

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

Lee County Generating Station, LLC, Complainant,)	
)	
)	
v.)	Docket No. EL23-57-000
)	
PJM Interconnection, L.L.C., Respondent.)	

ANSWER OF PJM INTERCONNECTION, L.L.C.

PJM Interconnection, L.L.C. (“PJM”), pursuant to Rule 213 of the Federal Energy Regulatory Commission’s (“Commission”) Rules of Practice and Procedure,¹ answers the Complaint filed by Lee County Generating Station, LLC (“Lee County” or “Complainant”) on April 5, 2023.² The Commission should deny the Complaint.

I. INTRODUCTION

Lee County should be assessed Non-Performance Charges stemming from Winter Storm Elliott because Lee County:

- Never purchased gas in the key periods;
- Put itself in a forced, i.e., unplanned, outage because it did not have fuel;
- Imposed, during the emergency, an exceedingly long notification parameter that was as much as 190 times longer than its usual notification time; and

¹ 18 C.F.R. § 385.213.

² *Lee County Generating Station, LLC v. PJM Interconnection, L.L.C.*, Complaint Requesting Fast Track Processing of Lee County Generating Station, LLC, Docket No. EL23-57-000 (Apr. 5, 2023) (“Complaint”).

- Never notified PJM that it was ready to generate, despite multiple requests from PJM to do so.

Lee County has been a committed Capacity Resource³ since [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC], and has been 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, Lee County was not available at the height of Winter Storm Elliott.⁴ And Lee County—generally a peaking facility with a [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC]—was not scheduled by PJM because of Lee County’s inflexible notification parameter, which was increased from [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] during the emergency, effectively absencing Lee County from PJM’s efforts to ensure resource adequacy throughout the worst period of the storm. The Tariff is explicit that a Capacity Resource’s non-performance is not excused if PJM could not dispatch the resource because of the Capacity Market Seller’s chosen operating parameters.⁵ Lee County was therefore properly assessed Non-Performance Charges.

³ 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.

⁴ Winter Storm Elliott refers to a large winter storm that passed through the PJM Region on December 23 through December 25, 2022. See *Winter Storm Elliott Info*, PJM Interconnection, L.L.C., <https://www.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).

⁵ See Tariff, Attachment DD, section 10A(d).

In its Complaint, Lee County seeks cover in the PJM operator’s request that Lee County reflect its patent unavailability in PJM’s systems with a forced outage ticket. But that guidance was simply part and parcel of the practical reality of managing the system in an emergency, when economics have exited the equation and *megawatts* (“MW”)—when, where, and how much—are dispatchers’ over-riding and immediate concern. System operators need up-to-the-minute, accurate information readily available in their systems to manage a Maximum Generation Emergency. Time spent making repeated phone calls to an unavailable resource takes vital time away from more rewarding efforts to schedule available resources to come online. Indeed, here, PJM called Lee County’s energy manager multiple times on December 23 and 24, 2022, and at no time were Lee County’s units available, with gas flowing, and ready to generate. Lee County submitted a forced outage ticket and never made its units capable of being scheduled after that.

The Complaint also unambiguously attempts to shift Lee County’s burden to PJM, arguing that PJM operators “bore the duty to tell Lee go find gas.”⁶ Incorrect. The Commission has made clear, time and again, that Capacity Market Sellers bear the burden—and the risk—of managing their fuel supplies.⁷ The Commission should firmly

⁶ Complaint at 16.

⁷ 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”).

reject that unreasonable suggestion here as well. The PJM Region has hundreds of gas-fired generators, taking service from numerous different pipelines, 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,⁸ whether, when, and how to get gas to meet Capacity Performance obligations is solely and entirely the responsibility of Capacity Market Sellers. 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. Indeed, PJM management instructs the operators that they are not to tell generators whether or not to buy gas.⁹ Deciding for Capacity Market Sellers whether and when they should be buying gas is not PJM operators' job—and the

⁸ 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., Docket No. RM21-17-000, at 20 (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.

⁹ Attachment D, Affidavit of Donald Bielak on Behalf of PJM Interconnection, L.L.C. ¶ 10 ("Bielak Aff.").

Commission has an excellent opportunity here to make that abundantly clear to any who have not yet received 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 have fuel, or fuel is terribly expensive, or it needs an extended time to come on line, then the question of non-performance under the Tariff is already settled.

Micro-managing those interactions after the fact, as Lee County and 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."¹⁰ Monday morning quarterbacking as to the fine details of PJM's implementation of its assigned responsibility, and discretion, to manage emergencies¹¹ is not only inappropriate, but would create a dangerous precedent that the Commission should be very reluctant to set. As related in detail below, PJM and its operators managed the many difficult challenges posed by Winter Storm Elliott,¹² 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

¹⁰ *Big Sandy Peaker Plant. LLC v. PJM Interconnection, L.L.C.*, 154 FERC ¶ 61,216, at P 50 (2016).

¹¹ See Operating Agreement, section 10.4(xx).

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

providing assistance to neighbors, and did not direct a single mandatory load curtailment—*the lights stayed on*. The 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 Capacity Performance rules in the Tariff, Capacity Market Sellers “bear the burden of delivering on their capacity obligation;”¹³ consequently, “[a] natural gas generator is held responsible for arranging sufficient natural gas deliveries despite pipeline outages.”¹⁴ As Lee County did not meet its Capacity Performance obligations during the Performance Assessment Intervals, PJM properly assessed Non-Performance charges on Lee County. Lee County’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, with Very Limited Excuses, or Pay Stringent Non-Performance Charges*

The principle underlying PJM’s Capacity Performance rules is simple: Capacity Market Sellers are responsible for the performance of their Capacity Resources. Specifically, Capacity Market Sellers are responsible for ensuring their resources are ready and available to perform. In addition, 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 responsible for deciding when and

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

¹³ *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157, at P 110 (2016) (“CP Rehearing Order”), *aff’d sub nom. Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017).

how to buy fuel needed to ensure that their resources are capable of performing—and for any Non-Performance Charges resulting from their economic choices.

The Tariff makes no exception for fuel purchasing or operating parameter issues because, as between load and Capacity Market Sellers, performance responsibility appropriately lies with the Sellers as the parties in the best position to assess and address the relevant risks (including the well-known strictures of nominations deadlines and risks of pipeline interruptions, operational flow orders, and ratable take requirements) that its resource might not be able to perform (and who are being compensated for their committed Capacity Resources). As Mr. Bielak testifies, the fuel delivery risk associated with not having on-site fuel is up to generators to address.¹⁵

The Tariff does make two exceptions to Non-Performance Charge assessment, 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. And the second exception for PJM scheduling actions does not apply when the scheduling action was forced by the Capacity Resource’s operating parameter limitations or a higher market-based offer.¹⁶ Lee County’s operating parameters, particularly its long notification times, are the chief reason Lee County is not entitled to an excuse from Non-Performance Charges.

PJM’s capacity market is designed to ensure reliability at just and reasonable rates. Following the Polar Vortex in January 2014, during which generating resources in

¹⁴ CP Rehearing Order at P 110.

¹⁵ Bielak Aff. ¶ 10.

¹⁶ See Tariff, Attachment DD, section 10A(d).

