

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Parkway Generation Keys )  
Energy Center LLC, )  
Complainant, )  
 ) Docket No. EL23-60-000  
v. )  
 )  
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,<sup>1</sup> submits this answer to the Complaint filed by Parkway Generation Keys Energy Center LLC (“Keys” or “Complainant”) on April 6, 2023.<sup>2</sup> The Commission should deny the Complaint.

**I. INTRODUCTION**

Keys should be assessed the Non-Performance Charges stemming from Winter Storm Elliott because it:

- Rejected PJM’s December 23, 2022 request to remain online and provide energy during Winter Storm Elliott, because Keys feared “about a 6 million dollar loss” on the gas it would need to operate;
- Never purchased gas to run any time from 10:00<sup>3</sup> December 23, 2022, to 10:00 December 24, 2022;

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<sup>1</sup> 18 C.F.R. § 385.213.

<sup>2</sup> *Parkway Generation Keys Energy Center LLC v. PJM Interconnection, L.L.C.*, Complaint of Parkway Generation Keys Energy Center LLC, Docket No. EL23-60-000 (Apr. 6, 2023) (“Complaint”).

<sup>3</sup> All times in this answer are in 24-hour clock and in Eastern Prevailing Time.

- When it did buy gas starting at 10:00 December 24, 2022, procured only enough gas to generate 140 megawatts (“MW”) of its 830.5 MW resource capability;
- Tripped offline when it tried to restart on December 24; and
- Never provided energy or reserves during the Performance Assessment Intervals on December 23 and 24, 2022.

Keys has been a committed Capacity Resource<sup>4</sup> since [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC], and has been well paid by PJM Region loads for all those years to support PJM Region resource adequacy at the times of greatest need. But when the PJM Region encountered its most acute resource adequacy challenge since the inception of the Capacity Performance construct, Keys was not available at the height of Winter Storm Elliott.<sup>5</sup> And Keys was unavailable because it made the economic choice not to procure fuel and to shut down on the morning of December 23, despite PJM’s express request to stay online and run. The Tariff is explicit that a Capacity Resource’s non-performance is not excused if the Capacity Resource was unavailable for dispatch for reasons other than a PJM-approved planned or maintenance outage.<sup>6</sup> Keys was therefore properly assessed Non-Performance Charges.

The Complaint argues that PJM operators were “fully in control of the circumstances that would have made Keys available” and “chose not to schedule Keys.”<sup>7</sup>

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<sup>4</sup> 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.

<sup>5</sup> 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).

<sup>6</sup> *See* Tariff, Attachment DD, section 10A(d).

<sup>7</sup> Complaint at 14.

But this is just an attempt to obscure the fact that PJM called Keys because PJM needed Keys to run, and Keys response was that it could not run and did not want to incur the cost to run. Keys expressly instructed its energy manager, Direct Energy, to “just tell [PJM] there’s no gas for us to buy to run them.”<sup>8</sup> Direct Energy thereupon dutifully advised PJM “we have absolutely no gas” and that Keys was “looking [at] about a 6 million dollar loss” if it bought gas.<sup>9</sup>

The Commission has made clear, time and again, that Capacity Market Sellers bear the burden—and the risk—of managing their fuel supplies.<sup>10</sup> The Commission should firmly reject Keys’s unreasonable suggestion here as well. The PJM Region has hundreds of gas-fired generators, each with its own particular operating, scheduling, and curtailment rules and practices. While PJM has a gas team that monitors the gas markets and transportation in the region to advise the PJM operators and enhance PJM’s operational awareness, whether, when, and how individual resources get gas to meet Capacity Performance obligations is solely and entirely the responsibility of Capacity

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<sup>8</sup> Complaint, Attachment 2 at 3 (transcript of 12/23 07:31 call between Keys and Direct Energy).

<sup>9</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

<sup>10</sup> See *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at P 14 (2015) (“CP Order”), *order on reh’g & compliance*, 155 FERC ¶ 61,157, at PP 18 (2016) (“CP Rehearing Order”) (“[H]old[ing] capacity resources accountable for delivering on their capacity commitments . . . .”), 110 (“[W]e do not find it unreasonable for capacity sellers to bear the burden of delivering on their capacity obligation, as now defined in PJM’s capacity market, to load. A natural gas generator is held responsible for arranging sufficient natural gas deliveries despite pipeline outages and this same principle should apply to all such outages.”), *aff’d sub nom. Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017); see also *Midcontinent Indep. Sys. Operator, Inc.*, 180 FERC ¶ 61,141, at P 251 (2022) (“Resource owners should already make investments in their units to ensure future availability . . . .”), *order on reh’g & compliance*, 182 FERC ¶ 61,096 (2023), *petitions for review pending sub nom. Entergy Arkansas, LLC v. FERC*, Nos. 22-1335 & 23-1111 (D.C. Cir. Dec. 28, 2022); *New England Power Generators Ass’n v. ISO New England Inc.*, 144 FERC ¶ 61,157, at P 47 (2013) (imposing a “strict performance obligation on capacity resources and that capacity resources may not take economic outages, including outages based on economic decisions not to procure fuel or transportation.”).

Market Sellers.<sup>11</sup> In particular, if a Capacity Resource manager approaches circumstances that could develop into Performance Assessment Intervals, the Tariff and the Commission’s governing precedents provide an unmistakable signal that the resource operator (not PJM or some other party) needs to ensure the plant is not caught short on its fuel supplies. During emergencies, PJM operators need to focus on operating the grid and maintaining reliability; deciding for Capacity Market Sellers whether and when they should be buying gas is not PJM operators’ job. Indeed, PJM’s Senior Manager-Dispatch, Donald Bielak testifies that “PJM management instructs its operators to not direct generators to buy fuel.”<sup>12</sup> The Commission has an excellent opportunity here to make that abundantly clear to any who have not yet gotten that message.

Nor should the Commission be led down the path of parsing individual PJM operator statements to try and divine on-the-fly waivers of Capacity Market Sellers’ plain Tariff obligations. When PJM is in or approaching a Maximum Generation Emergency, and it is individually telephoning Capacity Resource operators, *it needs the resource*. If the resource manager’s response is that the resource cannot perform because it does not

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<sup>11</sup> That more can and should be done (as PJM has encouraged in several dockets, (*see, e.g., Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, Initial Comments of PJM Interconnection, L.L.C., at 20, Docket No. RM21-17-000 (Aug. 17, 2022); *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Comments and Responses of PJM Interconnection, L.L.C., Docket No. AD18-7-000, at 6 (Mar. 9, 2018))) to ensure better gas/electric coordination that would reconcile the forward nomination and scheduling processes of the pipelines and system operator dispatch directives does not change the governing question here. Under Capacity Performance, responsibility for the present limitations on gas/electric coordination practices plainly rests with Capacity Market Sellers during Performance Assessment Intervals, and that responsibility (or ensuing costs) cannot be shifted to PJM operators or PJM Region loads. Moreover, PJM notes that the Commission has assigned the gas/electric coordination issue to the North American Energy Standards Board for preparation of a report as part of the recommendations arising from the Commission’s joint report with the North American Electric Reliability Corporation on Winter Storm Uri. *See FERC, NERC Encourage NAESB to Convene Gas-Electric Forum to Address Reliability Challenge*, Federal Energy Regulatory Commission (July 29, 2022), <https://www.ferc.gov/news-events/news/ferc-nerc-encourage-naesb-convene-gas-electric-forum-address-reliability>. PJM has been active in that process.

<sup>12</sup> Attachment D, Affidavit of Donald Bielak on Behalf of PJM Interconnection, L.L.C. ¶ 10 (“Bielak Aff.”).

have fuel, or it needs an extended time to come online, then the question of non-performance under the Tariff is already settled. Subsequent conversations in which an operator, faced with a plea to look elsewhere, moves on to find resources that *can* perform, is not a *de facto* excuse for non-performance, and certainly does not rise to the level of the narrow Tariff excuse of a PJM scheduling action that PJM “determin[es] . . . was appropriate to the security-constrained economic dispatch of the PJM Region.”<sup>13</sup>

Micro-managing those interactions after the fact, as Keys and certain other Winter Storm Elliott complainants suggest, amounts to the very sort of “second-guessing” that the Commission has made clear it will avoid when it comes to regional transmission organizations (“RTOs”) exercising their “operational and reliability-related discretion.”<sup>14</sup> Monday morning quarterbacking as to the fine details of PJM’s implementation of its assigned responsibility, and discretion, to manage emergencies<sup>15</sup> is not only inappropriate, but would create a dangerous precedent that the Commission should be very reluctant to set. As explained in detail below, PJM and its operators managed the many difficult challenges posed by Winter Storm Elliott,<sup>16</sup> including unusually high overnight and holiday weekend demand, massive amounts of generator forced outages, managing hydro-pumped storage resources to best extract their desperately needed benefits, and providing assistance to neighbors. Importantly, during this entire event, PJM did not direct a single mandatory load curtailment—*the lights stayed on*. The

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<sup>13</sup> Tariff, Attachment DD, section 10A(d).

<sup>14</sup> *Big Sandy Peaker Plant, LLC v. PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,216, at P 50 (2016).

<sup>15</sup> See Operating Agreement, section 10.4(xx).

<sup>16</sup> 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, 2022. 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>.

Commission should keep those facts in mind as it evaluates Complainant requests to tease out of individual operator statements alleged excuses for Capacity Resource non-performance.

Under the Tariff's Capacity Performance rules, Capacity Market Sellers "bear the burden of delivering on their capacity obligation;"<sup>17</sup> consequently, "[a] natural gas generator is held responsible for arranging sufficient natural gas deliveries despite pipeline outages."<sup>18</sup> As Keys did not meet its Capacity Performance obligations during the period from 05:30 on December 23, 2022, to 22:00 on December 24, 2022, PJM properly assessed Non-Performance charges on Keys. Keys's efforts to nullify those charges through its Complaint are unavailing.

## II. BACKGROUND

### ***A. The Capacity Performance Construct Shifted Performance Risk to Generators from Load by Requiring Generators to Perform when Needed, or Pay Stringent Non-Performance Charges. Excuses from Such Charges Were Limited by Design and Explicitly Approved by the Commission to Meet the Intended Goal of Ensuring Reliability During Stressed System Conditions***

#### *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. Capacity Market Sellers, not PJM, are

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<sup>17</sup> CP Rehearing Order at P 110.

<sup>18</sup> CP Rehearing Order at P 110.

responsible for deciding when and how to buy needed fuel—or to make their plant dual-fuel capable—to ensure that their resources are capable of performing—and for any Non-Performance Charges resulting from their economic choices.

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 its fuel declares an outage. But the Tariff makes no exception for such conditions, because the fundamental principle noted above is that, as between customers and Capacity Market Sellers, performance responsibility appropriately lies with the seller as the party in the best position to assess and address the relevant risks (including the well-known risks of pipeline interruptions) that its resource might not be able to perform. In return load pays the seller capacity payments throughout the delivery year in reliance on that assurance the resource will perform at a time of system emergency.

