

**PUBLIC VERSION  
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MATERIALS HAVE BEEN REMOVED PURSUANT TO 18 C.F.R. § 388.112**

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

<b>Affirmed Energy LLC,</b>	)	
	)	
v.	)	<b>Docket No. EL24-124-000</b>
	)	
<b>PJM Interconnection, L.L.C.</b>	)	

**ANSWER OF PJM INTERCONNECTION, L.L.C.**

In accordance with Rule 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (Commission),<sup>1</sup> and the Commission’s Notice issued in this proceeding on October 30, 2024, PJM Interconnection, L.L.C. (PJM) submits this Answer to the Emergency Complaint Requesting Fast Track Processing (Complaint) filed by Affirmed Energy LLC (Affirmed) on July 5, 2024.<sup>2</sup> Affirmed alleges that PJM’s retention of \$93M in Restricted Collateral<sup>3</sup> that was posted by Affirmed in 2023 to address Affirmed’s performance risk in PJM Markets was not consistent with PJM’s Tariff and was unjust and unreasonable under Section 206 of the Federal Power Act (FPA).<sup>4</sup> Affirmed’s Complaint lacks any merit, and the Commission should deny it for the reasons set forth in this Answer and in the Affidavit of Dr. Carl F. Coscia, Ph. D., PJM’s Vice President and Chief Risk Officer, appended hereto in Exhibit A.

Affirmed is an Energy Efficiency (EE) Resource provider in PJM’s capacity market. PJM holds **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in Collateral, most of which is

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<sup>1</sup> 18 C.F.R. §§ 385.213 (2023).

<sup>2</sup> *Affirmed Energy LLC v. PJM Interconnection, L.L.C.*, Docket No. EL24-124-000, Emergency Complaint Requesting Fast Track Processing at 1, 2 (July 5, 2024) (Complaint).

<sup>3</sup> Capitalized terms used herein have the meaning set forth in the PJM Open Access Transmission Tariff (Tariff) and Governing Documents.

<sup>4</sup> *See* Complaint at 1, 2.

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Restricted Collateral, from Affirmed as of October 31, 2024.<sup>5</sup> PJM required this Restricted Collateral in Collateral Call Notices that PJM made<sup>6</sup> after determining that Affirmed posed an “unreasonable credit risk” to PJM Markets under the terms of its Tariff.<sup>7</sup> Affirmed seeks to recover \$93M of that Restricted Collateral because, in Affirmed’s view, that money was related solely to Affirmed’s capacity delivery obligations for Delivery Year 2023/2024, which ended on May 31, 2024.<sup>8</sup> In addition, Affirmed claims that PJM lacked adequate grounds to make the determination that Affirmed presented an “unreasonable credit risk.”<sup>9</sup> Both of these arguments are incorrect.

First, PJM continues to require Affirmed’s Collateral to support Affirmed’s continued participation in PJM’s markets, including new capacity obligations Affirmed acquired for the 2025/2026 Delivery Year after Affirmed filed its Complaint. Affirmed’s Collateral obligation was in excess of the amount of Collateral that PJM held when Affirmed sought the recovery of Collateral and will be even more deficient by the end of the current Delivery Year. PJM may hold Restricted Collateral to secure performance of any of Affirmed’s obligations for as long as the identified risks persist.<sup>10</sup> Moreover, Affirmed must post approximately **BEGIN CUI//PRIV-HC**

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<sup>5</sup> PJM Ex. A, Aff. of Carl Coscia at P 5 (Coscia Aff.).

<sup>6</sup> See August 18, 2023 E-mail from Carl Coscia to Luke Fishback, *et al.*, Complaint, Ex. A at 8 (August 18, 2023 Collateral Call Notice); PJM Ex. B, February 28, 2024 E-Mail from Carl Coscia to Luke Fishback, *et al.*, at 1 (February 28, 2024 Collateral Call).

<sup>7</sup> Tariff, Attach. Q § II.E.8.

<sup>8</sup> See Complaint at 8-9.

<sup>9</sup> See *id.* at 10-14.

<sup>10</sup> See Tariff, Attach Q § II.F (“PJM may establish certain restrictions on available credit by requiring that some amounts of credit, i.e. Restricted Collateral, may not be available to satisfy credit requirements. Such designations shall be construed to be applicable to the calculation of credit requirements only, and shall not restrict PJM’s ability to apply such designated credit to any obligation(s) in case of a default.”). In addition, the Stipulation and Standstill Agreement filed in this proceeding provides that the Collateral currently held by PJM to secure Affirmed’s obligations “may be used to satisfy deficiencies for audits of Affirmed Energy’s Efficiency programs for any Delivery Year that are not otherwise satisfied.” *Affirmed Energy LLC v. PJM Interconnection*,

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██████ **END CUI//PRIV-HC** of *additional* Restricted Collateral to support its capacity obligations for the current Delivery Year to remain compliant with PJM’s credit requirements going forward.<sup>11</sup>

Second, PJM had very strong grounds to determine that Affirmed represented, and continues to represent, an “unreasonable credit risk.” As PJM explained in its Collateral Call Notices and related notices to Affirmed, PJM originally determined that Affirmed represented an “unreasonable credit risk” in August 2023 based on a combination of factors: (i) the significant size of Affirmed’s capacity market position for the 2023/2024 Delivery Year; (ii) the pendency of a FERC Office of Enforcement investigation into Affirmed’s market practices, including the eligibility of the EE MW it cleared in PJM Capacity Auctions; and (iii) Affirmed’s thin capitalization and low unsecured credit availability. Based on these factors, PJM determined that “an adverse outcome for Affirmed at FERC would pose a substantial danger to Affirmed’s financial viability.”<sup>12</sup> Or, as PJM later explained, “any material amount imposed by FERC would likely render Affirmed insolvent and in default on its obligations to PJM.”<sup>13</sup> These risks still persist because the investigation continues and the potential penalties greatly exceed Affirmed’s assets. Indeed, other significant factors have emerged that further support PJM’s decision. These include, for example, a complaint filed by the Independent Market Monitor (IMM) for PJM that challenges

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*L.L.C.*, Docket No. EL24-124-000, Joint Motion to Stay Proceedings And Request For Confidential Treatment of PJM Interconnection, L.L.C. and Affirmed Energy LLC, Ex. A, Stipulation and Standstill Agreement (July 15, 2024) (Standstill Agreement).

<sup>11</sup> *See* *Coscia Aff.* at P 11.

<sup>12</sup> August 18, 2023 Collateral Call Notice at 8.

<sup>13</sup> Complaint, Ex. A June 6, 2024 Response to UCR and Status at 2.

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the lawfulness of Affirmed’s past and current participation as an EE Resource provider in PJM,<sup>14</sup>  
a finding by Affirmed’s auditors **BEGIN CUI//PRIV-HC** [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] **END CUI//PRIV-HC** and a determination by Affirmed’s lender to restrict its  
liquidity.<sup>16</sup>

Affirmed argues that PJM’s determination of an “unreasonable credit risk” was incorrect because Affirmed claims PJM may only consider a narrow set of factors expressly enumerated in the Tariff.<sup>17</sup> That is not true. Tariff Attachment Q, section II.D unequivocally states that PJM’s analysis is “*not* limited to” the factors Affirmed lists in its Complaint.<sup>18</sup> Furthermore, Commission precedent squarely holds that PJM has broad flexibility in making this determination and may consider the totality of the circumstances because “it is impractical to enumerate all of the examples that constitute an unreasonable credit risk, as doing so may unnecessarily limit when an RTO can act to protect its wholesale markets and market participants to only those specified instances enumerated in the tariff.”<sup>19</sup>

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<sup>14</sup> See *Indep. Market Monitor for PJM v. Indicated Energy Efficiency Suppliers*, Docket No. EL24-113-000, Complaint of the Independent Market Monitor for PJM (May 31, 2024).

[REDACTED]

<sup>16</sup> PJM Ex. C, Affirmed Energy LLC, Financial Statements as of and for the years ended December 31, 2023 and 2022 and Independent Auditor’s Report at 18; PJM Ex. D, Affirmed Energy LLC, Financial Statements as of and for the years ended December 31, 2022 and 2021 and independent Auditor’s Report at 17; see *Coscia Aff.* at P 19; see *infra* Part II.C (discussing these additional factors).

<sup>17</sup> See Complaint at 10-11.

<sup>18</sup> See Tariff, Attach. Q § II.D (emphasis added).

<sup>19</sup> *PJM Interconnection, LLC*, 171 FERC ¶ 61,173, at P 36 (2020).

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Affirmed also claims PJM cannot reasonably consider the impact of the Enforcement investigation because a final ruling will be “temporally remote” given Affirmed’s stated intention to take advantage of all available legal options to challenge an adverse Commission decision.<sup>20</sup> That position is ludicrous. FERC investigations constitute a Material Adverse Change under the Tariff<sup>21</sup> and PJM is required to evaluate the risk profile of a Market Participant that experiences a Material Adverse Change.<sup>22</sup> It is not unreasonable for PJM to examine whether an investigation by the Office of Enforcement could result in potential penalties that significantly exceed Affirmed’s assets, thus exposing PJM and other Market Participants to the risk of default by Affirmed. The mere assertion of an intent to exercise legal rights common to any FERC Enforcement target is not some sort of talismanic “safe harbor” that exempts an investigation from consideration in PJM’s credit risk analysis.

Affirmed’s claim that PJM has taken “punitive actions against Affirmed”<sup>23</sup> is also completely unfounded. PJM has properly exercised its responsibilities under Tariff Attachment Q to protect PJM Markets and PJM Market Participants. To the extent that Affirmed is experiencing financial difficulties, those circumstances are of its own making. In fact, Affirmed has taken deliberate steps to impoverish itself.<sup>24</sup> Affirmed has continued to follow its long-standing policy

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<sup>20</sup> Complaint at 10.

<sup>21</sup> Tariff, Attach Q § II.E.3(f) (defining Material Adverse Change to include, among other things, “the filing of a lawsuit or initiation of an arbitration, investigation, or other proceeding that would likely have a material adverse effect on any current or future financial results or financial condition or increase the likelihood of non-payment”).

<sup>22</sup> *Id.* § II.E.3 (“Upon identification of a Material Adverse Change, PJM shall evaluate the financial strength and risk profile of the Market Participant and/or its Guarantor at that time and may do so on a more frequent basis going forward.”).

<sup>23</sup> Complaint at 7.

<sup>24</sup> *See* *Coscia Aff.* at P 25.

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of maintaining minimal capitalization and has not set aside any funds to address its potential FERC liabilities.<sup>25</sup> Affirmed is entitled to make its own business decisions but when those business decisions impose extraordinary default risks on PJM’s customers, PJM has a duty to act.

Finally, Affirmed’s insistence that the Complaint should be given fast track treatment was not supported in its Complaint because Affirmed did not adequately substantiate its claim of “imminent . . . harm.”<sup>26</sup> Further, its assertion that “Affirmed . . . cannot continue its business of offering energy efficiency into PJM’s capacity market”<sup>27</sup> is contradicted by the fact that, subsequent to the filing of the Complaint, Affirmed did participate in the Base Residual Auction for the 2025/2026 Delivery Year and cleared sufficient capacity to be entitled to receive **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** in capacity revenues for that period. Accordingly, Affirmed’s request for fast track treatment should be rejected.

