

186 FERC ¶ 61,097
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
Allison Clements and Mark C. Christie.

PJM Interconnection, L.L.C.

Docket Nos. ER24-98-000
ER24-98-001

ORDER REJECTING TARIFF REVISIONS

(Issued February 6, 2024)

1. On October 13, 2023, as amended on December 8, 2023, pursuant to section 205 of the Federal Power Act (FPA)¹ and Part 35 of the Commission's Rules of Practice and Procedures,² PJM Interconnection, L.L.C. (PJM) submitted proposed revisions to its Open Access Transmission Tariff (OATT) and the Reliability Assurance Agreement (RAA)³ to modify the rules governing the market seller offer cap (offer cap) and Capacity Performance, as well as to adopt a forward-looking Energy and Ancillary Services (EAS) offset for purposes of calculating the Minimum Offer Price Rule (MOPR) and offer cap. We reject PJM's filing with guidance, as discussed below.

I. Background

2. PJM generally conducts a Base Residual Auction (BRA) to procure capacity three years in advance of a delivery year.⁴ PJM's capacity market includes the Capacity Performance construct, which incentivizes capacity resources to deliver energy and reserves during emergency conditions by imposing Non-Performance Charges on capacity resources that perform below their expected performance, relative to their

¹ 16 U.S.C § 824d.

² 18 C.F.R. pt. 35 (2023).

³ Capitalized terms that are not defined in this order have the meaning specified in the OATT and RAA.

⁴ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 5.4 (Reliability Pricing Model Auctions) (8.1.0).

capacity commitments, and awarding bonus performance payments to resources that overperform relative to their capacity commitments.⁵ PJM measures resource performance during Performance Assessment Intervals (PAI), which are triggered when PJM declares an Emergency Action.⁶

3. The offer cap is a maximum offer price applicable, under certain conditions, to sellers that PJM determines have market power.⁷ In 2021, the Commission granted complaints regarding PJM's existing default offer cap and directed the current offer cap as the replacement rate.⁸ Under the current tariff, capacity offers subject to the offer cap are limited to the resource's unit-specific net Avoidable Cost Rate (ACR), meaning unit-specific gross ACR minus the net energy and ancillary service revenues (EAS Offset) (unit-specific offer cap or offer cap).⁹ Alternatively, those sellers that do not wish to undergo unit-specific review may instead submit an offer cap that uses a technology-specific default gross ACR minus their unit-specific EAS Offset.¹⁰ Sellers undergoing unit-specific review may choose to include Capacity Performance Quantifiable Risk (CPQR) in their proposed offer caps. CPQR consists of the quantifiable and reasonably supported costs of mitigating the risks of non-performance associated with submission of a Capacity Performance offer, such as insurance expenses associated with resource non-performance risks.¹¹ Existing resources are generally required to submit an offer into the

⁵ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance) (12.0.0).

⁶ *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,058, at P 6 (2023) (PAI Trigger Order).

⁷ *See*, PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.5 (Mitigation) (2.0.0).

⁸ *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,212 (2021) (Offer Cap Complaint Order); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137 (2021) (Offer Cap Order); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,121 (2022) (Offer Cap Rehearing Order).

⁹ Offer Cap Rehearing Order, 178 FERC ¶ 61,121 at P 7.

¹⁰ Offer Cap Order, 176 FERC ¶ 61,137 at PP 8, 63. EAS Offset "is an estimate of the net revenues a capacity resource will earn from the energy and ancillary services markets during a given delivery year." *PJM Interconnection, L.L.C.*, 177 FERC ¶ 61,209, at P 45 (2021).

¹¹ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.8 (Avoidable Cost Definition) (2.0.0).

BRA, subject to certain specified exceptions, including intermittent resources, storage resources, Demand Resources, and Energy Efficiency resources.¹²

II. Filing

4. PJM proposes several revisions to enhance the rules governing the offer cap, including: (1) establishing a standardized methodology that can be used to calculate CPQR; (2) allowing sellers of resources that will participate in the energy and ancillary service markets regardless of receiving a capacity commitment to reflect a standalone unit-specific CPQR component; (3) allowing requests for segmented unit-specific offer caps; (4) modifying the offer cap rules for Planned Generation Capacity Resources; and (5) providing more flexibility for PJM in approving offer caps.¹³ PJM also proposes changes to Capacity Performance, including: (1) clarifying when committed capacity resources are excused from Non-Performance Charges; (2) modifying the calculation of the Balancing Ratio; (3) modifying how entities participating in the Fixed Resource Requirement Alternative (FRR) are assessed Non-Performance Charges; and (4) establishing the ability for market participants to transfer performance obligations of capacity resources before a PAI (PAI Obligation Transfer). PJM further proposes to adopt a forward-looking EAS Offset for the purposes of calculating the offer cap and Minimum Offer Price Rule (MOPR). Finally, PJM proposes to modify the eligibility for Capacity Performance bonus payments.

5. PJM requests that the Commission accept this filing effective December 12, 2023, to allow the changes to be implemented for the upcoming BRA associated with the 2025/2026 delivery year (2025/2026 BRA).¹⁴ PJM states that this effective date is necessary to provide for an orderly conduct of the 2025/2026 BRA, which is scheduled to commence in June 2024, with pre-auction deadlines occurring in January 2024.¹⁵

¹² See PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.6 (Offer Requirement for Capacity Resources) (1.0.0); *id.* § 6.6A (Offer Requirement for Capacity Performance Resources) (2.0.0).

¹³ Transmittal at i-ii, 1-2.

¹⁴ *Id.* at 3.

¹⁵ *Id.* at 64.

6. On November 17, 2023, Commission staff issued a letter informing PJM that its filing was deficient and requesting additional information.¹⁶ PJM filed a response on December 8, 2023, which amended its filing (Deficiency Letter Response).¹⁷

III. Notice and Responsive Pleadings

7. Notice of PJM's filing was published in the *Federal Register*, 88 Fed. Reg. 72,059 (Oct. 19, 2023), with interventions and protests due on or before November 3, 2023. On October 27, 2023, the Commission extended the deadline for interventions and protests to and including November 9, 2023.¹⁸ Notices of intervention and timely motions to intervene were filed by the entities listed in the Appendix.¹⁹ Comments and protests were submitted by numerous entities, as summarized below. Answers were submitted by PJM, AEMA, AMP, Constellation, the Market Monitor, Michigan Commission, P3, PIOs, and Vistra.

8. Notice of PJM's Deficiency Letter Response was published in the Federal Register, 88 Fed. Reg. 86,890 (Dec. 15, 2023), with interventions and protests due on or before December 29, 2023. Timely comments on PJM's response were filed by PIOs, the Market Monitor, and AMP.

IV. Discussion

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2023), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.²⁰

¹⁶ *PJM Interconnection, L.L.C.*, Docket No. ER24-98-000 (Nov. 17, 2023) (Deficiency Letter).

¹⁷ *PJM Interconnection, L.L.C.*, Deficiency Letter Response, Docket No. ER24-98-001 (filed Dec. 8, 2023).

¹⁸ *PJM Interconnection, L.L.C.*, Notice of Extension of Time (issued Oct. 27, 2023).

¹⁹ The abbreviated names or acronyms by which these entities are referred to in this order are noted in the Appendix.

²⁰ Entities that filed comments and/or protests but did not file a notice of intervention or motion to intervene are not parties to this proceeding. See 18 C.F.R. § 385.211(a)(2) (2023) ("The filing of a protest does not make the protestant a party to

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2023), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers filed by PJM, AEMA, AMP, Constellation, the Market Monitor, Michigan Commission, P3, PIOs, and Vistra because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

11. As discussed below, we reject PJM's filing finding that PJM fails to demonstrate that several elements of its proposal, including the standalone CPQR offer cap, the standardized methodology for calculating CPQR, the changes to the FRR Alternative, and PJM's proposal regarding excuses from performance shortfalls are just and reasonable. We also find that PJM fails to demonstrate that its proposal to limit eligibility for Capacity Performance bonus payments is just and reasonable. Although we reject PJM's filing in its entirety, we provide limited guidance on PJM's proposal for third-party verification of CPQR and the PJM-determined offer cap as discussed below.

1. Standalone Unit-Specific CPQR as Offer Cap

a. PJM's Proposal

12. PJM proposes that, for resources that would continue to participate in the EAS markets regardless of whether they receive a capacity commitment, those resources would have an offer cap that is no less than their incremental cost of providing capacity (standalone CPQR offer cap).²¹ PJM states that, if a resource would continue to operate even if it did not receive a capacity commitment, capping the resource's offer at Net ACR would result in over-mitigation because the EAS Offset may cancel out the CPQR component and result in a Net ACR that does not accurately reflect the cost of risk.²²

the proceeding. The protestant must intervene under Rule 214 to become a party.”). Republican Members of the Pennsylvania Senate Environmental Resources and Energy Committee (Pennsylvania Representatives), and the Ohio House Public Utilities Committee and Ohio Senate Energy and Unity Committee (Ohio State Representatives) filed comments but did not file a motion to intervene. Chief Power Transfer Parent, LLC and Keycon Power Holdings, LLC (Chief/Keycon) filed comments but did not file a motion to intervene; though, their subsidiaries Chief Conemaugh Power, LLC and Chief Keystone Power, LLC did file a timely motion to intervene. Although we do not grant party status to Ohio Representatives, Pennsylvania Representatives, and Chief/Keycon, we address their pleadings in this order.

²¹ Transmittal at 17; 22.

²² *Id.* at 17-19.

PJM explains that a competitive offer for such resources should reflect only costs that are avoidable if the resource does not accept a capacity commitment, such as CPQR, and not reflect other components of Net ACR, such as maintenance and operations costs.²³ PJM clarifies that there may be other costs in addition to CPQR that are appropriately included, such as capital investments undertaken to improve reliability, but that, in most cases, incremental costs would be limited to CPQR.²⁴

13. PJM explains that, under the existing rules, resources subject to the must-offer requirement could be forced to take on capacity obligations that exceed their avoidable costs, and resources not subject to the must-offer requirement could be discouraged from participating in the capacity market.²⁵ PJM states that a seller's offer cap should not be less than the risk the seller "believe[s] they face from net Non-Performance Charges."²⁶ PJM explains that the goal of mitigation should be to replicate "natural, profit-maximizing offers of competitive Capacity Market Sellers."²⁷

14. To implement this change, PJM proposes modifications to the tariff to allow sellers to certify whether they will continue to operate in the EAS markets absent a capacity commitment.²⁸ Sellers indicating in the affirmative will be able to use an offer cap based on incremental costs that would be avoided only in the absence of a capacity obligation, without an EAS revenue offset.

15. PJM contends that this proposed change is just and reasonable because PJM is preserving the penalty structure under Capacity Performance and that sellers should be able to reflect the risk of that structure in their offers.²⁹ PJM also argues that it is preferable, from a policy perspective, for capacity resources to be incentivized to offer into the capacity market as opposed to becoming energy-only resources. PJM explains

²³ *Id.* at 18 (citing Graf Aff. ¶¶ 80-81).

²⁴ *Id.* at 20 n.41, 22.

²⁵ *Id.* at 19.

²⁶ *Id.*

²⁷ *Id.* at 20.

²⁸ *Id.* at 22.

²⁹ *Id.* at 23.

that the Commission has approved a similar alternative offer cap in ISO New England (ISO-NE).³⁰

b. Responsive Pleadings

i. Comments

16. Several parties support PJM's proposal for a standalone CPQR offer cap, arguing that it would allow sellers to accurately reflect risk in their offers.³¹ Parties argue that PJM's proposal resolves concerns regarding over-mitigation under the existing tariff that leads sellers to be worse off for having assumed capacity market obligations when they are subject to a must-offer obligation, disincentivizes their participation in the capacity market if they are an intermittent resource that is not subject to the must-offer obligation,³² or leads to premature retirements of resources needed for reliability.³³ Renewable Energy Coalition states that intermittent resources assume substantial risk in capacity market participation because their technology type does not allow them to guarantee 24/7 performance.³⁴ Renewable Energy Coalition argues that a standalone CPQR offer cap will ensure that riskier resources can offer at levels commensurate with their risk, thereby allowing for competition by less risky units, resulting in the retirement of the risky unit or subsequent changes to become more competitive. Clean Energy Associations argue that resources exposed to risks beyond their control should be able to reflect those risks in their offers to ensure they are reflected in the capacity market price.³⁵

³⁰ *Id.* at 24.

³¹ Chief/Keycon November 9 Comments at 5; Clean Energy Associations November 9 Comments at 11; Ohio FEA November 9 Comments at 3-4; P3 November 9 Comments at 6; Pennsylvania Commission November 9 Comments at 3; Pennsylvania Republicans at 3; Pine Gate November 9 Comments at 4-6; Renewable Energy Coalition November 9 Comments at 12; Vistra November 9 Comments at 9.

³² Ohio FEA November 9 Comments at 4-6; Renewable Energy Coalition November 9 Comments at 9; Vistra November 9 Comments at 9.

³³ Ohio FEA November 9 Comments at 4-5; Renewable Energy Coalition November 9 Comments at 13.

³⁴ Renewable Energy Coalition November 9 Comments at 12-13.

³⁵ Clean Energy Associations November 9 Comments at 4-5.

17. Ohio FEA asserts that the proposal will incentivize resources to offer into the capacity auction and, in doing so, improve reliability and enhance the auction's competitiveness.³⁶ Pennsylvania Commission argues "[t]here is a planning benefit to having resources participate in the capacity market as well as a benefit to load in having generation shoulder a commitment to perform."³⁷ Pine Gate agrees with PJM that the offer cap process has become unduly contentious and argues that the proposal would prevent offers from being mitigated to zero despite a risk of Non-Performance Charges.³⁸ Renewable Energy Coalition states PJM's proposed approach is consistent with Commission-approved rules for the ISO-NE capacity market.³⁹ Pennsylvania Commission argues that other recent and proposed changes will limit CPQR's effect overall, including recent changes to the PAI triggers,⁴⁰ PJM's proposal to limit eligibility for bonus payments, PJM's proposal to create a new PAI bilateral transaction, and PJM's proposals in Docket No. ER24-99-000 to reduce the stop-loss limit, increase generator testing, and move to Effective Load Carrying Capability resource accreditation.⁴¹

18. Chief/Keycon states that PJM's proposal is an improvement over the existing offer cap and should be approved, but contends the revisions also take the offer cap process further down a "complex computational 'rabbit hole'" that will limit the ability of generators without quantitative capabilities to participate.⁴² Clean Energy Associations and Renewable Energy Coalition argue that sellers should be allowed to offer the larger of their Net ACR (inclusive of CPQR) and CPQR and that CPQR should include expected penalty payments, net of expected bonus payments, and the cost of mitigating the downside tail risk of penalty payments.⁴³

³⁶ Ohio FEA November 9 Comments at 4.

³⁷ Pennsylvania Commission November 9 Comments at 3.

³⁸ Pine Gate November 9 Comments at 4-6.

³⁹ Renewable Energy Coalition November 9 Comments at 9-10.

⁴⁰ Pennsylvania Commission November 9 Comments at 3 (citing PAI Trigger Order, 184 FERC ¶ 61,058).

⁴¹ Pennsylvania Commission November 9 Comments at 3 (citing PJM, Resource Adequacy Filing, Docket No. ER24-99-000, at 92 (filed October 13, 2023)).

⁴² Chief/Keycon November 9 Comments at 5.

⁴³ Clean Energy Associations November 9 Comments at 4-5; Renewable Energy Coalition November 9 Comments at 15.

ii. Protests**(a) Purpose of the Capacity Market**

19. Several parties contend that PJM's proposal is premised on separating the energy and capacity markets, because it would no longer net EAS revenues from capacity offers, and therefore would fundamentally change the purpose of the capacity market.⁴⁴ The Market Monitor argues that PJM's proposal will redefine the capacity market as a standalone market where a separate capacity product is bought and sold, unconnected to the fact that the only purpose of the resource is to provide reliable energy.⁴⁵ The Market Monitor also argues that using the option of being an energy-only resource as the basis of not offsetting certain costs recreates the opportunity cost logic that underlay PJM's old default offer cap.⁴⁶

20. Similarly, parties argue that, by disconnecting the energy and capacity markets, a standalone CPQR would unreasonably allow parties that do not have missing money, and therefore do not need the additional incentive of a capacity payment to continue operating, to nevertheless offer above zero as though they did need the additional incentive.⁴⁷ New Jersey Board explains a standalone CPQR offer cap would allow sellers to submit offers above zero even if the seller's CPQR is entirely offset by expected EAS revenues.⁴⁸ Parties argue this change will increase costs to consumers without a commensurate reliability benefit.⁴⁹ New Jersey Board argues that there is no reliability justification for this change because these resources are not at risk of retirement or, in the case of new entry, failing to commence operation, and this change may actually increase reliability risk by decreasing the incentive for resource owners to invest in improving

⁴⁴ Market Monitor November 9 Protest at 3-4 and 7-9; Maryland People's Counsel November 9 Protest at 11-12; New Jersey Rate Counsel November 9 Protest at 3-4; New Jersey Board November 9 Comments at 4; PJM-ICC November 9 Protest at 10; PIOs November 9 Protest at 23.

⁴⁵ Market Monitor November 9 Protest at 3-4 and 7-9.

⁴⁶ *Id.* at 11.

⁴⁷ AMP November 9 Protest 9, 10-11 (citing PJM, Keech Aff. ¶¶ 3-4); Maryland People's Counsel November 9 Comments at 12; New Jersey Board November 9 Comments at 4; PIOs November 9 Protest at 23; PJM-ICC November 9 Protest at 10.

⁴⁸ New Jersey Board November 9 Comments at 3-4.

⁴⁹ AMP November 9 Protest 9, 10; New Jersey Board November 9 Comments at 4.

performance because it transfers penalty risk to load.⁵⁰ AMP argues that PJM provides no evidence that failing to adopt its offer cap proposal results in confiscatory rates for sellers.⁵¹ PIOs note that real-time energy market prices in PJM have more than doubled between 2021 and 2022, indicating that energy prices are high enough to offset Capacity Performance risks that generators take on.⁵²

21. Maryland OPC argues that, if resources can offer higher than their avoided costs relative to retiring or mothballing, they will have opportunities to exert their market power and distort the market.⁵³ AMP and the Market Monitor state that PJM failed to provide any quantitative analysis of the potential cost impact that this change will have on consumers, and the proposal will likely allow sellers with market power to unreasonably increase their offers.⁵⁴

(b) Incremental Costs

22. The Market Monitor states that PJM's proposal is not specific about what costs qualify as incremental costs.⁵⁵ Specifically, the Market Monitor states that PJM's proposal to include "the incremental costs that would be avoided only in the absence of a capacity obligation such as CPQR" in offer caps is unacceptably vague, includes no operational criteria, and could cover a broad range of as yet unspecified costs, potentially allowing the Avoidable Project Investment Recovery component of ACR to define an offer without any EAS Offset.⁵⁶ The Market Monitor explains that PJM's proposal redefines avoidable costs to exclude all, or most, of the current components, including labor, maintenance, and other operating expenses.⁵⁷ The Market Monitor acknowledges that PJM will keep the current definition of avoidable costs for resources that intend to either retire or mothball if not cleared in the capacity market but argues that this creates confusion. The Market Monitor also argues that some resources could be required to

⁵⁰ New Jersey Board November 9 Comments at 3-4.

⁵¹ AMP November 9 Protest 14. *See also* PIOs November 9 Protest at 24.

⁵² PIOs November 9 Protest at 25.

⁵³ Maryland People's Counsel November 9 Comments at 12.

⁵⁴ AMP November 9 Protest 5, 9; Market Monitor November 9 Protest at 8.

⁵⁵ Market Monitor November 9 Protest at 4-5.

⁵⁶ *Id.* at 6-7.

⁵⁷ *Id.* at 3-4; 7-9.

offer at less than Net ACR under PJM's proposal, including resources with high Net ACR but low or moderate CPQR.⁵⁸

23. AMP similarly argues the proposed tariff language is likely to raise disputes as to which costs beyond CPQR are truly "incremental" to a capacity obligation.⁵⁹ PIOs argue that this failure to articulate a clear principle for distinguishing costs that may be offset by EAS revenues from costs that may not be offset results in an unclear understanding of the consequences of the proposal.⁶⁰ PIOs contend that expenses like firm fuel transportation contracts that provide demonstratable energy market performance benefits should not be viewed as avoidable if the seller does not take on a capacity market obligation and therefore must be offset by expected EAS revenues, and argue PJM should clarify how such costs would be treated.

(c) **Other**

24. The New Jersey Board argues that the standalone CPQR offer cap would allow sellers to fully mitigate the risk of non-performance at the expense of consumers, and therefore the proposal unduly shifts the cost of risk to consumers.⁶¹ New Jersey Board further notes that consumers already pay a cost for non-performance in the form of loss of service.⁶² The Market Monitor argues that PJM fails to demonstrate how its proposal will interact with other aspects of the capacity market design, such as other places where PJM estimates a competitive capacity offer, including the demand curve and MOPR.⁶³

25. With respect to ISO-NE's static de-list bid calculations, AMP states PJM does not establish that the overall offer cap framework that PJM would apply is identical to the overall static de-list bid calculation applied by ISO-NE.⁶⁴ PIOs state that PJM inappropriately proposes to rely solely on seller representations of their intention to continue operating absent a capacity obligation when determining whether or not EAS revenues should offset CPQR, without any method to hold sellers accountable, despite

⁵⁸ *Id.* at 5.

⁵⁹ AMP November 9 Protest 14.

⁶⁰ PIOs November 9 Protest at 27-28.

⁶¹ New Jersey Board November 9 Comments at 2.

⁶² *Id.* at 5.

⁶³ Market Monitor November 9 Protest at 12.

⁶⁴ AMP November 9 Protest 15.

sellers' motivation to make the representation that would lead to a higher allowable capacity market offer.⁶⁵

c. Deficiency Letter and Responsive Pleadings

26. The Deficiency Letter noted that PJM states that “[w]hile CPQR is the most direct example of a cost that can be avoided by not taking on a capacity commitment, there are others that could also apply”⁶⁶ and requested additional information as to how PJM would determine whether a cost is undertaken specifically for a capacity commitment. In its Deficiency Letter Response, PJM states that sellers will be required to provide support for the level or percentage of the different cost components that would be avoided.⁶⁷ PJM explains that this is similar to how sellers provide support for their avoided costs today, and also similar to how ISO New England Inc. (ISO-NE) reviews offer caps.⁶⁸ For example, PJM explains, a unit may incur additional staffing costs by taking on a capacity obligation, which would be captured in the “avoidable operations and maintenance labor” component of the avoidable cost rate.⁶⁹ PJM also explains that a unit may incur avoidable fuel availability expenses to firm up their resources to meet Capacity Performance obligations and avoid Non-Performance Charges, or incur costs for investing in on-site backup fuel capability that it would have otherwise avoided absent receiving a capacity commitment.⁷⁰

27. AMP argues that PJM’s Deficiency Letter Response confirms that there are likely to be other costs that a seller can argue would be avoided only in the absence of a capacity obligation, such as a portion of operations and maintenance expenses or avoidable fuel availability expenses.⁷¹ PIOs state that PJM does not respond to the Commission’s question of how PJM will determine whether a cost is undertaken

⁶⁵ PIOs November 9 Protest at 26. *See also* Market Monitor January 17 Answer at 8-9.