The Tariff does make two exceptions, each of which, by design, is explicit, narrow, and limited. No one alleges 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. In particular, if the seller’s economic choices (e.g., a resource’s operating parameter limitations) impair PJM’s ability to rely on a resource to alleviate emergency conditions, this exception does not apply.<sup>19</sup>

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.<sup>20</sup> 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.”<sup>21</sup>

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 stringent<sup>22</sup> Non-Performance Charges and over-performing resources earn bonus payments.<sup>23</sup> Specifically, for the period (known as Performance Assessment Intervals) when certain PJM-declared Emergency Actions are in effect, the Tariff requires PJM to assess Non-Performance Charges when a Capacity Resource underperforms.<sup>24</sup> The Commission found that Non-Performance Charges will “act as a strong incentive for performance,”<sup>25</sup> explaining that “if and to the extent [a Capacity Resource] fails to perform during an emergency, when it is most needed, it is

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<sup>19</sup> See Tariff, Attachment DD, section 10A(d).

<sup>20</sup> See CP Order at P 7.

<sup>21</sup> CP Order at P 28.

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> 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).

<sup>25</sup> CP Rehearing Order at P 72.



appropriate that the compensation for that resource be reduced and possibly entirely forfeited.”<sup>26</sup>

There are only two excuses from Non-Performance Charges, and they are “strictly circumscribed.”<sup>27</sup> 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.”<sup>28</sup>

Thus, any outage that is not a Generator Planned Outage or Generator Maintenance Outage cannot provide the basis for an excuse from Non-Performance Charges. To be on either of these outages, a resource must follow the formal request processes, and PJM will consider reliability implications as part of its analysis of such a requested outage, before approving or denying the request.<sup>29</sup> In contrast, a forced outage is unplanned and not approved by PJM and is the result of an unexpected or unanticipated failure by the resource. Because a Capacity Resource that is on a forced outage is unavailable to meet its capacity obligations, and PJM does not approve such unavailability, a forced outage is not an excuse from Non-Performance Charges.

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

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<sup>26</sup> CP Rehearing Order at P 29.

<sup>27</sup> CP Order at P 167.

<sup>28</sup> Tariff, Attachment DD, section 10A(d).

<sup>29</sup> See Operating Agreement, Schedule 1, section 1.9.2(a)-(b) (rules for Generator Planned Outages); Operating Agreement, Schedule 1, section 1.9.3 (rules for Generator Maintenance Outages).

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]."<sup>30</sup>

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."<sup>31</sup> When it comes to the issue of fuel procurement, "[a] natural gas generator is held responsible for arranging sufficient natural gas deliveries despite pipeline outages and this same principle should apply to all such outages."<sup>32</sup> In other words, Capacity Market Sellers, not PJM or load, bear the responsibility and risks associated with ensuring Capacity Resources are available to perform during emergencies. In this way, the Non-Performance Charge "holds capacity resources accountable for delivering on their capacity commitments"<sup>33</sup> 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."<sup>34</sup>

Capacity Resources are not paid to simply standby; they are paid to be available to perform and serve PJM's loads. Thus, Capacity Market Sellers should assume that their resources will be needed, at a minimum, any time the PJM Region is under a

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<sup>30</sup> Tariff, Attachment DD, section 10A(d).

<sup>31</sup> CP Rehearing Order at P 110.

<sup>32</sup> CP Rehearing Order at P 110.

<sup>33</sup> CP Rehearing Order at P 18.

declared emergency for capacity shortages. If Capacity Market Sellers need to purchase natural gas and self-schedule to ensure that their Capacity Resources can be available when needed, then sellers of gas-fueled Capacity Resources should engage in such forward-looking behavior.<sup>35</sup>

Capacity Performance also offers a carrot to perform, in addition to the Non-Performance Charge stick. Resources that over-perform receive “bonus” payments,<sup>36</sup> “provid[ing] the appropriate incentives for all resources to perform when they are most needed.”<sup>37</sup> The Non-Performance Charges and bonus payments 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 suppliers.<sup>38</sup> Stated another way, PJM’s Tariff rules penalizing under-performance and rewarding over-performance are designed so that customers get

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<sup>34</sup> 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.”).

<sup>35</sup> Generators have recognized that the Capacity Performance rules require that “the generator must manage its fuel supply risks and ensure that it is able to perform when called to do so by PJM.” *See PJM Interconnection, L.L.C., Answer of Direct Energy to PJM Interconnection, L.L.C.’s Motion for Leave to Answer and Answer*, Docket No. ER19-664-000, at 3 (Feb. 14, 2019).

<sup>36</sup> *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.”).

<sup>37</sup> CP Order at P 182.

<sup>38</sup> *See, e.g.*, CP Order at PP 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.”), 464 (“[T]he risk of capacity resource non-performance must be borne by either capacity suppliers or consumers, and capacity suppliers are in the best position to assess and price the performance risk associated with their resources, including performance risks beyond a resource owner’s control, such as weather-related outages.” (citing *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 62 (2014))); 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

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."<sup>39</sup>

***B. Commission Policy and the Governing Provisions of the Tariff and Operating Agreement Afford PJM Substantial Discretion and the Needed Tools and Flexibility 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 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."<sup>40</sup> Applying this policy, the Commission recently declined to specify requested criteria that "could restrict operators' ability to apply their expert judgment to actual conditions on the system in making decisions to maintain reliable operations."<sup>41</sup> In the same vein, the Commission has found that "it may be appropriate to provide operational and reliability-

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reallocation of non-performance risk from capacity suppliers to consumers." (citing *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 71)).

<sup>39</sup> CP Order at P 158.

<sup>40</sup> *Me. Pub. Utils. Comm'n*, 97 FERC ¶ 61,322, at P 26 (2001).

<sup>41</sup> *PJM Interconnection, L.L.C.*, 180 FERC ¶ 61,051, at P 82 (2022).

related discretion to independent system operators, and to not second-guess their decisions in that regard.”<sup>42</sup>

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 the Emergency.<sup>43</sup> The Operating Agreement broadly 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.”<sup>44</sup>

Implementing this responsibility, PJM has an entire manual solely devoted to Emergency Operations.<sup>45</sup> That manual opens with policy statements that provide the 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

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<sup>42</sup> *Big Sandy Peaker Plant, LLC*, 154 FERC ¶ 61,216, at P 50; *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.”).

<sup>43</sup> Operating Agreement, section 10.4(xx).

<sup>44</sup> Operating Agreement, Definitions – E-F.

<sup>45</sup> *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>.

that “[t]hese events demand timely, decisive action to prevent further propagation of the disturbance.”<sup>46</sup> 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.”<sup>47</sup>

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.”<sup>48</sup> 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.”<sup>49</sup>

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<sup>46</sup> PJM Manual 13, section 1.1.

<sup>47</sup> *Id.* (emphasis added); *see also* Tariff, Definitions – G-H (defining Good Utility Practice).

<sup>48</sup> Tariff, Definitions – E-F.

<sup>49</sup> Tariff, Definitions – L-M-N (emphasis added).

**C. *PJM Exercised Its Discretion to Declare Emergency Actions During Winter Storm Elliott in 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.<sup>50</sup> The severe cold weather on December 23,<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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

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<sup>50</sup> 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”).

<sup>51</sup> All dates noted in this chronology are in 2022.

<sup>52</sup> See Winter Storm Elliott FAQ at 3.

<sup>53</sup> 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”).

shown on the timeline in Attachment B, were intended to elevate awareness of impending 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.<sup>54</sup> 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.<sup>55</sup> For comparison, PJM’s day-ahead reserve requirement for December 23 was 3 GW.

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.<sup>56</sup> PJM responded by exercising its discretion to invoke its Emergency-related authorities, including calling upon generators with capacity commitments, deploying Synchronized Reserves, initiating RTO-wide Maximum Generation Emergency Actions,

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<sup>54</sup> See Winter Storm Elliott FAQ at 3, 7.

<sup>55</sup> See Winter Storm Elliott Overview at 5.

<sup>56</sup> See Winter Storm Elliott Overview at 12.



and calling on demand response resources. 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.<sup>57</sup> The declaration of the Maximum Generation Emergency Action triggered Performance Assessment Intervals and put all on notice of the severity of the emergency conditions facing the PJM Region.<sup>58</sup> 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,<sup>59</sup> at 23:00, PJM declared a Maximum Generation Alert and Load Management Alert, starting December 24 at 00:00.<sup>60</sup>

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.<sup>61</sup> At 04:20, PJM issued a Pre-Emergency Load Management Reduction Action, and an Emergency Load Management Reduction Action.<sup>62</sup> On December 24, PJM issued a Maximum Generation

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<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> See Winter Storm Elliott FAQ at 3.

<sup>60</sup> See Attachment B at 1.

<sup>61</sup> See Attachment B at 2.

<sup>62</sup> See Attachment B at 2.

Emergency for the period from 04:28 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 petitioned DOE for a declaration of energy emergency on the afternoon of December 24.<sup>63</sup> At 17:30, DOE issued the requested section 202 emergency order,<sup>64</sup> 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. The DOE emergency order lasted from 17:30 on December 24 through 12:00 on December 26.<sup>65</sup>

PJM’s actions helped preserve reliability during this very challenging period.

*Most importantly, PJM did not shed any load during Winter Storm Elliot.*

***D. Keys Failed to Provide Any Energy During the Performance Assessment Intervals. Keys Declined PJM’s Request to Operate on December 23 Because It Did Not Want to Buy “Uneconomic” Gas, and Then Keys Failed to Start on December 24***

PJM needed Keys’s 830.5 MW to meet the region’s energy and reserve needs during Winter Storm Elliott on December 23 and 24 and, to that end, called on Keys repeatedly. PJM’s attempts to obtain energy and reserves from Keys are recounted

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<sup>63</sup> 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>.

<sup>64</sup> 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>.

<sup>65</sup> *Id.*

below, along with conversations between Keys’s energy manager, Direct Energy, and Keys personnel. The transcripts of these conversations are included in Attachment C to this answer and Attachment 2 to the Complaint. These transcripts show that Keys made the *economic choice* not to purchase fuel and to shutdown before 10:00 on December 23. That economic choice prevented Keys from being “reliably available to provide energy and reserves in an emergency condition”<sup>66</sup> as required by its capacity commitment.

**December 23**

On December 23 at 7:24, PJM dispatchers called Keys’s energy manager, Direct Energy, “requesting that [the] unit [] remain online . . . economic real-time”<sup>67</sup> “at least through the [evening] peak,”<sup>68</sup> because “PJM dispatchers wanted additional generation online for the coming day just to meet load across the PJM Region at system marginal price, so dispatchers contacted Keys’s energy manager.”<sup>69</sup> At that time Keys was online and scheduled to run for another two and a half hours, i.e., until 10:00.

Direct Energy stated it needed to check with Keys, and asked if they could call PJM back—to which PJM agreed. Keys personnel informed Direct Energy that they “don’t have gas,” the price is “uneconomic,” and they would have to buy a full day’s worth of gas due to the ratable take requirements in effect on the pipeline.<sup>70</sup> Their conversation, reprinted in relevant part below, shows that Keys was unprepared to

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<sup>66</sup> CP Order at P 28.

