

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Essential Power OPP, LLC, et al.)	
v.	)	Docket No. EL23-53-000
PJM Interconnection, L.L.C.	)	(not consolidated)

Aurora Generation, LLC)	
Elwood Energy LLC)	
Jackson Generation, LLC)	
Lee County Generating Station, LLC)	
Lincoln Generating Facility, LLC)	
LSP University Park, LLC)	
Rockford Power, LLC)	
Rockford Power II, LLC)	
University Park Energy, LLC)	
v.	)	Docket No. EL23-54-000
PJM Interconnection, L.L.C.	)	(not consolidated)

Coalition of PJM Capacity Resources)	
v.	)	Docket No. EL23-55-000
PJM Interconnection, L.L.C.	)	(not consolidated)

Talen Energy Marketing, LLC)	
v.	)	Docket No. EL23-56-000
PJM Interconnection, L.L.C.	)	(not consolidated)

Lee County Generation Station, LLC)	
v.	)	Docket No. EL23-57-000
PJM Interconnection, L.L.C.	)	(not consolidated)

SunEnergy1, L.L.C.)	
v.	)	Docket No. EL23-58-000
PJM Interconnection, L.L.C.	)	(not consolidated)

Lincoln Generating Facility, L.L.C.)	
v.	)	Docket No. EL23-59-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Parkway Generation Keys)	
Energy Center LLC)	
v.	)	Docket No. EL23-60-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Old Dominion Electric Cooperative)	
v.	)	Docket No. EL23-61-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Energy Harbor LLC)	
v.	)	Docket No. EL23-63-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Calpine Corporation)	
v.	)	Docket No. EL23-66-000
PJM Interconnection, L.L.C.	)	(not consolidated)
Invenergy Nelson LLC)	
v.	)	Docket No. EL23-67-000
PJM Interconnection, L.L.C.	)	(not consolidated)

**MOTION FOR
ADOPTION OF PROTECTIVE ORDER**

PJM Interconnection, L.L.C. (“PJM”), pursuant to Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.212, respectfully requests that the Commission adopt and issue the proposed Protective Order attached hereto as Attachment A (“Protective Order”) to govern the

provision and protection of confidential information in all of the above-captioned proceedings.¹

In each of the captioned cases, one or more Capacity Market Sellers² objects to the assessment of Non-Performance Charges for shortfalls in their Capacity Resources' performance during Performance Assessment Intervals triggered by PJM's invocation of emergency procedures during Winter Storm Elliott³ on December 23 and December 24, 2022. Additional such complaints may yet be filed. By this motion, PJM seeks to have the Commission establish one common set of rules and procedures for handling protected information in all of these proceedings, to replace the nine different protective agreements⁴ that the various complainants have tendered in these proceedings.

Having one set of rules, instead of multiple different rules and procedures, to govern the sharing of protected information in these proceedings is clearly in the public interest. First, PJM is the respondent in each of these twelve proceedings, and may need to include in some, many, or most of these proceedings confidential information, market sensitive information, or Critical Energy Infrastructure Information ("CEII"). Second, many of the

¹ PJM notes that, pending the Commission's issuance of the proposed Protective Order, PJM will tender to any parties seeking access to any non-public materials in PJM's forthcoming answers in these proceedings a protective agreement (and associated non-disclosure certificates) identical to the proposed Protective Order, as an interim means to satisfy the Commission's regulations governing privileged treatment for documents submitted to the Commission. *See* 18 C.F.R. § 388.112.

² Capitalized terms used, but not defined, in this motion have the meaning set forth in PJM's Open Access Transmission Tariff ("Tariff").

³ For purposes of this filing, "Winter Storm Elliott" refers to a large winter storm that passed through the PJM Region on December 23-24, 2022. *See Winter Storm Elliott Info*, PJM Interconnection, L.L.C., <https://www.pjm.com/markets-and-operations/winter-storm-elliott> (last visited May 22, 2023) (collecting PJM's public statements addressing Winter Storm Elliott's impact on PJM's operations and markets).

⁴ The complainants in Docket Nos. EL23-53-000, EL23-54-000, EL23-55-000, EL23-56-000, EL23-57-000, EL23-58-000, EL23-59-000, EL23-61-000, and EL23-66-000 tendered their protective provisions under 18 C.F.R. §388.112(b)(2)(i), which contemplates protective agreements. Despite that, some labeled their proposed provisions as "Protective Orders," but none of them has moved the Commission to issue a protective order.

same parties have intervened in many of these proceedings; many if not all of them will likely wish to obtain any PJM-provided or complainant-provided protected information, and may choose or need to provide protected information of their own. Third, the potentially relevant protected information in all proceedings will likely be of a similar type, category, or character, given that all of the proceedings concern the assessment of Non-Performance Charges as a consequence of Capacity Resource performance during two days last December. Fourth, it is readily conceivable that the very same items of protected information could be provided in multiple proceedings. Fifth, PJM on April 14, 2023, moved the Commission to adopt global settlement judge procedures encompassing the first eight proceedings captioned above and “any similar complaints that may be filed by the time the Commission acts on this motion.”⁵ As PJM showed in its settlement procedures motion, the Commission can establish common settlement judge procedures for multiple proceedings even if it does not order a Subpart E⁶ evidentiary hearing in those cases or consolidate them for hearing and decision.⁷

Properly handling and protecting confidential information in Commission proceedings is inherently a burdensome affair—but that burden is wholly warranted and entirely appropriate, given the need to limit disclosure of such information. In sharp contrast, establishing differing rules for the same parties handling the same or similar protected information across multiple similar proceedings imposes much greater, and completely unwarranted, burdens. Parties, especially PJM, will need to track which set of

⁵ *Essential Power OPP, LLC v. PJM Interconnection, L.L.C.*, Motion of PJM Interconnection, L.L.C. for Establishment of Settlement Judge Procedures, Docket Nos. EL23-53-000, et al., at 2 (Apr. 14, 2023) (“Settlement Procedures Motion”).

⁶ See 18 C.F.R. Part 385, Subpart E.

⁷ Settlement Procedures Motion at 6.

differing rules follow which pieces of information, with the possibility that differing rules could apply even to the same piece of information provided in different proceedings. Having multiple differing rules creates a situation in which *the wrong rules* could be applied to a given piece of protected information, thus creating a significant risk of violating the protective procedures. And these substantially increased burdens and risks provide *zero* additional protection—one well-crafted set of rules and procedures provides all the protection needed. Indeed, the compliance traps generated by multiple differing sets of rules and procedures could easily result in a net degradation in protection of confidential materials.

