

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Talen Energy Marketing, LLC,)
Complainant,)
)
v.) Docket No. EL23-56-000
)
PJM Interconnection, L.L.C.,)
Respondent.)

ANSWER OF PJM INTERCONNECTION, L.L.C.

PJM Interconnection, L.L.C. (“PJM”), pursuant to Rule 213 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure,¹ submits this answer to the complaint filed by Talen Energy Marketing, LLC (“Talen” or “Complainant”) on April 5, 2023.² The Commission should dismiss the Complaint.

I. INTRODUCTION

The Talen Generators³ fell well short in providing energy and reserves to help address the emergency conditions facing the PJM Region⁴ during Winter Storm Elliott⁵ on December 23 and 24, 2022. As PJM’s Donald Bielak testifies, the **[BEGIN**

¹ 18 C.F.R. § 385.213.

² *Talen Energy Marketing, LLC v. PJM Interconnection, L.L.C.*, Complaint of Talen Energy Marketing, LLC, Docket No. EL23-56-000 (Apr. 5, 2023) (“Complaint”).

³ The Talen Generators include: Martins Creek 3, Martins Creek 4, Wagner 1, Wagner 4, and Montour 2. See Complaint at 7.

⁴ Capitalized terms used, but not otherwise defined, in this pleading have the meaning provided in, as applicable, the PJM Open Access Transmission Tariff (“Tariff”), the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (“Operating Agreement”), or the Reliability Assurance Agreement Among Load-Serving Entities in the PJM Region.

⁵ Winter Storm Elliott refers to a large winter storm that passed through the PJM Region between December 23 and December 25, 2022. See *Winter Storm Elliott Info*, PJM Interconnection, L.L.C., <https://pjm.com/markets-and-operations/winter-storm-elliott> (last visited May 25, 2023) (collecting PJM’s public statements addressing Winter Storm Elliott’s impact on PJM’s operations and markets).

CUI//PRIV-HC [REDACTED] **[END CUI//PRIV-HC]** long notification plus startup times included in the Talen Generators’ operating parameters were the sole reason PJM did not dispatch the Talen Generators.⁶ As a result, the Tariff dictates⁷ that the resources are subject to Non-Performance Charges for their Performance Shortfall.

Such an outcome is just and reasonable. The Tariff provides very narrow and limited excuses from Non-Performance Charges. The relevant excuse here is unavailable to resources that were not scheduled “solely due to . . . any operating parameter limitations submitted in the resource’s offer.”⁸ The Commission has determined that “it is reasonable for a resource that fails to perform because of parameter limitations to receive less net capacity revenue than a performing resource,” because “a resource that is unable to produce energy or provide operating reserves during Performance Assessment [Intervals] because of parameter limitations provides less capacity value to customers than a resource that is able to perform during these hours.”⁹

The Talen Generators, which received capacity payments for the seven months leading up to Winter Storm Elliot, *did* provide less value than other resources with shorter startup periods, as the Talen Generators generally were offline and not available to be dispatched within a timeframe that PJM dispatchers determined would help alleviate the emergency conditions.

⁶ See Attachment C, Affidavit of Donald Bielak on behalf of PJM Interconnection, L.L.C. ¶ 12 (“Bielak Aff.”).

⁷ See Tariff, Attachment DD, section 10A(d).

⁸ Tariff, Attachment DD, section 10A(d).

⁹ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at P 441 (2015) (“CP Order”), *order on reh’g & compliance*, 155 FERC ¶ 61,157 (2016) (“CP Rehearing Order”), *aff’d sub nom. Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017).

PJM dispatchers would have needed perfect foresight of the unexpectedly fast-changing weather conditions and the unforeseen scale of forced outages to see a need to schedule these resources [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] in advance of the emergency conditions that PJM declared at 17:30¹⁰ December 23. But PJM dispatchers did not have perfect foresight.¹¹ Winter Storm Elliott presented very challenging conditions for PJM operators. While PJM dispatchers took prudent and preemptive steps to prepare in advance of Winter Storm Elliott, system conditions rapidly deteriorated during this event due to a combination of extreme temperature drops, higher than expected loads, and, most importantly, over a quarter of PJM’s generation fleet (about 47,000 megawatts (“MW”)), failed to perform and took unplanned (forced) outage. As a result, PJM dispatchers made countless phone calls as they increasingly found unavailable resources that were supposed to perform.¹² Ultimately and notwithstanding all the resource underperformance, the hard work and diligence of PJM’s dispatchers paid off; there were no mandatory load curtailments directed by PJM during this entire event—i.e., *the lights stayed on*.

Talen argues that it is not responsible for the fact that its resources underperformed during Winter Storm Elliott, and that the blame rests with PJM for not calling on the resources. However, the [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] long notification plus startup times included in the Talen Generators’

¹⁰ All times in this answer are in 24-hour clock and in Eastern Prevailing Time.

¹¹ When PJM’s dispatchers did have sufficient insight and scheduled two of the Talen Generators for the early morning hours of December 24, both resources failed to meet their commitments. Both came online hours late, and then one had trouble staying online.

¹² The severity of the event and the threat to maintaining grid reliability was recognized by the Secretary of Energy who issued an emergency order on December 24. See Department of Energy, Order No. 202-22-4

operating parameters were the sole reason PJM did not dispatch the Talen Generators.¹³ Capacity Resources are not paid to simply exist; they are paid to be available to perform and serve PJM’s loads. Thus, Capacity Market Sellers, like Talen, should assume that their resources will be needed, at a minimum, any time the PJM Region is entering stressed conditions.

Talen took on the risk of the Talen Generators underperforming in the face of such quickly changing conditions when it bid such long lead units into the capacity market. Talen had several options to mitigate this risk. Talen could have: affirmatively reached out to PJM dispatchers to see if they should go ahead and startup; self-scheduled at a level to ensure availability in the event PJM needed them to alleviate emergency conditions. Instead, Talen made the economic choice to simply sit by the phone and conserve its resources in hopes that no emergency conditions (i.e., Performance Assessment Intervals) would develop.

Contrary to the Complaint, Talen’s failure to perform during most of Winter Storm Elliott’s emergency conditions was not covered by the Tariff’s narrow and limited excuses for non-performance. Under the Capacity Performance rules in the Tariff, Capacity Market Sellers “bear the burden of delivering on their capacity obligation.”¹⁴ Because Talen did not meet these obligations during the Performance Assessment Intervals on December 23 and December 24, it was properly assessed Non-Performance Charges.

(Dec. 24, 2022), <https://www.pjm.com/-/media/documents/ferc/orders/2022/20221224-pjm-202c-doe-order.ashx>.

¹³ Bielak Aff. ¶ 12.

¹⁴ CP Rehearing Order at P 110.

II. BACKGROUND

A. *The Capacity Performance Construct Shifted Performance Risk to Generators from Load by Requiring Generators to Perform when Needed, with Very Limited Excuses, or Pay Stringent Non-Performance Charges*

1. *Overview.*

The principle underlying PJM’s Capacity Performance rules is simple: Capacity Market Sellers are responsible for the performance of their Capacity Resources. Specifically, as further elaborated on below, Capacity Market Sellers are responsible for ensuring their resources are ready and available to perform. Additionally, Capacity Market Sellers are responsible for ensuring that their resources do indeed perform when needed at times of declared emergencies.

The exactitude of this simple principle can produce seemingly harsh results; for example, a gas-fired resource is treated as non-performing even if the pipeline supplying it fuel declares an outage or if the resource is designed with a really long lead time. But the Tariff makes no exception for such conditions, because the simple principle noted above puts performance responsibility on the seller as the party in the best position to assess and address the relevant risks (including the well-known risks of pipeline interruptions and a need to perform with little notice) that its resource might not be able to perform.

The Tariff does make two exceptions, and they are explicit, narrow, and limited. Talen does not allege that the first exception—for Generator Planned Outages and Generator Maintenance Outages—applies here. The second applies only to a “scheduling action” by PJM, but only in certain circumstances. And if PJM’s hand was forced by the

seller's economic choices—its operating parameter limitations or a higher market-based offer—even this exception does not apply.¹⁵

2. *Relevant requirements of PJM's Capacity Performance Tariff provisions.*

Following severe weather events in January 2014 during which generating resources in the PJM Region performed very poorly, PJM proposed, and the Commission accepted, capacity market reforms to incent committed Capacity Resources to deliver the promised energy and reserves when PJM calls upon them in emergencies.¹⁶ Central to these reforms was a new capacity product, the Capacity Performance Resource, which must be “capable of sustained, predictable operation such that the resource will be reliably available to provide energy and reserves in an emergency condition.”¹⁷

To incent Capacity Performance Resources to deliver the capacity and reliability they are paid to provide, the Tariff provides that, in emergency conditions, underperforming Capacity Resources face stringent¹⁸ Non-Performance Charges and over-performing resources earn bonus payments.¹⁹ Specifically, for the period (known as Performance Assessment Intervals) when certain PJM-declared Emergency Actions are in effect, the Tariff requires PJM assess Non-Performance Charges when a Capacity

¹⁵ See Tariff, Attachment DD, section 10A(d).

¹⁶ See CP Order at P 7.

¹⁷ CP Order at P 28.

¹⁸ The Non-Performance Charge is based on the Net Cost of New Entry (Tariff, Attachment DD, section 10A(e)) even if the Capacity Resource Clearing Price for the relevant Delivery Year is set at a level well below the Net Cost of New Entry.

¹⁹ The details for applying and determining Non-Performance Charges and bonus payments are set forth in Tariff, Attachment DD, section 10A. A resource does not need to be a Capacity Resource to receive bonus payments.

Resource underperforms during emergency condition.²⁰ The Commission found that Non-Performance Charges will “act as a strong incentive for performance,”²¹ explaining that “if and to the extent [a Capacity Resource] fails to perform during an emergency, when it is most needed, it is appropriate that the compensation for that resource be reduced and possibly entirely forfeited.”²²

There are only two excuses from Non-Performance Charges, and they are “strictly circumscribed.”²³ Specifically, a resource’s performance shortfall may be excused only if the resource was on a PJM-approved Generator Planned Outage or Generator Maintenance Outage or the resource “was not scheduled to operate by [PJM], or was online but was scheduled down, by [PJM], based on a determination by [PJM] that such scheduling action was appropriate to the security-constrained economic dispatch of the PJM Region.”²⁴

Moreover, there is a crucial caveat to that second exception: a resource shall be assessed Non-Performance Charges to the extent it “otherwise was needed and would have been scheduled by [PJM] to perform, but was not scheduled to operate, or was scheduled down, solely due to: (i) any operating parameter limitations submitted in the resource’s offer, or (ii) the seller’s submission of a market-based offer higher than its cost-based [offer].”²⁵

²⁰ See Tariff, Attachment DD, section 10A(c) (prescribing comparison of Actual Performance against Expected Performance); Tariff, Definitions – E-F (defining Emergency Action), *id.*, Definitions – O-P-Q (defining Performance Assessment Interval).

