**UNITED STATES OF AMERICA**
**BEFORE THE**
**FEDERAL ENERGY REGULATORY COMMISSION**

| | | |
|---|---|---|
| **PJM Interconnection, L.L.C.** | **)** | **Docket Nos. ER21-2582-001** |

# REQUEST FOR REHEARING OF THE ELECTRIC POWER SUPPLY ASSOCIATION

Pursuant to Sections 205(g)(1)(A) and 313(a) of the Federal Power Act (the "FPA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the "Commission" or "FERC"),[2] the Electric Power Supply Association ("EPSA")[3] respectfully requests rehearing with respect to the Commission's inaction that allowed the July 30, 2021, filing[4] by PJM Interconnection, L.L.C. ("PJM")[5] in the above-captioned proceeding to take effect by operation of law.[6] As discussed below, the Commission's failure to reject PJM's proposed revisions to its minimum offer price rule ("MOPR") was arbitrary and capricious and contrary to law and must be reversed.

---

1 16 U.S.C. §§ 824d(g)(1)(A), 825*l* (2018).

2 18 C.F.R. § 385.713 (2021).

3 EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. 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.

4 Revisions to Application of Minimum Offer Price Rule, Docket No. ER21-2582-000 (filed July 30, 2021) (the "July 30 Filing").

5 Capitalized terms used and not otherwise defined herein have the meaning given them in the July 30 Filing or, if not therein defined, the PJM Open Access Transmission Tariff (the "Tariff").

6 *See PJM Interconnection, L.L.C.*, Notice of Filing Taking Effect by Operation of Law, Docket No. ER21-2582-000 (Sept. 29, 2021) (unreported) (the "September 29 Notice").

## I. STATEMENT OF ISSUES

In accordance with Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,[7] EPSA hereby identifies the issues on which it seeks rehearing and provides representative precedent in support of its position on such issues:[8]

1. The statement of Chairman Glick and Commissioner Clements (the "Supporting Commissioners"),[9] who support the outcome here, is not a Commission order and the Commission, as a body, has not, therefore, provided any explanation for allowing the July 30 Filing to take effect. *See, e.g.*, 42 U.S.C. § 7171(e) (2018); *Western Coal Traffic League v. STB*, 998 F.3d 945, 952 (D.C. Cir. 2021) ("*Western Coal*"); *Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc.*, 695 F.3d 181, 190 (1st Cir. 2012) ("*Bangor Gas*"); *Public Serv. Comm'n of N.Y. v. FPC*, 543 F.2d 757, 776 (D.C. Cir. 1974) ("*PSCNY*"); *CAlifornians for Renewable Energy v. California Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,213 at P 13 (2021) ("*CARE*"); *Fraser Papers, Inc.*, 83 FERC ¶ 61,129 at 61,575 n.12 (1998) ("*Fraser*") *on reh'g*, 84 FERC ¶ 61,036 (1998), *aff'd sub nom. Wisconsin v. FERC*, 192 F.3d 642 (7th Cir. 1999). Because the Commission has not articulated a satisfactory explanation (or, indeed, any explanation) for its action, including a response to serious objections raised by EPSA,[10] other intervenors[11] and

---

7 18 C.F.R. § 385.713(c)(2) (2021).

8 As discussed below in Section III.A.2, EPSA reserves its right to raise additional issues in future pleadings and on appeal.

9 Statement of Chairman Glick and Commissioner Clements, Docket No. ER21-2582-000 (Oct. 19, 2021) (the "Supporting Statement").

10 *See* Protest of the Electric Power Supply Association, Docket No. ER21-2582-000 (filed Aug. 20, 2021) (the "EPSA Protest"); Motion for Leave to Answer and Limited Answer of the Electric Power Supply Association, Docket No. ER21-2582-000 (filed Sept. 21, 2021) (the "EPSA Answer").

11 *See, e.g.*, Protest of the PJM Power Providers Group, Docket No. ER21-2582-000 (filed Aug. 20, 2021) (the "P3 Protest"); Reply to Comments of the PJM Power Providers Group, Docket No. ER21-2582-000 (filed Sept. 3, 2021) (the "September 3 P3 Reply"); Motion to Submit Limited Reply of PJM Power Providers Group to Answer to Protest of PJM Interconnection, LLC and Limited Reply of PJM Power Providers Group Attaching Reply Affidavit of Dr. Roy Shanker, Ph.D. to Answer to Protest of PJM Interconnection, LLC Attaching Answering Affidavit of Dr. Peter Cramton, Ph.D., Docket No. ER21-2582-000 (filed Sept. 20, 2021) (the "September 20 P3 Reply"); Protest of the Independent Market Monitor for PJM at 5, Docket No. ER21-2582-000 (filed Aug. 20, 2021) (the "IMM Protest"); Joint Protest of the Pennsylvania Public Utility Commission and Public Utilities Commission of Ohio to PJM's Filing Concerning Application of the Minimum Offer Price Rule, Docket No. ER21-2582-000 (filed Aug. 20, 2021) (the "PaPUC/PUCO Protest"); Joint Protest of Calpine Corporation and LS Power Development, LLC Docket No. ER21-2582-000 (filed Aug. 20, 2021); Protest of the NRG Companies, Docket

Commissioners Danly and Christie[12] and an explanation for its departures from precedent, its action is per se arbitrary and capricious and not the product of reasoned decision-making. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 20 (D.C. Cir. 2014) ("*West Deptford*"); *American Gas Ass'n v. FERC*, 593 F.3d 14, 21 (D.C. Cir. 2010) ("*AGA*"); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ("*CAPP*").

2. The Supporting Statement was not a Commission order, and EPSA is not required to raise all of its objections to the arguments of the Supporting Commissioners in order to raise such objections on appeal. *See, e.g.*, 42 U.S.C. § 7171(e) (2018); 16 U.S.C. § 825*l*(b) (2018); *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) ("*Common Cause*").

3. Even assuming *arguendo* that the Supporting Statement can be treated as the explanation for the Commission's action here, it falls well short of what is required under the Administrative Procedure Act (the "APA")[13] in numerous respects including (but not necessarily to limited to) the following:

   a. The one-sided approach taken by PJM and embraced by the Supporting Commissioners is contrary to law in that it does not reflect the statutorily and constitutionally required "balancing of the investor and the consumer interests." *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*"). *See also, e.g.*, *Bluefield Waterworks & Imp. Co. v. Public Serv. Comm'n of W. Va.*, 262 U.S. 679, 690 (1923) ("*Bluefield*"); *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1099 (D.C. Cir. 1993) ("*Gulf Power*").

   b. The Supporting Commissioners' failure to engage in the required balancing of interests and to grapple with the serious objections raised, and evidence submitted by, EPSA and others relevant to this issue was arbitrary and capricious and not the product of reasoned decision-making. *See, e.g.*, 5 U.S.C. § 706(2)(A) (2018); *Public Utilis. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1051 (9th Cir. 2006) ("*CPUC*"); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) ("*PPL Wallingford*"); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992) ("*KN Energy*").

---

No. ER21-2582-000 (filed Aug. 20, 2021); Protest and Motion to Intervene of Vistra, Docket No. ER21-2582-000 (filed Aug. 20, 2021); Joint Protest of Carroll County Energy LLC and South Field Energy LLC, Docket No. ER21-2582-000 (filed Aug. 20, 2021) (the "CCE/SFE Protest").

[12] Statement of James P. Danly, Docket No. ER21-2582-000 (Oct. 27, 2021) (the "Danly Statement"); Statement of Commissioner Christie, Docket No. ER21-2582-000 (Oct. 19, 2021) (the "Christie Statement").

[13] 5 U.S.C. §§ 551, *et seq.* (2018).

c. The Supporting Commissioners' claims that allowing the July 30 Filing to become effective will enhance competition in, and improve the efficiency of, the PJM capacity market are unsupported by substantial evidence and not the product of reasoned decision-making. *See, e.g.*, *Environmental Health Trust v. FCC*, 9 F.4th 893, 909 (D.C. Cir. 2021) ("*Environmental Health*"); *Public Citizen, Inc. v. FERC*, 7 F.4th 1177, 1200 (D.C. Cir. 2021) ("*Public Citizen II*"); *New England Power Generators Ass'n v. FERC*, 881 F.3d 202, 212 (D.C. Cir. 2018) ("*NEPGA*").

d. The Supporting Commissioners also fail to reconcile their claims regarding competition with contrary statutory and constitutional requirements, as well as Commission and judicial precedent. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *General Land Office v. U.S. Dept. of the Interior*, 947 F.3d 309, 321 (5th Cir. 2020) ("*General Land*"). *See also, e.g.*, *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990) ("*Tejas*"); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 at PP 35-36 (2018) (the "June 2018 Order"), *on reh'g*, 171 FERC ¶ 61,034 (2020) (the "April 2020 Complaint Rehearing Order"); *PJM Interconnection, L.L.C.*, 135 FERC ¶ 61,022 at PP 102, 194 (the "April 2011 Order"), *on reh'g*, 137 FERC ¶ 61,145 (2011) (the "November 2011 Order"), *on reh'g*, 138 FERC ¶ 61,194 (2012), *aff'd sub nom. New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74 (3d Cir. 2014).

e. The Supporting Statement is illogical in claiming that the weakened MOPR will give resources an opportunity to recover their costs. *See, e.g., Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) ("*Allentown*"); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983) ("*Baltimore Gas*"). In this respect, the Supporting Statement also failed to respond to EPSA's arguments and contrary precedent standing for the proposition that the weakened MOPR results in unduly preferential and discriminatory rates because it fails to recognize that unsubsidized resources will have to rely wholly on revenues from the PJM markets, as opposed to subsidized resources receiving out-of-market revenues. *See* 16 U.S.C. § 824(b) (2018); *Fox*, 556 U.S. 502 at 515; *CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198.

f. The Supporting Statement's attempt to justify the weakened MOPR proposed in the July 30 Filing as consistent with the original version of PJM's MOPR is a "non sequitur" that fails to engage with the serious objections raised by EPSA and others or with intervening precedent. *City of Vernon v. FERC*, 845 F.2d 1042, 1048 (D.C. Cir. 1988) ("*Vernon*"). *See also, e.g.*, *Fox*, 556 U.S. 502 at 515; April 2011 Order, 135 FERC ¶ 61,022 at P 141; *PJM Interconnection,*

*L.L.C.*, 126 FERC ¶ 61,275 at P 182 (the "March 2009 Order"), *on reh'g*, 128 FERC ¶ 61,157 (2009).

g. The Supporting Commissioners' vague reference to "changing circumstances" alleged to justify their proposed departure from precedent, Supporting Statement at P 60, does not even begin to justify any such departure, as the APA requires. *See, e.g.*, *Fox*, 556 U.S. 502 at 515; *West Deptford*, 766 F.3d at 20.

h. The Supporting Statement fails adequately to account for serious reliance interests engendered by over a decade of Commission precedent and upended by the July 30 Filing. *See, e.g.*, *Fox*, 556 U.S. 502 at 515; *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) ("*Encino*"). It likewise fails to grapple with serious objections raised by EPSA and other parties on this issue. *See, e.g.*, *Cook Cnty. v. Wolf*, 962 F.3d 208, 231 (7th Cir. 2020) ("*Cook County*"); *CPUC*, 462 F.3d at 1051; *PPL Wallingford Energy*, 419 F.3d at 1198.

i. The Supporting Commissioners' jurisdictional analysis is contrary to law, because, properly understood, the FPA and principles of federalism not only allow, but require, Commission action to protect the integrity of the wholesale capacity market and thereby to ensure that this market does not allow subsidizing states to shift the costs of their policy choices onto other states. *See* EPSA Protest at 16-30. *See also, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019) ("*Hyatt*"); *BMW of N. Am. v. Gore*, 517 U.S. 559, 571 (1996) ("*Gore*"); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) ("*Kansas*").

j. The Supporting Commissioners' "dismissive treatment" of EPSA's horizontal federalism arguments was arbitrary and capricious and failed to satisfy the requirements of reasoned decision-making. *NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158, 1165 (D.C. Cir. 1998) ("*NorAm*"). *See also, e.g.*, *CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

k. The Supporting Commissioners failed to engage in reasoned decision-making by virtue of their failure to provide a cogent explanation for their proposed departure from Commission precedent recognizing the need for an effective MOPR as a means of preventing subsidizing states from shifting costs onto other states. *See, e.g.*, *Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20; December 2019 Order, 169 FERC ¶ 61,239 at P 41; November 2011 Order, 137 FERC ¶ 61,145 at P 64.

l. The Supporting Statement fails to provide a meaningful response to objections raised by, and evidence submitted by, EPSA and others, including Commissioner Christie, regarding the failure of the weakened MOPR to fulfill even the limited purpose set forth in the July 30 Filing because it recreates flaws in prior versions of the MOPR and, critically, does not address states' incentive and ability to exercise buyer-side market power. *See, e.g.*, *Environmental Health*, 9 F.4th at 909; *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015) ("*Kake*"). The Supporting Commissioners' position on the exercise of market power by states was illogical and unreasoned and also failed to justify their proposed departure from longstanding Commission precedent. *See, e.g.*, *Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20; *GameFly, Inc. v. Postal Regulatory Comm'n*, 704 F.3d 145, 148 (D.C. Cir. 2013) ("*GameFly*"); March 2009 Order, 126 FERC ¶ 61,275 at P 182.

m. The Supporting Commissioners' failure to justify various exclusions from the "Conditioned State Support" test under the revised MOPR, including the exclusion for programs in effect prior to October 1, 2021, was illogical and internally inconsistent and thus not the product of reasoned decision-making. *See, e.g.*, *GameFly*, 704 F.3d at 148; *ANR Storage Co. v. FERC*, 904 F.3d 1020, 1028 (D.C. Cir. 2018) ("*ANR Storage*").

n. The Supporting Statement also fails to reflect reasoned decision-making in asserting that "a state-directed but non-specific exhortation to bid 'competitively' or 'at cost' are likely not 'bid to clear' requirements that should trigger application of the MOPR," Supporting Statement at P 140, as this statement ignores an important aspect of the problem and fails to respond to the Independent Market Monitor for PJM's (the "IMM's") explanation that this renders the Conditioned State Support test "meaningless in practice," IMM Protest at 5. *See, e.g.*, *State Farm*, 463 U.S. at 43; *CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

o. The Supporting Statement is not supported by substantial evidence and improperly ignores contrary evidence. *See, e.g.*, 5 U.S.C. § 706(2)(E) (2018); 16 U.S.C. § 825*l*(b) (2018); *Environmental Def. Fund v. FERC*, 2 F.4th 953, 975 (D.C. Cir. 2021) ("*EDF*"); *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018) ("*Genuine Parts*"); *Illinois Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) ("*ICC*"); *Tenneco Gas v. FERC*, 969 F2d 1187, 1214 (D.C. Cir. 1992) ("*Tenneco*"). Among other things, the Supporting Statement appears to accept at face value claims in the affidavits of

Professor Peter Cramton[14] and the affidavit of Drs. Kathleen Spees and Samuel Newell,[15] without recognizing that these witnesses' testimony had little or no basis in economics. *See, e.g.*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993) ("*Daubert*"); *Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d 45, 50 (D.C. Cir. 2004) ("*Williston Basin*"). In addition, the Supporting Commissioners improperly ignore contrary evidence, including expert testimony submitted by EPSA and others[16] contradicting that of Professor Cramton and Drs. Spees and Newell and otherwise identifying serious flaws with the approach proposed in the July 30 Filing. *See, e.g.*, *Genuine Parts*, 890 F.3d at 312; *Tenneco*, 969 F2d at 1214.

p. Rehearing of the inaction that permitted the July 30 Filing to take effect is required because inaction on an FPA Section 205 filing, particularly in these circumstances, cannot lawfully upend contrary findings in Commission orders issued pursuant to FPA Section 206. *See, e.g.*, *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 10 (D.C. Cir. 2002) ("*Atlantic City*"); *City of Winnfield v. FERC*, 744 F.2d 871, 875 (D.C. Cir. 1984) ("*Winnfield*").

