UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Calpine Corporation	)	
	)	
v.	)	**Docket No. EL16-49-000**
	)	
PJM Interconnection, L.L.C.	)	
PJM Interconnection, L.L.C.	)	**Docket No. ER18-1314-000**
	)	**Docket No. ER18-1314-001**
PJM Interconnection, L.L.C.	)	**Docket No. EL18-178-000**
		(Consolidated)

REPLY BRIEF OF THE ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to the June 29, 2018 order of the Federal Energy Regulatory Commission (the "Commission" or "FERC") in the above-captioned proceedings and the Commission's notice of extension of time,[1] the Electric Power Supply Association ("EPSA")[2] hereby submits its reply brief, as well as the affidavits of David W. DeRamus, Ph.D., and Collin Cain, M.SC. (the "DeRamus/Cain Affidavit") (Attachment A), and Paul M. Sotkiewicz, Ph.D. (the "Sotkiewicz Reply Affidavit") (Attachment B), in the paper

[1] *See Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 at Ordering Para. (F) (2018) (the "June 29 Order"), *reh'g pending*; *Calpine Corp. v. PJM Interconnection, L.L.C.*, Notice of Extension of Time, Docket Nos. EL16-49-000, *et al.* (August 22, 2018) (unreported).

[2] Launched over 20 years ago, EPSA is the national trade association representing leading independent power producers and marketers. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. Power supplied on a competitive basis collectively accounts for 40 percent of the U.S. installed generating capacity. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

hearing established by the June 29 Order. As discussed in EPSA's initial brief,[3] the Commission should require PJM Interconnection, L.L.C. ("PJM")[4] to implement a "clean MOPR" in order to "protect PJM's capacity market from the price suppressive effects of resources receiving out-of-market support,"[5] and should abandon the "FRR Alternative" proposed in the June 29 Order, which will exacerbate, rather than mitigate, these very same price suppressive effects. A "clean MOPR" is the most direct remedy for the price suppression problem and is a remedy that can be implemented in time for the next Base Residual Auction ("BRA"). Adopting a "clean MOPR" will ensure that this and subsequent Reliability Pricing Model ("RPM") auctions produce just and reasonable rates, as required under Section 206 of the Federal Power Act (the "FPA").[6]

I. ARGUMENT

A review of the initial submissions in this paper hearing confirms that the proper course is for the Commission to go forward with its proposal to require PJM to implement "[a]n expanded MOPR, with few or no exceptions,"[7] and, more specifically, what has been referred to as a "clean MOPR" and to abandon the "FRR Alternative" proposed in the June 29 Order[8] and variants of that proposal put forth by various

---

3 Initial Brief of the Electric Power Supply Association, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "EPSA Initial Brief").

4 Capitalized terms not otherwise defined herein have the meanings given them in the PJM Open Access Transmission Tariff (the "PJM Tariff").

5 June 29 Order, 163 FERC ¶ 61,236 at P 158.

6 16 U.S.C. § 824e (2012).

7 June 29 Order, 163 FERC ¶ 61,236 at P 158.

8 *Id.* at P 160.

parties, including (but not limited to) PJM's Resource Carve Out ("RCO") approach.[9] As acknowledged by PJM and others advocating such an approach, the FRR Alternative will negate the remedial benefits of an expanded MOPR and thus perpetuate the price suppression problem that the Commission properly found to be unjust and unreasonable in the June 29 Order. Adopting such a replacement rate would be irrational and unacceptable as a policy matter and unlawful as a statutory and constitutional matter.

EPSA discusses the serious problems with the FRR Alternative underscored by RCO, as well as the dangers of various other proposals to punch holes in the expanded MOPR, below. EPSA also separately responds to (1) the "competitive carve-out" approach proposed in the initial comments of the Maryland Public Service Commission (the "Maryland PSC"),[10] (2) the initial brief of the Independent Market Monitor for PJM (the "IMM"),[11] and (3) baseless suggestions by certain parties that the Commission should give up on the RPM construct altogether.

At the outset, much as EPSA and the Commission might wish for broad stakeholder consensus behind an approach that would both mitigate the effects of subsidized resources and accommodate such resources, no such consensus exists. Importantly, notwithstanding claims by certain groups to represent "broadly divergent

---

[9] *See generally* Initial Submission of PJM Interconnection, L.L.C., Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "PJM Brief").

[10] *See* Initial Comments of the Maryland Public Service Commission, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "Maryland PSC Comments").

[11] *See* Brief of the Independent Market Monitor for PJM, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "IMM Brief").

interests,"[12] these groups do not speak for the public utilities that depend on the PJM-administered markets for their revenues and that have a statutory and constitutional right to "the *opportunity* to recover [their] costs" in those markets,[13] a right denied them when prices in those markets are artificially suppressed by below-cost offers from subsidized resources. Rather, these groups are unified by their shared economic interest in preventing effective mitigation of the price suppression found to be unjust and unreasonable in the June 29 Order.[14] As the Commission has recognized, this sort of stakeholder unity "may simply indicate financial interests"[15] having nothing to do with market efficiency concerns.[16] In any event, the Commission has an "independent duty to ensure that jurisdictional rates are just and reasonable,"[17] and no amount of

---

[12] Joint Brief of Consumer Advocates, NGOs, and Industry Stakeholders at 1, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "Joint Stakeholders Brief").

[13] *Bridgeport Energy, LLC*, 113 FERC ¶ 61,311 at P 29 (2005) (emphasis in original), *on reh'g*, 114 FERC ¶ 61,265 (2006). *See also*, *e.g.*, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944); *Price Formation in Energy and Ancillary Servs. Mkts. Operated by Reg'l Transmission Orgs. & Indep. Sys. Operators*, 153 FERC ¶ 61,221 at P 2 (2015); *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,196 at P 49, *on reh'g*, 103 FERC ¶ 61,210 (2003).

[14] In this regard, EPSA notes that the "generation companies" subscribing to the positions attached to the Joint Stakeholders Brief, Joint Stakeholders Brief at 1, are all entities that currently receive or are seeking subsidies for their nuclear-power resources. It is thus hardly surprising that they would find agreement with the other parties to that brief on "certain basic principles," *id.* at 2, centered around undermining the effectiveness of an expanded MOPR.

[15] *ISO New England Inc.*, 131 FERC ¶ 61,065 at P 36, *on reh'g*, 132 FERC ¶ 61,122 (2010).

[16] *See New York Indep. Sys. Operator, Inc.*, 136 FERC ¶ 61,165 at P 65 (2011) (agreeing that "individual market participants may be driven by considerations narrowly focused on their own economic interests in a way that will not align with the efficiency implications" of a proposed market rule change).

[17] *Arkansas Power & Light Co.*, 59 FERC ¶ 61,417 at 62,540 (1992) ("*Arkansas P&L*") (citations omitted).

stakeholder support allows it to shirk that duty.[18] And no amount of stakeholder support can justify replacement rates that would simply perpetuate the existing unjust and unreasonable price suppression identified in the June 29 Order.

A. The Commission Should Abandon The FRR Alternative And, If It Does Not Abandon That Proposal Altogether, Must Take Additional Steps To Protect The RPM Market

1. The Commission Should Abandon The FRR Alternative And Reject RCO And Other FRR Alternative Variants

PJM's RCO proposal perfectly illustrates how and why adoption of the FRR Alternative replacement rate will negate the remedial benefits of an expanded MOPR. To be clear, while the particulars of the RCO mechanism underscore the flaws in the FRR Alternative, these flaws are inherent in the FRR Alternative. As Dr. DeRamus and Mr. Cain observe, any of the different "flavors" of the FRR Alternative "will enshrine price suppression rather than correct it."[19] As a result, none of the other variants on the FRR Alternative set forth in parties' initial submissions are materially better than the

---

[18] *See*, *e.g.*, *California Indep. Sys. Operator Corp.*, 120 FERC ¶ 61,192 at n.31 (2007) ("The stakeholders have approved this filing, but we nevertheless must independently assess its merits and find the proposal just and reasonable."); *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 FERC ¶ 61,117 at P 25 ("[A] stakeholder vote by itself is not a sufficient basis for finding a rate just and reasonable." (footnote omitted)), *on reh'g*, 115 FERC ¶ 61,162 (2006); *PJM Interconnection, L.L.C.*, 104 FERC ¶ 61,309 at P 19 (2003) ("While we recognize that the [regional transmission organizations] and [independent system operators] have approved these filings through their stakeholder processes and will give such approval due deference, we nevertheless must address each filing on its merits and be able to find the proposal just and reasonable."), *on reh'g*, 109 FERC ¶ 61,286 (2004); *PJM Interconnection, L.L.C.*, 103 FERC ¶ 61,167 at P 31 (2003) ("[E]ven if the Commission's determination were at odds with the stakeholder process, we find that the stakeholder process cannot impede the larger goal of ensuring non-discriminatory terms and conditions . . . ."). *Cf. ISO New England Inc.*, 162 FERC ¶ 61,205 at P 119 (2018) (the "CASPR Order") (stating that "lack of stakeholder support does not alone render a section 205 filing unjust and unreasonable" (citation omitted)).