⁶⁶ Deficiency Letter at 3 (citing Transmittal at 22).

⁶⁷ PJM Deficiency Letter Response at 14.

⁶⁸ *Id.* (citing to ISO-NE, *FCM Delisting*, slide 26 (Feb. 9, 2023), <https://www.iso-ne.com/static-assets/documents/2023/02/20230209-fcm-delisting.pdf>).

⁶⁹ *Id.* (citing to PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.8 (Avoidable Cost Definition), § 6.8(a)).

⁷⁰ *Id.* at 15.

⁷¹ AMP December 29 Protest at 6-7.

specifically for a capacity commitment and fails to provide any principles PJM would apply in verifying a seller's assertions, or any other way in which PJM might scrutinize the information submitted by a seller.⁷² PIOs argue that not all costs to improve a resource's performance as capacity—including the example costs that PJM mentions in its Deficiency Letter Response—are necessarily avoidable if the resource does not take on a capacity obligation because many of those investments may also increase the sellers' EAS revenues.⁷³

28. The Market Monitor argues that, though PJM makes vague and contradictory statements about what costs may be included in offer caps, PJM is effectively proposing to include most existing avoidable costs, as well as possible new costs, while eliminating the revenue offset.⁷⁴

29. The Market Monitor notes that, while PJM's Deficiency Letter Response states that staffing costs could be an example of other costs that could be avoided if not taking on a capacity commitment, the tariff states that "labor, maintenance, and other operating expenses are not avoidable."⁷⁵ The Market Monitor contends that, under PJM's proposal, an offer cap could be defined as CPQR plus avoidable project investment recovery, avoidable fuel availability expenses, labor expenses, and other claimed incremental costs minus zero net revenues, which the Market Monitor argues could result in offer caps that exceed those calculated using the Net CONE times B approach that the Commission previously rejected.⁷⁶

30. The Market Monitor argues that PJM failed to provide any sensitivity analyses on the elimination of EAS Offset other than "the conservatively low estimate" of \$600 million in higher capacity market revenues that resulted from adding a \$15 per MW-day CPQR to offers.⁷⁷ However, the Market Monitor argues CPQR could exceed \$100/MW-

⁷² PIOs December 22 Protest at 6 (citing PIOs, Wilson Aff. ¶ 10).

⁷³ *Id.* at 7-8 (citing PIOs, Wilson Aff. ¶ 17).

⁷⁴ Market Monitor December 22 Protest at 9.

⁷⁵ *Id.* at 8-9 (citing PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.8 (Avoidable Cost Definition), § 6.8(b)).

⁷⁶ *Id.* at 9-10.

⁷⁷ *Id.* at 9 (citing PJM Interconnection, L.L.C., *Simulation Analysis of PJM CIFP-RA Proposals*, at 9-10 (August 14, 2023), <https://pjm.com/-/media/committees-groups/cifp-ra/2023/20230814/20230814-item-05d---2023-08-14-market-simulation-analysis.ashx>).

day under PJM's proposal, to as much as \$500/MW-day for some resources with high net revenues and avoidable costs.

d. Answers

i. Purpose of the Capacity Market

31. PJM disagrees that its proposal would sever the link between the EAS markets and the capacity market because the tariff already allows sellers to reflect the opportunity cost of external sales of capacity in their offer caps.⁷⁸ Vistra argues that protestors fail to demonstrate why it is just and reasonable to force sellers to take on an uncompensated risk by netting CPQR.⁷⁹ Vistra argues that it is not clear that sellers with high net EAS Offsets do not experience missing money, but that, even if they did not, such sellers are entitled to an opportunity to reflect the risks associated with a capacity obligation in their offers. Vistra argues "the FPA makes clear that even if a seller generates revenues through the sale of other distinct products and services, that does not provide a legitimate basis for denying it the opportunity to reflect the incremental costs of supplying capacity in its capacity offers."⁸⁰ As such, Vistra contends, the amount of revenue a seller earns in the EAS markets "is irrelevant to its ability to reflect its costs of taking a commitment in the capacity market."⁸¹ Constellation similarly argues that capacity is a call option that imposes real obligations and risks, and, therefore a supplier should not be forced to offer below the incremental costs associated with a capacity commitment, regardless of expected EAS revenues.⁸² In response to the Market Monitor's concerns regarding market power, Constellation states that there is no evidence or reason to believe that a resource offering at its incremental cost is exercising market power.

⁷⁸ PJM January 17 Answer at 10.

⁷⁹ Vistra December 4 Answer at 6-7.

⁸⁰ *Id.* at 8 (citing *e.g., Ameren Servs. Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018) ("Investors, however, invest in entire enterprises, not just portions thereof. FERC must explain how investors could be expected to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return."); *Me. Pub. Util. Comm'n v. ISO New England Inc.*, 126 FERC ¶ 61,090, at P 41 (2009)).

⁸¹ *Id.*

⁸² Constellation December 15 Answer at 4.

ii. Incremental Costs

32. The Market Monitor argues that PJM's proposed redefinition of gross ACR is so vague as to eliminate meaningful market power mitigation.⁸³ The Market Monitor argues the proposal would allow any seller that states it intends to retire if it does not clear the capacity market to continue to offer at Net ACR, but that this statement of intention is not enforceable or binding, which the Market Monitor argues may allow gaming.⁸⁴ The Market Monitor also argues that most, if not all, capacity resources will continue to operate in the EAS markets absent a capacity commitment.⁸⁵ With respect to ISO-NE, the Market Monitor argues that ISO-NE has a different capacity market design, which includes a net revenue offset in the definition of bids, a different auction structure, bonus payments to resources that do not clear in the capacity auction, and "sole IMM review of offers."⁸⁶

33. PJM asserts that its proposal is sufficiently clear as to what costs sellers may include in their caps, and clarifies that any such costs will be reviewed by the Market Monitor and PJM to confirm that the incremental costs are consistent with the tariff and associated with taking on a capacity commitment.⁸⁷ PJM disagrees with the Market Monitor's argument that PJM's proposal would allow sellers to include all existing avoidable costs as defined today, as well as some new costs, and argues the proposal is limited to costs incremental to a capacity commitment.⁸⁸ PJM responds to PIOs' argument that many investments to support a capacity obligation would also lead to higher EAS revenues, stating that the current offer cap rules do not require adjusting EAS Offsets for avoidable costs that may increase future EAS revenues and PJM's proposal does not alter this existing dynamic.⁸⁹ PJM argues that any potential increase in EAS revenues would be difficult to accurately estimate and likely to be *de minimis*.

⁸³ Market Monitor January 17 Answer at 3.

⁸⁴ *Id.* at 4 (citing PJM, Proposed OATT, attach. DD, § 6.7 (Data Submission), § 6.7(d)(i)).

⁸⁵ Market Monitor January 26 Answer at 6.

⁸⁶ *Id.* at 7-8.

⁸⁷ PJM January 17 Answer at 6.

⁸⁸ *Id.* at 9.

⁸⁹ *Id.* at 6-7.

i. Other

34. Vistra objects to protests arguing PJM's proposal would shift risk to load, arguing instead that PJM's proposal would provide sellers with an opportunity to reflect risks in their offers.⁹⁰ Vistra argues that, absent PJM's proposed changes, intermittent and renewable resources will have little incentive to participate in the capacity market, leading to declining capacity market participation and reserve margins, along with increasing capacity prices.⁹¹

e. Commission Determination

35. We agree that, as a general matter, a competitive offer in the capacity market may reasonably reflect only incremental costs that are avoidable if the resource does not receive a capacity commitment.⁹² However, as further discussed below, we find that PJM has not shown that its proposal is just, reasonable, and not unduly discriminatory or preferential because PJM has not sufficiently explained in the tariff or transmittal how it will distinguish a resource's incremental costs that are (or would be) incurred as a result of receiving a capacity commitment from those costs that are not. Given this lack of clarity, the Commission is unable to assess whether the proposal is just and reasonable. Therefore, we reject the filing in its entirety and provide guidance to assist PJM in developing a new proposal, should it wish to do so.

36. PJM has made clear that under its proposal, costs other than CPQR may be considered incremental costs that would be avoided in the absence of a capacity obligation.⁹³ For example, PJM explains that, if a seller made an investment specifically to mitigate against the potential risks of non-performance during a PAI, such as becoming dual-fuel capable, those costs would be considered incremental costs that would be avoided in the absence of a capacity obligation. In the Deficiency Letter Response, PJM cites to other examples of incremental costs, including additional staffing costs of taking

⁹⁰ Vistra December 4 Answer at 8 (citing OCC November 9 Protest at 6-7).

⁹¹ *Id.* at 9.

⁹² We further note that ISO-NE employs a similar paradigm. ISO-NE, Transmission, Markets and Services Tariff, § III (Market Rule 1), § 13.1 (Forward Capacity Auction Qualification) (79.1.0), §§ 13.1.2.3.2.1.2.A, 13.1.2.3.2.1.2.B.

⁹³ Transmittal at 20 n.41.

on a capacity obligation, fuel availability expenses, and on-site backup fuel capability upgrades.⁹⁴

37. These examples illustrate that there are a variety of costs that could reasonably fall within the scope of the phrase “incremental costs that would be avoided only in the absence of a capacity obligation, such as CPQR” in PJM’s proposed tariff.⁹⁵ However, PJM does not include in its pleadings or proposed tariff provisions a defining principle to identify and differentiate costs incurred only in the absence of a capacity obligation compared to costs incurred in whole or in part for some other purpose, such as to enhance EAS revenues. PJM’s proposal seems to require PJM to employ a subjective assessment as to the intentions underlying complex investment decisions of sellers participating in a variety of markets, i.e., the capacity, energy, and ancillary services markets, and bilateral transactions.⁹⁶ We acknowledge PJM’s statements that sellers would be responsible for submitting proposed allocations of costs incurred in part to mitigate against the potential risks of non-performance during a PAI for PJM and Market Monitor review, but PJM has not explained how it will review those proposed allocations, detailed what type of supporting documentation sellers would be required to submit, or provided any standardized criteria pursuant to which PJM would review such allocations. As such, capacity sellers and other stakeholders face uncertainty about what costs may and may not be included in PJM’s proposed standalone CPQR offer cap. We note that PJM provided examples of some incremental costs, but the definition of standalone CPQR is not clear. We further note that, while PJM has stated that the Market Monitor will review these proposed allocations of costs, the Market Monitor contends that PJM’s proposal is too vague to be enforceable and does not contain sufficient information for the Market Monitor to engage in a thorough review process.⁹⁷ We agree, noting the critical role of the Market Monitor in the offer cap review process. As such, we find that PJM has not sufficiently demonstrated that its proposal is just and reasonable.

38. Although we are rejecting the filing, we address certain issues below. With respect to protests that PJM’s proposal would sever the link between the energy and capacity markets, the Commission rejected similar arguments in accepting ISO-NE’s current static de-list bid paradigm as just and reasonable, and we find that logic

⁹⁴ Deficiency Letter Response at 15.

⁹⁵ PJM, Proposed OATT, attach. DD § 6.8 (Avoidable Cost Definition) (3.0.0), § 6.8(b).

⁹⁶ For example, PJM states that certain costs may be “deemed” incremental costs if a seller “decides to make an investment... to mitigate against the potential risks of non-performance. . . .” Transmittal at 20 n.41.

⁹⁷ Market Monitor November 9 Protest at 4-7.

applicable here as well. Specifically, in that proceeding, protestors argued that it was not appropriate to redirect the focus of the capacity market “from permitting capacity resources to recover expected out-of-pocket costs net of expected earnings from participating in EAS markets to what costs are saved if a resource does not take on a [capacity supply obligation].”⁹⁸ However, the Commission found that most generators will participate in the EAS markets regardless of whether they are also providing capacity, and it is appropriate to base the calculation of net going-forward costs on that assumption.⁹⁹ The Commission also noted that sellers could propose inclusion of other relevant going-forward costs to the ISO-NE market monitor and protest ISO-NE’s annual, informational filing should they disagree with the ISO-NE market monitor’s conclusions.

39. We also disagree with parties arguing that it is unjust and unreasonable to allow sellers that do not have “missing money,” and do not need the additional incentive of a capacity payment to continue operating, to have an offer cap above zero. While a resource may not need revenues from the capacity market to support its continued operation, the resource would still incur the incremental risks, which are borne as costs, from taking on a capacity commitment, including, for example, costs to mitigate a risk of Non-Performance Charges (e.g., making arrangements for firm fuel supplies or winterization). Such a resource would have little to no incentive to incur the incremental costs of taking on a capacity commitment unless it was able to offer consistently with these incremental costs. To the extent the incremental costs of accepting a capacity commitment have been reviewed and accepted by PJM and the Market Monitor, offering consistently with these costs would not be an exercise of market power, as protestors allege, but rather a reflection of the resource’s rational economic decision.

40. Given the complexity involved, we note that there is more than one just and reasonable approach to developing market seller offer caps in capacity markets. We note that the Commission has repeatedly found the existing offer cap just and reasonable.¹⁰⁰ That finding has also been upheld by the United States Court of Appeals for the District of Columbia Circuit.¹⁰¹

⁹⁸ *ISO New England, Inc.*, 135 FERC ¶ 61,029, at P 317 (2011).

⁹⁹ *Id.* PP 322-324.

¹⁰⁰ *See e.g.*, Offer Cap Order, 176 FERC ¶ 61,137 at PP 61-63 (setting the current offer cap at unit-specific ACR because Net ACR “is a reasonable estimate of a competitive capacity offer...”).

¹⁰¹ *Vistra Corp. v. FERC*, 80 F.4th 302, 318 (D.C. Cir. 2023).

41. With respect to protests arguing that PJM has failed to provide data on the cost impact of its proposal,¹⁰² the Commission does not generally require a utility to provide a cost-benefit analysis, nor does the Commission require a utility to affirmatively demonstrate that the benefits of a proposed rate change outweigh its costs.¹⁰³ Rather, in determining whether proposed rates are just and reasonable, “the Commission considers the proposal in light of the currently effective tariff and comments in support and opposition to reach its determination.”¹⁰⁴ Although costs are an important consideration, the Commission has “broad authority to consider non-cost factors as well as cost factors.”¹⁰⁵ The Commission “does not have to find net savings”¹⁰⁶ and may “act based upon reasonable predictions rooted in basic economic principles”¹⁰⁷ in order to find a proposal just and reasonable.

42. New Jersey Board argues that the standalone CPQR offer cap would allow sellers to mitigate the risk of non-performance at the expense of consumers. We disagree. New Jersey Board’s argument applies generally to the existence of CPQR, and the Commission has found it is just and reasonable for sellers to include CPQR in their offer

¹⁰² See, e.g., AMP November 9 Protest 5, 9; Market Monitor November 9 Protest at 8.

¹⁰³ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at PP 9, 49 (2015) (Capacity Performance Order) (“PJM is not required by the FPA or Commission precedent to provide the mathematical specificity of a cost-benefit analysis to support a market rule change”); see also *Sw. Power Pool, Inc.*, 141 FERC ¶ 61,048, at P 57 (2012) (“A cost-benefit analysis is largely a tool for stakeholders to evaluate different market designs and to determine their interest in moving forward with a market proposal.”); *Process Gas Consumers Grp. v. FERC*, 866 F.2d 470, 477 (D.C. Cir. 1989) (“FERC, in making these judgments, need not engage in painstaking cost-benefit analysis of the merits of research proposals on a project-by-project basis. Rather, the Commission is required to make only a candid, common-sense assessment as to the consistency of a project’s objectives with the interests of the ratepayers providing the financing. FERC’s mandate to determine “just and reasonable” rates requires no less.”).

¹⁰⁴ Capacity Performance Order, 151 FERC ¶ 61,208 at P 49.

¹⁰⁵ Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P 30 (citations omitted).

¹⁰⁶ *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (“The Commission explained the important non-cost reasons for approving PJM’s proposal. It does not have to find net savings.”).

¹⁰⁷ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 77 (D.C. Cir. 2014).

caps to properly allow capacity resources to reflect their estimates of capital costs needed to allow an existing generator to remain in service or improve peak-hour availability or operating flexibility.¹⁰⁸ As noted above, allowing sellers to offer at CPQR, without an EAS Offset, would not automatically shift additional risk onto consumers, but rather would allow sellers to offer their incremental costs of accepting a capacity commitment.

43. The Market Monitor argues that PJM has not explained how it is just and reasonable to use a different version of a competitive offer for the offer cap than for the Variable Resource Requirement (VRR) curve and the MOPR. However, the VRR curve and MOPR rules are outside the scope of this filing. PJM must only show that it has proposed a just and reasonable definition of a competitive offer with respect to the offer cap. We note, however, that we are not convinced that using a different definition of a competitive offer for different purposes is unjust and unreasonable. The existing tariff already uses different definitions of competitive offers for different purposes, such as new and existing resources in the MOPR.¹⁰⁹

44. AMP argues that PJM has failed to demonstrate that its overall offer cap framework is identical to the construct in ISO-NE. However, PJM is not required to make such a demonstration. Rather, PJM must show that its proposal, in its own market, is just and reasonable. As discussed above, we find that PJM has failed to do so.

45. With respect to Renewable Energy Coalition's request that the Commission remind PJM to ensure that the methodology allows a seller to offer the larger of its Net ACR (inclusive of CPQR) or CPQR, as well as expected Non-Performance Charges net of expected bonus payments and the cost of mitigating the downside tail risk of Non-Performance Charges,¹¹⁰ we note that this request is not consistent with what PJM proposed. Rather, PJM proposed that, should sellers intend to continue operating regardless of whether they receive a capacity commitment, they would be required to offer at their incremental cost. We decline to opine on Renewable Energy Coalition's alternative proposal.

¹⁰⁸ Capacity Performance Order, 151 FERC ¶ 61,208 at PP 352-353; Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at PP 202-204.

¹⁰⁹ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 5.14 (Clearing Prices and Charges) (37.0.0), § 5.14(h-1).

¹¹⁰ Renewable Energy Coalition November 9 Comments at 15.

2. Standard CPQR

a. PJM's Proposal

46. For the purpose of calculating offer caps, PJM proposes to add to the tariff a standard methodology by which PJM will calculate CPQR on behalf of the seller.¹¹¹ PJM states that the proposed formula provides that CPQR is the estimated cost of managing the risk of Non-Performance Charges times the annual total net Non-Performance Charges for the resource “based on a probabilistic analysis conducted by the Office of the Interconnection that models the resource’s performance under a range of simulated system conditions to measure the distribution of potential annual total net over- and under-performance of the resource.”¹¹² PJM states this analysis would use “the same enhanced analytical framework used to study reliability risks and assess resource accreditation” to generate “a distribution of performance during simulated Performance Assessment Intervals, as well as other parameters, such as Balancing Ratio, necessary to assess the distribution of potential net Non-Performance Charges and Performance Payments.”¹¹³ PJM explains that it would take the maximum exposure to Non-Performance Charges at the 95th percentile from the resulting distribution of risk and multiply it by an estimated cost of managing risk to determine CPQR.¹¹⁴ PJM argues taking the 95th percentile is a reasonable estimate of “an extreme value on the tail of the distribution.”¹¹⁵

47. PJM further explains that it would use a resource’s after-tax Weighted Average Cost of Capital (ATWACC) as the estimated cost of managing the risk of Non-Performance Charges (Risk Cost).¹¹⁶ PJM clarifies that sellers could choose to submit their own estimate of a unit-specific Risk Cost, with supporting documentation, and PJM

¹¹¹ Transmittal at 12.

¹¹² *Id.* at 12-13 (quoting PJM, Proposed OATT, attach. DD, § 6.8 (Avoidable Cost Definition), § 6.8(a)).

¹¹³ *Id.* at 14.

¹¹⁴ *Id.* at 16.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 14. PJM explains that ATWACC would be calculated as percent equity * cost of equity + percent debt * debt interest rate * (1- effective tax rate). *Id.* (citing PJM, Graf Aff. at ¶ 103).

would use that value to calculate CPQR instead of the resource's ATWACC.¹¹⁷ PJM states that offers from sellers with market power would continue to be reviewed through the offer cap process, but PJM would calculate the CPQR value.¹¹⁸

48. PJM states that it consulted with industry experts in developing its approach and that it is consistent with the actuarial practices of the industry.¹¹⁹ PJM further states that the ISO-NE internal market monitor has stated that an industry-standard value-at-risk approach is an acceptable framework for participants to manage and measure risk in the context of the ISO-NE capacity performance paradigm.¹²⁰

b. Responsive Pleadings

i. Comments

49. Several parties support PJM's changes to the offer cap broadly.¹²¹ Constellation supports PJM's standardized CPQR formula, arguing it is a streamlined and transparent alternative for calculating CPQR that will allow sellers to avoid the offer cap review process and the potential for disagreements with the Market Monitor and PJM.¹²² Constellation further states that this option could be particularly useful for smaller resource owners that have limited resources to develop and model their own CPQR.

¹¹⁷ *Id.* at 14-15.

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.* at 16.

¹²⁰ *Id.* (citing ISO-NE, Informational Filing for Qualification in the Forward Capacity Market of ISO New England Inc., Attachment J Methodology Used by Market Monitor in Establishing an Alternative De-List Bid Value When the Market Monitor Rejected Some or All of the Components of the Participant-submitted De-List Bids, Docket No. ER15-328-000, at 12 (filed Nov. 4, 2014)).

¹²¹ Buckeye November 9 Comments at 5; Chief/Keycon November 9 Comments at 2; Constellation November 9 Comments at 32-33; Invenegy November 9 Comments at 2; Ohio State Representatives November 9 Comments at 1; Ørsted November 9 Comments at 6; Pennsylvania Commission November 9 Comments at 1-2; PSEG November 9 Comments at 1; Renewable Energy Coalition November 9 Comments at 2.

¹²² Constellation November 9 Comments at 32-33.