<sup>67</sup> Attachment C at 1 (Transcript of 12/23/22, 07:24).

<sup>68</sup> Attachment C at 2 (Transcript of 12/23/22, 07:26); *see* Complaint, Attachment 2 at 3 (same).

<sup>69</sup> Bielak Aff. ¶ 11.

<sup>70</sup> Complaint, Attachment 2 at 3 (transcript of 12/23 07:31 call between Keys and Direct Energy).

provide energy on December 23 and that Keys made the economic decision to not buy fuel and run based on its concern “about a 6 million dollar loss” to run.<sup>71</sup>

**KEYS:** [W]e don’t have gas and there’s a [ratable take] on the pipeline. Do you have anyone over there [at PJM] I can contact? Because unless you want to call them back and tell them gas is extremely uneconomic and we don’t have anything on the pipeline to get.

\* \* \*

**DIRECT ENERGY:** Do we not have gas? We don’t have the ability to buy gas yesterday.

**KEYS:** No. The plant is going to be shutting down at \$65 gas for where it cleared today. We don’t have any. And there’s a [ratable take] on the pipeline that we have to buy a full day of gas and that’s like a \$6 million loss to run them.

**DIRECT ENERGY:** Okay, so that’s like a \$65 gas. We say it’s about a \$[6] million loss here. Let me touch base with you man. I’ll let them know.

\* \* \*

**KEYS:** Yeah. See what they [PJM] say. But just tell them there’s no gas for us to buy to run them.<sup>72</sup>

Following Keys’s directive, Direct Energy told PJM, “we have absolutely no gas”<sup>73</sup> but, that if they did have to buy gas, “it’s gonna be ratable so, it has to be bought for, for the 24 hour period. And, uh, it’s going to be at 65 bucks per dekatherm, so we’re looking at, uh, we’re looking [at] about a 6 million dollar loss, you know, just to be able to run this one.”<sup>74</sup>

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<sup>71</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

<sup>72</sup> Complaint, Attachment 2 at 3 (transcript of 12/23 07:31 call between Keys and Direct Energy).

<sup>73</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

<sup>74</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

The PJM operator, consistent with PJM managements' instruction "to not direct generators to buy fuel,"<sup>75</sup> deferred to Keys's economic concerns with procuring gas and stated to Direct Energy "we were talking about Keys. At this point . . . forget about that."<sup>76</sup> Thus, PJM operators acknowledged Keys decision to go offline and moved on to find other resources that were willing to provide energy.<sup>77</sup> Notably, PJM did not request Keys to go offline.

Then, despite the fact that PJM requested Keys to run until 10:00 on December 23, Direct Energy informed PJM that it planned to take Keys offline at 09:00 to ramp down for an hour. However, PJM rejected that request because it "expect[ed] those megawatts" from Keys and "need[ed] the energy."<sup>78</sup>

**PJM:** [W]e're gonna have to give you a call closer to 10 o'clock to take [Keys] offline.

**DIRECT ENERGY:** [T]hat's going to be too late for us.

**PJM:** You were scheduled till 10.

**DIRECT ENERGY:** Yeah, but they – they require an hour to ramp down.

**PJM:** Right. But you – well, you – right. But you –guys were committed in the day-ahead market for – til 10 o'clock. You know, we – we expect those megawatts, so if they have to come off early you're gonna have to take a forced outage.

**DIRECT ENERGY:** Okay. There's no way to do it before 10 o'clock, that's what you're saying?

**PJM:** Right. 'Cause we need -- we need the energy, correct.<sup>79</sup>

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<sup>75</sup> Bielak Aff. ¶ 10.

<sup>76</sup> Attachment C at 5 (Transcript of 12/23/22, 07:43).

<sup>77</sup> See Bielak Aff. ¶ 11.

<sup>78</sup> Attachment C at 8 (Transcript of 12/23/22, 08:32).

<sup>79</sup> Attachment C at 8 (Transcript of 12/23/22, 08:32).

At 13:44, after going offline at 10:00 and because Keys had chosen to not purchase fuel, Keys submitted an outage ticket in eDART,<sup>80</sup> which had an effective time of December 23 at 10:00 until December 24 at 10:00, resulting in Keys's unavailability being reflected in Markets Gateway beginning at 13:00.

PJM did not communicate with Keys again until 21:26 on December 23 to confirm that Keys was unavailable until December 24 at 10:00.<sup>81</sup> As a result, Keys was offline and unavailable on December 23 for the Synchronized Reserve Event and Maximum Generation Emergency Action, the latter of which calls for "Generation dispatchers [to] suspend regulation, as requested, and load all units to the Maximum Emergency Generation level, as required."<sup>82</sup>

#### **December 24**

Starting at 00:00 on December 24, Markets Gateway showed Keys as available.

At 01:55, PJM called Keys to confirm Keys's unavailability at that time:

**PJM:** Hey uh Keys Energy Center is unavailable today, correct?

**DIRECT ENERGY:** It is – has no fuel.<sup>83</sup>

PJM accordingly told Direct Energy to mark Keys as "unavailable on Markets Gateway."<sup>84</sup> Registering this change in Markets Gateway ensures that PJM has an

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<sup>80</sup> eDART (Dispatcher Application and Reporting Tool) is a PJM mechanism that allows generation and transmission owners to submit generation and transmission outage requests. eDART allows its users to manage their outage data by viewing the status of their outages and obtaining outage reports. *See eDart*, PJM Interconnection, L.L.C., <https://www.pjm.com/markets-and-operations/etools/edart> (last visited May 24, 2023).

<sup>81</sup> *See* Complaint, Attachment 2 at 6 (transcript of 12/23 21:26 call between Direct Energy and PJM) (**PJM:** Keys is "not available for tomorrow? **Direct Energy:** "Until 10:00 AM [on December 24] [Keys is] unavailable.").

<sup>82</sup> PJM Manual 13, section 2.32 (Real-Time Emergency Procedures, Step 4A).

<sup>83</sup> Attachment C at 12 (Transcript of 12/24/22, 01:55).

<sup>84</sup> Attachment C at 12 (Transcript of 12/24/22, 01:55).

accurate picture of which resources are available and on what operating parameter limitations. Because Keys had no fuel, could not run, and had previously entered a forced outage ticket in eDART, PJM appropriately advised Keys to update the resource's status in Markets Gateway as unavailable.

Later in the morning, Keys called PJM. Keys recognized that it is “currently forced out because [it does not] have any fuel available” and stated that “[w]e’re working on trying to procure fuel.”<sup>85</sup> PJM stated: “We want it.” Keys cautioned that startup takes about seven to eight hours, “so we’ll at least help you guys out [in the] evening.”<sup>86</sup>

PJM operators, trying to get as much generation online and providing energy as possible but without directing sellers to buy any fuel,<sup>87</sup> told Keys at approximately 08:31: “We want it regardless. I want it. Let’s put it this way, when you find out what type of fuel you can get or whatever, just let me know the run parameters. I don’t know if it only has a five-hour run window and obviously I’m going to want to plan that out a little bit, but if it can run from the peak until tomorrow, then I really want it.”<sup>88</sup>

A couple minutes later, Direct Energy called to tell PJM the parameters on which Keys would run. While Keys is an 830.5 MW facility,<sup>89</sup> Direct Energy stated that “we’re trying to buy gas, but we’re only going to be able to buy enough to generate 300 MW all

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<sup>85</sup> Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM).

<sup>86</sup> Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM).

<sup>87</sup> See Bielak Aff. ¶ 10 (“PJM management instructs its operators to not direct generators to buy fuel.”).

<sup>88</sup> Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM).

<sup>89</sup> See Complaint at 4.

the way through hour ending ten tomorrow.”<sup>90</sup> Direct Energy also confirmed the six to eight hour startup time, but stated that Keys “should be there for the evening peak.”<sup>91</sup>

Around 09:30, PJM called Direct Energy to check on the status of Keys, and when it would be available. Direct Energy stated that it would be “online around 10” and “it should be fully available around [BEGIN CUI//PRIV-HC] [REDACTED]. [END CUI//PRIV-HC]”<sup>92</sup> When asked why the startup would take that long, Direct Energy “guess[ed] a cold start.” PJM then requested “If there’s any reason it cannot come on, let us know, okay?”<sup>93</sup>

At 12:23, Direct Energy informed PJM that while they had stated that Keys would provide 300 MW at [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC], Keys would only be able to provide 140 MW.<sup>94</sup>

An hour later, at 13:31, [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] before Keys was supposed to be online and providing energy, Direct Energy called PJM with “bad news”<sup>95</sup>:

**DIRECT ENERGY:** Keys Energy Center, they failed on the start. They’ve had a couple of trips and -- they’re they forced off. They’re forced out.

**PJM:** All right. Keys Energy Center. For how long? Are they doing work on it or it how long is the outage for?

**DIRECT ENERGY:** No, we -- put it in through – how long ago did we take a ticket here. We put that one in through the -- through

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<sup>90</sup> Complaint, Attachment 2 at 9 (transcript of 12/24 08:34 call between Direct Energy and PJM).

<sup>91</sup> Complaint, Attachment 2 at 9 (transcript of 12/24 08:34 call between Direct Energy and PJM).

<sup>92</sup> Attachment C at 13 (Transcript of 12/24/22, 09:27).

<sup>93</sup> Attachment C at 13 (Transcript of 12/24/22, 09:27).

<sup>94</sup> Attachment C at 16 (Transcript of 12/24/22, 12:23).

<sup>95</sup> Attachment C at 17 (Transcript of 12/24/22, 13:31).



midnight tomorrow. They're -- they're having -- they're having issues due to the ambient conditions.

**PJM:** Okay.

**DIRECT ENERGY:** They're getting some temperatures that cause them some problems and at the same time they're also getting emissions that caused them some problems. So.

**PJM:** All right Keys Energy Center's currently out and e DART ticket's in and through midnight tomorrow

**DIRECT ENERGY:** Yes, sir

**PJM:** So that would be basically until Monday morning.<sup>96</sup>

In other words, because Keys decided to shut the resource all the way down, the unit sat in sub-freezing temperatures for 24 hours, became too cold to restart,<sup>97</sup> and therefore was unavailable until Monday, December 26, at the earliest.

In sum, Key's decision to shutdown on the morning of December 23 in order to avoid "a 6 million dollar loss" was an economic decision on Keys's part—and contrary to PJM's explicit request—which led to the resource being unavailable throughout the event at the very time that PJM operators were calling Keys as part of PJM's effort to get all available generation online. At no time on the morning of December 23 did PJM direct Keys to go offline. Keys's behavior is the type that Capacity Performance was designed to *disincent* through Non-Performance Charges, and therefore PJM properly assessed Keys Non-Performance Charges.

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<sup>96</sup> Attachment C at 17 (Transcript of 12/24/22, 13:31).

<sup>97</sup> Keys told PJM it would need to do "a cold start" to get Keys back online. Attachment C at 13 (Transcript of 12/24/22, 09:27).