## II. BACKGROUND

In the July 30 Filing, PJM proposed to replace its then-effective "Expanded MOPR," which included features required by the Commission in a series of recent orders,[17] in

---

[14] *See* July 30 Filing, Attachment C, Affidavit of Peter Cramton on behalf of PJM Interconnection, L.L.C. (the "Cramton Initial Affidavit"); Motion for Leave to Answer and Answer of PJM Interconnection, Attachment A, Reply Affidavit of Peter Cramton on behalf of PJM Interconnection, L.L.C., Docket No. ER21-2582-000 (filed Sept. 7, 2021) (the "Cramton Reply Affidavit" and together with the Cramton Initial Affidavit, the "Cramton Affidavits").

[15] *See* Comments of Natural Resources Defense Council, Sustainable FERC Project, Sierra Club, and Union of Concerned Scientists, Attachment A, Written Testimony of Dr. Kathleen Spees and Dr. Samuel A. Newell, Docket No. ER21-2582-000 (filed Aug. 20, 2021) (the "Spees/Newell Affidavit").

[16] *See* EPSA Protest, Attachment A, Affidavit of Collin Cain, M.SC. (the "Cain Initial Affidavit"); EPSA Answer, Attachment A, Supplemental Affidavit of Collin Cain, M.SC. (the "Cain Supplemental Affidavit"); P3 Protest, Attachment A, Affidavit of J. Arnold Quinn, Ph.D., on behalf of the PJM Power Providers Group (the "Quinn Affidavit"); P3 Protest, Attachment B, Affidavit of Roy J. Shanker, Ph.D. (the "Shanker Initial Affidavit"); September 20 P3 Reply, Attachment, Reply Affidavit of Roy J. Shanker, Ph.D. (the "Shanker Reply Affidavit").

[17] *See* June 2018 Order, 163 FERC ¶ 61,236; April 2020 Complaint Rehearing Order, 171 FERC ¶ 61,034; *Calpine Corp. v. PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,239 (2019) (the

order to "return the MOPR to its original purpose by focusing on prohibiting and mitigating the exercise of buyer-side market power."[18] Specifically, PJM proposed to "replace the Expanded MOPR ordered by the Commission in [the] December 2019 [Order], as well as the previously existing legacy MOPR," with what it characterized as a "focused MOPR,"[19] applicable only to resources receiving "Conditioned State Support" or where PJM identifies an "Exercise of Buyer-Side Market Power."[20] In a masterful piece of understatement, PJM described this U-turn from the stronger MOPR PJM itself proposed just three years earlier[21] and the even stronger Expanded MOPR the Commission required less than two years ago[22] as a mere "course correction."[23]

According to the September 29 Notice, the rate change proposed in the July 30 Filing took effect by operation of law when the Commission failed to issue an order by September 28, 2021, as a result of the Commissioners' being "divided two against two as to the lawfulness of the change."[24] As required by Section 205(g)(1)(B) of the FPA,[25] the Commissioners issued written statements stating their respective positions on the July 30

---

"December 2019 Order"), *on reh'g*, 171 FERC ¶ 61,035 (the "April 2020 Remedy Rehearing Order"), *on reh'g*, 173 FERC ¶ 61,061 (2020).

18 July 30 Filing, Transmittal Letter at 1.

19 *Id.* at 2 (footnotes omitted).

20 *Id.* at 3.

21 *See* Capacity Repricing or in the Alternative MOPR-Ex Proposal: Tariff Revisions to Address Impacts of State Public Policies on the PJM Capacity Market, Docket No. ER18-1314-000 (filed Apr. 9, 2018) (the "ER18-1314 Filing").

22 *See* December 2019 Order, 169 FERC ¶ 61,239.

23 July 30 Filing, Transmittal Letter at 2.

24 September 29 Notice.

25 16 U.S.C. § 824d(g)(1)(B) (2018).

Filing.[26] These statements indicate that Chairman Glick and Commissioner Clements would have voted to accept the July 30 Filing, and Commissioners Danly and Christie would have voted to reject that filing.

## III. REQUEST FOR REHEARING

As discussed in greater detail below, allowing the weakened MOPR proposed in the July 30 Filing to take effect was arbitrary and capricious and contrary to law. The Commission provided no explanation, much less a reasoned explanation, for the order deemed to have issued when it failed to act. Even assuming *arguendo* that the Supporting Statement can be treated as the explanation for this failure, that statement falls well short of what was required as it fails to grapple adequately with the arguments and the evidence presented or to reconcile the changes made to the MOPR with the requirements of the FPA and binding precedent.

### A. The Supporting Statement is Not a Commission Order for Purposes of Rehearing or Review

As discussed below, the Supporting Statement simply represents the views of the Supporting Commissioners as individuals and does not constitute an order of the Commission or part of the order deemed to have issued when the Commission failed to act on the July 30 Filing within 60 days. As such, this statement does not provide the Commission's reasoning for allowing the July 30 Filing to become effective, and that result cannot, therefore, be the product of reasoned decision-making. Even assuming *arguendo* that a reviewing court can lawfully look to the Supporting Statement as an explanation for the Commission's action, EPSA and other aggrieved parties are not required to raise their

[26] *See* Supporting Statement (joint statement of the Supporting Commissioners); Danly Statement; Christie Statement.

objections to that statement on rehearing in order to preserve those objections for appeal. Accordingly, EPSA reserves the right to raise further objections to the Supporting Commissioners' arguments on appeal.

### 1. The Commission Cannot Satisfy the Requirements of Reasoned Decision-making Where It Provides No Explanation for Allowing the July 30 Filing to Become Effective

It is well-established that "[t]he Commission speaks through its issued orders, which must stand or fall on the evidence, application of pertinent statutes and regulations, and reasoning contained therein."[27] With the enactment of Section 205(g) of the FPA,[28] the Commission's "failure to issue an order accepting or denying" the July 30 Filing is "considered an order issued by the Commission accepting the [filing] for purposes of" rehearing[29] pursuant to Section 313(a) of the FPA.[30] That deemed order, however, cannot stand because it contained no "evidence, application of pertinent statutes and regulations, [or] reasoning . . . ."[31] Reasoned decision-making required, among other things, that the Commission respond meaningfully to the serious objections,[32] including objections raised by EPSA and other parties[33] and by Commissioners Danly and Christie,[34] acknowledge

---

27 *Fraser*, 83 FERC ¶ 61,129 at 61,575 n.12. *See also Wisconsin Valley Improvement Co.*, 80 FERC ¶ 61,054 at 61,164 n.19 (same), *on reh'g*, 81 FERC ¶ 61,082 (1997), *on reh'g*, 82 FERC ¶ 61,100 (1998).

28 16 U.S.C. § 824d(g) (2018).

29 16 U.S.C. § 824d(g)(1) (2018).

30 16 U.S.C. § 825*l* (2018).

31 *Fraser*, 83 FERC ¶ 61,129 at 61,575 n.12.

32 *See, e.g.*, *CAPP*, 254 F.3d at 299 ("Unless the Commission answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.").

33 *See supra* notes 10, 11 (citing various pleadings opposing the July 30 Filing).

34 *See, e.g.*, *AGA*, 593 F.3d at 21 ("Where a dissenting Commissioner raises a reasonable alternative, the majority is obligated to consider it.").

and explain its departures from precedent,[35] including (but not limited to) the December 2019 Order whose requirements PJM expressly sought to negate,[36] and the Commission was also required to support its deemed order (*i.e.*, its failure to act within 60 days) with substantial evidence.[37] The Commission, as a body, has done nothing of the kind and has not otherwise "articulated a satisfactory explanation" – or, in fact, any explanation at all – "for its action."[38]

To be sure, Section 205(g)(1)(B) of the FPA requires each Commissioner to "add to the record of the Commission a written statement explaining the views of the Commissioner with respect to the change,"[39] and each Commissioner issued such a statement. But, as Commissioner Danly observes, those "statements have no legal significance."[40] There is nothing in Section 205(g) or any other provision of the FPA that would allow the statement of the Supporting Commissioners to be imputed to the Commission or otherwise to serve as a substitute for the evidence, application of law, and reasoning that is required to be provided in a Commission order. As the Commission

---

35 *See, e.g.*, *West Deptford*, 766 F.3d at 20 ("It is textbook administrative law that an agency must "provide[] a reasoned explanation for departing from precedent or treating similar situations differently," *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C.Cir.1995) [("*ANR Pipeline*")], and Commission cases are no exception . . . ."). *See also* Danly Statement at P 70 ("[T]he acceptance of PJM's [July 30 Filing] has effectively reversed years of Commission precedent without any explanation.")

36 *See* July 30 Filing, Transmittal Letter at 2 (stating that the narrow MOPR was intended to "replace the Expanded MOPR ordered by the Commission in [the] December 2019 [Order]" (footnotes omitted)).

37 *See, e.g.*, 5 U.S.C. § 706(2)(E) (2018) (requiring reviewing courts to set aside agency actions "unsupported by substantial evidence").

38 *State Farm*, 463 U.S. at 43.

39 16 U.S.C. § 824d(g)(1)(B) (2018).

40 Danly Statement at P 73 (footnote omitted).

confirmed earlier this year: "Individual Commissioners' statements reflect their personal views and do not reflect the views of the Commission as a deliberative body. The Commission speaks through, and only through, its orders."[41]

The Supporting Commissioners and other supporters of the July 30 Filing may point to precedent under the Federal Election Campaign Act ("FECA") in which the Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has allowed judicial review and looked to the statements of individual Federal Election Commission (the "FEC") members in certain cases where the FEC has deadlocked. In these cases, the D.C. Circuit has directed the FEC commissioners that voted against, and thereby

---

[41] *CARE*, 175 FERC ¶ 61,213 at P 13 (footnotes omitted). *See also, e.g.*, *PSCNY*, 543 F.2d at 776 ("[T]he Commission is an entity apart from its members, and it is its institutional decisions – none other – that bear legal significance." (footnote omitted)); *ANR Pipeline Co.*, 173 FERC ¶ 61,131 at P 53 (2020) ("[T]he Commission is a deliberative body that speaks through its orders. . . ."); *Rover Pipeline LLC*, 173 FERC ¶ 61,019 at P 31 (same), *on reh'g*, 173 FERC ¶ 61,138 (2020); *Seminole Energy Servs., LLC*, 126 FERC ¶ 61,041 at 61,264 (2009) (same); *Entergy Servs., Inc.*, 119 FERC ¶ 61,187 at n.44 (2007) (finding a party's "reliance on statements made by individual Commission's [to be] misplaced" because the Commission speaks through its orders), *on reh'g*, 122 FERC ¶ 61,216 (2008); *Indianapolis Power & Light Co.*, Opinion No. 328, 48 FERC ¶ 61,040 at 61,203 (same), *on reh'g*, 49 FERC ¶ 61,328 (1989). *Cf. Bangor Gas*, 695 F.3d at 190 ("[S]tatements by FERC officials are not FERC findings."); *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1133 (D.C. Cir. 2007) (finding that petitioners' suggestion that judicial review "turn on the reasoning contained in the joint statement of the two commissioners who voted in favor of the draft order . . . makes no sense," because, among other things, "[t]heir individual statements do not represent the [Federal Communications] Commission's views"); *North Carolina Utils. Comm'n v. FERC*, 42 F.3d 659, 663 (D.C. Cir. 1994) ("The Commission's decision 'must be upheld, if at all, on the basis articulated by the agency itself.'" (quoting *State Farm*, 463 U.S. at 50)); *Illinois Citizens Comm. for Broadcasting v. FCC*, 515 F.2d 397, 402 (D.C. Cir. 1974) (finding that an agency chairman's statement was "not [agency] action at all, but merely represents the unofficial expression of the views of one member of the Commission"); *Marine Engineers' Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546, 550 (7th Cir. 1953) ("The interpretation of its enabling act by an administrative body is, of course, important as bearing upon the effect of a statute, but interpretation given by an individual member of a Board or by its attorney is not, we think, to be taken as that official kind of interpretation to which courts must pay attention."); *Citizens for Responsibility & Ethics in Wash. v. American Action Network*, 410 F.Supp.3d 1, 29 (D.D.C. 2019) (finding that a party "was not entitled to rely upon the statements of the minority of the Commissioners or the statements of the Office of General Counsel because such statements are 'not law' and provide no 'binding legal precedent or authority'" (quoting *Common Cause*, 842 F.2d at 449 n.32).

prevented the agency from initiating, enforcement action to issue statements explaining their votes and then "for purposes of judicial review, the statement or statements of those naysayers – the so-called "controlling Commissioners" – will be treated as if they were expressing the Commission's rationale for dismissal . . . ."[42] This precedent is inapposite in the FPA Section 205 setting.

In a decision issued prior to the enactment of the Section 205(g) of the FPA,[43] the D.C. Circuit found itself without jurisdiction in a challenge to an FPA Section 205 rate filing that had become effective by operation of law, and expressly declined to "import[]" its FECA precedent.[44] The D.C. Circuit acknowledged the FECA precedent allowing judicial review of agency inaction in such circumstances and looking to individual commissioner statements as the explanation for the resulting dismissal of the complaint,[45] and noted that, "[a]s does the FPA with FERC, FECA requires [the] FEC to act by majority vote."[46] "But," the court explained, "there are other obvious and significant differences between FECA and [the] FPA."[47]

---

42 *Citizens for Responsibility & Ethics in Wash. v. FEC*, 892 F.3d 434, 437 (D.C. Cir. 2008) ("*CREW*").

43 16 U.S.C. § 824d(g) (2018).

44 *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) ("*Public Citizen I*").

45 *Id.* at 1170 (citing *FEC v. National Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*")). *See also NRSC*, 966 F.2d at 1476 (describing the D.C. Circuit's practice of allowing judicial review in FEC deadlock cases and requiring that those commissioners voting in favor of the resulting dismissals provide statements which "necessarily state[] the agency's reasons for acting as it did"); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*") (finding an FEC's dismissal due to a deadlock of a complaint to be "reviewable" and directing that commissioners voting for dismissal "explain coherently the path they are taking").

46 *Public Citizen I*, 839 F.3d at 1170 (citing 52 U.S.C. §§ 30106(c), 30109(a)(2)).

47 *Id.*

While the enactment of FPA Section 205(g) removes certain of the differences between FECA and the FPA described in *Public Citizen I*, the core difference remains: the FEC has an even number of commissioners with an equal number from each party and thus "unlike other agencies – where deadlocks are rather atypical – [the] FEC will regularly deadlock as part of its *modus operandi*."[48] That being the case, the D.C. Circuit found that "the FEC approach should not be imported" in the FPA Section 205 setting.[49] Rather, as with other agencies that conform the rule in which deadlocks are atypical, the statements of individual commissioners, while added to the administrative record, cannot and should be imputed to the Commission. Indeed, even as it has continued to follow that precedent in the FEC setting, the D.C. Circuit has acknowledged that this "rather apparent fiction" whereby individual commissioner statements are attributed to the agency "rais[es] problems of its own."[50]

Notably, the D.C. Circuit also declined to import its FECA precedent in a case involving the Surface Transportation Board (the "STB"), an agency with a structure similar to that of the Commission and dissimilar to that of the FEC.[51] Where each of the STB's three then-sitting board members issued separate statements, the D.C. Circuit held that it would be "quite out of bounds" to "review the individual statements of the Board Members and conclude that two of the three are arbitrary and capricious . . . ."[52] The court explained:

---

48 *Id.* at 1171.

