

**BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PJM Interconnection, L.L.C.

)

Docket No. ER21-2582

**AMENDED JOINT PETITION FOR REHEARING OF THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION AND PUBLIC UTILITIES COMMISSION OF
OHIO TO THE COMMISSION'S FAILURE TO ISSUE AN ORDER
ACCEPTING OR DENYING PJM'S FILING CONCERNING APPLICATION OF
THE MINIMUM OFFER PRICE RULE**

Pursuant to Rules 212 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (FERC or Commission)¹ and section 313 of the Federal Power Act (FPA),² the Pennsylvania Public Utility Commission (PAPUC) and Public Utilities Commission of Ohio (PUCO) file this Amended Joint Petition for Rehearing in response to the Commission's failure to issue an order accepting or denying the proposed tariff changes (Proposal) of PJM Interconnection, L.L.C, (PJM) to its Open Access Transmission Tariff (OATT or tariff), filed July 30, 2021, to reform the Minimum Offer Price Rule (MOPR). PJM made its filing under section 205 of the Federal Power Act (FPA)³ and part 35 of the regulations.⁴

¹ 18 C.F.R. §§ 385.212 and 385.713.

² 16 U.S.C. § 825*l*.

³ 16 U.S.C. § 824*d*.

⁴ 18 C.F.R. part 35.

I. REQUEST FOR REHEARING

Section 205(d) of the FPA⁵ provides the Commission a 60-day period to act upon rates filed by a public utility, such as the Proposal filed by PJM. Section 205(g)(1)(A) of the FPA⁶ allows parties to seek rehearing on the Commission’s inaction with respect to the Proposal. Under that section, where the Commission permits the established 60-day period to expire without issuing an order accepting or denying the change “because the Commissioners are divided two against two as to the lawfulness of the change ... the failure to issue an order accepting or denying the change ... shall be considered an order issued by the Commission accepting the change for purposes of section 8251(a) of this title”⁷ Additionally, the section requires each Commissioner to add to the record a written statement explaining his or her views with respect to the change.⁸

Under Section 205(g)(1)(A) of the FPA, the 60-day period for Commission action ended on September 28, 2021. The next day, the Commission issued a Notice fixing the proposed date of the effective tariff sheet as September 29, 2021.⁹ The Notice further explained that the Commission did not act on PJM’s filing because “the Commissioners are divided two against two as to the lawfulness of the change.”¹⁰ On October 19, 2021, only nine days before the deadline to request rehearing, Commissioner Christie filed his individual statement required by Section 205(g)(1)(B) of the FPA, and Chairman Glick

⁵ 16 U.S.C. § 824d(d).

⁶ 16 U.S.C. § 824d(g)(1).

⁷ *Id.* Section 8251(a) addresses applications for rehearing of Commission orders and judicial review of such orders.

⁸ 16 U.S.C. § 824d(g)(1)(B).

⁹ Notice of Filing Taking Effect by Operation of Law, Docket No. ER21-2582-000 (Sept. 29, 2021).

¹⁰ *Id.*

and Commissioner Clements filed a joint statement (Joint Statement). Commissioner Danly's statement was docketed on October 27, 2021.

The failure of the Commissioners to issue timely statements explaining their positions as to the lawfulness of PJM's proposal substantially diminishes the rehearing and appeal rights of parties, such as the PAPUC and PUCO. Unlike the appeal of some federal agency actions, appeal of FERC orders requires the filing of a petition for rehearing.¹¹ Aggrieved parties are given only thirty days to file rehearing requests,¹² and any issues not raised in rehearing requests are waived and cannot be raised on appeal.¹³

The purpose for this rule is to provide the Commission with the first opportunity to address, and potentially resolve, issues that are headed for the courts. *Public Service Commission of State of New York v. Federal Power Commission*, 543 F.2d 757, 775 (D.C. Cir. 1974). In normal circumstances, that would involve parties addressing the reasoning of the Commission as contained in an order, but in these circumstances, parties are, to the extent practicable, referencing the statutory statements of the Commissioners. With the earliest statement filed only nine days before the rehearing deadline, this presents an untenable situation that makes it impossible to address the reasoning of the Commissioners in a viable rehearing request and, consequently, frustrates the due process rights of parties to seek rehearing and appeal.

¹¹ 16 U.S.C. § 825l(a).

¹² *Id.*

¹³ 16 U.S.C. § 825l(b).

