UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, *et al.*	Docket Nos. EL16-49-000
v.	
PJM Interconnection, L.L.C.	
PJM Interconnection, L.L.C.	ER18-1314-000 ER18-1314-001
PJM Interconnection, L.L.C.	EL18-178-000 (Consolidated)

REQUEST FOR REHEARING OF THE AMERICAN PUBLIC POWER ASSOCIATION, AMERICAN MUNICIPAL POWER, INC., AND PUBLIC POWER ASSOCIATION OF NEW JERSEY

Pursuant to section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[2] the American Public Power Association ("APPA"), American Municipal Power, Inc. ("AMP"), and the Public Power Association of New Jersey ("PPANJ") hereby request rehearing of the Commission's June 29, 2018 order in the above-captioned dockets.[3]

I. INTRODUCTION

In the June 29 Order, the Commission rejects two alternate proposals filed by PJM Interconnection, L.L.C. ("PJM") to amend the provisions of the PJM Open Access Transmission Tariff ("Tariff") governing PJM's mandatory forward capacity construct, the Reliability Pricing Model ("RPM").[4] PJM's mutually exclusive proposals – "Capacity Repricing" and "MOPR-Ex"

[1] 16 U.S.C. § 825*l*.

[2] 18 C.F.R. § 385.713 (2018).

[3] *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) ("June 29 Order").

[4] *Id.* at P 7.

– were "designed to address the price suppressing effects of state out-of-market support for certain resources."[5]

Having rejected PJM's Capacity Repricing and MOPR-Ex proposals, the Commission finds, pursuant to section 206 of the FPA,[6] that PJM's Tariff, and, in particular, its Minimum Offer Price Rule ("MOPR"), is unjust and unreasonable and unduly discriminatory.[7] The Commission summarizes the basis for its FPA section 206 finding as follows:

> [The Tariff] fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources, regardless of the generation type or quantity of the resources supported by such out-of-market support. The resulting price distortions compromise the capacity market's integrity. In addition, these price distortions create significant uncertainty, which may further compromise the market, because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies. Ultimately, these problems with PJM's existing Tariff result in unjust and unreasonable rates, terms, and conditions of service.[8]

The June 29 Order establishes expedited paper hearing proceedings to investigate a replacement rate under FPA section 206,[9] with the Commission making a preliminary finding "that modifying two aspects of the PJM Tariff may produce a just and reasonable rate."[10] Specifically, the Commission suggests that an expanded MOPR covering "out-of-market support

[5] *Id.* at P 4 (footnote omitted).

[6] 16 U.S.C. § 824e.

[7] *See* June 29 Order at PP 149-50, 157.

[8] *Id.* at P 150.

[9] *Id.* at P 157.

[10] *Id.*

to all new and existing resources, regardless of resource type,"[11] coupled with adoption of a resource-specific version of PJM's existing Fixed Resource Requirement ("FRR") may produce a just and reasonable replacement rate.[12]

APPA, AMP, and PPANJ have long expressed fundamental concerns with features of RPM, and mandatory capacity markets in general. APPA has been particularly critical of the MOPR component of mandatory capacity markets, and its detrimental effects on new public power self-supply resources and new resources developed to achieve state policy goals. APPA, AMP, and PPANJ agree, therefore, that the time is ripe to revisit RPM in a comprehensive manner. Indeed, in their filings in Docket No. ER18-1314, APPA and AMP urged the Commission to reject PJM's proposals, arguing that PJM should seek to reform its resource adequacy construct to encourage more stable forms of procurement via bilateral contracting and ownership of resources by states, utilities and large customers.[13] APPA argued that PJM stakeholders should be encouraged to develop true market reforms that would create a viable residual capacity market without mandatory capacity market restrictions. Accordingly, APPA, AMP, and PPANJ do not challenge the Commission's rejection of PJM's Capacity Repricing and MOPR-Ex proposals.

The Commission's finding under FPA section 206 that PJM's Tariff is unjust and unreasonable because the existing MOPR is too *narrow*, however, is unreasonable and unsupported, and has the potential to make the already-flawed PJM capacity construct

[11] *Id.* at P 158.

[12] *See id.* at PP 158-60.

[13] *See PJM Interconnection, L.L.C.*, Docket No. ER18-1314-000, Motion to Intervene and Protest of the American Public Power Association (May 7, 2018) ("APPA Protest"); *PJM Interconnection, L.L.C.*, Docket No. ER18-1314-000, Comments of American Municipal Power, Inc. on PJM Interconnection L.L.C.'s Capacity Repricing or in the Alternative MOPR-Ex Proposal (May 7, 2018).

significantly worse. An expanded MOPR could raise capacity prices in exchange for uncertain benefits, heighten the risk of excess capacity, increase complexity, and interfere with the pursuit of state policy goals.[14] While the RPM framework may have substantial deficiencies, a MOPR with insufficient reach is not among them.