49 *Id.*

50 *CREW*, 892 F.3d at 438 (citing *Common Cause*, 842 F.2d at 449).

51 *See Western Coal*, 998 F.3d at 952.

52 *Id.*

> We exercise judicial review only over the actions of the Board, not over the substance of the views of the individual commissioners. . . . In this sense, the separate statements of the Board Members are akin to concurring (or dissenting) opinions of judges. And of course, a judge's separate statement cannot be imputed to an opinion of the court. So too administrative decisions must be equally respected.[53]

Had Congress intended that any or all of the individual Commissioners' statements required by FPA Section 205(g) be imputed to the Commission in some fashion, it knew how to draft language to that effect, just as it knew how to draft language stating that the Commission's failure to act would be "considered to be an order" for rehearing purposes.[54] Rather than providing that any Commissioners' statements supporting a rate that was permitted to take effect would be considered the reasoning of the Commission, however, Congress only provided that all of the Commissioners' statements, including those opposed or unable to vote, would be "add[ed] to the record,"[55] where they now sit alongside pleadings and testimony submitted by PJM, EPSA and other parties. Like the courts, the Commission "has no roving license . . . to disregard clear language simply on the view that . . . Congress 'must have intended' something broader."[56]

Moreover, construing the language of Section 205(g) of the FPA[57] as written does not, as the Supporting Commissioners allege, "*sub silentio* gut the operation-of-law

---

53 *Id.* at 952-53 (internal citations omitted).

54 16 U.S.C. § 824d(g)(1)(A) (2018).

55 16 U.S.C. § 824d(g)(1)(B) (2018).

56 *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014). *See also, e.g., Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

57 16 U.S.C. § 824d(g) (2018).

provisions in Section 205(d) . . . ."[58] It simply recognizes what changes to the regulatory scheme Congress did and did not effect when it enacted Section 205(g):

- Congress ***did not*** disturb precedent allowing Section 205 filings to take effect by operation of law in the absence of timely Commission action to reject or suspend them;
- Congress ***did*** modify the regulatory scheme to provide that allowing a Section 205 filing to take effect by operation of law will be deemed to be an "order" for purposes of rehearing and judicial review; and
- Congress ***did not*** change the rule that the Commission speaks exclusively through its orders and not through statements of individual Commissioners or Commission staff.

The reading urged by the Supporting Commissioners would disregard these congressional choices and would assume a "*sub silentio* gut[ting]"[59] of the Department of Energy Organization Act, which provides that "[a]ctions of the Commission shall be determined ***by a majority vote*** of the members present."[60] Indeed, the interpretation favored by the Supporting Commissioners disregards the fact that Section 205(g) applies not only when there is a deadlock but also when the Commission "lacks a quorum . . . ."[61] In such circumstances, it could very well be that there is not even a single Commissioner who would have voted to allow the Section 205 filing in question to take effect.

The Supporting Commissioners also imply that Commissioner Christie agreed with them on the July 30 Filing[62] and that this has some legal significance. They are wrong

---

58 Supporting Statement at P 48.

59 *Id.*

60 42 U.S.C. § 7171(e) (2018) (emphasis added).

61 16 U.S.C. § 824d(g)(1) (2018).

62 *See, e.g.*, Supporting Statement at P 48 (asserting that "three Commissioners – a majority of those participating – in their statements accompanying that 'order' explicitly support the conclusion that the Expanded MOPR is unjust and unreasonable and that a change of course is required"); *id.* at P 65 (claiming that "statements of three Commissioners reflect the judgment that

on both counts. First, as Commissioner Christie emphasizes, the three commissioners most decidedly "are not on the same page, which is why [he] would *reject* the [July 30 Filing] as unjust and unreasonable . . . ." [63] Second, even assuming *arguendo* that Commissioner Christie meant "accept" when he said "reject," the fact remains that this alleged majority never voted to do anything, and the Commission, as a body, has not determined "that a change of course is required,"[64] much less that the U-turn contemplated by the July 30 Filing was just and reasonable.

### 2. EPSA Reserves the Right to Raise Additional Arguments in Future Pleadings and On Appeal

EPSA wishes to make clear that, while it raises certain objections to the Supporting Statement below, it reserves the right to raise additional objections, including objections not articulated here, in future pleadings and on appeal. In this regard, it bears emphasis that Section 313(b) of the FPA[65] does not require EPSA and other aggrieved parties to raise their objections to the statements of individual Commissioners in order to preserve those objections for appeal.[66] Rather, only an "objection to the ***order of the***

---

the Expanded MOPR, the zenith of the Commission's approach to aggressively mitigate state policy, is not just and reasonable"); *id.* at P 81 (claiming that "three Commissioners agree that the harm of the Expanded MOPR is worse than any purported benefit it may bring to 'market integrity'").

63 Christie Statement at n.11 (emphasis in original). *See also id.* at P 5 ("I would have voted to reject PJM's proposal . . . ."). Commissioner Christie makes clear that this difference of opinion extends not just to the merits of PJM's proposal but also to the reasons for his concerns about the Expanded MOPR, reiterating that his concerns go to the "*political realities*" of the PJM region, *id.* at n.11 (emphasis in the original), not, as the Supporting Commissioners claim, perceived impacts on state policy or on consumers, *id.*

64 Supporting Statement at P 48.

65 16 U.S.C. § 825*l*(b) (2018).

66 *See* Danly Statement at n.4.

***Commission***" must be so preserved,[67] and, whatever else FPA Section 205(g) does or does not do, it does not transform an individual Commissioner's statement into a Commission order.

To be sure, Section 205(g)(1)(A) of the FPA provides that, when the Commission lacks a quorum or deadlocks, "the failure to issue an order or denying the change by the Commission shall be considered an order issued by the Commission for purposes of [FPA Section 313(a)] . . . ."[68] But nothing in Section 205(g), Section 313 or any other provision of the FPA performs any similar alchemy with respect to the statements that individual Commissioners are required to add to the record under Section 205(g)(1)(B).[69] In the absence of any express statutory language to the contrary, the Supporting Statement, like any other statement added to the record pursuant to Section 205(g)(1)(B), is not an order or action of the Commission inasmuch as it was necessarily not "determined by a majority vote of the members present."[70] Instead, the statement of the Supporting Commissioners simply "reflect[s] their personal views and do[es] not reflect the views of the Commission as a deliberative body."[71] In fact, by definition, the "failure to issue an order"[72] means that the Commission, as a body, has not put forward any reasoning for allowing the July 30 Filing to take effect that must be addressed in order to be preserved for appeal.

The D.C. Circuit's FECA precedent, even if applicable, does not support a different

---

67 16 U.S.C. § 825*l*(b) (2018) (emphasis added).

68 16 U.S.C. § 824d(g)(1)(A) (2018).

69 16 U.S.C. § 824d(g)(1)(B) (2018).

70 42 U.S.C. § 7171(e) (2018).

71 *CARE*, 175 FERC ¶ 61,213 at P 13 (footnote omitted). *See also supra* note 41.

72 16 U.S.C. § 824d(g)(1)(A) (2018).

conclusion. Even if FPA Section 205(g) is interpreted as importing the FECA approach, that would mean, at most, that a reviewing court could look to the Supporting Statement as a means for its authors "to explain coherently the path they are taking," including how they allowed the July 30 Filing to become effective "while leaving undisturbed apparently contrary precedent."[73] Indeed, the D.C. Circuit has made crystal clear that the commissioners' statements so considered under its FECA precedent are not agency orders, stating:

> Of course, such a statement of reasons would not be binding legal precedent or authority for future cases. The statute clearly requires that for any *official* Commission decision there must be . . . [a] majority vote. To ignore this requirement would be to undermine the carefully balanced . . . structure which Congress has erected.[74]

Finally, if Congress had intended that aggrieved parties be required to raise all of their objections to Commissioners' statements pursuant to FPA Section 205(g) in order to preserve them for appeal, it presumably would have required the prompt issuance of those statements. Congress imposed no such requirement, and the issuance of the Supporting Statement was, in fact, anything but prompt, with the Supporting Statement having been released late in the day on October 19, 2021, after more than two-thirds of the rehearing period had passed. And egregious as the delay in the present case may be,[75] there is nothing in Section 205(g) that would have prevented the issuance of that

---

[73] *DCCC*, 831 F.2d at 1133.

[74] *Common Cause*, 842 F.2d at 449 n.32 (emphasis in original).

[75] With all due respect, EPSA cannot agree that release of the 88-page Supporting Statement slightly more than a week before the rehearing deadline afforded parties anything close to "a full and fair opportunity to consider and respond to the arguments made [there]in . . . ." Supporting Statement at n.4.

statement after the 30-day rehearing deadline, which the Commission cannot waive,[76] had passed. The courts have previously rejected the argument that there is a jurisdictional bar to raising arguments for the first time on appeal where the aggrieved party lacked adequate notice of challenged justifications for the Commission's action.[77]

### B. Even Assuming *Arguendo* that the Supporting Statement Can Be Considered the Explanation for the Commission's Action, that Explanation Does Not Satisfy the Requirements of Reasoned Decision-Making

Even assuming *arguendo* that the Supporting Statement can be considered the explanation for the Commission's having allowed the July 30 Filing to take effect by operation of law, that explanation does not satisfy the requirements of reasoned decision-making or otherwise justify the result of the Commission's inaction.

#### 1. The Supporting Commissioners Fail to Justify the Adoption of a MOPR that Ignores Investor Interests and Results in Unjust, Unreasonable, and Unduly Discriminatory Rates

It is black-letter law that, as both a statutory and constitutional matter, "the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."[78] The Supporting Statement gives no hint that the Supporting Commissioners

---

[76] *See, e.g.*, *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 424 (1st Cir. 2001) (noting that "[t]he Commission itself has consistently held that the thirty-day time limit 'is a jurisdictional time limit which [the] Commission has no authority to extend'" and that "[s]everal courts of appeals . . . have voiced substantial agreement with this view" (quoting *Turnbull & Zoch Drilling Co.*, 37 FPC 255, 256 (1967))).

[77] *See Columbia Gas Transmission Corp. v. FERC*, 477 F.3d 739, 741 (D.C. Cir. 2007) ("[T]he reason [petitioner] hadn't attacked those [Commission] arguments in its petition for rehearing is plain: FERC hadn't yet revealed them.").

[78] *Hope*, 320 U.S. at 603. *See also Bluefield*, 262 U.S. at 690 ("Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."); *Jersey Cent. Power &*

even attempted to engage in such a balancing exercise. That is, perhaps, not surprising given the one-sided proposal that PJM put before the Commission. PJM conceded that the July 30 Filing was developed with the intent of "accommodat[ing] the interests of states and integrated utilities,"[79] and, as EPSA explained, this one-sided approach carried through the entire filing.[80] As Commissioner Danly observes, the revised MOPR provisions "are so deliberately ineffectual that their approval violates [the Commission's] statutory duty to ensure that PJM's capacity market produce just and reasonable rates."[81]

Like the July 30 Filing, the Supporting Statement reflects an entirely one-sided approach rather than the careful balancing that is statutorily and constitutionally required. For example, the Supporting Commissioners acknowledge that, by allowing the participation of state-supported resources without mitigation, the weakened MOPR "could

---

*Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) ("*Jersey Central*") ("[T]he *Hope* test defines the point at which a rate becomes unconstitutionally confiscatory as well.").

79 July 30 Filing, Transmittal Letter at 5.

80 *See* EPSA Protest at 54-64.

81 Danly Statement at P 37. *See also, e.g., Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County, Wash.*, 554 U.S. 527, 532 (2008) (stating that in setting rates, "FERC must choose a method that entails an appropriate 'balancing of the investor and the consumer interests'" (citation omitted)); *Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968) (stating that a reviewing court must determine, among other things, whether the Commission's order "may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interest"); *Jersey Central*, 810 F.2d at 1178-79 ("In reviewing a rate order courts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates. Moreover, an order cannot be justified simply by a showing that each of the choices underlying it was reasonable; those choices must still add up to a reasonable result."); *id.* at 1179 ("In the face of a serious *Hope* challenge, the Commission made no findings, performed no balancing, offered no reasoned consideration of [the petitioner]'s allegations and proffered testimony, misstated the law by saying that the reasonableness of the end result cannot be evaluated without regard to the individual components that go into a rate, and, most recently, claimed that our reviewing function was ended if the rate order did not cast [the petitioner] into bankruptcy. This performance alone would justify reversal and a remand for a *Hope* hearing.")

result in a lower price,"[82] and that the resulting lower prices would allow subsidized resources to displace non-subsidized ones, which would not receive the price signals necessary for new entry or to "forestall retirement."[83] Their own one-sided approach is also evident in their unsupported and illogical claim that state policies, such as "[s]iting policies, tax rules, and labor regulations," are "no different" from the subsidies directed at new entry or continued operation of generation targeted by the Expanded MOPR,[84] which implies that allowing below cost offers from resources receiving the latter category of subsidies somehow balances the scales. Nowhere do the Supporting Commissioners provide "evidence that [they] actually engaged in any meaningful balancing" of the investor interests at issue here.[85] This failure, in and of itself, renders the Supporting Commissioners' position arbitrary and capricious contrary to law[86] and requires rehearing. Moreover, as discussed in greater detail below, the Supporting Commissioners fail to grapple with the serious objections raised, and evidence submitted, by EPSA and others relevant to the balancing of interests and otherwise failed to engage in reasoned decision-making.[87]

---

82 Supporting Statement at P 55.

83 *Id.* at P 54.

84 *Id.* at P 56.

85 *Gulf Power*, 983 F.2d at 1099.

86 *See* 5 U.S.C. § 706(2)(A) (2018). *See also* 5 U.S.C. §§ 706(2)(B), 706(2)(C) (2018) (requiring a reviewing court "to hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right," or "in excess of statutory jurisdiction, authority, or limitations").

87 *See, e.g., PPL Wallingford*, 419 F.3d at 1198 (requiring the Commission to "respond meaningfully" to concerns raised by parties); *KN Energy*, 968 F.2d at 1303 (stating that an agency must "engage the arguments raised before it – that it conduct a process of *reasoned* decisionmaking" (emphasis in original)).

### (a) The Supporting Commissioners Attempt to Justify the Weakened MOPR Based on an Unsupported and Unsupportable View of "Competition"

As the Supporting Commissioners correctly observe, the "principal dispute" regarding PJM's July 30 Filing involves "PJM's proposal to allow capacity market sellers to reflect all state support in their offers, except for Conditioned State Support . . . ."[88] They argue that this approach is just and reasonable because it "will allow resources to compete based on their actual net going forward costs"[89] and even suggest that an effective MOPR "undermines competition in the capacity market."[90] Notwithstanding this sleight of hand, there is nothing even remotely competitive about the approach taken in the July 30 Filing and embraced by the Supporting Commissioners. To the contrary, as Commissioner Christie states, this approach "forfeits any remaining credibility to the claim that the PJM capacity market is based on actual competition or is run for the benefit of consumers."[91]

At the outset, there is no basis for characterizing costs that are calculated excluding any out-of-market payments as "actual" costs, or for suggesting that competition based on such purported "costs" is somehow just and reasonable. As EPSA and others explained, the Commission has long recognized that mitigation is necessary to ensure that out-of-market payments do not disrupt competition and distort clearing

---

88 Supporting Statement at P 36.

89 *Id.* at P 43. *See also id.* at P 11 (under the July 30 Filing, resources would "compete" in capacity markets based on offers that "must reflect all relevant costs ***minus all relevant revenues, including costs and revenues that are not derived from Commission-jurisdictional markets***" (emphasis added) (footnote omitted)).

