

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

PJM Interconnection, L.L.C.

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Docket No. ER13-535-00\_

**MOTION OF PJM INTERCONNECTION, L.L.C.  
FOR ORDER ON REMAND**

PJM Interconnection, L.L.C. (“PJM”), pursuant to Rule 212 of the Commission’s procedural rules, 18 C.F.R. § 385.212, respectfully moves for a Commission order on remand resolving this proceeding. In 2013, the Commission accepted most of the proposed Minimum Offer Price Rule (“MOPR”) tariff revisions PJM filed under section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d, on the condition that PJM retain two then-existing provisions that PJM had proposed either to remove or modify: the unit-specific exception to the MOPR and the one-year duration for MOPR mitigation. Upon review,<sup>1</sup> the United States Court of Appeals for the District of Columbia Circuit (“the Court”) found that the Commission could not impose that condition under section 205, as it amounted to a non-minor change only permitted under FPA section 206, 16 U.S.C. § 824e.

The Commission must now determine on remand how to proceed with PJM’s pending section 205 filing given the Court’s articulation of the Commission’s authority. As further set forth below, certain intervening facts illuminating the impact (or lack thereof) of the Commission’s ordered changes afford the Commission an easy path to resolving this matter within its clarified authority and putting this case behind it without

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<sup>1</sup> *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017) (“*NRG*”).

any disruption to PJM's settled market outcomes. Whatever concerns the Commission had that resulted in the Commission directives on the unit-specific exception and one-year mitigation period, those directives have had no practical impact (as compared to PJM's original proposal) on the auction results in the five annual auctions conducted since the Commission's initial order in this case. Accordingly, the Commission on remand can (without disrupting past auctions) simply accept PJM's original section 205 proposal, unchanged, as just and reasonable.

### BACKGROUND

In its May 2, 2013 "Order Conditionally Accepting in Part, and Rejecting in Part, Proposed Tariff Provisions, Subject to Conditions," the Commission "accept[ed] PJM's proposed categorical exemption for competitive-entry, subject to conditions, as a just and reasonable modification to PJM's MOPR process," finding the exemption "will remove an unnecessary barrier to entry for merchant projects and other projects that are procured on a competitive basis."<sup>2</sup> Similarly, the Commission "conditionally accept[ed] PJM's proposed [self-supply] exemption for filing," finding that "as a general matter, providing exemptions for resources properly designated as self-supply when they meet suitable net-short and net-long thresholds is reasonable."<sup>3</sup>

However, although the Commission found that the two new exemptions "appropriately identify entry that is consistent with competitive behavior," it also found that "PJM's proposal does not provide a just and reasonable replacement for the unit-

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<sup>2</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 53 (2013) ("Initial Order"); *see also id.* at PP 54-60 (rejecting arguments that proposed competitive entry exemption is unreasonable).

<sup>3</sup> *Id.* at PP 107-08; *see also id.* at PP 110-12 (rejecting arguments that proposed self-supply exemption is unreasonable).

specific review process” because “[t]here may be resources ineligible for any MOPR exemptions that have lower competitive costs than the default offer floor, and these resources should have the opportunity to demonstrate their competitive entry costs.”<sup>4</sup> The Commission “therefore accept[ed] PJM’s filing conditioned on the retention of its unit-specific review process.”<sup>5</sup>

The Commission also rejected PJM’s proposal to impose MOPR mitigation on non-exempt capacity offered below the MOPR floor price for three years, rather than only one.<sup>6</sup>

On rehearing, the Commission made its “conditioning” approach even more explicit. The Commission explained it “has utilized a long standing practice of accepting filings conditioned on the utility . . . revising its proposal, when the Commission finds the filing generally just and reasonable, but further determines that certain components of the filing are not just and reasonable.”<sup>7</sup> Based on its understanding that court precedent “recognized the Commission’s ability to act under section 205 . . . when the utility . . . ‘consents’ to the change,”<sup>8</sup> the Commission concluded its “conditional acceptance pursuant to section 205 provided PJM with the opportunity to move forward with its two

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<sup>4</sup> *Id.* at P 26.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at P 211.

<sup>7</sup> *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066, at P 16 (2015) (“Rehearing Order”).

