

187 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

PJM Interconnection, L.L.C.

Docket No. ER23-729-003

ORDER ON REHEARING AND MOTION FOR STAY

(Issued May 24, 2024)

1. On May 6, 2024, the Commission issued an order¹ granting PJM Interconnection, L.L.C.'s (PJM) petition requesting confirmation regarding the capacity commitment rules for the 2024/2025 Base Residual Auction (BRA) following a decision² by the United States Court of Appeals for the Third Circuit (Third Circuit) vacating a portion of Commission orders allowing PJM to apply amendments to its Open Access Transmission Tariff (Tariff) to the 2024/2025 BRA.³ On May 13, 2024, PJM Load Parties⁴ filed a request for rehearing and emergency motion for stay of the Petition Order. For the reasons discussed below, we deny PJM Load Parties' request for rehearing and the motion for stay.

¹ *PJM Interconnection, L.L.C.*, 187 FERC ¶ 61,065 (2024) (Petition Order).

² *PJM Power Providers Grp. v. FERC*, 96 F.4th 390, 395 (3d Cir. 2024) (*PJM Power Providers*).

³ *PJM Interconnection, L.L.C.*, 182 FERC ¶ 61,109 (2023) (Initial Order), *order on reh'g*, 184 FERC ¶ 61,055 (2023) (Rehearing Order) (LDA Reliability Requirement Orders).

⁴ For purposes of this filing, PJM Load Parties are: American Municipal Power, Inc., Delaware Division of the Public Advocate, Delaware Energy Users Group, Delaware Municipal Electric Corporation, Inc., Delaware Public Service Commission, Maryland Office of People's Counsel, Maryland Public Service Commission, and Old Dominion Electric Cooperative.

I. **Background**⁵

2. In the LDA Reliability Requirement Orders, the Commission accepted PJM's proposed revisions to the PJM Tariff under FPA section 205⁶ to allow PJM to update a planning parameter for the BRA—the Locational Deliverability Area (LDA) Reliability Requirement—during the auction process, under certain circumstances.⁷ PJM explained that the revisions were necessary to accurately clear the BRA because a significant amount of Planned Generation Capacity Resources that were expected to participate in the BRA in the Delmarva Power & Light Company (DPL) South LDA did not offer into the BRA, even though those resources were included in the initial LDA Reliability Requirement; as a result, the LDA Reliability Requirement initially calculated for the DPL South LDA was overstated and inaccurate.⁸ In the absence of its proposed Tariff amendments, PJM estimated that load in the DPL South LDA would pay over \$100 million in excess of what would have been necessary for capacity for the 2024/2025 delivery year.⁹

3. As relevant here, the Commission found in the LDA Reliability Requirement Orders that the filed rate doctrine did not prohibit PJM from proposing under FPA section 205 to adjust the DPL South LDA's Reliability Requirement prior to the time that

⁵ The history of this case is recounted in the prior orders in the LDA Reliability Requirements Order and the Petition Order. *See* Initial Order, 182 FERC ¶ 61,109 at PP 2-22; Rehearing Order, 184 FERC ¶ 61,055 at PP 4-14; Petition Order, 187 FERC ¶ 61,065 at PP 3-10.

⁶ 16 U.S.C. § 824d.

⁷ Initial Order, 182 FERC ¶ 61,109 at PP 140-50; Rehearing Order, 184 FERC ¶ 61,055 at PP 2, 106. PJM proposed to exclude Planned Generation Capacity Resources from the calculation of the LDA Reliability Requirement if the addition of such resources materially increases the LDA Reliability Requirement and such resources do not participate in the relevant capacity auction. PJM, Transmittal, Docket No. ER23-729-000 at 1-2 (filed Dec. 23, 2022) (Transmittal); *see* Initial Order, 182 FERC ¶ 61,109 at P 5. Capitalized terms that are not defined in this order have the meaning specified in the Tariff.

⁸ Transmittal at 2, 9, 10, 31. PJM posted planning parameters for the 2024/2025 BRA, including the LDA Reliability Requirement for the DPL South LDA, on August 29, 2022. Petition Order, 187 FERC ¶ 61,065 at P 4; Rehearing Order, 184 FERC ¶ 61,055 at P 10.

⁹ Transmittal at 34.

capacity supply obligations and the corresponding rights were awarded under the BRA.¹⁰ The Commission also dismissed as moot PJM's concurrent FPA section 206¹¹ complaint alleging that absent the changes proposed in the concurrent FPA section 205 filing, the initial LDA Reliability Requirement for the DPL South LDA would result in an unjust and unreasonable auction outcome.¹²

A. Third Circuit Opinion

4. In *PJM Power Providers*, the Third Circuit found that the Tariff amendments accepted in the LDA Reliability Requirement Orders were impermissibly retroactive because they altered the legal consequence attached to a past action by allowing PJM to use a different LDA Reliability Requirement than the one it had calculated and posted prior to the BRA.¹³ The court found that, because the Tariff amendments “nullified a legal consequence attached to a past action,” the Commission violated the filed rate doctrine by approving them.¹⁴ The court further “emphasize[d] that the equities play no role in our application of the filed rate doctrine” even if “this bright-line rule could potentially produce a harsh result in this case.”¹⁵ The court vacated only the portion of the Commission's orders that allow PJM to apply the Tariff amendments to the 2024/2025 BRA.¹⁶

¹⁰ Initial Order, 182 FERC ¶ 61,109 at PP 163, 167; Rehearing Order, 184 FERC ¶ 61,055 at PP 54, 66, 70.