90 *Id.* at P 11.

91 Christie Statement at P 8.

prices.[92] For example, as far back as 2006, the Commission explained, in discussing the "alternative price rule" (an offer-floor mitigation mechanism formerly employed in the ISO New England Inc. ("ISO-NE") capacity market), that offers must reflect the actual costs of generation in order to maintain reliability:

> In the absence of the alternative price rule, the price in the [auction] could be depressed below the price needed to elicit entry if enough new capacity is self-supplied (through contract or ownership) by load. That is because self-supplied new capacity may not have an incentive ***to submit bids that reflect their true cost of new entry.*** New resources that are under contract to load may have no interest in compensatory auction prices because their revenues have already been determined by contract.[93]

Similarly, in 2011, the Commission stressed that offer-floor mitigation is needed in capacity markets because, "[b]y preventing new resources from offering at prices that are significantly below their true net cost of entry, new resources would not be able to lower the price of capacity significantly below competitive levels."[94] On rehearing, the Commission again explained that capacity markets are "designed to require resources to compete to provide capacity based on economic criteria – prices – as well as on technical criteria, so as to ensure that the lowest-cost set of resources are accepted in the auction," and that "[t]o facilitate this purpose, asset-specific benchmarks are used ***to make sure that resources bid their true costs*** into the [capacity market]."[95] Similarly, in considering

---

92 *See, e.g.*, EPSA Protest at 31-37; P3 Protest at 2 & n.7 (citing cases).

93 *Devon Power LLC*, 115 FERC ¶ 61,340 at P 113 (2006) (emphasis added), *aff'd sub nom. Maine Pub. Utils. Comm'n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part sub nom. NRG Power Mktg., LLC v. Maine Pub. Utils, Comm'n*, 130 S.Ct. 693 (2010).

94 *ISO New England Inc.*, 135 FERC ¶ 61,029 at P 166 (2011) ("ISO-NE April 2011 Order") (footnote omitted), *on reh'g*, 138 FERC ¶ 61,027 (2012) ("ISO-NE January 2012 Order").

95 ISO-NE January 2012 Order, 138 FERC ¶ 61,027 at P 81 (emphasis added).

proposed changes to PJM's MOPR in 2011, the Commission expressly rejected a proposal to allow offers at "levels reflecting the full extent of . . . state backing," and found instead that resources receiving state support "must submit bids into the capacity auction consistent with their competitive costs."[96] The Commission likewise rejected exactly the proposition that the Supporting Commissioners now advance, holding that "[m]itigating an offer that is below a new resource's actual costs cannot be considered 'over mitigation.'"[97]

Relatedly, there is no basis whatsoever for the Supporting Commissioners' assertion that a weak MOPR will promote "[t]rue competition."[98] To the contrary, as one of PJM's witnesses in this case, Adam J. Keech, testified just three years ago:

> a zero-priced offer that is made possible only because a seller receives an out-of-market subsidy is not competitive behavior. The seller is relying on a state subsidy available only to select resources to submit an offer in the PJM capacity market that is well below what it needs if one looks only at its resource costs and the revenues available to it from PJM's other markets.[99]

The Commission agreed, holding that:

> Out-of-market support to existing resources has proliferated in recent years, which increases the ability of even uncompetitive existing resources, for whom a competitive offer would be significantly higher than zero, to submit offers into the PJM capacity market that do not reflect their actual costs. While this was always theoretically possible, there is an important difference between a resource that offers low as

96 April 2011 Order, 135 FERC ¶ 61,022 at P 194.

97 *Id.* at P 102.

98 Supporting Statement at P 11.

99 ER18-1314 Filing, Attachment E, Affidavit of Adam J. Keech on behalf of PJM Interconnection, L.L.C., ¶ 15 (the "Keech ER18-1314 Affidavit"). Excerpts from the ER18-1314 Filing, including the Keech ER18-1314 Affidavit, were submitted in this proceeding as an attachment to the EPSA Protest. *See* EPSA Protest, Attachment B.

> a result of competition in the market and one that offers low because a state subsidy gives it the luxury of doing so. The state subsidy protects the latter resource from the potential downside of that bidding behavior.[100]

The Supporting Commissioners attempt to brush aside this and similar precedent, insisting that they have adequate reason to "change course."[101] As explained in Section III.B.5 below, however, the Supporting Commissioners only rely on conclusory statements and fail to identify substantial evidence justifying any such course correction. Nor is it sufficient for the Supporting Commissioners simply to declare that "sell offers do not become anti-competitive or otherwise improper simply because the seller has earned revenues pursuant to state policy," and that "even if such revenues were 'uneconomic,' the harms of an approach premised on that assumption would vastly outweigh any benefits that it might provide."[102] This type of "conclusory and unexplained statement is not the 'reasoned' explanation required by the APA."[103]

In the April 2020 Complaint Rehearing Order, the Commission explained that the price suppression caused by subsidized resources harms unsubsidized resources and the market as a whole, explaining:

> The concern with price suppression is a long-run, not a short-run, concern. In the near term, existing plants with sunk costs

---

100 June 2018 Order, 163 FERC ¶ 61,236 at P 153. *See also* April 2020 Complaint Rehearing Order, 171 FERC ¶ 61,034 at P 28 ("It is axiomatic that resources receiving out-of-market subsidies need less revenue from the market than they otherwise would. The rational choice for such resources, given their need to participate in PJM's capacity market, is to reduce their offers commensurably to ensure they clear in the market. In short, subsidized resources can suppress capacity market clearing prices below competitive outcomes by offering below their costs.").

101 Supporting Statement at P 46 & n.94.

102 *Id.* at P 105 (footnote omitted).

103 *Environmental Health*, 9 F.4th at 909. *See also, e.g.*, *Public Citizen II*, 7 F.4th at 1200 (finding the Commission's "breezy analysis" insufficient); *NEPGA*, 881 F.3d at 212 (reminding the Commission that its "complex mandate doesn't relieve it of the requirements of reasoned decisionmaking").

> will continue to operate. However, uncertainty caused by this price suppression may be expected to discourage competitive new entry in the long run, as investors may be hesitant to invest in a market where both new entry and the viability of uneconomic existing resources is dictated largely by state subsidy programs, rather than competition.
>
> Further, regardless of whether the market currently attracts new entry and adequate supply, subsidized resources are still able to offer lower than they otherwise would, including lower than other similarly-situated resources that do not receive subsidies, which may compromise new entry in the future. Competitive, unsubsidized resources may also be driven out of the market by subsidies, lowering reserve margins, or may seek subsidies themselves, further distorting the market.[104]

While the Supporting Commissioners may be content to sacrifice competition in the name of advancing certain preferred state policies, their desire for a "course correction"[105] does not explain why the harms resulting from price suppression previously recognized by the Commission are no longer of concern. Indeed, as Commissioner Danly suggests, those harms should be, if anything, of even greater concern given the reliability implications of allowing subsidized intermittent resources to displace unsubsidized dispatchable resources.[106]

Equally important, the Supporting Commissioners cannot ignore the fact that any change in policy must still be "permissible under the statute . . . ."[107] Accordingly, even if

---

104 April 2020 Complaint Rehearing Order, 171 FERC ¶ 61,034 at PP 35-36 (footnotes omitted).

105 Supporting Statement at P 16.

106 *Danly Statement* at P 62 ("When the inevitable price suppression caused by unmitigated state subsidies results in the premature retirement of too many conventional, dispatchable resources (like gas and coal-fired generators), reliability will be compromised."). *See also id.* at P 61 ("When it comes to capacity markets, rate design has profound practical implications: if we get the rates wrong, the electric system will be unreliable.").

107 *Fox*, 556 U.S. at 515.

there were some reasoned basis for the Supporting Commissioners' take on what constitutes "competition," a demonstration that the resulting rates adequately consider investor interests would still be required.[108] The Supporting Commissioners have made no such showing. To the contrary, by critiquing the strong MOPR required by the December 2019 Order for resulting in prices that "will falsely signal that new entry is needed or that existing resources should forestall retirement,"[109] while applauding the weakened MOPR for "reflect[ing] the forces actually shaping supply and demand,"[110] the Supporting Statement effectively concedes that the weakened MOPR will result in subsidized resources pushing unsubsidized resources out of the market. In addition, although *Hope* makes clear that, at a minimum, just and reasonable rates must be "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital,"[111] it is difficult to imagine that any rational investors will be willing to invest in a market where they "cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on

[108] *See, e.g., General Land*, 947 F.3d at 321 (vacating decision that was based "on an incorrect legal standard"); *Dana Container, Inc. v. Secretary of Labor*, 847 F.3d 495, 499 (7th Cir. 2017) (in order for its decision to be upheld, an agency must have "considered relevant data under the correct legal standards").

[109] Supporting Statement at P 54.

[110] *Id.* at P 3.

[111] *Hope*, 320 U.S. at 603.

state subsidies."[112] Rehearing is therefore required because the Supporting Statement is manifestly "not in accordance with law . . . ."[113]

### (b) The Weak MOPR Does Not Give Suppliers a Reasonable Opportunity to Recover Their Costs

The Supporting Statement dismisses concerns about the impact of the weakened MOPR on investors on the grounds that "'suppliers in competitive wholesale electricity markets are not guaranteed full cost recovery, but only the opportunity to recover their costs."[114] But this response begs the question of how a supplier can be said to have received such an opportunity in markets when the two Commissioners whose position has prevailed by operation of law openly deride the notion that the Commission should care about "market integrity."[115] It is a foundational principle that market-based ratemaking, including that embodied in the rules for organized markets administered by PJM and other regional transmission organizations ("RTOs") and independent system operators ("ISOs"), is only permissible under the FPA when the Commission has taken steps to ensure that there is "a competitive market, where neither buyer nor seller has

---

112 June 2018 Order, 163 FERC ¶ 61,236 at P 150. *See also Ameren Servs. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018) (remanding where Commission's order raised concerns about "whether any future providers of capital would choose to enter into that questionable bargain" (citing *Hope*, 320 U.S. at 603)).

113 5 U.S.C. § 706(A) (2018).

114 Supporting Statement at P 45 (quoting *CXA La Paloma v. Cal. Indep. Sys. Operator Corp.*, 165 FERC ¶ 61,148 at P 71 (2018)).

115 *See* Supporting Statement at P 2 (objecting to the Expanded MOPR as having been based on the "flawed notion that states' exercise of their undisputed authority over generation resources interfered with what the Commission called 'market integrity'"); *id.* at P 60 (dismissively referring to the "abstract concept of market integrity"). *See also, e.g.*, April 2020 Complaint Rehearing Order, 171 FERC ¶ 61,034, Dissenting Statement at P 18 (Glick, Comm'r, dissenting) (alleging that "investor confidence" and "market integrity" were "buzz words" and "inscrutable terms").

significant market power."[116] In this case, and as explained above, the weakened MOPR tilts the playing field and prevents unsubsidized resources from fairly competing for capacity commitments. The result will be to deprive unsubsidized resources of a reasonable opportunity to recover their costs.

Similarly, there is no basis for the Supporting Commissioners' claim that the weakened MOPR "will provide a sufficient opportunity for resources to recover their costs,"[117] because "PJM's capacity market clearing price will cover the costs the marginal resource incurs to supply capacity and, by definition, the costs of all of the inframarginal capacity resources that clear the auction (i.e., the rate will be non-confiscatory)."[118] The fatal flaw in this reasoning is revealed by the Supporting Commissioners' admission that "under the Focused MOPR, resources will be allowed to reflect a more complete version of their net costs in their offers and, as such, a different mix of resources may clear the market . . . ."[119] Given that, as explained above, a subsidized resource is likely to submit offers that are well below its actual costs and as low as zero, unsubsidized resources will have little or no "opportunity" to compete for capacity revenues or to recover their costs, and will instead be pushed out of the market.[120] It is therefore plainly illogical for the Supporting Statement to summarily conclude "that fact does not render the Focused

---

116 *Tejas*, 908 F.2d at 1004. *See also* Danly Statement at PP 10-36 (discussing the need for effective buyer-side market power mitigation measures in order to comply with the FPA).

117 Supporting Statement at P 45.

118 *Id.*

119 *Id.*

120 *See, e.g., Allentown*, 522 U.S. at 374 (the process by which an agency arrives at a particular "result must be logical and rational"); *Baltimore Gas*, 462 U.S. at 105 (agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made" (citations omitted)).

MOPR unjust and unreasonable."[121]

In this respect, EPSA also raised concerns that the weakened MOPR violates the FPA's prohibition against unduly preferential or discriminatory rates.[122] As ESPA explained, the Commission previously recognized "[t]he receipt of out-of-market support is a difference that requires different ratemaking treatment,"[123] and that, absent mitigation, subsidies distort competition, and thereby "produce[] unduly preferential rates by allowing subsidized resources to distort the market to their benefit while unduly discriminating against non-subsidized resources."[124] The Supporting Commissioners nowhere address EPSA's concerns[125] or demonstrate that the FPA permits such a result.[126] In fact, by setting the market clearing price based on offers by subsidized resources, the weakened MOPR will result in cost recovery only for a subset of resources. The Supporting Statement is therefore arbitrary and capricious in suggesting that unsubsidized resources will have the opportunity to recover their costs despite the implementation of PJM's focused MOPR because they "entirely failed to consider an important aspect of the problem,"[127] and, without explanation, ignored the Commission's prior findings.[128]

---

121 Supporting Statement at P 45.

122 *See* EPSA Protest at 36-37.

123 June 2018 Order, 163 FERC ¶ 61,236 at P 68.

124 April 2020 Complaint Rehearing Order, 171 FERC ¶ 61,034 at n.198.

125 *See, e.g., CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

126 *See* 5 U.S.C. § 706(2)(A) (2018).

127 *State Farm*, 463 U.S. at 43.

128 *See Panhandle E. Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999) ("*Panhandle*") ("As we have repeatedly reminded FERC, if it wishes to depart from its prior policies, it must explain the reasons for its departure." (citations omitted)). *See also, e.g., Fox*, 556 U.S. 502 at 515; *West Deptford*, 766 F.3d at 20.

### (c) Attempts to Justify the Weakened MOPR as Consistent with the Original MOPR are Disingenuous and Unavailing

As PJM did in the July 30 Filing, the Supporting Statement suggests that the weakened MOPR is just and reasonable because it "restores PJM's MOPR to its original purpose: eliminating the incentive that large net buyers of capacity may have to take uneconomic action to decrease capacity prices."[129] Even if this were an accurate characterization of the original MOPR, it is a complete "non sequitur"[130] that fails to address the concerns raised by EPSA and others regarding the legality of PJM's proposal. It is simply no answer for the Supporting Commissioners to point to the supposed intent underlying the MOPR that was adopted more than a decade ago, when the Commission's obligation is to ensure that any current rates that will result from the application of the weakened MOPR will be just and reasonable and in accordance with law.

Moreover, any attempt to justify the July 30 Filing by pointing to the original MOPR ignores more than a decade of action by PJM and the Commission to refine and strengthen the MOPR, as described in detail in the EPSA Protest.[131] While EPSA will not repeat the full history here, it would emphasize that, as far back as 2009, the Commission recognized that states have "the incentive and ability" to support otherwise uneconomic capacity, and to "offer the capacity into the market as a price-taker, and thereby depress

---

129 Supporting Statement at P 3.

130 *Vernon*, 845 F.2d at 1048 (explaining that "an agency is not entitled under the APA to respond with a non sequitur" (citations omitted)). *See also Tennessee Gas Pipeline Co. v. FERC*, 824 F.2d 78, 84 (D.C. Cir. 1987) (finding decision to be arbitrary and capricious where the Commission's finding was a "complete *non sequitur*").

