources’ eligibility more broadly.” *PJM Interconnection, LLC*, 189 FERC ¶ 61,095 at P 71 (2024).

II. The Filed-Rate and Retroactivity Doctrines

The Commission may adjust electricity rates and related regulations only prospectively. This constraint on FERC’s authority rests on two related principles: the filed-rate doctrine and the rule against retroactive rate-making. The filed-rate doctrine is grounded in provisions of the Federal Power Act that require regulated entities (like PJM) “to charge only the rates filed with FERC and to change their rates only prospectively.” *Oklahoma Gas*, 11 F.4th at 829. That statutory prohibition on retroactive changes to the filed rate “is not limited to ‘rates’ *per se*”; it also “extends to matters directly affect[ing] ... rates”—such as the EER auction-participation rule at issue here. *Id.* (cleaned up) (quoting *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986)). The scope of the doctrine is consistent with the Act’s broad language requiring regulated entities to publicly file proposed changes in any “rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto.” 16 U.S.C. § 824d(d).

The rule against retroactive ratemaking is a “corollary” and “logical outgrowth” of the filed-rate doctrine. *SFPP, L.P. v. FERC*, 967 F.3d 788, 801, 802 (D.C. Cir. 2020). It generally “prohibits the Commission from adjusting current rates to make up for a utility’s over- or under-collection in prior periods.” *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1227 (D.C. Cir. 2018).

Together, 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 rate for good cause or for any other equitable considerations.” *Old Dominion Elec.*, 892 F.3d at 1230; *see also Okla. Gas*, 11 F.4th at 829-30 (noting that the doctrines are “nearly impenetrable shield[s]” that do “not yield, no matter how compelling the equities”). Strict application of those principles gives effect to Congress’s command for FERC to ensure predictable and stable electricity rates. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007); *see also PJM Power Providers Grp. v. FERC*, 96 F.4th 390, 402 (3d Cir. 2024) (“FERC has no authority to disregard Congress’s will” in achieving predictable auction rules.); *cf. Pub. Utilities Comm’n of Cal. v. FERC*, 894 F.2d 1372, 1383 (D.C. Cir. 1990) (The Natural Gas Act’s ban on retroactive ratemaking “reflects a congressional determination that parties in the industry need to be able to rely on the finality of approved rates, and that this interest outweighs the value of being able to correct for decisions that in hindsight may appear unsound.”).

In evaluating the retroactivity of a tariff provision approved by FERC, courts look to the Supreme Court’s decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), for guidance. *See, e.g., PJM Power Providers*, 96 F.4th at 398 (noting that the Federal Power Act does not define “retroactivity” and drawing on *Landgraf*). *Landgraf* explains that a law or regulation is retroactive if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” 511 U.S. at 269 (cleaned up). A regulation does not have retroactive effect “merely because it is applied in a case arising from

conduct antedating the [regulation’s] enactment, ... or upsets expectations based in prior law.” *Id.* Rather, the critical question is whether the new provision “attaches new legal consequences to events completed before its enactment.” *Id.* at 270; *see also Bd. of Cnty. Comm’rs v. EPA*, 72 F.4th 284, 292-93 (D.C. Cir. 2023) (“[R]etroactive rules alter the past legal consequences of past actions.”).

Landgraf instructs that the “conclusion that a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.” 511 U.S. at 270 (cleaned up). The analysis is therefore “fact-intensive,” Shambie Singer, *Sutherland Statutory Construction* § 41:4 (8th ed. 2018), and informed by “familiar considerations of fair notice, reasonable reliance, and settled expectations,” *Landgraf*, 511 U.S. at 270.

III. Analysis

In my view, PJM’s 2024 tariff amendment is impermissibly retroactive and violates the filed-rate doctrine to the extent that it strips Affirmed of its entitlement to bid its EERs in the 2026/27 and 2027/28 delivery-year auctions—an entitlement that attached when Affirmed’s EERs cleared the 2023/24 and 2024/25 delivery-year auctions. Under *Landgraf*, the 2024 tariff amendment “takes away or impairs” Affirmed’s “vested right” to bid in subsequent auctions, which was “acquired under [the] existing [tariff].” 511 U.S. at 269 (cleaned up). The amendment also “attaches a new disability ... in respect to transactions or considerations already past.” *Id.* The “past” events were the 2023/24 and 2024/25 delivery-

year auctions, in which Affirmed earned the right to participate in subsequent auctions by clearing its EERs.

Under *Landgraf*, the retroactivity analysis turns on whether PJM's pre-existing tariff attached a past legal consequence to a past action. That inquiry begins with interpreting the tariff's "plain meaning," understood through both "its text and context." *Okla. Gas*, 11 F.4th at 827. The relevant tariff provision here, Section L.4, plainly states that an EER that "clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction." J.A. 61. The guarantee of three subsequent years of auction participation is so clear that my colleagues in the majority "do not doubt that under Section L.4's plain meaning, Affirmed obtained permission to bid at up to four consecutive auctions." Maj. Op. at 14.

Landgraf notes that the fact-intensive retroactivity analysis is informed by "familiar considerations of fair notice, reasonable reliance, and settled expectations." 511 U.S. at 270. Here, the multi-year participation provision in Section L.4 was intended to provide an incentive for EER suppliers to participate in PJM's capacity auctions and to more accurately account for the contributions of EERs to the electricity market. Because EERs provide ongoing reductions in demand for future delivery years, FERC determined that EER "providers should have the ability to obtain the full economic benefits of their investments" by participating in up to four auctions. 2009 Order, 126 FERC ¶ 61,275 at P 137. FERC's 2009 Order and the tariff itself thus set the expectation that EER suppliers would be granted multi-year participation in capacity auctions if their EERs cleared an initial auction. In other words, that expectation was embodied in the filed rate.

The tariff's multi-year auction provision, approved by the 2009 Order, drove Affirmed to substantially invest in EERs and to bid them in the 2023/24 and 2024/25 delivery-year auctions. In executing its business plan and formulating its bids, Affirmed relied on Section L.4's guarantee that if its EERs cleared an auction, Affirmed would secure multi-year eligibility to offer the continued energy savings from those EERs in three consecutive auctions. Critically, Affirmed submitted EER bids that cleared the auctions for the 2023/24 and 2024/25 delivery years. Affirmed's settled expectation *at the time of clearance* was that it would be permitted to participate in the next three capacity auctions.

Despite the plain meaning of Section L.4 and Affirmed's reliance on it, my colleagues in the majority conclude that the 2024 amendment that bars EERs from PJM's capacity auctions operates only prospectively in this case. Maj. Op. at 16-19. They reason that the 2024 amendment does not disturb Affirmed's past entitlement but instead merely frustrates Affirmed's expectations of participating in future auctions. *Id.* Although the difference between a "past entitlement" and a mere "expectation" is not easy to parse, my colleagues do not attempt to explain why they view the change to PJM's tariff as "prospective" as applied to Affirmed, when Affirmed's right to participate in future auctions ripened in the past—*i.e.*, during the auctions for the 2023/24 and 2024/25 delivery years.

As I see it, the key facts before us are that (1) Affirmed's right to bid its EERs in the 2026/27 and 2027/28 delivery-year auctions vested when its EERs cleared the 2023/24 and 2024/25 delivery-year auctions; (2) the filed-rate doctrine safeguards Affirmed's reliance on Section L.4 of the operative tariff, which PJM filed and FERC approved; and (3) the prohibition against

retroactive rate-making and general principles of retroactivity further constrain the ability of PJM and FERC to alter the tariff to the extent that it affects a “past legal consequence”—here, the vesting of Affirmed’s rights when its EERs cleared past auctions.

The cases cited by my colleagues in their analysis of the retroactivity issue are factually and legally distinguishable. None of them addresses a situation where a change in regulatory policy altered a past legal consequence—*i.e.*, where a legal right was conferred on the petitioning party in the past but was stripped away by the new rule. Instead, the majority’s cited cases largely address circumstances where companies made business decisions based on their understanding of certain rules that later changed, thereby upsetting the companies’ expectations. The critical distinction here is that Affirmed’s EERs already cleared auctions for the 2023/24 and 2024/25 delivery years, and the operative tariff guaranteed that Affirmed therefore would be entitled to bid those EERs in the 2026/27 and 2027/28 delivery-year auctions. The cases cited by the majority would be more on point if Affirmed had not cleared any auctions in the past but argued that it should be allowed to participate in the next auction because it had invested time and money to prepare a bid in reliance on the terms of the pre-existing tariff. But instead, Affirmed’s past clearing bids resulted in a past legal consequence—the right to bid again—that sets this case apart. It is also notable that my colleagues rely on cases involving the Federal Communications Commission (“FCC”) that do not involve filed rates or the application of the filed-rate doctrine, even though the filed-rate doctrine constrains FERC’s ability to change the terms of the tariff at issue in this case.

My colleagues principally rely on *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997). There, we addressed whether the FCC had retroactively divested permittees of a right to receive satellite channels. *Id.* at 821. Initially, the FCC issued an order that reserved for permittees “the first right” to a *pro rata* share of any additional channels that might later be surrendered or canceled. *Id.* at 822. Years later, the FCC canceled and reclaimed a forfeited channel. The agency, however, abandoned “its existing, but never implemented, policy of re-assigning channels on a *pro rata* basis among existing permittees...” Respondents’ Brief at 6, *DIRECTV*, 110 F.3d 816 (No. 96-1001). Instead, when it reclaimed the forfeited channel, the FCC announced its decision to adopt a new rule reallocating the forfeited channel through a competitive auction. *Id.* We rejected the permittees’ retroactivity claim because the FCC’s former *pro rata* policy did not grant them “the right to any specific channel.” *DIRECTV*, 110 F.3d at 826. Rather, the former policy had prospectively established “the Commission’s plan for the distribution of reclaimed channels, should there ever be any.” *Id.*

DIRECTV is inapposite because it involved a prospective policy that the agency announced but never implemented. Here, by contrast, the relevant provision of the 2009 tariff was in effect for fifteen years until PJM decided to change it. Moreover, the permittees in *DIRECTV* took no action that triggered an obligation by the FCC; but in the instant case, Affirmed succeeded in clearing two capacity auctions with its EERs, and that obligated PJM to allow it to participate in up to three more auctions. Although the permittees in *DIRECTV* made unilateral business decisions to spend “millions of dollars building satellites ... for more channels,” that action had no legal consequence under the agency’s policy.

110 F.3d at 826. Thus, the permittees’ business decision rested solely on an “expectation[]” that the FCC would implement the *pro rata* policy. *Id.* But here, PJM’s tariff amendment operated retroactively because it was “substantively inconsistent with a prior agency practice and attache[d] new legal consequences to events completed before its enactment”—*i.e.*, the amendment deprived Affirmed of a right that it had already secured when its EERs cleared in past auctions. *Arkema Inc. v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010) (cleaned up).

Similarly, *National Cable & Telecommunications Ass’n v. FCC* (“*NCTA*”) is not analogous because it also involved a straightforward case of upsetting business expectations. 567 F.3d 659 (D.C. Cir. 2009). In *NCTA*, the FCC banned exclusivity agreements between cable companies and owners of apartment buildings due to the agreements’ anticompetitive effects. *Id.* at 662. The petitioners challenged the rule by arguing, in relevant part, that the ban’s application to existing contracts was retroactive. *Id.* at 670. We rejected that argument, noting that “[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes.” *Id.* (quoting *Chem. Waste Mgmt. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989)). Such a change in the law that merely upsets expectations is not retroactive. But we reaffirmed in *NCTA* that altering “past legal consequences of past actions” would be. *Id.* As discussed, the key fact in the case before us is that Affirmed’s entitlement to participate in the auctions for the 2026/27 and 2027/28 delivery years was a “past legal consequence” of its “past action” of submitting clearing bids in the 2023/24 and 2024/25 delivery-year auctions.

Likewise, my colleagues’ reliance on *Mobile Relay Associates v. FCC*, 457 F.3d 1 (D.C. Cir. 2006), is

misplaced. In *Mobile Relay*, we rejected a retroactivity challenge to the FCC’s decision to reconfigure portions of a radio spectrum, which incidentally impaired the petitioners’ ability to use their spectrum licenses. *Id.* at 10. The petitioners argued that, when they purchased their licenses at an auction, the FCC had advertised certain features that allowed “future flexible use,” which was “one of the economically advantageous assets of the license.” Petitioners’ Brief at 11, *Mobile Relay*, 457 F.3d 1 (No. 04-1413). We held that the FCC’s reconfiguration decision that made the licenses less advantageous posed no retroactivity concern because the petitioners’ purchase of the licenses created only a contingent expectation—not a fixed legal entitlement—that the FCC’s licensing regime would continue to permit flexible operations indefinitely. *Mobile Relay*, 457 F.3d at 10-11. The FCC’s reconfiguration decision prospectively affected future operations and did not alter the legal effect of any past event because the petitioners’ licenses did not make any guarantees or promises about the configuration of the spectrum. That, of course, is very different from the situation now before us, where Section L.4 of the pre-existing tariff guaranteed Affirmed’s entitlement to participate in future auctions once its EERs cleared an initial auction.

Notably, we observed in *Mobile Relay* that the FCC’s licensing scheme did not, by itself, create vested rights or otherwise trigger fixed legal consequences based on the terms of the licenses because “the [FCC] has the unilateral authority, provided it gives notice to the licensee, to modify a license ‘either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity.’” 457 F.3d at 12 (quoting 47 U.S.C. § 316(a)(1)); *see also Celtronix*

Telemetry, Inc. v. FCC, 272 F.3d 585, 589 (D.C. Cir. 2001) (The FCC “always retain[s] the power to alter the term of *existing* licenses by rulemaking.” (emphasis added)). That statutory backdrop stands in stark contrast to the regulatory scheme that we consider here. The Communications Act authorizes the FCC “to modify a license” midstream, “if in the judgment of the Commission such action will promote the public interest, convenience, and necessity,” *Mobile Relay*, 457 F.3d at 12 (quoting 47 U.S.C. § 316(a)(1)); but the tariff amendment in the instant case was subject to the filed-rate doctrine, which “leave[s] 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,” *Old Dominion Elec.*, 892 F.3d at 1230. Although my colleagues mention that courts have applied the filed-rate doctrine “across the spectrum of regulated utilities,” Maj. Op. at 18 n.2, they fail to acknowledge that the filed-rate doctrine “does not have a life of its own. Its application depends on the underlying statute,” *Towns of Concord, Norwood, & Wellesley v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992). In this instance, the specific features of the governing statutes are critical, and they make *Mobile Relay* inapt because the FCC in that case was not subject to the same constraints that bind FERC in this case.³

³ To be sure, Title II of the Communications Act, 47 U.S.C. § 203, requires common carriers to publicly file their rates and tariffs with the FCC, subject to the filed-rate doctrine. *Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 221-22 (1998). But the cases cited by my colleagues do not involve the rates filed by regulated parties and instead primarily consider the FCC’s broader regulatory authority to manage licenses under Title III of the Communications Act, 47 U.S.C. §§ 301, 316.

In sum, the FCC cases cited by my colleagues shed little light on the question of retroactivity in the present context. To my mind, the most analogous case is *Arkema*, which more precisely addresses the meaning of “past legal consequence.” 618 F.3d at 7. There, the EPA’s former rule allowed companies to permanently transfer their baseline allowances of hydrochlorofluorocarbons production. *Id.* at 4. Under that rule, the petitioner completed a permanent transfer of its baseline allocation, which the EPA approved. *Id.* at 7. The EPA later amended its rule and refused to honor the previously approved transfer. *Id.* at 3. We held that the new rule operated retroactively because it sought to “undo these completed transactions.” *Id.* at 9. As we explained, “[t]he Agency’s approval and acknowledgment of Petitioners’ actions distinguish[] this case from situations where a company’s unilateral business expectations are thwarted by a change in the regulatory framework.” *Id.* at 8. Similarly here, FERC approved—and PJM implemented—a tariff that authorized EERs’ participation in auctions and conferred multi-year eligibility once a resource cleared the first auction. This “successive iteration in a long-running regulatory regime” remained in effect for fifteen years. *Id.* at 9. Refusing to honor Affirmed’s vested entitlement to bid the continued energy savings from its cleared EERs will “undo what [FERC] had, in practice, approved under the” 2009 tariff. *Id.* Heeding *Landgraf*’s directive to assess the nature and extent of the tariff amendment’s change, this case is most similar to *Arkema*: PJM’s 2009 tariff operated to approve and acknowledge Affirmed’s right to participate in the auctions for the 2026/27 and 2027/28 delivery years; Affirmed’s right to bid in subsequent auctions was a legal consequence of its successful EER

bids in earlier auctions; and the 2024 amendment sought to “undo [those] completed transactions.” *Id.*

* * *

For the foregoing reasons, I would grant Affirmed’s petition in part and vacate FERC’s approval of PJM’s 2024 tariff amendment to the extent that it deprives Affirmed of its vested right to participate in the capacity auctions for the 2026/27 and 2027/28 delivery years. My fact-bound conclusion does not suggest, as PJM and FERC claim, that utilities may never amend their tariffs. What distinguishes this case is the vesting of Affirmed’s right to bid its EERs in specific future auctions, under the terms of the tariff provision at issue. I agree with my colleagues’ conclusion that FERC may otherwise approve PJM’s proposed tariff amendment and that it may operate prospectively. I disagree only with the retroactive divestment of Affirmed’s entitlement to participate in the 2026/27 and 2027/28 auctions. I thus respectfully dissent from Section II.A of the majority opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-1091

AFFIRMED ENERGY, LLC,
Petitioner,
v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

MONITORING ANALYTICS, LLC, AND
PJM INTERCONNECTION, LLC,
Intervenors

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before: HENDERSON and PAN, *Circuit Judges,*
and GINSBURG, *Senior Circuit Judge*

Filed February 10, 2026

JUDGMENT

This cause came to be heard on the petition for review of orders of the Federal Energy Regulatory Commission and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review be denied, in accordance with the opinion of the court filed herein this date.

54a

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

Date: February 10, 2026

Opinion for the court filed by Circuit Judge Henderson.

Opinion dissenting in part filed by Circuit Judge Pan.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

189 FERC ¶ 61,095
Docket No. ER24-2995-000

PJM Interconnection, L.L.C.
(Issued November 5, 2024)

Before Commissioners:
Willie L. Phillips, Chairman; Mark C. Christie,
David Rosner, Lindsay S. See and Judy W. Chang

ORDER ACCEPTING TARIFF REVISIONS

1. On September 6, 2024, pursuant to section 205 of the Federal Power Act (FPA)¹ and part 35 of the Commission's regulations,² PJM Interconnection, L.L.C. (PJM) filed revisions to the PJM Open Access Transmission Tariff (Tariff) and Reliability Assurance Agreement (RAA) to prospectively sunset Energy Efficiency Resource participation in PJM's wholesale capacity market, the Reliability Pricing Model (RPM).³ In this order, we

¹ 16 U.S.C. § 824d.

² 18 C.F.R. pt. 35 (2024).

³ Transmittal at 1; PJM Interconnection, L.L.C./Intra-PJM Tariffs, ATTACHMENT DD-1, OATT ATTACHMENT DD-1 (24.0.0) (Proposed Tariff, Attachment DD-1), § L; PJM Interconnection, L.L.C./Intra-PJM Tariffs, RAA SCHEDULE 6 (23.0.0) (Proposed RAA Schedule 6), § L. PJM adds that its proposal seeks to appropriately recognize energy efficiency on the demand side of the

accept PJM’s proposed revisions, effective November 6, 2024, as requested.

I. Background

2. In March 2009, the Commission accepted in relevant part proposed tariff revisions from PJM to incorporate energy efficiency participation in the RPM.⁴ PJM’s filing followed Commission approval of a comprehensive settlement in which PJM agreed to establish an additional process within the PJM region for pursuing and supporting demand response and incorporating energy efficiency applications into its capacity market.⁵ In the March 2009 Order, the Commission agreed with PJM that, based on the configuration of the PJM capacity market at that time, PJM’s proposal corrected “a mismatch between [energy efficiency]-related load reductions and capacity requirement levels” due to the four-year lag between when an Energy Efficiency Resource is initially installed and when its load-reducing effects are reflected in PJM’s load forecast and the associated installed reserve requirement for the Delivery Year.⁶ The Commission noted that, “[a]s a result of not including the [energy efficiency] in the load forecast, the [Variable Resource Requirement] curve fails to move to the

capacity market, where it is already reflected in the load forecast in the aggregate. Transmittal at 4.

⁴ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at PP 131-132 (March 2009 Order), *order on clarification*, 127 FERC ¶ 61,104, *order on clarification & reh’g*, 128 FERC ¶ 61,157 (2009).

⁵ *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 133 (2006) (December 2006 Order), *order on reh’g & clarification*, 119 FERC ¶ 61,318 (June 2007 Order), *denying reh’g*, 121 FERC ¶ 61,173 (2007).

⁶ March 2009 Order, 126 FERC ¶ 61,275 at P 134.

left, increasing the price paid and capacity acquired compared with a load forecast that correctly included [energy efficiency].”⁷

3. The PJM Tariff and RAA define an Energy Efficiency Resource as:

a project, including installation of more efficient devices or equipment or implementation of more efficient processes or systems, exceeding then-current building codes, appliance standards, or other relevant standards, designed to achieve a continuous (during peak summer and winter periods as described herein) reduction in electric energy consumption at the end-use customer’s retail site that is not reflected in the peak load forecast prepared for the Delivery Year for which the Energy Efficiency Resource is proposed, and that is fully implemented at all times during such Delivery Year, without any requirement of notice, dispatch, or operator intervention.⁸

4. RAA Schedule 6, section L.3 and Tariff, Attachment DD-1, section L.3 provide, in part, that an Energy Efficiency Resource may be offered with a price offer or as self-supply and, if an Energy Efficiency Resource clears the auction, it shall receive the applicable capacity resource clearing price. RAA Schedule 6, section L.4 and Tariff, Attachment DD-1, section L.4 provide that an Energy Efficiency Resource that clears an auction for a

⁷ *Id.*

⁸ PJM Interconnection, L.L.C./Intra-PJM Tariffs, ATTACHMENT DD-1, OATT ATTACHMENT DD-1 (23.0.0) (Tariff, Attachment DD-1), § L.1; PJM Interconnection, L.L.C./Intra-PJM Tariffs, RAA SCHEDULE 6 (22.0.0) (RAA Schedule 6), § L.1.

delivery year “may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction.”⁹

II. PJM Filing

A. 2016 Load Forecast Methodology Revision

5. PJM states that it improved its peak load forecast in 2016 by developing an end-use intensity modeling methodology that directly captures the impact of energy efficiency projects and thereby eliminates the four-year lag between when energy efficiency projects are installed and when they are reflected in the load forecast.¹⁰ PJM explains that its peak load forecast has been primarily based on publicly available data from the Energy Information Administration (EIA) and relies on Form EIA-861M for historic energy use data and the EIA’s Annual Energy Outlook for forward-looking energy use data to forecast energy efficiency impacts on load. As a result of this change, PJM states that it now includes energy efficiency on the demand side on a forward basis (i.e., within the load forecast) for each RPM auction and that it is no longer reasonable to claim that energy efficiency is not already reflected in the load forecast.

6. PJM explains that, after its load forecasting methodology improvements, it adopted an “addback” to continue accommodating Energy Efficiency Resource capacity market participation while avoiding double-counting the impact of Energy Efficiency Resources on both the supply and demand sides of the RPM.¹¹ PJM

⁹ Tariff, Attachment DD-1, § L.1; RAA Schedule 6, § L.1.

¹⁰ Transmittal at 14-15, 23-24.

¹¹ *Id.* at 5, 24-30 & attach. C, Aff. of Andrew Gledhill on Behalf of PJM Interconnection, L.L.C. (Gledhill Aff.) ¶¶ 38-42. PJM

asserts that improper double-counting could cause PJM to fail to procure sufficient capacity to maintain reliability. PJM states that it implements the addback by adding a MW to the reliability requirement for each MW of Energy Efficiency Resources that clears in an RPM auction. Thus, PJM explains, Energy Efficiency Resources no longer contribute to meeting the reliability requirement and may not serve as a substitute for any other capacity resource committed in the RPM auction. PJM asserts that load therefore pays capacity prices to Energy Efficiency Resources without receiving a corresponding benefit.

B. Proposed Tariff Revisions

7. PJM proposes to add a provision to its rules governing participation of Energy Efficiency Resources stating that those rules are “effective only through the 2025/2026 Delivery Year” and that “no Energy

asserts that, without the addback, double-counting would occur because Energy Efficiency Resources would reduce the reliability requirement—therefore counting on the demand side—and contribute to meeting the region’s reliability needs—thus, counting on the supply side. To illustrate the double-counting risk, PJM describes a hypothetical scenario in which (1) PJM has an initial 1,000 megawatt (MW) reliability requirement and (2) energy efficiency projects contribute 50 MW in load reduction. Because the load forecast reflects the 50 MW reduction caused by energy efficiency projects, PJM’s reliability requirement, or the amount of demand, decreases from 1,000 MW to 950 MW. On the supply side, the auction clears 900 MW of generation and demand response resources and 50 MW of energy efficiency capability, for a total of 950 MW of cleared capacity. But while the market ostensibly clears 950 MW, because the same 50 MW of energy efficiency capability that reduced the reliability requirement is also used to meet the reliability requirement, PJM only procures 900 MW of generation and demand response resources to meet a 950 MW reliability requirement. Transmittal at 28-29.

Efficiency Resources shall qualify to be offered into the RPM Auctions beginning with the 2026/2027 Delivery Year.”¹² PJM states that its proposal is prospective and would not unsettle RPM auction results, including for the 2025/2026 Delivery Year Base Residual Auction (BRA), or undo any existing Energy Efficiency Resource commitments.¹³

8. PJM asserts that its proposed revisions are just and reasonable. PJM contends that its proposal is the most effective way to account for energy efficiency in the RPM while avoiding double-counting a MW of energy efficiency capability on both the supply side and demand side, which would create reliability concerns.¹⁴ Otherwise, PJM states that it must either carve out energy efficiency impacts from the load forecast or maintain the status quo addback, each of which creates problems. PJM states that carving out energy efficiency measures from the peak load forecast would be methodologically difficult and would overstate the amount of capacity that PJM needs to procure to maintain reliability unless all energy efficiency capability offers into and clears capacity auctions for each given delivery year. PJM argues that the addback, for its part, requires load to pay capacity rates for load reductions that would naturally occur

¹² Transmittal at 10, 31 (quoting Proposed Tariff, Attachment DD-1, § L.1; Proposed RAA Schedule 6, § L.1).

¹³ PJM states that, as a result, Energy Efficiency Resources that cleared the RPM auctions for the 2025/2026 Delivery Year will need to follow through on their commitments and submit compliant post-installation measurement and verification reports in advance of that delivery year to substantiate their cleared quantities. *Id.* at 10.

¹⁴ *Id.* at 31-35.

and from which load already receives benefits through the reduced load forecast.

9. PJM contends that energy efficiency measures are proliferating, and will continue to do so, because of: (1) customers responding to market prices reflected in their retail energy bills; (2) end-use customers purchasing more electrically efficient items; (3) local and state adoption of updated and stricter energy efficiency standards, such as building codes; and (4) residential programs and utility programs carried out in accordance with applicable state agency directives.¹⁵ PJM argues that none of these actions depend on capacity payments, that end-use customers may not even be aware of such payments, and that capacity payments to Energy Efficiency Resources therefore do not drive investment in energy efficiency projects. PJM adds that its current capacity market rules do not require a showing of a causal link between capacity payments made to Energy Efficiency Resources and energy efficiency investment, but nevertheless asserts that there is no evidence that any such causal link exists.

10. PJM maintains that intrinsically accounting for energy efficiency capability in its load forecast lowers the total amount of capacity procured through the RPM, and, all else equal, reduces the resulting wholesale

¹⁵ *Id.* at 2, 7-8, 38-39. PJM states that several utility members that currently offer Energy Efficiency Resources into PJM's capacity market have indicated they will continue to incentivize energy efficiency projects through state-sponsored retail programs. *Id.* at 9, 39 & n.106 (citing Alex Stern, *Exelon EE Package Proposal*, Exelon Corp. (Aug. 7, 2024), <https://www.pjm.com/-/media/committees-groups/committees/mic/2024/20240807/20240807-item-02a-1---ee-resource-evaluation-exelon-proposal---presentation.ashx>).

capacity market prices and overall costs.¹⁶ Thus, PJM argues, load-serving entities (LSEs) and their customers already receive the benefits of lower capacity bills resulting from lower energy consumption—which, in turn, incents load to continue adopting energy efficiency measures.¹⁷ PJM argues that continuing capacity payments to Energy Efficiency Resources through the add-back mechanism would thwart these savings by charging customers for efficiency measures that are already, and will continue to be, adopted independent of receiving wholesale capacity market revenues.

11. PJM states that it regularly seeks stakeholder feedback on its load forecasting methodology and that it has continued to enhance its methodology through an iterative process to make the forecast as accurate as possible.¹⁸ PJM also states that it has engaged outside

¹⁶ *Id.* at 39-41.

¹⁷ In addition, PJM claims that energy efficiency projects provide the following other cascading benefits: (1) the capacity market sets a lower reliability requirement by accounting for the permanent reduction in energy consumption in the load forecast than it would absent energy efficiency projects; (2) the lower reliability requirement results in the market procuring less capacity to maintain reliability, which also means that the PJM region will need fewer resources to accommodate the energy transition while maintaining reliability; (3) load pays lower capacity rates because the market procures less capacity; (4) fewer resources interconnect to the grid, which reduces queue congestion, complexity, and interconnection and transmission buildout costs; (5) consumers implementing energy efficiency projects pay lower capacity costs due to a reduced load forecast for their zone; (6) end-use customers realize lower peak load contributions from their respective LSEs, which, in turn, reduces those customers' specific capacity costs; and (7) individual end-use customers who install energy efficiency measures pay reduced energy costs. *Id.* at 40.

¹⁸ *Id.* at 15-16, 19-20 & Gledhill Aff. ¶¶ 33-34.

consultants to validate its approach, promote transparency, and identify potential enhancements to the load forecast process. PJM further supports its claim that the peak load forecast accurately accounts for energy efficiency projects by noting that the weather normal peak load¹⁹ for the 2023/2024 and 2024/2025 Delivery Years exceeded PJM's forecasted peak loads for those delivery years, which, holding all else equal, PJM claims would not have occurred if the PJM load forecast had failed to account for significant energy efficiency reduction to load.

12. PJM contends that energy efficiency need not participate as a supply-side resource for a capacity market to be just and reasonable.²⁰ PJM states that the Commission accepted PJM's RPM market design without requiring energy efficiency to participate and rejected a request for rehearing on this issue.²¹ PJM also notes that the Commission rejected requests that it require the New York Independent System Operator, Inc. (NYISO) to allow energy efficiency to participate as

¹⁹ Weather normalization is a process that adjusts actual energy or peak outcomes, which can vary from year to year, to what would have happened under normal (i.e., typical) weather conditions. See Eric Fox et al., *2022 PJM Model Review* 47-49 (Sept. 6, 2022), <https://www.pjm.com/-/media/planning/res-adeq/load-forecast/pjm-model-reviewfinal-report-from-itron.ashx>.

²⁰ Transmittal at 36.