¹¹ 16 U.S.C. § 824e.

¹² Initial Order, 182 FERC ¶ 61,109 at P 181. PJM stated that its section 206 filing contained identical Tariff amendments as proposed in its section 205 filing, and should the Commission accept its 205 filing, PJM would consider its 206 filing to be moot and withdrawn. PJM, Transmittal, Docket No. EL23-19-000, at 2 n.4, 36 (filed Dec. 23, 2022).

¹³ *PJM Power Providers*, 96 F.4th at 399; *id.* at 400 (explaining that “[u]nder the Tariff, PJM calculated and posted the LDA Reliability Requirement (past action), and it was required to use it in the Auction (legal consequence),” but the Tariff amendments “permitted PJM to use a different LDA Reliability Requirement to reflect certain resources’ lack of participation”).

¹⁴ *Id.* at 401.

¹⁵ *Id.* at 401-402.

¹⁶ *Id.* at 402 (citing *Bd. of Cnty. Comm'rs of Weld Cnty. v. U.S. EPA*, 72 F.4th 284, 296 (D.C. Cir. 2023)) (“[J]udicial remedies should be ‘no more burdensome to the

B. Petition Order

5. In its March 29, 2024 petition, PJM requested confirmation that, as a result of the Third Circuit's decision in *PJM Power Providers*, the Tariff provisions governing the conduct of the BRA for the 2024/2025 delivery year are those that were in effect prior to the LDA Reliability Requirement Orders, and that the capacity commitments that would result from applying those Tariff provisions are binding and effective for the 2024/2025 delivery year.¹⁷ PJM also asked the Commission to authorize PJM to rerun the Third Incremental Auction for the 2024/2025 delivery year.¹⁸

6. In order to implement the court's holding,¹⁹ the Commission in the Petition Order granted PJM's petition and directed PJM to recalculate the 2024/2025 BRA results under the status quo ante auction rules and parameters, rerun the Third Incremental Auction, and submit a compliance filing removing the Tariff amendments accepted in the LDA Reliability Requirement Orders.²⁰

defendant than necessary to provide complete relief' to the plaintiffs or petitioners." (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979))).

¹⁷ Petition at 1.

¹⁸ *Id.* In addition to an annual BRA, PJM holds three Incremental Auctions in advance of each delivery year, which runs from June 1 to May 31. PJM, Intra-PJM Tariffs, Tariff, Attach. DD, § 5.4 (Reliability Pricing Model Auctions) (9.0.0). The Third Incremental Auction for the 2024/2025 delivery year was held in February 2024. See Petition Order, 187 FERC ¶ 61,065 at P 3 & n.10 (citing *Calpine Corp. v. PJM Interconnection, L.L.C.*, 173 FERC ¶ 61,061, at PP 337, 358 (2020)).

¹⁹ Although the court did not remand any particular matter to the Commission, the Commission stated that it retains authority to implement the requirements of the court's opinion. Petition Order, 187 FERC ¶ 61,065 at P 22 (citing *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998); *Burlington N., Inc. v. U.S.*, 459 U.S. 131, 141 (1982)).

²⁰ Petition Order, 187 FERC ¶ 61,065 at PP 22, 26.

II. Rehearing

A. Request for Rehearing

7. PJM Load Parties assert that the Commission misconstrued and improperly limited its remedial authority in response to the Third Circuit's ruling.²¹ PJM Load Parties contend that the Third Circuit's conclusion that the Commission erred in accepting PJM's proposed Tariff amendments does not deprive the Commission of its discretion to determine appropriate relief, including, in this case, the discretion to allow PJM to retain the 2024/2025 BRA results posted following the Initial Order on February 28, 2023.²²

8. PJM Load Parties assert that not only was the Commission not obligated to put parties back in the position they would have occupied absent its legal error, but here they posit that doing so is not possible, arguing that had the Commission rejected the Tariff amendments in the Initial Order, and had PJM then posted the resulting auction prices in February 2023, parties would have had over a year before the start of the delivery year in which to seek prospective changes to those rates under FPA section 206 or take steps to hedge their exposure to those prices or mitigate the rate shock.²³ By contrast, PJM Load Parties argue that the Petition Order imposes a roughly \$178 million rate increase with

²¹ Rehearing Request and Stay Motion at 2-3, 5-10 (citing *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354 (D.C. Cir. 2017); *Consol. Edison Co. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007); *Conn. Valley Elec. Co., Inc.*, 208 F.3d 1037 (D.C. Cir. 2000); *Exxon Co. v. FERC*, 182 F.3d 30, 50 (D.C. Cir. 1999); *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993); *Towns of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992)).