[19] DeRamus/Cain Affidavit, ¶ 7.

Commission's proposal, and all would have the same effect of negating the remedial benefits of an expanded MOPR.[20]

Under RCO, PJM would "deem that sellers are offering [RCO] resources at a price of zero dollars" into the RPM auction.[21] That being the case, it is a massive understatement for PJM to say that its RCO proposal "will not fully protect capacity clearing prices from the effects of awarding capacity commitments to uneconomic resources."[22] In point of fact, RCO will not protect the market at all and will prevent an expanded MOPR from protecting the market. PJM's own witness, Hung-po Chao, Ph.D., concedes as much and also makes clear that the same would be true if the resources and load were removed from the market as contemplated by the June 29 Order's description of the Alternative FRR,[23] stating:

> [T]he economic effects of the RCO generally should be expected to be the same as those that would result from the subsidized resource submitting an offer at zero price. If a subsidized (state-sponsored) resource is allowed to satisfy a fixed quantity of demand carved out of the capacity auction, it would have the same economic effects (price suppression and resource substitution) on the capacity market as a zero-price offer in the capacity market.[24]

In other words, as Dr. DeRamus and Mr. Cain confirm, the economic effects of price-taker offers under RCO are the same as no mitigation at all, and genuinely carving out

---

20 *See id.*, ¶¶ 6-7, 17-29, 37-40.

21 PJM Brief at 57 (citation omitted).

22 *Id.* at 64.

23 *See* June 29 Order, 163 FERC ¶ 61,236 at P 160.

24 PJM Brief, Attachment C, Affidavit of Hung-po Chao, Ph.D. on Behalf of PJM Interconnection, L.L.C., ¶ 9 (the "Chao Affidavit").

the resources and load, as contemplated by the June 29 Order, would have the same economic effects.[25]

Because the economic effect of RCO or any other version of the FRR Alternative will be the same as no mitigation at all, even a "clean MOPR" will only protect the market to the extent that the FRR Alternative "exemption" does not apply. PJM asserts that, together, the expanded MOPR and the RCO will provide "*sufficient* protection,"[26] but provides no evidence, much less substantial evidence, for this assertion. Notably, PJM has not even attempted to quantify the price suppression that would actually be eliminated by the combination of its expanded MOPR and RCO or to explain why the price suppression that will remain is just and reasonable. Having found the level of price suppression allowed by the current rules to be unjust and unreasonable,[27] the Commission requires substantially more than PJM's "say-so" before it can find the level of price suppression preserved under the RCO to be just and reasonable,[28] and it

---

[25] *See* DeRamus/Cain Affidavit, ¶ 9 (stating that the "RCO proposal is a faithful attempt at filling in the details of the FRR Alternative" and that the "specifics of the PJM proposal make clear that price suppression would be preserved"). *See also* Initial Brief of the PJM Power Providers Group, Revised Attachment, Affidavit of Roy J. Shanker, Ph.D., ¶ 28, Docket Nos. EL16-49-000, *et al.* (filed Oct. 4, 2018) (the "Shanker Affidavit") ("[T]here is no distinction between the unit specific FRR proposal of removing both subsidized generation and comparable load versus simply the full inclusion of unmitigated, subsidized supply offering in at zero. In both cases, the result is the same, and the level of price suppression is identical."); Initial Brief of NRG Power Marketing LLC, Attachment, Affidavit of Robert B. Stoddard on Behalf of NRG Power Marketing LLC, ¶ 18, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) ("Stoddard Affidavit") ("As proposed, the FRR Alternative functionally destroys MOPR in its entirety.").

[26] PJM Brief at 64 (emphasis in original).

[27] *See* June 29 Order, 163 FERC ¶ 61,236 at P 156.

[28] *See*, *e.g.*, *Midcontinent Indep. Sys. Operator, Inc.*, 148 FERC ¶ 61,071 at P 61 (2014) (rejecting proposal where "no studies or other evidence in the record that support" it were provided), *on reh'g, Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 150 FERC ¶ 61,104 (2015); *Southwest Power Pool, Inc.*, 147 FERC ¶ 61,201 at P 141 (2014) (declining to order tariff revisions where the proponent had "not provided adequate evidence to

certainly cannot, as some parties suggest, shift "the burden for articulating a rationale for *why* [the resulting] prices are too low" onto EPSA and others opposed to the FRR Alternative.[29] The Commission bears the burden in this case of fixing a just and reasonable replacement rate,[30] and doing so demands a showing that any residual price suppression allowed by any replacement rate is just and reasonable. In other words, the Commission must demonstrate that it has eliminated enough price suppression to render the PJM Tariff just and reasonable.

Other supporters of the FRR Alternative similarly concede that this mechanism will negate the effect of an expanded MOPR; indeed, in many cases, that is precisely why they support it. The Joint Stakeholders, for example, tout the fact that their "FRR-RS" version of the FRR Alternative "would largely offset the potential impact of an expanded MOPR and lead RPM clearing prices closer to recent results."[31] Preserving the status quo is no virtue, however, when the status quo has been found to be unjust and unreasonable because of "the price suppressive impact of resources receiving out-

---

support [its] assertion"), *on reh'g*, 152 FERC ¶ 61,235 (2015); *ISO New England Inc.*, 118 FERC ¶ 61,224 at P 11 (2007) (finding that "find that the Applicants have not provided the Commission with adequate information to determine that the proposed tariff revision is just and reasonable and not unduly discriminatory or preferential"); *New York Indep. Sys. Operator, Inc.*, 111 FERC ¶ 61,117 at P 85 (cautioning the New York Independent System Operator, Inc. ("NYISO") against proposals supported only by "a flat conclusory statement that each conclusion was reached based on NYISO's best judgment and was fully debated in the stakeholder process" and reminding it that "[t]he Commission must rely on evidence in the record to approve the applicant's proposals and may not merely rubber stamp NYISO's findings"), *on reh'g*, 112 FERC ¶ 61,283 (2005).

[29] Comments of Clean Energy and Consumer Advocates at 17, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) ("Clean Energy & Consumer Advocates Brief").

[30] *See FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 353 (D.C. Cir. 2014); *Maryland Pub. Serv. Comm'n v. FERC*, 632 F.3d 1283, 1285 n.1 (D.C. Cir. 2001); *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988).

[31] Clean Energy & Consumer Advocates Brief, Attachment A, *A Proposal for the Resource-Specific Fixed Resource Requirement that Accommodates State Public Policy Goals, Preserves the Capacity Market, and Protects Consumer Interests* at 9.

of-market support."[32] Having found it "necessary to address" that "price suppressive impact,"[33] the Commission must actually address that impact and cannot adopt an FRR Alternative that effectively cancels out the remedial effects of an expanded MOPR.

The particulars of PJM's version of the FRR Alternative illustrate how a dangerous misconception about the current Fixed Resource Requirement (the "FRR") underlies and distorts thinking about the FRR Alternative in much the same way this mechanism would allow out-of-market subsidies to continue distorting the RPM market. This misconception, which Dr. Sotkiewicz discussed in detail in his initial affidavit, is that, under the FRR or the FRR Alternative, "both supply resources and demand are simply removed from the [capacity] market."[34] The June 29 Order describes the current FRR and the FRR Alternative in precisely these terms,[35] and PJM likewise claims that, under RCO, "subsidized resources and load are excluded from the market . . . ."[36] But as Dr. Sotkiewicz explained, "[t]his idea is a myth"[37] that "gives the illusion of protecting the market but does nothing of the kind."[38] While the current FRR has conditions that

---

32 June 29 Order, 163 FERC ¶ 61,236 at P 5.

33 *Id.*

34 *See* EPSA Initial Brief, Attachment A, Affidavit of Paul M. Sotkiewicz, Ph.D., ¶¶ 8-12, 68-79, 89-92 (the "Sotkiewicz Initial Affidavit").

35 *See*, *e.g.*, June 29 Order, 163 FERC ¶ 61,236 at P 160 (describing the FRR Alternative as "allow[ing], on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load"); *id.* at P 161 (stating that the FRR Alternative creates a "bifurcated capacity market" where "resources receiving out-of-market support and a commensurate amount of load would be outside of the PJM capacity market").

