STATEMENT

Dissent of
Commissioner Richard Glick on
PJM Interconnection Capacity Market Proposals

Date: June 29, 2018

Docket No.: EL16-49-000
ER18-1314-000
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EL18-178-000

Today, the Commission finds that PJM Interconnection, L.L.C.'s (PJM) Tariff violates the Federal Power Act (FPA) because it fails to "mitigate" state efforts to shape the generation mix. I strongly disagree. The state programs of which the Commission disapproves are precisely the sort of actions that Congress reserved to the states when it enacted the FPA. The Commission's role is not—and should not be—to exercise its authority over wholesale rates in a manner that aims to mitigate, frustrate, or otherwise limit the states' exercise of their exclusive authority over electric generation facilities.

In addition, the Commission entirely fails to meet its burden to show that PJM's Tariff is unjust and unreasonable. The record is devoid of evidence that the states' exercise of their authority is actually interfering with the Commission's responsibility to ensure resource adequacy at just and reasonable rates. To the contrary, PJM's capacity market has resulted in a capacity surplus that is well in excess of the level required to reliably meet the region's electricity demands, suggesting that, if anything, the prices in PJM's capacity market are too high, not too low.[1]

Rather than interfering with state policies that address externalities associated with electric generation, such as greenhouse gas emissions that contribute to the existential threat of climate change, the Commission should be striving to accommodate and give effect to those state initiatives. Although today's order suggests that the Commission seeks to accommodate state policies by creating a new resource-specific Fixed Resource Requirement (FRR) alternative, the Commission fundamentally misunderstands that the state policies that it targets compensate resources for their environmental attributes, not their capacity. As contemplated, the Commission's proposal would effectively force state-sponsored resources out of the capacity market, depriving them of a payment for capacity that they will actually provide and leaving it to the states to pick up that tab.

I. <u>The Commission Is Interfering with the States' Exclusive Jurisdiction</u>

The FPA is clear that the states, not the Commission, are the entities responsible for shaping the generation mix. Although the FPA provides the Commission with jurisdiction over wholesale sales of electricity as well as rates and practices affecting those wholesale sales, Congress expressly precluded the Commission from regulating "facilities used for the generation of electric energy," instead vesting the states with exclusive jurisdiction over those facilities.[2]

[1] Today's order also rejects PJM's two alternative proposals for mitigating the effects of state efforts to shape the generation mix because it finds that PJM failed to demonstrate under section 205 of the FPA, 16 U.S.C. § 824d (2012), that either proposal is just and reasonable and not unduly discriminatory or preferential. I agree with this finding, but largely for the reasons explained in this statement, not those advanced by the Commission.

[2] 16 U.S.C. § 824(b)(1) (2012); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016) (describing the jurisdictional divide set forth in the FPA); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016) (*EPSA*) (explaining that "the [FPA] also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction"); *see also Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (recognizing that issues including the "[n]eed for

It is an inevitable consequence of the FPA's division of jurisdiction over the electricity sector that one sovereign's exercise of its authority will affect matters subject to the other sovereign's exclusive jurisdiction.[3] For example, any state regulation that increases or decreases the number or type of generation facilities will, through the law of supply and demand, inevitably affect wholesale rates. But the existence of such cross-jurisdictional effects is not necessarily a "problem" for the purposes of the FPA. Rather, these cross-jurisdictional effects are the product of the "congressionally designed interplay between state and federal regulation,"[4] at least so long as neither the states nor the Commission exercise their authority in a manner that "targets" or "aims at" the other sovereign's exclusive jurisdiction.[5]

Nevertheless, the Commission now claims that the "integrity and effectiveness" of PJM's capacity market "have become untenably threatened by out-of-market payments provided or required by certain states for the purpose of supporting the entry or continued operation of preferred generation resources."[6] In other words, the Commission believes that the states' exercise of the exclusive authority that Congress reserved to them under the FPA has rendered PJM's capacity market unjust and unreasonable. Even the Commission, however, does not question that these states' efforts fall squarely within their authority: It recently recognized that many state policies, including renewable energy credits (RECs) and the zero-emissions credits (ZECs), which appear to have motivated PJM's section

new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States"). Although these cases deal with the question of preemption, which is, of course, different from the question of whether a rate is just and reasonable under the FPA, the Supreme Court's discussion of the respective roles of the Commission and the states remains instructive when it comes to evaluating how the application of a minimum offer price rule (MOPR) squares with the Commission's role under the FPA.