²² *Id.* at 2, 4, 5-6; *id.* at 6 (stating that the Commission's broad remedial authority includes the authority not to remedy a filed rate doctrine violation (citing *Towns of Concord*, 955 F.2d at 72-73); *id.* (asserting that the Commission failed to respond to PJM Load Parties' citation to legal principles affording the Commission this discretion (*N.E. Power Generators Ass'n v. FERC*, 881 F.3d 202, 210 (D.C. Cir. 2018))).

²³ *Id.* at 6. PJM Load Parties further surmise that, had the Commission rejected PJM's FPA section 205 filing, it "presumably would have entertained" the concurrent FPA section 206 complaint, providing time to consider prospective changes to protect customers against unjust and unreasonable prices caused by the overstated LDA Reliability Requirement. *Id.* at 6 n.27.

less than four weeks' notice, making effective auction prices that were announced publicly for the first time only the month before.²⁴

9. PJM Load Parties assert that the Commission focused too narrowly on the Third Circuit's statements in applying the *PJM Power Providers* decision to PJM's petition.²⁵ PJM Load Parties point to the Third Circuit's finding that PJM "was required to use" the initial LDA Reliability Requirement in the 2024/2025 BRA, which they maintain articulates the Third Circuit's findings with respect to application of PJM's filed rate, but was not intended to cabin the Commission's remedial discretion.²⁶ They similarly assert that the court's statement that "the equities play no role in [the court's] application of the filed rate doctrine" likewise was not intended to undermine the Commission's remedial discretion.²⁷ Nor, PJM Load Parties argue, did the Commission identify any precedent finding that a filed rate doctrine violation limits the Commission's duty to consider equitable factors in exercising its remedial discretion.²⁸

10. PJM Load Parties argue that the Commission erred by granting the petition despite evidence of adverse and unjustified effects on customers in the DPL South LDA, including undisputed evidence from PJM Load Parties that granting the petition could increase capacity charges for the 2024/2025 delivery year by roughly \$178 million.²⁹

²⁴ *Id.* at 6-7. PJM Load Parties variously refer to the amount of the increase as "more than 177 million," *id.* at 22, and "nearly \$178 million," *id.* at 23.

²⁵ *Id.* at 8-9.

²⁶ *Id.* at 8 (citing Petition Order, 187 FERC ¶ 61,065 at PP 22, 25 (citing *PJM Power Providers*, 96 F.4th at 400)).

²⁷ *Id.* at 9 (citing *PJM Power Providers*, 96 F.4th at 401).

²⁸ *Id.* at 9 & n.42 (citing Petition Order, 187 FERC ¶ 61,065 at P 22 n.59 (citing *Koch Gateway Pipeline Co.*, 136 F.3d 810)).

²⁹ *Id.* at 4, 10-12 (citing PJM Load Parties Apr. 11, 2024 Protest at 12-13 & Attachment 1 (Affidavit of Dan Klose); Petition Order, 187 FERC ¶ 61,065 at P 15; *id.*, (Phillips, Chairman, concurring at P 3 n.3)); *id.* at 11 (noting arguments from PJM Load Parties' protest and complaint in Docket No. EL23-104-000 that the LDA Reliability Requirement resulting from the petition artificially increases prices without spurring additional investment (citing PJM Load Parties, Complaint, Docket No. EL24-104-000, at 13-14, 18 (filed Apr. 22, 2024))); *id.* at 11-12 (citing the separate statements from the Chairman and Commissioners recounting the adverse effects of granting the petition

11. The Commission further erred, PJM Load Parties contend, by departing from its usual policy and precedent against rerunning auctions.³⁰ PJM Load Parties claim that the Commission improperly suggests that the Commission's policy against rerunning auctions is based on the "technical difficulties" of doing so,³¹ but maintain that the policy also reflects consideration of parties' reliance on announced auction results and how changing announced prices and commitments could affect parties who are unable to adjust their commercial arrangements in response to the new results.³² Here, PJM Load Parties argue that rerunning the market upsets the reasonable expectations of market participants who relied on the posted 2024/2025 BRA results.³³ PJM Load Parties further assert that the Commission did not provide a reasoned response to PJM's acknowledgment that its proposal to recalculate the BRA results would implicate concerns underlying the policy against rerunning the markets, including clearing different resources in the recalculated results, potential double commitments of capacity, and upsetting the expectations of market participants.³⁴ In addition, PJM Load Parties argue

(citing Petition Order, 187 FERC ¶ 61,065 (Phillips, Chairman, concurring at PP 3-4); *id.* (Christie, Comm'r, concurring at PP 1-2))).