Renewable Energy Coalition states that PJM's proposal will save sellers time and increase certainty.¹²³

50. Constellation states that CPQR is vital to Capacity Performance resources given the potential significance and unpredictability of Non-Performance Charges.¹²⁴ Constellation states that market sellers currently have little confidence in the process to establish CPQR because there is uncertainty as to whether the Market Monitor and PJM will agree on various risk factors, ranging from weather to the likelihood of equipment failures and the correlation of outages to PAIs, or fuel supply/deliverability limitations. Invenergy argues that PJM's proposal to standardize the offer cap review process will improve the competitiveness of the capacity market.¹²⁵ Clean Energy Associations state that PJM's proposal for offer cap review is reasonable and consistent with best practices in risk assessment.¹²⁶

51. Several other parties support PJM's proposal but express concerns regarding implementation going forward. P3 states that it supports the concept of a default CPQR option but has concerns regarding the formula PJM proposes, including the use of ATWACC, Capital Recovery Factor, and Avoidable Project Investment Recovery.¹²⁷ P3 also argues that the risk assessment is "ill-defined."¹²⁸ P3 requests that the Commission accept the proposal, but that PJM continue to evaluate the formula going forward. Vistra asserts that the standardized CPQR formula could be improved by allowing technology-specific default methodologies.¹²⁹ Renewable Energy Coalition states that probabilistic CPQR modeling is an appropriate standard method for calculating CPQR.¹³⁰ However, Renewable Energy Coalition states that sellers must understand the PJM model construction and inputs to enable an informed choice about whether to elect to use the default model. Renewable Energy Coalition therefore urges the Commission to direct PJM to clarify that sellers must have reasonable transparency into the default model

¹²³ Renewable Energy Coalition November 9 Comments at 17.

¹²⁴ Constellation November 9 Comments at 30-31.

¹²⁵ Invenergy November 9 Comments at 9-10.

¹²⁶ Clean Energy Associations November 9 Comments at 4-5.

¹²⁷ P3 November 9 Comments at 7.

¹²⁸ *Id.*

¹²⁹ Vistra November 9 Comments at 8.

¹³⁰ Renewable Energy Coalition November 9 Comments at 15-16.

inputs (e.g., performance characteristics, the seller's financial structure or risk appetite).¹³¹

ii. Protests

52. Other parties oppose the proposal.¹³² Several parties assert that the input assumptions are unsupported.¹³³ For example, the Market Monitor states that PJM does not support its proposal to set the loss level threshold in its value-at-risk model at 95%, the use of ATWACC, or its proposal to multiply them.¹³⁴ PJM-ICC states that PJM has not provided any analytical support justifying the 95th percentile assumption.¹³⁵ PIOs assert that PJM failed to explain how its proposed use of the 95th percentile of risk is consistent with prior Commission orders that found it was not appropriate for a cost-based offer to price every possible adverse outcome, and that such an approach would unreasonably shift all risk from investors to consumers.¹³⁶ PIOs argue that PJM's proposed use of the 95th percentile is unsupported because many sellers in PJM are not as risk averse as the formula assumes because they are offering assets as part of large portfolios that allow sellers to mitigate Capacity Performance risks or otherwise absorb such risk. ODEC contends using the 95th percentile will inflate offer caps and lead to unreasonably high capacity prices because it does not recognize that resources will sometimes receive net bonus payments, or not face Non-Performance Charges at that level.¹³⁷

¹³¹ *Id.* at 17-18.

¹³² AMP November 9 Protest at 15; Market Monitor November 9 Protest at 14-15; New Jersey Board November 9 Comments at 1; OCC November 9 Protest at 4; ODEC November 9 Protest at 4.

¹³³ AMP November 9 Protest at 15-17; Market Monitor November 9 Protest at 14-15; OCC November 9 Protest at 7; ODEC November 9 Protest at 5; PIOs November 9 Protest at 17; PJM-ICC November 9 Protest at 8-9.

¹³⁴ Market Monitor November 9 Protest at 14-15.

¹³⁵ PJM-ICC November 9 Protest at 9.

¹³⁶ PIOs November 9 Protest at 18-19.

¹³⁷ ODEC November 9 Protest at 5.

53. AMP argues that PJM fails to show that it would be reasonable to use ATWACC as a proxy for a seller's cost of mitigating non-performance risk.¹³⁸ AMP explains that a seller's ATWACC (and the underlying equity and debt costs) would not necessarily reflect only the cost of risk associated with Capacity Performance but would also reflect the seller's overall enterprise-wide risk profile. Thus, AMP argues that the use of ATWACC would contravene the Commission's guidance that CPQR must be a "complex, fact-specific calculation that varies by capacity resource," limited to the costs associated with a seller's risk of participating as a Capacity Performance resource, and that the values produced under the formula may bear no relationship to the actual CPQR for that resource.¹³⁹ AMP argues that while PJM contends that the proposed formulaic CPQR option is consistent with actuarial practices used in the industry, even if correct, PJM does not address the problems with using the approach in the context of setting a unit-specific CPQR.¹⁴⁰

54. AMP states that the probabilistic analysis conducted to identify a seller's value-at-risk appears to be based in part on historical data and could be skewed by poor performance during outlier periods such as Winter Storm Elliott. AMP argues that these costs currently must be justified on a case-by-case basis in the offer cap review process, with a showing that the CPQR calculation is based on standard actuarial practices for modeling or valuing risk.¹⁴¹ AMP states the new standardized formula for CPQR, in contrast, would formalize use of historical experience and effectively reward poor performance by inflating the CPQR values of under-performing units. AMP argues that the proposed standardized CPQR formula has not been shown to appropriately measure any particular seller's cost of mitigating non-performance risk, raising the prospect that the approach could unreasonably increase costs to consumers.

55. Several parties contend that PJM's proposed modeling approach is inappropriate.¹⁴² For example, the Market Monitor disagrees with the proposal to use the same process for resource accreditation to predict PAIs because the underlying Reserve Reliability Study simulates whether there is enough capacity to meet load, but does not simulate commitment, dispatch, or transmission constraints and therefore assumes that

¹³⁸ AMP November 9 Protest at 17-18.

¹³⁹ *Id.* at 15-16, 18 (citing Offer Cap Rehearing Order, 178 FERC ¶ 61,121 at PP 48-55).

¹⁴⁰ *Id.* at 18.

¹⁴¹ *Id.* at 16-17.

¹⁴² *Id.* at 18; Market Monitor November 9 Protest at 14-15; PIOs November 9 Protest at 12-13.

any MW available can be instantly used to meet demand.¹⁴³ The Market Monitor also states that the standard insurance approach to set premiums is potential loss plus an adder, and that PJM's proposal could be less than the expected loss. PIOs argue that PJM does not explain whether it will model resources based on seller-supplied performance characteristics or a PJM default, or "how its probabilistic assessment will work in terms of what kinds of unexpected circumstances will be tested in the model."¹⁴⁴

56. Several entities argue that PJM's proposal fails to account for risk mitigation benefits.¹⁴⁵ For example, Office of the Ohio Consumers' Counsel (OCC) argues that PJM's standardized CPQR formula will fail to reflect a seller's actual risk because risk is dependent on specific actions taken by the seller.¹⁴⁶ PIOs state that it is unclear whether PJM's proposed modeling approach will account for unit-specific adjustments to the seller's capacity accreditation or the risk mitigation benefits of PJM's proposed PAI Obligation Transfer.¹⁴⁷

57. Several entities argue that the expected impact of the proposal is unclear or unproven but could raise costs unreasonably.¹⁴⁸ PIOs state that the Graf affidavit suggests the upper limit on the standard CPQR calculation will be 10% of the clearing price, which may be substantial; and PJM has not established that a 10% increase in the clearing price attributable to CPQR is just and reasonable.¹⁴⁹ AMP states that PJM has failed to provide any quantitative analysis of the potential cost impact this change will have on consumers, and the proposal will likely overcompensate capacity resources.¹⁵⁰

¹⁴³ Market Monitor November 9 Protest at 14-15.

¹⁴⁴ PIOs November 9 Protest at 22.

¹⁴⁵ OCC November 9 Protest at 7; ODEC November 9 Protest at 5; PIOs November 9 Protest at 21.

¹⁴⁶ OCC November 9 Protest at 7.

¹⁴⁷ PIOs November 9 Protest at 21.

¹⁴⁸ AMP November 9 Protest at 16; OCC November 9 Protest at 7; ODEC November 9 Protest at 5; PIOs November 9 Protest at 22.

¹⁴⁹ PIOs November 9 Protest at 22 (citing PJM, Graf Aff. ¶ 105).

¹⁵⁰ AMP November 9 Protest 5, 9. *See also* OCC November 9 Protest at 7.

58. Parties also dispute the notion that the current process is contentious.¹⁵¹ ODEC argues that PJM's justification for the standardized CPQR formula is "an unproven assertion that the offer cap review process is so contentious" that sellers are not using it.¹⁵² ODEC argues that, if PJM is concerned that sellers find the process too difficult, PJM should encourage sellers to submit their offer caps to PJM, as PJM makes the final determination.¹⁵³ FirstEnergy asserts that it is unclear whether the Market Monitor must accept the outcomes of the reforms PJM proposes, including their new standardized calculation methodology, and, if not, the proposal may not reduce impasses with the Market Monitor.¹⁵⁴

59. OCC argues that CPQR cannot be predicted or forecasted accurately.¹⁵⁵ AMP states that PJM's proposed standardized CPQR formula exacerbates a core problem with the Capacity Performance framework: the penalty-based construct exposes sellers to financial risk, which then causes customers to pay higher rates to compensate sellers for taking this risk.¹⁵⁶

c. Deficiency Letter and Responsive Pleadings

60. The Deficiency Letter sought clarification as to whether and how PJM or the Market Monitor would be able to review CPQR values calculated under the standardized methodology, as well as how PJM would evaluate a seller's estimate of Risk Cost.¹⁵⁷ In its response, PJM states that PJM and the Market Monitor would review the inputs and assumptions used to determine the values for the standard CPQR formula, and that a seller would be expected to provide reasonable support for the use of an alternative Risk Cost.¹⁵⁸ The Deficiency Letter also noted that the proposed tariff allows a seller to substitute their own estimate of Risk Cost with supporting documentation, and asked

¹⁵¹ Market Monitor November 9 Protest at 13; ODEC November 9 Protest at 4-5.

¹⁵² ODEC November 9 Protest at 4.

¹⁵³ *Id.* at 4-5.

¹⁵⁴ FirstEnergy November 13 Comments at 11-12.

¹⁵⁵ OCC November 9 Protest at 7.

¹⁵⁶ AMP November 9 Protest 17.

¹⁵⁷ Deficiency Letter at 1-2.

¹⁵⁸ PJM Deficiency Letter Response at 9.

PJM to provide additional details as to how PJM would evaluate a seller's estimate.¹⁵⁹ In its response, PJM states that it would be inappropriate to provide an exhaustive list of acceptable documentation that may be used to support a Risk Cost because of the complexity and company-specific nature of valuing performance risk.¹⁶⁰ But PJM explains, for example, if a seller requests a Risk Cost based on its own evaluation of the company's cost of capital, PJM would require documented support for such cost (*e.g.*, SEC Form 10-K).

61. The Market Monitor states that PJM's response indicates that PJM intends to include non-capacity-market-related risks in Risk Cost, which the Market Monitor contends is directly counter to the Commission's most recent statements on this issue.¹⁶¹ The Market Monitor disagrees with PJM that it would be "unduly prescriptive" to define the required supporting documentation because the Market Monitor contends that tariffs are prescriptive by their nature.¹⁶² The Market Monitor stresses that because there is excessive structural market power in PJM's capacity market, every element of a competitive offer must be defined clearly. The Market Monitor argues that it would not have the opportunity to meaningfully review a CPQR calculated under PJM's proposed standardized CPQR formula and cannot know what will be in the model PJM uses for that calculation.

62. In its protest to the Deficiency Letter Response, AMP states that sellers may seek to inflate CPQR by proposing a higher individualized Risk Cost, and PJM fails to provide a useful explanation of how it will assess sellers' alternate proposals.¹⁶³ AMP argues that estimating a seller's cost of capital is difficult, especially if it does not have publicly traded common equity.¹⁶⁴

¹⁵⁹ Deficiency Letter at 1-2.

¹⁶⁰ PJM Deficiency Letter Response at 10-11 (citing to Offer Cap Rehearing Order, 178 FERC ¶ 61,121 at P 86 (the Commission "decline[d] to provide an exhaustive list of costs that could be included in the CPQR component.")).

¹⁶¹ Market Monitor December 22 Protest at 6-7 (citing Offer Cap Order, 176 FERC ¶ 61,137 at P 72 ("The Commission explained that CPQR 'was not intended to permit market sellers to include all market risks a capacity resource faces from participating in PJM's markets, for example energy market-related risks that are not new to the Capacity Performance construct.")) (citations omitted)).

¹⁶² Market Monitor December 22 Protest at 6-7.

¹⁶³ AMP December 29 Protest at 8.

¹⁶⁴ *Id.* at 9 (citing *Cf. MISO Transmission Owners v. FERC*, 45 F.4th 248, 253-

d. Answers

63. In its answer, PJM reiterates that the 95th percentile is a reasonable choice and contends that the Market Monitor has previously used it.¹⁶⁵ PJM also argues that the standardized methodology will provide more transparency than the existing tariff, as no market participants are currently able to see how CPQR is currently calculated.¹⁶⁶ Constellation supports PJM's explanation that using the 95th percentile is a reasonable measure of a typical extreme value that is placed at risk and contends that the Market Monitor's attack on PJM's value-at-risk approach offers nothing of substance to the contrary.¹⁶⁷ In response to protestor arguments that PJM overstates the risks of assuming a capacity obligation for sellers with portfolios of resources, Vistra argues that, regardless of the magnitude of risk, sellers should be able to include those risks in their offers.¹⁶⁸

64. The Market Monitor argues that the value-at-risk approach is not a tool for pricing risk but rather a metric for quantifying the risk of a financial position.¹⁶⁹ The Market Monitor also argues that PJM's proposal is not consistent with the standard insurance model where the insurance premium exceeds the expected loss by an amount that reflects the risk preferences of the insurance company and the insured.

65. In response to AMP's protest on the Deficiency Letter Response, PJM states that AMP appears to argue that CPQR must include the cost of mitigating CPQR risk, but, PJM contends, CPQR is the cost of risk.¹⁷⁰ PJM also argues that AMP is incorrect in arguing that allowing sellers to request their own Risk Cost would inflate CPQR, as the Commission has previously recognized sellers may use probabilistic risk modeling to support their offer caps, and that any requests would be reviewed by PJM and the Market Monitor.

257 (D.C. Cir. 2022)).

¹⁶⁵ PJM December 21 Answer at 40 (citing PJM, Graf Aff. ¶ 100).

¹⁶⁶ *Id.* at 41.

¹⁶⁷ Constellation December 15 Answer at 5-6.

¹⁶⁸ Vistra December 4 Answer at 8 (citing PIOs November 9 Protest at 18-19).

¹⁶⁹ Market Monitor January 17 Answer at 13.

¹⁷⁰ PJM January 17 Answer at 7 (citing AMP December 29 Protest at 5).

e. **Commission Determination**

66. As a general matter, it may be just and reasonable to have a standardized default methodology to calculate CPQR because standardizing this calculation has the potential to increase transparency for all parties and decrease administrative burdens. Further, it may also be just and reasonable to use a probabilistic analysis to estimate a seller's CPQR. However, as discussed below, we find that PJM has not shown that its proposed standardized CPQR methodology is just and reasonable. Therefore, we reject PJM's filing. In the event PJM may choose to submit a future filing with an alternative proposal, we provide guidance on certain issues below.

67. Specifically, we find that PJM has not demonstrated that its proposed methodology contains sufficient transparency for interested stakeholders, including the Market Monitor, sellers, and the Commission, to know how PJM would calculate CPQR under the standard methodology, or what the inputs might be.¹⁷¹ Though PJM states that the Market Monitor would review CPQR values, the Market Monitor itself states that it would not be able to meaningfully review the standardized CPQR values PJM calculates because PJM's proposal is too vague, and protestors raise several questions regarding the methodology that cannot be resolved based on the record.¹⁷²

68. We note that PJM proposes to use a proprietary model and has not offered to make this model available to stakeholders, such as the Market Monitor or sellers, nor has PJM sufficiently explained the assumptions that will be used in the model. Also, PJM does not explain whether PJM will modify its model to account for unit-specific adjustments to accreditation, which may alter a seller's risk exposure, or to accommodate the proposed PAI Obligation Transfer that may reduce a resource's risk exposure.¹⁷³ Further, as noted above, PJM does not explain whether, and if so, how, estimates of risk exposure will incorporate actions that sellers take or intend to take to reduce that exposure.

69. Although we are rejecting the filing described herein, we offer guidance for a future filing. With respect to ATWACC, we agree with PJM that ATWACC may be a reasonable proxy for the cost of managing the risk of Non-Performance Charges, because it is a commonly used financial metric for measuring the cost of capital. However, we note that PJM does not state in its filing how it will determine the inputs for the ATWACC rate, including whether the rate will be specific to the unit or the seller. That

¹⁷¹ We acknowledge PJM states that the proposal contains more transparency than the existing tariff with respect to CPQR; however, the existing tariff is not at issue in this filing, and we decline to opine on it. PJM December 21 Answer at 41.

¹⁷² Market Monitor December 22 Protest at 6.

¹⁷³ See, e.g., PIOs November 9 Protest at 20-21.

said, we disagree with other protests on this matter. AMP argues that the use of ATWACC would contravene the Commission's guidance that CPQR must be a complex, fact-specific calculation limited to Capacity Performance risk.¹⁷⁴ We disagree. The Commission did not prohibit a default CPQR value in the Offer Cap Orders, and it appears that PJM's proposed methodology would represent a complex, fact-specific calculation that varies by capacity resource. Though we have found that PJM has not provided sufficient detail to understand how the model components would be implemented in its proposed standardized CPQR formula,¹⁷⁵ using a probabilistic model with unit-specific data would ensure a CPQR value that is specific to that resource and its risk profile. We acknowledge that ATWACC is a generalized financial proxy that may not specifically reflect Capacity Performance risk, but ATWACC may be a reasonable estimate of cost of risk because it represents how much a company pays for capital, adjusted for taxes.¹⁷⁶ As such, ATWACC, combined with an estimate of a resource's risk exposure, may represent a reasonable estimate of CPQR.

70. AMP argues that the probabilistic analysis should not reflect historical values.¹⁷⁷ We disagree. Using historical data is one just and reasonable way to estimate future values. Further, using historical data to inform models of future performance would not, as AMP argues, reward poor performance. Historically, poor performers may be more likely to perform poorly in the future, and thus face greater performance risk. Therefore, a higher CPQR value for such resources is appropriate to accurately reflect the costs and risks these resources face in the capacity market absent other investments to mitigate risk exposure. In addition, there is no guarantee that a resource offering under a higher offer cap will clear the market. However, we reiterate that, should PJM file an alternative proposal, PJM should explain whether, and if so, how, estimates of risk exposure will be adjusted to incorporate actions that sellers take or intend to take to reduce that exposure.

71. As above, we disagree with protestors arguing that PJM's proposal is not just and reasonable because it fails to include a quantitative cost-benefit analysis.¹⁷⁸ Finally, OCC's argument that CPQR cannot be accurately forecasted is out of scope. The existing tariff already allows for sellers to include CPQR in their offer caps, and the

¹⁷⁴ AMP November 9 Protest at 15-16, 18 (citing Offer Cap Rehearing Order, 178 FERC ¶ 61,121 at PP 48-55).

¹⁷⁵ See *supra* PP 67, 68.

¹⁷⁶ PJM, Graf Aff. ¶ 101.

¹⁷⁷ AMP November 9 Protest at 16-17.

¹⁷⁸ See, *supra* P 41.

Commission has found this just and reasonable.¹⁷⁹ As such, this argument appears targeted at the existing tariff, which is not at issue in this filing.

3. FRR Alternative Changes

a. PJM's Proposal

72. PJM states that the RAA currently allows an FRR entity that experiences a Performance Shortfall during a PAI to choose either a financial or physical non-performance assessment.¹⁸⁰ PJM explains that, under the financial non-performance assessment, the FRR entity is subject to the Non-Performance Charge, but under the physical non-performance assessment option, FRR entities can choose to instead assign more capacity in the future rather than pay the Non-Performance Charge.¹⁸¹ PJM states that the physical non-performance assessment option “defers the penalty’s effects” and can “mute incentives to perform when the system needs it the most, especially when the FRR Entity has already excess supply not in its FRR Plan or can readily purchase it on the market at low cost.”¹⁸² Further, PJM explains, the physical non-performance assessment option only requires the FRR entity to assign additional capacity for one year, which PJM argues means the “economic impact of the physical penalty option” is lower than the financial Non-Performance Charge.¹⁸³

73. PJM argues that FRR entities should be subject to the same Non-Performance Charges as other committed capacity resources and therefore proposes to eliminate the physical non-performance assessment option, which does not exist for other entities.¹⁸⁴ PJM further proposes that this change should be effective with the 2025/2026 delivery year, rather than the 2024/2025 delivery year, to allow FRR entities a one-year grace period. PJM states that this is appropriate because FRR entities generally plan on a multi-year basis.

¹⁷⁹ Capacity Performance Order, 151 FERC ¶ 61,208 at P 352; Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at PP 202-204.

¹⁸⁰ Transmittal at 55.

¹⁸¹ *Id.* (citing PJM, Intra-PJM Tariffs, RAA, Schedule 8.1.C, (Election, and Termination of Election); PJM, Keech Aff. ¶ 37).

¹⁸² *Id.* at 56 (quoting PJM, Keech Aff. ¶ 37).

¹⁸³ *Id.* at 56.

¹⁸⁴ *Id.* at 56-57 (citing PJM, Keech Aff. ¶ 37).

b. Responsive Pleadings

i. Comments

74. Several parties support the proposed FRR changes.¹⁸⁵ AMP argues that the FRR physical non-performance assessment option could have adverse impacts on resource adequacy and is misaligned with the capacity framework.¹⁸⁶ AMP states that PJM's proposal will improve the incentives for FRR entities to ensure their resources are able to perform during critical periods and better align the FRR Alternative approach with the Capacity Performance model. Vistra agrees with PJM that allowing resources to procure more capacity in future years, in lieu of financial Non-Performance Charges, can severely mute needed performance incentives.¹⁸⁷ P3 and Vistra agree with PJM that FRR entities should have the same obligations as those participating in capacity auctions.¹⁸⁸

ii. Protests

75. FRR Coalition¹⁸⁹ urge the Commission to reject PJM's proposal, arguing that PJM's proposal to eliminate the physical non-performance assessment option for FRR Entities represents a significant, unexplained, and inappropriate change that fails to account for the unique circumstances of FRR entities that continue to operate under the traditional, vertically integrated utility model in fully regulated states.¹⁹⁰ FRR Coalition argue that FRR entities that opt for the physical non-performance assessment are also not eligible for bonuses, and instead performance is assessed on "a net portfolio basis."¹⁹¹ FRR Coalition argue that this is consistent with the fact that FRR entities plan their system as an integrated portfolio under the regulation of state regulators. FRR Coalition

¹⁸⁵ AMP November 9 Protest 6, 25; P3 November 9 Comments at 10; Vista November 9 Comments at 5.