**I. BACKGROUND**

In 2023, PJM became concerned about the heightened risk posed by Affirmed as a result of the significant Performance Assessment Interval (PAI) bonus payments that were paid by PJM in association with Winter Storm Elliott. PJM had concerns about some Market Participants’ ability to repay the PAI bonus payments because a large number of complaints were filed by parties who faced Non-Performance Charges and those complaints requested refunds that bonus recipients like Affirmed would need to remit if the complaints were successful.<sup>28</sup> Consequently, PJM issued

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<sup>25</sup> *See id.*

<sup>26</sup> Complaint, Ex. B., Decl. of Fred Bo Clayton Jr. (Clayton Declaration) at P 10.

<sup>27</sup> *Id.* P 8.

<sup>28</sup> Ultimately, the Winter Storm Elliott complaints were resolved through an uncontested settlement that reduced Non-Performance Charges, and therefore Bonus payments, by approximately 30%. *See PJM Interconnection L.L.C., et al.*, 185 FERC ¶ 61,204 (2023). That outcome validated PJM’s concerns.

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unreasonable credit risk determinations to retain the PAI bonus payments for some Market Participants, including Affirmed. In 2023, PJM received information regarding initial findings by the Commission’s Office of Enforcement investigation into Affirmed’s EE Resource programs in PJM.<sup>29</sup> FERC enforcement staff’s initial findings regarding Affirmed constituted a Material Adverse Change under PJM’s Tariff, Attachment Q, which required PJM to act. The definition of a Material Adverse Change specifically includes, among other things, “the filing of a lawsuit or initiation of an arbitration, investigation, or other proceeding that would likely have a material adverse effect on any current or future financial results or financial condition or increase the likelihood of non-payment.”<sup>30</sup> Upon the occurrence of a Material Adverse Change impacting a Market Participant, PJM is required to evaluate the financial strength and risk profile of the Market Participant<sup>31</sup> and to make a determination as to whether circumstances warrant a determination that the Market Participant poses an “unreasonable credit risk.”<sup>32</sup> Upon making such a determination, PJM must “take steps to mitigate the financial exposure to the PJM Markets.”<sup>33</sup>

In accordance with the Tariff, PJM took action to evaluate Affirmed’s risk profile and ultimately declared Affirmed to be an “unreasonable credit risk.” PJM retained a portion of bonus payment amounts owed to Affirmed in connection with Winter Storm Elliott **BEGIN CUI//PRIV-  
HC—[REDACTED]—END CUI//PRIV-HC** as Restricted Collateral and demanded additional

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<sup>29</sup> FERC Office of Enforcement, Preliminary Findings Regarding the Investigation of Affirmed Energy (Midcontinent Energy LLC, Wylan Energy LLC and Affirmed Energy LLC) (July 14, 2023).

<sup>30</sup> Tariff, Attach Q § II.E.3(f).

<sup>31</sup> *Id.* § II.E.3.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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Restricted Collateral in two Collateral Call notices.<sup>34</sup> The first Collateral Call notice issued on August 18, 2023, and later amended on August 23, 2023, advised Affirmed that its participation in PJM Markets represented an “unreasonable credit risk” and demanded \$72.1M from Affirmed as Restricted Collateral.<sup>35</sup> PJM followed this with an additional Collateral Call Notice on November 17, 2023 confirming the determination made in the August 18, 2023 Collateral Call.<sup>36</sup> The second Collateral Call, issued on February 28, 2024, **BEGIN CUI//PRIV-HC** [REDACTED]

[REDACTED]  
[REDACTED] [REDACTED]  
[REDACTED]  
[REDACTED] **END CUI//PRIV-HC**

The Collateral Call notices gave similar explanations for PJM’s determination that Affirmed constituted an “unreasonable credit risk.” Three factors, in combination, supported PJM’s initial decision: (i) the significant size of Affirmed’s capacity market position for the 2023/2024 Delivery Year, which represented \$62.9M in expected capacity revenues and \$30.1M in potential Capacity Resource Deficiency Charges; (ii) the pendency of the FERC Office of Enforcement investigation into Affirmed’s market practices, including the eligibility of the EE

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<sup>34</sup> See *Coscia Aff.* at P 13.

<sup>35</sup> August 18, 2023 Collateral Call Notice at 1. PJM initially demanded \$75M in Collateral, but in a subsequent amendment to the August 18, 2023 Collateral Call Notice, reduced that figure to \$72.1M.

<sup>36</sup> See November 17, 2023 E-Mail from Carl Coscia to Luke Fishback, *et al.*, Complaint, Ex. A at 6 (November 17, 2023 Collateral Call Notice). The November 17, 2023 Notice also advised that the retained bonus payment amounts associated with Winter Storm Elliott were also being retained as Restricted Collateral. *See id.*

<sup>37</sup> [REDACTED]

<sup>38</sup> [REDACTED]



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MW it cleared in PJM RPM Auctions; and (iii) Affirmed’s thin capitalization, which reflected a tangible net worth of about \$500,000, and an RPM Seller Credit (unsecured credit) in excess of \$10M.<sup>39</sup> Based on these factors, PJM determined that “an adverse outcome for Affirmed at FERC would pose a substantial danger to Affirmed’s financial viability and thus an unreasonable credit risk for PJM.”<sup>40</sup> The Restricted Collateral demands were satisfied with monies already being held by PJM for Affirmed. This Restricted Collateral is the source of the \$93M that Affirmed is seeking to recover now.

Affirmed submitted Sell Offers for Energy Efficiency Resources in the RPM Auction for the Delivery Year 2024/2025 and cleared **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** The total Collateral amount associated with Affirmed’s obligations as of the end of the current Delivery Year, counting both Delivery Year payments and Capacity Resource Deficiency Charges, will be **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** This Collateral requirement is more than the total Collateral of **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** held by PJM at present, resulting in under-collateralization of approximately **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** Affirmed is receiving capacity payments related to this Delivery Year. Further, PJM has not demanded additional Collateral to support these obligations—which Affirmed has explained is not a realistic option, according to the

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<sup>39</sup> See August 18, 2023 Collateral Call Notice at 1. When the November 17, 2024 Collateral Call issued, Affirmed’s RPM unsecured credit level had fallen to \$9M. See November 17, 2024 Collateral Call at 1.

<sup>40</sup> August 18, 2023 Collateral Call Notice at 1. The November 17, 2023 Collateral Call Notice used slightly different terminology to convey the same points: “Affirmed’s entitlement to capacity revenues is at risk pending the outcome of the FERC investigation, posing a substantial danger to Affirmed’s financial viability and thus an unreasonable credit risk for PJM.” November 17, 2023 Collateral Call Notice at 1.

■ [REDACTED]  
■ [REDACTED]

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declaration of the company’s CEO attached to the Complaint.<sup>43</sup> Thus, requiring the full Collateral necessary from Affirmed would more likely than not force Affirmed to default, which would lead to terminating Affirmed as a Market Participant if Affirmed is unable to cure the default within the time period specified in the Operating Agreement.<sup>44</sup>

PJM provided an additional “unreasonable credit risk” notification to Affirmed on May 22, 2024, in which PJM reiterated its determinations as to Affirmed’s participation in the RPM Auction for Delivery Year 2025/2026.<sup>45</sup> In that notice, PJM identified three *additional* factors that contributed to PJM’s concerns related to Affirmed’s ongoing financial viability: (i) Affirmed’s notification to PJM that its lender was restricting Affirmed’s liquidity; (ii) the then-ongoing independent audit of Affirmed’s Energy Efficiency Program as related to the PJM Capacity Market; and (iii) Affirmed’s balance sheet and capitalization in relation to its PJM market activity.

Also, on May 22, 2024, the Commission’s Office of Enforcement issued a notice pursuant to 18 C.F.R. § 1b.19 indicating its recommendation to issue an Order to Show Cause why American Efficient LLC (Affirmed’s parent), should not be made the subject of a public enforcement proceeding for disgorgement and civil penalties.<sup>46</sup> Further, on May 31, 2024, the

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<sup>43</sup> See Clayton Declaration at P 8 (“Without a source of funding, Affirmed cannot post collateral.”).

<sup>44</sup> See Coscia Aff. at P 18; Operating Agreement §§ 15.1.5, 15.1.6.

<sup>45</sup> May 22, 2024 Email from Carl Coscia to Luke Fishback, *et. al.*, Complaint, Ex. A at 4 (May 22, 2024 UCR Notice).

<sup>46</sup> See *PJM Indep. Market Monitor*, Docket No. EL24-113-000, American Efficient LLC Response to Office of Enforcement 1b.19 Notice dated July 22, 2024 and American Efficient LLC Response to Office of Enforcement 1b.19 Notice dated July 22, 2024 Executive Summary (September 4, 2024). (collectively Affirmed Section 1b.19 Response.); May 22, 2024 OE Notice.

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PJM Independent Market Monitor initiated a Complaint at FERC against Affirmed and other companies challenging the eligibility of their EE Resources for capacity payments.<sup>47</sup>

Thereafter, on June 6, 2024, PJM responded to Affirmed's June 3, 2024 response to the May 22, 2024 UCR Notice. In that response, PJM explained its reasons for the determination that Affirmed posed an "unreasonable credit risk" as follows:

[Past capacity delivery] periods are subject to an ongoing investigation of Affirmed's activities during these periods by the FERC Office of Enforcement. When this enforcement activity is considered in connection thin capitalization, large posit[i]ons, and Affirmed's current inability to replenish any collateral that may be returned, PJM will continue to hold the current level [sic] collateral. Simply put, Affirmed has a going concern warning from its auditor and any material amount imposed by FERC would likely render Affirmed insolvent and in default on its obligations to PJM. PJM has broad authority to protect its members from such credit risk.<sup>48</sup>

It is noteworthy, as this notice indicates, that Affirmed advised PJM that it would be unable to replace any collateral amounts that PJM released. In addition, PJM requested Affirmed to provide a copy of the May 22, 2024 OE Notice.<sup>49</sup>

On June 3, 2024, Affirmed requested the return of the \$93M in Restricted Collateral associated with the earlier Collateral Call Notices. PJM notified Affirmed on June 26, 2024 that PJM had made its final "unreasonable credit risk" determination and informed Affirmed that PJM would not return the Restricted Collateral due to the risk factors it previously identified.<sup>50</sup>

Subsequently, PJM and Affirmed engaged in negotiations to enable Affirmed to participate in the RPM Auction for Delivery Year 2025/2026. This negotiation was ultimately successful and

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<sup>47</sup> *See Indep. Market Monitor for PJM v. PJM Interconnection L.L.C.*, Docket No. EL24-113-000, Complaint of the Independent Market Monitor for PJM (May 31, 2024) (IMM Complaint).

<sup>48</sup> Complaint, Ex. A, June 6, 2024 Final Unreasonable Credit Risk Determination and Status at 2 (June 6, 2024 Notice).

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* at 1.