[3] *EPSA*, 136 S. Ct. at 776 (explaining that, under the FPA, the federal and state spheres of jurisdiction "are not hermetically sealed from each other"); *see Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015) (explaining that the natural gas sector does not adhere to a "Platonic ideal" of the "clear division between areas of state and federal authority" that undergirds both the FPA and the Natural Gas Act).

[4] *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 518 (1989)); *id.* ("recogniz[ing] the importance of protecting the States' ability to contribute, within their regulatory domain, to the Federal Power Act's goal of ensuring a sustainable supply of efficient and price-effective energy").

[5] *EPSA*, 136 S. Ct. at 776 (emphasizing the importance of "'the *target* at which [a] law *aims*'") (citing *Oneok*, 135 S. Ct. at 1600); *Oneok*, 135 S. Ct. at 1600 (recognizing "the distinction between 'measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at' subjects left to the States to regulate") (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 94 (1963)); *see also Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 576 (S.D.N.Y. 2017) ("[W]hen the State is legitimately regulating a matter of state concern, 'FERC's exercise of its authority must accommodate' that state regulation '[u]nless clear damage to federal goals would result.'") (quoting *Nw. Cent. Pipeline Corp.*, 489 U.S. at 522)).

[6] *Calpine Corp. v. PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236, at P 1 (2018) (Order). In the order approving ISO New England Inc.'s Capacity Auctions with Sponsored Policy Resources (CASPR) proposal, the Commission set out a series of "first principles," the purpose of which the Commission stated was to ensure adequate "investor confidence" in the capacity market. *ISO New England Inc.*, 162 FERC ¶ 61,205, at PP 21, 24 (2018). Ensuring "investor confidence" appeared, albeit briefly, to be the Commission's new standard for evaluating how capacity markets should address state policies. However, just three months later, the Commission appears to have settled on a new standard, the "integrity" of the market, for justifying interference with state policies. Other than a passing reference to the CASPR order, the phrase "investor confidence" is absent from the Commission's discussion in today's order. *See* Order, 163 FERC ¶ 61,236 at P 17 n.24. These shifting justifications should further call into question whether the Commission's interference with state policies is the product of reasoned decision-making rather than a straightforward effort to prop up prices for certain resources.

205 filing, are "not payments for, or otherwise bundled with, sales of energy or capacity at wholesale."[7] Rather, these public policies focus on the significant externalities associated with electricity generation by reflecting "the environmental attributes of a particular form of power generation."[8] Addressing these externalities is at the core of the authority over "generation facilities" that Congress gave to the states when it enacted the FPA. Accordingly, the Commission should, consistent with the federalist design of the statute, accommodate and facilitate those state efforts.[9]

If there is a problem, it lies not with the states, but with the Commission's use of its authority over wholesale rates to mitigate, frustrate, or otherwise limit the states' exercise of their exclusive authority over generation. The Commission argues that today's order "in no way divests the states in the PJM region of their jurisdiction over generation facilities," and that "[s]tates may continue to support their preferred types of resources in pursuit of state policy goals."[10] But by "mitigating" state policies of which the Commission disapproves in an attempt to prop up the wholesale rates received by so-called "competitive" resources, the Commission is directly interfering with state efforts to shape the generation mix. Make no mistake, although the Commission frames today's order in terms of the effect of certain state-sponsored resources on wholesale rates, the order's rationale is clear that the Commission's real aim is to support certain resources that do not benefit from state efforts to address environmental externalities. In attempting to counteract these state policies by propping up those resources, the Commission is exercising its authority over wholesale rates in a manner that aims directly at the states' exclusive jurisdiction.[11]

It is not the Commission's role under the FPA to create an electricity market free from governmental programs aimed at public policy considerations.[12] Although today's order fixates on the "integrity" and "effectiveness" of PJM's capacity market,[13] neither of which it defines, the order ignores the fact that governmental policies that internalize

[7] Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae in Support of Defendants-Respondents and Affirmance at 10, *Vill. of Old Mill Creek v. Star*, Nos. 17-2433 and 17-2445 (consolidated) (7th Cir. May 29, 2018) (Seventh Circuit Brief); *see WSPP Inc.*, 139 FERC ¶ 61,061, at PP 18-26 (2012).

[8] Seventh Circuit Brief at 10.

[9] *Cf. Ari Peskoe*, *Easing Jurisdictional Tensions by Integrating Public Policy in Wholesale Markets*, 38 Energy L.J. 1, 38-40 (2017) (discussing the potential for the Commission to address these issues by designing capacity market rules to accommodate or reflect state policies).

[10] Order, 163 FERC ¶ 61,236 at P 158.

