UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, et al.) Docket Nos. EL16-49
) EL18-178
v. ) ER18-1314-000
) ER1314-001
PJM Interconnection, L.L.C. ) (consolidated)

REQUEST FOR REHEARING OF CLEAN ENERGY ADVOCATES

Pursuant to section 313 of the Federal Power Act, 16 U.S.C. § 825l(a), and Rule 713 of the Federal Energy Regulatory Commission’s ("Commission" or "FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713, the Environmental Defense Fund, Natural Resources Defense Council, Sierra Club, Sustainable FERC Project, and Union of Concerned Scientists (collectively "Clean Energy Advocates") hereby request rehearing of the Commission’s Order Establishing Just and Reasonable Rate, 169 FERC ¶ 61,239 (December 19, 2019) (the "December 2019 Order" or "the Order"), which reaffirms its holding that existing capacity market tariff provisions are not just and reasonable, and determines a replacement capacity market rate.

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I. SUMMARY OF ARGUMENT

The Commission’s December 2019 Order mangles PJM’s capacity market beyond recognition, impedes competition at significant cost to consumers, and seriously oversteps boundaries on the Commission’s jurisdiction. The Order is not only bad policy, it also contravenes the basic requirements of the Federal Power Act and the Administrative Procedure Act.

The flaws in the December Order stem directly from the Commission’s misguided June 2018 order, 163 FERC ¶ 61,236 (June 29, 2018), determining that PJM’s prior capacity market rules were unjust and unreasonable. The harm to PJM’s markets and its consumers cannot be fully remedied without the Commission reversing that June 2018 determination. The Commission’s failure to timely rule on pending requests for rehearing of the 2018 Order inappropriately circumvents judicial review and compounds the Commission’s prior error, throwing PJM’s markets into entirely avoidable turmoil.

The Commission has once again failed to articulate a reasoned and lawful basis for why certain sources of benefit or revenue earned outside of FERC-jurisdictional markets justify mitigation, but others do not. The fact that some revenues derive from state policies is not a convincing explanation for why they should be treated differently. Rather, it indicates that the Commission is impermissibly aiming at and seeking to nullify state generation policies. The ultimate result of the Commission’s targeting of state policies will be to slow the growth of renewable energy resources in the PJM region, thereby preserving market share for fossil fuel resources and interfering with states’ lawful efforts to address the climate crisis.

The Commission’s replacement rate is unjust and unreasonable and unduly discriminatory.
First, the unworkably broad definition of State Subsidy renders the replacement rate unlawful on multiple grounds. To begin with, the sheer magnitude of the definition—implicating nearly any state policy that is not explicitly carved out in an exemption—is unworkable. The substantial uncertainty, additional administrative burdens, and significant transactional costs imposed by implementing this definition impacts the efficiency of the market and results in rates that are not just and reasonable. Additionally, the definition guarantees over-mitigation. The Commission arbitrarily and capriciously fails to consider the harm of over-mitigation in its determination of the replacement rate, ignoring without explanation its own precedent. The Commission also lacks the record basis to support its sweeping definition, and the broad definition is not tailored to address its findings of market harm under Federal Power Act section 206, and the lack of clarity in the definition is itself evidence of the unreasoned nature of the Commission’s decision-making. Finally, the vagueness of the definition has the effect of unconstitutionally delegating the Commission’s authority to private entities, PJM and the Independent Market Monitor (IMM).

Second, the Commission’s selective application of the MOPR only to resources benefiting from state policies, but not to those benefiting from federal policies or private sales of generation byproducts, demonstrates that the replacement rate is arbitrary and not tailored to address the purported market harm. It also amounts to undue discrimination, as the Commission has not offered any reasonable basis for distinguishing among sources of out-of-market revenue that reflects its incredibly broad view of market harm. At the same time, the Commission ignores the underlying basis for the vast majority of state policies that it has decided interfere with and wrongly ascribes to such policies an intent to reject the “premise” of the capacity market. States have long supported new and existing generation resources in various ways, as is
their express prerogative under the Federal Power Act. For the capacity market to structurally ignore any revenues received outside of FERC-jurisdictional markets on the mistaken premise that these markets alone must send the price signals for entry and exit is to deny that states have any role in generation.

Third, the Order contains numerous errors of law and fact that reflect the Commission’s heedless expansion of the minimum offer price rule to resources receiving payments for renewable energy credits from voluntary buyers, resource for whom electricity generation is not a primary purpose, demand resources, and self-supply entities. Should the Commission not set aside the Order in its entirety, it must revise it to address these particular issues.

Fourth, the Order disconnects the capacity market from resource adequacy, and will lead to capacity prices and purchases greater than necessary to ensure resource adequacy in PJM. The Order’s determination that a just and reasonable replacement rate includes a broad MOPR encompassing any resource that receives a scintilla of benefit through state policy abandons the core rationale for approving the RPM in the first place: attracting adequate generation at a just and reasonable price. The artificially inflated demand for capacity resulting from the MOPR will, in turn, create clearing prices that exceed the level needed to ensure the region’s capacity needs are met. By ignoring perfectly good capacity and forcing the purchase of unnecessary capacity, the Commission’s broad MOPR would grossly overshoot the installed reserve margin needed to meet reliability standards. The Federal Power Act’s requirement that rates be just and reasonable prohibits setting rules in such a manner that misses the mark by design. Fifth, the Commission’s determination that offer price floors for new renewable energy resources should be based on Net CONE does not result in just and reasonable rates. The Commission provides no reasonable explanation for why such resources should be mitigated to this level, considering
that renewable energy resources, as well as many others, rationally do not rely on a single year’s price signal from the capacity market to determine whether or not to enter operation. The capacity market is not sole source of price signals, and pretending as though it were forces consumers to pay more for capacity than is needed to incent entry. The use of Net CONE for new resources also puts such resources at an unjustified competitive disadvantage compared to new resources. In light of the dramatic expansion of the MOPR, the Commission should reexamine the use of Net CONE to establish offer price floors for new resources.

Sixth, the Commission failed to comply with its statutory duty to protect ratepayers from excessive rates in ordering PJM to implement an expanded MOPR, while rejecting its own prior proposal to implement a resource-specific FRR. The Commission’s core purpose under sections 205 and 206 of the Federal Power Act is to protect the public interest and ensure “just and reasonable rates” by protecting energy customers against excessive prices. Yet the December Order shirks responsibility for the dramatic increase in rates that its expanded MOPR will cause, attempting to shift blame to states pursuing legitimate policy goals within their authority under the Federal Power Act. The Commission did not engage in the statutorily required balancing of consumer and investor interests. If it had, the record would not have supported the result, considering the enormous price increases that will result from this order and lack of any evidence that such increases are needed to incent entry and retention in PJM’s capacity market. The Commission summarily rejected without any reasoned basis its proposed resource-specific FRR, leaving consumers with few if any workable options to avoid excessive rates.

Seventh, by directly targeting state policies, including regulations designed to address the health and environmental consequences of electricity generation, the Commission exceeds its role under the FPA and invades states’ sovereign authority to protect their citizens. Just as states
may not regulate in a manner that aims at a subject within the Commission’s jurisdiction, FERC may not regulate or target an area reserved for state authority.

*Finally,* the Order perpetuates the turmoil in PJM’s market and invites endless litigation by providing insufficient guidance and only 90 days for PJM to submit a complex and controversial compliance filing. Among many other tasks, that compliance filing must transform the Commission’s vague subsidy definition into workable tariff language, and develop offer price floors for resources like demand response in PJM, a completely novel and inherently problematic undertaking. The Commission’s haste to put in place new market rules is confounding in light of the length of time it took the Commission to establish a replacement rate. For the foregoing reasons, and as set out below, Clean Energy Advocates respectfully request the Commission reverse its determination that an expanded minimum offer price rule applying to all, and only to, resources benefiting from state policies, will lead to just and reasonable, and not unduly discriminatory rates.

**II. STATEMENT OF ISSUES**

Pursuant to Rules 203(a)(7) and 713, 18 C.F.R. §§ 385.203(a)(7) and 385.713 (2018), Clean Energy Advocates present the following identification of errors and statement of issues:

The Commission violated the Federal Power Act and Administrative Procedure Act in reaffirming its finding that PJM’s existing Tariff is unjust and unreasonable, and in determining a replacement Tariff under Federal Power Act Section 206. In particular:

1. The Commission fails to articulate a reasoned basis for its reaffirmation that PJM’s prior capacity market rules were unjust and unreasonable and unduly discriminatory;
a. The Commission’s selective application of its principle that certain sources of out of market revenue result in unjust price suppression relies on a novel and incorrect interpretation of Federal Power Act Section 206.1

b. The Commission’s reaffirmation of its prior finding that PJM’s capacity market rules were unjust and unreasonable without issuing a formal denial of requests for rehearing of that prior finding inappropriately circumvents the Federal Power Act’s judicial review provisions.2

2. The replacement rate established by FERC is unjust, unreasonable and unduly discriminatory

a. The Commission’s overbroad definition of State Subsidies triggering application of the minimum offer price rule will result in a large proportion of resources in RPM being subject to offer price floors, leading to prices determined more by subjective application of administrative mechanisms than competition.3

b. The vague definition of State Subsidy unconstitutionally delegates to PJM and the independent market monitor authority to make judgments that are core governmental functions.4

c. The replacement rate is not tailored to address the purported market harm, as it arbitrarily and discriminatorily singles out certain resources receiving benefits


2 16 U.S.C. § 825l.

3 Blumenthal v. FERC., 552 F.3d 875 (D.C. Cir. 2009); Envtl. Action, Inc. v. FERC, 939 F.2d 1057 (D.C. Cir. 1991); California ex rel. Lockyer v. FERC., 383 F.3d 1006 (9th Cir. 2004) review granted, cause remanded sub nom. California ex rel. Harris v. FERC., 784 F.3d 1267 (9th Cir. 2015).

for the expanded MOPR while exempting others with similar effects on PJM’s capacity market.\(^5\)

d. The Commission’s failure to give reasoned consideration to the benefits of state policies or weigh evidence counter to its theories or assessment of market harm is arbitrary and capricious.\(^6\)

e. The Commission makes basic errors of fact and law regarding resources whose primary purpose is not electricity production, behind the meter generation, resources receiving revenues from sales of renewable energy credits to voluntary buyers, and the availability of FRR plans to single customer entities, making application of the MOPR to such resources arbitrary and capricious.\(^7\)

f. The Order disconnects capacity market price signals from resource adequacy and will lead to capacity prices greater than necessary to ensure resource adequacy in PJM, as well as an excess amount of capacity being procured.\(^8\)

g. The Commission’s determination that offer price floors for new renewable energy resources should be based on Net CONE does not result in just and reasonable rates.\(^9\)

h. The Commission failed to address evidence in the record regarding the expanded MOPR’s costs to ratepayers or explain why its replacement rate


\(^9\) 16 U.S.C. §824(e); Emera Maine v. FERC, 854 F.3d 9 (D.C. Cir. 2017); Colorado Office of Consumer Counsel v. FERC, 490 F.3d 954 (D.C. Cir. 2007).
reflects the required balancing of consumer and investor interests, violating its statutory duty to protect ratepayers.\(^{10}\)

i. The Commission failed to explain why it rejected the Resource-Specific FRR, which would have reduced the harm to consumers associated with a broad MOPR.\(^{11}\)

j. The Commission errs in reversing its prior findings regarding demand response registration without evidence in a 206 proceeding that did not state those rates were under review.\(^{12}\)

3. The Order exceeds the Commission’s authority under the FPA by targeting matters within states’ Authority.

   a. The Order overturns the FPA’s balance of federal and state power by targeting matters reserved to the states.\(^{13}\)

   b. The Order encroaches upon states’ inherent authority to craft public policy.\(^{14}\)

4. The Commission’s proposed 90-day timeline for PJM’s compliance filing, which must address a wide range of highly complex and contentious matters, is inadequate and will result in further uncertainty regarding PJM’s capacity market.


III. BACKGROUND

A. Procedural History

The Order caps a multi-year saga marked by profound “regulatory hubris.”15 Beginning with a fully functioning resource adequacy mechanism and among the highest capacity reserves in the country, PJM Interconnection LLC’s (PJM) capacity market now faces the prospect of mass exodus and possible collapse.

1. Initial filings

On March 2016, Calpine Corporation and a group of other generation owners filed a complaint under section 206 of the Federal Power Act16 The complaint focused on the alleged market impacts of a then-proposed action by the Public Utilities Commission of Ohio (“PUCO”) to allow approximately six gigawatts of capacity owned by AEP and FirstEnergy subsidiaries to recover costs under proposed affiliate power purchase agreements (“akin to traditional cost-of-service, rate of-return regulation”) from retail ratepayers.17 Complainants argued that the new threat of the capacity market bidding incentives created by the generous rate-recovery warranted extension of the Minimum Offer Price Rule (MOPR), which only applied to new gas-fired resources, to existing units participating in the capacity market.18 PUCO did not ultimately move forward with the power purchase agreements as proposed, and Complainants submitted an amended filing targeting the alleged market effects of Illinois legislation providing for the

15 December 2019 Order, Dissent of Commissioner Glick at P 58 (“Glick Dissent”).


17 Id. at 25-26.

18 Id. at 2.
procurement of zero-emissions credits ("ZECs"). Complainants maintained that the Illinois policy would affect as much as 2,800 megawatts of existing nuclear capacity in the PJM market, argued that the ZEC program would pose the same threat to the PJM capacity market as the PUCO proposal, and reiterated its request to expand the scope of the MOPR to existing resources. Neither the original nor the amended complaint mentioned state Renewable Portfolio Standards ("RPS") as a policy posing similar concerns.

The Commission had not acted on the Calpine Complaint by the time that PJM filed its own proposed tariff revisions that aimed to address the interaction of state public policy with the PJM capacity market. PJM’s filing to FERC was preceded by a stunted and contentious stakeholder process, in which a majority of stakeholders resoundingly rejected the notion that the capacity market faced an urgent threat requiring changes to market rules. Nevertheless, on April 9, 2018 PJM overrode stakeholder judgment and filed before the Commission two alternate tariff proposals, each of which would bring sweeping changes to PJM’s capacity market construct, known as the Reliability Pricing Model ("RPM"). The first and PJM-preferred

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19 Motion to Amend, and Amendment to, Complaint and Request for Expedited Action on Amended Complaint, Docket No. EL16-49 (Jan 9, 2017).

20 Id. at 7, 10-11, 16.

21 See Protest of Clean Energy Advocates, Docket No. ER18-1314 (May 7, 2018) at 25-30 (describing frustrations of many stakeholders with a process that was too rushed, failed to identify a clear problem in the market, and ignored majority stakeholder support for the status quo) (attached hereto as Exhibit A).

22 Docket No. ER18-1314, PJM Interconnection, L.L.C., Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the Capacity Market (Apr. 9, 2018) ("April 2018 Filing").
option, Capacity Re-pricing, PJM styled as “accommodating” state policy actions. The second, preferred by the Independent Market Monitor and dubbed “MOPR-Ex,” PJM openly acknowledged was “punitive” to states whose policies fell within its scope. Clean Energy Advocates timely intervened and opposed both sets of tariff changes, submitting evidence and expert reports demonstrating the proposals would result in unjust and unreasonable rates and undue discrimination to consumers and/or resources.

2. The June 2018 Order

On June 29, 2018, the Commission issued an order (“June 2018 Order”) which, in addition to its substantive determinations, described below, consolidated the Calpine Complaint proceeding (EL16-49) with the PJM section 205 filing proceeding (ER18-1314) and instituted sua sponte a third, consolidated, proceeding (EL18-178) under Federal Power Act section 206.

In the June 2018 Order, the Commission declared that “the integrity and effectiveness of the capacity market administered by PJM . . . have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market.” The Commission stated that its intervention into the PJM capacity market was “necessary to address the price suppressive impact of resources receiving out-of-market support” because the “resulting price distortions compromise the

23 April 2018 Filing at 6.

24 Id. at 53, 56, n.138.

25 See Ex. A; see also December 2019 Order at PP 28, 30 (granting Clean Energy Advocates’ timely-filed motions for intervention).