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resulted in the Stipulation and Standstill Agreement (Standstill Agreement). Among other provisions, the Standstill Agreement specifies that “[t]he Collateral [currently held by PJM to secure Affirmed’s obligations] may be used to satisfy deficiencies for audits of Affirmed Energy’s Efficiency programs for any Delivery Year that are not otherwise satisfied.”<sup>51</sup> Based on these negotiations, Affirmed was permitted to participate in the RPM Auction for the 2025/2026 Delivery Year that commenced on July 17, 2024. Affirmed cleared **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in that auction. The total collateral needed to secure this obligation is **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** counting both the Delivery Year revenues and potential Capacity Resource Deficiency Charges.<sup>52</sup>

For the sake of clarity, in addition to the initial factors that supported PJM’s determination that Affirmed posed an “unreasonable credit risk,” PJM also identified the following factors that support this determination: (1) the May 22, 2024 OE Notice; (2) the May 31, 2024 IMM Complaint; (3) Affirmed’s Independent Financial Auditor finding that **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** (4) notification from Affirmed that its Lender has restricted the capital available to the company;<sup>54</sup> (5) findings of the Independent Audit of Affirmed Energy Efficiency Program for the 23/24 Delivery Year;<sup>55</sup> (6) Affirmed’s large capacity positions with minimal balance sheet;<sup>56</sup> (7) conversations

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<sup>51</sup> Standstill Agreement at P 5 (Use of Collateral).

[REDACTED]

[REDACTED]

<sup>54</sup> *See id.* Affirmed permitted PJM to engage directly with its Lender. *Id.* P 26.

<sup>55</sup> *See id.* PP 10, 19.

<sup>56</sup> *See id.* P 19

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with Affirmed management and counsel on February 13, 2024, February 14, 2024, February 20, 2024, including conversations with respect to Affirmed’s inability to post additional Collateral for participation in PJM’s markets;<sup>57</sup> and (8) potential Capacity Resource Deficiency Charges associated with the independent audit of Affirmed’s EE Program for the 2024/2025 Delivery Year.<sup>58</sup>

## **II. ARGUMENT**

### **A. PJM Properly Retained Collateral Submitted by Affirmed to Secure Affirmed’s Current Operational Risks**

Affirmed’s contention that PJM must return the \$93M in Restricted Collateral it submitted to cover its participation in the RPM Auction for Delivery Year 2023/2024 is based on the following Tariff provision:

Collateral which may no longer be required to be maintained under provisions of the Agreements, shall be returned at the request of a Participant, no later than two (2) Business Days following determination by PJM within a commercially reasonable period of time.<sup>59</sup>

Affirmed claims this provision controls because the \$93M amount submitted as Collateral is “no longer required.”<sup>60</sup> Affirmed asserts that this Collateral relates solely to its capacity obligations for the 2023/2024 Delivery Year, which has ended, and that Affirmed has “already fulfilled” its obligations.<sup>61</sup> Affirmed maintains that PJM must return the \$93M in Restricted Collateral because PJM does not need “protect[ion]’ . . . arising from a risk in the future” and because “the common

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<sup>57</sup> *See id.*

<sup>58</sup> *See id.*; Tariff, Attach. DD § 7.b.

<sup>59</sup> Complaint at 2 (citing Tariff, Attach. Q § V).

<sup>60</sup> *Id.* at 8.

<sup>61</sup> *Id.* at 8-9.

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function of ‘collateral’ across a variety of contexts is to guard against risk of default or non-performance.”<sup>62</sup>

But Affirmed’s argument ignores other pertinent Tariff provisions. The provision cited by Affirmed does not restrict PJM’s entitlement to retain Collateral solely for the purpose of securing performance of a single transaction. Rather, the provision refers to “Collateral . . . that [is] required to be maintained under provisions of the Agreements,”<sup>63</sup> which by its terms authorizes PJM to retain Collateral for *any* purpose specified in the Tariff. In this case, PJM properly retained these monies.

First, at the time Affirmed requested return of the Collateral, Affirmed already had an obligation to supply additional Collateral for its capacity commitments for the 2024/2025 Delivery Year and, since July 2024, Affirmed incurred more Collateral obligations related to its capacity obligations for the 2025/2026 Delivery Year. Second, because PJM designated the Collateral as “Restricted Collateral” to address the risks that Affirmed posed to the PJM Market, PJM must retain those monies until those risks have abated, which they have not. Third, PJM is expressly authorized by the Standstill Agreement to retain the Collateral to offset any deficiencies uncovered by on-going and future audits of the compliance of its EE Programs with PJM requirements.

**1. Affirmed is not Entitled to Return of the Collateral Because the Collateral Held by PJM Does Not Exceed Affirmed’s Collateral Obligations**

Affirmed is not entitled to recover its Collateral for the simple reason that at the time Affirmed sought recovery of the \$93M in June 2024, Affirmed was already obligated to supply

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<sup>62</sup> *Id.* at 9.

<sup>63</sup> Tariff, Attach. Q § V.

**BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in Collateral.<sup>64</sup> Moreover, Affirmed was on notice prior to the end of the 2023/2024 Delivery Year that it would be expected to provide Collateral to secure performance of its obligations in the 2024/2025 Delivery Year.<sup>65</sup> In addition, now that the period covered by the Standstill Agreement has ended, Affirmed will become responsible for further Collateral obligations related to its capacity obligations for the 2024/2025 Delivery Year. PJM estimates that as of May 31, 2025, PJM will need Collateral equal to **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC**.<sup>66</sup>

At present, the amount of Collateral held by PJM is significantly less than the total amount needed for Affirmed to be fully collateralized. The total **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in Collateral held by PJM for Affirmed, including the \$93M which is the subject of this Complaint, will secure a total current Collateral obligation of **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC**.<sup>67</sup> The monies held by PJM thus are only about **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** of Affirmed's Collateral requirements for the current Delivery Year.

**2. PJM Properly Designated the Collateral Provided by Affirmed in Response to PJM's Collateral Calls as "Restricted Collateral" to Secure Unresolved Credit Risks**

PJM is entitled under the Tariff to designate "available credit" under its control as Restricted Collateral when needed to address identified risks associated with a Market

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<sup>64</sup> Coscia Aff. at P 20 fig. 1.

<sup>65</sup> *See id.* P 19 (discussing "conversations with Affirmed's management and counsel on February 13, 2024, February 14, 2024, February 20, 2024, including conversations with respect to Affirmed's inability to post additional collateral for participation in PJM's markets"); November 17, 2023 Collateral Call Notice at 1 (discussing PJM's need "for Collateral to cover Affirmed's maximum penalties for the 23/24 and 24/25 BRA").

<sup>66</sup> Coscia Aff. at P 22 fig. 3.

<sup>67</sup> *Id.*

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Participant’s involvement in PJM-administered markets.<sup>68</sup> Amounts designated as Restricted Collateral are not related to specific transactions, but rather relate to particular risks associated with the Market Participant’s engagement with PJM. The Tariff states that “PJM may establish certain restrictions on available credit by requiring that some amounts of credit, *i.e.*, Restricted Collateral, may not be available to satisfy credit requirements.”<sup>69</sup> Further, “[s]uch Restricted Collateral will not be returned to the Participant until PJM has determined that the risk for which such Restricted Collateral is being held has subsided or been resolved.”<sup>70</sup>

PJM has previously explained the concept of holding Collateral to the Commission as follows:

The general idea is that collateral should be held for as long as the relevant risk presents itself to each RTO/ISO market and membership. Because the analysis of what that timeframe is will depend on many factors—including the type of products held, volume, position valuation, and type of collateral being used—it is appropriate for each RTO/ISO to have flexibility when making its determination to continue holding or release collateral of a market participant, within the parameters of the its own tariff.<sup>71</sup>

The Restricted Collateral provisions of PJM’s Tariff epitomize the concept “that collateral should be held for as long as the relevant risk presents itself to each RTO/ISO market and membership.” PJM has used this approach in making decisions regarding the Collateral it obtained from Affirmed.

PJM advised Affirmed in the August 18, 2023 Collateral Call Notice, amended on August 21, 2023, that Affirmed’s participation in PJM Markets represented an “unreasonable credit risk”

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<sup>68</sup> Tariff, Attach. Q § II.F.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *RTO/ISO Credit Principles and Practices et al.*, Docket No. AD21-6-000, *et al.*, Comments of PJM Interconnection, L.L.C. at 5-6 (June 7, 2021).



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and demanded \$72.1M from Affirmed as “Restricted Collateral.”<sup>72</sup> Similarly, PJM retained approximately **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in bonus payments related to Winter Storm Elliott as Restricted Collateral<sup>73</sup> and sought **BEGIN CUI//PRIV-HC** [REDACTED]

[REDACTED]  
[REDACTED] **END CUI//PRIV-HC**

PJM explained in the Collateral Call Notices that Affirmed represented an “unreasonable credit risk” and that Restricted Collateral needed to be supplied, because the risk of “an adverse outcome for Affirmed at FERC [Enforcement] would pose a substantial danger to Affirmed’s financial viability”<sup>75</sup> given its low net worth and low credit availability. **BEGIN CUI//PRIV-HC**

[REDACTED]  
[REDACTED] **END CUI//PRIV-HC** but the *risk* addressed in the notice was Affirmed’s “financial viability” due to the FERC Enforcement investigation and its weak finances. Because the investigation is still ongoing and Affirmed’s finances have not improved, this risk has not “subsided or been resolved.”<sup>77</sup> Accordingly, PJM must retain the \$93M in Restricted Collateral as credit support for fulfillment of outstanding obligation of Affirmed in PJM’s markets.<sup>78</sup> Further,

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<sup>72</sup> August 18, 2023 Credit Call Notice at 1.

<sup>73</sup> See November 17, 2023 Credit Call Notice at 1.

[REDACTED]

<sup>75</sup> August 18, 2023 Credit Call Notice at 1. The November 17, 2024 Collateral Call Notice related used slightly different wording, stating: “Affirmed’s entitlement to capacity revenues is at risk pending the outcome of the FERC investigation, posing a substantial danger to Affirmed’s financial viability and thus an unreasonable credit risk for PJM.” November 17, 2024 Collateral Call Notice at 1.

[REDACTED]

<sup>77</sup> *Coscia Aff.* at P 15; *see id.* PP 10-13.

<sup>78</sup> See Tariff Attach. Q § II.F (“Restricted Collateral will not be returned to the Participant until PJM has determined that the risk for which such Restricted Collateral is being held has subsided or been resolved.”). The Commission has found that retention of collateral is appropriate when

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since PJM provided the original Collateral Call Notices, PJM has identified additional risks that support the continued treatment of these monies as Restricted Collateral.<sup>79</sup>

PJM’s Tariff requires PJM to retain the \$93M in Restricted Collateral that Affirmed is seeking to recover for as long as this Collateral is needed to secure Affirmed’s performance of obligations whose satisfaction is jeopardized by the risks PJM has identified.<sup>80</sup> When Affirmed requested PJM to return its Restricted Collateral on June 3, 2024, Affirmed had an existing Collateral obligation of **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC**.<sup>81</sup> In addition, Affirmed already had an obligation to supply **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** of capacity for Delivery Year 2024/2025. The total Collateral amount associated with that obligation, counting both Delivery Year payments and Capacity Resource Deficiency Charges, at present, is **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC**.<sup>82</sup> Because the risks that the \$93M in Restricted Collateral was addressing were still present on June 3, 2024, PJM was entitled to retain that Collateral to secure performance of Affirmed’s obligations.

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authorized by a Tariff pending a final determination of the market participant’s obligations. *See e.g., Constellation Energy Commodities Grp., Inc. v. FERC*, 457 F.3d 14, 21 (D.C. Cir. 2006) (upholding determination that ISO could retain collateral when “consistent with both the text of [the tariff], which nowhere limits which liabilities must be collateralized, and the general purpose of the provision requiring that market transactions be secured”); *La Paloma Generating Co., LLC*, 110 FERC ¶ 61,386, at P 12 (2005) (denying complaint seeking return of collateral that “was posted . . . in accordance with the CAISO tariff requirement that [certain entities] provide an acceptable form of credit support to cover all applicable outstanding and estimated liabilities”).