[11] The Courts have upheld the Commission's authority over capacity markets, including against challenges that certain applications of the MOPR amount to an impermissible regulation of generation. *See, e.g.*, *N.J. Bd. of Pub. Utils. v. FERC*, 74, 96 (3d Cir. 2014); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-82 (D.C. Cir. 2009). Similarly, the Supreme Court has recognized that certain state efforts to incentivize the construction of new generation resources can intrude on FERC's exclusive jurisdiction where the state's action effectively "sets an interstate wholesale rate." *Hughes*, 136 S. Ct. at 1297. But these cases do not address the situation in which the Commission is targeting state efforts to regulate the consequences of electricity generation that fall within the states' statutory authority and that are not addressed in the markets subject to Commission jurisdiction. The MOPR interferes with the states' prerogatives in a way that Congress neither foresaw nor intended. It impairs the states' ability to make a political decision regarding the generation mix within their borders—a decision that they are far better equipped to make than is the Commission.

[12] *ISO New England Inc.*, 162 FERC ¶ 61,205 at 3 (Glick, Comm'r, dissenting in part and concurring in part).

[13] Order, 163 FERC ¶ 61,236 at PP 1, 150, 157, 161-162.

the externalities associated with electricity generation are essential to reaching an efficient market outcome.[14] Indeed, PJM's capacity market does not account for arguably the most significant consequence of generating electricity, the unpriced externalities associated with greenhouse gas emissions that are causing climate change. In attempting to mitigate price "suppression," the Commission fails to recognize the cost of stymying state efforts to address environmental externalities, such as climate change.[15] Without policies addressing these externalities, PJM's capacity market will produce a sub-optimal outcome.

It is irrelevant to assert that the Commission lacks jurisdiction to address climate change directly. Even if true, this does not suggest that the Commission can or should "mitigate" state efforts to take on that responsibility. Nor does it suggest that leaving these externalities unaddressed is a natural or desirable outcome, as today's order appears to conclude. In any case, interpreting the FPA to require the Commission to frustrate state efforts to address the environmental costs of electricity generation is, in effect, to deploy the FPA to make it ever more difficult for states to address this existential threat.

The Commission's interference with state policies is all the more problematic because it is picking and choosing which policies to frustrate and which to willfully ignore. Government subsidies pervade the energy markets and have for more than a century. Since 1916, federal taxpayers have supported domestic exploration, drilling, and production activities for our nation's fossil fuel industry.[16] And since 1950, the federal government has provided roughly a trillion dollars in energy subsidies, of which 65 percent has gone to fossil fuel technologies.[17] These policies have artificially reduced the price of natural gas, oil, and coal, which in turn has allowed resources that burn these fuels—including many of the so-called "competitive" resources that stand to benefit from today's order—to submit "suppressed" bids into PJM's markets for capacity, energy, and ancillary services. By lowering the marginal cost of fossil fuel-fired units, government policies have allowed these units to operate more frequently and have encouraged the development of more of these units than might otherwise have been built.

These policies continue to shape the current generation landscape in PJM. Consider the example of natural gas. The federal tax credit for nonconventional natural gas,[18] contributed to the spike in new natural gas-fired power plants

[14] Sylwia Bialek & Burcin Unel, Institute for Policy Integrity, *Capacity Markets and Externalities: Avoiding Unnecessary and Problematic Reforms* at 12 (2018).

[15] *See, e.g.*, *id.* at 11 (explaining that the annual climate change damages associated with a typical 1,000 MW coal plant are roughly $230 million); Exelon Protest at 12 (estimating that the externalities associated with carbon dioxide alone amount to $12.1 billion to $17.7 billion annually across PJM).

[16] *See* Molly Sherlock, Cong. Research Serv., *Energy Tax Policy: Historical Perspectives on and Current Status of Energy Tax Expenditures* 2-3 (May 2011), *available at* https://fas.org/sgp/crs/misc/R41227.pdf (Energy Tax Policy).

[17] *See* Nancy Pfund and Ben Healey, DBL Investors, *What Would Jefferson Do? The Historical Role of Federal Subsidies in Shaping America's Energy Future*, (Sept. 2011), *available at* http://www.dblpartners.vc/wp-content/uploads/2012/09/What-Would-Jefferson-Do-2.4.pdf; *New analysis: Wind energy less than 3 percent of all federal incentives*, Into the Wind: The AWEA Blog (July 19, 2016), https://www.aweablog.org/14419-2/ (citing, among other things, Molly F. Sherlock and Jeffrey M. Stupak, *Energy Tax Incentives: Measuring Value Across Different Types of Energy Resources*, Cong. Research Serv. (Mar. 19, 2015), *available at* https://fas.org/sgp/crs/misc/R41953.pdf; The Joint Committee on Taxation, *Publications on Tax Expenditures*, https://www.jct.gov/publications.html?func=select&id=5 (last visited June 29, 2018)) (extending the DBL analysis through 2016).