²¹ CP Rehearing Order at P 72.

²² CP Rehearing Order at P 29.

²³ CP Order at P 167.

²⁴ Tariff, Attachment DD, section 10A(d).

²⁵ Tariff, Attachment DD, section 10A(d).

As a result of the very limited excuses from Non-Performance Charges, Capacity Market Sellers are responsible for ensuring resource performance, and thus “bear the burden of delivering on their capacity obligation.”²⁶ In this way, the Non-Performance Charge “holds capacity resources accountable for delivering on their capacity commitments”²⁷ and “provide[s] incentive to capacity sellers to invest in and maintain their resources by tying capacity revenues more closely with real-time delivery of energy and reserves during emergency system conditions.”²⁸

Capacity Performance also offers a carrot to perform, in addition to the Non-Performance Charge stick. Resources that over-perform receive “bonus” payments,²⁹ “provid[ing] the appropriate incentives for all resources to perform when they are most needed.”³⁰ The Non-Performance Charges and bonus payments are “a tariff-defined mechanism that establishes a transparent, operative framework to provide an incentive for resource reliability.”³¹ Together, both advance the overarching goal of Capacity Performance: ensuring all Capacity Resources are available to provide energy or reserves when needed, while reallocating non-performance risk from consumers to capacity

²⁶ CP Rehearing Order at P 110.

²⁷ CP Rehearing Order at P 18.

²⁸ CP Order at P 158; *see also* CP Rehearing Order at P 88 (“Capacity sellers need to make the investment and maintenance decisions ahead of time to reduce the probability that they will consistently, and for prolonged periods, be unable to deliver energy during Performance Assessment Hours.”).

²⁹ *See* Tariff, Attachment DD, section 10A(g) (“Revenues collected from assessment of Non-Performance Charges for a Performance Assessment Interval shall be distributed to each Market Participant, whether or not such Market Participant committed a Capacity Resource or Locational UCAP for a Performance Assessment Interval, that provided energy or load reductions above the levels expected for such resource during such interval.”).

³⁰ CP Order at P 182.

³¹ CP Order at P 15.

suppliers.³² Stated another way, PJM’s Tariff rules penalizing under-performance and rewarding over-performance are designed so that customers get the reliability for which they are paying and generators’ capacity revenues are tied “more closely with real-time delivery of energy and reserves during emergency system conditions.”³³

B. Commission Policy and the Governing Provisions of the Tariff and Operating Agreement Afford PJM Substantial Discretion to Declare, Manage, and Resolve Emergencies

As noted in the preceding section, Non-Performance Charges are assessed during Performance Assessment Intervals, which are triggered by PJM’s declaration of certain types of procedures that qualify as Emergency Actions. The Commission has repeatedly recognized the importance of affording regional transmission organizations (“RTOs”), such as PJM, the discretion to respond to operational circumstances related to reliability concerns, and the Tariff and Operating Agreement assign PJM the central role in declaring and managing emergencies, with few if any express Tariff conditions on how PJM implements that vital responsibility.

For context, the Commission has long recognized that “[t]he reality of pool operations is a continuous matching of load and supply that requires every system operator to have the flexibility to respond to operational crises as they develop.”³⁴

Applying this policy, the Commission recently declined to specify requested criteria that

³² See, e.g., CP Order at P 5 (“[A] resource adequacy construct that fails to provide adequate incentives for resource performance can threaten the reliable operation of PJM’s system and force consumers to pay for capacity without receiving commensurate reliability benefits.”); CP Rehearing Order at PP 27 (“PJM’s proposed revisions to the capacity market penalty structure reallocate a significant portion of this performance risk to capacity resource owners and operators.”), 109 (recognizing that each non-performance excuse “represent[s] a reallocation of non-performance risk from capacity suppliers to consumers.” (citing *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 71 (2014))).

³³ CP Order at P 158.

³⁴ *Me. Pub. Utils. Comm’n*, 97 FERC ¶ 61,322, at P 26 (2001).

“could restrict operators’ ability to apply their expert judgment to actual conditions on the system in making decisions to maintain reliable operations.”³⁵ In the same vein, the Commission has found that “it may be appropriate to provide operational and reliability-related discretion to independent system operators, and to not second-guess their decisions in that regard.”³⁶

Understandably, the need for such discretion is most acute during emergencies, and PJM’s governing documents are designed to not unduly constrain PJM’s efforts to address emergencies. Most importantly, the Operating Agreement (executed by all Capacity Market Sellers, among others), without elaboration, assigns to PJM the authority to declare an Emergency and manage grid operations to ensure reliability and alleviate or end an Emergency.³⁷ The Operating Agreement defines “Emergency” to include “an abnormal system condition requiring manual or automatic action to maintain system frequency, or to prevent loss of firm load, equipment damage, or tripping of system elements that could adversely affect the reliability of an electric system or the safety of persons or property;” and “a condition that requires implementation of emergency procedures as defined in the PJM Manuals.”³⁸

Implementing this responsibility, PJM has an entire manual solely devoted to Emergency Operations.³⁹ That manual opens with policy statements that provide the

³⁵ *PJM Interconnection, L.L.C.*, 180 FERC ¶ 61,051, at P 82 (2022).

³⁶ *Big Sandy Peaker Plant, LLC v. PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,216, at P 50 (2016); *see also Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,129, at P 37 (2018) (“We find that it is appropriate for MISO to have discretion to respond to operational circumstances related to reliability concerns.”).

³⁷ Operating Agreement, section 10.4(xx).

³⁸ Operating Agreement, Definitions – E-F.

³⁹ *See* System Operations Division, *PJM Manual 13: Emergency Operations*, PJM Interconnection, L.L.C. (May 18, 2023), <https://www.pjm.com/-/media/documents/manuals/m13.ashx>.

essential context for the details that follow, explaining that “Power system disturbances” which can occur “as the result of loss of generating equipment . . . or as the result of unexpected load changes . . . may be of, or develop into, a magnitude sufficient to affect the reliable operation of the PJM RTO and/or the Eastern Interconnection;” and stressing that “[t]hese events demand timely, decisive action to prevent further propagation of the disturbance.”⁴⁰ PJM’s overarching responsibility during Emergencies is “[t]aking actions [PJM] determines are consistent with Good Utility Practice and are necessary to maintain the operational integrity of the PJM RTO and the Eastern Interconnection.”⁴¹

As particularly relevant here, the Tariff defines “Emergency Actions” that trigger Performance Assessment Intervals as “any emergency action for locational or system-wide capacity shortages that either utilizes pre-emergency mandatory load management reductions or other emergency capacity, or initiates a more severe action.”⁴² One such action, declared here, is a “Maximum Generation Emergency” which means “an Emergency declared by [PJM] to address either a generation or transmission emergency in which [PJM] anticipates requesting one or more Generation Capacity Resources . . . to operate at its maximum net or gross electrical power output, subject to the equipment stress limits for such Generation Capacity Resource . . . in order to manage, alleviate, or end the Emergency.”⁴³

⁴⁰ PJM Manual 13, section 1.1.

⁴¹ *Id.* (emphasis added); see also Tariff, Definitions – G-H (defining Good Utility Practice).

⁴² Tariff, Definitions – E-F.

⁴³ Tariff, Definitions – L-M-N (emphasis added).

C. *PJM Exercised Its Discretion to Declare Emergency Actions During Winter Storm Elliott as a Component of PJM’s Prudent Response to Very Challenging, Rapidly Changing Conditions, Including Unexpectedly High Demand and Unexpectedly High Forced Outages*

- 1. The PJM Region faced unprecedented, rapidly changing conditions during Winter Storm Elliott.*

Winter Storm Elliott, lasting from December 23, 2022 through December 25, 2022, caused record cold temperatures across the PJM Region.⁴⁴ The severe cold weather on December 23, including a record-breaking temperature drop of 29 degrees Fahrenheit over 12 hours on that day surpassed the previous PJM record of a 22-degree drop during the 2014 Polar Vortex.⁴⁵ Adding to the grid management challenges, the overnight minimum load in the early morning hours of December 24 was by far the highest on record for that date—exceeding by 40,000 MW the second highest minimum overnight load on that date in the prior decade.⁴⁶ The challenges were exacerbated by over a quarter of PJM’s generation fleet (about 47,000 MW) taking unplanned (i.e., forced) outages during these emergency conditions.

- 2. PJM deployed its available tools to give generators advance notice of the need to prepare for challenging conditions.*

Beginning on December 20, PJM issued multiple Cold Weather Advisories and Cold Weather Alerts on both a regional basis and an entire RTO basis. These various types of advisories and alerts, defined and explained in Attachment A and deployed as shown on the timeline in Attachment B, were intended to elevate awareness of impending

⁴⁴ See *Winter Storm Elliott Frequently Asked Questions*, PJM Interconnection, L.L.C., 3 (Apr. 12, 2023), <https://www.pjm.com/-/media/markets-ops/winter-storm-elliott/faq-winter-storm-elliott.ashx> (“Winter Storm Elliott FAQ”).

⁴⁵ See Winter Storm Elliott FAQ at 3.

⁴⁶ See Mike Bryson, Sr. et al., *Winter Storm Elliott*, PJM Interconnection, L.L.C., 8 (Jan. 13, 2023), <https://pjm.com/-/media/committees-groups/committees/mic/2023/20230111/item-0x---winter-storm-elliott-overview.ashx> (“Winter Storm Elliott Overview”).

conditions and provide notice to Members—including those responsible for Capacity Resources—so they could prepare personnel and facilities for extreme cold weather conditions.

3. *PJM declared emergency actions during December 23 and December 24 as part of PJM’s successful effort to preserve reliability.*

On the morning of December 23, PJM started the operating day with approximately 133 gigawatts (“GW”) of energy committed in the Day-Ahead Market and an additional 9 GW of available 30-minute reserves, notwithstanding the approximately 12 GW of unplanned (forced) outages that were reported for the PJM generation fleet.⁴⁷ A total of 155,750 MW of generation reported as available on the morning of December 23 exceeded the then-forecast PJM Region peak of about 127,000 MW, leaving (at that time) almost 29 GW of reserve capacity expected to be available to absorb load increases and generation contingencies and support PJM’s neighboring systems.⁴⁸

However, as the day went on, temperatures plunged incredibly quickly and demand spiked. At the same time, PJM began seeing high levels of forced generation outages.⁴⁹ At 17:30 on December 23, PJM declared a Pre-Emergency Load Management Reduction Action, and a Maximum Generation Emergency Action through 23:59 on December 23.⁵⁰ The declaration of the Maximum Generation Emergency Action triggered Performance Assessment Intervals and put all on notice of the severity of the

⁴⁷ See Winter Storm Elliott FAQ at 3, 7.

