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 v. PJM Interconnection, L.L.C. PJM Interconnection, L.L.C.	)	Docket Nos. EL16-49-000 EL18-178-000 (Consolidated)

REQUEST FOR REHEARING
OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)

On December 19, 2019, the Federal Energy Regulatory Commission ("FERC" or the "Commission") issued its "Order Establishing Just and Reasonable Rate" in the above-referenced dockets, instituting a new replacement rate ("the Replacement Rate") that expands applicability of the minimum offer price rule ("MOPR") in the capacity market of PJM Interconnection, L.L.C. ("PJM").[1] Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure,[2] the Electricity Consumers Resource Council (ELCON) hereby requests rehearing of the December 19 Order.

[1] *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C,* 169 FERC ¶ 61,239 (2019) (hereinafter "December 19 Order" or "Order").

[2] 18 C.F.R. § 385.713.

ELCON continues to believe, as it stated in its comments filed earlier in this proceeding, that "[e]xpanding MOPR will elevate offers above competitive levels, resulting in inflated market prices that elevate costs to load above competitive levels."[3] The Replacement Rate under the December 19 Order, which broadly applies MOPR with an expansive definition of state subsidies, would result in rates that are unjust, unreasonable, unduly discriminatory, and preferential, and its issuance is arbitrary and capricious rulemaking that is not supported by sufficient evidence. Former FERC Chairman Bay's ultimate conclusion in one of his last orders should be heeded: "the MOPR has turned out to be unsound in principle and unworkable in practice."[4]

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies produce a wide range of products from virtually every segment of the manufacturing community. ELCON members operate hundreds of major facilities and are consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to our members' operations. ELCON intervened and filed comments, both individually and as part of a coalition of industrial consumers, in the earlier stage of this proceedings.

Contemporaneously with this filing, ELCON participated in and supports the Request for Rehearing and Clarification being filed by the PJM Consumer Representatives. Here, ELCON offers further evidence from an economic and technical perspective establishing that rehearing should be granted.

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[3] Comments of ELCON in Docket No. EL18-178, Oct. 2, 2018, at p. 4.

[4] Bay, Norman, Concurring opinion, *New York State Public Service Commission, et al. v. New York Independent System Operator, Inc.*, 158 FERC ¶ 61,137 (Feb. 3, 2017) at p. 1.

STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Rule 713(c),[5] ELCON respectfully submits that the December 19 Order is arbitrary and capricious and does not reflect reasoned decision-making, is insufficiently supported, and would result in rates that are unjust, unreasonable, unduly discriminatory, and preferential. ELCON supports, and incorporates by reference, the Statement of Issues and Specification of Errors in the Request for Rehearing and Clarification being filed today by the PJM Consumer Representatives. Here, ELCON offers further evidence and support for the positions that: (i) the December 19 Order would result in rates that are unjust, unreasonable, unduly discriminatory, and preferential; (ii) the scope of state subsidies to which the MOPR would apply is vastly overbroad; and (iii) the Replacement Rate is arbitrary and capricious and is not supported by sufficient evidence.

REQUEST FOR REHEARING

I. The December 19 Order Would Result in Unjust and Unreasonable Rates

In its comments filed earlier in this proceeding, ELCON urged the Commission to avoid excessive application of administrative mechanisms intended to "correct" for subsidies but which actually leave consumers worse off. ELCON posited that application of administrative fixes will undermine efficient resource entry and exit – a core purpose of capacity markets – and unnecessarily raise costs to consumers while deterring innovation and encouraging gaming.[6] Instead, the December 19 Order pursues an overly expansive approach which would result in inefficient outcomes, limited competition, and ultimately result in extreme over-mitigation of the issue that it seeks to address, to the detriment of consumers.

[5] 18 C.F.R. § 385.713(c).

[6] Comments of ELCON, Docket No. EL18-178, Oct. 2, 2018, at p. 3.

A. The December 19 Order Fails to Support Departure from the MOPR's Fundamental Purpose to Mitigate Exercise of Market Power

The December 19 Order is not supported by any actual demonstration of monopsony power or other market failure, quantitative assessment of price suppression, or economic theory explaining why the MOPR fixes "price suppression" as opposed to raising prices above competitive level. The Commission failed to meet its burden to demonstrate that the rates resulting from the December 19 Order would be just and reasonable and not unduly discriminatory or preferential.

In particular, there is not sufficient evidence to justify the administrative intervention reflected in the December 19 Order because there is no showing of market power or manipulation or any other identified market failure, and none could be shown. Prior administrative interventions generally have been aimed at preventing the exercise of market power, given court determinations about what is a just and reasonable rate in a market context.[7] Specifically, prior applications of the MOPR were based on identified instances of monopsony (buyer-side) market power. Thus, the Commission's original order approving the MOPR in PJM stated, "The Commission finds the [MOPR] a reasonable method of assuring that net buyers do not exercise monopsony power by seeking to lower prices through self-supply."[8] The Commission's later approvals of changes to MOPR stated, "We 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."[9] Whether market power was present or absent

[7] "[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. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990). *See also Elizabethtown Gas Co. v. FERC*, 10 F.3d. 866, 870 (D.C. Cir. 1993) https://www.leagle.com/decision/199387610f3d8661752 and *FPC v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326-27, 41 L.Ed.2d 141 (1974) (Congress has "subject[ed] producers to regulation because of anticompetitive conditions in the industry").