The June 29 Order indicates that adoption of a blanket MOPR applicable to all new and existing resources receiving state out-of-market support is necessary to render the PJM capacity construct rules just and reasonable.[15] This sweeping expansion of the MOPR is not supported by reasoned analysis; the Commission neither substantiates the factual assertions underlying its ruling, nor adequately explains why expansion of the MOPR as suggested in the June 29 Order would be a reasonable response to the growth in state support for new and existing generation. The Commission does not quantify the key assertion that certain state support programs within the PJM footprint "allow resources to suppress capacity market clearing prices,"[16] nor does the Commission reconcile the claimed need to expand the MOPR with the undisputed fact that PJM currently has a significant reserve surplus, which will continue at least through the 2021/22 Delivery Year.

APPA, AMP, and PPANJ acknowledge and appreciate the Commission's suggestion in the June 29 Order that public power self-supply could properly be exempted from the expanded MOPR contemplated by the Commission.[17] An exemption for public power self-supply

[14] *See, e.g.*, APPA Protest at 3-5.

[15] Notably, the Commission has not made any conclusive finding that *any* particular exceptions would be required as part of a just and reasonable MOPR framework.

[16] June 29 Order at P 149; *see also id.* at P 5 (finding "that it has become necessary to address the price suppressive impact of resources receiving out-of-market support"); *see also id.* at PP 2, 5, 154, 155, 158.

[17] *See id.* at P 167 (requesting comment on whether "an exemption [should] be included for self-supplied resources used to meet loads of public power entities").

resources might feasibly mitigate some of the most significant concerns for public power that APPA, AMP, and PPANJ have raised with respect to a mandatory capacity construct in PJM. APPA, AMP, and PPANJ intend to participate in the paper hearing process to address this and other questions raised by the June 29 Order.

APPA, AMP, and PPANJ also recognize that the Commission made a preliminary finding 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."[18] Under this option, individual resources, and an associated portion of load, would not participate in the capacity market. The Commission also indicated that participants in the paper hearing would have the opportunity to present other replacement rate proposals.[19] APPA, in coordination with its members in PJM, AMP, and PPANJ intend to address the FRR Alternative and other potential replacement rate proposals in the paper hearing.

It is possible that the paper hearing ultimately could result in a workable resource adequacy construct for PJM. But as things now stand, the Commission has made a specific finding under FPA section 206 that PJM's Tariff is unjust and unreasonable because the MOPR is too limited in scope, while offering only the uncertain possibility that a replacement rate to be litigated in a highly-expedited paper hearing might reasonably accommodate public power self-supply resources and/or facilities receiving state support.

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[18] *Id.* at P 160. The June 29 Order also asks whether, if public power self-supply resources are not granted a MOPR exemption, such resources should "have the option to use the resource-specific FRR Alternative?" *Id.* at P 167.

[19] *Id.* at P 172 (stating that "the Commission is initiating a paper hearing to address the just and reasonable replacement rate for PJM's existing MOPR, *including the proposal identified above or any other proposal that may be presented*." (emphasis added)).

The Commission, therefore, should grant rehearing of its finding that PJM's RPM Tariff provisions are unjust and unreasonable because the existing MOPR is insufficient to address the alleged price-suppressive effects of state out-of-market support mechanisms. The Commission could instead pursue an approach similar to that suggested by Commissioner LaFleur in her dissent from the June 29 Order, *i.e.*, rejection of PJM's Capacity Repricing and MOPR-Ex proposals, accompanied by preliminary findings and targeted guidance to stakeholders concerning reforms to PJM's resource adequacy construct, including, potentially, directing consideration of an expanded FRR construct or other alternative frameworks that would appropriately accommodate self-supply and state-supported resources.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

In accordance with Rule 713(c)(2),[20] APPA, AMP, and PPANJ provide the following enumerated statement of issues, including citations to representative Commission and court precedent on which they rely:

1. The Commission erred in finding that the PJM Tariff is unjust and unreasonable and unduly discriminatory because it does not protect the PJM capacity market from the price-suppressive impacts of state out-of-market support for certain generating resources that are not subject to the existing PJM MOPR.

2. In concluding that the PJM Tariff is unjust and unreasonable and unduly discriminatory because it does not protect the PJM capacity market from the price-suppressive impacts of state out-of-market support for certain generating resources, the Commission failed to comply with the requirements of section 206 of the FPA, as it did not provide a conclusive

[20] 18 C.F.R. § 385.713(c)(2) (2018).

finding as to which "out-of-market" support mechanisms beyond the MOPR's current reach render the PJM Tariff unjust and unreasonable.[21]

3. The Commission's conclusion that the PJM Tariff is unjust and unreasonable and unduly discriminatory because it does not protect the PJM capacity market from the price-suppressive impacts of state out-of-market support for certain generating resources was arbitrary and capricious and not based on substantial evidence.[22]

4. The Commission did not provide a reasoned explanation for its suggestion that the PJM Tariff is unduly discriminatory because it does not protect the PJM capacity market from the price-suppressive impacts of state out-of-market support for certain generating resources.[23]

5. The Commission's conclusion that the PJM Tariff is unjust and unreasonable and unduly discriminatory because it does not protect the "integrity of competition" in the PJM capacity market from the price-suppressive impacts of state out-of-market support for certain generating resources arbitrarily and capriciously failed to address a number of important considerations, including the risk of over-mitigation, the reasonable reliance interests of sponsors and investors in existing resources, and the risk of unreasonable price increases in constrained Load Deliverability Areas ("LDAs").[24]

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[21] *See, e.g., Emera Maine v. FERC*, 854 F.3d 9 (D.C. Cir. 2017).

