UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.	**)**	**Docket No. ER24-98-___**

REQUEST FOR REHEARING

Pursuant to Section 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] The PJM Power Providers Group ("P3")[3] and the Electric Power Supply Association ("EPSA"[4] and together with P3, "Petitioners") respectfully request rehearing of the Commission's February 6, 2024 order[5] in the above-captioned proceeding. For the reasons set forth herein and in Commissioner Clements's well-reasoned dissenting statement,[6] the Commission erred in finding that PJM's proposed reforms to the process for determining resource-specific offer caps "do[] not align with the important role of the Market Monitor"[7] and in rejecting

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1 16 U.S.C. § 825*l*(a) (2018).

2 18 C.F.R. § 385.713 (2023).

3 P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM Interconnection, L.L.C. ("PJM") region. Combined, P3 members own over 83,000 MWs of generation assets and produce enough power to supply over 63 million homes in the PJM region covering 13 states and the District of Columbia. For more information on P3, visit www.p3powergroup.com. This filing represents the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue.

4 EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This filing represents the position of EPSA as an organization but not necessarily the views of any particular member with respect to any issue.

5 *PJM Interconnection, L.L.C.*, 186 FERC ¶ 61,097 (2024) (the "February 6 Order").

6 *See id.*, Dissenting Statement (Clements, Comm'r) (the "Clements Statement").

7 February 6 Order, 186 FERC ¶ 61,097 at P 160. "Market Monitor" and other capitalized terms used and not otherwise defined herein have the meanings assigned to them in the PJM Open Access

proposed reforms to how entities participating in the Fixed Resource Requirement Alternative (the "FRR Alternative") are assessed Non-Performance Penalties.[8]

While this request for rehearing focuses on two specific errors in the February 6 Order,[9] Petitioners wish to re-emphasize the vital need for continued reforms to PJM's capacity market rules, particularly reforms allowing Capacity Market Sellers to fully reflect their costs and risks in offers, to ensure that resource adequacy and reliability are maintained. As both P3 and EPSA stressed in their earlier pleadings in this proceeding, the reforms to the Market Seller Offer Cap rules proposed by PJM in this proceeding represented a good first step on this front, but further reforms are needed.[10] Indeed, PJM itself acknowledged that its proposals were "not the end of the story" and pledged to work with stakeholders on "further enhancements . . . addressing the resource adequacy and other challenges stemming from the energy transition's impact on the resource mix in the PJM Region."[11] The need for such work is even greater now that the February 6 Order has rejected what would have been a good first step toward addressing those challenges.

Transmission Tariff (the "Tariff") or if not defined therein, in the Reliability Assurance Agreement among Load Serving Entities in the PJM Region (the "RAA").

[8] *See* February 6 Order, 186 FERC ¶ 61,097 at PP 80-81.

[9] To be clear, Petitioners' silence should not be construed as agreement with, or acceptance of, other rulings in the February 6 Order.

[10] *See generally* Comments of The PJM Power Providers Group and Protest Only of Severable Section on Performance Payment Eligibility, Docket No. ER24-98-000 (filed Nov. 9, 2023); Comments of the Electric Power Supply Association, Docket Nos. ER24-98-000, *et al.* (filed Nov. 9, 2023). *See also* Motion for Leave to Answer, and Answer of the PJM Power Providers Group at 2, Docket No. ER24-98-000 (filed Nov. 27, 2023) (the "P3 Answer") ("The Commission should approve the incremental [offer cap] reforms offered by PJM as a good first step, but much more needs to be done to address over-mitigation that prevents market participants from exercising their business judgment to reflect the costs and risks of their resources in their capacity offers. Without these critical reforms, the region will face increasing retirements from the market and a retreat of merchant capital to more inviting markets.").

[11] Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C. at 2-3, Docket No. ER24-98-000 (filed Dec. 21, 2023) (the "PJM Answer").

I.

BACKGROUND

In its October 13, 2023 filing in this proceeding, PJM proposed various revisions to the capacity market rules set forth in the Tariff and the RAA.[12] As relevant here, PJM proposed revisions that would have: (1) authorized PJM to independently calculate an alternative unit-specific Market Seller Offer Cap following the Market Monitor's review of a seller's requested cap, rather than being limited to accepting or rejecting the requested cap;[13] and (2) removed the option for underperforming FRR Entities to avoid Non-Performance Charges by assigning more physical capacity in the future, with the result that FRR Entities would, like other Capacity Resources, only have had the option of paying financial penalties for underperformance.[14]

In the February 6 Order, the Commission rejected the October 13 Filing, finding that PJM "fail[ed] to demonstrate that several elements of its proposal, including the standalone [Capacity Performance Quantifiable Risk ("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."[15] With respect to the proposed changes to the unit-specific Market Seller Offer Cap process, the Commission stated that "[h]aving found PJM's filing unjust and unreasonable" for other reasons, it did not need to "make determinations on the rest of the proposals . . . ."[16] Nonetheless, the Commission provided "guidance" on the

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[12] Proposed Enhancements to PJM's Capacity Market Rules – Market Seller Offer Cap, Performance Payment Eligibility, and Forward Energy and Ancillary Service Revenues, Docket No. ER24-98-000 (filed Oct. 13, 2023) (the "October 13 Filing").

[13] *See id.*, Transmittal Letter at 30-32.

[14] *See id.* at 55-57.

[15] February 6 Order, 186 FERC ¶ 61,097 at P 11.

[16] *Id.* at P 159.

proposed changes,[17] opining that "PJM's proposal does not align with the important role of Market Monitor."[18]

Commissioner Clements dissented, in part, to the February 6 Order. On the proposed change to the unit-specific Market Seller Offer Cap issue, Commissioner Clements saw "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."[19] With respect to the majority's rejection of reforms to the FRR Alternative, Commissioner Clements found it "reasonable for PJM to subject them to performance penalties and incentives comparable to those faced by other capacity resources on its regional system."[20]

II.

REQUEST FOR REHEARING

A. The February 6 Order's Characterization of the Market Monitor's Role in Prospective Mitigation Turns Commission Precedent on its Head and Is Otherwise Contrary to Law and Arbitrary and Capricious

At the outset, it is unclear why, having found that it did not need to address the proposal to allow PJM to calculate alternative unit-specific Market Seller Offer Caps, the Commission nonetheless chose to offer "guidance" on the subject.[21] Even more puzzlingly, that "guidance"

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17 *Id.*

18 *Id.* at P 160.

19 Clements Statement at P 19.

20 *Id.* at P 9.