26 June 2018 Order at P 1.
capacity market’s integrity” and “create significant uncertainty, which may further compromise the market.”27 The Commission concluded that it “cannot rely on such a construct to harness competitive market forces and produce just and reasonable rates.”28 Accordingly, it granted the Calpine Complaint and declared that rates in PJM’s capacity market were unjust and unreasonable and unduly discriminatory.29 The Commission nonetheless rejected both PJM’s alternative proposed tariff changes, finding that “they have not been shown to be just and reasonable, and not unduly discriminatory or preferential.”30

The Commission made a preliminary finding that a just and reasonable replacement rate would include two elements: (1) applying the MOPR to new and existing resources that receive out-of-market payments, regardless of resource type, with few to no exemptions and (2) allowing “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.”31 This second element, dubbed the “resource-specific FRR Alternative,” would serve to accommodate state policy decisions, reduce the risk of excess capacity in the system, and avoid charging consumers double for capacity requirements. The Commission stated that this “bifurcated capacity construct” would “increase the integrity of the PJM capacity market for competitive resources and load” that would “provide significant benefits through increased

27 Id. at PP 5, 150.
28 Id. at P 156.
29 June 2018 Order at PP 107-175.
30 Id. at P 7.
31 Id. at PP 8, 159-161.
transparency for investors, consumers, and policymakers.”\textsuperscript{32} Though the remaining capacity market would be smaller, it would “ensure that all resources participating in the capacity market … offer competitively.”\textsuperscript{33}

The Commission then commenced a paper hearing to solicit input to help it determine how to implement this proposed bifurcated market, including, among others, questions about “the appropriate scope of out-of-market scope to be mitigated by the expanded MOPR” as well as “types of MOPR exemptions that should be included” and how the minimum offer price should be set.\textsuperscript{34} Recognizing that a number of details would need to be addressed to implement the proposed replacement, the Commission solicited input on a series of issues relating to a replacement that that would include an expanded MOPR working in tandem with an Fixed Resource Requirement (FRR) Alternative.\textsuperscript{35} The Commission set a 60-day deadline for initial comments, with an additional 30-days for reply, and indicated its intent to issue a final decision by no later than January 4, 2019.\textsuperscript{36}

Commissioners LaFleur and Glick issued noteworthy dissents to the June 2018 Order. Noting that she views tailored regional solutions as the best path forward to addressing the tensions between state policies and wholesale capacity market objectives, Commissioner LaFleur voiced alarm that the majority intends to adopt “the most sweeping changes to the PJM capacity

\textsuperscript{32} Id. at P 162.

\textsuperscript{33} Id.

\textsuperscript{34} June 2018 Order at P 167, 171.

\textsuperscript{35} Id. at 164-171.

\textsuperscript{36} Id. at 172.
construct since the market’s inception more than a decade ago” within the short timeframe of the paper hearing. Commissioner LaFleur also stated that she was particularly troubled that the decision “hamstrings” the Commission’s ability to engage with states regarding the replacement rate. Similarly Commissioner Glick disagreed strongly with the majority’s conclusion that failure to “mitigate” state’s efforts to shape the generation mix results in unjust and unreasonable rates, where the targeted programs are “precisely the sort of actions that Congress reserved to the states when it enacted the FPA.” He explained that by mitigating these state policies, the Commission is directly interfering with state efforts to shape the generation mix. He concluded that the majority was thus “picking and choosing which policies to frustrate and which to willfully ignore.” Commissioner Glick also disagreed with the majority because it had failed to meet its burden to show that PJM’s tariff is unjust and unreasonable. Finally, Commissioner Glick voiced concern that the significant questions left open by the June 2018 Order could not be meaningfully answered within the time provided by majority.

37 Id. (LaFleur, C. dissenting at 1).

38 June 2018 Order (LaFleur, C. dissenting at 1).

39 Id.

40 Id. (LaFleur, C. dissenting at 5).

41 Id. (LaFleur, C. dissenting at 6).

42 Id. (LaFleur, C. dissenting at 1).

43 June 2018 Order at 12-13. Commissioner Powelson issued a concurrence in support of the June 2018 Order.
3. **Subsequent developments**

Clean Energy Advocates and many other parties filed requests for rehearing of the June 2018 Order.\(^44\) The Commission has not explicitly responded to these requests except to issue “tolling orders” granting the requests solely for the purpose of further consideration.\(^45\)

PJM and numerous stakeholders submitted proposals, comments, reply comments, and answers in the paper hearing mandated in the June 2018 Order. Although there were several different proposals for a replacement rate, nearly all attempted to include in some form the two elements the Commission had signaled were necessary for such a rate to be just and reasonable: expansion of the MOPR to address the purported threat posed by resources with “out-of-market support” to the capacity market, and an FRR Alternative to avoid imposing excess costs on consumers and interfering with state policies.

On April 10, 2019, PJM submitted a motion seeking clarification of the June 2018 Order, seeking confirmation that, to the extent the Commission had not established a replacement rate prior to the August 2019 Base Residual Auction (“BRA”), any replacement rate later established would be applied prospectively and would not require PJM to rerun the August 2019 BRA.\(^46\) The Commission denied PJM’s motion by order on July 25, 2019, stating, “we believe that in the circumstances presented here, on balance, delaying the auction until the Commission establishes

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\(^{44}\) Request for Rehearing of Clean Energy Advocates, Docket Nos. ER18-1314, EL16-49, EL18-178 (and consolidated cases), at 9-17 (July 30, 2018) (attached hereto as Exhibit C).

\(^{45}\) See Order Granting Rehearings for Further Consideration (Aug. 29, 2018).

\(^{46}\) Order on Motion for Supplemental Clarification at P 14 (July 25, 2019) (“July 2019 Order”).
a replacement rate will provide greater certainty to the market than conducting the auction under the existing rules.”

Commissioner LaFleur concurred, noting that although the June 2018 Order assumed that a 90-day paper would be sufficient to build a record, receive feedback from the states and other stakeholders, and set the just and reasonable replacement design for the market, more than a year had elapsed. She chastised the commission for failing to “resolve the foreseeable and avoidable uncertainty created by our own actions,” observing that “the uncertainty created by the Commission might . . . be labeled an act of regulatory malpractice.” In his concurrence, Commissioner Glick similarly lamented the “uncertainty that was created by the June 2018 Order, which has only been compounded by the Commission’s continuing failure to implement a remedy on a timeline even remotely close to what it promised.”

4. Summary of Order

On December 19, 2019, the Commission issued its Order Establishing Just and Reasonable Rate (“December 2019 Order”) in which “reaffirmed” its preliminary finding that PJM “should expand the MOPR to cover out-of-market support to all resources, regardless of the resource type, with few . . . exceptions” in order to “protect the ‘integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the

47 Id. at 5.

48 Id.

49 Id. Commissioner McNamee also concurred, voicing his support for reasoning behind PJM’s April 2018 Filing and the June 2018 Order.
uneconomic entry of new resources.” In response to those who had raised the point that the MOPR “was designed to address monopsony power and is therefore not well suited to address State Subsidies” it disagreed, stating that “[a] purpose of the MOPR has been to address price suppression.” It summarily dismissed concerns that an expanded MOPR would increase the exercise of market-side power, stating that “[t]his speculative concern is not sufficiently supported in the record of this proceeding.” As for concerns about the associated increase in costs to consumers, the Commission held that “states ‘are free to make their own decisions regarding how to satisfy their capacity needs, but they ‘will appropriately bear the costs of [those] decision[s],’ . . . including possibly having to pay twice for capacity.’” The Commission reasoned that “the replacement rate directed in this order will enable PJM’s capacity market to send price signals on which investors and consumers can rely to guide the orderly entry and exist of economically efficient capacity resources.”

The Commission proposed that, with a few exemptions, all new and existing, internal and external resources that receive or are entitled to any state subsidy and participate in the capacity market, regardless of resource type, would be subject to the MOPR. The Commission defined

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50 December 2019 Order at PP 32, 38.

51 Id. at P 39. As support for its position the Commission cited 117 FERC ¶ 61,331 at P 34 for the proposition that “the MOPR would apply to sellers that ‘may have incentives to depress market clearing prices below competitive levels’”.

52 December 2019 Order at P 40.

53 Id. at P 41, citing NJBPU, 744 F.3d at 96-97 (quoting Connecticut PUC, 569 F.3d at 481).

54 Id.

55 Id. at PP 49, 50.
a state subsidy to include any direct or indirect benefit from a state or local government, and excluded any materiality thresholds as had been proposed by PJM and its stakeholders. The Commission stated that its concern was “with those forms of State Subsidies that are not federally preempted “but nonetheless are most nearly ‘directed at’ or tethered to the new entry or continued operation of generating capacity” that “‘may not otherwise be able to succeed in a competitive wholesale capacity market.”

The Commission held that in the future, the default offer price floor for new resources subject to the MOPR would be the Net Cost of New Entry (Net CONE) and existing sources would have a default offer price floor of the Net Avoidable Cost Rate (net ACR). The Commission created three categorical exemptions “to reflect reliance on prior Commission decisions: (1) existing self-supply resources, (2) existing demand response, energy efficiency, and storage resources, and (3) existing renewable resources participating in RPS programs.” It also established a Competitive Exemption for resources that are not subsidized, and permitted any resource to apply for a Unit-Specific Exemption.

The Commission found that it would not order a refund in connection with this replacement rate and directed PJM to submit a compliance filing consistent with its findings.

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56 Id. at PP 67, 98.

57 Id. at P 68.

58 December 2019 Order at P 2.

59 Id. at P 2.
within 90 days of the date of the order, including revised dates and timelines for the 2019 and 2020 Base Residual Auctions (BRA).  

Commissioner Glick dissented, calling the Order “illegal, illogical, and truly bad public policy.”  

He criticized the Order for targeting state programs in violation of the FPA’s jurisdictional principles—which prohibit “one sovereign regulating in a manner that aims at or targets the other jurisdiction”—observing that “[i]t is hard to imagine how the Commission could much more directly target or aim at state authority over resource decision-making.”  

Accusing the Commission of substituting its own policy preferences for those of the states, Commissioner Glick noted that the Commission was “hid[ing] behind excuses such as investor confidence, market integrity, and the premise of capacity markets—principles that, as applied here, are so abstract as to be meaningless.”  

He warned that the Order would allow the Commission to “to zero out any state effort to address the externalities associated with sales of electricity,” including the Regional Greenhouse Gas Initiative (RGGI) and any future carbon tax, cap-and-trade program, or clean energy standard.  

Commissioner Glick warned that the Order’s replacement rate is not just and reasonable for several reasons. Regarding the Order’s vague definition of “subsidy,” which would make

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60 Id. at PP 3, 4.
61 Id. (Commissioner Glick, dissenting, at P 1).
62 Id. (Commissioner Glick, dissenting, at PP 9, 12).
63 December 2019 Order (Commissioner Glick, dissenting, at P 16).
64 Id. (Commissioner Glick, dissenting, at P 17).
“perhaps the vast majority” of all capacity in PJM potentially subject to the MOPR,\textsuperscript{65} he cautioned that “it will likely be years before we have a concrete understanding of how the subsidy definition works in practice or resources know for sure whether they will be subject to mitigation.”\textsuperscript{66} Commissioner Glick also argued that the replacement rate is arbitrary and capricious because: [i]t excludes federal subsidies even though they have similar impacts on the capacity market as the state subsidies targeted in the Order;\textsuperscript{67} its disparate offer floors unduly discriminate against new resources vis-à-vis existing resources;\textsuperscript{68} and the Commission failed to consider the replacement rate’s potentially ruinous impacts on existing business models for aggregated demand response providers, public power, and resources financed in part through sales of voluntary renewable energy credits.\textsuperscript{69}

Commissioner Glick stated that the Order’s replacement rate is a far cry from a competitive market, warning that the resulting “administrative pricing regime is likely to be as complex and cumbersome as cost-of-service regulation,” with “none of the benefits that a cost-of-service regime can provide.”\textsuperscript{70} He also observed that the apparent overarching purpose of the Order is “[t]o slow the transition to a clean energy future,” noting that “at every meaningful decision point in today’s order, the Commission has elected the path that will make it more

\begin{footnotesize}
\begin{enumerate}
\item Id. (Commissioner Glick, dissenting, at P 18).
\item Id. (Commissioner Glick, dissenting, at P 25).
\item Id. (Commissioner Glick, dissenting, at P 27).
\item Id. (Commissioner Glick, dissenting, at P 32).
\item December 2019 Order (Commissioner Glick, dissenting, at P 36).
\item Id. at (Commissioner Glick, dissenting, at PP 43, 46).
\end{enumerate}
\end{footnotesize}
difficult for states to shape the future resource mix.”71 Commissioner Glick calculated that the
Order will likely cost consumers $2.4 billion dollars per year, even under conservative estimates,
and castigated the Commission for failing to consider the Order’s staggering costs for
consumers.72 Commissioner Glick further criticized the Commission for “bungl[ing] this process
from the start,” warning that the Order’s hasty 90-day compliance was “a patently unreasonable
period of time in which to accomplish all that the Commission has put on PJM’s plate.”73 In
conclusion, he observed that this proceeding demonstrates “we should be taking a hard look at
whether a mandatory capacity market remains a just and reasonable resource adequacy construct
in today’s rapidly evolving electricity sector.”74

B. Legal Background

The Administrative Procedure Act “sets forth the full extent of judicial authority to
review executive agency action for procedural correctness.”75 The relevant inquiry for review of

71 Id. (Commissioner Glick, dissenting, at PP 47, 52).

72 Id. (Commissioner Glick, dissenting, at PP 54, 57).

73 Id. (Commissioner Glick, dissenting, at PP 60, 61).

74 December 2019 Order (Commissioner Glick, dissenting, at P 62).

Commission orders is whether it has “articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”

Even when not clearly erroneous, the Commission’s decisions will be reversed by a court where such action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Agency action is arbitrary and capricious if, for example, the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

Although agencies are allowed to change an existing position, as the Commission has done here, an agency cannot choose to not enforce laws of which it disapproves or ignore

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statutory standards in carrying out its duties.\textsuperscript{79} Rather, agencies changing position must “show that there are good reasons for the new policy.”\textsuperscript{80}

Further, an agency must “provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. It would be arbitrary and capricious to ignore such matters.’”\textsuperscript{81} Any “unexplained inconsistency” between a policy and its repeal is “a reason for holding an interpretation to be an arbitrary and capricious change.”\textsuperscript{82}

IV. REQUEST FOR REHEARING

A. FERC fails to articulate a reasoned basis for its “reaffirmation” that PJM capacity market rules are not just and reasonable or unduly discriminatory

The foundation upon which the Commission constructs the whole of its December 2019 Order is its determination in its June 2018 Order that PJM’s capacity market rates are unjust,

\textsuperscript{79} State Farm, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part).


\textsuperscript{81} Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199, 1209 (2015) (citation omitted); Fox Television Stations, 556 U.S. at 515 (“a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.”).

\textsuperscript{82} Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).
unreasonable, and unduly discriminatory. Clean Energy Advocates filed a request for
rehearing of the June 2018 Order challenging that determination as arbitrary and capricious,
unsupported by evidence, rife with fundamental economic errors, and failing to grapple with
opposing evidence. By determining that PJM’s capacity rates are unjust, unreasonable, and
unduly discriminatory without first providing a reasoned explanation of the scope of that harm or
the factual basis supporting it, the Commission essentially put its determination cart in front of
its required procedural and evidentiary horse. Because the Commission reaffirms its threshold
Section 206 finding without addressing any of the failings of its earlier determination, Clean
Energy Advocates incorporate by reference and reassert the arguments presented in our
July 2018 Request for Rehearing and prior and subsequent briefing before the Commission.
The refusal to acknowledge, much less address the substantial arguments and adverse evidence

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83 June 2018 Order at P 66.

84 See Ex. C. Numerous other parties filed requests for rehearing raising similar arguments.

85 Ex. C at 19-22.

86 Exhibit B, Docket No. EL18-169, Protest of Clean Energy Advocates (June 20, 2018); Exhibit
C, Docket Nos. ER18-1314, EL16-49, EL18-178 (and consolidated cases), Request for
Rehearing of Clean Energy Advocates (July 30, 2018); Exhibit D, Docket Nos. ER18-1314,
EL16-49, EL18-178 (and consolidated cases), Comments of Clean Energy Advocates Separately Addressing the Scope of the Expanded Minimum Offer Pricing Rule (Oct. 2, 2018); Exhibit E, Docket Nos. ER18-1314, EL16-49,
EL18-178 (and consolidated cases), Comments of Clean Energy and Consumer Advocates (Oct. 2, 2018); Exhibit F, Docket Nos. ER18-1314, EL16-49, EL18-178 (and consolidated cases), Reply Comments of Clean Energy Advocates Separately Addressing the Scope of the Expanded Minimum Offer Pricing Rule (Nov. 6, 2018); Exhibit G, Docket Nos. ER18-1314, EL16-49,
EL18-178 (and consolidated cases), Reply Comments of Clean Energy and Consumer Advocates in Support of FRR-RS, (Nov. 6, 2018); Exhibit H, Docket Nos. ER18-1314, EL16-49, EL18-
178 (and consolidated cases), Motion to Apply Ethics Guidance to Proceedings (Jan. 11, 2019);
Exhibit I, Docket Nos. ER18-1314, EL16-49, EL18-178 (and consolidated cases) Motion
Requesting Disclosure of the Basis for Non-Recusal or, in the Alternative, Recusal of Commissioner McNamee (Sept. 9, 2019).
on the record before reaching its decision is a textbook example of arbitrary and capricious
decision-making.\textsuperscript{87} We address here additional ways in which the December 2019 Order further
undercut and reveal the illogic of the Commission threshold section 206 finding.