¹⁸⁶ AMP November 9 Protest 27.

¹⁸⁷ Vistra November 9 Comments at 11.

¹⁸⁸ P3 November 9 Comments at 10; Vista November 9 Comments at 5.

¹⁸⁹ American Electric Power Service Corporation, Duke Energy Kentucky, Inc., and Dominion Energy Services, Inc.

¹⁹⁰ FRR Coalition November 9 Protest at 1-2, 9.

¹⁹¹ *Id.* at 3-4.

also argue that FRR entities do not procure commitments or receive payments through the capacity auctions.

76. FRR Coalition argue that FRR entities engage in long-term planning and that this supports the reliability of the PJM region as a whole.¹⁹² FRR Coalition continue that the physical non-performance assessment option similarly supports reliability because it requires FRR entities to carry additional capacity, which has a direct impact on reliability, whereas the Non-Performance Charge relies on “the hope that market participants will respond to financial incentives and penalties in a manner that ultimately improves reliability and contributes to the long-term resource adequacy needs of the region...”.¹⁹³

77. FRR Coalition argue that PJM’s proposal to eliminate the physical non-performance assessment option unduly discriminates against FRR entities because it fails to account for the differences between the FRR Alternative and the capacity market.¹⁹⁴ FRR Coalition argue that these differences include that FRR entities are subject to the oversight of state regulators, which ensures that they take steps necessary to ensure reliable service to ratepayers.¹⁹⁵ FRR Coalition also argue that PJM fails to account for the disparate impact financial Non-Performance Charges would have on FRR entities as compared to market participants. FRR Coalition explain that, from the perspective of the state regulator, it is sufficient if the entire FRR entity portfolio adequately performs, regardless of whether that involves some individual resource over or under performance. Further, FRR Coalition argue that it is unclear how financial bonus payments and Non-Performance Charges will be allocated among customers across states, or how FRR entities would recover increased costs of Non-Performance Charges. FRR Coalition argue that PJM fails to explain why the physical non-performance assessment option is no longer a reasonable accommodation for FRR entities given these differences between the capacity market and FRR Alternative.¹⁹⁶

78. FRR Coalition argue that the Commission can reject this specific aspect of PJM’s proposal without running afoul of the *NRG* because *NRG* does not prohibit the

¹⁹² *Id.* at 6.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 9.

¹⁹⁵ *Id.* at 10-11.

¹⁹⁶ *Id.* at 6.

Commission from maintaining the status quo.¹⁹⁷ Rather, FRR Coalition argue, *NRG* only prohibits the Commission from modifying filings such that it resulted in a rate design different than that previously in effect.¹⁹⁸

c. Answers

79. The Michigan Commission disagrees with FRR Coalition's arguments in their protest.¹⁹⁹ The Michigan Commission argues that PJM's proposal to align the rules and incentives of the FRR Alternative and Capacity Performance is logical and equitable. The Michigan Commission states that it does not share FRR Coalition's concerns.

d. Commission Determination

80. We find that PJM has not met its burden of supporting as just and reasonable its proposal to eliminate the physical non-performance assessment option for FRR entities. The FRR Alternative, which requires FRR entities to commit to a fixed forward capacity level, was developed to provide entities selecting the FRR Alternative with greater certainty and stability in their forward capacity obligations.²⁰⁰ Unlike load serving entities that participate in PJM-administered capacity markets, FRR entities are subject to a five-year commitment to fulfill their capacity obligation through the FRR Alternative.²⁰¹ FRR entities must submit detailed, resource-specific plans to demonstrate that the FRR entities meet PJM's capacity and resource requirements for each delivery year during this five-year commitment period.²⁰² In addition, FRR entities must obtain state regulatory approvals in developing the resource portfolios that make up their FRR plans for this five-year period.²⁰³

81. Due to these unique characteristics, the Commission found that the physical non-performance assessment option is an appropriate accommodation for the difficulties FRR

¹⁹⁷ *Id.* at 6-7.

¹⁹⁸ *Id.* (citing *NRG Power Mktg., LLC v. FERC*, 862 F.3d 108, 116 (D.C. Cir. 2017)).

¹⁹⁹ Michigan Commission November 21 Answer at 2-3.

²⁰⁰ *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,275, at P 90 (2009).

²⁰¹ *See, e.g.*, Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P 150.

²⁰² *Id.*

²⁰³ *Id.*

entities may face to cover their risk of non-performance through their retail tariffs.²⁰⁴ PJM has not sufficiently justified its departure from that precedent. We agree with FRR Coalition that the physical non-performance assessment option subjects FRR entities to a similar performance standard as resources with capacity market commitments, and evaluating FRR entities on a net-portfolio basis is more consistent with how FRR entities conduct resource adequacy planning at the portfolio level. Removing the physical non-performance assessment option would subject FRR entities to financial Non-Performance Charges on an individual resource basis. However, as FRR Coalition explain, the resources that participate in PJM's capacity market can incorporate the risk of such charges into their offers while certain resources in an FRR entity's portfolio (e.g., a resource owned by an FRR entity) cannot. As such, PJM's proposal to eliminate the physical non-performance assessment option is unjust and unreasonable because it fails to provide an appropriate accommodation to the unique planning processes of FRR entities. Generally, such FRR entities are subject to the jurisdiction and oversight of state public utility commissions with respect to resource planning and performance.

4. Excusals from Performance Shortfalls

a. PJM's Proposal

82. PJM states that it is proposing to remove existing language stating that a resource would be considered in the calculation of a performance shortfall if it is not scheduled solely due to the seller's submission of a market-based offer that is higher than its cost-based offer.²⁰⁵ PJM states that this proposal is reasonable because PJM only considers the cost-based offer when a seller has market power, and, unless a seller fails the market power test, PJM would not consider the cost-based offer. Therefore, PJM argues, a seller that is not considered to have market power and is committed and dispatched on its market-based offer should not be assessed a Non-Performance Charge unless it fails to perform.

b. Responsive Pleadings

i. Comments

83. Several parties generally support the non-severable aspects of PJM's filing, including PJM's proposal to clarify when resources may be excluded from the calculation of a performance shortfall.²⁰⁶ AMP supports PJM's proposal to clarify the circumstances

²⁰⁴ Capacity Performance Order, 151 FERC ¶ 61,208 at P 208.

²⁰⁵ Transmittal at 36.

²⁰⁶ Buckeye November 9 Comments at 5; Chief/Keycon November 9 Comments at 2; EPSA November 9 Comments at 2-3; Invenergy November 9 Comments at 2; Ohio

under which resources may be excused from performance shortfalls.²⁰⁷ Renewable Energy Coalition states that PJM's proposal will minimize uncertainty for market participants going forward, provide concrete guidance regarding actions suppliers can take to avoid the imposition of Non-Performance Charges, avoid unnecessary litigation in the future, and support desirable supplier behavior.²⁰⁸ P3 states that it is inappropriate to penalize a seller that does not have market power and is scheduled by PJM on its market-based offer.²⁰⁹

ii. Protests

84. The Market Monitor argues that PJM's proposal regarding sellers with market-based offers above their cost-based offers would permit the exercise of market power and allow resources to avoid Non-Performance Charges by increasing their market-based offer.²¹⁰ The Market Monitor asserts that the Commission previously found that PJM's proposed approach was flawed, and that it was reasonable for sellers to assume risk of non-performance resulting from their offer strategy.

c. Deficiency Letter and Responsive Pleadings

85. The Deficiency Letter noted that, with respect to the tariff provision regarding market-based and cost-based rates, though PJM notes that it does not consider the cost-based offer when dispatching a resource if the seller does not have market power,²¹¹ the existing tariff language was not limited to sellers with market power.²¹² The Deficiency Letter requested PJM to provide additional information regarding why the proposed

State Representatives November 9 Comments at 1; Ørsted November 9 Comments at 6; P3 November 9 Comments at 2; Pennsylvania Commission November 9 Comments at 1-2; Renewable Energy Coalition November 9 Comments at 2; Talen November 9 Protest at 1; Vistra November 9 Comments at 2.

²⁰⁷ AMP November 9 Protest at 26 n.95.

²⁰⁸ Renewable Energy Coalition November 9 Comments at 20.

²⁰⁹ P3 November 9 Comments at 8. *See also* Ørsted November 9 Comments at 3.

²¹⁰ Market Monitor November 9 Protest at 19-20 (citing Capacity Performance Order, 151 FERC ¶ 61,208 at P 168).

²¹¹ Deficiency Letter at 4 (citing Transmittal at 36).

²¹² *Id.* (citing PJM, Intra-PJM Tariffs, OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance) (12.0.0), § 10A(d)).

change is just and reasonable. In its Deficiency Letter Response, PJM explains that, unless a seller fails the market power test, PJM would not even be able to consider the cost-based offer.²¹³ PJM states that penalizing a resource dispatched on its market-based offer after the fact because its cost-based offer may have been cheaper than its market-based offer is inappropriate when the seller is compliant with PJM's energy market rules. Moreover, PJM states that assessing Non-Performance Charges based on an offer on which the resource was not committed and is not being dispatched can create a perverse incentive to deviate operationally from dispatch instructions.

86. The Market Monitor states that PJM's Deficiency Letter Response ignores aggregate market power in emergency PAI conditions and attempts to define market power as solely locational market power.²¹⁴ The Market Monitor argues, under PAI conditions, all resources have market power in the aggregate market. The Market Monitor also argues that the fact that a resource is not dispatched by PJM during a PAI because its market-based offer exceeds its cost-based offer is evidence of market power in itself, because the resource was needed at its cost-based offer but was able to avoid dispatch by adding a markup.

d. Answers

87. PJM argues that the Market Monitor has not justified its claims that a resource that has not failed the market power test has market power.²¹⁵ PJM explains that declaration of Emergency Actions does not suspend normal market rules in a way that all sellers are presumed to have market power and can be offer capped. PJM explains that sellers that do not have market power cannot be withholding when offering consistently with the tariff,²¹⁶ especially given that PJM would not have been permitted to schedule them on their lower cost-based offer.²¹⁷

88. PJM argues that the Market Monitor asserts that, during PAIs, all resources have market power and should be committed on their cost-based offers, but that this is beyond

²¹³ Deficiency Letter Response at 25-26.

²¹⁴ Market Monitor December 22 Protest at 17.

²¹⁵ PJM December 21 Answer at 17-18.

²¹⁶ *Id.* at 18 (citing PJM, Intra-PJM Tariffs, Operating Agreement (OA), Schedule 1, § 1.10 (Scheduling), §§ 1.10.1(d) and 1.10.9A).

²¹⁷ *Id.* (citing PJM, Intra-PJM Tariffs, OATT, attach. K (Appendix), § 6.6 (Minimum Generator Operating Parameters – Parameter Limited Schedules), § 6.6(a)).

the scope of the filing.²¹⁸ PJM further argues that assessing Non-Performance Charges based on an offer on which the resource was not actually committed or dispatched would nullify the offer cap rules in the energy market.²¹⁹

89. The Market Monitor argues that resources offering above their cost-based offers during a PAI are engaging in economic withholding because, if all resources are needed, then all suppliers are pivotal by definition.²²⁰ The Market Monitor argues that PJM states this behavior is not withholding because it is permitted under the tariff, but, the Market Monitor argues, it is not currently permitted.²²¹ The Market Monitor argues that PJM's proposal is discriminatory because there is no meaningful difference between resources that withhold energy using their operating parameters (which may be subject to Non-Performance Charges) and those that withhold using a price mark-up (which, under PJM's proposal, may not).

e. **Commission Determination**

90. We reject PJM's proposal regarding treatment of resources with higher market-based offers than cost-based offers. The Commission previously found that the tariff provision in question was "needed to preserve the incentives embodied by the rest of [PJM's Capacity Performance] proposal" because, without it, a resource that did not expect to be able to perform could avoid Non-Performance Charges by offering well above cost in the hope of not being scheduled.²²² PJM has not explained what has changed such that this incentive is no longer necessary. It remains true that sellers of resources that are online and concerned about their ability to perform could increase their market-based offers to a level that would prevent dispatch. While the Commission recognized that this policy could force sellers to submit a market-based offer equal to its cost-based offer when the resource expects a PAI will occur, the Commission found this outcome reasonable, because a seller choosing to be scheduled based on its market-based offer is making an economic decision and should bear the non-performance risk resulting

²¹⁸ PJM January 17 Answer at 13.

²¹⁹ *Id.* at 14.

²²⁰ Market Monitor January 17 Answer at 5-6.

²²¹ *Id.* at 6-8.

²²² Capacity Performance Order, 151 FERC ¶ 61,208 at P 168.

from its offer strategy.²²³ We note that allowing a seller to submit a market-based offer greater than its cost-based offer comports with PJM's energy market mitigation rules.

91. While the Market Monitor argues that PJM's proposal would permit the exercise of market power, we find that whether a seller has market power is not relevant to whether the seller is subject to Non-Performance Charges. We agree with the Market Monitor that, with respect to Non-Performance Charges, there is no meaningful difference between resources that choose to submit market-based offers using relatively less flexible parameters than their cost-based offer or market-based parameter-limited offer and those that choose to submit market-based offers using relatively higher economic parameters than their cost-based offers. Both strategies would constitute a capacity resource failing to meet its obligation to perform during an emergency and, therefore, require appropriate penalties.

92. Though PJM argues that sellers may be incentivized to ignore dispatch instructions in order to avoid penalties, PJM does not claim that sellers have chosen to do so nor provide a sufficient alternative explanation in support of its proposal, and therefore PJM failed to adequately support its filing that would reverse the existing precedent. Further, we note that sellers are required to follow PJM dispatch instructions²²⁴ and may be assessed charges when they fail to do so.²²⁵

5. Bonus Payment Eligibility

93. Under PJM's existing rules, the performance of a capacity resource during a PAI is measured as the difference between expected performance and actual performance.²²⁶

²²³ *Id.*

²²⁴ PJM, Intra-PJM Tariffs, OATT, attach. K (Appendix), § 1.8 (Selection, Scheduling and Dispatch Procedure Adjustment Process) (1.0.0), § 1.8.2(a) ("Market Participants shall comply with all determinations of the Office of the Interconnection on the selection, scheduling or dispatch of resources in the PJM Interchange Energy Market, or to meet the operational requirements of the PJM Region.").

²²⁵ PJM, Intra-PJM Tariffs, OA, Schedule 1, § 3.2 (Market Buyers) (60.0.0), § 3.2.3(o) Operating Reserves ("Pool-scheduled generation resources and dispatchable self-scheduled generation resources that do not follow dispatch shall be assessed balancing Operating Reserve deviations in accordance with the calculations described below and in the PJM Manuals.").

²²⁶ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance) (12.0.0), § 10A(c). The calculation of expected performance varies by resource type.

If actual performance falls short of expected performance, the resource may be subject to Non-Performance Charges. Conversely, if actual performance exceeds expected performance, the resource may be eligible for bonus payments. Currently, any resource—including a resource without a capacity commitment and non-firm imports into PJM—that overperforms relative to its capacity commitment is eligible for bonus payments.

a. PJM's Proposal

94. PJM proposes to limit eligibility for bonus payments to committed Generation Capacity Resources (generation resources) with a capacity obligation that outperform their expected performance during a PAI, up to their committed level of installed capacity.²²⁷ PJM explains that the committed level of installed capacity refers to the installed capacity equivalent of the UCAP commitment, which is calculated by dividing the committed UCAP by the Accredited UCAP Factor.²²⁸

95. Under PJM's proposal, resources without capacity commitments would not be eligible for bonus payments. Moreover, Demand Resources, Price Responsive Demand, and Energy Efficiency Resources would also be ineligible for bonus payments—regardless of whether they have a capacity commitment—because the actual performance of those resources is capped at their installed capacity commitment (which, under the current tariff, is equal to their expected performance).²²⁹ Therefore, PJM explains, this would “effectively preclude” these resources from receiving bonus payments, as they would be unable to overperform their expected performance level.

96. PJM argues that the changes to bonus payment eligibility are just and reasonable for several reasons.²³⁰ First, PJM states that the revisions will provide greater economic incentives for resources to participate and offer competitively in the capacity market. PJM contends that the current bonus eligibility rules—which provide bonus payments to resources that are not subject to reliability requirements, testing requirements,

²²⁷ Transmittal at 44 (citing PJM, Proposed OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance), § 10A(g)). Generation Capacity Resources are generating facilities, or the contractual right to capacity from a specified generating facility, that meets the requirements of RAA Schedules 9 and 10. PJM, Intra-PJM Tariffs, RAA, art. 1 – Definitions (42.0.0).

²²⁸ *Id.* at 45.

²²⁹ *Id.* at 44 (citing PJM, Proposed OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance), § 10A(c)).

²³⁰ *Id.* at 45.

accreditation rules, and penalties—weaken performance incentives for committed capacity resources that PJM must rely on during an emergency.

97. Second, PJM contends that limiting the bonus pool eligibility to cleared capacity resources will strengthen performance incentives for capacity resources and enhance reliability.²³¹ PJM states that its proposal strengthens reliability because it creates a stronger incentive for capacity resources to be offered into the capacity market (as opposed to serving as energy-only resources) and to perform above their committed capacity level.²³² PJM contends that resources without capacity commitments already have an incentive to perform during emergencies by virtue of elevated EAS markets clearing prices (e.g., shortage pricing) that occur during such periods. PJM explains that this is the goal of shortage pricing—to ensure prices reflect system conditions and incentivize participation of all available supply.²³³ To the extent shortage pricing incentives are insufficient to ensure performance of those resources during an emergency, PJM contends that such a problem can be viewed as an indication of the need for reforms to the EAS markets, not as a need to shift capacity market revenues to non-committed resources.²³⁴ Uncommitted resources are providing energy, and not capacity, PJM explains, and so should be compensated through the EAS markets and not the capacity market.

98. Third, PJM argues that limiting the eligibility of bonus payments to only committed capacity resources aligns with the current formulation of the offer cap, which does not permit opportunity costs—such as potential revenues that an uncommitted resource could receive if it performs during an emergency—to be included by a capacity resource in forming its offer.²³⁵

99. PJM further argues that it is appropriate to exclude Demand Resources, Price Responsive Demand, and Energy Efficiency Resources from bonus payments.²³⁶ PJM explains that its proposal to limit eligibility for bonus payments to committed resources up to their committed installed capacity level naturally precludes Demand Resources and Price Responsive Demand from receiving bonus payments because their installed

²³¹ *Id.* at 47.

²³² *Id.* at 48.

²³³ *Id.* at 48-49.

²³⁴ *Id.* at 49.

²³⁵ *Id.* at 45.

²³⁶ *Id.* at 50.

capacity levels are based on the difference between Peak Load Contribution and their Firm Service Level.²³⁷ PJM further explains that if these resources are fully committed and curtail below their Firm Service Levels, that would mean they curtailed below their level of committed capacity. PJM argues that resources with that capability should be incentivized to offer it into the capacity market, rather than reserve it for potential bonus payments.²³⁸ Further, PJM notes that this is consistent with the treatment of generation resources, which are not eligible for bonus payments for uncommitted capacity.

100. Additionally, PJM explains that Demand Resources and Price Responsive Demand are already ineligible for bonus payments for performance above the Balancing Ratio under the existing rules because their performance is assessed at the installed capacity level rather than unforced capacity times the Balancing Ratio.²³⁹ PJM explains that this is because Demand Resources take on a commitment to reduce load to the Firm Service Level, rather than provide output up to a certain level.²⁴⁰ PJM further explains that, when it accredits Demand Resources, load available to curtail is modeled as scaling proportionally with the level of system load, so when the Balancing Ratio is below one, system load was below the total amount of capacity procured, and, therefore, the load underlying the Demand Resource would be expected to fall below such load's peak load contribution during the event. As such, PJM states, when a Demand Resource curtails load to Firm Service Level, there is no overperformance to compensate because the resource is providing value exactly equal to the value assumed during accreditation.²⁴¹ PJM explains that this means that accreditation assumes perfect performance (100% ability to reduce load to Firm Service Level during a PAI, regardless of the level at which load is consuming).

101. PJM also states that, for Demand Resources and Price Responsive Demand, it is difficult to parse the difference between over-performance in response to a capacity emergency and natural reductions for unrelated reasons.²⁴² Further, PJM states that it is difficult to count on over-performance for these resources because Demand Resources

²³⁷ *Id.* at 51.

²³⁸ *Id.* (citing PJM, Graf Aff. ¶ 61).

²³⁹ *Id.*

²⁴⁰ Deficiency Letter Response at 28.

²⁴¹ *Id.* at 28-29.

²⁴² Transmittal at 53.

are not required to provide metering data until months after the fact, meaning PJM has limited visibility into how they respond in real-time.

102. PJM similarly states that Energy Efficiency Resources should not be eligible for bonus payments because they do not provide specific real-time reductions during emergencies.²⁴³ Rather, PJM explains, actual performance for Energy Efficiency Resources is measured based on a comparison of their post-installation and measurement and verification report—which is submitted before the delivery year begins—and the committed megawatts of the resource.²⁴⁴ PJM avers that it is not appropriate for resources accredited outside of consideration of their ability to respond in real-time to capacity emergencies to receive bonus payments.²⁴⁵

103. PJM also states that, consistent with its proposed changes to bonus payment eligibility, PJM is proposing conforming changes to the Balancing Ratio.²⁴⁶ Specifically, PJM proposes that, for the purposes of bonus eligibility, the Balancing Ratio numerator will be equal to the total committed Generation Capacity Resource actual performance, capped at the committed installed capacity equivalent for each resource.²⁴⁷ PJM further explains that the Balancing Ratio would not include any net energy imports, Demand Resources, Price Responsive Demand, or Energy Efficiency Resources. PJM states that PJM consents to making its proposed revisions regarding the eligibility of bonus payments and the associated Balancing Ratio update severable from the remainder of its filing in Docket No. ER24-98-000.²⁴⁸

²⁴³ *Id.* 53.

²⁴⁴ *Id.* (citing PJM, Intra-PJM Tariffs, RAA, Schedule 6 (Procedures for Demand Resources and Energy Efficiency), § L.6).

²⁴⁵ *Id.* at 54.

²⁴⁶ *Id.*

²⁴⁷ *Id.* (citing PJM, Proposed OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance), 10A(c)).