21 February 6 Order, 186 FERC ¶ 61,097 at P 159. Given that the discussion of this issue in the February 6 Order was, as the Commission concedes, not necessary to the rejection of the October 13 Filing, the Commission can and should clarify that such discussion was *dicta* and has no precedential effect. *See, e.g.*, *Louisiana Pub. Serv. Comm'n v. FERC*, 551 F.3d 1042, 1046-47 (D.C. Cir. 2008) (finding that statements in prior Commission orders were "in fact dicta and d[id] not preclude [petitioner] from pressing [an] issue in a different proceeding"). Absent such clarification, the Commission should grant rehearing for the reasons set forth herein.

radically reallocates mitigation responsibility and authority in a way that finds no support in – and in fact, conflicts with – the Tariff, Commission precedent and the Commission's own regulations. In particular, the February 6 Order relies on the Commission's Order No. 719[22] and Section 12A of the Tariff as the basis for agreeing with protestors that allowing PJM to calculate an alternative unit-specific Market Seller Offer Cap would infringe on the role of the Market Monitor.[23] But, as Commissioner Clements rightly observes and as discussed in greater detail below, both of these "authorities . . . appear to clearly support PJM's position, rather than that of protestors."[24]

The Commission's findings on this issue are contrary to law given that the February 6 Order mischaracterizes Order No. 719 and the Tariff, while ignoring entirely Section 35.28(g)(3)(iii) of the Commission's regulations.[25] In this regard, it bears emphasis that the Commission, like any other agency, "is bound by its own regulations,"[26] and is not at liberty to disregard the allocation of responsibility and authority between regional transmission organizations ("RTOs")/independent system operators ("ISOs") and market monitors prescribed under Section 35.28(g)(3)(iii) of the Commission's regulations.[27] The February 6 Order also fails to satisfy the requirements of reasoned decision-making, because it is "illogical on its own

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22 *Wholesale Competition in Regions with Org. Elec. Mkts.*, Order No. 719, 125 FERC ¶ 61,071 (2008) ("Order No. 719"), *on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059, *on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

23 *See* February 6 Order, 186 FERC ¶ 61,097 at P 160 & n.425 (citing Tariff, § 12A); *id.* at P 162 & nn.428, 429 (citing Order No. 719).

24 Clements Statement at P 10.

25 18 C.F.R. § Section 35.28(g)(3)(iii) (2023).

26 *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("*Panhandle*"). *See also, e.g.*, *Action on Smoking & Health v. Dep't of Lab.*, 107 F.3d 901, 902 (D.C. Cir. 1997) (explaining that "agency regulations have the force of law and an agency is not free to disregard its regulations at will"); *Transactive Corp. v. United States*, 91 F.3d 232, 238 (D.C. Cir. 1996) (holding than an agency cannot "ignore its own regulation"). *Cf. United States v. Nixon*, 418 U.S. 683, 695 (1974) ("So long as [a] regulation is extant it has the force of law.").

27 18 C.F.R. § Section 35.28(g)(3)(iii) (2023).

terms,"[28] represents an unacknowledged and unexplained departure from Order No. 719 and other Commission precedent,[29] and fails to grapple with contrary arguments of PJM and other parties[30] and dissenting Commissioner Clements.[31]

1. The Commission's Position Turns Order No. 719 on Its Head

The Commission's position that allowing PJM to calculate an alternative unit-specific Market Seller Offer Cap 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"[32] finds no support in Order No. 719 and would, in fact, turn Order No. 719 on its head. In Order No. 719, "the

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[28] *GameFly, Inc. v. Postal Regul. Comm'n*, 704 F.3d 145, 148 (D.C. Cir. 2013) ("*GameFly*") (citation omitted). *See also, e.g.*, *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) ("*Baltimore Gas*") (agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made" (citations omitted)).

[29] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*") (holding that an agency must "display awareness that it *is* changing position" and "show that there are good reasons for the new policy" (emphasis in original)); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("*West Deptford*") ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently,' and Commission cases are no exception . . . ." (internal citation omitted)).

[30] *See* October 13 Filing, Transmittal Letter at 32 (stating that that its proposal would not have "change[d] the respective roles of PJM and the Market Monitor"). *See also, e.g.*, PJM Answer at 27-31; Motion for Leave to Answer and Answer of Vistra Corp. and Dynegy Marketing and Trade, LLC at 3-6, Docket No. ER24-98-000 (filed Dec. 1, 2023); P3 Answer at 6-7; Comments and Limited Protest of Constellation Energy Generation, LLC at 32-34, Docket Nos. ER24-98-000, *et al.* (filed Nov. 9, 2023).

[31] *See American Clean Power Ass'n v. FERC*, 54 F.4th 722, 728 (D.C. Cir. 2022) ("*ACPA*") (reversing order in which "FERC acted arbitrarily and capriciously by failing to meaningfully respond to Petitioner's arguments"); *Fred Meyer Stores, Inc. v. NLRB*, 865 F.3d 630, 639 (D.C. Cir. 2017) (finding error where a multi-member board "failed to respond to key points raised by the dissent"); *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2015) ("*NEPGA*") (finding error where "FERC failed to respond to the substantial arguments put forward by Petitioners and failed to square its decision with past precedent"); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 12 (D.C. Cir. 2015) ("*TransCanada*") ("It is well established that the Commission must 'respond meaningfully to the arguments raised before it.'" (quoting *Public Serv. Comm'n v. FERC*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) ("*NYPSC*"))); *American Gas Ass'n v. FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010) ("*AGA*") ("[W]hile FERC is not required to agree with arguments raised by a dissenting Commissioner . . . , it must, at a minimum, acknowledge and consider them." (citing *Chamber of Commerce v. SEC*, 412 F.3d 133, 137-38 (D.C. Cir. 2005))); *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988) (stating the Commission "has no alternative but to confront the questions raised by the [commissioner's] dissent").

[32] February 6 Order, 186 FERC ¶ 61,097 at n.433.