[18] Energy Tax Policy at 2 n.3. That credit has now lapsed. *Id.* at 18.

between 2000 and 2005,[19] by decreasing the cost of operating those plants. Similarly, the domestic nuclear power industry would not exist without the Price-Anderson Act, which imposes indemnity limits for nuclear power generators, enabling them to secure financing and insurance at rates far below what would reflect their true cost.[20] These and other federal government interventions have had a far greater "suppressive" impact on the markets than the "actionable subsidies" targeted by today's order, yet they are unaccounted for in the order.

There are also a plethora of potentially "non-actionable" state and local policies that "suppress" prices in the energy markets, well beyond ZEC and RPS programs. The PJM states have adopted over 100 programs to subsidize all forms of energy sources.[21] For example, West Virginia has enacted tax benefits to support its coal industry, including tax credits for coal loading facilities, thin-seamed coal, and waste coal.[22] Similarly, Pennsylvania exempts natural gas utilities from paying the state's gross receipt tax on their sales, reducing their tax bill by an estimated $82 to $108 million annually while all coal purchases are exempted from Pennsylvania's sales and use tax, a benefit equivalent to $87 million annually.[23] These measures significantly reduce the cost of natural gas and coal produced in Pennsylvania. In addition, natural gas and oil production are one of the few commercial operations exempted from paying local property tax in Pennsylvania, avoiding half a billion to a billion dollars in taxes annually.[24]

Finally, the Commission's list of actionable state policies fails to recognize one of the largest sources of out-of-market support: Roughly 20 percent of the installed capacity within PJM is owned by vertically integrated utilities. Those utilities are guaranteed to recover the cost their resources, irrespective of the price they receive in PJM's capacity market.[25] Nevertheless, the Commission deems these resources "competitive."

If the Commission really wants to protect what it calls the "integrity" of the capacity market, it would need to mitigate each and every federal, state, and local subsidy that allows a resource to lower its capacity market offer as well as the offers of vertically integrated utilities with guaranteed cost recovery. I suspect that we would soon find that there are few, if any, resources that would qualify to participate in PJM's capacity market without being subject to an offer floor. Although that may not be an appealing option, that is no reason to isolate a few disfavored state policies for mitigation and claim, without any support, that they are the only subsidies that threaten the integrity of the market.

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[19] *Natural gas generators make up the largest share of overall U.S. generation capacity*, Energy Info. Admin. (Dec. 18, 2017), https://www.eia.gov/todayinenergy/ detail.php?id=34172.

[20] 42 U.S.C. § 2210(c) (2012).

[21] *Subsidy Short List*, PJM Capacity Construct/Public Policy Senior Task Force Meeting, (June 5, 2017), *available at* http://www.pjm.com/-/media/committees-groups/task-forces/ccppstf/20170605/20170605-item-02-subsidy-short-list-20170531.ashx.

[22] *Id.*

[23] *See id.*; PennFuture, *Fossil Fuel Subsidy Report for Pennsylvania* 17-18, 22 (Apr. 2015), *available at* https://pennfuture.org/Files/News/ FossilFuelSubsidyReport_PennFuture.pdf (Fossil Fuel Subsidy Report for Pennsylvania).

[24] Fossil Fuel Subsidy Report for Pennsylvania at 32.

[25] Illinois Commerce Commission Protest at 19; Harvard Electricity Law Institute Comments at 8 (noting that generation owned by vertically integrated utilities and public power make up roughly 25 percent of PJM's market).

Some may argue that the Commission "has to draw a line somewhere." But that line cannot be arbitrary and capricious. It is hard to conceive of a more arbitrary and capricious approach than to inhibit state efforts to price the externalities of electricity generation, but permit other federal, state, and local policies that interfere with the functioning of the markets.