⁴⁸ See Winter Storm Elliott Overview at 5.

⁴⁹ See Winter Storm Elliott Overview at 12.

⁵⁰ See Attachment B at 1. Although it was issued to be in effect through 23:59, PJM cancelled the Maximum Generation Emergency Action at 23:00.

emergency conditions facing the PJM Region.⁵¹ During the evening of December 23, with (as previously noted) power demand rising to a peak of about 135,000 MW and generator forced outages increasing to 34,500 MW,⁵² at 23:00, PJM declared a Maximum Generation Alert and Load Management Alert, starting December 24 at 00:00.⁵³

Given the persistent high load demand and high forced outage rates (rising up to about 47,000 MW by the morning peak, as previously noted) on the morning of December 24, PJM continued to invoke its various alerts and authorities to manage the Emergency and maintain reliability, and to put all Market Participants on notice of the urgent need for capacity. Thus, PJM issued a rare public region-wide call for conservation from 04:00 on December 24 to 10:00 on December 25.⁵⁴ At 04:20, PJM issued a Pre-Emergency Load Management Reduction Action, and an Emergency Load Management Reduction Action.⁵⁵ On December 24, PJM issued a Maximum Generation Emergency for the period from 04:27 to 22:00, triggering Performance Assessment Intervals.

Additionally, around 06:30 on December 24, in response to generators starting to inform PJM dispatchers that their resources were reaching their emission runtime limits, PJM began working with the U.S. Department of Energy (“DOE”) to obtain an emergency order pursuant to section 202(c) of the Federal Power Act (“FPA”). PJM,

⁵¹ Performance assessment hours are triggered when PJM declares an Emergency Action. Tariff, Attachment DD, section 10.A(a). An Emergency Action is defined as “locational or system-wide capacity shortages” that cause “pre-emergency mandatory load management reductions or . . . a more severe action.” Tariff, Definitions – E-F.

⁵² See Winter Storm Elliott FAQ at 3.

⁵³ See Attachment B at 1.

⁵⁴ See Attachment B at 2.

⁵⁵ See Attachment B at 2.

later that day, petitioned DOE for a declaration of energy emergency,⁵⁶ and at 17:30 the DOE issued the requested section 202 emergency order,⁵⁷ authorizing all electric generating units serving the PJM Region to operate up to their maximum generation output levels under limited, prescribed circumstances, even if doing so exceeded their air quality or other permit limitations.

PJM's actions helped preserve reliability during this very challenging period. PJM did not shed any load during Winter Storm Elliot.

III. TALEN DOES NOT QUALIFY FOR AN EXCUSAL FROM NON PERFORMANCE CHARGES.

A. *PJM Did Not Schedule the Talen Generators Solely Due to Their Very Long Lead Times, Which Precluded the Resources from Being Able to Meet Fast-Arriving Emergency Conditions*

1. *But for the Talen Generators' long lead times, PJM would have scheduled these resources to meet the Winter Storm Elliott emergency conditions.*

Under the Capacity Performance construct, generators are responsible for ensuring that they are available to timely provide energy and reserves during emergencies, otherwise they are subject to Non-Performance Charges. As discussed, a resource that “otherwise was needed and would have been scheduled by [PJM] to perform, but was not scheduled to operate, or was scheduled down, solely due to . . . any operating parameter limitations submitted in the resource’s offer” is subject to Non-Performance Charges for any underperformance.⁵⁸ That is the case here. As Mr. Bielak

⁵⁶ Request for Emergency Order Under Section 202(c) of the Federal Power Act of PJM Interconnection, L.L.C., Dept. of Energy (Dec. 24, 2022) <https://www.energy.gov/sites/default/files/2022-12/PJM%20202%28c%29%20Request.pdf>.

⁵⁷ See Department of Energy, Order No. 202-22-4 (Dec. 24, 2022), <https://www.pjm.com/-/media/documents/ferc/orders/2022/20221224-pjm-202c-doe-order.ashx>.

⁵⁸ Tariff, Attachment DD, section 10A(d).

explains, *but for* the Talen Generators’ long lead times, PJM would have scheduled these resources. Mr. Bielak explains that “PJM needed the Talen Generators to provide energy to help alleviate the emergency conditions, [but] we could not call on them because they would take too long to arrive.”⁵⁹ That fact is determinative, and ends the inquiry. Accordingly, PJM properly assessed Non-Performance Charges.

Each of the Talen Generators has very long lead times for notification and startup before the resource is capable of providing energy:

- Martins Creek 3 – [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] notification plus startup time;
- Martins Creek 4 – [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] notification plus startup time;
- Wagner 1 – [BEGIN CUI//PRIV-HC] [REDACTED] [REDACTED] [END CUI//PRIV-HC] notification plus startup time;
- Wagner 4 – [BEGIN CUI//PRIV-HC] [REDACTED] [REDACTED] [END CUI//PRIV-HC] notification plus startup time; and
- Montour 2 – [BEGIN CUI//PRIV-HC] [REDACTED] [REDACTED] [END CUI//PRIV-HC] notification plus startup time.⁶⁰

These long lead times require any entity (whether PJM or Talen) that desires these resources to be online and capable of providing energy and reserves to project [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] into the future and evaluate the merits of running such resources.

Yet, Talen asserts that it is “not plausible” that PJM did not run its units “solely due to” these long lead operating parameter limitations.⁶¹ Talen offers speculation as to

⁵⁹ Bielak Aff. ¶ 14.

⁶⁰ See Complaint at Attachment 1 Affidavit of Dale E. Lebsack, Jr. ¶¶ 7 (Martin Creek 3), 1 (Martin Creek 4), 4 (Wagner 1), 8 (Wagner 4), 12 (Montour 2).

⁶¹ Complaint at 16.

other reasons why PJM may have chosen to not schedule these resources.⁶² In particular, Talen hypothesizes that because PJM scheduled “Talen-operated plants with start-up times similar to the Martins Creek units” (i.e., [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC]), then there must have been some reason other than the long lead times for why PJM did not schedule the Talen Generators.⁶³ This is a non sequitur. An anecdotal reference to the dispatch of other resources is irrelevant to why PJM did not schedule the resources subject of the Complaint, and merely serves to obscure matters.

The facts and circumstances behind each dispatch decision are unique. For example, Mr. Bielak explains that some long lead generators were dispatched *before* the emergency conditions arrived for the purpose of addressing localized congestion mitigation issues.⁶⁴ Mr. Bielak states that no such congestion issues necessitated scheduling the Talen Generators.⁶⁵ However, this has no bearing on PJM’s inability to schedule Talen Generators in response to the quickly appearing emergency conditions due to their long lead times.

Talen further speculates that PJM must not have dispatched the Talen Generators for reasons other than their long lead times because the Performance Assessment Intervals extended beyond those long lead times, meaning that there was sufficient time for PJM to schedule the resources and have them operating during the emergency.⁶⁶

⁶² See Complaint at 16.

⁶³ Complaint at 16.

⁶⁴ Bielak Aff. ¶ 16 (“To the extent PJM scheduled long lead-time generators before the emergency conditions arrived, that was for the purpose of addressing localized congestion issues. These resources therefore were not dispatched to address Winter Storm Elliott emergency conditions, but to resolve other system conditions.”).

⁶⁵ Bielak Aff. ¶ 16 (“No such transmission congestion issues required PJM to call on any of the Talen Generators for December 23 or 24.”).

⁶⁶ See Complaint at 16-18.

However, this argument assumes perfect foresight on PJM’s part as to when the emergency conditions would begin and for how long it would extend; it also assumes that that PJM would dispatch resources based on the anticipated length of the emergency. As explained above, system conditions, including demand and the availability of generation resources, were constantly in flux and rapidly changing. The capacity emergency developed very quickly, and system conditions deteriorated rapidly on December 23. PJM was working diligently to end the emergency as quickly as possible, and as Mr. Bielak explains, resources with shorter lead times were preferred to accomplish that goal.⁶⁷ Mr. Bielak also states that “[h]ad the Talen Generators been available with much shorter notification plus startup times they could have helped PJM manage those rapidly evolving conditions during Winter Storm Elliott, and PJM would have dispatched them.”⁶⁸

Indeed, in order for PJM to have scheduled the Talen Generators in time to help alleviate the emergency conditions that arrived on December 23 at 17:30, PJM would have needed to have scheduled them between 18:30 on December 22 and 05:30 on December 23. But, on the morning of December 23, PJM anticipated having sufficient resources without calling on the Talen Generators, with about 29 GW of reserve capacity reasonably expected to be available to absorb any load increases and generation contingencies and support PJM’s neighboring systems.⁶⁹ For comparison, PJM’s Day-ahead reserve requirement for December 23 was 3 GW. Although a Cold Weather

⁶⁷ Bielak Aff. ¶ 14 (“To respond to the rapidly changing conditions, including a number of resources that did not show up as scheduled on December 23, PJM operators called on resources with as short a lead time as possible to alleviate the conditions sooner.”).

⁶⁸ Bielak Aff. ¶ 14.

⁶⁹ See Winter Storm Elliott Overview at 5.

Advisory was in effect at this time, the system was not experiencing emergency conditions. Thus, at the times PJM would have needed to contact Talen—in accordance with the Talen Generators’ operating parameter limitations—for those resources to help address emergency conditions, system conditions did not support dispatching those resources.⁷⁰

2. *PJM would have called on the Talen Generators if they had shorter lead times.*

Talen implies that PJM’s not dispatching the Talen Generators was equivalent to a determination by PJM that the Talen Generators were not needed.⁷¹ Talen inaccurately characterizes its lack of performance as “following PJM’s dispatch instructions.”⁷² However, PJM did not dispatch the Talen Generators because they were not ready to generate and provide energy in the necessary timeframe.⁷³ Merely sitting by the phone waiting when an emergency occurs is not enough. Talen asserts that Martins Creek units were not scheduled through “no failure or shortcoming on the part of Martins Creek.”⁷⁴ Not so. It was Talen’s responsibility, not PJM’s, to ensure that the Talen Generators started up in time to be available for dispatch by PJM during the performance assessment event. Talen’s failure to start up their long lead resources with enough time to ensure

⁷⁰ See Bielak Aff. ¶ 13.

