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

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| Independent Market Monitor for PJM | ) | |
| | ) | |
| v. | ) | Docket No. EL24-12-000 |
| | ) | |
| PJM Interconnection, L.L.C. | ) | |

**COMMENTS OF**
**AMERICAN MUNICIPAL POWER, INC.**
**IN SUPPORT OF COMPLAINT**

On November 7, 2023, Monitoring Analytics, LLC, acting in its capacity as the Independent Market Monitor ("IMM") for PJM Interconnection, L.L.C. ("PJM") filed a complaint in the above-captioned proceeding pursuant to section 206 of the Federal Power Act ("FPA")[1] requesting that the Federal Energy Regulatory Commission ("Commission" or "FERC") find the current rules for determining Non-Performance Charges[2] in the PJM Capacity Performance construct, and related rules for calculating the Non-Performance Charge Limit (i.e., the annual stop-loss)[3] are unjust and unreasonable and should be replaced ("Complaint").[4] The IMM requests that the Commission adopt replacement rules under which Non-Performance Charges and the stop-loss associated with capacity commitments awarded in the next two Reliability Pricing Model ("RPM") Base Residual Auctions ("BRA") would be calculated based on the market clearing price instead of the net cost of new entry ("Net CONE").[5]

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1 16 U.S.C. § 824e.

2 *See* Tariff, Attachment DD, section 10A(e).

3 *See id.* section 10A(f).

4 IMM, Complaint, Docket No. EL24-12-000 (November 7, 2023).

5 *See id.* at 11-14; *see also* IMM, Answer, Docket No. EL24-12-000, at 11-12 (November 21, 2023) (clarifying proposed replacement rate).

American Municipal Power, Inc. ("AMP") agrees that the current provisions of the PJM Open Access Transmission Tariff ("Tariff") governing the calculation of Non-Performance Charges and the stop-loss are unjust and unreasonable and must be replaced. As described in the Complaint,[6] AMP has been a vocal advocate for reforming the Non-Performance Charge Rate[7] calculation and the related stop-loss mechanism that unreasonably expose Capacity Market Sellers to Non-Performance Charges far in excess of the revenues that they may earn through participation in RPM. As explained below, those unnecessary risks produce costs that are passed on to consumers, without any corresponding increase in reliability. Accordingly, AMP hereby submits its comments in support of the Complaint.[8]

# I. COMMENTS

## A. The Complaint demonstrates that the existing Tariff provisions governing calculation of Non-Performance Charges and the stop-loss are unjust and unreasonable.

The Complaint presents compelling evidence that the existing Tariff provisions governing the calculation of Non-Performance Charges and the related stop-loss are unjust and unreasonable and must be replaced. Non-Performance Charges under PJM's Capacity Performance construct are currently set with reference to Net CONE.[9] As an administratively determined estimate of the amortized cost of constructing certain new hypothetical generating resources in PJM, Net CONE bears no direct relationship to the revenues to be earned by Capacity Resources in PJM when they are awarded a capacity

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[6] *See* Complaint at 8-9.

[7] *See* Tariff, Attachment DD, section 10A(e).

[8] AMP notes that PJM filed an answer on November 15, 2023, urging the Commission to dismiss the Complaint. PJM, Answer, Docket No. EL24-12-000 (November 15, 2023).

[9] Complaint at 3-4.

commitment in the BRA, and it does not represent a reasonable input for calculating either the Non-Performance Charge Rate or the stop-loss.

As shown by the Non-Performance Charges assessed in the wake of Winter Storm Elliott, the current Tariff provisions expose generators to penalties that far exceed their potential total annual capacity payments.[10] Indeed, in the PJM stakeholder process that preceded PJM's filing in Docket No. ER23-1996-000 to revise the Tariff definition of Emergency Action used for the purpose of determining when Performance Assessment Intervals ("PAIs") are triggered,[11] AMP calculated that, for the 2024/2025 Delivery Year, the current Non-Performance Charge Rate based on Net CONE is more than ten times higher than the BRA clearing price in dollars per megawatt-day.[12] This means that for every five-minute PAI of non-performance, a resource is effectively penalized ten days of RPM revenue.[13] The likelihood that there may be fewer PAIs going forward as a result of Tariff changes recently approved by the Commission[14] does not necessarily address the concern that Non-Performance Charge exposure will be significant, as it may be concentrated in a small number of PAIs. Similarly, the annual stop-loss under the status quo is more than fifteen times the annual RPM capacity revenue available to PJM

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10 *See id.*

11 *See generally PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,058 (2023).