Commission drew a distinction between prospective and retrospective mitigation, and directed that a sole internal or sole external [market monitor] may only conduct retrospective mitigation, not prospective mitigation."[33] For this purpose, "prospective mitigation" encompasses "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 (e.g., ramp rates and start-up times) at or before the time they are considered in a market solution."[34] The proposition that an RTO/ISO, like PJM, is responsible for prospective mitigation is reflected in regulations promulgated pursuant to Order No. 719. Specifically, Section 35.28(g)(3)(iii)(A) of the Commission's regulations provides that an RTO/ISO "may not permit its Market Monitoring Unit, whether internal or external, to participate in the administration of the Commission-approved [ISO]'s or [RTO]'s tariff or, except as provided in paragraph (g)(3)(iii)(D) of this section, to conduct prospective mitigation."[35]

Rather than grappling with the explicit requirements of Order No. 719 and the regulations promulgated pursuant thereto, the February 6 Order attempts to concoct a rule-swallowing exception from Order No. 719's statement that a market monitor "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."[36] As an initial matter, the regulatory

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[33] *ISO New England Inc.*, 130 FERC ¶ 61,054 at P 146 (2010) (citing Order No. 719, 125 FERC ¶ 61,071 at P 375). *See also New York Indep. Sys. Operator, Inc.*, 129 FERC ¶ 61,164 at P 102 (2009) ("*NYISO*") (same).

[34] Order No. 719, 125 FERC ¶ 61,071 at P 375 (emphasis added). *See also Midwest Indep. Transmission Sys. Operator, Inc.*, 137 FERC ¶ 61,214 at n.363 (2011) ("*MISO*") ("Prospective mitigation is that which can affect market outcomes on a forward-going basis, such as altering prices or physical parameters of offers (i.e., ramp rates and start-up times) at or before the time they are considered in a market solution."); *NYISO*, 129 FERC ¶ 61,164 at n.125 (same); *Southwest Power Pool, Inc.*, 129 FERC ¶ 61,163 at n.118 (2009) (same).

[35] 18 C.F.R. § 35.28(g)(3)(iii)(A) (2023).

[36] February 6 Order, 186 FERC ¶ 61,097 at P 162 (quoting Order No. 719, 125 FERC ¶ 61,071 at P 375).

text does not support the notion that this clause is any sort of exception to the broad rule that a market monitor is not permitted to conduct prospective mitigation, much less an exception so powerful it negates the broader rule. To the contrary, the language of Section 35.28(g)(3)(iii) of the Commission's regulations[37] makes clear that allowing a market monitor to provide inputs does not reallocate responsibility and authority for prospective mitigation from the RTO/ISO to the market monitor but merely contemplates that an RTO/ISO may let its market monitor may provide data when the RTO/ISO conducts prospective mitigation.

The only exception – that is, the only "case to which [the] rule does not apply"[38] – to the broad rule that RTOs/ISOs are responsible for prospective mitigation is the exception for internal market monitors in hybrid monitoring structures set forth in Section 35.28(g)(3)(iii)(D) of the Commission's regulations.[39] Specifically, this subsection allows an RTO/ISO with a hybrid market monitoring unit to "permit its internal market monitor to conduct prospective and/or retrospective mitigation, in which case it must assign to its external market monitor the responsibility and the tools to monitor the quality and appropriateness of the mitigation."[40] Importantly, this exception does not apply here because PJM's Market Monitor is an external market monitor in a non-hybrid market monitoring unit. Indeed, the Commission held as much, stating that this exception "is inapplicable to PJM."[41] Accordingly, in PJM, the general rule

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37 18 C.F.R. § 35.28(g)(3)(iii) (2023).

38 Exception, *Webster's Dictionary*, https://www.merriam-webster.com/dictionary/exception.

39 *See* 18 C.F.R. § 35.28(g)(3)(iii)(D) (2023).

40 18 C.F.R. § 35.28(g)(3)(iii)(D) (2023).

41 *PJM Interconnection, L.L.C.*, 129 FERC ¶ 61,250 at P 161 (2009) (the "December 2009 Order"). *See also Offer Caps in Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, Order No. 831, 157 FERC ¶ 61,115 at n.326 (2016) (explaining that "prospective mitigation may only be carried out by an internal market monitor if the RTO/ISO has a hybrid Market Monitoring Unit structure"), *on reh'g*, Order No. 831-A, 161 FERC ¶ 61,156 (2017).

applies, and the Market Monitor "may not [be] permit[ted] . . . to conduct prospective mitigation,"[42] which includes "altering the prices of offers . . . at or before the time they are considered in a market solution."[43]

Rather than respecting its own regulations, the Commission in the February 6 Order reinterprets the language allowing market monitors to provide inputs as creating a second exception to the prohibition against market monitors conducting prospective mitigation. This interpretation is not only illogical; it also runs counter to the well-established legal principle of *expressio unius est exclusio alterius* ("expression of one thing is the exclusion of the other"[44]). As the Supreme Court has explained, under this principle: "When [a rule] provides exceptions, . . . it does not follow that courts [or agencies] have authority to create others. The proper inference . . . is that [the author] considered the issue of exceptions and, in the end, limited the [exceptions] to the ones set forth."[45] Having specified one exception to the general rule that market monitors cannot conduct prospective mitigation, Section 35.28(g)(3)(iii) of the Commission's regulations[46] cannot reasonably be construed as providing for another.

In allowing market monitors to provide inputs, Order No. 719 merely allows market monitors to play what Commissioner Clements correctly describes as "a supporting role to an

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42 18 C.F.R. § 35.28(g)(3)(iii)(A) (2023).

43 Order No. 719, 125 FERC ¶ 61,071 at P 375.

44 *DC Energy, LLC v. PJM Interconnection, L.L.C.*, 144 FERC ¶ 61,024 at P 74 (2013).

45 *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("*Johnson*"). *See also, e.g.*, *Persian Broad. Serv. Global, Inc. v. Walsh*, 75 F.4th 1108, 1113 (9th Cir. 2023) ("When a provision contains express exceptions, 'the familiar judicial maxim *expressio unius est exclusio alterius* counsels against finding additional, implied, exceptions.'" (quoting *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2017))); *Schumann v. CIR*, 857 F.2d 808, 811 (D.C. Cir. 1988) ("*Schumann*") ("[U]nder the maxim *expressio unius exclusio alterius*, [the rule's] specific enumeration of certain exceptions indicates that no other exceptions were intended.").

46 *See* 18 C.F.R. § 35.28(g)(3)(iii) (2023).

