

to existing Black Start Unit owners recovering Black Start Capital Costs incurred prior to June 6, 2021 (hereinafter “Existing Black Start Investments”).⁶

As discussed below, PJM’s Tariff remains just and reasonable and not unduly discriminatory or preferential as it relates to Existing Black Start Investments because the owners of Black Start Units that made the Existing Black Start Investments, which provide a vitally important service to PJM’s system, are not similarly situated to new Black Start Unit investors in the timing of investment in Black Start capability and the filed rate at the time of their investment decisions; thus, establishing a distinction in the Tariff that maintains the existing rate structure for Existing Black Start Investments is just and reasonable.⁷ In addition, the evidence shows that the CRF percentages for Existing Black Start Investments were presented in the Tariff as black box stated rates, disconnected from any analyses of the development of the rates and providing no indication of how the CRF rate may be changed during the life of a project, nor under what circumstances.⁸ Moreover,

⁶ Show Cause Order at P 9. The Commission also notes that the Independent Market Monitor for PJM (“IMM”) claims the existing CRF stated rate is based on an assumed federal corporate income tax rate that pre-dates the Tax Cuts and Jobs Act of 2017 (“TCJA”), Pub. L. No. 115-97, 131 Stat. 2054 (2017), which lowered the federal corporate income tax rate from a maximum 35% to a flat 21% rate effective January 1, 2018. Show Cause Order at PP 46-47 (citing Comments of the Independent Market Monitor for PJM, Docket No. ER21-1635-000, at 5 n.15 (Apr. 29, 2021) & Comments of the Independent Market Monitor for PJM, Docket No. ER21-1635-001, at 4-5 (July 2, 2021)).

⁷ Some comments on the April 7 Filing argued that existing Black Start Service providers are recovering Black Start Capital Costs under a rate that is protected under the *Mobile-Sierra* doctrine. Given PJM’s view, as set forth above, that it is just and reasonable to honor the terms of the Tariff at the time Black Start Unit owners entered into long-term commitments under the special circumstances of Black Start Service, PJM does not view the *Mobile-Sierra* argument as necessary to this question, and does not address it. *See infra* note 21.

⁸ Contrary to the IMM’s claim that the stated CRF percentages in the Tariff were based on an assumed federal corporate income tax rate of 35%, PJM’s filing proposing to add the table of stated CRF values describes them as “designed to ensure that recovery of the new improvements are depreciated in a manner commensurate with the age of the Black Start Unit at the time of the improvement” and “represent[ing] a reasonable recovery of [the Black Start Unit Owner’s] capital investment.” *PJM Interconnection, L.L.C.*, Submittal of PJM Interconnection, L.L.C., Docket No. ER09-730-000, at 4 (Feb. 19, 2009). PJM’s filing does not describe any components of or mechanisms for development of the CRF values. The Commission accepted the addition of the table to Tariff, Schedule 6A in

the Commission's orders following the enactment of the TCJA did not require PJM to change the stated rate CRF percentages for Existing Black Start Investment to reflect the change in corporate income tax rates.

I. RESPONSE

PJM's decision to retain the existing stated CRF percentages in the Tariff for the Existing Black Start Investments is based upon (i) the critical importance of Black Start Service to system reliability; (ii) the decision by PJM's Members in the stakeholder process concerning Black Start reforms to approve the Problem Statement to limit the application of the updated CRF values to new investment in Black Start Units;⁹ and (iii) the information that Black Start Unit owners had at the time they evaluated the risks of, and compensation for, making the Existing Black Start Investments and voluntarily committed their units to Black Start Service. Black Start Service is not only uniquely important; it also presents Black Start Unit owners with unique risks. First, it is the only service PJM procures on a multi-year basis, requiring unit owners to evaluate risks over a longer time frame than most services and products in the PJM markets, thus introducing more uncertainty. Also, because Black Start Service must be available even in the face of severe grid disruptions, Black Start Unit owners are subject to specific requirements under North American Electric Reliability Corporation ("NERC") standards. NERC's Emergency Preparedness and

2009 as a set of stated percentages with no mention of the CRF values being based on particular components or assumptions. See *PJM Interconnection, L.L.C.*, 127 FERC ¶ 61,197, at P 39 (2009).