131 *See* EPSA Protest at 5-13, 31-37. *See also Baltimore Gas*, 462 U.S. at 105 (agency must "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made" (citations omitted)).

market-clearing prices received by other at-risk existing suppliers."[132] In 2011, the Commission found, in the context of another RTO's capacity market, that "[out-of-market] capacity suppresses prices ***regardless of intent***," and that the Commission therefore must act to address the "unjust and unreasonable outcomes" in situations where state actions "result in offers into the capacity market from these resources that are not reflective of their ***actual costs***."[133] Earlier that same year, the Commission applied that same principle in eliminating PJM's MOPR exemption for resources developed in response to state initiatives, finding that "uneconomic entry can produce unjust and unreasonable wholesale rates by artificially depressing capacity prices, and therefore the deterrence of uneconomic entry falls within our jurisdiction,"[134] and agreeing with the Pennsylvania Public Utility Commission (the "PaPUC") that "there is no valid state interest in ensuring that uneconomic offers can submit below-cost offers into the RPM auction."[135] Accordingly, the April 2020 Complaint Rehearing Order explained:

> Although the Commission has stated in the past that the MOPR is used to prevent the exercise of buyer-side market power, a purpose of the MOPR is to address price suppression that renders capacity market prices unjust and unreasonable. Consistent with that policy, in 2011, the Commission accepted PJM's proposal to eliminate the state-mandate exemption from the MOPR, finding that state-supported uneconomic entry can produce unjust and unreasonable rates by artificially suppressing capacity prices. Thus, the Commission previously has recognized that the MOPR is intended to address price suppression by ensuring resources offer competitively. The Commission's PJM MOPR

---

132 March 2009 Order, 126 FERC ¶ 61,275 at P 182.

133 ISO-NE April 2011 Order, 135 FERC ¶ 61,029 at P 170 (emphases added) (footnote omitted).

134 April 2011 Order, 135 FERC ¶ 61,022 at P 141 (footnote omitted).

135 *Id.* at P 142.

> precedent shows that the MOPR has evolved in scope out of necessity in light of changed circumstances.[136]

Based on its recognition of the need for market rules to "evolve[]" and its experience with the PJM and other RTO/ISO markets, the Commission set forth the following "first principles" of organized capacity markets in 2018:

> A capacity market should facilitate robust competition for capacity supply obligations, provide price signals that guide the orderly entry and exit of capacity resources, result in the selection of the least-cost set of resources that possess the attributes sought by the markets, provide price transparency, shift risk as appropriate from customers to private capital, and mitigate market power. Ultimately, the purpose of basing capacity market constructs on these principles is to produce a level of investor confidence that is sufficient to ensure resource adequacy at just and reasonable rates.[137]

By contrast, not only does the weakened MOPR under the July 30 Filing require a manifest intent to suppress prices in order to trigger mitigation but, as explained above, it also impedes competition and results in the selection of resources based not on their actual costs. It is difficult to imagine how, with this framework, the RPM market will be able to attract any investment from resources that do not also have guarantees of out-of-market support, as the Commission recognized when it found that investors will be reluctant to invest when they "cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies."[138]

---

136 April 2020 Complaint Rehearing Order, 171 FERC ¶ 61,034 at P 55 (footnotes omitted).

137 *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 21 (2018) (footnotes omitted), *on reh'g*, *ISO New England Inc.*, 173 FERC ¶ 61,161 (2020), *on reh'g*, 174 FERC ¶ 61,120 (2021).

138 June 2018 Order, 163 FERC ¶ 61,236 at P 150. *See also* Comments of the Independent Market Monitor for PJM at 8-9, Docket Nos. ER18-1314-000, *et al.* (filed May 7, 2018) (explaining that "subsidies suppress energy and capacity market prices and therefore suppress incentives for

The upshot is that, as the IMM put it, PJM's proposal "undo[es] 20 years of evolution and refinement of the definition of market power actually applied in PJM markets."[139] While the Supporting Statement dismisses this evolution as "MOPR mission creep,"[140] considerably more was required to justify such a radical departure from more than a decade's worth of considered Commission policy with respect to appropriate mitigation measures.[141]

**(d) There Have Been No Changes in Circumstances That Would Support Allowing the July 30 Filing to Become Effective**

In the July 30 Filing, PJM feebly claimed that changed circumstances, including its adoption of Effective Load Carrying Capacity ("ELCC") rules, justified acceptance of its weak MOPR proposal.[142] As EPSA explained, there was no merit to this claim,[143] and, although they discuss the ELCC construct briefly,[144] the Supporting Commissioners do not endorse PJM's argument. They do, however, refer vaguely to "changing circumstances" as justifying their departure from precedent.[145] The Supporting

investments in new, higher efficiency thermal plants but also suppress investment incentives for the next generation of energy supply technologies and energy efficiency technologies").

139 IMM Protest at 8.

140 Supporting Statement at P 8.

141 *See, e.g., Fox*, 556 U.S. 502 at 515 (stating that an agency departing from its own precedent must "display awareness that it is changing position" and "show that there are good reasons for the new policy"); *West Deptford*, 766 F.3d at 20 ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently,' . . . and Commission cases are no exception . . . ." (quoting *ANR Pipeline*, 71 F.3d at 901)).

142 *See* July 30 Filing, Transmittal Letter at 19.

143 *See* EPSA Protest at 52-53.

144 *See* Supporting Statement at P 82.

145 *Id.* at P 60.

Commissioners only identify two specific changes that purportedly justify allowing the July 30 Filing to take effect. First, they claim that "several states have considered abandoning the capacity market altogether rather than have the resources needed to meet their public policy goals be subjected to mitigation,"[146] without addressing EPSA's argument that this claim is "entirely speculative" and "'highly exaggerated,' given the costs of using [the Fixed Resource Requirement Alternative] to avoid the alleged double payment problem."[147] Moreover, while forced to concede that a weak MOPR could cause non-subsidizing states to exit the PJM capacity market,[148] the Supporting Commissioners breezily dismiss this countervailing factor with the unsupported assertion that the exit of subsidizing states "presents an even greater risk."[149] In any event, as Commissioner Danly observes, "the possibility that a state or a Self-Supply entity may leave PJM if its policy objectives are not accommodated in the capacity market cannot serve as a basis for the Commission to disregard its obligation to ensure just and reasonable rates."[150]

The second change identified by the Supporting Commissioners is that "[s]tates are playing a more active role in shaping the resource mix – including both entry and exit – than they were at the time the Commission issued previous orders addressing the scope and purpose of PJM's MOPR."[151] But, under the reasoning of those prior orders

---

146 *Id.* at P 58.

147 EPSA Protest at 63 (quoting Cain Initial Affidavit, ¶ 60). *See also* Danly Statement at P 53 (argument that states will leave the capacity market "appears to be greatly exaggerated, particularly in light of the results of PJM's most recent auction").

148 *See* Supporting Statement at n.125. *See also* EPSA Protest at 63; Danly Statement at P 54.

149 Supporting Statement at n.125.

150 Danly Statement at P 55.

151 Supporting Statement at P 59.

and basic economic principles, this change would only reinforce the need for a strong MOPR with respect to subsidies resulting in new entry or continued operation of resources in the PJM market.[152] This change cannot, therefore, even begin to explain this abrupt departure from – and, indeed, a deliberate effort to reverse – that precedent.[153] At the end of the day, it is clear that the only change in circumstances relevant to the outcome here is a change in the composition that left the Commission without a majority willing to rebuff PJM's effort to unwind the Commission's MOPR precedent.

### 2. The Supporting Commissioners Fail Adequately to Account for Serious Reliance Interests Upended By the July 30 Filing

EPSA and others emphasized that allowing the July 30 Filing to take effect would upend serious reliance interests of suppliers that have invested billions of dollars in generation facilities in reliance on the MOPR and the Commission's MOPR precedent.[154]

---

[152] *See, e.g.*, June 2018 Order, 163 FERC ¶ 61,236 at P 156 (finding action necessary because "out-of-market payments by certain PJM states 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 to guide the orderly entry and exit of capacity resources"). *See also* Danly Statement at P 52; Cain Initial Affidavit, ¶ 31 ("The fact that there is a growing volume of state-subsidized resources in PJM is not an indicator of the hopelessness of the situation, because adequate mitigation is not about preventing states from pursuing resource objectives, it is about protecting the competitive market construct.").

[153] *See, e.g.*, *Fox*, 556 U.S. 502 at 515 (stating that an agency departing from its own precedent must "display awareness that it is changing position" and "show that there are good reasons for the new policy"); *West Deptford*, 766 F.3d at 20 ("It is textbook administrative law that an agency must 'provide[] a reasoned explanation for departing from precedent or treating similar situations differently,' . . . and Commission cases are no exception . . . ." (quoting *ANR Pipeline*, 71 F.3d at 901)). Of course, whatever role it may be deemed to serve, the Supporting Statement has no precedential value and does not, therefore, reverse this precedent. *See Common Cause*, 842 F.2d at 449 n.32.

[154] *See* EPSA Protest at 64-69. *See also, e.g.*, CCE/SFE Protest at 2-10.

As EPSA explained,[155] reasoned decision-making required that the Commission "account for the reliance interests of . . . [suppliers] that ha[ve] crafted their business models and invested significant resources"[156] based on the MOPR and what Commissioner Danly has accurately described as "more than ten years of consistent Commission precedent requiring mitigation of price suppressive subsidies . . . ."[157] The Supporting Commissioners barely acknowledge these concerns, stating only that the capacity market is "an administrative construct with rules and regulations that are always subject to prospective change,"[158] and that "only one auction has been run with the Expanded MOPR in place . . . ."[159] This mere "nod to [intervenors'] argument[s]" falls well short of what reasoned decision-making required: those arguments "called for a serious explanation."[160]

The observation that rules and regulations change barely rises to the level of a "nod" to EPSA's argument. All agency rules, regulations, and policies are, within the limits of the underlying organic statutes, subject to change. But such changes must still be

---

155 *See* EPSA Protest at 66-67 & n.292.

156 *National Lifeline Ass'n v. FCC*, 921 F.3d 1102, 1114 (D.C. Cir. 2019). *See also*, *e.g.*, *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S.Ct. 1891, 1913 (2020); *Encino*, 136 S.Ct. at 2126; *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 (2015); *Fox*, 556 U.S. at 515; *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *National Urban League v. Ross*, 977 F.3d 770, 778 (9th Cir. 2020); *Mobile Comm. Corp. of Am. v. FCC*, 77 F.3d 1399, 1407 (D.C. Cir. 1996).

157 Commissioner James Danly, *White Paper: Commissioner James Danly on the Requirement that Competitive Markets be Protected from the Exercise of Market Power Applied to RTO Capacity Markets*, at 4 (first supplement dated June 17, 2021) (the "Danly White Paper"), https://www.ferc.gov/news-events/news/white-paper-commissioner-james-danly-requirement-competitive-markets-be-protected.

158 Supporting Statement at P 61.

159 *Id.*

160 *Cook County*, 962 F.3d at 231. *See also, e.g.*, *CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

implemented in accordance with the APA, which requires that such changes be the product of reasoned decision-making, and reasoned decision-making requires, in turn, that an agency, such as the Commission, "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[161] Saying that rules and regulations change simply underscores that the Supporting Commissioners' did not take the obligation to account for these legitimate and significant reliance interests seriously.

Similarly, the statement that the Expanded MOPR was only in place for one auction is just another in a long series of *non sequiturs* that the Supporting Statement offers in lieu of the meaningful engagement required under the APA.[162] By its terms, the July 30 Filing turned back the MOPR clock well past December 2019, as it replaced not only the Expanded MOPR but also "the previously existing legacy MOPR . . . ."[163] The Supporting Commissioners concede as much, hailing the July 30 Filing for providing a "coherent framework" for buyer-side market power mitigation "for the first time in more than a decade . . . ."[164] Moreover, the Commission precedent on which suppliers have relied is more than the particular version of the MOPR in effect at any given time; it also encompasses what the Commission has been saying in its MOPR orders for more than a decade,[165] as well as its consistent practice of expanding the scope of the MOPR in

---

161 *Encino*, 136 S.Ct. at 2126 (citing *Fox*, 556 U.S. at 515).

162 *See Vernon*, 845 F.2d at 1048.

163 July 30 Filing, Transmittal Letter at 2.

164 Supporting Statement at P 163.

165 *See* EPSA Protest at 2-13 (describing the history of PJM's MOPR). *See also id.* at 65-68 (discussing Commission and PJM statements regarding their commitment to an effective MOPR);

response to "[t]he mounting evidence of risk from what was previously only a theoretical weakness in the MOPR rules that could allow uneconomic entry."[166] As PJM itself recognized until recently, the Commission's orders, as well as PJM's own action, engendered a "*market expectation* that new entry can outcompete and displace older, less efficient incumbent resources," consistent with "a long history of Commission policy embracing competition in wholesale electricity markets."[167]

### 3. The Supporting Commissioners' Jurisdictional Analysis is Contrary to Law and Not the Product of Reasoned Decision-making

In the Supporting Commissioners' view, the MOPR required by the December 2019 Order was "based on the flawed notion that the states' exercise of their undisputed authority over generation resources interfered with what the Commission called 'market integrity.'"[168] Accordingly, the Supporting Commissioners claim that one of the principal benefits of the weak MOPR proposed in the July 30 Filing is that it does not "interfer[e] with the authority that Congress reserved for the states when it enacted the FPA."[169] The Supporting Commissioners' jurisdictional assessment is 180 degrees off the mark and fails to provide a meaningful response to the arguments of EPSA and others on this issue.

---

Danly White Paper at 4 (discussing "more than ten years of consistent Commission precedent requiring mitigation of price suppressive subsidies").

166 April 2011 Order, 135 FERC ¶ 61,022 at P 139.

167 ER18-1314 Filing, Transmittal Letter at 11-12 (emphasis in original) (footnote omitted).

168 Supporting Statement at P 2.

169 *Id.* at P 1.

As EPSA explained in its protest, claims that an effective MOPR interferes with state authority are unfounded,[170] and, properly understood, the FPA and principles of federalism not only allow, but require, Commission action to protect the integrity of the wholesale market and thereby to ensure that this market does not allow subsidizing states to shift the costs of their policies onto other states.[171] At a minimum, reasoned decision-making required that the Commission engage with these serious objections to the July 30 Filing[172] and provide a cogent explanation for its departure from Commission precedent on these issues.[173] But the Supporting Commissioners only respond obliquely, derisively stating that Commissioner Danly's argument on this point "comes from a protestor's rather liberal reformulation of Supreme Court precedent."[174] Such "dismissive treatment . . . , which [is] hardly a response at all, [is] not the product of a reasoned decisionmaking process."[175]

---

170 *See* EPSA Protest at 26-30. *See also, e.g.*, Danly Statement at P 56 ("Arguments that market-power mitigation impermissibly invades the states' prerogatives under the FPA are directly contrary to judicial precedent."); December 2019 Order, 169 FERC ¶ 61,239 at P 41 ("States have the right to pursue policy interests in their jurisdictions. Where those state policies allow uneconomic entry into the capacity market, the Commission's jurisdiction applies, and we must ensure that wholesale rates are just and reasonable." (footnote omitted)); November 2011 Order, 137 FERC ¶ 61,145 at P 64 ("[N]o one state (or states) can claim the right to artificially skew wholesale outcomes by escaping market power mitigation of subsidies, particularly given that such efforts would affect all other PJM states.").