Congress has recognized the importance of these rights and taken action to codify them. Prior to an amendment to the FPA in 2018,¹⁴ FERC’s failure to issue an order on a 205 filing, as has happened in the instant case, was not appealable. In discussing this prior lack of appealability, the Court of Appeals for the D.C. Circuit (D.C. Circuit) opined in 2016 that the petitioners in that case could not “demonstrate FERC engaged in agency action; they therefore cannot seek recourse.” *Public Citizen, Inc. v. Federal Energy Regulatory Commission*, 839 F.3d 1165, 1169 (D.C. Cir. 2016); *see also Utility Workers Union of America Local 464 v. Federal Energy Regulatory Commission*, 896 F.3d 573, 576 (D.C. Cir. 2018). The D.C. Circuit concluded that it was up to Congress to remedy the inherent unfairness in the FPA, which Congress corrected by adding section 205(g) in the 2018 amendment. The Commission has heeded Congress’ instruction to file statements but has not done so in a way that still effectuates the purpose of the rehearing statute: to permit effective rehearing.

While section 205(g) directs that the “failure to issue an order accepting or denying the change” is to be “considered”¹⁵ an order of the Commission for purposes of seeking rehearing, FERC’s failure to issue an order—thus allowing PJM’s filing to go into effect by operation of law—is, importantly, not an action of the Commission or an application of the law by the Commission. *See Public Citizen, Inc. v. Federal Energy Regulatory Commission*, 7 F.4th 1177, 1196 (D.C. Cir. 2021), *Public Citizen, Inc. v.*

¹⁴ America’s Water Infrastructure Act of 2018, PL 115-270, October 23, 2018, 132 Stat 3765, and 16 U.S. Code § 824d(g)(1)(A).

¹⁵ 16 U.S. Code § 824d(g)(1)(A).

Federal Energy Regulatory Commission, 839 F.3d 1165, 1169, *Utility Workers Union of America Local 464 v. Federal Energy Regulatory Commission*, 896 F.3d 573, 576 (D.C. Cir. 2018).¹⁶ Chairman Glick and Commissioner Clements, in the Joint Statement, attempt to assert that there is a majority as to one issue,¹⁷ but this assertion is refuted by Commissioner Christie.¹⁸ Indeed, the failure to issue the order is not a majority decision but is the product of the Commission’s inability to reach a reasoned decision as to the lawfulness of the PJM tariff, and the result is unjust and unreasonable.

Alternatively, FERC’s failure to issue an order accepting or denying PJM’s proposed tariff changes, thus giving effect of PJM’s tariff filing, is arbitrary and capricious and represents a departure from established precedent without any reasoned explanation. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A), *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983); *Hatch v. Federal Energy Regulatory Commission*, 654 F.2d 825 at 834 (1981).¹⁹ FERC further fails to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168 (1962).

Commissioner Christie’s Statement further underscores the unlawfulness of the PJM Proposal. The Commissioner unequivocally notes that he “would have voted to reject PJM’s proposal because it fails to meet even the minimum standard required by

¹⁶ *See also* Statement of Commissioner Danly at paragraphs 73 and 74.

¹⁷ Statement of Chairman Glick and Commissioner Clements at paragraph 47.

¹⁸ Statement of Commissioner Christie at fn. 11. *See also* Statement of Commissioner Danly at paragraph 68.

¹⁹ *See also* Statement of Commissioner Danly at paragraph 70.

FPA section 205, and [he] would have simultaneously initiated an FPA section 206 proceeding...” based on three guiding principles.²⁰ Commissioner Christie’s principles would ensure that the ratepayers of a state sponsoring its preferred public policy resources would only pay once for their own state’s policy resources, while the ratepayers in other states “would not be forced to pay for the policy choices made by the sponsoring state’s politicians.”²¹ In that respect, Commissioner Christie found the Joint Protest of the PAPUC and PUCO and the “devastating critique” of PJM’s Independent Market Monitor (PJM’s IMM) persuasive as to the failure of the PJM Proposal to meet the Section 205 just and reasonable standard.²²

In a characteristically candid voice, Commissioner Christie observes that the PJM Proposal does not create a market based on the central principle of “non-discriminatory competition on a level-playing field” but “a rent-seekers’ paradise in which consumers lose” because “the winners and losers are determined by which interest groups’ lobbyists can obtain the biggest subsidies from politicians.”²³ Commissioner Christie ends his Statement with a question to Pennsylvania and Ohio, as well as other states in PJM that continue to rely on “competition on a level-playing field” that invites them to consider “the more realistic path” of reclaiming their authority and responsibility for resource adequacy instead of relying on a capacity market regulated by the Commission.²⁴

²⁰ Statement of Commissioner Christie at paragraphs 5-6.