²¹ *Id.* at 36 (citing June 2007 Order, 119 FERC ¶ 61,318 at PP 198-204).

supply-side resources in its capacity market as part of distributed energy resource aggregations.²²

13. Rather, PJM argues that compensating Energy Efficiency Resources at the capacity market clearing price violates the beneficiary pays cost causation principle, which requires that customers only pay for facilities or services from which they benefit, because Energy Efficiency Resources do not provide capacity nor do capacity payments result in additional energy efficiency adoption.²³

14. Further, PJM argues that energy efficiency is no longer a nascent industry warranting capacity revenues.²⁴ Rather, PJM notes that energy efficiency standards have become more stringent at the federal, state, and local levels since 2010, including all states in the PJM region and the District of Columbia. PJM argues that these standards naturally result in the adoption of energy efficiency actions without the need for capacity revenues. PJM also notes that these constantly evolving standards make it increasingly difficult to conclude that Energy Efficiency Resources being offered into RPM auctions reflect energy efficiency projects that “exceed[] then-current building codes, appliance standards, or other relevant standards,” as required by the Energy Efficiency Resource RAA definition.²⁵

²² *Id.* (citing *N.Y. Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,198, at P 112 (NYISO), *order on reh’g*, 181 FERC ¶ 61,054 (2022)).

²³ *Id.* at 37-38.

²⁴ *Id.* at 3, 17-18.

²⁵ *Id.* at 18 (citing RAA Schedule 6, § L.1).

15. PJM also argues that acceptance of its proposal would promote regulatory efficiency, allowing the Commission to dispose of pending complaints filed by the Independent Market Monitor for PJM (IMM) and various consumer advocates in Docket Nos. EL24-126-000 and EL24-118-000, respectively, that also concern elimination of the addback.²⁶

16. PJM states that its proposal resulted from a stakeholder-initiated holistic review of Energy Efficiency Resource participation in PJM's RPM auctions that began in November 2023. PJM states that a sector-weighted majority of PJM stakeholders at the Markets and Reliability Committee and Members Committee endorsed the instant proposal on August 21, 2024, and the PJM board subsequently approved the proposal on August 26, 2024.²⁷ PJM requests a November 6, 2024 effective date for its proposed Tariff and RAA revisions.

III. Notice and Responsive Pleadings

17. Notice of PJM's filing was published in the *Federal Register*, 89 Fed. Reg. 74,937 (Sept. 13, 2024), with interventions and protests due on or before September 27, 2024.

18. Timely motions to intervene were filed by: Advanced Energy Management Alliance (AEMA); Advanced Energy United; Affirmed Energy LLC; American Electric Power Service Corporation; Buckeye Power, Inc.; Calpine Corporation; Constellation Energy Generation, LLC; Delaware Division of the Public Advocate; Dominion Energy Services, Inc.; Electric Power Supply Association; Enerwise Global Technologies,

²⁶ *Id.* at 10.

²⁷ *Id.* at 41-42.

LLC; Environmental Law & Policy Center; Exelon Corporation; Illinois Attorney General's Office; Illinois Citizens Utility Board; Illinois Municipal Electric Agency; Maryland Office of People's Counsel; Monitoring Analytics, LLC, acting in its capacity as the IMM; Natural Resources Defense Council and Sustainable FERC Project; New Jersey Division of Rate Counsel; NRG Curtailment Solutions, Inc.; Ohio Federal Energy Advocate; Old Dominion Electric Cooperative; PJM Power Providers Group (P3); PPL Electric Utilities Corporation; PSEG Companies; Public Citizen, Inc.; Recurve Analytics, Inc. (Recurve Analytics); Rockland Electric Company; Southern Maryland Electric Cooperative, Inc.; and Vistra Corp. New Jersey Board of Public Utilities filed a notice of intervention.

19. IMM and P3 filed comments supporting PJM's proposal. Protests were filed by AEMA; Advanced Energy United; Affirmed Energy; Environmental Law & Policy Center, Natural Resources Defense Council and Sustainable FERC Project (together, Public Interest Organizations); New Jersey Division of Rate Counsel, Maryland Office of People's Counsel, Illinois Citizens Utility Board, Illinois Attorney General's Office, Delaware Division of The Public Advocate, and the District of Columbia Office of People's Counsel (together, Consumer Advocates); PJM Cities and Communities Coalition;²⁸ and Recurve Analytics.

²⁸ PJM Cities and Communities Coalition are: Alexandria, VA; Arlington County, VA; Charlottesville, VA; Chicago, IL; Cincinnati, OH; Columbus, OH; Dayton, OH; Delaware County, PA; Montgomery County, MD; Newark, NJ; Philadelphia, PA; Pittsburgh, PA; Richmond, VA; Sustainable Ohio Public Energy Council; and Washington, DC

20. Maryland Public Service Commission filed a motion to intervene out-of-time on October 7, 2024.

21. PJM filed a motion for leave to answer and answer to the protests on October 11, 2024. IMM filed a motion for leave to answer and answer to the protests on October 15, 2024. Public Interest Organizations and AEMA each filed a motion for leave to answer and answer to PJM's answer on October 22, 2024. Affirmed Energy filed a motion for leave to answer and answer to PJM's answer on October 28, 2024. PJM filed a motion for leave to answer and answer to Affirmed Energy's Answer on October 29, 2024.

A. Protests

22. Several protesters argue that PJM has not satisfied its burden under FPA section 205 to demonstrate that its proposal is just and reasonable and not unduly discriminatory or preferential.²⁹ Protesters argue that the Commission should reject PJM's proposal³⁰ for the reasons discussed below.

1. PJM's Proposal Conflicts with Commission Precedent

23. Several protesters argue that PJM's proposal conflicts with the March 2009 Order accepting PJM's energy

²⁹ Advanced Energy United Protest at 3; AEMA Protest at 3; Affirmed Energy Protest at 2; Consumer Advocates Protest at 1; Public Interest Organizations Protest at 11.

³⁰ Advanced Energy United Protest at 16; Affirmed Energy Protest at 1, 11-12, 14-15; Consumer Advocates Protest at 2; Public Interest Organizations Protest at 21; Recurve Analytics Protest at 2.

efficiency proposal.³¹ These protesters contest PJM's assertion that PJM's initial proposal was needed only to address the four-year lag before energy efficiency was reflected in the demand curve.³² Rather, they note that the Commission also stated that energy efficiency is a critical part of efficient energy markets in PJM and should be treated on equal footing with other resources³³ and that the owners of Energy Efficiency Resources should have the ability to obtain the full economic benefits of their investments.³⁴

24. Advanced Energy United argues that Commission precedent does not support excluding energy efficiency from the capacity market.³⁵ Advanced Energy United disputes PJM's characterization of the June 2007 Order rejecting a rehearing request regarding the Commission's acceptance of PJM's RPM market design without energy efficiency participation. Instead, Advanced Energy United argues that the Commission agreed with the underlying logic of the New Jersey Board of Public Utilities' rehearing request, but rejected it because it found that the New Jersey Board of Public Utilities had not proposed a workable plan for including energy

³¹ Advanced Energy United Protest at 1; AEMA Protest at 9; Consumer Advocates Protest at 2.

³² Advanced Energy United Protest at 4 (citing Transmittal at 4); AEMA Protest at 9.

³³ Advanced Energy United Protest at 4-5 (citing March 2009 Order, 126 FERC ¶ 61,275 at PP 130, 134); Consumer Advocates Protest at 2.

³⁴ Advanced Energy United Protest at 4-5 (citing March 2009 Order, 126 FERC ¶ 61,275 at PP 130, 134); AEMA Protest at 7-10 (citing March 2009 Order, 126 FERC ¶ 61,275 at PP 133, 137).

³⁵ Advanced Energy United Protest at 10-11.

efficiency in the RPM.³⁶ Advanced Energy United also argues that the Commission’s rejection of a request to require NYISO to allow energy efficiency resources to participate in its capacity market is irrelevant because NYISO’s capacity market never included those resources, whereas PJM must justify its proposal to *remove* energy efficiency resources from its capacity market. According to Advanced Energy United, the fact that energy efficiency need not participate as a supply-side resource for a capacity market to be just and reasonable does not mean that PJM’s filing is just and reasonable.

25. Recurve Analytics and AEMA further argue that PJM’s proposal erects a barrier to energy efficiency participation and therefore violates Order No. 2222’s³⁷ requirement to allow technology-neutral distributed energy resource aggregations.³⁸ These parties argue that because Order No. 2222 stated that distributed energy resources “may include,” but are not limited to, energy efficiency resources, prohibiting one category of distributed energy resources from participating directly in PJM’s Capacity Market contravenes Order No. 2222.³⁹ AEMA argues that PJM’s citation to the Commission’s finding in *NYISO* ignores fundamental differences

³⁶ *Id.* at 11 (citing June 2007 Order, 119 FERC ¶ 61,318 at P 202).

³⁷ *Participation of Distributed Energy Res. Aggregations in Mkts. Operated by Reg’l Transmission Orgs. & Indep. Sys. Operators*, Order No. 2222, 172 FERC ¶ 61,247 (2020), *order on reh’g*, Order No. 2222-A, 174 FERC ¶ 61,197, *order on reh’g*, Order No. 2222-B, 175 FERC ¶ 61,227 (2021)).

³⁸ AEMA Protest at 21; Recurve Analytics Protest at 6.

³⁹ AEMA Protest at 20-21; Recurve Analytics Protest at 6.

between the two Regional Transmission Organizations (RTOs) and that NYISO specifically sought an exemption from Order No. 2222's requirements.⁴⁰

2. Energy Efficiency Resources Provide Capacity Value

26. Several protesters also contest PJM's filing for treating Energy Efficiency Resources differently than other capacity resources. Public Interest Organizations appeal to the Commission's statements in Order Nos. 841 and 2222 to suggest that the Commission has established a general rule that market operators should enable resources that are "technically capable of providing services" to participate in wholesale markets for those services.⁴¹ Several protesters argue that Energy Efficiency Resources are similar to generation resources because they provide capacity value toward reliability, avoiding the need for expensive generation alternatives.⁴² Public Interest Organizations add that energy efficiency resources deployed in PJM over the past 15

⁴⁰ AEMA Protest at n.71 (referencing *NYISO*, 179 FERC ¶ 61,198).

⁴¹ Public Interest Organizations Protest at 8-10 (citing *Elec. Storage Participation in Mkts. Operated by Reg'l Transmission Organs. & Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018); Order No. 2222, 172 FERC ¶ 61,247).

⁴² Advanced Energy United Protest at 2; PJM Cities and Communities Coalition Protest at 1-2; Public Interest Organizations Protest at 5; Recurve Analytics Protest at 6; *see also* Consumer Advocates Protest at 2 (arguing that PJM's proposal lacks evidence demonstrating that Energy Efficiency Resources are technically incapable of providing capacity); Recurve Analytics Protest at 7 (asserting that energy efficiency is technically capable of providing additional wholesale services to reduce all customers' costs when measured hourly at the meter with comparison groups "to parse out incrementality and net out exogenous effects").

years have provided significant load reductions, reducing the amount of generation that LSEs must procure through the RPM, lowering capacity costs for customers and producing rates that are just and reasonable.⁴³

27. Public Interest Organizations and Recurve Analytics assert that PJM's proposal is unduly discriminatory. Recurve Analytics argues PJM's proposal is unjust, unreasonable, and unduly discriminatory because it makes a technology-specific bar to wholesale capacity market eligibility.⁴⁴ Recurve Analytics contends that there is no basis for eliminating energy efficiency measured with meter data and properly attributed to the hour(s) relevant to capacity needs from the capacity market. Public Interest Organizations and AEMA, for their part, argue that PJM's proposal unduly discriminates against Energy Efficiency Resources by selectively applying a novel strict causation standard to them only.⁴⁵ Public Interest Organizations also suggest that capacity market eligibility typically focuses on whether a resource can effectively provide reliability service rather than on whether market payments will affect deployment of that resource.⁴⁶ Further, Public Interest Organizations and Consumer Advocates note that the Commission has recognized in the buyer-side mitigation rules context that ignoring resources despite lack of causation would distort the market and risk over-procuring capacity.⁴⁷

⁴³ Public Interest Organizations Protest at 7-8.

⁴⁴ Recurve Analytics Protest at 5-6.

⁴⁵ AEMA Protest at 19-20; Public Interest Organizations Protest at 15, 19.

⁴⁶ Public Interest Organizations Protest at 16-17.

⁴⁷ Consumer Advocates Protest at 6 (citing *N.Y. Indep. Sys. Operator, Inc.*, 179 FERC ¶ 61,102, at P 39 (2022)); Public Interest

Public Interest Organizations assert that non-discriminatory application of a causation requirement would perversely penalize the most cost-effective resources that can provide a service for no cost by relying on other revenue sources and eliminate capacity payments to over half of PJM's generation fleet.⁴⁸

3. Excluding Energy Efficiency Resources Will Result in Unjust and Unreasonable Rates

28. In addition, several protesters argue that supply-side participation for Energy Efficiency Resources is needed in PJM's capacity market to produce just and reasonable rates.

29. Several protesters contest PJM's suggestion that supply-side energy efficiency participation is no longer necessary because PJM's load forecast methodology now reflects the impact of energy efficiency measures—thereby producing just and reasonable capacity market auction results. These protesters argue that several alleged features of PJM's load forecast cause it to underestimate the impact of energy efficiency measures, therefore resulting in rates that are not just and reasonable,⁴⁹ including by: (1) excluding significant categories

Organizations Protest at 7 (citing *PJM*, Filing, Docket No. ER21-2582-000, at 8 (filed July 30, 2021) (“[I]f the resource is installed (or remains in service) and effectively provides a reliability service notwithstanding denial of capacity revenues, the auction presents an incorrect view of both the price and quantity of providing reliability service in PJM.”)).

⁴⁸ Public Interest Organizations Protest at 16-18.

⁴⁹ AEMA at 15; Affirmed Energy Protest at 7-9; Public Interest Organizations Protest at 4, 12-13. Advanced Energy United, Affirmed Energy, and Consumer Advocates also assert that PJM has not demonstrated that its load forecast accurately reflects the

of energy efficiency measures, including higher efficiency equipment sold with midstream/upstream rebates, commercial outdoor lighting and chillers, and those supported by certain rebate programs in the PJM footprint;⁵⁰ (2) using EIA data that EIA has acknowledged overestimates energy intensity, thereby underestimating energy efficiency;⁵¹ and (3) using forward-looking data that by nature is based on projections and is stale before the delivery year, because the load forecast takes place several years in advance, and therefore cannot account for intervening policy developments like the Inflation Reduction Act.⁵² Advanced Energy United also asserts that PJM's load forecast will not incorporate new energy efficiency technology innovations.⁵³ In addition, several protesters contest PJM's claim that forecasted peak load exceeding the weather normal peak loads for the 2023/2024 and 2024/2025 Delivery Years shows that PJM's load forecast accounted for significant energy efficiency reduction to load⁵⁴ because (1) that claim assumes all else will be taken equal, which is unreasonable given the extraordinary complexity of the load forecast methodology,⁵⁵ and (2) PJM cherry-picks

impacts of energy efficiency measures. Advanced Energy United Protest at 8; Affirmed Energy Protest at 6-7, 9-10, 11; Consumer Advocates Protest at 4.

⁵⁰ Public Interest Organizations Protest at 12 & Ex. A at 4-5.

⁵¹ Affirmed Energy Protest at 7.

⁵² *Id.* at 8-9, 11; Advanced Energy United Protest at 9; Public Interest Organizations at 15.

⁵³ Advanced Energy United Protest at 10.

⁵⁴ *See* Transmittal at 19-20 & Gledhill Aff. ¶¶ 33-34.

⁵⁵ Advanced Energy United Protest at 9; Affirmed Energy Protest at 9-10.

data, while a more systematic review of the comparison between the load forecast and actual load establishes multiple facts consistent with under-forecasting energy efficiency.⁵⁶

30. Public Interest Organizations also state that PJM has admitted that its load forecast may not reflect all energy efficiency investments in the PJM region, and argued that expecting perfect accuracy is not reasonable.⁵⁷ Nevertheless, Public Interest Organization and Consumer Advocates claim that PJM has not attempted to quantify the extent of energy efficiency absences from the load forecast.⁵⁸ In light of this undercounting risk, Public Interest Organizations claim that supply-side energy efficiency participation serves to mobilize merchant energy efficiency providers to document savings that PJM does not model in its load forecast and commit

⁵⁶ Public Interest Organizations Protest at 13. Public Interest Organizations note that: (1) PJM's load was only in the 60th percentile of forecasts for the summer of 2024, despite being in the 98th percentile for heat; (2) PJM's load model very consistently forecasts load 1-3% higher than actual when tested with actual weather; and (3) load on every peak day in the summer of 2024 was lower than the model forecast when tested with actual weather conditions. *Id.* (citing Molly Mooney, *Review of Preliminary Summer 2024 Loads* 2, 8, 9 (Sept. 19, 2024), <https://www.pjm.com/-/media/committees-groups/subcommittees/las/2024/20240919/20240919-item-03—review-preliminary-summer-2024-loads.ashx>). *See also* AEMA Protest at 15 (noting that PJM's most recent review of preliminary summer 2024 Loads demonstrates that peak loads were as much as 2% lower (about 3,000 MW) than expected, given actual weather conditions).

⁵⁷ Public Interest Organizations Protest at 13-14 (citing *PJM*, July 29, 2024 Answer, Docket No. EL24-118-000, at 2-3 (filed July 29, 2024)).

⁵⁸ Consumer Advocates Protest at 4; Public Interest Organizations Protest at 4, 14.

to delivering those savings.⁵⁹ According to AEMA, despite the addback provisions in PJM’s manual, PJM has never identified any amount of Energy Efficiency Resources that are both in the load forecast and offered in the capacity auction for a delivery year (i.e., double-counted).⁶⁰ AEMA contends that PJM’s top-down load forecast methodology cannot capture any specific double-counting of Energy Efficiency Resources because PJM does not actually reduce forecasted demand based upon Energy Efficiency Resources offering into the capacity market.

31. In addition, protesters suggest that allowing energy efficiency measures to participate in the capacity market as supply importantly aligns market signals.⁶¹ Advanced Energy United contends that PJM’s proposal is unjust and unreasonable because energy efficiency providers will not “obtain[] the full economic benefit of their investment.”⁶² That is because, according to Advanced Energy United, under PJM’s proposal, the customer will bear the cost of installing Energy Efficiency Resources while the entire zone benefits from the customer’s

⁵⁹ Public Interest Organizations Protest at 4 (citing Kathleen Spees et al., *The Benefits of Energy Efficiency Participation in Capacity Markets* 1 (Apr. 1, 2021), <https://www.aee.net/hubfs/The%20Benefits%20of%20Energy%20Efficiency%20Participation%20in%20Capacity%20Markets1.pdf>).

⁶⁰ AEMA Protest at 15-16.

⁶¹ Advanced Energy United Protest at 7-8; Public Interest Organizations Protest at 21.

⁶² Advanced Energy United Protest at 7 (citing March 2009 Order, 126 FERC ¶ 61,275 at P 137).

investment.⁶³ Advanced Energy United argues that this will lead to lower deployment of energy efficiency, to the detriment of all customers in that zone. Advanced Energy United contends that the proper way to compensate energy efficiency providers who provide benefits for the entire zone is through capacity market revenues. Advanced Energy United also adds that energy efficiency aggregators undertake risk and expend substantial effort and capital to enable the efficient and cost-effective deployment of energy efficiency measures, but, unlike customers, do not save money from their investment in energy efficiency and instead must be compensated for the value that energy efficiency provides through energy and/or capacity cost savings. Therefore, Advanced Energy United claims that energy efficiency is undervalued when participating on the demand-side only, and allowing energy efficiency aggregators to earn capacity market revenues by participating as supply-side resources in the capacity market bridges the gap between the low marginal price that consumers pay for capacity and the higher marginal value of that capacity on the system, leading to a more efficient market outcome. Public Interest Organizations similarly argue that retail rates typically do not provide any economic benefit to customers who reduce their peak load contributions and that capacity market payments provide market signals to a broader cross-section of energy efficiency providers.⁶⁴ Otherwise, according to Public Interest Organizations, only LSEs that can pass capacity costs on to end-users and therefore have little incentive to attempt to reduce peak load will receive a direct market signal in the form of their reduced capacity obligation. Public

⁶³ *Id.* at 2-3, 7-8.

⁶⁴ Public Interest Organizations Protest at 15, 20-21.

Interest Organizations argue that failure to recognize the capacity value that energy efficiency measure load reductions represent increases capacity prices unnecessarily, resulting in unjust and unreasonable rates.

32. AEMA argues that PJM fails to explain why, given that other RTOs like the California Independent System Operator and ISO New England successfully incorporate energy efficiency measures into their capacity market rules, PJM must remove Energy Efficiency Resource participation from its Tariff and RAA.⁶⁵

4. Capacity Market Payments Cause Adoption of Energy Efficiency Measures

33. Several protesters also contest PJM's claim that energy efficiency adoption is naturally occurring and will continue absent capacity market revenues as conclusory and not supported.⁶⁶ To the contrary, Public Interest Organizations and Advanced Energy United maintain that Energy Efficiency Resources are responsive to financial incentives, and that providers react to price signals just like any other market participant to maximize return on investments.⁶⁷ Advanced Energy United states that capacity market payments provide an additional revenue stream to offset the costs of energy efficiency investments, thereby incenting further investment. Affirmed Energy adds that capacity market payments provide an incentive for retailers to boost adoption of energy efficient products—including through

⁶⁵ AEMA Protest at 17.

⁶⁶ Advanced Energy United Protest at 6; AEMA Protest at 6; Affirmed Energy Protest at 2-4, 6, 11; Public Interest Organizations Protest at 15-16.

⁶⁷ Advanced Energy United Protest at 6; Public Interest Organizations Protest at 16.

lower prices, product placement, signage, or other sales efforts.⁶⁸ Further, Advanced Energy United disputes PJM's claim that RPM payments provide no incremental value in light of state energy efficiency programs, arguing that RPM payments incent investment: (1) above that would occur through state programs; (2) in states that no longer have state energy efficiency standards; and (3) spurred by merchant providers.⁶⁹

34. AEMA also notes, agreeing with PJM, that PJM's existing Tariff does not require Energy Efficiency Resource providers to demonstrate that RPM payments nor the Energy Efficiency Resource provider "caused" an end-use customer to purchase the Energy Efficiency Resource product.⁷⁰

5. Filed Rate Doctrine & Request for Transition Period

35. Advanced Energy United further argues that PJM's proposal to sunset Energy Efficiency Resource participation starting with the BRA for the 2026/2027 Delivery Year violates the filed rate doctrine because it would retroactively eliminate the right of resources that cleared in recent BRAs to participate and earn revenue in subsequent auctions.⁷¹ Advanced Energy United and Affirmed Energy add that Energy Efficiency Resources participate in the RPM under the expectation that they will be able to participate in four consecutive BRAs.⁷²

⁶⁸ Affirmed Energy Protest at 3.

⁶⁹ Advanced Energy United Protest at 6.

⁷⁰ AEMA Protest at 18.

⁷¹ Advanced Energy United Protest at 14-15.

⁷² *Id.* at 15; Affirmed Energy Protest at 12-14. Affirmed Energy states that its assets, purchased during the 2024/2025 Delivery

Affirmed Energy therefore argues that PJM's failure to provide a mechanism for an orderly transition out of the market while PJM continues to benefit from the energy savings that Affirmed Energy's assets provide is unfair, unjust, and unreasonable.⁷³

6. Sunsetting Energy Efficiency Will Harm Consumers

36. Protesters also argue that PJM's proposal will not benefit consumers. Advanced Energy United asserts that supply-side participation benefits consumers by: (1) yielding binding capacity market commitments from Energy Efficiency Resources; (2) supporting improved load forecasts; (3) reducing barriers for energy efficiency, especially for merchants; (4) yielding more cost-effective capacity markets by enabling less expensive Energy Efficiency Resources to participate and avoiding inflated load forecasts; and (5) providing additional incentives for investment in energy efficiency and ensuring that individual customers reap the full benefit of energy efficiency savings that are otherwise spread across the load zone.⁷⁴ Consumer Advocates argue that maintaining supply-side Energy Efficiency Resource participation will help to manage capacity prices and ensure affordability for ratepayers.⁷⁵ PJM Cities and Communities Coalition agrees, adding that energy efficiency programs assist local governments, reduce demand, and increase grid resilience, which will be important given PJM's

Year, are currently eligible for the 2027/2028 and 2028/2029 Delivery Year BRAs under existing rules. Affirmed Energy Protest at 13.

⁷³ Affirmed Energy Protest at 12-14.

⁷⁴ Advanced Energy United Protest at 12-13.

⁷⁵ Consumer Advocates Protest at 4.

forecasted 2.3% annual load growth over the next 10 years.⁷⁶ Affirmed Energy and Public Interest Organizations similarly assert that eliminating Energy Efficiency Resource participation in the capacity market at a time of rising demand will not lead to lower prices and could cause dramatic price increases given the potential for small variations to cause large price swings in times of tight regional capacity.⁷⁷ Conversely, Advanced Energy United argues that the cost of Energy Efficiency Resource participation is marginal, amounting to roughly 1% of total cost of capacity cleared in the 2025/2026 Delivery Year—and that, if the same quantity of energy efficiency that cleared the 2025/2026 BRA had received 2024/2025 Delivery Year prices, consumers would have paid only \$15.4 million.⁷⁸

7. Other Concerns

37. In addition, Advanced Energy United and Affirmed Energy contest PJM's suggestion that capacity market eligibility should depend in part on the nascency of a resource.⁷⁹

⁷⁶ PJM Cities and Communities Coalition Protest at 2 (citing PJM Resource Adequacy Planning Department, *2024 PJM Load Forecast Report* at 2 (Jan. 2004), <https://www.pjm.com/-/media/library/reports-notice/load-forecast/2024-loadreport.ashx>).

⁷⁷ Affirmed Energy Protest at 4 (citing Kathleen Spees et al., *Enabling Cost-Effective Energy Efficiency in PJM's Capacity Market: The Advantages of a Supply-Side, Gross Accounting Framework* 5 (July 2021); Johannes Pfeifenberger et al., *Review of PJM's Reliability Pricing Model (RPM)* 116 (June 30, 2008)); Public Interest Organizations Protest at 15.

⁷⁸ Advanced Energy United Protest at 14; Affirmed Energy Protest at 6.

⁷⁹ Affirmed Energy Protest at 6.

38. AEMA and Consumer Advocates also make several arguments about PJM's addback. Consumer Advocates argue that the addback inflates the auction clearing price and capacity procurement to the detriment of rate-payers.⁸⁰ AEMA argues that the addback provisions in PJM's manuals are unenforceable, and that PJM is not entitled to rely upon such manual provisions to justify its treatment of Energy Efficiency Resources.⁸¹ AEMA posits that PJM decided in 2015 not to make an FPA section 205 filing with the addback provisions because PJM only intended to address a load forecasting issue, not to substantively impact the number of years that an Energy Efficiency Resource could participate in a capacity auction. AEMA states that if the addback language had actually resulted in the elimination of Energy Efficiency Resources as a supply-side capacity resource, such a modification would have required a filing to amend Attachment DD-1 to the PJM Tariff, Procedures for Demand Resources and Energy Efficiency, pursuant to the filed-rate doctrine.

39. Lastly, Advanced Energy United argues that PJM's stakeholder process was insufficiently rigorous and rushed, meaning that various stakeholders were unable to provide valuable perspective on the proposal.⁸²

⁸⁰ Consumer Advocates Protest at 4.

⁸¹ AEMA Protest at 12-14 (citing *Advanced Energy Econ.*, 167 FERC ¶ 61,032 (2019)).

⁸² Advanced Energy United Protest at 15-16.

8. Requested Disposition

40. Protesters therefore ask the Commission to reject PJM's proposal.⁸³ If the Commission does not reject PJM's filing, Affirmed Energy argues that the Commission should set it for hearing to resolve material issues of fact, including: (1) whether the PJM load forecast fully captures all energy efficiency savings in the market such that energy efficiency participation in the capacity market should end; (2) whether the load forecast uses outdated data; (3) whether anecdotal statements about energy efficiency's impacts are enough to remove energy efficiency from the capacity market; and (4) whether there is evidence to support PJM's claim that eliminating all payments to energy efficiency will have no impact on market efficiency or the load forecast.⁸⁴ Several protesters also argue that the Commission should hold a technical conference⁸⁵ to: (1) develop a model that allows energy efficiency in the RPM while addressing reliability and double-counting issues;⁸⁶ (2) explore opportunities to effectively value energy efficiency in the capacity market;⁸⁷ (3) understand the impacts of removing energy efficiency from the capacity market;⁸⁸ (4) address

⁸³ *Id.* at 16; Affirmed Energy Protest at 1, 11-12, 14-15; Consumer Advocates Protest at 2; Public Interest Organizations Protest at 21; Recurve Analytics Protest at 2.

⁸⁴ Affirmed Energy Protest at 11.

⁸⁵ Advanced Energy United Protest at 16; Consumer Advocates Protest at 2; PJM Cities and Communities Coalition Comments at 1-2; Public Interest Organizations Protest at 4-5, 22; Recurve Analytics Protest at 7.

⁸⁶ Consumer Advocates Protest at 7.

⁸⁷ PJM Cities and Communities Coalition Protest at 1-2.

⁸⁸ *Id.*

proper measurement methodologies for participation in wholesale electricity markets;⁸⁹ (5) identify which types of energy efficiency measures the PJM load forecast captures so that resources not reflected can continue to participate in the capacity market; (6) consider whether it is more efficient to compensate energy efficiency as supply-side resources or to include them in the load forecast; and (7) evaluate comparative models from MISO and ISO-NE.⁹⁰

41. Several protesters also argue that PJM should develop a more targeted proposal to address the problems it identifies. Consumer Advocates suggest rejecting PJM's proposal and requiring PJM to develop a mechanism that ensures that Energy Efficiency Resources are incremental to the load forecast.⁹¹ Recurve Analytics also argues that, given PJM's concerns about causation, PJM should have proposed to require a causation showing rather than prohibiting all energy efficiency.⁹² Recurve Analytics argues that it is unduly discriminatory to eliminate from the capacity market energy efficiency measured with meter data and properly attributed to the hour(s) relevant to capacity needs. Recurve Analytics states that hourly consumption data from the meter can be used to accurately measure energy efficiency with respect to both energy savings and the hour in which energy savings occur. According to Recurve Analytics, PJM's proposal is unduly discriminatory because it prohibits such a causal showing from ever being made

⁸⁹ *Id.* ; Recurve Analytics Protest at 6-7.

⁹⁰ PJM Cities and Communities Coalition Protest at 1-2; Public Interest Organizations Protest at 22.

⁹¹ Consumer Advocates Protest at 4.

⁹² Recurve Analytics Protest at 5.

by prohibiting all energy efficiency regardless of how it is measured, even those that can demonstrate a causal link with rigorous measurement. PJM Cities and Communities Coalition suggests that the Commission and PJM should work with stakeholders to bring more value from energy efficiency to the capacity market while acknowledging that it may be possible for energy efficiency to be utilized and valued more effectively than provided for in the current Tariff rules.⁹³

B. Comments in Support

42. Several commenters support PJM's proposal. P3 argues that: energy efficiency's value is most appropriately reflected as a demand-side reduction.⁹⁴ P3 and IMM argue that PJM's ability to accurately reflect energy efficiency in the load forecast has improved since the Commission last reviewed participation of energy efficiency in PJM's capacity market fifteen years ago, negating the original rationale for inclusion.⁹⁵ P3 notes that IMM has long recommended that PJM remove Energy Efficiency Resources from the capacity market and contends that acceptance of PJM's proposed revisions would moot two pending complaints before the Commission regarding energy efficiency participation in the capacity market.⁹⁶ IMM argues that PJM's proposal clarifies market rules and protects efficient market

⁹³ PJM Cities and Communities Coalition Protest at 1-2.

⁹⁴ P3 Comments at 2.

⁹⁵ *Id.* at 2-4; IMM Comments at 1-2.