⁹ *Black Start Unit Capital Recovery Factor; and Involuntary Termination & Substitution Rules, Problem/Opportunity Statement*, PJM Interconnection, L.L.C., 2, (May 13, 2020), <https://www.pjm.com/-/media/committees-groups/committees/oc/2020/20200514/20200514-item-05a-black-start-mtsl-problem-statement.ashx> ("Problem Statement") (first read at the May 14, 2020 meeting of the Operating Committee stating "Current Black Start Units receiving the capital cost recovery rate (Schedule 6A) and units already awarded in recent Black Start RFPs will continue with the commitment period and CRF rates as documented in the current Open Access Transmission Tariff, Schedule 6A, Black Start Service.").

Operations Standard EOP-005-3, which specifically concerns System Restoration from Black Start Resources, underscores the importance of system restoration planning by establishing unique training, testing, and drill requirements for Generation Operators with Black Start Resources.¹⁰ These Black Start Resource-specific NERC requirements establish increased risk of NERC audits and NERC penalties for non-compliance identified in an audit or through the required testing. These NERC requirements are specific to Black Start Resources and not required for other generating resources.

Black Start Unit owners that made Existing Black Start Investments had the opportunity to evaluate both the long-term uncertainty (from multi-year commitments) and the added risk and exposure from Black Start-specific NERC requirements when considering the stated CRF percentages in the Tariff at the time they voluntarily entered into their commitments. However, they did not have an opportunity to evaluate the proposed new formulaic, annually adjusted CRF percentages before entering their existing commitments. Thus, there are legitimate reasons to retain the stated rate CRF percentages in the Tariff for existing Black Start Units with Existing Black Start Investments at present. As shown below, the Commission has approved different treatment for resources in instances where there are factual distinctions and legitimate policy reasons for doing so,¹¹ and should do the same here to allow PJM to retain the existing stated CRF percentages in the Tariff for Black Start Unit owners' Existing Black Start Investments.

¹⁰ *Emergency Preparedness and Operations Standard No. EOP-005-3, System Restoration from Blackstart Resources*, North American Electric Reliability Corp., R11-R16 (Apr. 1, 2019).

¹¹ *See, e.g., Sw. Power Pool, Inc.*, 158 FERC ¶ 61,063, at P 12 (2017) (approving Southwest Power Pool, Inc.'s ("SPP") proposal to treat all new non-wind variable resources as dispatchable while allowing existing variable non-wind resources to remain non-dispatchable, in part based on the policy benefit of increasing dispatchable non-wind resources in SPP).

A. According to Precedent, Different Rates Among Non-Similarly Situated Customers Are Not Unduly Discriminatory.

Retaining the CRF percentages currently stated in the Tariff for Existing Black Start Investments is just and reasonable and not unduly discriminatory because there are legitimate, factual differences between existing and new Black Start Unit owners and their investment decisions. As an initial matter, PJM notes there can be more than one just and reasonable rate.¹² Therefore, given that the new unit owners and existing unit owners are not similarly situated due to the different understandings each group had or will have at the time they voluntarily entered or will enter into a Black Start Service commitment, maintaining different rate structures (i.e., retaining the existing just and reasonable rate for Existing Black Start Investments and implementing a different just and reasonable rate for new Black Start Units incurring Black Start Capital Costs going forward) is just and reasonable and not unduly discriminatory. Further, the Commission has accepted different rates, and non-rate terms and conditions, for existing and new customers as just, reasonable, and not unduly discriminatory where there are distinctions in timing, notice, and expectations between the two groups.¹³ Maintaining the existing CRF percentages for Black Start Unit owners with Existing Black Start Investments under Tariff, Schedule 6A,

¹² *See Am. Elec. Power Serv. Corp. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,083, at P 88 (2008) (“As the courts have found, on the same set of facts there can be ‘multiple just and reasonable rates’ and the resolution may depend on whether the proceeding is initiated under section 206.” (quoting “*Complex*” *Consol. Edison Co. of NY v. FERC*, 165 F.3d 992, 1003 (D.C. Cir. 1999))), *order on reh’g*, 125 FERC ¶ 61,341 (2008).

