UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

PJM Power Providers Group	)	
	)	
v.	)	Docket No. EL11-20-___
	)	
PJM Interconnection, L.L.C.	)	
PJM Interconnection, L.L.C.	)	Docket No. ER11-2875-___

REQUEST FOR REHEARING AND CLARIFICATION

The PJM Power Providers Group ("P3"), [1] the GenOn Parties, [2] and PSEG Energy Resources & Trade LLC hereby request rehearing and clarification of the Commission's Order of April 12 in the above-captioned dockets, *Order Accepting Proposed Tariff Revisions, Subject to Conditions, and Addressing Related Complaint*, 135 FERC ¶ 61,022 (2011) ("Order"). In its Order, the Commission once again reaffirmed the need to fully mitigate buyer market power, taking prompt and significant action to eliminate several gaping holes in the Minimum Offer Price Rule of PJM's Reliability Pricing Model ("RPM"). The thrust of the Commission's Order is very constructive, taking key steps to protect and enhance organized electric markets in the face of vociferous and highly politicized opposition. There are, however, several important shortcomings in the Order—hence this request for rehearing and clarification on six specific points:

[1] P3 is a non-profit organization dedicated to advancing federal, state and regional policies that promote properly designed and well-functioning electricity markets in the PJM region. Combined, P3's twelve member companies own over 87,000 megawatts of power and over 51,000 miles of transmission lines in the PJM region, serve nearly 12.2 million customers and employ over 55,000 people in the 13-state and District of Columbia PJM region. The content of this complaint represents the position of P3 as an organization, but not necessarily the views of any particular member with respect to any issue. For more information on P3, please visit www.p3powergroup.com.

[2] The GenOn Parties are GenOn Energy Management, LLC, GenOn Chalk Point, LLC, GenOn Mid-Atlantic, LLC, GenOn Potomac River, LLC, GenOn REMA, LLC, and GenOn Wholesale Generation, LP.

First, the revised Minimum Offer Price Rule permits new resources to be offered into the PJM capacity auctions at prices that are 10% below benchmark cost. While this is an improvement over the prior rule, the correct answer—and the only one that can lead to sustainable competitive markets in the long run—is to mitigate new resources to 100% of benchmark cost. Anything less will allow out-of-market entry to permanently suppress capacity auction price outcomes to levels below the cost of competitive new entry. While a 10% shortfall is, by definition, better than a 20% or 30% shortfall, any discount will make competitive new entry unprofitable over the long run, and thus pose a serious threat to the viability of the competitive market model. Furthermore, as we explain below, any concern about potential errors in determining benchmarks does not support the Commission's ruling here, because the harm that would flow from setting benchmarks too high, and over-mitigating a new resource, is much smaller than the harm that would flow from setting benchmarks too low.

Second, the revised Minimum Offer Price Rule calculates energy and ancillary services offsets based solely on real-time prices for resources that typically are committed in the day-ahead market, resulting in estimates of the net costs of new entry for such resources that are unreasonably low. The economically correct, lawful, rational and equitable approach is to use the prices (real-time, day-ahead, or for some resources an admixture) that each resource would have received. PJM should determine the degree to which resources would have been committed in the day-ahead market. To that degree, day-ahead prices should be used for calculating the energy and ancillary services offset. To the degree they would have been committed in the real-time market, real-time prices should be used. This approach mimics the actual unit-commitment process and avoids significantly overstating the energy and ancillary services offset, in particular for combined-cycle units. Using only real-time prices will, by definition, get the wrong

answer—suppressing capacity prices (because energy market price spikes typically occur only in real time). That approach thus is unjust, unreasonable, and unduly discriminatory.

Third, and relatedly, the revised Minimum Offer Price Rule bases its energy and ancillary offset for a resource on the *highest* prices historically achieved by any resource anywhere in the zone, rather than the revenues received by a resource at its actual location. This substantially overstates the revenue offset and therefore understates the benchmark. As a consequence, resources which are uneconomic because they cannot expect to achieve the implied energy and ancillary services revenues could nevertheless pass the benchmark and artificially depress prices. That is unjust, unreasonable, and unduly discriminatory.

Fourth, the revised Minimum Offer Price Rule permits resources to escape mitigation forever after clearing only in one auction with potentially uniquely higher prices. While the Commission attributes this proposal to Dr. Bowring, the PJM Independent Market Monitor, his proposal actually was different, and was better designed to ensure that mitigation would be applied for an appropriate period of time. The Commission should correct this facial error on rehearing, and adopt either P3's proposal or Dr. Bowring's *actual* proposal.

Fifth, the revised Minimum Offer Price Rule subjects resources that can demonstrate that they do not receive any direct or indirect out-of-market subsidies to unnecessary mitigation. P3 proposed an "off-ramp," whereby new entrants can certify that they do not receive any subsidies and thus would not be subject to the mitigation process. This approach would enhance the efficiency, and reduce the burdens, of the mitigation process. The Commission, however, erroneously declined to give it any meaningful consideration. On rehearing, the Commission should adopt our pro-competitive, efficiency-enhancing proposal.

Sixth, the revised Minimum Offer Price Rule, like the previous one, applies only in constrained zones. P3 proposed to change this, applying the mitigation scheme to all zones. P3 also proposed to defer this issue to the stakeholder process, along with several others, to be litigated at the close of that process if there was no agreed-upon resolution. The Commission did not substantively address this point, but the tariff language proposed by PJM and accepted by the Commission limits application to constrained areas. We ask the Commission to clarify that it did not intend to foreclose consideration of this issue in the stakeholder process. Alternatively, we seek rehearing. There is absolutely no substantive basis for geographically restricting the application of buyer-market-power mitigation. The exercise of buyer market power can be just as profitable in regions where there is no price separation, and where prices are relatively lower. The law thus requires the Commission to grant relief.