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.¹⁷ 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.”¹⁸

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 stringent¹⁹ Non-Performance Charges.²⁰ Specifically, for the periods (known as Performance Assessment Intervals) when certain PJM-declared Emergency Actions are in effect, the Tariff requires PJM to compare a Capacity Resource’s Actual Performance against its Expected Performance, and assess Non-Performance Charges when the resource falls short.²¹ The Commission found that Non-Performance Charges will “act as a strong incentive for performance,”²² explaining that “if and to the extent [a Capacity Resource] fails to perform during an emergency,

¹⁷ See CP Order at P 7.

¹⁸ CP Order at P 28

¹⁹ 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.

²⁰ 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.

²¹ 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).

²² CP Rehearing Order at P 72.

when it is most needed, it is appropriate that the compensation for that resource be reduced and possibly entirely forfeited.”²³

The very limited excuses from Non-Performance Charges put the responsibility for ensuring resource performance on Capacity Market Sellers, and requires them to “bear the burden of delivering on their capacity obligation.”²⁴ As a result, 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.”²⁵ In this way, the Non-Performance Charge “holds capacity resources accountable for delivering on their capacity commitments”²⁶ 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.”²⁷

Capacity Resources are not paid to simply stand by; 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 declared emergency for capacity shortages. If Capacity Market Sellers need to purchase natural gas and self-schedule to ensure that their Capacity Resources are available when

²³ CP Rehearing Order at P 29.

²⁴ CP Rehearing Order at P 110.

²⁵ CP Rehearing Order at P 110.

²⁶ CP Rehearing Order at P 18.

²⁷ 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.”).

needed, then sellers of gas-fueled Capacity Resources should engage in such forward-looking behavior.²⁸

In sum, PJM’s Tariff rules penalizing under-performance are designed so that customers get the reliability for which they are paying and generators’ capacity revenues are tied “more closely with real-time delivery of energy and reserves during emergency system conditions.”²⁹ Further, as the Commission stated, each excuse of non-performance, “represent[s] a reallocation of nonperformance risk from capacity suppliers to consumers.”³⁰ Lee County seeks to be excused from the consequences of its Performance Shortfalls during the Performance Assessment Intervals, representing a large and wholly unwarranted shift of non-performance risk to consumers and a corresponding degradation of the incentives for Capacity Performance that the Commission should not permit.

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 as defined in the PJM Tariff. 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

²⁸ 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).

²⁹ CP Order at P 158.

³⁰ CP Rehearing Order at P 109 (citing *ISO New England Inc.*, 147 FERC ¶ 61,172, at P 71 (2014)).

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.”³¹ 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.”³² In the same vein, the Commission has found that “it may be appropriate to provide operational and reliability-related discretion to independent system operators, and to not second-guess their decisions in that regard.”³³

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 ability

³¹ *Me. Pub. Utils. Comm’n*, 97 FERC ¶ 61,322, at P 26 (2001).

³² *PJM Interconnection, L.L.C.*, 180 FERC ¶ 61,051, at P 82 (2022).

³³ *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.”). *See also* Tariff, Definitions – G-H (“Good Utility Practice” includes “any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition.”); *New England Power Co.*, 31 FERC ¶ 61,047, at 61,084 (1985) (“managers of a utility have broad discretion in conducting their business affairs; . . . the appropriate test to [determine prudence of costs] is whether they are costs which a reasonable utility . . . would have made, in good faith, under the same circumstances, and at the relevant point in time;” and “while in hindsight it may be clear that a management decision was wrong, our task is to review the prudence of the utility’s actions . . . based on the particular circumstances existing . . . at the time.”).

to declare emergencies and manage grid operations to ensure reliability. The Tariff, in turn, 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.”³⁴

Implementing this responsibility, PJM has an entire manual solely devoted to Emergency Operations.³⁵ As specified in that manual, 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.”³⁶

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.”³⁷ 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

³⁴ Operating Agreement, Definitions – E-F.

³⁵ 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>.

³⁶ Manual 13, section 1.1 (emphasis added); see also Tariff, Definitions – G-H (defining Good Utility Practice).

³⁷ Tariff, Definitions – E-F.

stress limits for such Generation Capacity Resource . . . in order to manage, alleviate, or end the Emergency.”³⁸

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.³⁹ The severe cold weather on December 23⁴⁰ was unprecedented for early winter.⁴¹ The 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.⁴² 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.⁴³

The challenges were exacerbated by very high levels of generation outages. While PJM started the operating day on December 23 with 155,750 MW of reported available generation, well above the forecast peak for that day of about 127,000 MW,

³⁸ Tariff, Definitions – L-M-N (emphasis added).

³⁹ 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”).

⁴⁰ All dates noted in this chronology are in 2022.

⁴¹ See Winter Storm Elliott FAQ at 3.

⁴² See Winter Storm Elliott FAQ at 3.

⁴³ 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”).

generator forced outages increased rapidly. During the early evening of December 23, as power demand rose to a peak of about 135,000 MW, generator forced outages reached as high as 34,500 MW.⁴⁴ By the early morning of Saturday, December 24, generation outages had grown to a level initially estimated at nearly 46,000 MW,⁴⁵ and later updated to approximately 47,000 MW.⁴⁶

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

PJM prepared for cold weather operations beginning in the summer of 2022 and continuing throughout the fall, 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.⁴⁷ Beginning on December 20, PJM issued multiple Cold Weather Advisories and Cold Weather Alerts on both a regional basis and an entire RTO basis. These various types of advisories and alerts, defined and explained in Attachment A and deployed as shown on the timeline in Attachment B, were intended to elevate awareness of impending 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.*

⁴⁴ See Winter Storm Elliott FAQ at 3.

⁴⁵ See Winter Storm Elliott FAQ at 3.

⁴⁶ Operating Committee, *Winter Storm Elliott Generator Performance*, PJM Interconnection, L.L.C. (Feb. 9, 2023), <https://www.pjm.com/-/media/committees-groups/committees/oc/2023/20230209/20230209-item-04---winter-storm-elliott-generator-performance.ashx>.

⁴⁷ Bielak Aff. ¶ 5.

On the morning of December 23, after issuing Cold Weather Advisories and Cold Weather Alerts each of the three prior days, PJM developed its operating plan for the day cautiously. 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 outages that were reported for the PJM generation fleet.⁴⁸ In addition, based on the operating parameters submitted and visible to PJM, approximately 13 GW of short-lead, aka “fast start,” units were then reported as available.⁴⁹ As noted above, the resulting 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 (an extremely conservative amount as compared to the 3,000 MW reserve requirement) expected to be available to absorb load increases and generation contingencies and support PJM’s neighboring systems.⁵⁰

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.⁵¹ 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, 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

⁴⁸ See Winter Storm Elliott FAQ at 3, 7.

⁴⁹ See Winter Storm Elliott FAQ at 3.

⁵⁰ See Winter Storm Elliott Overview at 5.

⁵¹ Bielak Aff. ¶ 8.

Emergency Action through 23:59 on December 23.⁵² 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.⁵³ 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,⁵⁴ at 23:00, PJM declared a Maximum Generation Alert and Load Management Alert, as well as an EEA1 condition, starting December 24 at 00:00.⁵⁵

Given the persistent high load demand and high forced outage rates (rising up to 47,000 MW by the morning peak, as previously noted) on the morning of December 24, PJM invoked its various alerts and authorities to manage the Emergency and maintain reliability. Thus, PJM issued a rare Region-wide public call for conservation from 04:00 on December 24 to 10:00 on December 25.⁵⁶ At 04:20, PJM issued a Pre-Emergency Load Management Reduction Action and an Emergency Load Management Reduction Action.⁵⁷ On December 24, PJM issued a Maximum Generation Emergency for the period from 04:27 to 22:00, triggering Performance Assessment Intervals. At 04:52, PJM issued a Voltage Reduction Alert.⁵⁸ PJM then, at 06:17, encouraged Market Participants

⁵² 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.