36 PJM Brief at 3.

37 Sotkiewicz Initial Affidavit, ¶ 8.

38 *Id.*, ¶ 12.

mitigate the harm to the market and ensure that load "pay[s] for the consequences of their FRR election,"[39] the FRR Alternative, by its nature, lacks such protections.[40]

In truth, as Dr. Sotkiewicz explained in his initial affidavit, both the FRR and the FRR Alternative leave load in the capacity market and pull uneconomic generation back into the capacity market.[41] Demand for resource adequacy is determined for the entire PJM footprint, and FRR mechanisms merely allow for some part of the resource adequacy need to be satisfied with specific resources.[42] Similarly, the uneconomic resources typically used to serve FRR load cannot be removed from the market for the simple reason that one "cannot remove supply from the market when it was not in the market."[43] The mechanics of PJM's RCO variant leave no room for anyone but the most committed fantasist to maintain otherwise:

- PJM would "deem that sellers are offering [RCO] resources at a price of zero dollars";[44]
- The allegedly "carved out" resources will "still obtain capacity commitments"[45] and be "counted toward meeting the region-wide reliability requirement";[46]
- PJM will "include resources and load that have elected the Resource Carve-Out option . . . in the auction clearing process";[47] and

---

39 *Id.*, ¶ 67.

40 It is precisely for this reason that, while EPSA strongly opposes the FRR Alternative, it is not proposing to eliminate the current FRR and recognizes that the current FRR provides an option for states wishing to opt out of the RPM construct.

41 *See* Sotkiewicz Initial Affidavit, ¶¶ 9-11, 70-71.

42 *See id.*, ¶ 9.

43 *See id.*, ¶ 11.

44 PJM Brief at 57 (citation omitted).

45 *Id.*

46 *Id.*, Attachment B, Affidavit of Adam J. Keech on Behalf of PJM Interconnection, L.L.C., ¶ 10 (the "Keech Affidavit").

- RCO resources "will be used by PJM to serve all PJM load and the carved out load will be served by the most economic set of resources in PJM . . . ."[48]

Adam Keech, PJM's Executive Director for Market Operations, states that PJM's approach is "consistent with the physical reality of system operations" and that "[m]odels that remove the Carved Out Resource and subsidizing load . . . suggest a physical relationship between the two that is inconsistent with system operations."[49] Nonetheless, PJM would have the Commission pretend that "subsidized resources and load are excluded from the market . . . ."[50] While the willing suspension of disbelief plays a useful role when reading poetry, it can lawfully have no role in ratemaking under the FPA or agency decision-making under the Administrative Procedures Act.[51]

The danger of the myth that FRR constructs remove resources and load from the capacity market is evident in PJM's assertion that, under RCO, "the offers and demand curve that form price in the residual market are themselves competitive."[52] This assertion is simply incorrect, both as to RCO and as to the FRR Alternative more broadly, in at least two critical respects. First, there is no separate "residual market,"[53] because, as discussed above, the generation and load never leave the capacity market under either RCO or the FRR Alternative. Second, the prices in the RPM market will not

---

47 Keech Affidavit, ¶ 6.

48 *Id.*

49 *Id.*, ¶ 7.

50 PJM Brief at 3.

51 *See*, *e.g.*, *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 212 (D.C. Cir. 2018) (emphasizing that "FERC's complex mandate doesn't relieve it of the requirements of reasoned decisionmaking" (citation omitted)).

52 PJM Brief at 3.

53 *Id.*

be competitive, as they will not reflect the marginal cost of the highest cost resource taking on a capacity commitment. As PJM's own expert witness admits, the purported carve-out of a given resource will "have the same economic effects (price suppression and resource substitution) on the capacity market as a zero-price offer in the capacity market."[54] The result will be the perpetuation of a status quo that, as the Commission has already held, fails to "harness competitive market forces and produce just and reasonable rates."[55] The resource substitution effect is also flatly inconsistent with the Commission's rejection in the June 29 Order of "the premise that resources receiving out-of-market support should obtain a capacity commitment at the expense of [economic] resources . . . ."[56]

2. If The Commission Moves Forward With The FRR Alternative, It Must Take Additional Steps To Protect The RPM Market

As discussed above, the FRR Alternative will negate the remedial effects of an expanded MOPR. The logical and rational (as well as just and reasonable) response would be to abandon the FRR Alternative and to require that PJM adopt only an expanded MOPR, which will address the unlawfulness identified in the June 29 Order by "protect[ing] PJM's capacity market from the price suppressive effects of resources receiving out-of-market support by ensuring that such resources are not able to offer below a competitive price."[57]

---

54 Chao Affidavit, ¶ 9.

55 June 29 Order, 163 FERC ¶ 61,236 at P 156.

56 *Id.* at P 66.

57 *Id.* at P 158.

If the Commission nonetheless presses forward with the FRR Alternative, it should not do so without also requiring the "Extended RCO" mechanism described in PJM's brief and the Chao Affidavit, which will counteract some, but not all, of the FRR Alternative's price suppressive effects. The Commission must also ensure that FRR Alternative/RCO transactions are subject to transaction-specific review under Section 205 of the FPA,[58] at least where those transactions involve affiliates.

(a) The Commission Should Not Adopt The FRR Alternative Without Also Adopting The Extended RCO

PJM "offers for consideration" the Extended RCO, which "takes the RCO alternative and adds an explicit mechanism, not unlike PJM's Capacity Repricing, to restore the residual market clearing price closer to the economically correct outcome."[59] Of course, the only reason it is necessary to make this further adjustment to "get closer to the economically correct outcome"[60] is because RCO and other versions of the FRR Alternative move the clearing prices away from that outcome, and leave in place the existing price suppression that the Commission properly found to be unjust and unreasonable in the June 29 Order.[61] If one assumes that the Commission will take that unwise, unjust and unreasonable step, it is vital that the Commission take the further step of mitigating the unjust and unreasonable price-suppressive effects of the FRR Alternative through the Extended RCO or some similar mechanism.

---

58 16 U.S.C. § 824d (2012).

59 PJM Brief at 10.

60 *Id.*

61 *See* June 29 Order, 163 FERC ¶ 61,236 at PP 155-56.

The Extended RCO would provide for a two-stage BRA, under which (1) capacity commitments are assigned in the first stage "based on competitive offers from non-RCO resources and (deemed) zero-price offers from [RCO] resources,"[62] and (2) the price for the non-RCO resources is determined in a second stage after PJM "remove[s] from the supply stack all resources that elected the RCO option . . . ."[63] Economic resources "crowded out" in the first stage would be paid the difference between their offer price and the second-stage clearing price.[64] Dr. Chao states that the Extended RCO thus "should reasonably address the risk" of price suppression under RCO and the "resource substitution effect due to commitment of the uneconomic [RCO] resources . . . crowding out the infra-marginal offers of economic resources."[65]

PJM concedes that this additional element of Extended RCO is necessary, because RCO alone does not mitigate conventional buyer-side market power.[66] PJM states:

> [R]estoring competitive pricing removes (or at least blunts) the incentives of large market buyers (or subsidizing states) to use uncompetitive resources to reduce clearing prices for their auction purchases below competitive levels. This concern is not speculative. States have approved resource subsidies knowing of the price suppressive impacts of such subsidies and may have even considered the "savings" that result from keeping prices artificially low as an offset to paying the subsidies for the resource. For example, testimony offered to the New Jersey assembly claimed that

---

62 PJM Brief at 66.

63 *Id.*

64 *See id.* at 71.

65 Chao Affidavit, ¶ 11.

66 The MOPR has always been concerned with "deterring the exercise of buyer-side market power," even as its role has "expanded to address the capacity market impacts of out-of-market state revenues." June 29 Order, 163 FERC ¶ 61,236 at P 5 (footnotes omitted).

> forestalling threatened retirements of the 3,360 MW Salem and Hope Creek nuclear plants would cost about $300 million in subsidy, but "save" New Jersey $400 million in wholesale power expenditure.[67]

Accordingly, without the additional pricing element, RCO would create a loophole allowing buyers to exercise buyer-side market power, which, as the Commission has consistently held, will prevent a capacity market from producing just and reasonable prices.[68]

Dr. DeRamus and Mr. Cain agree with Dr. Chao that the Extended RCO would address some, but not all, of the price suppression caused by RCO and other FRR Alternative schemes and would provide some relief to owners of economic resources crowded out by the RCO.[69] To be clear, the Extended RCO is not an optimal market design choice and is a choice that would be unnecessary but for an affirmatively bad market design choice, the FRR Alternative. As Dr. DeRamus and Mr. Cain put it, the Extended RCO proposal is essentially "a re-correction on top of the mitigation-reversing effects of the [RCO]," and "is not a necessary result," when a "properly-formulated MOPR would provide the necessary correction of market distortions without the complexities of carve-outs."[70] While "less than ideal,"[71] Extended RCO would be

---

67 PJM Brief at 68-69 (footnotes omitted).

68 *See, e.g.*, *PJM Interconnection, L.L.C.*, 128 FERC ¶ 61,157, at P 90 (2009) ("A capacity market will not be able to produce the needed investment to serve load and reliability if a subset of suppliers is allowed to bid non-competitively to suppress market clearing prices."); *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61,211 at P 103 ("While a strategy of investing in uneconomic entry and offering it into the capacity market at a low or zero price may seem to be good for customers in the short-run, it can inhibit new entry, and thereby raise price and harm reliability, in the long-run."), *on reh'g*, 124 FERC ¶ 61,301 (2008).