[22] 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018); *Emera Maine v. FERC*, 854 F.3d 662 (D.C. Cir. 2017); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014).

[23] *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *City of Vernon v. FERC*, 845 F.2d 1042 (D.C. Cir. 1988).

[24] *See, e.g.*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Motor Vehicle Manufacturer's Ass'n*, 463 U.S. 29; *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014); *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053 (D.C. Cir. 2003); *Canadian Ass'n of Petrol. Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001); *KN Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992); *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158 (D.C. Cir. 1990); *Union Elec. Co. v. FERC*, 890 F.2d 1193 (D.C. Cir. 1989); *ISO New England Inc.*, 158 FERC ¶ 61,138 (2017), *pet. for review pending*, D.C. Cir. No. 17-1110; *ISO New England Inc.*, 145 FERC ¶ 61,095 (2013).

6. The Commission erred in requiring participants to address fundamental and complex changes to the PJM capacity market – including changes for which participants had no prior notice – in a 90-day paper hearing process.[25]

III. REQUEST FOR REHEARING

A. The Commission's Ruling Does Not Comply with FPA Section 206

To modify an existing rate under FPA section 206, the Commission is required to engage in a two-step process. First, the Commission must find that the existing rate is unlawful, *i.e.*, "unjust, unreasonable, unduly discriminatory or preferential."[26] This initial finding is a "condition precedent"[27] to step two, establishing a just and reasonable rate "to be thereafter observed."[28]

The Commission finds in the June 29 Order that the existing PJM Tariff is unjust and unreasonable under FPA section 206. The Commission's finding is based on the conclusion that the current MOPR "fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support" for certain allegedly "uneconomic" resources.[29] At the core of the Commission's FPA section 206 finding, therefore, is the conclusion that state "out-of-market" support that is not addressed by the existing MOPR is ultimately causing rates in the PJM capacity market to be unjust and unreasonable.[30] The Commission, however, does not provide a conclusive finding as to which

[25] *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[26] 16 U.S.C. § 824e(a); *see also Emera Maine*, 854 F.3d at 22-27.

[27] *Emera Maine*, 854 F.3d at 24.

[28] 16 U.S.C. § 824e(a); *see also Emera Maine*, 854 F.3d at 22-27.

[29] June 29 Order at P 150.

[30] *See id.* at P 149.

"out-of-market" support mechanisms beyond the MOPR's current reach render the PJM Tariff unjust and unreasonable. The Commission points to state Zero Emission Credit ("ZEC") and Renewable Portfolio Standard ("RPS") programs as examples of out-of-market payments that provide the basis for its determination.[31] The Commission also states that the PJM Tariff is rendered unjust and unreasonable by "out-of-market revenue that a state either provides, or requires to be provided, to a supplier that participates in the PJM wholesale capacity market."[32]

The Commission, however, specifically identifies "[t]he appropriate scope of out-of-market support to be mitigated by the expanded MOPR" as one of the matters to be addressed in the paper hearing to investigate a replacement rate under FPA section 206.[33] The Commission has, in effect, found that the MOPR is unjust and unreasonable because it has insufficient scope, while at the same time setting for hearing what the scope of the MOPR should be. Under FPA section 206, however, the Commission "bore the burden of making an explicit finding that the existing [rate] was unlawful before it was authorized to set a new lawful [rate]."[34] In finding under FPA section 206 "step one" that the PJM Tariff is unjust and unreasonable based on the existence of out-of-market support payments that the Commission only proposes to conclusively define under "step two," the Commission has failed to comply with the rate-changing requirements of the FPA.[35]

[31] *Id.* at P 1 n.1.

[32] *Id.*

[33] *Id.* at P 165; *see also id.* at P 1 n.1, P 167.

[34] *Emera Maine v. FERC*, 854 F.3d at 26.

[35] *See id.* at 24-27.

B. The Commission's Finding that the PJM Tariff is Unjust and Unreasonable and Unduly Discriminatory Because the MOPR is Too Narrow Is Arbitrary and Capricious and Is Not Supported by Substantial Evidence

As the D.C. Circuit has observed, "[i]t is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently."[36] The June 29 Order does not include a reasoned explanation for its departure from its past rulings that restricted application of the MOPR to new, natural gas-fired resources. While the Commission asserts that changed circumstances warrant expansion of the MOPR to non-gas-fired resources and existing plants,[37] its conclusions are not the product of reasoned decision-making. The allegedly changed circumstances cited by the Commission are not adequately substantiated, and, in any event do not support the conclusion that the scope of the existing MOPR is unjust and unreasonable because it does not apply to existing and non-gas-fired resources.[38]

1. The Commission Does Not Provide a Reasoned Explanation for Its Conclusion That Out-of-Market Payments Render the Existing PJM Tariff Unjust and Unreasonable

The Commission contends that, during the last several years, "[t]he amount and type of generation resources receiving . . . out-of-market support has increased substantially."[39] The Commission points, in particular, to "laws passed in a number of PJM states that provide or require out-of-market support for nuclear, solar, and wind resources."[40] According to the

[36] *West Deptford Energy, LLC*, 766 F.3d at 20 (internal quotes, alterations and citations omitted).

