

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Technical Conference on Modernizing Electricity Market Design:)
Resource Adequacy in the Evolving Electricity Sector) Docket No. AD21-10-000

**REPLY COMMENTS OF PUBLIC INTEREST ORGANIZATIONS IN RESPONSE TO NOTICE
INVITING POST-TECHNICAL CONFERENCE COMMENTS**

Pursuant to 18 C.F.R. Part 385, Sierra Club, Sustainable FERC Project, and Natural Resources Defense Council (collectively “Public Interest Organizations”) respectfully submit and request consideration of these reply comments regarding the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Notice Inviting Post-Technical Conference Comments.

I. Introduction

There is widespread agreement among those involved in this proceeding and the litigation that precipitated it that applying buyer-side mitigation to state energy policy resources is unsustainable at best, and that the mandatory capacity market model needs considerable reform if it is to meet consumer demands in a rapidly decarbonizing economy. Yet others continue to insist that a mandatory capacity market with an Expanded Minimum Offer Price Rule (“MOPR”) is necessary to preserve competition (despite the fact that the Independent Market Monitor (“IMM”) has *never* found the Reliability Pricing Model (“RPM”) structure to be competitive¹), and to ensure sufficient capacity (despite the billions of dollars consumers have wasted on overprocurement of capacity over the last decade), in order to protect “unsubsidized” and supposedly “economic” resources (that have benefited from over a century of federal and state fossil fuel subsidies) that are necessary to ensure reliability of the system (despite having repeatedly been the primary source of forced outages during extreme weather events²).

The Federal Power Act (“FPA”) does not permit FERC or the Regional Transmission Organizations (“RTOs”) to thwart the efforts of states or other entities who unequivocally have authority to address climate change and other public health threats in the electric sector. That FPA does give FERC the responsibility of ensuring that

¹ Power Markets Today, *FERC rejects PJM IMM protests of market based rate requests* (Dec. 10, 2020), <https://www.powermarketstoday.com/public/FERC-rejects-PJM-IMM-protests-of-market-based-rate-requests.cfm>; see also the capacity market analysis from every PJM Interconnection LLC’s (“PJM”) State of the Market Reports from 2007–2020. Monitoring Analytics, *Analysis of the 2021/2022 RPA Base Residual Auction: Revised*, at 3 (Aug. 24, 2018), https://www.monitoringanalytics.com/reports/Reports/2018/IMM_Analysis_of_the_20212022_RPM_BRA_Revised_20180824.pdf.

² PJM, *PJM Cold Snap Performance Dec. 28, 2017 to Jan 7, 2018* (Feb. 26, 2018), <https://www.pjm.com/-/media/library/reports-notice/weather-related/20180226-january-2018-cold-weather-event-report.ashx>.

rates are just and reasonable, which it cannot achieve through continued misapplication of buyer-side market power mitigation theory to state generation policies. We urge the Commission to set the eastern RTOs on a clear course for sustainable reform of the capacity market construct that will meet the actual needs of a diversifying and decarbonized grid.

II. Impact of the Expanded MOPR

Application of the Expanded MOPR produces prices that do not reflect underlying supply and demand fundamentals, foisting hundreds of millions of dollars in costs on consumers each year. Without denying that these costs are substantial, some parties supporting the MOPR object to estimates of those costs, as when the PJM Power Providers Group (“P3”) questions the assumptions underlying The Brattle Group’s (“Brattle”) analysis of potential costs to consumers as a result of the Expanded MOPR.³ P3 objects to Brattle’s assumption that new resources needed to meet New Jersey’s clean energy requirements would not clear the auction, pointing to speculation by the IMM that offers from renewable sources have been, and will continue to be, competitive. However, the fact remains that the default offer floors for wind and solar resources are considerably higher than recent and anticipated RPM clearing prices.⁴ It borders on absurdity to suggest that those assessing the impacts of the MOPR are unreasonable in using default offer floors—which FERC has approved⁵—as the basis for their analysis, and should instead speculate about whether numerous renewable projects will instead obtain significantly lower resource-specific offer floors based on their project-specific costs. Absent evidence that resources subject to the MOPR have *in fact* been able to obtain sufficiently low offer prices to clear the auction, the only reasonable assumption is that they will not clear.⁶

Several commenters suggest that there is little urgency to reform the MOPR because its impact will be relatively small in the next several auctions,⁷ either because relatively few new renewable resources subject to the MOPR will be offered, or because those resources will be able to obtain price floors that enable them to clear. But other comments reveal that a large number of suppliers planning to offer into this auction have sought modifications

³ Comments of P3, at 6–7 (Apr. 26, 2021), Accession No. 20210426-5256 (“P3 Comments”).

⁴ Comments of Public Interest Organizations, p. 7-8, Docket No. AD21-10 (Apr. 26, 2021), Accession No. 20210426-5308.

⁵ See *Calpine Corp. v. PJM Interconnection*, 173 FERC ¶ 61,061 at P 187 (2020).

