

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

Calpine Corporation, Dynegy Inc., Eastern)	Docket Nos. EL16-49-000
Generation, LLC, Homer City Generation,)	EL18-178-000
L.P., NRG Power Marketing LLC, GenOn)	(Consolidated)
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.)	

**REQUEST FOR REHEARING AND CLARIFICATION OF
THE PJM CONSUMER REPRESENTATIVES**

On December 19, 2019, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued an order (“December 19 Order” or “Order”) instituting a new replacement rate (“the Replacement Rate”) in the capacity market of PJM Interconnection, L.L.C. (“PJM”) in the above-referenced proceeding.¹ Pursuant to Rule 713 of the Commission’s Rules of Practice and Procedure,² the PJM Consumer Representatives hereby seek rehearing and clarification of the December 19 Order. For purposes of this Request for Rehearing and Clarification, the PJM Consumer Representatives are comprised of the PJM Industrial Customer Coalition (“PJMICC”), Illinois Industrial Energy Consumers (“IIEC”), the Electricity Consumers Resource Council

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 (2019).

(“ELCON”), Industrial Energy Consumers of America (“IECA”), the Pennsylvania Energy Consumer Alliance (“PECA”), the Industrial Energy Consumers of Pennsylvania (“IECPA”), the and American Forest and Paper Association (“AF&PA”).

The PJM Consumer Representatives share the Commission’s goal of ensuring just and reasonable prices in both the short-term and the long-term through proper and sustainable operation of the PJM capacity market. The December 19 Order conveys a clear signal that states’ efforts to subsidize capacity resources will not be permitted to interfere with the efficient functioning of the PJM capacity market.

However, there are several aspects of the December 19 Order that should be corrected and clarified to enable its practical implementation without unlawfully upsetting existing commercial arrangements and market dynamics. To that end, the PJM Consumer Representatives respectfully submit that the December 19 Order errs in certain respects. The December 19 Order unduly discriminates against certain Capacity Resources and certain classes of consumers by jeopardizing the clearing of certain capacity resources and by preventing consumers from relying on capacity for which states have ordered them to pay. The December 19 Order errs by discriminatorily frustrating the receipt of capacity value for new natural gas-fired resources, for projects that are selling their environmental attributes or renewable energy credits (“RECs”) outside of any state Renewable Portfolio Standards (“RPS”) program through market-based commercial arrangements, and for demand resources and energy efficiency resources that have not been shown to be capable of suppressing capacity clearing prices. The PJM Consumer Representatives propose corrections to the December 19 Order to address these areas, to bring the Commission’s Replacement Rate into compliance with the Federal Power Act, the Administrative Procedure Act, and other legal authorities.

The December 19 Order also requires clarification in several important respects, so that PJM and market participants understand the new rules and are capable of implementing them on a practical level. If demand resources are to be subject to the expanded Minimum Offer Price Rule (“MOPR”), then the rules regarding the treatment of behind-the-meter generation (“BTMG”) and default offer prices for demand resources must be clarified. The application of the exemption for existing demand resources and existing renewable resources must also be clarified, so that similarly situated resources are treated comparably. The PJM Consumer Representatives propose clarifications to address these and other ambiguities in the December 19 Order.

I. BACKGROUND

On June 29, 2018, the Commission instituted a proceeding under Section 206 of the Federal Power Act” (“June 2018 Order”) in the above-referenced proceeding.³ Acting on the records in the PJM Section 205 filing in Docket No. ER18-1314-000 and the Complaint filed by Calpine Corp., *et al.* against PJM in Docket No. EL16-49-000, the Commission found PJM’s Open Access Transmission Tariff (“Tariff”) to be unjust and unreasonable because it failed to effectively address out-of-market state support to resources in PJM’s capacity market.⁴ Noting that state subsidies are projected to increase in the future, the Commission found that PJM’s Tariff allows subsidized resources to suppress capacity market clearing prices.⁵ The June 29 Order held that PJM’s 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

³ See *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018) (hereinafter “June 2018 Order”).

⁴ *Id.* at P 149.

⁵ *Id.* at PP 149, 155-156.

support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources.”⁶

In the June 2018 Order, the Commission explained that it did not have a sufficient record to make a final determination regarding a just and reasonable replacement rate to be included in the PJM Tariff to address the impact of actionable subsidies.⁷ However, the Commission “preliminarily” determined that “modifying two aspects of the PJM Tariff may produce a just and reasonable replacement rate.”⁸ The Commission recommended that PJM should (1) expand the MOPR to cover out-of-market support to all new and existing resources regardless of resource type and (2) implement a Resource-Specific Fixed Resource Requirement (“RSFRR”) option to accommodate resources that receive out-of-market support by allowing the resource to satisfy capacity performance obligations, but without clearing in the PJM-administered capacity auctions.⁹ The Commission explained that the RSFRR option would create a bifurcated capacity construct where resources receiving out-of-market support, and a corresponding amount of load, would be matched outside the PJM capacity auctions, thereby “increasing the integrity of the PJM capacity market for competitive resources and load.”¹⁰

Recognizing that its recommendations for a new capacity market construct in the PJM region required more detail and discussion, the Commission in the June 2018 Order raised various questions for parties to address in a Section 206 paper hearing.¹¹ Several parties,

⁶ June 2018 Order at P 150.

⁷ *Id.* at P 157.

⁸ *Id.*

⁹ *Id.* at PP 157-160.

¹⁰ *Id.* at P 161.

¹¹ *See id.* at PP 164-172.

including many of the PJM Consumer Representatives on this pleading, filed initial and reply comments in the paper hearing.

On December 19, 2019, the Commission issued the December 19 Order in response to those comments and established the Replacement Rate in the PJM Capacity Market. The Order established an expanded MOPR with limited exemptions. The expanded MOPR will apply to all new and existing State-Subsidized Resources that participate in the capacity market, regardless of resource type.¹² The December 19 Order also found that all natural gas-fired generation resources should continue to be subject to the MOPR, even if those resources receive no State Subsidies.¹³ Generally, the Order determined that the default offer price floor for new resources will be the Net Cost of New Entry (“Net CONE”) for their resource class while the default offer price floor for existing resources will be the Net Avoidable Cost Rate (“Net ACR”) for their resource class.¹⁴ The Order established the following, broad definition of “State Subsidy:”

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.¹⁵

¹² December 19 Order at PP 2, 5.

¹³ *Id.* at P 8.

¹⁴ *Id.* at P 2.

¹⁵ *Id.* at P 9.

The Order directs PJM to expand its current MOPR to apply to any new or existing resource that receives, or is entitled to receive, a State Subsidy, and that does not qualify for an exemption.¹⁶

The Commission directed PJM to submit a compliance filing within 90 days of the order.¹⁷

II. GENERAL SUPPORT FOR THE ORDER'S POLICY DIRECTION

The PJM Consumer Representatives appreciate the December 19 Order's effort to address difficult and complex issues that have arise with the PJM capacity market construct as a result of state policies that seek to buttress certain new generation types and nascent technologies or retain existing uneconomic generation resources. The Order sends a clear message that State Subsidies undermine the efficient functioning of competitive capacity markets, rendering wholesale rates unjust and unreasonable unless mitigated. The PJM Consumer Representatives share the Commission's objectives in this regard. As representatives of manufacturers and large commercial customers that are directly impacted by pricing and supply outcomes produced by operation of PJM's capacity rules, the PJM Consumer Representatives do not merely advocate for low prices in the short-term but, rather, share the Commission's goal of ensuring just and reasonable price outcomes in both the short-term and the long-term. The PJM Consumer Representatives also seek solutions that minimize disruption of the commercial arrangements into which they have entered to ensure adequate power supply at affordable prices.

The PJM Consumer Representatives generally agree with the Commission's determination in the December 19 Order to send a clear signal that states' efforts to subsidize capacity resources will not be permitted to interfere with wholesale markets. However, where states have already taken such action, consumers in those states (many of whom opposed the states' subsidy initiatives) should not be penalized by being forced to pay not only for the costs

¹⁶ December 19 Order at PP 4-5.

¹⁷ *Id.* at P 4.

of the subsidy but also pay for the costs of other generation and capacity resources to meet their capacity obligations. To address that issue and several others, the PJM Consumer Representatives respectfully seek rehearing and clarification of discrete issues raised in the December 19 Order.

III. STATEMENT OF ISSUES/SPECIFICATIONS OF ERRORS

Pursuant to Rule 713(c),¹⁸ the PJM Consumer Representatives respectfully submit that the December 19 Order is arbitrary and capricious, does not reflect reasoned decision-making, is insufficiently supported, and results in a rate outcome that is unjust, unreasonable, unduly discriminatory, and preferential. Due to the errors identified herein and the clarifications needed for PJM capacity market participants, the Order should be modified on rehearing.

The PJM Consumer Representatives respectfully specify the following errors:

1. The December 19 Order is arbitrary and capricious because the Replacement Rate unjustly and unreasonably requires some consumers to pay twice for capacity. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014) (*NJBPU*); *Xcel Energy Servs. v. FERC*, 815 F.3d 947 (D.C. Cir. Mar. 8, 2016); *FERC v. EPSA*, 136 S. Ct. 760 (U.S. 2016); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668 (9th Cir. 2007); *New Eng. Power Generators Ass'n*, 881 F.3d 202 (D.C. Cir. 2018); *W. States Petroleum Ass'n v. EPA*, 87 F.3d 280 (9th Cir. 1996); *Michigan v. EPA*, 135 S. Ct. 2699 (2015); *TransCanada v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); *PPL Wallingford Energy v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005); *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).
2. The December 19 Order's application of the MOPR to existing resources that are receiving State Subsidies constitutes retroactive ratemaking. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979); *Town of Norwood v. FERC*, 53 F.3d 377 (D.C. Cir. 1995); *San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv. et al.*, 96 FERC ¶ 61,120 (2001); *Consol. Edison of N.Y. v. FERC*, 347 F.3d 964 (D.C. Cir. 2003); *Oxy USA v. FERC*, 64 F.3d 679 (D.C. Cir. 1995); *ANR Pipeline Company and TC*

¹⁸ 18 C.F.R. § 385.713(c) (2019).