[37] June 29 Order at PP 32, 153, 155.

[38] *See, e.g.*, *New England Power Generators Ass'n*, 881 F.3d at 211 (observing that "[a]lthough case-by-case adjudication sometimes results in decisions that seem at odds but can be distinguished on their facts, it is the agency's decision to provide a reasoned explanation of why those facts matter.").

[39] June 29 Order at P 1.

[40] *Id.* at P 151.

Commission, "[t]hese subsidies allow resources to suppress capacity market clearing prices, rendering the rate unjust and unreasonable."[41]

While the Commission cites the alleged growth of "out-of-market" support provided or required by states in PJM as the basis for its finding, the Commission does not offer a reasoned explanation for its conclusion that the identified state programs, such as ZECs and RPS, now render the PJM Tariff unjust and unreasonable and allegedly necessitate expansion of the MOPR. As Commissioner Glick observed in his dissent, "[g]overnment subsidies pervade the energy markets and have for more than a century."[42] The Commission does not articulate a clear rationale or governing principle for why the programs referenced in the June 29 Order – as opposed to any other type of "out-of-market" support that benefits existing generation resources – should subject the supported resources to expanded price mitigation and the associated risk that affected customers will be required to pay twice for capacity.[43] Indeed, as discussed above, the Commission does not even clearly define the categories of "out-of-market" support that the Commission believes cause the Tariff to be unjust and unreasonable. In his dissent, Commissioner Glick aptly observed that even if the Commission "has to draw the line somewhere,"[44] in identifying out-of-market support that should be subject to the MOPR, "that line cannot be arbitrary and capricious."[45]

In this regard, the MOPR should not be applied at all to state "subsidies" in the absence

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[41] *Id.* at P 149.

[42] *Id.*, Comm'r Glick Dissent at p. 6; *see also id.* at pp. 7-8 (discussing the potential breadth of the "subsidy" concept in this context).

[43] The Commission seeks to sidestep this issue by asserting in a footnote that "we cannot, and need not, address at this time all of the possible ways a state might provide out-of-market support for its preferred generation resources." *Id.* at P 1 n.1.

[44] *Id.*, Comm'r Glick Dissent at p. 9 (quotes in original).

[45] *Id.*

of a demonstration of intent and ability to exercise market power to suppress capacity prices. It should not be the role of the Commission to adjust the bids of resources that may be the beneficiaries of state out-of-market support so as to raise prices for the benefit of merchant generation.[46]

The Commission also failed to quantify the out-of-market support's impact on capacity prices that allegedly now renders the Tariff unjust and unreasonable. Again, government support for electric generation in one form or another has been a feature of the industry for years. Until now, however, the Commission has not deemed state "out-of-market" support for certain resources to be grounds for extending the MOPR beyond the new, gas-fired resources to which the MOPR has been limited, consistent with the original purpose of the MOPR to mitigate the exercise of buyer-side market power.[47] The Commission does not provide a reasoned explanation as to why the current, or even expected, level of such state support renders the rates produced by RPM unjust and unreasonable.

The Commission characterizes state programs as providing "meaningful" support to certain resources,[48] and asserts that the PJM Tariff "allows resources receiving out-of-market support to significantly affect capacity prices."[49] The Commission, however, "does not point to any evidence about the size of this potential [capacity price] reduction or why a reduction of that size – as opposed to some other level – is sufficient to render the Tariff unjust and unreasonable."[50]

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[46] *See, e.g.*, APPA Protest at 9-11.

[47] *See* June 29 Order at PP 5, 155.

[48] *Id.* at P 149.

[49] *Id.* at P 156; *see also id.* at PP 151-52.

[50] *Id.*, Comm'r Glick Dissent at p. 11.

In seeking to substantiate the assertion that out-of-market support may significantly affect capacity prices, the Commission relies almost exclusively on the affidavit of Dr. Anthony Giacomoni submitted with PJM's application in Docket No. ER18-1314.[51] But the figures that the Commission cites from Dr. Giacomoni's affidavit merely show the rough level of certain state subsidies on a MW-day basis.[52] Speculation that support at the levels identified by Dr. Giacomoni may allow high-cost resources to bid into the market as price-takers,[53] however, does not establish how state out-of-market support programs are impacting RPM clearing prices or provide a sufficient basis for concluding that these programs now render the PJM Tariff unjust and unreasonable unless mitigated.[54]

The Commission, in fact, never quantifies its key assertion that state out-of-market payments in PJM "allow resources to suppress capacity market clearing prices."[55] Other than the figures calculated by Dr. Giacomoni, the June 29 Order does not point to any quantitative evidence concerning the relationship between the state programs cited in the Order and the RPM clearing prices. The Commission's concerns regarding "the price suppressive impact of resources receiving out-of-market support"[56] appear to be based entirely on theory. The Commission, to be sure, is entitled to rely on economic theory as the basis for action "at least in

[51] *See id.* at PP 151-52.