12 AMP, *Comparison of Market Design Options for Non-Performance Charge Rate and Stop-Loss Rate*, https://pjm.com/-/media/committees-groups/committees/mc/2023/20230511-special/item-01a---2-amp-supplement-to-may-11-special-mc.ashx ("AMP Non-Performance Rate/Stop-Loss Calculations").

13 *Id.* This calculation would be *unaffected* by the Tariff changes recently approved by the Commission that may reduce the number of future PAIs by modifying the definition of Emergency Action under the Tariff. *See generally PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,058.

14 *See PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,058.

Capacity Resources.[15] Exposure to Non-Performance Charges at these levels is simply unreasonable and counterproductive.

AMP has long been critical of the Capacity Performance "carrot and stick" approach to promoting resource performance during critical periods as costly and ineffective. But if penalties are used to encourage resource performance, they should be set at an appropriate level – high enough to provide a meaningful incentive to perform, while not creating unreasonable and counterproductive financial risk. The current Tariff provisions for calculating Non-Performance Charges and the stop-loss do not strike the appropriate balance.

There is no reasonable basis for the current extreme penalty rate. While PJM continues to assert that the current level of Non-Performance Charges "serve[s] as a strong impetus for resource performance during emergency conditions,"[16] there is no clear evidence that Capacity Sellers are responding to this "impetus." The percentage of Capacity Resources that failed to perform during Winter Storm Elliott was greater than the percentage of failures experienced during the 2014 Polar Vortex that prompted the adoption of Capacity Performance.[17] The current high penalty rate/high stop-loss combination failed to prevent over 47,000 MW of outages during Winter Storm Elliott.[18] Thus, even accepting for the sake of argument that exposure to penalties provides some incentive for Sellers to perform, experience under Capacity Performance has not shown

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[15] AMP Non-Performance Rate/Stop-Loss Calculations, *supra* note 12.

[16] PJM, Answer, Docket No. EL24-12-000, at 18 (November 15, 2023); *see also* PJM, Filing, Docket No. ER24-99-000, at 96 (October 13, 2023).

[17] AMP, Post-Forum Comments, Docket No. AD23-7-000, at 15-17 (August 14, 2023).

[18] *See* PJM, *Winter Storm Elliott: Event Analysis and Recommendation Report,* at 33-34 (July 17, 2023), https://www.pjm.com/-/media/library/reports-notices/special-reports/2023/20230717-winter-storm-elliott-event-analysis-and-recommendation-report.ashx.

that exposure to extremely high Non-Performance Charges encourages greater performance than a more reasonable penalty level.[19]

The Complaint presents evidence that exposure to very high penalties will negatively affect affordability and may have detrimental impacts that are exacerbated by the fact that exposure to extreme financial risk occurs simultaneously among a "range of generators."[20] As the Complaint explains,[21] the current penalty structure imposes significant financial risk on Sellers that goes far beyond a meaningful incentive to perform and exposes Sellers to risk of default and bankruptcy. At a minimum, exposure to extreme and unpredictable financial risk is likely to diminish market confidence and create a *disincentive* to invest in new resources or to continue operating existing generators.

Further, while the evidence does not show that consumers have benefited from increased reliability during critical periods as a result of extremely high Non-Performance Charges, these consumers are perversely required to shoulder increased costs associated with the financial risk these unreasonable penalties produce,[22] including through the Capacity Performance Quantifiable Risk ("CPQR") component of the Market Seller Offer Cap ("MSOC") calculation.[23] Indeed, this is one of the core problems with the

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19 *See* Complaint at 11 (observing that "[a]bstract discussions of incentives and penalties led some to the conclusion that if high prices provide incentives at times, then even higher prices or extreme penalties are even better incentives. One of the lessons of the winter storms Uri and Elliott, in very different market designs, is that extreme prices and penalties do not have the intended incentive effect and do have a destructive effect, in the energy market and in the capacity market.").