171 *See* EPSA Protest at 16-26. *See also, e.g., Hyatt*, 139 S. Ct. at 1497 ("Each State's equal dignity and sovereignty under the Constitution implies certain constitutional 'limitation[s] on the sovereignty of all of its sister States.'" (citation omitted)); *Gore*, 517 U.S. at 571 ("[I]t is clear that no single State . . . [may] impose its own policy choice on neighboring States."); *Kansas*, 206 U.S. at 97 ("Each State . . . can impose its own legislation on no one of the others, and is bound to yield its own views to none.").

172 *See, e.g., CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

173 *See, e.g.*, *Fox*, 556 U.S. at 515; *West Deptford*, 766 F.3d at 20.

174 Supporting Statement at n.141.

175 *NorAm*, 148 F.3d at 1165.

In its protest, EPSA cited numerous instances going back at least a decade in which PJM states emphasized the need for an effective MOPR as a means to preserve the integrity of the wholesale capacity market on which they rely.[176] These concerns were echoed in state filings in response to the July 30 Filing. For example, the PaPUC and Public Utilities Commission of Ohio opposed the July 30 Filing on the grounds that it "unjustly transfers the consequences of a particular state's policy preference(s) to all states and consumers within the PJM region."[177] Similarly, Ohio State Senators Matt Huffman and Rob McColley stated that "Ohio has constructed an energy policy that is grounded on competition and the efficiencies that can be gained from a regional wholesale power market,"[178] and that:

> PJM's filing represents a significant step backward for an RTO that has traditionally been a champion of just and reasonable competitive markets. Ohio utilities joined PJM with the expectation of joining a regional market in which reliability would be ensured by competitive resources vying to serve load at the lost cost. Ohio desires a market based on competition, not subsidies, and FERC has a duty to protect that market from the disruptive actions of a one state that impact the outcomes for other states.[179]

In the same vein, State Senator Mark Romanchuk, a member of the Ohio Senate Energy and Public Utilities committee, stressed that "other states' policy decisions should not be allowed to create unfair advantages for select generators in a competitive regional

---

176 *See id.*

177 PaPUC/PUCO Protest at 4.

178 Letter from Matt Huffman and Rob McColley at 1, Docket No. ER21-2582-000 (filed Sept. 1, 2021).

179 *Id.*

market," and urged the Commission "to stand firm against a market structure which exports the policies and higher prices of one state to another state."[180]

Significantly, as noted by Commissioner Christie, the states of Pennsylvania and Ohio, which opposed the July 30 Filing, "represent collectively nearly 40% of both summer and winter peak load in PJM, as well as having nearly 40% of existing installed capacity . . . ."[181] The fact that the PJM states were "not of one mind" on the July 30 Filing[182] belies any contention that the weak MOPR respects state policy choices and underscores that its actual purpose and effect is to elevate certain states' policy choices over the policy choices of other states. It also belies claims that the weak MOPR is better for consumers and "will most likely lower total costs for consumers in other states,"[183] because, as explained by the Office of the Ohio Consumers' Counsel ("OCC"):

> PJM's proposal would allow existing and new subsidized generating plants to participate in the competitive markets, with unwelcome results for consumers. PJM's proposal would ultimately result in higher prices for Ohio consumers. Allowing these subsidized resources to participate in the capacity auction clearing could suppress prices to uneconomic levels, which could force otherwise efficient (not subsidized) power plants to shutter operations, or new more efficient generation not to be built. The closure and non-construction of power plants could result, over the long term, in increased prices for consumers because of the negative impacts on competition. The closure (or decisions not to build) could also threaten

180 Letter from Mark Romanchuk at 1, Docket No. ER21-2582-000 (filed Aug. 20, 2021).

181 Christie Statement at P 10 (citing PaPUC/PUCO Protest at 3).

182 *Id.*

183 Supporting Statement at P 63 (citing July 30 Filing, Attachment E, Affidavit of Dr. Walter F. Graf on Behalf of PJM Interconnection, L.L.C., ¶ 17, n.3).

> reliability because many of the state-subsidized facilities will be less reliable intermittent resources.[184]

While objecting that an effective MOPR seeks "to strip away the influence of disfavored state policies on capacity prices,"[185] the Supporting Commissioners ignore entirely the impact that enabling their favored state policies to influence capacity prices will have on other states and consumers in those other states. Such a failure "to consider an important aspect of the problem" cannot be squared with the requirements of reasoned decision-making.[186]

Tellingly, the Supporting Commissioners do not deny that a weak MOPR will let subsidizing states shift the costs of their policy statements onto consumers and businesses in other states. Instead, they deflect, insisting that "indirect cross-border price effects are an inevitable consequence of any form of state regulation" and that "states in an interstate market cannot be wholly insulated from legally valid policy choices of other states."[187] But that is beside the point. The Commission has a statutory duty to prevent undue discrimination,[188] and, as discussed in the EPSA Protest, that duty encompasses a duty to prevent – or, at a minimum, not to facilitate – one state's use of a Commission-jurisdictional wholesale market as a means of imposing the costs of its policy choices on other states.[189]

---

184 Comments in Support of Competitive Markets for Benefiting Consumers by Office of the Ohio Consumers' Counsel at 2, Docket No. ER21-2582-000 (filed Aug. 20, 2021).

185 Supporting Statement at P 12 (footnote omitted).

186 *State Farm*, 463 U.S. at 43.

187 Supporting Statement at P 63.

188 See 16 U.S.C. § 824d(b) (2018); 16 U.S.C. § 824e(a) (2018).

189 *See* EPSA Protest at 18-19.

In support of their contention that a strong MOPR has the Commission "arrogating to itself the role that Congress reserved for the states," even if it is only "block[ing] the *effects* of state policies," the Supporting Commissioners assert that "a federal policy of eliminating the effects of state policies is itself a form of public policy – just not one that Congress gave the Commission authority to pursue."[190] Implicit in this statement is the notion that states have some kind of cognizable interest in enacting policies that affect wholesale rates. But Congress did not adopt any sort of "state preemption" doctrine under which the Commission is barred from exercising, or permitted to abdicate, its jurisdiction over wholesale rates and practices affecting wholesale rates if doing so might have some effect on matters subject to state jurisdiction.[191] To the contrary, as the Court of Appeals for the Fourth Circuit observed in discussing Congress's enactment of the FPA to fill the gap created by the Supreme Court's decision in *Public Utilities Commission v. Attleboro Steam & Electric Company*:[192]

> Only FERC, as a central regulatory body, can make the comprehensive public interest determination contemplated by the FPA and achieve the coordinated approach to regulation found necessary in *Attleboro*. No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination.[193]

---

190 Supporting Statement at P 19 (emphasis in original).

191 *See FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 281 (2016) ("When FERC regulates what takes place on the wholesale market, as part of carrying out its charge to improve how that market runs, then no matter the effect on retail rates, [16 U.S.C.] § 824(b) imposes no bar.").

192 273 U.S. 83 (1927) ("*Attleboro*").

193 *Appalachian Power Co. v. Public Serv. Comm'n of W.V.*, 812 F.2d 898, 905 (4th Cir. 1987).

In any event, adopting a weak MOPR in order to accommodate preferred state policies is also a "form of public policy."[194] The vital difference between the two public policies is that the public policy choice reflected in a weak MOPR, unlike that reflected in an effective MOPR, unlawfully allows a subsidizing state, in PJM's words, to "export[] the impact of its subsidy onto other states . . . ."[195]

As indicated in the EPSA Protest, there is evidence that this extra-territorial effect is exactly what certain subsidizing states have in mind, and that, when they complain about an effective MOPR interfering with their policy goals, subsidizing states are specifically concerned that their subsidized resources are not being allowed to displace disfavored resources in other states.[196] And the Supporting Statement strongly implies that the Supporting Commissioners take the same view. Indeed, that would seem to be the only way to reconcile their concern that an effective MOPR will "'nullify' the effects of legitimate state policies"[197] with their assertion that "[s]tates will continue to exercise their authority over the resource mix no matter how hard the Commission tries to frustrate those efforts . . . ."[198] If a subsidizing state is going to support its preferred resources irrespective of whether an effective MOPR is in place, the only way an effective MOPR can even conceivably be said to interfere with the subsidizing state's policy objectives is if those objectives include displacement of other, unsubsidized resources. There is no

---

194 Supporting Statement at P 19.

195 ER18-1314 Filing, Transmittal Letter at 29. *See also id.* at 4 (noting that state subsidies impact "other states that may not embrace the subsidizing state's particular policy preference").

196 *See* EPSA Protest at 24-25.

197 Supporting Statement at P 3 (footnote omitted). *See also, e.g.*, *id.* at P 20 (suggesting that the Expanded MOPR "interfer[es] with state policies").

198 *Id.* at P 15.

question that, within the boundaries of their respective states, state authorities "retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the Commission."[199] But states have no right to interfere with the resource mix in other states, and it is unduly discriminatory for the Commission to regulate the wholesale market in a way that would help them do so.

#### 4. The Supporting Commissioners Fail to Meaningfully Respond to EPSA's and Other Intervenors' Objections that the Revised MOPR is Ineffective Even for the Limited Purposes Set Forth in the July 30 Filing

Even assuming, *arguendo*, that just and reasonable rates only required the narrow mitigation of the exercise of market power as PJM claimed in the July 30 Filing, the Supporting Commissioners fail adequately to respond to arguments by EPSA and others that the rules set forth in the July 30 Filing are insufficient to fulfill even that limited purpose. Indeed, Commissioner Danly notes that the number of "off ramps from mitigation" under the weakened MOPR "is so extensive that it is exceedingly unlikely that any offer from a load-serving market participant ever will be mitigated."[200] As EPSA explained, the July 30 Filing in fact represents a substantial step backwards and, not surprisingly, reinstates flaws in earlier versions of the MOPR and that PJM and the Commission had taken pains to remedy.[201] Most notably, the revised MOPR does not

---

199 *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).

200 Danly Statement at P 48.

201 *See* EPSA Protest at 38-43.

even include states in the definition of the "Load Interests" that would trigger a review for the potential exercise of market power,[202] even though PJM's witness, Professor Cramton, acknowledged that "states, cooperatives, and other large buyers may have an interest in reducing capacity prices."[203]

The Supporting Statement provides no meaningful response to EPSA's arguments that the MOPR set forth in the July 30 Filing recreates flaws that had previously been recognized and addressed by PJM and the Commission.[204] Moreover, without addressing the contradictions between PJM's proposal and its own witness's statements, the Supporting Commissioners claim that only "large net buyers" pose a threat[205] and that it is inappropriate to "turn[] states into buyers (they are not) . . . ."[206] This assertion arbitrarily and capriciously ignores the fact that, as the Commission has long recognized, "***states*** may have the incentive and ability to encourage or require their regulated utilities or others" to take actions that would "depress market-clearing prices received by other at-risk existing suppliers."[207] As the courts have made clear, "even when reversing a

---

202 *See id.* at 42-43.

203 Cramton Initial Affidavit, ¶ 33.

204 *See, e.g., CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

205 Supporting Statement at P 3. *See also id.* at P 6 ("In the context of capacity markets, buyer-side market power is used to refer to a net buyer of capacity that has the ability to take an otherwise uneconomic action to depress the capacity price, thereby benefitting its net-short position." (footnote omitted)).

206 *Id.* at n.180. *See also* Danly Statement at P 59 (noting that, in the July 30 Filing, PJM had put forth a "new, narrowed definition" of buyer-side market power, and that "even the most charitable among us can be forgiven for taking the somewhat cynical view that PJM is merely attempting to define its way out of a problem").

207 March 2009 Order, 126 FERC ¶ 61,275 at P 182 (emphasis added). *See also New York Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,058 at P 16 (2020) (finding that state instrumentalities should not be eligible for a self-supply exemption because they "act on behalf of more than their

policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation,"[208] and the Supporting Commissioners cannot overlook the "incentive and ability" of states to suppress prices simply because they believe "a change in policy" is appropriate.[209]

The Supporting Commissioners not only fail adequately to address EPSA's arguments regarding the ineffectiveness of the mitigation measures proposed by PJM; they also ignore the IMM's warnings that PJM proposed "an unenforceable definition of market power, complete with a complex set of barriers to gathering information and impossible deadlines," and that there is no "example of an actual case that would fail [PJM's] proposed MOPR tests."[210] As Commissioner Christie noted, the Supporting Commissioners' dissatisfaction with the Expanded MOPR required by the December 2019 Order does not justify the adoption of "a structure that the [IMM] says is *even worse* than having no MOPR at all."[211]

While acknowledging that "[t]he Commission has at times come close to justifying mitigation of resources that receive state support on the basis that the state itself is exercising buyer-side market power because it looks out for the interests of all consumers in the state," the Supporting Commissioners now summarily declare that "[t]hat notion

---

own specific set of customers (i.e., the whole state) and, as a result, they have the incentive and ability to artificially suppress [capacity] market prices").

208 *Kake*, 795 F.3d at 968.

209 Supporting Statement at P 46.

210 IMM Protest at 3.

211 Christie Statement at P 3 (emphasis in original) (footnote omitted). *See also* Danly Statement at P 4 ("No critique of the now-accepted Expanded MOPR, regardless of how convincing or well-reasoned, can inform the determination we are called upon to make here under FPA section 205.").

never held water."[212] In their view, "[s]tates regulate for a variety of reasons, and treating all state regulation as anti-competitive or an exercise of market power fundamentally misunderstands and distorts the states' central role in electric power generation, as recognized explicitly in the FPA."[213] As an initial matter, it is difficult to imagine certain state representatives would have so vigorously opposed the Expanded MOPR and insisted on their subsidized resources being permitted to submit lower-priced offers into the RPM markets if they had no interest in price suppression. But even accepting that a state may act "for a variety of reasons,"[214] the Supporting Commissioners have not provided a reasoned basis for creating a blanket exception for state actions.[215] This is particularly true because, as the IMM noted, "the requirement of intent in determining market power is not consistent with economic theory," and "[t]he existence of market power is structural and its consequences . . . exist regardless of intent and regardless of whether any particular strategy is ultimately profitable."[216] Ultimately, the intent underlying a state's action does not absolve the Commission of its obligation to ensure that wholesale rates are just and reasonable or justify the Commission permitting state actions to suppress wholesale prices.

The Supporting Commissioners also argue that state actions should not be considered in buyer-side mitigation measures because "states are often concerned with the interests of sellers within their borders and yet the Commission has never found, to

212 Supporting Statement at P 21 (footnote omitted).

213 *Id.*

214 *Id.*

215 *See, e.g., Allentown*, 522 U.S. at 374; *Baltimore Gas*, 462 U.S. at 105.

216 IMM Protest at 10.

our knowledge, that state efforts that benefit particular sellers should be treated like seller-side market power."[217] This argument cannot be squared with the Supporting Commissioners' claims that mitigation measures applicable to buyers and sellers should be different, which renders their statement "internally inconsistent."[218] More importantly, to EPSA's knowledge, in cases where states have taken actions to "benefit particular sellers,"[219] those actions have taken the form of subsidies and other programs that would ***lower*** a seller's costs. The Supporting Commissioners certainly do not identify any state programs that would "benefit" sellers by raising their costs.[220]

In its answer, PJM argued that any concerns regarding the potential exercise of market power by states are addressed by the Conditioned State Support prong of the July 30 Filing.[221] The Supporting Commissioners, however, instead took the position that "the application of PJM's MOPR to resources receiving Conditioned State Support is reasonable, not because such policies constitute a form of buyer-side market power, but because such state programs are likely preempted under the [*Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016) ("*Hughes*")] standard."[222] In short, the Supporting Statement acknowledges that the Conditioned State Support test provides no protection other than to mitigate state programs that would be preempted and legally invalid under

---

217 Supporting Statement at P 21.

218 *ANR Storage*, 904 F.3d at 1028.