Offshore LLC, 143 FERC ¶ 61,225 (2013); *PPL Wallingford Energy v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005); *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).

3. The December 19 Order’s decision to continue applying the MOPR to non-subsidized new natural gas-fired generation is unduly discriminatory against such resources and is not supported by substantial evidence. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014); *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013), *order on reh’g*, 153 FERC ¶ 61,066 (2015), *vacated and remanded sub nom. NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017); *18 CFR Part 35 Frequency Regulation Compensation in the Organized Wholesale Power Markets*, 137 FERC ¶ 61,064 (2011); *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045 (2003); *Midwest Indep. Transmission System Operator, Inc., et al.*, 153 FERC ¶ 61,101 (2015); *Black Oak Energy v. FERC*, 725 F.3d 230 (D.C. Cir. 2013); *Tennessee Gas Pipeline Commission*, 99 FERC ¶ 61,285 (2002); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 (2011); *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).
4. The December 19 Order unduly discriminates against certain existing resources by providing explicit exemptions for certain types of existing resources, but not others. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *18 CFR Part 35 Frequency Regulation Compensation in the Organized Wholesale Power Markets*, 137 FERC ¶ 61,064 (2011); *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045 (2003); *Midwest Indep. Transmission System Operator, Inc., et al.*, 153 FERC ¶ 61,101 (2015); *Black Oak Energy v. FERC*, 725 F.3d 230 (D.C. Cir. 2013).
5. The December 19 Order erred to the extent it determined that “voluntary RECs” are State Subsidies, particularly in arrangements where the environmental attributes that are being traded do not include any RECs that are necessary for state RPS compliance. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).
6. The December 19 Order errs by failing to conclude that renewable resources that qualify for the MOPR exemption include all resources that were, as of December 19, 2019, eligible to provide RECs under one or more state RPS statute. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; PJM Tariff, Art. 1.
7. The December 19 Order’s errs by finding that the MOPR should apply to demand response resources, because that finding is not supported by substantial evidence. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*

169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014); *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

8. The December 19 Order errs in establishing exemptions for existing resources based only on the status of an interconnection construction service agreement and not based on other, substantially similar contractual arrangements that are entered into by those existing resources and that are filed with the Commission by PJM. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251.
9. The December 19 Order errs in assuming that a customer with behind-the-meter generation operates in the same manner as in-front-of-the-meter merchant generation. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014).

The PJM Consumer Representatives respectfully specify the following requests for clarification:

10. If the Commission does not grant rehearing and determine that both existing and new demand response resources should be exempt from the MOPR, the Commission should clarify the following regarding demand resources:
 - a. The calculation of the Net CONE value and the default offer price for both BTMG demand resources and non-BTMG demand resources should hinge on a historical measure of actual capacity clearing prices;
 - b. New State-Subsidized demand resources that clear a Base Residual Auction (“BRA”) will remain subject to the MOPR and a default offer price based on Net ACR;
 - c. PJM should not consider inclusion of the value of lost manufacturing in default offers from demand resources; and
 - d. Changes in the subsidy level for existing demand resources should not impact the exemption of those resources from the MOPR. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).
11. The Commission should clarify and find that the Regional Greenhouse Gas Initiative’s (“RGGI”) credit and allowance program does not qualify as a State Subsidy. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251.

12. The Commission should clarify that the Replacement Rate must include any necessary changes to the FRR mechanism that are necessary to ensure that an exercise of the FRR option does not undermine state decisions to allow retail competition. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251; *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018).
13. The Commission should clarify that renewable facilities should be able to elect whether to receive the State Subsidy or receive capacity revenue each year. *Calpine Corp. et al. v. PJM Interconnection, L.L.C., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019); 16 U.S.C. §§ 824d, 824e; 16 U.S.C. § 8251.

IV. REQUEST FOR REHEARING

A Commission order will be reversed on review if it is arbitrary or capricious, reflects an abuse of discretion, is not otherwise in accordance with law, or is not supported by substantial evidence.¹⁹ In order to satisfy its obligation to engage in reasoned decision-making, the Commission must examine the relevant data and articulate a rational connection between the facts found and the choices made.²⁰ The Commission must reach its conclusion through decision-making that is “reasoned, principled, and based upon the record.”²¹ Under the Federal Power Act, FERC’s factual findings are determinative so long as they are supported by substantial evidence.²² The “substantial evidence” standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.”²³ Substantial evidence

¹⁹ *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55 (D.C. Cir. 2014); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 528 (D.C. Cir. 2010).

²⁰ *Sacramento*, 616 F.3d at 528; *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, (1983)).

²¹ *New Eng. Power Generators Ass’n v. FERC*, 881 F.3d 202, 210-11 (D.C. Cir. 2018); *West Deptford Energy, LLC*, 766 F.3d 10, 20 (D.C. Cir. 2014); *ExxonMobil Oil v. FERC*, 487 F.3d 945, 953 (D.C. Cir. 2007); see *New York v. FERC*, 535 U.S. 1, 36 (2002); see also *Transmission Access Policy Group v. FERC*, 225 F.3d 667, 705, 716 (D.C. Cir. 2000) (citing *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1021 (D.C. Cir. 1987)); *Colo. Interstate Gas Co. v. FERC*, 146 F.3d 889, 893 (D.C. Cir. 1998).

²² Section 313(b) of the FPA, 16 U.S.C. § 8251(b).

²³ See *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, at 97 (3d Cir. 2014) (*NJBPU*) (quoting *La. PSC v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008)).

is “relevant evidence” that “a reasonable mind might accept as adequate to support a conclusion.”²⁴

The December 19 Order instituting reforms in the PJM-operated capacity market will cause unjust and unreasonable rates by unnecessarily increasing capacity rates and requiring certain consumers to pay twice for capacity. The Order also unduly discriminates between existing and new resources and between specific resource types. Rehearing and clarification are needed to address the errors and issues raised herein.

1. The December 19 Order is Arbitrary and Capricious Because the Replacement Rate Unjustly and Unreasonably Requires Some Consumers to Pay Twice for Capacity.

The December 19 Order is arbitrary and capricious because it fails to consider the upward pressures that the Replacement Rate places on capacity costs and the resulting unjust and unreasonable rate increases that may result for customers. Critically, the December 19 Order’s Replacement Rate does not account for the potential for consumers to pay twice for capacity. Customers in certain states may be forced to pay twice for existing capacity if State-Subsidized resources do not clear the capacity auctions – once through payment of the subsidies to certain generators and again by paying for other capacity to cover their capacity obligations that cannot be met with the subsidized generation.²⁵

Numerous parties in this proceeding raised concerns about the potential increase in capacity prices resulting from an overly expansive definition of subsidy and application of an

²⁴ *Id.* (quoting *Mars Home for Youth v. NLRB*, 666 F.3d 850, 853 (3d Cir. 2011)).

²⁵ See Reply Comments of the PJM Consumer Representatives at 8; see also Request for Rehearing of FirstEnergy Solutions, Docket No. EL16-49 *et al.*, at 15-16 (filed Jan. 17, 2020) (arguing that consumers will have to pay twice for capacity, once as state taxpayers in the state with the State Subsidy and again as an electric ratepayer paying for unnecessary capacity procured by PJM). FirstEnergy Solutions explained that the December 19 Order did not even address this “double payment” problem and the concerns about paying twice for capacity. *Id.* at 16.

expanded MOPR.²⁶ Parties argued that an expanded MOPR without an accommodation mechanism (*e.g.*, a resource carve out from the capacity market) is not just and reasonable.²⁷ The December 19 Order briefly dismissed arguments that an expanded MOPR will unjustly and unreasonably increase costs by citing to an opinion by the United States Court of Appeals for the Third Circuit (“Third Circuit”) for the proposition that states may freely make decisions about capacity needs, but consumers in those states will bear the costs of those decisions, including the potential of paying twice for capacity.²⁸ Instead of directly addressing the cost impact and increase in capacity prices, the December 19 Order elects not to solve or address the problem and instead shifts responsibility to the states by explaining that states are free to support or incentivize certain generation resources. Yet, the Commission is best-situated to address this problem as concerns existing Capacity Resources, and should do so consistent with its consumer-protection duties under the Federal Power Act.

Section 205 of the Federal Power Act requires that “[*a*]ll rates and charges made, demanded, or received by any public utility...and *all* rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable.”²⁹ The primary aim of the Federal Power Act is to protect consumers from excessive rates and charges.³⁰ The Commission has the duty to

²⁶ See December 19 Order at PP 34-36 (citing ELCON Initial Testimony at 2-4, 7; IMEA Reply Testimony at 4; Joint Consumer Advocates Initial Testimony at 2; New Jersey Board Reply Testimony at 4; Illinois Commission Initial Testimony at 3; Illinois Attorney General Initial Testimony at 10; Policy Integrity Initial Testimony at 13; Joint Consumer Advocates Reply Testimony at 6).

²⁷ See, *e.g.*, December 19 Order at P 34 (citing Policy Integrity Initial Testimony at 6-16).

²⁸ December 19 Order at P 41 (citing *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, at 97 (3d Cir. 2014) (*NJBPU*)). In *NJBPU*, the Third Circuit found that state actions in New Jersey and Maryland “to introduce thousands of megawatts of new capacity into the Base Residual Auction would have had an effect on the prices of wholesale electric capacity in interstate commerce.” *Id.* at 96. Because FERC has exclusive jurisdiction over the sale of capacity in interstate markets, the Third Circuit held that FERC had authority to approve rules that prevented such state action from adversely affecting wholesale capacity rates.

²⁹ 16 U.S.C. § 824d (2019) (emphasis added).

³⁰ *Xcel Energy Servs. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. Mar. 8, 2016); *FERC v. EPSA*, 136 S. Ct. 760, 768 (U.S. 2016).

ensure that all rates in connection with the transmission of electric energy are just and reasonable and that such finding is based on substantial evidence.³¹ As noted by Commissioner Glick in his dissent, the December 19 Order “does not discuss the potential cost increases, much less justify them.”³² The December 19 Order’s decision not to address the cost consequences³³ of its Replacement Rate is arbitrary and capricious and not reflective of reasoned decision-making.