⁷¹ See Complaint at 13 (“If a unit was not dispatched, it follows that the unit was not needed . . .”), 18 (“PJM made a clear choice when it chose not to dispatch Martins Creek, signaling that these units were not needed.”).

⁷² Complaint at 18.

⁷³ See Bielak Aff. ¶ 14 (“Had the Talen Generators been available with much shorter notification plus startup times they could have helped PJM manage those rapidly evolving conditions during Winter Storm Elliott, and PJM would have dispatched them.”).

⁷⁴ Complaint at 15.

their availability for dispatch is not equivalent to a “schedule down” by PJM under the Tariff.

B. Because the Talen Generators Were Not Scheduled Solely Due to Their Long Lead Time Operating Parameters, it Is Just and Reasonable to Assess Non-Performance Charges

Contrary to Talen’s claims that imposing Non-Performance Charges here would be unjust and unreasonable,⁷⁵ such an outcome is just and reasonable, as dictated by Tariff and Commission holdings. As discussed, the Tariff explicitly does not excuse from Non-Performance Charges underperforming resources that were not scheduled “solely due to . . . any operating parameter limitations submitted in the resource’s offer.”⁷⁶ Application of Non-Performance Charges in such instance reflects that the Capacity Market Seller has placed limitations on the availability of the resource, thereby reducing PJM’s ability to deploy the resource to help alleviate an emergency. Thus, any shortfall in the resource’s performance below its capacity commitment that would have been provided *but for* the seller’s economic choice(s), are assessed Non-Performance Charges, regardless of whether that choice is reflected in a seller-specified parameter limitation (e.g., notification and startup times).⁷⁷

As the United States Court of Appeals for the District of Columbia Circuit observed, “the Commission concluded that it is reasonable to penalize a resource for failing to operate outside of its parameter limitations. It explained that ‘parameter limits

⁷⁵ Complaint at 10.

⁷⁶ Tariff, Attachment DD, section 10A(d).

⁷⁷ See, e.g., *PJM Interconnection, L.L.C.*, Answer of PJM Interconnection, L.L.C., Docket No. ER15-623-000, at 70 (Feb. 13, 2015) (“[P]hysical resource limitations are a design and economic choice by the resource provider. Other resource providers may have made a choice to install a more flexible or robust design. Resource providers should be exposed to the consequences of those economic design choices. When they are, the result over time will be more flexible and better performing resources—because project developers will see that better performing resources end up with more capacity revenues.”).

should not be viewed as a permanent entitlement to under-perform. Instead, those limits should be exposed to financial and market consequences.”⁷⁸ In other words, the Capacity Performance Tariff holds “resources with restrictive operating limits to the same standards as resources with fewer limitations.”⁷⁹ This equivalent treatment appropriately reflects that “a resource that is unable to produce energy or provide operating reserves during Performance Assessment [Intervals] because of parameter limitations provides less capacity value to customers than a resource that is able to perform during these [intervals].”⁸⁰ As a result, “a resource that fails to perform because of parameter limitations [may] receive less net capacity revenue than a performing resource.”⁸¹ Accordingly, the Commission has specifically rejected “exemptions for resources based upon their physical operating parameters.”⁸² Under PJM’s capacity market rules “[r]esources . . . run a risk in including parameter limitations in their energy market offers, and are encouraged to maximize their flexibility to perform consistent with the new capacity obligation.”⁸³

Thus, the Talen Generators’ failure to perform properly is not excused, because even though they were needed, PJM could not schedule them to operate solely due to the

⁷⁸ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d at 674 (quoting CP Rehearing Order at P 103); see CP Order at P 45 (“Without more stringent penalties, PJM has shown there is little incentive for a seller to make capital improvements, or increase its operating maintenance for the purpose of enhancing the availability of its unit during emergency conditions.”).

⁷⁹ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d at 674.

⁸⁰ CP Order at P 441; see CP Rehearing Order at P 106 (“[I]n the capacity market, if PJM does not schedule that resource due to its parameter limits, then PJM applies a Non-Performance Charge since the resource was not available pursuant to its capacity obligation. Resources therefore run a risk in including parameter limitations in their energy market offers, and are encouraged to maximize their flexibility to perform consistent with the new capacity obligation.”).

⁸¹ CP Order at P 441.

⁸² *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,213, at P 24 (2016).

⁸³ CP Rehearing Order at P 106.

long lead times specified in their operating parameter limitations.⁸⁴ Talen should not be excused from its decisions to invest in resources that require long lead times and offering them into the capacity market. Such decisions exposed Talen to the financial consequences of Non-Performance Charges that were assessed. The long lead times of the Talen Generators are driven by their inherent physical characteristics, and not outside forces.⁸⁵ The lack of flexibility in long lead times present an inherent risk of underperformance that Talen was aware of when it bid those resources into the capacity market and agreed to an “obligat[ion] to deliver energy during the relevant Delivery Year as scheduled and/or dispatched by [PJM] during the Performance Assessment Intervals.”⁸⁶ Nonetheless, Talen made the economic choice to accept capacity payments for everyday of the 2022/2023 Delivery Year in exchange for providing capacity during emergency conditions or pay Non-Performance Charges.⁸⁷ Accordingly, the Talen Generators’ inability to respond to the Winter Storm Elliott emergency conditions is rightfully subject to Non-Performance Charges.

Moreover, following the Tariff and assessing Non-performance Charges to resources that were needed but were not scheduled solely due to an inflexible operating parameter limitation, like long lead times, provides a signal for investment in more flexible resources. The Commission has recognized that the Capacity Performance construct should affect long-term Capacity Resource investments, stating that “[i]t is

⁸⁴ See Bielak Aff. ¶ 11.

⁸⁵ See Bielak Aff. ¶ 19.

⁸⁶ Tariff, Attachment DD, section 5.5A(a).

⁸⁷ Recognizing that there is a capacity market must offer requirement for certain Existing Generation Capacity Resources, Talen could have elected to remove the Capacity Resource status for its units and become energy only resources so that they would not be required to offer into the capacity market. See Tariff, Attachment DD, section 6.6.

critical that the capacity market rules send the proper long-term investment signals to ensure capacity that can meet the reliability needs of the region.”⁸⁸ Failure to impose Non-Performance Charges in accordance with the Tariff would undermine “[a] primary goal of PJM’s Capacity Performance construct [of] incent[ing] flexible resources.”⁸⁹

C. Talen’s Attempts to Shift Responsibility to PJM for the Talen Generators’ Failure to Provide Energy and Reserves During Winter Storm Elliott Should Be Rejected

1. Talen alone bears responsibility for meeting its capacity obligation.

Claiming that it was PJM’s decision to not schedule any of the Talen Generators and therefore the units should not be assessed Non-Performance Charges,⁹⁰ Talen attempts to shift responsibility for ensuring the Talen Generators’ availability to perform during the emergency conditions onto to PJM.⁹¹ Talen is correct that PJM is responsible for maintaining reliability,⁹² but PJM cannot meet that responsibility without the fleet of Capacity Resources that committed to be available to provide energy and reserves in emergency conditions. The Commission has found that “capacity sellers [like Talen] bear the burden of delivering on their capacity obligation.”⁹³

Notwithstanding this capacity obligation, Talen attempts to shirk this responsibility and place the generation owner in a wholly passive role, limiting them only

⁸⁸ CP Rehearing Order at P 103.

⁸⁹ CP Rehearing Order at P 103.

⁹⁰ See Complaint at 8-9.

⁹¹ See, e.g., Complaint at 10 (“PJM is Responsible for Directing Generators and Ensuring Reliability.”); Complaint at 10-11 (“PJM must therefore act to address the reliability of its area” (internal quotation marks and citation omitted)).

⁹² See Complaint at 10 (“PJM and generation owners each have responsibilities that, when followed, work to ensure the reliability of the PJM balancing authority.”).

⁹³ CP Rehearing Order at P 110.

to “taking any action, as requested or directed by PJM.”⁹⁴ The Talen Generators were indeed passive during Winter Storm Elliott: “Talen was aware of the coming storm and associated risk of extreme conditions and prepared its resources accordingly, then waited for dispatch instructions.”⁹⁵ But Capacity Market Sellers like Talen bear responsibility to do more than simply sit by the phone wondering if PJM will call. As the Commission held in accepting the Capacity Performance construct, “it is not enough simply to ensure that ‘capacity,’ whether in the form of existing or new resources, is procured to meet reserve targets; rather, that capacity must carry with it meaningful performance obligations, and corresponding incentives and penalties, to ensure that those resources actually deliver when needed.”⁹⁶ Thus, Talen’s apparent passivity is inappropriate, as it ignores the very long lead characteristics of the Talen Generators. Talen was instead required to act proactively to ensure its resources would be available to “provide energy and reserves whenever PJM determines an emergency condition exists.”⁹⁷

Talen is aware that the long lead times of the Talen Generators render them unable to adapt to the quickly changing weather patterns, but made the decision to keep the resources offline. As a large sophisticated entity, Talen has the ability to observe the weather patterns for itself and predict the turn of weather events. Indeed, PJM first notified members of the impending storm on December 20, with the issuance of the Cold

⁹⁴ Complaint at 11 (internal quotation marks and citation omitted).

⁹⁵ Complaint at 8.

⁹⁶ CP Order at P 9; *see also* CP Rehearing Order at P 33 (“[R]esources that clear the market and assume a Capacity Performance obligation are expected to perform during periods of system stress, with a failure to do so resulting in the loss of their capacity revenues.”).

⁹⁷ CP Order at P 51.

Weather Advisory.⁹⁸ Thus, even Talen admits that “[it] was aware of the coming storm and associated risk of extreme conditions . . . then waited for dispatch instructions.”⁹⁹ That is, Talen sat idly by awaiting a call from PJM instead of taking all necessary steps to ensure its resources would be able to perform in the event emergency conditions arose.

2. *Talen could have self-scheduled the Talen Generators to ensure availability during emergency conditions.*

One approach available to Talen was to self-schedule. Mr. Bielak explains that this option is available “[e]ven if PJM does not dispatch a Capacity Resource,”¹⁰⁰ and he is “not aware of any PJM policy against self-scheduling during emergency conditions.”¹⁰¹ The Commission has found self-scheduling to be “valid market behavior.”¹⁰² In PJM, all a seller needs to do is “request approval from PJM to self-schedule it and be granted to the ability to come online and generate, while not subject to PJM dispatch.”¹⁰³ PJM will evaluate such “requests to determine whether the self-schedule will affect reliability,” and “PJM’s standard for denying a self-schedule request is relatively high.”¹⁰⁴ PJM will only deny a self-scheduling request “[i]f, and only if, allowing the self-scheduled resource to come online would cause uncontrollable reliability issues would PJM deny the request.”¹⁰⁵ Indeed, if a resource’s self-scheduling request was denied, the Capacity Market Seller of that unit would not be subject to Non-Performance Charges as that

⁹⁸ See Attachment B at 1.

