UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation, *et al.*	Docket Nos.	EL16-49-000
		EL18-178-000
v.		(Consolidated)
PJM Interconnection, L.L.C.		
PJM Interconnection, L.L.C.		

REQUEST FOR REHEARING AND CLARIFICATION OF THE AMERICAN PUBLIC POWER ASSOCIATION, AMERICAN MUNICIPAL POWER, INC., AND THE PUBLIC POWER ASSOCIATION OF NEW JERSEY

Pursuant to section 313 of the Federal Power Act ("FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[2] the American Public Power Association ("APPA"), American Municipal Power, Inc. ("AMP"), and the Public Power Association of New Jersey ("PPANJ") hereby request rehearing of the Commission's December 19, 2019 order in the above-captioned dockets.[3] APPA, AMP, and PPANJ also request clarification of several aspects of the order.

I. INTRODUCTION

In the December 2019 Order, the Commission directs PJM Interconnection, L.L.C. ("PJM") to implement a sweeping expansion of the Minimum Offer Price Rule ("MOPR") used in PJM's capacity construct, the Reliability Pricing Model ("RPM"). The December 2019 Order requires PJM to apply the MOPR to any new or existing resource that receives, or is entitled to receive, a "State Subsidy," unless the resource is subject to one of the exemptions described in

[1] 16 U.S.C. § 825*l*.

[2] 18 C.F.R. § 385.713 (2019).

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

the order.[4] The Commission establishes exemptions for: (1) existing renewable resources that are participating in state renewable portfolio standard ("RPS") programs; (2) existing demand response, energy efficiency, and storage resources; (3) existing self-supply resources; and (4) competitive resources that do not receive state subsidies.[5] All non-exempt resources will be subject to the MOPR, with Net Cost of New Entry ("Net CONE") for the resource class used as the default offer price floor for new resources,[6] and the Net Avoidable Cost Rate ("Net ACR") for the resource class used as the default offer price floor for existing resources.[7]

The December 2019 Order adopts a very broad definition of the "State Subsidies" that will make a resource subject to the MOPR. The Commission defines a 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 capacity auction.[8]

This definition is overly broad and will doubtless prompt controversy and litigation.[9] Of particular concern to APPA, AMP, and PPANJ, the definition of State Subsidy encompasses

[4] December 2019 Order at P 2.

[5] *Id.*

[6] In this context, a new resource is one that has not cleared a PJM capacity auction. *Id.* at P 2 n.4.

[7] An existing resource in this context is one that has previously cleared a PJM capacity auction. *Id.* at P 2 n.5.

[8] *Id.* at P 67 (footnote omitted).

[9] *See id.*, Comm'r Glick Dissent at PP 21-25.

public power utilities, including individual municipal utilities and joint action agencies, engaged in self-supply pursuant to their traditional business model, as it would all vertically integrated utilities.[10] Although public power utilities generally recover their costs through non-bypassable consumer charges based upon the independent decisions of local communities who are both the owners of the resources and the load being served by them, these charges are now cast as "a process of a state government, a political subdivision or agency of a state, or an electric cooperative formed pursuant to state law."[11] Thus, the Commission's definition of State Subsidy inappropriately deems self-supply resources built or supported by local public power utilities as "subsidized" simply because municipalities are authorized to exist by their state. The non-bypassable charges authorized by public power load/owners do not in any way equate to a statewide legislative initiative to create a subsidy collected from retail customers to support generators with no obligation to serve those customers. While the Commission appropriately adopted an exemption to grandfather existing resources owned by self-supply entities from the MOPR's application,[12] the December 2019 Order will expose public power utilities and their customers to the risk of having to pay twice for new capacity resources, without providing them any effective way to mitigate that risk.[13]

The justification for this outcome is absent from the Commission's order. The idea that public power has a competitive advantage and less risk than other business models perhaps reflects a lack of understanding.[14] Public power exists to enable local communities to have an

[10] *See* December 2019 Order at PP 203-204, Comm'r Glick Dissent at PP 39-40.

[11] *Id.* at P 67.

[12] *Id.* at P 203; *see also id.* at P 17.

[13] As discussed in section IV.A, *infra*, APPA, AMP, and PPANJ ask that the Commission clarify that bilateral supply contracts between public power entities and unaffiliated third parties are not subject to the expanded MOPR, or, at a minimum, that such contracts would be encompassed by the self-supply exemption.

[14] *See* December 2019 Order at P 204.

opportunity to serve their customer-owners at the lowest possible cost consistent with the maintenance of reliable service and the policies of the community. Public power entities engage in self-supply when they determine that constructing capacity or entering into long-term bilateral contracts will best serve these goals. It is unthinkable to disallow public power entities and their customer-owners the ability to self-supply if they determine it is in their best economic interest.

The Commission's most fundamental error in the December 2019 Order is assuming the RPM resource adequacy construct is actually a market and that competitive markets require administrative interference to determine price outcomes. The Commission says that the core problem it is addressing is the price distortion caused by subsidized resources in "a capacity market that relies on competitive actions to set just and reasonable rates."[15] In reality, RPM is a mandatory resource adequacy construct that offers a single product and "competitive" prices are determined by PJM applying cost development guidelines with no empirical link to actual market conditions or consumer decisions. Ironically, by its latest action, the Commission has removed any remaining genuine market component of RPM by requiring all "competitive" offers to be determined administratively in Valley Forge, Pennsylvania. To be clear, APPA, AMP, and PPANJ support competition and competitive markets; there is simply not one here.

The Commission should grant rehearing to reconsider the fundamentally flawed replacement rate adopted in the December 2019 Order.[16] The vast expansion of the MOPR

[15] *Id.* at P 5.

[16] Although the Commission directs PJM to implement a replacement rate under FPA section 206, the December 2019 Order does not address (or even acknowledge) the numerous requests for rehearing that were filed in response to the Commission's June 29, 2018 order in this proceeding. *Calpine Corp., et al. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 ("June 2018 Order"). Many of those rehearing requests, including one filed by APPA, AMP, PPANJ, challenged the Commission's threshold finding under the first prong of FPA section 206 that the PJM Tariff was unjust and unreasonable because the existing MOPR is too *narrow*. As explained in those rehearing requests, the Commission's conclusion was flawed for numerous reasons, and the Commission's decision to establish a replacement rate without addressing these objections leaves the December 2019 Order with a wholly inadequate foundation. *See, e.g.*, Docket Nos. EL16-49-000, *et al.*, Request for Rehearing of the American Public Power Association, American Municipal Power, Inc. and Public Power Association of New Jersey (July 30, 2018).

directed by the Commission disregards principles of cooperative federalism and unlawfully intrudes on state and local authority in contravention of the jurisdictional lines drawn by Congress in the FPA, including the right of municipalities to utilize the public power business model to provide electric service to their customer-owners. The December 2019 Order imposes risks and burdens on the implementation of state and local electric generation policies, programs, and business models that would effectively countermand state and local action without offering states and localities a reasonable accommodation or alternative to address the impacts of the federally mandated resource adequacy construct.

The December 2019 Order's treatment of public power self-supply is characterized by a number of particular deficiencies. If the Commission retains anything like the expanded MOPR framework adopted in the December 2019 Order, APPA, AMP, and PPANJ urge the Commission to reconsider its decision to treat the public power business model as a form of State Subsidy subject to the expanded MOPR. Commissioner Glick was not being hyperbolic when he observed that the December 2019 Order constitutes "a fundamental threat to the long-term viability of the public power model" in PJM.[17] The decision will adversely impact the willingness and ability of public power utilities to effectively participate in PJM markets. While the December 2019 Order appropriately adopted a MOPR exemption for existing self-supply resources, the application of the MOPR to new public power self-supply resources will severely hinder the future ability of public power utilities in PJM to meet the long-term resource needs of their customers in a manner that is cost-effective and responsive to the values and policy preferences of their communities.

The Commission's application of the MOPR to new public power self-supply resources

[17] December 2019 Order, Comm'r Glick Dissent at P 40.

was inconsistent with the Commission's FPA section 206 findings in the June 2018 Order and unreasonably disregarded substantial evidence showing that it is unreasonable to apply the MOPR to public power self-supply resources. The December 2019 Order purports to borrow from PJM's proposed definition of "Material Subsidy,"[18] but PJM specifically proposed a categorical MOPR exemption for entities engaged in self-supply (subject to certain net-short/net-long thresholds for new resources) in recognition that their traditional business models did not give rise to concerns about artificial price suppression. The Commission itself has recognized this principle in the past, yet the December 2019 Order swerves from this precedent without adequate explanation.

If the Commission declines to revisit its conclusion that the public power business model is a form of State Subsidy (or reverse its decision to apply the MOPR to "state subsidized" resources in general), the Commission should adopt a MOPR exemption for new as well as existing public power self-supply resources to strike a balance between addressing any potential for price "suppression" and the legitimate interests of public power utilities and their customers. Neither the existing FRR option or the unit-specific review process offers a reasonable accommodation for the problems that would result from application of the MOPR to new public power self-supply resources.

The Commission's treatment of public power self-supply resources, while of critical importance to APPA, AMP, and PPANJ, was just one aspect of a broadly flawed decision to extend the MOPR. The MOPR framework adopted by the Commission is not just and reasonable, nor was the December 2019 Order the product of reasoned decision-making under the Administrative Procedure Act ("APA"). The Commission did not justify the transformation

[18] *See* December 2019 Order at P 9.

of the MOPR from a limited mechanism aimed at preventing price suppression by subsidized new entry into a sweeping restriction on almost all forms of non-federal support for generation resources. Even after conducting a paper hearing, the Commission does not point to any evidence drawing a connection between alleged price suppression attributable to State Subsidies and any failure of the RPM to send appropriate price signals to ensure resource adequacy in the PJM region, which currently has a substantial capacity surplus. In fact, the Commission expressly determines that evidence of actual price suppression is irrelevant to its determination.[19]

The December 2019 Order also declines to adopt the resource-specific Fixed Resource Requirement ("FRR") Alternative, which the Commission proposed in the June 2018 Order as a way "to accommodate state policy decisions and allow resources that receive out-of-market support to remain online . . . ."[20] Although the resource-specific FRR Alternative likely would have been a poor fit for public power utilities,[21] it was somewhat encouraging that the Commission recognized in the June 2018 Order that some accommodation of state resource policies was needed to ensure a just and reasonable replacement rate in light of the proposed expansion of the MOPR. In the December 2019 Order, however, the Commission concludes, with almost no explanation for its change in view, that the expanded MOPR approach adopted in the December 2019 Order would be superior to the FRR Alternative.[22]

The decision to expand the MOPR, made without any effort to gauge the potential cost

[19] *Id.* at P 72.

[20] June 2018 Order at P 8; *see also* December 2019 Order at PP 6, 219. In the December 2019 Order, the Commission often uses the term "FRR Alternative" to refer to the *existing* FRR in the PJM Tariff. To avoid confusion, APPA, AMP, and PPANJ will refer to the existing FRR as the "FRR option."

[21] *See* Docket Nos. EL16-49-000, *et al.*, Initial Submission of the American Public Power Association at 24 (Oct. 2, 2018) ("APPA Initial Submission").

[22] December 2019 Order at P 6; *see also id.*, Comm'r Glick Dissent at P 2 (noting that the December 2019 Order "unceremoniously discards the so-called 'resource-specific FRR Alternative'").

impact on consumers, will result in a more expensive and less efficient capacity construct that materially interferes with the ability of state and local regulators to exercise their authority to shape the generation resource mix. The Commission should grant rehearing.

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

In accordance with Rule 713(c)(2),[23] APPA, AMP, and PPANJ provide the following enumerated statement of issues, including citations to representative Commission and court precedent on which they rely:

1. The expanded MOPR unlawfully intrudes on state and local authority in contravention of the FPA and principles of cooperative federalism.[24]

2. The Commission erred in finding that characteristics inherent to the public power business model constitute "State Subsidies" that should subject new public power self-supply resources to application of an expanded MOPR.[25]

3. The Commission's decision to include public power self-supply resources within the definition of "State Subsidies" is unjust, unreasonable, and unduly discriminatory.[26]

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[23] 18 C.F.R. § 385.713(c)(2) (2019).

[24] 16 U.S.C. § 824; *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) ("*Hughes*"); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) ("*EPSA*"); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) ("*Oneok*"); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Sunray Mid-Continent Oil Co. v. FPC,* 364 U.S. 137 (1960); *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018); *Allco Finance Ltd. v. Klee,* 861 F.3d 82 (2d Cir. 2017); *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009); *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005); *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239 (D.C. Cir. 1996); *National Fuel Gas Supply Corp. v.* FERC, 909 F.2d 1519 (D.C. Cir. 1990); *Carolina Power & Light Co. v. FERC*, 860 F.2d 1097 (D.C. Cir. 1988); *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987) ("*AGD v. FERC*"); *Richmond Power & Light v. FERC*, 574 F.2d 610 (D.C. Cir. 1978); *Jacksonville Elec. Auth.*, 166 FERC ¶ 61,124 (2019); *Regional Transmission Organizations*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000), *petitions for review dismissed sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

[25] *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), *PPL Wallingford Energy LLC v. FERC*, 419 F3d 1194 (D.C. Cir. 2005).