²¹ *Id.* at 7.

²² *Id.* at paragraph 3, fn. 6, and paragraphs 9-10.

²³ *Id.* at paragraph 12.

²⁴ *Id.* at paragraphs 14-15.

Indeed, Pennsylvania and Ohio do not simply rely on a well-functioning and competitive capacity market in PJM to assist them in meeting their individual resource adequacy obligations—they are entirely dependent on it, having spent the last two decades restructuring the electric industry in their respective states and building a vibrant retail electricity market. In fact, 2021 marks the 25th anniversary of Pennsylvania’s Electric Generation Choice and Competition Act, which became law on December 3, 1996.²⁵ Ohio’s retail electric competition law took effect almost three years later, in 1999.²⁶

Pennsylvania’s Competition Act places an obligation on the PAPUC to “take all necessary and appropriate steps to encourage interstate power pools and *to enhance competition and to complement industry restructuring on a regional basis*” (emphasis added).²⁷ As the PAPUC Chairman testified before the Pennsylvania House Environmental Resources & Energy Committee on the subject of PJM’s Proposal, the competitive energy market has been a core element of electric utility service in Pennsylvania for the last quarter-century.²⁸ During that time, the PAPUC has focused on ensuring safe and reliable utility service; educating consumers about the options and opportunities available in the competitive market; developing regulations and policies to

²⁵ Electricity Generation Customer Choice and Competition Act, 66 Pa.C.S. §§ 2801–2812 (1996) (Competition Act).

²⁶ 1999 Ohio Laws File 47 (S.B. 3).

²⁷ Section 2805 of the Competition Act.

²⁸ See Prepared Testimony of Gladys Brown Dutrieuille, Chairman, PAPUC, Pa. House Environmental Resources & Energy Committee (September 27, 2021), available at <https://dingo.telicon.com/PA/library/2021/20210927TS.PDF>.

safeguard consumers who elect to use competitive suppliers; and constantly reviewing this process to reflect the evolving marketplace and new technologies.²⁹

The PAPUC has dutifully implemented the directive of the Pennsylvania General Assembly, but its efforts will be stalled or worse—entirely countermanded—if the Commission allows PJM’s tariff to take effect by operation of law without the necessary and appropriate market power mitigation tools in place.

Similarly, the PUCO is charged by Ohio law with carrying out the retail electric services policy of the state of Ohio.³⁰ This state policy is, in part, to:

- (1) “Ensure effective competition in the provision of retail electric service;”
- (2) “Ensure retail electric service consumers protection against ... market deficiencies, and market power;”
- (3) “Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;” and
- (4) “Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers.”³¹

The PJM tariff severely impedes the PUCO’s ability to implement these policies. It does so by: compromising the competitive element of the capacity market; allowing abuse of market power to invade the market without meaningful mitigation; jeopardizing the availability to Ohio consumers of reasonably priced electric service; and threatening

²⁹ *Id.* See also Statement of Commissioner Danly at fn. 111.

³⁰ Ohio Revised Code (O.R.C.) 4928.02.

³¹ O.R.C. 4928.02(H), (I), (A), and (C), respectively.

the competitive choice framework in Ohio that is intended to foster diversity of suppliers of adequate, safe, reliable, and efficient service. PJM's tariff stymies Ohio's customer choice law³² by fundamentally compromising the competitive nature of the capacity market in which Ohio's suppliers participate.³³

The Joint Commissions reiterate, however, that while the PJM tariff is anticompetitive and must be rejected, the tariff contains a few exemptions, which should be maintained in any capacity market design for supportive elements of our states' competitive frameworks, including for state retail default service procurements, self-supply entities, and new natural gas units that do not receive state subsidies.³⁴

The Commission must address the reasonable concerns of the PAPUC, PUCO, and PJM's IMM on rehearing. It cannot simply stay idle and let a poorly designed framework with a "convoluted and impossible to enforce definition of market power"³⁵ take effect and unjustly distort decades of efforts by those states that still rely on competition and least-cost-procurement principles for their resource adequacy plans.

The Commission has an ongoing obligation to deliver a wholesale electricity market that is based on actual competition and has strong measures in place to prevent anti-competitive market behavior. *See Public Citizen v. Federal Energy Regulatory Commission*, 7 F.4th 1177 (D.C. Cir. 2021) (*Public Citizen*), *New England Power*

³² See O.R.C. 4928.03.