1. \textbf{The Commission lacks a coherent theory of harm to support its
extraordinary reordering of regional market outcomes.}

The Commission’s December 2019 Order doubles down on the errors of the June 2018
Order, offering only tautological argument that fails to crystallize a coherent theory of how
lawful federal and state policies results in rates that are not just and reasonable or unduly
discriminatory. The Commission merely repeats its imprecise and unenlightening assertions that
“uncompetitive” offers have “price suppressive” effects, that subsidized resources “distort
prices,” and that the record demonstrates “an immediate threat” to “competitiveness of the PJM
market.”\textsuperscript{88} Instead of explaining a coherent theory of which policies matter most to market
outcomes and why, and, critically, how those market outcomes correspond to \textit{customer} harm, the
December 2019 Order only deepens the confusion.

The Commission now admits that federal policies may cause precisely the same effects
on market behavior, and potentially impacts on market outcomes, as state policies.\textsuperscript{89} The
Commission exempts federal policies under a theory that it cannot “nullify” the effects of other
federal laws.\textsuperscript{90} Yet this makes little sense under the Commission’s own theory that it is “the


\textsuperscript{88} December 2019 Order at PP 5-7.

\textsuperscript{89} \textit{Id.} at P 10.

\textsuperscript{90} \textit{Id.}
effect of disrupting the competitive price signals that PJM’s [capacity auction] is designed to produce” that triggers its authority under section 206.”91 As Clean Energy Advocates pointed out in an earlier filing, a single federal policy can be of such magnitude as to enable a class of resources to be economic when they otherwise would not.92 The Price-Anderson Act, for example, is a federal intervention into the power markets without which nuclear generation could not operate or be constructed; it historically enabled one-fifth of all generation nationally, and still accrues to the benefit of fifteen percent of existing capacity in PJM today.93 Authority questions aside, the Commission cannot explain how, under its theory that all policies “that disrupt[] [] competitive price signals” pose an “immediate threat” to markets such that they render rates unjust and unreasonable or unduly discriminatory,94 the PJM market has operated for so long in a manner that consistently produces more than adequate market entry (indeed, persistently overprocures capacity95) in spite of the ubiquity of so-called “price-suppressive” federal and state policies directly shaping market outcomes. The Commission’s admission that federal policy is indistinguishable in effect from state policy, as well as its broadening of the MOPR to include all manner of state policies because it also asserts their effects are indistinguishable, only underscore the irrationality of the Commission’s theory that lawful public energy policy results in market and consumer harm. If all manner of federal and state polices over the past three decades of the markets operation have posed an imminent threat, the

91 Id. at P 68.
92 See Ex. A at 112-114.
93 Id. at 113.
94 December 2019 Order at PP 7, 68.
95 Ex. A at 35-40.
customers and supply interests in PJM have emerged remarkably unscathed. Like Chicken Little’s cries that “the sky is falling!”, the Commission’s claims of imminent threat bear no basis in reality.

2. The Commission’s novel basis for its unbounded assertion of section 206 authority is not based in the statutory text.

Equally problematic, the Commission adopts here a new basis for a finding under section 206 of the Federal Power Act that is wholly unrooted in the statutory text. The Federal Power Act charges the Commission with ensuring rates that are “just and reasonable” and “not unduly discriminatory or preferential.”96 It does not charge the Commission with safeguarding “competitiveness”, the “integrity of competition”, or other abstract notions of market functioning divorced from the resulting rates.97 To the extent that the Commission asserts its section 206 authority to alter rates, it can do so only where that authority is necessary to its core statutory task. Thus, courts have upheld the Commission’s use of market-based forces because the Commission connected the use of markets to the outcome that matters: rates.98 Heretofore, the

96 16 U.S.C. §§ 825d (a)-(b), 825e (a).
97 December 2019 Order at PP 7, 38.
98 See e.g., Blumenthal v. FERC., 552 F.3d 875, 882–83 (D.C. Cir. 2009) (listing cases holding that FERC shirks its statutory mandate where it “resorts to largely undocumented reliance on market forces as the principal means of rate regulation.”) (internal quotation omitted); Envtl. Action, Inc. v. FERC, 939 F.2d 1057, 1061 (D.C. Cir. 1991) (“Competition is valued not for its own sake but because it is most likely to maximize the satisfaction of consumer wants.”); see also California ex rel. Lockyer v. FERC., 383 F.3d 1006, 1012–13 (9th Cir. 2004) (“The principle justifying this approach as “just and reasonable” was *1013 that “[i]n a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment”), review granted, cause remanded sub nom. California ex rel. Harris v. FERC., 784 F.3d 1267 (9th Cir. 2015).
Commission viewed wholesale market competition as “the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service.”

Yet, here, having failed to identify any clear and consistent measuring stick by which to determine which policies are “distorting,” the Commission lacks a coherent rationale to connect its intervention into the PJM capacity market to impacts on rates. Indeed, the Commission fashions a new articulation of the statutory standard, framing its intervention into the markets as a “just and reasonable means to address State Subsidies” – a standard wholly unmoored from the statutory text. The Commission likewise cobbles together a test of whether policies are “nearly directed at” or “tethered to” new entry or continued operation of generating capacity. This test, too, lacks any substantive articulation or explanation, and the Commission does not establish how or why such policies would have the greatest impacts on rates.

By refusing to articulate how certain policies more or less directly affect the efficiency of the market or its ability to ensure reliability at lowest cost, the Commission is advancing “competition” in name without accountability to its statutory north star: an actual impact on rates. Lacking such a compass, the Commission cannot say that the combination of policies it is permitting to shape capacity market outcomes (e.g., permitting local siting support) will produce a more or less efficient market outcomes than allowing some other mix of policies to shape capacity market outcomes (e.g., RPS).

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100 December 2019 Order at P 37.
101 Id. at PP 68, 83.
102 As discussed herein at Section IV.B.4.
The Commission’s failure to articulate a clear link between its intervention into the capacity market and the public interest (entailing a balancing customer and supply interests) is even more irrational given that such a coherent theory, based in well-established economics, was directly presented to the Commission. The Institute for Policy Integrity provided just such a framework to distinguish between economically efficient low prices and economically inefficient price suppression, which defines market efficiency in terms resonant with the Commission’s mandate under the Federal Power Act. Under the Institute for Policy Integrity’s formulation, perfectly competitive markets are “economically efficient” because they maximize the total net benefit of market participants. Unlike the Commission’s assertion of authority in the June 2018 and December 2019 Orders, the Institute for Policy Integrity presents a basis for intervening in the markets that is grounded in the balancing of investor and customer interests that is the lynchpin to just and reasonable rates.

3. The Expanded MOPR unduly discriminates against clean energy sources.

The Order’s undeniable impact is to stunt the development of clean energy resources in PJM, leaving more market share and creating higher prices for generators that burn fossil fuels. The record shows that state policies have long existed that support or incentivize the development of all kinds of electricity generating resources, as well as the extraction and

103 Institute for Policy Integrity Reply Comments, Docket No. EL16-19, at 13-25 (Nov. 6, 2018).

104 Id. at 5-6.
processing of fossil fuels.\textsuperscript{105} This is to be expected, considering the Federal Power Act’s express reservation to the states of authority over generation, as well as the close linkage between electricity generation and the health and welfare of a state’s residents.

Yet the Commission has not found it necessary to nullify the impact of these state policies on wholesale markets until now. It is reasonable to ask why. In both the June 2018 and December 2019 Orders, the Commission relies primarily upon the increasing ambition of state renewable portfolio standards.\textsuperscript{106} And indeed, the primary and intended effect of the replacement rate will be to exclude renewable energy and certain existing nuclear energy resources from the capacity market. Though the definition of State Subsidy is facially technology-neutral, the effect will not be, for two reasons. First, states in PJM are increasingly adopting the kinds of aggressive clean energy standards necessary to address climate change. In contrast, policies that benefit fossil fuels are generally falling out of favor as policymakers come to understand the long-term environmental and fiscal costs associated with such resources. The MOPR’s purpose is to deter state policies, and those policies overwhelmingly support clean energy resources. Second, subsidies to fossil fuel resources often work to reduce costs of fossil fuels themselves, and are therefore more indirect and hidden than the transparent payments made to renewable and some nuclear generators for the value of their environmental attributes. While the Commission’s broad subsidy definition, interpreted literally, should encompass even the

\textsuperscript{105} See, \textit{e.g.}, Ex. A, App. B, Koplow Report.

\textsuperscript{106} See December 2019 Order at P 175 ("However, that assessment of renewable resource participation in the market has changed. The evidence in this proceeding shows that RPS programs are growing at a rapid pace, and resources participating in these programs will increasingly have the ability to suppress capacity market prices."); June 2018 Order at P 151 ("As Calpine points out, out-of-market support for resources other than natural gas fired resources has been increasing. PJM, in its filing in Docket Nos. ER18-1314-000, \textit{et al.} makes a similar showing. These out-of-market programs include laws passed in a number of PJM states that provide or require out-of-market support for nuclear, solar, and wind resources.").
more concealed fossil fuel subsidies, it is unlikely to be interpreted as such after being run
through the ringer of PJM’s incumbent-dominated stakeholder process and reflecting the
enormous power and resources that fossil-fuel incumbents have to pressure PJM and the IMM
regarding the extent of the MOPR.
Clean Energy Advocates are concerned that the Order’s disproportionate impact on clean energy
development is not accidental and may reflect the preferences of the current administration to
favor fossil fuels, coal in particular, over clean energy resources.107

4. The Commission’s failure to formally deny still pending rehearing
requests when it has clearly rejected the substance of those requests
inappropriately circumvents the Federal Power Act’s judicial review
provisions.

Particularly egregious is the Commission’s decision, without a single acknowledgement
of the multiple requests for rehearing still pending before it and the eighteen months in which the
Commission had to consider them, to “affirm [its] initial finding that ‘[a]n expanded MOPR with

107 Both Chairman Chatterjee and Commissioner McNamee, the two commissioners signing the
December 2019 order have expressed sympathies for fossil fuel resources. See Gavin Bade,
FERC nominee McNamee slams renewables, green groups in Feb. video, UtilityDive (Nov. 21,
groups-in-feb-video/542702/ (reporting on 2018 statements by Bernard McNamee that fossil
fuels “are key to our prosperity, our way of life and also to a clean environment,” and attributing
to several of the undersigned organizations an intention to return the nation to “administrative
tyrranny”); Gavin Bade, How McConnell’s coal guy is helping Trump remake federal energy
policy, Politico (Aug. 5, 2019), https://www.politico.com/story/2019/08/05/neil-chatterjee-
mcconnell-coal-federal-energy-policy-1634304 (reporting on Chairman Chatterjee’s past support
for a coal bailout, Tweets of support for #FreedomGas, and politicization of Commission work).
few or no exceptions, should protect PJM’s capacity market from the price-suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price.”

The Commission’s “affirmation” of its earlier decision effectively rejects these rehearing requests, without acknowledging that these rehearing requests are outstanding. The Commission’s issuance of a lengthy order affirming the rationale of its June 2018 Order while simultaneously refusing to say the magic words “request denied” forces the continued and enormous investment of stakeholder time and resources implementing the Commission’s continually-evolving tariff plan, while obstructing judicial review of its underlying decision. As the concurring opinion of Judge Millet in Allegheny Defense Project v. FERC laid out – and the D.C. Circuit’s rare grant of en banc review of an order similarly tolled under the Natural Gas Act signals – the Commission’s abuse of tolling orders in this manner skates on thin Constitutional-ice.

The Commission refusal here to formally issue a denial, where it has already decided the matter and the order threatens imminent irreparable harm to state sovereign interests, market participants, and ratepayers, raises the specter of constitutional deprivation without due process. Moreover, the Commission’s interpretation of section 313 of the Federal Power Act to enable such indefinite tolling, particularly where the Commission has concluded its deliberative process on the substantive claims, is plainly inconsistent with the statutory text. By setting forth that applications for rehearing not acted upon by the Commission within 30 days “may be deemed to have been denied,” Congress created an opportunity for

108 December 2019 Order at P 5.

affected parties to pursue judicial review in a meaningful timeframe, an opportunity that is wholly thwarted by the Commission’s tolling order.\(^{110}\)

**B. The Replacement Rate Established by FERC is Unjust, Unreasonable, and Unduly Discriminatory**

1. The Commission’s overly broad and vague definition of a subsidy is arbitrary and capricious, does not result in just and reasonable rates, and results in unlawful delegation of its authority to PJM and the Independent Market Monitor.

As the lynchpin of its replacement rate, the Commission adopts a sweeping definition of the state policies that will be subject to the MOPR. The Commission defines the term State Subsidy as:

A direct or indirect payment, concession, rebate, subsidy, non-bypassable consumer charge, or other financial benefit that is

(1) a result of any action, mandated process, or sponsored process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law, and that

(2) is derived from or connected to the procurement of (a) electricity or electric generation capacity sold at wholesale in interstate commerce, or (b) an attribute of the generation process for electricity or electric generation capacity sold at wholesale in interstate commerce, or

(3) will support the construction, development, or operation of a new or existing capacity resource, or

(4) could have the effect of allowing a resource to clear in any PJM auction.\(^{111}\)

The nearly limitless scope of the State Subsidy definition renders the replacement rate unlawful on multiple grounds. First, the sheer breadth of the definition –implicating nearly any state policy that is not explicitly carved out in an exemption – is unworkable. The substantial uncertainty, additional administrative burdens, and significant transactional costs imposed by

\(^{110}\) 16 U.S.C. § 825l.

\(^{111}\) December 2019 Order at P 67, formatting added.
implementing this definition impacts the efficiency of the market and results in rates that are not just and reasonable. Second, the definition guarantees over-mitigation. The Commission arbitrarily and capriciously fails to consider the harm of over-mitigation in its determination of the replacement rate, ignoring without explanation its own precedent. Third, the Commission lacks the record basis to support its sweeping definition, and the broad definition is not tailored to address its findings of market harm under section 206. Fourth, the lack of clarity in the definition is itself evidence of the unreasoned nature of the Commission’s decision-making. Finally, the vagueness of the definition has the effect of unconstitutionally delegating the Commission’s authority to private entities, PJM and the Independent Market Monitor (IMM).

Although the Commission incorporates several exemptions to the State Subsidy definition, as discussed below at Section IV.B.3., these exceptions cannot rectify the flaws created by the definition’s astonishing overbreadth.

(a) The Commission’s overly broad definition of subsidy converts a functioning capacity market into a command economy that is wholly unworkable, and therefore does not ensure just and reasonable rates.

The Commission has drawn up a definition broad enough to capture a seemingly limitless scope of government action. Elements (3) and (4) are each so broad that it appears any financial benefit whatsoever – no matter how small – bestowed by a state or local government would meet the definition of a State Subsidy. Given the large role that states and localities play in the siting, economic development, regulation, and daily operations of businesses located within their jurisdiction, it is difficult to imagine any producer of electricity in the PJM capacity market that has not received treatment that can be construed as of financial benefit from a state or local government. As pointed out by Commissioner Glick and our earlier protest, while this definition captures not only large capacity resources such as those owned by vertically integrated utilities
and public power (representing nearly a fifth of PJM capacity) as well as the myriad direct and indirect subsidies, tax breaks, or other benefits tied to particular generation resources or types, it also could be argued to apply to any resource benefiting from a state clean energy standard or regulations designed to reduce air pollution including greenhouse gas programs, as well as to those generators receiving load through the New Jersey Basic Generation Service Electricity Supply Auction.\textsuperscript{112}

The broad definition makes application of the MOPR the default of the PJM capacity market, rather than the exception. The Commission’s unprecedented use of a MOPR profoundly expands its direct control over market outcomes and the administrative burdens and transaction costs of market participation. Rather than enhance efficiency, this administrative overlay degrades it.

Market participants face enhanced uncertainty, as even state benefits that they have not directly sought out may work to their benefit and trigger the MOPR. PJM and the IMM will face a tremendous new administrative burden to continually survey and determine which state and local laws meet the definition.\textsuperscript{113} The sheer magnitude of the definition limits PJM’s ability to give notice in advance as to which state policies will trigger MOPR.

Notwithstanding its breadth, the definition is nevertheless vague enough to create significant uncertainty around its application. For example, although the Commission aims to

\textsuperscript{112} \textit{Id.} (Commissioner Glick, dissenting, at PP 20-25); \textit{See also} Ex. A at App. B., Koplow Report.

\textsuperscript{113} As pointed out by Commissioner Glick, PJM and the IMM “will need to become the new subsidy police, regularly reviewing the laws and regulations of 13 different states and D.C. – not to mention hundreds of localities and municipalities – in search of any provision or program that could conceivably fall within the Commission’s definition of State Subsidy. ‘But that way lies madness.’” December 2019 Order (Commissioner Glick, dissenting, at P 45).
“exclude generic industrial development and local siting support”, the limits of “generic industrial development” and “local siting support” are unclear.\textsuperscript{114} Given the harsh consequences of MOPR’s application, market participants are sure to challenge these determinations. Market participants will be unsure, not only how their own offer will be treated, but also how the offers of numerous other market participants will be treated. The inevitable fallout from attempts to implement this Order will ensure only two things: perpetual market uncertainty and endless litigation.