⁹⁹ Complaint at 8.

¹⁰⁰ Bielak Aff. ¶ 17.

¹⁰¹ Bielak Aff. ¶ 18.

¹⁰² CP Rehearing Order at P 108.

¹⁰³ Bielak Aff. ¶ 17.

¹⁰⁴ Bielak Aff. ¶ 17.

¹⁰⁵ Bielak Aff. ¶ 17.

would be based on a determination by the PJM that such scheduling action was inappropriate to the security-constrained economic dispatch of the PJM Region. Here, however, Mr. Bielak states that “Talen could have brought the Talen Generators online during the Performance Assessment Intervals by making the choice to self-schedule the units.”¹⁰⁶

In contrast, Talen suggests that self-scheduling was not an option, pointing to a 2016 PJM training video, a 2019 review of a performance assessment event, and a PJM transmittal letter proposing an exemption from Non-Performance Charges for resources that provide energy consistent with a PJM-approved ramp rate.¹⁰⁷ But, the Commission rejected the PJM ramp rate exemption proposal that Talen cites.¹⁰⁸ The Commission found that self-scheduling during emergency conditions should *not* be a problem, because “that problem should be offset by additional resource availability and flexibility resulting from the currently approved Capacity Performance construct.”¹⁰⁹ The Commission also noted, “PJM operators can ramp down flexible units to avoid a reliability problem, and [PJM] can reject self-scheduling requests as necessary.”¹¹⁰

As demonstrated, no rule prevented Talen from self-scheduling the Talen Generators to ensure that they would be available perform during emergency conditions consistent with their capacity obligations.¹¹¹ Nonetheless, Talen chose not to do so,

¹⁰⁶ Bielak Aff. ¶ 17.

¹⁰⁷ Complaint at 13, 14, 17.

¹⁰⁸ See *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,213. The 2016 video presentation cited by Talen predates the Commission’s rejection of the ramp rate exemption proposal.

¹⁰⁹ *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,213, at P 26.

¹¹⁰ *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,213, at P 25.

¹¹¹ In fact, in the Capacity Performance proceeding, the Commission responded this same claim holding that, “[t]o the extent that resources choose to self-schedule, PJM’s OATT currently allows them to do so

presumably because it would have been uneconomic if its resources were not later dispatched. While self-scheduling is an option, it imposes costs for suppliers. Self-scheduled resources are not eligible for make whole payments, and may only be compensated at the applicable energy market price, regardless of whether that covers its costs. It is safe to assume that Talen, a sophisticated entity, evaluated the economic choice of incurring the costs to be available and ready, consistent with its capacity commitment, or test the odds that no emergency occurs, or if it does, that PJM does not need the resource-and no penalty is incurred. If the Talen Generators had taken on the economic risk of self-scheduling to be available, Talen would not have been assessed any Non-Performance Charges. But, Talen made the economic choice to *not* start up its generators and self-schedule to be available for dispatch when needed.¹¹²

Given the long lead times for these resources, merely sitting by the phone waiting for PJM to call was not enough. The fact that PJM did not actually contact Talen is not a valid exemption from Non-Performance Charges. Had PJM contacted Talen, the Talen Generators would not have been available to perform until [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] after the start of the emergency. Instead, Talen needed to proactively take steps to ensure that the Talen Generators would be “available

consistent with PJM’s market rules. This is valid market behavior, and we are not persuaded that the possibility of resources’ self-scheduling renders PJM’s proposal to assess Non-Performance Charges unjust and unreasonable.” CP Rehearing Order at P 108.

¹¹² In the ramp rate proceeding, the Commission found costs may be a deterrent to resources self-scheduling. *See PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,213, at P 25 (“To the extent PJM is concerned that resources will self-schedule in the hours leading up to a Performance Assessment Hour, before the system is under stress, resources risk economic losses should they self-schedule during a period where energy prices are below their cost of production.”).

to provide energy and reserves in an emergency condition”¹¹³ as required by its capacity commitment.

D. Elements of the Complaint Are Barred by Operating Agreement, Schedule 1, Section 1.8.2 and Commission Precedent

PJM’s answer and supporting affidavit demonstrate that Talen has not asserted any valid basis to challenge PJM’s unit dispatch or scheduling decisions made during Winter Storm Elliott. Talen is challenging PJM’s decision not to schedule, and the bases for not scheduling, the long-lead Talen Generators to address the emergency conditions brought by the storm.¹¹⁴ Regardless, however, the Commission need not reach or decide any of Talen’s arguments because these claims are barred by the Operating Agreement, Schedule 1, section 1.8.2 and *PPL EnergyPlus, LLC v. PJM Interconnection, L.L.C.*¹¹⁵

Specifically, Operating Agreement, Schedule 1, section 1.8.2 provides that disputes concerning PJM’s dispatch decisions should be made directly to PJM, not to the Commission.¹¹⁶ This provision states that “[c]omplaints arising from or relating to [the selection, scheduling or dispatch of resources] shall be brought to the attention of [PJM].”¹¹⁷ Section 1.8.2 requires that any such complaints must “be brought to the attention of [PJM] not later than the end of the fifth Business Day after the end of the Operating Day to which the selection or scheduling relates, or in which the scheduling or

¹¹³ CP Order at P 28.

¹¹⁴ See, e.g., Complaint at 3 (“[T]hey were not operating because of decisions, actions, or errors on the part of PJM.”), 8 (“These generators had available staffing, access to fuel, and start times that would have allowed them to provide power during the December 23 and December 24 PAIs, had PJM scheduled them in a timely manner.”), 15 (“During Winter Storm Elliott, PJM failed to follow its own reasoning when it chose not to schedule long-lead generation ahead of time or dispatch such units in real-time.”).

¹¹⁵ 117 FERC ¶ 61,338, at P 33 (2006)

¹¹⁶ See Tariff, Attachment K-Appendix, section 1.8.2.

¹¹⁷ Operating Agreement, Schedule 1, section 1.8.2(a); Tariff, Attachment K-Appendix, section 1.8.2(a).

dispatch took place.”¹¹⁸ It further provides that PJM’s market participants shall not be entitled to any “form of reimbursement from [PJM] or any other Market Participant for any loss, liability or claim, including any claim for lost profits, incurred as a result of a mistake, error or other fault by [PJM] in the selection, scheduling or dispatch of resources.”¹¹⁹ Talen’s request for relief falls squarely within the scope of this provision, and is foreclosed by it, because Talen questions PJM’s reasoning for not dispatching the Talen Generators—that they were not dispatched solely due to their long lead operating parameter limitation.¹²⁰ To address this claim, the Commission would have to decide the bases for PJM’s dispatch decisions and whether each of the Talen Generators should have been dispatched.

The Commission’s decision in *PPL EnergyPlus* confirms this reading of the Operating Agreement and supports the rejection of Talen’s argument. There, the Commission barred the claim of a generator that its unit should have been called sooner by the operators during a reliability emergency related to the overload of a single transmission line.¹²¹ The generator argued that its unit should have been dispatched before PJM called a Maximum Emergency Generation Event and started to purchase emergency power and not afterwards, in violation of the Operating Agreement.¹²² The Commission dismissed the generator’s claim stating: “PJM and the signatories to the

¹¹⁸ Operating Agreement, Schedule 1, section 1.8.2(a); Tariff, Attachment K-Appendix, section 1.8.2(a).

¹¹⁹ Operating Agreement, Schedule 1, section 1.8.2(d); Tariff, Attachment K-Appendix, section 1.8.2(d).

¹²⁰ See, e.g., Complaint at 3 (“[T]hey were not operating because of decisions, actions, or errors on the part of PJM.”), 15 (“PJM made a judgment call, or perhaps even a mistake, at the time of the PAIs, and *did not* dispatch Martins Creek.”), 16 (“Even if operational limitations were a factor in PJM’s decision not to schedule the Martins Creek units, it is not plausible that it was the only factor.”).

¹²¹ *PPL EnergyPlus*, 117 FERC ¶ 61,338, at PP 2, 33.

¹²² *Id.* at PP 3-4.

Operating Agreement, including PPL, have agreed that disputes concerning these matters *not* lead to the retroactive unraveling of PJM’s market dispatch decisions leading to re-creation of hypothetical prices based on potentially different dispatch decisions.”¹²³ This finding applies equally to Talen claims here.

Further, PJM’s longstanding rationale for including this provision in the Operating Agreement, as explained by the Commission, underscores why it should be applicable in this case:

As PJM correctly notes . . . the parties’ claim limitation agreement recognizes the day-to-day stress of system operations and the need, on PJM’s part, to exercise judgment in making dispatch decisions, particularly in emergencies. Because such dispatch decisions are made in real-time, such decisions cannot be reversed and trying to recreate monetary damages for potential errors would be difficult and inappropriate.¹²⁴

The “stress” faced by the PJM operators and the “need for judgement” during Winter Storm Elliott dwarfs the issues faced by the operators in *PPL EnergyPlus*, where the emergency conditions affected only a small part of the PJM system. This rationale thus applies with even greater force to the facts in this proceeding given the severity of the situation that PJM faced.

IV. ADMISSIONS AND DENIALS PURSUANT TO 18 C.F.R. § 385.213(c)(2)(i)

Pursuant to Rule 213(c)(2)(i) of the Commission’s rules of Practice and Procedure,¹²⁵ PJM affirms that any allegation in the Complaint that is not specifically and expressly admitted above is denied.

¹²³ 117 FERC ¶ 61,338, at P 33.

¹²⁴ *Id.*

¹²⁵ 18 C.F.R. § 385.213(c)(2)(i).

V. AFFIRMATIVE DEFENSES PURSUANT TO 18 C.F.R. § 385.213(c)(2)(ii)

PJM's affirmative defenses are set forth above in this answer, and include the following, subject to amendment and supplementation.

1. The Complainant has failed to satisfy its burden of proof under FPA section 206 (16 U.S.C. § 824e), and has not demonstrated that PJM violated any Commission order, the Tariff, the Operating Agreement, Reliability Assurance Agreement, the Consolidated Transmission Owners Agreement, or any other Commission-jurisdictional governing document.