¹³ *See Mo. River Energy Servs. v. FERC*, 918 F.3d 954, 958 (D.C. Cir. 2019) (“*Missouri River*”) (“A mere difference in the treatment of two entities does not violate that provision [FPA section 206(b)]; instead, undue discrimination occurs only if the entities are ‘similarly situated,’ such that ‘there is no reason for the difference.’” (quoting *State Corp. Comm’n of Kan. v. FERC*, 876 F.3d 332, 335 (D.C. Cir. 2017) & *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 721 (D.C. Cir. 2000) (per curiam))).

section 6, is consistent with the Commission’s precedent finding that discrimination is “due” when there are justifiable differences between two differently situated groups.¹⁴

For example, in *Missouri River*, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission’s acceptance of SPP’s decision to allow existing members to be exempt from certain charges based on a factual distinction between existing and prospective members of SPP.¹⁵ In the underlying SPP orders, the Commission relied on the precedent in *Dairyland I*¹⁶ and *Dairyland II*¹⁷ where the Commission found that prospective members can weigh the costs and benefits of joining and choose not to join an independent system operator (“ISO”) or regional transmission owner (“RTO”) if they do not wish to accept the terms, or if the costs outweigh the benefits, while existing members have no such opportunity.¹⁸

Similarly, in *ISO New England*, the Commission approved ISO New England Inc.’s (“ISO-NE”) proposal to apply its financial assurance policy to only new non-commercial capacity clearing in the upcoming forward capacity auction.¹⁹ The Commission found that new non-commercial capacity was not similarly situated with existing non-commercial capacity that cleared before the upcoming auction policy because “existing capacity would

¹⁴ *See id.*

¹⁵ *Id.* at 958-60. The court affirmed the Commission’s reasoning that there was no undue discrimination between new and existing members because the new members had the opportunity to consider the costs and benefits of joining SPP. *See id.* at 959; *see also Sw. Power Pool, Inc.*, 160 FERC ¶ 61,115, at PP 47-48 (2017), *reh’g denied*, 163 FERC ¶ 61,063, at P 27 (2018).

¹⁶ *Midwest Indep. Transmission Sys. Operator, Inc.*, 129 FERC ¶ 61,221 (2009) (“*Dairyland I*”).

¹⁷ *Midwest Indep. Transmission Sys. Operator, Inc.*, 131 FERC ¶ 61,163 (2010) (“*Dairyland II*”).

¹⁸ *See Sw. Power Pool, Inc.*, 160 FERC ¶ 61,115, at PP 47-48, *reh’g denied*, 163 FERC ¶ 61,063, at PP 44, 47; *Dairyland II* at P 22; *Dairyland I* at PP 39-41.

¹⁹ *ISO New England Inc.*, 170 FERC ¶ 61,011, at PP 14-15 (2020) (“*ISO New England*”).

have secured financing and/or made arrangements in anticipation of, and contingent upon, the incumbent financial assurance requirements.”²⁰

This precedent demonstrates that the Commission recognizes that new and existing suppliers/RTO participants are not similarly situated and that distinctions based upon when RTO participants elected to provide a service are permissible.²¹ As in *Missouri River*,²² at the time existing Black Start Unit owners made the tailored Existing Black Start Investments addressed by a CRF, they did not have notice of the new formulaic, annually updated CRF, or the opportunity to consider this new approach’s costs and benefits. In contrast, Black Start Unit owners committing to new facility investments after these Tariff changes take effect can take account of these new terms, and their costs and benefits, before committing to such new investments. Similarly, the owners of existing Schedule 6A, section 6 Black Start Units, like existing non-commercial capacity that cleared before the auction in *ISO New England* have made arrangements in anticipation of, and that are contingent upon, the existing stated CRF percentages. These arrangements are expressly directed at recovering the capital costs of discrete targeted investments tied to the critical task of system restoration.