³³ See Statement of Commissioner Danly at paragraph 66.

³⁴ See Joint Protest at 5.

³⁵ Statement of Commissioner Christie at paragraph 9, fn. 13 (citing the PJM IMM's Protest at 2-3).

Generators Association, Inc. v. Federal Energy Regulatory Commission, 757 F.3d 283, 291 (D.C. Cir. 2014), *California Independent System Operator Corp.*, 126 FERC ¶ 61150, ¶71 (2009).³⁶

For these reasons, as well the ones listed more specifically below, the PAPUC and PUCO request that the Commission grant this Petition for Rehearing, address our concerns, adopt our recommendations, and reject PJM’s tariff.

II. ARGUMENT

The Commission’s allowance of PJM’s unjust and unreasonable tariff to take effect is unlawful for the following reasons:

1. **PJM’s attestation process for buyer-side market power uses unclear or contra legal standards and is, therefore, unjust and unreasonable.**

Controlling judicial precedent dictates that market power be mitigated based on its potential exercise, not the market participant’s subjective intent to exercise market power. *See Public Citizen; New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*, 757 F.3d 283, 291 (D.C. Cir. 2014). Therefore, the Commission must ensure “that the seller *cannot* exercise anticompetitive market power” and the “seller *cannot* erect any barriers to entry against potential competitors.” *Public Citizen*, 7 F.4th at 1185 (emphasis added).³⁷

The Commission has adhered to this principle in the past when it stated that “it is the possession of market power (and, therefore, the potential to exercise it)... that triggers

³⁶ See also Statement of Commissioner Danly at paragraph 37.

³⁷ See also Joint Protest of the PAPUC and PUCO at 11-12, IMM’s Protest at 1-3.

the need for mitigation. Once it is shown that market power exists, adequate mitigation of the potential to exercise market power becomes essential.” *California Independent System Operator Corp.*, 126 FERC ¶ 61150, ¶71 (2009). And, as emphasized by the Court of Appeals for the D.C. Circuit, FERC has found that uneconomic entry into the capacity market, “regardless of resource and *regardless of intent*, ‘can produce unjust and unreasonable prices by artificially depressing capacity prices.’” *New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*, 757 F.3d 283, 291 (D.C. Cir. 2014) (quoting FERC, ISO New England, Inc. & New England Power Pool Participants Comm. New England Power Generators Association, Docket Nos. ER-10-787-000, et al, Order on Paper Hearing and Order on Rehearing, ¶ 170, April 13, 2011) (emphasis added).

The Commission’s failure to reject PJM’s definitions of “Exercise of Buyer-Side Market Power” and the tariff references to intent in PJM’s attestation process is unjust and unreasonable, and further represents a flagrant departure from its own established precedent without any reasoned explanation. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A), *Motor Vehicle Manufacturers Association*, 463 U.S. 29 at 43 (1983); *Hatch*, 654 F.2d 825 at 834 (1981). Additionally, the Joint Statement does not address, let alone provide a reasoned explanation, as to why a departure from controlling judicial precedent and established Commission precedent is just and reasonable.

PJM’s attempted response to why it’s necessary to introduce intent for determining what is an “Exercise of Buyer-Side market Power” also fails to address the controlling precedent and instead relies on the circular reasoning that “PJM cannot know

in advance whether a Capacity Market Seller plans to submit an uneconomic offer for a resource for the purpose of reducing Load Interests' costs."³⁸ To make things worse, PJM explains that this subjective test may be used not only initially—before PJM determines whether to “employ a more objective test”—but even during the performance of its fact-specific review:

When PJM or the Market Monitor is performing a fact-specific review of whether a Capacity Market Seller may be using a resource in an Exercise of Buyer-Side Market Power, the Capacity Market Seller will be afforded the opportunity to justify its contemplated offer price level. “[T]o the extent a seller is able to provide a credible (i.e., non-pretextual) justification for a below-cost offer, PJM would determine that the seller lacked intent to exercise Buyer-Side Market Power.³⁹ (emphasis added; footnote omitted).

Stated otherwise, PJM’s initial test and secondary “more objective test” both use the subjective intent test under the precise language of the tariff for determining whether to apply the MOPR.

