UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC	)	Docket Nos. EL16-49-000 EL18-178-000 (Consolidated)
v.	)	
PJM Interconnection, L.L.C.	)	
PJM Interconnection, L.L.C.	)	

REQUEST FOR REHEARING AND CLARIFICATION OF THE CLEAN ENERGY ASSOCIATIONS

Pursuant to Section 313 of the Federal Power Act, 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2019), the American Wind Energy Association ("AWEA"[1]), the Solar Energy Industries Association ("SEIA"[2]), Advanced Energy Economy ("AEE"[3]), the

[1] AWEA is a national trade association representing a broad range of entities with a common interest in encouraging the expansion and facilitation of wind energy resources in the United States. AWEA's members include active participants in the markets administered by PJM.

[2] SEIA is the national trade association of the U.S. solar energy industry, which now employs more than 250,000 Americans. SEIA works with its member companies to build jobs and diversity, champion the use of cost competitive solar in America, remove market barriers and educate the public on the benefits of solar energy. The comments contained in this filing represent the position of SEIA as a trade organization on behalf of the solar industry, but do not necessarily reflect the views of any particular member with respect to any issue.

[3] AEE is a national organization of businesses making the energy we use secure, clean, and affordable. AEE represents more than 100 companies and organizations that span the advanced energy industry and its value chains. Technologies that we consider advanced energy include energy efficiency, demand response, solar, wind, storage, electric vehicles, advanced metering infrastructure, transmission and distribution efficiency, fuel cells, hydro power, nuclear power, combined heat and power, and enabling software. Used together, these technologies and services will

American Council on Renewable Energy ("ACORE"[4]), and the Solar Council[5] (collectively "Clean Energy Associations") hereby request rehearing and clarification of the Commission's order issued on December 19, 2019, in the above-captioned proceedings (the "Order" [6]).

As discussed herein, the Commission's Order erred by, *inter alia*, regulating matters outside of its jurisdiction under the Federal Power Act ("FPA") and ordering a replacement rate that arbitrarily and capriciously expanded the scope of PJM's Minimum Offer Price Rule ("MOPR") in a drastic and unwarranted manner (the "Broad MOPR"). After failing to meet its burden of proof under Section 206 of the FPA—which requires the Commission to prove that PJM's current capacity market design "is unjust, unreasonable, unduly discriminatory, or preferential"[7]—both in the Order and in the June 2018 Order,[8] the Commission has failed to establish a new "just and reasonable rate" for PJM's capacity market.[9] Accordingly, for these

create and maintain a higher performing energy system—one that is reliable and resilient, diverse and cost effective —while also improving the availability and quality of customer facing services. AEE also manages the Advanced Energy Buyers Group (AEBG), which represents the interests of large electricity consumers interested in increasing their purchases of advanced energy to meet clean energy and sustainability goals.

[4] ACORE is a national non-profit organization dedicated to advancing the renewable energy sector through market development, policy changes and financial innovation.

[5] The Solar Council is a group of companies participating in AWEA's RTO Advisory Council that own, operate, develop, and finance solar projects and act, in coordination with AWEA, to advance joint goals before the Federal Energy Regulatory Commission and the nation's regional transmission markets and independent system operators.

[6] *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019).

[7] *See* 16 U.S.C. § 824e(a). As a threshold matter, the Clean Energy Associations continue to believe that the June 2018 Order "thwarts lawful state policies without the necessary supporting evidence for such a need." *See* Request For Rehearing of the Clean Energy Associations, Docket No. EL16-49-000, et al., at 2 (Jul. 30, 2018) [hereinafter Clean Energy Association's Request for Rehearing]. For this reason, and, for the reasons set forth in the Clean Energy Associations Request for Rehearing, the Clean Energy Associations continue to object to the June 2018 Order on both legal and policy grounds. Accordingly, nothing contained in these comments should be construed by the Commission or any party as constituting a change in position taken by any or all of the Clean Energy Associations in the Clean Energy Associations Request for Rehearing or constitute any waiver of any rights or privileges of any party with respect to the Commission's rehearing of the June 29 Order, or any associated appeal. *See, e.g.*, *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, *Order Granting Rehearings For Further Consideration*, Docket No. EL16-49-001, et al. (Aug. 29, 2018).

[8] *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 8 (2018) [hereinafter June 2018 Order].

[9] *See* 16 U.S.C. § 824e(a).

reasons, and for the additional reasons discussed herein, the Clean Energy Associations request rehearing of the Order, and further seek clarification of the Order, as specified herein.

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I. STATEMENT OF ISSUES AND SPECIFICATION OF ERROR

Pursuant to Rules 203(a)(7) and 713, 18 C.F.R. §§ 385.203(a)(7) and 385.713 (2019), Clean Energy Associations present the following identification of errors and statement of issues:

1. The Order exceeds the Commission's authority under the FPA and invades the authority over generating facilities reserved to the states because the capacity market rules required to be implemented would unreasonably and arbitrarily restrict state-subsidized generation resources from clearing the market and severely limit such resources from being developed, and thereby impermissibly nullify and supplant state law and policy.[10]

2. The Order exceeds the Commission's authority under the FPA because by defining a "State Subsidy" [11] so broadly as to include both "direct or indirect" benefits, regardless of whether those benefits merely "could" result in a resource clearing the capacity auction, the Commission strayed well beyond its authority as to practices directly affecting wholesale rates.[12]

3. The Order failed to meet the Commission's statutory burden under Section 206 of the FPA, present specifically sufficient evidence or explanation for finding PJM's current capacity market design unjust and unreasonable, and present sufficient evidence or explanation justifying its proposed replacement rate as being just and reasonable.[13]

4. The Order proposes an unjust and unreasonable replacement rate, unduly discriminates against renewable generation resources, and proposes administratively unworkable mitigation measures, in contravention of the FPA.[14]

5. The Order is arbitrary and capricious because it disregards a key holding of the June 2018 Order that the Commission needed to take action to address the "price suppressive impact of resources receiving out-of-market support," and did not make a reasoned decision

[10] 16 U.S.C. § 824(b)(1); *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016); *Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016); *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 384–85 (2015); *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1 (2002); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018); *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018).

[11] The Commission defines "State Subsidy" as "[a] direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction." *See* Order at P 67. All capitalized references herein to "State Subsidy" shall be to this definition.

[12] 16 U.S.C. § 824(b)(1); *Hughes*, 136 S. Ct. at 1297–99; *Elec. Power Supply Ass'n*, 136 S.Ct. at 782–84; *Oneok, Inc.*, 575 U.S. at 384–85.

[13] *See* 16 U.S.C. § 824e(a).

[14] *See id.*

based on the record before it when it held that all state subsidies suppress capacity market prices.[15]

6. The Order is arbitrary and capricious because the Commission failed to meaningfully address credible evidence in the record contradicting its conclusion that all state renewable portfolio standards ("RPS") and renewable energy certificate ("REC") revenues actually suppress capacity market prices.[16]

7. The Order drastically expands the scope of the MOPR in an arbitrary and capricious manner based on the record before it[17] and contrary to applicable Commission precedent.[18]

8. The Order is arbitrary and capricious because it disregards a key holding of the June 2018 Order that a just and reasonable rate for PJM's capacity market needed to accommodate state policies, and does not "explain a reasoned basis for departing from [its] past precedent."[19]

9. The Order is arbitrary and capricious because the Commission fails to explain how the Broad MOPR, with its sole focus on State Subsidies, fully addresses its general premise that "resources receiving out-of-market support are capable of suppressing market prices" and must be subject to mitigation. The Order is internally inconsistent and contradictory in its treatment of out-of-market revenues, focusing on State Subsidies while either explicitly excluding or failing to address other out-of-market support that, under the Commission's own logic, cause market price suppression. In addition, the Commission fails to support with evidence its rationale that out-of-market revenues included in the definition of State Subsidies are "direct[ed] at" or "tethered to" the PJM capacity market, and fails to adequately explain its departure from precedent in including RECs and self-supply arrangements within the Broad MOPR.[20]

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[15] *See, e.g.*, *S.C. Pub. Serv. Auth. v. Fed. Energy Regulatory Comm'n*, 762 F.3d 41, 54 (D.C. Cir. 2014) (the Commission must support the factual findings underpinning its determination with substantial evidence).

[16] *See, e.g.*, *Serv. Comm'n of Ky. v. Fed. Energy Regulatory Comm'n*, 397 F.3d 1004, 1008 (D.C. Cir. 2005) (the Commission must "respond meaningfully to the arguments raised before it"); *K N Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 968 F.2d 1295, 1302–03 (D.C. Cir. 1992) (the Commission must make an "effort to grapple with" alternate theories). The Order accordingly professes to "ameliorat[e] a real industry problem but then cit[es] no evidence demonstrating that there is in fact an industry problem," which "is not reasoned decisionmaking." *See Nat'l Fuel Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 468 F.3d 831, 843 (D.C. Cir. 2006) (citation omitted).

[17] *See, e.g.*, *S.C. Pub. Serv. Auth.*, 762 F.3d at 54 (the Commission must support the factual findings underpinning its determination with substantial evidence).

[18] *NRG Power Mktg., LLC v. Fed. Energy Regulatory Comm'n*, 862 F.3d 108 (D.C. Cir. 2017) ("*NRG*"); *N.J. Bd. of Pub. Utils. v. Fed. Energy Regulatory Comm'n*, 744 F.3d 74, 97–98 (3d Cir. 2014) ("*NJBPU*").

[19] *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009).

[20] *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (The Commission must "examine[] the relevant [considerations] and articulate[] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made." (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))); *S.C. Pub. Serv. Auth.*, 762 F.3d at 54 (the Commission must support the factual findings underpinning its determination with substantial evidence); *Fox Television Stations, Inc.*, 556 U.S. at 515 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display

10. The Order is arbitrary and capricious because it requires new generation resources, including renewable generation resources, to utilize the Net Cost of New Entry ("Net CONE") method, as well as Net CONE inputs that are not appropriate or accurate, when calculating default prices assigned to these resources when they offer into PJM capacity market auctions ("MOPR Prices"). The Order is also arbitrary and capricious because it does not allow new resources to utilize alternative methods, including the Net Avoided Cost Rate method ("Net ACR"), when calculating unit-specific MOPR Prices pursuant to the Unit Specific Exemption, and also does not allow resources to utilize more flexible and non-standardized financial and other inputs when calculating unit-specific MOPR Prices pursuant to the Unit Specific Exemption.[21] These errors, in turn, will result in unreasonably high and non-competitive offers into PJM capacity market auctions and corresponding unjust and unreasonable rates.[22]

11. The Order is arbitrary and capricious, and inconsistent with reasoned decision making, because the Commission impermissibly departs with its own precedent related to mitigation without explaining this departure. The Order requires PJM to implement sweeping mitigation through the Broad MOPR. However, the Order fails to address potential over-mitigation and does not engage in a serious inquiry into either the incentive or capability of resources mitigated under the Broad MOPR to exercise market power or otherwise actually suppress prices. Precedent from the Commission itself and appellate courts requires the Commission to act consistent with these requirements, or to adequately explain its departure from them. Because the Administrative Procedures Act does not allow the Commission to break with its own precedent without "'providing a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored'" the Order's expansion of mitigation is arbitrary and capricious.[23]

12. The Order does not result in just and reasonable rates because it would limit competition and artificially raise capacity prices, resulting in over-procurement of capacity at customer expense. Additionally, the Order discriminates against new renewable resources, which will be providing capacity in PJM without compensation. These aspects are inconsistent

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awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." (emphasis in original)).

[21] *See State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (agency rules typically deemed arbitrary and capricious if the agency "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[22] *See* 16 U.S.C. § 824e(a)(unjust and unreasonable rates unlawful).

[23] *See, e.g.*, *W. Deptford, LLC v. Fed. Energy Regulatory Comm'n*, 766 F.3d 10, 17 (D.C. Cir. 2014) (quoting *Alcoa Inc. v. Fed. Energy Regulatory Comm'n*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)); *see also Fox Television Stations, Inc.*, 556 U.S. at 515 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books."); *Edison Mission Energy, Inc. v. Fed. Energy Regulatory Comm'n*, 394 F.3d 964, 969 (D.C. Cir. 2005) ("[Mitigation] may well do some good by protecting consumers and utilities against . . . the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm . . . ."); *Midwest Independent System Operator, Inc.*, 109 FERC ¶ 61,157, at P 238 (2004) (explaining that assuring just and reasonable rates requires the Commission to "balance under-mitigation and over-mitigation").

with precedent,[24] improperly ignore the key aspect of customer impacts,[25] and are flatly inconsistent with the Commission's statutory mandate.[26] These clear errors, if not remedied upon rehearing, would require vacatur and remand of the Order.

13. The Order's narrow criteria for allowing renewable generation resources to qualify for the RPS Exemption, its failure to recognize that significant investments already have been made by a multitude of renewable generation resources in reliance upon the Commission's previous orders and factual findings, and its resultant and unduly discriminatory restriction on the ability of such resources fairly to be developed and to participate in PJM's capacity market, are unreasonable, irrational, arbitrary, and not based on substantial evidence.[27] Moreover, the Commission's proposed penalty of effectively prohibiting resources from participating in PJM's capacity market if they claim the Competitive Exemption by choosing to forego the State Subsidy, but then subsequently claim the State Subsidy, is unduly punitive and disproportional to the alleged harm caused. [28] Accordingly, the RPS Exemption qualification criteria and the penalty related to the Competitive Exemption should be modified as set forth herein.

14. The Order improperly affirms findings from the June 2018 Order without responding to timely petitions for rehearing, despite the proceedings being consolidated, denying parties finality, delaying a resolution prejudices the parties, and unreasonably preventing a timely conclusion of the consolidated proceeding.[29]

15. The Order is unclear as to whether voluntary RECs that can be identified as voluntary RECs by market sellers of resources prior to submitting offers into an applicable capacity market auction are considered State Subsidies. To the extent that the Commission fails to clarify that voluntary RECs should not be deemed State Subsidies, this constitutes an impermissible "fail[ure] to consider an important aspect of the problem."[30]

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[24] *See, e.g.*, *W. Deptford, LLC*, 766 F.3d at 17 (quoting *Alcoa Inc.*, 564 F.3d at 1347); *see also Fox Television Stations, Inc.*, 556 U.S. at 515 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books.").

[25] *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

[26] 16 U.S.C. § 824e(a).

[27] *See* 5 U.S.C. § 706(2)(A), (E); *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mutual Auto Insur. Co.*, 463 U.S. 29, 52–57 (1983); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 850–52 (D.C. Cir. 1970).

[28] *See, e.g.*, *Gulf Power Co. v. Fed. Energy Regulatory Comm'n*, 983 F.2d 1095, 1099–101 (D.C. Cir. 1993) (holding that FERC "failed to examine possible alternative sanctions that would have a produced a result more proportional to Gulf's violation"); *Guidance on Reliability Notices on Penalty N. Am. Elec. Reliability Corp.*, 129 FERC ¶ 61,069, at P 9 (2009) ("We continue to believe that the record in a Notice of Penalty should be proportional to the complexity and relative importance of the violations it addresses."), *modified*, 130 FERC ¶ 61,155 (2010).