⁹⁶ P3 Comments at 3 (referencing *IMM*, Complaint, Docket No. EL24-126-000 (filed July 11, 2024); *Joint Consumer Advocates*, Complaint, Docket No. EL24-118-000 (filed June 20, 2024)).

operations by correcting a longstanding market design flaw.⁹⁷ P3 notes that PJM's revisions were endorsed by a sector-weighted majority of PJM stakeholders at the August 21, 2024, Markets and Reliability Committee and the Members Committee after nearly a year of consideration and deliberation.⁹⁸ P3 and IMM assert that PJM's proposal is necessary because PJM's current rules have skewed prices by providing Energy Efficiency Resources capacity market payments that amount to a subsidy paid by consumers without contributing to reliability.⁹⁹

43. However, IMM disagrees with PJM's characterization of Energy Efficiency Resources' participation under the current Tariff rules. IMM states that under PJM's Tariff, Energy Efficiency Resources are not capacity resources and have been treated accordingly since 2017.¹⁰⁰ IMM asserts that PJM's market rules only allow Energy Efficiency Resources that are not already reflected in the peak load forecast to participate in the capacity market and argues that once PJM began incorporating energy efficiency into its forecasts in 2016, energy efficiency no longer qualified as a capacity resource. IMM states that, despite this, PJM has continued to apply the addback rules from PJM Manual 18, requiring customers to pay the capacity market clearing price to Energy Efficiency Resources that do not meet the definition of a capacity resource. IMM recommends that PJM make a

⁹⁷ IMM Comments at 2.

⁹⁸ P3 Comments at 4.

⁹⁹ *Id.* at 2-4; IMM Comments at 1-2.

¹⁰⁰ IMM Comments at 2-3.

future filing to remove all references to energy efficiency as a capacity resource for greater clarity.

C. Answers

44. In its October 11, 2024 answer, PJM argues that nothing in the Commission's approval of PJM's original energy efficiency tariff provisions restrains PJM or the Commission from modifying Energy Efficiency Resource participation in the capacity market.¹⁰¹ Rather, PJM and IMM assert that the driving force behind the Commission's determination to permit the conditional participation of energy efficiency projects in RPM auctions was the lag in recognizing the load reduction value of energy efficiency projects in PJM's load forecast.¹⁰² PJM and IMM state that that rationale was no longer relevant after PJM changed its load forecast methodology to capture projected energy efficiency projects.¹⁰³ Further, PJM notes that, before it proposed the energy efficiency rules accepted in the March 2009 Order, the Commission directed PJM to convene a stakeholder process to consider incorporating the value of energy efficiency initiatives either through updated and proactive adjustments to its load forecast or by allowing direct participation as a capacity resource in RPM auctions.¹⁰⁴ PJM asserts that including energy efficiency projects in

¹⁰¹ PJM October 11, 2024 Answer at 4.

¹⁰² *Id.* at 7; IMM Answer at 4-5.

¹⁰³ IMM Answer at 4-5; PJM October 11, 2024 Answer at 7.

¹⁰⁴ PJM October 11, 2024 Answer at 5 (citing *PJM Interconnection, L.L.C.*, 124 FERC ¶ 61,272, at P 115, *order on clarification*, 125 FERC ¶ 61,222 (2008)).

the load forecast was an available and sufficient alternative to participation as a supplier in RPM auctions.¹⁰⁵

45. PJM alleges that the Commission held in *NYISO* that Order No. 2222 does not require energy efficiency to be a supply-side resource in capacity markets.¹⁰⁶ PJM contends that the fact that PJM has previously allowed Energy Efficiency Resources to participate as supply-side resources does not prevent PJM from changing its Tariff or render inapplicable the Commission's *NYISO* holding.¹⁰⁷ IMM argues that Order No. 2222 is not relevant to PJM's proposal because the current PJM rules do not treat Energy Efficiency Resources as supply.¹⁰⁸

46. PJM also maintains that its proposal does not violate the filed rate doctrine or rule against retroactive rate-making because: (1) it only affects future RPM auctions, and therefore does not affect the legal consequences of commitments made by Energy Efficiency Resource providers in past auctions; (2) the existing Tariff provided conditional participation rights that Energy Efficiency Resources that clear an auction for a delivery year "*may* be offered ... but *shall not be assured* of clearing" in three additional delivery year auctions but did not guarantee future participation;¹⁰⁹ (3) the Commission has approved several capacity market reforms as prospective notwithstanding that they changed the obligations of capacity resources for a delivery year even after the

¹⁰⁵ *Id.* at 7-8.

¹⁰⁶ *Id.* at 8 (citing *NYISO*, 179 FERC ¶ 61,198).

¹⁰⁷ *Id.* at 10-11.

¹⁰⁸ IMM Answer at 12.

¹⁰⁹ PJM October 11, 2024 Answer at 14 (citing Tariff, Attachment DD-1, § L.4; RAA Schedule 6, § L.4 (emphasis added)).

completion of the relevant RPM auctions;¹¹⁰ and (4) IMM's arguments over several years and PJM's ongoing stakeholder process since October 2023 make it difficult to accept protesters' suggestion that Energy Efficiency Resources reasonably relied on their continued participation in the RPM.¹¹¹

47. IMM adds that PJM's proposal does not violate the rule against retroactive ratemaking because the rules that pay what IMM characterizes as a subsidy to Energy Efficiency Resources—i.e., the addback—are not in the filed tariff.¹¹² Therefore, IMM argues that PJM's instant proposal does not change any filed tariff rule. IMM also maintains that PJM's proposal is explicitly forward looking, and that, through operation of the addback, no Energy Efficiency Resource has cleared in a capacity auction since 2016, as Tariff, Attachment DD-1 and RAA Schedule 6 require for an Energy Efficiency Resource to be eligible to offer in up to three additional consecutive delivery year auctions.

48. PJM and IMM also oppose arguments for a transition period. PJM and IMM argue that an additional

¹¹⁰ *Id.* at 14-15 (citing *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at P 6 (2015), *order on reh'g*, 155 FERC ¶ 61,157 (2016); *PJM Interconnection, L.L.C.*, Docket No. ER21-2582-000, Notice of Filing Taking Effect by Operation of Law (Sept. 29, 2021), *reh'g denied*, 177 FERC ¶ 62,105 (Nov. 29, 2021), *pet. for review denied*, *PJM Power Providers Grp. v. FERC*, 88 F.4th 250 (3rd Cir. 2023), *cert. denied sub nom. Pub. Utils. Comm'n of Ohio v. FERC*, No. No. 23-1069 (Oct. 7, 2024); *PJM Interconnection, L.L.C.*, 186 FERC ¶ 61,080 at P 36, *reh'g denied*, 186 FERC ¶ 62,168 (2024); *PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,056, *reh'g denied*, 176 FERC ¶ 62,159 (2021)).

¹¹¹ *Id.* at 15.

¹¹² IMM Answer at 2, 6-7.

transition period is neither required nor appropriate because they allege that: (1) PJM's proposal already incorporates a transition period by honoring existing capacity commitments that are currently in place for Energy Efficiency Resources; (2) PJM's proposal allows energy efficiency providers to continue offering Energy Efficiency Resources into the RPM auctions through the 2025/2026 Delivery Year;¹¹³ (3) continued participation since PJM's 2016 load forecast methodology improvements has also provided a transition process given the fact that IMM asserts that Energy Efficiency Resources are not capacity resources;¹¹⁴ (4) customers would benefit from acceptance of PJM's proposal, and would not benefit in any meaningful way from a transition,¹¹⁵ which would impose significant and unjustified costs on PJM customers;¹¹⁶ and (5) a proposal with an additional transition period is not before the Commission and therefore need not be considered in this proceeding.¹¹⁷

49. In addition, PJM argues that its load forecast methodology is just and reasonable. PJM asserts that Commission precedent requires load forecast methodologies to be just and reasonable, not perfect.¹¹⁸ According to

¹¹³ *Id.* at 11; PJM October 11, 2024 Answer at 31-32.

¹¹⁴ IMM Answer at 11.

¹¹⁵ PJM October 11, 2024 Answer at 31-32 (citing *Cent. Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92 (2d Cir. 2015)).

¹¹⁶ IMM Answer at 11.

¹¹⁷ PJM October 11, 2024 Answer at 32.

¹¹⁸ *Id.* at 17-18, 21 (citing *Joint Consumer Representatives v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,187, P 32 n. 45 (2015) (citing *Ala. Elec. Co-Op., Inc. v. FERC*, 684 F.2d 20, 27 (D.C. Cir. 1982) & *Colo. Interstate Gas v. FPC*, 324 U.S. 581, 589 (1945)).

PJM, EIA data is a widely used source that both governments and utilities use—and that load forecasting without using EIA data would be questionable given existing industry standards and practices. PJM also explains that energy intensities are but one component in its top-down load forecast methodology that also incorporates economics, weather, distributed solar generation, and electric vehicles. PJM adds that it is not possible for its load forecast to underestimate energy efficiency load reductions in the 2023/2024 Delivery Year or the 2024/2025 Delivery Year, especially to the magnitude alleged by protesters, because the weather normal peak load in 2023 for the 2023/2024 Delivery Year exceeded the forecasted peak load and the most recent load forecasts for 2024/2025 Delivery Year used for the third incremental RPM auction were actually 1,510 MW higher than the older forecast for 2024/2025 Delivery Year used for the BRA.¹¹⁹ Conversely, PJM argues that if it were to rely exclusively on market-cleared energy efficiency for its load forecast modeling, it would almost certainly overestimate load.

50. PJM also contests protesters' opposition to its claims about lack of a causal link between capacity market payments and deployment of energy efficiency projects. PJM asserts that it focused on lack of causation not to set a new standard for capacity market participation but rather to explain the unique challenges that Energy Efficiency Resources face in demonstrating why their purported energy reduction benefits necessitate receiving capacity payments from PJM customers.¹²⁰ PJM argues that its observation about those challenges

¹¹⁹ *Id.* at 20 (citing Gledhill Aff. ¶¶ 33-34).

¹²⁰ *Id.* at 22-23, 26-28.

acknowledged that Energy Efficiency Resources are not similarly situated to other capacity resources and that therefore its proposal is not unduly discriminatory. In response to Public Interest Organization's protest, PJM argues that the fact that a generation plant's projected energy and ancillary services revenues might exceed its avoidable costs does not prove that the plant would have been constructed without the opportunity to receive capacity payments—which it asserts is the relevant question raised by its proposal. PJM adds that, while Affirmed Energy claims that capacity payments to energy efficiency providers that pay retailers to claim energy efficiency savings may encourage actions to increase sales, there is no evidence that retailers actually change, or are required to change, product placement as a result of contracts with providers, nor that such a change would demonstrate that capacity revenues would cause any given purchase. PJM argues that the unique challenges related to Energy Efficiency Resource valuation do not create disputed issues of material fact that require a trial-type hearing.¹²¹

51. PJM also argues that Energy Efficiency Resources are not similarly situated to other capacity resources because: (1) unlike thermal generation resources, Energy Efficiency Resources are installed in diffuse locations, and their installation and load reduction performance is not well documented; (2) the investments that other capacity resources make to sell energy and capacity expose those suppliers to greater performance risk in the

¹²¹ PJM argues that exhibits attached to Affirmed Energy's protest do not justify a hearing and should be disregarded because neither letter is sworn, both letters are from persons or entities that appear to benefit from PJM capacity payments, and one letter is vague and conclusory while the other does not mention PJM nor capacity payments specifically. *Id.* at 28.

face of vigorously price-sensitive competition than faced by installers of energy efficiency measures; and (3) capacity resources that actually produce energy and create capacity are subject to a robust system of oversight to determine whether their capacity offers are justified.¹²² In addition, contrary to PJM's claim that its capacity market rules do not explicitly require a showing that capacity payments to Energy Efficiency Resources effectuate reductions in energy consumption,¹²³ IMM argues that Energy Efficiency Resources are required under PJM's Tariff to cause decreases in energy consumption at an end-use customer's location.¹²⁴ IMM further adds that Energy Efficiency Resources are not capacity resources, cannot be used to replace capacity resources, and do not contribute to PJM system reliability as defined by the capacity market.¹²⁵

52. PJM reiterates that incorporating energy efficiency load reductions into the load forecast provides superior benefits to customers. PJM disputes arguments that the availability of capacity payments allow energy efficiency installers to capture the capacity benefit of the resources they install because a large share of capacity payments currently go to midstream and upstream energy efficiency aggregators.¹²⁶ PJM therefore asserts that, on net, more benefits will be realized by end-use customers when these aggregators are removed. PJM further argues that including energy efficiency in the load forecast

¹²² PJM October 11, 2024 Answer at 25-26.

¹²³ *See* Transmittal at 38.

¹²⁴ IMM Answer at 7.

¹²⁵ *Id.* at 3.

¹²⁶ PJM October 11, 2024 Answer at 29-30.

as a demand reducer provides additional benefits to customers because it also reduces the reserve margin that would be associated with the incrementally higher load forecast that did not include energy efficiency reductions.

53. Lastly, PJM argues that the Commission is under no obligation to consider alternatives to PJM's proposal in this proceeding despite requests from protesters.¹²⁷ PJM notes that stakeholders may continue to explore the development of other programs more narrowly focused on emerging technologies and with more prescriptive requirements, but that opportunity does not provide grounds to reject PJM's instant proposal. Rather, according to PJM, the only question properly before the Commission is whether PJM's proposal is just and reasonable. Further, IMM argues that no technical conference is warranted because PJM stakeholders have discussed issues related to Energy Efficiency Resource participation in PJM markets at length, culminating in endorsement of the substance of PJM's proposal by a sector-weighted super-majority of PJM's stakeholders.¹²⁸

54. In its answer, Public Interest Organizations argue that PJM's proposal does not constitute a targeted effort to address double counting of energy efficiency and instead, Public Interest Organizations assert that PJM's

¹²⁷ *Id.* at 1, 32-33 (citing *N.Y. State Pub. Serv. Comm'n v. FERC*, 104 F.4th 886, 891 (D.C. Cir. 2024); *Indep. Power Producers of N.Y., Inc. v. FERC*, No. 21-1166, 2022 WL 3210362, at *2 (D.C. Cir. Aug. 9, 2022) (per curiam) (unpublished); *Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,215, at P 81 & n.165 (2020); *OXY USA Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995); *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,265, at P 21 (2009)).

¹²⁸ IMM Answer at 12.

proposal will exclude some energy efficiency measures from both the supply and demand sides of PJM's capacity market because PJM's load forecast does not reflect the effects of certain energy efficiency measures.¹²⁹ Public Interest Organizations contend that energy efficiency measures not reflected in the load forecast should continue to have the opportunity to sell into the capacity market on the supply side. In addition, Public Interest Organizations and Affirmed Energy again suggest that numerous factors aside from energy efficiency could explain why PJM's load forecast underestimated actual load in the 2023/2024 Delivery Year—including that PJM could have underestimated load growth unrelated to energy efficiency,¹³⁰ and that, when applying the actual conditions to the load forecast model, PJM found that the model consistently overestimated load by 1-3%, consistent with a significant underestimate of energy efficiency.¹³¹

55. AEMA contests PJM's claim that load reductions from energy efficiency measures naturally occur independent from capacity market payments to Energy Efficiency Resources because Energy Efficiency Resources by definition must exceed relevant building codes and energy efficiency standards.¹³² Rather,

¹²⁹ Public Interest Organizations Answer at 2-5 (citing Public Interest Organization Protest Ex. A at 6-7).

¹³⁰ Affirmed Energy Answer at 4.

¹³¹ Public Interest Organizations Answer at 5 (citing Molly Mooney, *Review of Preliminary Summer 2024 Loads* at 9 (Sept. 19, 2024), <https://www.pjm.com/-/media/committees-groups/subcommittees/las/2024/20240919/20240919-item-03---review-preliminary-summer-2024-loads.ashx>).

¹³² AEMA Answer at 2-6.

AEMA asserts that development of Energy Efficiency Resources requires years of planning, investment, and coordination by an energy efficiency provider so that an end-use customer purchases a device or appliance that is more efficient than the default choice available to them. For that reason, AEMA also contests PJM's claim that other capacity resources' significant capital investment to construct, operate, and maintain their facilities distinguishes those resources from Energy Efficiency Resources. In addition, AEMA argues that the fact that creation, measurement, and verification of Energy Efficiency Resources may be less capital-intensive than for other capacity resources does not warrant the removal of Energy Efficiency Resources from PJM's capacity market.

56. Affirmed Energy reiterates that the lack of a transition mechanism allowing Energy Efficiency Resources that have cleared an auction to be eligible to offer into three additional consecutive years—causing providers of already-installed energy efficiency assets to be denied the capacity payments they reasonably expected to receive—warrants rejecting PJM's proposal.¹³³ In addition, Affirmed Energy argues that PJM's proposal is a departure from PJM's position in stakeholder discussions and letters to government officials, and whether PJM's proposal was expected does not bear on the proposal's justness and reasonableness. Affirmed Energy further asserts that PJM's claim that its proposal will have no impact on state energy efficiency programs is conclusory and unsupported. Lastly, Affirmed Energy argues that no Commission precedent supports PJM's proposal to exclude an entire resource class from the

¹³³ Affirmed Energy Answer at 2-3, 5, 7-8.

market, nor that energy efficiency is not similarly situated to other capacity resources.

57. In its October 29, 2024 answer, PJM asserts that, contrary to Affirmed Energy's suggestion, PJM accurately described its energy efficiency package considered by stakeholders.¹³⁴ PJM claims that Affirmed Energy neglects to mention, however, that the ultimate proposal endorsed by a sector-weighted super majority of PJM's stakeholders and filed here was originally proposed by IMM on April 11, 2024, putting stakeholders on notice.

IV. Commission Determination

A. Procedural Matters

58. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2024), New Jersey Board of Public Utilities' notice of intervention and the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

59. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2024), we grant Maryland Public Service Commission's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

60. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2024), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept PJM's, IMM's, Public Interest Organizations', AEMA's and Affirmed Energy's answers because they have provided

¹³⁴ PJM October 29, 2024 Answer at 2-3.

information that assisted us in our decision-making process.

B. Substantive Matters

61. We find that PJM's proposed Tariff and RAA revisions to sunset Energy Efficiency Resources' participation in capacity market auctions starting with the 2026/2027 Delivery Year are just and reasonable and not unduly discriminatory or preferential, and we accept them effective November 6, 2024, as requested.

62. In the March 2009 Order, the Commission accepted PJM's proposal to include Energy Efficiency Resources in PJM's capacity market largely because of the structure of PJM's load forecast methodology at that time. As the Commission explained in the March 2009 Order, PJM's proposal corrected for a four-year lag between when an Energy Efficiency Resource was initially installed and when its load-reducing effects were reflected in PJM's load forecast and the associated installed reserve requirement.¹³⁵ Since 2016, however, PJM has used an end-use intensity modeling methodology to forecast load that better captures the expected impact of energy efficiency measures.¹³⁶ Because PJM's current load forecasting methodology reasonably accounts for energy efficiency measures on the demand side, and for the further reasons discussed below, we find that, contrary to

¹³⁵ March 2009 Order, 126 FERC ¶ 61,275 at P 132 ("PJM's proposal corrects a mismatch between [energy efficiency]-related load reductions and capacity requirement levels. As PJM has explained, there is a four-year lag after an [energy efficiency] resource is initially installed before its load-reducing effects are reflected in PJM's load forecast and the associated installed reserve requirement for the Delivery Year.").

¹³⁶ Transmittal at 15-16.

protesters' assertions, it is not necessary for PJM to also include Energy Efficiency Resources in the capacity market on the supply side to achieve just and reasonable rates. The Commission has never required RTOs/Independent System Operators (ISOs) to allow the participation of energy efficiency measures in the supply-side of their capacity markets.¹³⁷

63. Based on the record before us, we find that sunset-ting Energy Efficiency Resources' participation in PJM's capacity market auctions is just and reasonable because it will benefit consumers by reducing capacity payments without adversely affecting resource adequacy or undermining the demand-side benefits that energy efficiency measures can provide to load. Under PJM's proposal, load will no longer make capacity payments to Energy Efficiency Resources, which all else being equal will reduce resulting wholesale capacity market costs, without any effect on the total amount of capacity that PJM must procure to meet its resource

¹³⁷ See, e.g., *NYISO*, 179 FERC ¶ 61,198 at P 112 (noting that energy efficiency resources were not capable of meeting the operational requirements to provide resource adequacy in NYISO). Advanced Energy United argues that neither the Commission's June 2007 Order rejecting the New Jersey Board of Public Utilities' RPM rehearing request nor its 2022 *NYISO* order accepting NYISO's Order No. 2222 compliance proposal should be read definitively to allow market operators to exclude energy efficiency participation on the supply side of capacity markets. Advanced Energy United Protest at 11 (referencing June 2007 Order, 119 FERC ¶ 61,318; *NYISO*, 179 FERC ¶ 61,198). But these orders establish that the Commission does not require such participation. Indeed, in the *NYISO* order, the Commission found that Order No. 2222 did not require NYISO to allow energy efficiency resources to participate in its capacity market as part of a distributed energy resource aggregation. *NYISO*, 179 FERC ¶ 61,198 at P 112.

adequacy requirement.¹³⁸ Specifically, to avoid double-counting Energy Efficiency Resources as both supply and demand, PJM developed an “addback” mechanism through which Energy Efficiency Resources receive the auction clearing price as an uplift payment but (1) are not counted toward meeting the reliability requirement and (2) cannot be substituted for other committed capacity resources.¹³⁹ Given PJM’s addback mechanism, Energy Efficiency Resources participating on the supply side in the RPM cannot lower the clearing price or costs paid by load; instead, these resources receive capacity payments despite the fact that they do not reduce or otherwise contribute towards meeting the region’s resource adequacy requirement. Therefore, sunsetting their participation in PJM’s capacity market auctions will lower total capacity payments without changing the amount of capacity resources that PJM must procure to satisfy its resource adequacy requirement. At the same time, we agree with PJM that load will continue to realize the demand-side benefits that energy efficiency measures provide, including by reducing the amount of capacity that needs to be procured to maintain resource adequacy, lowering capacity prices and costs paid by load, and otherwise reducing end-use customers’ energy consumption and therefore retail electricity bills.¹⁴⁰

64. We disagree with protesters’ claims that PJM’s proposal conflicts with the Commission’s statement in the March 2009 Order that energy efficiency is a critical part

¹³⁸ Transmittal at 35, 39.

¹³⁹ *Id.* at 5-6.

¹⁴⁰ *See id.* at 40.

of efficient energy markets.¹⁴¹ As PJM explains, “[a]cceptance of this filing does not mean that energy efficiency will have no place in the PJM Region.”¹⁴² Rather, as discussed above, we find that PJM’s proposal continues to recognize the importance of energy efficiency by appropriately reflecting it in the load forecast, which reduces costs to load and ultimately benefits consumers by decreasing the demand in the capacity market, and in turn reducing the amount of capacity procured.

65. Moreover, contrary to protesters’ assertions, we do not find any conflict between PJM’s proposal and the Commission’s acceptance of PJM’s energy efficiency proposal in the March 2009 Order. PJM first proposed to incorporate Energy Efficiency Resources into the RPM in order to “provid[e] a mechanism to fill the ‘gap’ between the time the [Energy Efficiency] Resource comes online, and the time its contribution to reducing loads is recognized in the load forecast used for the RPM auctions.”¹⁴³ However, as previously noted, PJM’s load forecast methodology improvements addressed this forecasting deficiency by incorporating the impacts of

¹⁴¹ Advanced Energy United Protest at 4-5 (citing March 2009 Order, 126 FERC ¶ 61,275 at PP 130, 134); Consumer Advocates Protest at 2.

¹⁴² Transmittal at 9 (“PJM’s stakeholders made clear that utilities within the PJM footprint will continue to incentivize energy efficiency projects based on various state-mandated programs irrespective of whether Energy Efficiency Resources continue to receive wholesale market revenues from PJM. PJM’s peak load forecast is developed through a top-down load analysis that accounts for the adoption of energy efficiency in aggregate in the PJM Region.”).

¹⁴³ *PJM*, Transmittal, Docket No. ER09-412-000, at 30 (filed Dec. 12, 2008).

energy efficiency measures into PJM's load forecast.¹⁴⁴ As a result, continued supply-side participation by Energy Efficiency Resources is no longer needed to serve this original purpose. In addition, contrary to the protests, the Commission's initial acceptance of PJM's Energy Efficiency Resource participation rules do not preclude PJM from proposing, or the Commission from accepting, a different just and reasonable proposal, particularly as PJM has pointed to changed circumstances rendering such a change reasonable.

66. We also find that PJM's proposal is not unduly discriminatory because Energy Efficiency Resources are not similarly situated to other capacity resources in the RPM.¹⁴⁵ The Commission has found that undue discrimination occurs when there is a difference in rates or services among similarly situated customers that is not justified by a legitimate factor.¹⁴⁶ In PJM, currently, "Energy Efficiency Resources cannot be counted toward meeting the Reliability Requirement and cannot be

¹⁴⁴ Transmittal at 15 & Gledhill Aff. ¶¶ 28-35.

¹⁴⁵ Cf. AEMA Protest at 19-20; Consumer Advocates Protest at 6; Public Interest Organizations Protest at 7, 15-19; Recurve Analytics Protest at 5-6.

¹⁴⁶ *El Paso Nat. Gas Co.*, 104 FERC ¶ 61,045, at P 115 (2003), *reh'g denied*, 106 FERC ¶ 61,233 (2004); *see also Ark. Elec. Energy Consumers v. FERC*, 290 F.3d 362, 367 (D.C. Cir. 2002) ("A rate is not 'unduly' preferential or 'unreasonably' discriminatory if the utility can justify the disparate effect."); *Cities of Bethany v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir. 1984) ("Rate differences may be justified and rendered lawful by facts-cost of service or otherwise." (quotation marks omitted)); *Pub. Serv. Co. of Ind., Inc. v. FERC*, 575 F.2d 1204, 1211 (4th Cir. 1978) (differences may be justified when predicated upon individual characteristics and market impacts).

substituted for any other committed Capacity Resource.”¹⁴⁷ This distinguishes Energy Efficiency Resources’ supply-side participation in PJM’s capacity market from that of other capacity resources, including demand response resources,¹⁴⁸ which provides a reasonable basis for different treatment.¹⁴⁹

67. Nor is PJM’s proposal, as argued by some protestors, inconsistent with any findings by the Commission related to removing barriers to the participation of certain resources that are technically capable of providing services in an RTO/ISO market from participating in the market.¹⁵⁰ In Order Nos. 841 and 2222, the Commission

¹⁴⁷ Transmittal at 5-6.

¹⁴⁸ Load reductions from demand response resources are not reflected in the load forecast because they are not continuous and passive reductions, but rather the result of customer choices at specific points in time in response to instructions from PJM operators as well as price signals in the capacity and/or energy markets. For that reason, in part, demand response resources can contribute to meeting the reliability requirement. In addition, while Energy Efficiency Resources could theoretically reduce electricity consumption and thus demand continuously, they also differ from demand response resources in PJM in that they are not required to operate under the direction of the Office of the Interconnection. *See* Tariff, Attachment DD-1, §§ A, A.5, & L.1.

¹⁴⁹ Several protesters argue that PJM’s proposal is unduly discriminatory for applying a novel strict causation requirement to Energy Efficiency Resources alone, which should not form the basis for capacity market eligibility. *See* AEMA Protest at 19-20; Public Interest Organizations Protest at 7, 15-19. However, our acceptance of PJM’s filing does not depend on its assertions related to the link between capacity market payments and Energy Efficiency Resource investments. For that reason, we are unpersuaded that the proposal should be rejected based on these arguments.

¹⁵⁰ *Cf.* Public Interest Organizations Protest at 8-10 (arguing that PJM’s proposal would contravene an alleged general rule

found that barriers to entry can preclude resources that are technically capable of providing services from competing with resources that are already participating in the RTO/ISO markets, thereby reducing the efficiency of the RTO/ISO markets and increasing costs to load.¹⁵¹ Energy Efficiency Resources participating in the PJM markets, however, are not technically capable of meeting all of the requirements of the PJM capacity market because they do not contribute to meeting PJM's reliability requirement and PJM cannot direct or require them to operate to address a capacity deficiency. Therefore, we find that the Commission's concerns in Order Nos. 841 and 2222 about barriers to entry for resources that are technically capable of providing services do not apply to Energy Efficiency Resources participating as supply-side resources in the capacity market in PJM.

68. Relatedly, we are also unpersuaded by arguments that PJM's proposal violates Order Nos. 2222 and 2222-A.¹⁵² Order No. 2222 requires RTOs/ISOs to allow

established by Order Nos. 841 and 2222 that market operators should enable resources that are "technically capable of providing services" to participate in wholesale markets for those services).

¹⁵¹ Order No. 841, 162 FERC ¶ 61,127 at P 2; *see also* Order No. 2222, 172 FERC ¶ 61,247 at P 3 ("Where such barriers exist, resources that are technically capable of providing some services on their own or through aggregation are precluded from competing with resources that are already participating in the RTO/ISO markets. These restrictions on competition can reduce the efficiency of the RTO/ISO markets, potentially leading an RTO/ISO to dispatch more expensive resources to meet its system needs. By removing barriers to the participation of distributed energy resource aggregations in the RTO/ISO markets, this final rule will enhance competition and, in turn, help to ensure that the RTO/ISO markets produce just and reasonable rates." (citations omitted)).

¹⁵² *Cf.* Recurve Analytics Protest at 6-7.

distributed energy resource aggregations to participate in wholesale energy markets¹⁵³ and defined distributed energy resource in order to “ensur[e] that any resource that is technically capable of providing wholesale services through aggregation is eligible to do so.”¹⁵⁴ In *NYISO*,¹⁵⁵ the Commission found that Order No. 2222 did not require the inclusion of energy efficiency resources when “these resources are not capable of meeting all of the current operational requirements to provide resource adequacy in NYISO.”¹⁵⁶ The record indicates that Energy Efficiency Resources in PJM are not technically capable of providing capacity in PJM as Energy Efficiency Resources, do not contribute to meeting PJM’s reliability requirement, and are not required to operate under the direction of PJM.¹⁵⁷ Therefore, we

¹⁵³ Order No. 2222, 172 FERC ¶ 61,247 at P 129.

¹⁵⁴ *Id.* at P 114. *See also id.* P 117 (“[W]e clarify that distributed energy resource aggregations must be able to meet the qualification and performance requirements to provide the service that they are offering into RTO/ISO markets.”); *NYISO*, 179 FERC ¶ 61,198 at P 112 (holding, in NYISO’s Order No. 2222 compliance proceeding, that NYISO was not required under Order No. 2222 to change its capacity market qualification requirements to enable energy efficiency resources (or any other resource type that currently does not qualify) to participate in NYISO’s capacity market)).

¹⁵⁵ 179 FERC ¶ 61,198.

¹⁵⁶ *Id.* at P 112.

¹⁵⁷ The fact that PJM previously found Energy Efficiency Resources could participate in the market because they were not reflected in the load forecast, and the Commission accepted that proposal, does not foreclose the Commission from changing its position once such resources are reflected. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“[W]e fully recognize that regulatory agencies do not establish rules of conduct to last forever.”) (internal quotations omitted); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir.

find that Order No. 2222 does not require PJM to allow Energy Efficiency Resources to participate as a supply-side resource in its capacity market.

69. Several protesters allege that PJM’s load forecast methodology underestimates the effects of energy efficiency¹⁵⁸ and note that PJM itself has acknowledged that its load forecast is not 100% accurate.¹⁵⁹ We find that these protesters have failed to demonstrate that use of PJM’s load forecast methodology will produce unjust and unreasonable results in PJM’s RPM auctions absent the supply-side participation of Energy Efficiency Resources.¹⁶⁰ While there inevitably will be some difference between PJM’s load forecast and the amount of capacity that PJM ultimately needs in a given delivery year given the uncertainty inherent in any load forecast,¹⁶¹ the record indicates that PJM has taken steps to

1970) (an agency may change its course as long as it “suppl[ies] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”).

¹⁵⁸ See Advanced Energy United Protest at 9-10; AEMA at 15; Affirmed Energy Protest at 7-9; Public Interest Organizations Protest at 4, 12-13, 15 & Ex. A at 4-5; Public Interest Organizations Answer at 2-5.