<sup>8</sup> *Id.* at P 17.

new categorical exemptions and the rest of its filing while retaining the just and reasonable unit-specific review process.”<sup>9</sup>

On review, the Court framed “[t]he question in this case” as “whether FERC exceeded its authority under Section 205 when it suggested those modifications to PJM’s proposal,” and answered in the affirmative.<sup>10</sup> The Court held the Commission exceeded its authority and mis-applied precedent, because the Commission-ordered changes at issue went beyond the type of changes that could be effectuated in the context of a Section 205 review of a rate filing. Finding the Commission’s modifications “resulted in an ‘entirely different rate design’ than both PJM’s proposal and PJM’s prior rate scheme,”<sup>11</sup> the Court vacated *in part* the Commission’s orders, specifically noting that the Commission’s conditions “largely eviscerated the terms of the bargain,” effectively referencing the approval of PJM’s proposed tariff revisions by PJM stakeholders and “remand[ed] the matter to FERC.”<sup>12</sup> Importantly, the Commission’s order recognized that other parts of PJM’s rate submission that had been accepted by the Commission, were unchallenged and unaffected by the Court’s decision, and thus remain in effect.<sup>13</sup>

Following a minor corrective action on rehearing, the Court issued its mandate on September 28, 2017.

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<sup>9</sup> *Id.* at P 22.

<sup>10</sup> *NRG*, 862 F.3d at 11.

<sup>11</sup> *Id.* at 115 (quoting *Western Resources v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993)).

<sup>12</sup> *Id.* at 117.

<sup>13</sup> *NRG*, 862 F.3d at n.1.

## ARGUMENT

As the Commission recently recognized, a federal court may vacate a Commission rate order, but doing so “leave[s] in effect the rates filed under the Commission’s authority pending the Commission’s redetermination of a reasonable rate’ on remand from the court.”<sup>14</sup> When tasked with addressing a statutory violation, including its own legal error on remand, the Commission is permitted “great deference in . . . its selection of a remedy, for ‘the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies, and sanctions.’”<sup>15</sup> The Commission is afforded this broad deference “even in the face of an undoubted statutory violation, unless the statute itself mandates a particular remedy.”<sup>16</sup> As the courts and the Commission have often held, “when the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made.”<sup>17</sup>

Here, as the Commission’s orders and the Court’s opinion (reviewed above) make plain, the Commission’s legal error was its mistaken view (based on its interpretation of

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<sup>14</sup> *ISO-New England Inc.*, 161 FERC ¶ 61,031, at P 26 (2017) (quoting *Burlington Northern, Inc. v. United States*, 459 U.S. 131, 144 (1982)).

<sup>15</sup> *La. Pub. Serv. Comm’n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008) (quoting *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967)).

<sup>16</sup> *Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1044 (D.C. Cir. 2000).

<sup>17</sup> *Pub. Util. Comm’n Cal. v. FERC*, 988 F.2d 154, 168 (D.C. Cir. 1993); *see also Panhandle E. Pipe Line Co. v. FERC*, 907 F.2d 185, 189 (D.C. Cir. 1990); *Office of Consumers’ Counsel, Ohio v. FERC*, 826 F.2d 1136, 1139 (D.C. Cir. 1987); *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057, at P 21 (2016) (finding that the Commission has a “general policy of ensuring that the parties harmed by our legal error are put in the same position in which they would have been had the Commission not erred”).

prior court precedent) that it could condition its acceptance of PJM's section 205 filing on PJM's consent to retention of the unit-specific review process and the one-year MOPR duration. The Court has now instructed the Commission that the modifications it suggested<sup>18</sup> exceeded those permitted under section 205, even with PJM's consent, because the changes (at least in aggregate) are not "minor."<sup>19</sup>

Given the partial acceptance by the Commission of PJM's original section 205 filing, as modified, and the Court's partial vacatur, PJM's original section 205 filing is again before the Commission for further determinations consistent with the Court's opinion. The question on remand, therefore, is how the Commission should address PJM's still-pending section 205 filing with the clarified limits on its authority to modify PJM's section 205 filing. As noted, the Commission's discretion in this circumstance is broad. Without limiting that discretion, the Commission's options to apply the framework prescribed by the Court appear to include:

- concluding that, viewed as a whole rather than in parts, PJM's section 205 filing is just and reasonable;
- making a reasoned determination that one or more Commission-desired changes are sufficiently minor that they may be effected under section 205 with PJM's consent; or

The first option provides the Commission a ready means to meet its obligations on remand and close this case. It would be entirely consistent with the Commission's broad authority on remand to consider how it would have addressed the section 205 filing if it had been aware of the Court's view of the limitations on its authority to modify certain aspects of that filing. In that case, the Commission could have, and (PJM

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<sup>18</sup> *NRG*, 862 F.3d at 114.