Although the Commission often relies on protective agreements to govern the handling of confidential materials,⁸ the Commission has also found it appropriate to issue protective orders in complaint proceedings,⁹ even before setting a matter for hearing or settlement judge procedures.¹⁰ This is especially true where a market operator’s response to a complaint is expected to contain highly sensitive competitive market data,¹¹ as is the case here. The Commission has specifically acknowledged that cases involving the disclosure of market-sensitive information by market operators have been appropriate for Commission-issued protective orders in lieu of the standard protective agreements.¹²

⁸ 18 C.F.R. § 388.112(b)(2)(i).

⁹ See *Hudson Transmission Partners, LLC v. N.Y. Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,022, at P 9 (2014).

¹⁰ See *Astoria Generating Co. v. N.Y. Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,155, at P 24, ordering para (A) (2011) (issuing protective order to facilitate the sharing of a confidential document to facilitate response to the document before Commission ruling on complaint).

¹¹ See *id.* at PP 16-19, 24-25; *Hudson Transmission Partners, LLC*, 146 FERC ¶ 61,022, at P 9 (“[W]e recognize that NYISO and market participants have a legitimate interest in keeping competitively sensitive information and NYISO’s market monitoring and mitigation processes confidential.”).

¹² See *id.*

Adopting a common protective order in these proceedings is particularly appropriate because each of the captioned proceedings already involves or is likely to involve materials designated confidential pursuant to Section 18.17 of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (“Operating Agreement”). Operating Agreement, Section 18.17 protects Member information from disclosure except under very limited circumstances, with such circumstances often requiring additional protections to ensure confidentiality notwithstanding the limited disclosure. As relevant here, Operating Agreement, Section 18.17.2(a) permits PJM “to disclose to third parties, information that is otherwise required to be maintained in confidence pursuant to this [Operating] Agreement” if required to do so “by applicable law, order, or in the course of administrative or judicial proceedings.” PJM has thus drafted the Protective Order to explicitly provide that:

Participants disclosing such information in accordance with the terms of this Protective Order will be deemed to not have contravened the prohibitions of this Operating Agreement provision, including without limitation the disclosure and notification requirements of Operating Agreement, Section 18.17.2, and in the event of any conflict with such Operating Agreement provisions, such provisions shall be deemed waived by this Protective Order, for good cause shown and solely as and to the extent such information is provided under and governed by the terms of this Protective Order.

Securing a Commission protective order to support this specific provision will help avoid any concerns that providing confidential information under some other arrangement, such as a bilateral protective agreement, might be insufficiently coordinated with the notice and objection provisions of Operating Agreement, Section 18.17.

PJM is including a redline version of the proposed Protective Order showing changes from the Model Protective Order as Attachment B to this motion. The proposed

Protective Order will permit the sharing of confidential information, market sensitive information, and CEII, while providing necessary protections for that information.

As can be seen in Attachment B, PJM proposes to modify the Model Protective Order by:

- providing that “Protected Material” includes material provided as part of settlement proceedings under the settlement privilege established by 18 C.F.R. § 385.603;
- providing additional protections for commercially sensitive material using a “Highly Confidential Protected Materials” category, including a provision that Reviewing Representatives for purposes of Highly Confidential Materials cannot include Competitive Duty Personnel, similar to provisions the Commission has adopted in other protective orders;¹³
- making clear that Highly Confidential Protected Materials include materials designated as confidential under Operating Agreement, section 18.17, since that refers to material provided confidentially to PJM by Market Participants;
- eliminating, through the language quoted above, the possibility of any claimed conflict between the provision of Protected Materials under this Protective Order and the requirements of Operating Agreement, section 18.17;
- providing that Competitive Duty Personnel, who are not permitted access to Highly Confidential Protected Materials, includes in-house counsel who provide consulting services (including legal consultation or advice) to employees engaged in marketing energy, and includes any employees who directly or indirectly supervise employees engaged in marketing, to address the inherent concern that employees or officials higher in the organization chart that see (or discuss with other employees) market-sensitive Highly Confidential Protected Materials information cannot “unlearn” or compartmentalize that information in their future decision-making;
- making conforming changes to implement the separate category of Highly Protected Confidential Materials, including a separate non-disclosure certificate, and a limitation that Highly Confidential Protected Materials can only be shared between Reviewing Representatives that are qualified to review that category of protected material and that have signed the non-disclosure certificate applicable to that category;

¹³ See, e.g., *Hudson Transmission Partners, LLC*, 146 FERC ¶ 61,022, Protective Order at P 9; *Astoria Generating Co*, 136 FERC ¶ 61,155, at Protective Order at P 9.

- providing, as an essential part of meeting the need for establishing a common set of rules and procedures for all of these proceedings, that the proposed Protective Order supersedes and replaces¹⁴ any protective agreement or proposed protective order previously filed or used in this proceeding;
- replacing the more limiting term “privileged” Material in the Model Protective Order with the more inclusive term “protected” materials (since not all confidential materials that require protection are necessarily privileged under evidentiary rules); and
- removing, as inapplicable, Model Protective Order language pertaining to proceedings under the Interstate Commerce Act.

WHEREFORE, PJM respectfully requests that the Commission issue an order adopting the proposed Protective Order.

¹⁴ The proposed Protective Order adds five days after the Protective Order is issued for prior protective agreements to be superseded, so that parties can execute new non-disclosure certificates and avoid any gap in their ability to access the Protected Materials.

Respectfully submitted,

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ATTACHMENT A
PROTECTIVE ORDER

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Insert complainant]

v.

Docket No. EL23-____-000

PJM Interconnection, L.L.C.

PROTECTIVE ORDER

(Issued _____)

1. Participants in this proceeding(s) may exchange documents or materials that are deemed to contain Protected Material and/or Critical Energy/Electric Infrastructure Information (CEII), as those terms are defined herein. Accordingly, IT IS ORDERED THAT this Protective Order shall govern the use of all such material produced by, or on behalf of, any Participant in the above-captioned proceeding(s).
2. The Commission's regulations¹ and its policy governing the labelling of controlled unclassified information (CUI),² establish and distinguish the respective designations of Protected Material and CEII. As to these designations, this Protective Order provides that a Participant:
 - A. *may* designate as Protected Material any material which customarily is treated by that Participant as commercially sensitive or proprietary or material subject to a legal privilege, which is not otherwise available to the public, and which, if disclosed, would subject that Participant or its customers to risk of competitive disadvantage or other business injury; and
 - B. *must* designate as CEII, any material that meets the definition of that term as provided by 18 C.F.R. §§ 388.113(a), (c).

¹ Compare 18 C.F.R. § 388.112, with 18 C.F.R. § 388.113. This Protective Order does not alter the respective requirements imposed by these sections on Privileged Material or CEII.

² Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff, 82 Fed. Reg. 18,632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

3. For the purposes of this Protective Order, the listed terms are defined as follows:
- A. Participant(s): As defined at 18 C.F.R. § 385.102(b).
 - B. Protected Material:³
 - i. Material (including depositions) provided by a Participant in response to discovery requests or filed with the Commission, and that is designated as Protected Material by such Participant;⁴
 - ii. Material provided by a Participant in the course of settlement negotiations before a settlement judge pursuant to 18 C.F.R. § 385.603, including materials provided in response to informal discovery requests, and designated by such Participant as protected;
 - iii. Material that is privileged under federal, state, or foreign law, such as work-product privilege, attorney-client privilege, or governmental privilege, and that is designated as Protected Material by such Participant;⁵
 - iv. Any information contained in or obtained from such designated material;
 - v. Any other material which is made subject to this Protective Order by the Presiding Administrative Law Judge (Presiding Judge) or the Chief Administrative Law Judge (Chief Judge) in the absence of the

³ The Commission's regulations state that "[f]or the purposes of the Commission's filing requirements, non-CEII subject to an outstanding claim of exemption from disclosure under FOIA will be referred to as privileged material." 18 C.F.R. § 388.112(a). The regulations further state that "[f]or material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant's access to material for which privileged treatment is claimed is governed by the presiding official's protective order." 18 C.F.R. § 388.112(b)(2)(v).

⁴ See *infra* P 11 for the procedures governing the labeling of this designation.

⁵ The Commission's regulations state that "[a] presiding officer may, by order . . . restrict public disclosure of discoverable matter in order to . . . [p]reserve a privilege of a participant. . . ." 18 C.F.R. § 385.410(c)(3). To adjudicate such privileges, the regulations further state that "[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities." 18 C.F.R. § 385.410(d)(1)(i).

Presiding Judge or where no presiding judge is designated, the Federal Energy Regulatory Commission (Commission), any court, or other body having appropriate authority, or by agreement of the Participants (subject to approval by the relevant authority);

- vi. Notes of Protected Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Protected Material);⁶ or
- vii. Copies of Protected Material.
- viii. Protected Material does not include:
 - a. Any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be privileged by such agency or court;
 - b. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order; or
- ix. Additional Subcategory of Protected Material:
 - a. Highly Confidential Protected Material: A Participant may use this designation for those materials that are of such a commercially sensitive nature among the Participants or of such a private, personal nature that the producing Participant is able to justify a heightened level of confidential protection with respect to those materials. Highly Confidential Protected Material includes materials designated confidential pursuant to section 18.17 of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (“Operating Agreement”). Participants disclosing such information in accordance with the terms of this Protective Order will be deemed to not have contravened the prohibitions of this Operating Agreement provision, including without limitation the disclosure and notification requirements of Operating Agreement, Section 18.17.2, and

⁶ Notes of Protected Material are subject to the same restrictions for Protected Material except as specifically provided in this Protective Order.

in the event of any conflict with such Operating Agreement provisions, such provisions shall be deemed waived by this Protective Order, for good cause shown and solely as and to the extent such information is provided under and governed by the terms of this Protective Order. Except for the more limited list of persons who qualify as Reviewing Representatives for purposes of reviewing Highly Confidential Privileged Materials, such materials are subject to the same provisions in the Protective Order as other Protected Materials.

- b. Notes of Highly Confidential Protected Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Highly Confidential Protected Material);⁷ or
 - c. Copies of Highly Confidential Protected Material.
- C. Critical Energy/Electric Infrastructure Information (CEII): As defined at 18 C.F.R. §§ 388.113(a), (c).
- D. Non-Disclosure Certificate: The certificate attached to this Protective Order, by which Participants granted access to Protected Material and/or CEII must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for this proceeding.
- E. Reviewing Representative: A person who has signed a Non-Disclosure Certificate and who is:
- i. Commission Trial Staff designated as such in this proceeding;
 - ii. An attorney who has made an appearance in this proceeding for a Participant;

⁷ Notes of Highly Confidential Protected Material are subject to the same restrictions for Highly Confidential Protected Material except as specifically provided in this Protective Order.

- iii. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney who has made an appearance in this proceeding on behalf of a Participant;
 - iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding;
 - v. A person designated as a Reviewing Representative by order of the Presiding Judge, the Chief Judge, or the Commission; or
 - vi. Employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.
- F. The term “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material defined in Paragraph 3(B)(viii)(a) shall mean a person who has signed a Non-Disclosure Certificate and who is:
- i. Commission Trial Staff designated as such in this proceeding;
 - ii. Outside counsel of a Participant, i.e., an attorney who is not employed by the Participant but is retained by a Participant, who has made an appearance in this proceeding for a Participant, and their partners, associates, and staff of such outside counsel;
 - iii. In-house counsel, i.e., an attorney who is employed by the Participant, who has made an appearance in this proceeding for a Participant and who is not Competitive Duty Personnel as defined in Paragraph 3(G);
 - iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding; provided, however, such individual is not Competitive Duty Personnel as defined in Paragraph 3(G);
 - v. A person designated as a Reviewing Representative and is otherwise eligible to review Highly Confidential Protected Material by order of the Presiding Judge, the Chief Judge, or the Commission.
 - vi. A “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material does not include Competitive Duty Personnel as defined in Paragraph 3(G)
- G. The term “Competitive Duty Personnel” shall mean any individual(s), including in-house counsel, whose scope of employment or engagement

includes the marketing, sale, or purchase of electric energy or capacity (collectively, “Covered Marketing”), the direct or indirect supervision of any employee or employees whose duties include Covered Marketing, the provision of consulting services, including legal consultation or advice, to any person whose duties include Covered Marketing, or other Covered Marketing services in competition with the producing Participant, all of which are considered “Competitive Duties;” except that Competitive Duty Personnel shall not include employees of the Federal Energy Regulatory Commission, and/or any state utilities commission which is a Participant, outside counsel.

4. Protected Material, Highly Confidential Protected Material, and/or CEII shall be made available under the terms of this Protective Order only to Participants and only to their Reviewing Representatives as provided in Paragraphs 6-10 of this Protective Order. The contents of Protected Material, Highly Confidential Protected Material, CEII, or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this specific proceeding.
5. All Protected Material, Highly Confidential Protected Material, and/or CEII must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to Paragraphs 7-9 of this Protective Order.
6. Protected Material, Highly Confidential Protected Material, and/or CEII must be handled by each Participant and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 9 of this Protective Order. Protected Material, Highly Confidential Protected Material, and/or CEII shall not be used except as necessary for the conduct of this proceeding, nor shall they (or the substance of their contents) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this proceeding and who needs to know the information in order to carry out that person’s responsibilities in this proceeding. Reviewing Representatives may make copies of Protected Material, Highly Confidential Protected Material, and/or CEII, but such copies automatically become Protected Material, Highly Confidential Protected Material, and/or CEII. Reviewing Representatives may make notes of Protected Material and Highly Confidential Protected Material, which shall be treated as Notes of Protected Material if they reflect the contents of Protected Material. A Reviewing Representative shall not disclose Highly Confidential Protected Material to a Reviewing Representative that does not meet the qualifications in Paragraph 3(F).
7. If a Reviewing Representative’s scope of employment includes any of the activities listed under this Paragraph 7, such Reviewing Representative may not use information contained in any Protected Material, Highly Confidential Protected Material,

and/or CEII obtained in this proceeding for a commercial purpose (e.g. to give a Participant or competitor of any Participant a commercial advantage):

- A. Covered Marketing;
- B. Direct or indirect supervision of any employee or employees whose duties include Covered Marketing; or
- C. The provision of consulting services, including legal consultation or advice, to any person whose duties include Covered Marketing.