The ambiguity in the subsidy definition grants PJM significant discretion to sweep in broad swaths of market participants – or not.\textsuperscript{115} Furthermore, the price floors that will apply with astonishingly greater frequency due to the expanded MOPR are inherently administrative constructs, which cannot keep pace with the innovation and pace of change in competitive markets. None of the price floors set by PJM will represent the most efficient nor likely the lowest prices one would get in a competitive market, since they will represent prices across multiple facilities averaged over a number of years. Moreover, each of these steps: determining applicability of the MOPR, arguing for a possible exemption, and then establishing the relevant price floor for an individual unit, entails significant financial and time burdens – effectively increasing the transaction costs to access the capacity market. These increased transaction costs will have a disproportionate impact on smaller facilities and new entrants. Forcing a broad share

\textsuperscript{114} Other examples of ambiguity include: Is a county zoning board or local regulatory authority decision granting a request by a specific resource for a waiver, expansion, or other special treatment that allows it to expand its production “local siting support” or does it constitute a “financial benefit”? Could it help it to clear an auction? When is a given resource “entitled” to a particular financial benefit?

\textsuperscript{115} To the extent the Commission curtails the scope of this definition in an order on PJM’s forthcoming compliance filing or other subsequent complaints, it must do so without introducing discrimination among supply resources that are unwarranted.
of market participants to navigate this additional layer of bureaucratic decision-making to access the markets undercuts transparency and market efficiency. Finally, as increasing numbers of suppliers become subject to the MOPR, there may well be incentive for lower-cost facilities to raise their bids or skip seeking a unit-specific exemption if they believe they can get a higher price due to the widespread application of the price floor. In sum, the Commission would transform a functional market into a capacity economy managed by PJM.

The Commission fails to grapple with these impacts of its overly broad and vague definition and its finding that the replacement rate is just and reasonable is therefore arbitrary and capricious. The Commission has not adequately considered how such a sweeping application of MOPR will reduce transparency, reduce market efficiency, and result in rates that are not just and reasonable. “The result of all this may be full employment for energy lawyers, but it [is] hardly the most obvious way to harness the forces of competition to benefit consumers, which, after all, is the whole reason these markets were set up in the first place.”

(b) The overbreadth of the State Subsidy definition guarantees over-mitigation.

The Commission equally fails to give due consideration to the substantial over-mitigation that its broad definition will inevitably cause. Even assuming, arguendo, that the Commission is correct that state subsidies cause harm, it must weigh the benefits of addressing those harms in

116 December 2019 Order (Commissioner Glick, dissenting, at P 56).

117 Id. (Commissioner Glick, dissenting, at P 45).
this sweeping manner against the costs of doing so. If the medicine kills quicker than the disease, the replacement rate is not just and reasonable. Inherent in its vague and expansive State Subsidy definition is a total disregard for the harms of over-mitigation. This is further evidenced by the Commission’s summary decision, without articulated rationale, for abandoning any materiality thresholds, as most parties to this proceeding had supported. Instead, the Commission explicitly held that there is no *de minimus* level below which a state subsidy would not “have the ability to impact capacity prices,” so setting any threshold “would undermine the very purpose of our action here.”

Yet prior to this Order, the Commission has long recognized that over-mitigation *is* a cost. As a Commission staff paper explained, “As a general matter, any market power mitigation construct should be designed to constrain actions that will alter competitive market outcomes, while avoiding overmitigation that can deter from the formation of accurate market price signals for investment in capacity resources.” As the Commission represented to the D.C. Circuit as recently as 2016 and 2017, the Commission must “balance[e] the need to mitigate buyer-side market power against the risk of over-mitigating competitive entry.” Indeed, the Commission

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118 See *Maryland People’s Counsel v. FERC*, 761 F.2d 780, 788-89 (D.C. Cir. 1985) (“the crucial question—one the Commission left unaddressed—is whether the program FERC approved will do “more good than harm.”) (internal quotation omitted); *Edison Mission v. FERC*, 394 F.3d 964, 969 (“The [new rate] may well do some good by protecting consumers and utilities against price increments caused by the exercise of market power. But the Commission gave no reason to suppose that it does not also wreak substantial harm . . . “).  

119 June 2018 Order at P 98.  


121 Brief of Respondent FERC at 20, 22, *NRG v. FERC*, Case Nos. 15-1452, 15-1454 (D.C.
regularly weighs a broad array of costs of over-mitigation, including impacts on state policy interests, the costs of over procurement, the risk of “false positives,” negative impacts on price signals, and administrative burden, and balances those costs against the benefits of mitigation. The Commission preliminarily found in this very case that the costs of over-mitigation are substantial enough to warrant accommodation of resources “to mitigate or avoid the potential for double payment and over procurement” through a resource-specific FRR alternative.

The Commission has no reasoned explanation, no new cache of data, or changed circumstances to justify its about-face now. The costs of over-mitigation remain real and substantial, and are only heightened by the extreme breadth and ambiguity of the State Subsidy definition. The Commission has acted in an arbitrary and capricious manner by failing to give due consideration of the costs of over-mitigation in setting the replacement rate.

The broad State Subsidy definition lacks substantial evidence in the record and is not reasonably tailored to target the basis of the Commission’s 206 finding.

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123 June 2018 Order at P 160.
The Commission determination of the rate replacement is also arbitrary and capricious because it is not supported by substantial evidence in the record. The Commission claims to be targeting policies that “squarely” impact the production of electricity or supply-side participation in PJM’s capacity market and therefore “require corrective action” by the Commission.\textsuperscript{124} The breadth of the State Subsidy definition belies this claim. The Commission has no basis to determine which state policies most “require corrective action,” because it has never clearly articulated the salient characteristics of state policies that pose the greatest threat to the public interest it is mandated to protect under the Federal Power Act. Because its initial section 206 finding lacks a clear theory of market harm,\textsuperscript{125} the Commission correspondingly lacks a sound basis for its replacement rate.

Even if the Commission had established a sufficient basis for a section 206 finding, the sweeping reach of the definition of a State Subsidy is not reasonably tailored to address that finding. “[T]he Commission cannot enact “an industry-wide solution for a problem that exists only in isolated pockets. In such a case, the disproportion of remedy to ailment would, at least at some point, become arbitrary and capricious.”\textsuperscript{126} Both the breadth and ambiguity of the definition will certainly result in policies being caught up by the MOPR that pose no significant risk to just and reasonable rates.

\textbf{(d) The vagueness of the State Subsidy definition demonstrates the unreasoned nature of the Commission’s decision-making.}

\textsuperscript{124} December 2019 Order at P 68.

\textsuperscript{125} See Section IV.B.1, \textit{supra}.

\textsuperscript{126} Interstate Nat. Gas Ass’n of Am. \textit{v. FERC}, 285 F.3d 18, 37 (D.C. Cir. 2002); see also Colorado Office of Consumer Counsel \textit{v. FERC}, 490 F.3d 954, 956 (D.C. Cir. 2007).
That the Commission’s State Subsidy definition is so vague that it fails to provide sufficient guidance for its implementation is, itself, a basis to conclude that the Commission’s determination of the replacement rate is arbitrary, capricious, and an abuse of its discretion.127 Market participants lack the clarity they need to respond to the ruling and understand how it affects their operations; states lack the clarity needed to clearly understand the consequences to their sovereign interests. The Commission itself should provide such basic aspects of a rate as to define the kinds of policies that “have the effect of allowing a resource to clear in any auction.” Such a vague decision that fails to provide the key content of the determination is no decision-making at all.

(e) The vague definition unconstitutionally delegates authority to PJM and IMM to make judgments that are core governmental functions.

The upshot of the Commission’s failure to provide a precise and understandable definition of State Subsidy is to hand over the discretion to make those determinations to PJM. Granting this authority to PJM to play “subsidy police” requires the company to make numerous subjective judgments as to the kinds of policies the Commission considers as “most nearly directed at or tethered to the new entry or continued operation of generating capacity.”

The Commission’s determination effectively puts a private company in the position of making jurisdictional determinations about the scope of federal law, and as to which state interests warrant being “nullified.” Inevitably, this arrogation of power to PJM to deem a policy a “subsidy” to be discouraged, based on a vague test unmoored from any factual evidence of

127 See e.g., Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt., 273 F.3d 1229, 1233 (9th Cir. 2001) (finding it arbitrary and capricious “to issue terms and conditions so vague as to preclude compliance therewith”).
market impact, will impermissibly result in the intrusion on matters that do not “directly affect” wholesale market rates. Moreover, the vague but expansive definition has the practical effect of making PJM the arbiter of traditional state policy powers long considered to be part of a state’s sovereign interest. For example, by determining that an environmental statute or regulation has the effect of “support[ing] the construction, development, or operation” of some class of generators, PJM obtains the power to “nullify” its effects in the regional markets. Where the aim of the state policy is to eliminate a class of pollution sources entirely, PJM will have the practical power to fully prevent the sovereign from achieving that objective.

Such a grant of core government functions to a private entity is an anathema to the Constitution. “Federal lawmakers cannot delegate regulatory authority to a private entity. To do so would be “legislative delegation in its most obnoxious form.”” There can be no doubt that determinations that touch upon statutory jurisdiction – the reach of federal law itself – and the disposition of state interests – in certain domains, a co-equal sovereign – are precisely the essential government tasks that cannot be granted away to the private sector. The effective delegation of this authority to PJM is unconstitutional.

2. **FERC’s Proposed Replacement Rates Are Arbitrary and Unduly Discriminatory.**

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**128** Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C., 737 F.2d 1095, 1143 (D.C. Cir. 1984) (“We also caution the Commission that it cannot, of course, cede to private parties [] either the right to decide contests between themselves and their opponents or even the opportunity to narrow the margins of the debate regarding access charges for private systems”); FERC v. EPSA, 136 S. Ct. at 774, 193 L. Ed. 2d 661 (2016).

The Commission’s asymmetric treatment of federal subsidies demonstrate that its replacement rate is arbitrary and not tailored to address the purported market harm.

The Commission concedes that “federal subsidies distort competitive markets in the same manner that State subsidies do.” Indeed, as Commissioner Glick describes in his dissent, such federal policies “have had a far greater ‘suppressive’ impact on markets than the ‘state subsidies’ targeted by [the December 2019 Order].” Nevertheless, the Commission concludes it may not apply the MOPR to federal policies because to do so would “disregard or nullify the effects of federal legislation.” Illogically, the Commission concludes not only that it may “disregard or nullify the effects” of state legislation, but that it must do so to ensure just and reasonable rates.

The Commission’s blithe determination that federal policies with substantially more “distorting” market effects may be left undisturbed exposes its rationale for the replacement rate as a sham. If federal policies distort market outcomes in a manner that truly threatens crucial price signals and reliability, the Commission would have no choice but to intervene to ensure just and reasonable rates. By its own description, “the Commission has a statutory obligation, and exclusive jurisdiction, to ensure that wholesale capacity rates in the multi-state regional market are just and reasonable.” Because it does not intercede to address federal policies, one can

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130 December 2019 Order at P 8.

131 Id. (Commissioner Glick, dissenting, at P 28).

132 Id. (Commissioner Glick, dissenting, at PP 27-28).

133 Id. (Commissioner Glick, dissenting, at P 7).

134 Id.
only conclude that the so-called “distortions” caused by public policy do not pose a real threat to just and reasonable rates. On the other hand, the extreme actions that the Commission takes to nullify the effect of state policy are either wholly unwarranted or at least grossly disproportionate to the lesser threat they could pose. In light of the free pass given federal policy, the Commission’s sweeping application of the MOPR to state policies is not logically justified, nor reasonably tailored to respond to the scale of the purported threat.135

3. The Commission’s failure to give reasoned consideration to the benefits of state policies or weigh evidence counter to its theories or assessment of market harm is arbitrary and capricious.

The State Subsidies in question here are not preempted by federal law.136 Instead, “States may continue to support their preferred types of resources in pursuit of state policy goals”, while the Commission ensures that the market provides power and wholesale rates that are just and reasonable.137 Such an exercise demands that FERC engage in reasoned decision making, which includes weighing competing interests and articulating a reason for choices. The December 2019 Order gives no sign that the Commission considered the purpose or benefits of affected state policy. In the absence of such consideration, FERC ruled that any market harm, no matter how small, outweighs the benefits of any state electricity policy, no matter how great. The Commission’s lack of reasoned decisionmaking is arbitrary and capricious.138

135 Colorado Office of Consumer Counsel v. FERC, 490 F.3d 954, 956 (D.C. Cir. 2007) (Section 206 proceeding must be “designed to identify and address such discrete issues” that are the basis of the 206 finding).


137 July 2018 Order at P 158.

Chairman Chatterjee has been quoted: “I believe that climate change is real, and I believe that man is having an impact on it. I don't believe that it is in FERC’s purview. FERC is not an environmental regulator — leave that up to other agencies to make that determination. Our job is to evaluate projects and oversee these markets, and not make determinations on environmental policies.” That is exactly what has happened here: the environmental regulators, in this case states, have made determinations on environmental policy. Those determinations are that states wish to exercise their state sovereign police powers to reduce the carbon emissions of their electricity generators. But, rather than making any meaningful accommodation for these environmental policies, FERC instead aims to counteract the very policies Chairman Chatterjee says are not in its purview.

The Commission makes no acknowledgement of the central role of climate change and other public health harms resulting from fossil fuel combustion in the dispute before it. But the truth is that the intent behind state actions in the clean energy sector is central to a proper analysis of whether the Commission acts reasonably in enacting a policy designed to counteract state action, since as discussed infra, it is also treading in an area where there is traditional special solicitude toward sovereignty. The Commission barely acknowledges any of these arguments and therefore fails utterly to “respond meaningfully to the arguments raised before it,”

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140 Indeed, the Commission asserts that it is applying the MOPR to resources benefitting from state policies that “reject the premise of the capacity markets,” December 2019 Order at P 17. This not only ignores the stated objectives of state clean energy policies, but asserts an exclusive role for the capacity market wholly incompatible with the Federal Power Act’s express reservation to states of authority regarding generation.
or make any “effort to grapple with” the public interest served by state electricity policies.\textsuperscript{141} As further discussed below, the Commission’s blanket determination that all state supports for low-carbon electricity require application of a MOPR in order to ensure just and reasonable rates fails to consider the evidence before the Commission and as such is arbitrary and capricious.\textsuperscript{142}

\textbf{(a) The Commission’s determination that Voluntary RECs cannot be distinguished from State Subsidies is erroneous.}

The December 19 Order states, “As to voluntary REC arrangements, meaning those which are not associated with a state-mandated or state-sponsored procurement process, based on the record in this proceeding, we agree with intervenors that it is not possible, at this time, to distinguish resources receiving privately funded voluntary RECs from state-funded or state-mandated RECs . . . “\textsuperscript{143} The Commission cites to no support for its finding, which is factually incorrect, as PJM administers the database that tracks all RECs in the region.

PJM Environmental Information Services\textsuperscript{144} operates the Generator Attribute Tracking System, or GATS, which is the system of record for all RECs in the PJM region. In a very literal sense, RECs in the PJM region exist only as entries in databases operated by PJM EIS. The Commission’s conclusion that it is not possible to determine the final disposition of voluntary RECs is thus clear error.


\textsuperscript{142} Motor Vehicle Mfrs. Ass’n, 463 U.S. at 43.

\textsuperscript{143} December 19 Order at P 176.

\textsuperscript{144} See \url{https://www.pjm-eis.com/}.
The Commission can remedy this error by modifying paragraph 176 of the December 19 Order to instead direct PJM to take steps necessary to ensure that voluntary REC program purchases are structured to meet the Competitive Exemption.

(b) The Commission makes errors of fact and law in the treatment of resources whose primary purpose is not electricity production and behind the meter generation.

The December 19 Order states it is not intended to cover every form of state financial assistance, but only those related to entry or operation of generation capacity.\(^{145}\) The Order also states that sales of ZECs and RECs are distinguishable from other out-of-market revenues.\(^{146}\) However, sections of the Order regarding treatment of resources whose primary purpose is not electricity production\(^{147}\) and behind the meter generation\(^{148}\) contradict those statements, namely by allowing factors unrelated to state support of entry or operation of generation capacity to trigger the MOPR. Specifically:

- Many resources whose primary purpose is not electricity production receive revenue from state or local governments. For example, solid waste fired generators may well receive payments from a city sanitation department; landfill gas fired units may be supported by a municipality as the least-cost solution to landfill safety issues, police station backup generators may be motivated by disaster recovery concerns, and so on. These payments would appear to fall under the definition of State Subsidy, rendering those units

\(^{145}\) December 2019 Order at P 68

\(^{146}\) Id. at P 69.