RTO/ISO . . . ."[47] The February 6 Order, however, would convert this supporting role into a starring role in conducting prospective mitigation. Pointing to Order No. 719's statement that allowing market monitors to provide inputs "will enable the RTO or ISO to utilize the considerable expertise and software capabilities developed by their [market monitors], and reduce wasteful duplication,"[48] the Commission objects that letting PJM calculate an alternative unit-specific Market Seller Offer Cap would "duplicate the role of the Market Monitor."[49] But, as Commissioner Clements notes, Order No. 719 "provides only that external market monitors '*may* provide' this assistance to RTOs/ISOs . . . ."[50] It does not preclude RTOs/ISOs from determining their own inputs and certainly does not contemplate that "it must be the role of the external market monitor to make ***final*** determinations as to these inputs."[51] Rather, in allowing RTOs/ISOs to obtain inputs from their market monitors, Order No. 719 merely sought to ensure that the prohibition on market monitors conducting prospective mitigation did not deprive RTOs/ISOs of the benefit of their market monitors' expertise and software capabilities. The February 6 Order's misreading of this language as limiting PJM's role in conducting prospective mitigation would impermissibly subordinate PJM to the Market Monitor with respect to prospective mitigation.

2. Nothing in the Tariff Supports the Commission's Position

In the February 6 Order, the Commission interprets Section 12A of the Tariff as "limit[ing] PJM's role with respect to market power determinations" in a way that would preclude PJM from

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47 Clements Statement at P 17. *See also MISO*, 137 FERC ¶ 61,214 at P 272 ("Order No. 719 also provided that an MMU may be permitted to provide inputs to its respective RTO or ISO ***to assist*** the latter in conducting prospective mitigation . . . ." (emphasis added)).

48 Order No. 719, 125 FERC ¶ 61,071 at P 375.

49 February 6 Order, 186 FERC ¶ 61,097 at P 162.

50 Clements Statement at P 17.

51 *Id.* at P 17 (emphasis added).

calculating an alternative Market Seller Offer Cap.[52] Specifically, the Commission relies on language in Section 12A authorizing the Market Monitor "to determine whether the level of an offer or cost inputs raise market power concerns"[53] and on the following:

> 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.[54]

From this, the Commission concludes that the Market Monitor's "exclusive authority" precludes PJM from calculating an alternative unit-specific Market Seller Offer Cap,[55] expressing concern that PJM could "bypass the Market Monitor completely" by "calculat[ing] an entirely new offer cap with inputs of its choosing . . . ."[56]

The Commission's interpretation of the scope of the Market Monitor's "exclusive authority"[57] under Section 12A of the Tariff is untenable. As Commissioner Clements explains:

> [W]hen 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.[58]

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52 *Id.* at P 160.

53 *Id.* at P 164 (footnote omitted).

54 Tariff, § 14A (quoted in February 6 Order, 186 FERC ¶ 61,097 at P 160) (emphasis added in February 6 Order).

55 February 6 Order, 186 FERC ¶ 61,097 at P 164.

56 *Id.* at n.433.

57 *Id.* at P 164.

58 Clements Statement at P 16.

The Commission's overbroad, out-of-context reading, on the other hand, would upset the allocation of responsibility and authority for mitigation required by Order No. 719 and reflected in the Tariff.

As discussed above, Order No. 719 prohibits an external market monitor, like the Market Monitor, from conducting prospective mitigation but allows an external market monitor to conduct retrospective mitigation and to provide inputs to assist the RTO/ISO with prospective mitigation.[59] The same division of responsibility and authority is reflected in PJM's Tariff, as one would expect given that PJM, like other RTOs/ISOs, was required to bring its tariff into compliance with Order No. 719.[60] In accepting PJM's compliance filing, the Commission found that PJM was properly "retaining the provisions that allow the [Market Monitor] to provide the inputs for determining prospective mitigation, while reserving the final authority to determine the appropriate default rates."[61] In that same order, the Commission rejected just the sort of role for the Market Monitor that its February 6 Order presupposes, stating:

> [W]hile the [Market Monitor] may continue to participate in the mitigation process, as contemplated under PJM's proposed [Tariff] revisions, and must be permitted to actively monitor these activities on an independent basis, ***it is PJM, not the [Market Monitor], that must be ultimately responsible for the administration of its tariff and the determination of prospective mitigation***.[62]

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59 *See* Order No. 719, 125 FERC ¶ 61,071 at P 375.

60 *See id.* at P 578.

61 December 2009 Order, 129 FERC ¶ 61,250 at P 156. *See also id.* at P 165 ("The MMU objects to the authority given to PJM, under [Sections 6.4(d) and 6.6(d) of Attachment DD to the Tariff], to make its own determination regarding the level of the market seller offer cap, or the level of the EFORd, in the event the capacity market seller and MMU cannot agree. However, PJM's authority is consistent with its ultimate authority, under Order No. 719, over tariff administration.").

62 *Id.* at P 155 (emphasis added). *See also Vistra Corp. v. FERC*, 80 F.4th 302, 318 (D.C. Cir. 2023) (describing the process as one in which a supplier, if it cannot agree on an offer cap with the Market Monitor, "may still submit its offer and supporting data to PJM, which PJM then reviews independently" and where "PJM, alone, decides 'whether to accept or reject the requested unit-specific' offer" (quoting Tariff, Attachment DD, § 6.4(b))).

Commissioner Clements's interpretation of Section 12A of the Tariff fits neatly with the Commission's earlier interpretation: the Market Monitor is responsible for identifying potential exercises of market power, and PJM is ultimately responsible for ensuring that an offer from a seller deemed to possess market power does not exceed its costs and otherwise meets the applicable requirements of the Tariff.[63]

That the February 6 Order would frame its concern with PJM's proposal as allowing PJM to "bypass the Market Monitor"[64] is telling, because it implicitly assumes that the Market Monitor plays the role of gatekeeper where prospective mitigation is concerned. That gets it exactly backwards because as the Commission and the courts have recognized, PJM, not the Market Monitor, "plays the primary role of determining which offer makes it to market."[65] And any other arrangement, including one that precludes PJM from "bypass[ing] the Market Monitor" where prospective mitigation is involved, violates the Tariff, Order No. 719 and the Commission's regulations.

The February 6 Order's interpretation also fails to account for the fact that, in compliance with Order No. 719, PJM "consolidate[d] in a single place each of the core functions and duties of the [Market Monitor],"[66] and that single place was Attachment M-Appendix to the Tariff, not Section 12A.[67] Here again, the February 6 Order's construction of Section 12A as overriding the

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63 *See* Clements Statement at P 16. *See also* December 2009 Order, 129 FERC ¶ 61,250 at P 143 (describing PJM's filing in compliance with Order No. 719 as "clarify[ing] that PJM, as the public utility responsible for implementing and administering its tariff, is not obligated to accept the [Market Monitor]'s determinations regarding mitigation inputs and other cost-related matters for which the [Market Monitor] is currently responsible").