[29] *La. Pub. Serv. Comm'n v. Fed. Energy Regulatory Comm'n*, 482 F.3d 510, 520–21 (D.C. Cir. 2007).

[30] *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

16. To the extent the Commission does not clarify that state, county or local property tax relief do not constitute State Subsidies, the Order exceeds the Commission's authority under the FPA and invades the authority over local land use reserved to the states, thereby impermissibly nullifying state law and policy.[31]

II. REQUEST FOR REHEARING

As the Clean Energy Associations explained in their Request for Rehearing of the June 2018 Order, the Commission erred in determining, absent evidentiary support in the record, that PJM's tariff is unjust and unreasonable.[32] Importantly, when the Commission and its staff began considering how state-jurisdictional subsidies may influence PJM's capacity market prices, the Commission's stated goal was to find a solution that would "reconcile the competitive market framework with the increasing interest by states to support particular resources or resource attributes."[33] Yet, as explained in the Clean Energy Associations' Request for Rehearing of the June 2018 Order, the Commission's June 2018 Order did not even present a "back of the envelope" demonstration of how capacity market prices have been "distorted" by state energy programs, nor did it meaningfully address the record evidence contradicting the Commission's conclusion that all state policies suppressed PJM's capacity market prices.[34]

Now, even though requests for rehearing on the June 2018 Order remain unanswered by the Commission *18 months* after they were originally submitted, the Commission has moved forward with issuing the Order and set a replacement rate that will expand the MOPR to apply to all resources that receive, or are entitled to receive, a State Subsidy. Put simply, the Order will subject far more resources to mitigation compared to any action previously contemplated by the Commission, including the June 2018 Order, and the Order's proposed replacement rate, if

[31] *See* 16 U.S.C. § 824(b)(1).
[32] *See* Request for Rehearing of the Clean Energy Associations, Docket No. EL16-49, et al. (July 30, 2018) [hereinafter July 2018 Request for Rehearing].
[33] *See Notice of Technical Conference*, Docket No. AD17-11 (Mar. 3, 2017)
[34] *See* July 2018 Request for Rehearing at 11-18.

ultimately implemented, will weaken confidence in PJM and its markets, drastically alter investment and development decisions related to all resources in PJM and will significantly and negatively impact the public interest.

The Clean Energy Associations strongly oppose instituting a replacement rate that will unwind decades of work to build confidence in the Commission's wholesale power markets. As discussed herein, the Order requires rehearing for four principal reasons: *first*, the Order exceeds the Commission's jurisdiction under the FPA; *second*, the Order directs PJM to implement rates and practices that are incompatible with the FPA; *third*, the Commission's handling of this proceeding is arbitrary, capricious, and inconsistent with reasoned decision making; and *fourth,* the Order improperly reconsiders and upholds findings from its June 2018 Order while failing to address timely petitions for rehearing on that order.

A. The Order Exceeds the Commission's Authority Under the FPA

The FPA expressly reserves to the states the authority to regulate facilities used for the generation of electric energy.[35] In addition, states have authority to enact laws and policies that protect their citizens from environmental harm.[36] The Commission, in turn, is authorized to regulate the rates, terms, and conditions of interstate wholesale electricity transactions and to promulgate rules and practices affecting them.[37]

Because virtually all indirect and tangential inputs to generation—e.g., steel, fuel and labor—or even some plainly constitutional state actions—e.g., requiring a jurisdictional utility to build a power plant—could be said to "affect" wholesale electric rates, however remotely, the

[35] 16 U.S.C. § 824(b)(1).
[36] *See generally* 33 U.S.C. § 1251(b) ("It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ."); *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 582–84 (1987); *Bohmker v. Oregon*, 903 F.3d 1029, 1038 (9th Cir. 2018); *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1045 (9th Cir. 2007).
[37] *See* 16 U.S.C. §§ 824(b)(1), 824d(a).

Supreme Court has adopted "a common-sense construction of the FPA's language, limiting FERC's 'affecting' jurisdiction to rules or practices that *directly* affect the wholesale rate,"[38] while simultaneously preserving a state's right to enact generation policies and to offer incentives that are "untethered to how the affected generators are to perform in the wholesale market."[39] Federal law was drawn with "meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."[40] As a result, it is now the law of the land that (1) states "may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain;"[41] and (2) state policies that affect auction prices by increasing the quantity of power available are permissible,[42] as are incentives such as tax exempt bonding, property tax relief and permitting treatment,[43] as well as state directives

[38] *Elec. Power Supply Ass'n*, 136 S. Ct. at 774 (internal quotations and citations omitted).
[39] *Hughes*, 136 S. Ct. at 1299 (citation omitted); *see also Vill. of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 WL 3008289, at *11 (N.D. Ill. July 14, 2017) ("*EPSA* explained that FERC cannot take action that transgresses states' authority over generation, *no matter how direct, or dramatic, the program's impact on wholesale rates*." (internal quotations and citations omitted; emphasis added)), *aff'd sub nom. Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018).
[40] *Oneok, Inc.*, 575 U.S. at 384–85; *see also Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 512 (1989) ("The NGA 'was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.'" (citations omitted)). Because the relevant provisions of the FPA and the Natural Gas Act are "in all material respects substantially identical," there is an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).
[41] *Hughes*, 136 S. Ct. at 1298.
[42] *See Star*, 904 F.3d at 523–24 (7th Cir. 2018) ("The zero-emissions credit system can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close and by raising the costs that carbon-releasing producers incur to do business. A larger supply of electricity means a lower market-clearing price, holding demand constant. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law."); *see also Zibelman*, 906 F.3d at 54 ("[E]ven though the ZEC program exerts downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the FPA.").
[43] *See PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 253 n.4 (3d Cir. 2014) (permissible means to achieve state policy goals include "utilization of tax exempt bonding authority, the granting of property tax relief, the ability to enter into favorable site lease agreements on public lands, the gifting of environmentally damaged properties for brownfield development, and the relaxing or acceleration of permit approvals. New Jersey may also directly subsidize generators so long as the subsidies do not essentially set wholesale prices." (internal quotations and citation omitted)).

requiring their jurisdictional utilities to build power plants.[44]

Accordingly, the Commission's Order exceeds its statutory authority insofar as it requires PJM to set an administrative floor price below which "any resource, new or existing, that receives, or is entitled to receive," a State Subsidy cannot offer into the capacity market.[45] Moreover, the Commission defines a State Subsidy so broadly as to include virtually any action a state may take to encourage the development of preferred generation resources,[46] thereby eviscerating the line between federal and state authority. Under the Broad MOPR all such resources are forced to offer into the capacity market at administratively set prices which indisputably make them far less likely to clear the market and, therefore, in some cases, less likely to be developed at all—in direct contravention of the states' constitutionally authorized prerogatives. At minimum, the Order will make it more difficult and expensive for states to pursue policy objectives that are squarely within their jurisdiction, such as environmental policies. The Order thereby exceeds the Commission's authority, and intrudes on the very authority expressly reserved to the states over generation resources.

1. The Order Effectively Nullifies Lawful State Policies

The Order's overreach effectively nullifies state policies regulating in-state generation facilities and the environmental impacts associated with electricity generation by erecting an entry barrier that many, if not most, new generation resources will be unable to surmount. The

[44] *See New York*, 535 U.S. at 24 (observing that the Commission has recognized that the States retain significant control over local matters, including the States' traditional authority over such areas as "utility generation and resource portfolios." (quoting Order No. 888, at 31,782, n.544)).
[45] Order at P 9. There are certain exemptions described in the Order.
[46] *See id.* at P 9 ("we consider a State Subsidy to be: a direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that (2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or (3) will support the construction, development, or operation of a new or existing capacity resource, or (4) could have the effect of allowing a resource to clear in any PJM capacity auction.").

Commission offers a cavalier and factually inaccurate justification for the Order—that, notwithstanding MOPR rules effectively barring significant numbers of resources from receiving capacity market revenues moving forward, states nonetheless remain free to exercise jurisdiction over generation resources because resources that fail to clear the capacity market may continue to participate in the energy and ancillary services markets.[47] This defense cannot cure the Commission's invasion of state authority over generation resources expressly reserved in the FPA or their undisputed authority to regulate environmental matters. There should be no doubt that the Order will nullify state regulation of in-state generation and state environmental policies,[48] and if the effect of the Commission's action is to prevent states from exercising their lawful jurisdiction, or to otherwise destine such exercises to fail, the Commission's action cannot stand.[49]

It is not surprising, then, that the Order goes beyond the precedent on which the Commission relies because it has no other precedent for which it can reach.[50] The Order cites *NJBPU*, where, after the Commission approved PJM's proposed elimination of the state-mandated resource MOPR exception, the court found on review that the newly-expanded MOPR did not impermissibly dictate which resources could be used to fulfill capacity obligations, because states could still use their preferred resources; it just might be at a significantly increased cost (e.g., their ratepayers might have to pay twice for capacity).[51] This assumption that states are still able to use their preferred resources to achieve legitimate generation resource and environmental objectives is wrong. Indeed, the Order all but concedes that resources receiving

[47] *Id.* at P 7.
[48] *See, e.g.*, Order, Commissioner Glick Dissenting Opinion at PP 29–31 [hereinafter Glick Dissent].
[49] *Vill. of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 WL 3008289, at *11 (N.D. Ill. July 14, 2017).
[50] Order at P 7 nn.21 & 23.
[51] *NJBPU*, 744 F.3d at 97–98.

State Subsidies will be effectively shut out of the capacity market,[52] thereby depriving those resources of any related revenues whatsoever. The fact that states are not literally prohibited from exercising jurisdiction over generation facilities, and that there might be a hypothetical scenario, no matter how unreasonable, uneconomic, or even conceptually tenuous under which those generation policies could be implemented, does not change the fact that the Order undermines, if not effectively abrogates, the states' lawful energy and environmental policies regarding such generation facilities.[53]

Moreover, the MOPR in *NJBPU* applied only to natural gas facilities, which the Commission concluded are the resources most likely to suppress capacity prices, and the court found the Commission's "enumerated reasons for approving the elimination of the state-mandated [MOPR] exception relate directly to the wholesale price for capacity . . . ."[54] Notably, this was a targeted solution to a specific problem based on a well-reasoned and thorough analysis. The same cannot be said here. While the Order nods superficially to "price suppression," which was the rationale for the order addressed in the *NJBPU* decision, the current Order sweeps in *all* resources receiving a State Subsidy (subject to limited enumerated exceptions) regardless of whether the subsidy directly affects the market price or is tethered to the wholesale market's operation.

Furthermore, it is notable that the Commission acknowledges that applying the Broad MOPR has the effect of nullifying the effect of the law or policy to which it is targeted. In

[52] Order at P 7 ("resources that states choose to support, and whose offers may fail to clear the capacity market under the revised MOPR directed in this order, will still be permitted to sell energy and ancillary services in the relevant PJM markets.").
[53] To the extent the cited New England cases also rely on this mistaken reasoning, they were wrongly decided for the same reason. Order at P 7 n.23 (citing *New England Power Generators Ass'n, Inc. v. Fed. Energy Regulatory Comm'n*, 757 F.3d 283, 290–91 (D.C. Cir. 2014); *Conn. Dep't of Pub. Util. Control v. Fed. Energy Regulatory Comm'n*, 569 F.3d 477, 481 (D.C. Cir. 2009)).
[54] *NJBPU*, 744 F.3d at 97.

concluding that it lacks legal authority to apply the Broad MOPR to federal subsidies, the Commission states that it cannot do so because such an action would *nullify* those policies.[55] There is no principled rationale to support the Commission's conclusion that applying the Broad MOPR to state policies *does not* nullify them if the applying that same Broad MOPR to federal policies *does* nullify them.

2. The Order Is Designed to Supersede Lawful State Policies

The Order is expressly designed to supersede state regulation of in-state generation facilities and state environmental policies seeking to reduce emissions from the power sector in their state and to replace those state policy decisions with federal capacity market rules that themselves "guide the orderly entry and exit of" resources.[56] The Order's stated purpose is to address "State Subsidies for both existing and new resources [that] are increasing, especially out-of-market state support for renewable and nuclear resources."[57] But neither the Commission's failure to establish capacity market rules that serve the public, nor its choosing to ignore PJM's proposals for possibly repairing its market, serve to authorize the Commission to augment its jurisdiction under the FPA or to arbitrarily attack state policies without any substantial evidence behind it.

The fact that most of the state policies the Broad MOPR directly targets are expressly designed to reduce the carbon emissions of in-state electric generation facilities further

[55] *Compare* Order at P 89 ("This Commission may not, therefore, disregard or nullify the effect of federal legislation by finding that it would be unjust, unreasonable, or unduly discriminatory to allow a PJM capacity resource to rely on a federal subsidy that provides the resource with a competitive advantage over other resources Congress has not chosen to assist in the same way."), *with* Order at P 7 ("Nor does this order prevent states from making decisions about preferred generation resources: resources that states choose to support, and whose offers may fail to clear the capacity market under the revised MOPR directed in this order, will still be permitted to sell energy and ancillary services in the relevant PJM markets.").

[56] Order at P 41 ("Where those state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable. The replacement rate directed in this order will enable PJM's capacity market to send price signals on which investors and consumers can rely to guide the orderly entry and exit of economically efficient capacity resources.").

[57] *Id.* at PP 37–38.

undermines the Commission's claimed rationale for mitigation of State Subsidies. These policies are exclusively about reducing emissions from in-state electric generation, matters squarely within state authority, and not about the functioning of the wholesale market or setting wholesale rates. The Commission's action is designed to remove resources that satisfy the lawful objectives of these policies from the capacity market and replace them with higher-emitting resources. Just as states cannot implement generation policies that are aimed at or tethered to Commission-jurisdictional wholesale markets,[58] the Commission is without authority to implement wholesale market policies that are aimed at or tethered to matters within the states' authority over their jurisdiction utilities' generation construction and resource portfolios.[59] Yet, the Order does precisely that—it takes direct aim at state generation laws and policies with market rules expressly aimed at undermining them, thereby impermissibly infringing upon matters reserved to the states' exclusive jurisdiction.