[26] 16 U.S.C. §§ 824d, 824e; *Alabama Elec. Coop. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982).

4. The Commission's decision to include public power self-supply resources within the definition of "State Subsidies" is arbitrary and capricious because public power self-supply was not part of the "problem" that the replacement rate purports to remedy.[27]

5. The Commission does not respond meaningfully to arguments and evidence supporting a conclusion that it would not be just and reasonable to apply the MOPR to public power self-supply resources.[28]

6. The December 2019 Order does not provide a reasoned explanation for the Commission's departure from its prior rulings acknowledging the merits of accommodating the public power business model.[29]

7. The application of the expanded MOPR to public power self-supply resources contravenes the Commission's obligations under section 217(b)(4) of the FPA.[30]

8. The Commission's suggestion that the existing FRR option and the Unit-Specific Review process accommodate public power self-supply resources was factually incorrect, arbitrary and capricious.

9. The Commission's application of a MOPR to all new and existing resources receiving State Subsidies, absent an exception is unjust, unreasonable, and unduly discriminatory.

10. The Commission's conclusion that a MOPR should be applied to all new and

[27] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29; *Burlington Truck Lines, Inc.*, 371 U.S. 156; *Delaware Riverkeeper Network*, 753 F.3d 1304; *PPL Wallingford Energy LLC*, 419 F.3d 1194.

[28] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29; *New England Power Generators Ass'n v. FERC*, 881 F.3d 202 (D.C. Cir. 2018).

[29] *New England Power Generators Ass'n*, 881 F.3d 202; *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014); *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at PP 107-115 (2013), *order on reh'g*, 153 FERC ¶ 61,066 (2015), *vacated, NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (2017).

[30] 16 U.S.C. § 824q(b)(4).

existing resources receiving State Subsidies, absent an exception was arbitrary and capricious and not based on substantial evidence.[31]

11. The Commission failed to provide a reasoned explanation for the rejection of the FRR Alternative or any other mechanism aimed at "accommodat[ing] state policy decisions and allow[ing] resources that receive out-of-market support to remain online . . . ."[32]

12. The Commission's adoption of an expanded MOPR arbitrarily and capriciously failed to address a number of important considerations, including the cost impact on consumers and the risk of over-mitigation.[33]

13. The Commission failed to reconcile its decision to apply the MOPR to resources that have already cleared an auction with precedent finding that the MOPR should not be applied to existing resources, regardless of whether the resource receives out-of-market payments.[34]

14. To the extent the Commission intends the expanded MOPR to apply to bilateral capacity agreements between public power entities and unaffiliated third parties, the December 2019 Order contravenes the Commission's obligations under section 217(b)(4)[35] of the FPA as well as Commission policy encouraging long-term bilateral contracts in organized markets.[36]

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[31] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29; *NextEra Energy Resources v. FERC*, 898 F.3d 14 (D.C. Cir. 2018); *Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017); *West Deptford Energy, LLC*, 766 F.3d 10; *Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012); *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009); *Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004); *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004); *Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18 (D.C. Cir. 2002).

[32] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. 29; *West Deptford Energy, LLC*, 766 F.3d 10.

[33] *Michigan v. EPA,* 135 S. Ct. 2699 (2015); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Motor Vehicle Manufacturer's Ass'n*, 463 U.S. 29; *NextEra Energy Resources*, 898 F.3d 14; *TransCanada Power Marketing v. FERC*, 811 F.3d 1 (D.C. Cir. 2015); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984).

[34] *West Deptford Energy, LLC*, 766 F.3d 10.

[35] 16 U.S.C. § 824q(b)(4).

[36] *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh'g*, Order No. 719-B,

III. REQUEST FOR REHEARING

A. The December 2019 Order Unlawfully Intrudes on State and Local Authority

In expanding the MOPR to cover all existing and new resources receiving State Subsidies unless an exemption applies, the December 2019 Order unlawfully intrudes on authority reserved to state and local authorities under section 201 of the FPA.[37] The explicitly-articulated aim of expanding the MOPR is to counter the effects of state policies and programs (many of them long-standing) that support certain generation resources and technologies.[38] Further, the Commission effectively treats state and local decisions to utilize the public power business model and/or allow retail service by vertically integrated utilities as a form of subsidy to which the expanded MOPR will apply.[39] The Commission does not assert that the policies, programs, and business models targeted by the expanded MOPR are preempted by the FPA.[40] The December 2019 Order nonetheless imposes risks and burdens on the implementation of these policies, programs, and business models that would, in the Commission's formulation (as applied to analogous federal subsidies), "disregard or nullify" them without offering state and local

129 FERC ¶ 61,252 (2009).

[37] 16 U.S.C. § 824.

[38] *See, e.g.*, December 2019 Order at P 7 (stating that the expanded MOPR responds to the "decision by some states to employ out-of-market subsidies to prevent or delay the retirement of state-preferred resources"); *id.* at P 22 (stating that "over the last few years the PJM region has experienced a significant increase in out-of-market payments provided by states for the purpose of supporting the entry or continued operation of preferred resources that may not otherwise be able to clear in the competitive wholesale capacity market."); *id.* at P 41 (asserting that the replacement rate will allow RPM "to send price signals on which investors and consumers can rely to guide the orderly entry and exit of economically efficient capacity resources"); June 2018 Order at P 1 n.1 (referencing "out-of-market revenue that a state either provides, or requires to be provided, to a supplier that participates in the PJM wholesale capacity market."); *id.* at P 151 (pointing to "laws passed in a number of PJM states that provide or require out-of-market support for nuclear, solar, and wind resources").

[39] *See, e.g.*, December 2019 Order at P 204 (observing that "in a regional market dominated by states with retail competition, it is not clear why utilities in states that prefer the vertical integration model should be afforded a competitive advantage").

[40] *See id.* at P 68 (explaining that "our concern is with those forms of State Subsidies that are not federally preempted . . .").

officials a reasonable accommodation.[41]

Under the FPA, the states and the Commission have responsibility for distinct, but not necessarily "hermetically sealed" aspects of electricity regulation.[42] Section 201 of the FPA grants the Commission jurisdiction over "the transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale in interstate commerce,"[43] but section 201 expressly excludes "facilities used for the generation of electric energy" from FERC's jurisdiction.[44] The states' reserved power to regulate generation facilities includes "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like."[45] Similarly, state decisions about how to regulate retail utility service are reserved to the states under FPA section 201.[46] The right of a municipality to choose the public power business model for the benefit of its customer-owners is a matter of state law, often granted pursuant to a home rule charter that is similarly reserved to municipalities.[47] And section 201(f) of the FPA specifically exempts public power utilities from the Commission's general regulatory authority under Part II of the Act.[48]

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[41] *Id.* at PP 10, 89.

[42] *EPSA*, 136 S. Ct. at 776.

[43] 16 U.S.C. §824(b)(1).

[44] *Id.*

[45] *Pac. Gas & Elec. Co.*, 461 U.S. at 212.

[46] *See, e.g.*, *Regional Transmission Organizations*, Order No. 2000-A (clarifying that Order No. 2000 "is not intended to require the unbundling of non-jurisdictional transmission service (*i.e.*, the transmission component of bundled retail sales of energy). That is, the requirement does not interfere in any way with whether retail open access and retail choice are provided, or with the pricing of retail bundled power sales which is a decision for appropriate state authorities.").

[47] *See* Docket Nos. EL16-49-000, *et al.*, Evidence and Arguments of American Municipal Power, Inc. and Public Power Association of New Jersey at 11-12 (Oct. 2, 2018) ("AMP/PPANJ Initial Submission"); *see also, e.g.*, Abby Briggerman, *et al.*, *Survey of State Municipalization Laws* (2012), available at: https://www.publicpower.org/system/files/documents/muncipalization-survey_of_state_laws.pdf.

[48] 16 U.S.C. § 824(f); *see also, e.g.*, *Jacksonville Elec. Auth.*, 166 FERC ¶ 61,124.

The courts have recognized states' authority to direct the generation resource mix, even where such state actions will affect wholesale market prices.[49] In *Hughes*, the Supreme Court indicated that states are not preempted "from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation."[50] Recent decisions by the Seventh and Second Circuits, moreover, have upheld Zero Emission Credit ("ZEC") programs in Illinois and New York, respectively, as appropriate exercises of state authority that are not preempted under the FPA.[51] State RPS programs have been in place for years without any finding by the Commission that they are incompatible with mandatory capacity markets, and have also been upheld in the face of claims of FPA preemption.[52] Given the states' confirmed authority to utilize such mechanisms, a program of cooperative federalism that accommodates state resource policies in wholesale markets is warranted.[53] Yet, in a decision that is the antithesis of cooperative federalism, it is precisely these non-preempted state programs and policies that the expanded MOPR targets.[54]

As Commissioner Glick observes in his dissent, recent Supreme Court precedent instructs that, in evaluating whether an action by a state or federal authority impermissibly intrudes on the

[49] *See, e.g.*, *Hughes*, 136 S. Ct. at 1299; *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d at 53-56; *Elec. Power Supply Ass'n v. Star*, 904 F.3d at 524; *Connecticut Dep't of Pub. Util. Control*, 569 F.3d at 481.

[50] *Hughes*, 136 S. Ct. at 1299 (internal quotes and citations omitted).

[51] *Coal. for Competitive Elec.*, 906 F.3d at 53-56; *Elec. Power Supply Ass'n v. Star*, 904 F.3d at 524.

[52] *Allco Finance Ltd. v. Klee,* 861 F.3d 82.

[53] *Cf. EPSA*, 136 S. Ct. at 780 (observing that the Commission's implementation of wholesale demand response under Order Nos. 719 and 745 "is a program of cooperative federalism, in which the States retain the last word"); *see also, e.g.*, *Coal. for Competitive Elec.*, 906 F.3d at 56 (collecting cases where "FERC itself has sanctioned state programs that increase capacity or affect wholesale market prices, so long as the states regulate matters within their jurisdiction").

[54] December 2019 Order at P 68 (explaining that "our concern is 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 in the federally-regulated multi-state wholesale capacity market administered by PJM." (footnotes omitted)).

jurisdiction of the other, it is important to look at the matter at which the action "aims" or "targets."[55] In broadly targeting state and local decisions concerning generation facilities and the organization of utilities, the December 2019 Order goes far beyond past efforts to address specific concerns about alleged price suppression through new entry in the PJM capacity construct.[56] The Commission's expansion of the MOPR to all existing and new non-exempt resources entitled to State Subsidies unlawfully infringes on states' rights to regulate generation by targeting and effectively countermanding state efforts to support certain resources and dictating which types of resources (including existing, non-exempt resources) will be able to qualify as capacity (and thereby avoid the risk of load serving entities ("LSEs") and their customers having to pay twice for capacity).[57] With respect to public power utilities, the MOPR framework required by the Commission overreaches by including state and local decisions to permit business models that utilize self-supply, such as public power or vertically integrated utilities.[58] The order unlawfully interferes with state and local decisions, made by the customer-owners who pay for those decisions, about utility business models by treating new self-supply resources as subject to the MOPR, exposing all self-supply entities to the risk of paying twice for new capacity.

The Commission implicitly *concedes* that the expanded MOPR adopted in the December 2019 Order will "disregard or nullify" state programs and policies that support certain generation

[55] *Id.*, Comm'r Glick Dissent at P 9 (citing *Hughes*, 136 S. Ct. at 1298; *EPSA*, 136 S. Ct. at 776; *Oneok*, 135 S. Ct. at 1600). Commissioner Glick's view is quite similar to the view articulated by the Supreme Court in *Hughes* that impermissible interference with a matter reserved to the Commission can be identified if state-based activity is "tethered" to federally approved pricing.

[56] *See generally* section III.D.1, *infra*.

[57] *See* December 2019 Order, Comm'r Glick Dissent at P 11 (observing that "the Commission adopts a sweeping MOPR that could potentially apply to any conceivable state effort to shape the generation mix.").