[52] *See id.*, Comm'r Glick Dissent at 11 (observing that "[d]ividing the size of a subsidy by the number of MW-days is arithmetic, not evidence that the subsidy is rendering PJM's Tariff unjust and unreasonable.").

[53] *Id.* at P 151.

[54] *Id.*, Comm'r Glick Dissent at p. 11 (observing that "the Commission enumerates several subsidies provided by states in PJM without meaningfully linking the existence of those programs to the claim that PJM's capacity market may not result in just and reasonable rates.").

[55] *Id.* at P 149; *see also id.* at P 5 (finding "that it has become necessary to address the price suppressive impact of resources receiving out-of-market support"); *see also id.* at PP 2, 5, 154, 155, 158.

[56] *Id.* at P 5.

circumstances where it would be difficult or even impossible to marshal empirical evidence."[57] Here, however, it is difficult to see why the Commission could not endeavor to develop a more granular empirical record of the relationship between "out-of-market" support and capacity auction results before declaring that such support renders the PJM Tariff unjust and unreasonable absent a significantly expanded MOPR. This is not a situation where the Commission is being asked "to conduct experiments in order to rely on the prediction that an unsupported stone will fall."[58] Rather, the Commission is required to more clearly define the relationship between state out-of-market support and capacity auction outcomes before imposing a MOPR on resources receiving such support.

Even accepting that state programs, as a general matter, would allow existing resources to bid into RPM auctions at prices lower than they might otherwise bid in the absence of state support, any downward pressure on clearing prices is appropriate and to be expected when there is sufficient supply. Rather than demonstrating a lack of "market integrity," lower prices send a proper price signal that new supply is not needed.[59]

Finally, from a broader perspective, there was no showing that state public policies are resulting in capacity prices that fail to incentivize an adequate supply of capacity resources, which, the Commission has said, is the fundamental purpose of the PJM capacity construct.[60] Not only is there no shortfall in needed capacity, but the amount of capacity procured through

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[57] *Emera Maine*, 854 F.3d at 671 (quoting *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) (internal quotes omitted); *see also* June 29 Order, Comm'r Glick Dissent at p. 10.

[58] *Emera Maine,* 854 F.3d at 671-72 (internal quotes and citations omitted).

[59] *See, e.g.*, APPA Protest at 7.

[60] *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157 at P 28 (2016), *aff'd*, *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017) (noting that "the PJM capacity market's fundamental purpose [is] to help ensure reliability through resource adequacy"); *see also id.* at PP 32, 112.

the Base Residual Auctions ("BRAs") has been, and is expected to remain, significantly above the reserve margin through at least 2020.[61] As discussed above, APPA, AMP, and PPANJ do not believe mandatory capacity constructs like RPM are a satisfactory mechanism for ensuring long-term resource adequacy in a manner that adequately accounts for the resource and policy preferences of affected states, load serving entities ("LSEs"), and consumers. The record in this proceeding, however, does not demonstrate a need to mitigate resources receiving state supports to promote resource adequacy, and such expansion of the MOPR could significantly increase the level of Commission interference in the policy choices of the states.[62]

2. The Commission Does Not Provide a Reasoned Explanation for Disregarding Its Prior Positions that Existing and Non-Gas-Fired Resources Should Not be Subject to the MOPR

Asserting that "circumstances in PJM have changed,"[63] the Commission now disavows its previous position that there is no basis to apply the MOPR to existing resources because "a competitive offer for an existing resource would typically be very low, and often close to zero – *regardless of whether the resource receives any out-of-market payments*."[64] The allegedly changed circumstances cited by the Commission, however, do not support a conclusion that a change to the PJM Tariff is justified, and, therefore, the Commission fails to provide a reasoned explanation for dismissing its previous view.[65]

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[61] *See* APPA Protest at 7-8. Citing data from the 2017 State of the Market Report for PJM, APPA noted that the amount of capacity procured through the BRAs exceeded the reserve margin by 8,209 megawatts ("MW"), or 5.9 percent of peak load, by June 1, 2016; 10,522 MW, or 7.5 percent, on June 1, 2017; and is expected to be 17,590 MW, or 12.6 percent, by June 1 of 2018; 12,962, or 9.1 percent, by 2019; and 10,338, or 7.3 percent, in 2020.

[62] *See, e.g.,* June 29 Order, Comm'r Glick Dissent at pp. 2-9.

[63] *Id.* at P 153.

[64] *Id.* (quoting *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 132 (2011) (internal quotes omitted) (emphasis added)).