³⁰ *Id.* at 3, 4, 12-15 (citing *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014); *Indep. Mkt. Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137 at P 77 (2021); *ISO New England Inc.*, 170 FERC ¶ 61,187, at P 21 (2020); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 at PP 42, 53-60 (2017), *order on reh'g*, 169 FERC ¶ 61,237 at PP 25-26 (2019); *Midwest Indep. Transmission Sys. Operator, Inc.*, 162 FERC ¶ 61,173 at PP 19-20 (2018)); *see also id.* at 7-8 (citing cases where the Commission has declined to rerun the market and further asserting that Constellation Energy Generation, LLC acknowledged the Commission's equitable discretion in its comments on the petition (citing Constellation Energy Generation, LLC Apr. 11, 2024 Comments at 1-4)); *id.* at 10 (asserting that *PJM Power Providers* did not justify a departure from precedent, noting that the Commission balanced the equities and declined to rerun the auctions following the court's ruling in *NRG Power Mktg. v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (citing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, *order on reh'g*, 169 FERC ¶ 61,237)).

³¹ *Id.* at 13 (citing Petition Order, 187 FERC ¶ 61,065 at P 25 n.65 ("While the Commission has previously acknowledged the technical difficulties in rerunning auctions, we note that here PJM can recalculate the BRA results by using the original offers and the Initial LDA Reliability Requirement."))).

³² *Id.* (citing *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,237 at P 25).

³³ *Id.* at 4, 14 (citing PJM Load Parties Apr. 11, 2024 Protest at 13-15).

³⁴ *Id.* at 15 (citing PJM Load Parties Apr. 11, 2024 Protest at 10-15).

that rerunning the Third Incremental Auction provides an opportunity for suppliers to adjust their positions but, apart from using the most recent load forecast, provides no similar adjustment on the load side and no means for customers to protect themselves from the increased prices.³⁵

12. PJM Load Parties argue that, absent remediation, the Petition Order will subject ratepayers to unjust and unreasonable rates contrary to FPA section 205, because the Commission has instructed PJM to recalculate the 2024/2025 BRA prices using the initial LDA Reliability Requirement despite compelling evidence that the resulting auction prices will be unjust and unreasonable.³⁶ PJM Load Parties assert that, in partially vacating the LDA Reliability Requirement Orders, the Third Circuit did not make a ruling on the underlying rates or absolve the Commission of its obligation to ensure that Commission-jurisdictional capacity charges are just and reasonable.³⁷ PJM Load Parties allege that the rates resulting from PJM's recalculation of the 2024/2025 BRA prices are, by definition, unjust and unreasonable because they serve no salutary purpose, have no reasonable justification, and will result in a roughly \$178 million windfall to the generators.³⁸

13. Finally, PJM Load Parties state that the Commission's rejection of the Maryland Public Service Commission's request to reopen the FPA section 206 complaint submitted in Docket No. EL23-19-000 was unexplained and incorrect.³⁹ Although the Commission explained that reopening the complaint would not permit it to reach a different outcome, PJM Load Parties contend that "[e]ven if the filed-rate doctrine and rule against retroactive ratemaking might have precluded the Commission from modifying PJM's Tariff in the same way as PJM's section 205 filing did, they would not have barred all

³⁵ *Id.* (citing *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,237 at P 25).

³⁶ *Id.* at 4, 16-18 (citing 16 U.S.C. § 824d(a); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016); *Citadel FNGE Ltd v. FERC*, 77 F.4th 842, 856-57 (D.C. Cir 2023); *Investigation of Terms & Conditions of Pub. Util. Mkt.-Based Rate Authorizations*, 103 FERC ¶ 61,349, at P 22 (2003)).

³⁷ *Id.* at 16-17 (citing *Hughes v. Talen Energy Mktg. L.L.C.*, 578 U.S. 150 (2016); *Burlington N., Inc. v. U.S.*, 459 U.S. at 144; *FPC v. Hope Nat. Gas Co.*, 320 U.S. 561, 602 (1944); *PJM Interconnection, L.L.C.*, 178 FERC ¶ 61,121, at P 100 (2022)).

³⁸ *Id.* at 18 (citing *Citadel FNGE, Ltd. v. FERC*, 77 F.4th at 856; *Investigation of Terms & Conditions of Pub. Util. Mkt.-Based Rate Authorizations*, 103 FERC ¶ 61,349 at P 22).

³⁹ *Id.* at 5, 19-20 (citing Petition Order, 187 FERC ¶ 61,065 at P 24).

potential relief.”⁴⁰ PJM Load Parties reason that the Commission was not limited to considering only the Tariff changes submitted in the complaint and, had it found the Tariff unjust and unreasonable, would have been obligated to consider prospective changes to the Tariff and 2024/2025 BRA results.⁴¹ PJM Load Parties request that the Commission clarify that, in concluding that reopening PJM’s complaint in Docket No. EL23-19-00 would not allow for a different outcome, “the Commission is in no way prejudging the merits of the PJM Load Parties’ pending complaint in Docket No. EL24-104-000,” and request rehearing to the extent the Commission declines to grant clarification.⁴²

B. Commission Determination

14. We continue to find that directing PJM to recalculate the 2024/2025 BRA results under the auction rules and parameters in place prior to the LDA Reliability Requirement Orders implements the requirements of the Third Circuit’s decision.⁴³ In *PJM Power Providers*, the Third Circuit vacated “the portion of the [LDA Reliability Requirement Orders] that allows PJM to apply the Tariff Amendment[s] to the 2024/25 capacity auction,” based on its finding that the unambiguous language of PJM’s Tariff “required [PJM] to use” the LDA Reliability Requirement calculated and posted prior to the 2024/2025 BRA.⁴⁴ Granting PJM’s petition institutes rates for the 2024/2025 BRA⁴⁵ that reflect the court’s unequivocal direction that PJM use the initial “calculated and posted LDA Reliability Requirement as the Tariff require[s].”⁴⁶

⁴⁰ *Id.* at 19.