BACKGROUND

The proceedings in the above-captioned dockets were initiated by P3's complaint alleging that the Minimum Offer Price Rule was wholly ineffective at constraining buyer-sider market power, rendering the Rule unjust, unreasonable, and unduly discriminatory. P3 Complaint and Request for Clarification Requesting Fast Track Processing, Docket No. EL11-20-000 (Feb. 1, 2011) ("P3 Complaint"), accompanied by Exhibit 1, Testimony of Roy J. Shanker Ph.D. ("Shanker"). Shortly thereafter, PJM filed tariff revisions addressing the same issues and offering similar revisions on several issues. PJM Tariff Revisions, Docket No. ER11-2875-000 (Feb. 11, 2011) ("PJM Proposal"). P3 commented on PJM's proposed tariff provisions, noting areas of agreement and areas in need of further revision. P3 Comments and Protest, Docket Nos. EL11-20-000 and ER11-2875-000 (Mar. 4, 2011) ("P3 Protest"), accompanied by Exhibit 4, Supplementary Testimony of Roy J. Shanker, Ph.D. ("Shanker Supp."), as amended. Finally, P3 filed an answer to various pleadings offered by other parties in response to P3's

complaint and PJM's tariff revisions. P3 Answer to Motions to Dismiss and Other Pleadings, Docket Nos. EL11-20-000 and ER11-2875-000 (Mar. 18, 2011) ("P3 Answer"), as amended, accompanied by Exhibit 7, Statement of William W. Hogan, Ph.D. ("Hogan"), and Exhibit 8, Answering Testimony of Roy J. Shanker, Ph.D. ("Shanker Answer").

The Commission addressed many of the issues raised in these filings. However, in addition to the issues the Commission decided, several equally critical issues threatening RPM over a less-imminent time frame were deferred to the stakeholder process. The Commission affirmatively stated that it "will not prejudge or impose any additional obligations or requirements on PJM regarding the additional issues raised by intervenors." Order at P 211. We therefore will proceed at the stakeholder level on these issues and only list them here. *See id.* at PP 210 & n.110, 211. These issues include the need for mitigation for long-lead time resources, *see* P3 Complaint at 54-55, for demand response resources, *see id.* at 56; P3 Protest at 20-21, renewable resources, *see* P3 Complaint at 56, and generally resources beyond combustion turbines and combined-cycles units, *see* P3 Protest at 16-20.

SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

The Order erred, or should be clarified, on the following points:

1. The Commission erred, Order at P 70, in permitting new resources to be offered into the capacity auctions at prices below 100% of benchmark cost, effectively capping capacity prices below just and reasonable levels. The resulting rate, while an improvement on the *status quo ante*, remains unjust, unreasonable, and unduly discriminatory in violation of sections 205 and 206 of the Federal Power Act ("FPA"). 16 U.S.C. §§ 824d(a)-(b), 824e(a). Moreover, the Commission's determination is not supported by substantial evidence, violating FPA section 313(b), *id.* § 825*l*(b), and section 10(e)(2)(E) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(E). On the contrary, because the Order necessarily deters rational, unsubsidized new capacity resources from competing, by allowing capacity prices to be depressed below the net cost of new entry, the rule adopted by the Commission is *per se* uneconomic and constitutes an arbitrary and capricious failure of reasoned decisionmaking. *Id.* § 706(2)(A). In addition, the Commission's complete failure to engage the asymmetry argument below, *see* P3 Complaint at 31-32, will require remand on judicial review if left uncured on rehearing.

See, e.g., *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294-95 (D.C. Cir. 2000) (citing cases).

2. The Commission erred, Order at P 46, in calculating energy and ancillary services offsets based only on real-time prices for resources, instead of the real-time or day-ahead price each resource would have been paid for each interval. The resulting rate structure is unjust, unreasonable, and unduly preferential in violation of the FPA, and the Commission's determination—which deliberately disregards known and measurable data—is unsupported by substantial evidence, as required by the APA and FPA. *See supra* Specification 1 (citing authorities).

3. The Commission erred, Order at P 47, in estimating energy and ancillary services offsets based on the *highest* such revenues historically achieved by any resource within the zone, rather than by the revenues the resource historically would have achieved at its actual, known location. The resulting rate structure is unjust, unreasonable, and unduly preferential in violation of the FPA, and the Commission's determination—which deliberately disregards known and measurable locational information—is unsupported by substantial evidence, as required by the APA and FPA. *See supra* Specification 1 (citing authorities).

4. The Commission erred, Order at P 176, in permitting resources to escape mitigation forever after clearing only in one auction, with potentially uniquely higher prices. That determination needlessly and wrongly permits evasion of the mitigation rules through selective participation in auctions during anomalous market circumstances, thus allowing capacity prices to be depressed to unsustainable and uncompetitive levels.

5. The Commission erred, Order at P 123, in imposing mitigation on new resources that can demonstrate that they do not receive any direct or indirect out-of-market subsidies. The resulting rate structure is unjust, unreasonable, and unduly discriminatory in violation of the FPA, and the Commission's determination is unsupported by substantial evidence, as required by the APA and FPA. *See supra* Specification 1 (citing authorities). Moreover, the Commission failed to engage in reasoned decision-making on this point because the Order does not acknowledge or distinguish precedent holding that mitigation is inappropriate in the absence of an opportunity to exercise market power. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 57 (1983).

6. The Commission erred, Order at P 211, in arguably implicitly exempting the unconstrained portion of the PJM region from mitigation in future auctions, or should clarify that it did not foreclose stakeholder consideration (and, if necessary, future litigation) regarding this issue. If the single vague sentence in the Order touching upon this issue was meant to create a broad exemption to mitigation under the Minimum Offer Price Rule across the lion's share of PJM, for future auctions, then the Order wrongly imposes a rate structure that is unjust, unreasonable, and unduly discriminatory in violation of the FPA, as well as unsupported by substantial evidence, as required by the APA and FPA. *See supra* Specification 1 (citing authorities).

REQUESTS FOR REHEARING AND CLARIFICATION

I. BUILDING IN A 10-PERCENT BUYER-MARKET-POWER DISCOUNT OFF OF BENCHMARK COSTS IS UNJUST, UNREASONABLE AND UNDULY DISCRIMINATORY

The Order permits the free exercise of buyer-side market power to suppress prices by 10% below the best available estimate of competitive offer levels—a significant flaw. As explained by Dr. Shanker, this unjustified discount and *de facto* cap will undermine PJM's capacity markets, by making most, if not all, competitive new entry unprofitable under prevailing auction price outcomes. This tariff structure, if left unchecked, will allow the exercise of market power with hundreds of millions of dollars of unjust and unreasonable artificial price suppression. For these reasons, we urge the Commission to require a mitigation level of 100% of the net cost of new entry. *See* Shanker Supp. at 13:21–19:12.

Under the pre-existing Minimum Offer Price Rule's conduct test, a resource's offer is compared to a benchmark of 80% of the cost of the resource's asset class, or, if there is no asset class estimate, to 70% of the cost of a combustion turbine. RPM § 5.14(h)(2)(ii). Any resource could be offered at any price down to this floor and escape the Minimum Offer Price Rule completely.