8. If a Participant wishes to designate a person not described in Paragraph 3(E) above as a Reviewing Representative, the Participant must seek agreement from the Participant providing the Protected Material and/or CEII. If an agreement is reached, the designee shall be a Reviewing Representative pursuant to Paragraph 3.D of this Protective Order with respect to those materials. If no agreement is reached, the matter must be submitted to the Presiding Judge for resolution. If a Participant wishes to designate a person not described in Paragraph 3(F) above as a Reviewing Representative for the purposes of reviewing Highly Confidential Protected Material, the Participant must request an order from the Presiding Judge, the Chief Judge, or the Commission granting such designation.

9. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Protected Material, Highly Confidential Protected Material, and/or CEII pursuant to this Protective Order until three business days after that Reviewing Representative first has executed and served the applicable Non-Disclosure Certificate.⁸ However, if an attorney qualified as a Reviewing Representative has executed a Non-Disclosure Certificate, any participating paralegal, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. Attorneys designated Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Order, and must take all reasonable precautions to ensure that Protected Material, Highly Confidential Protected Material, and/or CEII are not disclosed to unauthorized persons. Reviewing Representatives that are eligible to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) must execute a Non-Disclosure Certificate for Highly Confidential Protected Material in the form attached hereto. All executed Non-

⁸ During this three-day period, a Participant may file an objection with the Presiding Judge or the Commission contesting that an individual qualifies as a Reviewing Representative, and the individual shall not receive access to the Protected Material, Highly Confidential Protected Material, and/or CEII, as applicable, until resolution of the dispute.

Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for the proceeding.

10. Any Reviewing Representative may disclose Protected Material, Highly Confidential Protected Material, and/or CEII to any other Reviewing Representative as long as both Reviewing Representatives have executed the appropriate Non-Disclosure Certificate. In the event any Reviewing Representative to whom Protected Material, Highly Confidential Protected Material, and/or CEII are disclosed ceases to participate in this proceeding, or becomes employed or retained for a position that renders him or her ineligible to be a Reviewing Representative under Paragraph 3(E) or ineligible to review Highly Confidential Protected Material under Paragraph 3(F), access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate for as long as the Protective Order is in effect.⁹

11. All Protected Material, Highly Confidential Protected Material, and/or CEII in this proceeding filed with the Commission, submitted to the Presiding Judge, or submitted to any Commission personnel, must comply with the Commission's *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*.¹⁰ Consistent with those requirements:

- A. Documents that contain Protected Material must include a top center header on each page of the document with the following text: CUI//PRIV or CUI//PRIV-HC for Highly Confidential Protected Material. Any corresponding electronic files must also include this text in the file name.
- B. Documents that contain CEII must include a top center header on each page of the document with the following text: CUI//CEII. Any corresponding electronic files must also include this text in the file name.
- C. Documents that contain both Protected Material and CEII must include a top center header on each page of the document with the following text: CUI//CEII//PRIV. Any corresponding electronic files must also include this text in the file name.
- D. The specific content on each page of the document that constitutes Protected Material and/or CEII must also be clearly identified. For example, lines or individual words or numbers that include both Protected

⁹ See *infra* P 19.

¹⁰ 82 Fed. Reg. 18,632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

Material and CEII shall be prefaced and end with “BEGIN CUI//CEII/PRIV” and “END CUI//CEII/PRIV”.

12. If any Participant desires to include, utilize, or refer to Protected Material, Highly Confidential Protected Material, or information derived from such material in testimony or other exhibits during the hearing in this proceeding in a manner that might require disclosure of such materials to persons other than Reviewing Representatives, that Participant first must notify both counsel for the disclosing Participant and the Presiding Judge (or the Commission in the absence of a Presiding Judge), and identify all such Protected Material or Highly Confidential Protected Material. Thereafter, use of such Protected Material or Highly Confidential Protected Material will be governed by procedures determined by the Presiding Judge (or the Commission in the absence of a Presiding Judge).

13. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the production or use of Protected Material, Highly Confidential Protected Material, and/or CEII on any appropriate ground.

14. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge (or the Chief Judge in the Presiding Judge’s absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority, to find this Protective Order should not apply to all or any materials previously designated Protected Material or Highly Confidential Protected Material pursuant to this Protective Order. The Presiding Judge (or the Chief Judge in the Presiding Judge’s absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

15. Each Participant governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge (or the Chief Judge in the Presiding Judge’s absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority.

16. Subject to Paragraph 18, the Presiding Judge (or the Chief Judge in the Presiding Judge’s absence or where no presiding judge is designated), or the Commission shall resolve any disputes arising under this Protective Order pertaining to Protected Material (or Highly Confidential Protected Material) according to the following procedures. Prior to presenting any such dispute to the Presiding Judge, the Chief Judge or the Commission, the Participants to the dispute shall employ good faith best efforts to resolve it.

- A. Any Participant that contests the designation of material as Protected Material (or Highly Confidential Protected Material) shall notify the Participant that provided the Protected Material (or Highly Confidential

Protected Material) by specifying in writing the material for which the designation is contested.

- B. In any challenge to the designation of material as Protected Material (or Highly Confidential Protected Material), the burden of proof shall be on the Participant seeking protection. If the Presiding Judge, the Chief Judge, or the Commission finds that the material at issue is not entitled to the designation, the procedures of Paragraph 17 shall apply.
- C. The procedures described above shall not apply to material designated by a Participant as CEII. Material so designated shall remain subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's CEII Coordinator that such material need not retain that designation.

17. The designator will have five (5) days in which to respond to any pleading requesting disclosure of Protected Material (or Highly Confidential Protected Material). Should the Presiding Judge, the Chief Judge, or the Commission, as appropriate, determine that the information should be made public (or should not be subject to the restrictions applicable to Highly Confidential Protected Material), the Presiding Judge, the Chief Judge, or the Commission will provide notice to the designator no less than five (5) days prior to the date on which the material will become public. This Protective Order shall automatically cease to apply to such material on the sixth (6th) calendar day after the notification is made unless the designator files a motion with the Presiding Judge, the Chief Judge, or the Commission, as appropriate, with supporting affidavits, demonstrating why the material should continue to receive the requested protection. Should such a motion be filed, the material will remain confidential until such time as the interlocutory appeal or certified question has been addressed by the Motions Commissioner or Commission, as provided in the Commission's regulations, 18 C.F.R. §§ 385.714, .715. No Participant waives its rights to seek additional administrative or judicial remedies after a Presiding Judge or Chief Judge decision regarding Protected Material (or Highly Confidential Protected Material) or the Commission's denial of any appeal thereof or determination in response to any certified question. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Protected Material, Highly Confidential Protected Material, and/or CEII in the files of the Commission.