[65] *West Deptford Energy, LLC*, 766 F.3d at 20 (observing that "[i]t is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently")

The Commission argues that applying the MOPR to existing resources is supported by the fact that "many of the programs of current concern in PJM's filing, such as the ZEC program payments, apply only to resources that would not have been subject to PJM's current MOPR, even if they had been new."[66] This assertion, while true, does not rebut the Commission's prior economic rationale that a competitive offer from an existing resource would typically be very low regardless of any subsidies because, once a resource is built, the construction expenses are sunk costs, and "[a]t that point, the incremental costs of taking on a capacity obligation become much smaller, often approximating zero."[67]

The Commission also contends, however, that out-of-market support "increases the ability of even uncompetitive existing resources, for whom a competitive offer would be significantly higher than zero, to submit offers into the PJM capacity market that do not reflect their actual costs."[68] The Commission points, in particular, to "older resources that need to incur significant maintenance or refurbishment expenses to remain operational."[69] But it is not the purpose of the MOPR to adjust every resource's bid to match their exact costs. In a competitive market, resources may bid at a market rate rather than a cost-based rate.

The Commission should also reconsider its rationale that the MOPR should be extended beyond gas-fired resources because "they are not the only resources likely or able to suppress capacity prices."[70] The Commission's reasoning is undermined by its assumptions that state out-

(internal quotes, alterations and citations omitted)).

[66] June 29 Order at P 153.

[67] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145 at P 132.

[68] June 29 Order at P 153.

[69] *Id.*; *see also id.* at P 154.

[70] *Id.* at P 155.

of-market-support programs "suppress" prices by allowing "uneconomic" resources to make offers that are not truly "competitive."[71] The Commission suggests that resources can only be considered "economic" if they clear the market without subsidies. But by paying such resources a capacity price that does not reflect the actual amount of capacity in the market, such "economic resources" are also effectively receiving a price support from PJM.[72]

Further, impeding state policy goals by focusing on an overly-narrow conceptualization of a "competitive" offer can raise costs in the long-run if such policy goals are not met. PJM itself expressed concerns in its March 2017 paper, "PJM's Evolving Resource Mix and System Reliability," and in its recent proposal on "Valuing Fuel Security," that "heavy reliance on one resource type, such as a resource portfolio composed of 86 percent natural gas-fired resources, however, raises questions about electric system resilience."[73] Were PJM to obtain future Commission approval for the creation and pricing of locational fuel security constraints in the capacity auctions, then the absence of fuel diversity as a policy consideration in the present will itself create additional costs in the long-run.[74]

3. The Commission Does Not Explain Its Assertion that the PJM Tariff is Unduly Discriminatory

The Commission concludes in the June 29 Order "that PJM's existing Tariff is unjust and unreasonable and *unduly discriminatory*"[75] under section 206 of the FPA. The portion of the order in which the Commission describes the basis for its section 206 finding, however, does not

[71] *See id.* at PP 153-54.

[72] *See* APPA Protest at 9.

[73] PJM's Evolving Resource Mix and System Reliability, PJM Interconnection LLC (March 30, 2017) at 5.

[74] *See* APPA Protest at 8.

[75] June 29 Order at P 150 (emphasis added); *see also id.* at P 156.

contain any discussion of why a MOPR that does not extend to existing and non-gas-fired resources that receive out-of-market support should be deemed unduly discriminatory. The Commission's finding of undue discrimination, therefore, was arbitrary and capricious.[76]

To the extent the Commission's finding of undue discrimination is based on its analysis of PJM's Capacity Repricing proposal,[77] the June 29 Order does not reflect reasoned decision-making. The Commission's finding of undue discrimination as to Capacity Repricing was based, at least in part, on features specific to the Capacity Repricing proposal, and the Commission did not explain how this finding of undue discrimination could apply in a different factual context.[78]

If the Commission means to suggest, as a general proposition, that failing to apply a MOPR to resources that receive of out-of-market support "unduly discriminates against competitive resources"[79] in PJM, the June 29 Order is in error. In paragraph 68 of the June 29 Order, the Commission cites a number of cases for the principle that undue discrimination can occur "when a seller charges the same rate to differently-situated customers,"[80] such as when "the costs of providing service to one group are different from the costs of serving the other."[81] The cases cited by the Commission, which generally stand for the idea that a utility's cost of providing service should be fairly allocated among *customers* consistent with cost causation

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[76] *See, e.g.*, *SEC v. Chenery Corp.*, 332 U.S. at 196-97 (explaining that the basis for agency action "must be set forth with such clarity as to be understandable"); *City of Vernon*, 845 F.2d at 1047-48.

[77] *See* June 29 Order at PP 67-68.

[78] For example, the Commission observed that "Capacity Repricing appears to start from the premise that resources receiving out-of-market support should obtain a capacity commitment at the expense of other resources that, despite offering competitively, are not selected in the first stage of the auction." *Id.* at P 66. The Commission also concluded that "under PJM's Capacity Repricing proposal, a resource supported by a Material Subsidy would not only receive the same clearing price as competitive resources, but would then further benefit from the higher price set in stage two of the auction." *Id.* at P 67.

[79] *Id.* at P 68.

[80] *Id.* at P 68 n.112 (citing cases).

[81] *Id.* (quoting *Alabama Elec., Inc. v. FERC*, 684 F.2d 20, 27-28 & n.3 (D.C. Cir. 1982)).

principles, simply do not support a conclusion that PJM would be "unduly discriminat[ing] against competitive resources,"[82] by failing to account for out-of-market revenues received by certain other capacity supply resources.