\(^{147}\) Id. at P 51.

\(^{148}\) Id. at P 148.
subject to the MOPR simply due to their non-electric revenue streams. The Commission should remedy this by clarifying that payments to resources whose primary purpose is not electricity production for services provided do not trigger the MOPR, even if they meet the definition of State Subsidy (“a…payment…that is a result of any action…of a…political subdivision…”).

- Behind the meter generation provides many services to the host site. Some of these—e.g. process steam production—may have calculable market values. Others—e.g., human safety, continuity of business, or simply peace of mind from backup power—have value that is not easily calculable and may be at least partially subjective. However, the Order directs PJM to develop offer floors for generation-backed demand response without considering these factors.\(^{149}\) The Commission should remedy this by directing PJM to consider all relevant benefits, including but not limited to the value of lost load benefits from backup generation, in calculating Net CONE and ACR for generation-backed demand response.

- The Commission should clarify that the general provision of metering services and meter data do not constitute a State Subsidy triggering the MOPR for Demand Resources or Energy Efficiency, even when such services are funded by retail rate riders.

\(^{149}\) December 2019 Order at PP 144, 148.
(c) The Commission makes an error of law by reversing previous rulings on demand resource registration without support in the record.

The December 19 Order states that it may require demand response aggregators to contract with resources sooner, and directs PJM to include such changes if necessary in its compliance filing.\textsuperscript{150} However, the Commission developed an extensive record, including a technical conference, on this very issue in Docket No. ER13-2108, and concluded that demand response aggregators should not be required to identify specific customers as a condition of participating in a capacity auction.\textsuperscript{151} The order instituting the instant docket gave no notice that this policy was to be reconsidered, and there is nothing in the record to support its reversal. The order to change demand response requirements is a reversal without support, fails to acknowledge this record, its prior decision, or provide a reasoned basis for changing its position. As such, its decision is arbitrary and capricious and fails to meet section 206 requirements. The Commission should remedy this by striking note 297 from the December 2019 Order.

(d) The Commission makes an error of fact by stating that single customer entities may take advantage of FRR plans.

The Order determines that new resources owned by self-supply entities are subject to the MOPR.\textsuperscript{152} Self-supply entities are defined as vertically integrated utilities, public power, and single customer entities. The Order goes on to note that self-supply entities who prefer to craft their own resource adequacy plans may avoid MOPR offer floors by using the existing FRR

\textsuperscript{150} December 2019 Order, n.297.


\textsuperscript{152} December 2019 Order at 202.
alternative. However, single customer entities are not currently eligible to use an FRR plan.\textsuperscript{153} This leaves single customer entities unduly discriminated against relative to other entities the Order identifies as identically situated. The Commission should remedy this error by directing PJM to expand FRR eligibility to include single customer entities.

\textit{(e)} The MOPR applies only to resources receiving certain types of benefits, and not to others with the same potential impact on the PJM capacity market differently and is thus unduly discriminatory.

As the Commission itself acknowledges in discussing federal subsidies, the MOPR will interfere with state programs for resource support. That this interference is the purpose of the Order is further evident in the Order’s undue discrimination \textit{between} resources which receive financial benefits outside of FERC’s markets. The Commission’s stated purpose in imposing a broad MOPR is to ensure entry and exit into PJM’s capacity market is guided solely by the price signals in that market.\textsuperscript{154} Yet the Commission explicitly excludes from the application of the MOPR resources that receive revenue outside of the PJM market for the private sale of generation byproducts (such as coal combustion residuals or heat) \textit{and} state policies for “generic industrial development” or “siting.”\textsuperscript{155} Although intervenors, including the Institute for Policy Integrity and Exelon Corporation noted that these revenues and benefits have similar potential

\textsuperscript{153} RAA at 8.1.B.1, \url{https://www.pjm.com/directory/merged-tariffs/raa.pdf}.

\textsuperscript{154} December 2019 Order at PP 25, 41.

\textsuperscript{155} \textit{See} December 2019 at PP 69, 83.
effects on capacity market offers, the Commission summarily distinguished them.156 There is no
reasonable basis for these distinctions, and the Commission does not offer one; the
Commission’s replacement rate is therefore unduly discriminatory.

The Commission is prohibited, under Section 205(b) of the Federal Power Act, from
instituting rules which discriminate or confer a preference on one group of market participants
over another without an adequate justification.157 Once a rate is shown to have “different effects
on similarly situated” entities, the Commission has the “burden…to justify those disparities.”158
To do so, the Commission must provide “a rational basis for treating two entities differently,”
and must show “such differential treatment is based on relevant, significant facts which are
explained.”159

Here, the MOPR Order discriminates on its face between generators who receive out-of-
market payments based on both the source and type of payment: Generators who receive out-of-
market payments for byproducts (such as coal combustion residuals or steam heat) of power
generation through sales to private parties are not subject to the MOPR, nor are generators who

156 See December 2019 Order at PP 66 (discussing Policy Integrity’s argument that ZEC and
RPS programs are not distinguishable from other revenues received outside the PJM market such
as coal ash or steam heat sales); 80 (discussing multiple intervenors’, including LS Power’s,
argument that an exception for a specific type of subsidy program “would be inconsistent with
the Commission’s recognition that all subsidy programs result in price suppression”); 81
(discussing Exelon’s argument that development and siting incentives “raise[] the same concern
that the Commission has identified regarding transparency and the competitiveness of offers in
the capacity market”).

157 See 16 U.S.C. §824d(b); see also, e.g., Elec. Consumers Res. Council v. FERC, 747 F.2d
1511, 1515 (D.C. Cir. 1984).

158 See Transmission Agency of Northern California v. FERC, 628 F.3d 538, 549 (D.C. Cir.
2010).

159 BP Energy Co. v. FERC, 828 F.3d 959, 967 (D.C. Cir. 2016) (internal citations omitted).
receive benefits from public entities that are determined to be “siting” or “economic development” incentives. (Generators who receive public out-of-market payments for externalities of generation—such as reduced emissions—are subject to the MOPR.) The Commission thus bears the burden of demonstrating that this discrimination is justified, i.e., that it can articulate how the differences between these types of out-of-market revenue are relevant to the Commission’s reasons for imposing the MOPR at all. The Commission fails to do so; these distinctions are unduly discriminatory.

(i) The Commission offers only circular reasoning for its decision not to apply the MOPR to resources receiving revenues outside of FERC markets through private sales.

The MOPR ordered by the Commission discriminates between resources who obtain revenue outside FERC-jurisdictional markets depending on whether that revenue derives directly from state policies or from private transactions. The Commission expressly excludes from the expanded MOPR “commercial externalities or opportunities that might affect the economics of a particular resource.”\textsuperscript{160} Such externalities include the sale of generation byproducts such as coal ash or steam heat.\textsuperscript{161}

But these “externalities or opportunities” have the same potential effect on prices within the PJM capacity market as payments that “result [from] a state government.”\textsuperscript{162} Private externality payments allow resources to reduce their capacity price offers below what they would

\textsuperscript{160} December 2019 Order at P 68.

\textsuperscript{161} Id. at P 66; Comments of the Institute for Policy Integrity at New York University School of Law at 27-28; Initial Comments of the Maryland Public Service Commission, Affidavit of Dr. James Letzelter at 9 (“Penalizing renewables for selling these additional attributes is no more appropriate then penalizing a coal plant for selling by-products such as fly ash.”).

\textsuperscript{162} See December 2019 Order at P 67 (defining “State Subsidies”).
otherwise be able to offer based solely on capacity generation, and thus to suppress prices and gain a relative advantage over resources that do not have access to these same external markets. A resource that has access to an external market for coal ash residue sales, for example, can bid a lower price than a resource without the same access—even if the two have identical costs for the generation of capacity. The sale of coal ash, steam heat, or other byproducts, or the sale of credits between resources causes precisely the “core problem” the Commission purports to be addressing through its imposition of an MOPR: “distort[ed] prices in a capacity market that relies on competitive auctions to set just and reasonable rate.”

The Commission fails to explain why, despite having the same potential effect on PJM market prices, external private transactions should not be subject to the MOPR. Addressing the Institute for Policy’s Integrity argument that externality payments from ZEC and RPS programs “are not distinguishable from certain other revenues received outside the market,” the Commission does not find that these external payments have different effects on capacity market pricing. Instead, the Commission asserts that its “statutory mandate” requires the Commission to intervene “when subsidized [resources] supported by one state’s or locality’s policies has the effect of disrupting the competitive price signals that PJM’s [capacity auction] is designed to produce…” Order P 68. But this just begs the question. Even conceding that the Commission is “forced to act” to address the disruption of competitive price signals within the PJM capacity market

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163 December 2019 Order at P 5.

164 To the extent the Commission could point to the comparatively small size of these externality markets as compared to the PJM capacity market and thus the *de minimis* impact on offer prices of any sales of residuals or other cogeneration products, any argument for the distinction between private and public externalities is foreclosed by the Commission’s refusal to adopt a materiality threshold for the MOPR. See December 2019 Order P 98. These sales “may have the ability to impact capacity prices” in the same manner as small payments from public sources. *Id.*
market caused by state or local policies, that does not explain why the Commission is not similarly compelled to intervene to address other external payments that also “ha[ve] the effect of disrupting the competitive price signals” in the PJM capacity market. This circular reasoning cannot justify the distinction the Order makes between types of external payments.

(f) The exclusion of “generic industrial development and local siting support” from the MOPR is unduly discriminatory and reflects the Commission’s improper purpose of interference with state policy.

The Order’s exclusion of “generic industrial development and local siting support” from the MOPR rule is similarly arbitrary and similarly telling. An expanded MOPR is needed, the Commission concludes, because states have chosen “to support less economic or uneconomic resources,” thereby “distort[ing] prices” through the inclusion of offers in the capacity market at prices below the cost of production for resources without the benefit of such support.165 But under the Order, a resource that receives payments in lieu of taxes, rebates, or other subsidy may continue to make lower bids incorporating that public support and thereby (on the Commission’s reasoning) suppress auction-clearing prices, so long as the public support has the goal of bringing the resource to a particular locality, rather than encouraging the use of certain fuel.

To justify its decision to apply the MOPR to some resources that receive public support but not others, the Commission concludes that exempting general industrial development and siting support from its expanded MOPR is “reasonable, given that the support at issue is available to all businesses and is not ‘nearly “directed at”’ or tethered to the new entry or continued operation of generation capacity.”166 But this explanation is inaccurate on its face

165 See December 2019 Order at PP 5, 7.

166 December 2019 Order at P 83.
and wholly inadequate to justify the distinction. A public entity seeking to maintain the operation of an otherwise uneconomical resource for whatever reason (such as maintaining an employer within a political subdivision of the state) can do so through “industrial development” and “siting” subsidies or tax rebates and the record is replete with examples thereof.167 Such support may be directed at, and may succeed in enabling, the continued operation of “generation resources that may not otherwise be able to succeed in a competitive wholesale capacity market.”168

Nor can the Order’s disparate treatment of “generic industrial development and local siting support” be justified by the fact the latter is, at least nominally, “available to all businesses.”169 This “distinction” is a non-sequitur. Whether other, non-energy businesses could also benefit from these forms of support is entirely irrelevant to whether and to what extent these forms of support affect prices within the PJM capacity market—the ostensible basis for the expanded MOPR.

In sum, the expanded MOPR the Commission orders does not apply to all payments a resource may receive for externalities of its energy generation nor to all types of state support that might distort the overall competitive viability of a resource. The Commission exempts both private externality payments and public support for “general industrial development” and to incentivize “siting” without explaining why these forms of extra-PJM market income do not have the same purported price suppression effects as do the “State Subsidies” that trigger


168 Cf. December 2019 Order at PP 83, 68.

169 December 2019 Order P 83.
application of the expanded MOPR. This discrimination between resources that are similarly situated with respect to out-of-market support is not premised “on relevant, significant facts which are explained”\textsuperscript{170}, the Commission offers only superficial, circular reasoning in support of its different treatment. In fact, there is no rational basis for either distinction; rather, these exemptions reveal the Order is motivated by the Commission’s hostility to state programs to alter the generation mix that are otherwise outside the reach of FPA preemption. The MOPR is unduly discriminatory.

To be clear, an even broader MOPR that includes these now-exempted payments would, for the reasons described elsewhere in this request, not be just and reasonable and it is not Clean Energy Advocates’ position that the MOPR should be further expanded, as it would subject even more resources to the MOPR would further increase consumer costs and interfere with states’ abilities to implement policy over which they have jurisdiction. Rather, we highlight the logical inconsistencies and undue discrimination of the Commission’s decision and advocate that the Commission abandon a MOPR targeted at state generation upon rehearing.

The Commission should remedy this discrimination by amending the December 2019 Order so that generator sales of non-FERC jurisdicitional attributes, such as zero carbon or renewable energy, do not trigger the MOPR.

4. The Order disconnects the capacity market from resource adequacy and will lead to capacity prices and purchases greater than necessary to ensure resource adequacy in PJM.

The Order’s determination that a just and reasonable replacement rate includes a broad MOPR applied to any resource that receives a scintilla of benefit through state policy abandons

\textsuperscript{170} BP Energy Co., 828 F.3d at 967.
the core rationale for approving the RPM in the first place: attracting adequate generation at a just and reasonable price.\textsuperscript{171} A capacity market is meant to provide a price signal that guides efficient entry and exit of capacity resources, and procure a quantity of capacity appropriate to the region’s reliability needs, and procuring quantities of capacity supporting resource adequacy at a least-cost rate.\textsuperscript{172} In regions with capacity markets, the Commission has assumed responsibility to “reflect[] the economic value of capacity reserves”\textsuperscript{173} in a manner that is consistent with the region’s installed reserve margin. In other words, the Commission’s task in regulating capacity markets is to “ensure that there is enough generation to reliably meet load” without “overcharging . . . customers for unnecessary capacity.”\textsuperscript{174}

The core purpose of the RPM is supporting resource adequacy in PJM at just and reasonable rates.\textsuperscript{175} Accordingly, the RPM was designed to produce a price signal that incents new capacity resources, and retains existing resources, as needed for resource adequacy.\textsuperscript{176} As

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\textsuperscript{172} See e.g., \textit{New York Indep. System Operator, Inc.}, 122 FERC ¶ 61,064 at P 54 (Jan. 29, 2008), order on reh’g, 125 FERC ¶ 61,299 (Dec. 18, 2008) (rejecting use of updated demand curve factors that “do not recognize the need to balance the impact on consumers with the need to provide correct price signals for new generation entry.”); \textit{New England Power Generators Ass’n, Inc.}, 146 FERC ¶ 61,039 at P 52 (Jan. 24, 2014) (“[T]he Commission must strike a balance between, on one hand, setting a price that will retain enough existing resources to maintain reliability and, on the other hand, protecting consumers from overpaying for that capacity”).


\textsuperscript{174} \textit{ISO New England, Inc.}, 118 FERC ¶ 61,157 at P 49 (Feb. 28, 2007).

\textsuperscript{175} \textit{PJM Interconnection, L.L.C.}, 117 FERC ¶ 61,331, at P 1 (2006).

\textsuperscript{176} \textit{PJM Interconnection, L.L.C.}, 115 FERC ¶ 61,079, at PP 29, 169 (2006); see also \textit{ISO New England Inc. and New England Power Pool Participants Committee}, 158 FERC ¶ 61,138 at P 9 (2017) (“[o]ne purpose of capacity markets is to send appropriate price signals regarding where and when new resources are needed.”); \textit{Connecticut Dep't of Pub. Util. Control v. F.E.R.C.}, 569
the Commission has previously explained, “[b]y choosing the RPM market . . . load serving entities elect to participate in a three-year forward wholesale capacity market that relies on competition between existing resources (including self-supply) and competitive new entry to secure needed resources at a least cost rate.”177 Or, as the D.C. Circuit described ISO-NE’s capacity market, “[b]y using competitive bidding for future capacity contracts, this system both incentivizes and accounts for new entry by more efficient generators, while ensuring a price both adequate to support reliability and fair to consumers.”178

In its December 2019 Order, the Commission utterly disregards this well-established fundamental purpose for RPM. Applying the MOPR to thousands of megawatts of state-supported resources, many of which will be subject to offer price floors above the top of the demand curve,179 will result in in purchase of unneeded capacity. This inflated demand for capacity, in turn, creates clearing prices that exceed the level needed to ensure the region’s capacity needs are met. The Commission fails to acknowledge that its decision will result in capacity market results divorced from those needed to support resource adequacy, let alone explain why it is lawful. Such results are not just and reasonable.

F.3d 477, 481 (D.C. Cir. 2009) (“the purpose of the Forward Market is only to locate the price at which market incentives will be sufficient to meet that expected demand.”).


178 Connecticut Dep't of Pub. Util. Control v. F.E.R.C., 569 F.3d 477, 480 (D.C. Cir. 2009); see also ISO New England Inc. and New England Power Pool Participants Committee, 155 FERC ¶ 61,023 at P 35 (purpose of the FCM is to provide price signals “so that ISO-NE meets its reliability requirements at least cost”).