In order to prevent artificial price suppression by as much as 20% or 30%, P3 argued, along with PJM and its market monitor, that the Commission should increase the thresholds. Both P3 and Dr. Bowring argued that any level below 100% of the benchmark would continue to permit the exercise of buyer-side market power. PJM contended that an increase to 90% of the benchmark was appropriate. The Commission agreed with PJM, stating as follows:

> Nevertheless, while the current and the revised MOPR we accept here provide for a unit-specific cost justification process, we agree with PJM and others that such a process imposes an administrative burden on sellers. PJM therefore seeks to balance this burden with its need to prevent uneconomic behavior. We find persuasive PJM's assertion that the revised 90 percent threshold strikes a reasonable balance between protecting against unreasonable exercises of market

> power and recognizing the imperfection of administrative estimates and the burden of the cost justification process. We therefore reject P3's proposal, which involves raising the conduct screen to 100 percent of Net CONE.

Order at P 70. That rationale does not survive scrutiny.

It is true that 90% is a distinct improvement over the 80% and 70% numbers in the previous tariff. But the revised Minimum Offer Price Rule's 10% discount from the applicable benchmark cost is itself unjustified and permits market participants to substantially and artificially suppress auction price outcomes. An entity seeking to exercise buyer market power could, by offering a sufficient amount of capacity at a 10% discount, depress auction clearing prices continually—*without* failing the revised test. This downward bias in the benchmark is unjust, unreasonable and unduly discriminatory for the following reasons:

First, it gives buyers significant incentive and ability to exercise market power, and creates significant harm to the market and capacity suppliers (both generation and demand response resources). We can see this from the potential dollar effects. Extrapolating from unrebutted evidence in the record, a 10% discount still gives *carte blanche* for buyer-side market power to profit by over $300 million per year.[3] And as long as the exercise of buyer market

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[3] Addressing the pre-existing thresholds, Dr. Shanker calculated the following potential "permissible" downward price suppression:

> A conduct threshold of 80% or 70% permits offers 20% to 30% below economic levels to go unmitigated. This permits the extensive exercise of buyer market power before mitigation is even triggered just by bidding in subsidized new entry at a level slightly higher than the screen, e.g., 81%. Consider the effect of a 20% threshold in the EMAAC LDA. The EMAAC net Cost of New Entry was approximately $260 per MW-day for the last Base Residual Auction. Twenty percent equates to $52 per MW-day. Applied to the approximately 33,000 MW of capacity inside the EMAAC locational delivery area, there would be a permissible total annual dollar exercise of buyer market power of $626 million *before mitigation is even considered* ($52/MW-day x 365 days x 33,000 MW = $626,340,000).

Shanker at 21:3-13. Reducing the 20% discount to a 10% discount, as the Commission ordered, would produce a dollar effect, under Dr. Shanker's calculations, of $313 million (one-half of $626 million).

power is at all profitable—and testimony by the market monitor and statements by New Jersey officials confirm that it is, *see* P3 Complaint at 61-64—it will happen to the degree permitted by the tariff, which, if the 10% discount remains, would be 10% below the best estimate of the competitive price. This means load parties will have the incentive and ability, even under the revised Minimum Offer Price Rule, to ensure that capacity prices would never rise above 90% of the benchmark.

This is not, we submit, a "reasonable balance." It is, instead, unjust, unreasonable and unduly discriminatory. Load would hardly be satisfied with a seller-side market-power mitigation scheme that sanctioned sellers pushing capacity clearing prices *up* by a defined bandwidth, with an aggregate effect of hundreds of millions of dollars per year. The Commission should not grant the gander what it denies the goose.

Second, the 10% discount has ominous implications for organized markets—a danger greater than the near-term dollar effect. In the long term, this rule endangers the competitive organized market construct. In order for organized markets to exist on a sustainable basis, they need to support competitive new entry when and where needed. And competitive entry will occur only where that entry has a reasonable expectation of earning the cost of new entry, on average and over time. If expected capacity market revenues, on average and over time, are below the net cost of new entry, whether by 1% or 10% or 50%, a rational potential competitive new entrant will not enter. If buyers solicit uneconomic entry at 90 percent of benchmark costs, and the new entrant thus escapes mitigation, then buyers can permanently cap auction price outcomes at 90 percent of real cost levels. And that will block most, if not all, competitive new entry (allowing such entry only where the project proponent has unusual cost advantages equaling or exceeding 10% of the benchmark cost level).

No rational developer will invest under these conditions—at least without subsidies. And without competitive entry, the only alternative would be centrally planned, state-sponsored, subsidized entry. Over time, subsidized resources would come to dominate the entire region's generation fleet. Decisions about resource investments in PJM once again would be centrally planned and fully backstopped by consumers, rather than emerging from competition. All risks of bad investment or cost overruns once again would be borne by ratepayers instead of entrepreneurs. The 10% discount thus not only unlawfully creates hundreds of millions of dollars in artificial price suppression, but also threatens to extinguish the competitive market model. This is not, once again, a "reasonable balance."

Third, the Commission erred in giving dispositive weight to building some sort of "cushion" into mitigation to address the prospect of benchmark levels being set erroneously high. This reasoning arbitrarily and capriciously ignored P3's asymmetry point. As P3 explained at length below, P3 Complaint at 31-32; Shanker at 18:22–19:8, a benchmark that is slightly too high will have minimal, if any, ill effects on the long-term viability of RPM; in contrast, a benchmark that is even slightly too low will undermine RPM in the long run.

The Order refers to the "imperfection of administrative estimates." Order at P 70. We agree that PJM's estimates of the net cost of new entry are estimates. And as such, they will contain errors. We also agree that in order to account for this uncertainty, the Commission must "strike[] a reasonable balance." *Id.* But this means balancing the harms caused by a benchmark that is too high against the harms caused by a benchmark that is too low. And that the Commission did not do. The Commission thus not only failed to strike a "reasonable balance"; it failed to strike a balance at all.