⁶ The Commission should require PJM to release such information, in a form suitable to protect competitively sensitive data, as soon as practicable following the 2022/2023 Base Residual Auction. In the meantime, the Commission should also require PJM to provide basic information regarding the number of requests for resource-specific offer floors that it processed, and summary statistics regarding the resolution of these requests.

⁷ See, e.g., Comments of Vistra Corp., at 2 (Apr. 26, 2021), Accession No. 20210426-5292 (“Vistra Comments”); Comments of NRG, Inc., at 6 (Apr. 26, 2021), Accession No. 20210426-5268 (“NRG Comments”).

to their offer floor (i.e., they are not existing resources exempt from the MOPR), and note serious concerns about the effectiveness of the process in considering resource-specific costs as required by the Commission.⁸ The information submitted by these commenters establishes that the MOPR is likely to prevent a significant number of new renewable energy projects from clearing in the next auction.

III. The Expanded MOPR is not needed to ensure resource adequacy or reliability

A. MOPR supporters wrap calls for anticompetitive discrimination in reliability clothing

Several parties made unsubstantiated assertions that the development of clean energy resources would impede reliability, based on little more than broad misrepresentations about the causes of recent load-shedding events in California and Texas.⁹ These claims are novel; concerns about the reliability value of clean energy appear nowhere in any of the Commission's orders creating the Expanded MOPR.¹⁰ These assertions also fail to engage PJM's resource adequacy construct even at the most superficial level. As the Commission is aware, PJM procures capacity on an unforced capacity ("UCAP") basis, with the UCAP for different resource technologies calculated to ensure every unit of UCAP brings equivalent reliability value. As such, the reliability offered by different resource types is addressed through the rules determining UCAP; some of these rules are currently the subject of an open Section 206 investigation.¹¹ Any concerns about UCAP values accurately measuring capacity contributions sufficiently to ensure system reliability should be addressed in that proceeding or future re-evaluations grounded in data, rather than speculation.

Some commenters vary these claims by arguing the MOPR is required to ensure sufficient "flexibility" in the resource mix.¹² Those arguments mysteriously ignore that the Commission has approved PJM's Operating Reserve Demand Curve ("ORDC"),¹³ a market construct designed for the purpose of incenting flexible resources.

⁸ See, e.g., Post-Technical Conference Comments of the American Clean Power Ass'n, at 6–9 (Apr. 26, 2021), Accession No. 20210427-5028; Comments of Advanced Energy Buyers Group, at 3–7 (Apr. 26, 2021), Accession No. 20210426-5272.

⁹ See, e.g., Comments of LS Power Development, LLC ("LS Power"), at 3–4 (April 26, 2021), Accession No. 20210426-5311 ("LS Power Comments") (arguing that the "push to clear all state supported resources in the RPM auctions ignores the fact that resources desirable from a state's emission policy perspective may not necessarily provide the reliability service that RPM was intended to procure and therefore could threaten reliability, which contributed to recent outages in California").

¹⁰ *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018); and *Calpine Corp. et al. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019).

¹¹ See FERC Docket No. EL19-100-000; see also *Order Rejecting Proposed Tariff Revisions, Lifting Paper Hearing Abeyance, and Establishing Briefing Schedule*, 175 FERC ¶ 61,084 at P 1 (2021).

¹² Comments of Calpine Corporation, at 8–9 (Apr. 26, 2021), Accession No. 20210426-5303.

¹³ See *Order on Proposed Tariff and Operating Agreement Revisions*, 171 FERC ¶ 61,153 (2020).

Even without the ORDC, the flexibility arguments founder on basic review of the facts: the capacity market is indifferent to “flexibility,” procuring UCAP with no preference between nuclear or large steam units with response times measured in days, and batteries that respond in milliseconds.

Furthermore, even if there were any basis to these commenters’ claims, the MOPR would be an unreasonable and ineffective way to address them. Administratively repricing offers in an attempt to adjust the mix of resources to achieve certain attributes are unlikely to achieve these goals and instead will mitigate needed resources.

The shallowness of these reliability arguments suggests a different reading: some resource developers have underestimated their regulatory risk, and now seek to use the MOPR to socialize the costs of their poor investment decisions. Such a course is anathema to well-functioning markets, perhaps reflecting some generation owners’ nostalgia for the regulatory capture that competitive markets were created to eliminate.

Even if commenters’ concerns about the resource adequacy contributions of state-supported resources had any validity (which they do not), those concerns do not support continuing an unjust and unreasonable rate until any and all capacity accreditation issues are resolved. The quantity of state-supported resources coming online in the next decade that could be excluded by the Expanded MOPR is only about 5,800 UCAP MW.¹⁴ This is far less than even the extra capacity that the Base Residual Auction (“BRA”) last cleared—more than 8,100 UCAP MW above the PJM-wide Reliability Requirement.¹⁵ PJM currently exceeds its Reliability Requirement without even considering the capacity contributions of wind and solar resources,¹⁶ and will continue to do so for the foreseeable future.