### III. ANSWER TO COMPLAINT

#### A. *Keys Made the Economic Choice to Not Purchase Fuel, and Was Unavailable to Meet Its Capacity Obligations as a Result*

As shown above, the Capacity Performance provisions of the Tariff place Capacity Resource performance risk on Capacity Market Sellers, subject to only two “narrow and strictly circumscribed” excuses. Neither of those excuses applies here.

The first excuse, for Generator Planned Outage and Generator Maintenance Outage, does not apply because Keys was not on a Generator Planned or Maintenance Outage. No other type of outage is within the scope of this excuse.

The second excuse, i.e., PJM did not schedule the resource, or the resource was online but 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,”<sup>98</sup> also does not apply here.

The simple fact is Keys chose not to procure fuel for this period. Therefore, Keys was unavailable and on a forced outage, despite PJM’s request to remain online. As such, Keys was properly assessed Non-Performance Charges.

#### 1. *Keys made the economic choice to not buy fuel required Keys to go on forced outage, which is not an excused outage.*

Keys argues that the “forced outage designation was incorrect because the plant had been authorized to enter a reserve shutdown state.”<sup>99</sup> Neither statement is correct.

First, Keys was not in a reserve shutdown. As Mr. Bielak testifies, “PJM does not put units in reserve shutdown and this is not a term used by our operators.”<sup>100</sup> Thus, it is

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<sup>98</sup> Tariff, Attachment DD, section 10A(d).

<sup>99</sup> Complaint at 9.

<sup>100</sup> Bielak Aff. ¶ 17.

not surprising that Keys points to no evidence that PJM ever “authorized” it “to enter a reserve shutdown state.” The term “reserve shutdown” never appears in the transcripts of the numerous calls between PJM and Keys’s representatives.<sup>101</sup>

Moreover, Keys’s action of going offline with no access to fuel would not qualify as a “reserve shutdown.” Keys’s actions do not meet the PJM Manuals’ requirement for a reserve shutdown that a resource must be “available for service [within its total time to start] but not dispatched for economic or other reasons.”<sup>102</sup> Nor do Keys’s actions even meet Keys’s own definition that a reserve shutdown is “an event where a unit is available for load but is not synchronized due to lack of demand.”<sup>103</sup> Contrary to either definition, Keys was not available—by Key’s own admission—because it “ha[d] no fuel.”<sup>104</sup> Moreover, PJM attempted to dispatch Keys during this period for “economic real-time,”<sup>105</sup> but Keys declined, because it had “absolutely no gas”<sup>106</sup> and it did not want to buy gas because then it could be “looking [at] about a 6 million dollar loss.”<sup>107</sup> Similarly, Keys’s suggestion that it was not synchronized “due to lack of demand” is utterly divorced from the reality of the events on December 23 and December 24. In short,

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<sup>101</sup> See generally Attachment C; Complaint, Attachment 2.

<sup>102</sup> Resource Adequacy Planning, *PJM Manual 22: Generator Resource Performance Indices*, PJM Interconnection, L.L.C., section 2.1 (Mar. 26, 2020), <https://www.pjm.com/-/media/documents/manuals/m22.ashx> (definition of Reserve Shutdown Hours).

<sup>103</sup> Complaint at 2 n.5 (quoting *Generating Availability Data System – Data Reporting Instructions*, North American Electric Reliability Corp., III-16, <https://www.nerc.com/pa/RAPA/gads/Pages/Data%20Reporting%20Instructions.aspx>).

<sup>104</sup> See Attachment C at 12 (Transcript of 12/24/22, 01:55) (**PJM:** Hey uh Keys Energy Center is unavailable today, correct? **DIRECT ENERGY:** It is – has no fuel.”).

<sup>105</sup> Attachment C at 1 (Transcript of 12/23/22, 07:24).

<sup>106</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

<sup>107</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

Keys's attempted after-the-fact characterization of its resource as being on a reserve shutdown is entirely unconvincing.

Second, Keys itself submitted a forced outage ticket in eDart at 13:44 on December 23, with an effective time of December 23 at 10:00 until December 24 at 10:00, reflecting that the resource was on outage and unavailable.<sup>108</sup> This status merely reflected in PJM's systems the reality that Keys (by its own repeated telephone statements to PJM operators) was in no position to run, and did not want to run, because Keys "ha[d] absolutely no gas."<sup>109</sup> Moreover Keys itself recognized at the time that it was "forced out."<sup>110</sup> In particular, on multiple occasions on December 23-24, Keys stated that it was "unavailable"<sup>111</sup> and "forced out because [it does not] have any fuel available."<sup>112</sup>

PJM's December 24 request that Keys reflect its unavailability through a forced outage ticket in eDART changes nothing. PJM so advised Keys, at 01:44 December

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<sup>108</sup> Keys's action was consistent with PJM Manual 10, section 2.4. Operations Planning Division, *PJM Manual 10: Pre-Scheduling Operations*, PJM Interconnection, L.L.C., section 2.4 (Dec. 21, 2022), <https://www.pjm.com/-/media/documents/manuals/m10.ashx>. That provision requires sellers to, among other things, submit an unplanned (forced) outage ticket via eDART, provide PJM with the expected date and time that the generation resource will be made available, and provide PJM the reason for the outage. This action by the seller relieves the seller of any obligation "to submit offers for the sale of energy or other services or to satisfy delivery obligations, from a part of the generation resource undergoing an approved full or partial Unplanned Outage." *Id.*

<sup>109</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

<sup>110</sup> Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM) (**DIRECT EENRGY**: "Keys Energy Center is currently forced out because they don't have any fuel available.").

<sup>111</sup> Attachment C at 12 (Transcript of 12/24/22, 01:55).

<sup>112</sup> Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM); *see* Complaint at 7; Complaint, Attachment 2 at 6 (transcript of 12/23 21:26 call between Direct Energy and PJM) (**DIRECT ENERGY**: "Until 10:00 AM [December 24 Keys is] unavailable."); Attachment C at 12 (Transcript of 12/24/22, 01:55) (**PJM**: Hey uh Keys Energy Center is unavailable today, correct? **DIRECT ENERGY**: It is – has no fuel.").

24,<sup>113</sup> simply to ensure that PJM's systems accurately reflected the fact of Keys's unavailability. And, the instruction was consistent with Keys's earlier submission, on its own volition, of a forced outage ticket in eDART at 13:44 on December 23, indicating that the resource would be unavailable until 10:00 December 24. When PJM requested that Keys submit the outage tickets, Markets Gateway was inaccurately indicating Keys was available, prompting PJM dispatchers to spend their time calling an unavailable resource. By accurately reflecting Keys's status in eDART, Keys allowed PJM dispatchers to focus on finding resources that *could* address the stressed conditions.

In short, Keys was not on a reserve shutdown, and instead, by its own actions, was on an unplanned or forced outage.

2. *Keys's economic choice to not buy fuel made Keys unavailable for PJM to schedule or schedule down during the emergency conditions.*

Keys contends that it should be excused from Non-Performance Charges because "Keys was 'not scheduled to operate' or was 'scheduled down' by PJM for purposes of the PAIs" through December 24 at 10:00,<sup>114</sup> and, to that end, claims Keys going offline was "PJM's decision."<sup>115</sup> Neither excuse applies, and Keys's unavailability was patently not *PJM's* choice.

PJM was never given a choice to "not schedule[] [the resource] to operate," because the Keys facility was simply unavailable—due to Keys's failure to procure the fuel it needed to be available from 10:00 on December 23 to 10:00 on December 24. Nor

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<sup>113</sup> See Complaint at 12.

<sup>114</sup> Complaint at 11.

<sup>115</sup> See, e.g., Complaint at 11 ("PJM's decision not to schedule Keys . . .").

does the evidence show the resource being “online but . . . scheduled down by [PJM],”<sup>116</sup> because the resource was *not* online—it lacked fuel.

The PJM operator communications also reveal *the exact opposite* of PJM determining that not scheduling Keys was appropriate to the security-constrained economic dispatch of the PJM Region. PJM specifically called Keys because it needed them to run, and said at the outset of its communications that they were needed to “remain online [past 10:00] . . . economic real-time.”<sup>117</sup> The response from Keys was that it could not run.

Direct Energy presented PJM with what was, for all practical purposes, a fait accompli that Keys would not run because it had no fuel, and did not want to buy fuel because it was “looking [at] about a 6 million dollar loss, you know, just to be able to run.”<sup>118</sup> *Those uncontroverted Keys statements* were the predicate for PJM’s later acknowledgement that Keys was not going to run and to “forget about that.”<sup>119</sup> Notably, PJM *never* directed, requested, or otherwise told Keys to go offline after PJM requested Keys to remain online.<sup>120</sup> As can be seen from the transcripts of the calls with PJM (in Attachment C) and between Keys and Direct Energy (Complaint, Attachment 2 at 3), Keys’s predetermination to not buy fuel and to go offline (and its design choice to not be dual-fuel capable) foreclosed the possibility of any PJM decision to not schedule the resource.

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<sup>116</sup> Tariff, Attachment DD, section 10A(d).

<sup>117</sup> Attachment C at 1 (Transcript of 12/23/22, 07:24); *see also* Bielak Aff. ¶ 11.

<sup>118</sup> Attachment C at 3 (Transcript of 12/23/22, 07:33).

<sup>119</sup> Attachment C at 5 (Transcript of 12/23/22, 07:43).

<sup>120</sup> Attachment C at 1 (Transcript of 12/23/22, 07:24).

Moreover, Keys’s argument inappropriately seeks to shift responsibility to PJM for such facility management issues as procuring fuel. Commission acceptance of Keys’s approach would undermine Capacity Performance rules, by excusing Capacity Resource non-performance through mere dispatcher acknowledgement of their non-performance. Under Keys’s approach, rather than applying clear Tariff rules, performance would be determined by how vigorously a generator presses to the dispatcher its inability to perform, in hopes that it can get a recognition from an individual dispatcher that the unit will not perform. The Commission should reject that approach. Once it is established that a generator cannot perform, it is not the dispatcher’s responsibility (or authority) to order the generator to buy fuel, or to suddenly make available a generator that, by the operator’s own actions, is not available.

3. *In any event, the Commission should find that Keys failed to meet the burden of proof to support its claim that PJM “scheduled down” Keys in accordance with the Tariff standard.*

Keys has failed to meet its required burden of proof. “A complainant must present a prima facie case, and must “provide the Commission with evidentiary materials, including documents that support the facts in the complaint.”<sup>121</sup> The Complaint fails to meet this basic threshold. The Complaint does not demonstrate, with evidence, that Keys was “online but 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” during the Performance Assessment Intervals.<sup>122</sup> Keys has presented *no* evidence that PJM’s alleged decision to schedule down Keys prior to the declaration of

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<sup>121</sup> See *Sage Grouse Energy Project, LLC v. PacifiCorp*, 154 FERC ¶ 61,223, at P 25 & n.73 (“[T]he Commission requires that the complainant provide the Commission with evidentiary materials, including documents that support the facts in the complaint.”).