As P3 has argued before, the right balance unambiguously calls for a benchmark of 100% of PJM's net cost estimate; in fact, a *premium above* PJM's estimate would do less harm than a discount. This is because the costs created, and risks posed, by a benchmark that is too low are vastly greater than the competing considerations created by a benchmark that is too high. As Dr. Shanker explained:

> In the energy market, mitigation often occurs when there is a lack of competitive supply alternatives. Thus there is concern regarding not forcing a supply at what might be less than cost because the supply must be used, there typically is no alternative. That is not the case with the exercise of buyer-side market power in the capacity market. If the supply from a specific party offering subsidized capacity is mitigated, no barriers are created for others to put forward competitive alternatives. I discuss the importance of alternative competitive supply and its relevance to setting mitigation levels further below.
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> The implications of this can best be seen by looking at the issue of replicating competitive results from a "cost of the errors" perspective. That is, what is the relative harm or benefit from choosing too high of a value for the substitute Sell Offer versus too low a value. When this analysis is done, and the availability of competitive alternatives is taken into account, the clear conclusion is that it is better to have an upward bias in the substitute Sell Offers, if there is going to be any bias at all. Indeed, a value greater than 100% could easily be justified in the current circumstances.
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> For example, if the mitigated price set at the nominal levelized Unit Specific Net Cost of New Entry were deemed too high, what is the harm? The worst that happens is that the mitigated offer fails to clear, and presumably the new resource would not be built. This would occur because either there was no need for it, or if there was a need, it was filled by a lower-cost alternative competitive supplier. This is hardly a bad result, and in fact, is what *should* happen in a market. Empirically we know we have significant additional supply in PJM.
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> Alternatively, if the mitigated price is too low, and effectively sets a cap on the market below the actual cost of new entry, competitive entry is eliminated, prices are suppressed, and price discrimination is allowed. This assures the destruction of the market, because by definition the prices are being set at levels such that they will never be compensatory for a new entrant. No one will enter a market where the expected revenues are capped at less than the needed average price.

Shanker at 22:23–24:4 (footnote omitted).

While we do not advocate deliberately choosing a mitigation benchmark higher than competitive capacity price levels, the consequences of erring in that direction would be far less severe. *See* P3 Complaint at 31-32; Shanker Supp. at 17:6-21; 19:1-6. To begin with, the tariff, as approved by the Commission and, even more so, with a "no-subsidy" off-ramp (as we have urged, *see infra* at 24, contains features that would permit capacity markets to reach competitive levels—and no more—even if the mitigation benchmark is slightly too high. Any resource that can establish to PJM or, ultimately, the Commission that its actual costs are below the mitigation benchmark will be permitted to offer at its actual costs. Thus, even if the mitigation benchmark were too high, resources with proven lower costs would constrain capacity prices from exceeding competitive levels. Moreover, as we urge, *see infra* at 24, any potential resource establishing it did not receive any discriminatory subsidy would be permitted to offer into the capacity market at any price down to $0/MW-day. The ability to prove actual costs, alone or in combination with the no-subsidy off-ramp, thus prevents capacity prices from becoming un-competitively high, regardless of the mitigation benchmark.

Even if this competitive disciplining effect is not seen immediately, it will come into play quickly. If the mitigation benchmark were set too high, *and* new entry failed immediately to enter at the actual, lower cost of new entry, that outcome would be short-lived. Once capacity prices reached the level of the mitigation benchmark, the result would be an influx of new entry seeking to take advantage of any supra-competitive price. This new entry would, in turn, result in a surplus of capacity, producing prices below the true cost of new entry for one or more capacity periods to come. Only once this surplus was absorbed, and new entry is needed, would capacity prices again rise to the mitigation benchmark, at which point the cycle would repeat itself. In short, an erroneously-high mitigation benchmark, if not immediately alleviated by

lower-cost entry under a mitigation exemption, would result in nothing worse than a bit more oscillation around the true cost of new entry. Over time, however, capacity prices still would average to the competitive—meaning the just, reasonable and non-discriminatory—price.

In actuality, given that very little harm can flow from setting the benchmark too high, and a great deal of harm can flow from setting it too low, any uncertainty about PJM's estimates calls for a premium, not a discount. As Dr. Shanker explained:

> The impacts of over- and under-mitigation are hugely asymmetric. Under-mitigation drives out private entry and destroys the market. Over-mitigation, on the other hand, may increase some administrative costs or—under my proposals—potentially shift supply among competing parties, but it does not destroy the market. In these circumstances, notions like the 10% "rule of thumb" should be left at the door. The 10% variance is designed to accommodate a bit of uncertainty about actual costs, but it does so with little or no adverse impact to the market and under materially different short-term conditions, as I discussed previously. I am aware of no similar circumstances where an uncertainty adder is used when it has such extreme consequences.

Shanker Supp. at 18:22–19:8. Under no circumstances can uncertainty justify the 10% discount provided by the Order.

The choice here, we submit, is simple: mitigate to 100%. This outcome, as Dr. Shanker's testimony explained, conforms to the long-standing teaching of the United States Supreme Court that the purpose of the law is "'the protection of *competition*, not *competitors*.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)); *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (a Sherman Act claim "must allege and prove harm, not just to a single competitor, but … to competition itself"). The prime goal here should be to protect the market from distortion, because that is the greatest source of severe harm. Mitigating to at least 100% of the benchmark is the only way to achieve that goal.

II. THE COMMISSION ERRED BY CALCULATING THE ENERGY AND ANCILLARY SERVICES OFFSET EXCLUSIVELY BASED ON REAL-TIME PRICES BECAUSE MANY CAPACITY RESOURCES ARE COMMITTED AND PAID IN THE DAY-AHEAD MARKETS

The Order contains a subtle, but significant, flaw in its calculation of the energy and ancillary services offset for combined-cycle and combustion-turbine resources. *See* Shanker Supp. at 21:16–22:11. This issue, while technical, can have a very large economic impact. And in our view, correcting this technical flaw should not be controversial.

The Commission described the issue as follows:

> With respect to energy and ancillary service revenues, PJM states that its existing MOPR fails to explain how these revenues will be determined. To clarify this process, PJM proposes tariff language that specifies that Net CONE for a CT in the MOPR screen will use the same energy and ancillary services revenue offset estimate as is used for the CT Net CONE in the Variable Resource Requirement Curve.

Order at P 32 (footnote omitted). Assuming *arguendo* that there will be some resources that are committed *exclusively* in the real-time market, which could be the case for many combustion turbines, a revenue offset based on an estimate of real-time revenues might be appropriate. With respect to combined-cycle units in particular, however—which typically are committed in the day-ahead market—the Commission erred. The right answer is to calculate the estimated offset for each resource based on the market—day-ahead or real-time—that the resource would have been dispatched in.