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

[9] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at PP 20 (2013) ("May 2013 order").

was also the basis for allowing exemptions to state policy mitigation.[10] 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 without explanation the Commission's longstanding policy and practice of mitigating only identified market power.

The Commission's broad application of MOPR -- as opposed to surgical application to specifically address 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."[11] It is well established in economic theory that the 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).[12] As further stated by Dr. Willig, "Application of buyer-side market power mitigation 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."[13] The Commission

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[10] *See* May 2013 Order at PP 53, 107; October 2015 Order at PP 32, 52, *ISO New England Inc. and New England Power Pool Participants Committee*, 158 FERC ¶ 61,138 at P 10 (2017).

[11] Declaration of Dr. Robert Willig, attached to Protest of Exelon Corp. in Docket No. ER18-1314, May 7, 2018 at P 13.

[12] Bator, Francis M. 1958. "The Anatomy of Market Failure." Quarterly Journal of Economics (August): 351-79. Baumol, William J. and Wallace E. Oates. 1975. The Theory of Environmental Policy. Cambridge: Cambridge University Press. Cited in Request for Rehearing of Clean Energy Advocates, Docket Nos. EL16-49 and EL18-178, July 2018, Gramlich affidavit.

[13] Declaration of Dr. Robert Willig, *supra*, at P 24.

provides no economic theory for its broad application of MOPR in the Replacement Rate.

Furthermore, the Commission cannot rely on previous court decisions on MOPR[14] to justify the scale and scope of this administrative intervention. The mitigation at issue in the *NRG* and *NJBPU* cases, for example, addressed state policies to purchase power from isolated individual generators, whereas the Replacement Rate under the December 19 Order affects a majority of new generation and thus has a much more dramatic effect on rates paid by all customers in the region. The *NJBPU* court, for example, observed that MOPR "ensures that its sponsor cannot exercise market power…"[15] By contrast, here there is no demonstration or even allegation of market power by the broad range of entities to which the Replacement Rate would apply. There is no demonstration that market price with the administrative intervention applied is just and reasonable. Neither of the prior court cases dealt with FERC action anywhere near the scale and scope at issue here.

B. The Replacement Rate Would Result in Inefficient Outcomes and Excessive Costs to Consumers

The Replacement Rate component of the December 19 Order is unjust, unreasonable, and unsupported by sufficient evidence 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.

More specifically, the Replacement Rate is unjust and unreasonable because it will force consumers to pay for redundant capacity. It is undisputed that state-supported resources are less likely to clear the market and receive capacity payments,

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[14] *See, e.g., NRG Power Marketing, LLC v. FERC, 862 F.3d 108* (D.C. Cir. 2017) *(NRG); N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, at 97 (3d Cir. 2014) (*NJBPU)* (where FERC had recognized below that targeted application of the MOPR is a "pragmatic and reasonable approach").

[15] *NJBPU*, *supra,* 744 F.3d at 97.

yet they will still be providing capacity value to the system. As state-supported resources are removed, consumers must pay for other capacity. An affidavit by Michael Goggin in this proceeding 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."[16] The low end of this estimate reflects exemptions that the Replacement Rate did not include, so the high end of the estimate is more applicable. The $24.6 billion over ten years estimate amounts or approximately $2.5 billion per year, is approximately 25 percent of the cost of the roughly $10 billion/year capacity market in additional payments consumers must make. The cost would be higher if price increases in the capacity market are taken into account, and there are indications that Replacement Rate would result in significantly higher capacity prices.[17] The Commission did not evaluate these cost impacts. The Replacement Rate is a unique application of MOPR, broadly applying across a majority of the new resources on the system so requires a specific analysis.

The Replacement Rate also is likely to perpetuate excess supply in the market. Unlike the ISO-New England CASPR policy, which provides a mechanism for state-supported resources to replace older units ready to retire, and thus achieve something close to supply-demand balance, this replacement rate has no such mechanism. Redundant capacity will be kept on the system and paid for by consumers.

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[16] Affidavit of Michael Goggin, Grid Strategies LLC On Behalf of the Sustainable FERC Project, Natural Resources Defense Council, and Sierra Club, May 7, 2018 in Docket No. ER18-1314.

[17] Charles River Associates stated CRA: "Resulting market rules are likely to drive up capacity prices in upcoming Base Residual Auctions (BRA." http://www.crai.com/sites/default/files/publications/FERC_directs_PJM_capacity_market%20reforms_%20December_2019_CRA.pdf. 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 auction. https://www.linkedin.com/feed/update/urn:li:activity:6620335473082585088/. See also Grid Strategies estimate of the PJM proposal (which differs from the FERC replacement rate but impacts the market in the same direction): https://gridprogress.files.wordpress.com/2019/08/consumer-impacts-of-ferc-interference-with-state-policies-an-analysis-of-the-pjm-region.pdf .