⁴¹ *Id.* at 19-20.

⁴² *Id.* at 20.

⁴³ *See* Petition Order, 187 FERC ¶ 61,065 at P 22.

⁴⁴ *PJM Power Providers*, 96 F.4th at 400, 402; *id.* at 400 (explaining that the Tariff amendments were retroactive because, by permitting PJM to use a different LDA Reliability Requirement to reflect certain resources’ lack of participation, they altered the legal consequences attached to PJM’s calculation and posting of the LDA Reliability Requirement).

⁴⁵ *See* Petition Order, 187 FERC ¶ 61,065 at P 22 (citing *Burlington N., Inc. v. U.S.*, 459 U.S. at 141 (“federal court authority to reject Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves”)).

⁴⁶ *PJM Power Providers*, 96 F.4th at 400.

15. In light of this recalculation, and in the circumstances of this case, the Commission determined that rerunning the Third Incremental Auction will effectuate the court's requirement by allowing market participants the opportunity to adjust their revised capacity commitments in light of any existing commitments that were made in reliance on the LDA Reliability Requirement Orders.⁴⁷ Contrary to PJM Load Parties' assertions,⁴⁸ the Commission considered the record evidence in this proceeding and parties' concerns regarding rerunning the auction. We continue to find that granting PJM's petition is compelled by the Third Circuit's ruling that PJM "was required to use" the initial LDA Reliability Requirement.⁴⁹ Although PJM Load Parties continue to urge the Commission to exercise remedial discretion to leave in place the rates implemented following the LDA Reliability Requirement Orders,⁵⁰ the court emphasized that "the equities play no role in [its] application of the filed rate doctrine."⁵¹ Accordingly, we continue to acknowledge PJM Load Parties' concerns about rerunning auctions and the equities implicated by this proceeding, but continue to find that they do not authorize the Commission to change the outcome under the circumstances of this proceeding.⁵²

16. We are unpersuaded by PJM Load Parties' contention that the Commission failed to explain its determination not to reopen the FPA section 206 complaint in Docket No. EL23-19-000.⁵³ Having determined that recalculating the 2024/2025 BRA results was required by Third Circuit's ruling, and that rerunning the Third Incremental Auction is consistent with that ruling, the Commission declined to reopen the FPA section 206 complaint, which would not have yielded a different outcome. Nevertheless, we confirm that the Commission is not prejudging the merits of the pending complaint in Docket No. EL24-104-000, which the Commission will address in a separate order.

⁴⁷ Petition Order, 187 FERC ¶ 61,065 at P 23.

⁴⁸ See Rehearing Request and Stay Motion at 5-6, 10-18; see also PJM Load Parties' Apr. 11, 2024 Protest at 10-16.

⁴⁹ Petition Order, 187 FERC ¶ 61,065 at P 25 (citing *PJM Power Providers*, 96 F.4th at 400).

⁵⁰ Rehearing Request and Stay Motion at 2, 4, 5-6.

⁵¹ *PJM Power Providers*, 96 F.4th at 401. The court further stated that the application of the "bright-line rule" could "potentially produce a harsh result in this case." *Id.* at 401.

⁵² Petition Order, 187 FERC ¶ 61,065 at P 25.

⁵³ Rehearing Request and Stay Motion at 19-20.

III. Motion for Stay

A. Motion for Stay

17. PJM Load Parties request either a stay of the Petition Order pending resolution of their rehearing request and the outcome of potential judicial review, or clarification from the Commission that the capacity charges imposed pursuant to the Petition Order are subject to refund if the Commission either grants PJM Load Parties' complaint in Docket No. EL24-104-000 or grants rehearing and denies PJM's Petition in this docket.⁵⁴

18. PJM Load Parties state that the applicable standard for their stay motion is whether "justice so requires."⁵⁵ According to PJM Load Parties, when determining whether this standard has been satisfied, the Commission considers: (1) whether the party requesting the stay would suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.⁵⁶

19. PJM Load Parties argue they are likely to suffer irreparable injury absent a stay.⁵⁷ PJM Load Parties state that the Petition Order's authorization of PJM's proposal to recalculate the 2024/2025 BRA results is likely to increase capacity charges by roughly \$178 million. Although PJM Load Parties acknowledge that purely economic loss may not amount to irreparable harm because it can be remedied later, they argue that the impending start of the delivery year on June 1, 2024 puts in doubt whether the harm can be remedied later;⁵⁸ PJM Load Parties maintain that the Commission's reluctance to rerun auctions will presumably apply with even more force once the delivery year begins. PJM Load Parties therefore ask the Commission to state whether the increased charges imposed under the Petition Order would be subject to refund in the event that the Petition Order is overturned or that the PJM Load Parties' complaint in Docket No. EL24-104-000 is granted. PJM Load Parties state that, if the Commission will not provide that

⁵⁴ *Id.* at 20-21, 23, 25. PJM Load Parties seek action on their stay request by May 17, 2024. *Id.* at 1-2, 20-21, 25.