As Dr. Shanker demonstrated, the use of real-time revenue estimates for day-ahead resources will result in substantial error:

> The use of only real time prices tends to skew the results of the offset calculation to the high side. As PJM itself pointed out, the estimates are already "conservative" to the high side because they use the highest zonal prices in a CONE area as the basis for the calculation. *See* PJM Proposal at 10. Real time prices are subject to material excursions on the high side, so relying solely upon them increases the "conservative" bias.

> Because PJM has a "must offer" policy for capacity resources in the day ahead market, a much more appropriate estimate of energy margins would be obtained by first seeing if the reference unit cleared in the day ahead market, and if not, then determining if the unit would be committed in the real time market, and calculating the margins based on this analysis.

Shanker Supp. at 22:2-11. Dr. Shanker has testified at length on the significance of this distinction. *See id.* at 22:12–23:39; *see also id.* at 24:1-4 (noting support of PJM's market monitor for Dr. Shanker's conclusions).

The Commission based its decision on the following reasoning:

> We reject P3's and Dayton's objection to using real-time LMPs because PJM is simply proposing the same basic methodology for CT and CC units that PJM uses to produce the Net CONE for a CT for RPM's Variable Resource Requirement Curve.

Order at P 46. This argument is profoundly flawed.

Assuming *arguendo* that a combustion turbine is always committed in real time, it could be appropriate to calculate the net cost of new entry of the marginal resource for a particular zone—typically today, but not always, a combustion turbine—on the basis of the energy and ancillary services revenue such a resource can expect to receive, based on real-time prices for a reference resource typically dispatched in the real-time market. However, it does not follow that the same approach is appropriate for a different purpose (here, calculating benchmark costs) for a different category of resources (here, combined-cycle units) that typically are committed in the day-ahead market and consequently receive an entirely different set of energy and ancillary service revenues (here, day-ahead market prices). To deliberately use the incorrect set of revenue estimates, when the correct set of revenues estimates is readily available, is a paradigmatic example of arbitrary and capricious decisionmaking.[4]

[4] We are aware of the line of precedent affirming that the Commission may base its ratemaking decisions on good faith estimates that are reasonable when made, even if those estimates ultimately do not bear out. *See, e.g.*, *Cities of Anaheim v. FERC*, 941 F.2d 1234, 1248 (D.C. Cir. 1991); *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538,

The proper solution to this problem is clear and, given the information available to the market monitor, entirely feasible. *See* Shanker Supp. at 26:7-10. To estimate the energy revenue offset correctly, it is necessary to calculate what the actual dispatch would have been on the basis of historical data. If a resource would have been dispatched in the day-ahead market, the energy revenue offset should reflect day-ahead market prices. Only if a resource would *not* have been dispatched in the day-ahead market, but *would* have been dispatched in the real-time market, should the energy revenue offset reflect real-time market prices. This solution is entirely feasible, as demonstrated by the fact that the market monitor already employs it to calculate thresholds for seller-side market power mitigation. *See id.* at 23:19-28 (quoting testimony in Docket No. ER09-1063-004). Failure to employ this straight-forward solution will *over*-estimate the energy and ancillary services revenues; it therefore will *under*-estimate their net cost of new entry (which is derived by subtracting, among other things, the expected energy and ancillary services revenues from the gross cost of new entry). And if the estimate of the net cost of new entry is too low, the resulting mitigation benchmark will be as well.

The Commission properly recognized that the appropriate level of energy and ancillary revenues for combined-cycle units cannot correctly be calculated using the same methodology used for combustion turbines:

> PJM proposes tariff language for a CC using the same basic method as for a CT, but it replaces certain elements of the CT calculation stated in the tariff with values and assumptions that PJM states are appropriate for a CC.[27]
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> [27] Specifically, PJM proposes to add to the MOPR differing values appropriate for a CC for the heat rate, the variable operations and maintenance expense, and ancillary services revenue. PJM states it is clarifying that the dispatch assumption to estimate CC revenues is slightly different as PJM assumes that a CC is

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554 (D.C. Cir. 2010), *petition for cert. filed sub nom. Turlock Irrigation Dist. v. FERC*, No. 10-1124 (U.S. Mar. 10, 2011). That line of precedent has no application here, where the Commission has chosen the wrong estimate—one that is, by definition, less accurate than other estimates that are equally available.

> expected to be dispatched for nearly all of the daytime hours on the days when it is economic. In contrast, PJM states that a CT is assumed to be dispatched only for the four-hour blocks when it is economic.

Order at P 32 & n.27.

However, as explained above, the Commission failed to recognize the bigger issue—the difference between Day-Ahead and Real-Time prices. *See* Shanker Supp. at 24:7-26:10, Ex. 4-A. Not all units, and not even all combustion turbines, are regularly dispatched only in the real-time market. And the resulting artificial reduction in capacity payments will be even more significant in the future as shortage pricing develops in the real-time market (but not the day-ahead market). The Commission therefore should clarify that to the degree PJM's simulations demonstrate that units—both combined-cycle units and combustion turbines—are dispatched in the day-ahead market, and thus receive day-ahead market revenues, their revenue offsets are properly calculated to reflect that difference from combustion turbines.

III. THE COMMISSION ERRED BY CALCULATING A RESOURCE'S ENERGY AND ANCILLARY SERVICES OFFSET BASED ON THE LOCATION WITH THE HIGHEST REVENUES IN THE ZONE, RATHER THAN ON THE KNOWN ACTUAL LOCATION OF THE RESOURCE

The Commission also erred on an additional related issue: choosing the *highest* revenues for all resources in a zone rather than the *actual* revenue expectations for the actual resource at its actual location. As the Commission explained this point:

> Regarding the use of the highest LMP in the zone, we agree with PJM that this is a reasonable screen because the use of nodal LMP values could trigger the market power screen even though the resource was simply using its historical energy and ancillary services revenues offset for its zone. Therefore, we reject P3's and Dayton's objection to the use of the highest LMP in the zone.

Order at P 47. P3 objected to this approach because it "overstates the offset calculations and thus understates the Net CONE." *Id.* at P 36.

Under the Order, a new resource's energy revenues will be assumed to be (i) the revenues the resource hypothetically would receive if it were located wherever in the CONE area revenues would be highest, rather than (ii) the revenues the resource could expect to receive where it *actually* is located. This means that if the resource is located anywhere other than where energy revenues are highest, PJM's approach will over-estimate energy revenues, possibly substantially so. And an over-estimate of energy revenues will result in an under-estimate of the net cost of new entry. This will cause the mitigation threshold to be too low, and therefore permit uneconomic resources to enter, to clear the Base Residual Auction and to artificially suppress prices. That outcome is not administratively necessary and it is neither just nor reasonable.