¹⁴ Kathleen Spees et al., *Alternative Resource Adequacy Structures for Maryland*, Brattle Group, at 27 (Mar. 2021) (“Brattle Maryland Analysis”), https://brattlefiles.blob.core.windows.net/files/21870_alternative_resource_adequacy_structures_for_maryland_-_review_of_the_pjm_capacity_market_and_options_for_enhancing_alignment_with_marylands_clean_electricity_future.pdf.

¹⁵ See Monitoring Analytics, *Analysis of the 2021/2022 RPM Base Residual Auction: Revised*, at 10–11 (Aug. 24, 2018), https://www.monitoringanalytics.com/reports/Reports/2018/IMM_Analysis_of_the_20212022_RPM_BRA_Revised_20180824.pdf.

¹⁶ See Alex Engel et al., *Cutting Carbon While Keeping the Lights On*, Rocky Mountain Institute (Mar. 2021) <https://rmi.org/insight/cutting-carbon-while-keeping-the-lights-on/>.

B. Eliminating the Expanded MOPR will not cause retirements, or diminish the incentive for new entry, of resources needed for resource adequacy

Other arguments in support of the Expanded MOPR rely less on mischaracterizations regarding reliability, and more on the sustainability of the price signals it creates. Here too, these arguments are ultimately less about a rate that is just and reasonable, and more about the expectations of certain investors. For example, the Electric Power Supply Association (“EPSA”) notes that low-cost resources reduce capacity prices and threaten some generation resources’ economic viability. EPSA then proceeds to err in characterizing those threatened suppliers as “necessary for reliability.”¹⁷ What EPSA characterizes as “suppressed” prices are actually prices that correctly signal whether there is a need for new supply based on the reliability contributions of the actual supply in existence. A well-functioning market reacts to an increase in supply by lowering prices in the short term until quantities adjust to the new supply and demand fundamentals. State-supported resources may indeed displace those owned by EPSA members, but only to the extent they have been rendered superfluous to reliability needs. The MOPR distorts this functioning. As the Brattle Group explains, “the MOPR is not a sensible policy even if one’s objective is only to support competitive markets rather than to support clean energy policies.”¹⁸ This is because “[e]xcluding policy resources . . . results in procuring more capacity than needed and raises prices above the level corresponding to actual supply and demand conditions,” which “does not make for a well-functioning market, nor one that could sustainably support investment when needed.”¹⁹

Not only is the price signal unstable due to the controversy surrounding the MOPR, but the glut of capacity it ensures drives down energy and ancillary services prices, which provide the vast majority of revenue for most generators. Likewise, arguments that the Commission needs to demonstrate the viability of “other remaining generation resources” before it eliminates the Expanded MOPR,²⁰ misunderstand the nature of the Commission’s responsibility for setting just and reasonable rates. Commission-jurisdictional markets are not required to be “viable for all participants,”²¹ but rather to result in prices sufficient to attract the supply needed to meet resource

¹⁷ Comments of EPSA, at 20 (Apr. 26, 2021), Accession No. 20210426-5201 (“EPSA Comments”).

¹⁸ Brattle Maryland Analysis at 25.

¹⁹ *Id.*

²⁰ Post-Technical Conference Comments of Dr. Roy J. Shanker, PhD, at 7 (Apr. 26, 2021), Accession No. 20210426-5073 (“Shanker Comments”).

²¹ *Id.*

adequacy.²² LS Power asserts that “new, efficient, and flexible resources would seek ways to exit the market as soon as possible,”²³ without any supporting analysis of the projected earnings of those units as compared to their avoidable costs, especially in consideration of the revised ORDC, or the extent flexible resources do or can arrange bilateral contracts or financial hedges.²⁴ LS Power acknowledges that resources gain significant revenues from energy and ancillary services (“E&AS”) markets, but it seeks to explain away the investment utility of these markets by claiming it is “nearly impossible” to monetize expected revenues from ancillary service markets because they operate on a more immediate time frame and do not provide the transparency of energy markets.²⁵

As an initial matter, we agree that the E&AS markets should be reformed and possibly expanded so that the reliability attributes several commenters argue could be lost with a transition to renewable energy can be more precisely procured. But arguing that E&AS markets do not provide enough long-term investment signals ignores the reality that most resources within PJM already rely on those same markets for the majority of their revenue, and the capacity markets themselves have produced volatile prices that investors heavily discount.²⁶ Moreover, should the states or PJM determine that there is a further need for flexible resources, then additional policies or market designs can be pursued to address that concern rather than simply using the MOPR to broadly raise prices. Fundamentally, it is neither the Commission’s nor PJM’s responsibility to shield investors from the possibility of smaller-than-expected returns on their investments.