<sup>19</sup> *Id.* at 115-16.

submits) likely would have, determined that its particular concerns did not, on balance, warrant rejection of PJM's entire filing. That outcome is even more attractive and supportable today, because the numerous intervening auctions have demonstrated—without exception—that the two Commission changes have been completely inconsequential to the auction clearing results, as compared to what would have transpired if PJM's section 205 proposal simply had been accepted.

As set forth above, the Commission found the competitive entry and self-supply exemptions (with certain changes not at issue here) just and reasonable on their own terms.<sup>20</sup> The Commission's sole basis for finding them "standing alone" not to be just and reasonable was the possibility that sellers that do not qualify for the exemptions might still have legitimate, justifiable offers below the MOPR price floor.<sup>21</sup> The Commission conditioned its approval of the two exemptions on retention of the unit-specific process only to catch possible future competitive offers that that might fall through the cracks theoretically left by the two categorical exemptions.

As it happens, we now know that those cracks, if they exist at all, are quite narrow. Since the time PJM implemented the Initial Order by allowing sellers to proceed under both the unit-specific process and the categorical exemptions, PJM has conducted five Base Residual Auctions (PJM's principal annual auction that secures capacity commitments for a three-year forward Delivery Year) and nine Incremental Auctions. *Zero* unit-specific offers have been submitted in those auctions, as confirmed in the attached affidavit of Mr. Jeffrey D. Bastian, PJM's Manager of Capacity Market

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<sup>20</sup> Initial Order at PP 53, 107-08.

<sup>21</sup> *Id.* at P 141.

Operations.<sup>22</sup> Mr. Bastian concludes “[e]ven assuming it is theoretically possible for a seller’s offer to fail to qualify under the categorical exemptions, but qualify under the unit-specific process, that possibility has yet to materialize in any of the fourteen auctions conducted after the categorical exemptions were put in place.”<sup>23</sup> As Mr. Bastian also explains, it logically follows from the lack of unit-specific offers that “the auction results for those five Delivery Years would not change if the unit-specific process were assumed to have been unavailable for those auctions.”<sup>24</sup>

On remand, therefore, the Commission can conclude that the Initial Order’s concern, i.e., that the unit-specific process must be retained to ensure no competitive offers are turned aside, was overstated. The absence of unit-specific exception offers in the fourteen auctions to date does not rule out the possibility of future low-price competitive offers that do not qualify for the categorical exemptions, but it does show that this is not a major, or even substantial, concern. Under an approach, following *NRG*, that balances mild or minimal concern on a few issues in a section 205 filing versus the adverse effects of rejecting the entire filing, the Commission could comfortably tolerate the apparently inconsequential elimination of unit-specific review as part of its acceptance under section 205 of an overall filing that it otherwise found to be just and reasonable.

Similarly, the choice of one-year versus three-year MOPR mitigation has had no practical impact in any of the auctions conducted since the Initial Order. As Mr. Bastian

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<sup>22</sup> “Affidavit of Jeffrey D. Bastian on behalf of PJM Interconnection, L.L.C.,” at ¶ 6 (attached hereto).

<sup>23</sup> *Id.* at ¶ 7.

<sup>24</sup> *Id.* at ¶ 8.

explains, PJM’s “three-year” proposal “was designed to have a very narrow application, and is best viewed as an attempt to close a possible loophole, or preclude possible ‘gaming’ behavior.”<sup>25</sup> PJM’s proposed tariff changes were clear that the three-year rule applied only to “non-exempt” capacity, i.e., capacity for which a competitive entry or self-supply exemption had *not* been obtained.<sup>26</sup> If a seller *does* obtain one of those exemptions, and its resulting offer cleared the auction, then that cleared capacity, according to the proposed tariff, “shall not be subject to a MOPR Floor Offer Price in any subsequent RPM Auction.”<sup>27</sup> The three-year rule, as Mr. Bastian shows, matters only if a seller of new (i.e., post-February 2013) capacity, offers its capacity into the first-year auction *at or above* the MOPR floor price, and clears the auction. Under a “one-year” rule, that seller could then offer its capacity into the auction for the second and third years below the floor price. Under a three-year rule, however, the seller would have to either offer into those subsequent auctions at or above the floor price, or obtain an exemption.

However, as Mr. Bastian reports, the conditions that would have triggered the three-year rule have not occurred. Any seller of new gas-fired capacity to which MOPR applies that did not get a MOPR exemption did not clear—thus making any anticipated distinctions between a one-year or three-year mitigation period irrelevant. Instead, any seller of such capacity “only has cleared the auctions *if it obtained an exemption.*”<sup>28</sup> Consequently, “the absence of the three-year rule has had no effect on the clearing results

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<sup>25</sup> *Id.* at ¶ 10.