Commissioner Clements and Chairman Glick support PJM’s proposed test “because it speaks to ability and incentive” which is the textbook definition of buyer-side market power.⁴⁰ Yet, as we explained, this is not accurate. Under the language of the tariff, PJM’s “incentive test” ultimately goes to the seller and asks if it intends to manipulate the market.⁴¹

On the other hand, Commissioner Christie’s statement properly concurred with the IMM’s concern that PJM’s proposal would “effectively eliminate the MOPR while

³⁸ PJM’s Answer at 21.

³⁹ *Id.*

⁴⁰ Statement of Chairman Glick and Commissioner Clements at paragraph 100.

⁴¹ Proposed Tariff, Attachment DD, section 5.14(h-2)(2)(B).

creating a confusing and inefficient administrative process that effectively makes it unnecessary and impossible to prove buyer side market power as PJM has defined it.”⁴² (emphasis in the statement).⁴³

For these reasons, the Commission should grant rehearing on this issue and reject PJM’s attempt to inject subjectivity in the definition of buyer side market power.

2. PJM’s attestation process for buyer-side market power does not afford a meaningful ability to review offers and is, therefore, unjust and unreasonable.

The PJM tariff does not allot adequate time for meaningful review of buyer-side attestations (certifications) and potential mitigation prior to a capacity market auction. PJM’s filing provides that a Capacity Market Seller must make its attestation 150 days prior to a capacity market auction, with PJM and the IMM reviews due 135 days prior to the auction. This provides a potential window of only 15 days to review these attestations for buyer-side market power.⁴⁴

During this 15-day period, PJM’s Office of the Interconnection and the IMM would review a Capacity Market Seller’s intent to offer and attestation and initiate a fact-specific review only if the IMM and/or PJM “reasonably suspects” there would be an Exercise of Buyer Side Market Power.⁴⁵ To make things worse, PJM does not intend to conduct such fact-specific reviews and will instead rely on its newly-proposed

⁴² Statement of Commissioner Christie at paragraph 9, citing IMM’s August 20 Protest at 1.

⁴³ See also Statement of Commissioner Danly at paragraph 33.

⁴⁴ PJM Filing at 159-160.

⁴⁵ PJM Filing at 160.

“presumption of innocence” that the Market Seller attests in good faith.⁴⁶ This relinquishment of RTO responsibility strays from *Public Citizen*, and the provisions should be rejected as unjust and unreasonable.

The Joint Statement goes to great length to explain how the mitigation of market power is MOPR’s most important and narrow goal.⁴⁷ Clearly, as explained above, it is not. The Joint Statement then summarily dismisses the certification as merely “initial screens” that only focus on “whether the seller has a load interest and is attempting to offer an uneconomic resource”⁴⁸ and “not necessary for a just and reasonable rate.”⁴⁹ The Joint Statement’s reliance on required action by PJM or the IMM where there is reasonable suspicion of the Exercise of Market Power is misplaced. Again, PJM has stated that it does not intend to conduct such reviews and will rely on the “presumption of innocence” standard in violation of *Public Citizen*.

By contrast, Commissioner Christie’s statement highlights the IMM’s assessment regarding the infeasibility of the administrative process to determine Buyer-Side Market Power. Commissioner Christie is correct in noting the IMM’s concerns that PJM’s tariff definition of market power is unenforceable with its complex set of barriers to gathering information in “impossible” deadlines.⁵⁰ The Joint Statement is deficient when it states that there is nothing in the record to explain why those analyses cannot be completed in

⁴⁶ PJM Filing at 29-30.

⁴⁷ Statement of Chairman Glick and Commissioner Clements at paragraphs 33 -34, 43,53, 65, 99-103, and 162-163.

⁴⁸ *Id.* at paragraph 119.

⁴⁹ *Id.* at paragraph 120.

⁵⁰ Statement of Commissioner Christie at paragraph 9 and fn. 13, referencing IMM’s Protest at 2-3.

the timeframe allotted by PJM.⁵¹ The burden is on PJM to show the review can be completed, and moreover, the IMM's statement that the review cannot be completed is itself evidence in the record.

The certification and attestation process in PJM's tariff for Buyer-Side Market Power is wholly inadequate to allow for a meaningful review of offers and lacks real standards to govern that review. Therefore, it is unjust and unreasonable.⁵²

3. PJM's exemption of state legacy policies from buyer-side market power review lacks any quantifiable data regarding the effects of that exemption on the markets, flouts controlling legal precedent, and is, therefore, unjust and unreasonable.