<sup>79</sup> *See* *Coscia Aff.* at P 19.

<sup>80</sup> *See* Tariff Attach. Q § II.F (“Restricted Collateral will not be returned to the Participant until PJM has determined that the risk for which such Restricted Collateral is being held has subsided or been resolved.”).

<sup>81</sup> *Coscia Aff.* at P 13, 21.

<sup>82</sup> *Coscia Aff.* at P 20 fig. 1.

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PJM serves as the Risk Manager of its markets and is uniquely positioned to evaluate the risks posed by Market Participant actions. PJM has discretion to determine the commercial reasonableness of the return of a Market Participant's Collateral within the requirements of its Tariff.<sup>83</sup> PJM has considered the many and ongoing risk factors related to Affirmed's EE Program and Affirmed's future viability as an ongoing business. PJM concluded that, based on the criteria identified in its Tariff, it would be prudent to *fully* collateralize all of Affirmed's obligations in order to protect PJM and PJM Market Participants from the risk of default. As explained by Dr. Coscia:

Full collateralization of capacity obligations is the risk mitigation method to protect PJM from a potential default. This method of risk management requires Affirmed to post Collateral roughly equivalent to their exposure to minimize the losses resulting from an event of default. The calculation of the Collateral amount also includes the Capacity Resource Deficiency Charges that would be payable under PJM Tariff Attachment DD.<sup>84</sup>

Thus, because the risks faced by Affirmed could individually and collectively result in insolvency, full collateralization is the most reasonable approach.

To be clear, the risk of default by Affirmed is only *partially* mitigated at this time because PJM currently lacks full collateralization. The amount needed to fully collateralize Affirmed's

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<sup>83</sup> See Tariff, Attach. Q § II ("PJM will conduct a risk evaluation to determine eligibility to become and/or remain a Market Participant or Guarantor that . . . determines appropriate levels of Collateral."); *id.* § II.E.8 ("If PJM has reasonable grounds to believe that a Market Participant and/or its Guarantor poses an unreasonable credit risk to any PJM Markets, PJM may immediately notify the Market Participant of such unreasonable credit risk and . . . issue a Collateral Call to demand Collateral."); *id.* ("PJM has the right at any time to modify any Unsecured Credit Allowance and/or require additional Collateral as may be deemed reasonably necessary to support current or anticipated market activity as set forth in Tariff."); *id.* § II.H ("Neither requesting reconsideration nor contesting the determination [that the Unsecured Credit or credit requirements of a Market Participant is changed] shall relieve or delay Participant's responsibility to comply with all provisions of this Attachment Q, including without limitation posting Collateral, additional Collateral or Restricted Collateral in response to a Collateral Call.").

<sup>84</sup> Coscia Aff. at P 17.

capacity obligation for Delivery Year 2024/2025 is **BEGIN CUI//PRIV-HC [REDACTED]**<sup>85</sup> **END CUI//PRIV-HC**. Further, the amount needed to fully collateralize Affirmed’s capacity obligations will be **BEGIN CUI//PRIV-HC [REDACTED]** **END CUI//PRIV-HC** as of May 2025.<sup>86</sup> PJM is currently holding only **BEGIN CUI//PRIV-HC [REDACTED]** **END CUI//PRIV-HC** in Collateral compared with these needs. PJM calculates that an additional of approximately **BEGIN CUI//PRIV-HC [REDACTED]** **END CUI//PRIV-HC** of Collateral is required to support Affirmed’s *current* Collateral obligations.<sup>87</sup> Notwithstanding the Restricted Collateral that PJM holds, PJM thus is currently under-collateralized and anticipates that it will be even more acutely under-collateralized in the future.<sup>88</sup>

**3. Affirmed Has Agreed that PJM Can Utilize the Retained Collateral to Satisfy any Deficiencies Identified in Audits of Affirmed’s Energy Efficiency Programs**

The Reliability Assurance Agreement allows PJM to institute an audit at any point during a given Delivery Year.<sup>89</sup> PJM retained an independent firm to perform an audit of Affirmed’s Measurement & Verification (M&V) plans submitted to PJM for Delivery Years 2023/2024 and 2024/2025.<sup>90</sup>

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<sup>85</sup> *Id.* P 20 fig. 1.

<sup>86</sup> *Id.* P 22 fig. 3.

<sup>87</sup> *See id.* PP 5, 22 fig. 2.

<sup>88</sup> *See id.* P 20 (“Collateral amounts will change and PJM calculates that Affirmed will be required to post additional Collateral with PJM.”).

<sup>89</sup> *See* RAA, Sched. 6, § L.7; Tariff, Attach. DD-1, § L.7.

<sup>90</sup> *See* Coscia Aff. at P 19; *see* Tariff, Attach. DD-1, L7(“The Office of the Interconnection may audit, at the capacity Market Seller’s expense, any Energy Efficiency Resource committed to the PJM Region.”).

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During the pendency of these audits, PJM is authorized to retain the Collateral. On July 12, 2024, Affirmed and PJM entered into the Standstill Agreement concerning this Complaint.<sup>91</sup> Among other things, the Standstill Agreement provides that “[t]he Collateral [currently held by PJM to secure Affirmed’s obligations] may be used to satisfy deficiencies for audits of Affirmed Energy’s Efficiency programs for any Delivery Year that are not otherwise satisfied.”<sup>92</sup> The existence of an on-going audit of Affirmed’s EE Programs for Delivery Year 2024/2025 thus provides an additional basis to retain the Restricted Collateral.

**B. PJM Properly Determined That Affirmed Presented an “Unreasonable Credit Risk”**

Affirmed claims that PJM lacked an adequate basis to determine that Affirmed presented an “unreasonable credit risk” to PJM Markets. According to Affirmed, PJM failed to make “a careful, reasoned assessment of the likelihood of [its] default.”<sup>93</sup> On the contrary, PJM fully complied with the requirements of the Tariff by making a reasonable and well-supported determination, explained in the Collateral Call notices and updates, that there was a “substantial danger to Affirmed’s financial viability.”<sup>94</sup> Moreover, since that time, PJM has become aware of additional information that buttresses this determination.

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<sup>91</sup> The Standstill Agreement was filed with the Commission as an exhibit to the Joint Motion to Stay Proceedings and Request for Confidential Treatment of PJM Interconnection, L.L.C. and Affirmed Energy LLC filed in this docket on July 15, 2024.

<sup>92</sup> Standstill Agreement at P 5 (Use of Collateral).

<sup>93</sup> Complaint at 11.

<sup>94</sup> August 18, 2023 Collateral Call Notice at 1; November 17, 2023 Collateral Call Notice at 1, *see* May 22, 2024 UCR Notice at 1 (discussing “PJM’s concerns regarding Affirmed’s ongoing financial viability and ability to meet its existing obligations”).

**1. PJM Has Broad Discretion Under its Tariff to Determine When a Market Participant Poses an Unreasonable Credit Risk**

Affirmed claims that “[t]he Tariff’s express ‘indicators’ of what may constitute an ‘unreasonable credit risk’ confirm why it is implausible to conclude that a non-final, staff-level investigation creates ‘unreasonable credit risk.’”<sup>95</sup> Affirmed claims that most of the expressly enumerated factors that PJM may consider are “concrete, discernable past events” that are not present here.<sup>96</sup> It also claims that “there is no non-speculative basis” to apply a forward looking factor specifically identified in the Tariff, *i.e.*, “a reasonably likely future material liability,” to Affirmed.<sup>97</sup> But Affirmed’s contentions fail.

First, Affirmed fails to acknowledge that the enumerated provisions identified in the Tariff are not exhaustive. The Tariff expressly states that “[i]ndicators of potential unreasonable credit risk include, *but are not limited to*” the factors listed in the Tariff.<sup>98</sup> The standard to which PJM is held in its Tariff is whether “PJM has *reasonable grounds* to believe that a Market Participant and/or its Guarantor poses an unreasonable credit risk to any PJM Markets.”<sup>99</sup> Further, the Commission has found that PJM may consider the totality of the circumstances in making a determination of an “unreasonable credit risk” under the provisions of its Tariff:

In addition to using specific factors and indicators set forth in its tariff, PJM will use its discretion, based on all circumstances at the time, in determining whether there is an unreasonable credit risk. As the Commission has previously recognized, it is impractical to enumerate all of the examples that constitute an unreasonable credit risk, as doing so may unnecessarily limit when an RTO can act to protect its

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<sup>95</sup> Complaint at 10.

<sup>96</sup> *Id.* at 11.

<sup>97</sup> *Id.*

<sup>98</sup> Tariff, Attach. Q § II.D (emphasis added).

<sup>99</sup> *Id.* § II.E.8 (emphasis added).

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wholesale markets and market participants to only those specified instances enumerated in the tariff.<sup>100</sup>

In short, Affirmed’s cramped reading contradicts the plain language of the Tariff and Commission precedent.

Second, Affirmed stretches the limits of credible argument when it claims that PJM cannot consider the possibility of a determination by FERC Enforcement adverse to Affirmed as a “future material financial liability.”<sup>101</sup> According to Affirmed, the possibility of an adverse determination by FERC having financial consequences to the company is a “temporally remote outcome[.]”<sup>102</sup> The Complaint then recounts all of the potential steps available to an entity that is subject to a FERC Enforcement investigation and concludes that “any final penalty or other enforceable remedy against Affirmed, if there ever were one, would be years away, and would require Affirmed to lose completely in multiple fora, including this Commission, the district court, and an appellate court.”<sup>103</sup>

The term “final penalty” is doing a lot of work in that claim: it is the *assessment* of a penalty at any time before Affirmed exits PJM’s markets that concerns PJM. Affirmed’s

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<sup>100</sup> *PJM Interconnection, LLC*, 171 FERC ¶ 61,173, at P 26 (2020) (footnote omitted); see *N.Y. Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,054, at P 32 (2020) (“[W]e find that it is impractical and undesirable to list all examples that constitute an unreasonable credit risk and limit NYISO to act to protect the wholesale markets only in specific instances enumerated in the tariff.”); *Midcontinent Indep. Sys. Operator, Inc.*, 170 FERC ¶ 61,257, at PP 4, 8 (2020) (accepting tariff provision authorizing determination of “unreasonable credit risk . . . identified based on, but not limited” to certain indicators); *Credit Reforms in Organized Wholesale Electric Markets*, Order No. 741, 133 FERC ¶ 61,060, at P 147 (2010) (stating that the “list of conditions [under which an RTO/ISO would request additional collateral due to a material adverse change] should not be exhaustive and should allow the RTO/ISO to use their discretion to requesting additional collateral in response to unusual or unforeseen circumstances”).

<sup>101</sup> Complaint at 11.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.* at 13.

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opportunity to drag out, mitigate, or avoid such a Commission penalty assessment in subsequent litigation has no bearing on whether Affirmed faces a material risk to its financial survival *now*. A recitation of Affirmed’s due process protections, which are common to any target of government enforcement, is a distracting bromide that is beside the point. Every defendant must “lose completely in multiple fora” before the conviction or penalty they face is final. The duration of litigation says nothing conclusive about the merits of either side’s case or whether the prospect of extensive future litigation reduces either side’s litigation risk. PJM acknowledges the optimism Affirmed projects when it questions “if there ever” will be a “final penalty” in the future,<sup>104</sup> but PJM is not obliged to accept that perspective.