⁵³ 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.

⁵⁴ See Winter Storm Elliott FAQ at 3.

⁵⁵ See Attachment B at 1.

⁵⁶ See Attachment B at 1.

⁵⁷ See Attachment B at 1; *supra* note 53.

⁵⁸ See Attachment B at 2.

to submit bids to sell Emergency energy into PJM.⁵⁹ At 07:15, PJM issued a Voltage Reduction Warning and Reduction of Non-Critical Plant Load. Each of these actions, alerts, and warnings signaled Emergency conditions and put all market participants on notice of the urgent need for capacity.

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 submitted its petition for a declaration of energy emergency to the DOE on the afternoon of December 24.⁶⁰ At 17:30 the DOE issued the requested section 202(c) emergency order,⁶¹ 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 provided PJM emergency authority from 17:30 through 22:00 on December 24.⁶²

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

⁵⁹ See Attachment B at 2.

⁶⁰ 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>.

⁶¹ 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>.

⁶² *Id.*

D. By Its Own Account, Lee County Did Not Meet Its Capacity Performance Obligations Because It Was Not Available During the Emergency and Thus Is Not Entitled to an Excuse

PJM’s repeated, unsuccessful attempts to obtain needed energy and reserves from Lee County during the capacity emergency on December 23 and 24 are recounted below, including conversations between PJM dispatchers and Lee County’s energy manager. The transcripts, attached hereto as Attachment C and excerpted below, show that Lee County’s operating parameters, specifically its long notification times, are the reason Lee County was not dispatched. Those transcripts also show that Lee County chose not to purchase the fuel necessary for it to operate and failed to provide the PJM operators the updates as to its availability they requested. Lee County’s economic choices, i.e., its choice not to self-schedule and the choices reflected in its operating parameters, prevented Lee County from being “reliably available to provide energy and reserves in an emergency condition”⁶³ as required by its capacity commitment.⁶⁴ It was Lee County’s economic choice to be unable to meet its Capacity Performance obligations and Lee County does not qualify for an excuse from the Non-Performance Charges PJM rightfully imposed.

1. December 23

On December 23 at 10:17, PJM dispatchers called Lee County’s energy manager, regarding the time required to start up the Lee County units. Lee County’s energy manager confirmed that Lee County’s current start-up notification time was **[BEGIN CUI//PRIV-HC]** [REDACTED] **[END**

⁶³ CP Order at P 28.

⁶⁴ In addition, Lee County’s failure to update its availability as requested made the PJM operators’ job more difficult, at a time when they already were stressed by the emergency conditions. Bielak Aff. ¶ 11.

CUI//PRIV-HC]⁶⁵ At 11:55, PJM dispatchers again called Lee County’s energy manager and requested the start-up time for Lee County. Lee County’s energy manager responded that Lee County would not be available until 18:00 because its units were fuel-limited.

PJM: “Lee County . . . what’s the time to start on Lee County?”

LEE COUNTY’S ENERGY MANAGER: “Stand by. We’re in the same gas situation **[BEGIN CUI//PRIV-HC]** [REDACTED] **[END CUI//PRIV-HC]**. They wouldn’t be able to start until 18:00. We have to have gas nominated and flowing before we can start those units, so 18:00.”

PJM: “And they don’t have a dual fuel capability or anything of that nature?”

LEE COUNTY’S ENERGY MANAGER: “That is correct. Standby. No sir, they do not.”

PJM: “Okay. So basically they’re fuel limited.”

LEE COUNTY’S ENERGY MANAGER: “They would be fuel limited until 18:00 today, yes sir.”

PJM: “Until 18:00.”

LEE COUNTY’S ENERGY MANAGER: “And if you called them on now, we would have to procure that gas now and then it would start flowing at 18:00... so it’s, it’s the pipeline holding us.”

PJM: “No, no, I get it, I get it. Let’s see here 18:00...”

LEE COUNTY’S ENERGY MANAGER: “I’m pulling up...”

PJM: And how long do they have to run that... They have to run that **[BEGIN CUI//PRIV-HC]** [REDACTED] **[END CUI//PRIV-HC]** then? Or until the end...?”

LEE COUNTY’S ENERGY MANAGER: “The way I understand it is that because if we got the gas flowing it wouldn’t be a **[BEGIN CUI//PRIV-HC]** [REDACTED] **[END CUI//PRIV-HC]** run, we would be able

⁶⁵ Attachment C at 2 (Transcript of 12/23/22, 10:17).

to run until the end of the gas day at that point. So we would have gas from 18:00 flowing to 10 o'clock tomorrow morning.”

PJM: “Is that your time or my time?”

LEE COUNTY’S ENERGY MANAGER: “Eastern. Eastern time, PJM time.”

PJM: “Okay. Let me have a conversation with some people.”

LEE COUNTY’S ENERGY MANAGER: “Okay, very good sir.”⁶⁶

At 11:59, PJM dispatchers called Lee County’s energy manager regarding the time to start on the Crete Facility, another generating facility also managed by Lee County’s energy manager. During that call, Lee County’s energy manager reiterated that Lee County was unavailable until 18:00 on December 23 “because of the [gas pipeline] intra-day nomination schedules.”⁶⁷ PJM clarified that if it wanted to call on Lee County, it could do so at 18:00. Lee County’s energy manager agreed, noting that PJM needed to call on Lee County in the next hour and twenty minutes, i.e., by 13:20, or it “[would not] be able to burn gas until 23:00, because of the nomination windows, [intra-day] nomination windows.”⁶⁸

At 17:42, PJM dispatchers called Lee County’s energy manager and requested that Lee County CTs 1-8 come online:

PJM: “At this time requesting Lee County CTs 1 through 8 online for economics.”

LEE COUNTY’S ENERGY MANAGER: “[employee talking to someone else] Shannon at PJM calling. [employee to Shannon] we are trying to get gas.”

PJM: “You don’t have any gas right now?”

⁶⁶ Attachment C at 2 (Transcript of 12/23/2022, 11:55).

⁶⁷ *Id.* at 3 (Transcript of 12/23/2022, 11:59).

⁶⁸ *Id.*

LEE COUNTY’S ENERGY MANAGER: “They won’t let us run until 23:00.”

PJM: “All right well we requested them on so you are going to need to put a forced outage ticket in and *let us know when you’re available.*”

LEE COUNTY’S ENERGY MANAGER: “Okay, there’s a notification time in there that says we’re not available until 23:00.”

PJM: “But you need to make them unavailable right now then.”

LEE COUNTY’S ENERGY MANAGER: “Okay, thank you.”⁶⁹

At 18:27, PJM dispatchers again called Lee County’s energy manager, who confirmed Lee County was “not available for no gas.”⁷⁰ PJM once again asked Lee County’s energy manager to make Lee County unavailable in Markets Gateway, as PJM “need[s] to know exactly what [the available] capacity is right now.”⁷¹ Lee County’s energy manager confirmed that Lee County was unavailable and committed to updating Markets Gateway.