69 *See* DeRamus/Cain Affidavit, ¶¶ 10, 30-36.

70 *Id.*, ¶ 30.

71 *Id.*, ¶ 10.

significantly better than RCO or any other version of the FRR Alternative on a stand-alone basis.[72] Accordingly, to the extent that the Commission is going to adopt RCO or some other version of the FRR Alternative, the Commission must adopt the Extended RCO or some other means of addressing the price suppression problem.

(b) FRR Alternative Transactions, At Least Those Involving Affiliates, Must Be Subject To Transaction-Specific Review Under Section 205 Of The FPA

PJM correctly observes that "the transaction by which the RCO resource charges load to recoup its capacity value is a wholesale transaction, jurisdictional under the FPA," and that the Commission, therefore, is "bound to ensure that this rate is just and reasonable and not unduly discriminatory or preferential as required by the FPA."[73] The Commission's jurisdiction in this area is exclusive and non-delegable.[74] That a given

---

[72] *See id.* ("[W]hile it cannot solve the fundamental defects of RCO, [Extended RCO] would be far preferable to the base RCO proposal alone.").

[73] PJM Brief at 59.

[74] *See, e.g.*, *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 780 (2016) ("The FPA 'leaves no room either for direct state regulation of the prices of interstate wholesales' or for regulation that 'would indirectly achieve the same result.'" (quoting *Northern Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963))); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986) ("Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."); *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215 (1964) (holding that the FPA left "no power in the states to regulate . . . sales for resale in interstate commerce"); *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (1999) (stating that the Commission "alone has jurisdiction to regulate wholesale transactions"); *R.E. Ginna Nuclear Power Plant, LLC*, 154 FERC ¶ 61,157 at PP 30-31 (2016) (requiring modification of a settlement provision to make clear that a State commission's review of a reliability support services agreement will be "limited to [the agreement] that are within [the State commission]'s jurisdiction" in order to prevent any intrusion on the Commission's exclusive jurisdiction over "the wholesale rate and the terms and conditions of service related thereto"); *Midwest Indep. Transmission Sys. Operator, Inc.*, 111 FERC ¶ 61,448 at P 41 (rejecting the notion that "state commissions can serve as co-regulators with regard to wholesale energy markets" and emphasizing that "[t]he Commission is the agency charged by statute with regulating public utility sales for resale in interstate commerce"), *on reh'g*, 113 FERC ¶ 61,081 (2005); *Reporting Requirement for Changes in Status for Pub. Utils. with Market-Based Rate Authority*, Order No. 652 FERC Stats. & Regs. ¶ 31,175 at P 36 ("The Commission has an independent statutory duty to ensure that rates are just and

state may approve the rates for a particular RCO/FRR Alternative transaction does not relieve the Commission of its "independent statutory duty" to ensure that the rates, terms and conditions of the transaction are just and reasonable and not unduly discriminatory.[75]

Exactly how the Commission could find the rates, terms and conditions of many RCO/FRR Alternative transactions, whose prices are likely to be significantly higher than cost or market prices, to be just and reasonable and not unduly discriminatory, as required by Section 205 of the FPA, particularly when affiliates are involved, is unclear. What is clear, however, is that, as a general matter, the Commission will not be able to rely on the operation of the PJM market rules or blanket grants of market-based rate authorization to establish that the rates, terms and conditions of these transactions are just and reasonable and not unduly discriminatory or preferential and will, instead, have to review specific transactions under Section 205 of the FPA.

Not surprisingly, supporters of the FRR Alternative would prefer that the Commission simply wave these transactions through the gate without transaction-specific review under FPA Section 205. For example, the so-called "Joint Stakeholders" argue that sales from an FRR Alternative resource "with FERC market-based rate authority to an affiliated [load-serving entity] with captive customers, if undertaken pursuant to a state-sponsored clean capacity procurement, should not be subject to the

---

reasonable, and we cannot delegate this responsibility . . . ."), *on reh'g*, 111 FERC ¶ 61,413 (2005). *See also* PJM Brief at 59-60.

[75] *See Arkansas P&L*, 59 FERC ¶ 61,417 at 62,540.

Section 205 filing requirement under the seller's market-based rate tariff."[76] Emphasizing that "[t]his issue is important because a large share of the clean energy generation in PJM is owned by affiliated entities," the Joint Stakeholders opine that "[w]aiver of the affiliate restrictions would recognize and respect states' jurisdiction over environmental attributes and resource procurement and planning, and their strong policy interest in procuring capacity from non-emitting resources."[77] EPSA agrees that "[t]his issue is important,"[78] but strongly disagrees that the Commission can or should abdicate its responsibilities under FPA Section 205 as they suggest. The courts have made clear that the Commission "may not brandish a state's prior approval of . . . rates as if it were independently sufficient to satisfy the Commission's own regulatory obligations."[79] Moreover, the fact that many of these transactions will involve affiliates makes it more, not less, critical that the Commission carefully scrutinize their rates, terms and conditions.

At the outset, the Joint Stakeholders' argument begs the question of whether even non-affiliate transactions implementing the FRR Alternative can properly be allowed to occur pursuant to the sellers' market-based rate tariffs. From the buyer side of the equation, these transactions would not be voluntary but would be, as Exelon Corporation ("Exelon") puts it, "state-directed"[80] purchases from state-anointed sellers. And, as the Illinois Attorney General notes, the rates for these transactions will "be set

---

76 *See* Joint Stakeholders Brief at 11-12,. *See also* Initial Brief of Exelon Corporation at 25-28, Docket Nos. EL16-49-000, *et al*. (filed Oct. 2, 2018) (the "Exelon Brief")

77 Joint Stakeholders Brief at 12 (citation omitted).

78 *Id.*

79 *Missouri Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1077 (D.C. Cir. 2003).

80 Exelon Brief at 27.

outside the control of PJM, and the competitive constraints that are part of the BRA will be lost."[81] These transactions would essentially be puts, similar to those by qualifying facilities ("QFs") pursuant to the mandatory purchase provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). In the PURPA context, the Commission has found that such contracts do not qualify for market-based rate treatment where the seller was never a QF, stating:

> [B]ecause the power sale contract at issue is one that [the buyer] executed under the mandatory purchase requirements of PURPA, no aspect of the contract reasonably can be considered the product of market forces . . . . [T]he Commission approves market-based rates without reviewing the seller'[s] costs because the Commission can rely on the seller's lack of market power and the existence of market forces to determine a just and reasonable rate. There were no market forces at work here.[82]

It is hard to see how the foregoing would be any less true of the RCO/FRR Alternative transactions.

Even assuming that non-affiliate RCO/FRR Alternative transactions would be authorized under sellers' market-based rate tariffs, there would be no justification for a general rule allowing RCO/FRR Alternative transactions between affiliates to occur under those tariffs. The Commission's regulations prohibit any "wholesale sale of electric energy or capacity . . . between a franchised public utility with captive customers and a market-regulated power sales affiliate without first receiving Commission

---

[81] Initial Brief of the People of the State of Illinois at 14, Docket Nos. EL16-49-000, *et al*. (filed Oct. 2, 2018) (the "Illinois AG Brief").

[82] *Medina Power Co.*, 71 FERC ¶ 61,264 at 62,055 ("*Medina Power*"), *on reh'g*, 72 FERC ¶ 61,224 (1995).

authorization for the transaction under section 205 of the Federal Power Act."[83] The Commission adopted this prohibition in recognition of the risk of self-dealing and other affiliate abuse that arises when a franchised utility transacts with its affiliates. In so doing, the Commission held that "it is essential that ratepayers be protected and that transactions be above suspicion in order to ensure that the market is not distorted."[84]

To be sure, the Commission has waived the affiliate power sales restriction for many PJM utilities on the theory that these utilities no longer have captive customers as a result of retail choice.[85] At the same time, however, the Commission has rescinded such waivers where the costs of the affiliate transaction are to be recovered through non-bypassable charges, because even if it remains "true that [the utility's] ratepayers will continue to have a statutory right to choose one retail supply over another, . . . [they] are nonetheless captive in that they have no choice as to payment of the non-bypassable generation-related charges" associated with the affiliate transaction.[86] The Commission has recognized that such transactions "present the 'the potential for the inappropriate transfer of benefits from [captive] customers to the shareholders of the franchised public utility' and, thus, could undermine the goal of the Commission's

---

[83] 18 C.F.R. § 35.39(b) (2018).

[84] *Boston Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 at 62,167 (1991) ("*Edgar*") (footnote omitted). *See also Southern Power Co.*, 153 FERC ¶ 61,068 at P 15 (2015) (same); *Allegheny Energy Supply Co., LLC*, 108 FERC ¶ 61,082 at P 18 (2004) ("*Allegheny*") (same).