The Commission would be setting a dangerous precedent if it were to accept Affirmed’s argument. Every market participant has an opportunity to appeal an adverse ruling on an enforcement matter. Should this become a shield to examining the risk of a penalty, virtually every market participant facing an investigation can continue in the markets, expose other market participants to the risk of their default and then exit the market once the Enforcement ruling becomes final. PJM knows of no credit entity that is forced to close its eyes to an examination of risk resulting from enforcement and penalty proceedings. Such an approach would frustrate the very purpose of sound credit analyses and policies.

The material risk of a penalty that threatens Affirmed’s survival is, in itself, a sufficient basis to retain Affirmed’s Collateral as well as to increase it. And, as PJM has noted, the FERC Enforcement investigation is hardly the only indicator of the risks that Affirmed presents. PJM’s sole concern in holding Affirmed’s Collateral is to control the risk that Affirmed represents to PJM’s markets for so long as Affirmed continues to participate in them. And because Affirmed

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<sup>104</sup> *Id.* at 10.



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cleared Capacity in Delivery Year 2025/2026, it now has obligations in PJM Markets extending until May 2026.

**2. PJM Reasonably Determined, Based on the Totality of the Circumstances, that Affirmed Represented an “Unreasonable Credit Risk”**

Affirmed’s claim that PJM failed to undertake a “careful, reasoned assessment of the likelihood of [its] default”<sup>105</sup> is unsupported and also wrong. PJM reasonably determined that Affirmed’s situation posed an “unreasonable credit risk” based on the totality of the circumstances.

First, Affirmed wrongly claims that PJM’s determination relied almost entirely on the pending FERC Enforcement investigation, contending that “OE’s investigation drives PJM’s ‘unreasonable credit risk’ determination.”<sup>106</sup> Affirmed largely ignores another important factor that lead to PJM’s original determination that Affirmed represented an “unreasonable credit risk”—namely Affirmed’s weak finances<sup>107</sup> and “thin capitalization.”<sup>108</sup> But PJM considered these two considerations together in making its initial decision, as well the level of Affirmed’s obligations in the PJM Market.<sup>109</sup>

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<sup>105</sup> *Id.* at 11.

<sup>106</sup> *Id.* at n. 21.

<sup>107</sup> *See* May 22, 2024 UCR Notice at 1 (discussing “PJM’s concerns . . . including . . . Affirmed’s balance sheet and capitalization in relation to its PJM market activity”); August 18, 2023 Collateral Call Notice at 1 (“Affirmed’s balance sheet reflects a tangible net worth of less than \$500,000, and its RPM Seller Credit (unsecured credit) is in excess of \$10M.”); November 17, 2023 Collateral Call Notice at 1 (“Affirmed’s balance sheet reflects a tangible net worth of less than \$500,000, and its RPM Seller Credit (unsecured credit) is in excess of \$9M.”).

<sup>108</sup> June 6, 2024 Notice at 1.

<sup>109</sup> *See id.* (noting concern with Affirmed “large positions”); May 22, 2024 UCR Notice at 1 (discussing “PJM’s concerns . . . including . . . Affirmed’s balance sheet and capitalization in relation to its PJM market activity”).

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FERC Enforcement could find that a substantial portion of the Energy Efficiency resources cleared by Affirmed as capacity was not compliant with the requirements of the PJM Tariff. If that occurred, Affirmed would likely be required to disgorge all of the capacity payments associated with the disallowed MWs and pay a substantial Civil Penalty. The amount of such a disgorgement and civil penalty could easily exceed, by many times, Affirmed’s capitalization of only \$500,000.<sup>110</sup> As the August 18, 2023 Collateral Call Notice explained, “Affirmed is due to receive approximately \$62.9M in capacity revenues during the 2023/24 BRA Delivery Year, and Affirmed’s entitlement to such revenues is in jeopardy pending the outcome of the FERC investigation.”<sup>111</sup> Assuming that half of Affirmed’s EE resources that cleared in that auction were disallowed, Affirmed would have a disgorgement obligation of at least \$31.4M *plus* a potential civil penalty obligation. With only \$500,000 in capitalization, in these circumstances, Affirmed could file for bankruptcy protection and abrogate all of its outstanding obligations in PJM markets. PJM’s determination that there was a “substantial danger to Affirmed’s financial viability” thus was both reasonable and fully explained to Affirmed in the Collateral Call notices and related documents.

Further, based on the information that PJM currently possesses, the possibility that a substantial portion of Affirmed’s EE MW could be disallowed by FERC Enforcement cannot simply be brushed aside. Affirmed has stated that the allegations made in the IMM Complaint which is seeking the disallowances of all EE MW submitted by upstream and mid-stream EE Resource suppliers “*are identical to the crux of the allegations made by Office of Enforcement*

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<sup>110</sup> November 17, 2023 Collateral Call Notice at 1; August 18, 2023 Collateral Call Notice at 1.

<sup>111</sup> August 18, 2023 Collateral Call Notice at 1.

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*staff.*<sup>112</sup> While PJM did not support the IMM’s complaint, the potential for a substantial share of Affirmed’s EE MW to be disallowed on the grounds alleged by the PJM Market Monitor is not an entirely remote possibility. As stated in PJM’s response to the IMM Complaint:

While PJM maintains that prior review processes have been compliant with the requirements of the Governing Documents, additional review by an independent third party that specializes in EE, which itself is contemplated in the Governing Documents, is appropriate in light of the Market Monitor’s Complaint. These audits will confirm or amend the final Nominated EE Value and Capacity Performance value for the EE Resources that comprise the Indicated Energy Efficiency Sellers’ portfolios for the 2024/25 Delivery Year.<sup>113</sup>

Accordingly, PJM considered the IMM’s claims to be sufficiently meritorious to justify audits and noted that the audits could result in reductions to EE capacity values “potentially to zero.”<sup>114</sup>

Second, as shown above, Affirmed’s claim that the impact of the FERC Enforcement case will be “temporally remote” also lacks merit. PJM has explained that it cannot reasonably assume there will not be impacts from the FERC Enforcement investigation in the foreseeable future. This is especially so given that Affirmed currently has capacity market obligations extending to May 2026. Moreover, both the FERC Enforcement investigation and the IMM Complaint challenge

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<sup>112</sup> *PJM Indep. Market Monitor*, Docket No. EL24-113-000, Letter of Sudeen Kelly to Hon. Willie Phillips, *et. al.*, at 1 (June 18, 2024) (emphasis in original).

<sup>113</sup> *Indep. Market Monitor for PJM v. PJM Interconnection L.L.C.*, Docket No. EL24-113-000, Comments of PJM Interconnection, L.L.C. at 12 (July 3, 2024).

<sup>114</sup> *Id.* at 13.

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the lawfulness of Affirmed’s market activities dating back to 2014,<sup>115</sup> placing all EE revenues Affirmed has received from participation in the PJM markets in doubt.<sup>116</sup>

In sum, at the time PJM made the Collateral Calls, three factors were present: (i) Affirmed had a large open position in the PJM capacity market; (ii) PJM faced the realistic possibility that FERC Enforcement would find that a substantial portion of Affirmed’s EE Resources committed in PJM Capacity Auctions did not qualify as capacity; and (iii) Affirmed had minimal balance sheet assets. Based on these factors, PJM had “reasonable grounds” to make the determination that Affirmed represented an “unreasonable credit risk” because “an adverse outcome for Affirmed at FERC would pose a substantial danger to Affirmed’s financial viability.”<sup>117</sup> And, as PJM next explains, subsequent events—including the IMM Complaint, independent auditor reports concerning Affirmed’s finances and M&V practices—have only exacerbated Affirmed’s risk profile. PJM submits it would have been derelict in its duty to protect PJM Markets and PJM Members if it had not retained Affirmed’s existing Collateral. Moreover, in PJM’s view, the

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<sup>115</sup> See *Coscia Aff.* at P 7; FERC 1b.19 Notice, at 1 (“Staff’s recommendation [to request the Commission to issue and Order to Show Cause] is based on its conclusion that since May 2014, American Efficient has violated and continues to violate PJM Interconnection, LLC’s (‘PJM’s’) Open Access Transmission Tariff (‘PJM Tariff’) and Reliability Assurance Agreement (‘PJM RAA’).”); *id.* at 2 (“[S]taff concludes that since May 2014, American Efficient has violated and continues to violate the Commission’s Anti-Manipulation Rule.”); *Indep. Market Monitor for PJM*, Docket No. EL24-126, Complaint of the Independent Market Monitor for PJM at 4 (July 10, 2024) (contending that amounts paid to EE Resource have been unauthorized under the Tariff since Delivery Year 2016/2017).

<sup>116</sup> Enforcement decisions often consider multiple years of impacts. See e.g., *PacifiCorp*, 181 FERC ¶ 61,278, at P 17 (2022) (involving Enforcement determination “that PacifiCorp violated FPA [regulations] between August 31, 2009 and August 2017” concerning facility ratings); *Dominion Energy Transmission, Inc.*, 173 FERC ¶ 61,248, at PP 61-62 (2020) (approving audit findings and recommendations regarding accounting errors that affected rates from 2008 to 2015); *PSEG Energy Res. & Trade, LLC*, 163 FERC ¶ 61,056, at P 5 (2018) (noting “errors in . . . cost-based offer components [of energy market bids] going as far back as 2005”).

<sup>117</sup> August 18, 2023 Collateral Call Notice at 1.

Collateral PJM has retained is not sufficient and Affirmed remains under-collateralized at this time.

**3. Additional Factors Have Come to Light That Support PJM’s Original Determination That Affirmed Represents an “Unreasonable Credit Risk”**

Since PJM made the determination in the August 18, 2023 and November 17, 2024 Collateral Call Notice **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** that Affirmed poses an “unreasonable credit risk,” additional factors have come to light further demonstrating that Affirmed poses an “unreasonable credit risk.” Dr. Coscia’s Affidavit identifies these additional factors:

- The May 22, 2024 OE Notice recommending that the Commission issue an Order to Show Cause why the parent company of Affirmed parent should not be made the subject of a public enforcement proceeding and pay a civil penalty and disgorgement related to its market activities since 2014;
- The May 31, 2024 PJM IMM Complaint challenging Affirmed’s right to receive payment from PJM’s capacity market;
- A finding by Affirmed’s Independent Financial Auditor **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC**
- Notification from Affirmed that its lender had restricted the capital available to the company;
- The independent audit of Affirmed’s EE Program for the 23/24 Delivery Year **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC**
- Higher monetary balances associated with Affirmed’s capacity positions in PJM’s Capacity Market combined with the continuation of minimal balance sheet capitalization and a lack of access to debt that supports working capital;
- Conversations with Affirmed’s management and counsel on February 13, 2024, February 14, 2024, February 20, 2024, including conversations with respect to

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Affirmed's inability to post additional collateral for participation in PJM's markets;  
and

- Potential Capacity Resource Deficiency Charges associated with the independent audit of Affirmed's EE program for the 2024/2025 Delivery Year.

These additional factors confirm that PJM properly decided that Affirmed poses an "unreasonable credit risk" in PJM Markets and thus further supports PJM's continued retention of the Restricted Collateral.