⁵⁵ *Id.* at 21 (citing 5 U.S.C. § 705).

⁵⁶ *Id.* (citing *Tenaska Clear Creek Wind, LLC v. Sw. Power Pool, Inc.*, 182 FERC ¶ 61,084, at P 58 (2023)).

⁵⁷ *Id.* at 22.

⁵⁸ *Id.* at 23.

assurance, then the Petition Order's imposition of roughly \$178 million in unreasonable and unrecoverable charges is plainly irreparable harm.

20. PJM Load Parties also contend that a stay would not substantially harm other parties.⁵⁹ PJM Load Parties state that, while merchant generators may argue that granting a stay would hold capacity prices at a lower level than if the Petition Order is allowed to go into effect, this cannot be considered substantial harm because every supplier with a capacity commitment will be compensated at a price equal to or higher than the offer it submitted. PJM Load Parties state that the deprivation of a windfall without any incremental reliability benefit cannot be a cognizable harm. PJM Load Parties further state that, while some parties might argue that a stay would adversely affect certainty and predictability in the auction results, the opposite is true. PJM Load Parties argue that maintaining the 2024/2025 BRA and Third Incremental Auction results will promote stability, predictability, and certainty, whereas recalculating the 2024/2025 BRA and rerunning the Third Incremental Auction will upset settled expectations and undermine support for PJM's capacity market construct.⁶⁰

21. PJM Load Parties also argue that granting a stay would be in the public interest given the substantial legal issues the PJM Load Parties have raised on rehearing, the difficulty of obtaining effective relief after the 2024/2025 delivery year commences, and the lack of meaningful harm to other parties.⁶¹

B. Answers to Motion

22. Answers to PJM Load Parties' motion for stay were filed on May 17, 2024,⁶² by PJM; Vistra Corp. (Vistra); and the Electric Power Supply Association, PJM Power Providers Group, and the NRG Companies⁶³ (EPSA, P3, and NRG Companies).

⁵⁹ *Id.* at 24.

⁶⁰ *Id.* at 24-25.

⁶¹ *Id.* at 25.

⁶² PJM Load Parties requested that the Commission shorten the answer period for the motion for stay to two days, with answers due May 15, 2024. *Id.* at 2, 25-26. A notice was issued on May 14, 2024, setting a May 17, 2024 deadline for answers to the motion.

⁶³ For purposes of this answer, the NRG Companies are NRG Business Marketing LLC (f/k/a Direct Energy Business Marketing, LLC) and Midwest Generation, LLC.

23. PJM urges the Commission not to inject further uncertainty into the capacity commitments for the 2024/2025 delivery year given the proximity to the commencement of the delivery year on June 1, 2024.⁶⁴ PJM also provides a status update, explaining that it finalized the 2024/2025 BRA results on May 9, 2024 and has commenced the rerun of the Third Incremental Auction.⁶⁵ PJM states that the offer window for the Third Incremental Auction closed May 16, 2024 and PJM expects to post the final Third Incremental Auction results on May 23, 2024.

24. Vistra states that granting the stay would violate the Third Circuit's mandate that the BRA rules that were in place prior to the LDA Reliability Requirement Orders must govern the 2024/2025 BRA.⁶⁶ Vistra further contends that PJM Load Parties have not made any of the requisite showings supporting a motion to stay.⁶⁷ Vistra asserts that: (1) the only harm PJM Load Parties allege will occur absent stay is economic harm, which is not irreparable;⁶⁸ (2) granting a stay of the Petition Order two weeks before the delivery year begins would create significant, unreasonable uncertainty for all auction participants;⁶⁹ and (3) PJM Load Parties have failed to show that a stay would be in the public interest, due to the substantial harm from granting a stay and because it cannot be in the public interest to violate a court order.⁷⁰

⁶⁴ PJM Answer at 3.

⁶⁵ *Id.* at 2-3.

⁶⁶ Vistra Answer 3 (citing *PJM Power Providers*, 96 F.4th at 402).

⁶⁷ *Id.* at 3-5.

⁶⁸ *Id.* at 4 (citing Rehearing Request and Stay Motion at 22-24; *Am. Wind Energy Ass'n*, 168 FERC ¶ 61,006, at P 23 (2019)).