¹⁵⁹ See Public Interest Organizations Protest at 13-14 (citing *PJM*, July 29, 2024 Answer, Docket No. EL24-118-000, at 2-3 (filed July 29, 2024)).

¹⁶⁰ No party contends that PJM’s load forecast methodology contravenes its Tariff. See *PJM Interconnection, L.L.C./Intra-PJM Tariffs*, OATT ATT DD.5.10, OATT ATTACHMENT DD.5.10 Auction Clearing Requirements (33.0.1), § (d) (PJM “shall establish the Preliminary PJM Region Load Forecast for the Delivery Year in accordance with the PJM Manuals by February 1, prior to the conduct of the Base Residual Auction for such Delivery Year.”)).

¹⁶¹ See *Joint Consumer Representatives v. PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,187 at P 32 & n. 45 (“Load forecasting

ensure the reasonableness of its load forecast. PJM explains that its load forecast methodology incorporates several inputs, including energy intensity and other publicly available data that is widely used by governments and utilities, which PJM then calibrates to validate and improve the load forecast.¹⁶² PJM states that it also supplements its load forecast through outside consultant analysis and incorporates stakeholder feedback.¹⁶³ For these reasons, we find that PJM’s load forecast methodology reasonably reflects the expected impacts of energy efficiency measures. PJM is certainly free to continue refining its forecast methodology as it deems necessary to reflect all factors impacting load growth, including energy efficiency measures.¹⁶⁴

70. We are also unpersuaded by arguments suggesting that PJM’s proposal will produce unjust and unreasonable rates because of alleged incentive misalignment between entities that invest in energy efficiency measures

is not unlike rate design.” (citing *Ala. Elec. Co-Op., Inc. v. FERC*, 684 F. 2d 20, 27 (D.C. Cir. 1982) (“Ratemaking is, of course, much less a science than an art.”); *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945) (“Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.”)).

¹⁶² PJM October 11, 2024 Answer at 17-18.

¹⁶³ Gledhill Aff. ¶¶ 6-11.

¹⁶⁴ As Affiant Gledhill explains, “[m]ethodological enhancements to the PJM Load Forecast are made frequently to acknowledge ongoing patterns and best align the forecast with actual load trends or anticipated factors. These enhancements include, for example, relying on higher frequency EIA data by, for example, transitioning to relying on Form EIA-861M data instead of Form EIA-861 data. Improving the PJM Load Forecast is an iterative process aimed at making the forecast as accurate as possible.” *Id.* ¶ 8.

and the benefits they receive from those investments through the PJM markets.¹⁶⁵ Protesters have not shown how their allegations about the specific allocation of benefits and savings resulting from adoption of energy efficiency measures render the RPM construct or resulting capacity rates under PJM's proposal unjust and unreasonable. Protesters make a variety of arguments regarding the link between capacity market payments to Energy Efficiency Resources and adoption of energy efficiency measures. While we recognize that providing capacity payments to Energy Efficiency Resources may increase incentives to invest in energy efficiency measures, we do not believe that such incentives are necessary to ensure just and reasonable rates in PJM, particularly given that PJM will continue to reflect the effects of energy efficiency measures on the demand side, which could lower resource adequacy requirements and thus reduce capacity costs to loads. As noted above, the Commission has not required wholesale market operators to account for energy efficiency measures on the supply side of capacity markets, and we do not believe that doing so is necessary to ensure just and reasonable rates.

71. We also disagree with Advanced Energy United's argument that PJM's proposal violates the filed rate doctrine.¹⁶⁶ The fact that Tariff, Attachment DD-1 and RAA Schedule 6 provide that Energy Efficiency Resources are limited to offering into only three additional subsequent auctions does not prevent PJM from proposing forward-looking revisions to Energy Efficiency

¹⁶⁵ Advanced Energy United Protest at 2-3, 7-8; Public Interest Organizations Protest at 20-21.

¹⁶⁶ Advanced Energy United Protest at 14-15.

Resources' eligibility more broadly.¹⁶⁷ We find that PJM's proposal will apply prospectively starting with the BRA for the 2026/2027 Delivery Year.¹⁶⁸

72. In addition, as the Commission has previously determined, there is a difference between upsetting the expectations of market participants and violations of the filed rate doctrine.¹⁶⁹ As an initial matter, we note that there is always risk that tariffs and regulations can change, which is a risk that market participants take in a competitive market. And, an expectation in and of itself does not create a legal right to continue to collect revenues from customers. Where protesters have asserted that proposed tariff revisions would disrupt settled expectations mid-course and harm market participants who relied on the existing tariff in calculating prices and entering into contracts, the Commission has considered a "balancing of interests" or "balancing of

¹⁶⁷ PJM's Tariff contains a *Memphis* clause permitting it to make prospective changes to its tariff. PJM, Intra-PJM Tariffs, 9.2, OATT 9.2 Rights of the Transmission Provider: (1.1.0) ("PJM shall have the exclusive and unilateral right to file pursuant to Section 205 of the Federal Power Act and the FERC's rules and regulations thereunder to make changes in or relating to the terms and conditions of the PJM Tariff"). See *United Gas Co. v. Memphis Gas Div.*, 358 US 103 (1958).

¹⁶⁸ See *PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,103, at P 62 (2014) (finding no violation of the filed rate doctrine because "PJM is not changing rates, or terms and conditions of service, relating to past performance; it is only changing the requirements applicable to future performance").

¹⁶⁹ See *ISO New England Inc.*, 165 FERC ¶ 61,088, at P 25 (2018), *order on reh'g*, 170 FERC ¶ 61,187 (2020); *ISO New England Inc.*, 148 FERC ¶ 61,185, at P 29 (2014), *reh'g denied*, 150 FERC ¶ 61,129 (2015).

equities” in determining the appropriate outcome.¹⁷⁰ Thus, the Commission has accepted revisions where the benefits outweighed any settled expectations, and we do so here. First, as noted above, by sunseting Energy Efficiency Resources’ eligibility for capacity payments, PJM’s proposal will result in a more efficient capacity market based on an accurate load forecast and reduce capacity market costs borne by load and consumers while continuing to maintain reliability. Second, section L.4 of Tariff, Attachment DD-1 and the RAA provide a service term limiting Energy Efficiency Resources’ capacity market auction eligibility; they do not create an entitlement that PJM cannot change going forward. Third, the Tariff and RAA allow Energy Efficiency Resources that have cleared an auction for a delivery year to *offer* into the auctions for up to three additional consecutive delivery years, but do not guarantee that they will *clear* those auctions, discounting Energy Efficiency Resource providers’ legitimate reliance on expectations of ultimate capacity market revenues. Fourth, as PJM notes, its proposal will provide some transition period by continuing to honor existing capacity commitments, including those for 2025/2026 Delivery Year RPM auctions.¹⁷¹ Fifth, although Energy Efficiency Resource sellers may have taken into account an expectation of four delivery

¹⁷⁰ *ISO New England Inc.*, 165 FERC ¶ 61,088 at P 25; *ISO New England Inc.*, 148 FERC ¶ 61,185 at P 29 (explaining that the Commission accepted proposed tariff revisions after conducting a balancing of interests and determining that the proposal’s benefits, which included preventing consumers from paying “for non-existent capacity or [the possibility of] fac[ing] a multi-year capacity shortfall,” outweighed “market participants’ reliance upon the existing [Forward Capacity Market] rules.”); *see also ISO New England Inc.*, 145 FERC ¶ 61,095, at P 29 (2013).

¹⁷¹ PJM October 11, 2024 Answer at 31-32.

years of potential eligibility to offer into the RPM in making investment decisions, the record does not indicate the extent to which PJM's proposal would thwart any expectations or otherwise harm certain Energy Efficiency Resources—especially in light of the fact that the Tariff and RAA do not guarantee that those Energy Efficiency Resources will clear in the auctions for those subsequent delivery years.¹⁷² Accordingly, we find that the benefits of PJM's proposal outweigh the possible harm caused by upsetting any settled expectations.

73. Protesters raise several arguments that are not relevant to our evaluation of PJM's proposal. AEMA argues that PJM's existing Tariff does not require Energy Efficiency Resource providers to demonstrate that RPM payments or the Energy Efficiency Resource provider "caused" an end-use customer to purchase the Energy Efficiency Resource product.¹⁷³ This assertion is not relevant to the FPA section 205 application at issue in this proceeding, which proposes only prospective revisions to the Tariff and RAA, and therefore we decline to address this argument. Similarly, AEMA's relevant to the FPA section 205 application at issue in this proceeding, which proposes only prospective revisions to the Tariff and RAA. Similarly, AEMA's arguments about the effect of PJM's decision to include its addback procedures in its manuals rather than filing them with the Commission as Tariff revisions¹⁷⁴ are outside the scope of the instant filing. Additionally, Consumer Advocates argue that "the [a]ddback increases both the BRA clearing price and the quantity of capacity

¹⁷² Tariff, Attachment DD-1, § L.4; RAA Schedule 6, § L.4.

¹⁷³ See AEMA Protest at 18.

¹⁷⁴ See *id.* at 12-14.

procured through the auction, to the detriment of rate-payers.”¹⁷⁵ We decline to address Consumer Advocates’ assertion because the current issue does not concern higher prices caused by the addback, but only whether PJM’s proposal to sunset Energy Efficiency Resource supply-side participation in the capacity market is just and reasonable. However, we note that our acceptance of PJM’s instant proposal also eliminates the use of the addback,¹⁷⁶ thereby also addressing Consumer Advocates’ concerns. Further, while we agree that a resource’s status as an emerging technology does not determine capacity market eligibility,¹⁷⁷ we do not find this fact relevant to our consideration of whether PJM’s filing is just and reasonable.

74. Lastly, several protesters argue that PJM should develop a more targeted proposal to address the problems it identifies. However, the Commission’s “authority to review rates” under FPA section 205 is “limited to an inquiry into whether the rates proposed ... are reasonable.”¹⁷⁸ We find that PJM has made such a demonstration here.

¹⁷⁵ Consumer Advocates Protest at 4.

¹⁷⁶ Transmittal at 10.

¹⁷⁷ Affirmed Energy Protest at 6.

¹⁷⁸ *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984).

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The Commission orders:

The proposed Tariff and RAA revisions are hereby accepted, as discussed in the body of this order.

By the Commission:

(S E A L)

Debbie-Anne A. Reese,
Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

190 FERC ¶ 62,005
Docket No. ER24-2995-001

PJM Interconnection, L.L.C.
(January 6, 2025)

**NOTICE OF DENIAL OF REHEARING
BY OPERATION OF LAW AND PROVIDING
FOR FURTHER CONSIDERATION**

Rehearing has been timely requested of the Commission's order issued on November 5, 2024, in this proceeding. *PJM Interconnection, L.L.C.*, 189 FERC ¶ 61,095 (2024). In the absence of Commission action on a request for rehearing within 30 days from the date it is filed, the request for rehearing may be deemed to have been denied. 16 U.S.C. § 825l(a); 18 C.F.R. § 385.713 (2024); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

As provided in 16 U.S.C. § 825l(a), the request for rehearing of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 16 U.S.C. § 825l(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper.

Debbie-Anne A. Reese,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

190 FERC ¶ 61,081
Docket No. ER24-2995-001

PJM Interconnection, L.L.C.
(Issued February 7, 2025)

Before Commissioners:
Mark C. Christie, Chairman; Willie L. Phillips,
David Rosner, Lindsay S. See, and Judy W. Chang

**ORDER ADDRESSING ARGUMENTS RAISED
ON REHEARING AND DENYING STAY**

1. On November 5, 2024, the Commission issued an order¹ accepting PJM Interconnection, L.L.C.'s (PJM) proposed revisions to the PJM Open Access Transmission Tariff (Tariff) and Reliability Assurance Agreement (RAA) to prospectively sunset Energy Efficiency Resource (EER) participation in PJM's wholesale capacity market, the Reliability Pricing Model (RPM). Affirmed Energy LLC (Affirmed Energy) filed a motion for stay and request for rehearing on December 5, 2024.

¹ *PJM Interconnection, L.L.C.*, 189 FERC ¶ 61,095 (2024) (EER Order).

2. Pursuant to *Allegheny Defense Project v. FERC*,² the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 313(a) of the Federal Power Act (FPA),³ we are modifying the discussion in the EER Order and continue to reach the same result in this proceeding, as discussed below.⁴ We also deny Affirmed Energy’s motion for stay.

I. Background

3. In March 2009, the Commission accepted in relevant part proposed tariff revisions from PJM to incorporate energy efficiency participation in the RPM.⁵ In doing so, the Commission agreed with PJM that, based on the configuration of the PJM capacity market at that time, PJM’s proposal corrected “a mismatch between [energy efficiency]-related load reductions and capacity requirement levels” due to the four-year lag between when an Energy Efficiency Resource is initially installed and when its load-reducing effects are reflected in PJM’s load forecast and the associated installed reserve

² 964 F.3d 1 (D.C. Cir. 2020) (en banc).

³ 16 U.S.C. § 825l(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁴ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the EER Order. See *Smith Lake Improvement & Stakeholders Ass’n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁵ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at PP 131-132 (March 2009 Order), *order on clarification*, 127 FERC ¶ 61,104, *order on clarification & reh’g*, 128 FERC ¶ 61,157 (2009).

requirement for the Delivery Year.⁶ PJM's RAA and Tariff provided that an Energy Efficiency Resource, as defined therein,⁷ may be offered with a price offer or as self-supply and, if an Energy Efficiency Resource clears the auction, it shall receive the applicable capacity resource clearing price.⁸ RAA Schedule 6, section L.4 and Tariff, Attachment DD-1, section L.4 provided that an Energy Efficiency Resource can participate in the auction only if it was "not reflected in the peak load forecast prepared for the Delivery Year for which the Energy Efficiency Resource is proposed."⁹ These tariff provisions also provided that an Energy Efficiency Resource that clears an auction for a delivery year would be limited to offering the same energy efficiency investment for only three additional consecutive Delivery Years and further provided that the resource would not be assured of clearing in any such auction.¹⁰

4. In 2016, PJM improved its peak load forecast by initiating an end-use intensity modeling methodology that directly captured the impact of energy efficiency

⁶ March 2009 Order, 126 FERC ¶ 61,275 at P 134.

⁷ PJM, Intra-PJM Tariffs, ATTACHMENT DD-1, OATT ATTACHMENT DD-1 (Tariff, Attachment DD-1) (23.0.0), § L.1, <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=339590>; PJM, Intra-PJM Tariffs, RAA SCHEDULE 6 (RAA Schedule 6) (22.0.0), § L.1, <https://etariff.ferc.gov/TariffBrowser.aspx?tid=1731>; *see also* EER Order, 189 FERC ¶ 61,095 at P 3 (quoting this definition).

⁸ Tariff, Attachment DD-1 (23.0.0), § L.3; RAA Schedule 6 (22.0.0), § L.3.

⁹ Tariff, Attachment DD-1 (23.0.0), § L.1; RAA Schedule 6 (22.0.0), § L.1.

¹⁰ Tariff, Attachment DD-1 (23.0.0), § L.4; RAA Schedule 6 (22.0.0), § L.4.

projects and thereby eliminated the four-year lag between when energy efficiency projects are installed and when they are reflected in the load forecast.¹¹ As a result of this change, PJM included energy efficiency on the demand side (i.e., within the load forecast) for each RPM auction. Due to this change, PJM adopted an “add-back” to continue accommodating Energy Efficiency Resource capacity market participation while avoiding “double-counting” the impact of Energy Efficiency Resources on both the supply and demand sides of the RPM.¹² PJM implemented the addback by adding a megawatt (“MW”) to the reliability requirement for each MW of Energy Efficiency Resource capacity that clears in an RPM auction. Thus, Energy Efficiency Resources no longer contributed to meeting the reliability requirement and did not serve as a substitute for any other capacity resource committed in the RPM auction.

5. In the Tariff revisions at issue here, PJM proposed to sunset Energy Efficiency Resource participation in the RPM by adding a provision to its rules governing participation of Energy Efficiency Resources stating that those rules are “effective only through the 2025/2026 Delivery Year” and that “no Energy Efficiency Resources shall qualify to be offered into the RPM Auctions beginning with the 2026/2027 Delivery

¹¹ Transmittal at 14-15, 23-24. PJM further states that it makes frequent methodological enhancements to its improved load forecast, incorporates stakeholder feedback, and engages outside consultants to review its methodology. *See id.* attach. C, Aff. of Andrew Gledhill on Behalf of PJM Interconnection, L.L.C. (Gledhill Aff.) ¶¶ 8, 10-11.

¹² *Id.* at 5, 24-30, Gledhill Aff. ¶¶ 38-42.

Year.”¹³ Among other things, PJM stated that its proposal is prospective and would not unsettle RPM auction results, including for the 2025/2026 Delivery Year Base Residual Auction (BRA), or undo any existing Energy Efficiency Resource commitments. It also explained that its proposal is the most effective way to account for energy efficiency in the RPM while avoiding double-counting a MW of energy efficiency capability on both the supply side and demand side, which would create reliability concerns.¹⁴ In support of its proposal, PJM asserted that the addback results in load paying capacity prices to Energy Efficiency Resources without receiving a corresponding benefit.¹⁵

6. In the EER Order, the Commission found PJM’s proposed Tariff and RAA revisions to sunset Energy Efficiency Resources’ participation in capacity market auctions starting with the 2026/2027 Delivery Year to be just and reasonable and not unduly discriminatory or preferential.¹⁶ The Commission explained that it had accepted PJM’s 2009 proposal to include Energy Efficiency Resources in PJM’s capacity market largely because of the structure of PJM’s load forecast methodology at that time to correct for the four-year lag in reflecting the load-reducing effects of energy efficiency measures in PJM’s load forecast and associated reserve

¹³ *Id.* at 10, 31 (quoting Tariff, Attachment DD-1 (24.0.0), § L.1, <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=346314>; RAA Schedule 6 (23.0.0), § L.1, <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=346315>).

¹⁴ *Id.* at 31-35.

¹⁵ *Id.* at 27.

¹⁶ EER Order, 189 FERC ¶ 61,095 at P 61.

requirement.¹⁷ Because PJM demonstrated that its improved load forecasting methodology reasonably accounts for energy efficiency measures on the demand side, the Commission found including Energy Efficiency Resources in the capacity market was not necessary to ensure just and reasonable rates,¹⁸ and no longer served the original purpose of PJM’s 2009 tariff revisions.¹⁹

7. The Commission further found sunsetting Energy Efficiency Resources’ participation in PJM’s capacity market auctions to be just and reasonable because it will benefit consumers by reducing capacity payments without adversely affecting resource adequacy or undermining the demand-side benefits that energy efficiency measures can provide to load. Under the “addback” mechanism, Energy Efficiency Resources participating in the supply side in the RPM could not lower the clearing price or costs paid by load, but were—instead—receiving capacity payments “despite the fact that they do not reduce or otherwise contribute towards meeting the region’s resource adequacy requirement.”²⁰ The Commission also found that, under PJM’s proposed tariff revisions, “load will continue to realize the demand-side benefits that energy efficiency measures provide, including by reducing the amount of capacity that needs to be

¹⁷ *Id.* P 62.

¹⁸ *Id.*

¹⁹ *Id.* P 65 (noting that “PJM first proposed to incorporate Energy Efficiency Resources into the RPM in order to ‘provid[e] a mechanism to fill the ‘gap’ between the time the [Energy Efficiency] Resource comes online, and the time its contribution to reducing loads is recognized in the load forecast used for the RPM auctions.” (quoting *PJM*, Transmittal, Docket No. ER09-412-000, at 30 (filed Dec. 12, 2008))).

²⁰ *Id.* P 63.

procured to maintain resource adequacy, lowering capacity prices and costs paid by load, and otherwise reducing end-use customers' energy consumption and therefore retail electricity bills."²¹

8. As relevant here, the Commission was not persuaded by protestors' arguments that PJM's load forecast underestimates the effects of energy efficiency and, therefore, PJM failed to show that its proposal was just and reasonable.²² The Commission explained that, while there "inevitably will be some difference between PJM's load forecast and the amount of capacity that PJM ultimately needs in a given delivery year given the uncertainty inherent in any load forecast, the record indicates that PJM has taken steps to ensure the reasonableness of its load forecast."²³ The Commission summarized the steps that PJM had taken to ensure that reasonableness, including the use of several inputs, among them data that is widely used by governments and utilities; calibration of that data to validate and improve the load forecast; and outside consultant analysis and stakeholder feedback.²⁴

²¹ *Id.*; *see also id.* P 64 ("PJM's proposal continues to recognize the importance of energy efficiency by appropriately reflecting it in the load forecast, which reduces costs to load and ultimately benefits consumers by decreasing the demand in the capacity market, and in turn reducing the amount of capacity procured.").

²² *Id.* P 69 (explaining that protestors making such arguments had "failed to demonstrate that use of PJM's load forecast methodology will produce unjust and unreasonable results in PJM's RPM auctions absent the supply-side participation of Energy Efficiency Resources").

²³ *Id.* P 69 (citation omitted).

²⁴ *Id.*

9. The Commission was not persuaded by arguments that PJM's proposal should be rejected based on arguments regarding the benefits of supply-side participation of Energy Efficiency Resources in capacity markets and the incentives associated with such participation.²⁵ The Commission recognized that capacity payments to Energy Efficiency Resources may increase incentives to invest in energy efficiency measures, but found that such incentives were not necessary to ensure just and reasonable rates—particularly given that such measures would continue to be reflected on the demand side (i.e., in the load forecast).²⁶

10. The Commission disagreed with arguments that PJM's proposal violated the filed rate doctrine, explaining that PJM's proposal would apply prospectively, starting with the BRA in the 2026/2027 Delivery Year.²⁷ It found that PJM's Tariff and RAA provisions “provid[ing] that Energy Efficiency Resources are limited to offering into only three additional subsequent auctions does not prevent PJM from proposing forward-

²⁵ *Id.* P 70 (“Protesters have not shown how their allegations about the specific allocation of benefits and savings resulting from adoption of energy efficiency measures render the RPM construct or resulting capacity rates under PJM's proposal unjust and unreasonable”).

²⁶ *Id.* (noting that this approach “could lower resource adequacy requirements and thus reduce capacity costs to loads,” that the Commission had not required wholesale market operators to account for energy efficiency measures on the supply side of capacity markets, and that the Commission did not find that doing so was necessary to ensure just and reasonable rates).

²⁷ *Id.* P 71.

looking revisions to Energy Efficiency Resources' eligibility more broadly."²⁸

11. Finally, the Commission considered and rejected arguments that it should not accept PJM's proposal because it would disrupt the settled expectations of market participants based on a balancing of the interests involved.²⁹ First, the Commission reiterated that "PJM's proposal will result in a more efficient capacity market based on an accurate load forecast and reduce capacity market costs borne by load and consumers while continuing to maintain reliability."³⁰ Second, the Commission explained that section L.4 of Tariff, Attachment DD-1 and the RAA³¹ provide a service term limiting Energy Efficiency Resources' capacity market auction eligibility; they do not create an entitlement that PJM cannot change going forward. Third, while these provisions "allowed Energy Efficiency Resources that have cleared an auction for a delivery year to *offer* into the auctions for up to three additional consecutive delivery years, [they] do not guarantee that they will *clear* those auctions."³² Fourth, PJM's proposal continued to honor existing

²⁸ *Id.*

²⁹ *Id.* P 72 (noting also that there is always a risk that tariffs and regulations can change and "an expectation in and of itself does not create a legal right to continue to collect revenues from customers").

³⁰ *Id.*

³¹ These provisions stated that an Energy Efficiency Resource that clears an auction for a delivery year "may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction." Tariff, Attachment DD-1, § L.4 (23.0.0); RAA Schedule 6, § L.4 (22.0.0).

³² EER Order, 189 FERC ¶ 61,095 at P 72.

capacity commitments, including those for the 2025/2026 Delivery Year, affording some transition period.³³ Finally, the record did not indicate the extent to which PJM’s proposal would thwart any expectations or otherwise harm certain Energy Efficiency Resources—particularly given that the Tariff and RAA do not guarantee that those Energy Efficiency Resources would clear any subsequent auctions.³⁴

II. Rehearing Request

12. On rehearing, Affirmed Energy asserts that the EER Order is unlawful because it improperly shifts the burden of proof and persuasion onto protestors, rather than PJM, when the Commission “found that that protestors ‘failed to demonstrate that use of PJM’s load forecast methodology will produce unjust and unreasonable results.’”³⁵ It further contends that the EER Order is arbitrary and capricious because it fails to address challenges to the evidence PJM offered in support of its proposal.³⁶ Here, Affirmed Energy argues that the Commission failed to address challenges to the accuracy of PJM’s load forecasting methodology, particularly as to PJM’s use of Energy Information Administration (EIA) data that allegedly underestimates energy efficiency.³⁷ Affirmed Energy further asserts that the Commission

³³ *Id.*

³⁴ *Id.*

³⁵ Rehearing Request at 9-10.

³⁶ *Id.* at 9-10.

³⁷ *Id.* at 11-12 (also arguing the Commission failed to address Public Interest Organizations’ (PIO) assertion that neither PJM nor protestors know how many megawatts of energy efficiency load reductions PJM excludes from the load forecast).

failed to address challenges to PJM’s claim that its proposal avoided double-counting of energy efficiency on both the supply side and demand side, because PJM “never identified any amount of [Energy Efficiency Resources] that are both in the load forecast and offered in the capacity auction for a delivery year.”³⁸ Affirmed Energy argues that, in the face of such challenges, the Commission must provide a complete analytical defense of PJM’s predictive model and respond to each objection, absent empirical confirmation of accuracy.³⁹ Affirmed Energy asserts that the Commission did not provide a reasoned response to these objections or explain how PJM’s load forecast model works, that PJM has not explained how this model works, and that the Commission’s discussion of inherent uncertainty in load forecasting does not respond to these specific challenges.⁴⁰

13. Next, Affirmed Energy argues that the Commission failed to address the evidence in the record on the benefits of supply-side participation of Energy Efficiency Resources in PJM capacity markets.⁴¹ In particular, Affirmed Energy asserts that PJM’s claim that the proliferation of energy efficiency programs in its region is not related to capacity payments ignores the scale of capacity payments and how such payments influence the uptake of energy efficiency products by creating financial

³⁸ *Id.* at 12.

³⁹ *Id.* at 13 (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983); *Am. Pub. Gas Ass’n v. Fed. Power Comm’n*, 567 F.2d 1016, 1037, 1039 (D.C. Cir. 1977)).

⁴⁰ *See id.* at 13-15; *see also id.* at 15-17 (arguing that the Commission essentially rubberstamped PJM’s model and took PJM at its word by merely describing what PJM stated in its filings).

⁴¹ *See id.* at 9, 17-20.

incentives boosting the adoption of such products.⁴² Affirmed Energy argues that the Commission's conclusion that load will continue to realize demand-side benefits from energy efficiency fails to address the real-world impacts of removing \$100 million per year in funding for energy efficiency.⁴³

14. Affirmed Energy also asserts that the EER Order is arbitrary and capricious and that PJM's proposal is unjust and unreasonable because PJM's proposal fails to include a transition mechanism, while also negating the possibility that already purchased and installed energy efficiency assets will lose eligibility to participate in PJM's capacity auctions.⁴⁴ Affirmed Energy claims that the Commission simply asserts that the benefits of PJM's proposal outweigh any settled expectations, assuming the truth of PJM's conclusion that customers would not benefit from continued participation of Energy Efficiency Resources in PJM's capacity auctions.⁴⁵

⁴² *Id.* at 17-19 (arguing that capacity revenues are used to create incentives to adopt such products, particularly lower prices to end-use customers and higher incremental profits and revenue streams for retailers and manufacturers that incentivize sales efforts); *id.* at 19 (arguing that certain state consumer advocates opposed PJM's proposal).

⁴³ *See id.* at 19-20.

⁴⁴ *See id.* at 9, 20-22 (arguing that the providers of those assets will be deprived of the opportunity to receive capacity payments while PJM will continue to reap the benefits of those assets).

⁴⁵ *See id.* at 22-23 (arguing that the Commission failed to assess or weigh settled reliance interests) (citing Rehearing Request, Ex. A, Declaration of Fred Bo Clayton Jr. ¶ 5 (Clayton Dec.) (asserting that Affirmed Energy incurred nearly \$50 million in costs in expectation of participating in the July 2025 BRA)); *cf. also id.* at 25-26 (arguing that the EER Order has "secondary retroactive

15. Affirmed Energy also argues that the EER Order is impermissibly retroactive in violation of the filed rate doctrine,⁴⁶ relying in particular on *PJM Power Providers Group v. FERC*.⁴⁷ Specifically, Affirmed Energy points to the eligibility rules of PJM’s Tariff, which provided that Energy Efficiency Resources that have cleared an auction “may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction,”⁴⁸ and argues that the EER Order “alters the legal consequences of [Energy Efficiency Resource] providers’ past actions—by nullifying a *cleared* resource’s auction eligibility under the tariff for forward delivery years.”⁴⁹ Affirmed Energy asserts that it is irrelevant that PJM’s proposed tariff revisions applied only prospectively to the future conduct of future auctions.⁵⁰ Finally, Affirmed Energy asserts that the EER Order results in a regulatory taking in violation of the U.S. Constitution because it deprives Affirmed Energy and other Energy Efficiency Resource providers of the full benefit of their investments.⁵¹

effects” in making worthless substantial past investment and that the Commission did not grapple with these effects).

⁴⁶ *Id.* at 9-10, 24-25.

⁴⁷ 96 F.4th 390, 399 (3d Cir. 2024) (*PJM Power Providers*); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

⁴⁸ Tariff, Attachment DD-1, § L.4 (23.0.0); see also RAA Schedule 6, § L.4 (22.0.0).

⁴⁹ Rehearing Request at 25 (emphasis in original).

⁵⁰ *Id.* at 24 (“It matters not that PJM proposed a ‘sunset’ date in the future ...”).

⁵¹ *Id.* at 26.

III. Motion for Stay

16. Affirmed Energy also moves pursuant to Rule 212 of the Commission's regulations for an immediate stay of the effective date of the EER Order pending judicial review.⁵²

17. Affirmed Energy states that it satisfies the Commission's standards for a stay of the EER Order.⁵³ Affirmed Energy asserts that it will suffer irreparable harm from the EER Order if it is barred from participating in the BRA for the 2026/2027 Delivery Year.⁵⁴ Affirmed Energy states that, if the EER Order remains in effect, Affirmed Energy will be ineligible to participate in the BRA for the 2026/2027 Delivery Year, preventing recovery of nearly \$50 million in energy efficiency asset investments that would otherwise be eligible.⁵⁵ Affirmed Energy further argues that following the normal path of judicial review under the FPA is unlikely to provide timely relief to Affirmed Energy before PJM's June 9, 2025 deadline for submission of measurement and verification plans to participate in the BRA for the 2026/2027 Delivery Year scheduled to start on July 9, 2025.⁵⁶ Affirmed Energy states that because the Commission generally does not rerun auctions, once the capacity revenues from the BRA for the 2026/2027

⁵² *Id.* at 4 (referencing 18 C.F.R. § 385.212 (2024)).

⁵³ *Id.* at 6.

⁵⁴ *Id.*; Clayton Dec. ¶ 7.

⁵⁵ Rehearing Request at 6; Clayton Dec. ¶ 5.

⁵⁶ Rehearing Request at 5-6; Clayton Dec. ¶ 5.

Delivery Year are lost,⁵⁷ they cannot be returned to Affirmed Energy even if it later prevails—and that therefore Affirmed Energy’s loss cannot be remediated later because no entity will be able to provide “adequate compensatory or other corrective relief ... at a later date.”⁵⁸ Affirmed Energy adds that it will need to wind down operations once its existing obligations are fulfilled and that it has made multiple cuts to its workforce since PJM voted to approve the tariff proposal to sunset Energy Efficiency Resources’ participation in the RPM.⁵⁹ Affirmed Energy asserts that these circumstances constitute irreparable injury and not mere economic loss.