The December 19 Order’s Replacement Rate determination is also inconsistent with and deviates from the Commission’s findings and proposals in the June 2018 Order. In the June 2018 Order, the Commission instituted a Section 206 paper hearing to solicit comments on modifications to two aspects of PJM’s Tariff:

- 1) a modified MOPR with few to no exceptions that would apply to new and existing resources, regardless of resource type, that receive out-of-market payments, and
- 2) an option in the Tariff that would allow, 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.³⁴

The Commission proposed the second modification “in order to accommodate state policy decisions and allow resources that receive out-of-market support to remain online.”³⁵ The Commission directed PJM to implement a RSFRR Alternative to allow resources to remain on the system (for participation in the PJM-operated energy markets) despite their inability to

³¹ *FERC v. EPSA*, 136 S. Ct. at 774; *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (citing 16 U.S.C. §§ 824d, 824e).

³² December 19 Order, Glick Dissent at P 57.

³³ See *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (holding that “an agency may not entirely fail to consider an important aspect of the problem”); see also *TransCanada v. FERC*, 811 F.3d 1, 13 (D.C. Cir. 2015) (finding that FERC did not adequately explain its decision regarding market power and the economic forces in ISO New England’s energy markets).

³⁴ June 2018 Order at P 8.

³⁵ *Id.* at P 8.

compete in the capacity market based on their bids.³⁶ The Commission explained that resources that take advantage of the new RSFRR Alternative would not participate in the PJM capacity market and would not make or receive payments from the capacity market; however, those resources and their associated load could participate in PJM’s energy and ancillary services market (similar to the current FRR construct).³⁷ PJM proposed to implement the RSFRR Alternative through a resource carve-out option.³⁸

The December 19 Order’s expanded MOPR is consistent with the June 2018 Order’s first objective to modify the Tariff. However, the December 19 Order deviated from the June 2018 Order’s findings and rejected the FRR Alternative, any resource carve-out options, and any transition period to the new capacity market construct. The Order also diverged from its prior intent to accommodate state policy decisions, generically finding now that “the accommodation of state subsidy programs would have unacceptable market distorting impacts that would inhibit incentives for competitive investment over the long term.”³⁹ Such deviation from its prior order and prior determination requires an explanation.⁴⁰ The December 19 Order did not explain how an RSFRR Alternative or any resource carve-out option would create unacceptable market distortions or inhibit incentives for competitive investment. In fact, the December 19 Order did

³⁶ *Id.* at PP 157, 160.

³⁷ *Id.* at P 160.

³⁸ December 19 Order at P 6 (citing PJM Initial Testimony at 64-75).

³⁹ December 19 Order at P 6.

⁴⁰ *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687-88 (9th Cir. 2007) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”); *New Eng. Power Generators Ass’n*, 881 F.3d at 213 (“[a]lthough FERC may be sincere in its change of heart and, as a substantive matter, correct that its new rationale is just and reasonable, the Commission must provide some analysis and explanation in its Orders regarding why it changed course.”); *see also W. States Petroleum Ass’n v. EPA*, 87 F.3d 280, 284 (9th Cir. 1996) (stating that an agency “must clearly set forth the ground for its departure from prior norms”); *see also PPL Wallingford Energy v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (holding that the agency must “‘articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made’” (internal quotations omitted)).

not engage *at all* the arguments regarding the need for an RSFRR Alternative or a transition period from the old market construct to the new construct. While the PJM Consumer Representatives do not necessarily require implementation of an RSFRR Alternative, there needs to be some mechanism to recognize that certain states have already made decisions that cannot be altered. The failure of the December 19 Order to engage those arguments and explain the abrupt abandonment of any accommodative mechanism – especially in light of the potential for significant cost increases on, and double-payments by, customers – is arbitrary and capricious.

Several states in the PJM region have implemented subsidies based on either PJM’s prior MOPR rules (which applied only to natural gas-fired resources) or based on the understanding that FERC would allow a resource carve-out option to ensure that consumers in those states are not required to pay subsidies without receiving any associated capacity value. For example, Ohio House Bill 6, which was signed by the Ohio Governor on July 23, 2019, and took effect October 22, 2019, is designed to provide subsidies to struggling nuclear and coal plants.⁴¹ Maryland Senate Bill 516, which passed on May 25, 2019, aims to ensure that 50 percent of the state’s energy is produced by Tier 1 renewable sources by 2030 and provides further incentives for offshore wind projects.⁴² In May 2018, New Jersey’s Governor signed legislation establishing Zero Emissions Credits to support nuclear plants and legislation increasing the state’s RPS standards, requiring 50 percent of the energy sold in state to be from Class 1 renewable sources.⁴³ Illinois passed comprehensive legislation in late 2016 to subsidize struggling nuclear plants through Zero Emissions Credits.⁴⁴ The December 19 Order does not

⁴¹ See House Bill 6, available at <https://www.legislature.ohio.gov/legislation/legislation-status?id=GA133-HB-6>.

⁴² See Maryland Senate Bill, available at <https://legiscan.com/MD/text/SB516/id/2034938/Maryland-2019-SB516-Chaptered.pdf>.

⁴³ See N.J.S.A. §§ 48:3-87 to 48:3-87.7

⁴⁴ See 20 Ill. Comp. Stat. 3855/1-75(d-5).

address how consumers in these states will pay just and reasonable rates if they are exposed to the potential of losing the ability to apply stated-facilitated resources to meet their capacity obligations. Because the December 19 Order did not account for or address arguments regarding this adverse cost impact on consumers, especially consumers in states that recently implemented subsidies, the new Replacement Rate is not just and reasonable.

Remedying this error on rehearing would require only that the Commission treat all existing resources comparably. Just as the December 19 Order carves out and exempts certain demand resources, self-supply resources, energy efficiency resources, renewable resources, and capacity storage resources that are determined to be receiving a State Subsidy, the December 19 Order should also carve out and exempt nuclear and coal-fired resources that are currently receiving or eligible to receive a State Subsidy. The bright line between what resources are subject to the MOPR should be drawn as of December 19, 2019, the date on which all states, all consumers, and all resources were properly on notice of the going-forward changes to the PJM capacity rules. Accordingly, the PJM Consumer Representatives respectfully request that the Commission grant rehearing and revise the Replacement Rate to exempt from the MOPR all existing resources, in a comparable manner to how the December 19 Order provided exemptions for certain other classes of existing resources.

2. The December 19 Order’s Application of the MOPR to Existing Resources That Are Receiving State Subsidies Constitutes Retroactive Ratemaking.

In the December 19 Order, the Commission determined that the expanded MOPR will apply to all new and existing, internal and external, State-Subsidized Resources that participate in the capacity market, regardless of resource type unless the resource qualifies for an exemption outlined in the Order.⁴⁵ Resource owners and states providing subsidies to existing resources –

⁴⁵ December 19 Order at P 9.

that receive State Subsidies and do not enjoy an exemption from the MOPR – did not have advance notice that the December 19 Order would impose the MOPR on those resources and that the December 19 Order would abruptly abandon any form of an RSFRR Alternative. Even if states and resources were generally on notice of potential changes after the issuance of the June 2018 Order, the actual MOPR rules and details will not be finalized until FERC accepts PJM’s compliance filing (which is not due until March 18, 2020). Accordingly, the December 19 Order’s application of the MOPR to existing resources that receive state subsidies and do not enjoy an exemption constitutes retroactive ratemaking.

In the December 19 Order, the Commission recognized its statutory obligation and exclusive jurisdiction to ensure that wholesale capacity rates in the multi-state regional market are just and reasonable.⁴⁶ As a cardinal principle of ratemaking, the rule against retroactive ratemaking provides that “a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle.”⁴⁷ The rule against retroactive ratemaking is in place to help ensure due process by preventing the deprivation of property vis-à-vis that retroactive rate. The Commission assesses due process claims on a case-by-case basis based on the totality of the circumstances.⁴⁸ In *ANR Pipeline*, the Commission recognized the United

⁴⁶ *Id.* at P 7 (citing 16 U.S.C. §§ 824, 824d, 824e; 2011 MOPR Order, 135 FERC ¶ 61,022 at P 143; *NJBPU*, 744 F.3d at 100; *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1296 (2016); 2011 MOPR Rehearing Order, 137 FERC ¶ 61,145 at P 3; *ISO New England Inc.*, 162 FERC ¶ 61,205, at P 21 & n.32 (2018) (CASPR Order); *ISO New England, Inc.*, 135 FERC ¶ 61,029, at P 170 (2011) (2011 ISO-NE MOPR Order), *reh’g denied*, 138 FERC ¶ 61,027 (2012), *aff’d sub nom. New Eng. Power Generators Ass’n v. FERC*, 757 F.3d 283, 293-295 (D.C. Cir. 2014); *Connecticut Dept. of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009)).

⁴⁷ *Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979); *see Town of Norwood v. FERC*, 53 F.3d 377, 381 (D.C. Cir. 1995) (retroactive ratemaking doctrine prohibits the Commission from authorizing or requiring a utility to adjust current rates to make up for past errors in projections); *see also San Diego Gas & Elec. Co. v. Sellers of Energy and Ancillary Serv. et al.*, 96 FERC ¶ 61,120, 61,505 (2001). The rule against retroactive ratemaking and the filed rate doctrine “ensure rate predictability, and by preventing discriminatory pricing, they promote equity.” *Consol. Edison of N.Y. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003); *see also Oxy USA v. FERC*, 64 F.3d 679, 668-669 (D.C. Cir. 1995).