219 Supporting Statement at P 21.

220 *See Environmental Health*, 9 F.4th at 909 (rejecting a "conclusory and unexplained statement" as "not the 'reasoned' explanation required by the APA").

221 *See* Motion for Leave to Answer and Answer of PJM Interconnection, L.L.C. at 24, Docket No. ER21-2582-000 (filed Sept. 7, 2021).

222 Supporting Statement at P 135.

the Supreme Court's decision in *Hughes*, and would only "provide determinations more quickly than would be provided by the courts."[223]

At the same time, the Supporting Statement also fails to justify various exclusions to the Conditioned State Support test. In particular, the Supporting Statement claims that PJM's proposal to "categorically exclude from the definition of 'Conditioned State Support' any policy or program that is currently in effect (Legacy Policy) is just and reasonable" because "states enacted these programs prior to PJM's filing in this proceeding and so were not on notice of these proposed changes."[224] This argument is plainly "illogical on its own terms"[225] and "internally inconsistent"[226] with the Supporting Commissioners' statement that PJM's proposal "track[s] existing precedent"[227] because it is based on *Hughes*, which was decided in 2016 and applied by the Commission in 2019.[228] Moreover, this is not a case where the MOPR is being expanded such that it will apply to suppliers not previously subject to mitigation. As EPSA explained in its protest, creating an exception when the MOPR is being narrowed, rather than broadened, is entirely illogical and only serves to facilitate precisely the sort of regulatory evasion that the Commission has previously found undesirable.[229] Not surprisingly, the Supporting

---

223 *Id.* at P 134.

224 *Id.* at P 144.

225 *GameFly*, 704 F.3d at 148 (citation omitted).

226 *ANR Storage*, 904 F.3d at 1028. *See also, e.g., General Chem. Corp. v. U.S.*, 817 F.2d 844, 857 (D.C. Cir. 1987) (finding agency action "arbitrary and capricious" because it was "internally inconsistent and inadequately explained").

227 Supporting Statement at P 134.

228 *See id.* at P 135 n.283 (citing *New England Ratepayers Ass'n*, 168 FERC ¶ 61,169 at P 44 (2019)).

229 *See* EPSA Protest at 48 (citing April 2011 Order, 135 FERC ¶ 61,022 at P 87).

Statement provides no explanation why "notice" is required for a state program that was already invalid under Supreme Court precedent issued years earlier.

In addition, the Supporting Statement further fails to reflect reasoned decision-making in claiming that "a state-directed but non-specific exhortation to bid 'competitively' or 'at cost' are likely not 'bid to clear' requirements that should trigger application of the MOPR."[230] Particularly given the Supporting Statement's insistence that a "competitive" offer should reflect "all relevant costs minus all relevant revenues, including costs and revenues that are not derived from Commission-jurisdictional markets,"[231] a directive to "bid 'competitively' or 'at cost'" is equivalent to a requirement to set an offer at a price that is designed to clear. Accordingly, the Supporting Statement fails to reflect reasoned decision-making because it ignored an "important aspect of the problem," [232] and overlooked the IMM's explanation[233] that, the Conditioned State Support prong "is "meaningless in practice" as "[s]tates can achieve exactly the same outcome with slightly more careful wording."[234]

---

230 Supporting Statement at P 140.

231 *Id.* at P 11.

232 *State Farm*, 463 U.S. at 43.

233 *See, e.g., CPUC*, 462 F.3d at 1051; *PPL Wallingford*, 419 F.3d at 1198; *KN Energy*, 968 F.2d at 1303.

234 IMM Protest at 5.

### 5. The Supporting Commissioners' Explanation Is Not Supported By Substantial Evidence and Improperly Ignores Contrary Evidence

Under the APA and the FPA, a Commission order – like that deemed to have issued when the Commission failed to act on the July 30 Order[235] – will only survive judicial review if it is supported by substantial evidence.[236] As the applicant under Section 205 of the FPA,[237] PJM bore the burden of proof with respect to the changes to the MOPR proposed in the July 30 Filing.[238] To meet this burden, PJM was first required to:

> establish a *prima facie* case. The test for *prima facie* evidence is "whether there are facts in evidence which if unanswered would justify [persons] of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain." The burden of going forward then shifts to the opposing parties. But the ultimate burden of persuasion remains with the proponent, who will prevail only if the preponderance of the evidence supports its position.[239]

---

235 16 U.S.C. § 824d(g)(1)(A) (2018).

236 *See* 5 U.S.C. § 706(2)(E) (2018); 16 U.S.C. § 825*l*(b) (2018). *See also ICC*, 576 F.3d at 477 (explaining that a reviewing court cannot "uphold a regulatory decision that is not supported by substantial evidence on the record as a whole"); *Pacific Gas & Elec. Co. v. FERC*, 373 F.3d 1315, 1319 (D.C. Cir. 2004) (the Commission's orders must be "based upon substantial evidence in the record" (quoting *Northern States Power Co. v. FERC*, 30 F.3d 177, 180 (D.C. Cir. 1994))).

237 16 U.S.C. § 824d (2018).

238 *See, e.g.*, 16 U.S.C. § 824d(e) (2018); *ISO New England Inc.*, 166 FERC ¶ 61,060 at P 19 (2019) (stating that, "as the proponent of the 205 filing, [the filer] will bear the burden of proof"); *Indicated SPP Transmission Owners v. Southwest Power Pool, Inc.*, 165 FERC ¶ 61,005 at P 10 (2018) (finding that the proponent of a rate change under Section 205 of the FPA "has the burden of proof to demonstrate that the rate is just and reasonable, and must ensure that there is a sufficient evidentiary record for the Commission to make a reasoned decision"); *NorthWestern Corp.*, 155 FERC ¶ 61,158 at P 29 (2016) (affirming finding that "the utility filing for revised rates under section 205 of the [FPA] . . . clearly had the burden of proof to show its proposed rate was just and reasonable" (footnote omitted)), *aff'd sub nom. NorthWestern Corp. v. FERC*, 884 F.3d 1176 (D.C. Cir. 2018).

239 *Panda Stonewall LLC*, 174 FERC ¶ 61,266 at P 30 (2021) (footnotes omitted). As the Commission has further recognized:

As discussed in EPSA's prior filings, PJM failed even to make a prima facie case, much less to establish a preponderance of evidence supporting its position.

The Supporting Statement does not include any persuasive demonstration that PJM met its burden in this case. EPSA can only surmise that the Supporting Commissioners' vague references, without record citations, to "well-substantiated evidence of the cumulative harms that would result from the Expanded MOPR"[240] are to testimony submitted by PJM and the PIOs, most notably the Cramton and Spees/Newell Affidavits.[241] But they fail to recognize that, while Professor Cramton and Drs. Spees and Newell may be qualified to testify on matters of economics, their testimony had little or nothing to do with economics, and the Supporting Commissioners do not even begin to engage with a mountain of contrary evidence, including the testimony of other economists, including not only economists testifying on behalf of EPSA and the PJM

> [T]he Supreme Court explained that the burden of proof under the Administrative Procedure Act [(the "APA")] refers to a party's burden of persuasion, or the ultimate obligation to persuade the trier of fact as to the truth of the matter, and falls on the proponent of a rule or order. The Supreme Court explained that when a party has the burden of persuasion, it will lose "if the evidence is evenly balanced." The party with the burden of proof bears the burden of production, or the need to provide sufficient evidence to establish a prima facie case. Once it meets that burden, however, the burden of going forward shifts to the opposing party, although the ultimate burden of persuasion remains with the proponent. The party bearing the burden of proof will prevail only if the preponderance of evidence supports its position.

*San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs.*, 149 FERC ¶ 61,116 at P 45 (2014) (footnotes omitted).

240 Supporting Statement at P 60. *See also id.* at P 81 (referring, again without any record citation, that "the Expanded MOPR is worse than any purported benefit it may bring to 'market integrity,' based upon substantial record evidence").

241 EPSA notes that the Spees/Newell Affidavit is the subject of a motion to strike that remains pending before the Commission. *See* Motion to Strike of the PJM Power Providers, Docket No. ER21-2582-000 (filed Aug. 30, 2021).

Power Providers Group ("P3")[242] but also prior testimony of PJM's own Vice President of Market Design and Economics, Mr. Keech.[243]

It is all well and good that some subset of economists support the outcome here, but testimony that reflects personal policy preferences and employs circular reasoning cannot satisfy the substantial evidence requirement. As EPSA previously explained,[244] the predicate for allowing, and giving evidentiary weight to, expert testimony is that "the expert's opinion will have a reliable basis in the knowledge and experience of his discipline,"[245] and that the expert is "proffering opinions on issues or subject matter that are within his area of expertise."[246] As EPSA and other protestors demonstrated, that predicate was not met where the Cramton and Spees/Newell Affidavits are concerned. For example, as Roy J. Shanker, Ph.D., observed in testimony on behalf of P3, "Dr. Cramton's recommendations rely more on his subjective preferences than anything else."[247] Collin Cain, M.SC., in testimony on behalf of EPSA, made a similar observation with respect to Drs. Spees's and Newell's focus on state subsidies as compensation for

---

242 *See* Cain Initial Affidavit; Cain Supplemental Affidavit; Quinn Affidavit; Shanker Initial Affidavit; Shanker Reply Affidavit.

243 *See* Keech ER18-1314 Affidavit.

244 *See* EPSA Answer at 7-9.

245 *Daubert*, 509 U.S. at 592. While *Daubert*'s holding concerning the admissibility of expert testimony does not apply literally in Commission proceedings, it is well established that "the spirit of *Daubert* . . . does apply to administrative proceedings." *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004) (citations omitted).

246 *Arista Records LLC v. Usenet.com, Inc.*, 608 F.Supp.2d 409, 422 (S.D.N.Y. 2009) (citation omitted). *See also, e.g.*, *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484,1490 (9th Cir. 1991) (finding it appropriate to "give little weight to . . . a conclusory assertion" regarding geographic market definition by two anesthesiologists where there was "no evidence that [they] were experts qualified to opine on a highly technical economic question").

247 Shanker Initial Affidavit, ¶ 50. *See also id.*, ¶ 18 ("In fact, Dr. Cramton's support of the current PJM proposal appears to be based primarily on his subjective view of the dangers of over-mitigation versus under-mitigation, rather than reflecting the results of his model.").

environmental benefits, stating that this "is an emotional appeal, not an economic argument for PJM's proposed MOPR."[248] While Professor Cramton and Drs. Spees and Newell are entitled to their opinions, those opinions not entitled to evidentiary weight unless they are grounded in the economics, and the opinions they have expressed on the weak MOPR in this proceeding do not satisfy that requirement.

In the same vein, the Commission may rely on economic theory to meet the substantial evidence requirement but only if it "reasonably applie[s] sound economic principles and articulate[s] an adequate explanation for how those principles justified its conclusion."[249] As the courts have made clear, "mere reliance on an economic theory cannot substitute for substantial record evidence and the articulation of a rational basis for an agency's decision," particularly where the agency – or, in this case, the Supporting Commissioners – only "give[s] lip service to a theoretical design and then inexplicably distort[s] the theory in its application . . . ."[250] And that is precisely what the Supporting Statement does in accepting at face value claims by Professor Cramton, Drs. Spees and

---

248 Cain Supplemental Affidavit, ¶ 3.

249 *Central Hudson Gas & Elec. Corp. v. FERC*, 783 F.3d 92, 109 (D.C. Cir. 2015). *See also Ameren Servs. Co. v. FERC*, 880 F.3d 571, 578 (D.C. Cir. 2018) (stating that "in the absence of evidence, the Commission must at least rest on economic theory and logic"); *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014) (stating that "the Commission is free to act based upon reasonable predictions rooted in basic economic principles"); *Sacramento Mun. Util. Dist. v. FERC*, 616 F.3d 520, 531 (D.C. Cir. 2010) (finding it "legitimate for the Commission to base its findings . . . on basic economic theory, given that it explained and applied the relevant economic principles in a reasonable manner").

250 *Electricity Consumers Res. Council v. FERC*, 747 F.2d 1511, 1514 (D.C. Cir. 1984). *See also id.* at 1517 (reiterating that "mere economic theory may not take the place of record evidence and reasoned decision-making"). *Cf. TransCanada Power Mktg. Ltd. v. FERC*, 811 F.3d 1, 13 (D.C. Cir. 2015) (stating that "[t]he Commission's reference to a 'competitive as-bid program,' without further explanation, is simply a talismanic phrase that does not advance reasoned decision making" (citation omitted)); *Williston Basin*, 358 F.3d at 50 (finding "the Commission's unelaborated and, upon elaboration, unavailing invocation of 'general economic theory'" inadequate).

Newell, and others that a weak MOPR will improve economic "efficiency" by accounting for externalities and, in particular, for the social cost of carbon.[251] At the outset, such claims cannot be squared with the market design, which, in its current form, "has no feature to explicitly recognize . . . [such] goals . . . ."[252] Even putting that critical problem aside, however, these efficiency claims distort the very economic theory on which they are based, because there is nothing in the weakened MOPR that even attempts to ensure that state subsidies are directionally justified – *e.g.*, that they support low carbon resources – much less that they are pricing the externality in a manner that will enhance efficiency.[253] To the contrary, as Mr. Cain observed, the weak MOPR will allow "[a]ny resource . . . to clear the capacity market with a state subsidy and displace a marginal resource . . . , regardless of the level of subsidy or if it were renewable, nuclear, or fueled by biomass, or even coal."[254]

The same principles carry over to the Supporting Statement's reliance on Professor Cramton's modeling. As an initial matter, notwithstanding Professor Cramton's protestations to the contrary,[255] his model is, as Dr. Shanker observed, "a black box to the Commission, Stakeholders, and presumably anyone other than perhaps Dr. Cramton and

---

251 *See* Supporting Statement at PP 11, 127. *See also*, *e.g.*, Cramton Affidavit, ¶ 18; Cramton Reply Affidavit, ¶ 24; Spees/Newell Affidavit at 18-19.

252 November 2011 Order, 137 FERC ¶ 61,145 at P 90.

253 *See* Cain Supplemental Affidavit, ¶ 11. *See also* Cain Initial Affidavit, ¶¶ 40-43. *Cf.* Danly Statement at P 50 ("[W]hile I do not question the right of the states to grant such subsidies to encourage the construction of certain favored resources, it simply is not possible to justify such subsidies on the claim that they enhance market efficiency.").

254 Cain Supplemental Affidavit, ¶ 16. *See also* Shanker Initial Affidavit, ¶ 26.

255 *See* Cramton Reply Affidavit, ¶ 9.

his fellow authors."[256] As Mr. Cain explained, Professor Cramton provided little explanation "of the model methods and inputs, and the model itself is not available for inspection, testing or vetting by third parties."[257] That being the case, it is hardly surprising that the Supporting Statement could not demonstrate "a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from th[o]se results," as the substantial evidence requirement and reasoned decision-making demanded.[258]

While vital details of Professor Cramton's model remain unknown, what is apparent is that his modeling employed any number of "outcome-driven assumptions,"[259] with the

---

[256] Shanker Initial Affidavit, ¶ 51. *See also* Cain Initial Affidavit, ¶ 53 ("It should be noted that the Cramton model is essentially a 'black box.'"); Cain Supplemental Affidavit, ¶ 28 (explaining that the "model is not an implementation of a standard power system modeling tool such as PROMOD, or PLEXOS, which can be licensed by market participants and used to replicate or validate results advanced by others," but instead is "very much a black box – a unique construction that would be effectively impossible to replicate").