18. Affirmed Energy also claims that a stay will not substantially harm other parties.⁶⁰ Affirmed Energy maintains that other parties would not be negatively impacted by Energy Efficiency Resource participation in the capacity market, that other market participants have no legitimate interest in excluding Energy Efficiency Resources from the market, and that PJM will have an opportunity to advance its interest in the proposal accepted by the Commission both before the Commission and in any subsequent court action.

19. Affirmed Energy further argues that a stay would serve the public interest.⁶¹ Affirmed Energy asserts that a stay will preserve Energy Efficiency Resource

⁵⁷ Rehearing Request at 6 (citing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at P 55 (2017)).

⁵⁸ *Id.* at 6-7 (citing *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

⁵⁹ *Id.* at 7; Clayton Dec. ¶ 7.

⁶⁰ Rehearing Request at 7.

⁶¹ *Id.* at 7-8.

providers' abilities to recoup their substantial investments. In the alternative, Affirmed Energy argues that terminating the ability of cleared resources to participate in the BRA for the 2026/2027 Delivery Year cannot be undone and does not serve the public interest.

20. Affirmed Energy argues that granting a stay will, consistent with the primary purpose of stays, preserve the status quo while the Commission considers Affirmed Energy's petition for rehearing, and, if necessary, while the EER Order is reviewed on appeal.⁶² If the Commission denies the stay, however, Affirmed Energy states that the status quo ante would be permanently altered because Affirmed Energy will lose any capacity revenues that it could have earned in the BRA for the 2026/2027 Delivery Year even if it later prevails on appeal. Affirmed Energy also argues that it is likely to succeed on appeal, further supporting maintenance of the status quo ante and issuance of a stay.⁶³

IV. Answers

21. On December 16, 2024, PJM filed an answer to Affirmed Energy's motion to stay the EER Order. Also on December 16, 2024, the Independent Market Monitor for PJM (IMM) filed a combined answer to the motion to stay the EER Order and motion for leave to answer and answer to Affirmed Energy's rehearing request. On December 20, 2024, PJM filed a motion for leave to answer and answer to Affirmed Energy's rehearing request.

⁶² *Id.* at 8 (citing *Pa. Power & Light Co.*, 23 FERC ¶ 61,215, at 61,447 (1983) ("The primary purpose of a stay or suspension is to maintain the status quo ante pending further determination of pending issues.")).

⁶³ *Id.* at 9.

22. In its answer to Affirmed Energy’s motion to stay the EER Order, PJM argues that Affirmed Energy’s motion for stay should be denied. PJM first argues that Affirmed Energy cannot show that it will suffer irreparable injury because of the EER Order.⁶⁴ PJM asserts that Affirmed Energy’s financial injuries are self-inflicted rather than the result of the EER Order. Further, PJM argues that Affirmed Energy has no entitlement to continue offering energy efficiency projects in the BRA for the 2026/2027 Delivery Year nor can it claim exceptional harm simply because its business model relies on the Tariff remaining unchanged; rather, PJM notes that market rules evolve regularly. PJM also claims that Affirmed Energy has not shown that the EER Order is certain to threaten the existence of its business because Affirmed Energy’s business model is not intrinsically tied to PJM’s markets alone, and alternative markets and opportunities are available to Energy Efficiency Resource providers.⁶⁵ PJM adds that Affirmed Energy’s claim that it has reduced its staff to five employees is not meaningful because it neglects to provide a reference peak number of employees.

23. In addition, PJM contests Affirmed Energy’s claim that lost capacity revenues cannot be claimed after the BRA is conducted.⁶⁶ To the contrary, PJM suggests that, because of the addback mechanism, if “an appellate court were to allow the continued participation of

⁶⁴ PJM December 16, 2024 Answer at 2-6, 8.

⁶⁵ *Id.* at 8 (citing Midcontinent Independent System Operator/FERC Electric Tariff, 69A.3.3, Load Modifying Resources (35.0.0), <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1162&sid=330478>).

⁶⁶ *Id.* at 6-8.

[energy efficiency] in PJM’s capacity market, PJM could administratively determine the capacity revenues that would flow to Affirmed [Energy] based on the quantity of [energy efficiency] offered without having to rerun the entire 2026/2027 BRA.”⁶⁷ That is, through the add-back, PJM “would add a commensurate amount of [energy efficiency] that clears a capacity auction back to the demand curve,” leaving “the amount of supply that clears the capacity auction ... generally unaffected by the amount of [energy efficiency] that clears the market.” For that reason, PJM asserts that Affirmed Energy has not demonstrated that it will be irreparably harmed absent a stay.

24. Second, PJM argues that Affirmed Energy cannot show that the stay will not substantially injure other parties interested in the proceeding.⁶⁸ PJM alleges that Affirmed Energy’s claims that a stay will not harm other parties are conclusory and unsupported, and that allowing Energy Efficiency Resource providers like Affirmed Energy to continue participating in PJM’s capacity markets harms consumers by requiring them to pay for services that have not been shown to provide actual value.

25. Third, PJM argues that allowing Energy Efficiency Resources to participate in the BRA for the 2026/20267 Delivery Year is not in the public interest.⁶⁹ PJM again claims that Affirmed Energy’s arguments are conclusory. In addition, PJM asserts that denying the stay request protects the public interest by ensuring the integrity and efficiency of PJM’s capacity market and

⁶⁷ *Id.* at 7.

⁶⁸ *Id.* at 8-10.

⁶⁹ *Id.* at 10-11.

preventing inefficiencies that harm other market participants.

26. IMM asserts that Affirmed Energy will not face irreparable injury because economic loss alone does not constitute irreparable harm.⁷⁰ IMM adds that granting the stay would substantially harm other parties and not serve the public interest because, it argues, PJM customers have paid hundreds of millions of dollars in subsidies to Affirmed Energy and other energy efficiency sellers with no basis in the pre-EER Order Tariff for such payments.⁷¹

V. Discussion

A. Procedural Matters

27. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.⁷² Accordingly, we deny the motions for leave to answer Affirmed Energy's rehearing request, reject the portion of IMM's answer that pertains to Affirmed Energy's request for rehearing, and reject PJM's answer to the rehearing request. However, because our regulations permit answers to motions for stay, we accept PJM's answer to Affirmed Energy's motion for stay and

⁷⁰ IMM Answer at 2-5.

⁷¹ *Id.* at 2 (referencing *IMM*, Complaint, Docket No. EL24-126-000 (filed July 10, 2024) (arguing that, following PJM's 2016 load forecast methodology improvements, energy efficiency measures were no longer eligible to participate in RPM auctions because the Tariff's Energy Efficiency Resource definition excluded measures reflected in the peak load forecast)).

⁷² 18 C.F.R. § 385.713(d)(1) (2024).

the portion of IMM’s answer that pertains to the motion for stay.⁷³

B. Substantive Matters

1. Rehearing Request

28. Affirmed Energy does not challenge, on rehearing, many of the core determinations supporting the Commission’s conclusion that PJM’s proposed tariff revisions are just and reasonable. For example, Affirmed Energy does not contest the Commission’s finding that, since 2016, Energy Efficiency Resources have been “receiv[ing] capacity payments despite the fact that they do not reduce or otherwise contribute towards meeting the region’s resource adequacy requirement,” and that the costs of these payments are being borne by load.⁷⁴ Affirmed Energy also does not argue that the Commission erred in explaining that the original purpose of allowing Energy Efficiency Resources to participate in PJM’s capacity markets was to address a four-year lag in reflecting the impact of energy efficiency measures in PJM’s load forecast, a purpose that it has not served since PJM improved its load forecast to reasonably account for energy efficiency measures without such a lag.⁷⁵ Nor does

⁷³ 18 C.F.R. § 385.213(a)(3) (2024).

⁷⁴ EER Order, 189 FERC ¶ 61,095 at P 63 (explaining also that, under the “addback” mechanism, “Energy Efficiency Resources participating on the supply side in the RPM cannot lower the clearing price or costs paid by load”).

⁷⁵ *See id.* P 62 (“PJM’s proposal corrected for a four-year lag between when an Energy Efficiency Resource was initially installed and when its load-reducing effects were reflected in PJM’s load forecast and the associated installed reserve requirement.”); *id.* P 65 (“PJM’s load forecast methodology improvements addressed this forecasting deficiency by incorporating the impacts of energy efficiency measures into PJM’s load forecast. As a result, continued

Affirmed Energy dispute that “the Commission has never required [Regional Transmission Organizations (RTOs)]/Independent System Operators (ISOs) to allow the participation of energy efficiency measures in the supply-side of their capacity markets.”⁷⁶

29. Affirmed Energy instead argues that the Commission did not fully evaluate certain objections to PJM’s proposal and improperly weighed the evidence before it. In particular, Affirmed Energy argues that the Commission failed to address objections to PJM’s improved load forecast methodology, consider the benefits of supply-side participation of Energy Efficiency Resources in capacity markets, or grapple with the impact of PJM’s proposal on entities that would offer Energy Efficiency Resources into PJM’s capacity auctions.⁷⁷ We disagree with these arguments and continue to find that PJM has met its burden to show that its proposal is just and reasonable.

30. Starting with Affirmed Energy’s arguments as to PJM’s improved load forecast methodology, Affirmed Energy quotes the EER Order out of context in asserting that the Commission shifted the burden of proof onto protestors in stating that “protestors ‘failed to demonstrate that use of PJM’s load forecast methodology will produce unjust and unreasonable results.’”⁷⁸ The Commission was explaining there why it was not persuaded by arguments from protestors in which they “allege[d]

supply-side participation by Energy Efficiency Resources is no longer needed to serve this original purpose.”).

⁷⁶ *Id.* P 62.

⁷⁷ *See supra* P 12.

⁷⁸ Rehearing Request at 10 (quoting EER Order, 189 FERC ¶ 61,095 at P 69); *see also id.* at 3, 9.

that PJM's load forecast methodology underestimates the effects of energy efficiency and note[d] that PJM itself has acknowledged that its load forecast is not 100% accurate."⁷⁹ The Commission recognized explicitly that PJM bore the burden of proof, finding PJM had provided sufficient evidence to show "that PJM's load forecast methodology reasonably reflects the expected impacts of energy efficiency measures," based on record evidence proffered by PJM.⁸⁰ The Commission therefore did not shift the burden of proof from PJM to protestors.

31. We also continue to find that PJM has met its burden to show that its proposal will result in just and reasonable rates,⁸¹ and we sustain our finding that the record evidence supports the conclusion that PJM's improved load forecast reasonably accounts for energy efficiency measures. Contrary to Affirmed Energy's claims that PJM's model was insufficiently explained,⁸² the record contains a sufficient description of and support for PJM's load forecast methodology, including how it accounts for energy efficiency measures.

32. For example, and among other things, PJM described its load forecast methodology, including its use of EIA data, supplementation of that data and enhancements to that forecast, use of statistical modeling, solicitation of stakeholder feedback, and engagement of

⁷⁹ EER Order, 189 FERC ¶ 61,095 at P 69.

⁸⁰ *Id.*; see also *id.* P 74 ("[T]he Commission's 'authority to review rates' under FPA section 205 is 'limited to an inquiry into whether the rates proposed ... are reasonable.' We find that *PJM* has made such a demonstration here." (quoting *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984) (emphasis added))).

⁸¹ See *id.* P 61.

⁸² See Rehearing Request at 14, 15-16.

outside consultants to assess that model.⁸³ PJM further explained that it models the residential, commercial, and industrial sectors based on EIA energy usage data, which PJM refines and calibrates to make more specific to PJM's footprint.⁸⁴ PJM also discussed how it models energy efficiency in the load forecast, including the use of end-use intensity modeling to eliminate the former four-year lag between the installation of an energy efficiency project and the reflection of that project's impact on load in PJM's forecast.⁸⁵ Moreover, PJM described the credibility of EIA data—which, as the EER Order recognized, PJM described as “a widely used source [by] governments and utilities.”⁸⁶ PJM also stated that its model has been independently evaluated by third-party consultants, including as to how EIA data captures the impact of energy efficiency on load.⁸⁷

33. PJM has been using its improved load forecast model since 2016 and, in doing so, has “eliminated the four-year lag between installation of an energy

⁸³ Gledhill Aff. ¶¶ 6-11.

⁸⁴ *See id.* ¶¶ 12-15 (further discussing PJM's use of regression analyses and development of forecast scenarios).

⁸⁵ *See id.* ¶¶ 16-23.

⁸⁶ EER Order at P 49; Gledhill Aff. ¶¶ 24-27 (addressing the use of EIA data, transparency of that data, and continued improvements to the accuracy of that data with respect to energy efficiency modeling, and noting the use of that data by decision makers in the White House, the U.S. Congress, the Department of Energy, and other agencies); *id.* ¶¶ 28-35 (discussing the accuracy of PJM's modeling as to the impact of energy efficiency resources in its load forecast, including indications that the model was sufficiently incorporating energy efficiency measures based on results for 2023/2024 and 2024/2025 Delivery Years).

⁸⁷ *See, e.g.*, Gledhill Aff. ¶¶ 11, 21 n.8, 22 n.9, 24 n.10, 26.

efficiency project and the reflection of that project's impact on load in the PJM Load Forecast.”⁸⁸ While Affirmed Energy criticizes how PJM's improved methodology accounts for energy efficiency, the critiques it advances are significantly different from the four-year lag that PJM used to justify the original implementation of supply-side participation by Energy Efficiency Resources in its capacity markets. PJM notes that EIA is an agency within the U.S. Department of Energy and that EIA “collects, analyzes, and disseminates independent and impartial energy information”;⁸⁹ is widely used by governments and utilities, as noted above;⁹⁰ and is one input to PJM's model that PJM further adjusts and calibrates to the PJM footprint, including with actual load data.⁹¹ Particularly given that load forecasting is inherently uncertain,⁹² we continue to find that PJM

⁸⁸ *Id.* ¶ 19.

⁸⁹ *Id.* ¶ 6 (quoting *Mission and Overview*, U.S. ENERGY INFORMATION ADMINISTRATION, https://www.eia.gov/about/mission_overview.php (last visited Feb. 4, 2025)); *see also* PJM October 11, 2024 Answer at 17 (“EIA data is a widely utilized source that both governments and utilities utilize across the nation.”).

⁹⁰ *See* Gledhill Aff. ¶ 24.

⁹¹ *See* PJM October 11, 2024 Answer at 18-19 (summarizing this process). The Gledhill Affidavit also further provides support, based on the results of recent auction processes, that corroborates that PJM's model is sufficiently reliable in assessing the impact of energy efficiency. *See* Gledhill Aff. ¶¶ 33-34. Even recognizing that the recent auction evidence is not, in itself, dispositive as to the robustness of PJM's improved model, we find that it is further support for PJM's proposal, which is sufficiently supported as described above.

⁹² *See* EER Order, 189 FERC ¶ 61,095 at P 69 & n.161.

has met its burden to support its proposal based on the record evidence, including as to its use of EIA data.⁹³

34. Affirmed Energy’s arguments that we should reject PJM’s proposal because it underestimates energy efficiency impacts are particularly unpersuasive when viewed in the context of our statutory mandate to ensure just and reasonable rates. Even assuming, *arguendo*, that PJM’s improved load forecast—which the Commission has found sufficiently reliable in its assessment of energy efficiency—might still somewhat underestimate the impact of energy efficiency, this possibility neither negates the benefits of PJM’s proposal nor renders it unjust and unreasonable.⁹⁴ PJM’s proposal carries the

⁹³ See, e.g., *N.Y. State Pub. Serv. Comm’n v. FERC*, 104 F.4th 886, 893–94 (D.C. Cir. 2024) (sustaining rate design amid uncertainty regarding the impact of a law mandating zero emissions by 2040, holding that “[t]o the extent that any approach to setting rates here would have required some degree of guesswork, Section 205 of the Federal Power Act (and our prior judgment) required [the Commission] to resolve the matter in favor of the System Operator’s reasonable prediction”); *Alon Ref. Krotz Springs, Inc. v. Env’t Prot. Agency*, 936 F.3d 628, 663 (D.C. Cir. 2019) (sustaining EPA estimate of imports of sugarcane ethanol that was well over double the actual imports in the three preceding years, given the particular deference afforded to predictive judgments).

⁹⁴ See, e.g., *OXY USA, Inc. v. FERC*, 64 F.3d 679, 692 (D.C. Cir. 1995) (finding that under the FPA, as long as the Commission finds a methodology to be just and reasonable, that methodology “need not be the only reasonable methodology, or even the most accurate one”); *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,069, at P 48 & n.78, P 59 (2018) (citing *Cal. Indep. Sys. Operator Corp.*, 128 FERC ¶ 61,265, at P 21 (2009) (“the issue before the Commission is whether the CAISO’s proposal is just and reasonable and not whether the proposal is more or less reasonable than other alternatives”)).

concrete benefit of reduced capacity costs, without a negative impact on system reliability.⁹⁵

35. We disagree that the Commission failed to consider arguments or evidence as to the benefits of supply-side participation of Energy Efficiency Resources in PJM's capacity markets.⁹⁶ The Commission considered this issue and "recognize[d] that providing capacity payments to Energy Efficiency Resources may increase incentives to invest in energy efficiency measures," but found, on the record before it, that such incentives were not necessary to ensure just and reasonable rates in PJM.⁹⁷ The Commission explained that "PJM will continue to reflect

⁹⁵ See EER Order, 189 FERC ¶ 61,095 at PP 63, 64; *see also id.* P 72 (noting, in the context of an argument that PJM's proposal upset settled expectations, that "PJM's proposal will result in a more efficient capacity market based on an accurate load forecast and reduce capacity market costs borne by load and consumers while continuing to maintain reliability."). We are also not convinced by Affirmed Energy's argument that "PJM never identified any amount of [Energy Efficiency Resources] that are both in the load forecast and offered in the capacity auction for a delivery year." Rehearing Request at 12. This argument misses the point: as PJM noted and the Commission found, double counting occurs when energy efficiency is included on the demand side through the load forecast and the supply side through the auction. The "addback" was one approach PJM used to try to address this situation by moving energy efficiency from the demand to the supply side, *see id.* P 6 & n.11, whereas PJM later determined that it would be more efficient if energy efficiency is left on the demand side through the load forecast, which we find is a just and reasonable approach.

⁹⁶ See Rehearing Request at 17-20 (arguing that the Commission failed to consider "the arguments challenging PJM's assumption that there will be no impact on the demand side from sunseting capacity payments to energy efficiency," and asserting that capacity payments may flow to retailers and manufacturers to incentivize greater uptake of energy efficiency measures).

⁹⁷ EER Order, 189 FERC ¶ 61,095 at P 70.

the effects of energy efficiency measures on the demand side, which could lower resource adequacy requirements and thus reduce capacity costs to loads.”⁹⁸ Moreover, the Commission “has not required wholesale market operators to account for energy efficiency measures on the supply side of capacity markets.”⁹⁹ At its core, Affirmed Energy’s argument reflects a policy disagreement with PJM’s approach, arguing that PJM should maintain this continued stream of capacity payments to Energy Efficiency Resource market participants on the theory that some amount of these payments may provide incentives for greater energy efficiency uptake.¹⁰⁰ Affirmed Energy’s preference for this approach and its arguments about the benefits it may carry do not convince us—and the record does not show—that PJM’s proposal, which instead reflects the effects of energy efficiency on the demand side, will result in unjust and unreasonable rates.¹⁰¹

⁹⁸ *Id.* The Commission thus did not engage in “unquestioning reliance” on “PJM’s assumption that there will be no impact on the demand side from sunseting capacity payments to energy efficiency[,]” as Affirmed Energy claims. Rehearing Request at 18.

⁹⁹ EER Order, 189 FERC ¶ 61,095 at P 70.

¹⁰⁰ Affirmed Energy claims that PJM’s proposal results in “removing over \$100 million per year in funding for energy efficiency.” Rehearing Request at 19. This appears to be a reference to the amount of capacity payments made through the RPM, *see* Affirmed Energy Protest at 9 n.27. Notably, however, Affirmed Energy does not cite any particular amount of “funding for energy efficiency” from these capacity payments that actually flows through to retailers or manufacturers to incentivize energy efficiency uptake.

¹⁰¹ Put differently, the record before us does not convince us that PJM must account for energy efficiency measures on the supply side of its capacity markets.

36. Affirmed Energy’s arguments that the EER Order is unlawful or is unjust and unreasonable because it “fails to include any transition mechanism” or fails to consider reliance interests weighing against PJM’s proposal are also unpersuasive.¹⁰² The Commission conducted a thorough balancing of the interests—considering, *inter alia*, how PJM’s proposal would result in a more efficient capacity market and carry benefits for load and consumers; how PJM’s Tariff and RAA would inform the reasonable expectations of Energy Efficiency Resource providers; and the record regarding how PJM’s proposal would affect such providers—in assessing whether PJM’s proposal was just and reasonable.¹⁰³

37. We are unpersuaded by the argument that the Commission’s explanation that PJM’s proposal provided “some transition period by continuing to honor existing capacity commitments, including those for 2025/2026 Delivery Year RPM auctions,”¹⁰⁴ is “nonresponsive” to concerns about how PJM’s proposal may affect the interests of capacity market participants, as Affirmed Energy claims.¹⁰⁵ Rather, this finding is one aspect of the Commission’s analysis to properly define the scope of the reliance interests at stake, as it reflects that PJM’s proposal was not interfering with interests in the 2025/2026

¹⁰² Rehearing Request at 20; *see also id.* at 23; *cf. id.* at 25-26 (arguing that PJM’s proposal may have unreasonable “secondary retroactivity” based on its effects on past investment).

¹⁰³ *See* EER Order, 189 FERC ¶ 61,095 at P 72.

¹⁰⁴ *Id.*

¹⁰⁵ *See* Rehearing Request at 21 (arguing that “Affirmed [Energy] argued ... that PJM’s proposal strips away *even the possibility of eligibility* for the remaining delivery years of an [Energy Efficiency Resource’s] life”); *id.* at 23.

Delivery Year RPM auctions. So, too, with the Commission's finding that neither the Tariff nor RAA guarantee that "Energy Efficiency Resources that have cleared an auction for a delivery year ... will *clear* [subsequent] auctions."¹⁰⁶ Moreover, we disagree that the Commission "does not answer or even acknowledge the precise arguments ... that PJM's proposal improperly disregards ... the *ability* of a cleared resource to *participate*" in subsequent auctions.¹⁰⁷ The Commission explicitly acknowledged this consideration.¹⁰⁸ And Affirmed Energy does not acknowledge the other considerations that factored into the Commission's balancing analysis and also favored finding PJM's proposal was just and reasonable.¹⁰⁹

38. The Commission conducted a balancing analysis of these interests and found that the benefits of PJM's proposal outweighed the possible harm caused by upsetting any settled expectations.¹¹⁰ Affirmed Energy has not

¹⁰⁶ EER Order, 189 FERC ¶ 61,095 at P 72 (explaining that this "discount[s] Energy Efficiency Resource providers' legitimate reliance on expectations of ultimate capacity market revenues").

¹⁰⁷ Rehearing Request at 22.

¹⁰⁸ EER Order, 189 FERC ¶ 61,095 at P 72 (recognizing that "Energy Efficiency Resource sellers may have taken into account an expectation of four delivery years of potential eligibility to offer into the RPM in making investment decisions").

¹⁰⁹ *See id.* (explaining that "PJM's proposal will result in a more efficient capacity market based on an accurate load forecast and reduce capacity market costs borne by load and consumers while continuing to maintain reliability" and that PJM's Tariff and RAA "provide a service term limiting Energy Efficiency Resources' capacity market auction eligibility; they do not create an entitlement that PJM cannot change going forward").

¹¹⁰ *Id.*; *see also id.* PP 63-65.

convinced us that the Commission erred in this balancing. Indeed, on rehearing we further note that PJM's Tariff and RAA long provided that only those resources that are "not reflected in the peak load forecast" qualify as Energy Efficiency Resources¹¹¹ and that allowing Energy Efficiency Resources to participate in capacity markets was motivated by the four-year lag in reflecting such resources in the load forecast.¹¹² Given that PJM improved its load forecast as far back as 2016 to better include energy efficiency impacts in the load forecast and eliminate this four-year lag, reasonable parties considering investing in Energy Efficiency Resources should not have treated the possibility of obtaining capacity revenues from investments as an entitlement or a guarantee. In fact, and more broadly still, as the EER Order noted, it is well understood by market participants that capacity markets rules are subject to potential changes.¹¹³

39. We also disagree with Affirmed Energy's argument that the EER Order is unlawful because it has impermissible retroactive effects in violation of the filed rate doctrine, based on *PJM Power Providers*.¹¹⁴ As the Commission explained, PJM's proposal made "forward-looking revisions to Energy Efficiency Resources' eligibility" that "will apply prospectively starting with the

¹¹¹ Tariff, Attachment DD-1, § L.1 (23.0.0); RAA Schedule 6, § L.1 (22.0.0).

¹¹² See March 2009 Order, 126 FERC ¶ 61,275 at P 134.

¹¹³ EER Order, 189 FERC ¶ 61,095 at P 72 (noting the risk of tariff and regulatory changes).

¹¹⁴ See Rehearing Request at 24-26.

BRA for the 2026/2027 Delivery Year.”¹¹⁵ Affirmed Energy claims that it “matters not that PJM proposed a ‘sunset’ date in the future” because “[t]he Commission’s acceptance of PJM’s proposal ‘alter[s] the legal consequence[s] attached to a past action.’”¹¹⁶ This argument disregards the facts underlying *PJM Power Providers* and misconstrues PJM’s Tariff and RAA.

40. The court in *PJM Power Providers* considered a specific set of circumstances in which PJM sought to change a posted auction parameter because PJM identified an error in that parameter during the auction process in the BRA for the 2024/2025 Delivery Year.¹¹⁷ In doing so, PJM halted the auction and sought to adjust the tariff provisions governing that same, in-process auction after the offers had been submitted and just days before the results were to be posted.¹¹⁸ The court found that—only as to *that* ongoing auction process,¹¹⁹ but not as to future auctions—PJM’s proposed tariff revisions were impermissibly retroactive under the filed rate doctrine because they altered the legal consequences attached to past action.¹²⁰ The court did not address a public utility’s ability, under FPA section 205, to

¹¹⁵ EER Order, 189 FERC ¶ 61,095 at P 71.

¹¹⁶ Rehearing Request at 25 (quoting *PJM Power Providers Grp.*, 96 F.4th at 399).

¹¹⁷ *PJM Power Providers Grp.*, 96 F.4th at 396.

¹¹⁸ *See id.*

¹¹⁹ *See id.* at 402 (“[O]nly the portion of the orders that allows PJM to apply the Tariff Amendment to the 2024/25 capacity auction is retroactive.”).

¹²⁰ *See id.* at 400 (“Under the Tariff, PJM calculated and posted the LDA Reliability Requirement (past action), and it was required to use it in the Auction (legal consequence).”).

prospectively modify its tariff rules to revise forward-looking provisions that relate to future conduct. Indeed, the court expressly refused to vacate the Commission's orders in that case as they applied to the prospective application of PJM's proposed Tariff revisions, rejecting only those revisions' retroactive application to the 2024/2025 Delivery Year auction.¹²¹

41. Here, by contrast, PJM's proposal applied wholly prospectively, to change provisions governing the eligibility of certain resources to participate in future auctions.¹²² We are not persuaded by Affirmed Energy's efforts to dismiss this key distinction by arguing that the EER Order "alters the legal consequences of [Energy Efficiency Resource] providers' past actions—by nullifying a cleared resource's auction eligibility under the tariff for forward delivery years."¹²³ This argument misconstrues sections L.4 of PJM's Tariff, Attachment DD-1 and the RAA Schedule 6¹²⁴ as having provided an affirmative legal right for an Energy Efficiency Resource

¹²¹ See *id.* at 402; see also *ISO New England Inc.*, 190 FERC ¶ 61,063, at PP 30-33 (finding that tariff revisions did not violate the filed rate doctrine, noting *inter alia* that the revisions "will only have a prospective effect as they address future financial assurance requirements associated with risks of non-performance penalties that will occur after the requested effective date").

¹²² See EER Order, 189 FERC ¶ 61,095 at P 71; Rehearing Request at 24 (acknowledging that PJM "proposed a 'sunset' date in the future").

¹²³ Rehearing Request at 24.

¹²⁴ Tariff, Attachment DD-1, § L.4 (23.0.0) ("An Energy Efficiency Resource that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction"); RAA Schedule 6, § L.4 (22.0.0) (same).

that clears an auction for a Delivery Year to participate in three subsequent auctions,¹²⁵ rather than a limitation on Energy Efficiency Resources' eligibility to participate in capacity auctions to reflect the four-year period necessary to include them in PJM's load forecast.¹²⁶ Accepting Affirmed Energy's argument that PJM's proposal is retroactive would foreclose PJM's ability to make what are plainly prospective revisions to its Tariff and RAA—an outcome that is not remotely suggested by the filed rate doctrine, much less by sound policy. Further, as the Commission noted in the EER Order,¹²⁷ PJM's tariff includes a *Memphis*¹²⁸ clause under which it reserves the right to revise future rates regardless of the term of any parties' contract with PJM.¹²⁹

¹²⁵ See Rehearing Request at 24-25.

¹²⁶ See March 2009 Order, 126 FERC ¶ 61,275 at P 134. This conclusion is further reinforced when these provisions are read in the context of sections L.2 of PJM's Tariff, Attachment DD-1, and RAA Schedule 6, which (prior to PJM's revisions) provided that "[a]n Energy Efficiency Resource may be offered as a Capacity Resource in the Base Residual or Incremental Auctions for any Delivery Year beginning on or after June 1, 2011." See also Tariff, Attachment DD-1, § L.1 (23.0.0) (defining "Energy Efficiency Resource" as only those resources "not reflected in the peak load forecast prepared for the Delivery Year for which the Energy Efficiency Resource is proposed"); RAA Schedule 6, § L.1 (22.0.0).

¹²⁷ EER Order, 189 FERC ¶ 61,095 at P 71 n.167.

¹²⁸ *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103 (1958).

¹²⁹ PJM, Intra-PJM Tariffs, 9.2, OATT 9.2 Rights of the Transmission Provider: (1.1.0), § 9.2(a) ("PJM shall have the exclusive and unilateral right to file pursuant to Section 205 of the Federal Power Act and the FERC's rules and regulations thereunder to make changes in or relating to the terms and conditions of the PJM Tariff").

42. Indeed, Energy Efficiency Resources are in no different position than other resources whose eligibility to participate in future auctions is specified by tariff provisions that may be subject to change through tariff revisions under FPA section 205.¹³⁰ A contrary interpretation of *PJM Power Providers* runs the risk of locking down, perhaps indefinitely, public utilities' tariffs from revision under FPA section 205 and hampering their ability to prospectively propose just and reasonable rates.¹³¹ We thus continue to find that PJM's proposal is a permissible, prospective revision of its Tariff and RAA and is not impermissibly retroactive under the filed rate doctrine.

43. Affirmed Energy's argument that PJM's proposal results in an unconstitutional regulatory taking was not raised prior to rehearing as required by the Commission's Rule of Practice and Procedure 713(c)(3) and is,

¹³⁰ Cf. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J. concurring) ("The Treasury Department might prescribe, for example, that, for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable—whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, *i.e.*, in the sense of altering the *past* legal consequences of past actions A rule with exclusively future effect (taxation of future trust income) can unquestionably *affect* past transactions (rendering the previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA."). That PJM had already limited Energy Efficiency Resources' eligibility to participate in capacity auctions is not a basis to give them privileged treatment over other resources by precluding PJM from prospectively revising its capacity market eligibility rules as to Energy Efficiency Resources.