**C. There is No Evidence to Support Affirmed's Assertion that PJM Has Acted in a "Punitive" Manner and PJM Denies That Claim**

Affirmed's claim that PJM has taken "punitive actions against Affirm" are completely unfounded.<sup>118</sup> PJM has exercised the rights provided to it under Attachment Q of the Tariff to protect PJM Markets and PJM Market Participants. All of the steps taken by PJM were authorized by its Tariff. PJM would have been remiss if it had not taken action to address the issues confronting Affirmed.

One of the most important protective actions taken by PJM to mitigate the market risk associated with Affirmed has been to retain the \$93M in Restricted Collateral that Affirmed is seeking to recovery through its Complaint. Should Affirmed acquire these funds, nothing would stop Affirmed from moving these monies out of the company consistent with its long-standing practice of maintaining only minimal capitalization and lines of credit. Unless Affirmed thereafter provided new Collateral—which PJM understands is not an option<sup>119</sup>—PJM Markets and PJM

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<sup>118</sup> Complaint at 7.

<sup>119</sup> See *Coscia Aff.* at P 19 (discussing "conversations with Affirmed's management and counsel on February 13, 2024, February 14, 2024, February 20, 2024, including conversations with respect to Affirmed's inability to post additional collateral for participation in PJM's markets"); June 6, 2024 Notice at 1 (referencing "Affirmed's current inability to replenish any collateral that may be returned"); Clayton Declaration at P 8 ("Without a source of funding, Affirmed cannot post collateral.").

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Market customers would be exposed to excessive market risks related to Affirmed financial situation and business model.

PJM Staff devoted substantial internal resources to the analysis of Affirmed’s situation, held numerous meetings with Affirmed representatives, exchanged written information with Affirmed’s representatives, and sought additional materials from Affirmed that PJM Staff believe would be helpful in understating the Affirmed’s financial condition.<sup>120</sup> Further, as explained above, PJM reasonably determined that Affirmed posed an “unreasonable credit risk” and explained its reasoning to Affirmed. Moreover, as PJM obtained more information and its thinking evolved, PJM provided updates. Finally, PJM worked with Affirmed to develop procedures to allow Affirmed to participate in the Base Residual Auction for the 2025/2026 Delivery Year, notwithstanding the issues posed by PJM “unreasonable credit risk” determination.

Affirmed’s financial difficulties are of its own making. As Dr. Coscia explains, Affirmed has taken deliberate steps that have had the effect of “impoverish[ing] the company.”<sup>121</sup> Although Affirmed has received substantial revenues in PJM Markets, Affirmed has never attempted to build up its capital base, preferring instead to maintain only minimal capitalization<sup>122</sup> and not to set aside any funds to address its potential FERC liabilities.<sup>123</sup> Affirmed could have operated its business differently, but chose not to do so.

Affirmed’s attempt to blame PJM for its difficulties also ignores the impacts of actions taken by its commercial partners. For example, Affirmed’s own lender initiated actions that

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<sup>120</sup> See Coscia Aff. at PP 9, 10 (discussing meetings between PJM and Affirmed and PJM’s review of Affirmed’s audited financial statements); June 6, 2024 Notice at 1 (requesting documents); June 26, 2024 Notice at 1 (same).

<sup>121</sup> Coscia Aff. at P 25.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* P 11.

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adversely impacted Affirmed's access to capital. **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** the company that provides liquidity to Affirmed, restricted Affirmed's access to the capacity payments from PJM.<sup>124</sup> **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** treatment of Affirmed hardly inspires confidence in Affirmed's financial strength. If **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** really believed that Affirmed's revenue streams from PJM capacity sales were not at risk, it could provide credit support for sales to PJM by entering into a bilateral capacity agreement arrangements or a guarantee. But it has not done so and, instead, has taken control of PJM revenues away from Affirmed.

Finally, while Affirmed may view the actions taken by PJM to be harsh, PJM is obligated to consider the risks posed by Affirmed to the PJM Market as a whole. Affirmed is the largest Energy Efficiency resource operating in PJM's capacity market and has cleared capacity worth hundreds of million dollars over the past several years. The potential impact to the PJM capacity market would be substantial if Affirmed were to default in its capacity obligations. PJM must therefore balance its treatment of Affirmed against the potential impacts on other Market Participants. The Commission has reviewed PJM's credit practices many times and has consistently found that PJM should have discretion to determine, based on the circumstances at the time, whether a Market Participant presents an unreasonable risk to the market.<sup>125</sup> The Commission found that the flexibility provided by Attachment Q of PJM's Tariff permits PJM to

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<sup>124</sup> *Id.* P 27.

<sup>125</sup> *See, e.g., PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,173, at P 36 (2020).



protect the integrity of the PJM administered markets, as well as protect Market Participants, from financial losses that result from unreasonable credit risks and defaults.<sup>126</sup>

As the Commission has stated on numerous occasions, managing risk and credit necessarily involves balance. While the Commission seeks to assure liquidity, and therefore competition, in the organized wholesale markets, it also must take into account the need to mitigate potentially large disruptions in these markets through sound credit policy.<sup>127</sup>

While the retention of Affirmed’s Restricted Collateral poses a hardship for Affirmed, PJM believes that this action is required under its Tariff and is necessary to mitigate the risk Affirmed represents to the PJM Market and other Market Participants.

**D. The Complaint Should not be Granted Fast Track Treatment**

Affirmed’s assertion that the Complaint should be given fast track treatment should be denied. Affirmed did not adequately substantiate its claim of “imminent, significant, and irreparable harm.”<sup>128</sup> Moreover, the main allegation underlying these assertions, namely that “Affirmed cannot post collateral and therefore cannot continue its business of offering energy efficiency into PJM’s capacity market”<sup>129</sup> has not come to pass. Rather, the Complaint was filed, Affirmed and PJM reached an accommodation that enabled Affirmed to participate in the Base Residual Auction for the 2025/2026 Delivery Year. This resulted in Affirmed clearing sufficient capacity to be entitled to receive **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in performance revenues for this period.<sup>130</sup> Accordingly, Affirmed’s request for fast track treatment should be rejected.

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<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> Clayton Declaration at P 10.

<sup>129</sup> *Id.* P 9.

<sup>130</sup> Coscia Aff. at P 20 fig. 1.

**III. STATEMENTS PURSUANT TO 18 CFR §385.213C (2)**

**A. Admissions and Denials**

Pursuant to 18 C.F.R. § 385.213(c)(2)(i), PJM states that any allegation in the Complaint that is not specifically and expressly admitted is denied.

**B. Affirmative Defenses**

Pursuant to 18 C.F.R. § 385.213(c)(2)(ii), PJM states that any allegation in the Complaint that is not specifically and expressly admitted is denied.

**IV. COMMUNICATIONS**

PJM requests that the Commission place the following individuals on the official service lists for this proceeding.

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**V. REQUEST FOR CONFIDENTIAL TREATMENT**

PJM respectfully requests, pursuant to 18 C.F.R. § 388.112, non-public treatment of identified portions of this answer and its exhibits that are exempt from the mandatory public disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and that should be withheld from public disclosure. Specifically, non-public treatment is requested for

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certain market sensitive information provided to PJM by Affirmed as confidential under PJM Operating Agreement, section 18.17, which fall within the FOIA public disclosure exemption for “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”<sup>131</sup>

In accordance with 18 C.F.R. § 388.112(b)(2)(i), PJM is submitting a non-public version of this answer and its attachments that is marked “**CUI//PRIV-HC NON-PUBLIC VERSION – CONTAINS PRIVILEGED AND CONFIDENTIAL INFORMATION – DO NOT RELEASE**” in accordance with Paragraph 11 of the Protective Agreement attached as Exhibit B to the Joint Motion to Stay Proceedings filed on July 15, 2024 in this matter, and the Commission’s regulations. PJM asks that the marked version of this answer and its exhibits be placed in the Commission’s non-public files. PJM is also submitting a public version of this answer and its exhibits with the relevant confidential material redacted pursuant to section 388.112 of the Commission’s regulations.

**VI. CONCLUSION**

For the reasons set forth in this Answer, the Commission should deny the Complaint and provide no relief.

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<sup>131</sup> See 5 U.S.C. § 552(b)(4).

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Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this day caused to be served a copy of this answer upon all parties on the service list in these proceedings in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2023).

/s/ Blake Grow  
Blake Grow  
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November 11, 2024

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**Exhibit A  
Affidavit of Dr. Carl F. Coscia**

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

<b>Affirmed Energy</b>	)	
	)	
v.	)	<b>Docket No. EL24-124-000</b>
	)	
<b>PJM Interconnection, L.L.C.</b>	)	

**AFFIDAVIT OF DR. CARL F. COSCIA  
CHIEF RISK OFFICER OF PJM INTERCONNECTION, L.L.C.**

1. My name is Carl F. Coscia, Ph. D. Since September 2022, I have served as the Vice President and Chief Risk Officer of PJM Interconnection, L.L.C. (PJM). My business address is 2750 Monroe Boulevard, Audubon, PA 19403. My role at PJM involves ensuring that adequate risk management tools and policies are in place to protect PJM members.
2. I hold a Ph. D. in economics from the University of Minnesota, as well as a Bachelor of Science in economics and a Bachelor of Arts in mathematics from the University of Kansas.
3. My background includes more than 20 years of experience in commodity and financial markets, most recently as Global Head of Risk Management for German-based energy company, EnBW, where my responsibilities included market risk, enterprise risk, credit risk, compliance and approval for all master trading agreements. I previously served as Chief Business Officer and Chief Risk Officer for Hartree Partners, LP. Additionally, I worked as Vice President of Federal Energy Policy for Constellation Energy, Director of

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Wholesale Power Fundamentals for TXU Wholesale Power Trading, and Branch Chief for the Federal Energy Regulatory Commission's Office of Enforcement.

4. The purpose of this Affidavit is to support the Answer of PJM Interconnection, L.L.C. (PJM) in response to the July 3, 2024 Complaint of Affirmed Energy LLC (Affirmed) in the above-captioned proceeding. My Affidavit supports PJM's continued retention of the Collateral received from Affirmed.
5. PJM is currently holding approximately **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** of Collateral from Affirmed (Collateral). PJM required and retained the Collateral in accordance with the terms of PJM's Tariff, other Governing Documents, and prudent risk management practices.
6. PJM Tariff Attachment Q, PJM's Credit Policy requires PJM to maintain an ongoing risk evaluation process for all PJM Market Participants, who likewise have an ongoing disclosure requirement.<sup>1</sup> Affirmed submitted its financial statements to PJM in March 2022 and simply included a reference to an investigation in its financial statements. Affirmed violated PJM's Tariff as it failed to notify PJM, in the manner required by the Tariff, of FERC's investigation of Affirmed. Affirmed was required to notify PJM of the investigation within 5 business days of when Affirmed became aware of the event.

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<sup>1</sup> See Tariff, Attach. Q § II.E (Ongoing Risk Evaluation) ("In addition to the initial risk evaluation set forth ... above and the annual certification requirements set forth ... below, each Market Participant and/or its Guarantor has an ongoing obligation to provide PJM with the information required in section IV.A described in more detail below. PJM may also review public information regarding a Market Participant and/or its Guarantor as part of its ongoing risk evaluation. If appropriate, PJM will revise the Market Participant's Unsecured Credit Allowance and/or change its determination of creditworthiness, credit support, Restricted Collateral, required Collateral or other assurances pursuant to PJM's ongoing risk evaluation process. Each Market Participant and/or its Guarantor must provide the information set forth below on an ongoing basis in order to remain eligible to participate in any PJM Markets. The same quantitative and qualitative factors will be used to evaluate Market Participants whether or not they have rated debt.").