Moreover, while the Order suggests the expanded MOPR is directed only at price suppression, this is misleading.[60] As discussed further below in Sections II.C.2 and II.C.3, the Order completely disregarded substantial evidence that not all State Subsidies, particularly RECs, actually suppress prices. The Commission also expressly rejected requests to limit the scope of State Subsidies subject to the MOPR to those that actually produce uneconomic price impacts.[61] Rather than target those subsidies that are shown to produce uneconomic results, the Order targets subsidies to which a resource might be entitled even where it has not actually received them.[62] The Order also rejected requests to only subject "material" State Subsidies to

[58] *See Hughes*, 136 S. Ct. at 1298–99 (2016); *Oneok, Inc.*, 575 U.S. at 385–86.
[59] *See Elec. Power Supply Ass'n*, 136 S.Ct. 760, 776–77 (quoting *Oneok, Inc.*, 575 U.S. at 385).
[60] *See* Order at PP 39, 138.
[61] *Id.* at P 72 ("We reject intervenors' argument that mitigation under the expanded MOPR should only be triggered if the out-of-market support received by a resource can be demonstrated to actually allow a resource to uneconomically enter or remain in the market, thereby suppressing prices.").
[62] *Id.* at P 76.

the MOPR,[63] and determined that Self-Supply resources should be deemed to be State Subsidies subject to the MOPR, because "it is not clear why utilities in states that prefer the vertical integration model should be afforded a competitive advantage."[64] Of course the Commission does not say exactly why *not* treating Self-Supply resources as a State Subsidy necessarily would provide them with such an advantage. None of this is consistent with targeting price suppression; there is little, if any, indication that the Order's objective was anything other than targeting and supplanting lawful stated policies.[65]

3. The Order Exceeds the Commission's Jurisdiction by Improperly Mitigating Non-Jurisdictional State Subsidies that Do Not Directly Affect Capacity Market Prices

While the Commission has authority to establish wholesale capacity market rules,[66] that authority is limited to practices "directly affecting" the wholesale rate.[67] As discussed, the Supreme Court has ruled that for there to be a direct effect on rates, the state practice must itself be tethered to the market's operation, such as by including a requirement that the resource bid into the market at a specific price.[68] By defining a State Subsidy so broadly as to include "direct or indirect" benefits, and those that merely "could" result in a resource clearing PJM's capacity auction, and by ignoring the operational connection between a state subsidy and the wholesale market's operation, the Commission plainly has crossed the jurisdictional divide and has exceeded its proper authority. Tellingly, the Commission cites no precedent to support this departure, nor can it.

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[63] *Id.* at P 77.
[64] *Id.* at P 204.
[65] As described further below in Sections II.C.2 and II.C.3, even assuming that the Commission had the authority to promulgate the Order, by not targeting State Subsidies that suppress capacity market prices, the Order is also arbitrary and capricious.
[66] *NJBPU*, 744 F.3d at 97–98.
[67] *See Elec. Power Supply Ass'n*, 136 S.Ct. at 774.
[68] *Hughes*, 136 S. Ct. at 1298–99.

In its Order, the Commission states that it did not intend that every single form of state financial assistance fall under the MOPR's ambit.[69] But this is not reflected in the State Subsidy definition, which goes far beyond subsidies "tethered" to wholesale market participation to include virtually any state action that may even hypothetically allow a resource to clear the Reliability Pricing Model ("RPM"). Indeed, a State Subsidy expressly includes any "direct *or indirect* payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that . . . *could* have the effect of allowing a resource to clear in any PJM capacity auction."[70] This could potentially include unbundled RECs, even though the Commission has previously held that unbundled REC transactions "do[] not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity."[71]

Moreover, based on the Commission's definition of State Subsidy, if a town were to offer local permitting support to develop a specific new type of energy resource on a particular plot of land, and such program was not tied solely to "generic industrial development and local siting support,"[72] such program would also appear to be swept into the definition of State Subsidy. As this simple hypothetical example shows, the Order's proposed definition of State Subsidy is egregiously broad, as issues far removed from the Commission's jurisdiction over the "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce",[73] such as local land use, would now effectively be regulated by the Commission. Interpreting the scope of the Commission's authority in this manner is

[69] Order at P 68 ("This definition is not intended to cover every form of state financial assistance that might indirectly affect FERC-jurisdictional rates or transactions; nor is it intended to address other commercial externalities or opportunities that might affect the economics of a particular resource.").
[70] Order at P 9 (emphasis added).
[71] *WSPP, Inc.*, 139 FERC ¶ 61,061, at P 24 (2012).
[72] *See* Order at P 83.
[73] *See* 16 U.S.C. § 824(b).

directly contrary to the Supreme Court's ruling in *FERC v. EPSA*, where the Court acknowledged that "if indirect or tangential impacts on wholesale electricity rates" were sufficient to trigger the Commission's jurisdiction, "FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice. We cannot imagine that was what Congress had in mind."[74]

Consistent with this and other applicable precedent, the Commission was required to come up with a definition of State Subsidy that avoids regulating indirect or tangential impacts on Commission-jurisdictional rates. Notably, the Commission had ample opportunity to do so based on the record before it. For example, the Commission should have at least excluded state subsidies that would not be expected to have any material effect on wholesale rates, and with regard to which no substantial evidence has been offered. For instance, PJM proposed materiality thresholds (e.g. 20 MW or smaller resources would not be subject to the MOPR, and a subsidy constituting less than one percent of a resource's revenues would not trigger the MOPR), but the Commission rejected these thresholds, choosing instead to apply the MOPR to all resources regardless of whether they impact prices.[75] The Commission theorizes that aggregating all small resources "may" impact prices, but it provides no record evidence of how many small resources exist or whether their participation would, in fact, have any direct price impact whatsoever.[76] There is nothing in the record that would support applying the MOPR to resources that are 20 MW or smaller, or to resources receiving less than one percent of their revenues from a State Subsidy. Furthermore, even if it could reasonably be shown that such resources possibly could impact capacity market prices, there no evidence presented, nor any

[74] *See Elec. Power Supply Ass'n*, 136 S.Ct. at 774.
[75] Order at PP 90–91, 98–99.
[76] *Id.* at P 98 ("Since, on aggregate, small State-Subsidized Resources may have the ability to impact capacity prices, adopting a materiality threshold would undermine the very purpose of our action here.").

argument or analysis offered by the Commission, showing that such impact would be anything other than *de minimis*.

Similarly, the Order presented no evidence and offered no analysis for subjecting State Subsidies procured via competitive processes to the MOPR.[77] If a resource competed in a state program for benefits such as RECs or to receive a power purchase agreement, the State Subsidy was competitively obtained, resulted from competitive market dynamics and should not be subject to the MOPR. Further, the Order presented no evidence or offered no analysis for subjecting carbon allowances, such as Regional Greenhouse Gas Initiative ("RGGI") allowances, to the MOPR. Generators in states participating in RGGI are required to hold allowances corresponding to carbon emitted.[78] While it is possible a resource may buy and sell these allowances in various commercial transactions, and a single transaction taken alone could confer a financial benefit, compliance with RGGI typically represents a net cost to generators and should be excluded from State Subsidies triggering the MOPR.

Moreover, the Order improperly subjects voluntary RECs to the MOPR. Voluntary RECs are sold "to a purchaser that is not required by a state program to purchase the REC, and that purchaser does not receive any state financial inducement or credit for the purchase of the REC,"[79] and are distinct from RECs used to comply with state RPS programs. Even assuming that the Commission grants the Clean Energy Associations' request in Section III.A, and clarifies

[77] While the Commission "agree[d] with intervenors who argue that the MOPR should take into account the competitiveness of State-Subsidized Resources," *see id.* at P 73, the Commission's proposed mechanism for ensuring competitive offers from State Subsidized resources, the Unit Specific Exemption, will not in fact do so. *See infra* Section II.C.6.

[78] *Elements of RGGI*, REG'L GREENHOUSE GAS INITIATIVE, https://www.rggi.org/program-overview-and-design/elements (last visited Jan. 13, 2020) ("Within the RGGI states, fossil-fuel-fired electric power generators with a capacity of 25 megawatts (MW) or greater ('regulated sources') are required to hold allowances equal to their CO2 emissions over a three-year control period.").

[79] *See* PJM Initial Submission of PJM Interconnection, Docket No. EL16-49-000 et al., at 21 (Oct. 2, 2018) [hereinafter PJM Initial Submission].

that it did not intend to apply the MOPR to voluntary RECs that can be identified as voluntary RECs by Market Sellers prior to submitting offers into an applicable capacity market auction, the MOPR *will apply* to voluntary RECs that cannot be identified as voluntary by Market Sellers prior to submitting offers into an applicable capacity market auction, but that nonetheless *do not in fact meet the Commission's own definition of being a State Subsidy* because they are not "[a] direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law."[80]

Market power mitigation measures should not be extended to attributes that are not incorporated in Commission-jurisdictional markets, and that even under the plain language of the Order, are not the direct product of state policy. While it may be difficult for PJM or the Commission to distinguish between voluntary RECs and RECs that meet the Commission's definition of State Subsidy in every instance at the time of a capacity market auction qualification process, that does not allow the Commission to implement a market mitigation tool that will, by its own design, effectively regulate attributes *that are entirely outside of the Commission's jurisdiction* (in this case, environmental attributes voluntarily procured by consumers).

B. The Order Is Inconsistent with the Federal Power Act

1. The Order Fails to Meet the Commission's Statutory Burden Under Section 206 of the FPA

Even assuming *arguendo* that the Commission did not exceed its authority under the FPA in issuing the Order, the Order failed to meet the Commission's statutory burden under Section

[80] *See* Order at P 67.

206 of the FPA. When acting under Section 206 of the FPA, the Commission "itself may establish the just and reasonable rate, provided that it first determines that a rate set by a public utility is unjust[] [or] unreasonable . . . ."[81] Moreover, "[t]he directive to impose a just and reasonable rate . . . is triggered *only* by the Commission's finding that the existing one is 'unjust[ ] [or] unreasonable . . . .'".[82] As the D.C. Circuit has stated:

> a finding that an existing rate is unjust and unreasonable is the "condition precedent" to FERC's exercise of its section 206 authority to change that rate. Section 206 therefore imposes a "dual burden" on FERC. Without a showing that the existing rate is unlawful, FERC has no authority to impose a new rate. Thus, while "[t]he 'just and reasonable' lodestar is no loftier under section 206 than under section 205," the showing required of FERC to exercise its section 206 authority to change an existing rate is different from anything required for FERC to approve a utility's proposed rate adjustment under section 205.[83]

Accordingly, in order to satisfy its statutory burden under Section 206 of the FPA, the Commission first needed to show why PJM's existing capacity market is unjust and unreasonable. For the reasons specified herein and in the Clean Energy Associations' Request for Rehearing, the Commission has failed to demonstrate why PJM's current capacity market design is unjust and unreasonable.[84] Moreover, in order to satisfy its "dual burden" under Section 206 of the FPA, the Commission is required to do more than merely declare, without sufficient evidentiary support, that PJM's current capacity market is "*per se* unjust and unreasonable,"[85] as it has effectively done. As described further in Section II.C, the Order's proposed Broad MOPR is arbitrary and capricious and the result of unreasoned decision making. While courts "defer to FERC's expertise in ratemaking cases, the Commission's decision must

[81] *Cities of Bethany v. Fed. Energy Regulatory Comm'n*, 727 F.2d 1131, 1143 (D.C. Cir. 1984).
[82] *Am. Gas Ass'n v. Fed. Energy Regulatory Comm'n*, 912 F.2d 1496, 1504 (D.C. Cir. 1990) (emphasis added) (quoting 15 U.S.C. § 717d(a)).
[83] *Emera Me. v. Fed. Energy Regulatory Comm'n*, 854 F.3d 9, 25 (D.C. Cir. 2017) (citations omitted).
[84] *See, e.g.*, Clean Energy Associations' Request for Rehearing at 11–25.
[85] *See Emera Me.*, 854 F.3d at 27.

actually be the result of reasoned decision-making to receive that deference. Without further explanation, a bare conclusion that an existing rate is 'unjust and unreasonable' is nothing more than 'a talismanic phrase that does not advance reasoned decision making.'"[86] Accordingly, the Commission has utterly failed to meet its statutory burden under Section 206 of the FPA.

2. The Order Will Not Result in Just and Reasonable Rates

Several significant flaws in the Order render it unlawful under the FPA, which requires that rates be just and reasonable, and not unduly discriminatory or preferential.[87] These issues must be understood within the Commission's modern application of its statutory authority, in which "overseeing the integrity of the interstate energy markets" serves to ensure just and reasonable rates.[88] However, the Order would actually harm the integrity of PJM's capacity market for several reasons.

First, the new replacement rate is unjust and unreasonable because it replaces the interaction of supply and demand with a broad administrative intervention that raises costs for consumers, with no associated benefits or connection to any identified market failure. Administrative intervention is not justified here because there is no identified market power, manipulation, or other market failure. As a general matter, administrative interventions in the past have been aimed at preventing the exercise of market power, consistent with court determinations that transactions in the absence of market power can be assumed to be reasonable.[89] Previous applications of the MOPR were based specifically on identified instances

[86] *See id.* (quoting *TransCanada Power Mktg. Ltd. v. Fed. Energy Regulatory Comm'n*, 811 F.3d 1, 12 (D.C. Cir. 2015)).
[87] 16 U.S.C. § 824e(a).
[88] *NJBPU*, 744 F.3d at 81 ("Rather than setting rates for each public utility, FERC now seeks to ensure that market-based rates are 'just and reasonable' largely by overseeing the integrity of the interstate energy markets.").
[89] "[I]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment." *Tejas Power Corp. v. Fed. Energy*

of monopsony (buyer-side) market power. In fact, the Commission's original order approving the MOPR in PJM stated, "[t]he Commission finds the Minimum Offer Price Rule a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through Self-Supply."[90] The Commission's later approvals of changes to the MOPR stated, "[w]e begin our analysis with a review of the MOPR's underlying objectives. PJM's MOPR is a mechanism that seeks to prevent the exercise of buyer-side market power."[91] Whether market power was present or absent was also the basis for allowing exemptions to state policy mitigation.[92]

Here there is no evidence of monopsony power or other form of market power or market failure, and the Commission makes no such finding, violating longstanding Commission policy of mitigating only resources with identified market power. Instead, the Order abandons nearly 30 years of Commission policy and court decisions related to what constitutes a just and reasonable rate in a market context.[93] Since the Commission began allowing market-based rates, sellers have always been allowed to sell at rates below those which recover capital costs. Further, most market-based sales over the history of wholesale power markets have been from units that have had their capital costs recovered from retail customers under state policy actions approving the units for inclusion in a utility rate base. Many market-based sales from renewable

Regulatory Comm'n, 908 F.2d 998, 1004 (D.C. Cir. 1990). *See also Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974) (Congress has "subject[ed] producers to regulation because of anticompetitive conditions in the industry"); *Elizabethtown Gas Co. v. Fed. Energy Regulatory Comm'n*, 10 F.3d. 866, 870 (D.C. Cir. 1993).

[90] *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,331, at P 104 (2006).

[91] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 20 (2013).

[92] *See e.g.*, *id.* at PP 53, 107; *PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066, at PP 32, 52 (2015); *ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138, at P 10 (2017).

[93] *See, e.g., California* ex rel. *Lockyer v. FERC*, 383 F.3d 1008, (9th Cir. 2004) (evaluating the Commission's market-based rate tariff programs and explaining that "in a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment" (citations omitted).

resources over the history of wholesale power markets have been from units that have some of their capital costs recovered from retail customers through RPS and REC programs.[94] Financial support from state action is not new; rather, it has always been present and in fact has been the dominant arrangement (in one form or another) since organized wholesale electricity markets have existed. Despite facing familiar facts here, the Commission has now adopted a sweeping remedy inconsistent with this precedent, and the Commission provided *no reasoned basis* for this fundamental change to its longstanding policies related to wholesale electricity market design.