VI. REQUEST FOR CONFIDENTIAL TREATMENT

PJM respectfully requests, pursuant to 18 C.F.R. § 388.112, privileged treatment of identified portions of this answer and its attachments that are exempt from the mandatory public disclosure requirements of the Freedom of Information Act ("FOIA"),¹²⁶ and that should be withheld from public disclosure. Specifically, non-public treatment is requested for certain market sensitive information provided to PJM by Market Participants as confidential under Operating Agreement, section 18.17, which fall within the FOIA public disclosure exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential."¹²⁷

In accordance with 18 C.F.R. § 388.112(b)(2)(i), PJM includes with this filing, as Attachment D, a proposed form of protective agreement by which parties to this proceeding can obtain access to the non-public version of this answer and its attachments. The proposed Protective Agreement is identical in all substantive respects (other than being labeled a Protective Agreement rather than a Protective Order) to the Protective Order PJM moved the Commission on May 24, 2023, to issue in this proceeding and

¹²⁶ 5 U.S.C. § 552.

¹²⁷ See 5 U.S.C. § 552(b)(4).

eleven other related proceedings.¹²⁸ The proposed Protective Order, by its terms, will supersede and replace the proposed Protective Agreement five days after Commission issuance of the Protective Order. PJM is submitting a non-public version of this answer and its attachments that is marked “CUI//PRIV-HC” in accordance with Paragraph 11 of the Proposed Protective Agreement. PJM asks that the marked version of this answer and its attachments be placed in the Commission’s non-public files. PJM is also submitting a public version of this answer and its attachments with the relevant confidential material redacted pursuant to section 388.112(b)(1) of the Commission’s regulations.

VII. COMMUNICATIONS AND SERVICE

PJM requests that the Commission place the following individuals on the official service list for this proceeding:¹²⁹

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¹²⁸ *Essential Power OPP, LLC v. PJM Interconnection, L.L.C.*, Motion for Adoption of Protective Order, Docket Nos. EL23-54-000, et al. (May 24, 2023).

¹²⁹ To the extent necessary, PJM requests a waiver of Commission Rule 203(b)(3), 18 C.F.R. § 385.203(b)(3), to permit more than two persons to be listed on the official service list for this proceeding.

VIII. CONCLUSION

For the reasons set forth in this answer, the Commission should deny the Complaint.

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May 26, 2023

ATTACHMENTS

ATTACHMENT A: ADVISORIES, ALERTS, CONDITIONS

ATTACHMENT B: TIMELINE

ATTACHMENT C: AFFIDAVIT OF DONALD BIELAK ON BEHALF OF PJM
INTERCONNECTION, L.L.C.

ATTACHMENT D: PROPOSED PROTECTIVE AGREEMENT

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 26th day of May 2023.

/s/ Ryan J. Collins
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ATTACHMENT A
ADVISORIES, ALERTS, CONDITIONS

ADVISORIES, ALERTS, CONDITIONS

- A **Cold Weather Advisory** provides an early notice that forecasted temperatures may prompt PJM to issue a Cold Weather Alert.¹ Such an advisory is designed to elevate awareness and give PJM members ample time to gather information required by NERC standards.² A Cold Weather Advisory can be issued one or more days in advance of the operating day.³
- A **Cold Weather Alert** is issued one or more days in advance of the operating day for elevated awareness and to give PJM members time to prepare personnel and facilities for expected extreme cold weather conditions.⁴ PJM can initiate a Cold Weather Alert when forecasts predict temperatures of 10 degrees Fahrenheit or below.⁵ However, PJM may issue an alert at higher temperatures if PJM anticipates increased winds or if PJM projects a portion of gas fired capacity is unable to obtain spot market gas during load pick-up periods.⁶ PJM will initiate the Cold Weather Alert for the appropriate region(s) in advance of the operating day based on several factors, including historical experience, information supplied by the pipelines, and/or information supplied from the generator owners.⁷ PJM Manual 13 specifies that “PJM Dispatch will notify the

¹ System Operations Division, *PJM Manual 13: Emergency Operations*, PJM Interconnection, L.L.C., section 3.3.1 (May 18, 2023), <https://www.pjm.com/-/media/documents/manuals/m13.ashx>.

² PJM Manual 13, section 3.3.1.

³ PJM Manual 13, section 3.3.1.

⁴ PJM Manual 13, section 3.3.2.

⁵ PJM Manual 13, section 3.3.2.

⁶ PJM Manual 13, section 3.3.2.

⁷ PJM Manual 13, section 3.3.2.

generator owner that the unit is required to be online and ready to follow PJM Dispatch signals at XX:XXhrs on XX day for reliability. The unit parameters and the offer will then be confirmed and the unit will be offer capped.”⁸

- **Energy Emergency Alerts:** PJM follows the North American Electric Reliability Corporation (“NERC”) Reliability Standards for making emergency alert declarations relating to reliability.⁹ Consistent with NERC’s reliability standards, emergency conditions exist in PJM when PJM declares an Energy Emergency Alert (“EEA”) Level 2.¹⁰ NERC has established three levels of EEAs.¹¹
 - PJM may declare an EEA1 when all available generation resources are in use or are committed to meet firm Load, firm transactions, and reserve commitments, and PJM is concerned about sustaining its required Contingency Reserves.¹²
 - PJM may declare an EEA2 when PJM is no longer able to provide its expected energy requirements and is energy deficient, has implemented its operating plan to mitigate emergencies, but is still able to maintain minimum Contingency Reserve requirements.¹³ PJM will perform public appeals to reduce demand, reduce voltage, and interrupt non-firm load in accordance with applicable contracts.¹⁴

⁸ PJM Manual 13, section 3.3.2.

⁹ See Operating Agreement, Schedule 1, section 8.5; Tariff, Attachment K-Appendix, section 8.5.

¹⁰ See Operating Agreement, Schedule 1, section 8.5; Tariff, Attachment K-Appendix, section 8.5.

¹¹ *NERC Standard EOP-011-1*, North American Electric Reliability Corporation, Attachment 1, Energy Emergency Alerts, section B (Dec. 1, 2015), <http://www.nerc.com/pa/Stand/Reliability%20Standards/EOP-011-1.pdf> (NERC Standard EOP-011-1 was in effect during Winter Storm Elliott and has since been replaced by NERC Standard EOP-011-2, effective April 1, 2023); PJM Manual 13, section 2.3.1.

¹² NERC Standard EOP-011-1, Attachment 1, Energy Emergency Alerts, section B(1).

¹³ NERC Standard EOP-011-1, Attachment 1, Energy Emergency Alerts, section B(2).

¹⁴ PJM Manual 13, section 2.3.2.

- Before declaring an EEA3, PJM must make use of all available resources, including, but not limited to, all available generation units that are online, all generation capable of being online in the time frame of the emergency, and available demand-side resources.¹⁵ An EEA3 occurs when firm load interruption is imminent or in progress, and PJM is unable to meet minimum Contingency Reserve requirements.
- **Actions** are issued in real time and require PJM and/or member response. Actions include:
 - **Maximum Generation Emergency:** issued to increase the PJM RTO generation above the maximum economic level. It is implemented whenever generation is needed that is greater than the highest incremental cost level.
 - **Emergency Load Management Reductions:** PJM Dispatch posts detailed instructions to the Curtailment Service Providers (CSP) to dispatch 30, 60 and/or 120 minute Pre-Emergency Load Management Reductions.
 - **Voltage Reduction:** the purpose of this action is to warn members that the available synchronized reserve is less than the Synchronized Reserve Requirement and that present operations have deteriorated such that a voltage reduction may be required.
- PJM also may deploy **Synchronized Reserves**, the reserve capability of generation resources that can be converted fully into energy or Demand Resources whose demand can be reduced within ten minutes from the PJM dispatcher's request, and is provided by equipment that is electrically synchronized to the Transmission System. Synchronized Reserves are supplied from 10-minute synchronized generating

¹⁵ NERC Standard EOP-011-1, Attachment 1, Energy Emergency Alerts, section B(3).

resources (i.e., Spinning Reserves) and 10-minute demand-side response resources. Interruptible load resources cannot be part of the 10 minute synchronized generating reserves component of Synchronized Reserves.

ATTACHMENT B
TIMELINE

TIMELINE

* All dates noted in this chronology are in 2022 and all times are in 24-hour time.

<u>Date</u>	<u>Time</u>	<u>Event</u>	<u>Performance Assessment Interval Trigger?</u>
December 20	09:00	PJM issued a Cold Weather Advisory for the Western Region zones from 07:00 on December 23 through 23:00 on December 25.	
December 21	09:00	PJM issued a Cold Weather Alert for the Western Region zones from 07:00 on December 23 through 23:00 on December 25.	
	10:00	PJM extended the Cold Weather Advisory for the Western Region zones to last through 23:00 on December 26.	
December 22	17:30	PJM expanded the Cold Weather Advisory from 07:00 on December 23 through 23:00 on December 26 to the entire regional transmission organization (“RTO”).	
December 23	10:14	PJM called a 100% RTO Synchronized Reserve Event.	
	11:00	PJM issued a Cold Weather Alert for the entire RTO from 00:00 on December 24 through 23:59 on December 25.	
	16:17	PJM called a 100% RTO Synchronized Reserve Event.	
	17:30	Issued the EEA2 with Pre-Emergency Load Management Reduction Action and Maximum Generation Action through 23:59 on December 23.	Yes
	23:00	Declared a Maximum Generation Alert/Load Management Alert, and an EEA1, starting Saturday, December 24, at 00:00. Cancelled the Maximum Generation Action issued at 17:30.	No
December 24	00:05	PJM called a 100% RTO Synchronized Reserve Event.	
	02:23	PJM called a 100% RTO Synchronized Reserve Event.	

<u>Date</u>	<u>Time</u>	<u>Event</u>	<u>Performance Assessment Interval Trigger?</u>
	04:00	PJM called for conservation through 10:00 on December 25, and curtailed exports.	
	04:20	Issued an EEA2-Pre-Emergency Load Management Reduction Action and Emergency Load Management Reduction Action.	Yes (to start at 06:20)
	04:23	PJM called a 100% RTO Synchronized Reserve Event.	
	04:27	Issued an EEA2-Maximum Generation Emergency Action.	Yes
	04:52	PJM issued a Voltage Reduction Alert.	
	06:00	Load management came into effect.	
	06:17	PJM encouraged Market Participants to submit bids to sell emergency energy into PJM.	
	06:30	PJM received first notification of emissions issues from generation and began working with the Department of Energy (“DOE”) to obtain an emergency order pursuant to section 202(c) of the Federal Power Act (“FPA”).	
	07:15	PJM issued a Voltage Reduction Warning and Reduction of Non-Critical Plant Load.	
	17:30	The DOE issues emergency order pursuant to section 202(c) of the FPA, which PJM received and implemented.	
	22:00	Ended the EEA2-Maximum Gen Emergency Action, ending the PAIs and returned to EEA0.	
	23:38	PJM issued a Maximum Generation Emergency/Load Management Alert for December 25.	No
December 25	11:10	PJM issued a Cold Weather Alert for only the Western Region zones from 07:00–23:00 on December 26.	
	22:00	Returned to EEA0.	
December 26	23:00	The Cold Weather Alert ended.	