[85] *See*, *e.g.*, *FirstEnergy Solutions Corp.*, 125 FERC ¶ 61,356 at P 13 (2008), *on reh'g*, 128 FERC ¶ 61,119 (2009); *Exelon Generation Co., L.L.C.*, 93 FERC ¶ 61,140 at 61,425 (2000), *on reh'g*, 95 FERC ¶ 61,309 (2001).

[86] *Electric Power Supply Ass'n v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 at P 55 (2016) ("*FirstEnergy*"). *See also Electric Power Supply Ass'n v. AEP Generation Resources, Inc.*, 155 FERC ¶ 61,102 at P 57 (2016) (same) ("*AEP Generation*").

affiliate restrictions."[87] Consistent with its holdings in *FirstEnergy* and *AEP Generation*, the Commission should put parties on notice that general waivers of the affiliate power sales restriction will ***not*** apply to RCO/FRR Alternative transactions where the affiliated utility recovers subsidy costs through a non-bypassable charge and that such transactions will need to be the subject of separate FPA Section 205 filings to be reviewed under the *Edgar*/*Allegheny* standards.

Exelon weakly attempts to distinguish "affiliate transactions resulting from a state-directed procurement" from those at issue in *FirstEnergy* and *AEP Generation* on the theory that, in the latter cases, the state commission "reviewed the resulting power purchase agreement for prudence, [but] . . . did not direct the agreement; rather, the transaction originated with the utility, not the state."[88] Leaving aside the fact that it is a bit rich for Exelon to imply that the Illinois legislature spontaneously decided to award Exelon billions of dollars in subsidies,[89] there is simply no basis for the contention that the Commission's concerns about rates negotiated between affiliates are a function of the level of "state involvement."[90] The Commission has a statutory duty to ensure that rates for wholesale sales are just and reasonable and not unduly discriminatory or preferential, and, as discussed above, that duty may not be delegated to the states. If

---

87 *FirstEnergy*, 155 FERC ¶ 61,101 at P 55 (quoting *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268 at P 198 (2008)) (alteration in the original; footnote omitted). *See also AEP Generation*, 155 FERC ¶ 61,102 at P 57 (2016) (same).

88 Exelon Brief at 27 (footnote omitted).

89 *See*, *e.g.*, Joe Cahill, *The secret to Exelon's rising profit*, Crain's Chicago Business (Aug. 15, 2018), https://www.chicagobusiness.com/joe-cahill-business/secret-exelons-rising-profit.

90 Exelon Brief at 28.

anything, the fact that the utility may be coming to the table with a gun to its head should heighten, not lessen, this concern.[91]

The Commission should also provide guidance regarding the pricing of capacity provided through an RCO/FRR Alternative transaction, and make clear that parties to RCO/FRR Alternative transactions will not be permitted to evade effective Commission review by characterizing certain payments as being for supposedly non-jurisdictional products. This is particularly critical where affiliate transactions are concerned and the Commission is legitimately and properly concerned with "ensur[ing] that the buyer has chosen the lowest cost supplier from among the options presented . . . ."[92] Specifically, the Commission should make clear that, irrespective of how a given state subsidy may have been characterized for other purposes, that subsidy must be included in the deemed price for the associated capacity in an RCO/FRR Alternative transaction.

Inherent in the FRR Alternative concept is the proposition that the state has elected to compensate certain resources for their capacity outside, rather than through, the RPM market. In particular, one of the principal purported benefits of the FRR Alternative is that it will "make more transparent which capacity costs are the result of competition in the capacity market and which capacity costs are being incurred as a result of state policy decisions."[93] Allowing parties to RCO/FRR Alternative transactions to characterize certain subsidies as non-jurisdictional runs counter to this goal and will

---

91 Of course, even where the contracting parties are not affiliated, this should also be concerning as it becomes hard to see how, under these circumstances, the Commission "can rely on the seller's lack of market power and the existence of market forces to determine a just and reasonable rate." *Medina Power*, 71 FERC ¶ 61,264 at 62,055.

92 *Edgar*, 55 FERC ¶ 61,382 at 62,168.

93 June 29 Order, 163 FERC ¶ 61,236 at P 162.

encourage efforts to disguise the true cost of state policy decisions relative to costs in the RPM market. It will also lead inevitably to nonsensical claims that suppliers receiving out-of-market subsidies are willing to assume capacity commitments, including all the risks and costs associated with being a Capacity Performance Resource, at little or no charge.

B. The Commission Should Reject Other Calls To Weaken, Or Delay Implementation Of, An Expanded MOPR

As discussed above, the FRR Alternative would punch a massive hole in any expanded MOPR and should be rejected. The Commission should likewise reject other proposals to punch other holes in the expanded MOPR or to delay its implementation. Like the FRR Alternative, these proposals would undermine the effectiveness of an expanded MOPR and improperly and unlawfully perpetuate artificial price suppression in the RPM market.

1. The Commission Should Reject Proposed MOPR Exemptions That Would Undermine The Effectiveness Of An Expanded MOPR

Not surprisingly, various parties urge that certain resources be exempted or otherwise excluded from any expanded MOPR based on claims that their resources pose no threat to the RPM market.[94] These proposals should be rejected, and the

[94] *See*, *e.g.*, Initial Submission of the American Public Power Association at 14-17, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (advocating exclusion of public power self-supply from MOPR); Evidence and Arguments of American Municipal Power, Inc. and the Public Power Association of New Jersey at 8-17, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (same); Initial Submission of the National Rural Electric Cooperative Association at 15-25, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (same); Initial Comments of American Electric Power Service Corporation and Duke Energy Corporation at 7, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (advocating an exemption for self-supply); Comments of Dominion Energy Services, Inc. at 10-15, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) ("Dominion Comments") (same); PJM Brief at 32-34 (same); Comments of Clean Energy Advocates

Commission should adopt a "clean MOPR" in order to protect PJM's capacity market from resources receiving subsidies of all kinds.

The Commission needs to remain focused on the need to fix a replacement rate that will address the price suppression problem and not be distracted by the desires of individual stakeholders for exemptions or exclusions that will benefit their particular interests. A Swiss-cheese MOPR, riddled with exemptions to suit every purported special case, will have the same problem as the current MOPR in that it will not adequately "address the price suppressive impact of resources receiving out-of-market support."[95] With this overarching concern in mind, it is clear that, as Roy J. Shanker, Ph.D. has stated, "the best, indeed perhaps only, path forward"[96] is a "clean MOPR," which "would not include any special exemptions . . . other than [a resource's] ability to offer at its actual costs versus the default competitive level/reference price."[97]

A "clean MOPR" would be just and reasonable in that it would directly and adequately address the price suppression identified in the June 29 Order, and, just as importantly, it would not be unduly discriminatory or preferential. Exemptions and exceptions of the sort proposed by PJM and others would unduly discriminate against ***both*** other subsidized resources ***and*** unsubsidized resources. The undue discrimination against other subsidized resources would occur as a result of their receiving less favorable treatment than the similarly situated subsidized resources

---

Separately Addressing the Scope of the Expanded Minimum Offer Pricing Rule at 3, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "Clean Energy Advocates MOPR Brief") (advocating exemption for state renewable portfolio standard programs).

95 June 29 Order, 163 FERC ¶ 61,236 at P 5.

96 Shanker Affidavit, ¶ 10.

97 *Id.*, ¶ 8. *See also* Stoddard Affidavit, ¶¶ 5, 15-17 (advocating an expanded MOPR like that proposed in the June 29 Order).

exempted or excepted from the MOPR in the absence of any differences that are "material to the inquiry at hand."[98] Allusions to "traditional business models"[99] and assertions about the alleged absence of any "incentive to suppress prices in the RPM"[100] are not material to the issue of whether particular classes of subsidized resources "could create harmful price suppression,"[101] especially when the Commission has held that "resources receiving out-of-market support are capable of suppressing market prices, ***regardless of intent***."[102]

The undue discrimination against competitive resources would result from their being treated the same as the differently situated exempted or excepted resources.[103] As the Commission found in the June 29 Order, "[t]he receipt of out-of-market support is a difference that requires different ratemaking treatment when such support has a material effect on price or cannot otherwise be justified by our statutory standards."[104] In this regard, there can be little doubt that PJM's proposed exemption for self-supply would have a material effect on price. This proposal, which was opposed by a wide swath of parties, would "exempt the largest, most extensive source of out-of-market

98 June 29 Order, 163 FERC ¶ 61,236 at P 101 (quoting *New York Indep. Sys. Operator, Inc.*, 162 FERC ¶ 61,124 at P 10 & n.30 (2018)).

99 PJM Brief at 33.

100 Dominion Comments at 3.

101 June 29 Order, 163 FERC ¶ 61,236 at P 103.

102 *Id.* at P 155 (emphasis added).

103 *See id.* at P 68 & n.112.