64 February 6 Order, 186 FERC ¶ 61,097 at n.433.

65 *Vistra*, 80 F.4th at 318. *See also* December 2009 Order, 129 FERC ¶ 61,250 at P 155.

66 December 2009 Order, 129 FERC ¶ 61,250 at P 148.

67 *See id.*

allocation of responsibility and authority set forth in Attachment M would result in a violation of law – namely, Order No. 719's consolidation requirement[68] – and conflict with the Commission's prior order finding the Tariff in compliance with Order No. 719.[69]

The interpretation of the Tariff advanced in the February 6 Order would reallocate responsibility and authority in a way that has the Market Monitor not only identifying market power concerns but conducting the prospective mitigation, with PJM playing only an undefined, minimal role. Such an interpretation conflicts with the Commission's prior interpretation of the Tariff, as revised to comply with Order No. 719. It also conflicts with the recognized canon of construction that contract language "should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful . . . ."[70] If the Commission's interpretation of Section 12A of the Tariff is correct, that provision violates Order No. 719 and Section 35.28(g)(3)(iii) of the Commission's regulations[71] by allowing the Market Monitor not only to provide inputs to, but actually to conduct, prospective mitigation.

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[68] *See* Order No. 719, 125 FERC ¶ 61,071 at P 312 ("The Final Rule also requires RTOs and ISOs to consolidate all of their MMU provisions into one section of their tariffs."). *See also* 18 C.F.R. § 35.28(g)(3)(F) (2023) ("Each Commission-approved independent system operator or regional transmission organization must consolidate the core Market Monitoring Unit provisions into one section of its tariff.").

[69] December 2009 Order, 129 FERC ¶ 61,250 at P 148 ("PJM's proposed Attachment M - Appendix appropriately consolidates in a single place each of the core functions and duties of the MMU, as required.").

[70] *West Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059, 1065 (D.C. Cir. 2023) ("*West Flagler*") (quoting *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983)). *See also, e.g.*, *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) ("It is well understood that, where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful."). The Commission has long applied principles of contract construction when interpreting tariffs and rate schedules. *See, e.g.*, *DC Energy LLC v. PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,165 at P 76 & n.121 (2012) (citing *Public Serv. Co. of N.H. v. N.H. Elec. Coop.*, 86 FERC ¶ 61,174 at 61,598 (1999), *on reh'g*, 144 FERC ¶ 61,024 (2013)); *Pandhandle E. Pipe Line Co.*, Opinion No. 404, 74 FERC ¶ 61,109 at 61,416 (1996); *Boston Edison Co. v. Town of Concord*, 50 FERC ¶ 61,199 at 61,643 & n.6 (1990) (citing *Jersey Cent. Power & Light Co. v. FERC*, 589 F.2d 142, 145 (D.C. Cir. 1978)).

[71] 18 C.F.R. § 35.28(g)(3)(iii) (2023).

B. The Commission's Rejection of the Proposed FRR Reforms Was Contrary to Law and Not the Product of Reasoned Decision-Making or Supported by Substantial Evidence

Supported by testimony from Adam Keech, PJM's Vice President of Market Design and Economics, indicating that the physical option for FRR Entities "can severely mute incentives to perform when the system needs it the most,"[72] PJM proposed to eliminate the physical penalty option for FRR Entities and instead to make those entities "subject to the same Non-Performance Charges for non-performance as any other committed Capacity Resource through the RPM Auctions."[73] Failing even to acknowledge PJM's reliability concerns or Mr. Keech's testimony, the Commission found that PJM "had not met its burden of supporting as just and reasonable its proposal to eliminate the physical non-performance assessment option for FRR entities."[74]

Notwithstanding a tip of the hat to FPA Section 205's "just and reasonable" standard,[75] the February 6 Order improperly applied a much different and higher standard to PJM's proposal, insisting that "PJM ha[d] not sufficiently justified its departure from . . . precedent" accepting the physical penalty option.[76] That precedent, however, only found the physical penalty option to be ***a*** just and reasonable approach;[77] it did not find the physical penalty option to be ***the only*** just and reasonable approach or that the absence of this option was unjust and unreasonable. In fact, it is

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72 October 13 Filing, Attachment C, Affidavit of Adam Keech on Behalf of PJM Interconnection, L.L.C., ¶ 38 (the "Keech Affidavit").

73 October 13 Filing, Transmittal Letter at 56-57.

74 February 6 Order, 186 FERC ¶ 61,097 at P 80.

75 *See id.* ("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.").

76 *Id.* at P 81.

77 *See* Clements Statement at P 3 (explaining that the Commission found the physical and financial non-performance options "to be just and reasonable and not unduly discriminatory or preferential") (citing *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 at PP 202-12 (2015), *on reh'g*, *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157 at P 153 (2016) ("*PJM Interconnection*"), *on reh'g*, 162 FERC ¶ 61,047 (2018), *aff'd sub nom. Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017).

well-established that "there is not a single 'just and reasonable rate' but rather a zone of rates that are just and reasonable," and "a just and reasonable rate is [any] one that falls within that zone."[78] That being the case, when PJM proposed tariff revisions pursuant to Section 205 of the FPA[79] to eliminate the physical penalty option, it was not required to demonstrate that this option was unjust and unreasonable.[80] And, the Commission could reject PJM's proposed tariff revisions "only if it f[ound] that the changes proposed by the public utility are not 'just and reasonable.'"[81]

In fact, it is the Commission, not PJM, that is departing from precedent and that is doing so arbitrarily and capriciously without acknowledging, much less justifying, such departure.[82] When it accepted the physical penalty option, the Commission emphasized that "[t]he paramount objective of the Non-Performance Charge, and the physical non-performance assessment option, is to ensure that Capacity Performance Resources face adequate performance incentives."[83] The Commission also made clear that "[f]or the PJM grid to remain reliable, these resources must be subject to the same performance requirements as all other resources and must make whatever investments are needed to ensure they can respond when required by PJM."[84] PJM's October 13 Filing demonstrated, with evidentiary support in the form of the Keech Affidavit, that these

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78 *Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464, 471 (D.C. Cir. 2008) ("*Maine PUC*"). *See also Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint.").

79 16 U.S.C. § 824d (2018).

80 *See New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 94 (3d Cir. 2014) ("*New Jersey BPU*") ("It is not necessary, in a filing pursuant to § 205, that FERC find that the previous rate was *unjust or unreasonable*." (emphasis in original) (citation omitted)).

81 *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) ("*Atlantic City*"). *See also TransCanada*, 811 F.3d at 4 (explaining that under Section 205, "[t]he Commission can reject the proposed rates only if it finds the rates are not just and reasonable").