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Affirmed's failure to make this notification is a violation of PJM's Tariff. PJM ultimately notified Affirmed of the Material Adverse Change on July 18, 2023. Tariff Attachment Q requires PJM to determine whether "a Participant and/or its Guarantor has experienced a Material Adverse Change in its financial condition."<sup>2</sup> A Material Adverse Change generally includes "any adverse changes, events or occurrences which, individually or in the aggregate, could affect the ability of the entity to pay its debts as they become due or could reasonably be expected to have a material adverse effect on any current or future financial results or financial condition."<sup>3</sup> A Material Adverse Change also includes "the filing of a lawsuit or initiation of an arbitration, investigation, or other proceeding that would likely have a material adverse effect on any current or future financial results or financial condition or increase the likelihood of non-payment."<sup>4</sup>

7. Affirmed is a subsidiary of American Efficient that supplies Energy Efficiency (EE) products to PJM. The Federal Energy Regulatory Commission (Commission or FERC) Office of Enforcement (FERC Enforcement) is conducting an ongoing investigation of Affirmed's past and current market activity as an EE supplier in PJM. On May 22, 2024, FERC Enforcement issued a notice pursuant to 18 C.F.R. § 1b.19 (2023) indicating it "intends to recommend that the Commission issue an Order to Show Cause why American

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<sup>2</sup> *Id.* § II.E.3 (Material Adverse Changes) ("Each Market Participant and each Guarantor is responsible for informing PJM, in writing, of any Material Adverse Change in its or its Guarantor's financial condition within five (5) Business Days of any Principal becoming aware of the occurrence of a Material Adverse Change since the date of the Market Participant or Guarantor's most recent annual financial statements provided to PJM. However, PJM may also independently establish from available information that a Participant and/or its Guarantor has experienced a Material Adverse Change in its financial condition without regard to whether such Market Participant or Guarantor has informed PJM of the same.").

<sup>3</sup> *Id.* § II.E.3(m).

<sup>4</sup> *Id.* § II.E.3(f).

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Efficient should not be made the subject of a public enforcement proceeding and pay a civil penalty and disgorgement.”<sup>5</sup> FERC Enforcement concluded that the Company’s market activities in PJM since 2014 violated several provisions of the PJM Tariff regarding EE participation as well as the Commission’s Anti-Manipulation Rule.<sup>6</sup>

8. The FERC investigation constitutes a Material Adverse Change under the Tariff. In my opinion, the investigation will “likely have a material adverse effect on any current or future financial results or financial condition or increase the likelihood of non-payment” by Affirmed.<sup>7</sup> Tariff Attachment Q requires PJM “to evaluate the financial strength and

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<sup>5</sup> See Letter to David Applebaum from J. Cleaver, *et al.*, Investigation of American Efficient LLC (Modern Energy Group LLC and MIH LLC, Midcontinent Energy LLC, Wylan Energy, L.L.C., and Affirmed Energy LLC) (May 22, 2024) (FERC 1b.19 Notice). Affirmed has contested FERC Enforcement’s conclusions in a letter to the Commission. See *Affirmed Energy LLC v. PJM Interconnection, L.L.C.*, Docket No. EL24-124, American Efficient LLC Response to Office of Enforcement 1b.19 Notice (July 22, 2024) (Response to 1b.19 Notice); *Affirmed Energy LLC v. PJM Interconnection, L.L.C.*, Docket No. EL24-124, American Efficient LLC Response to Office of Enforcement 1b.19 Notice Executive Summary (July 22, 2024) (Executive Summary Response).

<sup>6</sup> See FERC 1b.19 Notice at 2.

<sup>7</sup> Tariff, Attach. Q §II.E.3 (“Upon identification of a Material Adverse Change, PJM shall evaluate the financial strength and risk profile of the Market Participant and/or its Guarantor at that time and may do so on a more frequent basis going forward. If the result of such evaluation identifies unreasonable credit risk to any PJM Market as further described in section II.E.8 below, PJM will take steps to mitigate the financial exposure to the PJM Markets. These steps include, but are not limited to requiring the Market Participant and/or each Guarantor to provide Collateral, additional Collateral or additional Restricted Collateral that is commensurate with the amount of risk in which the Market Participant wants to engage, and/or limiting the Market Participant’s ability to participate in any PJM Market to the extent, and for the time-period necessary to mitigate the unreasonable credit risk. In the event PJM determines that a Material Adverse Change in the financial condition or risk profile of a Market Participant and/or Guarantor, warrants a requirement to provide Collateral of any type, or some action to mitigate risk, PJM shall provide the Market Participant and/or Guarantor, a written explanation of why such determination was made. Conversely, in the event PJM determines there has been an improvement in the financial condition or risk profile of a Market Participant and/or Guarantor such that the amount of Collateral needed for that Market Participant and/or Guarantor can be reduced, PJM shall provide a written explanation why such determination was made, including the amount of the Collateral reduction and indicating when and how the reduction will be made.”).

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risk profile” of Affirmed upon the occurrence of a Material Adverse Change.<sup>8</sup> Attachment Q also requires PJM to maintain an ongoing risk evaluation.<sup>9</sup>

9. PJM’s first step after determining that a Material Adverse Change had occurred was to notify Affirmed of its concerns regarding the risk that the Company posed to PJM’s Markets. PJM held several meetings with Affirmed to better understand the Company’s risk profile. PJM met with Affirmed on August 21, 2023, to discuss the Unreasonable Credit risk Collateral Call that PJM planned to send. On August 21, 2023, PJM issued a \$72.1M Collateral Call. On August 28, 2023, PJM sent Affirmed a series of questions relating to their participation in the capacity market. On September 7, 2023, PJM notified Affirmed of concerns with its risk profile. On October 6, 2023, PJM held a meeting with Affirmed to discuss Affirmed’s corporate structure and risk policy.
10. PJM also examined Affirmed’s 2022 and 2023 audited financial statements, which raised concerns because Affirmed’s balance sheet was weak relative to its activity in PJM’s capacity market. Particularly concerning, Affirmed barely met PJM’s capitalization requirements<sup>10</sup> such that its capitalization was disproportionately low for its activity level in PJM. Moreover, following the Material Adverse Change, Affirmed took actions suggesting self-interest as its motivation rather than concern for meeting its obligations. In December 2022, Affirmed’s balance sheet showed a cash balance of **BEGIN CUI//PRIV-**

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<sup>8</sup> *Id.*

<sup>9</sup> *See id.* § II.E.

<sup>10</sup> *See id.*, Attach. Q III.D (Minimum Capitalization). Minimum capitalization may be met by demonstrating minimum levels of Tangible Net Worth or tangible assets. FTR Participants must demonstrate a Tangible Net Worth in excess of \$1 million or tangible assets in excess of \$10 million. Other Market Participants must demonstrate a Tangible Net Worth in excess of \$500,000 or tangible assets in excess of \$5 million.

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HC [REDACTED] END CUI//PRIV-HC (not including Restricted Cash), and by December 2023, the cash balance had declined to BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC (not including Restricted Cash). Despite the ongoing Office of Enforcement investigation and Affirmed's claims of meaningful settlement negotiations, Affirmed has not retained sufficient funds to meet potential obligations arising from a settlement or other circumstances.

11. Affirmed's financial practices met PJM's minimal capitalization requirements but fell meaningfully short in terms of planning for potentially adverse financial impacts from the FERC investigation or the IMM's complaint against Affirmed and other EE suppliers for the 24/25 capacity delivery year.<sup>11</sup> Affirmed is poorly situated to weather potential losses or events that pose material financial stress. In addition to Affirmed's minimal capitalization, Affirmed's access to debt is limited to a credit facility provided solely for the purpose of supporting the credit requirements of future PJM capacity auctions. The Company's weak balance sheet and lack of liquidity limited Affirmed's ability to support their business against charges related to the potential impacts of the FERC investigation or the IMM complaint or adverse audit findings.
12. The actions PJM took in evaluating the risk posed by Affirmed were in accordance with the Tariff and consistent with the manner in which PJM evaluates other Market Participants. Affirmed was not singled out or treated differently from any other similarly situated Market Participant.

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<sup>11</sup> See *Indep. Market Monitor for PJM v. Indicated Energy Efficiency Sellers*, EL24-113-000 (May 31, 2024) (IMM Complaint).

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13. PJM ultimately determined that Affirmed posed an “unreasonable credit risk” to PJM Markets and on August 18, 2023, PJM issued an “unreasonable credit risk” Collateral Call, amended on August 21 2023, pursuant to the terms of Tariff, Attachment Q.<sup>12</sup> The Collateral amount included in the amended August 18, 2023 Collateral Call issued to Affirmed was for \$72.1M. Further, on November 17, 2023, PJM advised Affirmed of PJM’s determination that Affirmed continued to pose an unreasonable credit risk to PJM Markets and that PJM was retaining as Collateral a portion of the bonus payments owed to Affirmed—equaling about **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC**—associated with Winter Storm Elliott. Thereafter, on February 28, 2024, PJM issued a Collateral Call for **BEGIN CUI//PRIV-HC [REDACTED] . END CUI//PRIV-HC**. In addition, PJM is also holding about **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** in Collateral related to Affirmed’s obligations for Delivery Year 24/25. This combined amount—totaling about **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC**—secures the amount of Affirmed’s financial exposure to PJM markets. This includes potential Capacity Resource Deficiency Charges that may be imposed under Attachment

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<sup>12</sup> See *id.* § II.E.8 (“If PJM has reasonable grounds to believe a Market Participant poses an unreasonable credit risk to any PJM Markets, PJM may immediately notify the Market Participant of such unreasonable credit risk and (1) issue a Collateral Call to demand Collateral, additional Collateral, or Restricted Collateral or other assurances commensurate with the Market Participant's and/or its Guarantor's risk of financial default or other risk posed by the Market Participant's or Guarantor's financial condition or risk profile to the PJM Markets and PJM members, or (2) limit or suspend the Market Participant's participation in any PJM Markets, to the extent and for such time period PJM determines is necessary to mitigate the unreasonable credit risk to any PJM Markets. PJM will only limit or suspend a Market Participant's market participation if Collateral, additional Collateral or Restricted Collateral cannot address the unreasonable credit risk.”).

[REDACTED]

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DD of the Tariff.<sup>14</sup> PJM’s determination of the appropriate levels of Collateral has always been in accordance with the Tariff provisions for EE Resources provided in Attachment Q and Attachment DD.<sup>15</sup> Under these provisions, when Affirmed requested the return of its Collateral on June 3, 2024, PJM would have needed to hold **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in Collateral to be fully collateralized.

14. PJM also sent additional updates to Affirmed regarding its “unreasonable credit risk” determination. PJM provided notices to Affirmed further explaining PJM’s decision and identifying additional risk factors that PJM was considering. These notices were provided to Affirmed on May 22, June 6, and June 26, 2024. These notices made clear that PJM remained concerned about Affirmed’s continued participation in PJM Markets and that Affirmed would not be allowed to continue its participation in PJM Markets without supplying sufficient Collateral.