II. The Record Does Not Support the Commission's Determination that PJM's Tariff Violates the FPA

Today's order is all the more troubling because there is not substantial evidence in the record to support a finding that there is a resource adequacy problem in PJM or that the capacity market is otherwise unjust and unreasonable or unduly discriminatory or preferential. In fact, PJM currently has far more generating capacity than it needs to reliably meet the region's electricity needs, even several years out. PJM's current reserve margin is nearly double what the North American Electric Reliability Corporation (NERC) has determined is necessary, meaning that the region currently has tens of thousands of additional MW of generating capacity beyond what it requires.[26] In addition, there are nearly 40 GW of natural gas-fired generation under development within PJM's footprint—equivalent to 25 percent of the installed capacity in the region—with over half of those MW in a relatively advanced state of development.[27] If anything, PJM's problem is that today's prices are so high that the region continues to attract new "competitive" generation resources at a time when the region already has too much capacity.[28]

Perhaps that is why, rather than pointing to actual record evidence of a resource adequacy problem, the Commission relies on theory—and theory alone—to find PJM's Tariff to be unjust and unreasonable. That theory appears to be that certain state subsidies pose a threat to the business model of the Commission's preferred resources and, as a result, at some unspecified point in the future, the capacity market may no longer procure adequate resources at just and

[26] *E.g.*, Exelon January 30, 2017 Protest at 14-15 (Docket No. EL16-49) ("The market is producing resource adequacy—achieving a reserve margin of 22 percent, exceeding its target of 16.5 percent."); Maryland Commission Protest at 5 ("Regarding investment in generation, PJM's Base Residual Auction (BRA) provides ample capacity and has consistently exceeded its target reserve margins."); Consumer Coalition Protest at 12 ("PJM has the most drastic capacity *oversupply* of any RTO in North America.").

[27] Clean Energy Advocates Protest at 36-37 (citing data compiled by S&P Global Market intelligence); Exelon Protest at 35-36.

[28] 1,401.3 MW of new Generation Capacity Resources cleared in the 2021/2022 Base Residual Auction, held in May 2018. That figured included 893.0 MW from new generation units and 508.3 MW from uprates to existing or planned generation units. PJM Interconnection, L.L.C., *2021/2022 RPM Base Residual Auction Results* 4 (2018), *available at* http://www.pjm.com/-/media/markets-ops/rpm/rpm-auction-info/2021-2022/2021-2022-base-residual-auction-report.ashx.

reasonable rates.[29] For example, the Commission asserts that "action must be taken" because PJM's Tariff is unable "to adequately address the evolving circumstances presented by resources that receive out-of-market support."[30]

Although the Commission "is free to act based upon reasonable predictions rooted in basic economic principles,"[31] today's order fails to meet this standard. The Commission's conclusions require it to make a litany of assumptions—most of them unstated—about how only certain public policies *may* affect capacity market prices and how that effect on prices *may* impact the "integrity" of PJM's capacity market. For example, the Commission asserts that there is evidence that state policies may significantly affect the capacity market price.[32] However, rather than citing to this elusive evidence, the order quotes an affiant's opinion as to what the out-of-market support payments provided by certain state programs equate to in dollars per MW-day.[33] Dividing the size of a subsidy by the number of MW-days is arithmetic, not evidence that the subsidy is rendering PJM's Tariff unjust and unreasonable.

Similarly, the Commission claims that any reduction in the capacity market price that is caused by these state policies will be sufficient to render PJM's tariff unjust and unreasonable. But the Commission does not point to any evidence about the size of this potential reduction or why a reduction of that size—as opposed to some other level—is sufficient to render the Tariff unjust and unreasonable. Instead, the Commission enumerates several subsidies provided by states in PJM[34] without meaningfully linking the existence of those programs to the claim that PJM's capacity market may not result in just and reasonable rates. Based on the PJM auction results and the entire record before us, the speculation in today's order is an insufficient basis to find PJM's existing Tariff to be unjust and unreasonable.

The Commission also claims without support that PJM's Tariff is unjust and unreasonable simply because it does not mitigate state policies, thereby creating uncertainty for "competitive" resources that do not know whether they will be competing against other resources that receive a subsidy considered by the Commission to be problematic.[35] In other words, the mere prospect of an unmitigated "actionable" subsidy renders PJM's Tariff unjust and unreasonable, regardless of whether that subsidy would actually affect the market-clearing price. That cannot be true. Uncertainty in many forms—commodity price uncertainty, demand uncertainty, and, yes, policy uncertainty—pervades the

[29] The precise contours of the Commission's theory are not exactly clear. If the Commission is asserting that PJM's capacity market is *already* failing to meet this standard because state public policies are resulting in capacity prices that too low to incentivize needed new entry, then the Commission's action is not only unsupported by the record evidence, but contrary to it. As noted above, the most recent auction continued to incentivize new entry, even though PJM's reserve margin far exceeds what is needed for reliability. The 2021/2022 Reliability Pricing Model (RPM) Base Residual Auction (BRA) cleared 163,627.3 MW of unforced capacity in the RTO representing a 22.0% reserve margin. The reserve margin for the entire RTO is 21.5 percent, considerably higher than the target reserve margin of 15.8 percent, when the Fixed Resource Requirement (FRR) load and resources are considered. This reported reserve margin of 21.5 percent does not even reflect the additional 22,877.5 MW of uncleared capacity. *See id.* 1, 19; *see also* PJM Answer at 10 ("PJM's prices have been low in large measure because PJM is carrying reserve margins in excess of 25%.").