PJM has long had a glut of capacity. Any slow-down of new entry over the medium to long-term (or acceleration of certain retirements) would represent a correction back to the level of capacity PJM’s own planning models have determined is needed to maintain resource adequacy. Eliminating the Expanded MOPR will allow the

²² See *PJM*, 171 FERC ¶ 61,040 (2020) (Glick, Comm’r, dissenting at P 19, n.141) (“[W]hy should customers have to pay higher prices for the benefit of keeping all resource types theoretically viable? That certainly seems like an “unnecessary cost.”).

²³ LS Power Comments at 17–18.

²⁴ Relatively efficient resources are unlikely to exit the market prematurely, even if profits are lower than expected, so long as they are able to cover their avoidable costs, as doing so would eliminate any possibility of further revenue recovery. See, e.g., Jurgen Weiss & Mark Sarro, *The importance of long-term contracting for facilitating renewable energy project development*, at 1 (May 7, 2014), https://brattlefiles.blob.core.windows.net/files/7487_the_importance_of_long-term_contracting_for_facilitating_renewable_energy_project_development_weiss_sarro_may_7_2013.pdf (noting that for power generation projects, “once the investment is made, the cost of the investment is sunk and cannot be recovered (for example by ‘un-building’ the plant and selling the material), and the owner of the plant will be willing to accept any price that at least covers the plant’s variable cost.”).

²⁵ LS Power Comments at 20–21.

²⁶ Comments of the Public Interest Organizations (“PIOs”) in Resp. to Notice Inviting Post-Technical Conference Comments, at 3, n.13 (Apr. 26, 2021).

price to be set by the marginal unit (new or existing) at the intersection with PJM’s administratively determined Variable Resource Requirement curve. While this price may be lower than what some existing generators expected when they entered the market, their expectations should not dictate a deviation from basic market principles.

IV. A MOPR to protect the interests of states from other state policies is not necessary or authorized

A few commenters assert that the Expanded MOPR is necessary to prevent the policy decisions of one state from impacting other PJM states,²⁷ arguing that “all state policy choices must be respected”²⁸ and that states that do not support “uneconomic generation”²⁹ must be protected from the “export” of any possible impacts from other state policies.³⁰ For instance, P3 alleges that “all states understood . . . when they joined PJM” that “FERC occasionally must limit the actions of one state to protect the integrity of the regional market upon which other states depend”—advising those that disagree with this view that they are free to leave PJM “at any moment.”³¹

PIOs agree that state energy policy decisions must be respected by FERC, but that respect comes from the jurisdictional divide between FERC and all states pursuant to the FPA. The FPA offers no factual or theoretical support for the premise that FERC or PJM must intervene to “protect” states from any impacts relating to the generation policy decisions of other states. Quite the opposite. As has been held in the foundational Supreme Court cases on this question,³² state actions will almost always have price impacts in a FERC-regulated wholesale market, but that does not make them inherently impermissible. Rather, the threshold jurisdictional analysis examines whether a state action directly regulates a matter within FERC’s exclusive jurisdiction or is otherwise in direct conflict with federal law.³³ State clean energy policies that regulate generating resources but do not require such resources to bid into and clear the PJM capacity market in order to benefit from such policies do not cross the jurisdictional FPA line, regardless of intent or any effect on wholesale market prices,³⁴ and are the type of state

²⁷ See, e.g., Comments of Pennsylvania Senator Gene Yaw, at 1–2 (Apr. 12, 2021), Accession No. 20210423-5216 (“Yaw Comments”); Initial Comments of the PJM Industrial Customer Coalition, at 11 (Apr. 26, 2021), Accession No. 20210426-5290; P3 Comments at 11–13; Shanker Comments ¶ 10.

²⁸ P3 Comments at 12

²⁹ *Id.*

³⁰ Comments of Pennsylvania Office of Consumer Advocate, at 5 (Apr. 26, 2021), Accession No. 20210426-5264.

³¹ P3 Comments at 12.

³² *Oneok v. Learjet*, 575 U.S. 373 (2015); *FERC v. EPSA*, 577 U.S. 260 (2016); *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016); see also *Northwest Central Pipeline Corp. v. State Corp. Com’n of Kansas*, 489 U.S. 493 (1989).

³³ *Oneok*, 575 U.S. at 385–388; *Hughes*, 136 S. Ct. at 1298–1299; Matthew Christiansen & Joshua Macey, *Long Live the Federal Power Act’s Bright Line*, 124 *Harvard Law Rev.* 1360 (2021), <https://harvardlawreview.org/wp-content/uploads/2021/02/134-Harv.-L.-Rev.-1360.pdf>.

³⁴ *Coalition for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018); *EPSA v. Star*, 904 F.3d 518 (2018).

action expressly permitted by the Supreme Court in *Hughes*.³⁵ Further, were a state action to cross the jurisdictional line by targeting wholesale market rates and requiring supported resources to bid and clear in that market, such state action would simply be pre-empted and no MOPR would be necessary.