⁴⁸ *ANR Pipeline Company and TC Offshore LLC*, 143 FERC ¶ 61,225 at P 57 (2013) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

States Supreme Court’s explanation that “the touchstone of due process is protection of the individual against arbitrary action of government.”⁴⁹ Due process requires that a party affected by government action be provided “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.”⁵⁰

By subjecting existing resources receiving State Subsidies to the MOPR, the Commission retroactively establishes a new ratemaking scheme for existing resources that relied on State Subsidies and have made significant investments and business decisions with respect to the PJM Capacity Market based on the State Subsidy and respective state legislation/policy. The retroactive ratemaking may result in a deprivation of property for those resources and for consumers in certain states that may be forced to pay twice for capacity. For example, if the State-Subsidized resources do not clear the capacity auctions due to the expanded MOPR requirement, then consumers will be responsible for the payment of the subsidies to certain generators and be responsible for paying for the capacity to cover their capacity obligations that cannot be met with the subsidized resource. Certain states in the PJM region have implemented subsidies based on the understanding that FERC would allow a resource carve-out option per the June 2018 Order; however, FERC withdrew that option without much explanation on December 19, 2019.⁵¹ Prior to the issuance of the order on December 19, 2019, states and generation resources did not receive official notice that the MOPR would broadly apply to all

⁴⁹ *Id.* at P 57 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974))) (citations omitted).

⁵⁰ *ANR Pipeline*, 143 FERC ¶ 61,225 at P 57 (quoting *Jones v. Flowers*, 547 U.S. 220, at 226 (2006)) (internal citations and quotations omitted). Due process also requires “the opportunity to be heard at a meaningful time and in a meaningful manner.” *ANR Pipeline*, 143 FERC ¶ 61,225 at P 57 (quoting *Mathews v. Eldridge*, 424 U.S. 319, at 333 (1976)) (internal citations and quotations omitted).

⁵¹ See December 19 Order, Glick Dissent at PP 2, 6, 51; see *PPL Wallingford Energy v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (requiring an agency to “articulate a satisfactory explanation”).

existing state-subsidized resources that do not enjoy an exemption (*e.g.*, nuclear, coal, natural gas, petroleum, solid waste), with no opportunity for an RSFRR Alternative.

The December 19 Order even recognizes that its Replacement Rate “does not purport to solve every practical or theoretical flaw in the PJM capacity market.”⁵² The Commission hopes to resolve some of those lingering issues and details in the Compliance Filing that PJM will file on March 18, 2020. Therefore, generation resources will not be on notice of the actual details of the Replacement Rate, such as the price floors and Net CONE or Net ACR calculations and methodologies, until the Commission rules on the PJM compliance filing that is due March 18, 2020.⁵³ The methodology behind the calculation of any default offer price floor will directly impact the economics and the business decisions of a generation resource that is subject to the expanded MOPR. For the reasons explained herein, the Commission should not apply the MOPR to existing resources receiving State Subsidies; such resources should be grandfathered, consistent with the Commission’s treatment of other existing State-Subsidized resources.

3. The December 19 Order’s Decision to Continue Applying the MOPR to Non-Subsidized New Natural Gas-Fired Generation Is Unduly Discriminatory Against Such Resources And Is Not Supported by Substantial Evidence.

In the December 19 Order, the Commission found that the MOPR should continue to apply to new natural gas-fired combustion turbine (“CT”) and combined cycle (“CC”) resources, regardless of whether those resources receive State Subsidies.⁵⁴ The Commission explained that although the June 2018 Order focused on State Subsidies, it set forth that new natural gas-fired resources remain able to suppress capacity prices.⁵⁵ However, nowhere in the December 19 Order nor the June 2018 Order did the Commission demonstrate or provide any evidence that

⁵² December 19 Order at P 5.

⁵³ *See id.* at PP 4, 14, 143-155.

⁵⁴ December 19 Order at P 42.

⁵⁵ *Id.* at PP 8, 42 (citing June 2018 Order at PP 151, 155).

new natural gas-fired resources are suppressing capacity prices and should be subject to the MOPR when they do not receive State Subsidies. The continued application of the MOPR to new non-subsidized natural gas-fired generation is inconsistent with the rationale and pro-competition theme in the rest of the December 19 Order, which found that the MOPR will not apply to other new non-subsidized resources.⁵⁶

Because the continued application of the MOPR to new non-subsidized natural gas-fired generation is not supported by substantial evidence or even a scintilla of new evidence,⁵⁷ the Commission’s findings on the matter are not determinative.⁵⁸ The June 2018 Order and the December 19 Order did not make any independent finding or adjudication on the ability of new non-subsidized natural gas-fired generation to suppress capacity prices. The June 2018 Order merely cited to the 2011 PJM MOPR Order where the Commission found that “new natural gas-fired resources were not similarly situated relative to other new entrants because natural gas-fired resources have the shortest development time, and ‘thus are more efficient resources to suppress capacity prices.’”⁵⁹ The underlying Calpine Complaint in this proceeding in Docket No. EL16-49 and PJM’s Tariff filings in Docket No. ER18-1314 did not allege price suppression by new *non-subsidized* gas-fired resources, but focused instead only on the increased level of state subsidies or out-of-market support for certain generation resources or resource types.⁶⁰ The December 19 Order established a new Replacement Rate in PJM’s capacity market in response

⁵⁶ See *id.* at PP 5-8.

⁵⁷ The “substantial evidence” standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, at 97 (3d Cir. 2014).

⁵⁸ Section 313(b) of the FPA, 16 U.S.C. § 8251(b).

⁵⁹ June 2018 Order at P 155 (quoting *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 153 (2011) (2011 PJM MOPR Order)).

⁶⁰ See December 2019 Order at P 1, 5; June 2018 Order at PP 155-156. The Calpine Complainants argued that existing resources receiving state-subsidized out-of-market payments were making below-cost offers and artificially suppressing capacity prices in the PJM-operated capacity market. “Complaint Requesting Fast Track Processing,” *Calpine Corp. et al. v. PJM*, Docket No. EL16-49-000 (filed Mar. 21, 2016).

to more recent data and information presented in the Calpine Complaint and consolidated dockets in this proceeding that focused on the impacts of State Subsidies.

Given changes in the market since 2011, the Commission cannot rely on the 2011 MOPR Order's treatment of new gas-fired resources when overhauling and revamping the rest of the MOPR. In the 2011 PJM MOPR Order proceeding, the PJM Load Group had argued that PJM had not demonstrated, through any testimony or evidence, that natural gas CT and CC units should be singled out for MOPR application.⁶¹ However, the Commission accepted PJM's proposal, and stated that CTs and CCs have the shortest development time and are more efficient resources capable of capacity price suppression.⁶² On rehearing, the Commission justified its application of the MOPR to CT and CC units based on an assertion that CT and CC "attributes...could trigger the concern for which the MOPR exists."⁶³ The December 19 Order and the July 2018 Order do not provide any reasoned explanation as to why any inherent attributes of new natural gas-fired generation resources still trigger the concern for the MOPR today. Historically, the MOPR was imposed on certain new natural gas-fired generation resources to prevent the exercise of market power by states relying on those resources to facilitate uneconomic new entry.⁶⁴ The December 19 Order and the July 2018 Order do not contain any evidence demonstrating that any potential for market power, uneconomic new entry, and price suppression by CC and CT natural gas-fired resources exists today when State Subsidies are absent. Yet, that is exactly what the December 19 Order finds and directs PJM to address in a compliance filing.

⁶¹ See 2011 PJM MOPR Order at P 151.

⁶² *Id.* at P 153, *order on reh'g*, 137 FERC ¶ 61,145, at PP 109-112 (2011) (2011 PJM MOPR Rehearing Order).

⁶³ 2011 PJM MOPR Rehearing Order at PP 109-112.

⁶⁴ *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at PP 19-20 (2013), *order on reh'g*, 153 FERC ¶ 61,066 (2015), *vacated and remanded sub nom. NRG Power Mktg., LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017).

The December 19 Order further clarified that “new resources that certify to PJM that they will not receive out-of-market payments will generally be exempt from review through the Competitive Exemption, *with the exception of new gas-fired resources*, which were already subject to review under the current MOPR and will remain so under the Replacement Rate.”⁶⁵

Regarding the Competitive Exemption, the December 19 Order determined that:

it is reasonable and consistent with the purposes of the expanded MOPR directed herein to allow new and existing resources (*other than new gas-fired resources*) that certify to PJM that they will forego any State Subsidies, to avoid being subject to the applicable default offer price floor. Doing so will facilitate the capacity market’s selection of the most economic resources available to meet resource adequacy objectives.⁶⁶

The December 19 Order does not explain how prohibiting new natural gas-fired resources from applying for the Competitive Exemption is reasonable or will help “facilitate the market’s selection of the most economic resources available.”⁶⁷ In fact, because the Commission would continue to subject new, non-subsidized natural gas-fired resources to the MOPR, natural gas-fired resources may not be able to offer at their most competitive level, and, therefore, consumers may be deprived of the capacity market’s selection of the most economic resources, even when those resources are developed without any State Subsidy. In the December 19 Order, the Commission concluded: “A competitive, fuel-neutral process is designed to select the most economic resources.”⁶⁸ Requiring a nexus between a State Subsidy and all other resources, but not requiring any nexus between a State Subsidy and natural gas-fired resources, directly undermines the Commission’s objective of ensuring a competitive fuel-neutral process that is

⁶⁵ See December 19 Order at P 2 (emphasis added).

⁶⁶ *Id.* at P 161 (emphasis added).

⁶⁷ See *id.*

⁶⁸ See December 19 Order at P 74; see *18 CFR Part 35 Frequency Regulation Compensation in the Organized Wholesale Power Markets*, 137 FERC ¶ 61,064 at P 16, 194 (2011) (emphasizing the importance of neutral treatment toward fuels).

designed to select the most economic resources. Such internal inconsistency within the December 19 Order reflects arbitrary and capricious decision-making.

The December 19 Order’s express carve-out of new natural gas-fired resources from the Competitive Exemption is unduly discriminatory. With respect to a sale under FERC’s jurisdiction, the Federal Power Act does not allow a public utility to “make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage” or “maintain any unreasonable differences in rates, charges, service, facilities, or in any other respect.”⁶⁹ Discrimination is “undue” where there is a difference in rates, charges, services, or facilities among similarly situated entities that is not justified by some legitimate factor⁷⁰ or valid reason.⁷¹ In the December 2019 Order, the Commission did not explain why new natural gas-fired generation is never entitled to a Competitive Exemption or why all new natural gas-fired generation must continue to be subject to the MOPR when other new, non-subsidized resources are not subject to the MOPR. The discrimination here is “undue” because the Commission did not justify its differential treatment by any “legitimate factor” or explanation.