[58] *See* December 2019 Order at PP 202-204.

resources, broadly including public power business model decisions. The Commission states that "federal subsidies distort competitive markets in the same manner that State Subsidies do."[59] Despite this acknowledgement, however, the Commission does not extend the MOPR to include federal subsidies, concluding that doing so would "disregard or nullify the effect of federal legislation."[60] APPA, AMP, and PPANJ do not suggest that federal subsidies should also require application of the MOPR, but, as Commissioner Glick logically observes, "[i]f the MOPR disregards or nullifies federal policy, it must have the same effect on state policy."[61]

The Commission maintains that the December 2019 Order does not "change the purpose of the MOPR, but only changes its scope in response to new efforts to provide State Subsidies."[62] As discussed in section III.D below, the December 2019 Order (unjustifiably) transforms the MOPR from a mechanism designed to address the impact of buyer side market power on prices from subsidized new entry into a broad limit on most "out-of-market" state support for any type of generation. The Commission asserts authority to require this MOPR expansion without establishing that the State Subsidies encompassed by the MOPR actually affect the FERC jurisdictional wholesale rate.[63] The change in the MOPR "is one of kind and not just degree,"[64] and this expansion of the MOPR fundamentally alters its purposes and impact in a way that impermissibly intrudes on state authority, even if it may be true at some level that the MOPR was always aimed at addressing "price suppression."[65]

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[59] *Id.* at P 10; *see also id.* at P 89.

[60] *Id.* at P 10 (footnote omitted); *see also id.* at P 89.

[61] *Id.*, Comm'r Glick Dissent at P 30.

[62] December 2019 Order at P 39.

[63] *See id.* at P 72; *id.*, Comm'r Glick Dissent at P 11.

[64] December 2019 Order, Comm'r Glick Dissent at P 16.

[65] *See* December 2019 Order at P 39. While courts have upheld the application of much narrower MOPRs to certain

The Commission disputes that the replacement rate impermissibly intrudes on state authority, arguing that the December 2019 Order "does not deprive states in the PJM region of jurisdiction over generation facilities because states may continue to support their preferred resource types in pursuit of state policy goals."[66] This assertion is contradicted by the Commission's implicit acknowledgment that application of the MOPR effectively disregards or nullifies the state programs within its scope. It is also at odds with the Commission's suggestion in the June 2018 Order that a mechanism such as the now-abandoned FRR Alternative was needed to "to accommodate state policy decisions and allow resources that receive out-of-market support to remain online . . . ."[67]

Moreover, the Commission's assertion that the replacement rate does not literally prevent state action ignores the practical impact of the December 2019 Order.[68] The expanded MOPR fundamentally interferes with the ability of states and public power utilities to support their preferred resource types given the broader scope of resources that will be at risk of not clearing the capacity auctions and the risk that LSEs and their customers will have to pay twice for a larger proportion of capacity. For state and local policymakers, a choice between forcing

resources, the MOPR expansion required by the December 2019 Order materially changes the impact of the MOPR on the exercise of state and local authority over generation, resource planning, and the choice of utility business model. *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3rd Cir. 2014) ("*NJBPU*"); *New England Power Generators Ass'n v. FERC*, 757 F.3d 283 (D.C. Cir. 2014). And while the Commission cites the Third Circuit's decision in *NJBPU* as support for its authority to expand the MOPR, the *NJBPU* decision did not reach the question of whether the Commission had erred in eliminating guaranteed clearing for self-supply resources, including public power self-supply. *See NJPBU*, 744 F.3d at 104-105. In discussing the self-supply issue, the court expressed serious concerns with the adequacy of the Commission's analysis, *id.* at 104, but the court ultimately concluded that it lacked jurisdiction to decide the question, as the issue had been mooted by the Commission's subsequent approval of a categorical MOPR exemption for self-supply. *Id.* at 105 (citing *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 (2013)).

[66] December 2019 Order at P 7.

[67] June 2018 Order at P 8; *see also* December 2019 Order at PP 6, 219.

[68] *See* December 2019 Order, Comm'r Glick Dissent at P 13.

customers to pay twice for capacity or relinquishing the ability to promote certain generation facilities or technologies amounts to "a choice between the noose and the firing squad,"[69] and the Commission cannot simply dismiss such practical concerns attendant to the expansion of the MOPR.[70] The courts have long cautioned that the Commission may not do indirectly what it is not permitted to do directly,[71] and the Commission's establishment of a replacement rate that effectively dictates how states and localities may shape the resource mix or organize utilities providing retail service runs afoul of this principle.

B. The Commission Erred in Defining "State Subsidy" to Include the Public Power Business Model

Even if granting rehearing of the Commission's expansion of the MOPR were not required on jurisdictional grounds, rehearing is necessary to address the December 2019 Order's unreasonable and unsupported treatment of the public power business model as a form of State Subsidy that will subject new public power self-supply resources to the MOPR.[72]

The Commission's treatment of self-supply exposes public power utilities in PJM to tremendous risk and uncertainty in planning future resources to supply their customer-owners consistent with public power's long-standing business model and leaves public power utilities without reasonable options to mitigate the risk and uncertainty that this will entail. APPA, AMP, and PPANJ urge the Commission to reconsider its decision to treat the public power business model as a form of "State Subsidy" that should be subject to the expanded MOPR and grant rehearing to remedy the errors described below.

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[69] *AGD v. FERC*, 824 F.2d at 1024.

[70] *See id.* at 1024-25.

[71] *Sunray Mid-Continent Oil Co. v. FPC,* 364 U.S. at 152; *Bonneville Power Admin.*, 422 F.3d 908; *Altamont Gas Transmission Co.*, 92 F.3d at 1246; *National Fuel Gas Supply Corp.*, 909 F.2d at 1522; *Carolina Power & Light Co.*, 860 F.2d at 1101; *Richmond Power & Light*, 574 F.2d at 620.

[72] *See* December 2019 Order at PP 202-204.

1. The Public Power Business Model Cannot Reasonably be Characterized as a State Subsidy

The Commission made clear, in both the June 2018 and December 2019 Orders, that its rationale for an expanded MOPR was to respond to new and growing state policies and programs that support particular generation resources and technologies – a description that does not apply to public power self-supply.[73] Given that securing self-supply resources to serve customers under long-standing business models was not the basis for finding the PJM Tariff unjust and unreasonable, it was unreasonable, arbitrary, and capricious to include public power self-supply resources within the Commission's definition of "State Subsidies" to which the MOPR applies.[74]

Municipal utilities, joint action agencies, and other public power entities may be instrumentalities of municipalities or the state and derive their authority from state law, but, in securing self-supply resources and recovering the costs from their customer-owners, they are not engaging in the type of legislatively-directed state support for particular generation resources or technologies that was the basis for the Commission's finding that the PJM Tariff was unjust and unreasonable.[75] Nor did the Commission point to any evidence showing that public power self-supply efforts are expanding by a comparable scale as the Commission found for resources subject to state procurement.[76] Public power self-supply resources are part and parcel of the long-standing public power business model itself, which "predates the capacity market by several decades and is premised on securing a reliable supply of power for each utility's citizen-

[73] *See id.* at PP 7, 22, 41; June 2018 Order at PP 1, 149, 151, 152, 156.

[74] *See, e.g.*, *Burlington Truck Lines*, 371 U.S. at 168 (explaining that an agency must articulate a "rational connection between the facts found and the choice made").

[75] *See, e.g.*, APPA Initial Submission, Montalvo Dec. at ¶ 24; *see also id.* at ¶ 7.

[76] *See* June 2018 Order at PP 32, 151-53, 155.

owners at a reasonable and stable cost, which often includes an element of long-term supply."[77] These "resource investments are made as economic business decisions and are not the result of state-sponsored external payments, the effects of which the Commission seeks to address with the expanded MOPR."[78] Disregarding the distinctions between the public power business model and state programs and policies supporting particular generation resources or technologies, the Commission unreasonably deems the public power business model itself to be a form of State Subsidy.[79]

Long-established state and local laws that allow for public power utilities with retail rate recovery are not the same thing as "out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources,"[80] and the Commission erred in equating them for purposes of defining State Subsidies. Since public power self-supply was not the basis for the Commission's finding that the PJM Tariff was unjust and unreasonable, the Commission's decision to encompass public power self-supply resources within the Commission's definition of "State Subsidies" to which the MOPR applies was arbitrary and capricious.[81] To be clear, APPA, AMP, and PPANJ do not believe the Commission should apply the MOPR to mitigate the impact of state programs that support particular resources or resource technologies, but, having cited the expansion of such programs as the specific grounds for its finding that RPM is unjust and unreasonable, the

[77] December 2019 Order, Comm'r Glick Dissent at P 39.

[78] APPA Initial Submission, Montalvo Dec. at ¶ 53.

[79] The Commission indicates that its definition of State Subsidies borrows from PJM's proposed definition of "Material Subsidy." *See* December 2019 Order at P 9. PJM, however, specifically proposed a categorical MOPR exemption for entities engaged in self-supply (subject to net-short/net-long thresholds for new resources), in recognition that their traditional business models did not give rise to concerns about artificial price suppression. *See* PJM Initial Submission at 32-34.

[80] June 2018 Order at P 1.

[81] *See, e.g.*, *Burlington Truck Lines*, 371 U.S. at 168.

Commission cannot simply extend that rationale to other, fundamentally different types of generation resource funding models.

2. The Commission Did Not Respond Meaningfully to Arguments and Evidence that Public Power Self-Supply Resources Should Not be Subject to the MOPR

Beyond the threshold error of adopting a "remedy" to address public power self-supply resources that are not part of the alleged "problem" cited by the Commission, the December 2019 Order failed to respond meaningfully to evidence and arguments offered by APPA, AMP, PPANJ and others demonstrating that public power self-supply participation in the RPM without being subject to a MOPR is fully consistent with reasonable market design principles.[82] Contrary to the Commission's suggestion that new public power self-supply resources should be presumed to be "uneconomic,"[83] the record supported a finding that these resources are the product of "legitimate market-based decisions" that reflect public power utilities' "pursuit of a portfolio of supply resources consistent with their business objectives and their cost, risk (diversity), flexibility, security, and environmental impact goals."[84]

In suggesting that public power self-supply resources "reject the premise of the capacity market and circumvent competitive outcomes,"[85] the Commission begs the questions of what the "premise" of the capacity market is and what constitutes a "competitive outcome,"[86] while failing to respond to expert testimony that specifically addresses these issues as to the

[82] *See, e.g.*, APPA Initial Submission at 14-22.

[83] *See, e.g.*, December 2019 Order at P 38.

[84] APPA Initial Submission at 14.

[85] December 2019 Order at P 17.

[86] *See. e.g.*, *id.*, Comm'r Glick Dissent at P 16 (arguing that "the Commission has little choice but to hide 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.").

participation of public power self-supply resources.[87]

APPA's paper hearing submission included a declaration from Marc D. Montalvo, a long-time proponent of competitive markets,[88] in which Mr. Montalvo explained why it would be inappropriate to apply the MOPR to public power self-supply resources. Mr. Montalvo explained that a decision to apply the MOPR to public power self-supply resources to ensure competitive integrity would reflect the "mistaken premise that all resource entry and exit must be coordinated solely by the RTO administered market to be deemed economic."[89] AMP and PPANJ made the same point in their paper hearing submission, observing that "[i]t was also never the intention of RPM for all capacity to be procured in the auctions (hence the name, Base *Residual* Auction or 'BRA')."[90]

The record established by APPA, AMP, PPANJ and other commenters showed that it would be incorrect and unreasonable to treat public power self-supply as uncompetitive. Mr. Montalvo observed for example that "it is not the case that only supply that enters and exits the marketplace subject to the standardized terms and conditions is deemed economic."[91] The RPM, "with its reliance on a single standardized contract, does not allow participants to fully reveal their preferences, the result of which is a potentially inefficient capital allocation."[92] Public power utilities pursue portfolios of self-supply resources using "standard capital budgeting

[87] In fact, public power supports genuinely competitive markets and rejects the notion that an organization, rather than a market, should set price.

[88] Mr. Montalvo spent a decade at ISO New England Inc. ("ISO-NE"), where he served as Director of Enterprise Risk Management, Director of Market Analysis and Investigation of the Internal Market Monitor, and Director of Market Development. APPA Initial Submission at 6.

[89] APPA Initial Submission, Montalvo Dec. at ¶ 26.

[90] AMP/PPANJ Initial Submission at 18.

[91] APPA Initial Submission, Montalvo Dec. at ¶ 33.

[92] *Id.*

techniques to select the investments that fully reflect their preferences and optimize the performance of their power supply portfolios."[93] This allows public power utilities to "consider investments in all resource types and a menu of contracts as part of a broader portfolio optimization problem, seeking an optimal resource mix for its load over a long-term investment horizon."[94] These "resource investments are made as economic business decisions and are not the result of state-sponsored external payments, the effects of which the Commission seeks to address with the expanded MOPR."[95] The portfolio approach to resource planning used by public power utilities engaging in self-supply reflects legitimate economic investment decision-making.[96]

Numerous other paper hearing submissions supported a finding that the MOPR should not encompass the self-supply resources of public power and other vertically integrated utilities. AMP demonstrated, with the support of an affidavit from Christopher J. Norton, AMP's Director of Market Regulatory Affairs, that it "has neither the incentive nor the ability to economically benefit from artificially lowering market prices."[97] More specifically, because of the business models employed by public power, including tax advantaged financing that prohibits municipal utilities from entering into any output contract that results in private use with respect to the project, there is little if any opportunity for municipal LSEs to build generation as merchant generation, for market manipulation, or for anything other than legitimate self-supply.