⁶⁹ *Id.* at 4-5 (“Suppliers would be unsure of whether they had a capacity supply obligation at all, and, if they do have a supply obligation, the extent of what that obligation would be.”); *id.* at 5 (asserting that the Commission has recognized that economic uncertainty, including cost uncertainty, constitutes substantial harm to third parties (citing *Midcontinent Indep. Sys. Operator, Inc.*, 184 FERC ¶ 61,020, at P 46 (2023))).

⁷⁰ *Id.* at 5.

25. EPSA, P3, and NRG Companies similarly contend that denial of the stay is compelled by the Third Circuit's decision in *PJM Power Providers*.⁷¹ EPSA, P3, and NRG Companies further argue that PJM Load Parties do not meet the stringent requirements for granting a stay; in particular, they contend that, as economic harm is generally insufficient to establish irreparable harm,⁷² the Commission need not examine the other factors.⁷³ In addition, EPSA, P3, and NRG Companies maintain that a stay would substantially harm other parties and be contrary to the public interest, as market participants were entitled to rely, and did rely, on the initial LDA Reliability Requirement, and the results of applying the parameter were predictable.⁷⁴ EPSA, P3, and NRG Companies assert that it would be "enormously disruptive" if the Commission were now to repeat its earlier error, and that adhering to the filed rate doctrine benefits the consuming public in the long term.⁷⁵ EPSA, P3, and NRG Companies argue that denying the stay and following the path forward established by the Third Circuit, Commission, and PJM will allow the 2024/2025 delivery year to commence with legally defensible capacity prices in place and is supported by market participants' and consumers' interest in finality.⁷⁶

⁷¹ EPSA, P3, and NRG Companies Answer at 1-2 (citing *PJM Power Providers*, 96 F.4th 390; Petition Order, 187 FERC ¶ 61,065 at P 25).

⁷² *Id.* at 2 (citing *ISO New England Inc.*, 178 FERC ¶ 61,063 at P 14 (2022); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,100 at P 13 (2012); *Olympic Pipe Line Co.*, 102 FERC ¶ 61,055 at P 17 (2003); *Cal. Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,111, at n.15 (2007); *Colo. Interstate Gas Co.*, 37 FERC ¶ 61,065, at 61,152 (1986)).

⁷³ *Id.* at 2-3 (citing *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000-A, 139 FERC ¶ 61,132 at P 390, *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)).

⁷⁴ *Id.* at 3; *id.* (noting that after the initial LDA Reliability Requirement and other BRA parameters were posted, NRG Companies contacted PJM to confirm their understanding of the implications for the DPL South LDA (citing NRG Companies Protest, Docket No. ER23-729-000, Affidavit of Joseph A. Holtman ¶ 16 (filed Jan. 20, 2023))).

⁷⁵ *Id.* at 3-4 (citing *PJM Power Providers*, 96 F.4th at 402).

⁷⁶ *Id.* at 4.

C. Commission Determination

26. We deny PJM Load Parties' motion to stay the Petition Order. We find that a stay is not justified, in that PJM Load Parties have not demonstrated irreparable harm without a stay, and that granting a stay would cause harm to other parties and is not in the public interest.

27. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act (APA): a stay will be granted if the Commission finds that "justice so requires."⁷⁷ Under this standard, the Commission considers such factors as: (1) whether the moving party will suffer irreparable injury without a stay, (2) whether a stay would substantially harm other parties, and (3) whether the stay is in the public interest.⁷⁸ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁷⁹

28. The standard for showing irreparable harm is strict. The key word is irreparable—the injury must be "beyond remediation"⁸⁰ and "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough."⁸¹ The movant further must substantiate that the injury not only is irreparable but is "likely" to occur.⁸² Bare allegations of what is likely to occur do not suffice because the Commission "must decide whether the harm will *in fact* occur."⁸³ The

⁷⁷ 5 U.S.C. § 705.

⁷⁸ See *Const. Pipeline Co., L.L.C.*, 154 FERC ¶ 61,092 at P 9 (2016); *Transcon. Gas Pipe Line Co., L.L.C.*, 150 FERC ¶ 61,183 at P 9 (2015); *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 14 (2012).

⁷⁹ See, e.g., *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,236 at P 8 (2016); *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183 at P 9; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022 at P 14.

⁸⁰ *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)); see also *In re NTE Conn., LLC*, 26 F.4th 980, 990 (D.C. Cir. 2022).

⁸¹ *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

⁸² *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183 at P 10 (citing *Wis. Gas Co.*, 758 F.2d at 674).