As for commenters' allegations of harm, there is simply no factual or theoretical evidence in the record to support that the clean energy policies targeted by the Expanded MOPR have led to uneconomic price suppression that threatens the reliability of the RPM, much less that there have been harms to other states.³⁶ State subsidies in the generation context are ubiquitous, of which the PJM market and its participants are both highly cognizant and whose effects, if any, are rapidly assimilated.³⁷ Pennsylvania's current nuclear pricing concerns³⁸ likely have less to do with New Jersey's decision to compensate its nuclear industry for state-required environmental services it could not procure from the BRA, than they do with Pennsylvania's fossil fuel subsidies (not to mention those of the federal government over the last century)³⁹ that helped gas plants to externalize their costs and to lower prices in the RPM. To insist that FERC and PJM try to call balls and strikes as rocks are thrown between glass houses is neither workable nor necessary to protect the wholesale market.⁴⁰

Finally, Dr. Roy Shanker cites to *NAACP v. FPC*⁴¹ as purported support for his argument that the Commission is not "empowered to facilitate state [clean energy] programs by ignoring their impact on wholesale markets."⁴² Dr. Shanker's framing of the question misses the mark entirely. *NAACP* finds that FERC may not

³⁵ 136 S. Ct. at 1299.

³⁶ *Order on Reh'g and Clarification*, 171 FERC ¶ 61,035 (2020) (Glick, Comm'r, dissenting at P 28); Protest of Clean Energy Advocates, at 2, App. B, Koplou Report, Docket No. ER18-1314 (May 7, 2018), Accession No. 20180507-5222 ("May 2018 Protest"); Comments of the Institute for Policy Integrity at New York University School of Law, at 5 (Apr. 26, 2021), Accession No. 20210426-5234 ("IPI Comments").

³⁷ May 2018 Protest, App. B, Koplou Report, at 2; IPI Comments at 10.

³⁸ Yaw Comments.

³⁹ May 2018 Protest, AppB., Koplou Report; Emily Persico et al., *Buried out of Sight, Uncovering Pennsylvania's Hidden Fossil Fuel Subsidies*, PennFuture (Feb. 2021),

https://www.pennfuture.org/Files/Admin/PF_FossilFuel_Report_final_2.12.21.pdf; Env'tl and Energy Study Institute, *Fact Sheet, Fossil Fuel Subsidies: A Closer Look at Tax Breaks and Societal Costs* (July 2019),

https://www.eesi.org/files/FactSheet_Fossil_Fuel_Subsidies_0719.pdf; James Ellsmoor, *United States Spend Ten Times More on Fossil Fuel Subsidies Than Education*, Forbes (June 15, 2019),

<https://www.forbes.com/sites/jamesellsmoor/2019/06/15/united-states-spend-ten-times-more-on-fossil-fuel-subsidies-than-education/?sh=72b86cd24473>; Matthew J. Kotchen, *The producer benefits of implicit fossil fuel subsidies in the United States*, 14 PNAS 1 (2021), <https://www.pnas.org/content/118/14/e2011969118>.

⁴⁰ See, e.g., IPI Comments at 2, 6–9 (the clean energy payments at issue are designed to correct the market's failure to correct negative externalities, making the market *more efficient*); *Order on Reh'g and Clarification*, 171 FERC ¶ 61,035 (Glick, Comm'r, dissenting at PP 31–36). See also, Shanker Comments at 18 (FERC is not authorized to adjudicate or modify the costs associated with the relative interstate impacts of emissions and environmental policy among various states).

⁴¹ 425 U.S. 662 (1976).

⁴² Shanker Comments at 15.

regulate areas outside its remit. It creates no mandate that FERC counter state policy in those areas. Dr. Shanker’s reading is patently absurd: it would require FERC to somehow nullify the effects of state anti-discrimination laws on FERC-jurisdictional matters. Furthermore, state actions to address climate change through decarbonization of the electric grid are undeniably of paramount public interest and while *NAACP* makes clear that while FERC does not get to set those laws or policies, it must also respect those laws where they intersect with its duty to ensure just and reasonable rates.⁴³ In eliminating the Expanded MOPR, the Commission would not be “ignoring” the impact of state policies on the wholesale market, but rather would be concluding that wholesale capacity rates are just and reasonable *because* they reflect influence by lawful state policies on generation resources—thus avoiding unnecessary purchases of capacity or prices that ignore valid revenues streams received by certain competitors. Attempts to nullify the effects of state policies are therefore not only inconsistent with *Hughes*, but actually run afoul of the public interest principle articulated in *NAACP v. FCP*, that the Commission clearly has the duty to prevent its regulatees from charging rates based upon illegal, duplicative, or unnecessary costs, which is consistent with the substantial precedent admonishing the Commission to protect consumers from excessive charges.⁴⁴

V. Potential Alternatives to the Expanded MOPR in PJM

A. Targeted MOPR Proposals

Other than recommendations for a self-supply exemption from the MOPR in the event a MOPR is retained,⁴⁵ very few parties proposed mechanisms for a “targeted MOPR,” and where these were proposed, they illustrated the difficulty of designing a targeted MOPR that avoids “mitigating” resources that do not result from any improper exercise of market power.