The Commission's failure to address the significant legal flaws with PJM's Legacy Policy exemption and critically analyze PJM's tariff for legal sufficiency and compliance with controlling court precedent⁵³ calls into question the Commission's even-handed evaluation of state public policies or programs that may in fact be utilized to set the wholesale rate.

The Joint Statement's justification to approve PJM's proposed application of the MOPR to resources receiving Conditioned State Support "because such state programs are likely preempted under the *Hughes* standard,"⁵⁴ but not apply the MOPR to Legacy Policy resources because such resources "were not on notice of this aspect of the MOPR when they enacted Legacy Policies," defies logic.⁵⁵ Both resources receiving Conditioned

⁵¹ Statement of Chairman Glick and Commissioner Clements at paragraph 119.

⁵² See Statement of Commissioner Danly at paragraph 19.

⁵³ See Joint Protest of the PAPUC and PUCO at 14-16.

⁵⁴ Statement of Chairman Glick and Commissioner Clements at paragraph 135.

⁵⁵ *Id.* at paragraph 144.

State Support and their subset Legacy Policy resources “were not on notice” of PJM’s MOPR filing and “are likely preempted under the *Hughes* standard.” More importantly, they didn’t have to be on notice. *Hughes* was decided in 2016—more than five years before PJM’s Proposal—and such resources had sufficient time to adjust to the controlling precedent of the highest court in the Nation. Moreover, this reasoning would inevitably lead to the conclusion that the Commission should never prohibit existing behavior because those engaging in that behavior were not on notice that it might be prohibited. The result is absurd.

The Joint Statement’s refusal to address the legal flaws of PJM’s Proposal in an impartial manner and its use of the *Hughes* test to justify approval for Conditioned State Support while at the same time punting application of the *Hughes* test for Legacy Resources to the courts⁵⁶ is the epitome of arbitrary and capricious reasoning. *Ameren Services. Co. v. Federal Energy Regulatory Commission*, 880 F.3d 571, 581 (D.C. Cir. 2018) (“since this contention was raised appropriately, failure to meaningfully respond to it makes FERC’s decision arbitrary and capricious.”). The Commission should reject such internally inconsistent justifications in the “headlong rush to slay the MOPR dragon as soon as possible.”⁵⁷

⁵⁶ See Statement of Chairman Glick and Commissioner Clements at paragraph 145 (“Any existing Legacy Policies could, if found to be preempted, be subject to remedies such as those that were imposed in the *Hughes* litigation, where the court determined that the preempted contracts for differences were void *ab initio*. But that fact, true as it is, does not preclude us from accepting these aspects of PJM’s filing.”).

⁵⁷ Statement of Commissioner Christie at paragraph 9, fn. 13.

Furthermore, neither PJM nor the Commission has addressed valid and critical concerns surrounding competition, resource adequacy, and reliability impacts resulting from the Legacy Policy Exemption.⁵⁸ PJM has provided no quantifiable data surrounding the effects of such an exemption on the market, nor has it provided any analysis of the potential impacts of its proposed MOPR changes on competitive market prices and on the ability to attract and retain resources that can respond when needed. Such information is necessary before providing a blanket exemption to existing policies. As a result, it is incumbent upon the Commission to reject the proposed Legacy Policy Exemption and require PJM, as part of a Section 206 filing, to commit to studying market impacts resulting from any future MOPR and its exemptions for state policies and programs.

4. PJM’s unit-specific exemption is unjust and unreasonable because it lacks consistent criteria and could allow market participants to evade proper review.

The Commission’s failure to address our and the IMM’s concerns about PJM’s lack of consistent criteria for unit-specific exemptions is arbitrary and capricious.⁵⁹ Under the PJM Proposal, a Capacity Market Seller must submit to PJM and the IMM its written request for an exemption, including all supporting documentation, no later than 120 days before the offer period for the applicable auction.⁶⁰ PJM proposed, among other things, allowing a unit-specific exemption even if the seller is unable to support each claimed cost advantage.⁶¹ PJM noted that, currently, it can reject a seller’s request if the seller

⁵⁸ See Joint Protest of the PAPUC and PUCO at 15-17.

⁵⁹ See Joint Protest of the PAPUC and PUCO at 18-19, Protest of the IMM at 15.

⁶⁰ PJM Proposed OATT (h-2)(4)(A).