¹³¹ The facts of this case present a time-limited example of this concern; in other circumstances, Affirmed Energy's reading of *PJM Power Providers* could arguably freeze tariffs indefinitely.

therefore, waived and need not be addressed here.¹³² In any event, we are not persuaded by this argument.¹³³ Affirmed Energy does not establish a protected property interest, as it has no legal entitlement to capacity revenues nor to participate in future auctions should PJM modify its eligibility rules.¹³⁴ Nor does Affirmed Energy conduct the fact-intensive analysis, examining the factors set forth by *Penn Central Transportation Co. v. City of New York*¹³⁵ and related cases, that is necessary to establish a Fifth Amendment regulatory taking of any such purported interest.¹³⁶

¹³² 18 C.F.R. § 385.713(c)(3) (providing that any request for rehearing must “[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order”); *Columbia Gulf Transmission, LLC v. FERC*, 106 F.4th 1220, 1231 (D.C. Cir. 2024) (“Even though Petitioners discussed Section 6.2 and Section 4.02(e) at the rehearing stage, FERC reasonably concluded that those discussions came too late.”); *NO Gas Pipeline v. FERC*, 756 F.3d 764, 770 (2014) (“We finally note that Jersey City’s alleged constitutional claim of actual bias is also barred as untimely. Jersey City has shown us nothing of record to establish that it raised this issue before FERC’s issuance of the initial order.”); *see also KEI (Me.) Power Mgmt. (III) LLC*, 173 FERC ¶ 61,069, at P 38 n.77 (2020).

¹³³ Even assuming that we agreed that the EER Order worked a regulatory taking (it does not), Affirmed Energy does not show that this renders PJM’s proposal not just and reasonable. *See Transmission Access Pol’y Study Grp. v. FERC*, 225 F.3d 667, 690 (D.C. Cir. 2000), *aff’d sub nom. N. Y. v. FERC*, 535 U.S. 1 (2002).

¹³⁴ *See, e.g., Roth v. King*, 449 F.3d 1272, 1284–85 (D.C. Cir. 2006) (to establish a property interest under the Fifth Amendment, a person must have a legitimate claim of entitlement).

¹³⁵ 438 U.S. 104, 124 (1978).

¹³⁶ *See* Rehearing Request at 26.

2. Motion for Stay

44. We also deny Affirmed Energy's motion for stay of the EER Order pending judicial review. A stay pending appeal is an extraordinary remedy and is not a matter of right.¹³⁷ As an initial matter, Affirmed Energy seeks a stay of the effective date of the EER Order, relying on the Administrative Procedure Act's provision that an agency may "postpone the effective date of action taken by it, pending judicial review," when "justice so requires."¹³⁸ In the EER Order, however, the Commission acted pursuant to FPA section 205, which, in relevant part,¹³⁹ provides that unless the Commission rejects the filing, the utility has a right to have proposed tariff revisions become effective within 61 days of the filing unless the Commission exercises its power to suspend the filing for up to five months subject to refund.¹⁴⁰ Accordingly, it is at least unclear whether, with the Commission's acceptance of PJM's Tariff revisions in the EER Order, the Commission may stay the effectiveness of those revisions as Affirmed Energy requests. However, even if a stay were permitted in this circumstance, we would

¹³⁷ See *Nken v. Holder*, 556 U.S. 418, 427 (2009); *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985).

¹³⁸ 5 U.S.C. § 705.

¹³⁹ 16 U.S.C. § 824d(d), (e).

¹⁴⁰ See *Ind. & Mich. Elec. Co. v. FPC*, 502 F.2d 336, 341 (D.C. Cir. 1974) (holding that the notice period provided for in FPA section 205(d), then 30 days, "is the maximum a utility can be compelled to wait from the time it files its rate changes until the date the changes take effect unless the Commission properly exercises its suspension power"); *ANR Pipeline Co. v. FERC*, 931 F.2d 88, 92 (D.C. Cir. 1991) (finding the Commission could summarily reject a proposal when there was no factual dispute but could not reject a proposal with unresolved issues).

deny Affirmed Energy’s request for stay on the merits, as discussed below.

45. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act: a stay will be granted if the Commission finds that “justice so requires.”¹⁴¹ Under this standard, the Commission considers such factors as: (1) whether the moving party will suffer irreparable injury without a stay; (2) whether a stay would substantially harm other parties; and (3) whether the stay is in the public interest.¹⁴² If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.¹⁴³ The Commission’s general policy is to refrain from granting stays in order to assure definiteness and finality in our proceedings.¹⁴⁴

46. To demonstrate irreparable harm, a movant must establish that the injury is both certain and great, and actual, not theoretical; bare allegations of what is likely

¹⁴¹ U.S.C. § 705; *see also Rio Grande LNG, LLC*, 186 FERC ¶ 61,021, at P 13 (2024).

¹⁴² *See Rio Grande LNG, LLC*, 186 FERC ¶ 61,021 at P 13; *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9 (2015); *Millennium Pipeline Co.*, 141 FERC ¶ 61,022, at P 13 (2012).

¹⁴³ *See Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (Wis. Gas Co.); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,236, at P 8 (2016); *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183 at P 9; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022 at P 14.

¹⁴⁴ *See SFPP, L.P.*, 166 FERC ¶ 61,211, at P 7 (2019); *Millennium Pipeline Co., LLC*, 141 FERC ¶ 61,022 at P 22; *Bos. Edison Co.*, 81 FERC ¶ 61,102, at 61,377 (1997).

to occur do not suffice.¹⁴⁵ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof that the harm is certain to occur in the near future.¹⁴⁶ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.¹⁴⁷ A stay generally “will not be granted against something merely feared as liable to occur at some indefinite time” in the future.¹⁴⁸ Moreover, the injury “must be beyond remediation” and “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.”¹⁴⁹

47. Affirmed Energy has not established that it is certain to suffer irreparable harm absent a stay. Financial injury is only irreparable when no adequate compensatory or other corrective relief will be available at a later date¹⁵⁰ or when the “monetary loss threatens the very

¹⁴⁵ *Wis. Gas Co.*, 758 F.2d at 674; *Sandy Hollow Power Co.*, 186 FERC ¶ 61,198, at P 11 (2024); *Rio Grande LNG, LLC*, 186 FERC ¶ 61,021 at P 15.

¹⁴⁶ *Wis. Gas Co.*, 758 F.2d at 674; *Sandy Hollow Power Co.*, 186 FERC ¶ 61,198 at P 11 (citing *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183 at P 10).

¹⁴⁷ *Wis. Gas Co.*, 758 F.2d at 674; *Sandy Hollow Power Co.*, 186 FERC ¶ 61,198 at P 11.

¹⁴⁸ *Wis. Gas Co.*, 758 F.2d at 674 (quoting *Conn. v. Mass.*, 282 U.S. 660, 674 (1931)).

¹⁴⁹ *Chaplaincy of Full Gospel Churches v. Eng.*, 454 F.3d 290, 297 (D.C. Cir. 2006) (quoting *Wis. Gas Co.*, 758 F.2d at 674); *Rio Grande LNG, LLC*, 186 FERC ¶ 61,021 at P 15.

¹⁵⁰ *See Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quoting *Wis. Gas Co.*, 758 F.2d at 674).

existence of the movant's business."¹⁵¹ Affirmed Energy argues that both circumstances apply here. Affirmed Energy argues that, "because the Commission generally does not re-run auctions, once the capacity revenues from the [BRA for the 2026/2027 Delivery Year] are lost, they cannot be returned to Affirmed [Energy], even should it later prevail."¹⁵² PJM, however, contests Affirmed Energy's claim that compensatory relief would even require rerunning an auction. To the contrary, PJM explains that, if necessary, it "could administratively determine the capacity revenues that would flow to Affirmed [Energy] based on the quantity of [energy efficiency] offered without having to rerun the entire 2026/2027 BRA."¹⁵³ As PJM explains, and as we describe earlier,¹⁵⁴ PJM does not treat energy efficiency as an auction participant that receives a supply obligation, which would have to be undone, pursuant to the addback mechanism.¹⁵⁵ Corrective relief therefore may be

¹⁵¹ *Wis. Gas Co.*, 758 F.2d at 674; *see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 n.2 (D.C. Cir. 1977); *Nat'l Ass'n of Mortg. Brokers*, 773 F. Supp. 2d 151, 182 (D.D.C. 2011) (finding that plaintiffs sufficiently alleged that employee layoffs will result in "the complete destruction of their business, which certainly constitutes irreparable harm") (internal quotation marks omitted).

¹⁵² Rehearing Request at 6 (referencing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 at P 55 (2017) ("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 outcomes will not change after the results are set.")).

¹⁵³ PJM December 16, 2024 Answer at 6.

¹⁵⁴ *See supra* P 23.

¹⁵⁵ PJM December 16, 2024 Answer at 6-7.

available without requiring rerunning the auction. While we do not prejudge the issue of appropriate remedy should the EER Order be remanded on appeal, we find that Affirmed Energy failed to demonstrate that financial relief could not be fashioned on remand of the order, such that any harm that Affirmed Energy claims it would face is certain to be irreparable.

48. Similarly, Affirmed Energy has not demonstrated that exclusion of Energy Efficiency Resources from the BRA for the 2026/2027 Delivery Year threatens the very existence of its business.¹⁵⁶ Affirmed Energy alleges that it is unlikely to receive relief following the normal path of judicial review under the FPA before PJM's June 9, 2025 deadline for submission of measurement and verification plans to participate in the BRA for the 2026/2027 Delivery Year, and that, if the EER Order remains in effect, it will need to wind down operations once its "existing market obligations through the 2025/2026 Delivery Year" are fulfilled.¹⁵⁷ The 2025/2026 Delivery Year does not conclude until May 31, 2026,¹⁵⁸ however,

¹⁵⁶ See Rehearing Request at 7; Clayton Dec. ¶ 7.

¹⁵⁷ Clayton Dec. ¶ 7; Rehearing Request at 6-7.

¹⁵⁸ Delivery Years end on May 31 of the relevant year in question. See PJM, Intra-PJM Tariffs, C-D, OATT Definitions—C-D (37.1.1), <https://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=338307> ("Delivery Year" shall mean the Planning Period for which a Capacity Resource is committed pursuant to the auction procedure specified in Tariff, Attachment DD, or pursuant to an FRR Capacity Plan under Reliability Assurance Agreement, Schedule 8.1"); PJM, Intra-PJM Tariffs, O-P-Q, OATT Definitions—O—P—Q (34.0.0), <http://etariff.ferc.gov/TariffSectionDetails.aspx?tid=1731&sid=348085> ("Planning Period" shall mean the 12 months [sic] beginning June 1 and extending through May 31 of the following year, or such other period approved by the Members Committee.").

nearly a year after the June 9, 2025 deadline to participate in the BRA for the 2026/2027 Delivery Year.¹⁵⁹ Affirmed Energy does not suggest that it is unlikely to obtain relief prior to the May 31, 2026 conclusion of the 2025/2026 Delivery Year, nor explain why it would be unable to continue operating if it receives a favorable decision on judicial review before that date—especially given the availability of potential compensatory relief described above. It is therefore not clear why Affirmed Energy would be unable to continue operating if it prevails on appeal, regaining eligibility to offer Energy Efficiency Resources into BRAs for future Delivery Years before ceasing operations. Affirmed Energy also has not shown that it does not and cannot sell any non-Energy Efficiency Resource product in PJM, or any other product in any other market—including those that continue to allow energy efficiency to participate in their capacity markets—that would allow it to continue operating despite the EER Order.¹⁶⁰ Accordingly, we find that Affirmed Energy has not established that it is certain to suffer an irreparable injury as a result of the EER Order.

49. Because Affirmed Energy has not established irreparable injury absent a stay, we need not reach whether granting a stay may substantially harm other parties or whether a stay is in the public interest.¹⁶¹ Nonetheless, while not necessary to our holding here, we also find that

¹⁵⁹ Rehearing Request at 5-6; Clayton Dec. ¶ 5.

¹⁶⁰ See PJM December 16, 2024 Answer at 8.

¹⁶¹ See *Wis. Gas Co.*, 758 F.2d at 674; *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,236 at P 8; *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183 at P 9; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022 at P 14.

neither of those factors would support a different outcome.

50. Affirmed Energy alleges that other parties would not be harmed by Energy Efficiency Resource participation in the capacity market.¹⁶² Affirmed Energy does not, however, contest or attempt to rebut the Commission's finding in the EER Order that PJM's proposal to sunset Energy Efficiency Resource participation in the RPM would significantly reduce capacity payments without adversely affecting resource adequacy.¹⁶³ Load in the PJM territory, and therefore consumers, would accordingly suffer substantial harm in the form of higher capacity payments than if the accepted revisions took effect, if a stay were granted.¹⁶⁴

51. We also conclude that Affirmed Energy has not shown that granting a stay would be in the public interest. To argue that granting a stay would serve the public interest, Affirmed Energy offers only that a stay "will preserve the ability of providers like Affirmed [Energy] to recoup their substantial investments."¹⁶⁵ First, while Affirmed Energy states that it has incurred nearly \$50 million for Energy Efficiency Resources that it would offer if it were able to participate in the 2026/2027

¹⁶² Rehearing Request at 7.

¹⁶³ EER Order, 189 FERC ¶ 61,095 at P 63. For example, payments to Energy Efficiency Resource providers rose to \$144 million for the 2025/2026 Delivery Year. Transmittal at 3.

¹⁶⁴ Affirmed Energy makes no representation that it would retain these funds in an escrow account or otherwise be able to assure PJM that it would be in a position to repay any capacity payments it receives from the auction if the EER Order is upheld.

¹⁶⁵ Rehearing Request at 7-8.

Delivery Year BRA,¹⁶⁶ it does not explain or support its \$50 million sunk investment claims, specify how much of that investment it already has recovered through prior participation in the capacity market, or provide evidence that it would be obligated to make future payments if it did not participate in the RPM auctions for the 2026/2027 Delivery Year. Nor has Affirmed Energy or anyone else submitted record evidence that a stay is needed for other providers to recoup their Energy Efficiency Resource investments.¹⁶⁷ Affirmed Energy’s argument that granting a stay would serve the public interest by “preserv[ing] the ability of providers like Affirmed [Energy] to recoup their substantial investments”¹⁶⁸ accordingly fails on its own terms. Moreover, even assuming that a stay was needed to allow Energy Efficiency Resource providers like Affirmed Energy to recoup their investments, we disagree that a stay would serve the public interest. As discussed above, the Commission determined in the EER Order that PJM’s proposal would benefit load by reducing capacity payments without adversely affecting resource adequacy.¹⁶⁹ Given these benefits, we cannot find that granting a stay to allow Energy Efficiency Resource providers—who were or always

¹⁶⁶ Rehearing Request at 6; Clayton Dec. ¶ 5.

¹⁶⁷ None of those providers sought rehearing of the EER Order. Notably, the need for a stay to allow *other* Energy Efficiency Resource providers to recoup their investments is critical to Affirmed Energy’s public interest claim because the public interest criterion necessarily implicates “consequences beyond the immediate parties.” See *Cal. Indep. Sys. Operator Corp.*, 126 FERC ¶ 61,013, at P 16 (2009); *Blumenthal v. NRG Power Mktg., Inc.*, 104 FERC ¶ 61,046, at P 17 (2003).

¹⁶⁸ Rehearing Request at 7-8.

¹⁶⁹ EER Order, 189 FERC ¶ 61,095 at P 63.

should have been on notice that the RPM participation rules could change¹⁷⁰—to recoup their investments would, standing alone, serve the public interest. Based on the preceding discussion, we do not find that granting a stay would serve the public interest.

52. Accordingly, even if a stay were permitted in this circumstance, we do not find that Affirmed Energy’s motion meets the high bar for justifying a stay.

The Commission orders:

(A) In response to Affirmed Energy’s request for rehearing, the EER Order is hereby modified and the result sustained, as discussed in the body of this order.

(B) Affirmed Energy’s motion for stay is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Carlos D. Clay,
Deputy Secretary.

¹⁷⁰ See *id.* P 72 (“[T]here is always risk that tariffs and regulations can change, which is a risk that market participants take in a competitive market.”).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25-1091
FERC-ER24-2995-000
FERC-ER24-2995-001

AFFIRMED ENERGY, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

MONITORING ANALYTICS, LLC AND
PJM INTERCONNECTION, LLC,
Intervenors

Filed May 7, 2026

BEFORE: Srinivasan, Chief Judge; Henderson,
Millett, Pillard, Wilkins, Katsas, Rao, Walker, Childs,
Pan, and Garcia, Circuit Judges; Ginsburg,
Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

160a

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Clifton B. Cislak, Clerk

BY:/s/

Lillian R. Wright

Deputy Clerk

APPENDIX G

RELEVANT STATUTORY PROVISIONS

16 U.S.C. § 824(b)(1)

§ 824. Declaration of policy; application of subchapter

* * *

(b) Use or sale of electric energy in interstate commerce

(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

* * *

16 U.S.C. § 824d(a)-(e)**§ 824d. Rates and charges; schedules; suspension of new rates; automatic adjustment clauses****(a) Just and reasonable rates**

All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) Preference or advantage unlawful

No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Schedules

Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Notice required for rate changes

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Suspension of new rates; hearings; five-month period

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into

effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * *

16 U.S.C. § 824e(a)

§ 824e. Power of Commission to fix rates and charges; determination of cost of production or transmission

(a) Unjust or preferential rates, etc.; statement of reasons for changes; hearing; specification of issues

Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or

sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

* * *

16 U.S.C. § 824q(a)(2)

§ 824q. Native load service obligation

(a) Definitions

In this section:

* * *

(2) The term “load-serving entity” means a distribution utility or an electric utility that has a service obligation.

* * *

16 U.S.C. § 825(b)**§ 825I. Review of orders**

* * *

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the

Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

* * *

APPENDIX H**PJM Open Access Transmission Tariff
(Marked/Redline Format)****ATTACHMENT DD-1**

Preface: The provisions of this Attachment incorporate into the Tariff for ease of reference the provisions of Schedule 6 of the Reliability Assurance Agreement among Load Serving Entities in the PJM Region. As a result, this Attachment will be modified, subject to FERC approval, so that the terms and conditions set forth herein remain consistent with the corresponding terms and conditions of RAA, Schedule 6. Capitalized terms used herein that are not otherwise defined in Tariff, Attachment DD or elsewhere in this Tariff have the meaning set forth in the RAA.

**PROCEDURES FOR DEMAND RESOURCES
AND ENERGY EFFICIENCY**

A. Parties can partially or wholly offset the amounts payable for the Locational Reliability Charge with Demand Resources that are operated under the direction of the Office of the Interconnection. FRR Entities may reduce their capacity obligations with Demand Resources that are operated under the direction of the Office of the Interconnection and detailed in such entity's FRR Capacity Plan. Demand Resources qualifying under the criteria set forth below may be offered for sale or designated as Self-Supply in the Base Residual Auction, included in an FRR Capacity Plan, or offered for sale in any Incremental Auction, for any Delivery Year for which such resource qualifies. Qualified Demand Resources generally fall in one of two categories, i.e., Guaranteed Load Drop or Firm Service Level, as

further specified in section G below and the PJM Manuals. Qualified Demand Resources may be provided by a Curtailment Service Provider, notwithstanding that such Curtailment Service Provider is not a Party to this Agreement. Such Curtailment Service Providers must satisfy the requirements hereof and the PJM Manuals.

1. A Party must formally notify, in accordance with the requirements of the PJM Manuals and section F hereof, as applicable, the Office of the Interconnection of the Demand Resource Registration that it is placing under the direction of the Office of the Interconnection. A Party must further notify the Office of the Interconnection whether the Demand Resource Registration is linked to a Summer-Period Demand Resource or an Annual Demand Resource.

2. A Demand Resource Registration must achieve its full load reduction within the following time period:

- (a) For the 2015/2016 Delivery Year and subsequent Delivery Years, a Demand Resource Registration must be able to fully respond to a Load Management Event within 30 minutes of notification from the Office of the Interconnection. This default 30 minute prior notification shall apply unless a Curtailment Service Provider obtains an exception from the Office of the Interconnection due to physical operational limitations that prevent the Demand Resource Registration from reducing load within that timeframe. In such case, the Curtailment Service Provider shall submit a request for an exception to the 30 minute prior notification

requirement to the Office of the Interconnection, at the time the Registration Form for that Demand Resource Registration is submitted in accordance with Tariff, Attachment K-Appendix. The only alternative notification times that the Office of Interconnection will permit, upon approval of an exception request, are 60 minutes and 120 minutes prior to a Load Management Event. The Curtailment Service Provider shall indicate in writing, in the appropriate application, that it seeks an exception to permit a prior notification time of 60 minutes or 120 minutes, and the reason(s) for the requested exception. A Curtailment Service Provider shall not submit a request for an exception to the default 30 minute notification period unless it has done its due diligence to confirm that the Demand Resource Registration is physically incapable of responding within that timeframe based on one or more of the reasons set forth below and as may be further defined in the PJM Manuals and has obtained detailed data and documentation to support this determination.

In order to establish that a Demand Resource Registration is reasonably expected to be physically unable to reduce load in that timeframe, the Curtailment Service Provider that submitted the Demand Resource Registration must demonstrate that:

- (i) The manufacturing processes for the Demand Resource Registration require gradual reduction to avoid damaging major industrial equipment used in the manufacturing process, or damage to the product generated or feedstock used in the manufacturing process;

(ii) Transfer of load to back-up generation requires time-intensive manual process taking more than 30 minutes;

(iii) On-site safety concerns prevent location from implementing reduction plan in less than 30 minutes; or,

(iv) The Demand Resource Registration is comprised of mass market residential customers or Small Commercial Customers which collectively cannot be notified of a Load Management Event within a 30-minute timeframe due to unavoidable communications latency, in which case the requested notification time shall be no longer than 120 minutes.

The Office of the Interconnection may request data and documentation from the Curtailment Service Provider and such Curtailment Service Provider shall provide to the Office of the Interconnection within three (3) Business Days of a request therefor, a copy of all of the data and documentation supporting the exception request. Failure to provide a timely response to such request shall cause the exception to terminate the following Operating Day.

At its sole option and discretion, the Office of the Interconnection may review the data and documentation provided by the Curtailment Service Provider to determine if the Demand Resource Registration has met one or more of the criteria above. The Office of the Interconnection will notify the Curtailment Service Provider in writing of its determination by no later than ten (10) Business Days after receipt of the data and documentation.

The Curtailment Service Provider shall provide written notification to the Office of the Interconnection of a material change to the facts that supported its exception request within three (3) Business Days of becoming aware of such material change in facts, and, if the Office of Interconnection determines that the physical limitation criteria above are no longer being met, the Demand Resource Registration shall be subject to the default notification period of 30 minutes immediately upon such determination.

3. The initiation of load reduction, upon the request of the Office of the Interconnection, must be within the authority of the dispatchers of the Party. No additional approvals should be required.
4. The initiation of load reduction upon the request of the Office of the Interconnection is considered a pre-emergency or emergency action and must be implementable prior to a voltage reduction.
5. A Curtailment Service Provider intending to offer for sale or designate for self-supply, a Demand Resource in any RPM Auction, or intending to include a Demand Resource in any FRR Capacity Plan must demonstrate, to PJM's satisfaction, that such resource shall have the capability to provide a reduction in demand, or otherwise control load, on or before the start of the Delivery Year for which such resource is committed. As part of such demonstration, each such Curtailment Service Provider shall submit a Demand Resource Sell Offer Plan in accordance with the standards and procedures set forth in RAA, Schedule 6, section A-1; RAA, Schedule 8.1 (as to FRR Capacity Plans) and the PJM Manuals, no later than 30 days prior to, as applicable, the RPM Auction in which such resource is to be

offered, or the deadline for submission of the FRR Capacity Plan in which such resource is to be included. PJM may verify the Curtailment Service Provider's adherence to the Demand Resource Sell Offer Plan at any time. A Curtailment Service Provider with a PJM-approved Demand Resource Sell Offer Plan will be permitted to offer up to the approved Demand Resource quantity into the subject RPM Auction or include such resource in its FRR Capacity Plan.

6. Selection of a Demand Resource in an RPM Auction results in commitment of capacity to the PJM Region. Demand Resources that are so committed must be linked to registrations participating in the Full Program Option or Capacity Only Option of the Emergency Load Response and Pre-Emergency Load Response Program and thus available for dispatch during PJM-declared pre-emergency events and emergency events.

A-1. A Demand Resource Sell Offer Plan shall consist of a completed template document in the form posted on the PJM website, requiring the information set forth below and in the PJM Manuals, and a Demand Resource Officer Certification Form signed by an officer of the Demand Resource Provider that is duly authorized to provide such a certification. The Demand Resource Sell Offer Plan must provide information that supports the Demand Resource Provider's intended Demand Resource Sell Offers and demonstrates that the Demand Resources are being offered with the intention that the MW quantity that clears the auction is reasonably expected to be physically delivered through Demand Resource registrations for the relevant Delivery Year. The Demand Resource Sell Offer Plan

shall include all Existing Demand Resources and all Planned Demand Resources that the Demand Resource Provider intends to offer into an RPM Auction or include in an FRR Capacity Plan.

1. Demand Resource Sell Offer Plan Template. The Demand Resource Sell Offer Plan template, in the form provided on the PJM website, shall require the Demand Resource Provider to provide the following information and such other information as specified in the PJM Manuals:

(a) Summary Information. The completed template shall include the Demand Resource Provider's company name, contact information, and the Nominated DR Value in ICAP MWs by Zone/sub-Zone that the Demand Resource Provider intends to offer, stated separately for Existing Demand Resources and Planned Demand Resources. The total Nominated DR Value in MWs for each Zone/sub-Zone shall be the sum of the Nominated DR Value of Existing Demand Resources and the Nominated DR Value of Planned Demand Resources, and shall be the maximum MW amount the Provider intends to offer in the RPM Auction for the indicated Zone/sub-Zone, provided that nothing herein shall preclude the Demand Resource Provider from offering in the auction a lesser amount than the total Nominated DR Value shown in its Demand Resource Sell Offer Plan.

(b) Existing Demand Resources. The Demand Resource Provider shall identify all Existing Demand Resources by identifying

end-use customer sites that are currently registered with PJM (even if not registered by such Demand Resource Provider) and that the Demand Resource Provider reasonably expects to have under a contract to reduce load based on PJM dispatch instructions by the start of the auction Delivery Year.

(c) **Planned Demand Resources.** The Demand Resource Provider shall provide the details of, and key assumptions underlying, the Planned Demand Resource quantities (i.e., all Demand Resource quantities in excess of Existing Demand Resource quantities) contained in the Demand Resource Sell Offer Plan, including:

(i) key program attributes and assumptions used to develop the Planned Demand Resource quantities, including, but not limited to, discussion of:

- method(s) of achieving load reduction at customer site(s);
- equipment to be controlled or installed at customer site(s), if any;
- plan and ability to acquire customers;
- types of customer targeted;
- support of market potential and market share for the target customer base, with adjustments for Existing Demand Resource customers within this market and the potential for other

Demand Resource Providers
targeting the same customers;
and

- assumptions regarding regulatory approval of program(s), if applicable.

(ii) Zone/sub-Zone information by end-use customer segment for all Nominated DR Values for which an end-use customer site is not identified, to include the number in each segment of end-use customers expected to be registered for the subject Delivery Year, the average Peak Load Contribution per end-use customer for such segment, and the average Nominated DR Value per customer for such segment. End-use customer segments may include residential, commercial, small industrial, medium industrial, and large industrial, as identified and defined in the PJM Manuals, provided that nothing herein or in the Manuals shall preclude the Provider from identifying more specific customer segments within the commercial and industrial categories, if known.

(iii) Information by end-use customer site to the extent required by subsection A-1(1)(c)(iv) or, if not required by such subsection, to the extent known at the time of the submittal of the Demand Resource Sell Offer Plan, to include: customer EDC account number (if known), customer name, customer premise address, Zone/sub-Zone in

which the customer is located, end-use customer segment, current Peak Load Contribution value (or an estimate if actual value not known) and an estimate of expected Peak Load Contribution for the subject Delivery Year, and an estimated Nominated DR Value.

(iv) End-use customer site-specific information shall be required for any Zones or sub-Zones identified by PJM pursuant to this subsection for the portion, if any, of a Demand Resource Provider's intended offer in such Zones or sub-Zones that exceeds a Sell Offer threshold determined pursuant to this subsection, as any such excess quantity under such conditions should reflect Planned Demand Resources from end-use customer sites that the Provider has a high degree of certainty it will physically deliver for the subject Delivery Year. In accordance with the procedures in subsection A-1(3) below, PJM shall identify, as requiring site-specific information, all Zones and sub-Zones that comprise any LDA group (from a list of LDA groups stated in the PJM Manuals) in which [the quantity of cleared Demand Resources from the most recent Base Residual Auction] plus [the quantity of Demand Resources included in FRR Capacity Plans for the Delivery Year addressed by the most recent Base Residual Auction] in any

Zone or sub-Zone of such LDA group exceeds the greater of:

- the maximum Demand Resources quantity registered with PJM for such Zone for any Delivery Year from the current (at time of plan submission) Delivery Year and the two preceding Delivery Years; and
- the potential Demand Resource quantity for such Zone estimated by PJM based on an independent published assessment of demand response potential that is reasonably applicable to such Zone, as identified in the PJM Manuals.

For each such Zone and sub-Zone, the Sell Offer threshold for each Demand Resource Provider shall be the higher of:

- the Demand Resource Provider's maximum Demand Resource quantity registered with PJM for such Zone/sub-Zone over the current Delivery Year (at the time of plan submission) and two preceding Delivery Years;
- the Demand Resource Provider's maximum for any single Delivery Year of [such provider's cleared Demand

Resource quantity] plus [such provider's quantity of Demand Resources included in FRR Capacity Plans] from the three forward Delivery Years addressed by the three most recent Base Residual Auctions for such Zone/sub-Zone; and

- 10 MW.

(d) Schedule. The Demand Resource Provider shall provide an approximate timeline for procuring end-use customer sites as needed to physically deliver the total Nominated DR Value (for both Existing Demand Resources and Planned Demand Resources) by Zone/sub-Zone in the Demand Resource Sell Offer Plan. The Demand Resource Provider must specify the cumulative number of customers and the cumulative Nominated DR Value associated with each end-use customer segment within each Zone/sub-Zone that the Demand Resource Provider expects (at the time of plan submission) to have under contract as of June 1 each year between the time of the auction and the subject Delivery Year.

2. Demand Resource Officer Certification Form. Each Demand Resource Sell Offer Plan must include a Demand Resource Officer Certification, signed by an officer of the Demand Resource Provider that is duly authorized to provide such a certification, in the form shown in the PJM Manuals, which form shall include the following certifications:

- (a) that the signing officer has reviewed the Demand Resource Sell Offer Plan and the information supplied to PJM in support of the Plan is true and correct as of the date of the certification;
- (b) that the Sell Offer Plan does not include any Critical Natural Gas Infrastructure facilities, and
- (c) that the Demand Resource Provider is submitting the Plan with the reasonable expectation, based upon its analyses as of the date of the certification, to physically deliver all megawatts that clear the RPM Auction through Demand Resource registrations by the specified Delivery Year.

As set forth in the form provided in the PJM Manuals, the certification shall specify that it does not in any way abridge, expand, or otherwise modify the current provisions of the PJM Tariff, Operating Agreement and/or RAA, or the Demand Resource Provider's rights and obligations thereunder, including the Demand Resource Provider's ability to adjust capacity obligations through participation in PJM incremental auctions and bilateral transactions.