104 *Id.* at P 68.

revenue, retail cost-recovery."[105] Indeed, as the AES Corporation ("AES") observed, owners of resources

> receiv[ing] huge out-of-market support payment in the form of a return of and on their rate base and recovery of all of their prudently incurred [operations and maintenance] costs . . . are the most likely, not the least likely, to offer into the PJM capacity market as price takers with near zero bids that suppress capacity prices for all unsubsidized resources.[106]

2. The Commission Should Reject The "Proportional MOPR" Proposal

AES proposes a so-called "Proportional MOPR," under which "the MOPR level for a capacity resource is based on the dollar per MW-day equivalent of the subsidy received."[107] The Commission should reject this proposal as unjust and unreasonable and unnecessary.

The Proportional MOPR proposal ignores the proportionality that is embedded in the MOPR. The MOPR does not exclude subsidized resources from the RPM market; it merely requires that their offers be competitive. As the IMM observes, "[t]here is no right to offer nonmarket resources in the capacity market at prices below the competitive level."[108] The MOPR only mitigates offer prices from subsidized resources up to competitive levels, and the mitigation is thus proportional to the extent to which a subsidy has suppressed a resource's unmitigated offer price below the competitive

---

105 Clean Energy Advocates MOPR Brief at 2. *See also*, *e.g.*, Exelon Brief at 18-20; Initial Brief of NRG Power Marketing LLC at 11-12; Initial Comments of FirstEnergy Solutions Corp. at 7-8, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018).

106 Initial Comments of the AES Corporation at 9, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "AES Comments").

107 *Id.* at 3.

108 IMM Brief at 11.

level. Moreover, both the current MOPR and the proposed "clean MOPR" provide additional proportionality by allowing suppliers whose resources are subject to the MOPR to cost-justify unit-specific offer floors. This effectively caps the mitigation such that a supplier's offer will never be increased to a price level above its cost, ensuring that a resource's offer will not be mitigated in a manner disproportionate to its cost.

AES's failure to recognize the proportionality built into the MOPR appears to reflect its false assumption that imposition of an offer floor "under the existing MOPR is effectively a death penalty for participation in the PJM capacity market."[109] That is simply not true. Notwithstanding AES's contrary understanding, a number of subsidized resources have, in fact, been subject to offer floors under the current MOPR and still cleared in RPM auctions.[110]

The Proportional MOPR proposal would also alter the focus and effect of the MOPR in important and fundamental ways. In refocusing the MOPR inquiry on the magnitude of the subsidy, AES's proposal misses the point that the purpose of the MOPR is to address subsidies that allow uneconomic resources to masquerade as economic resources in the RPM market. For a resource that is only slightly uneconomic, a relatively small subsidy may be sufficient to let it submit an offer low enough to clear, and the relative size of the subsidy is not dispositive of whether it will

[109] AES Comments at 12.

[110] Indeed, it was the well-publicized clearing of several offers from subsidized resources in the May 2012 BRA that prompted an unsuccessful effort to eliminate the unit-specific review process. *See PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,090 at PP 9, 117, 124, 135, 143 (2013) ("ER13-535 Order"), *on reh'g*, 153 FERC ¶ 61,066 (2015), *vacated on other grounds sub nom. NRG Power Mktg. LLC v. FERC*, 862 F.3d 108 (D.C. Cir. 2017).

allow that subsidized uneconomic resource to crowd out an economic resource.[111] It is entirely appropriate in such circumstances to require that the resource submit a competitive offer reflecting its actual costs, which is exactly what the current MOPR (if triggered) and an expanded MOPR would require.

The shift in focus proposed by AES also has other important implications for the effect of the MOPR, because, if triggered, the Proportional MOPR does not require the submission of a competitive offer but instead imposes an offer floor based on the amount of the subsidy. Dr. DeRamus and Mr. Cain state that, in this respect, the Proportional MOPR "would profoundly alter the concept of the MOPR in its existing application, and would contradict its intent."[112] In fact, AES's proposal would likely result in under-mitigation in some cases and over-mitigation in others, which would seem to be anything but proportional to a subsidy's impact on competition.[113]

3. The Commission Should Reject Calls For Delayed Implementation Of Expanded MOPR

Various parties opposed to an expanded MOPR and supportive of the FRR Alternative as a means of negating its effects argue that an expanded MOPR should only be implemented with some sort of "transition period or phase-in period."[114] These

---

111 By the same token, a relatively large subsidy might have no impact on the RPM market if the resource was so uneconomic that, even with the subsidy, it could still not submit an offer low enough to clear.

112 DeRamus/Cain Affidavit, ¶ 13.

113 *See PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252 at P 44 (2017) (rejecting the proposed elimination of the unit-specific exemption on the grounds that exclusive reliance on benchmark prices "may exceed the actual costs of individual generators and such generators should have an opportunity to demonstrate as much").

114 Clean Energy & Consumer Advocates Brief at 29. *See also* Initial Argument of the New Jersey Board of Public Utilities at 9-10, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018);

parties contend that the Commission has "previously approved of transitions mechanisms of various types, whenever significant changes are made to market rules, to allow market participants a chance to adapt."[115] While the Commission has certainly approved proposed transition periods and other phase-in mechanisms in certain circumstances, it has likewise declined to implement such mechanisms where, as here, such mechanisms would prevent markets from conveying appropriate price signals and market participants were on notice of the potential rule change. The Commission should require PJM to implement an expanded MOPR and, more specifically, a "clean MOPR" without further delay.

The Commission has rejected requests for transition periods or phased implementation under similar circumstances. For example, the Commission rejected proposals by NYISO and others for phased implementation of new capacity zones in New York, finding that such an approach "would delay the capacity market's ability to send more efficient investment price signals."[116] That finding was consistent with other orders in which the Commission rejected transition periods and phase-in mechanisms that would merely delay needed corrections to flawed market rules.[117] In this case, the

---

Illinois AG Brief at 4; Argument of the Organization of PJM States, Inc. at 4-5, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018).

115 Clean Energy & Consumer Advocates Brief at 28.

116 *New York Indep. Sys. Operator, Inc.*, 144 FERC ¶ 61,126 at P 29 (2013) ("*NYISO I*"), (footnote omitted) *on reh'g*, 147 FERC ¶ 61,152 (2014) ("*NYISO II*"), *aff'd sub nom. Central Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92 (2d Cir. 2015). *See also New York Indep. Sys. Operator, Inc.*, 146 FERC ¶ 61,043 at PP 162-66 ("*NYISO III*") (same), *on reh'g*, 147 FERC ¶ 61,148 at PP 59-65 (2014) (same).

117 *See*, *e.g., Southwest Power Pool, Inc.*, 142 FERC ¶ 61,070 at P 32 (2013) (denying a request for a transition period that would "perpetuat[e] the inequities among . . . transmission customers that [the system operator's] proposal is intended to eliminate"); *New York Indep. Sys. Operator, Inc.*, 137 FERC ¶ 61,240 at P 28 (2011) (declining to "require a phase-in period to temper what [an intervenor] alleges is the severity of [a] new cost allocation").

Commission has found that the overly narrow MOPR currently in place "fails to mitigate price distortions caused by out-of-market support" to resources other than new natural gas-fired resources[118] and that "out-of-market payments . . . have reached a level sufficient to significantly impact the capacity market clearing prices and the integrity of the resulting price signals on which investors and consumers rely . . . ."[119] Against this backdrop, further delay in fully implementing an expanded MOPR that will mitigate those price distortions will necessarily "delay the capacity market's ability to send more efficient investment price signals."[120] Indeed, further delay in implementing an expanded MOPR would be unlawful under Section 206 of the FPA inasmuch as it would represent an abdication of the Commission's statutory obligation to fix a just and reasonable rate "to be thereafter observed and in force" after finding the existing rate to be unjust and unreasonable.[121] That the unjustness and unreasonableness might be temporary does not make it any less unlawful, because the FPA "does not say a little unlawfulness is permitted."[122]

As in past cases in which the Commission rejected requests for transition periods, the parties advocating a transition period have had ample notice of the possible capacity market rule change. The complaint granted, in part, by the June 29 Order was filed on March 21, 2016,[123] and explicitly sought an expanded MOPR. The fact that it

---

118 June 29 Order, 163 FERC ¶ 61,236 at P 5.

119 *Id.* at P 156.

120 *NYISO I*, 144 FERC ¶ 61,126 at P 31.

121 16 U.S.C. § 824e(a) (2012).

122 *FPC v. Texaco Inc.*, 417 U.S. 380, 399 (1974).

123 Complaint Requesting Fast Track Processing, Docket No. EL16-49-000 (filed Mar. 21, 2016) (the "Original EL16-49 Complaint"); Motion to Amend, and Amendment to, Complaint and

was "filed more than two years ago" when the Commission acted prompted Commissioner LaFleur to observe that "this issue is not new to PJM."[124] Accordingly, as was the case with respect to the new capacity zone in NYISO, "there was sufficient notice provided so that a phase-in is not necessary to further address 'rate shock' to consumers."[125] To the extent a state elected to move forward with new subsidies in the shadow of proposed expansions of the MOPR that could be made effective retroactive to March 21, 2016,[126] it did so at its own risk and is not entitled to any further transition period.