Comments filed by Dominion Energy Services, Inc. ("Dominion") included an affidavit

[93] *Id.* at ¶ 10.

[94] *Id.* at ¶ 37.

[95] *Id.* at ¶ 53.

[96] *Id.*

[97] AMP/PPANJ Initial Submission at 15-17, 27.

from Dr. Kathleen Spees and Dr. Samuel Newell of The Brattle Group explaining that the MOPR should not apply to "Integrated Public Utilities," a term that includes vertically integrated public power utilities.[98] Drs. Spees and Newell explained that Integrated Public Utilities try to balance supply and demand, and "participation of an Integrated Public Utility with perfectly balanced supply and demand has no impact on the capacity market prices."[99] Even where there is marginal participation by Integrated Public Utilities in RPM with modest net-short or net-long positions, "there will be little or no effect when looking on average across many years, because the net long or net short positions are small as a proportion of the market and tend to offset."[100] Drs. Spees and Newell further concluded that "the system as a whole benefits from enabling trade between Integrated Public Utilities and the merchant capacity market."[101] As noted above, PJM itself specifically proposed that certain self-supply entities – including public power utilities – generally would be exempt from the MOPR, subject to net-short/net-long thresholds for new resources.[102]

The paper hearing submissions also showed that, throughout the evolution of PJM's capacity construct, the Commission has acknowledged the merit of accommodating public power self-supply resource participation and avoiding over-mitigation.[103] When RPM was first

[98] *See* Docket Nos. EL16-49-000, *et al.*, Dominion Comments, "Affidavit of Dr. Kathleen Spees and Dr. Samuel Newell in Support of Dominion Energy Services, Inc. Regarding the Need for a Self-Supply Exemption from Minimum Offer Price and Other Policy-Supported Resource Rules" ("Spees/Newell Aff.").

[99] *See id.*, Spees/Newell Aff. at 16; *see also id.* at 14 (concluding that "[a]llowing Integrated Public Utilities to continue their traditional self-supply business model does not impinge on the ability of the merchant market to support the needs of customers in retail choice states."); *see also* Reply Comments of Illinois Municipal Electric Agency at 12-15 (Nov. 6, 2018) ("IMEA Reply Comments").

[100] Spees/Newell Aff. at 17.

[101] *Id.* at 19.

[102] *See* PJM Initial Submission at 32-34.

[103] *See* APPA Initial Submission at 17-21.

implemented in 2006, PJM's Tariff was interpreted to allow self-supply resources to clear the auction prior to other capacity resources. Over the objections of APPA and others, the Commission eliminated this "guaranteed clearing" in 2011.[104] In doing so, however, the Commission agreed that "the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under long-standing business models."[105] The Commission sought to accommodate public power self-supply resources by allowing consideration of the public power business model in the unit-specific review,[106] an approach that, while well-intentioned, ultimately proved unworkable. Importantly, although the Third Circuit upheld the elimination of the state mandate MOPR exemption in *NJBPU*, the court did not reach the issue of whether the Commission had erred in eliminating guaranteed clearing for self-supply resources.[107]

The Commission accepted a self-supply categorical exemption (subject to net-short/net-long thresholds) in 2013 as part of a package of changes driven by stakeholders and proposed by PJM to RPM and the MOPR in particular.[108] One of the main drivers for the proposal was the fact that the unit-specific review approach adopted in 2011 was ineffective at avoiding over-mitigation.[109] Importantly, in accepting the self-supply exception in 2013, the Commission

[104] *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022, at P 191, *order on reh'g*, 137 FERC ¶ 61,145 (2011), *order on reh'g*, 138 FERC ¶ 61,194 (2012), *aff'd*, *NJBPU*, 744 F.3d 74.

[105] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 208.

[106] *See id.* at PP 5, 208-09.

[107] *See NJBPU*, 744 F.3d at 104-105.

[108] *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at PP 107-115 (2013), *order on reh'g*, 153 FERC ¶ 61,066 (2015), *vacated, NRG Power Marketing, LLC v. FERC*, 862 F.3d 108 (2017) ("*NRG*"), *order on remand, PJM Interconnection, LLC* 161 FERC ¶ 61,252 (2017), *reh'g denied*, 169 FERC ¶ 61,237 (2019).

[109] *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at PP 9, 116-117. PJM's filing cited a report prepared by the Brattle Group expressing concerns that the MOPR rules adopted in 2011 would "lead to over-mitigation that will undermine bilateral markets and RPM participation by entities, such as public power companies, that meet their customers' needs primarily through long-term contracts or other self-supply options." *PJM Interconnection, L.L.C.*, Docket No. ER13-535, Transmittal Letter at 7 (Dec. 7, 2012) (quoting Brattle Group, Second Performance

agreed that "a self-supply LSE that owns or contracts for a large proportion of the capacity needed to meet its load *has no reason to finance uneconomic entry* given that such a strategy would not be profitable."[110] Although the Commission's orders approving the package of changes were vacated by the D.C. Circuit in *NRG*, the Court did not address the merits of the self-supply exemption. Nor did the Commission revisit the merits of the self-supply exemption when it reinstituted PJM's previously-approved MOPR framework in response to the *NRG* ruling.[111]

The December 2019 Order did not provide a reasoned explanation for the Commission's departure from its prior rulings acknowledging the merits of accommodating the public power business model. Addressing this background, the Commission merely asserts that "the self-supply exemption authorized in 2013 was a temporary reversal in Commission policy that the Commission rejected in acting on the remand of *NRG*."[112] Even if the Commission's approval of a self-supply exemption in 2013 could be accurately characterized as a reversal in policy (which it cannot), the Commission would still be required to provide a reasoned explanation for why it is changing course from its 2013 decision.[113] Further, even before it accepted the 2013 self-supply exemption, the Commission had made clear that "the purpose and function of the MOPR is not to unreasonably impede the efforts of resources choosing to procure or build capacity under

Assessment of PJM's Reliability Pricing Model at p. 151 (Aug. 26, 2011)).

[110] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 25 (emphasis added).

[111] *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at PP 40-41.

[112] December 2019 Order at P 203.

[113] *See, e.g.*, *West Deptford Energy, LLC*, 766 F.3d at 20 (observing that "[i]t is textbook administrative law that an agency must provide a reasoned explanation for departing from precedent or treating similar situations differently"). In any case, the Commission's 2013 approval of the self-supply exemption did not reverse prior policy. To the contrary, the Commission explained at some length why approval of the self-supply exemption was consistent with its MOPR policy and the Commission's previous decisions. *See PJM Interconnection, L.L.C.*, 153 FERC ¶ 61,066, at PP 52-58.

long-standing business models."[114] The Commission recognized that an appropriate balance should be struck between "the need to protect against uneconomic entry while also mitigating parties' concerns about having to pay twice for capacity as a result of failing to clear in RPM."[115] And the Commission did not "reject" the self-supply exemption on remand from *NRG* due to any identified concern with the exception itself;[116] rather the Commission merely stood by its earlier determination that RPM would not be just and reasonable without a unit-specific review to go along with the self-supply and competitive entry exemptions.[117]

While the December 2019 Order appropriately adopts an exemption for existing self-supply resources,[118] the Commission did not respond meaningfully to the arguments and evidence showing that it would be unreasonable to apply the expanded MOPR to new public

[114] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 208.

[115] *Id.* at P 209.

[116] In fact, the Commission has also accommodated public power self-supply in the New York Independent System Operator, Inc. ("NYISO") Installed Capacity ("ICAP") market. Acting on an FPA section 206 complaint in 2015, the Commission found that the NYISO Tariff was unjust and unreasonable because it did not incorporate an exemption for new self-supply resources, including public power self-supply resources, "that have limited or no incentive and ability to exercise buyer-side market power to artificially suppress ICAP market prices." *N.Y. Pub. Serv. Comm'n v. N.Y. Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,022 at P 61 (2015), *reh'g denied*, 154 FERC ¶ 61,088 (2016), *pet. for rev. pending sub nom.*, *Entergy Nuclear Power Marketing, LLC v. FERC*, No. 16-1107 (D.C. Cir.) Rejecting arguments that utilities should simply rely on the ICAP market rather than engaging in self-supply, the Commission observed, *inter alia*, that, through long-term self-supply commitments, "these select entities can provide better price stability for their customers and make decisions that may be more uniquely tailored to their needs than the broader market will allow." *Id.* at P 64. APPA, AMP, and PPANJ recognize that the Commission has declined to adopt a "blanket" MOPR exemption for new self-supply resources in ISO-NE. *See, e.g.*, *ISO New England Inc.*, 151 FERC ¶ 61,055 (2015). In ruling on this issue, however, the Commission noted that, in PJM, it had accepted a self-supply exemption with net-long and net-short thresholds because "entities that satisfy this limitation would lack the incentive to use this exemption to depress the clearing price through the exercise of buyer market power." *Id.* at P 30. The Commission observed that "ISO-NE has not proposed an exemption with comparable parameters." *Id.*

[117] *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at PP 40-41. The Commission's determination was "without prejudice to PJM submitting a new, revised FPA section 205 filing if it determines doing so will cure the deficiencies with the December 2012 filing." Notably, both the Capacity Repricing and MOPR-Ex proposals included in PJM's filing in Docket No. ER18-1314 would have included an exemption for public power self-supply resources. *See PJM Interconnection, L.L.C.*, Docket No. ER18-1314-000, PJM Transmittal Letter at 51-52 (April 9, 2018).

[118] December 2019 Order at P 203.

power self-supply resources.[119] The December 2019 Order describes the paper hearing submissions relating to self-supply resources of public power and other utilities,[120] but the Commission's discussion of these issues as applied to new resources is limited to a few unsupported, conclusory sentences that do not satisfy standards of reasoned decision-making.[121] It is a not a reasoned response, for example, for the Commission to say that it can "see no reason to treat new resources owned by self-supply entities differently from resources owned by other types of electric utilities . . . ."[122] APPA, AMP, PPANJ, and other interested parties provided numerous "reasons" – including reasons previously accepted by the Commission itself – for not applying the MOPR to public power self-supply resources. The Commission failed to respond meaningfully to these arguments. Moreover, the Commission's equivocal assertion that new public power self-supply resources "may have the ability to suppress prices going forward"[123] simply disregards the role that public power and other forms of self-supply have long played in the PJM organized markets.

The Commission remarks that "[a]t bottom, a blanket self-supply exemption rests on the premise that some kinds of entities should face less risk than others in choosing whether to build their own generation resources or rely on the market to satisfy their energy and capacity

[119] The Commission's decision to exempt existing self-supply resources from application of the MOPR was grounded in its conclusion that "self-supply entities have made resource decisions based on affirmative guidance from the Commission indicating that those decisions would not be disruptive to competitive markets." *Id.* While such reliance considerations are certainly a valid basis for an exception, *see* APPA Initial Submission at 27-29, this ruling did not directly respond to the broader arguments that the MOPR should not apply to any public power self-supply resources.

[120] December 2019 Order at PP 178-201.

[121] *See, e.g., New England Power Generators Ass'n*, 881 F.3d at 210 (explaining that "[i]t is well established that the Commission must respond meaningfully to the arguments raised before it." (internal quotes and citations omitted)).

[122] December 2019 Order at P 203.

[123] *Id.*

requirements."[124] This myopic view seems to be based on the assumption that participation in the resource adequacy construct is the only risk entities face in making business decisions. But public power has risks of its own when compared to other entities in the electric utility industry. Public power has no shareholders and lacks the overall economies of scale that spread the results of an unsuccessful business decision over millions of captive consumers.

More importantly, the Commission does not accurately characterize the "premise" for exempting public power self-supply resources. As the record demonstrates, and as the Commission itself has recognized, the premise of exempting self-supply resources from the MOPR is to accommodate the long-standing business models of public power and other integrated utilities within the PJM capacity construct. The public power business model is not a gambit to reduce the risk associated with satisfying energy and capacity requirements; it is, as Commissioner Glick correctly explained, "premised on securing a reliable supply of power for each utility's customer-owners at a reasonable and stable cost, which often includes an element of long-term supply."[125] Applying the MOPR to all new public power self-supply resources, moreover, would not simply establish a level playing field between self-supply entities and other market participants as the Commission suggests, it would "fundamental[y] threat[en] . . . the long-term viability of the public power model" in PJM.[126]

The Commission goes on to say that "in a regional market dominated by states with retail competition, it is not clear why utilities in states that prefer the vertical integration model should

[124] *Id.* at P 204.