Performance Assessment Intervals was “based on a determination by [PJM] that such scheduling action was appropriate to the security-constrained economic dispatch of the PJM Region.”<sup>123</sup> Without such evidence, Keys cannot support its claim that the scheduling excuse should apply. In fact, such evidence does not exist, as PJM tried to schedule the resource, asking Keys to “remain online . . . economic real-time”<sup>124</sup> “at least through the next peak.”<sup>125</sup>

***B. Keys Is Solely Responsible for Ensuring It Is Available in Emergency Conditions***

In the Complaint, Keys attempts to shift the blame for Keys’s unavailability onto PJM. The Complaint asserts that “Keys did not fail to run because of external factors or because Keys failed to arrange sufficient natural gas. PJM was fully in control of the circumstances that would have made Key available.”<sup>126</sup> However, this gets things backwards. PJM is not obligated to follow Keys’s demands for “the conditions under which Keys could seek to be available;”<sup>127</sup> rather, as a Capacity Resource, Keys is “obligated to deliver energy during the relevant Delivery Year as scheduled and/or

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<sup>122</sup> Tariff, Attachment DD, section 10A(d).

<sup>123</sup> Tariff, Attachment DD, section 10A(d).

<sup>124</sup> Attachment C at 1 (Transcript of 12/23/22, 07:24).

<sup>125</sup> Attachment C at 2 (Transcript of 12/23/22, 07:26); *see* Bielak Aff. ¶ 11.

<sup>126</sup> Complaint at 14. In the Complaint, Keys implies that PJM’s acknowledgement to Keys demands to go offline may have been influenced by the make whole costs that would have been required to cover Keys’s fuel costs had Keys actually run. *See, e.g.*, Complaint 15 (“It could be that PJM was attempting to maintain reliability while also minimizing potential uplift costs by reducing the number (and timing) of the units it chose to commit.”). But this claim is wholly speculative. In fact, PJM’s primary concern was maintaining reliability and “keeping the lights on.” PJM’s dispatchers called on resources out of merit order to ensure reliability, without consideration of minimizing uplift costs. *See* Bielak Aff. ¶ 14 (“We wanted anything and everything we could get from a generator, without focusing on economic merit order or uplift costs. We instructed our dispatchers to call on all generation that they could.”).

<sup>127</sup> Complaint at 6.



dispatched by [PJM] during the Performance Assessment Intervals.”<sup>128</sup> In short, Keys is obligated to make itself available to PJM.<sup>129</sup>

Indeed, it is the Capacity Market Sellers’ responsibility, and not PJM’s, to ensure that their Capacity Resources are available to deliver energy or reserves to help alleviate emergency conditions. The Commission has made clear, time and again, that Capacity Market Sellers bear the burden—and the risk—of managing their fuel supplies, holding that natural gas-fired generators like Keys, must be “responsible for arranging sufficient natural gas deliveries despite pipeline outages.”<sup>130</sup>

Because sellers are responsible for procuring their own fuel supplies, and to encourage sellers to have firm supplies, unlike the spot market supplies relied on by Keys, the Tariff allows sellers to price “Avoidable Fuel Availability Expenses” in their Sell Offer. These “expenses are for firm fuel supply and apply solely for offers for a Capacity Performance Resource.”<sup>131</sup> This cost element was added as part of Capacity Performance because “[f]ailure of natural gas-fired plants to obtain firm fuel supplies has contributed to outages, price volatility, and high uplift costs.”<sup>132</sup>

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<sup>128</sup> Tariff, Attachment DD, section 5.5A(a).

<sup>129</sup> Keys suggests that PJM may have been hesitant to schedule Keys on December 23 because Keys’s supplying pipeline imposed 24-hour “ratable take requirements, and the potential uplift payments that Keys could be owed, if scheduled.” Complaint at 10. However, Keys did not update its operating parameters for December 23 to include any 24-hour minimum run time corresponding to the pipeline ratable take.

<sup>130</sup> CP Rehearing Order at P 110; *see* CP Order at P 466 (“In fact, it is this expectation, and the likely higher clearing price for the Capacity Performance product that will result, that will help incent investments in maintenance, dual or firm fuel, or weatherization to improve capacity resource performance, particularly during summer and winter peak periods.”).

<sup>131</sup> Tariff, Attachment DD, section 6.8(a).

<sup>132</sup> *PJM Interconnection, L.L.C., Reforms to the Reliability Pricing Market and Related Rules in the PJM Open Access Transmission Tariff and Reliability Assurance Agreement Among Load Serving Entities of PJM Interconnection, L.L.C.*, Docket No. ER15-623-000, at 57 (Dec. 12, 2014).

Moreover, PJM has no authority to direct Capacity Resources to procure fuel, and as Mr. Bielak explains, “PJM management instructs its operators to not direct generators to buy fuel.”<sup>133</sup> PJM only schedules the resources; it does not procure fuel, perform maintenance, or otherwise concern itself with the details of operating a Capacity Resource. Such are the responsibilities of the Capacity Market Seller. This is even more evident during emergencies, i.e., the periods for which Capacity Resources are *obligated to perform*.<sup>134</sup> When the system is stressed, PJM operators must focus on operating the grid and maintaining reliability—not the details of individual Seller’s fuel supplies. Some sellers have recognized that they “must manage [their] fuel supply risks and ensure [the Capacity Resource] is able to perform when called to do so by PJM,”<sup>135</sup> but, from Keys and other Winter Storm Elliott complaints, it is apparent that not all sellers understand that they bear that basic responsibility.

Accordingly, Keys is solely responsible for handling its fuel supply arrangements and being available to deliver energy and reserves in emergency conditions. Keys failed to take the steps necessary to ensure it could meet this obligation. Keys made no attempt to secure fuel for the 24-hour period between 10:00 December 23 and 10:00 December 24.<sup>136</sup> The exchange about purchasing gas between Direct Energy and Keys after PJM requested Keys to stay online after 10:00 December 23 for economic real time

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<sup>133</sup> Bielak Aff. ¶ 10.

<sup>134</sup> See Tariff, Attachment DD, section, 5.5A(a).

<sup>135</sup> Generators have recognized that the Capacity Performance rules require that “the generator must manage its fuel supply risks and ensure it is able to perform when called to do so by PJM.” See *PJM Interconnection, L.L.C.*, Answer of Direct Energy to PJM Interconnection, L.L.C.’s Motion for Leave to Answer, Docket No. ER19-664-000, at 3 (Feb. 14, 2019).

<sup>136</sup> See, e.g., Complaint at 6 (“Keys also noted that because it anticipated to shut down it had not procured any gas for Gas Days 23.”).

demonstrates that Keys was wholly unprepared to meet its capacity obligations.<sup>137</sup> Ultimately, Keys made the economic decision to not prepare and be available to meet its obligations, as Keys’s personnel instructed Direct Energy to “just tell [PJM] there’s no gas for us to buy to run them.”<sup>138</sup>

Given that “resources with restrictive operating limits [are held] to the same standards as resources with fewer limitations”<sup>139</sup> and Capacity Market Sellers “bear the burden of delivering on their capacity obligation,”<sup>140</sup> prudent operators should do what needs to be done to be available.<sup>141</sup> It was up to Keys to establish in advance the “few limitations” on its availability so that it *could perform* consistent with its capacity obligation, regardless of whether PJM scheduled it to provide energy or reserves. Yet, in Keys’s words, it was “forced out because [it does not] have any fuel available.”<sup>142</sup>

***C. Assessment of Non-Performance Charges on Keys Is Just and Reasonable and Required by the Tariff***

As an alternative argument, Keys asks, if the Commission finds (as it should) that the Tariff excuses do not apply to Keys, then the Commission should find that assessing Non-Performance Charges on Keys would nonetheless be unjust and unreasonable.<sup>143</sup> The Complaint’s rationale for this alternative argument is that, once PJM acknowledged

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<sup>137</sup> See Complaint, Attachment 2 at 3 (transcript of 12/23 07:31 call between Keys and Direct Energy).

<sup>138</sup> Complaint, Attachment 2 at 3 (transcript of 12/23 07:31 call between Keys and Direct Energy).

<sup>139</sup> *Advanced Energy Mgmt. All.*, 860 F.3d at 674.

<sup>140</sup> CP Rehearing Order at P 110.

<sup>141</sup> Other natural gas generators “procure[d] gas despite not having prior notice that PJM would need the facility to operate,” including “purchasing same-day natural gas at an extremely high price without any guarantee that [the Capacity Market Seller] would be able to recover the gas costs through market prices.” *PJM Interconnection, L.L.C.*, Protest of Constellation Energy Generation, LLC, to PJM Interconnection L.L.C.’s Motion for Establishment of Settlement Judge Procedures, Docket Nos. EL23-53-000, et al., at 8 (Apr. 24, 2023).

<sup>142</sup> Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM).

<sup>143</sup> Complaint at 13.

that Keys was going offline, “[a]t that point, Keys had met its obligations as a Capacity Resource—Keys had contacted PJM to inform them of the conditions under which Keys could be available to extend its run.”<sup>144</sup>

This alternative argument fares no better than Keys’s primary argument. As a Capacity Resource, Keys is “obligated to deliver energy during the relevant Delivery Year as scheduled and/or dispatched by [PJM] during the Performance Assessment Intervals.”<sup>145</sup> The Commission has recognized that a Capacity Resource has “a defined performance obligation and [PJM] enforces that obligation through a robust penalty and bonus payment mechanism.”<sup>146</sup> But Keys was unavailable during the Performance Assessment Intervals and could not provide any energy or reserves during the emergency event.<sup>147</sup> No excuses are available to Keys, as demonstrated above. Therefore, Keys’s unavailability is properly subject to Non-Performance Charges.<sup>148</sup>

Keys’s final attempted fallback argument is that the imposition of Non-Performance Charges “bears no reasonable relationship to any costs or burdens caused by Keys” is misplaced.<sup>149</sup> But the “cost causation principle” does not support Keys’s argument. The cost causation principle applies to ratemaking and ensures that parties taking service are “charged rates that fairly track the costs for which they are

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<sup>144</sup> Complaint at 14.

<sup>145</sup> Tariff, Attachment DD, section 5.5A(a).

<sup>146</sup> CP Rehearing Order at P 18.

<sup>147</sup> Keys submitted a forced outage ticket in eDART at 13:44 on December 23 until 10:00 on December 24. *See* Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM) (Keys was “forced out because [it does not] have any fuel available.”).

<sup>148</sup> *See* Tariff, Attachment DD, section 10A.

<sup>149</sup> Complaint at 14-15.

responsible.”<sup>150</sup> That principle does not apply to charges designed to incent market participants to follow through on their commitments to provide service. Thus, given that Non-Performance Charges are a performance incentive, not a cost or burden borne by ratepayers, the cost causation principle does not apply here.