Determining whether entities are similarly situated is a question of fact for the Commission.⁷² The December 19 Order did not explain why new natural gas-fired resources are situated differently than other new, non-subsidized resources offering into the PJM capacity market. The December 19 Order grants, without justification, a preference to other new non-

⁶⁹ See 16 U.S.C. § 824d(b).

⁷⁰ *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045 at P 115 (2003). See also *Midwest Indep. Transmission System Operator, Inc., et al*, 153 FERC ¶ 61,101, at 61,700-701 (2015) (“Prior Commission precedent has recognized that dissimilar treatment of dissimilar resources does not constitute undue discrimination.”).

⁷¹ *Black Oak Energy v. FERC*, 725 F.3d 230, 239 (D.C. Cir. 2013) (only accepting differential or disparate treatment “if FERC offers a valid reason for the disparity”).

⁷² See *Tennessee Gas Pipeline Commission*, 99 FERC ¶ 61,285 at p. 62,200 (2002).

subsidized resources over new gas-fired generation in violation of the Federal Power Act's prohibition against undue discrimination.⁷³ The PJM Consumer Representatives respectfully request that the Commission, on rehearing, reverse its determination that new, *non-subsidized* natural gas-fired generation should be subject to the MOPR.

4. The December 19 Order Unduly Discriminates Against Certain Existing Resources By Providing Explicit Exemptions for Certain Types of Existing Resources, But Not Others.

The December 19 Order provides explicit exemptions from the MOPR for some existing resources, but not for other existing resources.⁷⁴ For example, the Self-Supply Exemption is for self-supply resources that fulfill at least one of these criteria: (1) have successfully cleared an annual or incremental capacity auction prior to the December 19 Order; (2) have an executed interconnection construction service agreement on or before the December 19 Order; or (3) have an unexecuted interconnection construction service agreement filed by PJM for the resource with the Commission on or before the December 19 Order.⁷⁵ All existing generation resources were, by definition, developed and “existing” prior to the issuance of the order on December 19, 2019. Many of those existing resources have cleared several annual or incremental auctions. Several existing resources have executed interconnection construction service agreements or, as discussed below, other similar agreements prior to December 19, 2019. Several other resources may have unexecuted interconnection construction service agreements or functionally similar agreements filed by PJM prior to December 19, 2019. Yet, a broad category of existing resources (nuclear, coal, natural gas, petroleum) will be subject to the MOPR while other select

⁷³ See 16 U.S.C. § 824d(b).

⁷⁴ See December 19 Order at P 2 (providing three categorical exemptions for 1) existing self-supply resources; 2) existing demand response, energy efficiency, and storage resources; and 3) existing renewable resources participating in RPS programs).

⁷⁵ *Id.* at P 12.

existing resources obtain exemptions from the MOPR. The December 19 Order has not justified this differential treatment of similarly situated existing resources.

The December 19 Order concludes that “subsidized resources distort prices in a capacity market that relies on competitive auctions to set just and reasonable rates.”⁷⁶ The December 19 Order reflects the Commission’s goal of ensuring a competitive market with just and reasonable rates. The Commission has determined that a resource-neutral construct best ensures competitive, just, and reasonable outcomes.⁷⁷ In the December 19 Order the Commission concluded: “A competitive, fuel-neutral process is designed to select the most economic resources.”⁷⁸ Yet, the December 19 Order establishes differential treatment among existing resources and discriminates based on fuel type. This inconsistency in the December 19 Order reflects a lack of reasoned decision-making. The same rationale that motivates the Commission’s objective of a competitive, fuel-neutral process should motivate a fuel-neutral determination that existing resources should be exempt from the new MOPR approach that the Commission adopted, for the first time, on December 19, 2019.

Critically, the PJM Consumer Representatives do not seek to overturn the December 19 Order’s exemption for the three categories of existing resources. Rather, the PJM Consumer Representatives emphasize that the same outcome should apply to all existing resources, irrespective of fuel type. The December 19 Order’s discriminatory treatment among various classes of existing resources cannot be justified. For example, the Commission granted the Self-

⁷⁶ *Id.* at P 5.

⁷⁷ See 18 CFR Part 35 *Frequency Regulation Compensation in the Organized Wholesale Power Markets*, 137 FERC ¶ 61,064 at P 16, 194 (2011) (issuing a final rule revising regulations governing pricing and compensation for frequency regulation services in RTOs and ISOs upon finding that the rules were unduly discriminatory because the regulations resulted in disparate treatment of resources). The Commission emphasized: “[t]his Final Rule is . . . resource-neutral. The directives of this Final Rule will ensure that *all* eligible resources providing frequency regulation service within existing RTO or ISO frequency regulation markets are compensated at the just and reasonable rate.”) *Id.* at P 194 (emphasis in original).

⁷⁸ See December 19 Order at P 74.

Supply Exemption “[i]n order to limit disruption to the industry and to preserve existing investments.”⁷⁹ This same rationale applies equally to all existing resources, for which significant investments have been made, such as nuclear power plants. Exempting all existing resources would also dramatically lessen “disruption to the industry.” By only granting select MOPR exemptions for existing resources, the December 19 Order allows for the disruption of investments for certain industries/resources while minimizing disruption for other industries/resources. Such differential treatment, unjustified by any legitimate factor or valid reason,⁸⁰ constitutes undue discrimination in violation of the Federal Power Act.⁸¹ The Commission should provide MOPR exemptions for all existing resources, especially the most cost-intensive resources that have already made significant historical investments in their resources and operating facilities.

5. The December 19 Order Erred to the Extent It Determined That “Voluntary RECs” Are State Subsidies, Particularly In Arrangements Where The Environmental Attributes That Are Being Traded Do Not Include RECs That Are Necessary for State RPS Compliance.

The December 19 Order concluded that renewable energy credits that are procured as part of a state-mandated or state-sponsored procurement process are State Subsidies.⁸² The Order further explained that “voluntary REC arrangements” that are not part of the state-mandated process still constitute State Subsidies because “it is not possible, at this time, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-

⁷⁹ *Id.* at P 203.

⁸⁰ See *El Paso Natural Gas Co.*, 104 FERC ¶ 61,045 at P 115 (2003). See also *Midwest Indep. Transmission System Operator, Inc., et al.*, 153 FERC ¶ 61,101, at 61,700-701 (2015) (“Prior Commission precedent has recognized that dissimilar treatment of dissimilar resources does not constitute undue discrimination.”); *Black Oak Energy v. FERC*, 725 F.3d 230, 239 (D.C. Cir. 2013) (only accepting differential or disparate treatment “if FERC offers a valid reason for the disparity”).

⁸¹ See 16 U.S.C. § 824d(b); see also Request for Rehearing of FirstEnergy Solutions, Docket No. EL16-49 *et al.*, at 8, 17-19 (filed Jan. 17, 2020) (arguing that the December 19 Order’s select use of exemptions for existing resources, but not others, without any valid explanation, is unduly discriminatory)

⁸² December 19 Order at P 176.

mandated RECs.”⁸³ However, the December 19 Order also determined elsewhere that “the record in this proceeding does not demonstrate a need to subject voluntary, arm’s length bilateral transactions to the MOPR at this time.”⁸⁴ The PJM Consumer Representatives seek clarification or, in the alternative, rehearing, that resources engaged in the sale of RECs that are not necessary for the buyer to meet state RPS requirements are exempt from the MOPR, irrespective of whether the resource is new or existing. The RECs or other environmental attributes in such voluntary transactions are not State Subsidies.

In the open, bilateral market, parties may enter into contractual arrangements, such as power purchase agreements (“PPAs”), for energy and associated environmental attributes, including RECs, with renewable energy resources. To demonstrate corporate social responsibility and environmental stewardship, a company may enter into a PPA with a renewable facility wherein the renewable facility provides energy and RECs to the company or a third-party supplier acting on the company’s behalf. The RECs may be national credits such as Green-e credits, or may be defined as those meeting certain state RPS requirements. However, in a “voluntary REC” transaction, the RECs are not needed or used by the retail customer or its load-serving entity for state RPS compliance. Because there is no nexus between the customer’s load and any state RPS, the generating resource does not obtain any State Subsidy from its sale of the RECs.

Despite the December 19 Order’s indication that it is not possible to distinguish state-mandated RECs from voluntary RECs, the record in this proceeding demonstrates that PJM is capable of administering such a distinction. PJM itself proposed to exclude from its definition of Material Subsidy any RECs that a seller sells “to a purchaser that is not required by a state

⁸³ *Id.* at P 176.

⁸⁴ *Id.* at P 70.

program to purchase the REC, and that purchaser does not receive any state financial inducement or credit for the purchase of the REC.”⁸⁵ PJM explained that such an exchange occurs through a voluntary bilateral arrangement such as when a purchaser seeks to fulfill voluntary corporate green energy goals.⁸⁶ In its comments in this proceeding, the Microsoft Corporation explained that it enters into long-term PPAs with renewable developers and retires the RECs it receives without realizing any financial benefit from those RECs.⁸⁷ If a renewable resource can certify that all the RECs it sold are “voluntary RECs” outside of a state-sponsored program or mandate, then the resource should not be deemed to be receiving a State Subsidy and should be exempt from the MOPR.

The Commission’s aim in developing an expanded MOPR is “to mitigate the impact of State Subsidies on the capacity market.”⁸⁸ Recognizing that RECs may be competitively produced and competitively procured is fully consistent with the Competitive Exemption, which the Commission established because it recognized that resources that do not receive State Subsidies should be able to participate in the capacity market without mitigation.⁸⁹

On rehearing, the Commission should reverse its initial determination on “voluntary REC arrangements,” or provide the necessary clarification that voluntary REC arrangements that are not used for state RPS compliance do not constitute State Subsidies and do not subject a resource to the MOPR. Maintaining the determination on voluntary RECs in the December 19 Order is not supported by substantial evidence and does not reflect reasoned decision-making.