⁶⁹ *Id.* at 5 (Transcript of 12/23/2022, 17:42).

⁷⁰ *Id.* at 6 (Transcript of 12/23/22, 18:27).

⁷¹ *Id.*

2. December 24

At 05:54, PJM called Lee County’s energy manager to “find out if we can get any of your ComEd CTs,” including Lee County, and “what time they’d be able to run.”⁷² At 06:32, Lee County’s energy manager informed PJM that it was “fuel limited through 10:00 a.m. at this point on . . . Lee County.”⁷³ PJM reaffirmed that it needed constant updates on the ComEd CT generators’ ability to procure gas and run after 10:00 based on current conditions.

PJM: “Whatever you can get we need, we need like, we need to be constantly updated on it so we know where we stand.”

LEE COUNTY’S ENERGY MANAGER: “Understood.”⁷⁴

PJM dispatchers again called Lee County’s energy manager at 06:49 about the availability of Lee County. PJM requested that Lee County’s energy manager confirm that Lee County would be available at 10:00. Lee County’s energy manager stated that he would “give . . . an update as soon as I know.”⁷⁵ At 07:31, Lee County’s energy manager responded that Lee County was available with an [BEGIN CUI//PRIV-HC] ■ ■ ■ [END CUI//PRIV-HC] notification window.

Ten minutes later, at 07:41, Lee County’s energy manager let the PJM operators know that the Lee County notification period, which Lee County’s energy manager had just said was [BEGIN CUI//PRIV-HC] ■ ■ ■ [END CUI//PRIV-HC], would shortly change to [BEGIN CUI//PRIV-HC] ■ ■ ■ [END CUI//PRIV-HC], as a result of an

⁷² *Id.* at 7 (Transcript of 12/24/22, 05:54).

⁷³ *Id.* at 8 (Transcript of 12/24/22, 06:32).

⁷⁴ *Id.* at 9 (Transcript of 12/24/22, 06:32).

⁷⁵ *Id.* at 10 (Transcript of 12/24/22, 06:49).

exception request by Lee County to change its operating parameters *during the emergency.*

LEE COUNTY'S ENERGY MANAGER: "And then for the Lee County, they had submitted a notification time exception request, so they didn't get it in for today but it looks like it's pending, so those are going to be updated starting hour ending 11 for Lee County to a [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] notification time."

PJM: "Wow."

LEE COUNTY'S ENERGY MANAGER: "Yeah."⁷⁶

As the PJM operator summarized the about-to-be updated Lee County operating parameters, "it's [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] notification on Lee Countys, so basically they aren't available."⁷⁷ Lee County's energy manager agreed Lee County's availability status for December 24 was, [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC]⁷⁸ PJM notes that Lee County did not reference, recount, or quote the December 24, 07:41, call in the Complaint, thereby omitting a significant fact about Lee County's availability during the emergency period.

III. ANSWER TO COMPLAINT

A. *Lee County Was Unavailable Due to Its Operating Parameters and Therefore Cannot Claim Excuse from Non-Performance*

Lee County correctly states that the Tariff contains two excuses from Non-Performance Charges. PJM notes that these excuses are "strictly circumscribed."⁷⁹ Specifically, a resource's performance shortfall may be excused only if:

⁷⁶ *Id.* at 13 (Transcript of 12/24/22, 07:41).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ CP Order at P 167.

- the resource “was unavailable during such Performance Assessment Interval solely because the resource on which such Capacity Resource . . . is based was on a Generator Planned Outage or Generator Maintenance Outage approved by [PJM];” 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.”⁸⁰

There is a crucial caveat to that second exception: a resource shall be assessed Non-Performance Charges to the extent it “otherwise was needed and would have been scheduled by [PJM] to perform, but was not scheduled to operate, or was scheduled down, solely due to: (i) any operating parameter limitations submitted in the resource’s offer, or (ii) the seller’s submission of a market-based offer higher than its cost-based [offer].”⁸¹

These limitations on the narrow PJM “scheduling action” exception reflect that when a Capacity Market Seller places limitations on the availability of a resource, it has reduced PJM’s ability to deploy the resource to help alleviate an emergency. Thus, any shortfall in Actual Performance⁸² below Expected Performance⁸³ is not excused if PJM did not schedule the plant because of the seller’s economic choices reflected in its parameter limitations.⁸⁴ As the U.S. Court of Appeals for the D.C. Circuit observed, “the

⁸⁰ Tariff, Attachment DD, section 10A(d).

⁸¹ Tariff, Attachment DD, section 10A(d).

⁸² Expected Performance roughly is the amount of capacity the Capacity Resource was expected to provide during a given Performance Assessment Interval. *See* Tariff, Attachment DD, section 10A(c).

⁸³ Actual Performance for a generation resource like Lee County is “the metered output of energy delivered to PJM by such resource plus the resource’s real-time reserve or regulation assignment, if any, during the Performance Assessment Interval.” Tariff, Attachment DD, section 10A(c).

⁸⁴ *See, e.g., PJM Interconnection, L.L.C.*, Answer of PJM Interconnection, L.L.C., Docket No. ER15-623-000, at 70 (“[P]hysical resource limitations are a design and economic choice by the resource provider. Other resource providers may have made a choice to install a more flexible or robust design. Resource providers should be exposed to the consequences of those economic design choices. When they are, the

Commission concluded that it is reasonable to penalize a resource for failing to operate outside of its parameter limitations. It explained that ‘parameter limits should not be viewed as a permanent entitlement to under-perform. Instead, those limits should be exposed to financial and market consequences.’”⁸⁵

In other words, the Capacity Performance Tariff holds “resources with restrictive operating limits to the same standards as resources with fewer limitations.”⁸⁶ This equivalent treatment appropriately reflects that “a resource that is unable to produce energy or provide operating reserves during Performance Assessment [Intervals] because of parameter limitations provides less capacity value to customers than a resource that is able to perform during these [intervals].”⁸⁷ As a result, “a resource that fails to perform because of parameter limitations [may] receive less net capacity revenue than a performing resource.”⁸⁸

PJM did not schedule Lee County due solely to its parameter limits.⁸⁹ As the Complaint concedes, “Lee [County] was available consistent with its parameters.”⁹⁰ Lee

result over time will be more flexible and better performing resources—because project developers will see that better performing resources end up with more capacity revenues.”).

⁸⁵ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d at 674 (quoting CP Rehearing Order at P 103); see CP Order at P 45 (“Without more stringent penalties, PJM has shown there is little incentive for a seller to make capital improvements, or increase its operating maintenance for the purpose of enhancing the availability of its unit during emergency conditions”).

⁸⁶ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d at 674.

⁸⁷ CP Order at P 441; see CP Rehearing Order at P 106 (“[I]n the capacity market, if PJM does not schedule that resource due to its parameter limits, then PJM applies a Non-Performance Charge since the resource was not available pursuant to its capacity obligation. Resources therefore run a risk in including parameter limitations in their energy market offers, and are encouraged to maximize their flexibility to perform consistent with the new capacity obligation.”).

⁸⁸ CP Order at P 441.