15. Importantly, PJM has designated most of the **BEGIN CUI//PRIV-HC** [REDACTED] [REDACTED] **END CUI//PRIV-HC** Amounts retained as Collateral (as opposed to Restricted Collateral) secure specific Market Participant transactions. In contrast, Restricted Collateral addresses a risk or set of risks posed by the Market Participant’s presence in the market. Amounts designated as Restricted Collateral thus are not related to the typical market risk of a company’s transactions, such as fluctuations in the company’s market exposure associated with changes in market prices. Rather, Restricted Collateral is obtained as credit support to

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<sup>14</sup> See Tariff, Attach. DD § 8 (Capacity Resource Deficiency Charge).

<sup>15</sup> See *id.*

[REDACTED]

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address extraordinary risks posed by a particular Market Participant’s engagement with PJM. The Tariff states that “PJM may establish certain restrictions on available credit by requiring that some amounts of credit, i.e. Restricted Collateral, may not be available to satisfy credit requirements.”<sup>17</sup> Further, “[s]uch Restricted Collateral will not be returned to the Participant until PJM has determined that the risk for which such Restricted Collateral is being held has subsided or been resolved.”<sup>18</sup>

16. In this case, PJM was holding the Collateral as Restricted Collateral because of the potential insolvency risk posed to Affirmed due to FERC’s investigation, coupled with Affirmed’s weak capital structure and the large size of its capacity commitments. An adverse outcome at FERC could cause Affirmed to cease operations since it lacked the financial strength to satisfy a large payment obligation and/or to survive the loss of eligibility for a significant portion of its EE Resource portfolio. PJM is thus authorized to retain sufficient funds to address this risk based on Collateral determinations including reasonably anticipated future Collateral needs. The risks that gave rise to PJM’s original “unreasonable credit risk” determination have not gone away. In fact, they have multiplied.
17. The amount of Collateral held by PJM is proper under the Tariff. PJM’s Tariff requires PJM to fully collateralize Affirmed’s commitments in the capacity market. There is a risk that, if Affirmed fails to deliver the MWs they have committed to in the capacity market, they would be subject to a Capacity Resource Deficiency Charge under Attachment DD of PJM’s Tariff. Full collateralization of capacity obligations is meant to protect PJM from a potential default. This method of risk management requires Affirmed to post Collateral

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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roughly equivalent to their exposure to minimize the losses resulting from an event of default. The calculation of the Collateral amount also includes the Capacity Resource Deficiency Charges that would be payable under Attachment DD.

18. PJM nonetheless has exercised discretion in demanding strict adherence to full collateralization in recognition that Affirmed has advised—and PJM’s independent financial analysis supports—that Affirmed could not have met additional collateral calls. Thus, had PJM demanded more Collateral, the likelihood is that Affirmed would not have complied and would have defaulted under the Tariff, which would have further eroded its financial position. PJM judged that the most prudent course to protect the PJM Markets and PJM Market Participants, was to retain the substantial amount of Collateral it had but not to demand more.

19. PJM has now evaluated multiple factors as part of its risk evaluation of Affirmed in addition to the factors that resulted in the initial “unreasonable credit risk” determination in August 2023. These factors include: (1) the Commission’s issuance of the May 22, 2024 Section 1b.19 notice indicating the Commission’s intent to issue an Order to Show Cause why American Efficient—the parent company of Affirmed—should not be made the subject of a public enforcement proceeding and pay a civil penalty and disgorgement;<sup>19</sup> (2) a May 31, 2024 FERC complaint filed by PJM’s Independent Market Monitor challenging Affirmed’s right to receive payments from PJM’s capacity market;<sup>20</sup> (3) Affirmed’s Independent Financial Auditor’s finding **BEGIN CUI//PRIV-HC** [REDACTED]

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<sup>19</sup> See Response to 1b.19 Notice; Executive Summary Response; FERC 1b.19 Notice.

<sup>20</sup> See IMM Complaint.



[REDACTED]

[REDACTED] **END CUI//**

**PRIV-HC** (4) notification from Affirmed that its Lender had restricted the capital available to the company; (5) an independent Audit of Affirmed Energy Efficiency Program for the 23/24 Delivery Year with findings that raised significant concerns about Affirmed’s Energy Efficiency programs; (6) the continuation of Affirmed’s large capacity positions in PJM’s capacity market combined with its minimal balance sheet capitalization and lack of access to debt to that supports working capital; (7) conversations with Affirmed’s management and counsel on February 13, 2024, February 14, 2024, February 20, 2024, including conversations with respect to Affirmed’s inability to post additional collateral for participation in PJM’s markets; and (8) potential Capacity Resource Deficiency Charges associated with the independent audit of Affirmed’s EE program for the 2024/2025 Delivery Year.

20. Figure 1 below illustrates Affirmed’s fully collateralized positions for the indicated Delivery Years.

Figure 1 **BEGIN CUI//PRIV-HC**



[REDACTED]

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**END CUI//PRIV-HC** This table reflects the fully collateralized amounts of Affirmed's capacity position in each of the indicated Delivery Years. For the current Delivery Year, PJM is undercollateralized relative to the Collateral that Affirmed currently has posted with PJM. As demonstrated below, these Collateral amounts will change, and PJM calculates that Affirmed will be required to post additional Collateral. More specifically, Affirmed has **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** committed MW in the 24/25 Delivery Year and **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** committed MW in the 25/26 Delivery Year. PJM, and PJM's Tariff, requires Collateral to protect against the current risk of non-performance for these commitments.

21. Figure 2 below reflects the amount of Collateral that Affirmed was required to post to fully secure its positions as of May 31, 2024, which includes (1) 23/24 capacity revenue paid during the Delivery Year to Affirmed; (2) 23/24 capacity deficiency charge; (3) 24/25 capacity deficiency charge which commences June 1, 2024. PJM determined this amount to be **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** based on the **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** that Affirmed cleared in 23/24, and the **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** cleared in 24/25.

[REDACTED]

Figure 2 **BEGIN CUI//PRIV-HC**



22. Figure 3 below reflects the amount of Collateral that Affirmed is required to post to fully secure its positions as of May 31, 2025, which includes; (1) 24/25 capacity revenue paid during the Delivery Year to Affirmed; (2) 24/25 capacity deficiency charge; and (3) 25/26 capacity deficiency charge which commences June 1, 2025. PJM determined this amount to be approximately **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** based on the **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** that Affirmed cleared in this auction.

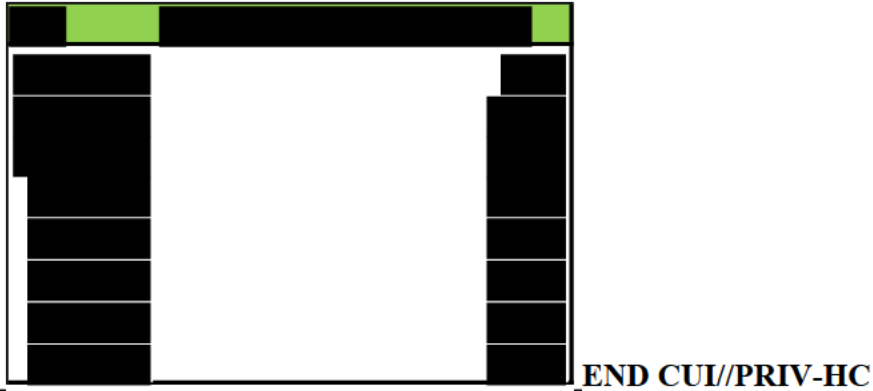
Figure 3 **BEGIN CUI//PRIV-HC**



23. The length of time that PJM is holding the Collateral is proper under the Tariff. Affirmed's current obligation in the capacity market represents current forward market exposure.

24. Further, the Collateral that a Market Participant is required to submit fluctuates. As demonstrated in Figure 4 below, PJM anticipates that Affirmed's total Collateral will increase each month from October 2024 through May 2025.

Figure 4 **BEGIN CUI//PRIV-HC**



25. Affirmed claims that it is financially distressed and facing existential threats. This situation is attributable to its own actions and cash management decisions. PJM has determined through various discussions with Affirmed that Affirmed's lender has restricted the cash available to the company. Affirmed's risk profile is further heightened by Affirmed's decision to maintain a minimally capitalized company. Affirmed has proactively taken actions that have impoverished the Company. Affirmed informed PJM that it made payments to its affiliates and other parties in a manner that only allows it to meet the minimum capitalization requirements.

26. Affirmed's bilateral lending agreement with **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** placed **BEGIN CUI//PRIV-HC** [REDACTED] **END CUI//PRIV-HC** in a position to control the revenues Affirmed receives from PJM. This arrangement is the source of Affirmed's financial distress and not any action by PJM. PJM has paid Affirmed all owed revenue from Affirmed's cleared MWs in the PJM Base Residual Auctions. The restriction of cash to Affirmed is solely the result of actions taken by its lender. A typical lending agreement would have PJM paying Affirmed and Affirmed making debt service payments to its lender. PJM is not responsible for the ill-fated commercial decisions that Affirmed has made to place its lender in front of Affirmed in receiving payments from PJM.

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27. PJM believes that Affirmed's actions, as described above, and the actions of Affirmed's lender, are largely responsible for the Company's weakened financial state. For example, **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC**, the company that provides liquidity to Affirmed, restricted Affirmed's access to the capacity payments from PJM. This action is directly at odds with the actions of a lender that has confidence in its debtor's business. If **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** really believed that Affirmed's revenue streams from PJM capacity sales were not at risk, **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** could provide credit support for sales to PJM by entering into bilateral capacity agreement arrangements or a guarantee. But it has not done so and, instead, has taken control of PJM revenues away from Affirmed. Further, **BEGIN CUI//PRIV-HC [REDACTED] END CUI//PRIV-HC** has restricted the amount of cash available to Affirmed, while PJM continues to make the weekly capacity payments from PJM's capacity market.
28. As part of its risk management efforts, PJM also considered suspending Affirmed's participation in PJM's capacity market as one of the risk mitigation tools available to PJM. PJM notified Affirmed that it would not be permitted to participate in its markets on June 26, 2024 based in part on its inability to post additional collateral.
29. In summary, PJM made the decision that Affirmed posed an unreasonable credit risk to PJM's markets. That risk has not been mitigated. Instead, that risk has only increased as evidenced, among other things, by the recent FERC Enforcement activity, litigation with respect to Affirmed's EE participation in PJM and third party audits of Affirmed's EE program. Affirmed continues to pose an ongoing risk to PJM. I believe it is just and

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reasonable and prudent risk management for PJM to retain the Collateral posted by  
Affirmed.

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

<b>Affirmed Energy LLC</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. EL24-124-000</b>
	)	
<b>PJM Interconnection, L.L.C.</b>	)	

**VERIFICATION**

I, **Carl F. Coscia**, state, under penalty of perjury, that I am the Carl F. Coscia referred to in the foregoing document entitled “Affidavit of Carl F. Coscia Chief Risk Officer of PJM Interconnection, L.L.C.,” that I have read the same and am familiar with the contents thereof, and that the facts set forth therein are true and correct to the best of my knowledge, information, and belief.

/s/ Carl Coscia  
Carl F. Coscia

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**Exhibit B  
February 28, 2024 Collateral Call**



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**Exhibit C  
2022/2023 Financial Statements and Independent Auditor's Report**

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**Exhibit D  
2021/2022 Financial Statements and Independent Auditor's Report**

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