***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 Keys has not asserted any valid basis to challenge PJM’s unit dispatch or scheduling decisions made during Winter Storm Elliott. Keys is challenging PJM’s acknowledgement of Keys’s decision to go offline at 10:00 December 23 as a scheduling decision.<sup>151</sup> As demonstrated above, PJM did not make a scheduling decision with respect to Keys on the morning of December 23; PJM *never* directed, requested, or otherwise told Keys to go offline after PJM requested Keys to remain online.<sup>152</sup> Regardless, however, the Commission need not reach or decide any of Keys’s arguments because these claims are barred by Operating Agreement, Schedule 1, section 1.8.2 and *PPL EnergyPlus, LLC v. PJM Interconnection, L.L.C.*<sup>153</sup>

Schedule 1, section 1.8.2 of the Operating Agreement provides that disputes concerning PJM’s dispatch decisions should be made directly to PJM, not to the Commission.<sup>154</sup> 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

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<sup>150</sup> *Pa. Elec. Co. v. FERC*, 11 F.3d 207, 211 (D.C. Cir. 1993).

<sup>151</sup> See Complaint at 11 (“By allowing Keys to shut down in the morning of December 23, PJM effectively chose to forego and not schedule Keys for the entirety of Gas Day 23”).

<sup>152</sup> Attachment C at 1 (Transcript of 12/23/22, 07:24).

<sup>153</sup> 117 FERC ¶ 61,338, at P 33 (2006).

<sup>154</sup> See Tariff, Attachment K-Appendix, section 1.8.2.

[PJM].”<sup>155</sup> 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 dispatch took place.”<sup>156</sup> 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.”<sup>157</sup> Keys’s request for relief falls squarely within the scope of this provision, and is foreclosed by it, because Keys claims that it “was ‘not scheduled,’ or was ‘scheduled down’” during the period in question.<sup>158</sup> To address this claim, the Commission would have to decide whether PJM made a scheduling decision at all with respect to Keys.

The Commission’s decision in *PPL EnergyPlus* confirms this reading of the Operating Agreement and supports the rejection of Keys’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.<sup>159</sup> 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.<sup>160</sup> The

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<sup>155</sup> Operating Agreement, Schedule 1, section 1.8.2(a); Tariff, Attachment K-Appendix, section 1.8.2(a).

<sup>156</sup> Operating Agreement, Schedule 1, section 1.8.2(a); Tariff, Attachment K-Appendix, section 1.8.2(a).

<sup>157</sup> Operating Agreement, Schedule 1, section 1.8.2(d); Tariff, Attachment K-Appendix, section 1.8.2(d).

<sup>158</sup> Complaint at 2.

<sup>159</sup> *PPL EnergyPlus*, 117 FERC ¶ 61,338, at PP 2, 33.

<sup>160</sup> *Id.* at PP 3-4.

Commission dismissed the generator’s claim stating: “PJM and the signatories to the 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.”<sup>161</sup> This finding applies equally to Keys’s 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.<sup>162</sup>

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,<sup>163</sup> PJM affirms that any allegation in the Complaint that is not specifically and expressly admitted above is denied.

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<sup>161</sup> 117 FERC ¶ 61,338, at P 33.

<sup>162</sup> *Id.*

<sup>163</sup> 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. 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”),<sup>164</sup> 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.”<sup>165</sup>

In accordance with 18 C.F.R. § 388.112(b)(2)(i), PJM includes with this filing, as Attachment E, 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

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<sup>164</sup> 5 U.S.C. § 552.

<sup>165</sup> See 5 U.S.C. § 552(b)(4).



eleven other related proceedings.<sup>166</sup> 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.

**VI. COMMUNICATIONS AND SERVICE**

PJM requests that the Commission place the following individuals on the official service list for this proceeding:<sup>167</sup>

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<sup>166</sup> *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).

<sup>167</sup> 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.

**VII. CONCLUSION**

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

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May 26, 2023

Respectfully submitted

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## **ATTACHMENTS**

ATTACHMENT A: ADVISORIES, ALERTS, CONDITIONS

ATTACHMENT B: TIMELINE

ATTACHMENT C: TRANSCRIPTS OF CALLS BETWEEN PJM AND KEYS'S  
ENERGY MANAGER, DIRECT ENERGY

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

ATTACHMENT E: 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.

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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.<sup>1</sup> Such an advisory is designed to elevate awareness and give PJM members ample time to gather information required by NERC standards.<sup>2</sup> A Cold Weather Advisory can be issued one or more days in advance of the operating day.<sup>3</sup>
- 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.<sup>4</sup> PJM can initiate a Cold Weather Alert when forecasts predict temperatures of 10 degrees Fahrenheit or below.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> PJM Manual 13 specifies that “PJM Dispatch will notify the

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<sup>1</sup> 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>.

<sup>2</sup> PJM Manual 13, section 3.3.1.

<sup>3</sup> PJM Manual 13, section 3.3.1.

<sup>4</sup> PJM Manual 13, section 3.3.2.

<sup>5</sup> PJM Manual 13, section 3.3.2.

<sup>6</sup> PJM Manual 13, section 3.3.2.

<sup>7</sup> 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.”<sup>8</sup>

- **Energy Emergency Alerts:** PJM follows the North American Electric Reliability Corporation (“NERC”) Reliability Standards for making emergency alert declarations relating to reliability.<sup>9</sup> Consistent with NERC’s reliability standards, emergency conditions exist in PJM when PJM declares an Energy Emergency Alert (“EEA”) Level 2.<sup>10</sup> NERC has established three levels of EEAs.<sup>11</sup>
  - 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.<sup>12</sup>
  - 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.<sup>13</sup> PJM will perform public appeals to reduce demand, reduce voltage, and interrupt non-firm load in accordance with applicable contracts.<sup>14</sup>

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<sup>8</sup> PJM Manual 13, section 3.3.2.

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

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

<sup>11</sup> *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.

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

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

<sup>14</sup> 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.<sup>15</sup> 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

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<sup>15</sup> 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.	

# **ATTACHMENT C**

## **TRANSCRIPTS OF CALLS**

### **BETWEEN PJM AND**

### **KEYS'S ENERGY MANAGER, DIRECT ENERGY**

Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8739841 12/23/22 @ 07:24	Phone rings
	Direct, this is Dewey speaking.
	Hey, Dewey, this is Anthony Gabrieli, PJM.
	Yes, sir.
	Hey, I’m calling about Keys Energy Center.
	Yes, sir.
	Uh, I, I see them coming offline at, uh, 10:00. At this...
	Right.
	Yeah, at this time, uh, PJM is requesting that unit to remain online, uh, economic real time.
	Um, let me [inaudible]. Uh, can I give you a call back on that?
	Sure
	[background noise] so...
	Yep.
	Thank you.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8739863 12/23/22 @ 07:26	Phone rings.
	Alex ( <i>unintelligible</i> – Lakatos?), PJM.
	Hey Alex, this is Dewey at Direct Energy. Um, how, how how long were you guys planning to keep Keys on?
	Do what?
	How long do you guys want to keep Keys on, online?
	Uh...
	At PJM?
	Hold on. Is it on, uh, hold on one sec. Oh, I mean Keys is, Keys is on the takeoff sheet for uh 10:00
	Yeah, for 10:00.
	Yeah.
	They’re coming off [inaudible] at 10:00 but...
	You...
	... um, do you want to keep Keys online? We’re trying to verify how long you guys want to keep it on so [crosstalk]...
	Did somebody call you?
	Yes
	Um, well, I would imagine, I mean, do they have another Day-ahead later today?
	Um, not, um, currently, I don’t see any for the next date, uh, for the next day.
	All right. I mean, hold on one sec. Did the, uh, scheduler call you?
	Yes.
	All right. Um, I, I really can’t give you an answer on how long we’re going to keep Keys on. I would anticipate at least through the next day.
Okay. Um, all right. I’ll let, I’ll let my, um, my gas guys know.	
All right. Thank you.	
All right, thank you.	

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8739920 12/23/22 @ 07:33	Phone rings.
	Direct Energy, this is Jose.
	Hey Jose. Anthony Gabrieli, PJM.
	Yes, sir Mr. Gabrieli.
	Hey, uh, calling about [other generation resource] 10?
	Yes, sir.
	I see the [other generation resource] is supposed to come off at 10:00? Uh, at this time, PJM is requesting [other generation resource] 10 to remain online per, uh, economic real-time.
	To, okay, I understand that PJM is requesting [other generation resource] Center to remain online for, uh, economics real time?
	Uh, that is correct, and also, uh, Keys Energy Center to remain online economic real time.
	Okay, uh, uh, on this, uh, on this, uh, uh, Keys Energy Center, we have absolutely no gas. And, uh, if, uh, I just got done, I just got off the, with the gas guy...
	Mm-hmm.
	... and he’s, he’s telling me that, uh, for when we buy gas for, for Keys, it’s gotta be, it’s gonna be ratable, so it has to be bought for, for the 24-hour period. And, uh, it’s going to be at 65 bucks per dekatherm, so we’re looking at, uh, we’re looking about a 6 million dollar loss, you know, just to be able to run this one.
	Um, let me ...
	And, and I do have a number if you want me to, if you want to get a hold of them? If you want to call them and kind of, uh, talk about it. I mean we’re kind of stuck in the middle on this one.
	Right, so, so, if it remained online you have to buy gas for 24 hours. Is that correct?
	Correct, if, if Keys Energy Center remains past it’s, uh, Day-Ahead award...
	Mm-hmm.
	... we’re going to ha-, we’re going to have to, uh, we’re going to have [to] buy 24 hours’ worth of gas at \$65 a, a dekatherm so.
	Which would cost 6 million dollars?
	Yes, that’s, that’s what he’s telling me.
All right. All right let me, um, uh, let’s go forward with the [other generation resource] remaining online economic real time. And then, uh, I’ll just talk to my, uh, supervisor about Keys.	



Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

	Now, I, I think [other generation resource]’s gas will be a little bit easier. So I’ll, I’ll let those guys know right now that as far as you’re aware you’re going to keep eco-, economic real time, uh, how many hours?
	I can’t give you, I...
	Through...
	...uh, uh...
	...at least, at least through the peak I would imagine 1800 [crosstalk]...
	Correct.
	...at least.
	Correct.
	Right, yeah.
	Yeah, yeah, correct. Yeah, uh, as, as for now, just, uh, online for uh, economic real time, so.
	Okay, and that, that’s going to be in the current configuration, 2 by 1?
	Correct.
	Okay, understand, uh, at this time Anthony Gabrieli is, uh, instructing [other generation resource] to remain online by per, uh, economic real time. And uh, we’re going to at least run it through peak, which is around 1800 at least?
	That’s, that’s all correct
	Okay. Thank you, sir.
	For the foreseeable future, yep. Thank you.
	All right. Bye-bye.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8739977 12/23/22 @ 07:43	(Prior to call being connected) Right, thank you
	(Prior to call being connected) (unintelligible) got the gas
	PJM, Anthony Gabrieli
	Hey, Anthony. This is Jose Martinez over at Direct Energy.
	Yes.
	Calling you in regards to that [other generation resource] sh-, sh-, uh, just want to get, just kind of close the loop of communication here.
	OK.
	And I just wanted to let you know it looked like, uh, it, it already is got, got a Day-Ahead award for the evening peak. So really it’s just bridging it, so, uh...
	OK. But, uh, at, it, it will remain online, correct?
	It will remain online, yes sir. We’re getting the gas right now. So it should be no problems at all on that one.
	Yes, and, and Jose I know we were talking about Keys. At this point, um...
	Yes.
	...you can forget about that. [crosstalk]
	Un-, un-, understand disregard Keys Energy Center. We’re not gonna, we’re, we’re gonna shut it down at 10:00 as scheduled.
	That is correct.
	Thank you, sir. I appreciate it.
Thank you.	
All right, bye-bye.	