Second, the Order would harm the integrity of the PJM markets because the Commission's broad application of the MOPR, as opposed to its historic surgical application to well-defined instances of market power, has no basis in law or economics. As stated by Dr. Robert Willig in testimony in this proceeding:

> There is no sound economic basis for PJM's proposed use of a MOPR as a general tool to regulate capacity resource developers' and owners' arrangements and conduct . . . In contrast, there are well known indicators of circumstances where bidding behavior may reflect the exercise of buyer-side market power, and plain logic for why a MOPR could be an appropriate and effective tool to apply in those specific circumstances.[95]

As noted previously in this proceeding, there is nothing more fundamental in economics than setting prices where supply and demand intersect.[96] It is well established in economic theory that an efficient and competitive level is achieved at the point where supply and demand intersect as long as there are no market failures (e.g., market power, externalities, and public goods).[97] As further stated by Dr. Willig, "[a]pplication of buyer-side market power mitigation

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[94] *See generally WSPP Inc.*, 139 FERC ¶ 61,061 (2012) (recognizing and explaining REC sales).
[95] Exelon Protest, Declaration of Dr. Robert Willig, Docket No. ER18-1314, at P13 (May 7, 2018) [hereinafter Willig Declaration].
[96] *See e.g.*, Protest of Clean Energy Advocates, Docket No. ER18-1314-000, Affidavit of Robert Gramlich, Grid Strategies LLC, On Behalf of Sustainable FERC Project, Natural Resources Defense Council and Sierra Club, at Section II (May 7, 2018).
[97] *See* Francis M. Bator, *The Anatomy of Market Failure*, 72 Q. J. OF ECON. 351, 351–79 (1958). *See also* William J. Baumol & Wallace E. Oates, The Theory of Environmental Policy (1975).

in the absence of anticompetitive concerns would thus be a serious policy mistake. In such instances, the MOPR could hamper low bids that are competitive and reflect truly low costs, where costs include offsets or subsidies based on positive environmental externalities that are not otherwise reflected in market operations."[98] Simply put, the Commission provides no economic theory for its broad application of MOPR in the Order.

Third, the rate is unjust and unreasonable because it will force consumers to pay for redundant capacity. If the Broad MOPR is ultimately implemented by PJM, it is undisputed that state-supported resources are less likely to clear the market and receive capacity payments, yet they will still be providing capacity value to the system. As state-supported resources are effectively removed from PJM's capacity market auctions, consumers must pay for other capacity; regardless of whether such additional capacity is required to provide reliable delivery. An affidavit by Michael Goggin submitted during the Paper Hearing estimated that "PJM's MOPR-Ex proposal would result in the procurement of roughly between $14 billion and $24.6 billion of redundant capacity over roughly the next 10 years."[99] The low end of this estimate reflects exemptions that the Order did not include, so the high end of the estimate is more applicable. The estimated $24.6 billion cost over ten years amounts to approximately $2.5 billion per year, approximately 25 percent of the value of the roughly $10 billion/year PJM capacity market, that will be additional costs that consumers must bear. The cost may in fact be higher if prices increase in the capacity market above their historical prices, and there are early analyses indicating that the Order may in fact result in such an outcome.[100]

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[98] Willig Declaration at P 24.
[99] Sustainable FERC Project, Natural Resources Defense Council, and Sierra Club, Affidavit of Michael Goggin, Docket No. ER18-1314 (May 7, 2018).
[100] *See FERC Directs PJM Capacity Market Reforms: Progress But Not Certainty*, CHARLES RIVER ASSOCIATES, http://www.crai.com/sites/default/files/publications/FERC_directs_PJM_capacity_market%20reforms

The Commission did not evaluate, and barely even acknowledged, these potential cost impacts when it issued the Order. Instead, the Order jumps to the conclusory determination that PJM's capacity auction, after imposing the Broad MOPR on numerous participants, will yield resource adequacy at just and reasonable rates.[101] However, the Order conflates *resource adequacy*—a system condition, with benefits that flow to customers—with the capacity market *rate* paid to participating generators. In attempting to administratively increase the rate for capacity, the Commission will cause customers to overpay for resource adequacy. The Order utterly fails to address the issue of capacity overpayment by customers in PJM, meaning that the Commission "failed to consider an important aspect of the problem,"[102] rendering the Order arbitrary and capricious as well as inconsistent with the FPA.

Fourth, the Order would improperly limit competition for capacity. The Broad MOPR would exclude numerous resources (principally new resources, but potentially existing resources that have not yet cleared a capacity auction or receive a new State Subsidy) from receiving capacity revenues. The Order's overbroad definition of State Subsidy essentially creates a new dual burden in which (1) PJM must classify subsidies which resources have received or are eligible for, and (2) the resource then has the onus of attempting to justify its own bid. However, this defies Commission precedent, which allows resources to bid at or below their marginal

_%20December_2019_CRA.pdf (last visited Jan. 20, 2020) ("Resulting market rules are likely to drive up capacity prices in upcoming Base Residual Auctions . . . ."); Ilkka Kovanen, Himanshu Pande, & George Katsigiannakis, *The Potential Impacts of PJM Market Reforms*, ICF INTERNATIONAL INC., https://www.icf.com/insights/energy/potential-impacts-pjm-market-reforms (last visited Jan. 20, 2020) (ICF Consulting stated that the Order "sends a positive signal for PJM capacity prices" and estimated an increase of $20-30/MW-day for the upcoming 2022-2023 Base Residual Auction); *see also* MICHAEL GOGGIN & ROB GRAMLICH, CONSUMER IMPACTS ON FERC INTERFERENCE WITH STATE POLICIES: AN ANALYSIS OF THE PJ REGION, https://gridprogress.files.wordpress.com/2019/08/consumer-impacts-of-ferc-interference-with-state-policies-an-analysis-of-the-pjm-region.pdf (last visited Jan. 20, 2020) (estimating that the PJM proposal, which differs from the FERC replacement rate, but impacts the market in the same direction).

[101] Order at P 7 ("We find that this replacement rate will ensure resource adequacy at rates that are just and reasonable and not unduly discriminatory or preferential.").

[102] *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

costs.[103] As noted previously, the Commission has approved mitigation measures in the past, but has focused on circumstances where participants have the ability and incentive to exercise market power; here, there is no actual finding of actual or likely price suppression. Moreover, by removing suppliers from the market, consumers have fewer options from which to choose, which tends to raise their costs. It is undisputed that resources subject to MOPR will have higher bids and will be less likely to clear. In this way, the replacement rate harms competition.

3. The Order Unduly Discriminates Against Renewable and New Resources

In requiring mitigation of an overly expansive range of State Subsidies, the Order runs counter to years of Commission precedent specifically finding that renewable resources in particular have neither the incentive nor the ability to suppress capacity market prices. For instance, the Commission has previously approved PJM mitigation measures excluding renewables from the MOPR,[104] restricted application of NYISO's buyer-side mitigation measures to renewable resources,[105] and specifically held that renewable resources have little ability to suppress market prices in ISO-New England ("ISO-NE") or PJM.[106] The Order does

[103] *See, e.g.*, *Tejas Power Corp.*, 908 F.2d at 1004 ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment."); *ISO New England Inc. and New England Power Pool Participants Comm.*, 158 FERC ¶ 61,138, at P 36 (allowing bidding below marginal costs, and emphasizing that resources bidding below marginal cost will experience the same "downside risk," which "acts as a disincentive for such offering behavior"); *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 142 FERC ¶ 63,011, at P 95 (2013) ("As discussed in our prior orders, our mitigation plan is intended to replicate the price that would be paid in a competitive market, in which sellers have the incentive to bid their marginal costs.").

[104] *See, e.g.*, *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 166 (exempting renewable resources and finding that the "MOPR may be focused on those resources that are most likely to raise price suppression concerns"), *vacated in part on other grounds sub. nom NRG Power Mktg., LLC v. Fed. Energy Regulatory Comm'n*, 862 F.3d 108 (D.C. Cir. 2017).

[105] *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator*, 153 FERC ¶ 61,022, at PP 2, 47 (2015) (granting exemption from buyer-side mitigation to certain renewable resources that have "limited or no incentive and ability to exercise buyer-side market power").

[106] *Iso New England Inc.*, 150 FERC ¶ 61,065, at P 26 (2015) ("[R]enewable resources are not similarly situated to other types of resources in that they are unlikely to be used for price suppression. As the Commission has explained, because renewable resources such as wind and solar can only qualify a fraction of their nameplate capacity,

not squarely address the Commission's past consideration of the unique attributes of renewable resources, and instead subjects them to the Broad MOPR without sufficient explanation of its apparent change in stance.

Further, under the Broad MOPR, whole classes of renewable resources that provide equal capacity value to the system will not be compensated for the capacity value that they are capable of providing to the system while other, non-renewable resources will be. This is unduly discriminatory. Importantly, this disparate treatment will be based on *the type* of non-Commission jurisdictional product that each resource sells. As discussed below in Section II.C.5, some generators that offer capacity into PJM's capacity market also sell coal ash, a product not subject to the Commission's jurisdiction. The revenues these generators receive from selling coal ash reduces the amount of compensation they need from other products in order to either be initially financed or stay in operation. Functionally, generators selling coal ash are no different than renewable generators selling RECs, another product that is not subject to the Commission's jurisdiction. Even assuming for the sake of argument that the Commission's premise that that all "out of market" revenues are capable of suppressing capacity market prices[107] and should be mitigated is correct (a premise that neither the Commission justifies, nor that the Clean Energy Associations agree with), in both cases the generators' receipt of this "out of market" revenue would have the potential to suppress capacity market prices. Yet the Order would only subject renewable resources selling RECs to the MOPR, while taking no action against those resources that sell coal ash, even though both types of resources are similarly

renewable resources are a poor choice if a developer's primary purpose is to suppress capacity market prices."); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 153 (2011) ("Wind and solar resources are a poor choice if a developer's primary purpose is to suppress capacity market prices. Due to the intermittent energy output of wind and solar resources, the capacity value of these resources is only a fraction of the nameplate capacity. This means that wind and solar resources would need to offer as much as eight times the nameplate capacity of a CT or CC resource in order to achieve the same price suppression effect.").

[107] *See* Order at P 72.

situated and, following the Commission's own rationale, have the ability to suppress capacity market prices based on their receipt of "out of market" revenues. This treatment is not only arbitrary and capricious, but also discriminatory against renewable resources and runs afoul of the Commission's longstanding precedent to treat similarly situated entities in a comparable manner.[108]

Moreover, the Order also discriminates against new resources in general—including significant quantities of wind, solar, demand response and energy efficiency—that will be subject to the Broad MOPR. As noted, these resources will be providing resource adequacy and capacity services to the region, but unlike the similarly situated resources that clear the capacity auction they will not receive any compensation for this benefit. In other contexts, the Commission has upheld the need to compensate resources capable of providing comparable services on a comparable basis.[109] The Commission's failure to acknowledge that the Order will produce a class of uncompensated but otherwise-comparable new resources in PJM violates its statutory mandate to ensure that rates and practices are not unduly discriminatory or preferential.

4. The Order's Proposed Processes Are Administratively Unworkable

The Order directs PJM to institute a replacement rate that applies the Broad MOPR to resources entitled to receive a State Subsidy, but does not address how PJM will make such determinations or how such determinations would be reviewed and considered. Under this rubric, PJM and the IMM will be tasked with becoming the "subsidy police,"[110] evaluating a

[108] *See e.g.*, *St. Michaels Utilities Comm'n v. Fed. Power Comm'n*, 377 F.2d 912, 915-16 (4th Cir. 1967); *South Carolina Elec. & Gas Co*., 143 FERC ¶ 61,058, at P 48 (2013).
[109] *See, e.g. Calpine Oneta Power, L.P*., 116 FERC ¶ 61,282, at P 36 (2006) ("[T]he Oneta Facility and AEP's generators are similarly situated for reactive power compensation purposes because they all have the capability of providing reactive power within their respective dead bands. Because they are similarly situated, compensating AEP's generators for their capability of providing reactive power and denying Oneta's Facility for similar capability is unduly discriminatory.").
[110] *See* Glick Dissent at P 42.

myriad of state programs across 13 states and the District of Columbia. To implement this directive, PJM will need to create processes and procedures by which each state program will be reviewed, consistent with PJM's independence obligations.[111] While some programs will clearly fall within the Commission's definition of State Subsidies, many others will not. As states pass new programs, and amend and revise existing programs, PJM will constantly be required to analyze whether the programmatic changes constitute a "subsidy." It is doubtful that PJM and the Independent Market Monitor for PJM ("IMM") have the resources or expertise to undertake this burdensome process, as there could be hundreds, if not thousands, of individual state programs that would need to be evaluated each year.[112]

In addition to the burden of determining what state programs constitute State Subsidies, PJM will be inundated with Unit Specific Exemption requests pursuant to the Commission's proposed Unit Specific Exemption. It is likely that PJM will receive hundreds if not thousands of Unit Specific Exemption requests each year from resources, which PJM's already-burdened staff will now need to somehow review in an orderly and timely manner. It is doubtful that PJM and the IMM have the resources necessary to undertake this burdensome, and often contentious, process.

The most likely outcome of the Commission deputizing PJM and the IMM as the "subsidy police" for 13 states and the District of Columbia and requiring them to conduct a more extensive Unit Specific Exemption process review than they ever have done before, is that

[111] *See, e.g., Regional Transmission Organizations*, FERC Stats. & Regs. ¶ 31,089 at 30,993 (1999), 65 Fed. Reg. 810 (2000), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 30,092, 65 Fed. Reg. 12,088 (2000), *aff'd, Public Utility District No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) (explaining the general obligations of an RTO, including the obligation to ensure that the RTO has "decision-making process that is independent of control by any market participant or class of participants.").

[112] The Order is not clear as to who bears the burden to identify the potential subsidies and whether market participants will be notified of PJM's determinations as to which state programs will garner the State-Subsidized designation. If the States are not a collaborative partner in this process it is difficult to see how PJM will police the disclosure of the receipt of state-subsidies.

neither process will occur correctly. The Commission has thus established an administratively unworkable framework that will likely make it impossible to implement what it purports to be a just and reasonable rate.

Moreover, the Commission has failed to quantify or acknowledge these additional costs that PJM, the IMM and market participants will bear in attempting to implement its new regime. The Commission in turn has not even attempted to undertake any analysis of whether the costs that will need to be borne by all parties (e.g., PJM's hiring of sufficient staff to manage these intensive review processes) justify the supposed "benefits" of implementing the Commission's proposed new regime.