3. Procedures. No later than December 1 prior to the Base Residual Auction for a Delivery Year, PJM shall post to the PJM website a list of Zones and sub-Zones, if any, for which end-use customer site-specific information shall be required under the conditions specified in subsection A-1(1)(c)(iv) above for all RPM Auctions conducted for such Delivery Year. Once so identified, a Zone or sub-Zone shall remain on the list for future Delivery Years until the

threshold determined under subsection A-1(1)(c)(iv) above is not exceeded for three consecutive Delivery Years. No later than 30 days prior to the RPM Auction in which a Demand Resource Provider intends to offer a Demand Resource, the Demand Resource Provider shall submit to PJM a completed Demand Resource Sell Offer Plan template and a Demand Resource Officer Certification Form signed by a duly authorized officer of the Provider. PJM will review all submitted DR Sell Offer Plans. No later than 10 Business Days prior to the subject RPM Auction, PJM shall notify any Demand Resource Providers that have identified the same end-use customer site(s) in their respective DR Sell Offer Plans for the same Delivery Year. In such event, the MWs associated with such site(s) will not be approved for inclusion in a Sell Offer in an RPM Auction by any of the Demand Resource Providers, unless a Demand Resource Provider provides a letter of support from the end-use customer indicating that it is likely to execute a contract with that Demand Resource Provider for the relevant Delivery Year, or provides other comparable evidence of likely commitment. Such letter of support or other supporting evidence must be provided to PJM no later than 7 Business Days prior to the subject RPM Auction. If an end-use customer provides letters of support for the same site for the same Delivery Year to multiple Demand Resource Providers, the MWs associated with such end-use customer site shall not be approved as a Demand Resource for any of the Demand Resource Providers. No later than

5 Business Days prior to the subject RPM Auction, PJM will notify each Demand Resource Provider of the approved Demand Resource quantity, by Zone/sub-Zone, that such Demand Resource Provider is permitted to offer into such RPM Auction.

- B. The Unforced Capacity value of a Demand Resource will be determined as:
 - (1) for Delivery Years through the 2024/2025 Delivery Year, as the product of the Nominated Value of the Demand Resource times the Forecast Pool Requirement. Nominated Values shall be determined and reviewed in accordance with sections I and J, respectively, and the PJM Manuals.
 - (2) for the 2025/2026 Delivery Year and subsequent Delivery Years, in accordance with RAA, Schedule 9.2. Nominated Values shall be determined and reviewed in accordance with sections I and J, respectively, and the PJM Manuals.
- C. Demand Resources offered and cleared in a Base Residual or Incremental Auction shall receive the corresponding Capacity Resource Clearing Price as determined in such auction, in accordance with Tariff, Attachment DD. For Delivery Years beginning with the Delivery Year that commences on June 1, 2013, any Demand Resources located in a Zone with multiple LDAs shall receive the Capacity Resource Clearing Price applicable to the location of such resource within such Zone, as identified in such resource's offer. Further, the Curtailment Service Provider shall register its resource in the same location within the Zone as specified in its cleared sell offer, and shall be subject to deficiency charges

under Tariff, Attachment DD to the extent it fails to provide the resource in such location consistent with its cleared offer.

- D. The Party, Electric Distributor, or Curtailment Service Provider that establishes a contractual relationship (by contract or tariff rate) with a customer for load reductions is entitled to receive the compensation specified in section C for a committed Demand Resource, notwithstanding that such provider is not the customer's energy supplier.
- E. Any Party hereto shall demonstrate that its Demand Resources performed during periods when load management procedures were invoked by the Office of the Interconnection. The Office of the Interconnection shall adopt and maintain rules and procedures for verifying the performance of such resources, as set forth in section K hereof and the PJM Manuals. In addition, committed Demand Resources that do not comply with the directions of the Office of the Interconnection to reduce load during an emergency shall be subject to the penalty charge set forth in Tariff, Attachment DD.
- F. Parties may elect to place Demand Resources associated with Behind The Meter Generation under the direction of the Office of the Interconnection for a Delivery Year by submitting a Sell Offer for such resource (as Self Supply, or with an offer price) in the Base Residual Auction for such Delivery Year. This election shall remain in effect for the entirety of such Delivery Year. In the event such an election is made, such Behind The Meter Generation will not be netted from load for the purposes of calculating the Daily Unforced Capacity Obligations under this Agreement.

- G. PJM measures Demand Resource Registrations in the following ways:

Firm Service Level (FSL) – Load management achieved by an end-use customer reducing its load to a pre-determined level (the Firm Service Level), upon notification from the Curtailment Service Provider’s market operations center or its agent.

Guaranteed Load Drop (GLD) – Load management achieved by an end-use customer reducing its load by a pre-determined amount (the Guaranteed Load Drop), upon notification from the Curtailment Service Provider’s market operations center or its agent. Typically, the load reduction is achieved through running customer-owned backup generators, or by shutting down process equipment.

- H. Each Curtailment Service Provider must satisfy (or contract with another LSE, Curtailment Service Provider, or electric distribution company to provide) the following requirements:

- A point of contact with appropriate backup to ensure single call notification from PJM and timely execution of the notification process;
- Supplemental status reports, detailing Demand Resources available, as requested by PJM;
- Entry of customer-specific Demand Resource Registration information, for planning and verification purposes, into the designated PJM electronic system.
- Customer-specific compliance and verification information for each PJM-initiated Demand Resource event or test event, as well as aggregated Provider load drop data for Provider-initiated

events, in accordance with established reporting guidelines.

- Load drop estimates for all Load Management events and test events, prepared in accordance with the PJM Manuals.

- I. The Nominated Values (summer or winter) for each Demand Resource Registration shall be determined consistent with the process described below.

The summer Nominated Value for Firm Service Level customer(s) on a registration will be based on the peak load contribution for the customer(s), as typically determined by the 5CP methodology utilized by the electric distribution company to determine ICAP obligation values. The summer Nominated Value for a registration shall equal the total peak load contribution for the customers on the registration minus the summer Firm Service Level multiplied by the loss factor. The winter Nominated Value for Firm Service Level customer(s) on a registration shall equal the total Winter Peak Load for customers on the registration multiplied by Zonal Winter Weather Adjustment Factor minus winter Firm Service level and then the result is multiplied by the loss factor.

The summer Nominated Value for a Guaranteed Load Drop customer on a registration shall equal the summer guaranteed load drop amount, adjusted for system losses and shall not exceed the customer's Peak Load Contribution, as established by the customer's contract with the Curtailment Service Provider. The winter Nominated Value for a Guaranteed Load Drop customer on a registration shall be the winter guaranteed load drop amount, adjusted for system losses, and shall not exceed the

customer's Winter Peak Load multiplied by Zonal Winter Weather Adjustment Factor multiplied by the loss factor, as established by the customer's contract with the Curtailment Service Provider.

Customer-specific Demand Resource Registration information (EDC account number, peak load contribution, Winter Peak Load, notification period, etc.) will be entered into the designated PJM electronic system to establish nominated values. Each Demand Resource Registration should be linked to a Demand Resource. Additional data may be required, as defined in sections J and K and the PJM Manuals.

- J. Nominated Values shall be reviewed based on documentation of customer-specific data and Demand Resource Registration information, to verify the amount of load management available and to set a summer or winter Nominated Value. Data is provided by both the zone EDC and the Curtailment Service Provider in the designated PJM electronic system, and must include the EDC meter number or other unique customer identifier, Peak Load Contribution (5CP), Winter Peak Load, contract firm service level or guaranteed load drop values, applicable loss factor, zone/area location of the load drop, number of active participants, etc. Such data must be uploaded and approved prior to the first day of the Delivery Year for which such Demand Resource Registration is effective. Curtailment Service Providers must provide this information concurrently to host EDCs.

For Firm Service Level and Guaranteed Load Drop customers, the 5CP values, for the zone and affected customers, will be adjusted to reflect an

“unrestricted” peak for a zone, based on information provided by the Curtailment Service Provider. Load drop levels shall be estimated in accordance with guidelines in the PJM Manuals.

The daily Nominated Value of a Demand Resource with a Capacity Performance commitment (which may consist of an Annual Demand Resource with a Capacity Performance commitment and/or Summer Period Demand Resource with a Capacity Performance commitment) shall equal the sum of the summer Nominated Values of the registrations linked to such Demand Resource for the summer period of June through October and May of the Delivery Year, and shall equal the lesser of (i) the sum of the summer Nominated Values of the registrations linked to such Demand Resource or (ii) the sum of the winter Nominated Values of the registrations linked to such Demand Resource for the non-summer period of November through April of the Delivery Year.

- K. Compliance is the process utilized to review Provider performance during PJM-initiated Load Management events and tests. Compliance will be established for each Provider on an event specific basis for the Curtailment Service Provider’s Demand Resource Registrations dispatched by the Office of the Interconnection during such event. PJM will establish and communicate reasonable deadlines for the timely submittal of event data to expedite compliance reviews. Compliance reviews will be completed as soon after the event as possible, with the expectation that reviews of a single event will be completed within two months of the end of the month in which the event took place. Curtailment Service Providers are responsible for the submittal

of compliance information to PJM for each PJM-initiated event and test during the compliance period.

Compliance is measured for Market Participant Bonus Performance, as applicable, and Non-Performance Charges. Non-Performance Charges are assessed for the defined obligation period of each Demand Resource as defined in RAA, Article 1, subject to the following requirements:

Compliance is checked on an individual customer basis for Firm Service Level, by comparing actual load during the event to the firm service level. Current load for a statistical sample of end-use customers may be used for compliance for residential non-interval metered registrations in accordance with the PJM Manuals and subject to PJM approval. Curtailment Service Providers must submit actual customer load levels (for the event period) for the compliance report. Compliance for FSL will be based on:

Summer (June through October and the following May of a Delivery Year)- End use customer's current Delivery Year peak load contribution ("PLC") minus the metered load ("Load") multiplied by the loss factor ("LF"). The calculation is represented by:

$$(PLC) - (Load * LF)$$

Winter (November through April of a Delivery Year)- End use customer's Winter Peak Load ("WPL") multiplied by Zonal Winter Weather Adjustment Factor ("ZWWAF") multiplied by LF, minus the metered load ("Load") multiplied by the LF. The calculation is represented by:

$$(WPL * ZWWAF * LF) - (Load * LF)$$

Compliance is checked on an individual customer basis for Guaranteed Load Drop. Current load for a statistical sample of end-use customers may be used for compliance for residential non-interval metered registrations in accordance with the PJM Manuals and subject to PJM approval. Guaranteed Load Drop compliance will be based on:

- (i) the lesser of (a) comparison load used to best represent what the load would have been if PJM did not declare a Load Management Event or the CSP did not initiate a test as outlined in the PJM Manuals, minus the Load and then multiplied by the LF, or (b) For a summer event, the PLC minus the Load multiplied by the LF. A summer load reduction will only be recognized for capacity compliance if the Load multiplied by the LF is less than the PLC. For a non-summer event, the WPL multiplied the ZWWAF multiplied by LF, minus the Load multiplied by the LF. A non-summer load reduction will only be recognized for capacity compliance if the Load multiplied by the LF is less than the WPL multiplied by the ZWWAF multiplied by LF.
- (ii) Curtailment Service Providers must submit actual loads and comparison loads for all hours during the day of the Load Management Event or the Load Management performance test, and for all hours during any other days as required by the Office of the Interconnection to calculate the load reduction. Comparison loads must be developed from the guidelines in the PJM Manuals, and note which method was employed.

- (iii) Methodologies for establishing comparison load for Guaranteed Load Drop end-use customers are described in greater detail in Manual M-19, PJM Manual for Load Forecasting and Analysis, at Attachment A: Load Drop Estimate Guidelines.

Load reduction compliance is determined on an hourly basis for a Demand Resource Registration linked to an Annual Demand Resource with a Capacity Performance commitment, for each FSL and GLD customer dispatched by the Office of the Interconnection for at least 30 minutes of the clock hour (i.e., “partial dispatch compliance hour”). Curtailment Service Provider may submit 1 minute load data for use in capacity compliance calculations for partial dispatch compliance hours subject to PJM approval and in accordance with the PJM Manuals where: (a) metering meets all Tariff and Manual requirements, (b) 1 minute load data shall be submitted to PJM for all locations on the registration, and (c) 1 minute load data measures energy consumption over the minute. The registered capacity commitment for a Demand Resource Registration with a Base or Capacity Performance commitment is not prorated based on the number of minutes dispatched during the clock hours. The actual hourly load reduction for the hour ending that includes a Performance Assessment Interval(s) is flat-profiled over the set of dispatch intervals in the hour in accordance with the PJM Manuals.

A Demand Resource Registration may not reduce their load below zero (i.e., export energy into the system). No compliance credit will be given for an incremental load drop below zero.

For a Performance Assessment Interval, compliance will be totaled over all dispatched registrations for FSL and GLD customers linked to a Provider's Annual Demand Resource with a Capacity Performance commitment to determine the Actual Performance for such Demand Resource in accordance with Tariff, Attachment DD, section 10A, and PJM Manuals. The Expected Performance for such Demand Resource shall be equal to the Provider's committed capacity on the Demand Resource, adjusted to account for any linked registrations that were not dispatched by PJM. A Provider's Demand Resources' initial Performance Shortfalls shall be netted for all the seller's Demand Resources in the Emergency Action Area to determine a net Emergency Action Area Performance Shortfall which is then allocated to the Capacity Market Seller's Demand Resources in accordance with Tariff, Attachment DD, section 10A, and PJM Manuals.

L. Energy Efficiency Resources – all provisions in RAA, Schedule 6, section L and Tariff, Attachment DD-1, section L shall be effective only through the 2025/2026 Delivery Year. Thereafter, no Energy Efficiency Resources shall qualify to be offered into the RPM Auctions beginning with the 2026/2027 Delivery Year.

1. An Energy Efficiency Resource is a project, including installation of more efficient devices or equipment or implementation of more efficient processes or systems, exceeding then-current building codes, appliance standards, or other relevant standards, designed to achieve a continuous (during peak summer and winter periods as described herein) reduction in electric energy consumption at the end-use customer's

retail site that is not reflected in the peak load forecast prepared for the Delivery Year for which the Energy Efficiency Resource is proposed, and that is fully implemented at all times during such Delivery Year, without any requirement of notice, dispatch, or operator intervention.

2. An Energy Efficiency Resource may be offered as a Capacity Resource in the Base Residual or Incremental Auctions for any Delivery Year beginning on or after June 1, 2011. No later than 30 days prior to the auction in which the resource is to be offered, the Capacity Market Seller shall submit to the Office of the Interconnection a notice of intent to offer the resource into such auction and a measurement and verification plan. The notice of intent shall include all pertinent project design data, including but not limited to the peak-load contribution of affected customers, a full description of the equipment, device, system or process intended to achieve the load reduction, the load reduction pattern, the project location, the project development timeline, and any other relevant data. Such notice also shall state the seller's proposed Nominated Energy Efficiency Value.
 - For the 2018/2019 Delivery Year and subsequent Delivery Years and for any Annual Energy Efficiency Resource committed as a Capacity Performance Resource, the seller's proposed Nominated Energy Efficiency Value for any Annual Energy Efficiency Resources, shall be the expected average load reduction, for all days from June 1 through August 31, inclusive, of such

Delivery Year that is not a weekend or federal holiday, between the hour ending 15:00 EPT and the hour ending 18:00 EPT. In addition, the expected average load reduction for all days from January 1 through February 28, inclusive, of such Delivery Year that is not a weekend or federal holiday, between the hour ending 8:00 EPT and the hour ending 9:00 EPT and between the hour ending 19:00 EPT and the hour ending 20:00 EPT shall not be less than the Nominated Energy Efficiency Value; and

- For the 2020/2021 Delivery Year and subsequent Delivery Years, the seller's proposed Nominated Energy Efficiency Value for any Summer-Period Energy Efficiency Resource shall be the expected average load reduction between the hour ending 15:00 EPT and the hour ending 18:00 EPT during all days from June 1 through August 31, inclusive, of such Delivery Year that is not a weekend or federal holiday.

The measurement and verification plan shall describe the methods and procedures, consistent with the PJM Manuals, for determining the amount of the load reduction and confirming that such reduction is achieved. The Office of the Interconnection shall determine, upon review of such notice, the Nominated Energy Efficiency Value that may be offered in the Reliability Pricing Model Auction.

3. An Energy Efficiency Resource may be offered with a price offer or as Self-Supply. If an

Energy Efficiency Resource clears the auction, it shall receive the applicable Capacity Resource Clearing Price, subject to section 5 below. A Capacity Market Seller offering an Energy Efficiency Resource must comply with all applicable credit requirements as set forth in Tariff, Attachment Q. The Unforced Capacity value of an Energy Efficiency Resource offered into an RPM Auction or committed in a FRR Capacity Plan shall be the Nominated Energy Efficiency Value times the Forecast Pool Requirement.

4. An Energy Efficiency Resource that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction; provided, however, an Energy Efficiency Resource may not be offered for any Delivery Year in which any part of the peak season is beyond the expected life of the equipment, device, system, or process providing the expected load reduction; and provided further that a Capacity Market Seller that offers and clears an Energy Efficiency Resource in a BRA may elect a New Entry Price Adjustment on the same terms as set forth in Tariff, Attachment DD, section 5.14(c).
5. For every Energy Efficiency Resource clearing an RPM Auction for a Delivery Year, the Capacity Market Seller shall submit to the Office of the Interconnection, by no later than 30 days prior to each Auction an updated project status and measurement and verification plan subject to the criteria set forth in the PJM Manuals.

6. For every Energy Efficiency Resource clearing an RPM Auction for a Delivery Year, the Capacity Market Seller shall submit to the Office of the Interconnection, by no later than the start of such Delivery Year, an updated project status and detailed measurement and verification data meeting the standards for precision and accuracy set forth in the PJM Manuals. The final value of the Energy Efficiency Resource during such Delivery Year shall be as determined by the Office of the Interconnection based on the submitted data.
7. The Office of the Interconnection may audit, at the Capacity Market Seller's expense, any Energy Efficiency Resource committed to the PJM Region. The audit may be conducted any time including the Performance Hours of the Delivery Year.
8. For RPM Auctions for the 2021/2022 Delivery Year and subsequent Delivery Years, if a Relevant Electric Retail Regulatory Authority receives FERC authorization to qualify or prohibit Energy Efficiency Resource participation in a specific area(s) of the PJM Region, the following process applies:
 - (a) The Office of the Interconnection will publicly post a reference to the FERC authorization of a Relevant Electric Retail Regulatory Authority order, ordinance or resolution that qualifies or prohibits Energy Efficiency Resource participation, the applicable electric distribution company(ies), and the applicable auction(s) and/or Delivery Year(s).

- (b) A Capacity Market Seller that intends to offer or certify Energy Efficiency Resources must identify and itemize all resources that are located in the jurisdiction of a Relevant Electric Retail Regulatory Authority authorized by FERC to qualify or prohibit Energy Efficiency Resource participation within the Zone or LDA, as required, and those outside of the area but within the Zone or LDA, as required.
- (c) A Capacity Market Seller that intends to offer or certify Energy Efficiency Resources must identify and itemize all Energy Efficiency Resources to be offered as part of its Energy Efficiency measurement and verification plan and certified post-installation measurement and verification report. The Office of Interconnection will provide a list to the relevant electric distribution company for the specific area(s) to review for compliance with the Relevant Electric Retail Regulatory Authority of Capacity Market Sellers that are:
 - (i) offering Energy Efficiency Resources in an RPM Auction within two (2) Business Days after the deadline for submitting an energy efficiency measurement and verification plan for such RPM Auction; and
 - (ii) certifying Energy Efficiency Resources with a Delivery Year post-installation measurement and verification report, within two (2)

Business Days of receipt of such Delivery Year post-installation measurement and verification report. The relevant electric distribution company for the specific area(s) shall review for compliance with rules from a Relevant Electric Retail Regulatory Authority authorized by FERC to qualify or prohibit Energy Efficiency Resource.

- (d) The relevant electric distribution company for the specific area(s) shall review for compliance with rules from a Relevant Electric Retail Regulatory Authority authorized by FERC to qualify or prohibit Energy Efficiency Resource participation and provide a response to the Office of the Interconnection within five (5) Business Days after receiving the list of Capacity Market Sellers offering Energy Efficiency Resources. The Office of the Interconnection will not allow a Capacity Market Seller to offer or certify Energy Efficiency Resources if an electric distribution company denies such Capacity Market Seller to deliver Energy Efficiency Resources in compliance with rules of a Relevant Electric Retail Regulatory Authority authorized by FERC to qualify or prohibit Energy Efficiency Resource participation.
- (9) For RPM Auctions for the 2021/2022 Delivery Year and subsequent Delivery Years, a Capacity Market Seller of Energy Efficiency Resources that cannot satisfy its RPM obligations in any Delivery Year due to the prohibition of participation by a Relevant Electric Retail

Regulatory Authority authorized by FERC to prohibit participation of such resources may be relieved of its Capacity Resource Deficiency Charge by notifying the Office of the Interconnection by no later than seven (7) calendar days prior to the posting of the planning parameters for the Third Incremental Auction of that Delivery Year. After providing such notice, the affected Capacity Market Seller may elect to be relieved of its RPM commitment, and shall not be required to obtain replacement capacity for the resource, and no charges shall be assessed by the Office of the Interconnection for the Capacity Market Seller's deficiency in satisfying its RPM obligation for the resource for such Delivery Year. In such case, however, the Capacity Market Seller shall not be entitled to, nor be paid, any RPM revenues for such resource for that Delivery Year. The Office of the Interconnection will apply corresponding adjustments to the quantity of Buy Bids or Sell Offers in the Incremental Auctions for such Delivery Years in accordance with Tariff, Attachment DD, sections 5.12(b)(ii) and 5.12(b)(iii).

PJM Reliability Assurance Agreement
(Marked/Redline Format)

SCHEDULE 6
PROCEDURES FOR DEMAND RESOURCES
AND ENERGY EFFICIENCY

A. Parties can partially or wholly offset the amounts payable for the Locational Reliability Charge with Demand Resources that are operated under the direction of the Office of the Interconnection. FRR Entities may reduce their capacity obligations with Demand Resources that are operated under the direction of the Office of the Interconnection and detailed in such entity's FRR Capacity Plan. Demand Resources qualifying under the criteria set forth below may be offered for sale or designated as Self-Supply in the Base Residual Auction, included in an FRR Capacity Plan, or offered for sale in any Incremental Auction, for any Delivery Year for which such resource qualifies. Qualified Demand Resources generally fall in one of two categories, i.e., Guaranteed Load Drop or Firm Service Level, as further specified in section G below and the PJM Manuals. Qualified Demand Resources may be provided by a Curtailment Service Provider, notwithstanding that such Curtailment Service Provider is not a Party to this Agreement. Such Curtailment Service Providers must satisfy the requirements hereof and the PJM Manuals.

1. A Party must formally notify, in accordance with the requirements of the PJM Manuals and section F hereof, as applicable, the Office of the Interconnection of the Demand Resource Registration that it is placing under the direction of the Office of the Interconnection. A Party must further notify the Office of the Interconnection whether the Demand Resource Registration is linked to a Summer-

Period Demand Resource or an Annual Demand Resource.

2. A Demand Resource Registration must achieve its full load reduction within the following time period:

(a) For the 2015/2016 Delivery Year and subsequent Delivery Years, a Demand Resource Registration must be able to fully respond to a Load Management Event within 30 minutes of notification from the Office of the Interconnection. This default 30 minute prior notification shall apply unless a Curtailment Service Provider obtains an exception from the Office of the Interconnection due to physical operational limitations that prevent the Demand Resource Registration from reducing load within that timeframe. In such case, the Curtailment Service Provider shall submit a request for an exception to the 30 minute prior notification requirement to the Office of the Interconnection, at the time the Registration Form for that Demand Resource Registration is submitted in accordance with Tariff, Attachment K-Appendix. The only alternative notification times that the Office of Interconnection will permit, upon approval of an exception request, are 60 minutes and 120 minutes prior to a Load Management Event. The Curtailment Service Provider shall indicate in writing, in the appropriate application, that it seeks an exception to permit a prior notification time of 60 minutes or 120 minutes, and the reason(s) for the requested exception. A Curtailment Service Provider shall not submit a request for an exception to the default 30 minute notification period unless it has done its due diligence to confirm that the Demand Resource Registration is physically incapable of responding within that timeframe

based on one or more of the reasons set forth below and as may be further defined in the PJM Manuals and has obtained detailed data and documentation to support this determination.

In order to establish that a Demand Resource Registration is reasonably expected to be physically unable to reduce load in that timeframe, the Curtailment Service Provider that submitted the Demand Resource Registration must demonstrate that:

- (i) The manufacturing processes for the Demand Resource Registration require gradual reduction to avoid damaging major industrial equipment used in the manufacturing process, or damage to the product generated or feedstock used in the manufacturing process;
- (ii) Transfer of load to back-up generation requires time-intensive manual process taking more than 30 minutes;
- (iii) On-site safety concerns prevent location from implementing reduction plan in less than 30 minutes; or,
- (iv) The Demand Resource Registration is comprised of mass market residential customers or Small Commercial Customers which collectively cannot be notified of a Load Management Event within a 30-minute timeframe due to unavoidable communications latency, in which case the requested notification time shall be no longer than 120 minutes.

The Office of the Interconnection may request data and documentation from the Curtailment Service Provider and such Curtailment Service Provider shall provide to the Office of the Interconnection within three (3)

Business Days of a request therefor, a copy of all of the data and documentation supporting the exception request. Failure to provide a timely response to such request shall cause the exception to terminate the following Operating Day.

At its sole option and discretion, the Office of the Interconnection may review the data and documentation provided by the Curtailment Service Provider to determine if the Demand Resource Registration has met one or more of the criteria above. The Office of the Interconnection will notify the Curtailment Service Provider in writing of its determination by no later than ten (10) Business Days after receipt of the data and documentation.

The Curtailment Service Provider shall provide written notification to the Office of the Interconnection of a material change to the facts that supported its exception request within three (3) Business Days of becoming aware of such material change in facts, and, if the Office of Interconnection determines that the physical limitation criteria above are no longer being met, the Demand Resource Registration shall be subject to the default notification period of 30 minutes immediately upon such determination.

3. The initiation of load reduction, upon the request of the Office of the Interconnection, must be within the authority of the dispatchers of the Party. No additional approvals should be required.
4. The initiation of load reduction upon the request of the Office of the Interconnection is considered a pre-emergency or emergency action and must be implementable prior to a voltage reduction.

5. A Curtailment Service Provider intending to offer for sale or designate for self-supply, a Demand Resource in any RPM Auction, or intending to include a Demand Resource in any FRR Capacity Plan must demonstrate, to PJM's satisfaction, that such resource shall have the capability to provide a reduction in demand, or otherwise control load, on or before the start of the Delivery Year for which such resource is committed. As part of such demonstration, each such Curtailment Service Provider shall submit a Demand Resource Sell Offer Plan in accordance with the standards and procedures set forth in RAA, Schedule 6, section A-1; RAA, Schedule 8.1 (as to FRR Capacity Plans) and the PJM Manuals, no later than 30 days prior to, as applicable, the RPM Auction in which such resource is to be offered, or the deadline for submission of the FRR Capacity Plan in which such resource is to be included. PJM may verify the Curtailment Service Provider's adherence to the Demand Resource Sell Offer Plan at any time. A Curtailment Service Provider with a PJM-approved Demand Resource Sell Offer Plan will be permitted to offer up to the approved Demand Resource quantity into the subject RPM Auction or include such resource in its FRR Capacity Plan.

6. Selection of a Demand Resource in an RPM Auction results in commitment of capacity to the PJM Region. Demand Resources that are so committed must be linked to registrations participating in the Full Program Option or Capacity Only Option of the Emergency Load Response and Pre-Emergency Load Response Program and thus available for dispatch during PJM-declared pre-emergency events and emergency events.

A-1. A Demand Resource Sell Offer Plan shall consist of a completed template document in the form posted on the PJM website, requiring the information set forth below and in the PJM Manuals, and a Demand Resource Officer Certification Form signed by an officer of the Demand Resource Provider that is duly authorized to provide such a certification. The Demand Resource Sell Offer Plan must provide information that supports the Demand Resource Provider's intended Demand Resource Sell Offers and demonstrates that the Demand Resources are being offered with the intention that the MW quantity that clears the auction is reasonably expected to be physically delivered through Demand Resource registrations for the relevant Delivery Year. The Demand Resource Sell Offer Plan shall include all Existing Demand Resources and all Planned Demand Resources that the Demand Resource Provider intends to offer into an RPM Auction or include in an FRR Capacity Plan.

1. Demand Resource Sell Offer Plan Template. The Demand Resource Sell Offer Plan template, in the form provided on the PJM website, shall require the Demand Resource Provider to provide the following information and such other information as specified in the PJM Manuals:

- (a) Summary Information. The completed template shall include the Demand Resource Provider's company name, contact information, and the Nominated DR Value in ICAP MWs by Zone/sub-Zone that the Demand Resource Provider intends to offer, stated separately for Existing Demand Resources and Planned Demand Resources. The total Nominated DR Value in MWs for

each Zone/sub-Zone shall be the sum of the Nominated DR Value of Existing Demand Resources and the Nominated DR Value of Planned Demand Resources, and shall be the maximum MW amount the Provider intends to offer in the RPM Auction for the indicated Zone/sub-Zone, provided that nothing herein shall preclude the Demand Resource Provider from offering in the auction a lesser amount than the total Nominated DR Value shown in its Demand Resource Sell Offer Plan.

(b) Existing Demand Resources. The Demand Resource Provider shall identify all Existing Demand Resources by identifying end-use customer sites that are currently registered with PJM (even if not registered by such Demand Resource Provider) and that the Demand Resource Provider reasonably expects to have under a contract to reduce load based on PJM dispatch instructions by the start of the auction Delivery Year.

(c) Planned Demand Resources. The Demand Resource Provider shall provide the details of, and key assumptions underlying, the Planned Demand Resource quantities (i.e., all Demand Resource quantities in excess of Existing Demand Resource quantities) contained in the Demand Resource Sell Offer Plan, including:

(i) key program attributes and assumptions used to develop the Planned

Demand Resource quantities, including, but not limited to, discussion of:

- method(s) of achieving load reduction at customer site(s);
- equipment to be controlled or installed at customer site(s), if any;
- plan and ability to acquire customers;
- types of customer targeted;
- support of market potential and market share for the target customer base, with adjustments for Existing Demand Resource customers within this market and the potential for other Demand Resource Providers targeting the same customers; and
- assumptions regarding regulatory approval of program(s), if applicable.

(ii) Zone/sub-Zone information by end-use customer segment for all Nominated DR Values for which an end-use customer site is not identified, to include the number in each segment of end-use customers expected to be registered for the subject Delivery Year, the average Peak Load Contribution per end-use customer for such segment, and the average Nominated DR Value per customer for such segment. End-use customer segments may include residential, commercial, small industrial,

medium industrial, and large industrial, as identified and defined in the PJM Manuals, provided that nothing herein or in the Manuals shall preclude the Provider from identifying more specific customer segments within the commercial and industrial categories, if known.

(iii) Information by end-use customer site to the extent required by subsection A-1(1)(c)(iv) or, if not required by such subsection, to the extent known at the time of the submittal of the Demand Resource Sell Offer Plan, to include: customer EDC account number (if known), customer name, customer premise address, Zone/sub-Zone in which the customer is located, end-use customer segment, current Peak Load Contribution value (or an estimate if actual value not known) and an estimate of expected Peak Load Contribution for the subject Delivery Year, and an estimated Nominated DR Value.

(iv) End-use customer site-specific information shall be required for any Zones or sub-Zones identified by PJM pursuant to this subsection for the portion, if any, of a Demand Resource Provider's intended offer in such Zones or sub-Zones that exceeds a Sell Offer threshold determined pursuant to this subsection, as any such excess quantity under such conditions should reflect Planned Demand Resources from end-use customer sites that the Provider has

a high degree of certainty it will physically deliver for the subject Delivery Year. In accordance with the procedures in subsection A-1(3) below, PJM shall identify, as requiring site-specific information, all Zones and sub-Zones that comprise any LDA group (from a list of LDA groups stated in the PJM Manuals) in which [the quantity of cleared Demand Resources from the most recent Base Residual Auction] plus [the quantity of Demand Resources included in FRR Capacity Plans for the Delivery Year addressed by the most recent Base Residual Auction] in any Zone or sub-Zone of such LDA group exceeds the greater of:

- the maximum Demand Resources quantity registered with PJM for such Zone for any Delivery Year from the current (at time of plan submission) Delivery Year and the two preceding Delivery Years; and
- the potential Demand Resource quantity for such Zone estimated by PJM based on an independent published assessment of demand response potential that is reasonably applicable to such Zone, as identified in the PJM Manuals.