In this regard, the Commission should grant rehearing of its broad suggestion that "receipt of out-of-market support is a difference that requires different ratemaking treatment when such support has a material effect on price or cannot otherwise be justified by our statutory standards."[83] The June 29 Order, as discussed above, does not provide a reasoned analysis for adopting such a rule in this proceeding. Further, the June 29 Order does not show that the receipt of out-of-market support has had "a material effect on price" in the RPM auctions, and the Commission does not explain or support the potentially expansive suggestion that resources receiving out-of-market support should receive different ratemaking treatment, even in the *absence* of any effect on price, if the Commission finds that the out-of-market support "cannot otherwise be justified by our statutory standards."[84]

C. The Commission's Ruling Threatens, Rather than Protects, the "Integrity of the Market"

The June 29 Order cites the need to protect the "integrity" of the PJM capacity market against price suppression attributable to resources that receive out-of-market support.[85] In invoking the "integrity of the market," however, the Commission's June 29 Order arbitrarily fails to address a number of important considerations, with the result that its order may threaten,

[82] *Id.* at P 68.

[83] *Id.*

[84] *Id.*

[85] *See id.* at PP 1, 150, 156.

rather than promote, market integrity.[86]

1. The Commission's Ruling Is Likely to Result in Over-Mitigation

Extending the MOPR to cover *all* existing resources benefitting from out-of-market support heightens the risk, in particular, that the MOPR will over-mitigate capacity resources in a manner that results in customers "paying twice" for capacity while sending an incorrect price signal that the market needs capacity when it does not. In this regard, bidding into the market as a price taker when a resource has out-of-market revenue streams is *consistent* with market integrity, because offering at zero sends a proper price signal that additional capacity is not needed.[87] Over-mitigating capacity resources, *i.e.*, needlessly raising prices above the level necessary to promote resource adequacy, is a more problematic threat to the "integrity" of the market than the support for certain generation resources by states to promote legitimate policy goals.[88]

The danger of over-mitigation is particularly acute here given the Commission's proposal to extend the MOPR well beyond its original purpose of mitigating the exercise of buyer-side market power by resources with the motive and intent to suppress market prices.[89] In finding

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[86] *See, e.g.*, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (stating that an agency acts arbitrarily and capriciously when it fails to "consider an important aspect of the problem"); *see also KeySpan-Ravenswood, LLC*, 348 F.3d at 1056 (explaining that "unless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned") (internal alterations, quotes and citation omitted); *Canadian Ass'n of Petrol. Producers*, 254 F.3d at 299; *KN Energy, Inc.*, 968 F.2d at 1303; *NorAm Gas Transmission Co.*, 148 F.3d at 1165.

[87] *See, e.g., ISO New England Inc.*, 158 FERC ¶ 61,138 at P 26 (explaining that "[t]o the extent that resources built pursuant to state incentive programs contribute toward meeting the region's resource adequacy requirements, the renewables exemption decreases the likelihood that customers must pay for more resources than are necessary to provide for resource adequacy or that the capacity market will provide a false signal that new investment is needed when this is not the case.").

[88] *Cf. Weyerhaeuser Co.*, 549 U.S. at 320 (explaining that "the costs of erroneous findings of predatory-pricing liability were quite high because the mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition, and, therefore, mistaken findings of liability would chill the very conduct the antitrust laws are designed to protect." (internal quotes and cites omitted)).

[89] *See, e.g.*, June 29 Order at PP 5, 155.

that the existing PJM Tariff is unjust and unreasonable because it does not encompass all resources receiving out of market support, the Commission failed to address the substantial threat of over-mitigation.

The Commission also fails to address how such over-mitigation could exacerbate seller market power. In each PJM State of the Market Report, the aggregate and local market structure of almost all of the PJM capacity auctions have been deemed "not competitive" due to both the PJM region and the LDAs failing the three pivotal supplier test.[90] The Commission has not evaluated whether a supplier with market power could utilize a greatly expanded MOPR combined with an individual unit FRR to achieve price increases. For example, a pivotal supplier with more than one "subsidized unit" could determine that arranging for the FRR Alternative for some of its supply, while allowing for another unit or portion of its supply to be subject to the MOPR could produce a supply curve that allows the unit with the MOPR to set the clearing price. The potential for such strategic behavior was not evaluated by the Commission in its consideration of a replacement rate.[91]

2. While Citing Investor Expectations as a Basis for its Decision, the Commission Fails to Consider the Reliance Interests of Investors in Existing Plants

The Commission supports its "market integrity" rationale for an expanded MOPR by citing the need to avoid "uncertainty" for investors.[92] The Commission fails to balance any such

[90] 2017 State of the Market Report for PJM, Monitoring Analytics LLC, at 223.

[91] As explained above, it is possible that the paper hearing initiated by the Commission may result in a just and reasonable resource adequacy construct in PJM. The Commission's finding that the existing PJM Tariff is unjust and unreasonable was based, however, on a finding that the current MOPR does not encompass all resources that receive state out-of-market support, and the prospect that the Commission will permit MOPR exemptions and/or the FRR Alternative or other mechanisms to accommodate supported resources remain subject to the uncertain outcome of what is sure to be vigorously-contested litigation.