²⁴⁸ *Id.* at 4.

b. Responsive Pleadings

i. Comments

104. Several parties support PJM's proposal to limit bonus payment eligibility.²⁴⁹ FirstEnergy supports PJM's proposal, arguing that only resources that take non-performance risk should receive bonus payments related to that risk.²⁵⁰ Ohio FEA states that energy-only resources are just energy-only, and argues they should not receive payments that arise out of the Capacity Performance construct.²⁵¹ Buckeye notes that capacity resources represent a known pool of resources PJM can count on as committed to respond to a capacity emergency.²⁵² Buckeye contends that PJM's proposal would improve reliability by aligning the costs and benefits of being a committed capacity resource.

105. NOVEC explains that allowing generators that do not assume performance obligations and the associated risk of non-performance penalties to receive bonus payments reduces the amount of those payments for resources that do accept the risks of a capacity obligation, reduces their confidence in the tradeoffs of continuing to accept capacity obligations, and serves to increase CPQR.²⁵³ NOVEC states that this situation causes a double impact on costs through higher auction-clearing prices when resources do not participate in the auction, as well as higher CPQR for those that do participate.

106. Several parties agree with PJM that elevated EAS markets prices should be sufficient to ensure that resources without capacity commitments perform in real time.²⁵⁴ Buckeye argues that removing the eligibility of such resources to receive bonus payments will not reduce their incentive to perform.²⁵⁵ NOVEC and Ohio FEA state that restricting bonus payment eligibility to committed capacity resources will further incentivize

²⁴⁹ Buckeye November 9 Comments at 3, 5; FirstEnergy November 9 Comments at 5; NOVEC November 9 Comments at 5-6; Ohio FEA November 9 Comments at 6-7.

²⁵⁰ FirstEnergy November 9 Comments at 6.

²⁵¹ Ohio FEA November 9 Comments at 6-7.

²⁵² Buckeye November 9 Comments at 3.

²⁵³ NOVEC November 9 Comments at 5-6.

²⁵⁴ Buckeye November 9 Comments at 3-4; FirstEnergy November 9 Comments at 6; Ohio FEA November 9 Comments at 6-7.

²⁵⁵ Buckeye November 9 Comments at 3-4.

generators to become capacity resources and perform the requisite obligations.²⁵⁶ Buckeye argues that the current bonus payment construct discourages resources from electing to be capacity resources because it allows such resources to receive the benefits of being a committed capacity resource without bearing the associated burdens.²⁵⁷

ii. Protests

(a) Reliability

107. A number of parties urge the Commission to reject the changes to bonus eligibility.²⁵⁸ First, several parties argue that PJM's proposal could reduce reliability.²⁵⁹ Talen argues that any resource that provides capacity during emergency conditions should be compensated appropriately—especially if such a resource has no obligation to do so.²⁶⁰ Talen states that PJM has previously recognized that bonus payments to energy-only resources are effectively a transfer of capacity payments from an underperforming capacity resource to an over-performing energy resource that “stood in” for the capacity resource.²⁶¹ PIOs similarly argue that the purpose of the capacity market is to provide reliability, and that money consumers pay for reliability should go to any resource that meets that goal.²⁶² PIOs note that, because the pool of cleared capacity resources is

²⁵⁶ NOVEC November 9 Comments at 5-6; Ohio FEA November 9 Comments at 6-7.

²⁵⁷ Buckeye November 9 Comments at 3.

²⁵⁸ *See, e.g.*, AEMA November 9 Comments at 8; AMP November 9 Protest 6, 23-25; Chief/Keycon November 9 Comments at 6; Clean Energy Associations November 9 Comments at 9-10; Calpine November 9 Protest at 1; EPSA November 9 Comments at 2-3; P3 November 9 Comments at 2, 12; Pine Gate November 9 Comments at 8-11; PJM-ICC November 9 Protest at 13; Steel Producers November 9 Comments at 3; Talen November 9 Protest at 5-6; Vistra November 9 Comments at 2-3; Voltus November 9 Protest at 2.

²⁵⁹ AEMA November 9 Comments at 8; Calpine November 9 Protest at 3; Pine Gate November 9 Comments at 8-11; PJM-ICC November 9 Protest at 14; Steel Producers November 9 Comments at 3-4; Vistra November 9 Comments at 2-3.

²⁶⁰ Talen November 9 Protest at 5-6.

²⁶¹ *Id.* at 6 (citing PJM, Transmittal Letter, Docket No. ER15-623-000, at 51 (filed Dec. 12, 2014)).

²⁶² PIOs November 9 Protest at 29-30.

theoretically sufficient to provide resource adequacy, “when failures cause PJM to assess penalties,” the remaining capacity resources—the only resources eligible for bonus payments under PJM’s proposal—will likely be insufficient to provide resource adequacy.²⁶³ Vistra explains that, by limiting the pool of resources incentivized to perform during tight system conditions, PJM risks market volatility, higher penalties, increased risk of default, and greater reliability risks.²⁶⁴

108. Several parties argue that PJM’s proposal will remove an important incentive for resources without capacity commitments to respond in an emergency.²⁶⁵ P3 argues that all resources should be incentivized to perform during PAIs, regardless of whether they are committed capacity resources.²⁶⁶ Talen contends that removing incentives for performance could have reliability consequences and increase the risk of insolvency across portfolios, potentially leading to more retirements.²⁶⁷ Vistra argues that extreme weather events, resource retirements, and an increasingly intermittent resource fleet make incentives to non-capacity resources increasingly important.²⁶⁸ Calpine, Vistra, and Talen note that PJM has previously argued that all resources should be encouraged to perform during an emergency and has not explained why its view has changed.²⁶⁹ Talen states the Commission has also agreed with this view, finding that a reduced bonus payment rate would dampen the incentive for resources without capacity commitments to perform during a PAI.²⁷⁰

²⁶³ *Id.* at 29-32.

²⁶⁴ Vistra November 9 Comments at 20.

²⁶⁵ Calpine November 9 Protest at 3; Chief/Keycon November 9 Comments at 6; Pine Gate November 9 Comments at 8-11; PJM-ICC November 9 Protest at 15; Steel Producers November 9 Comments at 3-5; Talen November 9 Protest at 5-6.

²⁶⁶ P3 November 9 Comments at 12.

²⁶⁷ Talen November 9 Protest at 10.

²⁶⁸ Vistra November 9 Comments at 15-16.

²⁶⁹ Calpine November 9 Protest at 4-5 (citing PJM, Transmittal Letter, Docket No. ER15-623-000, at 51 (filed Dec. 12, 2014)); Talen November 9 Protest at 7-8; Vistra November 9 Comments at 15-16.

²⁷⁰ Talen November 9 Protest at 7-8 (citing Capacity Performance Order, 151 FERC ¶ 61,208 at P 182); Voltus November 9 Protest at 9-10.

109. Talen states that there are situations in which providing additional energy above the capacity commitment without compensation would result in unwarranted risk, such as if a resource must procure additional fuel, for example.²⁷¹ Talen argues that sellers may not be willing to take this risk, especially if it will increase their chances of failing to perform in a future PAI. Calpine argues that bonus payments incentivize resources external to PJM to import energy during emergency conditions and that removing this incentive would make imports into PJM relatively less attractive, harming reliability.²⁷² Calpine contends that PJM's proposal runs counter to the purpose of Capacity Performance, which Calpine argues is to ensure resources have adequate incentives to perform.²⁷³ Vista argues that the proposal will reduce the incentives for non-capacity resources to make investments needed to ensure availability during high stress conditions.²⁷⁴

110. Several parties also argue that PJM is incorrect in arguing that energy market revenues are sufficient to encourage performance.²⁷⁵ Pine Gate argues that PJM relies on the capacity market, and not scarcity pricing, to send investment signals and further asserts that, if energy and ancillary service revenues were sufficient to incentivize performance, PJM would not need a capacity market.²⁷⁶ Voltus and OCC similarly argue that, if, as PJM claims, shortage pricing were sufficient incentive for uncommitted resources to perform during PAIs, it would be sufficient incentive for all resources.²⁷⁷ Vistra asserts that energy markets are not structured to provide incentives for resources to perform under emergency conditions.²⁷⁸ PIOs recognizes that PJM states that, should energy market incentives prove inadequate, further changes may be needed, but argues that any changes PJM would propose in the energy market would increase prices, thereby

²⁷¹ Talen November 9 Protest at 9.

²⁷² Calpine November 9 Protest at 5.

²⁷³ *Id.* at 5-6 (citing Capacity Performance Order, 151 FERC ¶ 61,208 at P 1; *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d at 667).

²⁷⁴ Vista November 9 Comments at 5-6.

²⁷⁵ Calpine November 9 Protest at 4-5; Pine Gate November 9 Comments at 8-11; Talen November 9 Protest at 7; Voltus November 9 Protest at 9.

²⁷⁶ Pine Gate November 9 Comments at 8-11.

²⁷⁷ Voltus November 9 Protest at 9; OCC November 9 Protest at 16.

²⁷⁸ Vistra November 9 Comments at 19.

double charging load for reliability.²⁷⁹ PIOs argue that the current tariff, without PJM's proposed change, already fairly distributes the money consumers currently pay for reliability to the resources providing that service.

111. Parties also argue that resources without capacity commitments historically have played an important role during stressed grid conditions, including during Winter Storm Elliott.²⁸⁰ PJM-ICC states that about 40% of the overperformance during Winter Storm Elliott came from resources that would be excluded from bonus payment eligibility under PJM's proposal, including Demand Resources.²⁸¹ Calpine similarly contends that approximately 30% of the MW eligible for bonus payments from Winter Storm Elliott were generated by non-committed resources, and that reliability could have been affected if these resources were not incentivized by bonus payments to perform.²⁸² Vistra asserts that energy-only resources played a critical role in enabling PJM to avoid load shed.²⁸³

112. Several protestors disagree that limiting bonus payment eligibility will incentivize resources to participate in the capacity market. Steel Producers assert that bonus payments are a poor mechanism to incentivize participation in the capacity market, because there have only been three PAIs in the last ten delivery years.²⁸⁴ Pine Gate argues that the purpose of allowing all resources to receive bonus payments is to facilitate real-time liquidity in meeting needs during tight conditions, not to incentivize capacity market participation.²⁸⁵ PIOs argue that the proposal will not increase participation because energy-only resources that lack Capacity Interconnection Rights (CIRs) cannot obtain them quickly and, for renewables that have CIRs, PJM exempts these resources

²⁷⁹ PIOs November 9 Protest at 31.

²⁸⁰ Pine Gate November 9 Comments at 8-11; Steel Producers November 9 Comments at 3-4; Vistra November 9 Comments at 2-3.

²⁸¹ PJM-ICC November 9 Protest at 15 (citing PJM, *Winter Storm Elliott Event Analysis and Recommendation Report*, at 41-42; 114, Table 21 (July 17, 2023), <https://pjm.com/-/media/library/reports-notice/special-reports/2023/20230717-winter-storm-elliott-event-analysis-and-recommendation-report.ashx> (Winter Storm Elliott Report)).

²⁸² Calpine November 9 Protest at 4; Clean Energy Associations November 9 Comments at 12-13.

²⁸³ Vistra November 9 Comments at 16-17.

²⁸⁴ Steel Producers November 9 Comments at 4-5.

²⁸⁵ Pine Gate November 9 Comments at 8-11.

from offering into the capacity market.²⁸⁶ Talen argues that PJM's proposal ignores that some resources are uncommitted, not because they choose not to participate in the auction, but because they were not necessary to meet the target reserve margin and so did not clear.²⁸⁷ Talen also notes that Non-Performance Charges are not typically large amounts of money and so bonus payments may not be large enough to create an incentive. Steel Producers assert that energy market payments to Demand Resources during PAIs will not provide incentives to be a capacity resource.²⁸⁸ Clean Energy Associations argue that it may not be economically rational for renewable energy resources to participate in the capacity market without the ability to mitigate the risk of penalties.²⁸⁹ PIOs similarly state that, even if PJM's proposal were to attract more renewable resources into the capacity market, it would do so in a matter that artificially inflates their prices and is thus harmful to consumers because these offers would price the risk of penalty against resources that are not physically able to perform at certain times.²⁹⁰

(b) Discrimination

113. Several parties argue that PJM's proposal unduly discriminates against Demand Resources, Price Responsive Demand, and/or Energy Efficiency Resources.²⁹¹ Parties argue that, physically, each incremental megawatt is equivalent with respect to its reliability impact and that there is no rational basis on which to discriminate between them.²⁹² Several parties also argue that PJM has not demonstrated that Demand

²⁸⁶ PIOs November 9 Protest at 33.

²⁸⁷ Talen November 9 Protest at 6-7.

²⁸⁸ Steel Producers November 9 Comments at 4-5.

²⁸⁹ Clean Energy Associations November 9 Comments at 13. *See also* PIOs November 9 Protest at 33-34.

²⁹⁰ PIOs November 9 Protest at 33-34.

²⁹¹ OCC November 9 Protest at 16; Ørsted November 9 Comments at 2; PJM-ICC November 9 Protest at 16; Steel Producers November 9 Comments at 3; Voltus November 9 Protest at 11 (citing Transmittal at 51).

²⁹² OCC November 9 Protest at 15-16. *See also* PJM-ICC November 9 Protest at 17. PJM-ICC also states that the United States Supreme Court has determined that it is reasonable to pay demand response providers at the same rate paid to generators for comparable load reductions/additions when providing the same service to the wholesale market. *Id.* (citing *FERC v. EPSA*, 577 U.S. 260, 292-295 (2016)).

Resources are less capable of performing in a system emergency than generation capacity resources.²⁹³

114. AMP states that Demand Resources and Price Responsive Demand should not be denied eligibility for bonus payments based on the way that their expected level of performance is established.²⁹⁴ Voltus explains that the fact that the Effective Load Carrying Capability analysis assumes load is scaled to Demand Resources does not mean that Demand Resources cannot overperform by reducing more than PJM contemplated in its risk analysis.²⁹⁵ Further, Voltus contends, it is reasonable that Demand Resources may be able to improve their curtailment ability between the time when Firm Service Level is determined and actual dispatch.²⁹⁶ Voltus argues that, under PJM's proposal, Demand Resources will not have an incentive to perform beyond their Firm Service Levels.

115. AEMA and Voltus assert that the proposal places an undue and discriminatory burden on Demand Resources and is therefore not compliant with the Order Nos. 719 and 745 requirements to remove barriers to Demand Resource participation.²⁹⁷ Voltus also argues that PJM's proposal would upset the balance between penalties and revenues because it would subject Demand Resources to penalties but not bonuses.²⁹⁸ Voltus also argues that generators are able to use bonus payments as a hedge against Non-Performance Charges but Demand Resources would be denied that option under PJM's proposal.²⁹⁹ Regarding Energy Efficiency Resources, AEMA argues that, if PJM is able to assess Energy Efficiency Resource penalties, Energy Efficiency Resources should also be eligible for bonus payments.³⁰⁰

²⁹³ Voltus November 9 Protest at 4; PJM-ICC November 9 Protest at 17.

²⁹⁴ AMP November 9 Protest 24.

²⁹⁵ *Id.* at 13.

²⁹⁶ *Id.* at 12.

²⁹⁷ AEMA November 9 Comments at 8-9; Voltus November 9 Protest at 13, 15.

²⁹⁸ Voltus November 9 Protest at 13.

²⁹⁹ *Id.* at 15.

³⁰⁰ AEMA November 9 Comments at 6-7.

c. **Deficiency Letter and Responsive Pleadings**

116. The Deficiency Letter requested PJM define “installed capacity” and “installed capacity commitment” with respect to bonus payment eligibility.³⁰¹ PJM explains in its Deficiency Letter Response that installed capacity is intended to refer to Installed Capacity as defined in Manual 21. PJM further states that, although the term is not specifically defined in the existing tariff, the concept of installed capacity commitment is used today in current tariff provisions and further described in the PJM Manuals.³⁰² For example, PJM states that, if a 100 MW generator is accredited for 80 MW UCAP and the resource partially clears for a 40 MW UCAP commitment, the resource would be eligible for bonuses up to 50 MW—its committed level of installed capacity.

117. The Deficiency Letter also requested PJM explain the proposed addition to tariff, Attachment DD section 10A(c) to state that PJM will determine a resource’s Performance Shortfall “as further detailed in the PJM Manuals.”³⁰³ In response, PJM explains that certain implementation details involving the calculation of a resource’s Performance Shortfall during a PAI are appropriately left to the PJM manuals, such as how Actual Performance is adjusted for ancillary service assignments, specifics on the Balancing Ratio calculation and excusals from Non-Performance Charges, and how resource modeling differences across PJM markets are handled. The Deficiency Letter also sought clarification that while Demand Resources, Price Responsive Demand, and Energy Efficiency Resources would be precluded under the proposal from receiving bonus payments, such resources would still be subject to Non-Performance Charges.³⁰⁴ In its response, PJM states that the current tariff sets the expected performance of Demand Resources, Price Responsive Demand, and Energy Efficiency Resources at committed ICAP.³⁰⁵ But under PJM’s proposal, any performance above committed ICAP would not be counted towards actual performance for purposes of bonus eligibility. PJM explains that these two design elements result in these resources being unable to overperform above their expected performance level. However, PJM explains that the proposed

³⁰¹ Deficiency Letter at 3-4.

³⁰² Deficiency Letter Response at 20-21.

³⁰³ Deficiency Letter at 4.

³⁰⁴ *Id.* at 5-6.

³⁰⁵ Deficiency Letter Response at 27.

changes would not preclude Demand Resources, Price Responsive Demand, and Energy Efficiency Resources from being assessed Non-Performance Charges.³⁰⁶

118. PIOs argue that the exact logic PJM uses to justify Demand Resources being ineligible for bonuses—that Demand Resources are expected to provide different amounts of energy at different times—applies equally to all other resource types.³⁰⁷ Second, PIOs state that PJM’s assertion that Demand Resources are required to reduce load to the Firm Service Level omits that Demand Resource’s non-summer obligations are based on their winter peak load, so the obligations are already adjusted to require increased performance during winter emergencies.³⁰⁸ PIOs assert that this calls into question PJM’s conclusion that the expected energy from Demand Resources exactly offsets the Balancing Ratio because Demand Resources will be measured relative to a different baseline, but the Balancing Ratio remains constant. PIOs also contend that by administratively setting a Demand Resources’ ICAP to exactly the value needed to meet their UCAP obligations, PJM arbitrarily forecloses any possibility of performance beyond the committed value, even though such performance is physically possible.³⁰⁹

d. Answers

i. Reliability

119. PJM argues that the changes are appropriate because capacity resources make commitments to provide forward energy that energy-only resources do not.³¹⁰ PJM also argues that it relies on that commitment for planning purposes to determine the level of capacity commitments necessary to maintain resource adequacy, because these resources have requirements that energy-only resources do not have, including being deliverable to load, testing requirements, and CIRs, as well as an energy market must-offer obligation. Finally, PJM argues that the existing tariff and precedent do not prevent PJM from proposing an alternative, and that changed circumstances allow the Commission to depart from precedent.³¹¹

³⁰⁶ *Id.* at 29.

³⁰⁷ *Id.* (citing Deficiency Letter Response at 29).

³⁰⁸ *Id.* at 9-11.

³⁰⁹ *Id.* at 12.

³¹⁰ PJM December 21 Answer at 9.

³¹¹ *Id.* at 11, 15.

120. PJM notes that some of the performance during PAIs will always be from resources without capacity commitments because not all resources are capacity resources, but that these non-capacity resources can be compensated without giving them a share of bonus payments since they did not commit as capacity.³¹² PJM argues that shortage pricing rules should ensure resources respond during shortage conditions, and that, going forward, four of the Emergency Actions require a primary reserve shortage, meaning there will be shortage pricing in effect whenever PAIs are triggered under those conditions.³¹³ PJM further explains that the other four defined Emergency Actions, which are not coupled with a primary reserve shortage, are the most severe conditions, making it likely that shortage pricing will be in effect when such emergency procedures are declared. In its answer, AEMA states that PJM is incorrect and only three Emergency Actions that trigger PAI require a primary reserve shortage.³¹⁴ AEMA asserts that PJM's answer does not substantively address the disparity in deeming shortage pricing an inadequate incentive for committed generation capacity to perform, but sufficient for committed Demand Resources.³¹⁵

121. PJM objects to arguments that numerous resources contributed to reliability during Winter Storm Elliott either without a capacity commitment or beyond their capacity commitment and that PJM therefore depends on performance from such resources to ensure reliability.³¹⁶ PJM argues that these protests rely on unproven assumptions that these resources can be relied upon for future events even when they have no commitment to respond, operated during PAIs only because of expected bonus payments, and would not otherwise respond to future PAIs in the absence of the expected bonus payments. PJM also argues that this argument overlooks other changes to the capacity market that reduce the likelihood of a PAI occurring, improve the likelihood of capacity resources performing during PAIs, and provide greater assurance that sufficient capacity resources will be committed to reduce the likelihood of expected unserved energy throughout the year.³¹⁷ PJM argues that the Commission should therefore not assume that PJM will need

³¹² *Id.* at 11-12.

³¹³ *Id.* at 5-6 (citing PAI Trigger Order, 184 FERC ¶ 61,058).

³¹⁴ AEMA January 5 Answer at 5 (citing PJM Manual 13 at 37, <https://www.pjm.com/~media/documents/manuals/m13.ashx>).

³¹⁵ *Id.* at 5-6.

³¹⁶ PJM December 21 Answer at 4.

³¹⁷ *Id.* at 4-8. PJM argues these changes are proposed in Docket No. EL24-99-000 and include the marginal Effective Load Carrying Capability approach, a more granular modeling approach using an Expected Unserved Energy metric, and new testing

to rely on non-capacity resources during future PAIs in the same manner as during Winter Storm Elliott.³¹⁸

ii. Discrimination

122. PJM argues that, if resources that do not have capacity commitments do not receive bonus payments, it is reasonable to also limit the bonus payments for committed capacity resources to the ICAP equivalent of their committed UCAP.³¹⁹ PJM claims committed ICAP is the appropriate limit because this is the MW level for which a resource has been studied to be deliverable and qualified to provide capacity, as well as the level at which the resource has committed to make itself available.³²⁰

123. PJM argues that the proposal cannot be discriminatory because it applies equally to all resource types.³²¹ PJM explains that it only affects Demand Resources and Price Responsive Demand resources differently than generation resources because nearly all such resources define their offer as a commitment to reduce load to a defined Firm Service Level under the existing tariff. PJM states that any reduction below the Firm Service Level is uncommitted capacity because the underlying load does not accept a capacity commitment for that additional curtailment. PJM argues that the proposal is not inconsistent with Order Nos. 719 or 745 because it does not create a barrier to participation by Demand Resources.³²²

124. PJM explains that Demand Resources and generation resources are inherently different because Demand Resources commit to reducing energy, rather than producing it, and this difference reasonably leads to different rules.³²³ PJM contends that PIOs' protest relies on several incorrect statements, including, for example, that a fully dispatched Demand Resource will be expected to deliver more energy than its UCAP.³²⁴

requirements. *Id.*

³¹⁸ *Id.* at 8.