20 *See id.* at 7 (explaining that "[w]hile markets can deal with episodic and uncorrelated bankruptcies, rules that, as part of their normal functioning, create bankruptcy risk across a range of generators simultaneously as the result of a single event lasting less than 24 hours are not just and reasonable. Such rules put the reliability of PJM in its current form at risk.").

21 *See id.* at 4-7.

22 *See id.* at 12.

23 *See generally Indep. Market Monitor for PJM v. PJM Interconnection, L.L.C.*, 176 FERC ¶ 61,137, at PP 71-72 (2021), *order on reh'g*, 178 FERC ¶ 61,121, at PP 49-51 (2022), *aff'd sub nom. Vistra Corp. v. FERC*, 80 F.4th 302 (D.C. Cir. 2023). AMP notes that PJM has proposed a number of changes to its MSOC rules – including those addressing CPQR – that would likely increase MSOCs for Capacity

Capacity Performance framework: the penalty-based construct exposes Sellers to financial risk, which then causes customers to pay higher rates to compensate Sellers for taking this risk. Criticizing this "circular logic," the IMM has observed that "[t]he CP model creates arbitrarily high penalty rates which affect CPQR which increase the [avoidable cost rate] market seller offer caps. The risk is created by the CP model and then the cost to mitigate that risk is compensated within the CP model."[24] Consumers may also be exposed to higher capacity prices as resources prematurely retire to avoid Capacity Performance risks, tightening supply.

PJM has specifically acknowledged the risks presented by the current Non-Performance Charge structure. As the Complaint explains,[25] PJM's submissions in response to complaints challenging its assessment of Non-Performance Charges following Winter Storm Elliot recognize the potential detrimental impact of the Non-Performance Charges.[26] Similarly, in proposing changes to the stop-loss in its recent filing in Docket No. ER24-99-000, PJM conceded that the "high level of exposure relative to compensation in the market may not represent the best balance between incentives and risk, and results in significant tail risk for Capacity Market Sellers, which could have an

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Resources and therefore increase capacity prices, resulting in higher costs to consumers. *See* AMP, Protest, Docket No. ER24-98-000, at 9-21 (November 9, 2023).

[24] IMM, *Comments on PJM's CIFP Proposals*, at 4 (August 18, 2023), https://pjm.com/-/media/committees-groups/cifp-ra/2023/20230823/20230823-stakeholder-written-comments---imm-cifp-resource-adequacy.ashx.

[25] Complaint at 4-7.

[26] *See, e.g.*, PJM, Filing, Docket No. ER23-1038-000, at 7 (February 2, 2023) (explaining that "a default of a Member triggered by the non-payment of Non-Performance Charges creates a reliability risk for the PJM load. This is because it is possible that a defaulting PJM Member may no longer honor prior capacity commitments for the previously committed Capacity Resource.").

impact of chilling future investment in PJM's capacity market or even inducing premature retirements."[27]

PJM stakeholders have recognized the flaws associated with the unreasonably high Non-Performance Charges and stop-loss, and have repeatedly considered Tariff changes to address these concerns. AMP has been a vocal proponent of these reform efforts. Unfortunately, PJM has consistently refused to propose an adequate solution in either its stakeholder process or filings under FPA section 205. As explained in the Complaint,[28] at a Special Meeting of PJM's Markets and Reliability Committee on May 4, 2023, and again at a Special Meeting of PJM's Members Committee on May 11, 2023, PJM Members overwhelmingly endorsed a stakeholder-sponsored Capacity Performance Penalties Solution ("Member-Endorsed Solution") that proposed changes to the Non-Performance Charge Rate and stop-loss to tie them both to the BRA clearing price, similar to what the IMM proposes here.[29] The Member-Endorsed Solution received 69.8% stakeholder approval, yet PJM refused to file these Tariff changes in Docket No. ER23-1996-000 along with proposed changes to the Tariff definition of Emergency Action.[30] Notably, while the Commission declined to initiate a FPA section 206 proceeding to address the Non-Performance Charge Rate in that proceeding, it did so based on the pendency of PJM's Critical Issue Fast Path process addressing resource adequacy

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[27] PJM, Filing, Docket No. ER24-99-000, at 94 (October 13, 2023); *see id.* at 1. PJM's proposed changes to the stop-loss in Docket No. ER24-99-000 would not fully address the concerns raised in the Complaint, as PJM proposes to keep Non-Performance Charges tied to Net CONE. Further, as discussed below, revising the stop-loss without a similar revision to the Non-Performance Charge Rate presents significant reliability concerns.