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys's energy manager

Green highlighted lines = PJM operator

8740080 12/23/22 @ 08:01	Phone rings
	Alex Lakatos, PJM.
	Hey Alex. This is Jay at Direct Energy. I would want to take Keys down to 400 megawatts.
	Keys goes to 400 megawatts., hold on a second. Keys clear to go to 400 megawatts.
	Understood, Keys is clear to go to 400 megawatts.
	Correct.
	Okay, thank you.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8740177	Phone rings
12/23/22	Alex Lakatos, PJM
@ 08:28	Hi this is Jay at Direct Energy. Uh, request for shutdown on Keys at top of the hour.
	Uh, I’m sorry, what’d you want to do with Keys?
	I’d like to take Keys offline at the top of the hour.
	Looking to take Keys offline at the top of the hour? All right, I’ll give you a call right back.
	Yeah, it takes them an hour to shut down. So we need to be offline by 10:00.
	Okay, I’ll give you a call right back.
	All right, thank you.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys's energy manager

Green highlighted lines = PJM operator

8740203 12/23/22 @ 08:32	Phone rings
	Direct, this is Dewey.
	Hey, it's Alex Lakatos, PJM.
	Yes, sir.
	Hey, Keys Energy Center. We'll be, we're gonna have to give you a call closer to 10 o'clock to take that unit offline.
	That -- that's going to be too late for us.
	You were scheduled til 10.
	Yeah, but they -- they require an hour to ramp down
	Right. But you -- well, you -- right. But you -- you guys were committed in the day-ahead market for -- til 10 o'clock. You know, we -- we expect those megawatts, so if they have to come off early, you're gonna have to take a forced outage.
	Okay. There's no way to do it before 10 o'clock is what you're saying?
	Right. 'Cause we need -- we need the energy, correct.
	Okay. All right. Thanks.
	Thank you.

Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8740280 12/23/22 @ 08:52	Phone rings
	PJM, Steve Barczyk.
	This is Jay at Direct Energy. Can you update Keys’s log as non-dispatchable?
	All right. Keys -- Keys you want logged, company non-dispatchable?
	That is correct.
	All right. I’ll make that change.
	Thank you, appreciate it.
	Okay.

Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8740539 12/23/22	Phone rings
@ 09:40	Alex Lakatos, PJM.
	This is Jay at Direct Energy requesting permission to shut down Keys at the top of the hour.
	Um, let me give you a call right back, all right?
	Okay.
	Thank you, bye.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8740590 12/23/22 @ 09:49	Phone rings
	Direct. This is Dewey.
	Hey. It’s Alex Lakatos, PJM.
	Uh, yeah.
	Hey. If you have to take the, uh, Keys unit offline, um, you can, uh, start shutting down now.
	Understood Keys is clear to, r-, uh, shut down.
	Correct.
	All right. Thank you.
	Thank you. Bye.



## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8745680 12/24/22 @ 01:55	Phone rings
	Direct Energy, this is Cory
	Yeah, this is Joe Parse, PJM.
	Yes, sir.
	Hey uh Keys Energy Center is unavailable today, correct?
	It is – has no fuel.
	So they’re unavailable?
	That is correct.
	OK, I need the forced outage tickets and I need them unavailable on Markets Gateway.
	OK Keys Energy Center, forced outage tickets and unavailable on Markets Gateway. I’ll get that taken care of. Thank you sir.
	Yes, thank you.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8747832	Phone rings.
12/24/22	Hello, this is Dewey
@ 09:27	Hi. Tom Kaiser at PJM
	Hello. This is Dewey.
	Yeah. Tom Kaiser at PJM
	Yes, sir.
	I’m calling about the Keys Energy Center Unit. Is that unit gonna to be available today, uh, after 10:00?
	Yes. The unit will be available today after 10.
	Okay. And what’s the time to start, on that unit?
	Give me one – one second.
	Hey, we got cut off. (Inaudible)
	Uh, one second. Let me – let me – let me verify when we’re gonna come online.
	Okay.
	Uh, they’re gonna come around – uh, online around 10.
	Okay, 10 a.m., Eastern?
	They’re coming online, and then it will be -- it should be fully available around Hour Ending [BEGIN CUI//PRIV-HC] [END CUI//PRIV-HC] --
	Okay. So they are coming online around 10. And it --
	-- roughly.
	It’s gonna take up to [BEGIN CUI//PRIV-HC] [END CUI//PRIV-HC] to be fully available?
	That is correct.
	Okay. And uh -- okay it’s just gonna take that long to ramp up, I guess?
	Yes.
	Okay. Got it. All right. So they are coming on at 10 o’clock?
	Yes, I guess -- I guess a cold start.
	Okay. Got it. Okay.
	All right.
	All right. Just double-checking.
	Thanks.

Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

	And, okay, great. All right. We’ll – we’ll, uh, keep an eye on the unit. If there’s any reason it cannot come on, let us know, okay?
	All right. Thanks.
	All right. Thanks. Bye.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys's energy manager

Green highlighted lines = PJM operator

8748485	Phone rings.
12/24/22	Direct, this is Dewey
@ 12:21	Hey. It's Alex ( <i>unintelligible</i> ), PJM.
	Hello, Alex.
	All right. Uh, question of the day: Keys Energy Center, where -- do you know where they're at status-wise?
	Uh, I believe it's [crosstalk] start button at 10 -- 10 a.m. [crosstalk] [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] startup time.
	Okay. So once they hit the start button, that's about a [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] process?
	Yes. And they'll be at 140 MW.
	Okay. That's perfect. Thank you.
	One -- one second. Hey Alex?
	Yeah?
	The, uh -- the plan is to run them at 300 megawatts flat.
	That -- that I do know. I -- I was I was just -- I -- my -- I was under the impression that at 10 a.m. they would sync.
	No. No.
	So --
	10 a.m. was, uh -- 10 a.m. was a push start button. It's about a [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] uh, evolution hopefully. Hopefully they didn't cool off too much.
	Okay. Not -- not a problem. I appreciate the information.
	No worries. Thanks.
	Thank you. Bye.

Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

8748489 12/24/22 @ 12:23	Phone rings.
	PJM, Steve Barczyk.
	Hey Steve. I just wanna let -- just giving Alex a courtesy notice that Keys, once -- once they’re starting up, they have a 4 hour cold start. They push the start button at 10. Once they get there, it’ll be 140 megawatts, not 300.
	All right. Keys -- you -- you already got that clearance to come online?
	Yes.
	Okay. Let’s see. And that was come -- that was that coming on for company then?
	Yes.
	Okay. 140 megawatts. So that should be -- you hit the start button at 10?
	Yes.
	So [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC]?
	Yes.
	Okay.
	All right. Thanks.
	All right. Thanks. Bye.

## Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys's energy manager

Green highlighted lines = PJM operator

8748701 12/24/22 @ 13:31	Phone rings
	PJM, Steve Barczyk.
	Hey, Steve. This is Jose Martinez at Direct Energy
	Hey.
	Hey, got good news and bad news, so --
	-- okay. Super
	I know all morning has been bad news and bad news.
	No, it's fine. No, no, what -- Wwat do you got?
	No, the [other generation resource]? He's released for dispatch. I've already updated -- I -- he -- he's -- he's not agency capable, but he can follow the step-point manually, so.
	All right. [other generation resource] is dispatchable, all right. I'll update that for economic real time, Okay.
	Economic real time and uh Keys Energy Center, they failed on the start. They've had a couple of trips and they're -- they're forced off. They're forced out.
	All right. Keys Energy Center. For how long? Are they doing work on it or it how long is the outage for?
	No, we -- put it in through -- how long ago did we take a ticket here. We put that one in through the -- through midnight tomorrow. They're -- they're having -- they're having issues due to the ambient conditions.
	Okay.
	They're getting some temperatures that cause them some problems and at the same time they're also getting emissions that cause them some problems. So.
	All right. Keys Energy Center's currently out and e DART ticket's in and through midnight tomorrow
	Yes, sir.
	So that would be basically until Monday morning.
Basically until Monday morning, yeah, 'cause we went through all this hassle of getting the gas and now we can't even run it. But -- anyways, yes, it would be through Monday morning.	
All right. Very good.	
If -- if something changes or the, you know, we'll let you know.	
Okay.	
All right. Thank you, sir.	

Transcriptions of Phone Calls between PJM Dispatchers and Direct Energy—Keys’s energy manager

Green highlighted lines = PJM operator

	Thanks. Yep. Bye.
	All right. Bye.

**ATTACHMENT D**

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





Engineering group, I managed the group responsible for coordinating day-ahead and real-time operating plans among PJM, its member Transmission Owners and Generation Owners, and our neighboring entities. As a Reliability Engineer prior to that, I performed these functions directly. In my previous engineering positions, I supported the Energy Management System and the Security Constrained Economic Dispatch application.

3. I hold a Bachelor of Science degree in Electrical Engineering, a Master of Science degree in Electrical Engineering, and a Master of Science degree in Engineering Management, all from Drexel University.

## **II. PURPOSE AND OVERVIEW OF AFFIDAVIT**

4. The purpose of my affidavit is to support PJM's answer to the complaint filed by Keys, regarding the Non-Performance Charges<sup>2</sup> assessed to Keys's generation facility ("Keys Facility"). Contrary to the Complaint, PJM properly assessed Non-Performance Charges on Keys because the Keys Facility was unavailable from 10:00 on December 23, 2022 through 10:00 December 24 because Keys did not have any fuel. Responsibility for procuring fuel and ensuring a Capacity Resource, like the Keys Facility, is available during emergency condition rests with Capacity Market Sellers such as Keys. PJM does not arrange or direct fuel procurement and can only act on the information Capacity Market Sellers have provided as to their generating units.

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<sup>2</sup> 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.

### **III. PJM PREPARATIONS FOR WINTER OPERATIONS AND FOR WINTER STORM ELLIOTT**

5. Consistent with PJM's obligations to maintain reliability in the operation of the PJM Transmission System, PJM initiated extensive preparations for operating in severe winter cold and winter storm events in the summer and fall of 2022, conducting emergency drills, verifying reactive capability, and issuing data requests to Members to ascertain seasonal fuel inventories, emissions data, and generator minimum operating temperature limits. My affidavit supporting PJM's May 26, 2023 answer in Docket No. EL23-54-000 provides greater detail on PJM's general preparation efforts.