³¹⁹ *Id.* at 12.

³²⁰ *Id.* at 12 n.26.

³²¹ *Id.* at 13.

³²² *Id.* at 14.

³²³ PJM January 17 Answer at 15.

³²⁴ *Id.* at 15-16 (citing PIOs December 22 Protest at 10).

To the contrary, PJM argues, Demand Resources are fully dispatched and yet not expected to reduce load by more than their UCAP any time the system load is substantially below the 50/50 peak load forecast during an hour of load shed risk when a Demand Resource would be expected to reduce load to its Firm Service Level. PJM also notes that PIOs incorrectly state that Demand Resources are committed to reduce load to a level based on the resource's weather-adjusted winter peak load, and, therefore, that their obligations already adjust to require increased performance during winter emergencies.³²⁵ To the contrary, PJM states, Demand Resources commit to reduce load to their nominated winter Firm Service Level, and so the obligation is not adjusted to a lower level of consumption during winter emergencies.³²⁶

e. **Commission Determination**

125. We reject PJM's proposed tariff revisions. We find that PJM fails to demonstrate that its proposed changes to bonus payment eligibility are just and reasonable. As a threshold matter, we note that, in accepting PJM's existing bonus payment structure, the Commission stated that "[t]he redistribution of capacity revenues from under-performing resources to over-performing resources provides the appropriate incentives for all resources to perform when they are most needed."³²⁷ The Commission further found that incentivizing all resources to perform during emergencies results in a more reliable system, reduces costs over the long term, and increases the probability that ratepayers will receive the capacity service for which they are paying.³²⁸

126. In this proceeding, PJM contends that its proposal to limit bonus payment eligibility to committed capacity resources will enhance reliability and incentivize capacity market participation. However, PJM fails to demonstrate that its proposal will achieve those objectives. Under PJM's proposal, the primary incentive for committed capacity resources to overperform is the potential for them to receive bonus payments. Although PJM argues that limiting bonus payment eligibility will provide stronger incentives to a smaller group of resources, such incentives must be weighed against the reduced performance incentives for other resources—namely, non-committed resources that would be ineligible for bonus payments. The Commission has previously found that a reduced bonus payment rate would dampen the incentive for resources without capacity

³²⁵ *Id.* at 17.

³²⁶ *Id.* (citing PJM, Intra-PJM Tariffs, RAA, Schedule 6 (Procedures for Demand Resources and Energy Efficiency), § K.

³²⁷ Capacity Performance Order, 151 FERC ¶ 61,208 at P 182.

³²⁸ *Id.* P 183; Capacity Performance Rehearing Order, 155 FERC ¶ 61,157 at P 133.

commitments to perform during emergencies.³²⁹ We similarly find here that limiting eligibility for bonus payments as PJM proposes may reduce the incentives to perform during emergencies and therefore could reduce PJM's ability to maintain resource adequacy during times of system stress. We note that PJM-ICC pointed out, during Winter Storm Elliott, about 40% of the overperformance came from resources that PJM proposes here to exclude from eligibility for bonus payments.³³⁰ We also agree with Vistra's argument that the proposal will reduce the incentive for non-capacity resources to make forward-looking investments to prepare for, and ensure availability during, high stress conditions. During extreme weather events, such as Winter Storm Elliott in 2022, PJM observed 24% of generators were not available.³³¹ Because the record shows that this element of PJM's proposal would reduce the possible solutions during emergencies and reduce the incentive for resources to ensure they are available during capacity emergencies, we find that PJM has not shown it to be just and reasonable. Having found PJM's filing unjust and unreasonable for the reasons discussed above, we decline to opine on other protests.

6. Third-Party Verification of CPQR

a. PJM's Proposal

127. PJM states that the existing tariff provides that a seller's CPQR shall be considered reasonably supported if it is based on widely used actuarial practices, but, PJM contends, that has left room for disagreements as to what types of practices meet this criteria.³³² PJM states that "differences of opinion" regarding what methodologies for calculating CPQR may be appropriate has led to the rejection of some unit-specific values.³³³ PJM states that it therefore proposes to allow sellers to submit a CPQR value where the risk model, along with supporting documentation, has been reviewed "by an independent third party entity with experience in evaluating Capacity Performance insurance policies to confirm that the proposed valuation of risk is consistent with

³²⁹ Capacity Performance Order, 151 FERC ¶ 61,208 at P 182; Voltus November 9 Protest at 9-10.

³³⁰ PJM-ICC November 9 Protest at 15 (citing Winter Storm Elliott Report at 41-42; 114, Table 21). Calpine similarly contends that approximately 30% of the MW eligible for bonus payments from Winter Storm Elliott were generated by non-committed resources. Calpine November 9 Protest at 4 (citing Winter Storm Elliott Report at 114).

³³¹ Winter Storm Elliott Report at 49.

³³² Transmittal at 11.

³³³ *Id.*

actuarial practices in the industry.”³³⁴ PJM argues that such parties are “better positioned to confirm whether a Capacity Market Seller’s risk valuation is consistent with actuarial practices used in this industry.”³³⁵ PJM clarifies that all CPQR values would continue to be reviewed by the Market Monitor and PJM and such values would still have to be ultimately accepted by PJM.

b. Responsive Pleadings

i. Comments

128. Several parties support PJM’s proposed changes to allow third party verifications of CPQR.³³⁶ Constellation argues that PJM’s proposal provides market sellers with confidence that their proposed CPQR values will be accepted, while maintaining the Market Monitor’s and PJM’s oversight role.³³⁷ P3 similarly argues that it will provide sellers with increased certainty as to what documentation is acceptable and flexibility to reflect their independent view of risk.³³⁸ Renewable Energy Coalition states that the proposal provides a reasonable avenue for settling the non-expert differences of opinion among PJM, the Market Monitor, and sellers during negotiation of offer caps.³³⁹ Vistra states that the current CPQR review process is poorly defined and unnecessarily contentious and thus often either prevents or discourages resources from recovering their costs, but, Vistra states, allowing third-party verification should reduce disputes.³⁴⁰

³³⁴ *Id.* at 11-12 (quoting PJM, Proposed OATT, attach. DD, § 6.8 (Avoidable Cost Definition), § 6.8(a)).

³³⁵ *Id.* at 12.

³³⁶ Constellation November 9 Comments at 32; Renewable Energy Coalition November 9 Comments at 14, 16-17; P3 November 9 Comments at 6; Vistra November 9 Comments at 7.

³³⁷ Constellation November 9 Comments at 32.

³³⁸ P3 November 9 Comments at 6.

³³⁹ Renewable Energy Coalition November 9 Comments at 17.

³⁴⁰ Vistra November 9 Comments at 7.

ii. Protests

129. Several parties argue that the proposed tariff language would require deference to a third-party verification, without adequate review from PJM or the Market Monitor.³⁴¹ The Market Monitor states that the tariff language is unclear, and either provides an alternative to Market Monitor review, bypassing a basic part of the review process, or is unnecessary, as no participant needs permission to support their position in any way they choose.³⁴² PIOs argue that Commission precedent has found independent review of offer caps, including risks, by PJM and the Market Monitor is a critical component of market power mitigation and that permitting sellers with market power to include their own assessments would defeat the point of that mitigation.³⁴³ PIOs contend that, while PJM argues the increase in unit-specific review is a problem, the Commission specifically directed that increase and rejected PJM's arguments that it would be burdensome.³⁴⁴

130. Several parties also object to allowing third-party verification for CPQR more broadly. Parties argue that providers of Capacity Performance insurance would not be "independent" third parties and would have a financial incentive to increase offer caps to increase the value of their product³⁴⁵ or because sellers pay them.³⁴⁶ OCC argues that PJM has not proposed any rules for evaluating the independence of third-party consultants and that it would not be possible for the Commission to verify the accuracy of third-party assessments.³⁴⁷ OCC explains that insurance carriers have an incentive to ensure sellers have the highest possible offer caps in order to reduce the chances of a claim against the insurance for non-performance. PIOs also argue that the moral hazard associated with such policies could undermine the performance incentives created by

³⁴¹ PIOs November 9 Protest at 9; Market Monitor November 9 Protest at 14.

³⁴² Market Monitor November 9 Protest at 14. *See also* OCC November 9 Protest at 5.

³⁴³ PIOs November 9 Protest at 10 (citing Offer Cap Rehearing Order, 178 FERC ¶ 61,121 at PP 47, 84 (quoting Offer Cap Order, 176 FERC ¶ 61,137 at P 69)).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 11; New Jersey Rate Counsel November 9 Protest at 3; OCC November 9 Protest at 5.

³⁴⁶ PIOs November 9 Protest at 11.

³⁴⁷ OCC November 9 Protest at 5, 7.

capacity performance.³⁴⁸ PIOs state that insurance companies must price additional risks including information asymmetry, that owners are more likely to seek insurance for poorly performing units, and insurance will reduce owners' incentive to take actions to mitigate risk.³⁴⁹ PIOs also argue that using insurance quotes for individual units will inflate CPQR because sellers with portfolios of resources can offset their Non-Performance Charges for one unit with bonuses or other revenues from other units.

131. PIOs argue that PJM has not demonstrated that third parties are better positioned to evaluate risk, especially since sellers have said they have limited data to do so, or that PJM or the Market Monitor lack the skills.³⁵⁰ PIOs state that there is no evidence that insurance policies are an appropriate basis for the cost of mitigating CPQR, and PJM has not shown that there are identified actuarial practices for pricing them or that there are any consultants with relevant expertise.³⁵¹ New Jersey Rate Counsel states that PJM does not provide evidence that there are any existing Capacity Performance risk insurance policies.³⁵²

132. PIOs argue that PJM has not explained whether it will consider if third-party verification of CPQR is consistent with the representations a seller makes about its availability in the accreditation process. PIOs request that, if the Commission accepts the proposal, the Commission should condition acceptance on PJM ensuring consistency between assessment of risk in accreditation and offer caps so that resources that request increased accreditation based on reduction in outage risk cannot simultaneously request a higher offer cap.³⁵³ OCC argues that PJM does not provide an analysis of the cost impact of this proposal.³⁵⁴

c. Deficiency Letter and Responsive Pleadings

133. The Deficiency Letter sought clarification as to whether and how PJM and/or the Market Monitor would review a CPQR value that has undergone independent third-party

³⁴⁸ PIOs November 9 Protest at 17.

³⁴⁹ *Id.* at 13-14.

³⁵⁰ *Id.* at 15.

³⁵¹ *Id.* at 13. *See also* New Jersey Rate Counsel November 9 Protest at 3.

³⁵² New Jersey Rate Counsel November 9 Protest at 3.

³⁵³ PIOs November 9 Protest at 12-13.

³⁵⁴ OCC November 9 Protest at 2.

review, as well as whether PJM would be able to reject such a value.³⁵⁵ In its response, PJM states that the addition of the third-party verification tariff language is intended to clarify the documentation that may be used to support a requested CPQR value.³⁵⁶ PJM explains that PJM and the Market Monitor would review the supporting documentation—including the requested CPQR value itself and the inputs used by the seller—in determining whether the requested value is reasonably supported. PJM states that it may reject a requested CPQR value on grounds that the seller failed to provide sufficient supporting documentation, the independent third party failed to conduct a thorough review, the third party is not actually independent or does not have experience in evaluating capacity performance insurance policies, or that the requested CPQR value is outside the bounds of reasonableness based on similar submittals and other information available to PJM, including after receiving input from the Market Monitor.³⁵⁷ PJM also explains that PJM will review the seller's inputs and financial assumptions, such as anticipated number of PAIs and a resource's expected performance.³⁵⁸ PJM further states that, consistent with current practice and tariff requirements, PJM would consider any input provided by the Market Monitor on a requested CPQR value.

134. PJM further states that, should the Commission believe that additional clarity is needed, PJM would be amenable to submitting a compliance filing to revise the proposed tariff language to state that such reasonable support is sufficient to establish the CPQR “upon acceptance by the Office of the Interconnection.”³⁵⁹

135. In comments on the Deficiency Letter Response, PIOs state that, while they appreciate PJM's clarification that it intends to preserve the ability of PJM and the Market Monitor to review every CPQR submission, PJM's intention is not consistent with the proposed revisions.³⁶⁰ PIOs state that PJM's initial proposal includes definitive language that the CPQR “shall” be considered reasonably supported if the seller provides evidence of third-party review. PIOs argue that PJM's proposal in its Deficiency Letter Response, on the other hand, to include language specifying that provision of support is sufficient “upon acceptance” by PJM is insufficient because sellers could contend that

³⁵⁵ Deficiency Letter at 1-2.

³⁵⁶ PJM Deficiency Letter Response at 4.

³⁵⁷ *Id.* at 5; 8.

³⁵⁸ *Id.* at 5-6.

³⁵⁹ *Id.* at 7.

³⁶⁰ PIOs December 22 Protest at 2.

“acceptance” describes merely a ministerial act rather than substantive review.³⁶¹ PIOs also contend that it is not clear whether the seller must submit actual documentation or merely an officer’s certification that such documentation exists, nor is it clear what exactly the officer must certify. Although PIOs continue to believe that PJM’s proposal is unjust and unreasonable, PIOs propose a revision in blackline that they argue would better capture PJM’s intent.³⁶²

d. Answers

136. PJM states that it is amenable to the tariff language proposed by PIOs in PIOs’ protest to the Deficiency Letter Response, asserting it does not substantively change the proposal.³⁶³ PJM explains that its proposal would not substantively change what costs can be included in CPQR, but rather clarify what costs can be included, given that the existing tariff can be read to exclude certain risk management strategies, such as risk retention.³⁶⁴ PJM argues that the tariff already allows sellers to include insurance premiums in their justification for CPQR, and that PJM is only proposing to clarify that quotes are also acceptable.³⁶⁵ PJM also argues that there are not any such policies are meritless, as there are publicly available options for sale. PJM explains that it is just and reasonable to allow insurance quotes, in addition to insurance premiums, because sellers would not secure insurance until they know whether they have a capacity commitment.

³⁶¹ *Id.* at 2-3 (citing to *Fuller v. Mortgage Elec. Registration Sys., Inc.*, 888 F.Supp 2d 1257, 1278 (M.D. Fla. 2012) (noting that “accepting and recording instruments is merely a ministerial act” and collecting cases that make similar observations); *U.S. v. Gomez-Lepe*, 207 F.3d 623, 629 (9th Cir. 2000) (describing “ministerial matters . . . such as simple acceptance of a verdict” as ones “that did not involve judgment calls or discretionary decisions”)).

³⁶² *Id.* at 4.

³⁶³ PJM January 17 Answer at 4-5 (citing PIOs December 22 Protest at 2-4).

³⁶⁴ PJM December 21 Answer at 34 (citing Offer Cap Order, 176 FERC ¶ 61,137 at P 75 (clarifying that “sellers can use probabilistic risk modeling to support their unit-specific offers and include expected non-performance penalties in CPQR”); Offer Cap Rehearing Order, 178 FERC ¶ 61,121 at P 86).

³⁶⁵ *Id.* at 35 (citing PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.8 (Avoidable Cost Definition), § 6.8(a) (“CPQR (Capacity Performance Quantifiable Risk) consists of the quantifiable and reasonably-supported costs of mitigating the risks of non-performance associated with submission of a Capacity Performance Resource offer (or of a Base Capacity Resource offer for the 2018/19 or 2019/20 Delivery Years), such as insurance expenses associated with resource non-performance risks.”)).

PJM also argues that the proposed tariff makes clear that third parties must be qualified to confirm the valuation of risk and that the Market Monitor and PJM must still review the proposals, including whether the consultant is qualified and truly independent.³⁶⁶

137. In their answer, PIOs argue that PJM failed to respond to its arguments that it is not reasonable to allow sellers to use insurance quotes or estimates as the basis for the cost of mitigating CPQR because such policy quotes would likely be exaggerated as a result of the insurer's relative lack of information, adverse selection and moral hazard issues, and the fact that an insurance policy for a single unit would ignore the rest of the fleet.³⁶⁷

138. PIOs also object to PJM's statement that the tariff already allows submission of insurance policies as justification for CPQR, arguing that PJM ignores that the new tariff language would consider such submissions sufficient to justify CPQR, but that PJM has failed to explain its view that these policies, or quotes and estimates for such policies, constitute reasonable estimates of the cost of mitigating risk.³⁶⁸ PIOs also argue that policy quotes are opening offers in the process of negotiating a policy contract and are therefore likely on the high side.³⁶⁹ PIOs contend that, even if the tariff previously recognized insurance costs as one basis for CPQR estimates, the proposed changes in this docket expand the ways in which such policies can be relied upon. PIOs also argue that, while PJM provides a link to demonstrate that Capacity Performance insurance policies exist, this link only demonstrates that such policies have been offered, not that they have been issued.³⁷⁰ PIOs argue that PJM's proposal assumes that these policies have not only been issued but that parties will have experience in evaluating them.

139. The Market Monitor argues that if PJM is correct in stating its proposal does not change the roles of the Market Monitor and PJM, then there is no reason to change the tariff.³⁷¹ However, the Market Monitor maintains that allowing the opinion of a

³⁶⁶ *Id.* at 36-37.

³⁶⁷ PIOs January 10 Answer at 3.

³⁶⁸ *Id.* at 4 (citing PJM December 21 Answer at 35).

³⁶⁹ *Id.* at 5.

³⁷⁰ *Id.* (citing PJM December 21 Answer at 35 n.109).

³⁷¹ Market Monitor January 17 Answer at 12.

consultant hired by a seller to establish, without further review, that the offer shall be considered reasonably supported “eviscerates the market power review process.”³⁷²

e. **Commission Determination**

140. Although we are rejecting the filing as described above, we provide limited guidance and address certain protested issues related to PJM’s proposal to modify the tariff to explicitly state that sellers may rely on third parties with experience evaluating Capacity Performance insurance policies to justify their proposed CPQR values.

141. As a threshold matter, we agree with protestors that the language PJM proposes is most reasonably read to require PJM and the Market Monitor to accept a third-party estimate of CPQR as part of a seller’s offer cap without additional review if a third-party consultant certifies it. In other words, it would require PJM to automatically accept any third-party consultant justification regardless of reasonableness.³⁷³ We find that such a requirement would not be just and reasonable because it would delegate responsibility that belongs to PJM and the Market Monitor to third parties. The Commission has found it is inconsistent with the principles of mitigation to allow sellers with market power to determine their own costs without review.³⁷⁴

142. We also agree with PJM that, as a general matter, it is just and reasonable to allow sellers to submit documentation from third-party consultants supporting their proposed CPQR value. We acknowledge that the existing tariff does not preclude third-party consultants and allows for the inclusion of insurance expenses in CPQR. Specifically, the tariff states that CPQR may include “insurance expenses associated with resource non-performance risks.”³⁷⁵ Further, we agree with PJM that, while the tariff does not

³⁷² *Id.* at 13.

³⁷³ See PJM, Proposed OATT, attach. DD, § 6.8 (Avoidable Cost Definition) (3.0.0), § 6.8(a) (“CPQR shall also be considered reasonably supported if a Capacity Market Seller provides supporting documentation, along with an officer certification, that their risk model, inputs, and costs of CPQR have undergone a review by an independent third party entity [...]. Provision of such reasonable support shall be sufficient to establish the CPQR.”).

³⁷⁴ See, e.g., Offer Cap Rehearing Order, 178 FERC ¶ 61,121 at P 47 (“Permitting sellers with market power to include their own assessments of costs and risks in offers instead of the quantifiable and reasonably-supported costs and risk permitted in PJM’s Tariff without oversight would defeat the purpose of market power mitigation.”).

³⁷⁵ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.8 (Avoidable Cost Definition) (2.0.0), § 6.8(a).

expressly allow insurance quotes or estimates, the tariff language also does not prohibit a seller from proposing to rely on such documentation in its offer cap. We agree with PJM that it may be just and reasonable to allow sellers to rely on insurance quotes or estimates for the purposes of establishing CPQR.

143. Nevertheless, protestors identify elements of PJM's proposal that lack clarity. In particular, PJM does not detail the criteria that sellers should utilize in selecting acceptable third-party consultants to ensure that these consultants have "experience in evaluating capacity performance insurance policies," are appropriately qualified to determine CPQR values, and are sufficiently independent. While we do not make an affirmative finding on what must be included, we note that these qualification criteria could include, for example, having prepared or issued Capacity Performance insurance policies, as well as necessary education or specific expertise needed to analyze a seller's financial profile and operations, the performance characteristics of the resource, engineering limitations, operational restrictions, and PJM's markets and operations. Moreover, PJM has not proposed a definition for the term independent third-party consultant nor recommended any criteria by which PJM and the Market Monitor would assess the qualifications of such consultants. Though we recognize that "independent" is a commonly used term, it is important to ensure that all parties are clear on the requirements to ensure market power is adequately mitigated. Factors included in such an evaluation could potentially include, for example, appropriate licensing and certification, any affiliate relationships, the nature of the contract between the consultant and the seller, any employer-employee relationship between the third-party consultant and the seller, the degree to which services performed by the third-party consultant can be controlled by the seller, if the third-party consultant offers similar CPQR evaluation services to other sellers in the market, or other criteria.

144. With respect to protests that parties who provide Capacity Performance insurance have an incentive to ensure sellers have the highest possible quotes in order to raise the value of their product, such concerns are speculative and not supported by the record before us. However, we urge PJM to consider these concerns in the event PJM chooses to submit a future filing, which should more clearly describe how third-party consultants' reports would be evaluated.

145. PIOs also argue that PJM has failed to demonstrate that third-party consultants are better positioned than sellers, the Market Monitor, or PJM to evaluate risk.³⁷⁶ PJM need only show that its proposal is just and reasonable, not that it is preferable.³⁷⁷ Further,

³⁷⁶ PIOs November 9 Protest at 15.

³⁷⁷ *Louisville Gas & Elec. Co.*, 114 FERC ¶ 61,282, at P 29 (2006) (the just and reasonable standard under the FPA is not so rigid as to limit rates to a "best rate" or "most efficient rate" standard; rather, a range of alternative approaches often may be just

PJM has clarified it does not intend to replace its own or the Market Monitor's review with that of third parties. PIOs further contend that PJM has not shown that standard actuarial practices for pricing Capacity Performance insurance exist, or that consultants would know how to utilize them.³⁷⁸ However, we find that further clarity regarding how consultant reports would be evaluated and standards for selecting consultants should resolve this concern. PIOs also argue that PJM has not explained how it will evaluate whether third-party verification of CPQR is consistent with the representations a seller makes about its expected performance in the accreditation process.³⁷⁹ We agree that the current record does not address this question. In addition, PIOs seek clarification as to whether sellers must submit documentation supporting the proposed CPQR value, or rather just a certification that such documentation exists.³⁸⁰ We agree with PIOs that the tariff language PJM submitted in its Deficiency Letter Response is not clear as to whether suppliers must submit documentation from the third-party consultant explaining how the value was calculated or rather certification that such documentation exists.³⁸¹

7. PJM-determined Offer Cap

a. PJM's Proposal

146. PJM proposes changes to the tariff to allow PJM, after the Market Monitor's review, to calculate an alternative offer cap independently based on information provided by the seller.³⁸² Under the current tariff, the Market Monitor reviews a seller's offer cap and, if it does not agree with the seller's value, provides an alternative calculation.³⁸³

and reasonable), *reh'g denied*, *E. ON U.S. LLC*, 116 FERC ¶ 61,020 (2006)).

