

**8 MINUTES -- 900 - 950 words**

**TOM -- 4 min**

Good afternoon. I'm Tom Rutigliano, with the Natural Resources Defense Council. It's a pleasure to see you again. My colleague Casey Roberts of Sierra Club and I represent our organizations and the Sustainable FERC Project. Thank you for having us today, and thanks to PJM staff for running the inclusive stakeholder process that led up to this meeting.

We've heard a lot today, and we appreciate your continued attention. A special welcome to PJM's new board members—you really were dropped right into the thick of things.

The environmental groups' message is simple: the MOPR should not be applied to state policies. We urge the board to direct a Section 205 filing that removes any mitigation of resources due to benefits received under state policy.

State laws may be federally preempted in particular circumstances, but PJM should not attempt to take on the functions of the courts by making those decisions. The MOPR should be returned to its original and correct function of addressing a specific commercial market behavior concern. Doing so respects the authority Congress gives states over generation and retail load.

Our industry is on the front lines of the unfolding climate crisis. There is no credible path to controlling greenhouse gasses that does not rely on a decarbonized electricity sector. This need for rapid change means that the resource mix will increasingly be influenced by state, local, and hopefully federal policy decisions.

PJM's role should be to run a reliable, efficient system within the landscape defined by those policies. It would be a grave mistake for RTOs to remain in a

position of opposition to decarbonization policy. If they do so, states will be faced with a needless choice between wholesale power markets and fighting climate change. That path leads to a vastly diminished role for RTOs. This would be tragic. Efficient markets and regional integration are critical tools for the upcoming era of rapid change. PJM should not put them at risk by allowing its markets to be captured by incumbent asset owners unable to navigate the future.

And make no mistake. The current MOPR is simply protectionism through market capture. Today's discussions of price formation and emerging technologies shouldn't hide that MOPR-ing state policy is about protecting quantities. The MOPR functions by forcing ratepayers to subsidize unneeded fossil-fired resources after they have built and paid for carbon-free replacements.

The Federal Power Act is clear that states have authority over their generation mix. This inevitably has an impact on PJM's markets—as the courts have observed, areas of state and federal jurisdiction are not 'hermetically sealed' from each other. It's silly to claim that Congress gave states the power to build generation without awareness that this could also impact prices. States that have concerns with the cost shifts inherent in interstate commerce should turn to Congress or the courts—PJM has nothing to gain by allowing itself to become a pawn in interstate disputes.

Contrary to what we've heard today, eliminating the state policy MOPR creates no reliability concerns because the MOPR was never intended to address reliability issues—the issue is never mentioned in FERC's MOPR orders, much less baseless claims that state clean energy policy creates reliability risk. As Commissioner Conway noted, the critical reliability issue is getting capacity values right. PJM's latest ELCC filing takes a rigorous approach to that problem, and we

fully support those efforts. Accurate ELCC, combined with the VRR curve, ensures that resource adequacy is maintained in all circumstances; artificial barriers like the MOPR play no role here. The board should see attempts to confuse the MOPR conversation with unfounded reliability fearmongering for what they are, a cynical move to take commercial advantage of reliability problems elsewhere in the country.

It's urgent to fix the MOPR now. Low prices notwithstanding, the last BRA saw at least 1900MW of needless capacity purchased because of the MOPR at a cost of tens of millions of dollars. Most likely, much of that 1900 MW represented new build fossil-fired units redundant to existing carbon-free resources. These impacts will only grow as more renewable resources come on-line. The Board was right to initiate this CIFP to bring about a timely fix, and should see this through by eliminating the MOPR on state policies.

Casey will now address specific elements of the PJM and stakeholder proposals related to state policies.

**CASEY -- 4 min.**

Thank you Tom -- good afternoon everyone. My name is Casey Roberts, I'm a senior attorney at the Sierra Club.

I'm going to focus on a finer point of how the MOPR applies, or doesn't, to state policy resources, echoing things you've heard from the Maryland Commission and consumer advocate today. Proposals brought forward by PJM staff and several other members, including the Delaware Public Advocate, AMP, and Exelon, would

impose MOPR on resources receiving revenues under state policy in only very narrow circumstances. These proposals are all a significant improvement over the status quo and set PJM on a path towards “respecting and accommodating state resource preferences,” as the Board’s letter initiating the CIFP required.