6. PJM also prepared specifically for Winter Storm Elliott,<sup>3</sup> as also presented in detail in my affidavit supporting PJM's May 26, 2023 answer in Docket No. EL23-54-000. In particular, as relevant to Keys's Complaint, PJM put generators on notice through Cold Weather Advisories and Cold Weather Alerts of the need for heightened readiness as Winter Storm Elliott approached. Despite PJM's efforts, many Capacity Resources failed to perform when they were most needed to support reliable system operations on December 23 and 24, 2022.

### **IV. WINTER STORM ELLIOTT PRESENTED VERY CHALLENGING CONDITIONS FOR PJM OPERATORS**

7. I was working remotely during the daytime hours of December 23 and then in the PJM Control Room for the period from 18:00<sup>4</sup> on December 23, through 08:00 on December 24 and then from 14:00 through 23:00 on December 24, managing PJM

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<sup>3</sup> 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).

<sup>4</sup> All times mentioned in this affidavit are in 24-hour clock and in Eastern Prevailing Time.

operators' successful efforts to keep the lights on. PJM operators repeatedly had to make difficult reliability decisions in real time while in the midst of unprecedented system conditions and significant uncertainties that were exacerbated by generator failures. Because of PJM employees' actions, PJM was able to keep the lights on even in the challenging system conditions. PJM did not shed a single megawatt ("MW") of load on December 23 and December 24.

8. Notwithstanding PJM's preparations for Winter Storm Elliott, the storm's extreme temperature drop coupled with the unusually high holiday weekend load would have stressed system operations by themselves. When the widespread failure of Capacity Resources to meet their Capacity Performance obligations, with roughly a quarter of the PJM Region's installed capacity and almost a third of the generation that should have been online that day—47,000 MW—in unplanned or forced outages, is added to the mix, PJM operators were forced to engage in what at times seemed like an unending recovery. Just as a generating unit was found to replace a unit that had unexpectedly tripped offline or was unable to start at all, another unit would trip off and the hunt for more MW began again.

9. On the morning of December 23, PJM started the operating day with approximately 133 gigawatts ("GW") of energy committed in the Day-Ahead Energy 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. PJM did not forecast any potential capacity issues leading into the operating day of December 23, 2022. However, as the day went on, temperatures plunged incredibly quickly, and the number of generating units on forced outage grew dramatically. By the evening of December 23, power demand had risen to a peak of about 135,000 MW

and generator forced outages had increased over the day to a total of 34,500 MW. By the morning of December 24, 2022, the forced outage rate had risen further, with about 47,000 MW unavailable in total.

**V. KEYS WAS UNAVAILABLE ON BOTH DECEMBER 23 AND DECEMBER 24 WHEN PJM REQUESTED IT TO RUN**

10. My understanding is that PJM's Capacity Performance rules put on Capacity Market Sellers the responsibility for Capacity Resources to perform, and the risk of Non-Performance Charges if they do not perform. In my experience, resource managers have options to mitigate resource performance risks associated with fuel supply through measures such as firm fuel supply and transmission contracts, adding dual-fuel capability to the plant, or maintaining a multi-day supply of fuel on site. But PJM does not make decisions about fuel procurement, fuel transportation, or fuel storage risk for the generators. In fact, PJM management instructs its operators to not direct generators to buy fuel.

11. On the morning of December 23, the Keys Facility was online and scheduled to run until 10:00. Because the Keys Facility is a Capacity Resource, Keys must offer the resource into the PJM energy market, and Keys had done so, with an offer price that was relatively economic. PJM dispatchers wanted additional generation online for the coming day just to meet load across the PJM Region at system marginal price, so dispatchers contacted Keys's energy manager and requested that the Keys Facility remain online for economic real-time at least through the evening peak on December 23. In response, Keys told PJM operators that "we have absolutely no gas,"<sup>5</sup> and that if they did have to buy gas, they were "looking [at] about a 6 million dollar loss, you know, just to be

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<sup>5</sup> PJM Answer, Attachment C at 3 (Transcript of 12/23/22, 07:33).

able to run this one.”<sup>6</sup> That response was not compatible with Keys’ then-effective energy offer parameters (Keys did not submit an updated Real-time Offer<sup>7</sup>)—which means Keys fell short in meeting what is expected of a Capacity Resource whether or not the system was under a declared Emergency Action. That type of response is neither normal nor expected, and it is certainly not treated as an opening of negotiations over whether the resource will run or under what conditions. As particularly relevant here, when PJM dispatchers move on to find the next economic resource that will run consistent with its offer parameters, that action is not a retroactive excuse for the first resource’s raising obstacles to meeting its commitment. That the first resource faces problems obtaining economic fuel supplies in order to run is the problem of the Capacity Market Seller. PJM Dispatch will not direct the resource manager to buy fuel; it will simply move on.

12. From the perspective of PJM Dispatch, when a resource manager rebuffs a PJM request to run the resource in accordance with its offer parameters (whether or not in an emergency), the resource is unavailable, and it is incumbent on the resource manager to reflect that status in PJM’s systems by submitting a forced outage ticket.<sup>8</sup> Sellers do not have to have active energy market offers for resources on an outage, and it is the seller’s responsibility to procure the appropriate fuel and submit an updated report of the resource’s available status to PJM Dispatch.<sup>9</sup> Capacity Market Sellers are expected to provide accurate, updated information to PJM, through PJM’s Markets Gateway and eDART<sup>10</sup>

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<sup>6</sup> PJM Answer, Attachment C at 3 (Transcript of 12/23/22, 07:33).

<sup>7</sup> See Operating Agreement, Schedule 1, sections 1.10.9A & 1.10.9B.

<sup>8</sup> See Operating Agreement, Schedule 1, section 1.9.4. A resource on a forced outage is “not [] expected to submit offers for the sale of energy or other services, or satisfy delivery obligations.” *Id.*

<sup>9</sup> See Operating Agreement, Schedule 1, section 1.9.4 (“A Market Seller shall not be expected to submit offers for the sale of energy or other services, or satisfy delivery obligations . . .”).

<sup>10</sup> eDART (Dispatcher Application and Reporting Tool) is a PJM mechanism that allows generation and transmission owners to submit generation and transmission outage requests. eDART allows its users to

systems as their parameters or status change, so that PJM operators can make sound operating choices based on current, accurate information. PJM operators can only make decisions based on the information provided to them, and resource managers, who best know the status of their resource and its parameters, are the best source of that information.

13. On December 23, after PJM operators moved on from the earlier request—rebuffed by Keys—that Keys stay online after 10:00, and told Keys’ fuel manager to “forget about that,” Keys did submit a forced outage ticket for the Keys Facility in eDART with an effective time of December 23 at 10:00 until December 24 at 10:00.

14. On the morning of December 24, when Keys told a PJM operator that it was working on getting fuel but unsure how much it could get, the PJM operator stated: “We want it regardless. I want it. Let’s put it this way, when you find out what type of fuel you can get or whatever, just let me know the run parameters. I don’t know if it only has a five-hour run window and obviously I’m going to want to plan that out a little bit, but if it can run from the peak until tomorrow, then I really want it.”<sup>11</sup> This is a great example of the struggles we were experiencing during the Maximum Generation Emergencies on December 23 and December 24. We wanted anything and everything we could get from a generator, without focusing on economic merit order or uplift costs. We instructed our dispatchers to call on all generation that they could.

15. As it turned out, the Keys Facility did not succeed in coming online on December 24. The facility encountered difficulty attempting a cold start during the frigid weather, and according to their communications with PJM Dispatch, the plant was also

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manage their outage data by viewing the status of their outages and obtaining outage reports. *See eDart*, PJM Interconnection, L.L.C., <https://www.pjm.com/markets-and-operations/etools/edart> (last visited May 24, 2023).

<sup>11</sup> Complaint, Attachment 2 at 8 (transcript of 12/24 08:31 call between Direct Energy and PJM).

reaching its emission limitations.<sup>12</sup> Direct Energy advised the PJM operator that they put in an outage ticket for the Keys Facility through midnight on December 25.<sup>13</sup> This was just one of multiple outage tickets Keys submitted for the Keys Facility during Winter Storm Elliot, including one that PJM requested Keys to submit very early on December 24 because, despite Key's submission of an outage ticket on December 23, the Keys Facility was still showing as unavailable on Markets Gateway.

16. Keys submission of the multiple outage tickets is consistent with the practice and expectation, which I discussed above, that resource managers are responsible for submitting outage tickets to keep PJM operators apprised of the current, accurate status of their facility. It is not PJM's responsibility to submit such outage tickets or to direct resource managers to submit such tickets. However, if the resource manager has not satisfied this responsibility to submit an outage ticket, PJM will request that it do so, to allow PJM operators to make dispatch decisions based on accurate information.

17. Last, although Keys states in its Complaint that PJM put the Keys Facility in a reserve shutdown, PJM does not put units in reserve shutdown and this is not a term used by our operators.

18. This concludes my affidavit.

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<sup>12</sup> I should note that, at 17:30 on December 24, 2022, the U.S. Department of Energy issued PJM an emergency order 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. *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>. Accordingly, Keys' emissions limitation would not have been an impediment after 17:30 had Keys been able to run.

<sup>13</sup> *See* Answer, Attachment C at 17 (Transcript of 12/24 13:31 call).



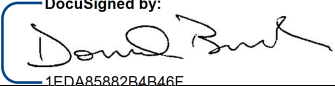
**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Parkway Generation Keys )  
Energy Center LLC, )  
Complainant, )  
v. )  
PJM Interconnection, L.L.C., )  
Respondent. )

Docket No. EL23-60-000

**VERIFICATION**

I, **Donald Bielak**, pursuant to 28 U.S.C. § 1746, state, under penalty of perjury, that I am the Donald Bielak referred to in the foregoing document entitled "Affidavit of Donald Bielak on Behalf of PJM Interconnection, L.L.C.," that I have read the same and am familiar with the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

DocuSigned by:  
  
1EDA85882B4B46F

Donald Bielak

**ATTACHMENT E**

**PROPOSED PROTECTIVE AGREEMENT**

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Parkway Generation Keys Energy Center LLC,	)	
Complainant,	)	
	)	
v.	)	Docket No. EL23-60-000
	)	
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:<sup>1</sup>
  - 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;<sup>2</sup>

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<sup>1</sup> 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).

<sup>2</sup> 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;<sup>3</sup>
- 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);<sup>4</sup> 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

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<sup>3</sup> 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).

<sup>4</sup> 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);<sup>5</sup> 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).

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<sup>5</sup> 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.<sup>6</sup> However, if an attorney qualified as a Reviewing

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<sup>6</sup> 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.<sup>7</sup>

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*.<sup>8</sup> 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

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

<sup>7</sup> See *infra* P 19.

<sup>8</sup> *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

Parkway Generation Keys Energy Center LLC,	)	
Complainant,	)	
	)	
v.	)	Docket No. EL23-60-000
	)	
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

Parkway Generation Keys Energy Center LLC,	)	
Complainant,	)	
	)	
v.	)	Docket No. EL23-60-000
	)	
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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