82 *See, e.g.*, *Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

83 *PJM Interconnection*, 155 FERC ¶ 61,157 at P 153.

84 *Id.* at P 148.

requirements are not being satisfied with the physical penalty option in place. First, as Mr. Keech testified, allowing FRR Entity to assign more capacity in the future rather than paying Non-Performance Charges "defers the penalty's effects" and "can severely mute incentives to perform when the system needs it the most, especially when the FRR entity has excess supply not in its FRR Plan or can readily purchase it on the market at low cost."[85]

Second, as PJM demonstrated, the physical penalty option results in FRR Entities having different "financial incentives for performance as Capacity Market Sellers of Capacity Resources with RPM commitments."[86] In fact, PJM showed that the physical penalty option gives FRR Entities an enormous financial advantage, offering the following hypothetical example using the current physical penalty rate of 0.00139 MW/Performance Assessment Interval:

> [A] hypothetical resource with 1,000 MW of shortfall summed across all Performance Assessment Intervals during Winter Storm Elliott would need to commit an additional 1.4 MW of capacity to their FRR plan for the delivery year following the event. By contrast, if the FRR Entity for this resource instead chose the financial non-performance assessment option and was subject to the RTO Non-Performance Charge rate of $250.69/MW per five-minute interval, the resource would be assessed a charge of $250,690.[87]

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85 Keech Affidavit, ¶ 38.

86 October 13 Filing, Transmittal Letter at 57.

87 *Id.* at 56 (footnotes omitted) (citing PJM, *Winter Storm Elliott Event Analysis and Recommendation Report* at 112 (July 17, 2023), https://pjm.com/-/media/library/reports-notices/special-reports/2023/20230717-winter-storm-elliott-event-analysis-and-recommendation-report.ashx). For context, if the FRR Entity were able to bilaterally procure that 1.4 MW of capacity at the "Rest of RTO" clearing price in the last Base Residual Auction (for the 2024/2025 Delivery Year), the financial impact of this physical penalty would be less than $15,000 (1.4 MW * $28.92/MW-day * 365 days). *See* PJM, Report at 5, https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2024-2025/2024-2025-base-residual-auction-report.ashx. Indeed, the FRR Entity would have to pay more than the auction price cap – 150 percent of Net CONE – before the physical penalty of 1.4 MW would have a financial impact equivalent to that of the financial penalty of $250,690 ($250,690/1.4 MW/365 days = $490.59/MW-day). *See* PJM, 2024/2025 RPM Base Residual Auction Planning Period Parameters at 5 (Feb. 27, 2023) (Net CONE of $293.19/MW-day), https://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2024-2025/2024-2025-planning-period-parameters-for-base-residual-auction-pdf.ashx.

Mr. Keech explained that the proposed removal of the physical penalty option would "expose FRR entities to the same financial incentives for performance as those with RPM commitments and thus create a uniform set of performance incentives across all capacity resources during a PAI."[88]

Nonetheless, in rejecting PJM's proposal, the February 6 Order does not even acknowledge the reliability concerns that result from the discrepancy in penalties, and instead focuses solely on the interests of the FRR Entities in having additional optionality.[89] But the Commission's description of the physical penalty option as "more consistent with how FRR entities conduct resource adequacy planning at the portfolio level"[90] misses the point. Under Section 205 of the FPA,[91] PJM was only required to demonstrate that its proposal was just and reasonable, not that it was better than the *status quo*.[92] Here, it was perfectly logical for PJM to prioritize eliminating rules that have threatened reliability, and whether the physical penalty option is or is not "more consistent" with how FRRs address resource adequacy[93] is irrelevant to the question of whether PJM's proposal was just and reasonable in and of itself.

As Commissioner Clements observes, PJM's proposal reflected its experience with the Capacity Performance construct and dealing with system emergencies such as Winter Storm Elliott, and the FRR Entities' interests thus had to "be balanced against PJM's interest in incentivizing the resource performance that allows it to maintain reliability during the emergency

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88 Keech Affidavit, ¶ 38.

89 *See* February 6 Order, 186 FERC ¶ 61,097 at PP 80-81.

90 *Id.* at P 81.

91 16 U.S.C. § 824d (2018).

92 *See California Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,058 at P 38 (2014) (stating that an applicant in an FPA Section 205 proceeding "does not need to demonstrate that its proposal is the *most* just and reasonable approach, and the Commission need not consider whether alternative proposals are superior" (emphasis in original) (citations omitted)).

93 February 6 Order, 186 FERC ¶ 61,097 at P 81.

conditions that trigger assessment intervals."[94] Having failed to grapple with the reliability issues raised by PJM, the Commission also failed to engage in reasoned decision-making inasmuch as it failed to "respond meaningfully to the arguments raised before it"[95] and "entirely failed to consider an important aspect of the problem . . . ."[96] The Commission further ignored entirely the Keech Affidavit and other evidence proffered by PJM in support of the elimination of the physical penalty option, in violation of the well-established principle that "an agency cannot ignore evidence that undercuts its judgment . . . [or] minimize such evidence without adequate explanation."[97] Having failed to engage with this evidence, the February 6 Order is not supported by substantial evidence,[98] as required by both the FPA and the Administrative Procedure Act (the "APA").[99]

Ultimately, the Commission's holding relies solely on the self-serving assertions of various FRR Entities who, not surprisingly, would like to preserve the optionality and preference they currently enjoy. That only serves to underscore the fact that the physical penalty option is unduly discriminatory and preferential and therefore unlawful.[100] Even looking only at one side of the scale, the February 6 Order rests on unsupported speculation that the physical penalty option is

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94 Clements Affidavit at P 7.

95 *TransCanada*, 811 F.3d at 12 (quoting *NYPSC*, 397 F.3d at 1008). *See also ACPA*, 54 F.4th at 728; *NEPGA*, 881 F.3d at 211; *AGA*, 593 F.3d at 20.

96 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

97 *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("*Genuine Parts*"). *See also Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) ("*Lakeland*") (holding that an agency cannot rely on a "clipped view of the record"); *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. NLRB*, 802 F.2d 969, 975 (7th Cir. 1986) ("*International Union*") (agency may not "confine[] its attention to evidence that support[s] its conclusion and . . . ignore[] any contrary evidence").

98 *See, e.g.*, *Tenneco Gas v. FERC*, 969 F.2d 1187, 1214 (D.C. Cir. 1992) ("*Tenneco*") (finding that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence").