179 December 2019 Order at P 142.
PJM continues to experience a glut of excess capacity, indicating that if anything the price signal coming from the capacity market is too high. The Commission has made no effort to explain why, in this context, applying the MOPR to state-sponsored resources furthers the RPM’s core goal of supporting resource adequacy at least cost rates. Failing to consider this important element of just and reasonable rates renders the Commission’s decision arbitrary and capricious.

The broad MOPR will force customers to fund massive amounts of unneeded capacity, as state-supported capacity resources will have minimum price floors too high to clear in the BRA, even though they will be providing capacity to the PJM market. By entirely ignoring perfectly good capacity and forcing the purchase of unnecessary capacity, the Commission’s broad MOPR would, by design, grossly overshoot the installed reserve margin needed to meet reliability standards. The Federal Power Act’s requirement that rates be just and reasonable prohibits setting rules in such a manner that misses the mark by design.

The Commission’s invocation of NJBPU, supra, is mistaken. NJBPU may establish that ordering consumers to “pay twice” for capacity is within FERC’s authority in some

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180 Ex. A at 36 (noting that PJM's planning reserve margin for the summer of 2018 was 28.7 percent, is significantly higher than PJM Staff’s recommended installed reserve margin target of between 15.8 and 16.1 for delivery years 2018/2019 through 2021/2022 PJM’s capacity market).

181 See also Initial Argument of the New Jersey Board of Public Utilities, at 8-9 (noting recent Brattle Group analysis showing administrative Net CONE prices in PJM well in excess of level empirically demonstrated to incent new entry).

182 In its June 2018 order, the Commission at least acknowledged parties’ evidence regarding capacity oversupply and arguments that reliability could not be threatened by purportedly suppressed prices, but responded only by summarily concluding that the suppression itself “render[s] the rate unjust and unreasonable”). See June 2018 Order at P 149. The Commission fails entirely to acknowledge the existing oversupply as relevant to its determination of a just and reasonable replacement rate.
circumstances.\textsuperscript{183} However, \textit{NJBPU} cannot relieve FERC of its obligation to provide “an articulation, in response to serious objections, of the Commission's reasons for believing that more good than harm will come of its action.”\textsuperscript{184} The Commission has failed to acknowledge, much less provide a reasoned explanation for, this departure from precedent.\textsuperscript{185}

In sum, the December 19 Order errs in not considering the relevant factor of the capacity overprocurement that its Order will cause, and is therefore invalid. The Commission’s replacement rate is not just and reasonable because it will result in capacity prices that exceed the level needed to incent appropriate entry and exit from that market, as needed to ensure resource adequacy at reasonable prices. The replacement rate is also unjust and unreasonable because it fails to update capacity procurement targets to account for the actual reliability value of the resources excluded from the market by the MOPR. As a result, the capacity market will procure resources not needed to ensure resource adequacy in PJM. Such a market design is not consistent with the purposes of RPM or the protections of the Federal Power Act.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{183} \textit{NJBPU}, 744 F.3d at 96-97 (quoting \textit{Connecticut PUC}, 569 F.3d at 481).
\item \textsuperscript{184} \textit{Maryland People’s Counsel v. FERC}, 761 F.2d 768 at 799 (1985); \textit{Edison Mission Energy, Inc. v. FERC}, 394 F.3d 964, 968 (D.C. Cir. 2005).
\item \textsuperscript{185} \textit{Cf F.C.C. v. Fox Television Stations, Inc.}, 556 U.S. 502, 515 (2009)( “[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. . . . And of course the agency must show that there are good reasons for the new policy.”).
\end{enumerate}
\end{footnotesize}
5. **FERC’s determination that offer price floors for new renewable energy resources should be based on Net CONE does not result in just and reasonable rates.**

FERC adopts PJM’s proposal to set the default offer price floor for new resources at Net CONE for each resource type.\(^{186}\) Net CONE includes the costs of constructing and developing a new resource, net of expected energy and ancillary service (E&AS) revenues. In contrast, FERC approved a default offer price floor for existing resources based on Net ACR.\(^{187}\) Net ACR reflects the units going-forward costs associated with taking on a capacity obligation (which could otherwise be avoided), net of E&AS revenues.

In doing so, FERC rejected arguments made by diverse parties including the Independent Market Monitor, Clean Energy Industries, D.C. Office of the People’s Counsel, ELCON, and Vistra, that the default offer price floor for both resources types should be set based on Net ACR.\(^{188}\) As the IMM explains:

> A competitive offer is a competitive offer, regardless of whether the resource is new or existing. The prior approach of defining a high competitive offer for a new entrant, equal to the net cost of entry for the resource, and then eliminating any requirement in year two, illustrates the fallacy. Resource owners enter and remain in the market with the expectation that they will recover their costs and earn a return on and of capital. That is true of new entrants and existing resources. A competitive offer in the capacity market is the marginal cost of capacity, or net ACR, regardless of whether the resource is planned or existing.\(^{189}\)

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\(^{186}\) December 2019 Order at P 138.

\(^{187}\) *Id.* at P 148.

\(^{188}\) *Id.* at P 120 n.250.

While FERC’s rationale for employing Net CONE as the basis for default offer price floors for new resources is largely based on its “consisten[cy] with the existing MOPR,” FERC then inexplicably changes the existing methodology to set the price floor at 100% of Net CONE rather than 90% of Net CONE. FERC does not explain why this departure from the existing methodology is just and reasonable—it's purpose seems to be solely increasing Net CONE so as to serve the Commission’s objective of ensuring that resources supported by state policies can never clear the market. As the IMM warned, “it is not appropriate to define a competitive offer so as to exclude some offers.” Nor does FERC explain why some parts of the offer price floor methodology cannot be revisited in light of the significantly changed scope of the MOPR, while others can be changed. The Commission’s selective application of “the way it’s always been” principle reveals arbitrary and capricious decision-making.

The Commission rejects Net ACR as the default offer price floor basis for new resources based on an incorrect conception of what constitutes a “competitive” offer. As the IMM and other parties explain, it is rationale competitive behavior for a resource to offer into the capacity market at its marginal cost of offering capacity (Net ACR), with the expectation that it will recover its cost of new entry over its lifetime through a combination of capacity, energy, and ancillary service market revenues. The notion that a resource’s initial capacity market offer

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190 December 2019 Order at P 138.

191 IMM Reply Comments at 5.

192 IMM Reply Comments at 4-5: “As a matter of economic logic and observed behavior, developers plan to build resources that will have an economic life of at least 20 years and expect to achieve full cost recovery and a target rate of return over that period. These goals are not met by offering at net CONE. Developers expect to earn their returns from inframarginal revenues in the energy and capacity markets as a result of the greater efficiency of the new units.”
must be sufficient to recover the unit’s cost of new entry over the life of the resource, or else it is uncompetitive, does not reflect investment, business or market realities. 193 The Commission’s professed “goal” is to prevent any resource from clearing the market if it could do so at a price that would not allow it to recover its full investment costs over the life of the resource. But this gives insufficient consideration to generators’ potential to earn revenues greater than the backward-looking energy and ancillary service offset that contribute towards the generators’ capital cost. It also assumes, counterfactually, that the first-year RPM price will be locked in – i.e., that a generator anticipates that it will recover equal capacity revenues over the next twenty years. In fact, generators may reasonably forecast that clearing prices will increase, allowing greater recovery of capital costs in later years. What results are offer price floors that significantly exceed what market participants are willing to accept in exchange for taking on a capacity obligation.

This does not ensure a competitive market, but rather suffocates it. By imposing its own (higher) view of what generators should require in exchange for entering the market, the Commission guarantees that consumers are overpaying for capacity, and that capacity prices will exceed the level needed to incent the proper degree of entry and exit needed to maintain resource adequacy.

Furthermore, FERC’s reliance upon the unit-specific exemption process to cure excessive default offer price floors is misguided.194 Generators seeking unit-specific exemptions are limited to demonstrating that their Net CONE is less than the default—they cannot obtain a

193 See ELCON Reply Comments at 6: “There is little economic rationale in establishing different competitive offer levels for the same resource simply based upon whether the resource has cleared a capacity auction or not.”

194 December 2019 Order at P 138.
lower offer price floor that reflects their true marginal cost of capacity (their Net ACR). FERC’s flawed choice of Net CONE for new resources therefore cannot be fixed through a unit-specific process.

FERC’s decision to continue Net CONE as the basis for new resource offer price floors also ignores that construction and development costs are sunk once a resource is constructed, and therefore should not be reflected in rational capacity market offers. The Commission asserts that these costs are still avoidable for new resources,\(^\text{195}\) hence such resources are only offering competitively where they can obtain capacity market revenues sufficient to recover their Net CONE. This ignores the reality that many resources will incur construction and development costs regardless of whether they obtain a capacity commitment. For example, resources that are built but fail to clear the first or second capacity auction into which they offer will rightly consider construction costs to be sunk and will rationally offer their marginal capacity cost (Net ACR) into RPM, not their Net CONE. Yet FERC rejects not only the notion that such unit should be able to offer into the auction at a level that reflects their rationale profit-maximizing behavior, but also rejects other compromise positions to reflect the reality of these already-built resources such as Clean Energy Industries’ Depreciated MOPR proposal.\(^\text{196}\)

Resources that are already at an advanced stage of development, but have not reached the milestones to qualify as “existing resources”\(^\text{197}\) will likewise be in operation and willing to offer at Net ACR due to their sunk costs, but will instead be forced to offer at a level that far exceeds

\(^{195}\) *Id.* at P 139.

\(^{196}\) *Id.* at P 141; Reply Comments of the Clean Energy Industries on the Application of the Minimum Offer Price Rule (Nov. 6, 2018).

\(^{197}\) December 2019 Order at PP 12-14.
what they require to take on a capacity obligation. FERC responds that such resources have been
on notice that capacity market rules may be revised since the complaint initiating Docket EL16-49 was filed in 2016. Even if the Commission were not applying principles of fairness regarding
market rule changes unevenly as between existing resources and planned resources already in the
pipeline, this notice argument misses the point. The point is not (just) whether market
participants can reasonably rely on a set of market rules, but whether those market rules result in
just and reasonable rates. Requiring new resources, especially those already built or in advanced
stages of development, to offer in at Net CONE, results in the market clearing at a price higher
than is needed to incent entry needed to ensure reliability.

Finally, as the IMM observes, the “[u]se of higher offers for new resources based on the
full cost of entry or net CONE . . . would constitute a noncompetitive barrier to entry and would
create a noncompetitive bias in favor of existing resources and against new resources of all
types.”198 Where both new and existing resources competitively offer at Net ACR, subjecting
new entrants to a higher offer price floor discriminates against those entrants, stymies
innovation, and diminishes reliability as existing resources with increasing forced outage rates
delay their exit from the market.

Because an offer price floor for new resources that is based on Net CONE does not
reflect economic reality, it will result in market prices that exceed the level needed to incent new
entry, and unduly discriminates against new resources, FERC’s determination results in a
replacement rate that does not meet the Federal Power Act’s requirements. If FERC declines to
reconsider its decision to expand the MOPR to all resource types, it must correct this flaw in its
methodology for establishing offer price floors for new resources.

198 IMM Reply Comments at 4-5.
The Commission’s core purpose under section 206 of the Federal Power Act is to protect the public interest and ensure “just and reasonable rates” by protecting energy customers against excessive prices. Yet in its December 2019 Order the Commission entirely ignored the dramatic increase in rates that its expanded MOPR will cause. Rather than fulfill its statutory obligation to consider and weigh these costs, the Commission shifted blame to states pursuing legitimate policy goals within their authority under the Federal Power Act. This deflection was an abrupt about-face from the Commission’s position, as recently as June 2018, that just and reasonable rates should not require consumers to “pay twice” for capacity. The Commission’s failure to even make findings as to how much the expanded MOPR will increase costs for ratepayers, much less balance those costs against the perceived interests of generators and justify its decision to promote an artificial conception of “competition” is inconsistent with the Federal Power Act, court precedent, and its own decisions.


200 See December 2019 Order.
(a) The Commission has a statutory duty to protect PJM ratepayers from overpaying for capacity.

“It is long-established that the ‘primary aim [of the Federal Power Act] is the protection of consumers from excessive rates and charges.’” Ensuring a “competitive” marketplace is one means to this end, but not an end in itself. Accordingly, the Commission and federal appellate courts have long held that ensuring just and reasonable rates entails balancing investor and customer interests, and that the Commission has a duty to engage in this balancing when setting rates. Specifically, in the context of capacity markets, the Commission must consider the impact of rate design choices on customers and the effect of price signals on entry and exit of capacity resources. “[T]he Commission must strike a balance between, on one hand, setting a price that will retain enough existing resources to maintain reliability and, on the other hand, protecting consumers from overpaying for that capacity...” A rate that does not account for,

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202 See Envtl. Action, Inc. v. FERC, 939 F.2d 1057, 1061 (D.C. Cir. 1991) (“Competition is valued not for its own sake but because it is most likely to maximize the satisfaction of consumer wants.”).


204 See e.g., New York Indep. System Operator, Inc., 122 FERC ¶ 61,064 at P 54 (Jan. 29, 2008), order on reh’g, 125 FERC ¶ 61,299 (Dec. 18, 2008) (rejecting use of updated demand curve factors that “do not recognize the need to balance the impact on consumers with the need to provide correct price signals for new generation entry.”).

205 See New England Power Generators Ass’n, Inc., 146 FERC ¶ 61,039 at P 52 (Jan. 24, 2014).
and justify, increased costs to consumers is not “just and reasonable” and is inconsistent with the Commission’s duties under the Federal Power Act.206

(b) The expanded MOPR will increase capacity costs by billions of dollars, costs which will be passed onto ratepayers.

The expanded MOPR will, in the words of Commissioner Glick, impose a “staggering cost” on ratepayers.207 Evidence before the Commission, as well as Commissioner Glick’s own estimation, show the expanded MOPR ordered by the Commission will cause billions of dollars of increases in capacity payments and ultimately customer energy bills. This cost is by design; the very purpose of the MOPR is to increase the capacity market offers of certain resources, thereby increasing the overall clearing price. The MOPR will thus both increase the price paid per megawatt hour for capacity in PJM’s capacity market, and result in consumers having to buy unnecessary capacity because resources developed pursuant to state policy are unable to count towards PJM’s reliability requirement.

Commissioner Glick, in his dissent to the December 2019 Order, performed a “back-of-the-envelope” calculation to estimate these increased capacity costs. Assuming that previously-cleared nuclear power plants in Illinois and New Jersey would no longer be able to clear the capacity market, and relying on public data from PJM to estimate the demand curve for the most

206 See Argument of the Organization of PJM States, Inc., at 6 (“Administratively inflating capacity prices to rise above the competitive cost of new entry, which any non-accommodative program would accomplish, contravenes the Commission’s responsibility to guard against unwarranted customer expense.”).

207 December 2019 Order (Commissioner Glick, dissenting, at P 54).
recent capacity auction, capacity clearing prices would increase $40/MW-day—totaling $2.4 billion in additional capacity costs each year.\textsuperscript{208}

More detailed analyses by experts, submitted as part of earlier related proceedings, show even more dramatic costs. An expert report submitted by Clean Energy Advocates at an earlier stage in this proceeding estimates that the cost of redundant capacity purchased as a result of an expanded MOPR will approach $24.6 billion over the next ten years—that is $379 for each of the 65 million people in PJM.\textsuperscript{209} The New Jersey Board of Public Utilities estimated that removing 3,000 MW from the bottom of the supply stack, a reasonable approximation of the impact of the MOPR, could increase rest-of-RTO clearing prices by $23.49/MW-day,\textsuperscript{210} more than a 16% increase over rest-of-RTO price in the most recent Base Residual Auction. A similar adjustment to the supply curve in the MAAC zone would result in annual increases in capacity prices of over $1 billion annually.\textsuperscript{211}

\textsuperscript{208} \textit{Id.} (Commissioner Glick, dissenting, at P 50).

\textsuperscript{209} Ex. A, Goggin Affidavit (“Goggin Affidavit”), at ¶ 3; \textit{see} June 2018 Order (incorporating Docket Nos. ER 18-1314 and EL16-49 into the instant docket, No. EL18-178). The Goggin affidavit evaluated increased costs of PJM’s earlier MOPR-Ex proposal, including a scenario in which renewable resources were ineligible for a narrowly written exemption for resources that participate in Renewable Portfolio Standard (“RPS”). The high end estimate in the Goggin affidavit is therefore a conservative estimate of the costs likely to be imposed by the broad MOPR that FERC approves in the December 2019 Order. This estimate is conservative with respect to the scope of the MOPR approved by FERC in part because it does not account for the effects of subjecting demand response, energy efficiency, and storage resources to the MOPR, as FERC has required in its Order.