[125] *Id.*, Comm'r Glick Dissent at P 39. Even where utilities that rely on self-supply have modest net-short or net-long positions, "there will be little or no effect when looking on average across many years, because the net long or net short positions are small as a proportion of the market and tend to offset." Dominion Comments, Spees/Newell Aff. at 17.

[126] December 2019 Order, Comm'r Glick Dissent at P 40.

be afforded a competitive advantage."[127] Leaving aside that this statement is more in the nature of a rhetorical question than a reasoned explanation, it persists in relying on the incorrect assumption that self-supply entities have a "competitive advantage." Further, the fact that PJM may be "dominated" by states with retail competition is not a reason to "fundamentally upend[] the public power model,"[128] which has long been accounted for in the PJM capacity construct, and which PJM itself has said should continue to be accommodated. Indeed, the Commission specifically *rejected* arguments that the 2013 self-supply exemption unduly discriminated in favor of traditionally regulated states relative to restructured states, agreeing that "there are differences pertinent to these issues between the types of traditional business models the self-supply exemption is designed to address and the restructured market."[129] Given the Commission's acknowledgment of such differences it is, in fact, unduly discriminatory to impose the expanded MOPR on self-supply entities, since the FPA's bar on undue discrimination prohibits both the dissimilar treatment of similarly situated customers and the similar treatment of dissimilarly situated customers.[130]

Finally, the Commission's attempts to justify the expansion of the MOPR to new self-supply resources are inconsistent with section 217(b)(4) of the FPA, which requires the Commission to exercise its authority so as to "enable[] load-serving entities to secure firm transmission rights (or equivalent tradable or financial rights) on a long-term basis for long-term

[127] December 2019 Order at P 204.

[128] December 2019 Order, Comm'r Glick Dissent at P 40.

[129] *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 111. The Commission agreed, in particular, that "[a]n uneconomic new entry strategy by a vertically-integrated utility, for example, poses a substantial risk of increasing its net costs," *id.* and, thus, "these entities are unlikely to depend on costly strategies to address the non-self-supply portion of their portfolio." *Id.*

[130] *See, Alabama Elec. Coop.*, 684 F.2d at 27-28.

power supply arrangements made, or planned, to meet [service obligation] needs."[131] Although focused on transmission rights, this provision evinces an intent to protect the ability of LSEs (including public power utilities) to utilize long-term power supply arrangements to serve their native load. The December 2019 Order undermines, rather than protects, the ability of public power entities to serve native load through long-term power supply arrangements.

The December 2019 Order's unreasonable and unsupported treatment of the public power business model as a form of State Subsidy that will subject new public power self-supply resources to the MOPR should be reversed on rehearing.

3. The Commission Erred by not at Least Adopting a Self-Supply Exception Subject to Appropriate Net-Short and Net-Long Parameters

In rejecting a "blanket self-supply exception,"[132] the Commission also failed to provide a reasoned explanation for not at least adopting a MOPR exception for new self-supply resources utilizing net-long and net-short thresholds to address the Commission's stated concerns about inappropriate price suppression.

The self-supply exemption accepted by the Commission in 2013 included several criteria designed to ensure that the exemption would not be used to exercise buyer-side market power for the purpose of decreasing clearing prices – consistent with the original purpose of the MOPR.[133] Among the applicable criteria were "net-short" and "net-long" thresholds intended to exclude from eligibility LSEs that either (1) acquired substantially more capacity in the PJM capacity auction than they sold (*i.e.*, they were significantly net-short); or (2) sold substantially more

[131] 16 U.S.C. § 824q(b)(4).

[132] December 2019 Order at P 204.

[133] *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at PP 63, 66.

capacity than they acquired in the auctions (significantly net-long).[134] Although, as discussed above, the MOPR should not be applied to public power self-supply resources at all, adopting criteria similar to those used for the previous MOPR exemption for new public power self-supply resources would have been a less extreme and disruptive approach to addressing any concerns about inappropriate price suppression than applying a MOPR to new public power self-supply resources.

In advocating for PJM's proposed self-supply exemption under the 2013 MOPR, which utilized the net-short/net-long criteria, PJM's then CEO, Andrew Ott, explained that "[t]here is no reason to expect . . . Self-Supply LSEs to take actions that increase net costs to their loads but benefit other loads (such as an uneconomic new entry strategy that is unprofitable from the perspective of their loads)."[135] The Commission acknowledged in the December 2019 Order that "PJM propose[d] to re-implement its previously approved exemption for self-supply resources"[136] that applied the net-short/net-long thresholds to new self-supply resources to "ensure that sellers do not have an opportunity to suppress clearing prices (for example, by 'dumping' excess capacity into the BRA, suppressing capacity prices)."[137] APPA argued similarly that the Commission should implement an exemption for new public power resources based on the net-short/net-long provisions contained in the 2013 MOPR package in the event that the Commission did not outright exclude these resources from the MOPR.[138] A number of

[134] *Id.* at PP 63-65.

[135] PJM Response to Deficiency Letter, Docket No. ER13-535, Affidavit of Andrew L. Ott at pp. 18-19 (March 4, 2013).

[136] December 2019 Order at P 178.

[137] *Id.* at P 179.

[138] APPA Reply Submission at 8 (Nov. 6, 2018) ("Outright exclusion of public power self-supply from the MOPR would be appropriate, but, if the Commission deems necessary, the net-short/net-long thresholds for planned resources that PJM proposes should be workable.").

parties submitted comments in support of PJM's proposed application of the net-short/net-long thresholds in the self-supply exemption.[139]

At no point did the Commission address the net-short/net-long thresholds included in PJM's proposed self-supply exemption. The Commission did not address the well-documented assurance these thresholds would provide that new self-supply resources added within the thresholds would in fact be built without the intention or effect of suppressing FERC-jurisdictional prices. On rehearing, the Commission should, at a minimum, adopt an exemption for new self-supply resources, subject to appropriate net-short/net-long thresholds.

C. Neither the Existing FRR Option nor the Unit-Specific Review Process Offers a Reasonable Accommodation for the Problems that Would Result from Application of the MOPR to New Public Power Self-Supply Resources

As described above, the Commission's determination to define the public power business model as a State Subsidy is unjust and unreasonable. The Commission's drastic and unsubstantiated reversal of positions regarding whether public power poses a threat to the capacity construct has left the public power community whipsawed at best. However, one of the most egregious points of the December 2019 Order is the unfounded pronouncement that "[s]elf-supply entities that prefer to craft their own resource adequacy plans remain free to do so through the existing FRR Alternative in PJM's Tariff."[140] The Commission made the determination that the FRR option is a viable alternative for public power entities without any record support or

[139] *See* December 2019 Order at PP 196-199. Only one party criticized application of the net-short/net-long thresholds, claiming that the "new purpose of the MOPR . . . is not related to price suppressive intent." *See id.* at P 201.

[140] *Id.* at P 202. It is worth pointing out that although the Commission uses the term, "FRR Alternative" to describe the option it believes is available to accommodate the needs of public power, the Commission rejected the "FRR Alternative" that it proposed in the June 2018 Order. *See* December 2019 Order at P 6; *see also id.*, Comm'r Glick Dissent at P 2 (noting that the December 2019 Order "unceremoniously discards the so-called 'resource-specific FRR Alternative'"). Accordingly, the discussion in this section refers to the FRR option as the existing FRR tariff language and not the resource-specific FRR Alternative, which is also not an option for public power since the Commission did not include it in the replacement rate adopted in the December 2019 Order.

even explanation and with total disregard of the many and uncontested arguments that the existing FRR option does not work for public power.[141] In this respect, the Commission repeats the error it made in the 2011 MOPR orders, in which the Third Circuit found the Commission had not countered evidence from states and LSEs "that the FRR is not a viable alternative for them."[142]

The Commission also suggests, without justification, explanation, support or record evidence that unit-specific review accommodates public power self-supply, asserting that "[n]ew self-supply resources that receive or are entitled to receive State Subsidies, as detailed in this order, may avail themselves of the Unit-Specific Exemption."[143]

The complete lack of explanation for these determinations coupled with the failure to address the arguments that have been consistently and emphatically made by self-supply LSEs demonstrating that both the FRR option and the Unit-Specific Exemption are poorly suited for

[141] Since at least the beginning of 2011, self-supply LSEs have been explaining why the FRR option does not work for them. *See, e.g.*, *PJM Interconnection, L.L.C.*, Docket No. ER11-2875-000, Protest and Request for Rejection or, In the Alternative, Request for Suspension and Further Procedures of the PJM Load Group (March 4, 2011); *PJM Interconnection, L.L.C.*, Docket No. ER11-2875-000, Motion to Lodge Evidence That There is No Need for MOPR Revisions Prior to the May 2011 Base Residual Auction (March 22, 2011); *PJM Interconnection, L.L.C.*, Docket No. ER13-535-000, Comments of PJM Load Group in Support of PJM Filing (December 28, 2012); *PJM Interconnection, L.L.C.*, Docket No. ER13-535-000, Motion for Leave to Answer and Answer of PJM Load Group in Support of PJM Filing (January 15, 2013); *PJM Interconnection, L.L.C.*, Docket No. ER13-535-000, Comments of PJM Load Group in Support of PJM's March 4, 2013 Response, (March 25, 2013); *Calpine Corporation*, *et al.* v. *PJM Interconnection, L.L.C.*, Docket No. EL16-49-000, Protest of Dominion Resources Services, Inc., American Municipal Power, Inc., American Public Power Association, Old Dominion Electric Cooperative, PJM Industrial Customer Coalition, and Public Power Association of New Jersey (April 11, 2016); *Calpine Corporation, et al. v. PJM Interconnection, L.L.C.,* Docket No. EL16-49-000, Motion for Leave to Answer and Answer of Dominion Resources Services, Inc., American Municipal Power, Inc., American Public Power Association, Old Dominion Electric Cooperative, PJM Industrial Customer Coalition, and Public Power Association of New Jersey (April 25, 2016); *PJM Interconnection, L.L.C.,* Docket No. ER18-1314-000, Comments of American Municipal Power, Inc. on PJM interconnection L.L.C.'s Capacity Repricing or In the Alternative MOPR-Ex Proposal (May 7, 2018); and, *PJM Interconnection, L.L.C.,* Docket No. EL18-169, Protest of American Municipal Power, Inc., (June 20, 2018).

[142] *NJBPU*, 744 F.3d at 102.

[143] December 2019 Order at P 204.

public power entities render the Commission's decision arbitrary and capricious.

1. The Existing FRR Option is Not a Viable Alternative for Public Power Entities

The Commission's assertion that public power may use the existing FRR option to craft their own resource adequacy plans is not supported by reasoned analysis; the Commission neither substantiates the factual assumptions underlying its ruling, nor adequately explains how the existing FRR option would be a reasonable option for public power, failing to engage in or distinguish arguments and rationales provided by public power entities that demonstrate why they cannot practically utilize the FRR option. The Commission's discussion regarding this claim is limited to two conclusory sentences amounting to, "self-supply entities that do not want to be subject to the MOPR may opt for the existing FRR Alternative."[144] The Commission ignores the reasons that the FRR option is incompatible with the long-standing business models of many self-supply LSEs, and public power specifically, which are once again set forth below.

The existing FRR option was part of the original RPM settlement and was designed as an accommodation for LSEs that were net long on capacity resources and capable of supplying ***all*** capacity obligations plus reserve requirements for the entire FRR Service Area for a five year period.[145] At that time, there were only a few LSEs that could meet the requirements for FRR. The thinking then was that it was preferable to have a construct where most, if not all could participate.

Under the current construct, an entity that chooses the FRR option submits to PJM a long-term plan for the commitment of capacity resources to satisfy the entity's ***entire*** capacity

[144] *Id.* at PP 202, 204.

[145] *See* PJM Reliability Assurance Agreement ("RAA") at Schedule 8.1.

obligations plus its reserve requirement within an identified area.[146] LSEs electing the FRR option may not include in their FRR Capacity Plan any capacity resource that has cleared in any RPM auction.[147] Most public power utilities have limited capacity resource options for self-supply and would be placed under disproportional risk if required to meet the FRR option criteria. As the Third Circuit observed in *NJBPU*, "participating in the FRR option is an all-or-nothing proposition, and appeals as a practical matter only to large utilities that still follow the traditional, vertically integrated model."[148]

In the first place, most public power LSEs satisfy only a portion of their capacity obligations with member-owned generation and are net buyers of capacity who purchase from third-parties or the RPM auction to satisfy the balance of their capacity requirements. Additionally, there is significant variability in both how members served by public power LSEs participate in projects or take other power supply. Public power LSEs may supply full or partial requirements wholesale power service to certain members and meet members' needs through the ownership of electric generation, the scheduling and dispatch of member-owned generation, and the entry into power supply and transmission arrangements with third parties. The supply arrangements have terms that can range from less than one year to very long term. Public power LSEs also accommodate the addition of new members. Because of this variability, public power's unforced capacity obligations can fluctuate materially over time. Moreover, public power LSEs may have limited capacity resource options because of the unavailability of

[146] The area covered by the plan is: (i) the service territory of an investor owned utility; (ii) the service area of a public power entity or electric cooperative; or (iii) a separately identifiable geographic area that is bounded by wholesale metering, or similar appropriate multi-site aggregate metering, and for which the FRR entity has or assumes the obligation to provide capacity for all load (including load growth) within such area. *Id.*

[147] *Id.* at Schedule 8.1(E)(1).