File [PUBLIC EL23-56 Talen - Bielak Aff - Attachment C.pdf] cannot be converted to PDF. (To download this file in its original format, please use the filename hyperlink from your search results. If you continue to experience difficulties, or to obtain a PDF generated version of files, please contact the helpdesk at ferconlinesupport@ferc.gov, or, call 866-208-3676 from 9AM to 5PM EST, weekdays. Please allow at least 48 hours for your helpdesk request to be processed.)

ATTACHMENT D

PROPOSED PROTECTIVE AGREEMENT

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Talen Energy Marketing, LLC,)	
Complainant,)	
)	
v.)	Docket No. EL23-56-000
)	
PJM Interconnection, L.L.C.,)	
Respondent.)	

PROTECTIVE AGREEMENT

THIS PROTECTIVE AGREEMENT (Protective Agreement) is made and entered into by and between PJM Interconnection L.L.C. (PJM), respondent in the above-captioned Proceeding, and each Participant in this Proceeding that indicates its agreement hereto by and to the extent its Reviewing Representatives execute Non-Disclosure Certificates in the form attached hereto.

WHEREAS, PJM submitted documents to the Federal Energy Regulatory Commission (Commission) in the above captioned docket (Proceeding);

WHEREAS, pursuant to section 388.112(b) of the Commission's regulations, 18 C.F.R. § 388.112(b), this Protective Agreement applies to requests for access to the non-public version of any document or portion of a document filed or produced by PJM in this Proceeding;

WHEREAS, Participant desires to obtain access to non-public information in this Proceeding;

WHEREAS, Participant has provided a signed Non-Disclosure Certificate and agrees to comply with all terms of this Protective Agreement and the Commission’s Regulations; and

WHEREAS, without waiving any claims of privilege or objections to any request for disclosure of documents, PJM agrees to disclose to Participant certain non-public information designated as privileged and/or CEII, or other Protected Materials (as defined below), pursuant to the terms of this Protective Agreement.

NOW, THEREFORE, PJM and Participant agree as follows:

1. This Protective Agreement shall govern the use of all Protected Materials filed or produced by, or on behalf of, PJM in the Proceeding. Notwithstanding any order terminating this Proceeding, this Protective Agreement shall remain in effect until terminated or modified by mutual written agreement of the Parties, by order of the Commission or court of competent jurisdiction, or by order of a Presiding Administrative Law Judge (including the Chief Judge) in a proceeding set for hearing pursuant to 18 C.F.R. § 385 Subpart E.

2. This Protective Agreement applies to the following categories of materials, all constituting Protected Materials (as defined in Paragraph 3):

(a) all materials filed or produced by PJM in the Proceeding and designated as (i) privileged, or (ii) privileged and not available to Competitive Duty Personnel (as defined below), or otherwise as Protected Materials which are customarily treated as sensitive or proprietary or if disclosed could risk of competitive disadvantage or other business injury;

(b) all materials produced by PJM in the Proceeding and designated as CEII, and

(c) all materials filed or produced in the Proceeding which reflect or disclose Protected Materials.

3. For the purposes of this Protective Agreement, the listed terms are defined as follows:

A. Participant(s): As defined at 18 C.F.R. § 385.102(b), which definition includes PJM as the respondent in this Proceeding.

B. Protected Material:¹

i. Material (including depositions) provided by a Participant in response to discovery requests or filed with the Commission, and that is designated as Protected Material by such Participant;²

¹ The Commission's regulations state that "[f]or the purposes of the Commission's filing requirements, non-CEII subject to an outstanding claim of exemption from disclosure under FOIA will be referred to as privileged material." 18 C.F.R. § 388.112(a). The regulations further state that "[f]or material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant's access to material for which privileged treatment is claimed is governed by the presiding official's protective order." 18 C.F.R. § 388.112(b)(2)(v).

² See *infra* P 11 for the procedures governing the labeling of this designation.

- ii. Material provided by a Participant in the course of settlement negotiations before a settlement judge pursuant to 18 C.F.R. § 385.603, including materials provided in response to informal discovery requests, and designated by such Participant as protected;
- iii. Material that is privileged under federal, state, or foreign law, such as work-product privilege, attorney-client privilege, or governmental privilege, and that is designated as Protected Material by such Participant;³
- iv. Any information contained in or obtained from such designated material;
- v. Any other material which is made subject to this Protective Agreement by the Presiding Administrative Law Judge (Presiding Judge) or the Chief Administrative Law Judge (Chief Judge) in the absence of the Presiding Judge or where no presiding judge is designated, the Commission, any court, or other body having appropriate authority, or by agreement of the Participants (subject to approval by the relevant authority);
- vi. Notes of Protected Material (memoranda, handwritten notes, or any other form of information (including electronic form and audio recordings) which copies or discloses Protected Material);⁴ or
- vii. Copies of Protected Material.
- viii. Protected Material does not include:
 - a. Any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any

³ The Commission's regulations state that "[a] presiding officer may, by order . . . restrict public disclosure of discoverable matter in order to . . . [p]reserve a privilege of a participant. . . ." 18 C.F.R. § 385.410(c)(3). To adjudicate such privileges, the regulations further state that "[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities." 18 C.F.R. § 385.410(d)(1)(i).

⁴ Notes of Protected Material are subject to the same restrictions for Protected Material except as specifically provided in this Protective Agreement.

- federal or state court, unless the information or document has been determined to be privileged by such agency or court;
- b. Information that is public knowledge, or which becomes public knowledge.
- ix. Additional Subcategory of Protected Material:
- a. Highly Confidential Protected Material: A Participant may use this designation for those materials that are of such a commercially sensitive nature among the Participants or of such a private, personal nature that the producing Participant is able to justify a heightened level of confidential protection with respect to those materials. Highly Confidential Protected Material includes materials designated confidential pursuant to section 18.17 of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement). Participants disclosing such information in accordance with the terms of this Protective Agreement will be deemed to not have contravened the prohibitions of this Operating Agreement provision, including without limitation the disclosure and notification requirements of Operating Agreement, section 18.17.2. Except for the more limited list of persons who qualify as Reviewing Representatives for purposes of reviewing Highly Confidential Privileged Materials, such materials are subject to the same provisions in the Protective Agreement as other Protected Materials.
 - b. Notes of Highly Confidential Protected Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Highly Confidential Protected Material);⁵ or
 - c. Copies of Highly Confidential Protected Material.
- C. Critical Energy/Electric Infrastructure Information (CEII): As defined at 18 C.F.R. §§ 388.113(a), (c).

⁵ Notes of Highly Confidential Protected Material are subject to the same restrictions for Highly Confidential Protected Material except as specifically provided in this Protective Agreement.

- D. **Non-Disclosure Certificate:** The certificate attached to this Protective Agreement, by which Participants granted access to Protected Material and/or CEII must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Protective Agreement, and that such Participants have read the Protective Agreement and agree to be bound by it. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for this proceeding.
- E. **Reviewing Representative:** A person who has signed a Non-Disclosure Certificate and who is:
- i. Commission Trial Staff designated as such in this proceeding;
 - ii. An attorney who has made an appearance in this proceeding for a Participant;
 - iii. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney who has made an appearance in this proceeding on behalf of a Participant;
 - iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding;
 - v. A person designated as a Reviewing Representative by order of the Presiding Judge, the Chief Judge, or the Commission; or
 - vi. Employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.
- F. The term “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material defined in Paragraph 3(B)(viii)(a) shall mean a person who has signed a Non-Disclosure Certificate and who is:
- i. Commission Trial Staff designated as such in this proceeding;
 - ii. Outside counsel of a Participant, i.e., an attorney who is not employed by the Participant but is retained by a Participant, who has made an appearance in this proceeding for a Participant, and their partners, associates, and staff of such outside counsel;
 - iii. In-house counsel, i.e., an attorney who is employed by the Participant, who has made an appearance in this proceeding for a Participant and who is not Competitive Duty Personnel as defined in Paragraph 3(G);

- iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding; provided, however, such individual is not Competitive Duty Personnel as defined in Paragraph 3(G);
 - v. A person designated as a Reviewing Representative and is otherwise eligible to review Highly Confidential Protected Material by order of the Presiding Judge, the Chief Judge, or the Commission.
 - vi. A “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material does not include Competitive Duty Personnel as defined in Paragraph 3(G).
- G. The term “Competitive Duty Personnel” shall mean any individual(s), including in-house counsel, whose scope of employment or engagement includes the marketing, sale, or purchase of electric energy or capacity (collectively, “Covered Marketing”), the direct or indirect supervision of any employee or employees whose duties include Covered Marketing, the provision of consulting services, including legal consultation or advice, to any person whose duties include Covered Marketing, or other Covered Marketing services in competition with the producing Participant, all of which are considered “Competitive Duties;” except that Competitive Duty Personnel shall not include employees of the Federal Energy Regulatory Commission, and/or any state utilities commission which is a Participant, outside counsel.
4. Protected Material, Highly Confidential Protected Material, and/or CEII shall be made available under the terms of this Protective Agreement only to Participants and only to their Reviewing Representatives as provided in Paragraphs 6-10 of this Protective Agreement. The contents of Protected Material, Highly Confidential Protected Material, CEII, or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with this Protective Agreement and shall be used only in connection with this specific proceeding.
5. All Protected Material, Highly Confidential Protected Material, and/or CEII must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to Paragraphs 7-9 of this Protective Agreement.
6. Protected Material, Highly Confidential Protected Material, and/or CEII must be handled by each Participant and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 9 of this Protective Agreement. Protected Material, Highly Confidential Protected Material, and/or CEII shall not be used except as necessary for the conduct of this proceeding, nor shall they (or the substance of

their contents) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Material, Highly Confidential Protected Material, and/or CEII, but such copies automatically become Protected Material, Highly Confidential Protected Material, and/or CEII. Reviewing Representatives may make notes of Protected Material and Highly Confidential Protected Material, which shall be treated as Notes of Protected Material if they reflect the contents of Protected Material. A Reviewing Representative shall not disclose Highly Confidential Protected Material to a Reviewing Representative that does not meet the qualifications in Paragraph 3(F).

7. If a Reviewing Representative's scope of employment includes any of the activities listed under this Paragraph 7, such Reviewing Representative may not use information contained in any Protected Material, Highly Confidential Protected Material, and/or CEII obtained in this proceeding for a commercial purpose (e.g. to give a Participant or competitor of any Participant a commercial advantage):

- A. Covered Marketing;
- B. Direct or indirect supervision of any employee or employees whose duties include Covered Marketing; or
- C. The provision of consulting services, including legal consultation or advice, to any person whose duties include Covered Marketing.