Furthermore, the Commission's justification for its decision—that use of "nodal LMP values could trigger the market power screen even though the resource was simply using its historical energy and ancillary services revenues offset for its zone"—is not empirically sound for at least two reasons:

To begin with, when referring to a resource and "*its* historical energy and ancillary services revenues," *id.* (emphasis added), the Commission assumes a pre-existing resource with a history on which to base estimates of energy and ancillary services revenues. But virtually all such resources already will have become exempt from mitigation by clearing in one or more previous auctions, *see infra* at 19, and the determination of benchmark cost will have become entirely moot.

Additionally, and more significantly, when referring to new resources, neither the market participant nor the market monitor are exercising judgment in a world of hypotheticals. The benchmark will be determined for a specific planned resource at a specific node for which the market participant and market monitor will have specific historical information on energy and

ancillary services revenue. Given the availability of this information, there is no reason to use less accurate (and invariably higher) zone-wide estimates. The relevant parties are capable of producing a more refined calculation of the specific figures for the specific resource. This eliminates the risk of over-mitigation and prevents under-mitigation. Given this more accurate alternative, there is no justification for deliberate use of inaccurate over-estimates.

The correct solution is straightforward: When calculating the energy revenue offset for a new resource, the market monitor should estimate the energy revenues at the actual location of that resource. This necessarily will be more accurate than an estimate based on a different location with higher or lower energy revenues. As the Commission stated, "no party has demonstrated that the key determinants of the energy and ancillary services revenues offsets should not be clearly stated in the tariff or that PJM should not recognize the locational differences in construction costs and energy prices." Order at P 44. A more accurate locational estimate of the energy and ancillary service revenues is what we seek. And a more accurate estimate of energy revenues will lead to a more accurate estimate of the net cost of new entry, producing more accurate mitigation decisions.

IV. CLEARING IN ONE CAPACITY AUCTION, WITHOUT MORE, IS INSUFFICIENT TO PROVE THAT RESOURCES ARE ECONOMIC

Under the pre-existing Minimum Offer Price Rule, resources were automatically exempt from mitigation after only one auction, regardless of whether they cleared or not. *See* RPM § 5.14(h)(4). This flaw alone left the Minimum Offer Price Rule toothless, and the parties seeking an effective Minimum Offer Price Rule—including PJM, its market monitor, and P3—sought to close this loophole. The Commission agreed and ordered as follows:

> [T]he appropriate duration is that the MOPR offer floor should apply to each new resource in the base residual and each incremental auction until the resource demonstrates that its capacity is needed by the market at a price near its full entry cost—by clearing one of the PJM capacity auctions (base residual or incremental)

> at an offer price near its full cost of entry. Under such an approach, the MOPR would apply to any resource until it has proven that it is needed by the market and from that point forward, the resource would be treated as an existing capacity resource not subject to the MOPR.

Order at P 176.

This new rule, while a substantial improvement on the pre-existing Minimum Offer Price Rule, still would allow uneconomic resources to enter and to distort the market whenever there are temporary auction price increases. The Commission therefore should grant rehearing and take steps to guard against this circumstance, which, as both history and recent developments make clear, is far from a hypothetical possibility.

A. *Permanently Exempting Resources That Clear Only in One Capacity Auction Would Allow Uneconomic Resources to Slip into the Market Unmitigated Every Time There Is a Temporary Price Increase*

The Commission's Minimum Offer Price Rule properly protects markets against artificial price suppression during periods of low price variability when capacity markets consistently clear at levels near the net cost of new entry of the marginal resource—that is, the necessary and proper economic revenue for competitive resources. During such periods of extended stability, when resources can rely on typically receiving prices in this normal range, any one year's clearing price is a reliable measuring stick to distinguish between economic and uneconomic resources.

However, as recent history has demonstrated, clearing prices have not been so invariable. Capacity prices for the same resource in the same location have varied significantly from one year to the next. Under the Variable Resource Requirement curves in various Locational Deliverability Areas, relatively small changes can result in substantial price swings. For example, a newly emerging, or soon to be eliminated, load pocket may have temporarily high prices until transmission improvements eliminate it; no competitive supplier would enter such a

load pocket on the basis of a price swing that can be predicted to last as little as a year, but a load party seeking to permanently depress prices can use this one higher-price auction as a loophole in the Minimum Price Offer Rule to clear uncompetitive resources and artificially suppress future price outcomes.[5]

For parties seeking to artificially depress capacity prices over the long run, these episodic increases in capacity clearing prices, combined with the Minimum Offer Price Rule adopted by the Commission, create a substantial opportunity for evading mitigation. Under the adopted Minimum Offer Price Rule, buyer-side entities seeking to depress long-run capacity prices merely need to keep a portfolio of uneconomic resources at the ready. During years where capacity prices clear at or below the long-run average competitive price, this portfolio can be kept in reserve. But during the inevitable higher-priced years, these uneconomic resources can clear even at benchmark prices and flood the market. The fact that these resources never will be economic in the long-run is not a deterrent to those seeking to artificially suppress capacity prices; to the contrary, inserting uneconomic resources into the market is the very purpose of these strategies. And under the Minimum Offer Price Rule adopted by the Commission—which permanently exempts resources after clearing just once, regardless of how fleeting higher capacity prices might be in that one auction—these strategies will tend to be successful.

B. Mitigating a Resource Until It Clears Only Once Is Insufficient According to All Advocates of Effective Buyer-Side Mitigation

In considering the duration of mitigation, the Commission rejected PJM's proposal for a unit to be subject to mitigation for three years after clearing once. Order at P 175. The Commission also rejected P3's proposal requiring clearing twice or, alternatively, a no-subsidy

[5] Notably, New Jersey's own Final Proposed Form Standard Offer Capacity Agreement (Mar. 1, 2011), http://www.nj-lcapp.com/Documents/FinalProposedFormSOCA.pdf, acknowledges this very point. It permits sponsored resources to attempt to clear in a Base Residual Auction for up to three times before the resources are deemed to be in default. *See id.* § 7.1.7.

off-ramp. Instead, the Commission purports to base its conclusion on the recommendation of the market monitor, stating as follows: "We agree with the [Market Monitor] that the appropriate duration is that the MOPR offer floor should apply to each new resource in the base residual and each incremental auction until the resource demonstrates that its capacity is needed by the market at a price near its full entry cost." Order at P 176.