⁸⁵ PJM Initial Testimony at 22.

⁸⁶ *Id.*

⁸⁷ *See* Microsoft Comments at 2-5.

⁸⁸ December 19 Order at P 161.

⁸⁹ *Id.*

6. The Commission Should Clarify, or, in the Alternative, Grant Rehearing and Find, That Renewable Resources That Qualify for the MOPR Exemption Include all Resources That Were, as of December 19, 2019, Eligible to Provide RECs Under One or More State RPS Statute.

The December 19 Order established an RPS exemption for existing renewable resources receiving support from state-mandated or state-sponsored RPS programs that: (1) have successfully cleared an annual or incremental capacity auction prior to the December 19 Order; (2) have an executed interconnection construction service agreement on or before the December 19 Order; or (3) have an unexecuted interconnection construction service agreement filed by PJM for the resource with the Commission on or before the December 19 Order.⁹⁰ The December 19 Order defined renewable resource within the context of the RPS exemption as an “Intermittent Resource” per PJM’s Tariff.⁹¹ PJM’s Tariff defines Intermittent Resource as “a Generation Capacity Resource with output that can vary as a function of its energy source, such as wind, solar, run of river hydroelectric power and other renewable resources.”⁹² The December 19 Order does not appear to provide for a MOPR exemption opportunity for any other existing renewable resources as defined in state RPS statutes.

The Commission should clarify or grant rehearing and determine that all existing renewable resources will be eligible for the existing renewable exemption. The PJM Tariff definition of Intermittent Resources, which the December 19 Order adopts as a proxy for renewable resources, captures only a subset of existing renewable resources. The term Intermittent Resources certainly does not cover all renewable resources that were eligible to receive and did receive RECs under existing RPS statutes prior to the issuance of the Order on December 19, 2019. Furthermore, renewable resource production may not always be

⁹⁰ December 19 Order at PP 14, 173.

⁹¹ *Id.* at P 173, fn. 340.

⁹² *Id.* at fn. 340 (citing PJM Tariff, Art. 1).

intermittent. Each state that has adopted a RPS has defined what resources may qualify to generate RECs and in what proportions. Prior to the December 19 Order, states did not have any clear notice that the Commission would broadly impose the MOPR on all new renewable facilities generating RECs for state compliance, but yet exempt only a subset of the renewable resources that have, for years, qualified to generate RECs under state RPS. States and new/planned renewable resource facilities are now clearly on notice that new renewable resources are subject to the MOPR if they receive State Subsidies. However, existing renewable resources that were in existence prior to December 19, 2019 had no such notice. States that implemented or recently modified their RPS statutes prior to December 19, 2019 also had no such notice. To respect the reasonable reliance by existing renewable resources on Commission precedent, the MOPR exemption for existing renewable resources should include all existing resource that were eligible to provide RECs under governing state RPS statutes prior to December 19, 2019, and not arbitrarily on a definition in the PJM Tariff that focuses on operational intermittency and not necessarily any renewable attributes.

The Commission also found that an RPS exemption for existing renewable resources was a necessary part of a just and reasonable replacement rate because decisions to invest in renewable resources were guided by FERC's prior determinations that "renewable resources had too little impact on the market to require review and mitigation."⁹³ Given that the Commission found that a MOPR exemption would be just and reasonable because an existing resource may have relied (correctly) on prior FERC decisions indicating that renewable resources had little impact on the PJM capacity market, the Commission should clarify on rehearing that the MOPR exemption for existing renewable resources includes *all* resources that were included in a state

⁹³ December 19 Order at P 174.

RPS statute that was enacted on or prior to the December 19, 2019 because *all* of those resources relied on the Commission’s prior orders.

7. The December 19 Order’s Finding That the MOPR Should Apply to Demand Response Resources Is Not Supported by Substantial Evidence.

The December 19 Order determined that new and existing demand response resources should be subject to the MOPR.⁹⁴ The December 19 Order did grant an exemption for certain existing demand response resources, *i.e.*, those that (1) have successfully cleared an annual or incremental capacity auction prior to the December 19 Order; (2) have completed registration on or before the December 19 Order; or (3) have a measurement and verification plan approved by PJM for the resource on or before the December 19 Order.⁹⁵ However, the December 19 Order did not make any finding or provide any evidence that demand resources are heavily subsidized or are having or were having any price-suppressive impact on clearing prices in PJM’s capacity auction. Instead, the December 19 Order generically concluded that all resources that participate in the PJM capacity market – including demand response, energy efficiency, storage, cogeneration, and seasonal resources – can impact the competitiveness of the capacity market and the resource adequacy it was designed to address.⁹⁶ The December 19 Order did not support that generic conclusion with any concrete evidence or even a scintilla of new evidence,⁹⁷ let alone substantial evidence. Accordingly, the Commission’s factual findings with respect to demand resources are arbitrary and not determinative.⁹⁸

⁹⁴ *Id.* at P 54.

⁹⁵ December 19 Order at P 13.

⁹⁶ *Id.* at P 54.

⁹⁷ The “substantial evidence” standard “requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence.” *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, at 97 (3d Cir. 2014).

⁹⁸ Section 313(b) of the FPA, 16 U.S.C. § 8251(b).

In his dissent, Commissioner Glick asserted that the December 19 Order ignores the existing business model around demand resources and points out that PJM’s market rules have permitted Curtailment Service Providers (“CSPs”) to participate in the capacity auction without identifying all of the end-use demand resources they aggregate.⁹⁹ Because CSPs will now need to know all of their demand resource end-users prior to the capacity auction (which is three years in advance of the delivery year), the CSP business model and the ability of demand resources to contribute to PJM reliability may be irreparably damaged.¹⁰⁰ CSPs would potentially need to enter into contracts with their customers three years in advance of a customer making a commitment to serve as a demand resource. Despite the increased market efficiency and reliability benefits that demand resources have provided to PJM, the December 19 Order arbitrarily, and without any evidentiary support as to demand resources’ price-suppressive capabilities, determined that demand resources should be subject to the MOPR.

Evidence presented in this proceeding supports a finding that the MOPR *should not* apply to existing and new demand resources. In requesting demand resources to be exempt from the MOPR, the D.C. Public Service Commission explained that nearly all PJM states have demand response programs that rely on the PJM capacity market’s value and that subjecting these demand resources to the MOPR would increase prices in the long-term.¹⁰¹ The D.C. Commission explained that adding a price floor will likely increase the price for the units cleared.¹⁰² The Maryland Commission argued that resources that aggregate seasonal resources

⁹⁹ December 19 Order at Glick Dissent, P 37 (citing PJM Manual 18: PJM Capacity Market – Attachment C: Demand Resource Sell Offer Plan).

¹⁰⁰ *See* December 19 Order at PP 37-38.

¹⁰¹ *Id.* at P 47 (citing DC Commission Initial Testimony at 6).

¹⁰² DC Commission Initial Testimony at 6.

for purposes of offering into the auction should be exempt from the MOPR, given the importance of demand resources and Energy Efficiency to federal and state energy policies.¹⁰³

The December 19 Order also ignores the benefits that demand resources provide to the PJM capacity market. In this proceeding, the Maryland Commission, citing to federal policy from the Department of Energy, explained that “demand response can help stabilize volatile electricity prices and help mitigate generator market power.”¹⁰⁴ The D.C. Commission explained that demand resources can enhance reliability, decrease prices, and reduce emissions.¹⁰⁵ In his dissent, Commissioner Glick cited to recent reports for the proposition that active participation by demand resources in electricity markets contributes to “more competitive and robust [] market results” and is a proven and “valuable tool for maintaining reliability both in terms of real-time grid stability and long-term resource adequacy.”¹⁰⁶ Furthermore, PJM indicated that the default offer floor price for certain demand resources would be at or near zero, even if they do receive a State Subsidy and are subject to the MOPR.¹⁰⁷

The December 19 Order does not cite to any specific evidence that demonstrates that demand resources have price-suppressive capabilities or shows that demand resources, existing or new, have contributed in any way to price suppression in the PJM capacity market and should be subject to the MOPR. On the contrary, the aforementioned record evidence supports *not*

¹⁰³ Maryland Commission Initial Testimony at 11-12 (quoting United States Department of Energy, Demand Response Policy, <https://www.energy.gov/oe/services/electricity-policy-coordination-and-implementation/state-and-regional-policy-assistanc-4>).

¹⁰⁴ *Id.*

¹⁰⁵ DC Commission Initial Testimony at 6.

¹⁰⁶ December 19 Order at Glick Dissent, fn. 72 (citing *2019 Assessment of Demand Response and Advanced Metering* 17, 20 (2019), available at <https://www.ferc.gov/legal/staff-reports/2019/DR-AM-Report2019.pdf>. and PJM Interconnection, *Demand Response Strategy 1* (2017), available at <https://www.pjm.com/~media/library/reports-notice/demand-response/20170628-pjm-demand-response-strategy.ashx>).

¹⁰⁷ PJM Initial Brief at 47; December 19 Order, Glick Dissent at P 38.

subjecting existing and new demand resources to the MOPR. The PJM Consumer Representatives request that, on rehearing, the Commission find that existing and new demand response resources should not be subject to the MOPR.

8. The December 19 Order Errs in Establishing Exemptions For Existing Resources Only Based On The Status Of An Interconnection Construction Service Agreement, And Not On Other Contractual Arrangements Entered Into By Those Existing Resources That Are Filed with the Commission by PJM.