18. Protected Material, Highly Confidential Protected Material, and/or CEII shall remain available to Participants until the later of 1) the date an order terminating this proceeding no longer is subject to judicial review, or 2) the date any other Commission proceeding relating to the Protected Material and/or CEII is concluded and no longer subject to judicial review. After this time, the Participant that produced the Protected Material and/or CEII may request (in writing) that all other Participants return or destroy the Protected Material and/or CEII. This request must be satisfied with within fifteen

(15) days of the date the request is made. However, copies of filings, official transcripts and exhibits in this proceeding containing Protected Material, or Notes of Protected Material, may be retained if they are maintained in accordance with Paragraph 5 of this Protective Order. If requested, each Participant also must submit to the Participant making the request an affidavit stating that to the best of its knowledge it has satisfied the request to return or destroy the Protected Material and/or CEII. To the extent Protected Material and/or CEII are not returned or destroyed, they shall remain subject to this Protective Order.

19. Any documents and materials, or information derived therefrom, provided by one Participant in this proceeding to another Participant pursuant to the terms of a bilateral protective agreement captioned with the name of this proceeding (whether marked as a protective agreement or protective order) shall become subject to the terms of this Protective Order, in lieu of the terms of such preceding protective agreement, on the date that is five days after the date of issuance of this Protective Order, and this Protective Order shall be the sole means for the provision among Participants in this proceeding and for purposes of this proceeding of Protected Material, Highly Confidential Protected Material, and CEII. Regardless of any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Judge, the Chief Judge, or the Commission. All CEII designations shall be subject to the “[d]uration of the CEII designation” provisions of 18 C.F.R. § 388.113(e).

20. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

By the Commission:

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Insert complainant]

v.

Docket No. EL23-____-000

PJM Interconnection, L.L.C.

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Material and/or Critical Energy/Electric Infrastructure Information (CEII) is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of Protected Material and/or CEII, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Protective Order. I acknowledge that I do not meet the qualifications to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) of the Protective Order and my duties and responsibilities may include “Competitive Duties” as described in the Protective Order. As such, I understand that I shall neither have access to, nor disclose, the contents of the Highly Confidential Protected Materials that are marked as “CUI//PRIV-HC,” any notes or other memoranda, or any other form of information that copies or discloses Highly Confidential Protected Materials that are marked as “CUI//PRIV-HC.” I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Insert complainant]

v.

Docket No. EL23-____-000

PJM Interconnection, L.L.C.

NON-DISCLOSURE CERTIFICATE
FOR HIGHLY CONFIDENTIAL PROTECTED MATERIALS

I hereby certify my understanding that access to Protected Materials, and Highly Confidential Protected Materials and/or Critical Energy/Electric Infrastructure Information (CEII) in the above-captioned case is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, Highly Confidential Protected Materials and/or Critical Energy/Electric Infrastructure Information (CEII), any notes or other memoranda, or any other form of information that copies or discloses Protected Materials, Highly Confidential Protected Materials, and/or Critical Energy/Electric Infrastructure Information (CEII) shall not be disclosed to anyone other than in accordance with that Protective Order and shall be used only in connection with this proceeding. I affirm that I meet the qualifications to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) of the Protective Order and my duties and responsibilities do not include "Competitive Duties" as described in the Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____

ATTACHMENT B

COMPARISON OF PROPOSED PROTECTIVE ORDER
AGAINST
MODEL PROTECTIVE ORDER

MODEL PROTECTIVE ORDER

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Insert complainant]

v.

Docket No. EL23-____-000

PJM Interconnection, L.L.C.

PROTECTIVE ORDER

(Issued _____)

1. Participants in this proceeding(s) may exchange documents or materials that are deemed to contain ~~Privileged~~Protected Material and/or Critical Energy/Electric Infrastructure Information (CEII), as those terms are defined herein. Accordingly, IT IS ORDERED THAT this Protective Order shall govern the use of all such material produced by, or on behalf of, any Participant in the above-captioned proceeding(s).

2. The Commission's regulations¹ and its policy governing the labelling of controlled unclassified information (CUI),² establish and distinguish the respective designations of ~~Privileged~~Protected Material and CEII. As to these designations, this Protective Order provides that a Participant:

- A. *may* designate as ~~Privileged~~Protected Material any material which customarily is treated by that Participant as commercially sensitive or proprietary or material subject to a legal privilege, which is not otherwise available to the public, and which, if disclosed, would subject that

¹ Compare 18 C.F.R. § 388.112, with 18 C.F.R. § 388.113. This Protective Order does not alter the respective requirements imposed by these sections on Privileged Material or CEII.

² *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*, 82 Fed. Reg. 18,632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

Participant or its customers to risk of competitive disadvantage or other business injury; and

- B. *must* designate as CEII, any material that meets the definition of that term as provided by 18 C.F.R. §§ 388.113(a), (c).
3. For the purposes of this Protective Order, the listed terms are defined as follows:
- A. Participant(s): As defined at 18 C.F.R. § 385.102(b).
- B. ~~Privileged~~Protected Material:³
- i. Material (including depositions) provided by a Participant in response to discovery requests or filed with the Commission, and that is designated as ~~Privileged~~Protected Material by such Participant;⁴
- ii. Material provided by a Participant in the course of settlement negotiations before a settlement judge pursuant to 18 C.F.R. § 385.603, including materials provided in response to informal discovery requests, and designated by such Participant as protected;
- iii. ~~ii.~~ Material that is privileged under federal, state, or foreign law, such as work-product privilege, attorney-client privilege, or governmental privilege, and that is designated as ~~Privileged~~Protected Material by such Participant;⁵

³ The Commission’s regulations state that “[f]or the purposes of the Commission’s filing requirements, non-CEII subject to an outstanding claim of exemption from disclosure under FOIA will be referred to as privileged material.” 18 C.F.R. § 388.112(a). The regulations further state that “[f]or material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant’s access to material for which privileged treatment is claimed is governed by the presiding official’s protective order.” 18 C.F.R. § 388.112(b)(2)(v).

⁴ See *infra* P 11 for the procedures governing the labeling of this designation.