That was not, however, the Market Monitor's complete recommendation on duration of mitigation. That recommendation was as follows:

> The Market Monitor recommends that the MOPR require that (i) a unit clear one [Base Residual Auction] based on either an offer of net CONE or its demonstrated individual net CONE, *and (ii) that its sponsor demonstrate that the unit is not receiving any subsidies*, defined to be any revenues from outside the organized PJM markets, and has not contracted to receive any subsidies.

Market Monitor Comments at 20 (Mar. 4, 2011) (emphasis added). Hence, the Market Monitor's one-year-clearing duration proposal was expressly tied to the project proponent qualifying for P3's "no-subsidy" off-ramp. The Commission dismisses this second requirement as surplusage. Order at P 177. But that degrades the Market Monitor's proposal in important ways, and it is simply wrong for the Commission to claim to have adopted his duration proposal, having stripped it of a key condition.

The no-subsidy off-ramp, which the Market Monitor also supported, appropriately focuses mitigation on resources that, because of out-of-market revenue streams, are potential vehicles of price suppression. Yet even then, the Market Monitor proposed a one-year-clearing requirement. He did *not* propose such a requirement for resources that did *not* qualify for the no-subsidy off-ramp. And as we have shown above, by taking only one-half of the Market Monitor's duration proposal, the Commission has adopted a rule susceptible to evasion.

C. The Commission Arbitrarily Ignored the Fact That Requiring Clearing in Two Capacity Auctions Is the Equivalent of the Commission's Rule in the NYISO Case Cited Below

The Commission's decision also departs, without reasoned explanation, from its ruling on the same issue when it recently adopted the equivalent of the Minimum Offer Price Rule for NYISO, the In-City Installed Capacity Offer Floor. *See N.Y. Indep. Sys. Operator*, 133 FERC ¶ 61,178 (2010) ("*NYISO*"), *reh'g pending*. Under that rule, resources become exempt only after they clear in at least 12 of the previous 24 monthly auctions:

> [W]e find reasonable NYISO's proposal to have the duration of in-City buyer mitigation turn on actual acceptance of the resource's capacity in the market at the offer floor[.] … [S]ubject to a minimum period of mitigation of six capability period (approximately three years), mitigation would be lifted for a new in-City generation resource when … the capacity clears in 12 monthly auctions at the offer floor.

Id. at P 49.

While *NYISO* required resources to clear for twelve auctions, each NYISO auction covers only one month. *Id.* Each capacity auction in RPM covers a delivery year. As Dr. Shanker explained:

> [In NYISO], with a monthly clearing process, the requirement was to clear in twelve auctions, which didn't necessarily need to be consecutive. Thus, because typically demand is higher, and capacity lower during the summer, the most likely clearing scenario is during two summer periods. Because PJM clears annually based on summer requirements, the use of two Base Residual Auctions is directly analogous.

Shanker at 57:16-21.

Clearing in two base residual auctions is the closest approximation to the Commission's recently approved standard for New York. *Id.* at 57:12-21 & n.45. Capacity prices typically peak during summer months. Hence, requiring a marginal resource to clear in 12 of the last 24 monthly periods effectively requires it to clear for two summer periods. Because PJM's delivery period is annual, rather than monthly, and the binding constraint typically is the summer period,

this corresponds to clearing in capacity auctions for two delivery years. By ignoring this contradictory prior ruling, the Commission departed from minimum standards of reasoned decision-making. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 57 ("'An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis … '") (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

D. The Commission Should Require Resources to Clear in at Least Two Capacity Auctions Before Permanent Exemption from Mitigation

The Commission should grant rehearing to consider requiring resources to clear at their mitigated prices for two capacity auctions. This not only would mirror the Commission's recent decision most closely, but also would guard against the exploitation of single-year price increases to artificially depress long-run capacity prices. At the same time, this approach strikes a reasonable balance between the interests of competitive resources that risk entering the market based on clearing only for a brief period and the potential for buyer-side market power exercise.

V. RESOURCES THAT DEMONSTRABLY HAVE NO LINKS TO BUYER-SIDE MARKET POWER SHOULD NOT BE SUBJECT TO MINIMUM-PRICE MITIGATION

P3 proposed to make the entire buyer-mitigation regime less burdensome for all stakeholders, and easier to administer, by creating an exemption for any resource that can establish that it will not receive any form of subsidy or discriminatory treatment, including selective inclusion of costs in the rate base of cost-regulated load-serving entities or financing through tax-preferred bonds. *See* P3 Complaint at 34-36, Attach. A; Shanker at 5:5-9, 53:1-20; Order at P 117. The rationale for this exemption is straightforward:

New entry could fail a conduct screen for one of two reasons: (a) a competitive entrant may simply have expectations about future energy and ancillary service revenues that are different than the estimates embedded in the benchmark, or (b) a resource can have some other

form of financial support, such as the type of contract proposed by the New Jersey Law. *See* Shanker at 19:1-18. The first situation does not, in our view, need to be addressed through buyer mitigation—it is not causing artificial price suppression, and instead reflects normal business conduct. The second, in stark contrast, does need to be addressed through mitigation. We therefore can focus the mitigation process on resources most likely to cause artificial price suppression if we allow resources to exit that process by establishing that they are not receiving any subsidies.

The Commission erred in declining to adopt P3's proposal. *See* Order at P 123. The Commission's only stated reason for finding such an off-ramp unnecessary was that "[a]ll parties have the opportunity to avoid mitigation by making a cost demonstration." *Id.* This explanation sidesteps the central concern behind the no-subsidy off-ramp: the cost determination will ultimately be the market monitor's, PJM's, and the Commission's and will depend heavily on predictions about the long-term future in unit and resource costs, other parties' investments, future regulation and untold other contestable factors. If such factors could be predicted with absolute precision, there would be no need for capacity markets—central planning could fulfill the task at least as well. If the only alternatives are prediction or the free exercise of buyer-side market power, then mitigation based on informed forecasting is the preferable result. But if independent, competitive capacity providers, without any financial incentive—however indirect or remote—to suppress capacity prices are willing to stake their own investments on the validity of their predictions, rather than that of third parties, there is no rational reason not to permit them to make their own economic choices without mitigation and suffer (or benefit from) the consequences.