[28] Complaint at 8.

[29] *See id.*

[30] *See id.*; *see also PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,058 at PP 8, 17.

("CIFP-RA"),[31] which, as discussed below, has not adequately addressed the problems that render the Non-Performance Charge Rate and stop-loss Tariff provisions unjust and unreasonable.

More recently, a proposal in the CIFP-RA process that was co-sponsored by the IMM, AMP, J-Power USA, and East Kentucky Power Cooperative ("Co-sponsored Proposal") focused on addressing concerns with the Non-Performance Charge Rate calculation and stop-loss, and proposed changes similar to the replacement rate proposed in the Complaint.[32] This proposed solution received the greatest percentage of member support of any CIFP-RA proposal.[33] Nevertheless, the PJM Board communicated that the vote was indicative-only, and the Co-sponsored Proposal was not included in PJM's recent filings in Docket Nos. ER24-98-000 and ER24-99-000. Instead, PJM has proposed only to modify the stop-loss,[34] leaving the Non-Performance Charge Rate tied to Net CONE.

AMP recognizes that the Commission approved the use of Net CONE in calculating Non-Performance Charges under the Capacity Performance construct in 2015,[35] but the Commission also specifically acknowledged in response to arguments to tie Non-Performance Charges to market clearing prices that "multiple reasonable

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[31] *PJM Interconnection, L.L.C.*, 184 FERC ¶ 61,058 at P 43.

[32] *See* Complaint at 9-10.

[33] *See* PJM, *Members Committee Supplemental Voting Results*, Item 3C (August 23, 2023), https://www.pjm.com/-/media/committees-groups/committees/mc/2023/20230823-special/mc-voting-results---item-3c-3f-3i---imm-1-daymark-ekpc-1-and-amp-jpower-1.ashx.

[34] PJM Filing, Docket No. ER24-99-000, at 92-97 (October 13, 2023).

[35] *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208, at P 159, *order on reh'g and clarification*, *PJM Interconnection, L.L.C.*, 152 FERC ¶ 61,064 (2015), *order on reh'g and compliance*, 155 FERC ¶ 61,157 (2016), *aff'd sub nom. Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017).

approaches could exist."[36] Experience in the eight years since the Capacity Performance framework was approved – including poor reliability performance during Winter Storm Elliott and the adverse impacts of the resulting Non-Performance Charges – shows that the Non-Performance Charge Rate and associated stop-loss are no longer just and reasonable.

In sum, the Complaint demonstrates that the current PJM Tariff rules for calculating Non-Performance Charges and the stop-loss are unjust and unreasonable and should be replaced. The Complaint provides a straightforward replacement rate that has been repeatedly endorsed by PJM stakeholders and should be adopted by the Commission, as discussed below.

### B. The replacement rate proposed in the Complaint is a just and reasonable interim solution and should be adopted.

As a remedy for the current unjust and unreasonable Tariff provisions, the Complaint proposes to tie both the Non-Performance Charge and the stop-loss to market clearing prices rather than Net CONE.[37] Further, the Complaint proposes that the Tariff changes would be applied to capacity commitments awarded in the BRA for the 2025/2026 Delivery Year in June 2024, and the BRA for the 2026/2027 Delivery Year in December 2024 or earlier.[38] These revisions are intended as an interim solution, as the Complaint suggests that the "BRA for 2027/2028 would be run on or before June 2025, based on a PJM filing in mid 2024 and auction preparation work beginning in January 2025."[39]

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[36] *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 at P 161.

[37] Complaint at 12-13.

[38] *Id.* at 13.