⁵ The Commission’s regulations state that “[a] presiding officer may, by order . . . restrict public disclosure of discoverable matter in order to . . . [p]reserve a privilege of a participant. . . .” 18 C.F.R. § 385.410(c)(3). To adjudicate such privileges, the regulations further state that “[i]n the absence of controlling Commission precedent,

- iv. ~~iii.~~ Any information contained in or obtained from such designated material;
- v. ~~iv.~~ Any other material which is made subject to this Protective Order by the Presiding Administrative Law Judge (Presiding Judge) or the Chief Administrative Law Judge (Chief Judge) in the absence of the Presiding Judge or where no presiding judge is designated, the Federal Energy Regulatory Commission (Commission), any court, or other body having appropriate authority, or by agreement of the Participants (subject to approval by the relevant authority);
- vi. ~~v.~~ Notes of ~~Privileged-Protected~~ Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses ~~Privileged-Protected~~ Material);⁶ or
- vii. ~~vi.~~ Copies of ~~Privileged-Protected~~ Material.
- ~~ii.~~ viii. ~~Privileged-Protected~~ Material does not include:
- a. Any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be privileged by such agency or court;
 - b. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order; or
- ix. ~~viii.~~ Additional ~~Subcategories of Privileged-Subcategory of Protected~~ Material ~~in Oil Pipeline Proceedings~~:

privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities." 18 C.F.R. § 385.410(d)(1)(i).

⁶ Notes of ~~Privileged-Protected~~ Material are subject to the same restrictions for ~~Privileged-Protected~~ Material except as specifically provided in this Protective Order.

~~e. Section 15(13) Privileged Material:⁷ Any materials, permitted to be produced by this Protective Order, concerning the nature, kind, quantity, destination or routing of any products tendered or delivered to a Participant for interstate transportation by or on behalf of a specific shipper, when the identity of the shipper is contained in or may be discerned from the material to be provided. This subcategory shall not apply if the shipper to whom such information pertains consents that the information be categorized as Privileged Material under the other provisions of this Protective Order or produced outside the scope of this Protective Order.~~

a. b. Highly Confidential ~~Privileged~~ Protected Material: A Participant may use this designation for those materials that are of such a commercially sensitive nature among the Participants or of such a private, personal nature that the producing Participant is able to justify a heightened level of confidential protection with respect to those materials. Highly Confidential Protected Material includes materials designated confidential pursuant to section 18.17 of the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (“Operating Agreement”). Participants disclosing such information in accordance with the terms of this Protective Order will be deemed to not have contravened the prohibitions of this Operating Agreement provision, including without limitation the disclosure and notification requirements of Operating Agreement, Section 18.17.2, and in the event of any conflict with such Operating Agreement provisions, such provisions shall be deemed waived by this Protective Order, for good cause shown and solely as and to the extent such information is provided under and governed by the terms of this Protective Order. Except

~~⁷Section 15(13) of the Interstate Commerce Act, 49 U.S.C. § 15(13), prohibits disclosure of information pertaining to the business activities of oil pipeline shippers or consignees. Participants disclosing such information in accordance with the terms of this Protective Order will be deemed to not have contravened the prohibitions of this statutory provision.~~

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for the more limited list of persons who qualify as Reviewing Representatives for purposes of reviewing Highly Confidential Privileged Materials, such materials are subject to the same provisions in the Protective Order as other Protected Materials.

b. Notes of Highly Confidential Protected Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Highly Confidential Protected Material);⁷ or

c. Copies of Highly Confidential Protected Material.

- C. Critical Energy/Electric Infrastructure Information (CEII): As defined at 18 C.F.R. §§ 388.113(a), (c).
- D. Non-Disclosure Certificate: The certificate attached to this Protective Order, by which Participants granted access to ~~Privileged~~ Protected Material and/or CEII must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Protective Order, and that such Participants have read the Protective Order and agree to be bound by it. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for this proceeding.
- E. Reviewing Representative:⁸ A person who has signed a Non-Disclosure Certificate and who is:
- i. Commission Trial Staff designated as such in this proceeding;

⁷ Notes of Highly Confidential Protected Material are subject to the same restrictions for Highly Confidential Protected Material except as specifically provided in this Protective Order.

~~⁸ For oil pipeline proceedings involving the additional subcategories of Privileged Material, there shall also be Section 15(13) Reviewing Representatives and Highly Confidential Reviewing Representatives subject to the corresponding terms of this definition.~~

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- ii. An attorney who has made an appearance in this proceeding for a Participant;
- iii. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney who has made an appearance in this proceeding on behalf of a Participant;
- iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding;
- v. A person designated as a Reviewing Representative by order of the Presiding Judge, the Chief Judge, or the Commission; or
- vi. Employees or other representatives of Participants appearing in this proceeding with significant responsibility for this docket.⁹

F. The term “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material defined in Paragraph 3(B)(viii)(a) shall mean a person who has signed a Non-Disclosure Certificate and who is:

- i. Commission Trial Staff designated as such in this proceeding;
- ii. Outside counsel of a Participant, i.e., an attorney who is not employed by the Participant but is retained by a Participant, who has made an appearance in this proceeding for a Participant, and their partners, associates, and staff of such outside counsel;
- iii. In-house counsel, i.e., an attorney who is employed by the Participant, who has made an appearance in this proceeding for a Participant and who is not Competitive Duty Personnel as defined in Paragraph 3(G);
- iv. An expert or an employee of an expert retained by a Participant for the purpose of advising, preparing for, submitting evidence or

⁹~~In oil pipeline proceedings, individuals that have direct or supervisory responsibilities over the purchase, sale, marketing, or exchange of crude oil or petroleum products (including liquefied petroleum gases), are ineligible to qualify as a Reviewing Representative.~~

testifying in this proceeding; provided, however, such individual is not Competitive Duty Personnel as defined in Paragraph 3(G);

- v. A person designated as a Reviewing Representative and is otherwise eligible to review Highly Confidential Protected Material by order of the Presiding Judge, the Chief Judge, or the Commission.
- vi. A “Reviewing Representative” for purposes of reviewing Highly Confidential Protected Material does not include Competitive Duty Personnel as defined in Paragraph 3(G)

G. The term “Competitive Duty Personnel” shall mean any individual(s), including in-house counsel, whose scope of employment or engagement includes the marketing, sale, or purchase of electric energy or capacity (collectively, “Covered Marketing”), the direct or indirect supervision of any employee or employees whose duties include Covered Marketing, the provision of consulting services, including legal consultation or advice, to any person whose duties include Covered Marketing, or other Covered Marketing services in competition with the producing Participant, all of which are considered “Competitive Duties;” except that Competitive Duty Personnel shall not include employees of the Federal Energy Regulatory Commission, and/or any state utilities commission which is a Participant, outside counsel.

4. ~~Privileged Material~~ Protected Material, Highly Confidential Protected Material, and/or CEII shall be made available under the terms of this Protective Order only to Participants and only to their Reviewing Representatives as provided in Paragraphs 6-10 of this Protective Order. The contents of ~~Privileged~~ Protected Material, Highly Confidential Protected Material, CEII, or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with this Protective Order and shall be used only in connection with this specific proceeding.