99 *See* 16 U.S.C. § 825*l*(b) (2018); 5 U.S.C. § 706(2)(E) (2018).

100 *See* 16 U.S.C. §824d(b) (2018) (prohibiting "any undue preference or advantage"); 16 U.S.C. § 824e(a) (2018) (prohibiting any rates found to be "unduly discriminatory or preferential").

"an ***appropriate*** accommodation to the unique planning processes of FRR entities."[101] To be sure, it is obvious why FRR Entities would want this accommodation, just as any market participant would welcome the chance to defer and minimize its penalty obligations. But that does not establish that FRR Entities and Capacity Market Sellers are differently situated in any way that would justify the more favorable treatment granted to the former.[102] As Commissioner Clements explains:

> 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.[103]

Tellingly, the only state regulator that commented on the proposed elimination of the physical penalty option, the Michigan Public Service Commission (the "Michigan PSC"), supported that

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[101] February 6 Order, 186 FERC ¶ 61,097 at P 81 (emphasis added).

[102] *See, e.g.*, *Missouri River Energy Servs. v. FERC*, 918 F.3d 954, 958 (D.C. Cir. 2019) ("*Missouri River*") (explaining that undue discrimination occurs if "entities are 'similarly situated,' *State Corp. Comm'n v. FERC*, 876 F.3d 332, 335 (D.C. Cir. 2017) (internal quotation markets omitted) such that 'there is no reason for the difference,' *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 721 (D.C. Cir. 2000)"); *Environmental Action, Inc. v. FERC*, 939 F.2d 1057, 1062 (D.C. Cir. 1991) (recognizing that "discrimination is not 'undue'" if there are "rational reasons for treating [one group] differently" and finding that the Commission failed to "identify any distinguishing feature" justifying the different treatment); *St. Michaels Util. Comm'n v. FPC*, 377 F.2d 912, 915 (4th Cir. 1967) (holding that "where there exists a difference in rates which is attacked as illegally discriminatory, judicial inquiry devolves on the question of whether the record exhibits factual differences to justify classifications among customers and differences among the rates charged them"); *New York Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,341 at P 46 (2015) (stating that "[t]reating similarly situated [entities] differently without justification is unduly discriminatory and preferential), *on reh'g*, 162 FERC ¶ 61,124 (2018); *Transwestern Pipeline Co.*, Opinion No. 238-A, 36 FERC ¶ 61,175 at 61,433 (1986) ("Undue discrimination is in essence an unjustified difference in treatment of similarly situated customers."), *aff'd sub nom. Transwestern Pipeline Co. v. FERC*, 820 F.2d 733 (5th Cir. 1987).

[103] Clements Statement at P 6.

proposal.[104] The Michigan PSC, which regulates an FRR Entity,[105] described the proposed elimination of the physical penalty option as "logical and equitable"[106] and expressed no concerns about how financial penalties fit with the retail regulatory structure.[107]

Moreover, even assuming *arguendo* that being "more consistent" with how FRR Entities plan were relevant to the analysis of PJM's FPA Section 205 proposal, the February 6 Order fails to establish that this is actually true. In this same vein, Commissioner Clements points out that the Commission's assertion that PJM's proposal "would subject FRR entities to financial Non-Performance Charges on an individual resource basis,"[108] makes little sense as that "is already the case today under either the financial or physical option."[109] Commissioner Clements further cites the relevant Tariff provisions demonstrating that "[a]ll resources, whether they clear PJM's capacity auction or are included in an FRR plan, are assessed for performance on an individual basis," while "both the financial and physical options provide for portfolio netting."[110] The

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104 *See* The Michigan Public Service Commission's Motion for Leave to Answer and Opposition to the November 9th Limited Protest at 2-4, Docket No. ER24-98-000 (filed Nov. 21, 2023).

105 *See id.* at 2.

106 *Id.* at 3.

107 The February 6 Order cites comments from FRR Entities indicating that participants in the capacity market "can incorporate the risk of [financial penalties] into their offers while certain resources in an FRR entity's portfolio (e.g., a resource owned by an FRR entity) cannot." February 6 Order, 186 FERC ¶ 61,097 at P 81. This statement does not establish that FRR Entities are different in any way that would justify the preferential treatment of FRR Entities, because the whole point of the FRR Alternative is that the FRR Entities are electing to procure capacity outside the capacity market and recover the associated costs, including Non-Performance Charges, through retail rates. It simply goes back to Commissioner Clements's point that an FRR Entity "will no doubt need to coordinate with its state regulator to account for the penalty," Clements Statement at P 6, regardless of whether it is financial or physical.

108 February 6 Order, 186 FERC ¶ 61,097 at P 81.

109 Clements Statement at P 5.

110 *Id.*

Commission thus also violated its obligation to ensure that its orders are supported by substantial evidence, as required by both the FPA and the APA.[111]

III.

STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[112] Petitioners hereby identify each issue on which they seek rehearing of the February 6 Order and provide representative precedent in support of its position on each of those issues:

1. The Commission's holding that allowing PJM to conduct prospective mitigation by determining an alternative unit-specific Market Seller Offer Cap would violate Order No. 719 was contrary to Order No. 719, the Commission's regulations, and the Tariff and thus contrary to law. *See, e.g.*, 18 C.F.R. § 35.28(g)(3)(iii) (2023); Order No. 719, 125 FERC ¶ 61,071 at P 375; December 2009 Order, 129 FERC ¶ 61,250 at P 155. Like any other agency, the Commission is "bound by its regulations," *Panhandle*, 613 F.2d at 1135, and it was not free to concoct a new exception to the prohibition against market monitors conducting prospective mitigation set forth in Section 35.28(g)(3)(iii) of its own regulations,[113] particularly where doing so violated the principle of *expressio unius est exclusio alterius*. *See Johnson*, 529 U.S. at 58; *Schumann*, 857 F.2d at 811. The Commission's interpretation of the Tariff also flies in the face of the principle that language "should, if possible, be interpreted in such a fashion as to render it lawful rather than unlawful . . . ." *West Flagler*, 71 F.4th at 1065.

2. The finding that allowing PJM to determine an alternative unit-specific Market Seller Offer Cap would conflict with the role of the Market Monitor represented an unacknowledged and unexplained departure from Order No. 719 and other Commission precedent making clear that PJM, as the RTO/ISO, "must be ultimately responsible for . . . the determination of prospective mitigation," December 2009 Order, 129 FERC ¶ 61,250 at P 155, and was, therefore, arbitrary and capricious. *See, e.g.*, *Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20. *See also* Order No. 719, 125 FERC ¶ 61,071 at P 375 (stating that "prospective

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111 *See* 16 U.S.C. § 825*l*(b) (2018); 5 U.S.C. § 706(2)(E) (2018). *See also Illinois Com. Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("*ICC*") (explaining that a reviewing court cannot "uphold a regulatory decision that is not supported by substantial evidence on the record as a whole"); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) ("*PG&E*") (the Commission's orders must be "based upon substantial evidence in the record" (citation omitted)).