[39] *Id.*

The IMM's proposed replacement Tariff provisions reflect a straightforward, just and reasonable solution that has garnered significant stakeholder support.[40] As noted, the proposal is very similar to the Member-Endorsed Solution that PJM declined to file in Docket No. ER23-1996-000.[41] In discussing that proposal in comments on PJM's filing in Docket No. ER23-1996-000, AMP noted that, under the Member-Endorsed Solution, each five-minute PAI of non-performance would result in a forfeiture of one-day's RPM revenue as a penalty, while the proposed changes to the stop-loss would result in a maximum potential loss of one and one-half times available annual revenue.[42] The overwhelming majority of PJM Members agreed that this was a reasonable approach to Capacity Performance penalties. The IMM's proposal in the Complaint, like the Member-Endorsed Solution and the Co-Sponsored Proposal in the CIFP-RA process, strikes an appropriate (i.e., just and reasonable) balance between risk, compensation, non-performance penalties, and stop-loss, while maintaining reliability.

Unlike PJM's proposal in Docket No. ER24-99-000 to modify the stop-loss,[43] the IMM's proposed replacement rate would tether both the Non-Performance Charge Rate and the stop-loss to the market clearing price, which has important implications for promoting reliability under the Capacity Performance construct. By retaining an unreasonably high Non-Performance Charge Rate, while reducing substantially the annual stop-loss, PJM's filing in Docket No. ER24-99-000 would create a situation where the overall annual Non-Performance Charges faced by Capacity Resources could be

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[40] *See id.* at 11 ("the Market Monitor proposes replacement penalty rate rules that have the support of a majority of stakeholders in the PJM stakeholder process and are just and reasonable.").

[41] *See supra* pp. 7-8.

[42] AMP, Comments, Docket No. ER23-1996-000, at 6-7 (June 9, 2023).

[43] PJM, Filing, Docket No. ER24-99-000, at 92-97 (October 13, 2023).

exhausted in just a few hours of non-performance during consecutive PAIs, leaving those resources with no further Non-Performance Charge incentive to operate reliably during the entire remainder of the Delivery Year.

To illustrate, on a day like December 24, 2022, where PJM experienced more than six hours of PAIs, a committed generator that was off line for the day would have faced penalties for its non-performance on that day of more than fifteen times the annual RPM capacity revenue available to PJM Capacity Resources, but would have no RPM-based incentive to get back on line and stay operational going forward for the balance of the 2022/2023 Delivery Year, which concluded on May 31, 2023, spanning 159 days.[44] While PJM's proposed changes to the stop-loss might reduce total penalty exposure, the changes would not address the concern that the incentive to perform could be exhausted during a single event, leaving the Capacity Resource with no Non-Performance Charge incentive toward reliable performance during the remainder of the Delivery Year. In contrast, a just and reasonable solution would tether both the stop-loss and the Non-Performance Charge Rate to the market clearing price, as the IMM proposes.

AMP also supports the IMM's proposal to apply these replacement Tariff provisions as an interim solution for the next two BRAs. In protesting PJM's filings in Docket Nos. ER24-98-000 and ER24-99-000, AMP urged the Commission to encourage PJM to renew its consensus-based stakeholder process with the goal of developing a just and reasonable set of reforms to its resource adequacy framework.[45] The PJM Board has indicated that it agrees that additional reforms to PJM's resource adequacy construct

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[44] *See* AMP, Comments, Docket No. ER23-1996-000, at 10-11 (June 9, 2023).

[45] *See* AMP, Protest, Docket No. ER24-98-000, at 28-29 (November 9, 2023); AMP, Protest, Docket No. ER24-99-000, at 26-28 (November 9, 2023).

should be considered.[46] Granting the Complaint would address the significant problems associated with the Non-Performance Charge Rate and stop-loss, while providing stakeholders time to work on additional capacity construct reforms.

As the IMM explains, the proposal would create certainty for market participants for the next two auctions at a time when PJM capacity markets need a period of stability and certainty.[47] The proposed replacement rules are designed to be simple and clear so that they can be implemented in connection with the next two BRAs for the 2025/2026 and 2026/2027 Delivery Years. The Commission should therefore direct PJM to implement these rule changes as a just and reasonable replacement rate.