For the renewable exemption and self-supply exemption for existing resources, the December 19 Order determined that those existing resources would be eligible for an exemption from the expanded MOPR if the resource has an executed interconnection construction service agreement (“ICSA”) on or before the December 19 Order or has an unexecuted ICSA filed with FERC by PJM for the resource with the Commission on or before the December 19 Order.¹⁰⁸ The December 19 Order does not recognize any other type of agreement that facilitates a generation resource’s interface with the PJM system. Generation resources may enter into contractual arrangements for market access aside from an ICSA. For example, a resource may also enter into an interconnection services agreement (“ISA”) if construction is not needed. An ISA provides rights and obligations to the interconnecting resource, including in many cases the necessary right to function as a Capacity Resource. Alternatively, a resource may enter into a wholesale market participation agreement (“WMPA”) if the generation resource interconnects with a local distribution system instead of a transmission system. The WMPA also allows a resource to participate in PJM’s capacity market. The Commission should grant rehearing and clarify that the RPS exemption and self-supply exemption would apply not just to ICSAs, but also to ISAs, WMPAs, and any other relevant contractual arrangement/agreement into which generators may enter in order to participate in the PJM capacity market. The existence of such

¹⁰⁸ December 19 Order at PP 12, 14.

agreements provides sufficient evidence that the associated generating resource was in the process of entering the PJM market prior to the December 19 Order and should, therefore, be exempt from the MOPR as an existing resource.

9. The December 19 Order Errs in Assuming That a Customer with Behind-the-Meter Generation (“BTMG”) Operates in the Same Manner as “In Front-of-the-Meter” Merchant Generation.

The December 19 Order expresses a belief that “it is feasible for PJM to determine [Net CONE and Net ACR] values for demand resources that rely on various types of [BTMG] as a substitute for purchasing wholesale power.”¹⁰⁹ The December 19 Order recognizes that the scale may be different for BTMG but concludes that “the fundamental elements of the analysis are the same.”¹¹⁰ The December 19 order errs in drawing this conclusion and in ignoring the unique circumstances of each customer with BTMG. A customer with BTMG does not operate in the same manner as front-of-the-meter merchant generation. In this proceeding, Direct Energy explained that BTMG is not economically similarly situated to in-front-of-the-meter generation.¹¹¹ If demand resources are subject to the MOPR at all, the Net CONE values for in-front-of-the-meter generation resources should not apply to BTMG.

The December 19 Order does not account for the unique configuration of each customer with BTMG. For example, an industrial customer with BTMG may use a cogeneration unit primarily to offset its steam load, and provide energy and capacity from the unit only as a by-product of its primary purpose as a steam source. Manufacturers with waste wood or waste heat resources may use those resources primarily to manage the waste by-product efficiently, not for the primary purpose of selling energy or capacity into the PJM markets. Other customers may

¹⁰⁹ *Id.* at P 13.

¹¹⁰ December 19 Order at P 13.

¹¹¹ *Id.* at P 119 (citing Direct Energy Initial Testimony at 12).

install BTMG for on-site reliability purposes. The common thread with BTMG is that the primary purpose of the generation is not sales into any PJM market, but to serve the unique interests of the retail customer that installed the BTMG. Merchant in-front-of-the-meter generation does not share these objectives. The conclusion in the December 19 Order that BTMG is comparable to merchant generation is not supported by substantial evidence and simply does not reflect reality. If demand resources are subject to the MOPR, they should not have default offer prices based on the Net CONE and Net ACR designed for merchant generation.

Moreover, the requirement in the December 19 Order that PJM use merchant generation Net CONE and Net ACR will impose significant, and unnecessary, administrative burdens on PJM and the Market Monitor. The generation resource configuration and associated cost structures for customers with BTMG that offer demand resource capacity into the capacity auction differ from customer to customer. For example, while the Gross CONE for a new type of cogeneration equipment may be discernible, the netting approach – in order to be valid – will need to ascribe some value to the steam that is produced by the cogenerator. The value of the steam will be customer-specific and, even for a single customer, may vary from day to day depending on manufacturing operations and the unit's varying heat rate. Given the inevitable need to evaluate demand resources on a case-by-case basis, PJM would be administratively burdened to develop resource-specific, site-specific, and time of day-specific offer floor prices for demand resources. Furthermore, PJM has never been charged with developing default offer prices for demand resources, as the MOPR has never applied to demand resources.¹¹² The administrative infeasibility of attempting to determine Net CONE or Net ACR values for BTMG,

¹¹² See June 2018 Order at P 41; *see also* PJM Initial Testimony at 42.

coupled with the dearth of evidence demonstrating that BMTG is suppressing prices in the capacity market, further supports not applying the MOPR to demand resources, including those with BTMG.

10. If the Commission Does Not Grant Rehearing and Determine That Existing and New Demand Response Resources Should Not Be Subject to the MOPR, the Commission Should Clarify the Treatment of Demand Resources.

If the Commission does not grant the rehearing request of the PJM Consumer Representatives that existing and new demand response resources should not be subject to the MOPR, then the Commission should clarify the treatment of demand resources, as discussed below.

- a. The calculation of the Net CONE value and the default offer price for both BTMG demand resources and non-BTMG demand resources should hinge on a historical measure of actual capacity clearing prices.**

In the December 19 Order, the Commission directed PJM to develop appropriate default offer price floor values – Net CONE values for new demand resources and Net ACR values for new demand resources that become existing demand resources after they clear an auction.¹¹³ The December 19 Order found that for non-BTMG, PJM may rely on a historical, three-year averaging approach similar to the one PJM had already proposed for planned demand response resources to create a proxy default offer price floor.¹¹⁴ The December 19 Order suggests that the default offer price for BTMG should be tied to the costs of the BTMG, which the December 19 Order finds “are the same as for other [generation] resources.”¹¹⁵ Once a new State-Subsidized BTMG demand resource clears an auction, it will be subject to a Net ACR calculation for that BMTG generation type. Once a new State-Subsidized non-BMTG demand resource clears an

¹¹³ December 19 Order at PP 13, 144.

¹¹⁴ *Id.* at P 13.

¹¹⁵ *See id.* at P 144.

auction, it will be subject to a default offer price. For unit-specific determinations of a default offer price for new State-Subsidized demand resources, the December 19 Order suggests “that PJM may need to evaluate idiosyncratic costs for things such as lost manufacturing value.”¹¹⁶

The Commission should clarify or, in the alternative, grant rehearing and find, that in lieu of calculating the Net CONE value and the default offer price for both BTMG demand resources and non-BTMG demand resources, PJM may rely on an average of actual, cleared competitive offers from demand resources that did not receive a State Subsidy. For example, PJM could use the actual cleared non-subsidized offers from demand resources for the past three BRAs. Those offers, unlike Net CONE, Net ACR, or lost production values, would actually reflect a competitive offer level for demand resources. During this proceeding, PJM had explained that it was generally not possible to determine an ACR for demand resources due to the inherent nature of the resource type.¹¹⁷ Accordingly, the Commission should clarify or grant rehearing and find that the historical competitive offers from non-subsidized demand resources may be used to set the default offer prices. If the Commission grants this request for clarification, PJM could avoid the administrative entanglement of calculating Net CONE, Net ACRs, and lost production value for each demand resource.

b. New State Subsidized demand resources that clear a BRA will remain subject to the MOPR and a default offer price based on Net ACR.

The December 19 Order is not clear regarding the use of Net CONE or Net ACR for purposes of calculating a default offer price for new State-Subsidized demand resources. In its summary section, the December 19 Order explained that, going forward, the default offer price floor for applicable new resources (*i.e.*, those that have not cleared a PJM capacity auction) will

¹¹⁶ December 19 Order at P 13.

¹¹⁷ *See* June 2018 Order at P 41.

be Net CONE for their resource class while the default offer price floor for applicable existing resources will be Net ACR for their resource class.¹¹⁸ The December 19 Order clearly stated it would not be appropriate to use Net ACR as the default offer price floor for new resources.¹¹⁹ However, the December 19 Order appeared to determine that new State-Subsidized demand resources that clear a BRA will remain subject to the MOPR and a default offer price based on Net ACR.¹²⁰ The December 19 Order appeared to direct PJM to develop “appropriate net ACR values for [demand response] resources that become existing resources in subsequent auctions.”¹²¹ Furthermore, the definition of “existing” in the exemption for demand resources includes only demand resources that cleared an auction “on or before the date of [the December 19 Order].”¹²²

The December 19 Order’s determination as to whether a resource is new or existing appears to depend on whether a resource will face one-time construction and permitting costs. If the resource is already built and the construction and permitting costs are already sunk as of December 19, 2019, the resource is considered “existing” and subject to the lower net ACR value. For demand resources, the December 19 Order assigns “existing” status based on a prior auction clearing.¹²³ Even if a demand resource is 20 years old, it would be considered “new” if it were now to elect to participate in the capacity auction for the first time. To address the inherent difficulties in classifying demand resources as new or existing and the difficulties in establishing new Net CONE values for new or planned demand resources that have not yet cleared an

¹¹⁸ December 19 Order at P 2.

¹¹⁹ *Id.* at P 140.

¹²⁰ *See id.* at P 13.

¹²¹ December 19 Order at P 13.

¹²² *Id.*

¹²³ *See id.* at P 141.

auction, the Commission should calculate any default offer price for these resources based on the historical average of actual cleared offers from competitive demand resources that did not receive a State Subsidy.

Accordingly, the PJM Consumer Representatives ask the Commission to clarify that new State-Subsidized demand resources that clear a BRA will remain subject to the MOPR and a default offer price based on an historical average of prior competitive demand resource cleared offers, not Net CONE.

c. PJM should not consider inclusion of the value of lost manufacturing in default offers from demand resources.

In its summary section, the December 19 Order explains that, for non-generating demand resources, PJM may rely on a historical averaging approach and may need to “evaluate idiosyncratic costs for things such as lost manufacturing value when considering requests for a Unit-Specific Exemption.”¹²⁴ However, the December 19 Order does not otherwise refer to or explain how lost manufacturing should be measured and calculated in the context of demand resources. In many cases where a non-BTMG demand resource interrupts in response to a curtailment directive, there may not even be a lost manufacturing value or means to measure and quantify that value. Unless the customer’s manufacturing operations are running at full capacity, the customer is likely to shift its “lost” production into another time period. For example, if a customer merely shifts its operations from on-peak hours to off-peak hours, then there is not necessarily a loss in manufacturing. If a manufacturing production line is idled, but the lost production can be moved to a time period when production has not been previously scheduled, then there may not be any actual loss.

¹²⁴ December 19 Order at P 13.