C. The Order Is Arbitrary and Capricious, and an Abuse of the Commission's Discretion

1. The Order Drastically Expands MOPR in an Arbitrary Manner

The Order, with little explanation, drastically and arbitrarily expanded the application of the MOPR to the point where it "could potentially apply to any conceivable state effort to shape the generation mix."[113] This drastic expansion goes well beyond what was proposed in the June 2018 Order and what was proposed by PJM in the Paper Hearing, and also is not in line with applicable Commission precedent. While this drastic expansion of the MOPR results in over-mitigation and unjust and unreasonable rates, the Commission also does not adequately discuss in any amount of detail why this drastic expansion of the MOPR is needed, nor what evidence supported the drastic expansion of the MOPR. This renders the Order arbitrary and capricious.

The June 2018 Order specifically rejected the Calpine Complaint's request "to extend the MOPR to a limited set of existing resources,"[114] and also established the Fixed Resource

[113] *See* Glick Dissent at P 11.
[114] *See* June 2018 Order at P 3.

Requirement ("FRR") Alternative ("FRRA") as part of the proposed just and reasonable rate.[115] The Order rejects these findings without any adequate amount of explanation, and subjects far more resources to the MOPR than what was contemplated in the June 2018 Order. Moreover, in the Paper Hearing, PJM proposed to comply with the June 2018 Order by proposing a MOPR that had several significant exceptions that were not incorporated into the Broad MOPR, including: (1) exempting resources with an unforced capacity value of less than 20 MWs[116]; (2) resources whose primary function is not to produce electricity;[117] (3) resources receiving subsidies that account for one percent or less of the expected PJM revenues the resources are expected to receive;[118] and (4) voluntary RECs that could be identified as such prior to the commencement of an applicable capacity market auction.[119] The Order rejected all of PJM's proposals without sufficient justification or explanation.

The expansion of the MOPR ignores these exceptions and breaks with applicable Commission precedent without explanation. Furthermore, the Commission cannot rely on previous court decisions on the MOPR to justify the scale and scope of the Commission's administrative intervention in the Order. Specifically, *NRG* and *NJBPU* were about isolated individual generators being used for one entity to minimize their wholesale market purchase costs, whereas the Order will affect a majority of new generation resources in PJM, and thus has a much more dramatic effect on rates paid by all customers in the PJM region. Additionally, in *NRG* and *NJBPU*, there were identified (rightly or wrongly) instances of monopsony power, and the MOPR in those cases applied narrowly to those entities that had the potential to exercise such

[115] The exclusion of the FRRA from the Order is discussed in more depth in Section II.C.4.
[116] *See* PJM Initial Submission at 12; Order at P 90.
[117] *See* PJM Initial Submission at 12; Order at PP 146, 150.
[118] *See* PJM Initial Submission at 12; Order at P 91.
[119] *See* PJM Initial Submission at 12; Order at P 163.

power.[120] Notably, in *NJBPU* the Third Circuit noted that the purpose of the MOPR was to "ensur[e] that its sponsor cannot exercise market power . . . ."[121] Here, there is no demonstration or even allegation by the Commission or any party related to the exercise of market power by any or all of the entities to which the Broad MOPR will apply.

2. The Order Arbitrarily Expands Mitigation Beyond the June 2018 Order's Finding that Action Was Necessary to Address "Price Suppressive" State Subsidies

In the June 2018 Order, the Commission stated that it had "become necessary [for the Commission] to address the price suppressive impact of resources receiving out-of-market support."[122] The Commission further opined that the current MOPR was inadequate because it "fail[ed] to mitigate price distortions caused by out-of-market support granted to other types [(i.e., resource types other than natural gas)] of new entrants or to existing capacity resources of any type."[123] Putting aside the Clean Energy Associations' disagreements with this holding of the June 2018 Order,[124] it is clear that the *raison d'être* of the June 2018 Order was to address what the Commission believed to be the "price suppressive impact of resources receiving out-of-market support."[125] However, Commissioner Glick correctly noted that the Order "rejects the suggestion that the MOPR should apply only to those state policies that actually affect the wholesale rate."[126] Instead, the Order's goal "is to 'send price signals on which investors and consumers can rely to guide the orderly entry and exit of economically efficient capacity resources'"[127] and the Commission "is attempting to establish a set of price signals for

[120] *NRG,* 862 F.3d at 115-17; *NJBPU,* 744, F.3d at 84-87.
[121] *NJBPU.*, 744 F.3d at 97.
[122] *See* June 2018 Order at P 5.
[123] *See id.*
[124] *See, e.g.*, Clean Energy Associations' Request for Rehearing at 11–25.
[125] *See* June 2018 Order at P 5.
[126] *See* Glick Dissent at P 11.
[127] *See id.* at P 12 (quoting Order at P 40).

determining resource entry and exit that will supersede state resource decision making and better reflect the Commission's policy priorities."[128]

While the Order avers that "the June 2018 Order is premised on the finding that, as a general matter, resources receiving out-of-market support are capable of suppressing market prices,"[129] the June 2018 Order's only support for this conclusion is a 2011 order related to ISO-NE's capacity market.[130] However, the 2011 ISO-NE Order predominantly addressed the issues of whether ISO-NE's capacity market provided sufficient income to incentivize market entry, and whether both buyer and seller market power was properly mitigated.[131] Notably, the 2011 ISO-NE Order did not mitigate nearly as many State Subsidies as the Order does, nor did the 2011 ISO-NE Order analyze a record replete with information demonstrating how not all types of state subsidies actually suppress capacity market prices, as was presented to the Commission during the Paper Hearing.

Accordingly, given that the 2011 ISO-NE Order does not adequately support the Order's conclusion that all State Subsidies suppress capacity market prices, and given that the Commission cites no other authority or offer any other explanation supporting this conclusion, its conclusion that all out of market revenues have the potential to suppress capacity market prices is arbitrary and capricious. The Order thus abandons the pretense of targeting subsidies that "suppress" capacity market prices which was the *principal justification* for the June 2018 Order. Accordingly, rather than making a reasoned decision based on the record before it,[132] the

[128] *See* Glick Dissent at P 12.
[129] *See* Order at P 72.
[130] *See id.* at P 72 n.154 (citing June 2018 Order at P 155).
[131] *ISO New England Inc. & New England Power Pool Participants Comm. New England Power Generators Ass'n*, 135 FERC ¶ 61,029, at P 15 (2011) ("2011 ISO-NE Order").
[132] *See, e.g.*, *S.C. Pub. Serv. Auth.*, 762 F.3d at 54 (the Commission must support the factual findings underpinning its determination with substantial evidence).

Commission instead arbitrarily expands the MOPR so that it "will potentially subject much, if not most, of the PJM capacity market to a minimum offer price rule."[133]

3. The Broad MOPR Arbitrarily Applies to All RECs

The Commission's conclusion that all State Subsidies suppress prices and therefore should be subject to the MOPR is particularly arbitrary with respect to the Commission's analysis of RPS programs and associated REC revenues. This is because the Commission disregarded a substantial amount of evidence presented in the Paper Hearing directly refuting this incorrect conclusion.

Notably, the Commission found that "[t]he record also shows that support for renewable resources through RPS programs drives the proliferation of these resources in the market. Regardless of how volatile and uncertain revenue from RPS programs may be, it is still a State Subsidy that has the ability to influence capacity market prices."[134] In reaching this conclusion, the Commission cited to its earlier holding in the June 2018 Order that the existence of RPS programs impacts capacity market prices, as well as an affidavit of Dr. Anthony Giacomoni submitted on behalf of PJM, which was submitted by PJM *prior to* the June 2018 Order. [135] Notably, the affidavit of Dr. Giacomoni did not *in any way* analyze how the existence of State Subsidies may or may not suppress capacity market prices, but instead "generally describe[d] the types of state programs at issue," projected the current and projected potential quantities of subsidized resources, and analyzed the cost of the subsidies.[136]

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[133] *See* Glick Dissent at P 2.
[134] *See* Order at P 175.
[135] *See id.* at P 175 n.346.
[136] *See* Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market, Docket No. ER18-1314-000, Affidavit of Dr. Anthony Giacomoni on Behalf of PJM Interconnection, L.L.C., at 2 (Apr. 9, 2018).

Rather than analyzing the record before it to support the conclusion that the existence of all RPS programs and REC revenues suppress capacity market prices, the Order completely ignores substantial evidence presented during the Paper Hearing demonstrating why and how most REC revenues *do not in fact* affect or suppress capacity market prices. Most notably, the Clean Energy Industries responded to this erroneous conclusion by noting that:

> most REC revenues do not actually and materially impact offers into the capacity market from Market Sellers of renewable energy resources. This is a crucial issue for the Commission to consider because if a Market Seller is not lowering its offer into the capacity market as a result of REC revenue, and therefore not suppressing capacity market prices in the manner that the Commission was concerned about in the June [2018] Order, then it follows that the Market Seller's offer should not be subject to the MOPR because mitigating an offer that is not actually suppressing offers into the capacity market would constitute *mitigating a competitive offer*.[137]

In support of this argument, the Clean Energy Industries went on to present an overview of REC markets, as well as a description of renewable energy project finance generally.[138] Importantly, the Clean Energy Industries explained that:

> RECs are simply not a key driver for whether or not a renewable energy project is financed or built and have little impact upon a renewable project owner's operational choices such as whether or not to bid into a capacity auction, how much capacity to bid, or at what price level. Put another way, because a Market Seller of a renewable energy resource does not normally know the value of RECs that it will receive when offering a renewable energy resource into the capacity market for a Delivery Year three years in the future, it cannot reasonably lower its offer into the capacity market in anticipation of receiving such known revenue stream. Accordingly, because the Market Seller cannot lower its capacity market offer in anticipation of an unknown REC value, RECs *do not have a price suppressive impact on the capacity market*.[139]

[137] Comments of the American Wind Energy Association, the Solar RTO Coalition, the Mid-Atlantic Renewable Energy Coalition, and the Solar Energy Industries Association, Docket No. EL16-49-000, et al., at 13 (Oct. 2, 2018) [hereinafter Clean Energy Industries Initial Comments] (emphasis in original) (citations omitted).
[138] *See id.* at 13–17.
[139] *Id.* at 15 (emphasis in original) (citations omitted).

Additionally, AEE prepared an *entire primer* explaining in detail how REC markets work,[140] and explained why "applying a MOPR to renewable energy projects that generate RECs would do nothing to address the market harm the Commission identified [i.e., the purported price suppressive effect of state subsidies]."[141] AEE further noted that because "[REC] revenues are volatile and uncertain, and are not even known until well after a capacity auction is held, they cannot materially impact the ability of a renewable resource owner to move its project forward or adjust its offer lower to ensure that it will clear the capacity market."[142]

Despite the host of information presented on this issue during the Paper Hearing, the Order does not analyze, discuss, cite, or even mention the existence of *any of* the aforementioned record, or similar arguments made by other parties,[143] set forth during the Paper Hearing which described in detail why and how most REC revenues, and the existence of RPS programs, do not suppress capacity prices. In fact, neither the Commission, nor any other party during the Paper Hearing, *has presented any evidence demonstrating how the mere existence of RPS programs and most REC revenues suppress capacity market prices*. Accordingly, the Commission's conclusion that "[RPS programs are] State Subsid[ies] that ha[ve] the ability to influence capacity market prices,"[144] is not based on any consideration of the actual record that is before it, and amounts to nothing more than an unsubstantiated allegation that is contradicted by the record in the above-captioned proceedings. Accordingly, the Order is arbitrary and capricious because

[140] Comments of Advanced Energy Economy, Docket No. EL16- 49-000, et al., Attachment A (Oct. 2, 2018) [hereinafter AEE Initial Comments].
[141] *See id.* at 10–14.
[142] *See id.*
[143] *See, e.g.*, Comments of the Clean Energy Advocates Separately Addressing the Scope of the Expanded Minimum Offer Pricing Rule, Docket No. EL16-49-000 et al., at 24–29 (Oct. 2, 2018).
[144] *See* Order at P 175.

the Commission failed to meaningfully address evidence in the record contradicting its cursory conclusion of price suppression.[145]

Moreover, the fact that the Order does not squarely address the "price suppressive" effect of RECs on capacity market prices is more than merely a matter of the Commission not carefully and reasonably considering the record before it. In upholding Illinois' Zero Emission Credit ("ZEC") program in *Electric Power Supply Association v. Star*,[146] the 7th Circuit noted that the fact that ZECs may impact PJM's capacity market did not mean that the ZECs were preempted under federal law.[147] However, the 7th Circuit went on to note that "[o]nce the Commission reaches a final decision in [the proceeding leading to the Order], the adequacy of its adjustments will be subject to judicial review."[148] An implicit assumption in the 7th Circuit's ruling was that in order for the Commission to have *a justifiable reason* to adjust a Commission-jurisdictional rate (in this case PJM's capacity market prices) to account for the effects of a state subsidy, the state subsidy *must actually affect* the Commission-jurisdictional rate. Otherwise, as discussed previously in Section II.A, the Commission would simply be taking an action that impermissibly interferes with a state-jurisdictional practice under the FPA. Given that the Order is subjecting RECs to the MOPR even though most do not in fact affect capacity market prices, this "adjustment" to the PJM capacity market price is not "adequate," and instead is completely unjustifiable.

Rather than tailoring its remedy to apply only to state subsidies that actually affect wholesale market prices (theoretically addressing the purported harm which the Commission

[145] *See, e.g.*, *Serv. Comm'n of Ky.*, 397 F.3d at 1008 (the Commission must "respond meaningfully to the arguments raised before it"); *K N Energy, Inc.*, 968 F.2d at 1302–03 (the Commission must make an "effort to grapple with" alternate theories).
[146] 904 F.3d at 524.
[147] *See id.*
[148] *See id.*

claims to address), the Order instead arbitrarily applies the Broad MOPR to all RECs (as well as other State Subsidies) without any evidence demonstrating that they actually suppress capacity market prices. Accordingly, while the Commission may be professing to "ameliorate[] a real industry problem" in subjecting all RECs to the MOPR, it "then cit[es] no evidence demonstrating that there is in fact an industry problem."[149] Thus, the Order "is not reasoned decision making."[150]

4. The Order Disregards the June 2018 Order's Holding that a Just and Reasonable Rate Must Accommodate State Policies

A central component of the June 2018 Order's replacement rate was the Commission's proposal to implement the resource-specific FRRA "in order to accommodate state policy decisions and allow resources that receive out-of-market support to remain online" and which would have "allow[ed], on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time."[151] Now, with essentially no explanation or rationale, the Commission completely disregards this key aspect of the June 2018 Order's replacement rate, rendering the Order arbitrary and capricious.

Notably, in the June 2018 Order, the Commission recognized:

> that, if PJM's MOPR applies to state subsidized resources with few or no exceptions, and yet the states continue to support those resources, some ratepayers may be obligated to pay for capacity both through the state programs providing out-of-market support and through the capacity market. The courts have directly addressed this point, holding that states 'are free to make their own decisions regarding how to satisfy their capacity needs, but they 'will appropriately bear the costs of [those] decision[s],' . . . including possibly having to pay twice for capacity.' Nonetheless, we do not take this concern—or the states' right to pursue

[149] *See Nat'l Fuel Gas Supply Corp.*, 468 F.3d at 843.
[150] *See id.*
[151] *See* June 2018 Order at P 8.