<sup>26</sup> *Id.* at Attachment A (excerpt from section 5.14(h)(4) of PJM’s proposed tariff revisions).

<sup>27</sup> *Id.* (excerpt from proposed section 5.14(h)(5)).

<sup>28</sup> *Id.* at ¶ 12 (emphasis added).

in the auctions held since the Commission rejected the three-year rule.”<sup>29</sup> Correspondingly, “if the three-year rule were deemed to have been in effect since February 2013, that assumption would not change any auction results.”<sup>30</sup>

Therefore, on this issue as well, the Commission could comfortably conclude that, as there is little practical effect from adopting a three-year rule instead of a one-year rule, accepting PJM’s section 205 proposal of a three-year rule would not meaningfully detract from an overall conclusion that PJM’s section 205 filing is just and reasonable. Alternatively, the Commission might conclude that, given the provision has little if any impact, ordering retention of the one-year rule is the type of minor change that *NRG* found would be permissible with the consent of the filing utility.

PJM acknowledges that the nature of the potential threats to the efficient operation of its wholesale markets may have evolved since 2012, and accordingly, prospective changes to its MOPR, or its Tariff more generally, may be warranted – but not in this proceeding. PJM has an ongoing stakeholder senior task force considering such issues.

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<sup>29</sup> *Id.* at ¶ 13.

<sup>30</sup> *Id.*

## CONCLUSION

Wherefore, PJM respectfully requests that the Commission issue an order on remand in this proceeding choosing to act within the bounds of its section 205 authority, as clarified by *NRG*, through acceptance of PJM's proposals to eliminate the unit-specific exception process and extend MOPR mitigation for non-exempt capacity to three Delivery Years.

Respectfully submitted,

*/s/ Paul M. Flynn*

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October 23, 2017



responsible for all operational aspects of PJM's Financial Transmission Rights market, and performs analysis to determine the economic impact of proposed transmission projects in support of the Regional Transmission Expansion Plan. Prior to joining to PJM in 1996, I was an engineer for twelve years in the Transmission Planning and Analysis Department of General Public Utilities.

4. I earned a Bachelor's Degree in Electrical Engineering from Pennsylvania State University in 1984.
5. The purpose of my Affidavit is to discuss the impact of the changes directed by the Commission's May 2, 2013 order<sup>1</sup> accepting most of the tariff revisions PJM proposed in its December 7, 2012 filing in this proceeding, on condition that PJM retain two pre-existing provisions it proposed to remove or change: a unit-specific MOPR exception and a one-year duration for MOPR mitigation. As I explain, those two changes have had no practical impact on the RPM auctions or on capacity market clearing results.
6. In its May 2, 2013 order, the Commission accepted PJM's proposed tariff revisions with an effective date of February 5, 2013. Since that time, PJM has conducted five Base Residual Auctions under those rules, i.e., the annual auctions held in May 2013, May 2014, May 2015, May 2016, and May 2017. These Base Residual Auctions cover the five Delivery Years beginning June 1, 2016, and ending May 31, 2021. In that same time, PJM also has conducted nine Incremental Auctions for Delivery Years covering the period from June 1, 2016 through May 31, 2020.

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<sup>1</sup> *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013).

**Unit-Specific Process**

7. Although the Commission expressed concern in May 2, 2013 order that the unit-specific exception process should be retained in case there might be legitimate low-cost offers that did not qualify for either of the two categorical MOPR exemptions, no unit-specific exemption offers have been submitted in any of the five Base Residual Auctions or nine Incremental Auctions held since that order was issued. All sellers from resources covered by the MOPR that sought to submit an offer below the MOPR offer price floor have instead proceeded under the categorical exemptions. Even assuming it is theoretically possible for a seller's offer to fail to qualify under the categorical exemptions, but qualify under the unit-specific process, that possibility has yet to materialize in any of the fourteen auctions conducted after the categorical exemptions were put in place.
8. In addition, the auction results for those five Delivery Years would not change if the unit-specific process were assumed to have been unavailable for those auctions. That conclusion follows logically from the fact, explained above, that no unit-specific exception offers have been submitted into any of those auctions.