[92] June 29 Order at P 150 (observing that "price distortions create significant uncertainty, which may further compromise the market, because investors cannot predict whether their capital will be competing against resources

potential uncertainty for investors in new resources against the legitimate reliance interests of investors in *existing* resources (potentially including public power utilities' investment in self-supply resources).

The finding in the June 29 Order that the existing PJM MOPR is unjust and unreasonable because it does not encompass existing resources receiving out-of-market support raises the prospect that those existing resources could be subject to the MOPR and fail to clear in the RPM auction, no matter how many times they have cleared previously. This significant change in approach could put existing generation investments at risk by depriving them of capacity revenue streams, or requiring their owners to pay twice for that capacity, which would not have occurred under a MOPR limited to new, gas-fired resources. Investors in existing resources may have detrimentally relied on the previously-approved MOPR framework, which the Commission now proposes to fundamentally change without the owners of those existing resources having done anything to justify having their investment placed at risk.[93] The concern is no less applicable where the investors that could potentially be adversely affected are public power LSEs where the ratepayers, rather than stockholders, are the owners.

While upholding changes to the MOPR framework in *New Jersey Board of Public Utilities v. FERC*, the Third Circuit expressed deep concern about eliminating the state-mandated MOPR exemption after stakeholders had made decisions in reliance on the exemption:

> It is more than mildly disturbing that, by endorsing a state-mandated exemption with perfectly predictable incentives, FERC would allow sovereign states and private parties to be drawn into making complex and costly investments, only to later pull the rug

that are offering into the market based on actual costs or on state subsidies.").

[93] *See, e.g.,* June 29 Order, Comm'r Glick Dissent at p. 12 (observing that "it is ironic to bemoan policy uncertainty when [the] Commission's and PJM's constant tinkering with the capacity market is one of, if not the, single biggest sources of uncertainty facing capacity market participants.").

> out from under those who were persuaded that the exemption was somehow real.[94]

In this case, the injury to reliance interests could be even more severe if the end result is a MOPR that sweeps in numerous existing resources and non-gas-fired resources without appropriate exemptions or mechanisms to accommodate planning and policy decisions.

The Commission itself has acknowledged that the reliance interests of existing stakeholders may be a consideration in determining how capacity market changes should be applied.[95] At a minimum, the reliance interests of existing investors and stakeholders associated with existing resources that may now be subject for the first time to a MOPR should be an issue for consideration in developing and implementing any replacement rate in this proceeding.

D. The Commission Erred in Adopting a Severely Compressed Hearing Schedule to Address Fundamental Changes to the PJM Capacity Construct

It is possible, as observed above, that the paper hearing initiated by the Commission will result in a workable resource adequacy construct for PJM. Unfortunately, the paper hearing schedule adopted by the Commission threatens to frustrate this goal by requiring stakeholders to address possible fundamental and complex changes to the PJM capacity market in a highly compressed time frame. The expedited schedule may hamper the parties' ability to develop a full and complete record for the Commission, and it will restrict the extent to which the PJM stakeholder process can be utilized to respond to the Commission's conclusions.[96]

The Commission could instead pursue an approach similar to that suggested by

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[94] *N.J. Bd. of Pub. Utils.*, 744 F.3d at 102. *Cf. Union Elec. Co.*, 890 F.2d at 1201 (observing that "[h]ere the Commission appears to be saying that if customers respond to incentives it has created in exactly the intended way, it will change the rules so as to deny them the resulting advantages.").

[95] *See ISO New England Inc.*, 145 FERC ¶ 61,095 at P 29 (discussing the Commission's policy of balancing interests when proposed tariff changes may upset settled expectations).

[96] *See, e.g., Mathews v. Eldridge*, 424 U.S. at 333 (explaining that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner" (internal quotes and cites omitted)).

Commissioner LaFleur in her dissent from the June 29 Order, *i.e.*, rejection of PJM's Capacity Repricing and MOPR-Ex proposals, accompanied by preliminary findings and targeted guidance to stakeholders concerning reforms to PJM's resource adequacy construct, including, potentially, directing consideration of an expanded FRR construct or other alternative frameworks that appropriately accommodate self-supply and state-supported resources. This approach would allow for a broader re-evaluation of the entire PJM capacity construct, as supported by APPA, AMP, and PPANJ.

IV. CONCLUSION

APPA, AMP, and PPANJ intend to participate in the paper hearing initiated by the Commission in this proceeding. As things now stand, however, the Commission has made a specific finding under FPA section 206 that PJM's existing Tariff is unjust and unreasonable because the MOPR is too limited in scope, while offering only the uncertain possibility that a replacement rate to be litigated in the paper hearing might reasonably accommodate public power self-supply resources and/or facilities receiving state support. For the reasons set forth above, the Commission should grant rehearing of its FPA section 206 finding that an overly-narrow MOPR renders PJM's Tariff unjust and unreasonable and provide targeted guidance concerning reforms to PJM's resource adequacy construct that may be pursued by stakeholders.

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Respectfully submitted,

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Dated: July 30, 2018

CERTIFICATE OF SERVICE

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

Dated at Arlington, Virginia, this 30th day of July, 2018.

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