C. The Commission Should Reject The Maryland PSC's "Competitive Carve-Out" Proposal

In its initial comments, the Maryland PSC outlines its so-called "competitive carve-out" proposal, under which a separate auction would be conducted for resources eligible for state environmental subsidies in advance of the BRA.[127] Subsidized resources that did not clear that auction could then offer into the BRA, "without being subject to MOPR," and the offers for the resources that did clear "would be included in the Traditional BRA."[128] As discussed below and in the DeRamus/Cain Affidavit, this proposal, like the FRR Alternative and variants thereof, "would preserve price suppression from subsidized resources, ultimately through the same mechanism in that

---

Request for Expedited Action on Amended Complaint, Docket No. EL16-49-000 (filed Jan. 9, 2017) (together with the Original EL16-49 Complaint, the "EL16-49 Complaint").

124 June 29 Order, 163 FERC ¶ 61,236 at 61,222 (LaFleur, Comm'r, *dissenting*).

125 *NYISO III*, 146 FERC ¶ 61,043 at P 163.

126 *See* June 29 Order, 163 FERC ¶ 61,236 at P 174 (establishing a refund effective date of March 21, 2016).

127 *See* Maryland PSC Comments, Appendix A, Maryland PSC Competitive Carve-Out Proposal (the "CCO Proposal").

128 *Id.* at 1.

subsidized resources would be represented explicitly in the main RPM auction with unrestricted offers."[129]

While labeled a "competitive carve-out," the Maryland PSC's proposal will have distinctly uncompetitive results.[130] Where resources receiving state environmental subsidies are concerned, the proposal will perpetuate the status quo by effectively exempting such resources from any expanded MOPR and inserting higher cost resources into the RPM market as if they were lower cost resources. The only such resources whose offers would be subject to the MOPR would be those that are eligible to participate in the pre-BRA auction but that decline to participate. This is likely to be a universe of none. The rationale for subjecting resources that choose not to participate in the pre-BRA auction to the MOPR is that they "could be viewed as attempting to intentionally suppress prices, unless going forward costs are legitimately low."[131] But if either of those conditions were satisfied, it is hard to imagine why the subsidized resources would not be offered into the pre-BRA auction. Moreover, this rationale evidences the Maryland PSC's failure to recognize that, as the Commission reiterated in

---

129 DeRamus/Cain Affidavit, ¶ 42.

130 To the extent that the description of the proposal as a "carve-out" implies that certain resources are being removed from the RPM market, that aspect of the name is similarly inaccurate. Resources participating in the pre-BRA auction and associated load are no more removed from the RPM market than resources subject to an FRR mechanism. As under an FRR, the load has not gone anywhere, because resource adequacy is still being determined for the entire PJM footprint. And to the extent the resources are uneconomic, they are actually being pulled back into the market. *See* Sotkiewicz Initial Affidavit, ¶¶ 8-12, 68-79, 89-92 (discussing this misconception as it relates to the FRR and FRR Alternative).

131 CCO Proposal at 4 n.37.

the June 29 Order, "resources receiving out-of-market support are capable of suppressing market prices, regardless of intent."[132]

The Maryland PSC's proposal is also problematic in that it results in subsidized resources receiving capacity revenues in addition to their subsidies. This represents a significant deviation from the FRR Alternative, which requires owners of subsidized resources to choose between being subject to the MOPR and keeping their capacity payments in addition to their subsidies.[133] The Maryland PSC's "competitive carve-out" undermines this design feature and, like the Capacity Repricing proposal rejected in the June 29 Order, forces load to pay "a windfall to the very same resources that initially caused the price suppression PJM is attempting to correct."[134]

Finally, as Dr. DeRamus and Mr. Cain discuss, the Maryland PSC's proposal "would provoke uncertain, and likely volatile, offer behavior, as subsidized resources not subject to a MOPR attempt to predict revenue-maximizing offers in the combined auction process."[135] Because resources whose offers do not clear in the pre-BRA auction would be allowed to submit unmitigated offers into the BRA, the owner of a subsidized resource would have an incentive "to game itself into the [BRA] . . . ."[136] By encouraging offer pricing divorced from a supplier's cost, the Maryland PSC's proposal

---

132 June 29 Order, 163 FERC ¶ 61,236 at P 155 (citation omitted).

133 *See id.* at P 160 (stating that a resources and load subject to an FRR Alternative election "would neither make nor receive payments from th[e] capacity market").

134 *Id.* at P 67.

135 DeRamus/Cain Affidavit, ¶ 45.

136 *Id.*

will present the same sort of concerns that have led the Commission to reject "pay as bid" auction designs.[137]

D. Response To The IMM Brief

The IMM Brief sets forth a proposed "Sustainable Market Rule" ("SMR"), which is based on the principle that "price suppression below the competitive level in the capacity market should not be acceptable and is not consistent with a competitive market design."[138] At the outset, EPSA could not agree more with the principle that informs the IMM's SMR. EPSA also agrees that "harmonizing" the market and non-market paradigms means allowing each "to work on its own terms":[139] states are free to "reregulate at any time"[140] but, at the same time, it is not appropriate to permit . . . nonmarket resources to suppress the capacity price for market resources."[141]

That said, EPSA is concerned that the SMR proposal is not fully developed and that language in the IMM Brief implies that SMR could convert price formation in RPM

---

137 *See*, *e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,196 at P 32 (finding the "pay as bid" method of pricing would mean that "suppliers would not have an incentive to bid their cost, rather they would all be expected to bid their estimate of the market clearing price," and "[i]t is likely that low cost suppliers would inevitably guess higher than high cost suppliers at times, resulting in inefficient dispatch"), *on clarification*, 102 FERC ¶ 61,338, *on reh'g*, 103 FERC ¶ 61,210 (2003); *New York Indep. Sys. Operator, Inc.*, 110 FERC ¶ 61,244 at n.76 ("If generators were paid only the price they bid, they would then try to guess at the market clearing price or else they would never receive more than their bid . . . . 'Clearly, if suppliers know that they are going to receive only what they bid, they will attempt to bid the market clearing price, a practice that introduces additional risks into the market.'" (citation omitted)), *on reh'g*, 113 FERC ¶ 61,155 (2005), *appeal denied sub nom. Consol. Edison Co. of N.Y., Inc. v. FERC*, 510 F.3d 333 (D.C. Cir. 2007).

138 IMM Brief at 3.

139 *Id.* at 8.

140 *Id.*

141 *Id.* at 12.

into a purely administrative exercise. The IMM Brief provides little detail about the SMR proposal beyond the following:

> The SMR design is simple. All capacity has a must offer requirement and all capacity offers are included in the supply curve in the capacity market at competitive levels. All MW required for reliability are included in the capacity market demand curve (VRR curve). All cleared resources are paid the capacity market clearing price.[142]

When read together with the IMM's relatively detailed discussion of what constitutes a "competitive offer,"[143] SMR could be understood as eliminating any degree of Capacity Market Seller discretion regarding difficult to quantify costs and risks and resulting in RPM Auctions into which PJM enters administratively determined offers for ***all*** units. While EPSA understands the need for offer caps and floors where sellers might otherwise submit non-competitive offers, EPSA does not view purely administrative pricing as either necessary or desirable.[144]

EPSA also respectfully takes issue with the IMM's characterization of the MOPR as "implicit[ly] impugning . . . nonmarket approaches . . . ."[145] To be sure, the MOPR may carry some baggage from its beginnings as a tool solely intended to "deter[] the exercise of buyer-side market power . . . ."[146] As the Commission noted in the June 29 Order, however, the MOPR has since evolved into a mechanism more broadly concerned with "address[ing] the capacity market impacts of out-of-market state

---

142 *Id.* at 13.

143 *See id.* at 15-18.

144 *See* DeRamus/Cain Affidavit, ¶ 53.

145 IMM Brief at 9.

146 June 29 Order, 163 FERC ¶ 61,236 at P 5 (citation omitted).

revenues,"[147] and one that is unconcerned with a supplier's "intent."[148] Moreover, in its orders on the MOPR, the Commission has been crystal clear that it is not "pass[ing] judgment on state policies and objectives" but acting to protect the RPM market.[149] Accordingly, EPSA does not accept the proposition that MOPR, as approved by the Commission, explicitly or implicitly "malign[s]" subsidies under the nonmarket paradigm as "consciously antimarket."[150]

E. The Commission Should Reject Broader Challenges To The RPM Construct As Beyond The Scope And Without Merit

Several parties used their initial submissions to air their grievances about the RPM construct and capacity markets in general. For example, starting with the modest assertion that "[c]apacity markets are inherently flawed,"[151] the Illinois Commerce Commission (the "ICC") urges the Commission not to "continu[e] to spend valuable time and effort on ongoing and inevitable future adjustments to PJM's flawed capacity construct, which, at best, serve as temporary Band-Aids to the structural flaws . . . ."[152] For the reasons set forth below and in the attached Sotkiewicz Reply Affidavit, the

147 *Id.* (citation omitted).