[30] Order, 163 FERC ¶ 61,236 at P 32.

[31] *Emera Maine v. FERC*, 854 F.3d 662, 671 (D.C. Cir. 2017).

[32] Order, 163 FERC ¶ 61,236 at P 151.

[33] *Id.* (quoting Giacomoni Aff. at 10-11).

[34] *Id.* P 152-153.

[35] *Id.* P 150. It is unclear why the Commission limits this uncertainty to "competitive" resources. Every resources faces uncertainty that policy developments relatively favorable to its competitors will make its position less advantageous.

electricity industry and the Commission leaves it to private companies to manage that uncertainty. Nothing in today's order explains why the uncertainty created by certain state policies is any different or why that difference is sufficient to render PJM's Tariff unjust and unreasonable. And it is ironic to bemoan policy uncertainty when Commission's and PJM's constant tinkering with the capacity market is one of, if not the, single biggest sources of uncertainty facing capacity market participants.[36]

Finally, it is again important to point out what the Commission's rationale means for efforts to fight climate change. The Commission's explanation of the problem with the PJM capacity market suggests that any state efforts to compensate resources for their environmental attributes would render those resources' offers "uncompetitive." In so doing, the Commission is concluding that resources can only be valued by the capacity they provide and that their environmental attributes must be valued at zero. I am aware of nothing in the FPA, our regulations, or the many court cases interpreting both that requires us to use our authority to stymie state efforts to fight climate change in this manner. Doing so puts the Commission on the wrong side of history in the fight against climate change.

III. The Commission's Proposed Replacement Rate Leaves Open Significant Questions that Cannot Be Meaningfully Answered in the Time Provided

Having declared PJM's Tariff unjust and unreasonable based on theory alone, the Commission proposes a replacement rate that fundamentally redesigns PJM's capacity market. This proposed approach—which combines an expanded MOPR, with all the attendant problems outlined above, with a "resource-specific FRR Alternative"—would be the most significant change in the capacity market's twelve-year history. Although the Commission itself acknowledges that there are important details to address in the design of a resource-specific FRR Alternative, the proposed questions for the paper hearing barely scratch the surface of the issues raised by such fundamental reforms. I agree with my colleague Commissioner LaFleur's observation that the record before the Commission contains virtually no discussion of a resource-specific FRR Alternative and that today's proposal is "little more than a rough concept, with major design elements left unresolved."[37] Making matters worse, the Commission provides almost no time—just three months—for PJM and its stakeholders to respond to these questions and provide the record needed to carry out the Commission's capacity market overhaul.

To reiterate, I strongly disagree that the current PJM Tariff is unjust and unreasonable and I am not convinced at this time that the Commission's proposal for a resource-specific FRR Alternative will sufficiently accommodate the state policies that are the target of the expanded MOPR. Nevertheless, I recognize that there can be more than one just and reasonable rate and, for that reason, reserve judgment on whether a resource-specific FRR Alternative could ever be just and reasonable. Below, I outline several concerns regarding the Commission's proposal that will be essential to evaluating PJM's filing.

A. Eligibility

The Commission proposes to create a bifurcated capacity market that classifies resources as either receiving "out-of-market support" or as being deemed "competitive." Those receiving out-of-market support will be subject to the expanded MOPR and also be eligible for the proposed resource-specific FRR Alternative. That distinction is the keystone of the Commission's proposal. Nevertheless, today's order provides scant guidance regarding what

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[36] *ISO New England Inc.*, 162 FERC ¶ 61,205 at 5 n.13 (Glick, Comm'r, dissenting in part and concurring in part) ("[C]hange has been the only consistent feature of capacity markets in recent years.").

[37] Order, 163 FERC ¶ 61,236 at 4 (LaFleur, Comm'r, dissenting).

government policies will trigger mitigation, and the limited guidance that it does provide suggests that the Commission will continue to arbitrarily pick and choose which governmental policies to target.