⁸⁹ Lee County’s arguments concerning another facility with the same operating parameters (Complaint at 12) are nothing more than a distraction. The difference in the dispatch of Crete and Lee County is due to the differing circumstances in which PJM sought to get the units online. PJM tried to call the Crete units on for economics during the morning of December 23. At that time, PJM was not experiencing a capacity emergency and the Crete units were less expensive than the Lee County units. When the energy manager

County's affirmation of its operating parameters is not the excuse Lee County imagines it to be, however, because Lee County's notification parameters at the time, which ranged from [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC], are the very reason PJM could not schedule Lee County and thus the reason Lee County is subject to Non-Performance Charges. As Lee County thus concedes, its Capacity Resource was *unavailable* due to the Seller-specified operating parameters, putting it squarely into the exception to the excuse. The reason PJM did not schedule Lee County was that it *could not* schedule Lee County when it needed the energy due solely to the operating parameter limitations Lee County submitted. Further, the fact that Lee County altered its notification periods to lengthen them during the emergency period (a fact Lee County conspicuously does not include in its Complaint) serves to highlight that the reason Lee County was not scheduled was entirely within Lee County's control.

Given that "resources with restrictive operating limits [are held] to the same standards as resources with fewer limitations"⁹¹ and Capacity Market Sellers "bear the burden of delivering on their capacity obligation,"⁹² Lee County can hardly claim it is unjust and unreasonable that its operating parameter limitations preclude an excuse from Non-Performance Charges.

for both Crete and Lee County said [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC], the PJM dispatcher "released" the Crete units and stated he would "log" them as coming on at 18:00. This was a real time economic dispatch, which PJM delayed because [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC]. Later in the day, at the beginning of the capacity emergency PJM tried to call Lee County for economics, to meet load, and was told Lee County still did not have gas. Later still, PJM dispatchers were calling generators looking for every possible megawatt, regardless of the price, and PJM asked about Lee County's availability several times and was consistently told Lee County did not have fuel.

⁹⁰ Complaint at 12.

⁹¹ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d at 674.

⁹² CP Rehearing Order at P 110.

B. Lee County Did Not Have Fuel During the Relevant Period

Lee County admits it did not purchase fuel during December 23 and 24,⁹³ but seems to argue it is excused from fuel procurement responsibility as long as it explains the pipeline deadlines to PJM. Lee County first suggests that it is PJM that “direct[s] Lee to schedule fuel to the plant.”⁹⁴ Next, Lee County goes so far as to claim that once Lee County explains to the PJM operator its status, “the PJM operator bore the duty to tell Lee go find gas.” As explained above, the PJM operators’ duty is to operate the system reliably and, during this capacity emergency, to obtain sufficient energy and reserves from the Capacity Resources that have been paid to provide energy and reserves in this very situation. Indeed, PJM specifically instructs its operators not to tell generators whether they should buy gas.⁹⁵ Lee County’s expectation that PJM operators should be telling generators when to procure fuel is unreasonable and would shift to PJM a responsibility that, under multiple Commission precedents, lies with the generators. And, if the Commission rewards Lee County’s audacious claim, it will shift to load risks and therefore costs that belong with Capacity Market Sellers.

Like every other gas-fired generator in PJM, Lee County (or its energy manager) should be handling its own gas supply arrangements and taking on the supply risks that it is uniquely situated to handle in return for the Capacity Performance payments it has been receiving. PJM does not direct resources to procure fuel.⁹⁶ Instead of PJM being

⁹³ See Complaint at 10, where Lee County states that it “could have bought gas” and “would have procured fuel,” tacitly admitting it did *not* buy fuel; see also *supra* at pages 19-21, quoting calls between Lee County’s energy manager and PJM in which Lee County’s energy manager reports Lee County as “fuel limited.”

⁹⁴ Complaint at 13.

⁹⁵ Bielak Aff. ¶ 10.

⁹⁶ Bielak Aff. ¶ 4.

able to command that action, PJM's markets are designed to send economic signals to incent Capacity Market Sellers to ensure that their Capacity Resources will be able to perform. When Capacity Market Sellers choose to ignore the incentives, and allow their resources to be unable to perform precisely at the critical time they are being paid throughout the year to perform, it is not PJM dispatchers' responsibility—in the height of an emergency—to figure out how to ameliorate the Seller's untenable situation.

The bottom line is that a responsible Capacity Market Seller should do what needs to be done to minimize the risk that its Capacity Resource will be unavailable.⁹⁷ If Lee County had chosen to maintain availability so that it could operate when called, by self-scheduling at minimum output, then it would have performed consistent with its capacity obligation, regardless of whether or not PJM scheduled it to provide energy or reserves.

In fact, Lee County practically admits as much in the Complaint. In the Declaration of Carla Banks on Behalf of Lee County Generating Station, LLC attached to the Complaint ("Banks Declaration"), Ms. Banks states that "around the time" the PJM operator requested that Lee County submit a forced outage ticket and *prompted by the ongoing Performance Assessment Intervals*, she was trying to procure gas for Lee County "to self-schedule the unit."⁹⁸ Ms. Banks says she ceased trying to procure gas for Lee County after "PJM's instruction to enter forced outage."⁹⁹ Ms. Banks's statements concerning purchasing gas and self-scheduling the units constitute an admission by Lee

⁹⁷ 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." 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).

⁹⁸ Complaint, Attachment A, at P 20 (Declaration of Clara Banks on Behalf of Lee County Generating Station, LLC).

County that they understood the correct course of action for a Capacity Market Seller during a capacity emergency but are now using the forced outage ticket as a reason they failed to purchase gas and self-schedule the unit. Lee County could have avoided incurring Non-Performance Charges by buying gas and coming online, but instead Lee County lengthened its notification periods and its energy manager confirmed Lee County was unavailable because it had no gas.¹⁰⁰

C. The Forced Outage Ticket Does Not Constitute an “Operator-Directed” Outage that Excuses Lee County

Lee County argues that the forced outage ticket it put in at the PJM operator’s request was an “Operating Instruction,” which constitutes a PJM-directed outage that excuses Lee County’s non-performance.¹⁰¹ Lee County further claims that the forced outage continued from 17:42 on December 23, when the PJM operator requested that a ticket be submitted, through December 24 because the PJM operator’s request that Lee County put in a forced outage ticket was not time-limited.¹⁰²

Contrary to Lee County’s arguments, the PJM operator’s request that Lee County reflect in PJM’s systems its unavailability to provide energy and reserves when called upon by submitting a forced outage ticket was intended to provide visibility to the PJM operators as to Lee County’s status. The PJM operators were trying to enhance their operational awareness as to unit availability by every means possible, as every phone call to generators to inquire as to their availability took time and the PJM operators did not

⁹⁹ Banks Declaration at P 20.

¹⁰⁰ See *supra* note 97.

¹⁰¹ Complaint at 13-18, 21-23.

¹⁰² Complaint at 25.

have much time to spare during the stressed emergency conditions.¹⁰³ In fact, the PJM operator's very next statement after requesting the forced outage ticket is "let us know when you're available,"¹⁰⁴ meaning Lee County should call PJM to inform PJM when it was available, rather than waiting and forcing PJM operators to make the calls.¹⁰⁵ Moreover, the generator is the entity that starts and ends forced outages, so Lee County could have ended the forced outage whenever it had gas and was ready to come online.