5. All ~~Privileged~~ Protected Material, ~~Highly Confidential Protected Material,~~ and/or CEII must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to Paragraphs 7-9 of this Protective Order.

6. ~~Privileged~~ Protected Material, ~~Highly Confidential Protected Material,~~ and/or CEII must be handled by each Participant and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 9 of this Protective Order. ~~Privileged~~ Protected Material, ~~Highly Confidential Protected Material,~~

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and/or CEII shall not be used except as necessary for the conduct of this proceeding, nor shall they (or the substance of their contents) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of ~~Privileged-Protected~~ Material- Highly Confidential Protected Material, and/or CEII, but such copies automatically become ~~Privileged-Protected~~ Material- Highly Confidential Protected Material, and/or CEII. Reviewing Representatives may make notes of ~~Privileged Protected Material and Highly Confidential Protected~~ Material, which shall be treated as Notes of ~~Privileged-Protected~~ Material if they reflect the contents of ~~Privileged Material~~Protected Material. A Reviewing Representative shall not disclose Highly Confidential Protected Material to a Reviewing Representative that does not meet the qualifications in Paragraph 3(F).

7. If a Reviewing Representative's scope of employment includes any of the activities listed under this Paragraph 7, such Reviewing Representative may not use information contained in any ~~Privileged-Protected~~ Material- Highly Confidential Protected Material, and/or CEII obtained in this proceeding for a commercial purpose (e.g. to give a Participant or competitor of any Participant a commercial advantage):

~~A. Energy marketing;~~

A. Covered Marketing;

B. Direct or indirect supervision of any employee or employees whose duties include ~~energy marketing~~Covered Marketing; or

C. The provision of consulting services- including legal consultation or advice, to any person whose duties include ~~energy marketing~~Covered Marketing.

8. If a Participant wishes to designate a person not described in Paragraph 3-~~E~~-(E) above as a Reviewing Representative, the Participant must seek agreement from the Participant providing the ~~Privileged-Protected~~ Material and/or CEII. If an agreement is reached, the designee shall be a Reviewing Representative pursuant to Paragraph 3.D of this Protective Order with respect to those materials. If no agreement is reached, the matter must be submitted to the Presiding Judge for resolution. If a Participant wishes to designate a person not described in Paragraph 3(F) above as a Reviewing Representative for the purposes of reviewing Highly Confidential Protected Material, the Participant must request an order from the Presiding Judge, the Chief Judge, or the Commission granting such designation.

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9. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII pursuant to this Protective Order until three business days after that Reviewing Representative first has executed and served ~~a~~-the applicable Non-Disclosure Certificate.¹⁰⁸ However, if an attorney qualified as a Reviewing Representative has executed a Non-Disclosure Certificate, any participating paralegal, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. Attorneys designated Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Order, and must take all reasonable precautions to ensure that ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII are not disclosed to unauthorized persons. Reviewing Representatives that are eligible to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) must execute a Non-Disclosure Certificate for Highly Confidential Protected Material in the form attached hereto. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for the proceeding.

10. Any Reviewing Representative may disclose ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII to any other Reviewing Representative as long as both Reviewing Representatives have executed ~~a~~-the appropriate Non-Disclosure Certificate. In the event any Reviewing Representative to whom ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII are disclosed ceases to participate in this proceeding, or becomes employed or retained for a position that renders him or her ineligible to be a Reviewing Representative under Paragraph 3-~~D of this Protective Order~~(E) or ineligible to review Highly Confidential Protected Material under Paragraph 3(F), access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the

¹⁰⁸ During this three-day period, a Participant may file an objection with the Presiding Judge or the Commission contesting that an individual qualifies as a Reviewing Representative, and the individual shall not receive access to the ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII-, as applicable, until resolution of the dispute.

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provisions of this Protective Order and the Non-Disclosure Certificate for as long as the Protective Order is in effect.¹¹²

11. All ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII in this proceeding filed with the Commission, submitted to the Presiding Judge, or submitted to any Commission personnel, must comply with the Commission's *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*.¹²¹⁰ Consistent with those requirements:

- A. Documents that contain ~~Privileged-Protected~~ Material must include a top center header on each page of the document with the following text: CUI//PRIV or CUI//PRIV-HC for Highly Confidential Protected Material.¹³ Any corresponding electronic files must also include this text in the file name.
- B. Documents that contain CEII must include a top center header on each page of the document with the following text: CUI//CEII. Any corresponding electronic files must also include this text in the file name.
- C. Documents that contain both ~~Privileged-Protected~~ Material and CEII must include a top center header on each page of the document with the following text: CUI//CEII/PRIV. Any corresponding electronic files must also include this text in the file name.
- D. The specific content on each page of the document that constitutes ~~Privileged-Protected~~ Material and/or CEII must also be clearly identified. For example, lines or individual words or numbers that include both ~~Privileged-Protected~~ Material and CEII shall be prefaced and end with "BEGIN CUI//CEII/PRIV" and "END CUI//CEII/PRIV".

¹¹² See *infra* P 19.

¹²¹⁰ 82 Fed. Reg. 18,632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

~~¹³ The parties in oil pipeline proceedings may desire additional protection in their handling of the following types of material as defined in this Protective Order: Section 15(13) Privileged Material; and Highly Confidential Privileged Material. Participants may incorporate these descriptive subcategories into their document labels as needed (e.g., CUI//PRIV Section 15(13) or CUI//PRIV-HC).~~

12. If any Participant desires to include, utilize, or refer to ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, or information derived from ~~Privileged Material~~-such material in testimony or other exhibits during the hearing in this proceeding in a manner that might require disclosure of such materials to persons other than Reviewing Representatives, that Participant first must notify both counsel for the disclosing Participant and the Presiding Judge (or the Commission in the absence of a Presiding Judge), and identify all such ~~Privileged-Protected Material or Highly Confidential Protected~~ Material. Thereafter, use of such ~~Privileged-Protected Material or Highly Confidential Protected~~ Material will be governed by procedures determined by the Presiding Judge (or the Commission in the absence of a Presiding Judge).

13. Nothing in this Protective Order shall be construed as precluding any Participant from objecting to the production or use of ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII on any appropriate ground.

14. Nothing in this Protective Order shall preclude any Participant from requesting the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority, to find this Protective Order should not apply to all or any materials previously designated ~~Privileged-Protected Material or Highly Confidential Protected~~ Material pursuant to this Protective Order. The Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding.

15. Each Participant governed by this Protective Order has the right to seek changes in it as appropriate from the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), the Commission, or any other body having appropriate authority.