112 18 C.F.R. § 385.713(c)(2) (2023).

113 18 C.F.R. § 35.28(g)(3)(iii)(A) (2023).

mitigation" includes "altering the prices of offers . . . at or before the time they are considered in a market solution").

3. The Commission's interpretation of Order No. 719 and the Tariff as precluding PJM from determining an alternative unit-specific Market Seller Offer Cap was "illogical on its own terms," *GameFly*, 704 F.3d at 148, and failed to grapple meaningfully with contrary arguments and evidence offered by PJM and other parties and dissenting Commissioner Clements. This renders the order arbitrary and capricious. *See, e.g.*, *Baltimore Gas*, 462 U.S. at 105; *ACPA*, 54 F.4th at 728; *NEPGA*, 881 F.3d at 211; *TransCanada*, 811 F.3d at 12; *GameFly*, 704 F.3d at 148; *AGA*, 593 F.3d at 20.

4. The Commission's interpretation of Section 12A of the Tariff as barring PJM from conducting prospective mitigation by determining an alternative unit-specific Market Seller Offer Cap improperly ignores Commission precedent recognizing that the core functions of the Market Monitor were consolidated and set forth in another part of the Tariff, Attachment M-Appendix. *See* December 2009 Order, 129 FERC ¶ 61,250 at P 148. This renders the February 6 Order arbitrary and capricious as a result of the Commission's failure to acknowledge, much less justify, its departure from precedent, or to engage with this important aspect of the problem. *See, e.g.*, *Fox*, 556 U.S. at 515; *State Farm*, 463 U.S. at 43; *West Deptford*, 766 F.3d at 20.

5. In rejecting the proposed elimination of the physical penalty option for FRR Entities, the Commission acted contrary to law by holding PJM to a standard more stringent than the "just and reasonable" standard applicable under Section 205 of the FPA[114] and by misinterpreting its prior acceptance of the physical penalty option as foreclosing any subsequent elimination of such option. *See, e.g.*, *New Jersey BPU*, 744 F.3d at 94; *Maine PUC*, 520 F.3d at 471. The Commission's prior acceptance of the physical penalty option did not make the absence of such an option unjust and unreasonable, and the Commission could not lawfully reject the proposed elimination of the physical penalty absent a finding that such elimination was unjust and unreasonable. *See, e.g.*, *TransCanada*, 811 F.3d at 4; *Atlantic City*, 295 F.3d at 9.

6. The Commission's failure to engage meaningfully with evidence and arguments, including arguments by dissenting Commissioner Clements, regarding the reliability impacts of the physical penalty option was arbitrary and capricious. *See, e.g.*, *Baltimore Gas*, 462 U.S. at 105; *ACPA*, 54 F.4th at 728; *NEPGA*, 881 F.3d at 211; *TransCanada*, 811 F.3d at 12; *GameFly*, 704 F.3d at 148; *AGA*, 593 F.3d at 20. It was also arbitrary and capricious as an acknowledged and unexplained departure from precedent holding that FRR Entities' resources "must be subject to the same performance requirements as all other resources and must make whatever investments are needed to ensure they can respond when required by PJM." *PJM*

[114] 16 U.S.C. § 824d (2018).

Interconnection, 155 FERC ¶ 61,157 at P 148. *See, e.g.*, *Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

7. The Commission's failure to acknowledge the Keech Affidavit and other record evidence relevant to the impacts of the physical penalty option renders the February 6 Order arbitrary and capricious and not supported by substantial evidence, as required by the FPA and the APA. *See, e.g.*, 16 U.S.C. § 825*l*(b) (2018); 5 U.S.C. § 706(2)(E) (2018); *Tenneco*, 969 F2d at 1214. *See also, e.g.*, *Genuine Parts*, 890 F.3d at 312; *Lakeland*, 347 F.3d at 963; *International Union*, 802 F.2d at 975.

8. The February 6 Order's assumption that the physical penalty option is a necessary or appropriate accommodation to FRR Entities' retail regulatory structure was arbitrary and capricious and not supported by substantial evidence. *See* Clements Statement at P 6. *See also, e.g.*, *Baltimore Gas*, 462 U.S. at 105; *ACPA*, 54 F.4th at 728; *ICC*, 576 F.3d at 477; *PG&E*, 373 F.3d at 1319; *Tenneco*, 969 F.2d at 1214.

9. The Commission's refusal to engage with arguments regarding the undue discrimination and preference resulting from FRR Entities having the physical penalty option was arbitrary and capricious. *See, e.g.*, *Baltimore Gas*, 462 U.S. at 105; *ACPA*, 54 F.4th at 728. It also results in the February 6 Order being contrary to law and, more specifically, contrary to the FPA's prohibition against unduly discriminatory or preferential rates and rate practices. *See, e.g.*, 16 U.S.C. §824d(b) (2018); 16 U.S.C. § 824e(a) (2018); *Missouri River*, 918 F.3d at 958.

IV.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully requests that the Commission grant rehearing of the February 6 Order as requested herein.

Respectfully submitted,

THE PJM POWER PROVIDERS GROUP

By: */s/ David G. Tewksbury*
David G. Tewksbury
Stephanie S. Lim
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001

Glen Thomas
Laura Chappelle
Diane Slifer
GT Power Group
101 Lindenwood Drive, Suite 225
Malvern, PA 19355

On behalf of **The PJM Power Providers Group**

ELECTRIC POWER SUPPLY ASSOCIATION

By: */s/ David G. Tewksbury*
David G. Tewksbury
Stephanie S. Lim
McDERMOTT WILL & EMERY LLP
The McDermott Building
500 North Capitol Street, N.W.
Washington, DC 20001

Nancy Bagot, Senior Vice President
Sharon Theodore, Vice President, Regulatory Affairs
Electric Power Supply Association
1401 New York Avenue, NW, Suite 950
Washington, DC 20005

On behalf of the **Electric Power Supply Association**

Dated: March 7, 2024

CERTIFICATE OF SERVICE

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

Dated at Washington, D.C., this 7th day of March 2024.

/s/ David G. Tewksbury
David G. Tewksbury