Lee County pretends the PJM operator's request to let PJM know when Lee County is available is incomprehensible because "Lee is never available to immediately run" as it must always arrange for fuel consistent with its parameter limits.¹⁰⁶ This claim not to understand plain English is yet another way in which Lee County tries to disclaim all responsibility for managing its fuel procurement and shift the risk to PJM. Moreover, several subsequent calls by the PJM operators to Lee County's energy manager seeking information as to Lee County's availability demonstrate the meaning of the PJM operator's request at 17:42, including a call at 18:27 on December 23 during which PJM once again asks Lee County's energy manager to make Lee County unavailable in Markets Gateway, as PJM "need[s] to know exactly what [the available] capacity is right now."¹⁰⁷

¹⁰³ Bielak Aff. ¶¶ 12-13.

¹⁰⁴ Attachment C at 5 (Transcript of 12/23/22, 17:42).

¹⁰⁵ Bielak Aff. ¶¶ 12-13.

¹⁰⁶ Complaint at 22.

¹⁰⁷ Attachment C at 6 (Transcript of 12/23/22, 18:27); *see also id.* at 5 (Transcript of 12/23/22, 17:42).

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 Lee County has not asserted any valid basis to challenge PJM's unit dispatch or scheduling decisions made during Winter Storm Elliott. Lee County is challenging the request of the PJM operator on December 23 at 17:42 that Lee County enter a forced, i.e., unplanned, outage to properly reflect its unavailability for lack of fuel as a scheduling action.¹⁰⁸ As demonstrated above, PJM could not make any scheduling decision with respect to Lee County because it was unavailable throughout the relevant period. Regardless, however, the Commission need not reach or decide any of Lee County's arguments because these claims are barred by the Operating Agreement, Schedule 1, section 1.8.2 and *PPL EnergyPlus, LLC v. PJM Interconnection, L.L.C.*¹⁰⁹

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.¹¹⁰ This provision states that "[c]omplaints arising from or relating to [the selection, scheduling or dispatch of resources] shall be brought to the attention of [PJM]."¹¹¹ 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."¹¹² It further provides that PJM's market participants shall not be

¹⁰⁸ See Complaint at 13-15.

¹⁰⁹ *PPL EnergyPlus*, 117 FERC ¶ 61,338, at P 33 (2006).

¹¹⁰ See Tariff, Attachment K-Appendix, section 1.8.2.

¹¹¹ Operating Agreement, Schedule 1, section 1.8.2(a); Tariff, Attachment K-Appendix, section 1.8.2(a).

¹¹² Operating Agreement, Schedule 1, section 1.8.2(a); Tariff, Attachment K-Appendix, section 1.8.2(a).

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.”¹¹³ Lee County’s request for relief falls squarely within the scope of this provision, and is foreclosed by it, because Lee County claims PJM “schedule[d] Lee down to zero” during the period in question.¹¹⁴ To address this claim, the Commission would have to decide whether PJM made any scheduling action with respect to Lee County.

The Commission’s decision in *PPL EnergyPlus* confirms this reading of the Operating Agreement and supports the rejection of Lee County’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.¹¹⁵ 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.¹¹⁶ The 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-

¹¹³ Operating Agreement, Schedule 1, section 1.8.2(d); Tariff, Attachment K-Appendix, section 1.8.2(d).

¹¹⁴ Complaint at 23.

¹¹⁵ *PPL EnergyPlus*, 117 FERC ¶ 61,338, at PP 2, 33.

¹¹⁶ *Id.* at PP 3-4.

creation of hypothetical prices based on potentially different dispatch decisions.”¹¹⁷ This finding applies equally to Lee County’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.¹¹⁸

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,¹¹⁹ PJM affirms that any allegation in the Complaint that is not specifically and expressly admitted above is denied.

¹¹⁷ *Id.* at P 33.

¹¹⁸ *Id.*

¹¹⁹ 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”),¹²⁰ 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.”¹²¹

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 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 eleven other related

¹²⁰ 5 U.S.C. § 552.

¹²¹ See 5 U.S.C. § 552(b)(4).

proceedings.¹²² 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.

¹²² *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).

VII. COMMUNICATIONS AND SERVICE

PJM requests that the Commission place the following individuals on the official service list for this proceeding:¹²³

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¹²³ To the extent necessary, PJM requests a waiver of Commission Rule 203(b)(3), 18 C.F.R. § 385.203(b)(3), to permit more than two persons to be listed on the official service list for this proceeding.

VIII. CONCLUSION

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

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May 26, 2023

Respectfully submitted

/s/ Wendy B. Warren
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ATTACHMENTS

- A. ADVISORIES, ALERTS, CONDITIONS
- B. TIMELINE
- C. TRANSCRIPTS OF CALLS BETWEEN PJM AND LEE COUNTY'S ENERGY MANAGER
- D. AFFIDAVIT OF DONALD BIELAK ON BEHALF OF PJM INTERCONNECTION, L.L.C.
- E. PROPOSED PROTECTIVE AGREEMENT

ATTACHMENT C

TRANSCRIPTS

ATTACHMENT D

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

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 26th day of May 2023.

/s/ Wendy B. Warren
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ATTACHMENT A
ADVISORIES, ALERTS, CONDITIONS

ADVISORIES, ALERTS, CONDITIONS

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

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

² PJM Manual 13, section 3.3.1.

³ PJM Manual 13, section 3.3.1.

⁴ PJM Manual 13, section 3.3.2.

⁵ PJM Manual 13, section 3.3.2.

⁶ PJM Manual 13, section 3.3.2.

⁷ PJM Manual 13, section 3.3.2.

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

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

⁸ PJM Manual 13, section 3.3.2.

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

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

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

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

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

¹⁴ PJM Manual 13, section 2.3.2.

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

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

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

ATTACHMENT B
TIMELINE

TIMELINE

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

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

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

ATTACHMENT C

TRANSCRIPTS OF CALLS BETWEEN PJM AND LEE COUNTY'S ENERGY MANAGER

Transcriptions of Phone Calls between PJM Dispatchers and Lee County’s energy manager

Green highlighted lines = PJM’s side of the conversation

8740755 12/23/2022 10:17 (PJM Dispatcher – Alex)	If I was to call the Lee CTs, how long is their start-up? It says [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] here
	Lee County?
	Yeah.
	Lee County? We would have to get [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] of fuel...
	I’m aware. I’m just, I’m looking at options here.
	It should be about that long...it’s between about [BEGIN CUI//PRIV-HC] [REDACTED], [END CUI//PRIV-HC] yes
	Okay, that’s all I needed, thank you. Bye.

Transcriptions of Phone Calls between PJM Dispatchers and Lee County's energy manager

Green highlighted lines = PJM's side of the conversation

8741374 12/23/2022 11:55 (PJM Dispatcher – Alex)	Lee County... what's the time to start on Lee County?
	Stand by. We're in the same gas situation [BEGIN CUI//PRIV-HC] [REDACTED]. [END CUI//PRIV-HC] They wouldn't be able to start until 18:00. We have to have gas nominated and flowing before we can start those units, so 18:00.
	And they don't have a dual fuel capability or anything of that nature?
	That is correct. Standby. No sir, they do not.
	Okay. So basically they're fuel limited?
	They would be fuel limited until 18:00 today, yes sir.
	Until 18:00.
	And if you called them on now, we would have to procure that gas now and then it would start flowing at 18:00... so it's, it's the pipeline holding us.
	No, no, I get it, I get it. Let's see here, 18:00...
	And I'm pulling up...
	And how long do they have to run that... They have to run that [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] then? Or until the end ...?
	The way I understand it is that because if we got the gas flowing it wouldn't be a [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] run, we would be able to run until the end of the gas day at that point. So we would have gas from 18:00 flowing to 10 o'clock tomorrow morning.
	Is that your time or my time?
	Eastern... Eastern time, PJM time.
	Okay. Let me have a conversation with some people.
Okay, very good sir.	
Thank you, bye.	