\textsuperscript{210} Initial Brief of the New Jersey Board of Public Utilities, at 6-7.

\textsuperscript{211} \textit{Id.} at 7 n.43; \textit{see also} Argument of the Organization of PJM States, Inc. at 7-9 (presenting similar analysis of impacts on market clearing prices).
The combination of increased market-clearing prices and the generation and purchase of redundant capacity will eventually be paid by customers. Analysis in 2018 by Grid Strategies, an independent expert firm, concluded that under a broad MOPR policy PJM ratepayers would pay $5.7 billion more per year, or an additional $6 per month per person.\textsuperscript{212}

Although estimates of the precise magnitude differ, it is undisputed that the expanded MOPR has the purpose of, and will in fact increase capacity costs and thus the rates paid by customers. This increase, independent experts and the Commission’s own member agree, will be in the billions of dollars. Such an increase is only “just and reasonable” if the Commission can explain why it is not an overpayment or windfall—that consumers are getting what they are paying several billion additional dollars for. Specifically, if the Commission believes that this increase is necessary to retain sufficient existing resources to maintain resource adequacy, it must explain why that level of increased rates is required to meet that goal.\textsuperscript{213}

\textbf{(c) The Commission ignored these costs in violation of its statutory duty to protect PJM ratepayers from overpaying for capacity.}

The Commission’s Order provides no such explanation. Not only does the Commission decline to offer its own estimate as to how much the expanded price floor will increase consumer rates or to acknowledge these costs weigh against the mitigation policy the Commission has chosen to adopt, its implicit finding that such (unknown) costs are justified is not supported by substantial evidence. As discussed supra, Section IV.A. 2, the record is devoid of any evidence that capacity market prices are, or may soon be, suppressed to a degree that the market no longer

\textsuperscript{212} Docket Nos. EL16-49, EL18-178, Letter from U.S. Senator Charles E. Schumer et al. to Chairman Chatterjee at 1 (Aug. 29, 2019) (citing the cost estimate from the Grid Strategies report).

\textsuperscript{213} New England Power Generators Ass’n, Inc., 146 FERC ¶ 61,039 at P 52 (Jan. 24, 2014).
sends price signals that attract new entrants and retain economic existing resources. The purpose of the capacity market is not simply to provide revenue for generators, it is to provide the level of revenue needed to attract the resources needed to ensure resource adequacy. The Commission points to no evidence that the price increases its Order will engender are necessary to ensure resource adequacy. This absence of both factual findings and policy reasoning render the Order arbitrary, capricious, and contrary to law.

The December 2019 Order mentions the effects of an expanded MOPR on customer costs only once. Nowhere in its Order does the Commission make any findings as to what the costs to ratepayers of the expanded MOPR will be. The Commission does not dispute that the expanded MOPR will increase costs to ratepayers. Having implicitly accepted this conclusion, however, the Commission does not attempt to quantify or estimate the total increased capacity costs of its Order or the likely increase in market-clearing prices, or to examine the expert evidence as to these increases submitted to it. The Commission does not acknowledge, much less attempt to balance, this increased consumer costs against the purported benefits to investors. But as the D.C. Circuit has recognized, such a failure to account for customer costs is a dereliction of the Commission’s duty. The Commission’s decision that the expanded MOPR is just and reasonable thus “cannot be sustained in light of [its] failure to make findings as to the impact [the revised rate] would actually have on ultimate consumers.” This failure to address the effects of the expanded MOPR on ratepayers is, standing alone, a basis for rehearing.

\[214\] See December 2019 Order at P 41.


\[216\] Id.
The Commission’s neglect of consumer interests is even more striking in light of its earlier admonition to PJM, in the underlying June 2018 Order, that any expanded MOPR must avoid an outcome whereby customers are required to pay twice capacity, or put another way, purchase unnecessary capacity. Recognizing that “it may be just and reasonable to accommodate resources that receive out-of-market support, and mitigate or avoid the potential for double payment and over procurement,” the Commission directed PJM and stakeholders to submit comments developing a resource-specific Fixed Resource Requirement Alternative that would allow load to be paired with capacity from resources supported by state policy outside of the PJM capacity market. 217 Expressing concern with avoiding a scenario in which customers paid twice for capacity—once inside the PJM market and again through state support for out-of-market resources—and the Commission Order found that it is “imperative” that market constructs “appropriately manage” these supports to avoid this outcome. 218

But the December 2019 Order “unceremoniously discards” the resource-specific FRR Alternative it previously directed PJM to develop. 219 Only 18 months after it directed PJM to develop such an Alternative, the Commission rejected PJM’s proposed resource-specific FRR alternative in its December 2019 Order without explanation or reasoned basis for this about-face. 220 Instead, the Commission blithely acknowledges that under the expanded MOPR, some

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217 June 2018 Order at P 160.


219 December 2019 Order (Commissioner Glick, dissenting, at P 2); see December 2019 Order at PP 204, 219.

220 See December 2019 Order at P 218 (stating that the Commission “declines to implement a resource-specific FRR Alternative” without further explanation).
states may have to pay twice for capacity, but contends (wrongfully, as explained *infra*) that this outcome has the courts’ approval. The Commission’s consideration of consumer costs is inadequate not only under the FPA and judicial precedent, but fails to meet even the criteria for a just and reasonable rate the Commission itself articulated in its earlier Order.

To the extent that the Commission relies on the existing “utility-wide” Fixed Resource Requirement (FRR) Alternative to address harms to consumers from having certain resources subject to the MOPR, its reliance is misplaced. The existing FRR Alternative is limited to public power and investor-owned utilities, and the latter may need changes in state law to allow them to utilize the FRR. If the Commission is to present the FRR Alternative as a viable path to reduce cost increases associated with its MOPR, it must ensure that the rules governing the FRR Alternative do not arbitrarily limit its use, and that eligible entities that had never previously contemplated use of the FRR have adequate time to obtain needed clarification or authority from regulators. Finally, we note that the Commission cannot use the theoretical availability of the FRR decision as means to avoid hard questions about whether its rates are just and reasonable.

In 2013, the Commission rejected arguments that the availability of the FRR obviated the need for a self-supply exemption, noting that “[a]t issue here, however, is not the adequacy, or inadequacy, of the FRR option for vertically-integrated utilities. Rather, the issue is whether PJM’s proposed Tariff changes are just and reasonable.” The Commission has not explained

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221 *Id.* at P 41.

222 *Id.* at PP 12, 202, 204.

why it now believes it can dodge the question of whether its rate is just and reasonable by pointing to a way for affected consumers to avoid its rate entirely.

(d) The Commission’s reliance on the Third Circuit’s opinion in *NJBPU* to deflect responsibility for these increased costs is misplaced.

Rather than weigh these increased costs to customers against the purported investor benefits of the expanded MOPR, as it is statutorily required to do, the Commission deflects responsibility to the states. Any increase in consumer prices, the Commission suggests, are simply the consequence of states’ policy decisions, and thus it is “‘appropriate[]’” that states “‘bear the costs of [those] decision[s]’” by “‘having to pay twice for capacity.’” 224 The Commission’s “Pay to Play” jurisdictional scheme finds no support either in the Federal Power Act or in the Third Circuit’s decision in *NJBPU*, on which the Commission purports to rely. 225

As an initial matter, the increased costs to consumers as a result of the expanded MOPR will not be limited to those in states with policies that promote certain types of resources. The stated goal of the expanded MOPR is to reduce “low or zero priced offers into the capacity market,” thereby increasing capacity market clearing prices. 226 All consumers that are end-purchasers of electricity bought by utilities who participate in the PJM capacity market will be affected by this increase in the market-clearing price for capacity, including consumers from states without policies promoting certain generation resources. Simply insisting that states must bear the costs of its own policy preferences does not address the Commission’s core

224 *Id.* (quoting *NJBPU*, 744 F.3d at 97).

225 *NJBPU*, 744 F.3d 74, 97 (3d Cir. 2014).

226 December 2019 Order at P 25.
responsibility to consider and weigh these increased costs in imposing the costs across the entire PJM footprint.

Moreover, the Commission’s reliance on \textit{NJBPU} as having “directly addressed” the issue of increased prices under a MOPR that includes all subsidized resources is misplaced. In \textit{NJBPU}, the Third Circuit found that the Commission did not exceed its jurisdiction under the Act by ordering the application of an MOPR to new resources that had contracts with states whereby the resource was required to participate in the PJM market but guaranteed to be paid (by the state) for the difference “between the contract price and the amount they were able to receive from the auction” on the back-end of the auction.\footnote{\textit{NJBPU}, 744 F.3d at 87-88.} New Jersey objected to the MOPR on the grounds that it would “prevent[] New Jersey from using the resources it has chosen to promote.”\footnote{\textit{Id.} at 97.} The Court responded that states were still free to use any resource they chose, they would just have to buy capacity from resources subject to the MOPR that did not clear the PJM capacity market \textit{in addition to} their capacity requirements, \textit{i.e.}, “pay twice for capacity.”\footnote{\textit{Id.}}

But the Third Circuit’s conclusion that the Commission \textit{has jurisdiction} to order an MOPR that will have the effect of forcing states to pay for contracted-for capacity outside the

\footnote{\textit{Id.} Connecticut Department of Utility Control does not support the Commission’s position either. There, the Court held that although states could prohibit the construction of new generation resources under the Federal Power Act but must “shoulder the economic consequences of their choices”—that is, pay the resulting higher prices when an RTO increased its capacity requirements for participants. \textit{Connecticut DPUC}, 569 F.3d at 481-42. But states with subsidy programs are already “shoulder[ing] the economic consequences” of their policy preferences for certain forms of generation through the subsidies themselves. PJM’s intervention to undermine the effect of these subsidies does not serve to internalize the costs of a state’s policy to the state itself but rather to use wholesale pricing mechanisms to counteract generation policy choices made by states.}
PJM market does not eliminate the Commission’s obligation to protect consumers from excessive rates when *exercising* that jurisdiction. In other words, while *NJBPU* held that FERC does not exceed its jurisdiction by imposing a tariff that requires a state to pay twice for capacity, it did not hold that doing so necessarily results in just and reasonable rates. The Commission must still fulfill its statutory duty to consider whether the enormous additional costs associated with a broad MOPR are necessary to incent sufficient entry into the capacity market. That states may have chosen to compensate certain generators for avoiding emissions does not absolve the Commission of its responsibility for addressing the increased costs to *all* PJM ratepayers of its decision to exclude state-supported resources from the market. *NJBPU*, which addresses whether the Commission may impose those costs consistent with the limits on its jurisdiction, does not hold otherwise. Nor does *NJBPU*’s holding that the Commission may prevent states from using the PJM market as a means of fulfilling their back-end contractual capacity obligations allow the Commission to ignore the effects of its price manipulation on customers throughout PJM who currently benefit from states’ front-end subsidies to encourage environmentally responsible generation. It is the Commission’s choices, not the states’, that will make capacity more expensive to ratepayers under the expanded MOPR.

But the Commission’s Order does not reckon with, let alone justify, this choice. The Commission’s Order implementing a broad MOPR ignores billions of dollars in increased energy costs for PJM ratepayers and completely fails to explain why the Commission’s stated goal of protecting the “PJM’s capacity market’s [ability] to send price signals” outweighs this dramatic increase in consumer costs.\(^\text{230}\) Conversely, the Order fails to make findings or otherwise explain

\(^{230}\) December 2019 Order at P 41.
why protecting “the integrity of...price signals” is necessary to ensure adequate and reliable
capacity. 231  Nowhere in either the December 2019 Order or its earlier June 2018 Order does the
Commission offer evidence of a capacity shortage, or a projection of future capacity shortage. 232
Indeed, such evidence is impossible, because its reserve margin is well in excess of
requirements. 233  The Commission never acknowledges arguments and evidence that the surplus
of capacity in PJM undermines its theory of price suppression. This abdication of the
Commission’s core statutory duty of consumer protection cannot be blamed on states exercising
their authority under the FPA to control their internal generation mix, especially when the
purported legal precedent for that deflection conflates states and ratepayers and capacity price
and quantity.

Courts overseeing the Commission’s role pursuant to 16 U.S.C. §824 have been clear that
“competition” is not valued “for its own sake,” but “because it is most likely to maximize the
satisfaction of consumer wants.” 234  Accordingly the Commission “misconceives” its purpose
when it looks to the interests of competitors rather than consumers. 235  That is exactly what the
Commission has done here. By ignoring the astronomical costs of the expanded MOPR, the

231 Id. at P 25.

232 See June 2018 Order at P 149 (responding to arguments that PJM currently has excess capacity
and reliability is not threatened by purportedly suppressed prices by summarily concluding that
the suppression itself “render[s] the rate unjust and unreasonable”).

233 See Ex. A at 36; Comments of Joint Consumer Advocates at 6 & n.14 (citing NERC 2018
Summer Reliability Assessment); see also June 2018 Order (Commissioner Glick, dissenting, at
P 53).


235 Id.
Commission has ordered a rate that is neither just nor reasonable. It has done so, moreover, in an arbitrary and capricious manner, without findings as to the magnitude of this cost and without weighing these costs against the putative benefits to reliability the expanded MOPR is intended to provide.\(^{236}\) The Commission must reconsider, and should reverse, its Order.

(e) **Unit-specific review will not prevent over-mitigation and excessive prices.**

The Commission’s replacement rate relies on optional unit-specific review to determine offer floor price, characterizing it as a “safety valve that helps to avoid over-mitigation of resources that demonstrate their offers are economic based on a rational estimate of their expected costs and revenues without reliance on out-of-market financial support through State Subsidies.”\(^{237}\) This safety valve is utterly inadequate to prevent over-mitigation and excessive price increases on consumers for two reasons. First, its methodology will still exclude excessive amounts of capacity from participating in the BRM. Second, it is a time-consuming and costly process that serves as an unwarranted barrier for new resources seeking to participate in the capacity market.

Unit-specific review will replicate much of the faulty methodology and assumptions underlying the default offer price floors, it will continue to unreasonably exclude large swaths of capacity resources. The Order directs PJM to retain the unit-specific exception and expand it to include all new and existing “State-Subsidized Resources.”\(^{238}\) Under the unit-specific

\(^{236}\) See *Motor Vehicle Mfrs. Ass’n of U.S., Inc.*, 463 U.S. at 43 (finding agency action arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem”).

\(^{237}\) December 2019 Order at P 16.

\(^{238}\) *Id.* at P 214.
exception process detailed in PJM’s initial submission, new resources are evaluated according to
a formula with assumption extremely similar to those used to calculate Net CONE for default
offer floor prices, including nominal leveling of gross costs, asset life of 20 years, and
exclusion of sunk costs.239

Unit-specific review will thus repeat the fundamental flaws present in using Net CONE
to calculate default offer floors for new resources—it is “simply another form of administrative
pricing”240 that penalizes new renewable resources with assumptions that do not reflect their
actual incentives to participate in the capacity market.241 It is arbitrary and illogical to assume a
20-year asset life for renewable units with a typical useful commercial life of 35 years.242 More
broadly, such unit-specific review based on Net CONE, with assumptions based on the particular
economic incentives of gas units used to exercise buyer-side market power, simply fails to
account for the “low net incremental avoidable costs of renewable resources consistent with their
long lead time to construct.”243 Far from providing a safety valve, unit specific review is of a
piece with the Order’s blanket exclusion of state-supported renewable resources from the
capacity market.

239 PJM Initial Submission at 42 (Oct. 2, 2018).

240 December 2019 Order (Commissioner Glick, dissenting, at P 44).

241 See id. (Commissioner Glick, dissenting, at P 34) (“[A]s the Independent Market Monitor
explains, Net CONE does not reflect how resources actually participate in the market.”) (citing
Independent Market Monitor Brief at 16).

242 Comment of Clean Energy Industries at 20 (“Current technologies along with modern operating
and maintenance practices result in units with a useful commercial life of 35 years.”) (Oct. 2, 2018).

243 Ex. A at 117, n.400.
Diverse commenters have pointed out that calculating unit-specific offer floor prices is unpredictable, administratively burdensome, and costly for applicants. Exelon describes the process as “opaque to outsiders, and in Exelon’s experience, highly subjective.”\textsuperscript{244} PSEG Companies note that “the unit-specific exemption has produced controversial outcomes in the past and has required the expenditure of significant resources by PJM and the IMM,” and that these “administrative difficulties and implementation burdens would be magnified exponentially when the MOPR is expanded to apply to many more units.”\textsuperscript{245} Commenters in Clean Energy Industries observe that “the need to pursue unit-specific review is unquestionably an added burden that could deter some projects from entering the PJM capacity market.”\textsuperscript{246} Thus, even resources whose unit-specific offer price floor would allow them to clear the market might be deterred from participating in the capacity market in the first place. As the Order includes no size threshold for mitigation, this burden will fall most heavily on smaller projects that cannot afford the expense and uncertainty of unit-specific review.