It will be administratively difficult to establish and apply a standardized process to the numerous permutations of demand response resources with variations in fuel use, on-site generation, energy consumption, manufacturing, and operations. The environmental and market conditions may frequently change and impact the lost manufacturing value. The December 19 Order is not clear as to whether a lost manufacturing value should be based on cost, or some other value-laden metric. Additionally, the use of any kind of metric to establish lost manufacturing value could require a company or resource to provide confidential and proprietary data. Given the potential for speculation and the difficulties in quantifying and verifying lost manufacturing value, the Commission should not require the inclusion of lost manufacturing value in capacity market offers submitted by demand resources or in considering requests for a Unit-Specific Exemption for demand resources.¹²⁵ As discussed above, if demand resources are subject to the MOPR at all, the most efficient and perhaps only feasible way to set default offer prices is to calibrate them based on an historical average of competitive (*i.e.*, non-subsidized) cleared demand resource offers.

d. Changes in the subsidy level for existing demand resources should not impact the exemption for those resources.

The December 19 Order determined that an existing demand resource that receives a State-Subsidy would be eligible for an exemption if it “successfully cleared an annual or incremental auction prior to [the December 19 Order].”¹²⁶ Although the December 19 Order does not provide any additional detail around this exemption, the intent of this provision appears to grant a broad exemption for any State-Subsidized existing demand resource that has cleared at

¹²⁵ If customers were given the option to purchase only the capacity they need for on-peak operations, instead of being forced to pay for capacity that PJM or an electric distribution company determines the customer needs for on-peak operations, then this shift from manufacturing on-peak to manufacturing off-peak during system emergency events would occur “naturally” and outside the confines of the capacity market regime.

¹²⁶ December 19 Order at P 13.

any time prior to the December 19 Order. The Commission should clarify that the number of megawatts (“MWs”) that cleared in the prior auction does not impact the future eligibility of a demand resource under this exemption *so long as* the resource “successfully cleared” in a prior auction.¹²⁷ In other words, if the demand resource can offer more or less MWs in the future, the demand resource should still be entitled to this exemption with respect to all of its MWs offered in future auctions.¹²⁸ Additionally, the Commission should clarify that any changes in the level of subsidy for existing resources should not impact the eligibility of the demand resource to seek and qualify for the existing demand resource exemption in future auctions. For example, interruptible credits under state-approved distribution rates could qualify as State Subsidies under the broad definition adopted in the December 19 Order. Those interruptible credits change over time, based on outcomes in state distribution rate cases or as a consequence of the updating of formula distribution rates. In some cases, an increase in a credit could be as small as \$0.01/kW/month, depending on how cost allocation and rate design outcomes in a litigated rate case. Changes in the level of those interruptible credits, or other revenue streams that are deemed to qualify as a State Subsidy, should not cause an exempted existing demand resource to lose that exemption. The Commission should clarify that a demand resource that once qualified for an exemption should retain that exemption indefinitely, notwithstanding any changes in its “capacity rating” or the level of State Subsidy it receives.

¹²⁷ *See id.*

¹²⁸ For a customer serving as a demand resource, the value of the curtailment that is available in PJM’s capacity market is directly dependent on the customer’s Peak Load Contribution (“PLC”) value. The PLC value is based on the customer’s peak consumption in a *prior* year during a limited number of peak hours on the system. Accordingly, year-to-year fluctuations in a customer’s consumption will impact the MWs a customer offers as a demand resource in the subsequent year. *See generally* PJM Tariff, Attachment DD-1.

11. The Commission Should Clarify and Find that RGGI's Credit and Allowance Program Does Not Qualify as a State Subsidy.

While the December 19 Order includes a broad definition of State Subsidy, the Order does not directly address whether the definition of State Subsidy is intended to cover existing and future carbon dioxide (“CO2”) taxes, cap and trade programs, and market-based programs seeking to reduce greenhouse gas emissions, such as “RGGI”.¹²⁹ Given that a few PJM states participate in RGGI and other PJM states may consider joining RGGI in the near future, the Commission should clarify that RGGI does not provide a State Subsidy to any generation resource in a PJM state that participates in RGGI or any generation resource in any PJM state that does not participate in RGGI. The RGGI credit auction process does not operate like a State Subsidy because it does not provide a direct benefit to any generation resource.¹³⁰ Instead, RGGI imposes additional *costs* on CO2-emitting generation resources while not imposing such costs on other generation resources (*i.e.*, those that do not emit CO2). The imposition of these costs under RGGI should not be misconstrued or interpreted as a “State Subsidy” that subjects any generation resource to the MOPR.

Clarification is necessary because the possibility that RGGI could be considered as a State Subsidy is raised not only in Commissioner Glick’s dissent, but has been raised frequently by PJM stakeholders, the industry, and interested commentators since the issuance of the December 19 Order. In many of the scenarios that have been postulated by stakeholders and industry observers involve converting state inaction (*e.g.*, a decision not to join RGGI or a decision not to subject certain resources to RGGI credit purchase obligations) into state action to

¹²⁹ See December 19 Order, Glick Dissent at P 19.

¹³⁰ Although the RGGI auction process does not provide a direct payment to any generation resource, each participating RGGI state has the discretion to use the auction proceeds for various purposes, which could include grants or payments to support renewable generation. Those payments could constitute State Subsidies for the receiving generators.

confer a relative benefit on certain resources. Clarification is necessary to avoid confusion and uncertainty for stakeholders and PJM.

Accordingly, the PJM Consumer Representatives ask the Commission to clarify that a CO2 emission credit obligation resulting from or flowing out of the RGGI construct does not somehow result in a State Subsidy to resources that are not subject to such obligations. In a request for clarification in this proceeding that has already been filed by the PJM Independent Market Monitor (“IMM”), the IMM took the position that RGGI allowance values in unit offers do *not* create a State Subsidy.¹³¹

12. The Commission Should Clarify that the Replacement Rate Must Include Any Necessary Changes to the FRR Mechanism to Ensure That an Exercise of the FRR Option Does Not Undermine State Decisions to Allow Retail Competition.

While the June 2018 Order sought comments on the use of the RSFRR Alternative option, the December 19 Order elected not to implement that option and elected not to change the existing FRR Alternative option in PJM’s Tariff.¹³² The December 2019 Order made a few brief references to the ability of public power, vertically integrated utilities, and self-supply entities to exercise the existing FRR option;¹³³ however, the December 19 Order did not evaluate the potential impact of an increase in the use of the FRR option by load-serving entities (“LSEs”) such as vertically-integrated utilities, public power, and cooperatives.

As representatives of retail consumers, the PJM Consumer Representatives seek clarification from the Commission regarding the application of the existing FRR option to ensure that an exercise of the FRR option does not undermine state decisions to allow retail competition. In their comments in this proceeding, PJM Consumer Representatives emphasized that

¹³¹ Request for Clarification of the IMM of PJM, Docket Nos. EL16-49 *et al.* (filed Jan. 17, 2019).

¹³² *See* December 19 Order at PP 6, 26, 219.

¹³³ *See id.* at P 12, 202, 204.

application of an FRR mechanism “must not frustrate retail competition.”¹³⁴ PJM Consumer Representatives explained that while “individual states will be responsible for ensuring that the correct retail arrangements are in place to facilitate the transfer of such value to individual end-use customers, the Commission can provide the necessary guidance to the states and affected stakeholders...”¹³⁵

A resource’s election of the FRR option may require state legislation to enable the state to create an FRR territory or service area. Then the respective utility or LSE would buy capacity for all customers in that territory, including shopping customers in de-regulated states that have retail competition or in regulated states (such as Virginia) that have provided limited opportunities for retail competition. The Commission should ensure that the benefits of retail competition are not undermined in an FRR territory or otherwise lost through wholesale market inefficiencies related to FRR implementation.¹³⁶ On rehearing, the PJM Consumer Representatives ask the Commission to clarify that its Replacement Rate includes any necessary changes to the FRR mechanism to ensure that an exercise of the FRR option does not undermine state decisions to allow retail competition. The implementation of the December 19 Order should not in any way undermine or reverse the ability of retail customers to shop for suppliers of power and energy where existing state legislation permits them to do so. Therefore, the Commission should ensure that changes to the existing FRR option are adopted that make it clear that a utility’s decision to employ the full FRR mechanism will not force retail customers who are legally eligible to shop for power under existing state law into an arrangement that requires them to obtain capacity through an FRR mechanism.

¹³⁴ See PJM Consumer Representatives Reply Comments at 8.

¹³⁵ PJM Consumer Representatives Comments at 17.

¹³⁶ See Reply Comments of Direct Energy and Nextera Energy Resources at 2; *see also* Reply Brief of NRG Power Marketing LLC at 14-17.

13. The Commission Should Clarify that Renewable Facilities Should Be Able to Elect Whether to Receive the State Subsidy or Receive Capacity Revenue Each Year.

Certain new renewable resources that do not qualify for an exemption from the MOPR will initially need to choose to either 1) accept a State Subsidy and be subject to the MOPR, or 2) to forego the State Subsidy in an effort to clear the capacity market. Depending on the market and the particular year, renewable facilities should be given the option to change their participation in PJM's capacity market from year to year. Many renewable resources do not have must-offer obligations and therefore do not raise market power concerns like other generation resources. Given that new renewable resources may have a more difficult time clearing the capacity market, a renewable resource should not be required to participate in back-to-back auctions and should not be subject to a stay-out period should the resource wish to renew its participation in a capacity auction after being out of the PJM capacity market for a period of time. The Commission should direct PJM to establish rules and deadlines that allow a renewable facility that receives or is eligible to receive a State Subsidy to determine, in advance of each Base Residual Auction and each Incremental Auction, whether it will continue to receive a State Subsidy and be subject to the MOPR, or forego the State Subsidy for the relevant Delivery Year and avoid being subject to the MOPR.

V. CONCLUSION

WHEREFORE, the PJM Consumer Representatives respectfully request that the Commission grant rehearing and clarification of the December 19 Order as set forth herein.

Respectfully submitted,

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Dated: January 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via first-class mail, electronic transmission, or hand-delivery the foregoing upon each person designated on the official service list compiled by the Secretary in this proceeding.

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

/s/ Robert A. Weishaar, Jr.

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