[148] 744 F.3d at 84 (footnote omitted).

economically priced capacity from existing generation, or internal resource limitations for financing self-build options. For these fundamental reasons, the FRR option is unworkable for public power.

Also, the potential for the addition of new Locational Deliverability Areas ("LDAs") or changing LDA boundaries with differing internal minimum resource requirements in combination with the five year length of the existing FRR option rule makes its use a riskier option for LSEs (particularly LSEs like public power) in constrained LDAs. LDA boundaries can be modeled and potentially altered under the existing RPM rules for a variety of reasons.[149] A change in such boundaries during a five year FRR plan may well result in a requirement to obtain a greater percentage of resources to satisfy capacity obligations from resources within the new LDA boundaries than existed at the time the LSE developed its five year FRR plan. Such a change would impose on the LSE a potentially significant risk that excess capacity from internal resources in the newly defined LDA may not be available for a bilateral transaction or that the owners of those resources may not be willing to sell that excess capacity in a bilateral transaction at reasonable and economic prices. There is real world potential for this occurrence. For example, the creation of a new binding Cleveland LDA could impact 100 percent of the municipality's load, whereas only a portion of the load of FirstEnergy, would be impacted.[150]

The existing FRR option eliminates the ability of the LSE to purchase a portion of its capacity needs from the RPM auctions. Thus, while a public power entity generally seeks "an

[149] PJM Tariff, Attachment DD, Section 5.10(a)(ii).

[150] *See PJM Interconnection, L.L.C.,* 142 FERC ¶ 61,008 (2013). So long as PJM models the Cleveland LDA (and others) as potentially binding, the risk that it could bind and negatively impact a municipality's load remains.

optimal resource mix for its load over a long-term investment horizon,"[151] the inability to access the RPM market when necessary eliminates an efficient market mechanism for the LSE to meet its capacity requirements that may arise due to changes in load forecasts, lumpiness of resource additions, or other uncontrollable circumstances.

In addition to not being able to purchase from the RPM auctions to satisfy any portion of their capacity obligations under the existing FRR option, the PJM RAA Schedule 8.1(E)(2) limits sales of excess capacity.[152] While this provision allows for some sales, as a practical matter it restricts or limits sales from most LSEs. Because it is based on the Preliminary Forecasted Peak Load of the FRR entity, a single municipal or even a group would be limited based on their load. Additionally, the lumpy nature of investment in generation results in a risk to LSEs using the existing FRR option that the capacity in the early life of the resource in excess of the LSE's needs will become stranded given the significant restrictions under the FRR plan rules on an LSE's ability to sell that excess capacity into RPM auctions. This combination of the lumpy nature of generation and the rules regarding the purchases and sales of excess capacity makes it more likely that public power LSEs would be prohibited from purchasing and selling their excess generation due to the nature of building generation to meet load growth or decline.

Another practical impediment to an LSE's ability to use the existing FRR option to self-supply capacity obligations is the disproportionately higher penalty for failing to submit an

[151] APPA Initial Submission, Montalvo Dec. at ¶ 10.

[152] Specifically, Schedule 8.1(E)(2) provides that an FRR entity that "designates Capacity Resources in its FRR Capacity Plan(s) for a Delivery Year based on the Threshold Quantity may offer to sell Capacity Resources in excess of that needed for the Threshold Quantity in any auction conducted under Attachment DD of the PJM Tariff for such Delivery Year, but may not offer to sell Capacity Resources in the auctions for any such Delivery Year in excess of an amount equal to the lesser of (a) 25% times the Unforced Capacity equivalent of the Installed Reserve Margin for such Delivery Year multiplied by the Preliminary Forecast Peak Load for which such FRR Entity is responsible under its FRR Capacity Plan(s) for such Delivery Year, or (b) 1300 MW."

acceptable annual capacity plan under the FRR option. The penalty for falling short of capacity commitments under RPM is the RPM auction clearing price plus the greater of 0.2 times that price or $20/MW-Day times the amount of the capacity deficiency.[153] An LSE using the existing FRR option is subject to either or both of two penalties, one of which is higher than the deficiency charges imposed under RPM.[154] Continually carrying additional capacity that will be stranded due to the Threshold Quantity limitation on sales by an FRR entity into the BRA, just to ensure avoidance of the 2x Gross CONE penalty is an inefficient outcome and another reason demonstrating why the existing FRR option does not work for self-supply entities.

The timing provisions of the FRR option make it very difficult for an LSE to elect the existing FRR option. Specifically, PJM RAA Schedule 8.1(C)(1) provides that not less than four months before the conduct of the Base Residual Auction for the first Delivery Year for which such election is to be effective, any Party seeking to elect the FRR option shall notify PJM in writing of such election. Additionally, no later than one month before such Base Residual Auction, such Party shall submit its FRR Capacity Plan demonstrating its commitment of Capacity Resources for the term of such election sufficient to meet such Party's Daily Unforced Capacity Obligation.

It is also important to note that, contrary to Commission's stated objective of preserving the capacity construct as a competitive option, even if public power LSEs could overcome the practical impediments to the existing FRR option, more widespread use of the existing FRR

[153] PJM Tariff, Attachment DD, Section 8.2, referencing the Daily Deficiency Rate in Section 7.1(b) of Attachment DD.

[154] An LSE that elects the existing FRR option that fails to submit its annual qualified plan demonstrating that it can satisfy 100 percent of its reliability requirements in any year is subject to a penalty of two times the gross Cost of New Entry for each MW of deficient capacity. PJM RAA, Schedule 8.1 (D)(7). The LSE also may be subject to an FRR Capacity Deficiency Charge for failure to satisfy its Daily Unforced Capacity Obligation of 1.2 times the weighted average RPM clearing price for all RPM auctions for the zones covered by the FRR plan. *Id.* at Schedule 8.1(F)(2).

option could also reduce overall market efficiency. As has been previously identified, the Brattle Group conducted an assessment of RPM and identified the adverse consequences for market efficiency of widespread use of the FRR option: "More widespread use of the FRR option would reduce market efficiency and increase costs because it places limits on selling into RPM, as discussed in our 2008 RPM Report."[155] In other words, Brattle viewed more widespread use of the existing FRR option as having inefficient, cost-increasing impacts on the market as a whole, as opposed to a price-insulation effect. Whatever the practical impediments, a rational market design should not encourage parties to pursue actions that, if taken, would increase costs or have other adverse impacts on the market.

The Commission's disregard for the uncontested demonstration that the FRR option is not a reasonably viable alternative for public power utilities, and the complete lack of support for its assertion otherwise does not amount to reasoned decision making. The order does not even attempt to include a "rational connection between the facts found and the choice made."[156] Accordingly, the Commission should reverse its determination that the availability of the FRR option provides support for applying the expanded MOPR to public power self-supply resources.

[155] The Brattle Group, *Second Performance Assessment of PJM's Reliability Pricing Model* at 150-151 (August 26, 2011), posted at: http://www.pjm.com/~/media/committees-groups/committees/mrc/20110818/20110826-brattle-report-second-performance-assessment-of-pjm-reliability-pricing-model.ashx. *See also, PJM Interconnection, L.L.C.,* Docket No. ER11-2875-001, Post Technical Conference Comments of American Municipal Power, Inc. at 9-10 (August 29, 2011).

[156] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; *see also, e.g., Delaware Riverkeeper Network*, 753 F.3d at 1313; *PPL Wallingford Energy LLC*, 419 F.3d at 1198.

2. The Unit-Specific Exemption is Not a Reasonable Option for Public Power

The Commission notes that new public power self-supply resources "may avail themselves of the Unit-Specific Exemption."[157] The suggestion that the Unit-Specific Exemption might provide a meaningful accommodation for new public power self-supply resources is not supported by reasoned analysis. As a threshold matter, the Unit-Specific Exemption is not truly a MOPR exemption at all. Commissioner Glick correctly points out that the mechanism only provides "an escape from the relevant default offer floor."[158] Resources using the Unit-Specific Exemption must still "bid above an administratively determined level, not at the level that they would otherwise participate in the market."[159] Thus, public power would still face the risk that a new resource would not clear the auction and the public power LSE and its customers would need to pay twice for any new capacity.

One of the few real-world applications of the Unit-Specific Exemption process to a public power entity's self-supply resource development shows the problems with the process for public power. The Delaware Municipal Electric Corporation ("DEMEC"), an APPA and AMP member, was required to utilize a unit-specific exemption identical to that retained by the Commission in the December 2019 Order to qualify its then-new gas-fired generation resource located on the Delmarva Peninsula (a PJM load pocket) in the RPM BRA held in 2011 for the year 2014. Patrick E. McCullar, DEMEC CEO, described the process in a statement filed with the Commission, which deserves to be quoted at length:

> My company was one of the first entities surprised and adversely affected by the unreasonably sudden PJM Section 205 filing to revise the MOPR and the subsequent issuance of the MOPR Order. Because DEMEC serves load in a

[157] December 2019 Order at P 204.

[158] *Id.*, Comm'r Glick Dissent at P 44.

[159] *Id.*

constrained portion of the PJM footprint, it decided in 2007 to take action to build additional generation to self-supply a portion of its load obligation, to mitigate the impact on its load of continued high RPM auction prices. After extensive discussions with existing suppliers over several years, DEMEC could not find a bilateral contract arrangement to satisfy its long-term energy and capacity needs at a cost that was less than the self-build option. Therefore, DEMEC decided to self build. It subsequently made irreversible major financial commitments to undertake the expansion of its existing Beasley Power Station in Smyrna, Delaware to serve the load growth in its communities on the Delmarva Peninsula and to meet its ever-increasing capacity obligations to PJM. DEMEC had already advanced significantly through the PJM generation interconnection process and had the right to offer this new generation resource into the 2014 BRA under the previously applicable rules for self-supply resources set out in the MOPR.

In the wake of the [Commission's April 2011] MOPR Order, however, PJM required DEMEC to submit a cost-based justification in order to make a capacity offer that was less than the 90% of Cost of New Entry (CONE) specified by PJM in its filing. As a reference, the PJM-calculated CONE for a Combustion Turbine-Combined Cycle facility was $247.52/MW-Day. DEMEC's own cost-based calculation, using the CONE format as the only methodology available from PJM (as nothing was provided as guidance in complying with the new MOPR provisions), was a small fraction of the CONE.

The Independent Market Monitor (IMM) was the entity that was supposed to review and approve such cost-based offers, as set out in PP 118-121 of the MOPR Order. The IMM, however, was opposed to almost every point in DEMEC's initial cost justification offer. He stated that our financing model was "all wrong" and that the financing cost set out in DEMEC's *pro forma* financials was lower than what would be available to a merchant generation project that received no "subsidy." The IMM felt that DEMEC's access to tax-exempt financing as a not-for-profit public power system constituted a "subsidy," even though this was DEMEC's actual cost of financing. I also should note that DEMEC's A bond rating from Standard & Poors and the long-term requirements type contracts DEMEC has with its distribution system members also played a major part in DEMEC's ability to float bonds to finance its generation upgrade at the cost that it did. These features are fundamental components of the public power not-for-profit business model, and they enable public power systems to keep costs and rates to their members low.

Nonetheless, the IMM wanted to add 200 basis points to DEMEC's actual financing rate without any justification, among other upward adjustments proposed. It was clear to DEMEC that the cumulative impact of the IMM's proposals would be to raise its offer number as high as possible. Such an upward mitigation of DEMEC's offer price, however, clearly created a high risk of stranding its already-made investment in DEMEC's new resource. DEMEC therefore strongly challenged the proposed mitigation. After intensive

> discussions, DEMEC and the IMM agreed to a mitigated offer that was still substantially higher than DEMEC's initial factually-supported, cost-based calculated offer. Fortunately, DEMEC's offer price for the new resource did clear the 2014 BRA. However, had DEMEC acceded to the IMM's original proposed upwardly mitigated offer price, DEMEC's generation resource would not have cleared the 2014 BRA, thereby stranding DEMEC's investment and causing irreparable harm to DEMEC and its communities. Surely this was not the intent of PJM and FERC, but this is what almost happened.[160]

DEMEC's experience sent a shudder through the public power community. As not-for-profit entities with long-term service obligations to retail customers, public power systems cannot, and should not be required to, invest in supply resources that might not clear the relevant capacity auctions. The Unit-Specific Exemption fails to meaningfully mitigate the risk. Indeed, with the expansion of the MOPR to new public power self-supply resources, the Commission's assertion that public power may "avail themselves of the Unit-Specific Exemption" without justification or support does not amount to reasoned decision-making. The order does not even attempt to include a "rational connection between the facts found and the choice made."[161] Accordingly, the Commission should reverse its determination that public power should be subject to the MOPR because they may utilize the Unit-Specific Exemption as an alternative to having their resources subject to MOPR and putting them at risk of paying twice for capacity.