⁴³ *NAACP*, 425 U.S. at 668.

⁴⁴ *Id.* at 665–668 (citations omitted) (emphases added); *see Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) (“That the purpose of the power given the Commission by [section] 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in [section] 201 of the Act that the scheme of regulation imposed ‘is necessary the public interest.’”); *Pennsylvania Water & Power Co. v. Fed. Power Comm’n*, 343 U.S. 414, 418 (1952) (“A major purpose of the whole Act is to protect power consumers against excessive prices.”); *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016) (“It is long-established that ‘the primary aim [of the FPA] is the protection of consumers from excessive rates and charges.’”) (quoting *Mun. Light Bds. of Reading & Wakefield v. Fed. Power Comm’n*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)); *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177 (D.C. Cir. 1987) (“[F]rom the earliest cases, the end of public utility regulation has been recognized to be protection of consumers from exorbitant rates.”) (quoting *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 15 (D.C. Cir. 1950)).

⁴⁵ *See* Post-Technical Conference Comments of the Nat’l Rural Elec. Coop. Ass’n and the American Pub. Power Ass’n, at 3 (Apr. 26, 2021), Accession No. 20210426-5291 (“Comments of the Nat’l Rural Elec. Coop. Ass’n and the American Pub. Power Ass’n”).

For example, Dr. Paul M. Sotkiewicz attached to his comments a proposal to apply the MOPR to state policies involving non-bypassable charges, based on his contention that such policies “effectively create tacit collusion across multiple LSEs provides the ability to exercise buyer-side market power that would otherwise be unachievable by a single LSE attempting such a strategy.”⁴⁶ Dr. Sotkiewicz’s theory of “tacit collusion” reflects the logical pretzel required to portray a lawful state action⁴⁷ as an exercise of buyer-side market power. While the memorandum that Dr. Sotkiewicz attached to his comments helpfully stated that renewable energy credits would not be deemed a form of buyer-side market power,⁴⁸ the elaborate test he proposed seems aimed more at dictating allowable retail cost recovery methods for state programs seeking to affect the generation mix, than ferreting out exercises of buyer-side market power.

No justification for a targeted MOPR was presented in any of the comments, and as American Municipal Power, Inc. correctly observed: “There is no evidence available demonstrating that any party has the ability to exercise buyer-side market power in RPM,” because “buyer-side market power could only exist in a true market without captive buyers.”⁴⁹ While there is scant justification for a MOPR, Exelon’s proposed limitations⁵⁰ on a MOPR only to natural gas resources and where state support is contingent upon clearing in the capacity auction, along with a self-supply and unit-specific exemption appears to be a reasonable approach and bears many similarities to the PIOs recommendations for a Targeted MOPR in response to Questions 13 and 14.

B. FRR and Residual Market

While many parties support the return of RPM to a residual market or the use of Fixed Resource Requirement (“FRR”) as a potential procurement tool,⁵¹ there are a small number of parties who oppose these proposals due to speculative concerns about the impacts to RPM competitiveness, a potential for reduced price transparency and volatility, potential burdens on demand-side resources, and fears of a return to utility-controlled

⁴⁶ Comments of Paul M. Sotkiewicz, Ph.D., President and Founder, E-Cubed Policy Associates, LLC, at 7 (Apr. 27, 2021), Accession No. 20210427-5019 (“Sotkiewicz Comments”).

⁴⁷ Post-Technical Conference Comments of Exelon Corp., at 11 (Apr. 26, 2021), Accession No. 20210426-5251 (“[I]t is fully within state authority to use a non-bypassable charge to recover costs associated with clean energy programs and other forms of state support”) (“Exelon Comments”).

⁴⁸ Sotkiewicz Comments, Attach. B at 3.

⁴⁹ Comments of American Municipal Power at 17 (Apr. 26, 2021), Accession No. 20210426-5214 (“AMP Comments”).

⁵⁰ Exelon Comments at 10–12.

⁵¹ See, e.g., Opening statement of Abraham Silverman on Behalf of the New Jersey Board of Public Utilities (Mar. 24, 2021), Accession No. 20210324-4010 (“Silverman Comments”); AMP Comments at 6–7, 19–20; Comments of the Nat’l Rural Elec. Coop. Ass’n and the American Pub. Power Ass’n at 16–17.

procurement.⁵² These criticisms rest primarily on an assumption that procurement outside of the RPM entails a return to the days of cost-of-service regulation. But even a cursory review of the New Jersey Board of Public Utilities Investigation of Resource Adequacy Alternatives, Maryland Energy Administration report, or Illinois Clean Energy and Jobs Act legislation on the subject reveals thoughtful consideration of how states could enact competitive procurement processes similar to those they already use on the retail level to drive innovation, offer benefits like portfolio management that could better integrate a diverse array of largely intermittent resources, and correct the perpetual overprocurement that is baked into the RPM design.⁵³ Of greater value than its critics' mere speculation is the thorough cost-benefit analysis conducted by Brattle concluding that an FRR option could offer considerable savings to New Jersey consumers over a status quo RPM, and even though an FRR-enabled Integrated Clean Capacity Market would cost more than an RPM without a MOPR, it would also procure more clean energy resources.⁵⁴