An additional benefit of the no-subsidy off-ramp, elucidated at some length in a previous filing, P3 Answer at 4, 10-12, is that it substantially addresses the concerns expressed by some public power parties regarding self-supply. *See, e.g.*, Public Power Association of New Jersey Protest (Mar. 4, 2011). An open Request for Proposals for long-term contracts, open to both new and existing suppliers, would permit parties averse to capacity market price risk to lock in their capacity supply obligations and associated expenses for extended periods. At the same time, an open Request for Proposals that does not discriminate between new and existing suppliers would not be useful tool for covert subsidies used to exercise buyer-side market power and as such would escape mitigation through the no-subsidy off-ramp.

The Commission's denial of a no-subsidy off-ramp is not just and reasonable. A demonstrably independent supplier should have no inherent economic incentive to exercise market power to suppress prices. And any supplier that has received no subsidy or other discriminatory out-of-market payments also should be lacking any artificial incentive to suppress prices. If such a supplier offers a new resource into the capacity market, the purpose cannot be to exercise market power. Under clear precedent, which was neither addressed nor distinguished in the Order, there is no justification for mitigation absent the potential exercise of market power. *See Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964, 968-70 (D.C. Cir. 2005); *see also Wisc. Pub. Power Inc. v. FERC*, 493 F.3d 239, 264 (D.C. Cir. 2007). The Commission therefore should grant rehearing and adopt the proposed no-subsidy exemption from mitigation.

VI. THE UNCONSTRAINED REGION OF PJM SHOULD BE SUBJECT TO APPROPRIATE MITIGATION

In its filing, PJM proposed to retain the existing exemption of all resources in unconstrained regions from buyer-side mitigation. Specifically, PJM states that the "MOPR applies only in Locational Deliverability Areas for which PJM has established a separate VRR

Curve." PJM Proposal at 18. And that is all it says on the point. PJM made no effort to attempt to justify the continued exemption from mitigation of all resources outside of constrained zones. *See id*; *see also, e.g.*, Public Utilities Commission of Ohio Comments at 3 (Mar. 4, 2011) ("request[ing] that FERC approve and confirm PJM's proposal that the MOPR applies only to those areas that are determined constrained" but also offering no reason why unconstrained zones should be unmitigated).

The Commission did not speak to the issue, beyond expressing "satisf[action] that the process outlined by PJM is sufficient for both addressing and resolving the interconnection issues related to PJM's filing and P3's complaint, first through PJM's stakeholder processes and then, if necessary, through additional section 205 filings," Order at P 211, and accepting PJM's tariff language. *See id.* at P 16 ("We accept, subject to conditions, PJM's tariff changes that modify its MOPR.").

At multiple points throughout the Order, however, the Commission appears to assume that all sell offers by new entrants, even in the large unconstrained area of PJM, are either currently subject to mitigation or will be after the revision. *See, e.g.*, *id.* at P 52 ("A sell offer is currently mitigated if it is less than 80 percent of the real levelized net CONE for the applicable asset class."); *id.* at P 75 ("Capacity offers from a seller and its affiliates who buy substantially more capacity from the RPM auction than they sell into it … are subject to PJM's MOPR."); *id.* at P 95 (summarizing, as apparently relevant, that P3 showed "that annual capacity compensation in the *unconstrained portion of PJM* could have been reduced by almost $1.4 billion" (emphasis added)). In none of these pronouncements did the Commission indicate that the MOPR would be expected only to apply within the smaller constrained parts of PJM.

We seek clarification that the Commission either did not, in fact, resolve this issue, or intended to order, and is ordering, PJM to mitigate its entire region. While there are other issues that the Commission also declined to act upon, we are particularly concerned that we may face (in our view, groundless) contentions that this issue was, in fact, resolved on the merits adversely to our position and is not subject to future stakeholder consideration or litigation efforts to achieve a different outcome. Alternatively, the Commission should grant rehearing in order to remove the blanket exemption. We have consistently sought to extend mitigation to every zone, including the unconstrained zone. P3 addressed this issue in full in its protest of PJM's filing. *See* P3 Protest at 13-15.

We submit there is no justification whatsoever for such a sweeping exemption, excising any buyer market-power mitigation from the so-called RTO or PJM zone, also known as "rest-of-pool," and from any unconstrained area, or any area projected to be unconstrained at the time of the auction. *See* Shanker Supp. at 20:2-8. The effect of this single sentence in PJM's filing is that approximately two-thirds of PJM would escape any mitigation under the Minimum Offer Price Rule. While unstated, there are only two potential explanations for such an exemption, and neither applies here.

First, some might argue that the risk of the exercise of market power in a large, unconstrained zone is *de minimis*. But as Dr. Shanker testifies, this is demonstrably wrong. *See id.* at 8:1–9:14, 20:9-19. Large or unconstrained zones—including the entire RTO or rest-of-pool zone—are susceptible to buyer-side market power exercise just like small or constrained zones. The incentives to exercise buyer market power are exactly the same. *See id.* at 21:4-13. Because of the slope of the demand curve, a *one* percent increase in supply causes a *twenty* percent reduction in prices. *Id.* at 8:9-10. Across PJM, it takes only 1,400 MW of additional

uneconomic capacity—less than either the Maryland or New Jersey schemes—to suppress prices RTO-wide by 20%. *See id*. at 8:10–9:2 (footnote omitted), 20:14-16.

Second, PJM could claim that applying the Minimum Offer Price Rule to unconstrained zones would be unduly burdensome. PJM has not actually made any such claim, however, and in fact has already confirmed that there is no significant administrative burden associated with screening for mitigation. In its discussion of the section 206 process that PJM proposes for resources found to be uneconomic, PJM explained that:

> This process need not be burdensome. PJM receives relatively few sell offers in the RPM base auctions each year that are based on new combined-cycle or combustion turbine power plants. And very few of those would be expected to submit offers significantly below the net cost of new entry each year.

PJM Proposal at 14 (footnote omitted). While we advocate ultimately expanding the mitigation beyond merely short-lead-time resources, even then the administrative burden will not be that significant. But even if it were a significant undertaking, it would still be necessary. The alternative—permitting uneconomic entry to destroy the market—is untenable. To be just, reasonable and non-discriminatory, the Minimum Offer Price Rule should apply everywhere. No area should be exempt from buyer-market-power mitigation.

CONCLUSION

For the foregoing reasons, the Commission should grant rehearing and clarify the Order.

Respectfully submitted,

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May 12, 2011

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served copies of the foregoing document upon each person designated on the official service list as compiled by the Office of the Secretary in the captioned proceedings, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and procedure, 18 C.F.R. § 385.2010.

Dated at Washington, D.C., this 12th day of May, 2011.

/s/ Carl Edman

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