More broadly, in mandating the Replacement Rate, the Commission abandoned nearly 30 years of FERC policy and court decisions on what constitutes a just and reasonable rate in a market context. Since the beginning of allowing market-based rates, sellers were allowed to sell at rates below that which recovers capital costs. Most market-based sales over the history of wholesale power markets have been from units that have their capital costs recovered from retail customers under state policy actions approving the units for inclusion in a utility rate base. Most market-based sales from renewable resources over the history of wholesale power markets have been from units that have some of their capital costs recovered from retail customers through state Renewable Portfolio Standards ("RPS") in the form of Renewable Energy Credits ("RECs"). Financial support from state action is not new; rather it has always been present and in fact has been the dominant arrangement. There is nothing different in either the type or scale of state policy support in the PJM region now from the full history of wholesale power markets. It does not matter that these are bids into an auction and most transactions historically were bilateral transactions; they are sales for resale in interstate commerce and must follow the Federal Power Act's just and reasonable standard. The Commission failed to provide sufficient evidence or explanation for this radical shift in FERC ratemaking.

Furthermore, the Commission cannot rely on the PJM filing's evaluation of its proposed rate to justify the Replacement Rate. PJM's proposed rate differed from the Replacement Rate in many important respects, including the resource specific fixed resource requirement, and size and materiality exceptions. It provided capacity payments to generators receiving state incentives because they would clear in the initial auction, lessening the ultimate impact on consumers. That is not the case under the Replacement Rate. The PJM evaluation accordingly fails to salvage the fundamental flaw that there is insufficient evidence to reach a determination that the Replacement Rate would be just and reasonable.

C. The Replacement Rate Would Limit Competition and Result in Over-Mitigation

The December 19 Order would be economically inefficient, distort competition, and increase costs to consumers in various other respects. For example, the Replacement Rate would limit competition, resulting in unjust and unreasonable rates. By removing suppliers from the market, consumers have fewer options from which to choose, tending to raise their costs. Resources subject to MOPR will have higher bids and be less likely to clear. Further, the Commission's broad definition of state subsidies (discussed below) and its application market-wide to hundreds of units, whether or not there is any exercise of market power or other market failure, violates the requirement for the Commission to balance the need to mitigate market power with the need to avoid over-mitigation.[18]

II. The Scope of State Subsidies Subject to the December 19 Order Is Overbroad

In our earlier comments in this proceeding, ELCON stated that it "stresses the need for the Commission to 1) acknowledge that administrative interventions are poorly suited to "correct" for subsidies and 2) adopt a clear, strict definition for "actionable subsidy" to limit the application of administrative fixes to only those subsidies that fundamentally compromise market performance."[19] In the December 19 Order, the Commission instead adopted an extremely broad brush approach to the scope of state subsidies, one that will lead to a dramatic impact on the market.

A. The Commission Should Exempt Competitive Processes

ELCON had commented that "the Commission . . . should limit the qualifying characteristics of an actionable subsidy only to the types and degrees of subsidization

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[18] *Edison Mission Energy, Inc. v. F.E.R.C.*, 394 F.3d 964, 969 (D.C. Cir. 2005) *citing Maryland People's Counsel v. FERC*, 761 F.2d 780, 788-89 (D.C. Cir. 1985) ("the crucial question — one the Commission left unaddressed — is whether the program FERC approved will do more good than harm").

[19] Comments of ELCON, Docket No. EL18-178, Oct. 2, 2018 at p. 3.

that fundamentally compromise competitive markets."[20] The Commission provides no justification for broadly applying MOPR to resources subject to competitive processes.

B. The Commission Should Exempt Voluntary Bilateral Contracts

ELCON had commented:

> In particular, private capital that pursues voluntary capacity contracts in bilateral markets should not face administrative corrections. For example, corporate consumers are increasingly deploying their own capital to voluntarily purchase power through the bilateral market or procure renewable energy credits, which do not constitute subsidies. Voluntary payments received outside of the capacity market should receive categorical exclusion.[21]

The December 19 Order provides inconsistent guidance on this point. It found that, given the difficulty in distinguishing voluntary RECs from compliance RECs, the MOPR should apply to all. The Commission should revisit this issue so as to ensure that transactions that are not influenced by state policy at all are not caught in the MOPR net.

C. The Commission Should Exempt Self-Supply

ELCON had also commented that self-supply by vertically integrated utilities should be exempt from MOPR.[22] ELCON members have been purchasing energy from vertically integrated resources for decades; it is a dramatic change in wholesale power markets for these sellers to have to sell at minimum levels reflecting capital costs of other types of commercial entities. The Commission provides no justification for this change.

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[20] *Id.* at p. 5.

[21] *Id.* at p. 7.

[22] *Id.*

CONCLUSION

For the foregoing reasons, ELCON respectfully requests that the Commission grant rehearing of the December 19 Order.

Respectfully Submitted:

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Dated: January 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary of this proceeding.

Dated at Washington, D.C.: January 21, 2020

/s/ W. RICHARD BIDSTRUP

W. Richard Bidstrup