**Duration of Mitigation**

9. PJM's 2012 tariff filing in this case proposed to apply the MOPR Floor Offer Price to certain combustion turbine, combined cycle, and integrated gasification combined cycle plants, but only as to their capacity that had not already cleared an RPM auction before these tariff changes took effect (i.e., before February 2013). If such a plant obtained a competitive entry or self-supply exemption for the sell offer it submitted in an auction, and cleared capacity in that auction, then the MOPR Floor Offer Price would not apply to that capacity in any subsequent

auction, as shown in the attached excerpts of PJM's proposed tariff changes.<sup>2</sup> But for any such plant that did not obtain a MOPR exemption for its capacity that had not cleared an auction before February 2013, then its "unexempt" capacity would remain subject to the MOPR Floor Offer Price until it had cleared capacity auctions for three Delivery Years (as also shown in those tariff proposal excerpts). Note that, under either the "one-year" or "three-year" rule, if a seller of such "new" capacity offers into an auction *and does not clear*, it is subject to the MOPR Floor Offer Price in subsequent auctions until it *does* clear.

10. This proposed change to a three-year duration therefore was designed to have a very narrow application, and is best viewed as an attempt to close a possible loophole, or preclude possible "gaming" behavior. Specifically, a seller of capacity from a "new," i.e., post-February 2013 resource, would run afoul of this rule only if it *did not obtain* a MOPR exemption in the first year it was offered into a PJM capacity auction. If such a seller did not obtain an exemption, offered *at or above* the MOPR Floor Offer Price in the first year, and cleared that auction, it would also have to offer at or above the MOPR Floor Offer Price in the auctions for both of the next two years.
11. By rejecting this "three-year" rule, the Commission opened the theoretical possibility that a seller of new gas-fired capacity (of the type addressed by the MOPR rule) could decline to obtain an exemption for the first year, offer at a price *at or above* the MOPR Floor Offer Price in that auction, clear the auction,

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<sup>2</sup> Attachment A to my Affidavit shows the relevant tariff revisions on the duration of MOPR mitigation that PJM proposed in its December 7, 2012 filing in this proceeding.

and then offer *below* the MOPR Floor Offer Price in auctions for either or both of the next two years.

12. PJM has not observed such behavior in any of the capacity auctions conducted after the Commission rejected PJM's proposed "three-year" rule. Instead, based on my review of offers and clearing prices in the relevant auctions, any seller of new gas-fired capacity that is covered by the MOPR only has cleared the auctions if it obtained an exemption and submitted an offer below the MOPR Floor Offer Price.
13. We can conclude from these facts that the absence of the three-year rule has had no effect on the clearing results in the auctions held since the Commission rejected the three-year rule. By the same token, if the three-year rule were deemed to have been in effect since February 2013, that assumption would not change any auction results.
14. This concludes my Affidavit.

**Attachment A**

**Proposed Tariff Revisions Addressing  
Three-Year MOPR Duration in Docket No. ER13-535**

**[from proposed section 5.14(h)(4)]** *Duration.* The MOPR Floor Offer Price shall apply to any Sell Offer based on a MOPR Screened Generation Resource (to the extent an exemption has not been obtained for such resource under this subsection) until . . . the time by which Sell Offers based on the non-exempt portion of such resource have cleared in RPM Auctions for no less than three Delivery Years . . . .

**[from proposed section 5.14(h)(5)]** *Effect of Exemption.* To the extent a Sell Offer in any RPM Auction for any Delivery Year is based on a MOPR Screened Generation Resource for which the Capacity Market Seller obtains, prior to the submission of such offer, either a Competitive Entry Exemption or a Self-Supply Exemption, such offer (to the extent of such exemption) may include an offer price below the MOPR Floor Offer Price (including, without limitation, an offer price of zero or other indication of intent to clear regardless of price). The Installed Capacity equivalent of any MOPR Screened Generation Resource's Unforced Capacity that has both obtained such an exemption and cleared the RPM Auction for which it obtained such exemption shall not be subject to a MOPR Floor Offer Price in any subsequent RPM Auction . . . .

UNITED STATES OF AMERICA  
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VERIFICATION

I, Jeffrey D. Bastian, being first duly sworn, depose and state that I am the Jeffrey D. Bastian referred to in the foregoing document entitled "Affidavit of Jeffrey D. Bastian on Behalf 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.

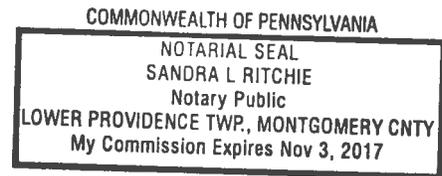
Jeffrey D. Bastian

Subscribed and sworn to before me, the undersigned notary public, this 23<sup>rd</sup> day of October, 2017.

Sandra L Ritchie

Notary Public

My Commission expires: Nov. 3, 2017



**CERTIFICATE OF SERVICE**

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

Dated at Washington, D.C., this 23rd day of October, 2017.

/s/ Brett K. White

Brett K. White

**Attorney for the  
PJM Interconnection, L.L.C.**

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