Although the Commission asks for comments on the "appropriate scope of out-of-market support to be mitigated" and "whether federal sources of out-of-market support should be addressed by Commission action,"[38] the Commission also explicitly states that PJM "need only address the forms of state support that we find, in this proceeding, render the current Tariff unjust and unreasonable—i.e., out-of-market revenue that a state either provides, or requires to be provided, to a supplier that participates in the PJM wholesale capacity market."[39] This puzzling combination of statements appears to mean that the Commission need address only *state* policies and, specifically, only those that provide out-of-market *revenue*, as opposed to policies that reduce costs. As I have explained above, these distinctions are arbitrary, capricious, and incapable of forming the basis for a just and reasonable and not unduly discriminatory or preferential market construct.

B. <u>FRR Construct</u>

The Commission's proposed replacement rate appears to present a false option for state-sponsored resources: Either choose to participate in the capacity market and be subject to the expanded MOPR, with the substantial risk that the resource will not clear the market, or else elect the resource-specific FRR Alternative, forfeiting any prospect of receiving a capacity payment from PJM for capacity that the resource will actually provide. Far from "accommodating" state policies, the Commission seems to ignore (or at least disregard) the fact that the out-of-market payments of which it apparently disapproves are not replacements for capacity payments, but rather are payments for attributes not accounted for in PJM's capacity market.[40] In forcing these resources to find compensation outside of the market, the Commission's proposal raises a host of questions. I am particularly interested in hearing from PJM and its stakeholders regarding the following issues:

1. **Selecting the resource-specific FRR Alternative.** How will state-sponsored resources elect the resource-specific FRR Alternative? What is the basis for limiting the resource-specific FRR Alternative to state-sponsored resources? Alternatively, should all resources have the option to elect the resource-specific FRR Alternative? What would be the impact of such an option? I will note that opening the resource-specific FRR Alternative to all resources would appear to give customers more flexibility and forestall continuous litigation regarding arbitrary judgments or cutoffs for resource eligibility.

2. **Compensating FRR Resources.** What options will FRR resources have for recovering the shortfall between their out-of-market support and their net going-forward costs? As noted, most of the state policies targeted by today's order compensate resources for environmental attributes and were not designed to be a substitute for a capacity payment. Will any of the state programs that the Commission intends to mitigate the effects of require legislative action to allow the resources that receive support pursuant to those programs to receive additional compensation either by the state or a load-serving entity (LSE)? Could resources enter into bilateral agreements with LSEs for the additional capacity payments? If so, should there be limitations on which LSEs

[38] *Id.* at PP 165, 171.

[39] *Id.* P 1 n.1.

[40] Illinois Commerce Commission Protest at 3 n.7 (arguing that PJM mischaracterizes state public policies "which provide due compensation for output produced by resources having beneficial environmental and public health characteristics," the purpose of which is not to subsidize, but "to compensate the provision of valuable attributes that are uncompensated in PJM markets").

are eligible to enter such contracts (based on, for example, the source of the out-of-market support)? If not, will states have any alternative to increasing the out-of-market support to compensate resources for capacity in addition to their environmental attributes? What is a reasonable time period in which to expect states to make any changes to their compensation structures? How does this vary between states that have enacted their policies via legislation versus regulation?

3. **Matching an FRR Resource with Load.** Who will determine what load is removed from the RPM auction for a given FRR resource and how will that determination be made? Should the determination be made by the FRR resource itself, the LSE(s), PJM, the sponsoring-state or some entities or entities? What would be the relative benefits and downsides of the various ways in which this might be accomplished? How would any such approach impact municipalities, cooperatives, and public power entities? Should the FRR resource be permitted to split its supply among different LSEs? What other steps are necessary for ensuring that the entities that provide the out-of-market support receive the benefit of the reduced capacity obligation in the RPM auctions? Would different state programs require different approaches? For example, cross-state renewable energy certificate (REC) programs may not have an obvious associated load—how should that be addressed? Do LSEs or other wholesale loads that self-supply present any unique considerations for a resource-specific FRR Alternative? Other than interstate REC programs, are there other governmental policies that could require a tailored approach?

4. **Timing.** Does PJM currently have the information about governmental programs and LSE constructs needed to evaluate options and address these questions? If not, how much time does PJM need to work with the states and stakeholders to gather sufficient information?