³⁷⁸ *Id.* at 13.

³⁷⁹ *Id.* at 12-13.

³⁸⁰ PIOs December 22 Protest at 3.

³⁸¹ Specifically, this portion of the Proposed OATT: "Such reasonable support shall also include an officer's certification that (1) the modeling and valuation of the CPQR was developed in accord with such practices or (2) documentation by an independent third party entity with experience in evaluating capacity performance insurance policies demonstrating that the proposed valuation of risk (including the risk model inputs and costs of CPQR) is consistent with actuarial practices in the industry." Deficiency Letter Response at 7.

³⁸² Transmittal at 30.

³⁸³ *Id.* at 30 (citing PJM, Intra-PJM Tariffs, OATT, attach. M (Appendix),

However, PJM explains, PJM can only accept or reject what the seller submits.³⁸⁴ PJM argues that this results in PJM rejecting the entire offer cap even when PJM agrees with a portion of the calculations. PJM explains that, as a result, when PJM rejects the offer cap, the seller is limited to using the default offer cap.

147. PJM states that the proposed tariff changes would allow PJM to accept any components of a seller's calculation that are consistent with the tariff, while recalculating others that are not.³⁸⁵ PJM clarifies that the offer cap would still be reviewed by the Market Monitor first, and the seller and the Market Monitor would still have an opportunity to agree on the level of the offer cap to send to PJM for review. PJM states that PJM already has, and will continue to have under the proposed revisions, ultimate approval authority of all offer caps. PJM explains that the Market Monitor would retain the ability to escalate any disagreements on a PJM-approved offer cap to the Commission for potential resolution.³⁸⁶ PJM reiterates that it has responsibility for ensuring all offer caps are consistent with the tariff.

b. Responsive Pleadings

i. Support

148. Several parties support PJM's proposal.³⁸⁷ P3 argues that PJM is ultimately responsible for "setting the offer caps under the tariff and it should be provided with the administrative flexibility to do so."³⁸⁸ Constellation argues that PJM's proposal will be helpful for situations where PJM disagrees with only one component or a few elements of the seller's proposed offer cap.³⁸⁹ Constellation further states that lowering the stakes of

§ II.E.2).

³⁸⁴ *Id.* at 31 (citing PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.4 (Market Seller Offer Cap), § 6.4(b)).

³⁸⁵ *Id.* at 32.

³⁸⁶ *Id.* (citing PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.4 (Market Seller Offer Cap), § 6.4(b); *id.* attach. M (Appendix), § M(E)).

³⁸⁷ Constellation November 9 Comments at 33; Ohio FEA November 9 Comments at 5; P3 November 9 Comments at 6; Renewable Energy Coalition November 9 Comments at 14.

³⁸⁸ P3 November 9 Comments at 6.

³⁸⁹ Constellation November 9 Comments at 33.

PJM's current "all or nothing" review to allow discrete changes to the offer cap calculation will enable sellers to offer their units at values that are appropriately compensatory, which will encourage investment.³⁹⁰ Ohio FEA cautions against rejecting the filing because this tariff revision has limited applicability and likely will have little, if any, impact on capacity market results.³⁹¹

ii. Protests

149. Several parties oppose PJM's proposal.³⁹² Protestors argue that the Market Monitor is ultimately responsible for market power mitigation and best positioned to review for exercises of market power.³⁹³ New Jersey Board argues that the Market Monitor's role is to mitigate market power and it is therefore the best entity to serve ratepayers in calculating offer caps.³⁹⁴ OCC argues that Order No. 719 gives PJM the final authority to determine prospective mitigation, but that PJM's proposal goes beyond making the final determination and would instead duplicate the role of the Market Monitor.³⁹⁵ OPSI argues that the primary role of the Market Monitor is to prevent the exercise of market power and that the Market Monitor is best positioned to achieve this aim, "both in terms of expertise and its institutional role."³⁹⁶ OPSI contends that establishing appropriate offer cap levels is a significant part of preventing market power. PIOs argue that PJM's proposal is a major change because it would significantly reduce

³⁹⁰ *Id.* See also Renewable Energy Coalition November 9 Comments at 18.

³⁹¹ Ohio FEA November 9 Comments at 5.

³⁹² AMP November 9 Protest 5, 9; Maryland People's Counsel November 9 Protest at 16; New Jersey Board November 9 Comments at 1; New Jersey Rate Counsel November 9 Protest at 4-5; OCC November 9 Protest at 25; OPSI November 9 Protest at 2; Pennsylvania Commission November 9 Comments at 2; PIOs November 9 Protest at 15-16; PJM-ICC November 9 Protest at 11.

³⁹³ AMP November 9 Protest 20-21; New Jersey Board November 9 Comments at 6-7; OCC November 9 Protest at 26; OPSI November 9 Protest at 2; PIOs November 9 Protest at 15-16.

³⁹⁴ New Jersey Board November 9 Comments at 6-7.

³⁹⁵ OCC November 9 Protest at 26 (citing *Wholesale Competition in Regions with Org. Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071 (2008) (Order No. 719); *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059; *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009)).

³⁹⁶ OPSI November 9 Protest at 2.

the ability of the Market Monitor to prevent the exercise of market power, even though the Market Monitor is charged with market power mitigation.³⁹⁷

150. A number of parties argue that the proposal will undermine the role of the Market Monitor and incentivize sellers to bypass Market Monitor review.³⁹⁸ Several parties state that the Commission should not accept PJM's proposal because it would replace the Market Monitor as the primary decision-maker in reviewing offer caps.³⁹⁹ Parties argue that a more limited role is appropriate for PJM because PJM's primary focus is reliability.⁴⁰⁰ AMP states that it is the role of the Market Monitor to provide an independent review of the offer cap proposals, insulated from other market administration considerations, to ensure that customers are protected from the exercise of market power by sellers.⁴⁰¹ OCC notes that PJM states its proposal would allow it to approve components of an offer cap that are consistent with the tariff while rejecting those that are not, but OCC contends that PJM is presuming the Market Monitor has not calculated the offer cap in accordance with the tariff in the first instance.⁴⁰²

151. OPSI also argues that while PJM states it will consider the Market Monitor's input, it does not explain how it will share components of the alternative offer cap with the Market Monitor, receive input, or consider that input.⁴⁰³ OPSI acknowledges PJM's argument that the Market Monitor can escalate disagreements on PJM-approved offer caps to the Commission but argues this should not be the preferred solution, and that PJM should instead work towards a process that incentivizes compromise, reduces the need for

³⁹⁷ PIOs November 9 Protest at 15-16.

³⁹⁸ AMP November 9 Protest 5, 9, 20; Maryland People's Counsel November 9 Protest at 16; New Jersey Board November 9 Comments at 6-7; New Jersey Rate Counsel November 9 Protest at 4-5; OCC November 9 Protest at 25; Pennsylvania Commission November 9 Comments at 2; PIOs November 9 Protest at 15-16; PJM-ICC November 9 Protest at 11; see also OSPI November 9 Protest at 2 (arguing sellers will negotiate directly with PJM in the hopes of obtaining a higher offer cap).

³⁹⁹ New Jersey Board November 9 Comments at 6-7; PJM-ICC November 9 Protest at 11.

⁴⁰⁰ Maryland People's Counsel November 9 Protest at 16-17; PIOs November 9 Protest at 16.

⁴⁰¹ AMP November 9 Protest 20-21.

⁴⁰² OCC November 9 Protest at 26.

⁴⁰³ OPSI November 9 Protest at 3.

dispute resolution, and safeguards against market power.⁴⁰⁴ OCC states that it is appropriate for the Commission to retain the power to review offer caps.⁴⁰⁵

152. The Market Monitor argues that, under the current rules, participants are responsible for their own behavior in the markets, and must be prepared to defend that behavior if challenged.⁴⁰⁶ The Market Monitor argues that, under PJM's proposal, PJM "improperly steps into the shoes of the seller" and creates confusion about who is responsible for the behavior of the seller, making it more difficult for the Commission to detect and prevent exercise of market power.⁴⁰⁷

153. The Market Monitor argues that PJM's proposal contradicts tariff Section 12A, which defines roles for the Market Monitor and PJM in the offer cap process, and is therefore unjust and unreasonable.⁴⁰⁸ The Market Monitor maintains that PJM's proposal would allow PJM to replace the Market Monitor in making decisions about market power, and that PJM would no longer be limited to determinations of compliance with market rules. The Market Monitor argues that this change would make it impossible for it to perform its duties. The Market Monitor maintains that the current rules work well and that there have only been a handful of cases that required direct Commission involvement.⁴⁰⁹

154. PIOs argue PJM's proposal would leave all stakeholders besides the seller, Market Monitor, and PJM without sufficient information to determine whether PJM's new discretion to amend sellers' offers may lead to unjust, unreasonable, or unduly discriminatory outcomes.⁴¹⁰ In the event the Commission approves a greater role for PJM, PIOs request that the Commission condition acceptance on PJM periodically

⁴⁰⁴ *Id.* at 2-3.

⁴⁰⁵ OCC November 9 Protest at 26.

⁴⁰⁶ Market Monitor November 9 Protest at 28.

⁴⁰⁷ *Id.*

⁴⁰⁸ Market Monitor November 9 Protest at 26 (quoting PJM, Intra-PJM Tariffs, OATT, § 12A (PJM Compliance Review) ("[PJM] does not make determinations about market power, including, but not limited to, whether the level or value of inputs or a decision not to offer a committed resource involves the potential exercise of market power.")). *See also* OCC November 9 Protest at 26.

⁴⁰⁹ Market Monitor November 9 Protest at 28-29.

⁴¹⁰ PIOs November 9 Protest at 16.

providing anonymized reports on how frequently it amends sellers' offers, what resource types have their offers amended, what methodology PJM uses to amend offers, and the degree to which PJM's amendments increase or decrease prices.

c. Answers

155. Several parties disagree with protestors that the proposal would meaningfully change the Market Monitor's role, arguing that the existing timeline and requirements for Market Monitor review are unchanged.⁴¹¹ Vistra and P3 state that the Commission and the courts have affirmed that PJM must retain the authority to make its own determination regarding the level of the offer cap.⁴¹² PJM argues that its proposal is consistent with Order No. 719, which states that market monitors may not conduct prospective mitigation such as calculating a unit-specific offer cap.⁴¹³ Vistra argues that the Commission has rejected arguments that market monitors should have ultimate responsibility for market mitigation, and Order No. 719 prohibits market monitors from conducting prospective mitigation.⁴¹⁴ Constellation argues that Order No. 719 provides that the Market Monitor "may," but is not required, to provide the inputs required by the RTO/ISO to conduct prospective mitigation.⁴¹⁵ Constellation states that PJM's proposal is consistent with Order No. 719 because PJM would maintain the last word, as it does now, and if the Market Monitor disagrees with PJM's decision it can always bring the matter to the Commission for review.

156. AMP contends that the expanded role proposed by PJM would be a material change to the current offer cap review process that is likely to affect the level of offer caps, and that PJM implicitly acknowledges this when it argues that limiting PJM to simply accepting or rejecting a request does not produce efficient market outcomes.⁴¹⁶ The Market Monitor argues that its ability to take concerns about offer caps to the

⁴¹¹ PJM December 21 Answer at 28; P3 November 27 Answer at 6; Vistra December 4 Answer at 2.

⁴¹² Vistra December 4 Answer at 3 (citing *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,250, at P 165 (2009)); P3 November 27 Answer at 7 (citing *Vistra Corp. v. FERC*, 80 F.4th 302, 319 (D.C. Cir. 2023)).

⁴¹³ PJM December 21 Answer at 30.

⁴¹⁴ Vistra December 4 Answer at 3 (citing *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,250 at P 165).

⁴¹⁵ Constellation December 15 Answer at 6.

⁴¹⁶ AMP January 8 Answer at 10.

Commission is not a substitute for clear rules, and that the Office of Enforcement would be unable to act in absence of such rules.⁴¹⁷ The Market Monitor clarifies that it does not seek authority to approve offer caps, but rather to maintain the current division of labor which separates the role of detailed review from that of the decisionmaker.

157. While acknowledging that Order No. 719 made PJM responsible for prospective mitigation, the Market Monitor notes that its role in evaluating the inputs to that mitigation was also acknowledged in Order No. 719 and approved by the Commission.⁴¹⁸ The Market Monitor argues that, subsequent to Order No. 719, PJM codified this relationship in tariff, Section 12A, which recognized that the Market Monitor has exclusive authority to determine whether the level of offer or cost inputs raise market power concerns, and with which PJM's current proposal is not consistent.⁴¹⁹

158. PJM also notes that sellers will continue to have an incentive to work with the Market Monitor because the Market Monitor will retain the ability to escalate offer caps that it believes are exercises of market power to the Commission for review.⁴²⁰ Vistra argues that sellers will still be motivated to reach an agreement with the Market Monitor "to avoid having to submit that determination to PJM's sole discretion."⁴²¹ Vistra states that most sellers will want to have input in the determination of their offer caps and so will work with the Market Monitor, and only seek PJM's determination if confident that the proposed offer cap is consistent with tariff requirements. Vistra and Constellation argue that no protestor provided any evidence that PJM's proposal will result in the exercise of market power.⁴²² Constellation states that protesters' claims that PJM will favor reliability over market power mitigation are speculative, as market power mitigation is a shared responsibility between PJM and the Market Monitor.⁴²³

⁴¹⁷ Market Monitor January 17 Answer at 8-9.

⁴¹⁸ *Id.* (citing *PJM Interconnection, L.L.C.*, 133 FERC ¶ 61,071, at P 148 (2010)).

⁴¹⁹ *Id.* at 10.

⁴²⁰ PJM December 21 Answer at 31.

⁴²¹ Vistra December 4 Answer at 4.

⁴²² *Id.* at 5; Constellation December 15 Answer at 6.

⁴²³ Constellation December 15 Answer at 7 (citing Offer Cap Order, 176 FERC ¶ 61,137 at P 69 ("Independent evaluation by PJM and the Market Monitor of the risk components of capacity offers is a fundamental and critical component of market power mitigation and therefore must continue." (emphasis added))).

d. Commission Determination

159. Having found PJM's filing unjust and unreasonable for the reasons detailed above, we need not make determinations on the rest of the proposals in the non-severable portion of the filing. However, with respect to PJM's proposal to modify the tariff to allow PJM to calculate its own version of a capacity seller's offer cap, we provide the following guidance. We agree with protestors that the Market Monitor is ultimately responsible for market power mitigation and is best positioned to review for exercises of market power.⁴²⁴

160. As an initial matter, it is not PJM's role to make determinations about market power. Rather, section 12A of the OATT limits PJM's role with respect to market power determinations, stating that:

The Office of the Interconnection does not make determinations about market power, including, but not limited to, whether the level or value of inputs or a decision not to offer a committed resource involves the potential exercise of market power. Acceptance or rejection of an offer or bid by the Office of the Interconnection does not include an evaluation of whether such offer or bid represents a potential exercise of market power.⁴²⁵

Given this broad prohibition against PJM making determinations about market power, we are concerned that PJM's proposal does not align with the important role of Market Monitor.

161. OPSI and the Market Monitor contend that the current offer cap process is reasonable and PJM has failed to justify its proposal.⁴²⁶ We agree with OPSI that:

The [Market Monitor] is best positioned to [guard against exercises of market power], both in terms of expertise and its institutional role. Establishing appropriate unit-specific offer caps is a significant curb on market power, and PJM's proposed change to the mechanism for setting the

⁴²⁴ AMP November 9 Protest 20-21; New Jersey Board November 9 Comments at 6-7; OCC November 9 Protest at 26; OPSI November 9 Protest at 2; PIOs November 9 Protest at 15-16.

⁴²⁵ PJM, Intra-PJM Tariffs, OATT, § 12A (PJM Compliance Review) (1.0.0) (emphasis added).

⁴²⁶ Market Monitor November 9 Protest at 28; OPSI November 9 Protest at 2.

market seller offer cap could open the door to improper exercises of market power.⁴²⁷

162. Moreover, Order No. 719 provides that the external market monitors “may provide the inputs required by the RTO or ISO to conduct prospective mitigation, including determining reference levels, identifying system constraints, cost calculations, and the like.”⁴²⁸ Order No. 719 further found that this division of responsibilities would “enable the RTO or ISO to utilize the considerable expertise and software capabilities developed by their [market monitors], and reduce wasteful duplication.”⁴²⁹ Here, PJM’s proposal would duplicate the role of the Market Monitor.

163. The Commission has recognized that the Market Monitor plays “an important role in market power mitigation in the RPM auctions” in “verify[ing] that resource-specific caps are calculated appropriately and in accordance with the tariff’s rules.”⁴³⁰ We share commenters’ concerns that under PJM’s proposal, the Market Monitor would not be able to provide meaningful feedback because PJM would replace the Market Monitor’s role in calculating offer caps, which could undermine the Market Monitor’s duty to ensure competitive markets. We further agree with the Market Monitor that its ability to take concerns about offer caps to the Commission is not a substitute for rules that clearly define the roles of each entity.

164. We further note that OATT, section 12A recognizes that the Market Monitor has exclusive authority to determine whether the level of an offer or the cost inputs raise market power concerns.⁴³¹ As explained by the Market Monitor, PJM’s proposal could be inconsistent with, and undermine the tariff rules governing, participation in PJM’s

⁴²⁷ OPSI November 9 Protest at 2.

⁴²⁸ Order No. 719, 125 FERC ¶ 61,071 at P 375. Additionally, Attachment M of PJM’s Tariff states that the Market Monitor “*shall* review all proposed sell offers” for market power concerns, “*shall*... attempt to come to agreement about the level or value of offers or cost inputs,” and “*shall* make a determination” about whether offer or cost inputs involve a potential exercise of market power. PJM, Intra-PJM Tariffs, OATT, Attachment M (5.0.0) (emphasis added).

⁴²⁹ *Id.*

⁴³⁰ *PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,264, at P 54 (2008).

⁴³¹ PJM, Intra-PJM Tariffs, OATT, § 12A (PJM Compliance Review) (1.0.0) (emphasis added) (“The Market Monitoring Unit has the exclusive authority to perform the functions set forth in Tariff, Attachment M and Tariff, Attachment M-Appendix.”).

capacity market.⁴³² PJM's proposal would substitute PJM for the Market Monitor in making decisions about whether a given capacity seller's offer raises market power concerns.⁴³³

⁴³² See, e.g., Market Monitor November 9 Protest at 26-27 (footnote omitted) ("PJM's proposal would inappropriately substitute PJM for the Market Monitor in making decisions about market power. PJM would not limit itself to determinations of compliance with the market rules, as the OATT provides, but would instead determine the level of the MSOC, meaning that it is making judgements on what constitutes an attempted exercise of market power. PJM's proposal contradicts the process and roles defined in the tariff, including Section 12A."); Market Monitor January 17 Answer at 10-11 ("The Market Monitor's role is to review offers for market power concerns. The seller's role is to determine the level of the offer, provided that it complies with the market rules in the tariff. PJM's role is to determine whether a seller's offer complies with the market rules in the tariff. PJM's proposal has not been shown to be just and reasonable because it proposes to confuse the proper roles of PJM and the Market Monitor in market power mitigation.").

⁴³³ The dissent argues that the Market Monitor's role will not be undermined and suggests that PJM's proposal does not change the role of the Market Monitor in the offer cap review process. But the dissent does not appear to recognize that PJM's proposal would permit PJM to bypass the Market Monitor completely. Under the existing process, the seller submits its offer and the Market Monitor reviews the sellers' offer in the first instance for market power concerns and PJM may accept or reject the seller's offer having been informed of the Market Monitor's position. Contrary to the suggestion by the dissent, this is not the same system PJM proposed. Under PJM's proposal, the seller submits its offer, the Market Monitor reviews that offer, and, PJM could now reject those two options and propose a third option: something PJM determines as appropriate. PJM's proposal would allow PJM to calculate an entirely new offer cap with inputs of its choosing and, as explained above, this would deprive the Market Monitor of its exclusive authority to determine whether the level of an offer or the cost inputs raise market power concerns.

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The Commission orders:

PJM's proposed Tariff revisions are hereby rejected, as discussed in the body of this order.

By the Commission. Commissioner Clements is dissenting in part with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Acting Secretary.

Appendix – Intervenors***Filed Comments**

Advanced Energy Management Alliance (AEMA)*
Advanced Energy United
AES Clean Energy Development, LLC (AES, collectively with Dayton Power and Light Company)
American Clean Power Association
American Electric Power Service Corporation (FRR Coalition, collectively with Duke Energy Kentucky, Inc. and Dominion Energy Services, Inc.)*
American Municipal Power, Inc. (AMP)*
Avangrid Renewables, LLC
Big Sandy Peaker Plant, LLC and Wolf Hills Energy, L.L.C.
BP Energy Company
Buckeye Power, Inc. (Buckeye)*
Calpine Corporation (Calpine)*
Chief Conemaugh Power, LLC and Chief Keystone Power, LLC
Constellation Energy Generation, LLC (Constellation)*
CPower, Inc.
CPV Power Holdings, LP
Crete Energy Venture, LLC and Lincoln Generating Facility, LLC
Cypress Creek Renewables, LLC (Renewable Energy Coalition, collectively with Leeward Renewable Energy, LLC, MN8 Energy LLC, and VC Renewables LLC)
Delaware Division of the Public Advocate
Delaware Municipal Electric Corporation, Inc.
Dominion Energy Services, Inc.*
Duke Energy Business Services LLC⁴³⁴
Duquesne Light Company
East Kentucky Power Cooperative, Inc.
EDF Renewables, Inc.
EDP Renewables North America LLC
Electric Power Supply Association (EPSA)*
Elevate Renewables F7, LLC
Enel North America, Inc.
Exelon Corporation

⁴³⁴ Duke Energy Business Services LLC submitted a motion to intervene on behalf of its franchised public utility affiliates, Duke Energy Carolinas, LLC; Duke Energy Progress, LLC; Duke Energy Florida, LLC; Duke Energy Ohio, Inc.; and Duke Energy Kentucky, Inc.