> valid policy goals—lightly. *Which brings us to the second aspect of our proposed replacement rate*.[152]

That second aspect was the FRRA. In proposing the FRRA, the Commission "preliminarily [found] that it may be just and reasonable to accommodate resources that receive out-of-market support, and mitigate or avoid the potential for double payment and over procurement, by implementing a resource-specific FRR Alternative option."[153] After describing the proposed FRRA construct,[154] the Commission held that it "would accommodate policies to provide out-of-market support to certain resources, but remove those resources from the market," and would "increase the integrity of the PJM capacity market for competitive resources and load."[155] Further, the Commission opined that the expanded MOPR, combined with the resource-specific FRRA construct, would "provide significant benefits through increased transparency for investors, consumers, and policymakers,"[156] and explained its rationale for why including the FRRA with the expanded MOPR was necessary to create a just and reasonable rate.[157]

Despite the June 2018 Order's focus on the importance of the FRRA being part of a just and reasonable replacement rate for PJM's capacity market, and after an extensive record built during the Paper Hearing related to how the FRRA could be implemented, the Order disregards the FRRA entirely without explanation. In fact, other than concluding that the Broad MOPR was "superior to" the FRRA construct proposed in the June 2018 Order,[158] the following sentence comprises the *entirety of the Commission's substantive discussion* related to why it decided not

[152] *Id.* at P 159 (emphasis added).
[153] *See id.* at P 160.
[154] *See id.*
[155] *See id.* at P 161.
[156] *See id.* at P 162.
[157] *See id.* at PP 162–63.
[158] *See* Order at P 6.

to move forward with the FRRA construct in favor of the Broad MOPR: "Because we decline to implement a resource-specific FRR Alternative, we dismiss as moot intervenors' requests that a transition mechanism be adopted to facilitate the adoption a resource-specific FRR Alternative."[159]

This single conclusory sentence without a scintilla of anything that could reasonably be considered to be qualitative or quantitative analysis, reasoning, explanation or rationale was all that the Commission provided when it disregarded a central component of the June 2018 Order that the Commission had preliminarily found was necessary to ensure that PJM's capacity market was just and reasonable. In fact, by disregarding the FRRA, it is reasonable to infer that the Commission now has found that it is "*un*reasonable to accommodate resources that receive out-of-market support" and that the Commission should "*not* mitigate or avoid the potential for double payment and over procurement."[160] This complete reversal by the Commission runs afoul of a basic tenet of administrative law that "[a]gencies are required to explain a reasoned basis for departing from their past precedent,"[161] and is thus arbitrary and capricious.

5. The Focus of the Broad MOPR on State Subsidies Is Wholly Inconsistent with the Order's General Premise that Any "Out-of-Market Support" Is Capable of Suppressing Market Clearing Prices, and the Commission's Unsupported "Direct[ed] at" or "Tethered to" Rationale Fails to Remedy This Inconsistency

The Commission fails to explain how the Broad MOPR fully addresses its own faulty premise regarding the need to expand mitigation, or how the lines it draws in focusing the Broad MOPR on State Subsidies, while leaving other out-of-market revenues out of the Broad MOPR, are consistent with that premise. In addition, the Commission's explanation of the transactions

[159] *See id.* at P 219.
[160] *See id.* at P 159 (emphasis added).
[161] *Fox Television Stations, Inc*., 556 U.S. at 515.

and business models it sweeps into the definition of State Subsidies and subjects to the Broad MOPR is inconsistent, lacks any support allowing the Commission to conclude that transactions and business models are "direct[ed] at" or "tethered to" the PJM capacity market, and fails to acknowledge precedent. The internal inconsistency of the Broad MOPR and the Commission's failure to offer a reasoned explanation for how it resolves the purported market problem the Commission identified is arbitrary and capricious.[162]

In the Order, the Commission reaffirms its extraordinarily broad finding in the June 2018 Order that "as a general matter, resources receiving out-of-market support are capable of suppressing market prices."[163] The Commission goes on, however, to adopt the Broad MOPR that applies *only* to those revenues it defines as State Subsidies. While the Commission's definition of State Subsidies is impermissibly broad, as explained elsewhere in this Request for Rehearing, the Commission offers almost no explanation to justify applying the Broad MOPR only to these out-of-market revenues and not others when, under its own logic, *all* out-of-market revenues "are capable of suppressing market prices."

First and foremost, the Commission fails to acknowledge or even consider the broad array of potential "out-of-market" revenues that may be available to a capacity resource. For example, the owner of a coal-fired power plant might obtain out-of-market revenues from the sale of numerous byproducts of its operation, including fly ash, bottom ash and boiler slag, and flue gas desulfurization materials.[164] Under the Commission's own premise, revenues from

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[162] *See, e.g.*, *Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (The Commission must "articulate 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" (quoting *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43))).

[163] *See, e.g.*, Order at P 72 (citing June 2018 Order at P 155).

[164] *See, e.g.*, Initial Comments of the Maryland Public Service Commission, Docket No. EL16-49-000 et al., at 9 (Oct. 2 , 2018); *Portland Cement Association Sustainable Manufacturing Fact Sheet: Power Plant Byproducts*, PORTLAND CEMENT ASS'N, https://www.acaa-usa.org/Portals/9/Files/PDFs/PCA_Power_Plant_Byproducts_Fact_Sheet_2005.pdf (last visited Jan. 20, 2020).

these sales should logically be expected to be "capable of suppressing market prices." Yet they are not subject to the Commission's Broad MOPR replacement rate.

In contrast, the Commission explicitly *includes* in the scope of the Broad MOPR the sale of environmental attributes, such as RECs, by renewable energy resources.[165] State governments and customers alike seek to purchase RECs to obtain the benefits of reduced emissions from electricity and comply with their own corporate sustainability goals. And RECs, like the coal combustion residuals noted above, are a byproduct of the operation of a particular generation resource. The Commission attempts to justify this inconsistent treatment of the sale of byproducts by different types of generation resources by asserting that RECs and other State Subsidies are "directed at or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market administered by PJM."[166] The Commission does not, however, reference a single state policy, law, or regulation related to RECs that is "direct[ed] at" or is "tethered to" the PJM capacity market. This failure to explain the Commission's application of its own remedy is textbook arbitrary and capricious decision-making.

In only two instances does the Commission attempt to explain why some out-of-market revenues should not be subject to the Broad MOPR. For example, the Commission explicitly excludes "generic industrial development and local siting support," on the basis that such support is not "nearly 'directed at' or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market administered by PJM."[167] But again, the Commission begs the question: if out-of-market revenues, "as a general

[165] *See* Order at P 176.
[166] Order at P 68.
[167] Order at P 83.

matter," allow a resource that receives or is eligible to receive them to be "capable of suppressing market prices," the market problem that the Commission says it must remedy, then the Commission must offer a plausible explanation for why it is excluding them from the replacement rate. The fact that they may not be "direct[ed] at" or "tethered to" participation in PJM's capacity market does not explain away the Commission's core premise for adopting the Broad MOPR. Moreover, the Commission fails to explain why it assumes that these kinds of incentives are not "direct[ed] at" or "tethered to" the operation of a generating resource in PJM; after all, it is reasonable to assume that a state or local entity offers such an incentive with the expectation that a power plant will be constructed and operated there and will contribute to the local economy and tax base.

In addition, the Commission excludes federal subsidies from the reach of the Broad MOPR. While the Commission correctly holds that it cannot "nullify the effect of federal legislation" through the Broad MOPR, the end result serves only to demonstrate the flawed logic and folly of the Commission's pursuit in the Order. The Commission holds that the potential to obtain out-of-market revenues renders the PJM capacity market unjust and unreasonable, while also admitting that it cannot or will not address the impact of all potential out-of-market revenues on the market. That result begs the question of how the Commission, under its flawed premise that out-of-market revenues render the PJM capacity market unjust and unreasonable, can ever be assured that the market is in fact just and reasonable. Moreover, the Commission's conclusion that applying the Broad MOPR to federal subsidies would "nullify" them, while also claiming that applying the Broad MOPR to State Subsidies *does not* nullify them, lays bare the

arbitrary and capricious inconsistency in the Broad MOPR replacement rate chosen by the Commission.[168]

Finally, the Commission's rationale underlying the subsidies it asserts must be subject to the MOPR is further undermined by its decision to include "Self-Supply" resources. Here again, the Commission fails to explain how Self-Supply arrangements are "directed at" or "tethered to" the PJM capacity market. In addition, including these arrangements within the Broad MOPR upends long-standing business models that predate the PJM capacity market by several decades, and disregards with little explanation the long-standing precedent respecting those business models in the PJM capacity market. The Commission is obligated to acknowledge and fully explain such a stark departure from precedent.[169] The Commission's claim that the existing self-supply exemption was a "temporary reversal in Commission policy"[170] is at best incomplete; from the very beginning of the PJM capacity market, the Commission has accommodated self-supply participation.[171] That claim also directly contradicts the Commission's rationale (in the very same paragraph) for adopting an exemption for existing self-supply; specifically, that "self-supply entities have made resource decisions based on affirmative guidance from the Commission indicating that those decisions would not be disruptive to competitive markets."[172]

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[168] *Compare* Order at P 89 (finding that applying MOPR to federal subsidies would nullify the federal legislation adopting them), *with* Order at P 7 ("Nor does this order prevent states from making decisions about preferred generation resources: resources that states choose to support, and whose offers may fail to clear the capacity market under the revised MOPR directed in this order, will still be permitted to sell energy and ancillary services in the relevant PJM markets.").

[169] *See, e.g.*, *Fox Television Stations, Inc.*, 556 U.S. at 515 ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." (emphasis in original)).

[170] Order at P 203.

[171] *See, e.g.*, *PJM Interconnection, L.L.C.*, 115 FERC ¶ 61,079 (2006) (preserving self-supply as an option under the new capacity market construct).

[172] *See* Order at P 203.

The Commission cannot simply offer supplementary rationale or otherwise explain away these foundational problems with its flawed premise that out-of-market revenues allow unjust and unreasonable suppression of capacity prices, or the inconsistencies in how its chosen remedy of the Broad MOPR is applied (or not) to various kinds of out-of-market revenues and types of generation. Simply put, if the Commission cannot craft a replacement rate that would make sense under its flawed premise, it must withdraw that premise.

6. The Methods and Assumptions Used to Calculate Default and Unit-Specific MOPR Prices Are Arbitrary and Capricious

a. Utilizing Net CONE for Resources that Have Not Previously Cleared a Capacity Market Auction Is Arbitrary and Capricious

The Commission's finding that it is just and reasonable to use different methodologies to determine the default offer price floors for new and existing resources[173] is arbitrary and capricious. Specifically, the Commission directed PJM to use resource-specific Net CONE values, and the Net CONE method, to calculate default MOPR Prices that have not previously cleared the PJM capacity market (i.e., a "new resource").[174] The Commission explicitly recognized the impacts that this directive would have on a new resource's offer and capacity market outcomes in making this determination, and conceded that using Net CONE values as the default offer price floor for such resources may "significantly affect the ability of new resources receiving State Subsidies to clear the market, as compared to the Net ACR."[175] However, the Commission nonetheless found, without any supporting evidence, that such an outcome is just

[173] Order at P 151.
[174] Order at PP 138, 143.
[175] Order at P 139.

and reasonable because it would "allow the MOPR to fulfill its purpose and protect the capacity market from uneconomic new entry by State-Subsidized Resources."[176]

This finding is arbitrary and capricious for several reasons. First, the Commission disregarded substantial record evidence demonstrating that the proposed default Net CONE input values proposed by PJM do not reflect accurate or competitive offers for all PJM resources in PJM that have not cleared a prior PJM capacity auction.[177] Applying these incorrect values, and resulting default MOPR Prices, to all new resources thus results in an administratively - determined capacity supply offer that significantly exceeds the competitive offer of that resource, which will result in a capacity market clearing price that exceeds the competitive level and unjustly raises capacity costs to PJM loads. This outcome is not just and reasonable.

The fact that the Net CONE values and method proposed by PJM and authorized by the Commission do not establish a competitive offer for all planned and existing resources that have not previously cleared a capacity market auction is unsurprising given that the concept of using Net CONE to determine a planned resource's offer price floor was developed on a theory that applied to a hypothetical natural gas resource that relied principally on PJM capacity market revenues, net of energy and ancillary revenues, to determine its entry decision.[178] The Net CONE method is also based on the premise that this hypothetical natural gas resource could be built within the three-year forward period of the base residual capacity auction. The Net CONE method further assumes that the hypothetical natural gas resource would choose to enter the

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[176] *See id.*

[177] *See, e.g.*, Reply Comments of the Clean Energy Industries on the Application of the Minimum Offer Price Rule, Docket No. EL16-49-000 et al., at 16–31 (Nov. 6, 2018) [hereinafter Clean Energy Industries Reply Comments].

[178] *See e.g.*, PJM Tariff, Article I (Definitions of "Cost of New Entry" and "Reference Resource"); *see also* SAMUEL A. NEWELL ET AL., THE BRATTLE GRP., PJM COST OF NEW ENTRY COMBUSTION TURBINES AND COMBINED-CYCLE PLANTS WITH JUNE 1, 2022 ONLINE DATE iii, 1–2 (2018), https://brattlefiles.blob.core.windows.net/files/13896_20180420-pjm-2018-cost-of-new-entry-study.pdf (last visited Jan. 20, 2020).

market (i.e., an entity would construct a natural gas resource) if the resource cleared a capacity market auction and obtained a capacity supply obligation and would choose *not* to enter the market if it did not clear a capacity market auction.

The record in this proceeding demonstrates that these conditions do not apply to all planned and existing (e.g., newly constructed) resources in PJM, particularly renewable resources in PJM that are likely to be subject the Broad MOPR proposed in the Order. As the Clean Energy Associations noted previously during the Paper Hearing, long-term power purchase agreements ("PPAs") – not capacity market revenues – are "the most important instrument for renewable energy project developers when obtaining financing."[179] As such, planned renewable resources do not rely principally on PJM capacity market clearing prices as the sole price signal for the decision of whether to enter the PJM market as the Net CONE method assumes, but rather, rely predominantly on PPAs – which are determined through arms-length negotiations outside of the PJM capacity market and are based primarily on PJM's *energy market* price signals.

While it is true that expected capacity market revenues may influence some commercial terms of long-term PPAs, including pricing, once a PPA is executed, the decision of whether a renewable resource should enter, exit or remain in the PJM market has effectively been made based on the terms of the PPA. Renewable resources also have significantly different operational and technological differences from the hypothetical natural gas plant upon which the Net CONE method is based, the most obvious of which is that renewable resources do not have any ongoing fuel costs. Moreover, some resources such as offshore wind take longer than natural gas plants to be developed, and accordingly do not neatly fit into the three-year

[179] Comments of the American Wind Energy Association, the Solar RTO Coalition, the Mid-Atlantic Renewable Energy Coalition and the Solar Energy Industries Association, Docket No. EL18-187-000, at 14–15 (Oct. 2, 2018).

development timeline that is assumed by the Net CONE method (meaning that Net CONE is not the appropriate cost level to assume for an offshore wind project offering into a capacity market auction).