In short, unit-specific offer floor prices do not provide a safety valve against over-mitigation and excessive price increases. The process of unit-specific review retains the flawed assumptions of Net CONE methodology and will thus continue to exclude wide swaths of clean energy resources the benefit from state policies. Moreover, this process is unpredictable, administratively burdensome, and costly, creating a barrier for new resources that will deter some resources from participating in the capacity market at all.

\textsuperscript{244} Initial Testimony of Exelon at 30 (Oct. 2, 2018).
\textsuperscript{245} Comments of the PSEG Companies at 14 (Oct. 2, 2018).
\textsuperscript{246} Clean Energy Industries Answer at 6 (Dec. 20, 2018).
(f) The existing Fixed Resource Requirement Alternative is not sufficient to prevent harm to consumers or alleviate the other harms created by the Commission’s overmitigation.

C. **The Order Exceeds FERC’s Statutory Role by Targeting Matters within States’ Authority**

By directly targeting state policies, including regulations designed to address the health and environmental consequences of electricity generation, the Commission exceeds its role under the FPA and invades states’ sovereign authority to protect their citizens. The FPA explicitly reserves state authority over generation facilities, and FERC may not use its statutory authority over market rates to effectively substitute its policy preferences regarding the generation mix for those of the states. Moreover, nothing in the FPA alters states’ inherent sovereign powers to legislate for the general welfare of their citizens. When a state exercises this power to address the health and environmental regulators of power generation, FERC may not nullify states’ actions under the guise of protecting wholesale capacity markets.

1. **The Order overturns the FPA’s balance of federal and state power by targeting matters reserved to the states.**

Because the “process through which consumers obtain energy stretches across state and federal regulatory domains,” the FPA is a statute of “collaborative federalism” that “envisions a federal-state relationship marked by interdependence.”\(^{247}\) Accordingly, while the FPA grants FERC broad powers to regulate wholesale rates and transmission, states retain primary authority “over facilities used for the generation of electric energy.”\(^{248}\) States may thus “direct the

\(^{247}\) *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring).

planning and resource decisions of utilities under [the state’s] jurisdiction,” such as by “order[ing] utilities to purchase renewable generation.”249

The interconnectedness of wholesale and retail components of the grid means that one sovereign’s exercise of its regulatory authority may have incidental effects on matters within the exclusive domain of the other, but this is a feature and not a bug of the FPA’s “congressionally designed interplay between state and federal regulation” 250 What the FPA does not permit is actions that “aim at” or “target” the other sovereign’s exclusive jurisdiction.251 States may not usurp FERC’s authority over wholesale markets—as in Hughes, in which the Supreme Court

249 Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted); see also Alco Fin. Ltd. v. Klee, 861 F.3d 82, 86 (2d Cir. 2017) (holding that a Connecticut long-term renewables procurement program is not preempted by the FPA); New York v. FERC, 535 U.S. 1, (2002) (explaining that “States retain significant control over local matters” including “administration of integrated resource planning and utility buy-side and demand-side decisions” and “authority over utility generation and resource portfolios”); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 205, 212 (1983) (decisions about the “[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States”).

250 Hughes, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kansas, 489 U.S. 493, 518 (1989)); EPSA, 136 S. Ct. at 776 (“It is a fact of economic life that the wholesale and retail markets in electricity . . . are not hermetically sealed from each other. To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level.”).

251 December 2019 Order (Commissioner Glick, dissenting, at P 9) (citing Hughes, 136 S. Ct. at 1298; EPSA, 136 S. Ct. at 776 (emphasizing the importance of “the target at which [a] law aims”); Oneok, 135 S. Ct. at 1600 (recognizing “the distinction between ‘measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at’ subjects left to the States to regulate”) quoting N. Nat. Gas Co. v. State Corp. Comm’n of Kan., 372 U.S. 84, 94 (1963)).
struck down a Maryland law “because it disregards an interstate wholesale rate required by FERC.” Conversely, FERC may not regulate or target an area reserved for state authority. Although “[t]he MOPR was originally used to mitigate buyer-side market power within the wholesale market,” an area squarely within the Commission’s authority under the FPA, the Order divorces the application of the MOPR from its past purpose by making “state resource decisionmaking [] the MOPR’s primary target.” The change in target, from resource owner and purchaser to state actor, is done, moreover, without attempt to identify actual price suppression or harm to markets. The Commission exchanges actual findings of market harm for newly minted and oft-replaced novel concepts, such as “investor confidence,” replaced later by market “integrity,” most recently now replaced by the assertion that state subsidies “reject the premise of the capacity market.” This change demonstrates the Commission’s intent behind the MOPR’s expansion is not to improve wholesale markets, but rather to target state authority over generating resources.

The state policies FERC targets and seeks to nullify include those squarely within state authority. The Order contends that it covers “those forms of State Subsidies that are not federally

252 Hughes, 136 S. Ct. at 1299.

253 EPSA, 136 S. Ct. at 784 (relying on the fact that FERC’s regulation of demand response “does not intrude on the States' power to regulate retail sales” in upholding FERC’s action).

254 December 2019 Order (Commissioner Glick, dissenting, at P 14).

255 Id. (Commissioner Glick, dissenting, at P 15). “The Commission’s effort to recast the MOPR as always having been about price suppression at some level of generality obfuscates that point and badly mischaracterizes the recent shift in the MOPR’s focus.” Id. (Commissioner Glick, dissenting, at P 16).

256 December 2019 Order at P 17 (majority opinion).
preempted, but nonetheless are most nearly ‘directed at’ or tethered to the new entry or continued operation of generating capacity in the federally-regulated multi-state wholesale capacity market.”257 This novel test misstates the standard set in Hughes, where the Court concluded that states may not condition (i.e., “tether”) state support on participation in the wholesale market.258 The Court did not call into question state policies that may affect the new entry or continued operation of generation facilities—a category that could sweep in everything from labor laws and tax policy to pollution standards.259 In short, this is exactly the sort of “direct regulation of generation facilities” that the U.S. Court of Appeals for the D.C. Circuit stated the Commission would not engage in when approving the Commission’s authority to create capacity markets.260 The Supreme Court declared that maintaining the congressionally designed interplay and permitting each sovereign to carry out its role is essential to the FPA’s purpose.261 “Cross-jurisdictional effects” will therefore exist, but are not a “problem” that the Commission must

257 Id. at P 68.

258 Hughes, 136 S. Ct. at 1299; see also EPSA v. Star, 904 F.3d at 523 (Hughes . . . draws a line between state laws whose effect depends on a utility’s participation in an interstate auction (forbidden) and state laws that do not so depend but may affect auctions (allowed)); Coal. for Competitive Elec., 906 F.3d at 51 (“[T]he tether in Hughes is tied to ‘wholesale market participation,’ not prices.”).

259 Cf. EPSA, 136 S. Ct. at 774 (observing that “markets in all electricity's inputs—steel, fuel, and labor most prominent among them—might affect generators' supply of power”).

260 Connecticut Dep’t of Pub. Util. Control v. FERC, 569 F.3d at 481-82.

261 Hughes, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting Northwest Central, 489 U.S. at 518).
FERC may not use its authority over wholesale markets to target and undo states’ valid exercises of their authority under the FPA.

2. **FERC’s Broad Expansion of the MOPR Encroaches upon States’ Inherent Authority to Craft Public Policy.**

The December 2019 Order unlawfully targets and seeks to directly nullify state exercise of authority, replacing states’ legitimate exercise of their sovereign authority with the transparently political policy preferences of unelected Commissioners. Indeed, “[i]t is hard to imagine how the Commission could much more directly target or aim at state authority over resource decisionmaking.” In doing so, FERC exceeds its authority under the FPA and impinges on states’ exercise of their inherent power to legislate for the general welfare of their people.

(a) **States’ inherent power to promote the general welfare extends to legislating to address the negative consequences of power generation.**

Beyond the FPA’s division of authority over the electric grid between FERC and the states, states have the independent authority reserved to them under the U.S. Constitution to legislate for the general welfare of its people. “The power to promote the general welfare is inherent in government,” and the “states in their sovereign capacity” possess this power for “all subjects jurisdiction of which is not surrendered to the federal government.” This power extends to legislation to promote the health of a state’s people and natural environment—“Legislation

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262 December 2019 Order (Commissioner Glick, dissenting, at P 8).

263 *Id.* (Commissioner Glick, dissenting, at P 12).

264 *Nebbia v. People of New York*, 291 U.S. 502, 524 (1934); *see also New York v. United States*, 505 U.S. 144, 156 (1992) (“The States unquestionably do retain a significant measure of sovereign authority ... to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”).
designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”265 State policies that regulate the negative externalities of power generation—including policies such as renewable portfolio standards that aim to replace polluting resources in the generation mix with clean ones—fall squarely within states’ inherent power to protect the health and welfare of their citizens, and its sovereignty over those police powers is independent of its authority under the Federal Power Act

(b) The Order invades states’ inherent powers by picking capacity resources based on the Commission’s apparent policy preferences.

The Order attempts to use the capacity market to override states’ legitimate exercise of their inherent powers. The Order accomplishes this through its overbroad definition of “subsidy.” As discussed infra at Section VI.B.1., on its face this definition will “ensnare a variety of state actions that have little in common with any ordinary use of the word ‘subsidy,’”266 as it applies to any resource that “receives financial benefit (whether direct or indirect) that is connected to electricity generation or an attribute of the generating process.”267 To make this excessively vague definition workable, the Commission may narrow it through subsequent normative decision-making and applying the MOPR to certain state policies while exempting others.268


266 December 2019 Order (Commissioner Glick, dissenting, at P 22).

267 Id.

268 Id. (Commissioner Glick, dissenting, at P 25); see also id. (Commissioner Glick, dissenting, at P 45) (“To implement this scheme, PJM and the Internal Market Monitor will need to become the new subsidy police . . . .”).
This, along with the Order’s arbitrary choice of exemptions,\textsuperscript{269} amounts to picking and choosing which state policies will be mitigated based on the Commission’s policy preferences.

Indeed, FERC has already begun to pick winners and losers, in a manner that unlawfully exhibits the undue political preference of the current Administration toward fossil fuel generation.\textsuperscript{270} The Order apparently leaves unmitigated payments for other externalities like coal ash and steam heat sales even though state policies influence the value of coal ash sales, and states have policies that encourage the production and sale of steam heat.\textsuperscript{271} In the process of deciding which policies to undo and which to leave in place, FERC takes on an unlawful role regulating generation facilities, and replacing state’s exercise of their core powers to promote general welfare with its own policy preferences. In the words of Commissioner Glick, FERC is “substituting its own policy preferences—a peculiar mix of reverence for ‘competition’ and

\textsuperscript{269} Supra section C.4.(a).


\textsuperscript{271} December 2019 Order at P 66 (discussing and rejecting concerns from Institute for Policy Integrity that RECs and ZECs are not distinguishable from payments for other externalities like coal ash and steam heat sales). The value of coal ash is influenced by state policies related to coal ash disposal. A variety of state policies provide incentives to combined heat and power facilities for steam heat sales. See U.S. E.P.A., Combined Heat and Power Partnerships (last updated May 13, 2019), \url{http://www.epa.gov/chp/dchpp-chp-policies-and-incentives-database}. 
reliance on administrative pricing—to entrench the existing resource mix and trample states’ concerns about the environmental externalities of electricity generation.”

V. PROCESS DEFECTS EXACERBATE THE ORDER’S SUBSTANTIVE ERRORS AND GUARANTEE CONTINUED CONFUSION AND UNCERTAINTY FOR PJM’S CAPACITY MARKET

The Order’s process defects exacerbate the harm of its substantively incorrect reasoning. The Order veers wildly from the course laid out in the June 2018 by abruptly abandoning the resource-specific FRR Alternative, and institutes a hasty deadline for PJM’s compliance filing, with inevitable gaps and deficiencies left presumably to be hashed out in subsequent ad hoc proceedings. Even assuming that state policies did pose more than a theoretical threat to just and reasonable rates in PJM’s capacity market, and they do not, nothing in the record justifies the rushed, shambolic approach the Commission has chosen.

The Order directs PJM to submit a compliance filing detailing a replacement rate and revised timelines for the 2019 and 2020 Base Residual Auctions (BRA) within 90 days of December 19, 2019. Worse still, it declines to adopt a transition mechanism without explanation. Ninety days not nearly enough time for PJM to craft the most significant changes the capacity market since its creation, and nothing in the record justifies the hasty, shambolic approach the Commission has chosen.

As Commissioner Glick notes in his dissent, the Order “puts almost no flesh on the bones of its subsidy definition and provides precious little guidance how its mitigation scheme will work in practice.” PJM will have to fill this vacuum itself. Once PJM arrives at a workable

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272 December 2019 Order (Commissioner Glick, dissenting, at P 12).


274 December 2019 Order (Commissioner Glick, dissenting, at P 53).
interpretation of Commission’s vague definition of subsidy, it will then have to apply that
definition through a comprehensive review of the regulatory environment in thirteen states and
the District of Columbia. According to PJM, it “will likely need to recalculate MOPR floor
prices and submit updated values” for new resources (based on Net Cone) and existing resources
(based on Net ACR), including never before calculated values for new demand response, energy
efficiency, black liquor, coal mine gas, landfill gas, and others.275 This is a laborious process that
can only be accomplished in consultation with the IMM and stakeholders.276

The rushed, haphazard compliance process mandated in this proceeding departs from the
deliberate, iterative process more often observed when making changes to PJM’s capacity
market. For example, when the Commission approved revisions to CONE values in the RPM in
2009, PJM had supported its proposed changes with reports by consultants including “a detailed
engineering study,” and Commission’s order was bookended with extensive stakeholder
consultations.277 Changes to capacity market rules take time. Indeed, when the Commission first
approved the MOPR in the RPM as part of a settlement in 2006, it gave PJM nine months to
develop the objective criteria to be used to monitor bids and police buyer-side market power.278
Here, the Commission has opted to jettison the reasoning of its June 2018 Order and demand that
PJM hastily implement an extreme replacement rate, with gaps and unintended consequences

275 Presentation of Adam Keech, Vice-President, Market Operations to the Markets
Implementation Committee at 9 (Jan. 8, 2020), available at https://www.pjm.com/-
/media/committees-groups/committees/mic/2020/20200108/20200108-item-04a-ferc-order-on-
mopr.ashx.

276 December 2019 Order (Commissioner Glick, dissenting, at P 53).


presumably to be addressed piecemeal in inevitable Section 206 complaints and petitions for declaratory from stakeholders operating in an environment of deep regulatory uncertainty.\textsuperscript{279}

Ramming radical changes through at the last minute is no way to make sound public policy, yet that it precisely what the Commission has elected to do for PJM’s capacity market. This choice is all the more baffling in light of the complete absence in the record of an imminent threat to resource adequacy in the PJM region that might justify an expedited response.\textsuperscript{280} Even assuming arguendo that the state-supported resources targeted in the Order posed more than a theoretical threat to just and reasonable capacity market rates, there is even less evidence that this threat is likely to have a material impact on the market’s ability to ensure resource adequacy at just and reasonable rates for the 2019 and 2020 BRMs. Indeed, PJM continues to experience a glut of excess capacity that the harsh medicine prescribed in the Order will only make worse.\textsuperscript{281} In short, there is no justification for the Order’s rush to implement the replacement rate through a 90-day compliance deadline.

Radical policy changes with billions of dollars in capacity payments and important state policies at stake should result from reasoned deliberation, including due consultation with affected stakeholders. Instead, the Commission should allow for no less than 180 day for PJM to

\textsuperscript{279} December 2019 Order (Commissioner Glick, dissenting, at P 53) (“most of the hard work will come in the compliance proceedings, not to mention the litany of section 205 filings, section 206 complaints, and petitions for a declaratory order seeking to address fact patterns that the Commission, by its own admission, has not yet bothered to contemplate.”).

\textsuperscript{280} Ex. C at 35-47 (detailing the lack of evidence for the Commission’s conclusion in the June 2018 Order that state programs are harming PJM’s capacity market).

\textsuperscript{281} Ex. A at 36 (noting that PJM's planning reserve margin for the summer of 2018 was 28.7 percent, is significantly higher than PJM Staff’s recommended installed reserve margin target of between 15.8 and 16.1 for delivery years 2018/2019 through 2021/2022 PJM’s capacity market).
develop its compliance filing, and require PJM to delay any base residuals auctions until at least nine months following the Commission’s final approval of that compliance filing.

VI. CONCLUSION

For the foregoing reasons, Clean Energy Advocates request rehearing and reversal of the Commission’s reaffirmation under Federal Power Act section 206 that PJM’s existing tariff renders capacity market rates unjust, unreasonable, or unduly discriminatory, and reversal of its direction to PJM to issue a replacement rate that expands application of the MOPR to resources in PJM as set forth herein. Clean Energy Advocates also request revisions to the Commission’s December 2019 Order to address specific errors, including adjustments to its deadlines for compliance filings and future base residual auctions, as set forth herein.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

Dated at this 21st day of January, 2020.

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