Transcriptions of Phone Calls between PJM Dispatchers and Lee County's energy manager

Green highlighted lines = PJM's side of the conversation

8741418 12/23/2022 11:59 (PJM Dispatcher – Alex)	The Crete units, how long do you expect them to hit line?
	[Employee asks someone in the background] What's the ETA on Crete hitting line? [Employee answering Alex] 18:00.
	It says [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] time to start.
	It's a gas issue. It's a gas day issue. We talked to... [Employee asks someone in the background] who did you talk to there? [Employee answering Alex] We reported this earlier.
	So...so then how long do they have to run for?
	Hold on a second. All right, go ahead Alex. [Switches to another employee] Hey, Alex.
	Hey, Crete Units
	[BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC]
	Okay, so this is the same issue as the Lees?
	Lee and [other resource], for that matter, yes
	...and [other resource]. So if I want any of those they all have to come on at 18:00.
	Yeah, so after... I have 1 hour and 20 more minutes to schedule fuel for an 18:00 start flow. If I don't schedule it by then it switches to starting... I won't be able to burn gas until 23:00.
	Okay...
	...because of the nomination windows, ID nomination windows.
	I got you, okay, so, the [other resource], Crete, and what was the other one?
[other resource], Crete, Lee County.	
...and Lee, okay. Then it's all the kind of the same thing that we can shut them off at the end of the gas day if we need to?	
Yup, exactly	

Transcriptions of Phone Calls between PJM Dispatchers and Lee County’s energy manager

Green highlighted lines = PJM’s side of the conversation

8743395 12/23/2022 17:42 (PJM Dispatcher – Shannon)	At this time requesting Lee County CTs 1 through 8 online for economics.
	[Employee talking to someone else] Shannon at PJM calling. [Employee to Shannon] we are trying to get gas.
	You don’t have any gas right now?
	They won’t let us run until 23:00.
	All right well we requested them on so you are going to need to put a forced outage ticket in and let us know when you’re available.
	Okay, there’s a notification time in there that says we’re not available until 23:00.
	But you need to make them unavailable right now then.
	Okay, thank you
	Okay?
	All right.
	All right thanks, bye.

Transcriptions of Phone Calls between PJM Dispatchers and Lee County's energy manager

Green highlighted lines = PJM's side of the conversation

8743727 12/23/2022 18:27 (PJM Dispatcher – Joe Labell)	Lee County CTs 1 through 8, they're not available for no gas, is that correct?
	That is correct.
	I need you to go into Markets Gateway and make them unavailable. I need to know exactly what my capacity is right now.
	Very good. Lee County's 1 through 8 unavailable, I will update Markets Gateway.
	Very good, thank you for your help sir. Bye.

Transcriptions of Phone Calls between PJM Dispatchers and Lee County’s energy manager

Green highlighted lines = PJM’s side of the conversation

8746620 12/24/2022 05:54 (PJM – Alex)	Hey, can you do me a favor and maybe find out if we can get any of your ComEd CTs and what time they’d be able to run or anything like that if possible?
	ComEd CTs?
	Yeah, your Lees uh like that stuff...I know things are crazy right now but just...any information you can get on any type of availability on those.
	Yeah, okay. So Lee, [other resource]...any of those.
	Anything that is not online that you can give us any information on running, let us know.
	Okay, and what was your name sir?
	Alex.
	Alex, okay will do.
Thank you, bye	

Transcriptions of Phone Calls between PJM Dispatchers and Lee County’s energy manager

Green highlighted lines = PJM’s side of the conversation

	Because I gotta go talk to people, I gotta go talk to people, but I’m pretty sure that we’re gonna need them since they’re on already, so call us back, [BEGIN CUI//PRIV-HC] [REDACTED].
	[END CUI//PRIV-HC]
	Understood, Mr. Willis.
	And [other resource] you can start, how many [other resource] can we get after 10am?
	Uh, I’ll have to get back with you on that.
	We’ll find out how many [other resource] we can get after 10am.
	Okay.
	Whatever you can get we need, we need like, we need to constantly be updated on it so we know where we stand.
	Understood.
	All right. Bye.

Transcriptions of Phone Calls between PJM Dispatchers and Lee County’s energy manager

Green highlighted lines = PJM’s side of the conversation

8746875 12/24/2022 06:49:39 AM (PJM – Bo)	I’m calling about the Lee Countys and [other resource] units. I’m just wondering if you think that they are going to be available at any point today?
	One second. I’m showing them out until 10am today... (Employee asks another employee - hey is [Employee X] here yet?)...um, I had a note...
	I’m assuming that’s for what, gas?
	Yes, it’s a gas issue, the gas day starts at 10am I think they’re available at that point.
	Okay, so you think Lee County and [other resource] will be available at 10?
	I believe so.
	Okay, and will you let us know when you know for sure?
	Yeah and who am I talking to?
	This is Bo Grove.
	Okay, Bo Grove at PJM, I’ll give you an update as soon as I know.
	All right, thanks.
	Hold on a second... Oh just as a caveat, [other resource] has [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] minimum run time if they get called on.
	Okay, okay, I understand. [other resource] [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] min run time?
	Yes sir.
	All right, then just let us know.
We’ll let you know.	
Thank you, I appreciate it.	

Transcriptions of Phone Calls between PJM Dispatchers and Lee County’s energy manager

Green highlighted lines = PJM’s side of the conversation

8747115 12/24/2022 07:31 AM (PJM – Steve)	They called earlier asking about [other resource] and Lee... if we were going to be available today to get any gas.
	Yes.
	As long as the notification times that are submitted are respected -- so like right now on the Lees and [other resource] we have like an [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] notification.
	We don’t see that...on [other resource] it still has like [BEGIN CUI//PRIV-HC] [REDACTED]. [other resource]..Lees we see the [REDACTED] [END CUI//PRIV-HC]
	I see. [other resource] you see [BEGIN CUI//PRIV-HC] [REDACTED]? [END CUI//PRIV-HC]
	Correct?
	Let me double check that then.
	Yeah, we see [BEGIN CUI//PRIV-HC] [REDACTED]. We see [REDACTED] [END CUI//PRIV-HC] for time to start for [other resource] and that includes notification time and...
	Yeah, oh okay I see.
	Yeah, right now we have a notification time of [BEGIN CUI//PRIV-HC] [REDACTED] and... [REDACTED] [END CUI//PRIV-HC] and then start-up for [BEGIN CUI//PRIV-HC] [REDACTED]. [END CUI//PRIV-HC]
	I don’t understand that because I’m looking at what was submitted.
	Well, I mean, unless you just did it maybe I need to refresh.
	No, sir I didn’t just do it.
	Okay.
	These were done yesterday so I’ve got to figure out what’s happening...
What’s the difference?	
Yeah, what’s happening on [other resource].	
Okay.	

Transcriptions of Phone Calls between PJM Dispatchers and Lee County's energy manager

Green highlighted lines = PJM's side of the conversation

	I will double check and get right back with you, but Lee would be an [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] notification at this point.
	And [other resource] as well?
	Ah, I will double check on [other resource] and call you right back.
	All right, very good.
	Yes, sir.
	Thank you. Bye.