### C. There is no reasonable basis to delay action on the Complaint.

PJM has argued that the Commission should decline to address the merits of the Complaint given PJM's recent filings to modify the RPM framework in Docket Nos. ER24-98-000 and ER24-99-000.[48] The pendency of those filings is not a basis to refrain from acting on the Complaint, which has shown that the existing Tariff is unjust and unreasonable and has identified a just and reasonable replacement rate.

Numerous parties, including AMP and the IMM, have protested PJM's filings in Docket Nos. ER24-98-000 and ER24-99-000 and urged the Commission to reject them.

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[46] *See* Letter from PJM Board of Managers to Stakeholders, at 6 (September 27, 2023) (explaining that "the Board has heard strong support from stakeholders for continuing targeted discussions to enhance the capacity market, including a more granular approach to the market. The Board is supportive of this as well and looks forward to stakeholder feedback at the upcoming Liaison Committee and meetings with the Organization of PJM States, Inc. (OPSI) as to the particulars of how PJM should proceed with stakeholder discussions."), https://www.pjm.com/-/media/about-pjm/who-we-are/public-disclosures/20230927-pjm-board-letter-re-its-decision-within-the-cifp-ra.ashx.

[47] Complaint at 3, 13.

[48] *See* PJM, Answer, Docket No. EL24-12-000, at 4 (November 15, 2023).

Thus, some or all of PJM's proposals made therein may never become effective.[49] The IMM's proposed replacement Tariff provisions would provide a solution to some of the most significant flaws in the Capacity Performance framework and govern capacity commitments awarded in the next two BRAs while stakeholders resume discussions. As the Complaint explains, its proposal:

> would permit the next two BRAs to proceed as currently scheduled, would permit stakeholders more time to consider additional potential changes to the capacity market design, and would eliminate the artificial time pressure to decide on a massive, complex pair of PJM filings in Docket Nos. ER24-98 and ER24-99 that would change basic elements of the capacity market without adequate time for stakeholder or regulatory review.[50]

The next evolution of PJM's capacity construct must yield a simplified and stable market structure that recognizes the intermittent nature of future supply and the dynamic nature of future demand. PJM has not demonstrated that its filings in Docket Nos. ER24-98-000 and ER24-99-000 will help meet the PJM Region's future reliability needs. The IMM proposes replacement rules that would set penalties at just and reasonable levels, while leaving the rest of the capacity construct unaffected and providing time for PJM and stakeholders to consider broader market design changes.

Even if the Commission is inclined to approve some or all of PJM's proposals in Docket Nos. ER24-98-000 and ER24-99-000, PJM has not proposed to modify the unjust

[49] On November 17, 2023, Commission Staff issued deficiency letters to PJM in Docket Nos. ER24-98-000 and ER24-99-000, requesting additional information in each docket. The issuance of the deficiency letters appears to make it infeasible for the Commission to issue substantive orders on PJM's filings by December 12, 2023, as requested by PJM. The likely impossibility of Commission action on PJM's proposed RPM changes by then provides further support for encouraging PJM to renew its consensus-based stakeholder process with the goal of developing a just and reasonable set of reforms to its resource adequacy framework, as requested by AMP. *See supra* note 45.

[50] Complaint at 3.

and unreasonable Non-Performance Charge Rate,[51] and thus, Commission action under FPA section 206 is appropriate, either in the Complaint docket or on the Commission's own motion in response to PJM's filing in Docket No. ER24-99-000 proposing changes only to the stop-loss. As explained above, it is critical that both the Non-Performance Charge Rate and stop-loss be tied to the BRA clearing price.

## II. CONCLUSION

WHEREFORE, for the foregoing reasons, American Municipal Power, Inc. respectfully requests that the Commission: (1) grant the Complaint; (2) adopt a just and reasonable interim replacement rate tying both the Non-Performance Charge Rate and the stop-loss to the BRA clearing price; and (3) encourage PJM to resume consideration of further improvements to RPM in its consensus-based stakeholder process.

Respectfully submitted,


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November 27, 2023

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[51] PJM Filing, Docket No. ER24-99-000, at 95-96 (October 13, 2023).

## 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 27th day of November, 2023.

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