The Net CONE method, and the default inputs authorized by the Order, take none of these commercial realities for renewable resources into account, and instead make many assumptions that are inapplicable, and in some instances directly contrary to, the assumptions that Market Sellers of renewable resources actually make when deciding whether to enter or exit the PJM market, and relatedly, how such renewable resources are offered into PJM capacity market auctions.

Furthermore, continuing to apply the Net CONE method to existing resources that are in fact in operation, but are nonetheless considered "new" because they have not previously cleared a capacity market auction, as the Order contemplates, is contrary to the Commission's finding that "[e]xisting resources face different cost than new resources because the decision to enter the market is different than the decision to remain in the market."[180] Applying the Net CONE method to an existing resource arbitrarily assumes that a resource that has been constructed will base its decision to "remain in the market" on whether or not it clears a given capacity market auction. This assumption would clearly be false for a newly constructed resource with a long-term PPA and decades of remaining useful life, during which it can earn energy and ancillary services revenues, among others. Having already been constructed, the resource's (amortized) construction costs would already have been incurred, and are thus sunk costs in economic terms. Indeed, the Commission recognizes the fact that existing resources face different costs, and explicitly recognizes that existing resources have already incurred certain fixed costs, which are

[180] Order at P 151.

principally constructions costs, that planned resources have yet to incur. [181] Continuing to apply the Net CONE method to such existing resources based solely on the fact that they may not have previously cleared a capacity market auction is thus arbitrary and capricious.

Moreover, continuing to apply Net CONE to existing resources becomes more unreasonable as time passes because the Net CONE value PJM calculates will become even more divorced from the existing resource's actual going forward costs, which are more appropriate calculated utilizing the Net ACR method. For example, the applicable Net CONE value in any given year can differ dramatically from an existing resource's actual going forward costs, which are based on when the resource was constructed, its actual construction and financing cost, and other costs, and are unlikely to bare any relationship to the Net CONE value PJM calculates in that given year, which would be estimated based on then-current construction cost, capital, and net energy and ancillary service revenues.[182] Therefore, the more time that passes between the year a resource actually enters the market (i.e., is constructed and incurs construction costs which become sunk) and the time the Net CONE value is applied, the more unreasonable the default Net CONE offer price floor becomes.

Given the foregoing, the Net CONE method and values approved in the Order will not result in just and reasonable default MOPR Prices. Accordingly, the Clean Energy Associations assert that default MOPR prices should be calculated utilize the Net ACR method, along with appropriate and accurate inputs.[183]

[181] *Id.* at P 151 ("For planned resources, the default offer price floor should include, for example, construction costs and certain fixed costs than an existing resource does not usually face.").
[182] Note that the Commission directed PJM to update default offer price floors regularly. *See id.* at P 155.
[183] *See* Clean Energy Industries Reply Comments at 24–25.

b. The Methods and Assumptions Used for the Unit-Specific Exemption Process Do Not Reflect Competitive Offers for Renewable Resources

As discussed, because the Net CONE method and default values directed by the Order do not produce competitive offers for all resources that have not previously cleared the PJM capacity market,[184] the Clean Energy Associations instead believe that in order to allow for truly competitive offers to be established via the Unit Specific Exemption as the Commission envisions,[185] the Commission must permit any resource seeking to utilize the Unit Specific Exemption process to utilize any appropriate method or inputs that will reflect actual, accurate and competitive offers from their resources, including but not limited to the use of the Net ACR method.

With respect to inputs used to calculate unit-specific MOPR Prices, the Commission's ruling that "the default MOPR values should maintain the same basis financial assumptions" because "standardized inputs are a simplifying tool appropriate for determining default offer price floors,"[186] is plainly unreasonable. This is because it is unreasonable to apply the same capital cost assumptions to planned natural gas units and planned renewable resources, such as a standardized useful life of 20 years, when renewable resources routinely and reasonable assume a useful life of between 30-40 years due to how the technology performs.[187]

Moreover, assuming these resource types face the same capital costs ignores the fact that federal tax incentives such as the ITC and PTC reduce the capital costs that renewable

[184] *See e.g.*, *id.* at 16–31.
[185] *See, e.g.*, Order at P 2 ("To preserve flexibility, PJM will also permit new and existing suppliers that do not qualify for a categorical exemption to justify a competitive offer below the applicable default offer price floor through a Unit-Specific Exemption.").
[186] Order at P 153 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013) at P 144).
[187] *Compare* Order at P 153 (accepting a standardized 20-year asset life for all resources), *with* Clean Energy Industries Reply Comments at 21–22 (noting that it is widely recognized that the useful life for solar facilities is 40 years and the useful life for wind resources is 30 years).

developers face. As the Clean Energy Associations noted in prior comments in this proceeding, the capital costs assumptions for each default resource type must be based on realistic assumptions for renewable facilities, which may have lower capital costs than other resources due to bonus depreciation and federal incentives from the ITC and PTC.[188] Failing to account for the fact that the federal ITC and PTC programs can lower the capital costs of certain wind, solar, and hybrid systems that include storage amounts to a backdoor application of the MOPR to certain federal subsidies, which the Commission found is prohibited.[189] Therefore, failing to account for the existence of the ITC or PTC when analyzing renewable resources' cost of capital is plainly unjust and unreasonable.

Accordingly, for the foregoing reasons, the financial inputs, methods and other assumptions utilized in constructing unit-specific MOPR Prices pursuant to the Unit Specific Exemption should be permitted to be as flexible as possible in order to ensure truly competitive offers from all resources seeking to utilize this exemption.

7. The Arbitrarily Order Fails to Account for Likely Over-Mitigation, Particularly for Renewables

In requiring PJM to mitigate an exceptionally broad category of State Subsidies[190] from all resource types,[191] including for non-exempt existing resources,[192] the Commission jettisons years of precedent establishing the proper role of mitigation in energy markets, as well as its own historic concerns with the prospect of over-mitigation, without adequate explanation. Upon rehearing, the Commission should instead significantly limit the application of mitigation measures so that the MOPR is only used (if at all) to ensure competitive results resulting in just

[188] Comments of the American Wind Energy Association, the Solar RTO Coalition, the Mid-Atlantic Renewable Energy Coalition and the Solar Energy Industries Association, Docket No. EL18-187-000, at 2 (Oct. 2, 2018).
[189] Order at P 89.
[190] *See id.* at P 9.
[191] *See id.* at P 8.
[192] *See id.* at P 7.

and reasonable rates, rather than administratively repricing enormous portions of the capacity market.

Historically, the Commission has approved RTO mitigation measures that support competitive prices by preventing the exercise of market power,[193] while reducing barriers to economically rational entry and exit, and while simultaneously carefully balancing the risks of over-and under-mitigation.[194] The Commission has even represented to courts that the use of mitigation measures requires a linkage to market power, and must avoid over-mitigation.[195] In *Edison Mission Energy v. FERC*, the D.C. Circuit addressed the inverse of the Broad MOPR, and rejected overly broad mitigation measures that would (if implemented) *reduce* capacity market prices, noting that "[i]f prices are suppressed in a competitive market, a natural inference is that suppliers who could otherwise profitably enter will be deterred from entry."[196] Consistent with *Edison Mission Energy*, the Commission has tended to carefully weigh the prospect of price

[193] *See, e.g.*, *Cal. Indep. Sys. Operator Corp.*, 119 FERC ¶ 61076, P 490 (2007) ("[I]t is the possession of market power (and, therefore, the potential to exercise it), not the actual exercise of market power, that triggers the need for mitigation…. Market power mitigation exists to guard against the potential exercise of market power, and is required whenever a market *participant is found to have* market power. Therefore, *once it is determined that an entity has market power*, adequate mitigation of the potential to exercise market power becomes essential." (emphasis added)). As noted below, the Order contains no determination that actual or likely market power is present in PJM.

[194] The Commission has accordingly rejected proposed mitigation measures that did not accurately reflect the incentives of market participants. *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 139 FERC ¶ 61,199, at PP 66–67 (2012) (rejecting a proposed MOPR where buyers were "generally unlikely to benefit from exercising market power by subsidizing uneconomic entry"), *aff'd*, 153 FERC ¶ 61,229, at P 105 (2015) (MOPR unnecessary where "[t]he purchasers of this capacity would not benefit significantly from suppressing prices in the MISO capacity market"). *See also Midcontinent Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,176, at P 78 (2018) (finding that "there is no evidence in the record that such [low] prices indicate price suppression rather than supply and demand fundamentals" and again rejecting imposition of a MOPR in MISO).

[195] *See* Brief for Respondent FERC at 20, 22, *NRG Power Mktg., LLC v. Fed. Energy Regulatory Comm'n*, 862 F.3d 108 (D.C. Cir. 2017) (Nos. 15-1452, 15-1454) (discussing balancing "the need to mitigate buyer-side market power against the risk of over-mitigating competitive entry").

[196] *Edison Mission Energy, Inc.*, 394 F.3d at 969.

impacts against sweeping mitigation measures, and in other decisions has required mitigation measures to avoid potential over-mitigation.[197]

Here, if application of the Broad MOPR *escalates* capacity prices by excluding many new resources, a natural inference is that otherwise-uneconomic suppliers will decline to exit. Further, the Order contains no finding of actual or incipient market power for the resources that will be subject to the Broad MOPR. The Order's failure to consider either the potential for over-mitigation or the potential exercise of market power breaks with precedent without explanation, rendering the Commission's decision arbitrary and capricious.[198]

8. The Commission Should Modify the Order's MOPR Exemptions so that They Are Not Arbitrary and Capricious.

a. Application of RPS Exemption

The Clean Energy Associations seek rehearing as to the resources eligible to receive an RPS Exemption. The Commission acknowledged that "a limited exemption for renewable resources receiving support from state-mandated or state-sponsored RPS programs is just and reasonable" and directed PJM:

> to include an RPS Exemption for resources receiving a State Subsidy through a currently existing state-mandated or state-sponsored RPS program if the resource fulfills at least one of these criteria: (1) has successfully cleared an annual or incremental capacity auction prior to this order; (2) has an executed interconnection construction service agreement on or before the date of this order; or (3) has an unexecuted interconnection

[197] *See, e.g.*, *Con Edison v. New York Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,139, at P 45 (2015) (finding NYISO's buyer-side mitigation rules "unjust and unreasonable because they are unnecessarily applied to unsubsidized, competitive entrants who have no incentive to inappropriately suppress capacity market prices"); *California Indep. Sys. Operator Corp.*, 119 FERC ¶ 61076, P 493 ("[T]he likelihood of over-mitigation is low and . . . local market power mitigation should not deter future investment in California."); *Midwest Indep. Transmission Sys. Operator, Inc. Pub. Utilities with Grandfathered Agreements in the Midwest Iso Region*, 111 FERC ¶ 61043, at P 78 (2005) ("We note . . . that the Court of Appeals has cited concerns with mitigation plans that mitigate workably competitive markets, suppress prices and deter market entry. And we recognize that the mitigation plan could result in potentially above-market costs for some customers for one day before the IMM institutes mitigation . . . . [W]e consider the potential harms of this one-day lag in mitigation to be lower, and the cost impact to be less, than the potential harm of footprint-wide mitigation for all days.").

[198] *See Fox Television Stations, Inc.*, 556 U.S. at 515.

construction service agreement filed by PJM for the resource with the Commission on or before the date of this order.[199]

The Commission found that the RPS Exemption was appropriate "because decisions to invest in those resources were guided" by the Commission's previous and longstanding precedent not to subject resources eligible to receive REC revenues to the MOPR.[200] However, significant investment decisions were made by certain other projects who, although also "guided" by the Commission's prior precedent, do not meet the criteria set forth in the RPS Exemption. Accordingly, the Clean Energy Associations request that the Commission revise its Order to afford an RPS Exemption to the additional resource categories discussed below, and as to which the Commission's rationale for the RPS Exemption is equally applicable.

First, the Clean Energy Associations aver that any resource that qualified as a "Planned Generation Capacity Resource"[201] ("PGCR") or "Existing Generation Capacity Resource"[202]

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[199] *See* Order at P 173.

[200] *See id.* at P 174.

[201] Planned Generation Capacity Resources are defined as "a Generation Capacity Resource, or additional megawatts to increase the size of a Generation Capacity Resource that is being or has been modified to increase the number of megawatts of available installed capacity thereof, participating in the generation interconnection process under Tariff, Part IV, Subpart A, as applicable, for which: (i) Interconnection Service is scheduled to commence on or before the first day of the Delivery Year for which such resource is to be committed to RPM or to an FRR Capacity Plan; (ii) for any such resource seeking to offer into a Base Residual Auction, or for any such resource of 20 MWs or less seeking to offer into a Base Residual Auction, a System Impact Study Agreement (or, for resources for which a System Impact Study Agreement is not required, has such other agreement or documentation that is functionally equivalent to a System Impact Study Agreement) has been executed prior to the Base Residual Auction for such Delivery Year; (iii) for any such resource of more than 20 MWs seeking to offer into a Base Residual Auction for the 2019/2020 Delivery Year and subsequent Delivery Years, a Facilities Study Agreement (or, for resources for which a Facilities Study Agreement is not required, has such other agreement or documentation that is functionally equivalent to a Facility Studies Agreement) has been executed prior to the Base Residual Auction for such Delivery Year; (iv) an Interconnection Service Agreement has been executed prior to any Incremental Auction for such Delivery Year in which such resource plans to participate; and (iv) no megawatts of capacity have cleared an RPM Auction for any prior Delivery Year. For purposes of the must-offer requirement and mitigation of offers for any RPM Auction for a Delivery Year, a Generation Capacity Resource shall cease to be considered a Planned Generation Capacity Resource as of the earlier of (i) the date that Interconnection Service commences as to such resource; or (ii) the resource has cleared an RPM Auction for any Delivery Year, in which case it shall become an Existing Generation Capacity Resource for any RPM Auction for all subsequent Delivery Years." *See* RAA, Article 1.

[202] Existing Generation Capacity Resources are defined as "for purposes of the must-offer requirement and mitigation of offers for any RPM Auction for a Delivery Year, a Generation Capacity Resource that, as of the date on which bidding commences for such auction: (a) is in service; or (b) is not yet in service, but has cleared any RPM

("EGCR") as of December 19, 2019 under PJM's Reliability Assurance Agreement ("RAA") should be eligible for the RPS Exemption. This is because under PJM's currently applicable rules, PGCRs and EGCRs are projects deemed to be sufficiently advanced so as to be eligible to participate in capacity market auctions,[203] even if they have not executed final interconnection agreements or are not yet operational. Thus, "decisions to invest" in these resources to the point where they became PGCRs or EGCRs were guided by the Commission's precedent; so if they became PGCRs or ECGRs by December 19, 2019, they too should be allowed to live by the Commission's rules as they existed at that time and, by the Commission's own logic, likewise be accorded an RPS Exemption.