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FirstEnergy Service Company⁴³⁵ (FirstEnergy)*
H-P Energy Resources LLC
Illinois Commerce Commission
Illinois Municipal Electric Agency
Invenergy Nelson LLC and Lackawanna Energy Center LLC*
Invenergy Wind Development North America LLC; Invenergy Storage Development
LLC; Invenergy Solar Development North America LLC; and Invenergy Thermal
Development LLC (Invenergy, collectively with Invenergy Nelson LLC and
Lackawanna Energy Center LLC)*
J-POWER USA Development Co., Ltd.
Kentucky Public Service Commission
Keystone Power Pass-Through Holders LLC and Conemaugh Power Pass-Through
Holders LLC
Leeward Renewable Energy, LLC*
LS Power Development, LLC (LSP Development)
Maryland Office of People's Counsel (Maryland People's Counsel)*
Maryland Public Service Commission (Maryland Commission)
Michigan Public Service Commission (Michigan Commission)
Mid-Atlantic Renewable Energy Coalition
MN8 Energy LLC*
Modern Energy Resources, LLC
Monitoring Analytics, acting in its capacity as Independent Market Monitor for PJM
(Market Monitor)*
National Hydropower Association
New Jersey Board of Public Utilities (New Jersey Board)*
New Jersey Division of Rate Counsel (New Jersey Rate Counsel)*
North Carolina Electric Membership Corporation
Northern Virginia Electric Cooperative, Inc. (NOVEC)*
NRG Business Marketing LLC and Midwest Generation, LLC
Office of the Ohio Consumers' Counsel (OCC)*
Public Utilities Commission of Ohio's Office of the Federal Energy Advocate (Ohio
FEA)*
Old Dominion Electric Cooperative (ODEC)*

⁴³⁵ FirstEnergy Service Company submitted a motion to intervene as agent for its franchised public utility affiliates Ohio Edison Company, Cleveland Electric Illuminating Company, Toledo Edison Company, Pennsylvania Power Company, Pennsylvania Electric Company, Metropolitan Edison Company, West Penn Power Company, Jersey Central Power & Light Company, Monongahela Power Company, and Potomac Edison Company.

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Olympus Power, LLC
Organization of PJM States, Inc. (OPSI)*
Ørsted Wind Power North America LLC (Ørsted)*
Pennsylvania Office of Consumer Advocate
Pennsylvania Public Utility Commission (Pennsylvania Commission)*
Pine Gate Renewables, LLC (Pine Gate)*
PJM Industrial Customer Coalition (PJM-ICC)*
PJM Power Providers Group (P3)*
Public Service Electric and Gas Company, PSEG Power LLC, and PSEG Energy
Resources & Trade LLC (PSEG)*
Public Citizen, Inc
REV Renewables, LLC
Rockland Electric Company
Shell Energy North America (US), L.P.
Sierra Club*
Solar Energy Industries Association
Southern Maryland Electric Cooperative, Inc. (SMECO)*
Steel Producers⁴³⁶*
Sustainable FERC Project and National Resources Defense Council (Public Interest
Organizations or PIOs, collectively with Sierra Club)*
Talen Energy Marketing, LLC (Talen)
Tenaska, Inc.
The Dayton Power and Light Company
VC Renewables LLC*
Vistra Corp. and Dynegy Marketing and Trade, LLC (Vistra)*
Vitol Inc., Vitol Solar I LLC, and Vitol Wind I LLC
Voltus, Inc. (Voltus)*

⁴³⁶ Steel Producers consists of the steel mills owned by Steel Dynamics, Inc and Nucor Corporation that are located in the PJM footprint.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket Nos. ER24-98-000
ER24-98-001

(Issued February 6, 2024)

CLEMENTS, Commissioner, *dissenting in part*:

1. Today's order rejects PJM's proposed capacity market revisions on several bases and offers PJM guidance should it choose to re-file a modified version of the proposal. I agree that PJM has not demonstrated its overall proposal is just and reasonable, and therefore I support much of the order. However, I believe two of the majority's stated bases for rejection are without merit, so I dissent in part on those elements of the order. Specifically, I believe PJM has met its Federal Power Act (FPA) section 205¹ burden on proposed tariff revisions governing (1) penalty application to Fixed Resource Requirement (FRR) resources and (2) PJM's role in administering its market power mitigation rules. I discuss these two elements in turn below.

2. PJM's existing tariff provides that an FRR entity must choose between two options to govern how the resources in its FRR plan will be penalized if one or more fail to deliver capacity during a Performance Assessment Interval: a financial non-performance assessment or a physical non-performance assessment.² The *financial option* subjects non-performing resources to the same penalties to which resources participating in PJM's capacity market are subject. This option also allows an FRR resource to earn bonus payments should it over-perform during an assessment interval. Because bonus payments are a redistribution of collected penalties,³ the financial options allows an FRR entity to offset under-performance by some of its resources with over-performance by others. That is, so long as its FRR plan portfolio on net delivers its expected performance, the FRR entity will incur little or no penalty.

3. The *physical option*, by contrast, levies no monetary penalty when an FRR resource under-performs, but rather requires that the FRR entity procure additional capacity for the next delivery year as a form of penalty.⁴ The quantity of additional

¹ 16 U.S.C § 824d(e).

² Transmittal at 55.

³ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance), § 10A(g) (12.0.0).

⁴ PJM, Intra-PJM Tariffs, RAA, Schedule 8.1.G (Capacity Resource

capacity the FRR entity must supply the next year is calculated pursuant to a tariff formula.⁵ Under the physical option an FRR resource is not eligible for any bonus for over-performance. However, an FRR entity may—similar to the portfolio approach under the financial option—offset the under-performance of some of its resources with the over-performance of others. Any physical penalty is applied to the net performance across its portfolio.⁶ In 2015 the Commission found both options to be just and reasonable and not unduly discriminatory or preferential.⁷

4. PJM now proposes to eliminate the physical option, to address what it argues is a lack of adequate performance incentives for FRR sellers that choose this option. PJM proposes to leave the financial option untouched. The majority rejects this change because it “would subject FRR entities to financial Non-Performance Charges on an individual resource basis.”⁸ The majority also finds that the change “fails to provide an appropriate accommodation to the unique planning processes of FRR entities” and that PJM has not sufficiently justified its departure from the precedent created when the Commission accepted the existing two-option model.⁹

5. I disagree that there is a basis to reject this element of PJM’s proposal. To the majority’s first point that the change would subject FRR entities to penalties on an individual resource basis, that is already the case today under either the financial or physical option. All resources, whether they clear PJM’s capacity auction or are included

Performance), § 8.1.G.2 (11.0.0).

⁵ *Id.* An example is illustrative. Suppose an FRR resource completely fails to deliver on a 500 MW obligation during a five-hour assessment interval, such as a period during a winter storm. Under the financial option, it would be penalized in the ballpark of \$7.6 million (using PJM’s published penalty rate applicable to the Rest of RTO zone during Winter Storm Elliott). PJM, *Winter Storm Elliott*, slide 28 (2023), <https://pjm.com/-/media/committees-groups/committees/mic/2023/20230111/item-0x---winter-storm-elliott-overview.ashx>. Under the physical option, it would be required to include an additional 41.7 MW of capacity in its plan for the next delivery year.

⁶ *Id.*

⁷ *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at PP 202-212 (2015) (Capacity Performance Order).

⁸ *PJM Interconnection, L.L.C.*, 186 FERC ¶ 61,097, at P 81 (2024) (Order Rejecting Tariff Revisions).

⁹ *Id.*

in an FRR plan, are assessed for performance on an individual basis.¹⁰ And, as described above, both the financial and physical options provide for portfolio netting. The distinction that the financial option nets on penalty/bonus dollars and the physical option nets on MWs is immaterial—the outcome is that an FRR entity’s performance is judged on a portfolio basis under either option.¹¹

6. The majority’s second justification is that elimination of the physical option deprives FRR entities of an appropriate accommodation to their unique planning processes and that PJM has failed to support a departure from the basis on which the Commission previously accepted the two-option structure. As an initial matter, it is not clear from the record why the physical option is necessarily more consistent with FRR entities’ retail regulatory structure. Whether an FRR portfolio’s under-performance incurs a monetary penalty or a penalty requiring the acquisition of additional capacity, the FRR entity will no doubt need to coordinate with its state regulator to account for the penalty. This reality is embedded in the two-option structure that exists today.

7. Regardless, this consideration must be balanced against PJM’s interest in incentivizing the resource performance that allows it to maintain reliability during the emergency conditions that trigger assessment intervals. Providing robust incentives for capacity resources to deliver energy during critical periods was PJM’s stated objective in proposing the Capacity Performance construct in 2014¹² and was central to the Commission’s acceptance of it.¹³ And today’s order—in a finding that I strongly

¹⁰ PJM, Intra-PJM Tariffs, RAA, Schedule 8.1.G.2 (11.0.0) (“For each Performance Assessment Interval, the Actual Performance and Expected Performance of each resource contained in an FRR Entity’s FRR Capacity Plan or Price Responsive Demand committed to reduce the FRR Entity’s unforced capacity obligation . . . will be determined in the same fashion as prescribed by the Tariff, Attachment DD, section 10A.”). Tariff, Attachment DD, section 10A is the tariff provision governing how the performance of resources clearing PJM’s capacity market is assessed during assessment intervals. PJM, Intra-PJM Tariffs, OATT, attach. DD, § 10A (Charges for Non-Performance and Credits for Performance) (12.0.0).

¹¹ It can be argued that the physical option is actually *disadvantageous* to FRR entities relative to the financial option. Under the financial option an FRR entity whose portfolio on net over-performs during an assessment interval will earn bonus payments; under the physical option it has no bonus payment eligibility.

¹² PJM, Transmittal, Docket No. ER15-623-000, at 2 (filed December 12, 2014).

¹³ Capacity Performance Order, 151 FERC ¶ 61,208 at P 22.

support—affirms that maintaining those incentives is a critical element of the Capacity Performance design.¹⁴

8. The Commission’s 2015 Capacity Performance order also found that, “while [FRR] entities do not procure their capacity commitment through PJM’s capacity auctions, the ability of these resources to perform is equally critical to system reliability.”¹⁵ Now, after nearly six delivery years’ worth of experience with Capacity Performance, PJM asserts it is appropriate to eliminate the physical option because it “can severely mute incentives to perform when the system needs [performance] the most” given that the penalty’s effects are deferred (until the next delivery year).¹⁶ PJM states this is especially the case when an FRR entity “has excess supply not already in its FRR plan or can readily purchase it on the market at low cost.”¹⁷ PJM argues that removing the physical option, among other market changes the Commission recently accepted unanimously,¹⁸ “create[s] equitable treatment between FRR entities and [capacity market] participants[.]”¹⁹

9. PJM continues to grapple with inconsistent resource performance during extreme weather events, most recently in Winter Storm Elliott.²⁰ As FRR resources are “equally critical to system reliability,” I believe it is reasonable for PJM to subject them to performance penalties and incentives comparable to those faced by other capacity resources on its regional system.

10. Today’s order also opines on the validity of PJM’s proposal to independently calculate offer caps in administering its capacity market power mitigation tariff rules.²¹

¹⁴ Order Rejecting Tariff Revisions, 186 FERC ¶ 61,097 at P 126.

¹⁵ Capacity Performance Order, 151 FERC ¶ 61,208 at P 204.

¹⁶ PJM, Keech Aff. ¶ 37.

¹⁷ *Id.*

¹⁸ *PJM Interconnection, L.L.C.*, 186 FERC ¶ 61,080, at PP 251-252 (2024).

¹⁹ PJM, Keech Aff. ¶ 37.

²⁰ PJM, *Winter Storm Elliott Event Analysis and Recommendation Report*, at 48-56 (July 17, 2023), <https://pjm.com/-/media/library/reports-notice/special-reports/2023/20230717-winter-storm-elliott-event-analysis-and-recommendation-report.ashx>.

²¹ Order Rejecting Tariff Revisions, 186 FERC ¶ 61,097 at PP 159-164.

While styled as guidance, the majority raises several concerns with PJM's proposal, signaling that it does not believe this element of the proposal passes muster under FPA section 205. I see no support for that conclusion. In fact, the two authorities cited by the majority—the Commission's Order No. 719 and section 12A of PJM's tariff—appear to clearly support PJM's position, rather than that of protestors.

11. Under PJM's existing tariff, when a capacity seller found to possess market power offers a resource into a capacity auction, the offer is subject to a unit-specific review process to ensure it comports with PJM's market rules.²² The result of this review process is that PJM determines an offer cap for each resource—i.e., a maximum price at which the seller can offer the resource into the capacity auction.²³ PJM's tariff also provides a defined role for the Market Monitor in this process. Specifically, capacity sellers must (1) provide to both PJM and the Market Monitor data and documentation supporting its preferred offer price; (2) promptly address any concerns identified by the Market Monitor regarding that data and documentation; (3) review the offer cap calculated by the Market Monitor; (4) attempt to reach agreement with the Market Monitor on an offer cap level; and (5) notify PJM and the Market Monitor whether such agreement has been reached and, if no agreement is reached, what offer price the seller wishes to put forward for PJM's review.²⁴

12. The tariff then provides that PJM will review the data submitted by the seller and make a determination as to whether to accept the seller's preferred offer or reject it.²⁵ As PJM explains in its filing, in the event PJM determines the seller's offer is inconsistent with the tariff rules, PJM's only option is reject the seller's offer, which then requires the seller to offer its capacity at a default price level corresponding to the resource's technology type, as specified in the tariff.²⁶

13. It is this last part—PJM's limited choice to accept or reject the seller's preferred offer price—that PJM seeks to revise in the instant filing. PJM argues that having only

²² PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.5 (Mitigation) (2.0.0).

²³ PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.4 (Market Seller Offer Cap), § 6.4(b) (4.0.0) (“[PJM] shall review the data submitted by the Capacity Market Seller, make a determination whether to accept or reject the requested unit-specific Market Seller Offer Cap, and notify the Capacity Market Seller and the [Market Monitor] of its determination[.]”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Transmittal at 30-31.

the binary choice of accepting or rejecting a seller's preferred offer is overly restrictive. PJM states that this limitation can result in a seller's offer being rejected outright even when PJM agrees with certain components of the seller's preferred offer (but disagrees with others).

14. To allow itself greater flexibility in administering these rules, PJM proposes a tariff revision to allow it to calculate an alternative offer cap for a resource based on the seller's submitted documentation.²⁷ If implemented, PJM would be able to (1) accept a seller's preferred offer price, (2) reject it and subject the seller to the tariff-derived default value, or (3) select PJM's own calculated value based on the data and documentation submitted by the seller.²⁸ PJM states that this change would "allow[] PJM to calculate and approve a unit-specific offer based on components that are consistent with the Tariff while rejecting others that are not."²⁹ PJM asserts that this change does not alter the respective roles of PJM and the Market Monitor with regard to this process as it exists under the existing tariff because PJM, with consideration of the Market Monitor's input and determination, already has ultimate approval authority of all offer caps; and the Market Monitor can escalate any disagreements with a PJM-approved offer cap to the Commission.³⁰

15. The majority takes issue with PJM's proposal on several grounds. First, it asserts that "the Market Monitor is ultimately responsible for market power mitigation[.]" This is incorrect. As described in the summary above, the Market Monitor plays an important but circumscribed and advisory role under PJM's offer cap rules; PJM is, under the existing tariff, the ultimate arbiter of whether a seller's offer comports with the market power mitigation rules. This is clear both from Attachment DD, section 6.4(b), of the tariff³¹ and from section 12A of the same. The majority quotes one excerpt of section 12A, which provides that "[PJM] does not make determinations about market power, including, but not limited to, whether the level or value of inputs or a decision not to offer a committed resource involves the potential exercise of market power." The majority ignores, however, the portion of section 12A that immediately precedes this excerpt. That portion states that

²⁷ PJM, Proposed OATT, attach. DD, § 6.4 (Market Seller Offer Cap), § 6.4(b) (5.1.0).

²⁸ Transmittal at 32.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Supra* n.23.

[PJM] determines whether an offer, bid, components of an offer or bid, or decision not to offer a committed resource complies with the PJM Market Rules. [PJM] has the final authority to determine whether an offer, bid or decision not to offer a committed resource complies with the PJM Market Rules. [PJM] may accept an offer, bid or decision not to offer a committed resource regardless of whether the [Market Monitor] has made a finding that such conduct raises market power concerns, unless the Commission issues an order determining that the offer or bid must be rejected prior to the clearing of the relevant RPM Auction.

16. Thus, when read in context—and in conjunction with the details of the market power mitigation rules in PJM’s tariff, including Attachment DD, section 6.4—the section 12A excerpt cited by the majority provides only that PJM does not make *express findings* that a seller’s offer, or constituent parts thereof, represent a potential exercise of market power. That is, PJM does not make findings as to a seller’s intent. Rather, PJM makes findings as to whether a seller’s offer comports with PJM’s tariff rules.³²

17. This reading is also consistent with the Commission’s Order No. 719, which, among other things, established requirements for the respective roles played by RTOs/ISOs and external market monitors.³³ The majority quotes an excerpt from Order No. 719 that states that external market monitors “may provide the inputs required by the RTO or ISO to conduct prospective mitigation, including determining reference levels, identifying system constraints, costs calculations, and the like.”³⁴ The majority argues that this excerpt supports the conclusion that PJM’s proposal is objectionable because it

³² The majority also points to Attachment M of PJM’s tariff to highlight that the Market Monitor reviews proposed sell offers and makes determinations about whether they involve a potential exercise of market power. Order Rejecting Tariff Revisions, 186 FERC ¶ 61,097 at n.431. This is consistent with the other portions of PJM’s tariff that I cite herein and would be unchanged by PJM’s proposal. The Market Monitor plays a key role by using its expertise to review offers and inform PJM as to what may constitute an exercise of market power. This allows PJM to make more informed decisions in administering the mitigation portions of its tariff.

³³ *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071 (2008).

³⁴ Order Rejecting Tariff Revisions, 186 FERC ¶ 61,097 at P 162 (citing Order No. 719, 125 FERC ¶ 61,071 at P 375).

would “duplicate the role of the Market Monitor.”³⁵ But this argument ignores that Order No. 719, including the quoted sentence, provides only that external market monitors “*may* provide” this assistance to RTOs/ISOs, not that it *must* be the role of the external market monitor to make final determinations as to these inputs. In fact, this statement from Order No. 719 is pulled from a broader Commission determination that RTOs/ISOs—whether themselves or through an *internal* market monitors—are the appropriate entities to administer the prospective mitigation rules in their tariffs.³⁶ The Commission concluded that while an external market monitor may provide a supporting role to an RTO/ISO, permitting it to conduct “unfettered” prospective mitigation³⁷ raised conflict of interest and subordination concerns.³⁸

18. Lastly, the majority argues that PJM’s proposal “does not align with the important role of the Market Monitor” and would serve to “bypass” the Market Monitor, and that under the proposal “the Market Monitor would not be able to provide meaningful feedback.”³⁹ I believe these concerns are unfounded. As described above, the Market Monitor’s role under the existing tariff is important but clearly circumscribed. The Market Monitor reviews a seller’s supporting data and documentation and attempts to reach agreement with the seller on an offer price that is consistent with PJM’s mitigation rules. When the Market Monitor and the seller do not reach agreement, it is the seller’s choice as to what offer price it puts forward for PJM’s consideration. The tariff provisions governing the Market Monitor’s role in this process are unchanged by PJM’s filing here.⁴⁰ PJM already reviews a seller’s data and documentation under the existing tariff,⁴¹ and the existing tariff states that, in the event the Market Monitor does not

³⁵ *Id.*

³⁶ *See* Order No. 719, 125 FERC ¶ 61,071 at PP 373-375.

³⁷ Order No. 719 described prospective mitigation as “includ[ing] only mitigation that can affect market outcomes on a forward-going basis, such as altering the prices of offers or altering the physical parameters of offers . . . at or before the time they are considered in a market solution.” Order No. 719, 125 FERC ¶ 61,071 at P 375. PJM’s instant filing relates to prospective mitigation.

³⁸ Order No. 719, 125 FERC ¶ 61,071 at PP 371, 373.

³⁹ Order Rejecting Tariff Revisions, 186 FERC ¶ 61,097 at PP 160, 163 & n.439.

⁴⁰ *See* PJM, Proposed OATT, attach. DD, § 6.4 (Market Seller Offer Cap), § 6.4(b) (5.1.0).

⁴¹ *See supra* P 12.

provide its determination to PJM and the seller by a specified deadline, PJM will independently determine the offer cap level.⁴²

19. To be clear, the Market Monitor plays a critically important role in the market power mitigation process under PJM's tariff and provides valuable analysis of the performance of PJM's markets more broadly. I have been outspoken in urging the Commission to fully investigate market power concerns raised by the Market Monitor when I believe they have merit.⁴³ However, I see no basis in this record to conclude that PJM's proposal undermines the Market Monitor's role or that PJM is either uniquely unqualified or prohibited from calculating offer caps in administering its capacity market rules.⁴⁴

For these reasons, I respectfully dissent in part.

Allison Clements
Commissioner

⁴² PJM, Intra-PJM Tariffs, OATT, attach. DD, § 6.4 (Market Seller Offer Cap), § 6.4(b) (4.0.0).

⁴³ *PJM Interconnection, L.L.C.*, 185 FERC ¶ 61,158 (2023) (Clements, Comm'r, dissenting in part).

⁴⁴ I note that most, if not all, of the other RTOs/ISOs already calculate offer caps or reference levels in administering their capacity and energy market mitigation rules, whether themselves or through an internal market monitor. *See, e.g.*, ISO New England, Transmission, Markets and Services Tariff, Appendix A (Market Monitoring, Reporting and Market Power Mit) (64.0.0) (“[T]he *Internal Market Monitor* is responsible for reviewing certain bids and offers made in the Forward Capacity Market”) (emphasis added); Midcontinent ISO, FERC Electric Tariff, § III (Market Mitigation Measures), § 65.2.2 (Implementation) (47.0.0) (“If the criteria [for bid mitigation] are met, the *Transmission Provider* shall prospectively substitute a Default Offer for an Offer submitted for a Generation Resource or Planning Resource.”) (emphasis added); Southwest Power Pool, OATT Sixth Revised, attach. AF (Market Power Mitigation Plan), § 3.2(B) (1.0.0) (“[T]he *Transmission Provider* shall apply mitigation measures by replacing the Energy Offer Curve with the mitigated Energy Offer Curve if [mitigation conditions are met].”) (emphasis added); New York ISO, Market Administration and Control Area Services Tariff, attach. H (ISO Market Power Mitigation Measures), § 23.4 (Mitigation Measures), § 23.4.1 (Purpose) (53.0.0) (“If [mitigation conditions are met], the appropriate mitigation measure described in this Section shall be applied *by the ISO.*”) (emphasis added).

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