⁶¹ PJM Filing at 52.

does not support each of its claims. But, PJM also argued that there are many data points to be reviewed during this process, and it would be too harsh to deny a request because a single cost element was not adequately supported. As a compromise, PJM proposed that an unsupported element should not be considered in determining the unit-specific offer floor.⁶²

As we stated previously, the benefit of this flexibility is unclear. Consistent criteria must be used to determine exemptions on a comparable basis, with clearly understandable parameters. The Commission and PJM neither acknowledged nor responded to our and the IMM's concerns on this issue, thus providing no reasoned explanation or record as to why PJM's tariff in this respect is just and reasonable.

5. PJM's proposed attestation process for state supported resources is unjust and unreasonable absent the Commission's directive to provide visibility of the attestations to all market participants, regulators, and interested parties.

The Commission's failure to correct an ambiguity in PJM's tariff frustrates the transparency benefits of the Conditioned State Support attestation. As we stated in our protest, we are concerned that while attestations of state support would be transparent and readily verifiable to those who view them, the PJM Proposal does not state to whom the attestations are available. Presently, the certification process is only necessarily visible to the IMM and PJM's Office of the Interconnection. To prevent needless challenges from private parties before FERC, the tariff should clearly state that this information is available to all market participants, state regulators, and other interested parties.

⁶² PJM Filing at 52-53.

The Joint Statement rejects P3's request for a formal process to raise concerns about a certain policy or program that qualifies as Conditioned State Support in favor of entities filing a protest or complaint at FERC when PJM files Attachment DD-3 of the PJM Tariff. The Joint Statement explains that Attachment DD-3 will contain the list of Conditioned State Support programs and policies.⁶³ Further, the Joint Statement asserts that Conditioned State Support and its associated attestation process is not necessary to find the Focused MOPR just and reasonable, thereby dismissing the concerns raised.⁶⁴

The Joint Statement's dismissal of legitimate concerns regarding transparency benefits will result, as we stated in our Protest, in needless challenges at FERC.⁶⁵ This is particularly true of a state that may wish to understand or provide additional information regarding a policy or program attributed to its actions.

While not directly responding to the PAPUC and PUCO Protest, the Joint Statement, in response to P3, directs entities to file a protest or complaint at FERC after PJM files its tariff containing a list of policies or programs that qualify as Conditioned State Support.⁶⁶ Until that point, a party such as the PAPUC or PUCO will not be aware of whether PJM deems a program or policy Conditioned State Support, or is reviewing a program or policy to make that determination. It is not just and reasonable to require parties such as the PAPUC or PUCO to bear the burden of proof to challenge or provide additional information after PJM performs its review of Conditioned State Support.

⁶³ Statement of Chairman Glick and Commissioner Clements at paragraph 142.

⁶⁴ *Id.* at paragraph 143.

⁶⁵ Joint Protest of the PAPUC and PUCO at 9.

⁶⁶ Statement of Chairman Glick and Commissioner Clements at paragraph 142.

Additionally, this process is not just and reasonable because it would generate numerous challenges at FERC where parties are severely limited by this lack of access to information on the review of Conditioned State Support. Ultimately, the burden of ensuring wholesale electricity market competition should be on those who are tasked with that responsibility by Congress—not market participants, state regulators, and other interested parties.⁶⁷

III. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

Pursuant to Rule 713(c) of the Commission’s Rules of Practice and Procedure, the PAPUC and PUCO submit the following statement of issues and specifications of error:

- 1. PJM’s attestation process for buyer-side market power uses unclear or contra legal standards and is, therefore, unjust and unreasonable.** *See Public Citizen v. Federal Energy Regulatory Commission*, 7 F.4th 1177 (D.C. Cir. 2021); *New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*, 757 F.3d 283, 291 (D.C. Cir. 2014); *California Independent System Operator Corp.*, 126 FERC ¶ 61150, ¶71 (2009).
- 2. The Commission’s failure to reject PJM’s definitions of “Exercise of Buyer-Side Market Power” and the tariff references to intent in PJM’s attestation process is unjust and unreasonable, and further represents a departure from its own established precedent without any reasoned explanation.** *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A), *Motor Vehicle Manufacturers Association*, 463 U.S. 29, 43 (1983); *Hatch*, 654 F.2d 825, 834 (D.C. Cir. 1981).
- 3. PJM’s attestation process for buyer-side market power does not afford a meaningful ability to review offers and is, therefore, unjust and unreasonable.** *See Public Citizen v. Federal Energy Regulatory Commission*, 7 F.4th 1177 (D.C. Cir. 2021); *New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*,

⁶⁷ *See* Statement of Commissioner Danly at paragraph 8.