The fundamental disconnect between the existing RPM construct and the clear reliability needs of *all* states in a rapidly decarbonizing society makes an enhanced FRR or residual market model a highly valuable complement to the RPM. States and some self-supply entities have highly diverse, capital-intensive resource needs that do not fit the relatively homogeneous, low-capital, and short-term model of the RPM. States will need more, not less, flexibility to secure specific resource types. For example, some states and large consumers have chosen to use long-term contracting as a means to meet some of their clean energy requirements, because doing so reduces the cost of financing these resources.⁵⁵ Long-term contracts with zero-marginal cost resources also can reduce exposure to fuel cost risks and enable states to ensure that resources are developed in ways that are consistent with or promote other policy objectives. Such contracting should not be viewed as a suspect or problematic component of the overall wholesale market, but rather as a tool that certain buyers and sellers may prefer at times to procuring short-term, undifferentiated commitments through a centralized and highly administrative market.⁵⁶ The fact that certain sellers may have some advantage when all are forced to compete on terms of short-term capacity obligations, does not mean

⁵² See, e.g., LS Power Comments at 15–16; EPSA Comments at 15; Comments of Advanced Energy Economy, at 14, 21, (Apr. 26, 2021), Accession No. 20210426-5286; NRG Comments at 9–10; Comments of the Advanced Energy Management Alliance, at 4, 9 (Apr. 26, 2021), Accession No. 20210426-5205.

⁵³ See Order Initiating Proceeding, Docket No. EO20030203 (N.J. Bd. of Pub. Utils. Mar. 27, 2020); S.B. 1718 & H.B. 804, 102 Gen. Assemb., (Il. 2021–2022) (proposed new subsection (k) to 20 Ill. Comp. Stat. Ann. 3855/1-75); Brattle Maryland Analysis at 28–29.

⁵⁴ Silverman Comments at 3.

⁵⁵ See, e.g., *supra* note 24 at 1–2; Rob Gramlich & Frank Lacey, *Who's the Buyer: Retail Electric Market Structure Reforms in Support of Resource Adequacy and Clean Energy Deployment*, at 6–7 (Mar. 2020) <https://gridprogress.files.wordpress.com/2020/03/whos-the-buyer.pdf>.

⁵⁶ See Jay Morrison, *Capacity Markets: A Path Back to Resource Adequacy*, 37 Energy L.J. 1, 11–12 (2016).

that a variety of procurement options that meet the needs of all parties enhances in any way detracts from competition and instead enhances the competitiveness of the markets.

It is also dubious whether a single capacity market model can meet diverse stakeholder needs that are often in conflict if not direct opposition. Certainly, the years of litigation around the many aspects of RPM design are not cause for optimism. The most sustainable way to protect “all state policies” while ensuring that PJM energy and capacity markets produce just and reasonable rates is to maximize flexibility for states and consumers to use the RPM when it provides what they need at a competitive price, but to permit them to go outside of the RPM when necessary to procure products either not available or not affordable in the RPM, through a modernized FRR framework or by returning the RPM to its original design as a voluntary residual market – a model currently working well in other RTOs, such as Midcontinent Independent System Operator. Such a structure keeps competitive pressure on the RPM, FRR, and bilateral markets – each option meeting different needs while also serving as a check on the other markets, and addresses concerns both of states who prefer to shape the resource mix through their policies, as well as states who profess a preference to rely solely upon “competitive markets” to determine their resource mix squarely within their jurisdiction.

C. Role of Energy and Ancillary Service Markets

PIOs agree with several commenters who noted, in response to Supplemental Question 20 or in general comments, that E&AS markets, broadly speaking, need to be reformed so they can better “ensure price signals are accurate and incent needed services.”⁵⁷ Several other commenters offered specific ideas for how to reform these markets—and as Shell pointed out in their comments, E&AS market reform is important as a method to help reduce certain investors’ current overreliance on capacity markets that “have evolved into administrative constructs that lack the characteristics of well-functioning markets.”⁵⁸

However, this docket does not allow for a discussion of E&AS market reform at the depth that such a topic merits. It is simply too complicated of a question to be addressed as a sub-issue to another technical proceeding (especially this one). PIOs welcome the opportunity to discuss broad and fundamental changes to the E&AS

⁵⁷ Comments of Edison Electric Institute, at 3 (Apr. 26, 2021), Accession No. 202104426-5161; *see also* AMP Comments at 8; Comments of the Nat’l Hydropower Assoc. Comments, at 5 (Apr. 26, 2021), Accession No. 20210426-5289; Comments of Shell Energy North America (US), L.P., at 5 (Apr. 26, 2021), Accession No. 20210426-5211 (“Shell Comments”).