Second, the Clean Energy Associations request that the Commission allow any resource, whether or not a PGCR or ECGR, that executed a System Impact Study Agreement (or, for resources for which a System Impact Study Agreement is not required, has entered into a functional equivalent to a System Impact Study Agreement) by December 19, 2019 also be afforded an RPS Exemption. Developers that have executed a System Impact Study Agreement have certainly made significant investments in these projects, and relied upon the Commission's prior precedent in doing so. Most often, by the time a developer executes a System Impact Study Agreement, already it has incurred significant non-refundable development costs for activities

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Auction for any prior Delivery Year. A Generation Capacity Resource shall be deemed to be in service if interconnection service has ever commenced (for resources located in the PJM Region), or if it is physically and electrically interconnected to an external Control Area and is in full commercial operation (for resources not located in the PJM Region). The additional megawatts of a Generation Capacity Resource that is being, or has been, modified to increase the number of megawatts of available installed capacity thereof shall not be deemed to be an Existing Generation Capacity Resource until such time as those megawatts (a) are in service; or (b) are not yet in service, but have cleared any RPM Auction for any prior Delivery Year." *See id.*

[203] Generation Capacity Resources are eligible to submit Sell Offers as Capacity Performance Resources in capacity market auction in PJM. *See e.g.*, PJM Tariff, Attachment DD, Section 5.5A(a). "Generation Capacity Resources" include PCGRs and ECGRs. *See* RAA, Article 1 (Definition of "Generation Capacity Resources"). This means that PCGRs and ECGRs are eligible to participate in PJM auctions. *See also* PJM Manual 18, available at https://www.pjm.com/-/media/documents/manuals/m18.ashx (describing eligibility criteria for participating in PJM capacity market auctions, including PCGRs and ECGRs)

such as land acquisition, finding offtakers, engineering analyses, acquiring permits, and paying non-refundable deposits related to maintaining queue position. Accordingly, allowing projects that had executed a System Impact Study Agreement by December 19, 2019 to avail themselves of the RPS Exemption is consistent with the Commission's rationale.

Third, and at an absolute minimum, the Commission should afford an RPS Exemption to any renewable resource recipient of a State Subsidy that had an Interim Interconnection Service Agreement (or its non-Commission jurisdictional equivalent) ("Interim ISA"), whether executed or filed unexecuted, as of December 19, 2019. The Commission arbitrarily and unreasonably selects the execution of (or the filing of an unexecuted) Interconnection Construction Service Agreement ("ICSA") as the event by which to distinguish between those facilities that will be subject to the MOPR from those that will be exempt from the MOPR's application. The fact is, though, that an interconnection customer that has instead executed an Interim ISA has, by so doing, made as firm a commitment to funding the interconnection costs as would be required under, but even before being presented with, an ICSA. This can and often has occurred when the customer wants to expedite the project's moving forward in advance of PJM's study timeline. And exactly as is true for an ICSA, an Interim ISA likewise "binds the Interconnection Customer to all costs incurred for the construction activities being advanced pursuant to the terms of the PJM Tariff."[204]

Just as the Commission looks to an ICSA as reflecting a developer's committed investment decision, the fact is that some developers already have committed themselves to investing millions of dollars in reliance upon, and as "guided" by, the Commission's previous directives. But they chose to express that commitment by means of entering into an agreement

[204] PJM Manual 14C, Section 1.4, available at https://www.pjm.com/-/media/documents/manuals/m14c.ashx.

which, although not called an ICSA, reflects no less a financial commitment and no less reliance on the Commission's rules as they found them at the time they invested millions of dollars. The Commission gives no explanation for why it chose to recognize only an executed ICSA (or one filed unexecuted), when an Interim ISA constitutes evidence of the project's investment decision that is every bit as reliable.

Accordingly, the Clean Energy Associations respectfully request that the Commission grant rehearing to amend the eligibility requirements for the RPS Exemption, as requested herein.[205]

b. Application of Competitive Exemption

In establishing the Competitive Exemption, the Commission held that if a resource initially claims the Competitive Exemption by choosing to forego the State Subsidy, but then subsequently claims the State Subsidy, "that resource may not participate in the capacity market from that point forward for a period of years equal to the applicable asset life that PJM used to set the default offer floor in the auction that the new asset first cleared."[206] While the Commission's rationale for putting forth this rule is to prevent "gaming" opportunities, the Commission's proposed rule is unduly punitive and not proportional to the alleged harm caused.

If a resource owner were to certify that it would forego all State Subsidies at the beginning of a project's life in order to avail itself of the Competitive Exemption, subsequent changes in the market may lead a company to avail itself of a State Subsidy at some point during an asset's useful life, which could be several decades. At such point, the Commission's proposal to impose a "death penalty" and prevent that resource from participating in the capacity market

[205] While the Clean Energy Associations are only proposing to expand the eligibility for utilizing the RPS Exemption, they would not object to a similar adjustment to the eligibility criteria for the Self Supply Exemption and Demand Response, Energy Efficiency, and Capacity Storage Resources Exemption.
[206] *See* Order at P 162.

for the remainder of its useful life has not been justified as being proportional to the alleged harm caused. This would be particularly true for a resource that has already been built and is in operation for several years, and that had already incurred all fixed capital costs and been built without receiving any State Subsidy. Accordingly, this aspect of the Commission's proposed application of the Competitive Exemption is unduly punitive and disproportional to the alleged harm caused, and accordingly should be revised by the Commission. [207]

D. Rehearing Requests Should Be Addressed Before Fashioning a Replacement Rate

By failing to directly address petitions for rehearing – despite reviewing and affirming conclusions from the June 2018 Order – the Order unreasonably denies parties to this proceeding finality and the ability to seek judicial review. Numerous parties, including the Clean Energy Industries, timely sought rehearing of the June 2018 Order.[208] Having waited 18 months to issue a subsequent rehearing order on the merits,[209] the Commission now studiously avoids any *direct* mention of these rehearing petitions in the December 2019 Order. However, in the Order the Commission elected to not just apply the June 2018 Order, but to specifically re-affirm its conclusions;[210] moreover, the June 2018 Order (issued from Calpine's complaint in Docket No.

[207] *See, e.g.*, *Gulf Power Co*, 983 F.2d at 1099–101 (holding that FERC "failed to examine possible alternative sanctions that would have a produced a result more proportional to Gulf's violation"); *Guidance on Reliability Notices on Penalty N. Am. Elec. Reliability Corp.*, 129 FERC ¶ 61,069, at P 9 ("We continue to believe that the record in a Notice of Penalty should be proportional to the complexity and relative importance of the violations it addresses."), *modified*, 130 FERC ¶ 61,155 (2010).

[208] *See* Request for Rehearing of the Clean Energy Associations, Docket Nos. EL16-49-001, EL18-178-001, ER18-1314-002 (Jul. 30, 2018).

[209] The Commission issued a tolling order 30 days after rehearing petitions were submitted. *See* Order Granting Rehearing for Further Consideration, Docket Nos. EL16-49-001, EL18-178-001, ER18-1314-002 (Aug. 29, 2018).

[210] *See, e.g.*, Order at P 5 ("We affirm our initial finding that '[a]n expanded MOPR with few or no exceptions, should protect PJM's capacity market from the price-suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price.'" (quoting June 2018 Order)); *id.* at P 32 ("In the June 2018 Order, the Commission preliminarily found that PJM should expand the MOPR to cover out-of-market support to all new and existing resources, regardless of the resource type, with few or no exceptions. *We reaffirm that finding.*" (emphasis added)); *id.* at P 72 ("Consistent with Commission precedent, the June 2018 Order is premised on the finding that, as a general matter, resources receiving out-of-market support are capable of suppressing market prices. *We continue to uphold that finding here*." (emphasis added)).

EL16-49) has been consolidated with the paper hearing (Docket No. EL18-178) upon which the Commission acted in the Order. In short, the Commission attempts to have it both ways by selectively upholding determinations from the June 2018 Order, while dodging issuance of a formal rehearing order – which prevents parties from being able to seek judicial review. The Order demonstrates that the Commission is actively moving forward with the underlying proceeding, rendering its failure to act on rehearing requests unreasonable.

This procedural shuffle harms both the Commission's authority to issue the Order, as well as participants in the underlying dockets, including the Clean Energy Associations. Although the Commission has "'broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures,'… [it] abuses that discretion … when its manner of proceeding significantly prejudices a party or unreasonably delays a resolution."[211] The Clean Energy Associations submit that the Commission's delay in this instance is improper, and may expose the Order to judicial intervention. Additionally, as in other recent cases, "the Commission's … continued inaction on rehearing—the non-finality of the [June 2018] Order—jurisdictionally locked [parties] out of federal court."[212] The Commission should therefore issue a rehearing order for the June 2018 Order, and should avoid finalizing any obligation imposed on PJM in this proceeding until parties receive a final decision on the petitions for rehearing of the June 2018 Order.

[211] *La. Pub. Serv. Comm'n*, 482 F.3d at 520–21 (citing *Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.,* 498 U.S. 211, 230 (1991); *GTE Serv. Corp. v. Fed. Commc'ns Comm'n*, 782 F.2d 263, 274 (D.C. Cir. 1986)). *See also Telecomms. Research & Action Ctr. v. Fed. Commc'ns Comm'n*, 750 F.2d 70, 79 (D.C. Cir. 1984) (describing a 6-factor test to determine when agency delay is sufficiently unreasonable to warrant issuance of a writ of mandamus).

[212] *Allegheny Def. Project v. Fed. Energy Regulatory Comm'n*, 932 F.3d 940, 949 (D.C. Cir. 2019) (Millett, J., concurring), *vacated*, 943 F.3d 496 (D.C. Cir. 2019).

III. REQUEST FOR CLARIFICATION

A. The Commission Should Clarify that the MOPR Does Not Apply to Certain Voluntary RECs

The Clean Energy Associations request clarification that the Commission did not intend to subject voluntary RECs that can be identified as voluntary RECs by Market Sellers prior to submitting offers into an applicable capacity market auction as being considered State Subsidies, and therefore subject to the MOPR.

As noted by PJM, voluntary RECs are RECs that are sold "to a purchaser that is not required by a state program to purchase the REC, and that purchaser does not receive any state financial inducement or credit for the purchase of the REC."[213] Accordingly, voluntary RECs do not meet the Order's definition of State Subsidy, which as a threshold matter must be "[a] direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is (1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law."[214]

Moreover, as the Order correctly notes, PJM "believes that voluntary REC purchases are distinguishable from . . . REC purchases made to show compliance with state RPS program mandates."[215] While there was a disagreement between PJM and several intervenors over whether it was correct to assume that RECs sold to intermediaries should be presumed to be for RPS compliance purposes and subject to the MOPR,[216] neither PJM, nor any other party submitting comments in the Paper Hearing, proposed subjecting voluntary RECs to the MOPR

[213] *See* PJM Initial Submission at 21.
[214] *See* Order at P 67.
[215] *See* Order at P 163 (citing PJM Initial Submission at 24–25).
[216] *See, e.g.*, PJM Initial Submission at 23 n.39 (proposing to presume that RECs sold to an intermediary should be subject to the MOPR); Clean Energy Industries Reply Comments at 7–14 (Nov. 6, 2018) (opposing PJM's proposal).

provided that a Market Seller could identify the REC as being voluntary in nature at the time of a capacity market auction qualification process. Notwithstanding the foregoing, the Order concluded that "[a]s to voluntary REC arrangements . . . we agree with intervenors that it is not possible, at this time, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs because resources typically do not know at the time of the auction qualification process how the REC will be eventually used."[217] However, as acknowledged by PJM, and not refuted by any party during the Paper Hearing, Market Sellers *often can* distinguish between voluntary and compliance RECs at the time of the auction qualification process, although admittedly *may not always* be able to do so.

Given the foregoing, the Clean Energy Associations request clarification that the Commission did not intend to consider voluntary RECs State Subsidies, and therefore be subject to the MOPR, if a Market Seller can identify a REC as being voluntary at the time of an applicable capacity auction qualification process. In the alternative, should the Commission not clarify this issue, the Clean Energy Associations seek rehearing on this issue, as there is no evidence presented by any party in the record suggesting that Market Sellers cannot identify RECs as being voluntary in some instances, and the Commission cites no authority to support its conclusion "that it is not possible, at this time, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs." Furthermore, subjecting voluntary RECs to the MOPR would exceed the Commission's authority under the FPA, and its own logic under the Order, as voluntary RECs do not even meet the Commission's definition of State Subsidy.

[217] *See* Order at P 176.

B. The Commission Should Clarify that It Does Not Consider a Property Tax Abatement to Be a State Subsidy

The Commission should clarify that any state, county or local property tax relief does not constitute a State Subsidy. Such an exclusion would align with the Order, which has already accepted MOPR exclusions for "payments (including payments in lieu of taxes), concessions, rebates, subsidies, or incentives designed to incent, or participation in a program, contract or other arrangement that utilizes criteria designed to incent or promote, general industrial development in an area" and "payments concessions, rebates, subsidies or incentives designed to incent, or participation in a program, contract or other arrangements from a county or other local government authority using eligibility or selection criteria designed to incent, siting facilities in that county or locality rather than another county or locality."[218]

Property tax relief is intended to incent developers to locate their projects in a particular place, be it anywhere in the state, or possibly only if within a much smaller region such as a city or county. The abatement has nothing to do with the capacity market. For instance, Virginia offers tax abatement for certain pollution control equipment, which is defined to include equipment used to grind wood and vegetation for reuse, as well as solar energy equipment.[219] Hence, just as the Order determined that general industrial development and local siting support exclusions are not directed at or tethered to participation in the wholesale capacity market, other state or local tax relief likewise should not be considered as being directed at or tethered to participation in the wholesale capacity market. Accordingly, Clean Energy Associations respectfully request that the Commission clarify that a state, county or local agency tax

[218] Order at PP 78, 83.
[219] *See* VA CODE ANN. § 58.1-3660.B.

abatement does not constitute a State Subsidy.[220] In the alternative, Clean Energy Associations seek rehearing on this issue, as subjecting state or local property taxes to the MOPR would clearly exceed the Commission's jurisdiction for same reasons previously specified and applicable to uses of local land.[221]

[220] There should be little doubt that most every existing generation plant on the grid today has received some sort of tax relief. Indeed, oftentimes, as with a payments in lieu of taxes the relief was only to that particular plant.
[221] *See* Section II.A.3, *supra*; *Elec. Power Supply Ass'n*, 136 S. Ct. at 774.

IV. CONCLUSION

For the foregoing reasons, the Clean Energy Associations respectfully request rehearing and clarification of the Order.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served this day upon each person designated on the official service list compiled by the Secretary in these dockets.

Dated at Washington, DC this 21st day of January 2020.

/s/ Gabe Tabak

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