[257] Cain Initial Affidavit, ¶ 53. *See also* Shanker Initial Affidavit, ¶ 52 ("[A]s Dr. Cramton himself states, the model is complex and built on a large number of assumptions, but these assumptions are not fully explained or available, and some are only implied. Thus, there is no ability to judge the reliability of the model or accuracy/validity of the building block assumptions."); Shanker Reply Affidavit, ¶ 3 ("The Cramton analysis is based on an incomplete and untested model that relies on assumptions that are highly speculative at best and overall inconclusive by his own admission.").

[258] *Sierra Club v. Costle*, 657 F.2d 298, 333 (D.C. Cir. 1981) (citing *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976); *Amoco Oil Co. v. EPA*, 501 F.2d 722, 740-41 (D.C.Cir.1974)). *See also, e.g.*, *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1152 (D.C. Cir. 2016) (finding that it is up to the agency to determine what methodology and data set will meet its burden but that "it may not do so in a way that cloaks its findings in ambiguity and imprecision, and consequently hinders judicial review"); *Natural Res. Def. Council v. Herrington*, 768 F.2d 1355, 1422 (D.C. Cir. 1985) (concluding that the "record does not contain an adequate explanation of [a critical modeling] assumption, and the model is therefore not supported by substantial evidence"). *Cf. Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1092 (D.C. Cir. 1987) ("We emphatically do not require FERC to embrace any particular economic theory from the range of rational approaches. What we do require is that the Commission come to grips with the obvious ramifications of its approach and address them in a reasoned fashion.").

[259] Shanker Initial Affidavit, ¶ 17.

result that what he and PJM tout as conclusions supported by the model were, in fact, only assumptions baked into the model from the outset. For example, as Dr. Quinn noted, Professor Cramton's model "assumed away the problems that can impair investor confidence," and, given that assumption, it is not "surprising or informative when Dr. Cramton concludes there is no price suppression under a Narrow MOPR and that reliability will be maintained under a Narrow MOPR."[260] Similarly, as Mr. Cain discussed, Professor Cramton's conclusion that "[t]here is no evidence of 'price suppression' with narrow MOPR,"[261] was a necessary result of his modeling assumption of a carbon price that makes subsidized low carbon-emitting resources appear economic.[262] The same was true of Professor Cramton's claim that a weakened MOPR would have no detrimental impact on reliability,[263] which reflected the fact that "reliability is effectively an assumption of the model . . . ."[264] Professor Cramton effectively conceded as much in his reply affidavit, where, even as he insisted that "[r]eliability is not a pre-ordained property of [his] model," he characterized it as "a feature of the capacity market construct."[265] As Mr. Cain explained, it is precisely because reliability is feature of the RPM construct that it would have been "captured in the Cramton model," such that "reliability is a necessary result in both the 'narrow' and 'broad' MOPR cases Professor Cramton evaluates."[266] A model

260 Quinn Affidavit, ¶ 22.

261 Cramton Initial Affidavit, ¶ 59.

262 *See* Cain Initial Affidavit, ¶ 55.

263 *See* Cramton Initial Affidavit, ¶ 74.

264 Cain Initial Affidavit, ¶ 54.

265 Cramton Reply Affidavit, ¶ 38.

266 Cain Supplemental Affidavit, ¶ 29.

that assumes the outcomes it is claimed to show provides no economic support, much less substantial evidentiary support, for allowing the July 30 Filing to become effective.

At a bare minimum, reasoned decision-making required that the Commission or, if the Supporting Statement is to serve as a proxy for an explanation from the Commission, the Supporting Commissioners "engage with [contrary] evidence" before crediting the claims of Professor Cramton and Drs. Spees and Newell.[267] Yet the Supporting Commissioners give this "contrary evidence . . . little more than [a] 'hand wave,'"[268] only describing opposing arguments in broad terms and not even acknowledging the expert testimony refuting these claims.[269] In fact, the Supporting Commissioners do not even acknowledge the conflicts between the testimony of Professor Cramton, on the one hand, and that of Drs. Spees and Newell, on the other hand, relying on the latter for the proposition that the Expanded MOPR required by the Commission's December 2019 order will increase costs by billions of dollars annually[270] but ignoring entirely Professor Cramton's assertion that "MOPR has little impact on capacity prices."[271] And, on this point, the Supporting Commissioners likewise ignore contrary testimony of Mr. Cain and Dr. Shanker explaining that, properly interpreted, the figures actually represent estimates

---

267 *EDF*, 2 F.4th at 975.

268 *Delaware Div. of the Pub. Advocate v. FERC*, 3 F.4th 461, 469 (D.C. Cir. 2021).

269 Even as they ignore this and other evidence contrary to their positions, the Supporting Commissioners scold Commissioner Christie for relying on statements by the IMM without "acknowledg[ing] any of the arguments that PJM made in its Answer, which responded to many of the IMM's concerns . . . ." Supporting Statement at n.243.

270 *See* Supporting Statement at P 50 & n.103 (citing, among other things, Spees/Newell Affidavit at 26, 28-39).

271 Cramton Initial Affidavit, ¶ 59.

of the transfer payments from suppliers to consumers under the weak MOPR proposed in the July 30 Filing.[272]

The Supporting Commissioners' refusal to engage with evidence rebutting Professor Cramton and Drs. Spees and Newell is part of a larger pattern of simply disregarding evidence, including not only the testimony extensive testimony of Mr. Cain and Drs. Quinn and Shanker but also Mr. Keech's prior testimony and other representations by PJM, that does not support their preferred outcome. For example, even as they invoke Mr. Keech's testimony in this proceeding as support for their bizarre claim that an effective MOPR "distorts market outcomes,"[273] the Supporting Commissioners disregard his prior testimony, testimony he has not repudiated, confirming that below-cost offers from subsidized resources are "not competitive behavior,"[274] as well as PJM's prior statements that such offers undermine RPM's ability "to send accurate price signals," which are needed "[t]o ensure continued economic investment in existing and new resources . . . ."[275] The Supporting Statement similarly ignores extensive testimony from Mr. Cain and Drs. Quinn and Shanker, all of whom are well respected expert economists, demonstrating why the July 30 Filing will distort pricing in the RPM auctions and otherwise undermine RPM's ability to perform as intended.[276] It is well

---

272 *See* Cain Supplemental Affidavit, ¶ 24; Shanker Reply Affidavit, ¶ 25.

273 Supporting Statement at P 56 & n.118 (citing July 30 Filing, Attachment D, Affidavit of Adam J. Keech on behalf of PJM Interconnection, L.L.C., ¶ 11; Spees/Newell Affidavit at 18-19).

274 Keech ER18-1314 Affidavit, ¶ 15.

275 MOPR Reform, Transmittal Letter at 4, Docket No. ER11-2875-000 (filed Feb. 11, 2011) (the "ER11-2875 Filing"), *accepted*, April 2011 Order, 135 FERC ¶ 61,022. *See also, e.g.*, ER18-1314 Filing at 18-42.

276 *See, e.g.*, Cain Initial Affidavit, ¶¶ 18-29; Shanker Initial Affidavit, ¶¶ 22-48.

established that the Commission is forbidden from taking this type of "ostrich's approach," whereby it "confine[s] its attention to evidence that support[s] its conclusion and . . . ignore[s] any contrary evidence."[277] And if their Supporting Statement is to be a proxy for the Commission's reasoning, then the Supporting Commissioners are no less precluded from sticking their heads in the sand when confronted with contrary evidence.

### 6. Inaction on an FPA Section 205 Filing Cannot Be a Vehicle to Upend Contrary Actions under FPA Section 206

As explained in the EPSA Protest, there is no difference between the standards for lawfulness under Sections 205 and 206 of the FPA.[278] Accordingly, absent a material change in circumstances (which, as discussed above, has not occurred here), it would not be permissible for the Commission to find lawful (*i.e.*, just and reasonable and not unduly discriminatory or preferential) under Section 205 today something it expressly found unlawful (*i.e.*, unjust, unreasonable and unduly discriminatory or preferential) under Section 206 yesterday: namely, a weak MOPR that fails to address the fact that state "subsidies allow resources to suppress capacity market clearing prices."[279] Moreover,

---

277 *International Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. NLRB*, 802 F.2d 969, 975 (7th Cir. 1986). *See also Genuine Parts*, 890 F.3d at 312 (making clear that "an agency cannot ignore evidence that undercuts its judgment . . . [or] minimize such evidence without adequate explanation"); *Tenneco*, 969 F2d at 1214 (finding that "a FERC order neglectful of pertinent facts on the record must crumble for want of substantial evidence"); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) (holding that the agency may not rely on a "clipped view of the record" to support its conclusion); *Green v. Shalala*, 51 F.3d 96, 102 (7th Cir. 1995) (holding that where the agency "did not grapple with significant record evidence in [its] decision," that decision "is not supported by substantial evidence" (citation omitted)); *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (finding decision to be arbitrary and capricious where the agency "ostrich fashion, did not discuss the most substantial objections to its approach, though the objections were argued vigorously to it").

278 16 U.S.C. §§ 824d, 824e (2018).

279 EPSA Protest at 51-52 (quoting June 2018 Order, 163 FERC ¶ 61,236 at P 149). *See also*, *e.g.*, June 2018 Order, 163 FERC ¶ 61,236 at P 107 (finding the then-effective MOPR "unjust and unreasonable because it does not address the impact on PJM's capacity market of existing

EPSA shares the P3's concern that this problem is greatly exacerbated where "one half of an equally divided Commission, through its non-action, [purports to] override a duly-enacted Commission directive under FPA section 206."[280]

This problem is further exacerbated by the fact that the posture of this Section 205 proceeding bears little resemblance to what Congress had in mind when it established Sections 205 and 206 as two separate and distinct "ratemaking" tracks:

> [Section 206] allows the commission, acting either on its own initiative or after a complaint, to change existing utility rate practices. To do so, the commission or the complainant must prove that the practices are unreasonable. The existing rates stay in effect while the proceedings take place; and, typically, the utility has no obligation to give customer refunds, even if the rates are found unreasonably high. [Section 205] allows the commission to review changes that the utility intends to make. Typically, the commission may suspend the proposed change for a few months; then, if the proceedings are not yet finished, the change takes effect, subject to a refund obligation if the change is found unreasonable.[281]

The second track, Section 205, gives "the utility the choice among various reasonable rate practices," and the statute does not allow the Commission or any other regulator "to use the second track by telling the utility to file a 'new schedule' . . . ."[282]

---

resources that receive out-of-market support"); *id.* at P 150 (finding the then-effective MOPR "unjust and unreasonable," because it "fails to protect the integrity of competition in the wholesale capacity market against unreasonable price distortions and cost shifts caused by out-of-market support to keep existing uneconomic resources in operation, or to support the uneconomic entry of new resources").

280 Emergency Request for Rehearing of the PJM Power Providers Group at 2, Docket No. ER21-2582-001 (filed Oct. 5, 2021).

281 *Commonwealth of Mass. Dept. of Pub. Utils. v. FERC*, 729 F.2d 886, 887 (1st Cir. 1984) (citations omitted).

282 *Id.* at 887-88.

The underlying assumption of this two-track scheme is that the investor interest will be protected by public utility's exercise of its Section 205 rights, while the consumer interest will be protected by the Commission's review of the public utility's filing under Section 205 and the exercise of its Section 206 powers. And in this scheme:

> the rate-making powers of [power] suppliers [a]re to be no different from those they would possess in the absence of the [FPA] to establish ex parte, and change at will, the rates offered to prospective customers, or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer.[283]

The assumption that suppliers will be able to protect their investor interests by exercising their Section 205 rights does not hold where, as here, the public utility making the Section 205 filing is an RTO/ISO that has no cognizable investor interest of its own to protect and that instead has an institutional interest in acceding to the demands of the Supporting Commissioners to weaken, if not eliminate, the MOPR.[284] The proposition that inaction on the July 30 Filing can reverse changes required by Commission orders under FPA Section 206 has thus effectively allowed the Supporting Commissioners to:

---

283 *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 343 (1956).

284 *See, e.g.*, *ISO New England Inc.*, 175 FERC ¶ 61,195, Dissenting Statement at P 5 (Glick, Chairman, dissenting in part) (urging ISO-NE "to move expeditiously to replace its . . . MOPR-related rules or the Commission will be left with little choice but to step in and establish new rules ourselves" (footnote omitted)), *on reh'g*, 176 FERC ¶ 61,125 (2021); *New York Indep. Sys. Operator, Inc.*, 175 FERC ¶ 61,081, Concurring Statement at P 3 (2021) (Glick, Chairman, concurring) (urging the New York Independent System Operator, Inc. ("NYISO") "to replace [its] buyer-side market power mitigation rules with a model that moves beyond [MOPR]s as a means of mediating the interaction between state policies" and stating that if "NYISO and its stakeholders cannot settle upon a replacement for its current buyer-side market power rules, then we will be left with little choice but to step in and establish such rules ourselves" (citation omitted)); *Calpine Corp. v. PJM Interconnection, L.L.C.*, 174 FERC ¶ 61,036, Concurring Statement at P 2 (Clements, Comm'r, concurring) ("While I did not participate in the previous orders [including, among others, the June 2018 Order, December 2019 Order and the April 2020 Remedy Rehearing Order], I strongly disagree with the imposition of a strict [MOPR] in this proceeding.").

> us[e] § 205, which is intended for the benefit of the utility – *i.e.*, as a means of enabling it to increase its rates within what has been called the 'zone of reasonableness,' *see FPC v. Conway Corp.*, 426 U.S. 271, 278-79 . . . (1976) – for the quite different purpose of depriving the utility of the statutory protection contained in § 206, that its existing rates be found to be entirely outside the zone of reasonableness before the agency can dictate their level or form.[285]

Such a result runs counter to a large body of precedent requiring that the Commission respect the difference between these two provisions[286] and thwarts the purpose of Section 205 as a means for regulated suppliers, such as the entities that have invested billions of dollars in the generation facilities that keep the lights on within PJM's footprint, "to increase [their] rates where justified,"[287] subject to Section 206's assurance that the Commission may intervene to protect "the public interest, as distinguished from the private interests of the utilities . . . ."[288]

---

285 *Winnfield*, 744 F.2d at 875.

286 *See, e.g.*, *Atlantic City*, 295 F.3d at 10 ("The courts have repeatedly held that FERC has no power to force public utilities to file particular rates unless it first finds the existing filed rates unlawful."); *Public Serv. Comm'n of N.Y. v. FERC*, 866 F.2d 487, 488-89 (D.C. Cir. 1989) ("*PSCNY*") (discussing corresponding provisions of the Natural Gas Act (the "NGA"), and stating, "[o]n four occasions in the last three years this court has reviewed Commission efforts to compromise [NGA] § 5's limits on its power to revise rates. On each the court has repelled the Commission's gambit. This is number five."); *Western Res., Inc. v. FERC*, 9 F.3d 1568, 1578 (D.C. Cir. 1993) (citing *PSCNY* and stating that "[w]e now make it an even six.").

287 *Atlantic Ref. Co. v. Public Serv. Comm'n of N.Y.*, 360 U.S. 378, 389 (1959).

288 *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

## IV. CONCLUSION

**WHEREFORE**, for the foregoing reasons, EPSA respectfully requests that the Commission grant rehearing as requested herein.

Respectfully submitted,

**ELECTRIC POWER SUPPLY ASSOCIATION**

By: */s/ David G. Tewksbury*

David G. Tewksbury
Stephanie S. Lim
McDermott Will & Emery LLP
The McDermott Building
500 North Capitol Street, NW
Washington, DC 20001

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: October 28, 2021

## 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, D.C., this 28th day of October, 2021.

*/s/ Stephanie S. Lim*
Stephanie S. Lim