16. Subject to Paragraph 18, the Presiding Judge (or the Chief Judge in the Presiding Judge's absence or where no presiding judge is designated), or the Commission shall resolve any disputes arising under this Protective Order pertaining to ~~Privileged-Protected~~ Material (or Highly Confidential Protected Material) according to the following procedures. Prior to presenting any such dispute to the Presiding Judge, the Chief Judge or the Commission, the Participants to the dispute shall employ good faith best efforts to resolve it.

- A. Any Participant that contests the designation of material as ~~Privileged Protected~~ Material (or Highly Confidential Protected Material) shall notify the Participant that provided the ~~Privileged-Protected~~ Material (or Highly

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Confidential Protected Material) by specifying in writing the material for which the designation is contested.

- B. In any challenge to the designation of material as ~~Privileged-Protected~~ Material (or Highly Confidential Protected Material), the burden of proof shall be on the Participant seeking protection. If the Presiding Judge, the Chief Judge, or the Commission finds that the material at issue is not entitled to the designation, the procedures of Paragraph ~~18-17~~ shall apply.
- C. The procedures described above shall not apply to material designated by a Participant as CEII. Material so designated shall remain subject to the provisions of this Protective Order, unless a Participant requests and obtains a determination from the Commission's CEII Coordinator that such material need not retain that designation.

17. The designator will have five (5) days in which to respond to any pleading requesting disclosure of ~~Privileged-Protected~~ Material (or Highly Confidential Protected Material). Should the Presiding Judge, the Chief Judge, or the Commission, as appropriate, determine that the information should be made public (or should not be subject to the restrictions applicable to Highly Confidential Protected Material), the Presiding Judge, the Chief Judge, or the Commission will provide notice to the designator no less than five (5) days prior to the date on which the material will become public. This Protective Order shall automatically cease to apply to such material on the sixth (6th) calendar day after the notification is made unless the designator files a motion with the Presiding Judge, the Chief Judge, or the Commission, as appropriate, with supporting affidavits, demonstrating why the material should continue to ~~be privileged~~ receive the requested protection. Should such a motion be filed, the material will remain confidential until such time as the interlocutory appeal or certified question has been addressed by the Motions Commissioner or Commission, as provided in the Commission's regulations, 18 C.F.R. §§ 385.714, .715. No Participant waives its rights to seek additional administrative or judicial remedies after a Presiding Judge or Chief Judge decision regarding ~~Privileged-Protected~~ Material (or Highly Confidential Protected Material) or the Commission's denial of any appeal thereof or determination in response to any certified question. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for ~~Privileged Protected~~ Material-, Highly Confidential Protected Material, and/or CEII in the files of the Commission.

18. ~~Privileged-Protected~~ Material-, Highly Confidential Protected Material, and/or CEII shall remain available to Participants until the later of 1) the date an order terminating this proceeding no longer is subject to judicial review, or 2) the date any

~~Revised May 11, 2020~~

other Commission proceeding relating to the ~~Privileged-Protected~~ Material and/or CEII is concluded and no longer subject to judicial review. After this time, the Participant that produced the ~~Privileged-Protected~~ Material and/or CEII may request (in writing) that all other Participants return or destroy the ~~Privileged-Protected~~ Material and/or CEII. This request must be satisfied with within fifteen (15) days of the date the request is made. However, copies of filings, official transcripts and exhibits in this proceeding containing ~~Privileged-Protected~~ Material, or Notes of ~~Privileged-Protected~~ Material, may be retained if they are maintained in accordance with Paragraph 5 of this Protective Order. If requested, each Participant also must submit to the Participant making the request an affidavit stating that to the best of its knowledge it has satisfied the request to return or destroy the ~~Privileged-Protected~~ Material and/or CEII. To the extent ~~Privileged-Protected~~ Material and/or CEII are not returned or destroyed, they shall remain subject to this Protective Order.

19. Any documents and materials, or information derived therefrom, provided by one Participant in this proceeding to another Participant pursuant to the terms of a bilateral protective agreement captioned with the name of this proceeding (whether marked as a protective agreement or protective order) shall become subject to the terms of this Protective Order, in lieu of the terms of such preceding protective agreement, on the date that is five days after the date of issuance of this Protective Order, and this Protective Order shall be the sole means for the provision among Participants in this proceeding and for purposes of this proceeding of Protected Material, Highly Confidential Protected Material, and CEII. Regardless of any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Presiding Judge, the Chief Judge, or the Commission. All CEII designations shall be subject to the “[d]uration of the CEII designation” provisions of 18 C.F.R. § 388.113(e).

20. Any violation of this Protective Order and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

~~Presiding Administrative Law Judge~~

By the Commission:

Revised May 11, 2020

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Insert complainant]

v.

Docket No. EL23- -000

PJM Interconnection, L.L.C.

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to ~~Privileged-Protected~~ Material¹⁴ and/or Critical Energy/Electric Infrastructure Information (CEII) is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of ~~Privileged-Protected~~ Material and/or CEII, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Protective Order. I acknowledge that I do not meet the qualifications to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) of the Protective Order and my duties and responsibilities may include “Competitive Duties” as described in the Protective Order. As such, I understand that I shall neither have access to, nor disclose, the contents of the Highly Confidential Protected Materials that are marked as “CUI//PRIV-HC,” any notes or other memoranda, or any other form of information that copies or discloses Highly Confidential Protected Materials that are marked as “CUI//PRIV-HC.” I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Printed Name: _____

~~¹⁴If applicable, for pipeline proceedings involving additional subcategories of Privileged Material, the signatory should indicate here whether this Non-Disclosure Certificate additionally governs access to:~~

~~: Section 15(13) Privileged Material~~

~~: Highly Confidential Privileged Material~~

Title: _____

Representing: _____

Date: _____

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Insert complainant]

v.

Docket No. EL23-____-000

PJM Interconnection, L.L.C.

NON-DISCLOSURE CERTIFICATE
FOR HIGHLY CONFIDENTIAL PROTECTED MATERIALS

I hereby certify my understanding that access to Protected Materials, and Highly Confidential Protected Materials and/or Critical Energy/Electric Infrastructure Information (CEII) in the above-captioned case is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, Highly Confidential Protected Materials and/or Critical Energy/Electric Infrastructure Information (CEII), any notes or other memoranda, or any other form of information that copies or discloses Protected Materials, Highly Confidential Protected Materials, and/or Critical Energy/Electric Infrastructure Information (CEII) shall not be disclosed to anyone other than in accordance with that Protective Order and shall be used only in connection with this proceeding. I affirm that I meet the qualifications to review Highly Confidential Protected Materials pursuant to Paragraph 3(F) of the Protective Order and my duties and responsibilities do not include "Competitive Duties" as described in the Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission.

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____

CERTIFICATE OF SERVICE

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

Dated at Washington, DC, this 24th day of May 2023.

/s/ Elizabeth P. Trinkle _____

Elizabeth P. Trinkle

Wright & Talisman, P.C.

1200 G Street, N.W., Suite 600

Washington, DC 20005