⁵⁸ Shell Comments at 4–5 (observing further that FERC “should have [PJM] consider ways to reduce the size of the capacity markets and increase reliance on properly designed ancillary service markets that work with scarcity pricing to encourage deployment of flexible resources needed to support a more intermittent generating fleet”).

markets; but we would support FERC convening a separate technical conference or other such proceeding to evaluate this issue.

D. Other Alternatives to the Expanded MOPR

Several parties advocate for other transformations of capacity or other FERC-jurisdictional markets to accommodate (or purportedly to achieve) state policies. Some of these transformations are offered as alternatives to action by the Commission that would promptly address the unjust and unreasonable rates created by the expanded MOPR. A complete response to these proposals is not possible in these reply comments, but we note a few points for the Commission's consideration. First, some parties suggest that FERC could attempt to boil down state policy goals to attributes that could be priced in a FERC-jurisdictional market, like NRG's Forward Clean Energy Market proposal, while continuing to subject to the MOPR any resources supported by state policies that resist such a reductive approach.⁵⁹ This approach completely misses the point of most state policies, which are not solely about reducing certain emissions at the lowest possible cost, but rather address a range of public health and environmental problems in a manner consistent with other state policy objectives.⁶⁰ While we appreciate NRG's acknowledgement that governance structures might need to adapt to reflect an expanded role for markets in promoting state policy goals,⁶¹ this remedy is completely inadequate to overcome what would otherwise constitute a usurpation of state responsibilities by this Commission. At best, FERC-jurisdictional entities could create voluntary markets that states could opt to use should they prove useful tools for implementing their policies.

While carbon pricing is a mechanism that could work in conjunction with other state policies, and possibly provide for greater efficiencies, its implementation would not obviate the need to address the MOPR in order to

⁵⁹ See NRG Comments at 5 (“NRG submits that it should be possible to find a market mechanism that measures and prices an attribute that a state policy ostensibly pertains to, thus accomplishing a heads-up competition that serves state policy interests and is in concord with FERC’s competitive wholesale markets.”). NRG also suggests that FERC is justified in mitigating certain state policies because they may impede retail competition, *id.* at 6, which is an inappropriate target of FERC action.

⁶⁰ Shelley Welton, *Electricity Markets and the Social Project of Decarbonization*, 118 Colum. L. Rev. 1067, 1097 (2018).

⁶¹ NRG Comments at 4–5. ⁶² Comments of Public Interest Organizations at 4, Docket No. AD20-14 (Nov. 16, 2020), Accession No. 20201116-5206.

ensure just and reasonable rates in the capacity market.⁶² In any event, FERC plays at most a supporting role in carbon pricing and has no authority to dictate that carbon pricing replace other state policies.⁶³

Finally, we urge the Commission not to consider options like the New England Competitive Auctions for State Policy Resources (“CASPR”) for PJM.⁶⁴ CASPR has manifestly failed to accommodate the entry of state policy resources in New England,⁶⁵ and by preventing such resources from offering into the initial Forward Capacity Auction at their true net cost of new entry, has caused prices in the FCA to be higher than is just and reasonable. FERC’s recent notice regarding a technical conference to be held on May 25, 2021 in this docket inquires into the extent of, and reasons for, CASPR’s failure to work as intended;⁶⁶ now would be the wrong time to consider expanding that failed approach to a new region.

Dated: May 10, 2021.

Respectfully submitted,

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⁶² Comments of Public Interest Organizations at 4, Docket No. AD20-14 (Nov. 16, 2020), Accession No. 20201116-5206.

⁶³ Carbon Pricing in Organized Wholesale Electricity Markets, Docket No. AD20-14-000 (Apr. 15, 2001), 175 FERC ¶ 61,036 at P 8.

⁶⁴ See *Visra Comments* at 9–11 (discussing Capacity Performance with Sponsored Supply proposal).

⁶⁵ See Request for Rehearing of Clean Energy Advocates, at 5, Docket No. ER18-619 (Dec. 21, 2020), Accession No. 20201221-5365 (noting that only 54 MW were traded in the substitution auction in FCA 13, and 0 MW were traded in FCA 14); ISO-NE, *Fifteenth Forward Capacity Auction (FCA 15) for Capacity Commitment Period 2024–2025: Summary of Results*, at slide 3 (Mar. 16, 2021), https://www.iso-ne.com/static-assets/documents/2021/03/a8_fca15_auction_results.pdf (in FCA 15, “no capacity supply obligations were traded this year under the substitution auction”); see also Transcript at 48:18-23 (statement of Connecticut Commissioner Katherine Dykes noting failure of CASPR).

⁶⁶ Supplemental Notices of Technical Conference on Resource Adequacy in The Evolving Electricity Sector re Modernizing Electricity Market Design, Docket No. AD21-10-000 (Mar. 9, 2021 and Mar. 16, 2021), Accession Nos. 20210309-3071 and 20210316-3086.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. § 385.2010 upon each party designated on the official service list in this proceeding by email.

Dated: May 10, 2021.

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