8. If a Participant wishes to designate a person not described in Paragraph 3(E) above as a Reviewing Representative, the Participant must seek agreement from the Participant providing the Protected Material and/or CEII. If an agreement is reached, the designee shall be a Reviewing Representative pursuant to Paragraph 3(D) of this Protective Agreement with respect to those materials. If no agreement is reached, the matter must be submitted to the Presiding Judge, the Chief Judge, or the Commission for resolution. If a Participant wishes to designate a person not described in Paragraph 3(F) above as a Reviewing Representative for the purposes of reviewing Highly Confidential Protected Material, the Participant must request an order from the Presiding Judge, the Chief Judge, or the Commission granting such designation.

9. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Material, Highly Confidential Protected Material, and/or CEII pursuant to this Protective Agreement until three business days after that Reviewing Representative first has executed and served the applicable Non-Disclosure Certificate.⁶ However, if an attorney qualified as a Reviewing

⁶ During this three-day period, a Participant may file an objection with the Presiding Judge or the Commission contesting that an individual qualifies as a Reviewing Representative, and the

Representative has executed a Non-Disclosure Certificate, any participating paralegal, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. Attorneys designated Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Agreement, and must take all reasonable precautions to ensure that Protected Material, Highly Confidential Protected Material, and/or CEII are not disclosed to unauthorized persons. Reviewing Representatives that are eligible to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) must execute a Non-Disclosure Certificate for Highly Confidential Protected Material in the form attached hereto. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for the proceeding.

10. Any Reviewing Representative may disclose Protected Material, Highly Confidential Protected Material, and/or CEII to any other Reviewing Representative as long as both Reviewing Representatives have executed the appropriate Non-Disclosure Certificate. In the event any Reviewing Representative to whom Protected Material, Highly Confidential Protected Material, and/or CEII are disclosed ceases to participate in this proceeding, or becomes employed or retained for a position that renders him or her ineligible to be a Reviewing Representative under Paragraph 3(E) or ineligible to review Highly Confidential Protected Material under Paragraph 3(F), access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Agreement and the Non-Disclosure Certificate for as long as the Protective Agreement is in effect.⁷

11. All Protected Material, Highly Confidential Protected Material, and/or CEII in this proceeding filed with the Commission, submitted to the Presiding Judge, or submitted to any Commission personnel, must comply with the Commission's *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*.⁸ Consistent with those requirements:

- A. Documents that contain Protected Material must include a top center header on each page of the document with the following text: CUI//PRIV or

individual shall not receive access to the Protected Material, Highly Confidential Protected Material, and/or CEII, as applicable, until resolution of the dispute.

⁷ See *infra* P 19.

⁸ *Notice of Document Labelling Guidance for Documents Submitted to or Filed With the Commission or Commission Staff*, 82 Fed. Reg. 18,632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

CUI//PRIV-HC for Highly Confidential Protected Material. Any corresponding electronic files must also include this text in the file name.

- B. Documents that contain CEII must include a top center header on each page of the document with the following text: CUI//CEII. Any corresponding electronic files must also include this text in the file name.
- C. Documents that contain both Protected Material and CEII must include a top center header on each page of the document with the following text: CUI//CEII//PRIV. Any corresponding electronic files must also include this text in the file name.
- D. The specific content on each page of the document that constitutes Protected Material and/or CEII must also be clearly identified. For example, lines or individual words or numbers that include both Protected Material and CEII shall be prefaced and end with “BEGIN CUI//CEII//PRIV” and “END CUI//CEII//PRIV”.

12. If any Participant desires to include, utilize, or refer to Protected Material, Highly Confidential Protected Material, or information derived from such material in testimony or other exhibits during the hearing in this proceeding in a manner that might require disclosure of such materials to persons other than Reviewing Representatives, that Participant first must notify both counsel for the disclosing Participant and the Presiding Judge (or the Commission in the absence of a Presiding Judge), and identify all such Protected Material or Highly Confidential Protected Material. Thereafter, use of such Protected Material or Highly Confidential Protected Material will be governed by procedures determined by the Presiding Judge (or the Commission in the absence of a Presiding Judge).

13. Nothing in this Protective Agreement shall be construed as precluding any Participant from objecting to the production or use of Protected Material, Highly Confidential Protected Material, and/or CEII on any appropriate ground.

14. Nothing in this Protective Agreement shall preclude any Participant from requesting the Presiding Judge (or the Chief Judge in the Presiding Judge’s absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority, to find this Protective Agreement should not apply to all or any materials previously designated Protected Material or Highly Confidential Protected Material pursuant to this Protective Agreement. The Presiding Judge (or the Chief Judge in the Presiding Judge’s absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority may alter or amend this Protective Agreement as circumstances warrant at any time during the course of this proceeding.

15. Each Participant governed by this Protective Agreement has the right to seek changes in it as appropriate from the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority.

16. Subject to Paragraph 18, the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), or the Commission shall resolve any disputes arising under this Protective Agreement pertaining to Protected Material (or Highly Confidential Protected Material) according to the following procedures. Prior to presenting any such dispute to the Presiding Judge, the Chief Judge or the Commission, the Participants to the dispute shall employ good faith best efforts to resolve it.

- A. Any Participant that contests the designation of material as Protected Material (or Highly Confidential Protected Material) shall notify the Participant that provided the Protected Material (or Highly Confidential Protected Material) by specifying in writing the material for which the designation is contested.
- B. In any challenge to the designation of material as Protected Material (or Highly Confidential Protected Material), the burden of proof shall be on the Participant seeking protection. If the Presiding Judge, the Chief Judge, or the Commission finds that the material at issue is not entitled to the designation, the procedures of Paragraph 17 shall apply.
- C. The procedures described above shall not apply to material designated by a Participant as CEII. Material so designated shall remain subject to the provisions of this Protective Agreement, unless a Participant requests and obtains a determination from the Commission's CEII Coordinator that such material need not retain that designation.

17. The designator will have five (5) days in which to respond to any pleading requesting disclosure of Protected Material (or Highly Confidential Protected Material). Should the Presiding Judge, the Chief Judge, or the Commission, as appropriate, determine that the information should be made public (or should not be subject to the restrictions applicable to Highly Confidential Protected Material), the Presiding Judge, the Chief Judge, or the Commission will provide notice to the designator no less than five (5) days prior to the date on which the material will become public. This Protective Agreement shall automatically cease to apply to such material on the sixth (6th) calendar day after the notification is made unless the designator files a motion with the Presiding Judge, the Chief Judge, or the Commission, as appropriate, with supporting affidavits, demonstrating why the material should continue to receive the requested protection. Should such a motion be filed, the material will remain confidential until such time as the interlocutory appeal or

certified question has been addressed by the Motions Commissioner or Commission, as provided in the Commission's regulations, 18 C.F.R. §§ 385.714, .715. No Participant waives its rights to seek additional administrative or judicial remedies after a Presiding Judge or Chief Judge decision regarding Protected Material (or Highly Confidential Protected Material) or the Commission's denial of any appeal thereof or determination in response to any certified question. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Protected Material, Highly Confidential Protected Material, and/or CEII in the files of the Commission.

18. Protected Material, Highly Confidential Protected Material, and/or CEII shall remain available to Participants until the later of 1) the date an order terminating this proceeding no longer is subject to judicial review, or 2) the date any other Commission proceeding relating to the Protected Material and/or CEII is concluded and no longer subject to judicial review. After this time, the Participant that produced the Protected Material and/or CEII may request (in writing) that all other Participants return or destroy the Protected Material and/or CEII. This request must be satisfied with within fifteen (15) days of the date the request is made. However, copies of filings, official transcripts and exhibits in this proceeding containing Protected Material, or Notes of Protected Material, may be retained if they are maintained in accordance with Paragraph 5 of this Protective Agreement. If requested, each Participant also must submit to the Participant making the request an affidavit stating that to the best of its knowledge it has satisfied the request to return or destroy the Protected Material and/or CEII. To the extent Protected Material and/or CEII are not returned or destroyed, they shall remain subject to this Protective Agreement.

19. Regardless of any order terminating this proceeding, this Protective Agreement shall remain in effect until specifically modified or terminated by the Presiding Judge, the Chief Judge, or the Commission. All CEII designations shall be subject to the "[d]uration of the CEII designation" provisions of 18 C.F.R. § 388.113(e).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Talen Energy Marketing, LLC,)	
Complainant,)	
)	
v.)	Docket No. EL23-56-000
)	
PJM Interconnection, L.L.C.,)	
Respondent.)	

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Material and/or Critical Energy/Electric Infrastructure Information (CEII) is provided to me pursuant to the terms and restrictions of the Protective Agreement filed by PJM Interconnection, L.L.C. on May 26, 2023 in this proceeding, that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Protected Material and/or CEII, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Protective Agreement. I acknowledge that I do not meet the qualifications to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) of the Protective Order and my duties and responsibilities may include “Competitive Duties” as described in the Protective Agreement. As such, I understand that I shall neither have access to, nor disclose, the contents of the Highly Confidential Protected Materials that are marked as “CUI//PRIV-HC,” any notes or other memoranda, or any other form of information that copies or discloses Highly Confidential Protected Materials that are marked as “CUI//PRIV-HC.”

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Talen Energy Marketing, LLC,)	
Complainant,)	
)	
v.)	Docket No. EL23-56-000
)	
PJM Interconnection, L.L.C.,)	
Respondent.)	

NON-DISCLOSURE CERTIFICATE
FOR HIGHLY CONFIDENTIAL PROTECTED MATERIALS

I hereby certify my understanding that access to Protected Materials, and Highly Confidential Protected Materials and/or Critical Energy/Electric Infrastructure Information (CEII) in the above-captioned case is provided to me pursuant to the terms and restrictions of the Protective Agreement filed by PJM Interconnection, L.L.C. on May 26, 2023 in this proceeding, that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of the Protected Materials, Highly Confidential Protected Materials and/or Critical Energy/Electric Infrastructure Information (CEII), any notes or other memoranda, or any other form of information that copies or discloses Protected Materials, Highly Confidential Protected Materials, and/or Critical Energy/Electric Infrastructure Information (CEII) shall not be disclosed to anyone other than in accordance with that Protective Agreement and shall be used only in connection with this proceeding. I affirm that I meet the qualifications to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) of the Protective Order and my duties and responsibilities do not include “Competitive Duties” as described in the Protective Agreement.

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____

Document Content(s)

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