⁸³ *Id.* (citing *Wis. Gas Co.*, 758 F.2d at 674 (emphasis in original)).

injury must be both certain and great and it must be actual and not theoretical. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.⁸⁴

29. Here we find that PJM Load Parties have not made the requisite showing of irreparable harm because they have not shown that any harm they face would be irreparable. In support of their motion for stay, PJM Load Parties cite to the financial harm resulting from the recalculation of the 2024/2025 BRA results, which they contend will increase capacity charges by roughly \$178 million. Although we acknowledge PJM Load Parties' concerns about the magnitude of harm and the serious equitable concerns implicated by this proceeding, PJM Load Parties have not shown that the financial harm would be irreparable.⁸⁵ Rather, they state that there is "doubt" whether the harm can be remedied after the delivery year begins and ask the Commission to provide assurance that the increased charges would be subject to refund in the event the Petition Order is overturned or that the complaint in Docket No. EL24-104-000 is granted.⁸⁶ The burden is on PJM Load Parties to demonstrate irreparable harm, and they have not shown that any financial harm they may face cannot be remedied as appropriate and consistent with any further court order. We find that they have not demonstrated that the harm is irreparable and could not otherwise be relieved in the ordinary course of litigation.⁸⁷

30. We disagree with PJM Load Parties that no other parties would be harmed by granting the requested stay. Granting the stay would result in uncertain capacity market clearing prices and associated capacity commitments during the 2024/2025 delivery year, which begins on June 1, 2024. Further, without definitive clearing prices and commitments, a resource's maximum exposure to Non-Performance Charges—which are based on the BRA clearing price—will be uncertain and could influence a resource's performance during an emergency event.⁸⁸ Such a result could have adverse impacts on

⁸⁴ *Id.*

⁸⁵ *See, e.g., Va. Petroleum Jobbers Ass'n*, 259 F.2d at 925 ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

⁸⁶ Rehearing Request and Stay Motion at 23.

⁸⁷ We note that PJM Load Parties are unlikely to prevail on the merits of an appeal given the Third Circuit's finding that the Tariff unambiguously requires PJM to use the posted LDA Reliability Requirement in the auction and the court's emphasis that "the equities play no role in [its] application of the filed rate doctrine" despite the "harsh result in this case." *See PJM Power Providers*, 96 F.4th at 399, 400-402

⁸⁸ *See PJM Interconnection, L.L.C.*, 186 FERC ¶ 61,080, at PP 234-235 (2024) (accepting PJM's proposal to benchmark the stop loss on the BRA clearing price and

reliability and harm both customers and sellers. Moreover, the harm that may be associated with performance during an emergency event is not merely financial; delayed or uncertain capacity commitments and compensation for capacity resources could adversely impact grid reliability during the delivery year.

31. We further find that, under the circumstances, PJM Load Parties have not met their burden to show that granting the stay would be in the public interest. In support of their public interest argument, PJM Load Parties cite to the legal issues raised on rehearing, the difficulty of obtaining relief, and the lack of harm to other parties. In this order, we address PJM Load Parties' rehearing arguments; these arguments do not establish a basis for finding that granting a stay is in the public interest, given that the Petition Order implements the requirements of the Third Circuit's decision. Moreover, PJM Load Parties' other arguments that the stay is in the public interest essentially repeat their arguments on the other factors relevant to whether a stay should issue,⁸⁹ which we have rejected above. Notwithstanding the significant equitable implications of this proceeding, which were addressed in detail in the concurrences to the Petition Order⁹⁰ we find that these arguments are insufficient to meet the PJM Load Parties' burden to show that a stay would be in the public interest, given the court's finding that the equities played no role in its determination.⁹¹

noting that “[o]ne key objective of the stop loss limit is to give resources a strong incentive to perform during times of system stress”).

⁸⁹ Rehearing Request and Stay Motion at 25 (pointing to the alleged “difficulty of obtaining effective relief if the May 6 Order is in effect when the 2025/25 Delivery Year commences, and the lack of meaningful harm to other parties from maintaining the status quo”).

⁹⁰ See Petition Order, 187 FERC ¶ 61,065 (Phillips, Chairman, concurring at PP 3-5); *id.* (Clements, Comm’r, concurring at PP 1-2); *id.* (Christie, Comm’r, concurring at P 1).

⁹¹ *PJM Power Providers*, 96 F.4th at 401-402.

The Commission orders:

(A) PJM Load Parties' request for rehearing is hereby denied, as discussed in the body of this order.

(B) PJM Load Parties' motion for stay is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Clements is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

PJM Interconnection, L.L.C.

Docket No. ER23-729-003

(Issued May 24, 2024)

CLEMENTS, Commissioner, *concurring*:

1. I am joining the decision with regard to its implementation of the Third Circuit’s ruling because I believe the Commission is required to follow the court’s direction to order PJM to use the initial calculated and posted LDA reliability requirement. The court specifically stated that “the filed rate doctrine does not yield, no matter how compelling the equities.”¹

2. That said, if, as the parties requesting rehearing suggest, the Third Circuit’s statement that “the equities play no role” applies only to the application of the filed rate itself and does not circumscribe the Commission’s potential reliance on equitable considerations pursuant to Section 309 of the Federal Power Act to fashion a remedy other than ordering PJM to use the initial calculated and posted LDA reliability requirement,² I would welcome such a clarification from the court.

For these reasons, I respectfully concur.

Allison Clements
Commissioner

¹ *PJM Power Providers Grp. v. FERC*, 96 F. 4th 390, 401 (3d Cir. 2024).

² *See* Rehearing Request and Stay Motion at 9.