D. The December 2019 Order Does Not Justify the Vast Expansion of the MOPR

The Commission's decision to apply an expanded MOPR to new public power self-supply resources, while particularly problematic for the reasons described above, was one aspect of a broader misguided effort to extend the MOPR to all new resources receiving what the Commission defined to be "State Subsidies," as well as some categories of existing resources.

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[160] *PJM Interconnection, L.L.C., et al.,* Docket Nos. ER11-2875-001, *et al.,* Statement of Patrick E. McCullar on Behalf of the Delaware Municipal Electric Corporation and the American Public Power Association at 2-3 (July 28, 2011).

[161] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

The Commission neither justified this vast expansion of the MOPR nor offered a just and reasonable approach to implementing it. The result will be more constrained resource choices and increased consumer costs without improvement in resource adequacy.

1. The Commission Did Not Reconcile the Replacement Rate with the Purpose of the MOPR

The fundamental purpose of the PJM capacity construct is "to help ensure reliability through resource adequacy."[162] Until this proceeding, the Commission has consistently described the MOPR as a mechanism to check market participants' ability to suppress prices by exercising buyer-side market power through new entry,[163] which the Commission reasoned could interfere with the effectiveness of RPM in helping to ensure resource adequacy. To this end, the PJM MOPR was only applied to natural gas plants, as these are the resources through which price suppression would most logically occur.[164] Further, the MOPR remained limited to new entry, since the Commission recognized that cleared resources had been shown to be needed, and a competitive offer from an existing resource would typically be very low regardless of any subsidies, which the Commission recognizes, at least implicitly, given that the December 2019 Order distinguishes between Net Cone and ACR for new versus existing resources.[165]

In the December 2019 Order, the Commission transforms the MOPR from a mechanism defended as a check on buyer-side market power into an all-purpose restriction on almost any

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[162] *PJM Interconnection, L.L.C.*, 155 FERC ¶ 61,157, at P 28 (2016), *aff'd, Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017); *see also id*. at PP 32, 112.

[163] *See, e.g.*, *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at P 20 (explaining that "PJM's MOPR is a mechanism that seeks to prevent the exercise of buyer-side market power in the forward capacity market, which occurs when a large net-buyer – that is, an entity that buys more capacity from the market than it sells into the market – invests in capacity and then offers that capacity into the auction at a reduced price"); December 2019 Order, Comm'r Glick Dissent at PP 14-15; Docket Nos. EL16-49-000, *et al.*, Request for Rehearing of Clean Energy Advocates at 26-31 (July 30, 2018) (describing the background of the MOPR).

[164] *See, e.g.*, *NJBPU*, 744 F.3d at 106-107.

[165] *See PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at PP 131-32; December 2019 Order at P 151.

"state" support for generation – including long-standing policies, programs, and business models that heretofore the Commission has not suggested justify MOPR application. The Commission's general assertion that "[a] purpose of the MOPR has been to avoid price suppression"[166] obscures and minimizes this fundamental shift in the MOPR. As Commissioner Glick correctly noted, the change to the MOPR adopted in the December 2019 Order is "one of kind and not just degree"[167]

The Commission utterly fails to justify this vast MOPR expansion. While APPA, AMP, and PPANJ have long objected to the Commission's MOPR policies, particularly as applied to public power resources, the Commission's nominal purpose of addressing the exercise of buyer-side market power through entry of a particular resource at least had some connection to the requirements of ensuring just and reasonable market-based rates under the FPA.[168] The Commission's expanded use of the MOPR to (selectively) counter "price suppression" attributable to numerous state and local policies and programs relating to generation fundamentally departs from the aim of mitigating the exercise of market power.

The Commission continues to point to "new efforts to provide State Subsidies to existing resources, or increased support for other types of new resources, that threaten to depress market clearing prices below competitive levels."[169] But state support for certain resources and technologies (such as RPS programs), to say nothing of the presence of public power and vertically integrated utilities, have coexisted in the PJM capacity construct for years with no harm to resource adequacy or the achievement of reliability standards. Until now, the

[166] December 2019 Order at P 39.

[167] December 2019 Order, Comm'r Glick Dissent at P 16.

[168] *See, e.g.*, *Mont. Consumer Counsel v. FERC*, 659 F.3d 910; *Blumenthal v. FERC*, 552 F.3d at 882; *Pub. Util. Dist. No. 1 of Snohomish Cty., Inc.*, 384 F.3d at 760; *California ex rel. Lockyer*, 383 F.3d 1006; December 2019 Order, Comm'r Glick Dissent at P 14.

[169] December 2019 Order at P 39.

Commission has not deemed state "out-of-market" support for certain resources to be grounds for extending the MOPR beyond the new, gas-fired resources to which the PJM MOPR has been limited, consistent with the original purpose of the MOPR to mitigate the exercise of buyer-side market power so as not to interfere with the resource adequacy aims of RPM.[170]

In neither the June 2018 Order nor the December 2019 Order has the Commission identified how the current, or even expected, level of state support now renders the rates produced by RPM unjust and unreasonable after years of RPM prices reflecting bids from resources that receive what the Commission now characterizes as "State Subsidies." The Commission does not allege that the various programs deemed to be State Subsidies reflect the exercise of buyer-side market power. Nor does the December 2019 Order offer any quantitative evidence showing that State Subsidies are impacting RPM clearing prices.[171]

Even after an extensive paper hearing, the Commission does not point to any substantial evidence drawing a connection between alleged price suppression attributable to State Subsidies and any failure of RPM to send appropriate price signals to attract generation needed to ensure resource adequacy in the PJM region such that the vastly expanded MOPR constitutes a just and reasonable replacement rate. It is undisputed that there is no shortfall in needed capacity in PJM; the amount of capacity procured through the BRAs has been, and is expected to remain, significantly above the reserve margin through at least June 2021.[172] Even accepting that state programs, as a general matter, would allow existing resources to bid into RPM auctions at prices

[170] *See* June 2018 Order at PP 5, 155.

[171] *See* Docket Nos. EL16-49-000, *et al.*, Request for Rehearing of the American Public Power Association, American Municipal Power, Inc. and Public Power Association of New Jersey at 12-14 (July 30, 2018) (discussing the insufficiency of the Commission's findings in the June 2018 Order).

[172] *See* 2019 Quarterly State of the Market Report for PJM: January through September, November 14, 2019 at p. 273, available at: http://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2019/2019q3-som-pjm-sec5.pdf.

lower than they might otherwise bid in the absence of state support, any downward pressure on clearing prices is appropriate and to be expected when there is over supply. Rather than demonstrating a lack of "market integrity," lower prices send a proper price signal that new supply is not needed.[173] Excluding existing and planned capacity from the market through the application of a broad MOPR (without any accommodation for state programs and policies) will only force consumers to pay higher capacity costs to support redundant capacity.

The Commission indicates that expansion of the MOPR is warranted because PJM's existing MOPR "failed to protect the 'integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support . . . .'"[174] The expanded MOPR process adopted in the December 2019 Order bears little resemblance to a "competitive" market. Rather, it implements a framework under which PJM and the IMM will administratively determine the "competitive" offer for every type of capacity resource.

The Commission has recognized that, in implementing a MOPR, it is important to strike an appropriate balance between over-mitigation and addressing price suppression.[175] Striking such a balance is, in fact, a requirement of reasoned decision-making, as the Commission may not adopt a remedy that is disproportionate to the problem it is seeking to address.[176] Extending the MOPR to cover *all* resources benefitting from State Subsidies unless an exemption applies is

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[173] *See, e.g., ISO New England Inc.*, 158 FERC ¶ 61,138, at P 26 (2017), *aff'd*, *NextEra Energy Resources v. FERC*, 898 F.3d 14 (explaining that "[t]o the extent that resources built pursuant to state incentive programs contribute toward meeting the region's resource adequacy requirements, the renewables exemption decreases the likelihood that customers must pay for more resources than are necessary to provide for resource adequacy or that the capacity market will provide a false signal that new investment is needed when this is not the case.").

[174] December 2019 Order at P 38 (quoting June 2018 Order at P 150).

[175] *See, e.g.*, *NextEra Energy Resources*, 898 F.3d at 21 (finding that "the Commission reasonably balanced the potential for limited price suppression against competing interests in concluding that the renewable exemption to the minimum offer price rule is consistent with the purpose of the forward capacity market"); *NJBPU*, 744 F.3d at 109 ("FERC is permitted to weigh the danger of price suppression against the counter-danger of over-mitigation, and determine where it wishes to strike the balance.").

[176] *See, e.g.*, *Interstate Nat. Gas Ass'n of Am.*, 285 F.3d at 37.

a vastly disproportionate response relative to the issue the Commission is purporting to address, as it will virtually guarantee that the MOPR will over-mitigate capacity resources in a manner that results in customers "paying twice" for capacity while sending an incorrect price signal that the market needs capacity when it does not. Over-mitigating capacity resources, *i.e.*, needlessly raising prices above the level necessary to achieve resource adequacy, is a more problematic threat to the "integrity" of the market than the support for certain generation resources by states to promote legitimate policy goals.[177]

2. The Commission Did Not Provide a Reasoned Explanation for Its Abandonment of the FRR Alternative

In the June 2018 Order, the Commission, having found the existing RPM provisions in the PJM Tariff unjust and unreasonable, suggested that a just and reasonable replacement rate might be constructed around "two overarching components."[178] The Commission reasoned that an expanded MOPR covering "out-of-market support to all new and existing resources, regardless of resource type,"[179] coupled with adoption of the FRR Alternative might produce a just and reasonable replacement rate.[180] The Commission acknowledged that adoption of an expanded MOPR with few exceptions might result in consumers paying twice for capacity as states pursued their resource policy goals.[181] The Commission emphasized that "we do not take

[177] *Cf. Weyerhaeuser Co.*, 549 U.S. at 320 (explaining that "the costs of erroneous findings of predatory-pricing liability are quite high because the mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition, and, therefore, mistaken findings of liability would chill the very conduct the antitrust laws are designed to protect." (internal quotes and cites omitted)).

[178] June 2018 Order at P 164.

[179] *Id.* at P 158.

[180] *See id.* at PP 158-60.

[181] *Id.* at P 159 (recognizing that "some ratepayers may be obligated to pay for capacity both through the state programs providing out-of-market support and through the capacity market.").

this concern—or the states' right to pursue valid policy goals—lightly."[182] The Commission found, therefore, "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, by implementing a resource-specific FRR Alternative option."[183] The FRR Alternative was a way "to accommodate state policy decisions and allow resources that receive out-of-market support to remain online . . . ."[184]

In the December 2019 Order, the Commission, with almost no discussion, declines to adopt the proposed FRR Alternative or any other mechanism aimed at "accommodate[ing] state policy decisions and allow[ing] resources that receive out-of-market support to remain online . . ."[185] The Commission provides no rationale for rejecting the FRR Alternative, offering only the conclusory statement that it finds the expanded MOPR approach adopted in the December 2019 Order superior to the FRR Alternative.[186] There is no explanation of *why* the Commission found the expanded MOPR without an accommodation method to be "superior." This is an inadequate explanation for abandoning what the Commission once characterized as one of "two overarching components" of a proposed just and reasonable replacement rate. APPA, AMP, and PPANJ recognize that the June 2018 Order's proposed replacement rate was just that – a proposal. Nonetheless, the Commission is obligated to provide a reasoned explanation for the significant change in its position about what would constitute a just and reasonable replacement rate and why, assuming that the Commission still does not take lightly concerns about paying twice for

[182] *Id.*

[183] *Id.*

[184] *Id.* at P 8.

[185] *Id.*; *see also* December 2019 Order at PP 6, 219.