Transcriptions of Phone Calls between PJM Dispatchers and Lee County’s energy manager

Green highlighted lines = PJM’s side of the conversation

8747191 12/24/2022 07:41 AM (PJM – Willis)	I just got confirmation on... I talked to Mr. Barczyk on the [other resource] and told him we can get gas after 10:00 with the notification times that are submitted and it’s a [BEGIN CUI//PRIV-HC] ██████ [END CUI//PRIV-HC] run once they’re called on.
	All right.
	And then for the Lee County, they had submitted a notification time exception request so they didn’t get it in for today but it looks like it’s pending so those are going to be updated starting hour ending 11 for Lee County to a [BEGIN CUI//PRIV-HC] ██████ [END CUI//PRIV-HC] notification time.
	Wow.
	Yeah.
	So it’s [BEGIN CUI//PRIV-HC] ██████ [END CUI//PRIV-HC] notification on Lee Countys, so basically they aren’t available.
	[BEGIN CUI//PRIV-HC] ██████. [END CUI//PRIV-HC]
	Yeah, but you said all the [other resource] are [BEGIN CUI//PRIV-HC] ██████ starts...I mean ██████ runs? [END CUI//PRIV-HC]
	They are [BEGIN CUI//PRIV-HC] ██████ [END CUI//PRIV-HC] runs, yes sir.
	And what’s the start on?
	The start time or the notification?
	The notification, I’m sorry...okay, what’s the notification then?
	Yeah, so right now if you’re calling them they’re [BEGIN CUI//PRIV-HC] ██████ [END CUI//PRIV-HC] away.
	Damn.
	Yeah, I know.
	And [BEGIN CUI//PRIV-HC] ██████ [END CUI//PRIV-HC] runs?

Transcriptions of Phone Calls between PJM Dispatchers and Lee County's energy manager

Green highlighted lines = PJM's side of the conversation

	Yes, sir.
	All of them? And Lee Countys are [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] away...and how long is the run?
	Hang on a second... Yes, [BEGIN CUI//PRIV-HC] [REDACTED] [END CUI//PRIV-HC] sir.
	All right, let me pass this on and I'll get back to you.
	Yes, sir. I appreciate it, Mr. Willis.
	Yup, bye.

File [PUBLIC EL23-57 Bielak Affidavit for Lee County Answer FINAL.pdf] cannot be converted to PDF. (To download this file in its original format, please use the filename hyperlink from your search results. If you continue to experience difficulties, or to obtain a PDF generated version of files, please contact the helpdesk at ferconlinesupport@ferc.gov, or, call 866-208-3676 from 9AM to 5PM EST, weekdays. Please allow at least 48 hours for your helpdesk request to be processed.)

ATTACHMENT E

PROPOSED PROTECTIVE AGREEMENT

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Lee County Generating)	
Station, LLC)	
Complainant,)	
)	Docket No. EL23-57-000
v.)	
)	
PJM Interconnection, L.L.C.,)	
Respondent.)	

PROTECTIVE AGREEMENT

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

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

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

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

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

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

NOW, THEREFORE, PJM and Participant agree as follows:

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

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

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

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

- A. Participant(s): As defined at 18 C.F.R. § 385.102(b), which definition includes PJM as the respondent in this Proceeding.
- B. Protected Material:¹
 - i. Material (including depositions) provided by a Participant in response to discovery requests or filed with the Commission, and that is designated as Protected Material by such Participant;²

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

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

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

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

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

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

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

Agreement, and that such Participants have read the Protective Agreement and agree to be bound by it. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for this proceeding.

- E. Reviewing Representative: A person who has signed a Non-Disclosure Certificate and who is:
- i. Commission Trial Staff designated as such in this proceeding;
 - ii. An attorney who has made an appearance in this proceeding for a Participant;
 - iii. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney who has made an appearance in this proceeding on behalf of a Participant;
 - iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding;
 - v. A person designated as a Reviewing Representative by order of the Presiding Judge, the Chief Judge, or the Commission; or
 - vi. Employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.
- F. The term “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material defined in Paragraph 3(B)(viii)(a) shall mean a person who has signed a Non-Disclosure Certificate and who is:
- i. Commission Trial Staff designated as such in this proceeding;
 - ii. Outside counsel of a Participant, i.e., an attorney who is not employed by the Participant but is retained by a Participant, who has made an appearance in this proceeding for a Participant, and their partners, associates, and staff of such outside counsel;
 - iii. In-house counsel, i.e., an attorney who is employed by the Participant, who has made an appearance in this proceeding for a Participant and who is not Competitive Duty Personnel as defined in Paragraph 3(G);
 - iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or

testifying in this proceeding; provided, however, such individual is not Competitive Duty Personnel as defined in Paragraph 3(G);

- v. A person designated as a Reviewing Representative and is otherwise eligible to review Highly Confidential Protected Material by order of the Presiding Judge, the Chief Judge, or the Commission.
- vi. A “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material does not include Competitive Duty Personnel as defined in Paragraph 3(G).

G. The term “Competitive Duty Personnel” shall mean any individual(s), including in-house counsel, whose scope of employment or engagement includes the marketing, sale, or purchase of electric energy or capacity (collectively, “Covered Marketing”), the direct or indirect supervision of any employee or employees whose duties include Covered Marketing, the provision of consulting services, including legal consultation or advice, to any person whose duties include Covered Marketing, or other Covered Marketing services in competition with the producing Participant, all of which are considered “Competitive Duties;” except that Competitive Duty Personnel shall not include employees of the Federal Energy Regulatory Commission, and/or any state utilities commission which is a Participant, outside counsel.

4. Protected Material, Highly Confidential Protected Material, and/or CEII shall be made available under the terms of this Protective Agreement only to Participants and only to their Reviewing Representatives as provided in Paragraphs 6-10 of this Protective Agreement. The contents of Protected Material, Highly Confidential Protected Material, CEII, or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with this Protective Agreement and shall be used only in connection with this specific proceeding.

5. All Protected Material, Highly Confidential Protected Material, and/or CEII must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to Paragraphs 7-9 of this Protective Agreement.

6. Protected Material, Highly Confidential Protected Material, and/or CEII must be handled by each Participant and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 9 of this Protective Agreement. Protected Material, Highly Confidential Protected Material, and/or CEII shall not be used except as necessary for the conduct of this proceeding, nor shall they (or the substance of their contents) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this proceeding and who needs to know the information

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

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

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

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

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

⁶ During this three-day period, a Participant may file an objection with the Presiding Judge or the Commission contesting that an individual qualifies as a Reviewing Representative, and the individual shall not receive access to the Protected Material, Highly Confidential Protected

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

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

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

- A. Documents that contain Protected Material must include a top center header on each page of the document with the following text: CUI//PRIV or CUI//PRIV-HC for Highly Confidential Protected Material. Any corresponding electronic files must also include this text in the file name.

Material, and/or CEII, as applicable, until resolution of the dispute.

⁷ See *infra* P 19.

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

- 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

Lee County Generating)	
Station, LLC)	
Complainant,)	
)	Docket No. EL23-57-000
v.)	
)	
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

Lee County Generating)	
Station, LLC)	
Complainant,)	
)	Docket No. EL23-57-000
v.)	
)	
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: _____

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