²⁰ *Id.* at P 15. The Commission also noted that the distinction was necessarily limited to the finite period before the non-commercial capacity resources became commercial. *See id.*

²¹ The *Memphis* clause set forth in Tariff, Part I, section 9, permits PJM to make prospective changes to its Tariff rates, terms, conditions, and charges. *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 110-13 (1958). Like the PJM Tariff, the tariffs of ISO-NE and SPP contain *Memphis* clauses. *See* ISO New England Inc. Transmission, Markets and Services Tariff § II.9 Regulatory Filings; Southwest Power Pool, Inc. Open Access and Transmission Tariff § 9 Regulatory Filings. The presence of a *Memphis* clause did not change the Commission’s analysis in *ISO New England* or *Southwest Power Pool*, 158 FERC ¶ 61,063, and should not change the analysis here.

²² 918 F.3d at 958.

Also, similar to the distinction between new and existing non-commercial capacity in *ISO New England*, where the Commission found the distinction was limited to a finite period, the number of existing Schedule 6A, section 6 Black Start Units will decline to zero over time, as the commitment periods for those existing Black Start Units terminate.²³ Thus, the difference in CRF percentages will not be a permanent feature of PJM’s Black Start program as the existing commitments expire.

Black Start Service entails a multi-year commitment, unlike any other service or product in PJM, and, as explained above, Black Start Units are subject to additional NERC requirements, which bring additional risks. Existing Black Start Unit owners weighed the risks and rewards of providing Black Start Service and committed their units based on the stated CRF percentages in the Tariff at the time they made that commitment. If PJM were to change the CRF for existing Schedule 6A, section 6 Black Start Units, those existing Black Start Unit owners would not easily be able to unwind their existing financial arrangements.

B. PJM’s Tariff Is Consistent with Commission Precedent Regarding Reductions to Stated Transmission Rates Following Passage of the TCJA.

The April 7 Filing’s treatment of stated CRFs for Existing Black Start Investments is consistent with *Alcoa Power Generating Inc.—Long Sault Division*, 162 FERC ¶ 61,224 (2018) (“*Alcoa*”). PJM notes that not all utilities with stated transmission rates that were

²³ See April 7 Filing, Attachment B, Affidavit of Thomas Hauske on Behalf of PJM Interconnection, L.L.C. ¶ 8 (explaining there are forty-three existing Schedule 6A, section 6 Black Start Units, noting that these units have differing commitment periods, but stating that approximately half of these units have a five-year commitment period). Thus, half of the existing Schedule 6A, section 6 Black Start Units, which will continue to receive the stated CRF percentages, will reach the end of their current commitment period within the next five years, while the other half will reach the end of their commitment periods within the next ten to twenty years, after which there will be no Black Start Units that receive the existing stated CRF percentages.

subjects of the show cause order in *Alcoa* filed to reduce their stated transmission rates to reflect the lower federal corporate income tax rate. Further, Order No. 864 required utilities with transmission formula rates to include mechanisms in their formula rates that accurately reflect excess or deficient Accumulated Deferred Income Taxes (“ADIT”) in their cost of transmission service following a change in income tax rates, but the Commission decided not to require similar changes to stated transmission rates to reflect the impact of TCJA, instead directing utilities with stated transmission rates to address TCJA’s impact on ADIT in their next rate case.²⁴ PJM did not file a new stated rate case in the April 7 Filing, but rather is maintaining the existing stated CRF percentages for existing Black Start Unit owners with Existing Black Start Investments and filing a formula rate for CRF going forward.

²⁴ *Public Utility Transmission Rate Changes to Address Accumulated Deferred Income Taxes*, Order No. 864, 169 FERC ¶ 61,139, at PP 28, 42, 86-90 (2019), *order on reh’g & clarification*, Order No. 864-A, 171 FERC ¶ 61,033 (2020).

II. CONCLUSION

PJM respectfully requests that the Commission accept this response and find that the Tariff remains just and reasonable and not unduly discriminatory or preferential.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 12th day of October 2021.

/s/ Uju Okasi
Uju Okasi