We appreciate the efforts to define a narrow set of criteria for state policies that should be subject to MOPR, but over the course of the CIFP process we have come to conclude that placing PJM in a position to decide which state policies are valid is not a durable solution.

First and foremost, application of MOPR should be limited to addressing the exercise of buyer-side market power. Otherwise, it becomes an unbounded mechanism to increase capacity market prices in the face of all kinds of real-world policy and economic forces that would decrease them.

Rather than defending any application of MOPR to state policy resources based on indicators of an exercise of BSMP, these proposals focus on state policies with characteristics that may render them preempted under the Federal Power Act. For example, PJM proposes to subject sellers to the MOPR if they receive state policy benefits conditional on the resource clearing in the capacity auction. While PJM’s proposal would have FERC make the final decision on application of the MOPR, PJM is still committing to file under Section 205 to prompt such a decision.

PJM should avoid putting itself in the place of the courts in deciding which state policies are preempted. The standard for Federal Power Act preemption is not as clear-cut as described in the proposals from PJM and others. In *Hughes v. Talen*, the Court was very focused on the fact that the state policy in question was

specifically aimed at increasing resource adequacy in the PJM capacity market, sought to influence bidding behavior, and re-stated the FERC-jurisdictional rate received for clearing in the market. The holding was very fact-specific and it is not clear how just one of those factors --- a state policy benefit conditioned on the resource clearing in a FERC-jurisdictional market -- would apply to state generation policies that do not aim at increasing resource adequacy.

Furthermore, it is likely that the *Hughes* standard will evolve over time. A tariff that tries to codify a moving target goes against the emphasis placed by FERC Commissioners and this Board on achieving a sustainable solution. Likewise, the variety of state policies enacted in PJM's territory will continue to grow as lawmakers work to address the climate crisis. Having set a precedent that it will seek to apply MOPR to state policies that meet some criteria for preemption, PJM will be beset by members seeking expansions of the criteria to address new judicial decisions or new policy types.

Such a solution is also unsustainable because disputes can and will arise over the interpretation of the "conditioned on clearing" tariff language. Discussions in the CIFP stakeholder process have already revealed disagreement--good faith or otherwise--about the scope of this proposed conditioned state policy tariff language. As you heard from Commissioner Richards of Maryland earlier--the "conditioned on clearing" standard could be interpreted to capture program structures that states may utilize to promote emerging technologies. An exemption for emerging technologies is one way to address this, but like any exemption, the devil is in the details. Not applying MOPR to any state policies is a far simpler and safer approach.

PJM staff's initial proposal recognized that it was not the appropriate entity to determine whether states are attempting to exercise buyer-side market power, and would not have imposed MOPR on any resources benefiting from state policies. The evolution of PJM's proposal, while well intentioned, has put PJM back into a position of making calls it acknowledges it is not well-suited to make.

The best way to avoid such conflicts is to leave questions of which state policies are preempted to the courts, rather than transferring that doctrine to the very different context of market power mitigation. However, if the Board decides to incorporate a preemption-like standard into the tariff, it is essential that the criteria for which state policies are subject to the MOPR be as objective and well-defined as possible to avoid continued conflict over the meaning of the tariff and provide certainty to state lawmakers that their participation in PJM does not jeopardize their mandate to protect the health and environment of their citizens. If the tariff language or other components of the filing introduce uncertainty on this fundamental issue, it is unlikely to be acceptable to our organizations.

The Board can provide for decisive and durable resolution of this issue by keeping PJM out of the business of deciding which states' policies are valid and which are not.

Want to take an extra moment to address Ms. Conboy's question regarding the use of Net ACR rather than Net CONE as the basis for offer floors where the MOPR does apply. [XYZ] Chairman Glick agreed with this view in his dissent . . . 171 FERC ¶ 61,035, beginning at P 80.

Thank you for the opportunity to speak today and for your consideration of our remarks.