148 *Id.* at P 155.

149 ER13-535 Order, 143 FERC ¶ 61,090 at P 54.

150 IMM Brief at 9.

151 Comments of the Illinois Commerce Commission at 7, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018).

152 *Id.* at 8. *See also*, *e.g.*, Initial Submission of the American Public Power Association at 4, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (arguing that "rather than doubling down on a mandatory merchant capacity construct . . . , the Commission should encourage PJM and its stakeholders to fundamentally modify the resource adequacy construct in the region"); Comments of the FirstEnergy Utility Companies at 11, Docket Nos. EL16-49-000, *et al.* (filed Oct. 2, 2018) (the "FE Utilities Comments") (claiming that "years and years of Band-Aids have rendered not just the PJM capacity market but all of its markets severely deficient").

Commission should reject these arguments as beyond the scope of these proceedings and without merit.

Notwithstanding some parties' assertions to the contrary, the June 29 Order did not make a generalized finding that "PJM's capacity markets are unjust and unreasonable"[153] in any way that would support a broad reopening of the RPM construct.[154] To the contrary, the Commission made a very specific finding that the RPM rules are unjust and unreasonable because the current MOPR is too narrow and fails adequately "to address the price suppressive impact of resources receiving out-of-market support."[155] The Commission made no finding in the June 29 Order that would support a generalized inquiry into the RPM construct more broadly, and there is nothing in the EL16-49 Complaint, PJM's FPA Section 205 filing in Docket No. ER18-1314, or the June 29 Order that would have put interested parties on notice that a broader restructuring of the RPM construct would be under consideration in these proceedings.[156] The Commission should, therefore, reject challenges to the broader RPM construct as beyond the scope of these proceedings.[157]

---

153 FE Utilities Comments at 5.

154 Nor did the June 29 Order open the door for parties to request unrelated changes to the way RPM Auctions are conducted, including, but not limited, the proposal that "any MOPR requirement be coupled with the right of state public utility commissions, state attorneys general, and state consumer advocates to receive the bidding data in any auction in which resources subject to the new MOPR participate . . . ." Illinois AG Brief at 4.

155 June 29 Order, 163 FERC ¶ 61,236 at P 5.

156 It is true enough the EL16-49 Complaint, PJM's Section 205 filing and the June 29 Order sought to address the RPM price suppression problem in order "to harness competitive market forces and produce just and reasonable rates," *id.* at P 156, and that the June 29 Order expresses a desire to accommodate state polices, *see id.* at P 159. But that plainly does not open the door to any and every possible market rules change that would arguably advance one or both of those ends. *See Northern Ind. Pub. Serv. Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 158 FERC ¶ 61,049 at P 23 (2017) ("[T]he fact that the goal of the Complaint may have been to support the development of transmission to relieve congestion does not bring *all*

Even if the Commission were to expand the scope of these proceedings, none of the parties urging such an expansion has proffered evidence that would even remotely support a finding that the overall RPM construct is unjust and unreasonable, much less that it is unjust and unreasonable in any way that would require its wholesale replacement. The fact that the Commission is often asked to revisit particular RPM rules,[158] as in these proceedings, is not evidence of some sort of fundamental design flaw. Rather, it is a reflection of the importance of RPM in the overall PJM market structure and of the need to adapt the RPM rules to changed circumstances, such as "the increase in programs providing out-of-market support" that caused the Commission to conclude that "it is no longer possible to distinguish the treatment of new and existing

---

reforms capable of achieving that result within the scope of the Complaint." (emphasis in original)); *North Carolina Elec. Membership Corp. v. Virginia Elec. & Power Co.*, 52 FERC ¶ 62,198 at 62,198 (1990) (refusing to expand the scope of a complaint proceeding regarding the quality of service to a complainant-cooperative's members "to a general investigation of the level of service to all customers").

[157] *See*, *e.g.*, *La Paloma Generating Co., LLC v. California Indep. Sys. Operator Corp.*, 157 FERC ¶ 61,002 at P 32 (2016) (denying requests for a technical conference on the California market generally as "beyond the scope of [the underlying] complaint"); *California Indep. Sys. Operator Corp.*, 153 FERC ¶ 61,003 at P 6 (2015) (declining to address "an issue that is beyond the scope of this section 205 proceeding" and noting that doing so "under these circumstances would not provide adequate notice to market participants"); *Entergy Servs., Inc.*, 116 FERC ¶ 61,132 at P 16 (2006) (declining to address an issue "beyond the scope of [an FPA Section 205 proceeding" and stating that the "appropriate course of action is for [the intervenor] to file a complaint in a separate proceeding to raise this issue," which will "provide[] all interested parties notice . . . an opportunity to respond"); *PSI Energy, Inc.*, 55 FERC ¶ 61,254 at 61,811 (1991) (finding arguments about discrimination against anyone other than the complaint "beyond the scope of this proceeding" and stating that those raising such issues "may file a complaint under section 206 of the FPA") (footnote denied), *reh'g denied*, 56 FERC ¶ 61,237 (1991).

[158] *See* FE Utilities Comments, Attachment, Affidavit of Dr. David Hunger in Support of the FirstEnergy Utility Companies Comments at 13.

resources in the context of PJM's MOPR."[159] It also reflects the Commission's commendable commitment to ongoing oversight of the markets.[160]

EPSA appreciates that, at times, the care and feeding of RPM and other capacity markets may induce a certain degree of capacity market fatigue and prompt questions about whether there is some better approach. But there is no evidence to suggest that the regulatory grass will be any greener on the other side of the fence, as any market design is going to present its own particular challenges,[161] and there will always be those who want reliability but do not want to pay for it.[162] In addition, as Dr. Sotkiewicz observes, "the constant market rule changes lamented by the ICC are likely to remain a fact of life whether they are in the capacity market or in the energy market."[163] Indeed, PJM's energy and ancillary services markets "have always been undergoing constant changes to their design," including some very dramatic changes.[164]

More importantly, as Commissioner LaFleur has observed, the capacity markets "have delivered substantial benefits to customers through regional resource selection

---

159 June 29 Order, 163 FERC ¶ 61,236 at P 153.

160 *See Grid Reliability & Resilience Pricing & Grid Resilience in Reg'l Transmission Orgs. & Indep. Sys. Operators*, 162 FERC ¶ 61,012 at P 10 (2018) ("As part of its ongoing oversight of wholesale electric markets, the Commission continues to evaluate its current rules and has issued several orders to ensure that our rates in our markets remain just and reasonable and not unduly discriminatory or preferential.").

161 For instance, even supporters of energy-only markets acknowledge that the scarcity pricing necessary to preserve reliability under such an approach may present political challenges. *See ISO New England Inc.*, 158 FERC ¶ 61,138 at 61,895 (2017) (Bay, Comm'r, *concurring*), *aff'd sub nom. NextEra Energy Res., LLC v. FERC*, 898 F.3d 14 (2018).

162 *See* Sotkiewicz Reply Affidavit, ¶¶ 15-16 (explaining that reliability is a public good and the fact that "there is an incentive for buyers to free ride on others paying for the good by not purchasing the public good themselves").

163 *Id.*, ¶ 7.

164 *Id.*, ¶ 39.

and deployment, protecting reliability at least cost, and promoting innovation and efficiency."[165] Dr. Sotkiewicz discusses the vital role that the RPM market, in particular, has played in ensuring reliability in the PJM region[166] and the serious free-rider problem that the region would face without it.[167]

---

165 CASPR Order, 162 FERC ¶ 61,205 at 62,098 (LaFleur, Comm'r, *concurring*, *in part*).

166 *See* Sotkiewicz Reply Affidavit, ¶¶ 28-37.

167 *See id.*, ¶ 6.

II. CONCLUSION

WHEREFORE, for the reasons set forth herein and in the EPSA Initial Brief, EPSA respectfully requests that the Commission (1) require PJM to implement a "clean MOPR"; (2) abandon the FRR Alternative or, if it does not abandon the FRR Alternative, take the additional steps discussed herein; and (3) otherwise take EPSA's comments into account in formulating a further order in these proceedings.

Respectfully submitted,

ELECTRIC POWER SUPPLY ASSOCIATION

By: */s/ David G. Tewksbury*

David G. Tewksbury
Stephanie S. Lim
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006

Nancy Bagot
Senior Vice President
Sharon Royka Theodore
Senior Director, Regulatory Affairs
Electric Power Supply Association
1401 New York Ave, NW, Suite 950
Washington, DC 20005

On behalf of the
Electric Power Supply Association

Dated: November 6, 2018

CERTIFICATE OF SERVICE

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

Dated at Washington DC, this 6th day of November, 2018.

/s/ Stephanie S. Lim
Stephanie S. Lim

Attachment A

The DeRamus/Cain Affidavit

Attachment B

The Sotkiewicz Reply Affidavit