757 F.3d 283, 291 (D.C. Cir. 2014); *California Independent System Operator Corp.*, 126 FERC ¶ 61150, ¶71 (2009).

- 4. PJM’s exemption of state legacy policies from buyer-side market power review lacks any quantifiable data regarding the effects of that exemption on the markets, flouts controlling legal precedent, and is, therefore, unjust and unreasonable.** See, e.g., *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1296 (2016), *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 100 (3d Cir. 2014); *Elec. Power Supply Ass. v. Star*, 904 F.3d 518, 524 (7th Cir. 2018); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 253-54 (3d Cir. 2014); *Ameren Services. Co. v. Federal Energy Regulatory Commission*, 880 F.3d 571, 581 (D.C. Cir. 2018); *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168 (1962).
- 5. PJM’s unit-specific exemption is unjust and unreasonable because it lacks consistent criteria and could allow market participants to evade proper review.** See *Public Citizen v. Federal Energy Regulatory Commission*, 7 F.4th 1177 (D.C. Cir. 2021); *New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*, 757 F.3d 283, 291 (D.C. Cir. 2014); *California Independent System Operator Corp.*, 126 FERC ¶ 61150, ¶71 (2009).
- 6. PJM’s proposed attestation process for state supported resources is unjust and unreasonable absent the Commission’s directive to provide visibility of the attestations to all market participants, regulators, and interested parties.** See *Public Citizen v. Federal Energy Regulatory Commission*, 7 F.4th 1177 (D.C. Cir. 2021); *New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*, 757 F.3d 283, 291 (D.C. Cir. 2014); *California Independent System Operator Corp.*, 126 FERC ¶ 61150, ¶71 (2009).
- 7. The Commission’s failure to issue an order—thus allowing PJM’s filing to go into effect by operation of law—is not an action of the Commission or an application of the law by the Commission.** See *Public Citizen, Inc. v. Federal Energy Regulatory Commission*, 7 F.4th 1177, 1196 (D.C. Cir. 2021); *Public Citizen, Inc. v. Federal Energy Regulatory Commission*, 839 F.3d 1165, 1169 (D.C. Cir. 2016); *Utility Workers Union of America Local 464 v. Federal Energy Regulatory Commission*, 896 F.3d 573, 576 (D.C. Cir. 2018).
- 8. The Commission’s failure to issue an order accepting or denying PJM’s proposed tariff changes, thus giving effect of PJM’s tariff filing, is arbitrary and capricious and represents a departure from**

established precedent without any reasoned explanation. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A), *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983); *Hatch v. Federal Energy Regulatory Commission*, 654 F.2d 825, 834 (D.C. Cir. 1981).

- 9. The Commission has failed to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.** *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168 (1962); See 5 U.S.C. § 706(2)(E); 16 U.S.C. § 8251(b); *TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 4 (D.C. Cir. 2015); *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071, at P 61 (2014); *Southwest Power Pool, Inc.*, 147 FERC ¶ 61,201, at P 141 (2014); *ISO New England Inc.*, 118 FERC ¶ 61,224, at P 11 (2007); *ISO New England Inc.*, 113 FERC ¶ 61,055, at P 28 (2005).
- 10. The Commission has failed to meet its ongoing obligation to deliver a wholesale electricity market that is based on actual competition and has strong measures in place to prevent anti-competitive market behavior.** See *Public Citizen v. Federal Energy Regulatory Commission*, 7 F.4th 1177 (D.C. Cir. 2021) (*Public Citizen*); *New England Power Generators Association, Inc. v. Federal Energy Regulatory Commission*, 757 F.3d 283, 291 (D.C. Cir. 2014); *California Independent System Operator Corp.*, 126 FERC ¶ 61150, ¶71 (2009).

IV. CONCLUSION

The PAPUC and PUCO respectfully request that our joint petition for rehearing be granted. We urge the Commission to reject PJM's Proposal and institute a new 206 proceeding, consistent with the recommendations contained herein.

Respectfully submitted,

/s/ Aspasia V. Staevska

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**On Behalf of The Public Utilities
Commission of Ohio**

Dated: October 28, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have on this date caused a copy of the foregoing document to be served on each person included on the official service list maintained for this proceeding by the Commission’s Secretary, by electronic mail or such other means as a party may have requested, in accordance with Rule 2010 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.2010. Dated this the 28th day of October 2021, at Columbus, Ohio.

/s/ Thomas G. Lindgren _____

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Assistant Attorney General