C. Reliability Pricing Model Auction Design

PJM and its stakeholders also need to consider how a resource-specific FRR Alternative will interact with the existing capacity market construct and whether any changes are needed to the structure of the Reliability Pricing Model (RPM) and its auctions. In so doing, PJM and its stakeholders should evaluate the following considerations:

1. **Auction Structure.** Assuming that state-sponsored resources can elect the resource-specific FRR Alternative and PJM has determined which load to associate with those resources, are there any other changes that would need to be considered to the structure of the RPM Auctions? Currently, load served under the existing FRR Alternative is deducted from the installed reserve margin and is defined by the FRR Service Area. Can this approach to structuring the RPM auctions work under the resource-specific FRR Alternative? What additional challenges, if any, would be presented if the load associated with resources that elected the resource-specific FRR Alternative cannot be defined in an FRR Service Area?

2. **Locational Needs.** How could PJM ensure that locational resource adequacy needs are met (respecting transmission constraints) while simultaneously removing an increasing amount of FRR load from the RPM? For example, how will PJM account for deliverability constraints in assigning a given FRR resource’s capacity to offset a specific load’s resource adequacy requirement if the resource is located in a constrained area that cannot reach load? Would doing so require any changes to the current Capacity Emergency Transfer Objective (CETO) /Capacity Emergency Transfer Limit (CETL) analysis, or its underlying assumptions? Would an increasing amount of FRR load over time (e.g., based on increasing renewable targets in some states) present any additional considerations?

3. **VRR Curve.** Today’s order asks whether changes are needed to the demand curve, or variable resource requirement (VRR) curve. The removal of additional load would reduce the installed reserve margin

represented in the VRR curve for capacity and would result in shifting the VRR curve to reflect the smaller market. Presumably, the Commission is asking if any further changes would be needed, such as the shape of the curve. What are the primary considerations for determining whether the VRR curve shape would need to be modified? Would a smaller market inherently require a differently shaped curve? How would this ensure that the auctions are competitive?

4. **Market Power.** Would the resource-specific FRR Alternative present any additional market power concerns? With a smaller market with fewer resources competing, would the existing market power mitigation measures be sufficient? If not, what additional tools would be needed?

5. **Capacity Performance.** How would the resource-specific FRR Alternative impact PJM's Capacity Performance construct? Currently, FRR entities can choose between financial or physical satisfaction of the Non-Performance Charge when a resource in the entity's FRR plan fails to meet its expected performance during a Performance Assessment Hour. Under the financial option, the entity pays the same Non-Performance Charge that applies to RPM Capacity Performance Resources. Under the physical option, the entity must commit additional capacity in the subsequent delivery year for each MW of performance shortfall. Is this still an appropriate structure if the Commission adopts the proposed FRR Alternative? If so, why would the associated load be required to commit additional capacity in a subsequent delivery year for the failure to perform of a resource that it does not own?

Once again, a resource-specific FRR Alternative can be just and reasonable only insofar as it allows state-sponsored resources to easily and timely become FRR resources with proportional load removed from PJM's centralized capacity market, thereby effectively accommodating governmental policies that address the externalities associated with electricity production.

Regarding the timeline, requiring interested parties to decipher today's order, develop testimony, gather evidence, and meaningfully respond within 60 days is irresponsible. On top of that, this short timeframe essentially guarantees that PJM will not be able to work with the states to develop a proposal that aligns with state policies. Even assuming that interested parties had sufficient time, and the Commission issued an order by January 4, 2019, it is unreasonable to assume that PJM could implement such fundamental market changes in time for its May 2019 auction, and that state-sponsored resources could cover the missing capacity payments if those resources elect to use the new resource-specific FRR Alternative. The most likely result is that PJM will have to delay its May 2019 auction, notwithstanding that delay, that PJM will over-procure capacity because states and sponsored resources will not have time to react and make alternative plans.

*   *   *

I close by noting the irony embedded in today's order. Decrying government involvement in the electricity sector, the Commission is taking action to increase the prices its preferred generation resources receive and stave off efforts to decarbonize the generation mix. Today's order is just government intervention by another name. The Commission appears untroubled by the fact that it is exercising essentially the same governmental role in shaping the generation mix that it simultaneously decries. The difference, however, between the state actions that the Commission now threatens and the Commission's action today is that Congress authorized the states to regulate the generation mix and expressly precluded the Commission from doing so. As I explained in my partial dissent from the CASPR order, the proper role for the Commission is to "get out of the business of mitigating the effects of state policies and instead encourage the RTOs/ISOs to work with the states to pursue a resource adequacy paradigm that respects states' role in shaping the generation mix while at the same time ensuring that we satisfy our responsibilities under the FPA."[41]

Accordingly, I respectfully dissent.

[41] *ISO New England Inc.*, 162 FERC ¶ 61,205 at 6 (Glick, Comm'r, dissenting in part and concurring in part).