[186] December 2019 Order at P 6.

capacity and states' right to pursue valid policy goals, the Commission apparently no longer believes that a mechanism aimed at "accommodat[ing] state policy decisions and allow[ing] resources that receive out-of-market support to remain online" is no longer needed for a just and reasonable replacement rate.[187]

3. The Commission Did Not Address the Replacement Rate's Costs to Consumers

In establishing a just and reasonable replacement rate in this proceeding, the Commission was obligated to weigh the costs to consumers,[188] even if it also considered non-cost factors.[189] The Commission has previously acknowledged that this analysis involves consideration of whether the MOPR framework "protect[s] consumers from paying for redundant capacity."[190] Although the Commission does not deny that capacity costs could increase, it makes no effort to assess the potential cost impact to consumers from the expanded MOPR framework or to weigh such cost impacts against the alleged benefits to be achieved through the expanded MOPR. As Commissioner Glick's calculation and other calculations in the record indicate, the cost impacts from an expanded MOPR are likely to be enormous.[191] The Commission does not address the potential cost impact except to say that it is appropriate for states to pay twice for capacity in situations where "state policies allow uneconomic entry in the capacity market."[192] Falling back on its theoretical justification for the MOPR expansion, the Commission argues that "[t]he

[187] June 2018 Order at P 8.

[188] *See NextEra Energy Resources*, 898 F.3d at 21 (explaining that "[t]he Commission must protect consumers from excessive rates and charges") (internal quotes, alterations and citations omitted).

[189] *See, e.g.*, *TransCanada Power Marketing*, 811 F.3d at 11-13; *Farmers Union Cent. Exch., Inc.*, 734 F.2d at 1502. *Cf. Michigan v. EPA,* 135 S. Ct. 2699.

[190] *ISO New England Inc.*, 155 FERC ¶ 61,023, at P 33 (2016), *reh'g denied*, 158 FERC ¶ 61,138 (2017), *aff'd NextEra Energy Resources v. FERC*, 898 F.3d 14.

[191] *See, e.g.*, December 2019 Order, Comm'r Glick Dissent at P 50.

[192] December 2019 Order at P 41.

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 exit of economically efficient capacity resources."[193] There is simply nothing in the December 2019 Order that even attempts to meet the Commission's obligation to assess and consider the cost impacts of its decision to expand the MOPR framework.

4. The Commission Did Not Justify the Application of the MOPR to Resources that Have Cleared an Auction

The expanded MOPR adopted in the December 2019 Order will apply to all resources that receive or are entitled to receive State Subsidies, even if a resource has already cleared a capacity auction. This decision departs from elementary economic theory and the Commission's previous view that there is no basis to apply the MOPR to existing resources because "a competitive offer for an existing resource would typically be very low, and often close to zero – *regardless of whether the resource receives any out-of-market payments*."[194] The Commission fails to provide a reasoned explanation for this particular change in policy.

The December 2019 Order is completely silent on this question. In the June 2018 Order, the Commission at least acknowledged that applying a MOPR to existing resources would be a change in policy, suggesting that application of the MOPR to existing resources would be justified by the fact that "many of the programs of current concern in PJM's filing, such as the ZEC program payments, apply only to resources that would not have been subject to PJM's current MOPR, even if they had been new."[195] This assertion, while true, did not rebut the Commission's prior economic rationale that a competitive offer from an existing resource would

[193] *Id.*

[194] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 132 (internal quotes omitted) (emphasis added)).

[195] June 2018 Order at P 153.

typically be very low regardless of any subsidies because, once a resource is built, the construction expenses are sunk costs, and "[a]t that point, the incremental costs of taking on a capacity obligation become much smaller, often approximating zero."[196]

IV. REQUEST FOR CLARIFICATION

A. The Commission Should Clarify that the MOPR Does Not Apply to Bilateral Self-Supply Contracts

APPA, AMP, and PPANJ ask the Commission to clarify that bilateral contracts between public power entities and unaffiliated third parties are not subject to the expanded MOPR adopted by the Commission in the December 2019 Order. If the Commission denies clarification, the Commission should grant rehearing on this point.

Public power entities in PJM, including joint action agencies, have traditionally met the power supply needs of their customers through a mix of owned generation and bilateral contracts.[197] The bilateral power supply contracts relied upon by public power entities to self-supply capacity are typically executed with unaffiliated third parties. In the past, PJM has treated these bilateral contracts as part of public power entities' self-supply for purposes of applying, and crafting exemptions from, the MOPR. For example, the self-supply exemption approved by the Commission in 2013 accounted for capacity from bilateral supply contracts in determining the applicable net-short and net-long thresholds.[198] PJM proposed to apply this same framework in response to the June 2018 Order.[199]

Given the breadth of the definition of "State Subsidies" adopted by the Commission, it is conceivable that a bilateral contract for capacity between a public power entity and an

[196] *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,145, at P 132.

[197] *See, e.g.,* AMP/PPANJ Initial Submission at 13-14; IMEA Reply Comments at 13-14.

[198] *See generally*, *PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090, at PP 63-115.

[199] *See* PJM Initial Submission at 32-34 and Attach. A; *see also* December 2019 Order at PP 178-79.

unaffiliated third party (or any resource backing the capacity contract) could be considered a subsidized resource subject to the expanded MOPR, absent an exception. Other language in the December 2019 Order, however, strongly indicates that the Commission does not intend for the MOPR to apply to capacity self-supplied through bilateral contracts. In particular, the Commission states at paragraph 70 of the December 2019 Order that "the record in the instant proceeding does not demonstrate a need to subject voluntary, arm's length bilateral transactions to the MOPR at this time."[200] Further, in describing the self-supply exemption for existing resources adopted in the December 2019 Order and the application of the MOPR going forward, the Commission consistently refers only to resources "owned" by self-supply entities.[201] This suggests that the Commission believes bilateral capacity contracts with unaffiliated suppliers are entirely excluded from the MOPR, and thus, there is no reason to include existing contracts within the self-supply exemption or specify how the MOPR might apply to future contracts.

The Commission should clarify that bilateral contracts between public power entities and unaffiliated third parties are not subject to the expanded MOPR adopted by the Commission in the December 2019 Order. Such a ruling would be consistent with the Commission's recognition of the benefits of long-term contracting in organized markets and its efforts to facilitate such agreements.[202] Granting clarification would also be consistent with the Commission's obligations under FPA section 217(b)(4), which, as discussed above, seeks to protect the ability of LSEs (including public power utilities) to utilize long-term power supply arrangements to serve their native load. Denying the requested clarification would be

[200] December 2019 Order at P 70 (footnote omitted).

[201] *Id.* at PP 12, 202-203.

[202] *See Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, FERC Stats. & Regs. ¶ 31,281 at PP 278, 301-309 (2008), *order on reh'g*, Order No. 719-A, FERC Stats. & Regs. ¶ 31,292, *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009).

inconsistent with FPA section 217(b)(4) and Order No. 719, in addition to being legally infirm for all the reasons that APPA, AMP, and PPANJ discuss above in the rehearing request, and rehearing should be granted in the absence of the requested clarification.

The Commission should, at a minimum: (i) clarify that the self-supply exemption adopted in the December 2019 Order extends to a resource owned or contracted for by a self-supply entity;[203] and (ii) clarify that, if a bilateral contract for capacity supported by a specific capacity resource terminates and the capacity resource becomes the subject of subsequent bilateral contract, the subsequent bilateral contract is not considered a new contract to which the MOPR applies again.

B. The Commission Should Clarify the Roles of PJM and the MMU in Reviewing and Approving the Unit-Specific Exemption

As discussed above, the Commission retained the Unit-Specific Exemption from the MOPR, expanded to cover existing and new resources of all types.[204] The Commission's intent appears to be to utilize the existing process for Unit-Specific Exemptions but expand the eligibility for the exemption to any "State-Subsidized Resources," whether new or existing.[205] However, the Commission's brief description of the existing Unit-Specific Exemption process may have unintentionally modified it to minimize PJM's role and increase the Market Monitor's role with regard to review and approval of requests for such an exemption. Accordingly, APPA, AMP, and PPANJ request that the Commission clarify that it did not intend to reverse the roles of PJM and the Market Monitor with regard to the Unit-Specific Exemption.

Attachment DD, Section 5.14(h)(5) of the PJM Tariff describes the current Unit-Specific

[203] *See* December 2019 Order at PP 202-203.

[204] December 2019 Order at P 214.

[205] *Id.*

Exemption.[206] As described in the Tariff, a Sell Offer that does not meet the criteria required to exceed the offer floor may still be permitted without being "re-set" to the minimum offer "if the Capacity Market Seller obtains a determination from the Office of the Interconnection or the Commission, prior to the RPM Auction in which it seeks to submit the Sell Offer, that such Sell Offer is permissible because it is consistent with the competitive, cost-based, fixed, net cost of new entry were the resource to rely solely on revenues from PJM-administered markets."[207] Accordingly, the PJM Tariff specifies that either PJM or the Commission may approve a Unit-Specific Exemption request. The Market Monitor's role is to "review the information and documentation in support of the request and shall provide its findings whether the proposed Sell Offer is acceptable, in accordance with the standards and criteria hereunder, in writing, to the Capacity Market Seller and the Office of the Interconnection by no later than ninety (90) days prior to the commencement of the offer period for such auction."[208] Thus, the Market Monitor reviews the Unit-Specific Exemption request and makes a recommendation but does not have the authority to approve or deny such a request.

In the December 2019 Order, the Commission directed PJM to maintain the Unit-Specific Exemption, expanded to cover new and existing State-Subsidized Resources of all types.[209] While the Commission noted that "PJM's criteria, parameters, and evaluation process, moreover, will largely track the Unit-Specific Exemption methodology set forth in PJM's currently-effective Tariff" the Commission also stated that any resource should "submit such bids to PJM

[206] PJM OATT Attachment DD.5.14(h)(5).

[207] *Id.*

[208] *Id.* at Attachment DD.5.14(h)(5)(iv).

[209] December 2019 Order at P 214.

for review."[210] Additionally, the Commission noted: "This will operate as a unit-specific alternative to the default offer price floor, as discussed above, for both new and existing resources, and will be based on the resource's expected costs and revenues, subject to approval by the Market Monitor."[211]

APPA, AMP, and PPANJ believe the Commission intended to retain the existing evaluation process, which includes: (i) review and a recommendation by the Market Monitor, rather than approval; and (ii) review and approval by PJM of Unit-Specific Exemption requests. The Commission should clarify that the Market Monitor's role is limited to review and recommendation and that the Market Monitor is not authorized to approve or deny Unit-Specific Exemption requests, consistent with the existing evaluation process. Given the increased importance of the Unit-Specific Exemption, such a clarification is important.

C. The Commission Should Clarify the Agreements Filed by PJM for Capacity Resources that Qualify as Existing Resources

The Commission lists the criteria for existing capacity resources owned by self-supply entities that may qualify for the Self-Supply Exemption, which includes, among other criteria, having an executed interconnection construction service agreement or having an unexecuted interconnection construction service agreement filed by PJM for the resource with the Commission on or before the December 2019 Order.[212] The interconnection construction service agreement is but one of the standardized PJM agreements for resources interconnecting to either Commission-jurisdictional transmission facilities or non-jurisdictional distribution facilities that

[210] *Id.*

[211] *Id.*

[212] *Id.* at P 202.

wish to access the PJM capacity construct and other PJM markets.[213] In addition to the Interconnection Construction Service Agreement ("ICSA"), the agreements include:[214]

• Interconnection Service Agreements ("ISA"): the standard agreement developed for generation and controllable flow transmission projects whose Point of Interconnection is FERC-jurisdictional. The ISA and ICSA are companion agreements and are generally executed concurrently.

• Wholesale Market Participant Agreements ("WMPA"): the standard agreement for generators planning to connect to the local distribution systems at locations that are not under Commission jurisdiction and wish to participate in PJM's markets. This is comparable to an ISA.

• Interim Interconnection Service Agreements ("IISA"): the IISA is used to advance construction activities before the completion of interconnection studies in the limited circumstances when an interconnection customer may wish to initiate project construction activities on an expedited basis, for example, when equipment or materials have a long lead time for delivery.

The Commission should clarify that any self-supply capacity resource that has an executed ICSA, ISA, WMPA, or IISA or that has requested that PJM file an unexecuted ICSA, ISA, WMPA or IISA with the Commission on or before the date of the December 2019 Order qualifies for the Self-Supply Exemption.

[213] PJM Manual 14(C) provides an overview of the different types of agreements that are the outcome of the PJM Regional Transmission Expansion Plan (RTEP) queue study process and discussion around the aspects of the agreements that have a significant bearing on project implementation in a majority of cases.

[214] The forms of each agreement are found in PJM Tariff, Attachment O.

V. CONCLUSION

For the reasons set forth above, APPA, AMP, and PPANJ respectfully request the Commission to grant rehearing and clarification of its December 2019 Order in this proceeding as described herein.

Respectfully submitted,

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Dated: January 21, 2020

CERTIFICATE OF SERVICE

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

Dated at Arlington, Virginia, this 21st day of January, 2020.

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