For each such Zone and sub-Zone, the Sell Offer threshold for each Demand

Resource Provider shall be the higher of:

- the Demand Resource Provider's maximum Demand Resource quantity registered with PJM for such Zone/sub-Zone over the current Delivery Year (at the time of plan submission) and two preceding Delivery Years;
- the Demand Resource Provider's maximum for any single Delivery Year of [such provider's cleared Demand Resource quantity] plus [such provider's quantity of Demand Resources included in FRR Capacity Plans] from the three forward Delivery Years addressed by the three most recent Base Residual Auctions for such Zone/sub-Zone; and
- 10 MW.

(d) Schedule. The Demand Resource Provider shall provide an approximate timeline for procuring end-use customer sites as needed to physically deliver the total Nominated DR Value (for both Existing Demand Resources and Planned Demand Resources) by Zone/sub-Zone in the Demand Resource Sell Offer Plan. The Demand Resource Provider must specify the cumulative number of customers and the cumulative Nominated DR Value associated with each end-use

customer segment within each Zone/sub-Zone that the Demand Resource Provider expects (at the time of plan submission) to have under contract as of June 1 each year between the time of the auction and the subject Delivery Year.

2. Demand Resource Officer Certification Form. Each Demand Resource Sell Offer Plan must include a Demand Resource Officer Certification, signed by an officer of the Demand Resource Provider that is duly authorized to provide such a certification, in the form shown in the PJM Manuals, which form shall include the following certifications:

(a) that the signing officer has reviewed the Demand Resource Sell Offer Plan and the information supplied to PJM in support of the Plan is true and correct as of the date of the certification;

(b) that the Sell Offer Plan does not include any Critical Natural Gas Infrastructure facilities, and

(c) that the Demand Resource Provider is submitting the Plan with the reasonable expectation, based upon its analyses as of the date of the certification, to physically deliver all megawatts that clear the RPM Auction through Demand Resource registrations by the specified Delivery Year.

As set forth in the form provided in the PJM Manuals, the certification shall specify that it does not in any way abridge, expand, or otherwise modify the current provisions of the PJM Tariff, Operating Agreement

and/or RAA, or the Demand Resource Provider's rights and obligations thereunder, including the Demand Resource Provider's ability to adjust capacity obligations through participation in PJM incremental auctions and bilateral transactions.

3. Procedures. No later than December 1 prior to the Base Residual Auction for a Delivery Year, PJM shall post to the PJM website a list of Zones and sub-Zones, if any, for which end-use customer site-specific information shall be required under the conditions specified in subsection A-1(1)(c)(iv) above for all RPM Auctions conducted for such Delivery Year. Once so identified, a Zone or sub-Zone shall remain on the list for future Delivery Years until the threshold determined under subsection A-1(1)(c)(iv) above is not exceeded for three consecutive Delivery Years. No later than 30 days prior to the RPM Auction in which a Demand Resource Provider intends to offer a Demand Resource, the Demand Resource Provider shall submit to PJM a completed Demand Resource Sell Offer Plan template and a Demand Resource Officer Certification Form signed by a duly authorized officer of the Provider. PJM will review all submitted DR Sell Offer Plans. No later than 10 Business Days prior to the subject RPM Auction, PJM shall notify any Demand Resource Providers that have identified the same end-use customer site(s) in their respective DR Sell Offer Plans for the same Delivery Year. In such event, the MWs associated with such site(s) will not be approved for inclusion in a Sell Offer in an RPM Auction by any of the Demand Resource Providers, unless a

Demand Resource Provider provides a letter of support from the end-use customer indicating that it is likely to execute a contract with that Demand Resource Provider for the relevant Delivery Year, or provides other comparable evidence of likely commitment. Such letter of support or other supporting evidence must be provided to PJM no later than 7 Business Days prior to the subject RPM Auction. If an end-use customer provides letters of support for the same site for the same Delivery Year to multiple Demand Resource Providers, the MWs associated with such end-use customer site shall not be approved as a Demand Resource for any of the Demand Resource Providers. No later than 5 Business Days prior to the subject RPM Auction, PJM will notify each Demand Resource Provider of the approved Demand Resource quantity, by Zone/sub-Zone, that such Demand Resource Provider is permitted to offer into such RPM Auction.

- B. The Unforced Capacity value of a Demand Resource will be determined:
- (1) for Delivery Years through the 2024/2025 Delivery Year, as the product of the Nominated Value of the Demand Resource times the Forecast Pool Requirement. Nominated Values shall be determined and reviewed in accordance with sections I and J, respectively, and the PJM Manuals.
 - (2) for the 2025/2026 Delivery Year and subsequent Delivery Years, in accordance with RAA, Schedule 9.2. Nominated Values shall be determined and reviewed in accordance with sections I and J, respectively, and the PJM Manuals.

- C. Demand Resources offered and cleared in a Base Residual or Incremental Auction shall receive the corresponding Capacity Resource Clearing Price as determined in such auction, in accordance with Tariff, Attachment DD. For Delivery Years beginning with the Delivery Year that commences on June 1, 2013, any Demand Resources located in a Zone with multiple LDAs shall receive the Capacity Resource Clearing Price applicable to the location of such resource within such Zone, as identified in such resource's offer. Further, the Curtailment Service Provider shall register its resource in the same location within the Zone as specified in its cleared sell offer, and shall be subject to deficiency charges under Tariff, Attachment DD to the extent it fails to provide the resource in such location consistent with its cleared offer.
- D. The Party, Electric Distributor, or Curtailment Service Provider that establishes a contractual relationship (by contract or tariff rate) with a customer for load reductions is entitled to receive the compensation specified in section C for a committed Demand Resource, notwithstanding that such provider is not the customer's energy supplier.
- E. Any Party hereto shall demonstrate that its Demand Resources performed during periods when load management procedures were invoked by the Office of the Interconnection. The Office of the Interconnection shall adopt and maintain rules and procedures for verifying the performance of such resources, as set forth in section K hereof and the PJM Manuals. In addition, committed Demand Resources that do not comply with the directions of the Office of the Interconnection to reduce load during

an emergency shall be subject to the penalty charge set forth in Tariff, Attachment DD.

- F. Parties may elect to place Demand Resources associated with Behind The Meter Generation under the direction of the Office of the Interconnection for a Delivery Year by submitting a Sell Offer for such resource (as Self Supply, or with an offer price) in the Base Residual Auction for such Delivery Year. This election shall remain in effect for the entirety of such Delivery Year. In the event such an election is made, such Behind The Meter Generation will not be netted from load for the purposes of calculating the Daily Unforced Capacity Obligations under this Agreement.
- G. PJM measures Demand Resource Registrations in the following ways:
 - Firm Service Level (FSL) – Load management achieved by an end-use customer reducing its load to a pre-determined level (the Firm Service Level), upon notification from the Curtailment Service Provider’s market operations center or its agent.
 - Guaranteed Load Drop (GLD) – Load management achieved by an end-use customer reducing its load by a pre-determined amount (the Guaranteed Load Drop), upon notification from the Curtailment Service Provider’s market operations center or its agent. Typically, the load reduction is achieved through running customer-owned backup generators, or by shutting down process equipment.
- H. Each Curtailment Service Provider must satisfy (or contract with another LSE, Curtailment Service Provider, or electric distribution company to provide) the following requirements:

- A point of contact with appropriate backup to ensure single call notification from PJM and timely execution of the notification process;
 - Supplemental status reports, detailing Demand Resources available, as requested by PJM;
 - Entry of customer-specific Demand Resource Registration information, for planning and verification purposes, into the designated PJM electronic system.
 - Customer-specific compliance and verification information for each PJM-initiated Demand Resource event or test event, as well as aggregated Provider load drop data for Provider-initiated events, in accordance with established reporting guidelines.
 - Load drop estimates for all Load Management events and test events, prepared in accordance with the PJM Manuals.
- I. The Nominated Values (summer or winter) for each Demand Resource Registration shall be determined consistent with the process described below.

The summer Nominated Value for Firm Service Level customer(s) on a registration will be based on the peak load contribution for the customer(s), as typically determined by the 5CP methodology utilized by the electric distribution company to determine ICAP obligation values. The summer Nominated Value for a registration shall equal the total peak load contribution for the customers on the registration minus the summer Firm Service Level multiplied by the loss factor. The winter Nominated Value for Firm Service Level customer(s) on a registration shall equal the total Winter Peak Load for

customers on the registration multiplied by Zonal Winter Weather Adjustment Factor minus winter Firm Service level and then the result is multiplied by the loss factor.

The summer Nominated Value for a Guaranteed Load Drop customer on a registration shall equal the summer guaranteed load drop amount, adjusted for system losses and shall not exceed the customer's Peak Load Contribution, as established by the customer's contract with the Curtailment Service Provider. The winter Nominated Value for a Guaranteed Load Drop customer on a registration shall be the winter guaranteed load drop amount, adjusted for system losses, and shall not exceed the customer's Winter Peak Load multiplied by Zonal Winter Weather Adjustment Factor multiplied by the loss factor, as established by the customer's contract with the Curtailment Service Provider.

Customer-specific Demand Resource Registration information (EDC account number, peak load contribution, Winter Peak Load, notification period, etc.) will be entered into the designated PJM electronic system to establish nominated values. Each Demand Resource Registration should be linked to a Demand Resource. Additional data may be required, as defined in sections J and K and the PJM Manuals.

- J. Nominated Values shall be reviewed based on documentation of customer-specific data and Demand Resource Registration information, to verify the amount of load management available and to set a summer or winter, Nominated Value. Data is provided by both the zone EDC and the Curtailment Service Provider in the designated PJM electronic

system, and must include the EDC meter number or other unique customer identifier, Peak Load Contribution (5CP), Winter Peak Load, contract firm service level or guaranteed load drop values, applicable loss factor, zone/area location of the load drop, number of active participants, etc. Such data must be uploaded and approved prior to the first day of the Delivery Year for which such Demand Resource Registration is effective. Curtailment Service Providers must provide this information concurrently to host EDCs.

For Firm Service Level and Guaranteed Load Drop customers, the 5CP values, for the zone and affected customers, will be adjusted to reflect an “unrestricted” peak for a zone, based on information provided by the Curtailment Service Provider. Load drop levels shall be estimated in accordance with guidelines in the PJM Manuals.

The daily Nominated Value of a Demand Resource with a Capacity Performance commitment (which may consist of an Annual Demand Resource with a Capacity Performance commitment and/or Summer Period Demand Resource with a Capacity Performance commitment) shall equal the sum of the summer Nominated Values of the registrations linked to such Demand Resource for the summer period of June through October and May of the Delivery Year, and shall equal the lesser of (i) the sum of the summer Nominated Values of the registrations linked to such Demand Resource or (ii) the sum of the winter Nominated Values of the registrations linked to such Demand Resource for the non-summer period of November through April of the Delivery Year.

- K. Compliance is the process utilized to review Provider performance during PJM-initiated Load Management events and tests. Compliance will be established for each Provider on an event specific basis for the Curtailment Service Provider's Demand Resource Registrations dispatched by the Office of the Interconnection during such event. PJM will establish and communicate reasonable deadlines for the timely submittal of event data to expedite compliance reviews. Compliance reviews will be completed as soon after the event as possible, with the expectation that reviews of a single event will be completed within two months of the end of the month in which the event took place. Curtailment Service Providers are responsible for the submittal of compliance information to PJM for each PJM-initiated event and test during the compliance period.

Compliance is measured for Market Participant Bonus Performance, as applicable, and Non-Performance Charges. Non-Performance Charges are assessed for the defined obligation period of each Demand Resource as defined in RAA, Article 1, subject to the following requirements:

Compliance is checked on an individual customer basis for Firm Service Level, by comparing actual load during the event to the firm service level. Current load for a statistical sample of end-use customers may be used for compliance for residential non-interval metered registrations in accordance with the PJM Manuals and subject to PJM approval. Curtailment Service Providers must submit actual customer load levels (for the event period) for the compliance report. Compliance for FSL will be based on:

Summer (June through October and the following May of a Delivery Year)- End use customer's current Delivery Year peak load contribution ("PLC") minus the metered load ("Load") multiplied by the loss factor ("LF"). The calculation is represented by:

$$(PLC) - (Load * LF)$$

Winter (November through April of a Delivery Year)- End use customer's Winter Peak Load ("WPL") multiplied by Zonal Winter Weather Adjustment Factor ("ZWWAF") multiplied by LF, minus the metered load ("Load") multiplied by the LF. The calculation is represented by:

$$(WPL * ZWWAF * LF) - (Load * LF)$$

Compliance is checked on an individual customer basis for Guaranteed Load Drop. Current load for a statistical sample of end-use customers may be used for compliance for residential non-interval metered registrations in accordance with the PJM Manuals and subject to PJM approval. Guaranteed Load Drop compliance will be based on:

- (i) the lesser of (a) comparison load used to best represent what the load would have been if PJM did not declare a Load Management Event or the CSP did not initiate a test as outlined in the PJM Manuals, minus the Load and then multiplied by the LF, or (b) For a summer event, the PLC minus the Load multiplied by the LF. A summer load reduction will only be recognized for capacity compliance if the Load multiplied by the LF is less than the PLC. For a non-summer event, the WPL multiplied the ZWWAF multiplied by LF, minus the Load multiplied by the

LF. A non-summer load reduction will only be recognized for capacity compliance if the Load multiplied by the LF is less than the WPL multiplied by the ZWWAF multiplied by LF.

- (ii) Curtailment Service Providers must submit actual loads and comparison loads for all hours during the day of the Load Management Event or the Load Management performance test, and for all hours during any other days as required by the Office of the Interconnection to calculate the load reduction. Comparison loads must be developed from the guidelines in the PJM Manuals, and note which method was employed.
- (iii) Methodologies for establishing comparison load for Guaranteed Load Drop end-use customers are described in greater detail in Manual M-19, PJM Manual for Load Forecasting and Analysis, at Attachment A: Load Drop Estimate Guidelines.

Load reduction compliance is determined on an hourly basis for a Demand Resource Registration linked to an Annual Demand Resource with a Capacity Performance commitment, for each FSL and GLD customer dispatched by the Office of the Interconnection for at least 30 minutes of the clock hour (i.e., “partial dispatch compliance hour”). Curtailment Service Provider may submit 1 minute load data for use in capacity compliance calculations for partial dispatch compliance hours subject to PJM approval and in accordance with the PJM Manuals where: (a) metering meets all Tariff and Manual requirements, (b) 1 minute load data shall be submitted to PJM for all locations on the registration, and (c) 1 minute load data measures energy consumption

over the minute. The registered capacity commitment for a Demand Resource Registration with a Base or Capacity Performance commitment is not prorated based on the number of minutes dispatched during the clock hours. The actual hourly load reduction for the hour ending that includes a Performance Assessment Interval(s) is flat-profiled over the set of dispatch intervals in the hour in accordance with the PJM Manuals.

A Demand Resource Registration may not reduce their load below zero (i.e., export energy into the system). No compliance credit will be given for an incremental load drop below zero.

For a Performance Assessment Interval, compliance will be totaled over all dispatched registrations for FSL and GLD customers linked to a Provider's Annual Demand Resource with a Capacity Performance commitment to determine the Actual Performance for such Demand Resource in accordance with Tariff, Attachment DD, section 10A, and PJM Manuals. The Expected Performance for such Demand Resource shall be equal to the Provider's committed capacity on the Demand Resource, adjusted to account for any linked registrations that were not dispatched by PJM. A Provider's Demand Resources' initial Performance Shortfalls shall be netted for all the seller's Demand Resources in the Emergency Action Area to determine a net Emergency Action Area Performance Shortfall which is then allocated to the Capacity Market Seller's Demand Resources in accordance with Tariff, Attachment DD, section 10A, and PJM Manuals.

- L. Energy Efficiency Resources – all provisions in RAA, Schedule 6, section L and Tariff, Attachment

DD-1, section L shall be effective only through the 2025/2026 Delivery Year. Thereafter, no Energy Efficiency Resources shall qualify to be offered into the RPM Auctions beginning with the 2026/2027 Delivery Year.

1. An Energy Efficiency Resource is a project, including installation of more efficient devices or equipment or implementation of more efficient processes or systems, exceeding then-current building codes, appliance standards, or other relevant standards, designed to achieve a continuous (during peak summer and winter periods as described herein) reduction in electric energy consumption at the end-use customer's retail site that is not reflected in the peak load forecast prepared for the Delivery Year for which the Energy Efficiency Resource is proposed, and that is fully implemented at all times during such Delivery Year, without any requirement of notice, dispatch, or operator intervention.
2. An Energy Efficiency Resource may be offered as a Capacity Resource in the Base Residual or Incremental Auctions for any Delivery Year beginning on or after June 1, 2011. No later than 30 days prior to the auction in which the resource is to be offered, the Capacity Market Seller shall submit to the Office of the Interconnection a notice of intent to offer the resource into such auction and a measurement and verification plan. The notice of intent shall include all pertinent project design data, including but not limited to the peak-load contribution of affected customers, a full description of the equipment, device, system or process intended to achieve

the load reduction, the load reduction pattern, the project location, the project development timeline, and any other relevant data. Such notice also shall state the seller's proposed Nominated Energy Efficiency Value.

- For the 2018/2019 Delivery Year and subsequent Delivery Years and for any Annual Energy Efficiency Resource committed as a Capacity Performance Resource, the seller's proposed Nominated Energy Efficiency Value for any Annual Energy Efficiency Resources, shall be the expected average load reduction, for all days from June 1 through August 31, inclusive, of such Delivery Year that is not a weekend or federal holiday, between the hour ending 15:00 EPT and the hour ending 18:00 EPT. In addition, the expected average load reduction for all days from January 1 through February 28, inclusive, of such Delivery Year that is not a weekend or federal holiday, between the hour ending 8:00 EPT and the hour ending 9:00 EPT and between the hour ending 19:00 EPT and the hour ending 20:00 EPT shall not be less than the Nominated Energy Efficiency Value; and
- For the 2020/2021 Delivery Year and subsequent Delivery Years, the seller's proposed Nominated Energy Efficiency Value for any Summer-Period Energy Efficiency Resource shall be the expected average load reduction between the hour ending 15:00 EPT and the hour ending 18:00 EPT during all days from June 1 through August 31,

inclusive, of such Delivery Year that is not a weekend or federal holiday.

The measurement and verification plan shall describe the methods and procedures, consistent with the PJM Manuals, for determining the amount of the load reduction and confirming that such reduction is achieved. The Office of the Interconnection shall determine, upon review of such notice, the Nominated Energy Efficiency Value that may be offered in the Reliability Pricing Model Auction.

3. An Energy Efficiency Resource may be offered with a price offer or as Self-Supply. If an Energy Efficiency Resource clears the auction, it shall receive the applicable Capacity Resource Clearing Price, subject to section 5 below. A Capacity Market Seller offering an Energy Efficiency Resource must comply with all applicable credit requirements as set forth in Tariff, Attachment Q. The Unforced Capacity value of an Energy Efficiency Resource offered into an RPM Auction or committed in a FRR Capacity Plan shall be the Nominated Energy Efficiency Value times the Forecast Pool Requirement.
4. An Energy Efficiency Resource that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive Delivery Years, but shall not be assured of clearing in any such auction; provided, however, an Energy Efficiency Resource may not be offered for any Delivery Year in which any part of the peak season is beyond the expected life of the equipment, device, system, or process

providing the expected load reduction; and provided further that a Capacity Market Seller that offers and clears an Energy Efficiency Resource in a BRA may elect a New Entry Price Adjustment on the same terms as set forth in Tariff, Attachment DD, section 5.14(c).

5. For every Energy Efficiency Resource clearing an RPM Auction for a Delivery Year, the Capacity Market Seller shall submit to the Office of the Interconnection, by no later than 30 days prior to each Auction an updated project status and measurement and verification plan subject to the criteria set forth in the PJM Manuals.
6. For every Energy Efficiency Resource clearing an RPM Auction for a Delivery Year, the Capacity Market Seller shall submit to the Office of the Interconnection, by no later than the start of such Delivery Year, an updated project status and detailed measurement and verification data meeting the standards for precision and accuracy set forth in the PJM Manuals. The final value of the Energy Efficiency Resource during such Delivery Year shall be as determined by the Office of the Interconnection based on the submitted data.
7. The Office of the Interconnection may audit, at the Capacity Market Seller's expense, any Energy Efficiency Resource committed to the PJM Region. The audit may be conducted any time including the Performance Hours of the Delivery Year.
8. For RPM Auctions for the 2021/2022 Delivery Year and subsequent Delivery Years, if a Relevant Electric Retail Regulatory Authority

receives FERC authorization to qualify or prohibit Energy Efficiency Resource participation in a specific area(s) of the PJM Region, the following process applies:

(a) The Office of the Interconnection will publicly post a reference to the FERC authorization of a Relevant Electric Retail Regulatory Authority order, ordinance or resolution that qualifies or prohibits Energy Efficiency Resource participation, the applicable electric distribution company(ies), and the applicable auction(s) and/or Delivery Year(s).

(b) A Capacity Market Seller that intends to offer or certify Energy Efficiency Resources must identify and itemize all resources that are located in the jurisdiction of a Relevant Electric Retail Regulatory Authority authorized by FERC to qualify or prohibit Energy Efficiency Resource participation within the Zone or LDA, as required, and those outside of the area but within the Zone or LDA, as required.

(c) A Capacity Market Seller that intends to offer or certify Energy Efficiency Resources must identify and itemize all Energy Efficiency Resources to be offered as part of its Energy Efficiency measurement and verification plan and certified post-installation measurement and verification report. The Office of Interconnection will provide a list to the relevant electric distribution company for the specific area(s) to review for compliance with the Relevant Electric Retail Regulatory Authority of Capacity Market Sellers that are:

- (i) offering Energy Efficiency Resources in an RPM Auction within two (2) Business Days after the deadline for submitting an energy efficiency measurement and verification plan for such RPM Auction; and
 - (ii) certifying Energy Efficiency Resources with a Delivery Year post-installation measurement and verification report, within two (2) Business Days of receipt of such Delivery Year post-installation measurement and verification report. The relevant electric distribution company for the specific area(s) shall review for compliance with rules from a Relevant Electric Retail Regulatory Authority authorized by FERC to qualify or prohibit Energy Efficiency Resource.
- (d) The relevant electric distribution company for the specific area(s) shall review for compliance with rules from a Relevant Electric Retail Regulatory Authority authorized by FERC to qualify or prohibit Energy Efficiency Resource participation and provide a response to the Office of the Interconnection within five (5) Business Days after receiving the list of Capacity Market Sellers offering Energy Efficiency Resources. The Office of the Interconnection will not allow a Capacity Market Seller to offer or certify Energy Efficiency Resources if an electric distribution company denies such Capacity Market Seller to deliver Energy Efficiency Resources in compliance with rules of a Relevant Electric Retail Regulatory Authority

authorized by FERC to qualify or prohibit Energy Efficiency Resource participation.

(9) For RPM Auctions for the 2021/2022 Delivery Year and subsequent Delivery Years, a Capacity Market Seller of Energy Efficiency Resources that cannot satisfy its RPM obligations in any Delivery Year due to the prohibition of participation by a Relevant Electric Retail Regulatory Authority authorized by FERC to prohibit participation of such resources may be relieved of its Capacity Resource Deficiency Charge by notifying the Office of the Interconnection by no later than seven (7) calendar days prior to the posting of the planning parameters for the Third Incremental Auction of that Delivery Year. After providing such notice, the affected Capacity Market Seller may elect to be relieved of its RPM commitment, and shall not be required to obtain replacement capacity for the resource, and no charges shall be assessed by the Office of the Interconnection for the Capacity Market Seller's deficiency in satisfying its RPM obligation for the resource for such Delivery Year. In such case, however, the Capacity Market Seller shall not be entitled to, nor be paid, any RPM revenues for such resource for that Delivery Year. The Office of the Interconnection will apply corresponding adjustments to the quantity of Buy Bids or Sell Offers in the Incremental Auctions for such Delivery Years in accordance with Tariff, Attachment DD, sections 5.12(b)(ii) and 5.12(b)(iii).

APPENDIX I

**Affirmed Energy LLC
DECLARATION OF B. ABRAM
May 1, 2025**

I, B. Abram, pursuant to 28 U.S.C. §1746, declare as follows:

1. I am the managing director of Affirmed Energy LLC (“Affirmed”). I make this declaration as of the date hereof based on my personal knowledge. I am over 18 years old.
2. I have served as an officer of Affirmed since it was founded in 2017 and of Affirmed’s predecessor since it began participating in the PJM Interconnection, L.L.C. market in 2014. Additionally, I am the CEO of Modern Energy Group LLC, the parent company of Affirmed. Due to my position, I am familiar with the finances and operations of Affirmed, as well as its participation in PJM’s wholesale electric capacity market.
3. Pursuant to Circuit Rule 28(a)(7), I submit this declaration in support of Affirmed’s standing to file this petition for review of the Federal Energy Regulatory Commission’s (“FERC”) November 5, 2024 Order entitled “Order Accepting Tariff Revisions” and published as *PJM Interconnection, L.L.C.*, 189 FERC ¶61,095 (2024); January 6, 2025 Order entitled “Notice of Denial of Rehearing by Operation of Law and Providing For Further Consideration” and published as *PJM Interconnection, L.L.C.*, 190 FERC ¶62,005 (2025); and February 7, 2025 Order entitled “Order Addressing Arguments Raised on Rehearing and

Denying Stay” and published as *PJM Interconnection L.L.C.*, 190 FERC ¶61,081 (2025).

4. Affirmed’s business model works by offering energy efficiency resources in capacity auctions, where entities offer a price they are willing to accept in exchange for committing their resources to provide electricity to the interstate electric grid in the future. In PJM’s auctions, PJM “clears,” or accepts, offers starting with the lowest offer until it obtains enough capacity to meet the expected demand of the grid. The last offer sets the “clearing price” for the auction, and all offers that clear the auction receive the same clearing price. Virtually all of Affirmed’s business relates to energy efficiency resources installed or intended for installation in PJM’s geographic territory.
5. Energy efficiency resources are projects including, among other things, the installation of more efficient devices or equipment that exceed current building codes or other relevant standards. Affirmed offers commitments to reduce energy consumption based on those projects in capacity auctions. Energy efficiency resource participation in PJM’s capacity market has been authorized by PJM’s tariff (the compilation of rates and charges for the capacity market, along with related regulations) since 2009.
6. To offer energy efficiency resources in those capacity auctions, Affirmed contracts with manufacturers, retailers, and distributors (like Home Depot) of energy efficient consumer products (like light bulbs). Affirmed pays its program partners per-unit compensation for each unique

energy efficient product they sell in exchange for the contractual rights to the capacity reductions from those energy efficient products.

7. Affirmed then calculates and aggregates the expected future energy capacity reductions from those products based on methodologies reviewed and approved by PJM, and offers those reductions in capacity auctions. Affirmed backs its commitments to provide these capacity reductions by posting significant financial collateral to PJM until PJM verifies that Affirmed has fulfilled its commitment.
8. Affirmed uses the capacity revenue it earns from the auctions to buy more energy efficiency resource capacity from its program partners who, in turn, can be incentivized by these payments to increase their sales of energy efficient products. For example, they may choose to stock more energy efficient products with the supplemental revenue stream they receive from energy efficiency providers or use the payments to increase marketing efforts for those products.
9. In reliance on PJM's tariff, Affirmed provides energy efficiency resources to the capacity market operated by PJM. It has offered energy efficiency resources in PJM's market since 2014, and it has participated in nearly 30 capacity auctions.
10. Prior to FERC's November 5, 2024 Order Accepting Tariff Revisions, 189 FERC ¶61,095, PJM's tariff stated, as relevant here, that "[a]n Energy Efficiency Resource that clears an auction for a Delivery Year may be offered in auctions for up to three additional consecutive

Delivery Years, but shall not be assured of clearing in any such auction.”

11. On each occasion in which Affirmed sought to offer previously cleared energy efficiency resources in subsequent auctions in which they were eligible to participate, PJM approved those energy efficiency resources to participate.
12. Affirmed offered energy efficiency resources from the 2022/23 Installation Year in the 2023/24 Base Residual Auction that cleared that auction for the 2023/24 Delivery Year. Affirmed offered energy efficiency resources from the 2023/24 Installation Year in the 2024/25 Base Residual Auction that cleared that auction for the 2024/25 Delivery Year. Under PJM’s prior tariff terms, Affirmed was eligible to offer those previously cleared energy efficiency resources in the 2026/27 Base Residual Auction¹ in July 2025 for the 2026/27 Delivery Year. Likewise, under PJM’s prior tariff terms, Affirmed was eligible to offer energy efficiency resources that cleared the 2024/25 Base Residual Auction for the 2024/25 Delivery Year in the 2027/28 Base Residual Auction for the 2027/28 Delivery Year, which is currently scheduled to take place in December 2025.
13. In reliance on the prior terms of PJM’s tariff, Affirmed incurred costs of nearly \$50 million for the energy efficiency resources it planned to offer in

¹ The declaration in support of Affirmed’s stay motion referred to this auction as the “2025/26 Base Residual Auction” since the auction is scheduled to take place in 2025. For consistency with the naming conventions used throughout the rest of this paragraph, however, this declaration refers to it as the “2026/27 Base Residual Auction.”

these two future auctions. That substantial sum represents Affirmed's payments to its program partners and financing fees for assets from Installation Years 2022/23 and 2023/24.

14. Affirmed incurred those costs in reliance on the previous tariff's guarantee that Affirmed could offer those energy efficiency resources in auctions for up to three consecutive Delivery Years based on the clearance of its bids in the 2023/24 and 2024/25 Base Residual Auctions. As relevant here, Affirmed understood that, under the tariff, it was guaranteed the right to offer the additional energy reductions from those energy efficiency resources in the July 2025 auction for the 2026/27 Delivery Year. And it understood that, under the tariff, it was guaranteed the right to offer the additional energy reductions from the energy efficiency resources that cleared the 2024/25 Base Residual Auction for the 2024/25 Delivery Year in the 2027/28 Base Residual Auction for the 2027/28 Delivery Year.
15. FERC's orders accepting PJM's tariff changes eliminate Affirmed's right under the prior tariff to offer its energy efficiency resources that cleared the 2023/24 and 2024/25 Base Residual Auctions in those two future auctions. This directly harms Affirmed.
16. Specifically, to take the upcoming July 2025 auction as an example, Affirmed has lost the ability to bid into that auction, in which it would have had the opportunity to obtain tens of millions of dollars in revenue streams from the \$50 million that it invested into energy efficiency resources that cleared the 2023/24 and 2024/25 Base Residual

Auctions. PJM has adopted a price cap and price floor for the July 2025 auction. Based on that cap and floor, and based on the number of Affirmed's energy efficiency resources that were previously guaranteed the right to participate in the July 2025 auction by virtue of having cleared the 2023/24 and 2024/25 Base Residual Auctions, Affirmed could potentially obtain roughly \$96 million (using the price floor figure) to \$178 million (using the price cap figure), depending on Affirmed's offer price and the final clearing price.

17. Additionally, FERC's orders essentially outlaw Affirmed's entire business model in PJM's geographic territory going forward, as the entirety of Affirmed's business involves offering energy efficiency resources into capacity auctions.

I declare under penalty of perjury that the foregoing is true and correct as of the date hereof.

Executed on May 1, 2025 in Durham, North Carolina.

[Signature]

B. Abram